

Understanding Costs and Other Impacts of Litigation of Forest Service Projects: A Region One Case Study

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Executive Summary

This report provides information on the agency costs and other impacts associated with litigation of forest management projects in the Northern Region (i.e., Region One) of the Forest Service (FS) through a combination of literature review, information provided by the agency's Region One (R1) and Washington offices, and a case study of the Spotted Bear River (SBR) project on the Flathead National Forest. Data to determine the total cost of litigation are not readily available from publicly accessible or even internal databases, and a high level of cooperation is needed from personnel at various levels within the involved agencies in order to determine the costs and other impacts associated with litigation.

The costs and impacts identified, described, and quantified for the SBR project include:

- Forest Service legal costs
- Forest Service analytical and administrative costs
- Loss of timber sale revenue
- Forgone or delayed agency work
- Forest Service ripple effects
- Fish and Wildlife Service (FWS) analytical and administrative costs
- Community impacts

As in previous attempts to quantify litigation costs (GAO 2012; Larence 2014), the time and costs associated with Department of Justice (DOJ) and Office of General Council (OGC) attorneys defending the FS and FWS were not able to be quantified. Thus, the litigation costs associated with the SBR case study are incomplete and likely under-stated.

Findings show that litigation costs of the SBR case to the FS (over \$95,000) and FWS (over \$4,500) exceed attorney fees and Equal Access to Justice Act (EAJA) payments (none in this case) made to plaintiffs and/or their attorneys. This finding is significant because: 1) previous studies have used attorney fees and EAJA payments as the sole measure of litigation cost, 2) attorney fees and EAJA payments are made in less than 20 percent of recently litigated FS and R1 cases, and 3) the SBR case study does not fully quantify the Regional impact of litigation.

Results from this study demonstrate that R1 experiences a relatively high level of litigation both in terms of the number of projects that are litigated and the proportion of the region's annual timber program and budget that are impacted by litigation. From 2008 through 2013, R1 had more than 70 projects litigated – more than any other FS region. In recent years, litigation has encumbered 40 to 50 percent of R1's planned timber harvest volume and treatment acres, and litigation of the SBR project alone involved more than 25 percent of the Flathead National Forest's FY 2013 timber program. The estimated financial impact of litigation-encumbered timber volume on R1's congressionally appropriated timber program budget was \$9.8 million in FY 2013 and \$6.8 million in FY 2014.

Economic impacts to communities – in jobs, labor income, federal, state, and local taxes – are identified as the largest potential impacts of FS litigation (potentially exceeding \$10 million and 130 jobs for the SBR project alone), particularly when timber harvesting and other land management activities that create or maintain private employment and generate wages and other taxable revenue are reduced, delayed, or completely forgone as a result of litigation.

Introduction

The costs and other impacts of environmental litigation of Forest Service (FS) land management activities is a topic of interest to many at the local level as well as Congress. Montana and north Idaho are in the Northern Region (Region One) of the National Forest System. In Montana, more than 60 percent (12 million acres) of timberland is within the NFS, and in Idaho that fraction is 73 percent (about 12.3 million acres; Miles 2014). Because of the substantial presence that the FS has on the landscape, the agency's ability to conduct forest management activities is very important to the States, local communities, forest industry, and taxpayers.

Region One experiences a high occurrence of litigation of forest management projects (Keele et al. 2006; GAO 2010; Miner et al. 2014), and the agency's ability to implement management activities is believed by many to be impaired by litigation, in particular by the costs of litigation and the related time and effort of FS personnel dealing with litigation. The Forest Service and other federal agencies are thought to make substantial efforts to defend themselves against adverse court review (Shapiro 1995), and a growing body of literature has identified and quantified various aspects of environmental litigants and litigation of FS land management activities (See Miner et al. 2014). However, to date there have been no case studies or comprehensive reviews of the variety of costs and other economic impacts that litigation creates for federal forest management agencies and resource-dependent communities.

Attorney fees are one type of cost that the agency can incur, particularly when litigants prevail against an agency in court or when a "fee shifting statute" (e.g., Equal Access to Justice Act - EAJA) may allow for litigants (i.e., plaintiffs) to have attorney fees paid by the prevailing agency (GAO 2012; Larence 2014). In 2012, an effort was made by the Government Accountability Office (GAO) to report the amount of attorney fees paid to parties that litigated against the US Department of Agriculture and the Department of the Interior. While the FS was one of only four (out of 33) USDA agencies found to track attorney fees, that information was limited to fiscal years 2000-2010, and a financial database that tracked the actual amount paid to plaintiffs or their attorneys was instituted in 2009 (GAO 2012). That 2012 GAO study was updated in testimony before the House of Representatives Subcommittee on Conservation, Energy, and Forestry, Committee on Agriculture (Larence 2014). However, the costs of litigation beyond attorney fees paid to plaintiffs were not quantified in the GAO testimony.

The purpose of this report is to provide specific examples of the costs and other impacts of litigation of particular FS projects/cases. The identified cases are not meant to be representative of all cases, but the goal is to provide an evaluation of the costs incurred as a result of litigation, particularly the amount of Executive Branch agency personnel time allocated to defending a litigated project, and other impacts to the agencies and communities associated with the litigated projects. Additional information on the frequency, duration, and other characteristics of project litigation in Region One is provided to improve understanding of the prevalence of project litigation.

Methods

This investigation began with a proposal to examine up to 10 Region One projects where proposed FS land management resulted in litigation (i.e., one or more specific court cases were identified). These cases were not randomly selected from the population of all litigated projects, and were not meant to be a representative sample of all projects or all litigated projects. Rather, these cases were identified because they were relatively "high profile," had media attention, were memorable to FS and

cooperating agency personnel and the public, and were thought to have a noticeable or significant impact—either on the ground or in legal or administrative precedent.

The FS projects/cases initially identified for this study included:

- Spotted Bear River (SBR) on the Flathead National Forest
- Colt Summit on the Lolo National Forest
- Bozeman Municipal Watershed (BMW) on the Gallatin National Forest
- Bussel 484 on the Idaho Panhandle National Forest
- Little Slate on the Nez Perce-Clearwater National Forest

It is important to note that litigation occurs after environmental impact analysis and public comment is conducted to comply with the National Environmental Policy Act (NEPA) and the administrative appeals process has been exhausted. This study specifically sought to identify and quantify the agency costs incurred *after* litigation began, thus separating litigation costs from the costs of NEPA analysis and the administrative appeals process. This study did not attempt to identify or quantify costs incurred by the Judicial Branch (e.g., salaries of judges or court clerical staff).

The types of costs and impacts to be identified and quantified included:

Forest Service legal costs: comprised of payments made to plaintiffs or their attorneys under the Equal Access to Justice Act (EAJA) or other statute, and/or payments made to timber purchasers for timber that was sold but not cut as a result of litigation.

Forest Service analytical and administrative costs: comprised of personnel time and other resources (e.g., travel, conference calls, printed materials, etc.) directly allocable to the agency's efforts to defend against litigation of specific projects.

Loss of timber sale revenue: comprised of the reduced receipts the agency or Treasury experienced because of a reduced volume and/or a reduced value of harvested timber (e.g., salvage timber commonly loses value due to staining or decay until it is harvested) attributable to project litigation. This category also includes revenue from other salable commodities (e.g., gravel, minerals, or grazing) that may have been reduced due to the litigation.

Forgone or delayed work: comprised of time spent working on litigation for this case/project that was not able to be spent on other duties or projects. This category represents the "opportunity cost" of dealing with the litigation, qualitatively and quantitatively describing other activities that were not accomplished specifically because of personnel's involvement with a particular project's litigation or loss of timber sale revenue. For projects with a Stewardship Contracting component, timber revenue also directly relates to project-specific on-the-ground land management activities or "service contract" work because the revenue from the timber sale directly pays for the land management or service work, rather than the work being paid from congressionally appropriated FS budget.

Forest Service ripple effects: comprised of the costs of changing agency procedures or practices on subsequent proposals or project analyses in response to the litigation of a specific project and the outcomes (e.g., judge's ruling) on that specific case.

Fish and Wildlife Service (FWS) costs: comprised of personnel and other costs attributable to the specific Forest Service case/project, particularly when consultation with FWS is needed due to Endangered Species Act (ESA) or other wildlife-related statute.

Office of General Council (OGC) costs: comprised of personnel and other costs attributable to the specific Forest Service case/project. The OGC is an independent legal agency within the USDA. OGC provides legal advice and services to the Secretary of Agriculture and to all other officials and agencies of the Department with respect to all USDA programs and activities. All legal services are centralized within OGC and the General Counsel reports directly to the Secretary.

Department of Justice (DOJ) costs: comprised of personnel and other costs attributable to the specific Forest Service case/project. The DOJ's Environment and Natural Resources Division has primary responsibilities for litigation as well as appellate and policy work on behalf of the United States regarding: Prevention and Clean Up of Pollution, Environmental Challenges to Federal Programs and Activities, Stewardship of Public Lands and Natural Resources, Property Acquisition for Federal Needs, Wildlife Protection, and Indian Rights and Claims. With offices across the United States, the Division is the nation's environmental lawyer, and the largest environmental law firm in the country.

Community impacts: comprised of lost revenue to logging companies and timber-processing facilities due to lost production from lack of raw materials; lost worker income to forest industry employees and other contracted services (e.g., road construction or removal, culvert replacement, thinning, tree planting) to perform; and lost tax revenue to local and state government from reduced worker income and corporate revenue.

The data for the case studies were collected during interviews and with self-administered questionnaires. The questions were developed by BBER in an iterative, multi-step process:

1. BBER held meetings with key FS staff to determine information needs;
2. BBER drafted questions to obtain the required information;
3. Key FS staff reviewed the draft questions and provided feedback; and
4. BBER revised the questions based on FS input.

The self-administered questionnaires were designed using guidelines published by Dillman et al. (2009). Respondents were identified by BBER during the questionnaire development meetings. Two types of respondent were identified based on initial analysis of jobs in litigation process: key managers and other involved personnel. Based on this apparent division of labor, BBER developed two types of questionnaires: key informant and other participant.

The key informant questionnaire asked the full battery of (24) questions, while the other participant questionnaire asked five of the questions from the full battery. This design minimized response burden on most study participants. Minimizing respondent burden strengthened this study in at least two ways: it demonstrated responsible stewardship of the valuable time of agency staff, and it probably resulted in improved data quality (Groves et al. 2004). Questionnaires were delivered by e-mail from BBER to study participants in November and December 2013. BBER also prompted study participants by e-mail to return completed questionnaires through spring of 2014.

Results & Discussion

The first case study identified and examined for this research was the Spotted Bear River (SBR) project on the Flathead National Forest. A summary of that project, its proposed management activities, associated economic impacts, major points of environmental litigation, and associated timeline are provided below. Additional case studies have not been conducted.

SBR project summary:

The project area (general area where project activities were to occur) was about 50,000 acres. The purpose and need for this project were indicated as:

- Restore forest structures and vegetation composition to a more natural, historical condition that would be more resilient and resistant to potential future disturbances (wildfire, disease or insect infestations) and climate change.
- Maintain or improve timber productivity on suitable lands and provide a variety of wood products to the local economy. This would include salvaging of current and potential value of trees that are dead or at imminent risk of mortality to insects or diseases.
- Maintain and improve recreational values and the safety of our visitors at developed recreation sites and other areas within the Wild and Scenic River corridor.
- Extend season of motorized access to Middle Big Bill and Silvertip Trailheads
- Reduce vehicle/trailer conflicts and safety impacts at the Silvertip Trailhead.

Proposed SBR activities included the following:

- Harvest approximately 1,193 acres of trees to improve long-term forest diversity and productivity, and to enhance the safety of visitors to recreational areas.
- Harvest approximately 7.3 million board feet (MMBF) Scribner of timber with an estimated market value of \$729,000 and direct and indirect community impacts of 136 jobs, \$7.4 million of income to workers, and \$2.7 million in tax revenue to state & federal government.
- Thin approximately 660 acres of saplings to improve tree growth, and encourage species diversity and forest resilience.
- Perform prescribed burns on 1,346 acres to sustain the role of fire in the natural ecosystem and improve the availability of seasonal habitats for ungulates, bears, and other wildlife species.
- Extend the motorized season by 5 weeks on the Spotted Bear River Road (Road 568) and the Big Bill Road (Road 9856), which access Silvertip and Middle Big Bill trailheads, respectively.
- Improve the parking and turn-around area at the Silvertip Trailhead.

The major statutes that this case was litigated on were the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Endangered Species Act (ESA). The following were the claims alleged by the plaintiffs in the case:

NEPA:

- An Environmental Impact Statement (EIS) was required.
- Inadequate analysis, including cumulative effects analysis, was conducted on the impacts of the project on grizzly bears, lynx, wolverine, fisher, bull trout, and west-slope cutthroat trout.

NFMA:

- The agency failed to comply and/or ensure compliance with NFMA's and the Flathead Forest Plan's requirements for wolverine and fisher.
- The agency failed to comply and/or ensure compliance with standard VEG S6 for lynx (Northern Rockies Lynx Management Direction).
- The agency failed to comply and/or ensure compliance with NFMA's and the Flathead Forest Plan's requirements for grizzly bears.

ESA:

- The Forest Service's determination (and U.S. Fish & Wildlife Service's concurrence) that only 93 acres of thinning was likely to adversely affect lynx and lynx critical habitat, and that the regeneration harvest units would have "no effect" on lynx or lynx critical habitat violated Section 7 (requiring consultation) of the ESA.

The SBR project & litigation timeline:

- Public scoping on SBR project began November 4, 2009.
- Comment period ended September 17, 2010.
- The Decision notice was signed and legal notice provided August 7, 2011.
- An appeal to FS was filed by Swan View Coalition on Sept 20, 2011, and an appeal to FWS on September 21, 2011.
- The End of Appeal Date was September 21, 2011.
- An Informal Disposition (attempt to resolve appeal) occurred on October 5, 2011.
- The Decision was affirmed on November 4, 2011.
- The Notice of Intent to sue was filed December 20, 2011, providing notification of pending litigation concerning ESA non-compliance.
- The initial complaint was filed February 28, 2012 – case 9:12-cv-00029-DLC-JCL. The plaintiffs were Friends of the Wild Swan and The Swan View Coalition. This action marks the beginning of litigation.
- A motion, brief, statement, notice, order, or other court action or legal filing occurred every month, except October, between February and December 2012, with additional legal/court activities occurring April through June 2013.
- Magistrate Lynch's findings & recommendations in favor of the FS and against all plaintiff claims were entered June 3, 2013.
- Tin Mule timber sale (volume 7.3 MMBF Scribner) was awarded June 19, 2013.
- Plaintiffs filed for a temporary restraining order/preliminary injunction (TRO/PI) on June 20, 2013.
- The FS filed a Declaration of Harm on June 27, 2013.
- The District Court Judge Christensen ruled not to grant a TRO/PI on July 8, 2013.
- The Plaintiffs made an appeal of the TRO/PI ruling to 9th Circuit in September 2013.
- Oral arguments to 9th Circuit began April 9, 2014 on the TRO-PI.
- Timber harvest on the Tin Mule sale was scheduled to begin in June 2014, weather permitting.
- The 9th Circuit upheld the lower court's ruling against the TRO/PI on September 24, 2014.
- District Court Judge Christensen upheld Magistrate Lynch's decision against all plaintiff claims February 23, 2015. The District Court decision was able to be appealed to the 9th Circuit for 60 days. No appeal was made.
- About half (3.4 MMBF) of the Tin Mule timber sale was harvested by February 24, 2015.

Project activities completed to date include: parking lot improvements at the trailhead were completed, motorized season extension on the two roads occurred in 2013, hand slashing of small trees and shrubs was completed (to create fuel breaks) for two of the prescribed burn units, one timber sale contract (Tin Mule) was awarded in June 2013, and was about 50 percent complete as of February 24, 2015. The second (Spotted Bear River) timber sale contract is to be awarded in Fiscal Year 2016. Road improvement work was being conducted by the timber sale contractor.

When a project is litigated, it is typically the agency's analysis of the project that is being questioned, and the agency with its legal counsel must defend the analysis. Once in litigation, the agency generally does not or legally cannot conduct new/more analysis or make change to the analysis – unless ordered to do so by the court. This was the case with the SBR case; no new or additional (environmental) analysis was conducted. So, the time that the project/case is in litigation is essentially “dead time” where very limited amounts of work – analytical or on-the-ground – can be performed, especially if a TRO/PI is involved.

SBR litigation costs and other impacts are outlined below, according to the major categories identified in the Methods section.

Forest Service legal costs: **None identified.**

The Forest Service prevailed in the litigation of the SBR project, no attorney fees to plaintiffs were ordered by the court, and no payments were made to timber sale purchasers for timber sold but not cut.

Forest Service analytical and administrative costs: **Exceeded \$95,000.**

In total, 18 FS personnel spent 1,903 hours on SBR litigation, with cost to government of \$95,059. Twelve (12) FS personnel at the Forest and District levels were identified as directly involved with the litigation of the SBR project, with 1,833 hours of work on case litigation, and costs exceeding \$90,700. Six (6) FS employees at the Regional Office (RO) were identified as involved with this project's litigation, with almost 70 hours of work on case litigation, and costs exceeding \$4,300.

Loss of timber sale revenue: **None identified.**

The Forest Service prevailed in the litigation of the SBR project, and no reduction in harvest volume was identified as a result of the litigation. The “Tin Mule” timber sale included about 7.3 MMBF Scribner, which represented about 27% of the Flathead National Forest's annual timber sale program (Starling 2013). The Tin Mule sale would have been offered in the spring/summer of 2012; however, it was delayed by approximately 16 months due to litigation. Tin Mule was awarded June 19, 2013, and the fair market value of the timber was \$729,000 at the time of auction. Harvesting was scheduled to begin in June 2014, and about half (3.4 MMBF) of that timber sale has been harvested. The second timber sale - “Spotted Bear River” - with approximately 10 MMBF Scribner is planned for offer in FY 2016, and it has not been delayed by current litigation.

Forgone or delayed work: **Significant impacts identified at the forest and regional office level.**

The 1,833 hours of work identified by Flathead NF personnel as spent on SBR litigation were hours not spent implementing the SBR project, conducting other projects, or delivering other services. These impacts were described qualitatively by Flathead NF personnel, and no specific dollar amounts were identified or estimated.

Items identified at the Forest and District level as directly impacted because of SBR litigation included: various improvements to recreation access in the Flathead NF were delayed; fire risk in the project area increased; forest health and wildlife habitat improvements were delayed; implementation of several other Flathead NF projects was delayed; NEPA documentation on several Flathead NF projects was not completed; the Wild Cramer Fuels Reduction and Forest Health Final EIS and decision were delayed about 5 months; draft conservation strategies and budget preparation was delayed; Flathead NF forest plan revisions were delayed; several personnel mentioned field time and meetings with the public were curtailed; work on the Glacier Loon project and litigation was delayed or reduced; work on the Island Unit Trails system Additions Project was impacted; work on Bob Marshall Wilderness Complex Outfitting and Guiding Documents was delayed by two months; and other program management responsibilities including climate change, forest planning, travel planning, monitoring and evaluation, and staff training were all significantly affected. Several respondents also mentioned the inefficiency and loss of time associated with having to stop and then re-start work on the SBR project after several weeks or months due to litigation, for example: time spent on contract preparation for the Tin Mule timber sale tripled, from roughly 30 hours to 120 hours.

Likewise, the 70 hours of RO personnel time spent on the case represented time not available to be spent on other projects or necessary activities. Some relevant items identified at the RO as delayed because of SBR litigation included updates to the Region One litigation database, development of NEPA analysis templates for other projects, and work on other litigation/cases. All of the individuals identified at the RO are involved to a greater or lesser extent with multiple litigated projects simultaneously. Several indicated it can be very difficult to identify time spent on a specific project/case because as salaried employees they do not track their time by case or associated project, many cases involve similar issues (e.g., consultation with the FWS on one or more threatened or endangered species) and work on a particular issue can apply to multiple cases or projects, and cases as well as issues persist for many budget cycles (i.e., years) making allocation of their time on specific projects very difficult.

The duration of the SBR case exceeded 460 days, from the initial complaint in February 2012 through the Magistrate's original recommendation in June 2013. However, with the plaintiffs' request for a temporary restraining order, subsequent appeal to the 9th Circuit, and review of the Magistrate's decision by the District Court, the case was in litigation until February 23, 2015, or about 1,090 days. The most recent (February 23, 2015) District Court decision had a 60-day appeal period, but no appeal was made.

Forest Service ripple effects: None identified.

No specific changes to FS procedures or practices on subsequent proposals or project analyses were identified in direct response to the SBR litigation. The RO litigation staff identified SBR as a relatively "discreet" case, not expected to have far-reaching impacts or implications for other projects.

The SBR project is not, however, completely isolated from other projects. The Tin Mule timber sale was identified in the litigation of another project—Soldier Addition II. So, the outcome of that case also had the potential to delay or cancel the Tin Mule sale in the SBR project. The FS indicated that it is somewhat unusual for a single timber sale to be directly involved in the litigation of two different projects. It is more common to have several timber sales directly impacted in a single project/case.

Forest Service personnel indicated it is quite common for litigation of a single project to have implications or *indirect* connections to other ongoing or subsequent projects because highly interrelated issues (e.g., protection of lynx, bull trout, cutthroat trout, grizzly bear habitat) are the basis of many cases. For example, Salix, Mission Brush, Fleecer, and Antelope Basin were four litigated cases indicated as having broad implications around the Region or the country and far-reaching “tentacles” touching many projects. The duration of litigation, particularly for cases with a high level of interconnectedness with multiple projects, has a chilling effect on many other projects because of the uncertainty that exists while cases remain in litigation (including appeals to higher courts).

Related information requests, not part of litigation or discovery process *per se*, issued under Freedom of Information Act (FOIA) also consume agency personnel time and effort at Forest and RO level. Because these additional FOIA requests were indicated as fairly common but not specifically part of the identified case study, the time, effort, and costs associated with them could be considered a ripple effect, but no such FOIA requests were identified as part of the SBR project.

Other ripple effects mentioned by the FS and FWS personnel involved with the SBR case included reduced morale and feelings of frustration among personnel involved from repeatedly having the quality, completeness, and/or validity of their work called into question by litigants, by the press when these cases make it into the news, and by their professional peers and community neighbors.

Other (non-FS) agency costs: exceed \$4,500 (excluding DOJ and OGC attorneys).

Two FWS employee were identified as directly involved with the litigation of the SBR project, with 90 hours of work and cost to government over \$4,500 to date.

Both OGC and DOJ were unable to participate in the study. It is not clear whether OGC or DOJ track time spent on individual cases or can provide estimates of time spent on specific litigation. Discussing the amount of time spent by these agencies was indicated as a major concern, potentially impacting agencies’ abilities to negotiate or recover attorney fees. Two OGC attorneys were identified as key informants, but no data were provided including their time, salaries, or other agency participants. Two DOJ attorneys were identified through court documents, but no data were available or provided including their time, salaries, or other agency participants.

Community impacts: Potentially exceeded \$10 million and 130 jobs.

Neither of the proposed timber sales in the SBR project were canceled as a result of litigation, although one sale was delayed and some of the project’s other activities were delayed or only partially implemented. For example, parking lot improvements at the trailhead were completed, motorized season extension on the two roads occurred in 2013, hand slashing of small trees and shrubs to create fuel breaks for two of the prescribed burn units was completed, and prescribed burning has not been delayed by litigation. However, the Tin Mule timber sale was delayed by approximately 16 months as a result of SBR project litigation. The financial impact of these delays on Montana mills and contractors has not been quantifiable. Because the Tin Mule sale was not a salvage sale, there was not a loss of timber volume or value readily identifiable as a result of the litigation-caused delay. As indicated above, timber from the Tin Mule sale has been sold and about half of the timber volume has been harvested.

Information provided by the RO indicates that the Tin Mule timber sale (7.3 MMBF Scribner) was estimated to have a direct economic impact on Montana loggers, mills, and communities of 68

direct jobs and \$3.7 million in labor income. The indirect and induced jobs and labor income along with federal and state taxes were estimated by the RO to be equal to the direct impacts (Type II multiplier = 2.0; Minnesota IMPLAN Group, Inc. 2010), for a total of 136 direct and indirect jobs, \$7.4 million in associated labor income, and \$2.7 million in federal and state tax revenue associated with the Tin Mule timber sale. Taking the direct, indirect, and induced economic impacts of the Tin Mule timber sale together, the *potential* impacts to the community totaled more than \$10 million.

Litigation information from ancillary sources

In order to provide more context for the case studies in this investigation of Region One (R1) litigation costs, additional information on FS litigation was sought from a variety of ancillary data sources, including aforementioned published studies and the agency's Regional and Washington offices.

A regional timber program summary based on litigated volume in each R1 forest and program unit costs indicated that almost 54% (164 MMBF Scribner) of the Region's FY 2013 timber program volume and 39% (114.6 MMBF Scribner) of the FY 2014 timber program volume were encumbered by litigation. According to the summary, the financial impact of the encumbered volume to the Region's congressionally appropriated timber program budget was \$9.8 million in FY 2013 and \$6.8 million in FY 2014.

A vegetation decision summary spreadsheet also provided by R1 contained information on 125 different timber sale projects awarded between June 2012 and June 2013, including whether or not the project was administratively appealed or objected to, whether or not it was litigated, the timber sale volume, and number of cruised acres associated with each project. Analysis of the spreadsheet showed 50 of the 125 projects had an administrative appeal or objection. Of the 75 projects not appealed, 31 were Categorical Exclusions (CE) not subject to administrative appeal, and a total of 24 projects were litigated. Thus, 53% of the projects identified in this 13-month period not under CE were appealed, while 92% of the timber sale volume and 93% of acres were administratively appealed. Also, 54% of the timber sale volume (226.5 MMBF) and 64% of the acreage (35,485 cruised acres) was litigated, with over one-quarter of projects not under CE being litigated. This information strongly suggests that the frequency of administrative appeals in R1 is high—relative to the total number of vegetation management projects matriculating through the NEPA process—and that the vast majority (over 90%) of the Northern Region's planned harvest volume and harvested acres during the June 2012 through June 2013 period were impacted by administrative appeals or objections, which precede litigation. Likewise, litigation appears to occur frequently and impacts a significant portion of the timber program in R1, with more than half of the planned timber harvest volume and acres awarded during the 13-month period being litigated.

The FS Washington Office (WO) provided a spreadsheet with a variety of information on litigated FS cases taken from FS records, including the Planning Appeals, and Litigation System (PALS) database beginning in 2006. The spreadsheet covered cases brought against the FS from October 2002 (Federal FY 2003) through September 2013 (FY 2013)—roughly the past 11 years. Information included the case name with lead plaintiff (e.g., AWR v. Weldon), Docket number, District or Circuit Court the case was filed in, date it was filed, NFS Region, NFS Forest, name of the project being challenged, date of district court decision, date of circuit court decision, amount of attorney fees or EAJA payments, case open/closed status, resource category (e.g., timber, fuels, wildlife), and plaintiff category (e.g., environmental, government, business, private party).

The WO spreadsheet identified 738 cases nationally (Table 1). R1 had the most cases (133 cases in R1, plus 3 multi-region cases that include R1). Of the 133 R1 cases over the past 11 years, 50 were marked “open” and 83 were marked “closed.” A “closed” status did not indicate the case was completely over. An unknown number of “closed” cases may have been subject to appeal to a higher (Circuit or Supreme) court for some period of time. For example, 51 of the “closed” cases and 47 of the “open” cases had no Circuit Court decision date recorded.

Table 1: Number of Cases, Attorney and EAJA fees by NFS Region, 2003-2013

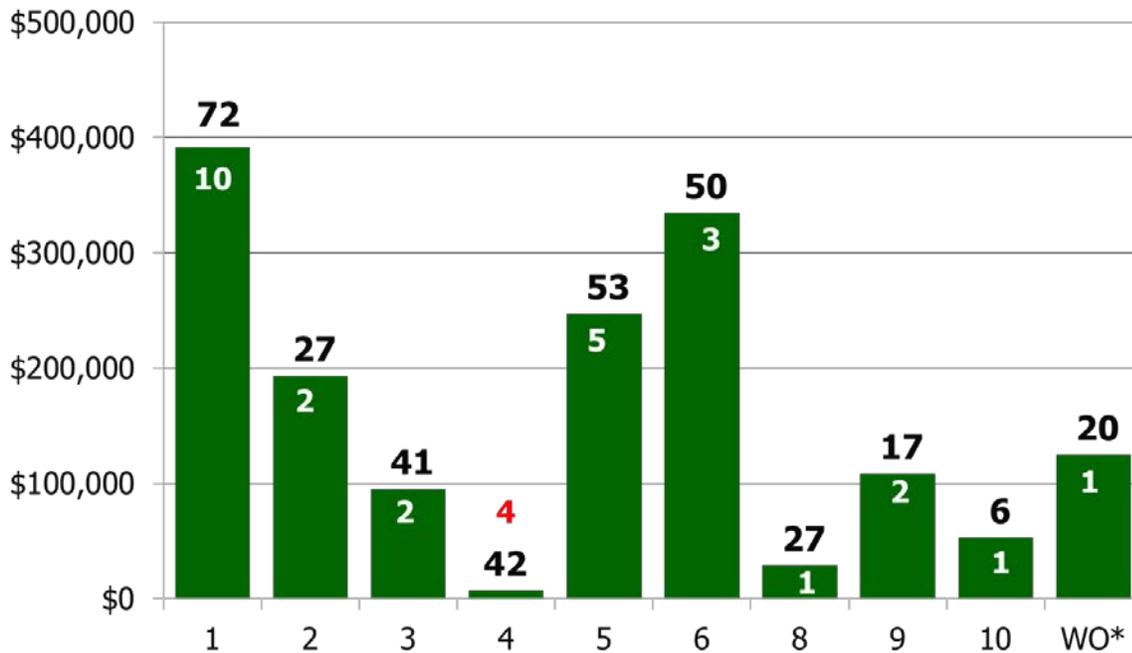
Region	Number of cases	Cases with fees	Sum of Atty/EAJA Fees
1	133	25	\$1,086,668
2	59	7	\$379,592
3	80	11	\$204,422
4	83	18	\$658,986
5	105	25	\$1,847,782
6	128	27	\$1,743,300
8	51	5	\$368,779
9	36	5	\$372,291
10	22	5	\$228,000
WO	41	7	\$846,066
Grand Total	738	135	\$7,735,886

According to the WO spreadsheet, R1 paid more than \$1 million in attorney and EAJA fees over the past 11 years (including the recent “Fleecer” and “Cabin Gulch” attorney fee payments). Attorney/EAJA fees were identified with 25 cases in R1, and ranged from \$2,000 to \$186,500 for individual cases. Corroborating the case study findings, no attorney fees were identified in the WO spreadsheet for the SBR case study.

Of the 133 R1 cases in past 11 years, the majority (75) were by repeat litigants, with 30 cases filed by the Alliance for the Wild Rockies (AWR), 19 by the Native Ecosystems Council (NEC), 8 by the Lands Council, 5 each by the Ecology Center, Friends of the Wild Swan, and Swan View Coalition, and 3 by the Wild West Institute. Three of the top four recipients of attorney/EAJA fee payments in R1 were repeat litigants: AWR received \$139,200 over 6 cases; NEC received \$137,436 over 4 cases, and the Ecology Center received \$173,072 over 4 cases. The Rock Creek Alliance received \$186,500 for a single case.

From January 2008 until September 2013, 355 total cases were identified in the spreadsheet (Figure 1). R1 had the most cases (72 plus 1 multi-region case that included R1), and R1 paid the most (\$391,000) in attorney fees & EAJA payments. These attorney fees were paid in 10 of the 73 (less than 15% of) total R1 cases over the six-year period.

Figure 1: Number of Cases and Attorney Fees by NFS Region, 2008-2013



Black numbers indicate the total number of cases, white and red numbers indicate the number of cases where payments were made. WO* indicates Washington Office and multi-region cases.

Of the 73 R1 cases filed since January 2008, 49 cases were marked “open” and 24 were marked “closed.” Of those marked “closed”, only 5 had Circuit Court decision dates, possibly indicating some of the “closed” cases could re-open if appealed. Seven of the closed cases had fees totaling over \$220,000; one open case had over \$46,000 in attorney fees identified. With the decisions on Fleecer and Cabin Gulch, fees on “closed” cases would increase to more than \$344,000, but with the option for appeal it is not clear if those two cases are “closed” or not. Nineteen of the 73 cases had multiple decision dates, several with four or more decisions, reinforcing the notion that cases can extend beyond the first court decision.

Of the 24 R1 cases marked “closed”, the length that the case was open (filed date to last decision date recorded) averaged 510 days (about 1 year and 4 months). The shortest durations were 22 and 125 days, and the longest durations were 1,421 days (3 years 11 months), and 1,139 days (3 years 1 month). Of the 49 “open” cases, 27 had no decision date, and 22 had decision dates, with 4 being Circuit Court decisions. The average duration of the 22 “open” cases with a decision date was 653 days (1 year and 9

months). The two shortest durations were 291 and 381 days. The three longest were 1,445 days, 1,164 days, and 1,025 days (2 years 9 months to almost 4 years). Of the 27 “open” cases that did not have a decision date, one had an initial filing date of 2009, four were filed in 2011, 11 were filed in 2012, and 11 were filed in 2013. As of May 5, 2014 (date these data were analyzed), these 27 cases had an average duration of 602 days (1 year and 7 months), ranging from 216 days to more than 1,670 days.

Of the 73 R1 cases since Jan 2008, 51 were by “environmental” groups, 9 were by “private parties”, and 6 were by county or state government; 28 were classified as a “timber” resource category, 12 were recreation, 12 were lands, 8 were fuels, and 6 were wildlife. In about half (37) of the cases the primary plaintiff was an environmental group identified on four or more cases: 17 by Alliance for the Wild Rockies, 16 by Native Ecosystems Council, and 4 by Friends of the Wild Swan.

Conclusions & Recommendations

This first attempt to quantify the costs and other impacts of litigation of Forest Service projects is somewhat incomplete yet revealing. Most significantly, data to determine the total cost of litigation are not readily available from publicly accessible or even internal agency databases, and a high level of cooperation is needed from personnel at various levels within the Executive Branch agencies involved (i.e., FS, FWS, OGC, and DOJ). This study did not consider any costs incurred by the Judicial Branch (e.g., salaries of judges or clerical staff); likewise it did not attempt to examine the costs that plaintiffs incur when bringing litigation against federal agencies.

This study is believed to have captured the majority of the quantifiable costs that the FS and FWS incurred defending litigation of a single (i.e., the Spotted Bear River-SBR) project. Also, without information from *all* of the agencies involved, the cost accounting is incomplete and represents an unknown fraction of the total cost of litigation. In particular, without the costs of the (OGC and DOJ) attorneys involved, a significant amount of non-FS cost is missing.

By all accounts from the FS and FWS personnel interviewed for the SBR case study, other agency information, and from broader GAO reports, the costs of environmental litigation of FS projects far exceed the sum of attorney fees paid to plaintiffs. The estimated financial impact of litigation-encumbered timber volume on R1’s congressionally appropriated timber program budget was about \$9.8 million in FY 2013 and \$6.8 million in FY 2014. Specifically in the SBR case, *no* attorney fees were awarded or paid, and litigation costs exceeded \$99,500, with 1,933 FS and FWS personnel hours spent on litigation, and these figures do not include any attorney time or salary from either OGC or DOJ. The potential loss of revenue to the Treasury/agency, had the sale not been implemented, exceeded \$729,000 for the Tin Mule timber sale. The potential community impact of this sale not being implemented exceeded 130 jobs and \$10 million in labor income and tax revenue. So, in cases where attorney fees are awarded to a plaintiff, the total cost and other monetary impacts of litigation would clearly exceed the awarded attorney fees alone.

From the interviews and questionnaires of FS personnel, foregone and delayed work is where the agency and communities “feel” the impact of litigation the most. Although it is difficult to identify all of the specific forgone or delayed activities and quantify the value of time and effort *not* spent on those activities, the availability of agency budget and personnel resources is finite and often non-substitutable. As one Flathead NF staff officer stated: “Due to the timely nature of some of these duties, about 50

percent of this work could not be accomplished later following the delay from this litigation workload.” Time that agency personnel spend defending against litigation is time they are not able to spend planning or analyzing other projects, interacting with the public, or delivering the suite of services and resources the public counts on them to provide.

The relatively high frequency of litigation in Region One and the protracted duration (often one to two years) of litigated cases certainly contribute to agency workload, cost, and uncertainty, as well as uncertainty and related economic impacts for loggers, mills, and communities near the forests. Even if agency personnel were not spending effort working on these cases each day cases were open, the duration of most litigated cases was over multiple planning and budget cycles, making resource management and financial decisions very difficult for the FS, mills, loggers, and forest-dependent communities in the Region.

According to the March GAO report (Larence 2014), the USDA has budget object classification codes in its financial database for recording attorney fees (code 4236) as well as damages, filing and reporting fees, expert witness expenses, telephone, postage, travel, and copying (code 4230). However, “litigation costs are broader than attorney fees” and associated court costs, and “the agency does not track other litigation costs, such as cost or time associated with the support provided to DOJ in preparation for litigation, because the litigation specialists who assist DOJ with these cases are salaried employees” (Larence 2014). That was certainly evident and a complicating factor in the attempt to collect costs associated with the SBR case study. Also, according to Larence (2014), the U.S. Attorneys’ Office (i.e., DOJ) database does not track attorney hours worked by case, further complicating the ability to quantify that agency’s costs associated with specific projects.

Some, perhaps the majority, of the agency costs associated with project litigation extend well beyond the actual litigation and the specific project, and these “extended costs” are also very difficult to quantify. Forest Service personnel at various levels repeatedly indicated that much more time and effort is spent on a project’s NEPA analysis—which precedes and is often the subject of litigation—than is spent on litigation/legal defense *per se*. And virtually every proposed project, whether it is implemented or not and whether or not it is eventually litigated, is required to be analyzed and is also subject to potential litigation. This constant threat of litigation contributes substantially to time and effort spent trying to “bullet proof” analyses, the costs of analyses, and what many refer to as “analysis paralysis.” Likewise, the case law and administrative precedents that result from a single project’s court case can have far-reaching implications and impacts on other projects. And the ever-growing body of cases and case law makes required NEPA analysis, ESA consultation, and NFMA compliance more complex, more time-consuming, and more costly for the agencies involved.

Given the duration of litigation and far-reaching impacts that litigation of particular projects/cases can have on subsequent projects or analyses, it may not be possible to calculate or track all of the costs associated with litigation of each particular FS project. However, improved individual project cost tracking—from proposal and planning, throughout NEPA analysis, the administrative appeals or new “pre-decisional objection” process, initial litigation and subsequent legal appeals to higher courts, on-the-ground project implementation, and eventual project completion and close-out—could help improve quantification and understanding of the costs of legal compliance, including costs associated with litigation of specific projects.

Because of Congressional interest in the issue of the cost of litigation, budget constraints, personnel limitations, and the growing body of related case law, it would seem prudent for the FS to investigate

improved methods for tracking and reporting the actual (as opposed to annually budgeted) costs associated with individual projects and their associated planning, analysis, litigation, and implementation. Perhaps the FS could include more cost/financial information in the PALS (Planning, Appeals, and Litigation System) database or otherwise integrate PALS with the agency's financial database and/or other database(s) that keep record of FS personnel time and effort by project, function, and pay period. Including the costs associated with personnel from other agencies (e.g., F&WS, OGS, and DOJ) would also help provide a more complete picture of total cost.

In the absence of changes in accounting procedures at the FS and other federal agencies, substantial additional time and effort would be required to develop complete cost information for more case studies. In particular, examining one or more cases where plaintiff attorney fees were paid would provide some information on the costs including attorney fees, and would at least provide an example of the magnitude of attorney fees relative to other costs. Examining one or more cases that are permanently closed (e.g., were appealed to and ruled on by the 9th Circuit or U.S. Supreme Court) could provide more insight to the costs that accrue after judgment(s) in lower courts. It might also be informative to examine cases where the FS prevailed in court and timber harvest volume was reduced or value was lost as a result of the litigation process.

While more case studies would provide additional examples of litigation costs and broader impacts, the cases and results may not be representative or transferrable to all the projects/cases in Region One or across the National Forest System. A key weakness or drawback to the case study method exposed during the interview process and through the ancillary data, which demonstrate the prevalence of litigation in R1, is that the cumulative costs/impacts of litigation cannot be calculated. The costs and other impacts of studied cases can be identified, quantified, and some of the broader impacts can be qualitatively described. But there are numerous litigated projects, some have more complexity and impact than others, and the sum of individual case study costs may still not reflect the *total* cost of litigation. This was most evident at the RO level, where multiple cases are always being dealt with simultaneously, have a high degree of interrelatedness, and individual project costs and other impacts on personnel and program delivery may not be distinguishable.

Ways to measure aggregated costs and cumulative impacts of litigation need to be identified and implemented to demonstrate how forgone and delayed work translate into measurable year-to-year impacts on accomplishment of program objectives. It does not seem possible to collect case study information for all the R1 cases—even all the R1 cases in a given year. There were 26 litigated R1 projects identified during the June 2012 to June 2013 period. So, while the case study method can provide valuable information on the costs and broader impacts of some litigated projects, it will clearly fall short of providing a comprehensive and complete analysis of the total cost of litigation. A more comprehensive and systematic approach to monitoring the agencies' costs of legal compliance, including defending against litigation, will be necessary to truly quantify and understand the total impact of environmental litigation.

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