As Donald Floyd notes in his introduction to this issue of the *Journal*, appeals and litigation “represent the skirmish lines within a network of conflicting values” (p. 9). To get some firsthand accounts from these skirmish lines, we invited Michael Anderson and Charles Burley to contribute their opinions on this topic. Following are their thoughts, from their distinct vantage points.

**Response:** Appeals Process Provides Multiple Benefits

Michael Anderson

Appeals and litigation are essential elements of a healthy public land management system, ensuring that USDA Forest Service managers follow the law and providing a legitimate forum for resolving controversy. The administrative appeals process has multiple benefits:

- It gives citizens an informal opportunity to take issue with the propriety and legality of agency decisions. As eloquently stated by a federal judge in Montana, Forest Service appeals “allow the democratic process of participation in governmental decisions the full breadth and scope to which citizens are entitled in a participatory democracy.”

- It gives Forest Service officials an efficient way to review and correct controversial decisions by lower-level agency managers. Often, the result is better land management decisions.

- It reduces the need for litigation by providing an alternative means of dispute resolution. Only a relative handful of administrative appeals end up in court.

For decades, the Forest Service administrative appeals process has allowed forest users and concerned citizens to question land management and planning decisions. As controversy over national forest management escalated during the 1980s, so did the number of appeals and lawsuits. Some timber industry representatives blamed “frivolous appeals” for stopping Forest Service logging and road-building projects. In 1992, the Forest Service proposed to eliminate the appeals process.

Congress responded by enacting the Appeals Reform Act (ARA), which gave the public a statutory right to appeal project-level decisions by the Forest Service. The ARA instituted a straightforward 90-day appeals process, available to anyone who had previously commented or expressed interest in a project. The Forest Service promulgated regulations to implement the ARA in 1993.

Unfortunately, the Bush administration has sought to weaken the appeals and litigation process by capitalizing on legitimate public concerns about catastrophic wildfires. The administration’s assault on Forest Service appeals began in 2002, when President Bush announced his “Healthy Forests Initiative.” Bush urged Congress to repeal the ARA and to make it harder to challenge Forest Service projects in court. When Congress balked at the president’s sweeping proposal, the administration moved ahead with regulatory amendments, which were finalized in June 2003.

The Bush regulations make the existing Forest Service appeals process more difficult to use and may violate the ARA in several ways:

- They seek to exempt from appeal any project decision signed by top US Department of Agriculture officials. This appears to conflict with the ARA, which permits appeals by people who submit comments or “otherwise express interest” in a project.

- They exempt from appeal logging projects that the Forest Service has categorically excluded from environmental analysis. Another Healthy Forest Initiative regulation adopted in June 2003 allows categorical exclusion of
logging projects up to 1,000 acres in size if their primary objective is fuel reduction. The prior appeal regulations allowed appeals of all timber sales regardless of size or purpose.

As for the Bush administration’s complaints that environmental appeals are causing “analysis paralysis" and hampering fire prevention efforts by the Forest Service, recent studies by the General Accounting Office (GAO) and Northern Arizona University (NAU) cast considerable doubt on those allegations. The GAO found that only 24 percent of all Forest Service fuel reduction activities in the past two years were administratively appealed and just 3 percent were litigated. Of the activities that were subject to appeal, 59 percent were appealed. However, 79 percent of those appeals were decided within the prescribed 90-day time frame and 74 percent of the appealed projects were implemented without change. Thus, relatively few fuel reduction projects have been significantly delayed by administrative appeals or lawsuits.

The Northern Arizona University study took a broader look at Forest Service appeals, examining all types of management activities. Significantly, NAU researchers found that one-third of all appeals were filed by individual citizens rather than by any organization. Timber sales were the single most commonly appealed management activity, but the large majority of appeals focused on nontimber activities such as grazing, mining, and recreation. During the past five years, the total number of appeals peaked in 1998 and has declined somewhat since then.

These studies indicate that appeals and litigation have not significantly disrupted Forest Service efforts to reduce unnatural fire risks. Furthermore, they demonstrate that the appeals process is used by many people for many different reasons. The Bush administration is wrong to blame environmental appeals and lawsuits for the forest health problems facing our national forests.

The national forests are a distinctive part of America’s natural landscape and social fabric, providing many resource benefits and public involvement opportunities not commonly found on private and state lands. Reducing the ability of the American people to voice their concerns and use the legal system to challenge national forest management decisions is not in the public interest.

Response: Appeals and Litigation: A View from Industry

Charles H. Burley

Perhaps the best way to begin explaining industry’s concerns with appeals and litigation is by presenting a case example. The McCache Vegetation Management Project on the Deschutes National Forest was designed to improve forest health and reduce hazardous fuels. The planning started in 1996 with watershed assessments and a late successional reserve assessment. The NEPA work started in January 1999. That summer two fires occurred in the vicinity, burning less than 400 acres together. The Decision Notice for the project was signed on October 18, 2001. Two environmental groups appealed that decision.

On December 20, 2001, and January 3, 2002, informal disposition meetings were held with appellants to try to resolve the issues, but to no avail. On May 2, 2002, the Regional Office affirmed the Forest Supervisor’s decision. On July 23, 2002, the Cache Mountain fire started in an area that would have been treated under the McCache project. This fire grew to nearly 4,000 acres, burning 1,265 acres of the McCache project area and destroying two homes. On May 20, 2003, environmentalists filed a lawsuit on McCache. By July 1, 2003, the District completed its review of the fire and its effects on the McCache project and concluded no changes were warranted to the original NEPA document. On July 5, 2003, the Link fire started in the immediate vicinity of McCache and burned nearly 3,600 acres.

Where this now stands is that the plaintiffs and the government have stipulated that all noncommercial activities of McCache can move forward. But the government agreed to stay the commercial portion (two timber sales) until the court rules on the lawsuit.

So here we have a project that started in 1996 and as of today nothing has been implemented. Since the decision late in 2001, appeals and a lawsuit have delayed implementation. And now, with the stipulation agreement, the appellants’ true motive becomes clear—stop any commercial activity.

There are several major problems with the administrative appeals process. One is the ambush tactics employed by parties that did not participate substantively during the public participation process prior to the decision. Then, once the appeal is filed, the informal disposition meetings constitute bilateral negotiations without other parties able to participate. Sometimes these negotiations lead to changes in the project so appellants drop the appeal. These changes do not go through any public participation or review process and typically do not go
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Another major issue is that the USDA Forest Service, as required by the rules, administratively stays the project pending the resolution of the appeal. Even though by regulation this stay should last only 90 days (45 for the appeal period and 45 for the reviewing officer to make a decision), in the McCache appeal the Regional Office took about 190 days. In the meantime, the District shifted its resources to other projects and thus McCache did not get implemented in the 2002 field season. This lack of action may have contributed to the Cache Mountain fire growing as large as it did and destroying two homes.

Now, having said that, how do the new appeal regulations look? There are definitely some improvements. A significant change in the new rule is the requirement for “standing.” Potential appellants must have submitted substantive comments during the public involvement process in order to maintain the right to appeal. This change should eliminate the form letter and postcard appeals previously allowed.

In addition, the rule clarifies that categorical exclusions are exempt from appeal. The new rule also changes the definition for emergency exemption from appeals by allowing for the consideration of the economic impact of the project. It also clarifies that when an emergency is declared the project will not be administratively stayed.

Two changes the industry would have liked that were not included address appeal content and the informal disposition. The industry wanted the appeal content limited to issues raised during the comment period. However, the Forest Service chose not to do this. With respect to the informal disposition, there are no substantive changes—the meetings will still occur and be open to the public but, unless you are an appellant, you still cannot participate in the negotiations.

The Forest Service administrative appeals process is an excellent example of a well-intentioned policy gone awry. Opponents wishing to stop or delay projects have found it a very useful tool, which has led to abusive practices. But there is no political support to completely abolish the process.

Those wanting to keep the process argue it is their right as citizens to challenge decisions and it is the only means of checks and balances. Having watched this process for two decades, it is apparent to me that it has become a highly ineffective means for debate. It has completely stripped resource professionals of their ability to apply their knowledge of the best science and substituted instead a conflict-driven process for advancing personal opinions and values. It has also become a huge waste of time and money, often leading to projects not being completed and, consequently, resource objectives not being accomplished on the ground.

Only time will tell if the changes in the appeals process can bring it back under control. But I strongly suspect that, as long as this process exists in any form, those who do not want to see management, particularly commercial operations, on federal lands will continue to use it as a way to obstruct progress and exert their own values. It almost makes you wonder why we should participate in good faith during the public participation phase when the project can be subverted by appeals.

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