

Prepared Statement re: Camino Sawmill Closing

Steve Eubanks
Retired U.S. Forest Service
Tahoe National Forest forest supervisor

My name is Steve Eubanks. I retired from the Forest Service in January, 2008 following a 38-year career with the agency. At retirement, I was Forest Supervisor of the Tahoe National Forest in California. I have ample experience dealing with lawsuits and process appeals and understand well the environmental and economic impact of those tactics.

The Role of Administrative Appeals and Litigation in Restricting Management and Increasing Negative Effects

The overall effect of what has become a steady stream of administrative appeals and legal challenges to forest management activities planned by the U.S. Forest Service has been described by the agency chief and others as “analysis paralysis.” Planning and preparation of national forest projects normally requires extensive analysis by experienced resource professionals under the guidelines of the National Environmental Policy Act (NEPA) followed by preparation of detailed documents listing environmental effects--and mitigation measures for any predicted negative effects. Preparation of NEPA documents involves significant public participation so that issues and concerns can be fully discovered and addressed. In addition, there is ample opportunity for public review and comment of NEPA documents before a line officer approves the final document and project plans. Once that approval occurs, there is an opportunity for any dissatisfied person or organization to appeal the approval decision. Note that this appeal opportunity is somewhat unique for Forest Service NEPA decisions – most federal agencies’ decisions are not subject to appeal. Whether the appeal has merit or not, resolution of the appeal can and usually does take several months. This delays project implementation and can result in the project being cancelled because it is no longer viable. If the original NEPA decision is upheld upon appeal, dissatisfied persons or organizations can still litigate to stop the project. Litigation further delays implementation and is even more likely to result in the project no longer being viable.

All the above leads to a number of observations and realities:

Persons or organizations can appeal NEPA decisions whether or not their concerns have real resource or scientific merit. In other words, anyone can appeal simply because they philosophically disagree with certain types of forest management, even if those kinds of management are part of the Forest Service’s legislated mission.

Because of current legislation, litigants who do prevail in their case against the government can and almost always do recover all costs associated with their lawsuit. If the government prevails, no such recovery option exists. This puts the government at a serious disadvantage as it has limited budget to deal with legal challenges and court costs. Payment of court costs to successful litigants must often come from a national forest’s project budget and ultimately taxpayer dollars. This results in a direct reduction in the forest’s ability to complete other resource work with those funds.

The outcomes of lawsuits often hinge on seemingly minor process weaknesses. Since the legal and legislative framework guiding NEPA work is so complex, it is not difficult for litigants to find process flaws. There need not be any consideration for whether or not the process flaws will affect the quality of the proposed resource project.

Many projects are time-critical, so the act of appealing or litigating a NEPA decision can render the project moot due to the delays that result. Thus, even if an appeal or litigation has no real merit, the appellant or litigant can achieve their objective even if they do not prevail in their appeal or lawsuit. Many projects involve a cost associated with resource degradation or loss. An example is removing beetle-killed trees from a campground. If the project is timely, the cost of removing the trees can be covered by the value of the trees. If the project is delayed, the trees no longer hold value and removal must be paid for from project funds. Cost of resource degradation or loss is not covered by appellants or litigants whether or not they prevail in their challenge. In one real example, delays caused by one appeal ultimately found to be without merit caused a loss of over \$1 million dollars in revenue and reforestation funds following the 2001 Gap fire on the Tahoe National Forest.

The process of planning projects and preparing the accompanying NEPA documents involves extensive amounts of time and effort by resource specialists. Often, the amount of time involved in preparing the documents is significantly larger than is needed to ensure high quality on-the-ground projects because of desire to create a document that can successfully withstand appeals and litigation. Often, basic resource planning can be completed in 3 months time, but additional document perfection can involve another 6 to 9 months. This extra time plus the time and administrative processes needed to respond to appeals and litigation cost as much as 40% of a forest's vegetation management budget. These funds are then no longer available to carry out actual on-the-ground work.

The ecological result of 'analysis paralysis' is the delay of many high priority forest management projects in national forests across the country and forests that are becoming increasingly dense and vulnerable to insects, disease and wildfire. While all these factors are natural parts of forest ecosystems, the current magnitude of their impact is no longer natural. The size and intensity of wildfires in the West are well above normal and increasing. Arizona, Colorado, Oregon, California, Utah and Alaska have all set records for their worst fire seasons on record since 2002.

Environmental Impact of Overstocked Forestlands

Many Sierra Nevada forests now stand in stark contrast to their Gold Rush Era predecessors. Historic Sierra forests that may have had 50-70 trees per acre now may have 700 or more trees per acre. Most of the additional trees are in the understory. These trees serve as flammable fuel "ladders" that carry ground fires into the forest canopy to create high intensity crown fires.

When fire enters an ecosystem choked with uncharacteristic fuel loads, fires burn hotter and with greater environmental consequence. Water quality is affected when soils are exposed to increased erosion in post-fire rains. Millions of tons of greenhouse gases are released as carbon-storing vegetation is burned. Fires in recent years have made huge areas of old forest habitat nonviable. This includes many spotted owl habitat areas.

Active management to thin fuels and establish resilient forests has, on the other hand, proven to have beneficial impacts on wildfire behavior, water quality, wildlife habitat and air quality. The more forest management projects are blocked by delays, the greater the fuel accumulations on public forest lands and the more effects there will be on the forest-provided resources we all hold dear.

Conclusion

Appeals and litigation are significantly affecting the ability to manage forest resources on national forestlands. They are putting forest resources at risk and taking a considerable toll on California's forestry infrastructure and rural economies, as witnessed by the closing of the Camino mill. When we lose forestry infrastructure, we lose tools critical to establishing sustainable forested landscapes. We must find ways to overcome obstructionist tactics so agencies entrusted with the care and management of public resources can do their jobs in accordance with their stated missions. While there needs to be a process for citizens to address legitimate concerns and to participate in positive ways to improve national forest management, there needs also to be a way to minimize delays resulting from those who simply oppose the legally-established mission of the Forest Service.

One approach is quite simple but would require political courage. That approach is to pass legislation to require litigants, perhaps even appellants, to post a performance bond when they challenge a NEPA decision. The amount of the bond would vary and would be adequate to cover potential court costs and also costs of any resource value that could be lost due to delay of the proposed resource project. The bond would be forfeited if the litigant lost the lawsuit (or appeal if appellants are included). Requiring a bond would not eliminate challenges to NEPA decisions, but it would reduce frivolous challenges. I believe the bond approach would be fair. It would not discourage appeals or litigation that had true merit; I.e., those based on real environmental issues and not simply philosophical opposition to management of public forests.

Most Forest Service employees believe that having a process that allows the public to participate in project planning and assessment is important. Most probably also agree there should be an avenue for challenging questionable projects. The real question is whether or not those whose basic philosophy conflicts with the Forest Service's legislated mission should be able to block that mission through appeals and litigation or whether they should have to seek legislative changes to the mission as would seem to be more appropriate.

Steve Eubanks

"mailto:steubanks@hughes.net" steubanks@hughes.net