



As a deciduous conifer, the western larch has a contrary nature.

LARCH COMPANY OCCASIONAL PAPER #4

FOREST SERVICE ADMINISTRATIVE APPEALS: A MISALLOCATION OF RESOURCES

by Andy Kerr

ABSTRACT

Conservationists could achieve more and better conservation of national forest lands if they traded away administrative appeals of agency decisions in exchange for Congressionally mandated substantive protections for roadless, riparian, older, naturally younger and other ecologically significant forests. The time and effort spent by the conservation community on administrative appeals could be better spent on preparing for litigation, political organizing, resource monitoring and public education. The proposed legislated trade of process for substance would not affect judicial review of agency actions.



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Rooster Rock in the Table Rock Wilderness, Clackamas County, Oregon. While an administrative appeal delayed the clearcutting of the headwaters of Image Creek, a tributary of the Molalla River, it was an Act of Congress that permanently prevented the logging.

Administrative appeals of Forest Service decisions are not as useful as they once were and will continue to decline in utility as the agency learns how to routinely process (and ignore the spirit of and reasons for) administrative appeals. An alternative to the current system of Forest Service decisionmaking and administrative appeals would not require bureaucrats to merely consider doing the right thing to conserve public lands and resources, but mandate bureaucrats to do the right thing.

This author filed his first administrative appeal of a Forest Service decision in 1975. Thirty years ago challenging an agency decision was effective and an efficient use of conservation resources because an appeal was considered by the Forest Service as a black mark against the line officer involved and the agency responded by improving (or abandoning) its management proposal. But as time passed, administrative appeals became a badge of courage for Forest Service officials who were viewed both inside and outside the agency as holding the line against unreasonable environmental agitators. Today, administrative appeals have devolved into simply another cost of doing business.

The public lands conservation community should trade away the increasingly marginal benefits offered by the Forest Service administrative appeal process for legislated substantive protection for our national forests.¹ Such a trade would be a net gain for forest conservation and also create a more efficient public lands conservation movement. “Substantive protection” means legislative protection for:

- old-growth, late-successional (mature) and naturally regenerated young forests;
- riparian areas;
- roadless areas; and
- other kinds of ecologically important forests.

This proposal does not in any way contemplate conservationists surrendering their right to sue the Forest Service in federal court over poorly conceived forest projects. The checks and balances provided by the courts in public land use management is vital to assuring that the executive branch heed the wishes of Congress as expressed in federal statute. Justice for public forests, if it comes at all, is usually provided by an independent judiciary and judges with lifetime appointments and guaranteed salaries.

The Forest Service administrative appeals process fails to produce just, reasonable, well-considered management of our national forests. The primary reason conservationists appeal Forest Service decisions is because doing so is presently a necessary first step to suing the agency in federal court (where conservationists actually have a chance of stopping or improving a project). Under current federal law, one must first exhaust any and all administrative remedies before proceeding to court. If there were not a supposed administrative remedy to disputes over agency decisionmaking, the public could take the Forest Service directly to court.

Despite whatever other factual information, legal policies or good stewardship the Forest Service is supposed to consider during an administrative appeal, the agency will only grant relief to an appellant if (1) the agency believes the appellant has the capacity to sue the agency in federal court; and (2) the agency fears it would lose the lawsuit. Any conservation organization that files an administrative appeal without a reasonable expectation of having their day in court and a further expectation of winning in court is wasting scarce resources.

¹ Discussion and recommendations presented in this paper are also generally applicable to Bureau of Land Management administrative appeals. Though BLM has a more elaborate and formal protest and appeals process that are resolved by a quasi-judicial administrative body (the Interior Board of Land Appeals), the deck is similarly stacked against the public. Too many don't know or forget that 2.6 million acres of federal forests in western Oregon are under BLM control. See A. Kerr. 2007. Transferring Western Oregon Bureau of Land Management Forests to the National Forest System. Larch Occasional Paper #2. The Larch Company. Ashland, OR (available at www.andykerr.net/downloads).

There are cases where a conservation organization extracts concessions out of the Forest Service during a negotiated settlement of an administrative appeal. This can occur even when the conservation organization has no intention or ability to take the agency to court. As the agency is never quite sure when an appellant has the ability or not to litigate, it is prudent for the Forest Service to settle certain appeals. It may also be the case that the bureaucracy has learned to purposefully pad project proposals with throwaway items to offer up in settlement of administrative appeals.

ADMINISTRATIVE APPEALS ARE A TACTIC, NOT A STRATEGY

In 1981 Oregon Wild (then Oregon Wilderness Coalition and in between Oregon Natural Resources Council) filed an administrative appeal before the Interior Board of Land Appeals to slow the construction of a timber access road across 200 feet of Bureau of Land Management (BLM) holdings that would allow clearcutting on one square mile of private timberland in the headwaters of Image Creek (see picture on cover). The administrative appeal stalled the project, giving conservationists time to persuade the private land owner to trade his property for BLM land elsewhere, which allowed then-Congressman Ron Wyden (now a U.S. Senator) to persuade Congress to designate the area as Wilderness (to prevent BLM from logging it) in 1984. To no one's surprise, IBLA upheld the agency decision. Conservationists were prepared to go to court, where litigation under the National Environmental Policy Act (NEPA) might have prevailed and given conservationists another year to find another way to delay roading and logging the forest, but BLM would have eventually produced an environmental impact statement that satisfied NEPA and proceeded to build the road to facilitate clearcutting on the private land. Ultimately, it was legislative (an Act of Congress), not administrative (an administrative appeal) and not legal (a lawsuit) action that saved the roadless area for current and future generations.

“But we have to do something!” cry the valiant forest warriors bunkered in appeal shops that comprise part or all of many forest conservation organizations. But doing “something” (i.e., filing administrative appeals) that is destined to be unsuccessful because one cannot think of doing anything else reflects both futility and a lack of vision. The public lands conservation movement can afford neither.

The Forest Service administrative appeal process is purposefully rigged. Agency appellate review is not conducted by a disinterested third party, but by an agency line officer superior to the junior line officer responsible for the project in question. In many cases the superior line officer put that junior line officer in that job to make those decisions. The biases that cloud the appellate review process are inherent.

In most cases where conservationists “win” a Forest Service administrative appeal, the challenged project is usually simply remanded by the reviewing officer (or withdrawn by the deciding officer) to fix procedural errors under the National Environmental Policy Act. Too many people think NEPA is the National Environmental Protection Act. A more accurate name would be the National Environmental Procedures Act.

Rarely is a Forest Service decision overturned upon appeal because the proposed project is bad for public land, water, wildlife or resources. In most cases—once the paperwork deficiencies are corrected—the project (e.g., timber sale) is again sent back up the line for approval, unchanged, except that more paper has been produced to cover the agency's bureaucratic ass in court.

If an administrative appeal is well-reasoned and legally buttressed—and the appellant has the capacity to litigate the challenged project in federal court—then the appeal should be filed. However, if the relief sought will likely be limited to correcting paperwork deficiencies, the appellant better have a Plan B to actually protect the public land in dispute.

Too many administrative appeals are filed to no effect. They are submitted merely in attempt to delay a project and buy time. Buying time is only consequential if one has an associated strategy or plan to use the time to actually protect the affected public lands. If filing an administrative appeal is the entire plan to protect an area, then it is very likely to fail to achieve that goal. In cases where the Forest Service is in a particular hurry to implement a project, it can override the administrative appeal process by declaring the project in full force, so no stay is allowed under the appeal regulations.

What if there was no administrative appeal process? What would happen to those hardworking and committed conservationists who staff organization appeal shops? Conservationists are multi-talented and would devote the time and resources saved from fewer appeals to other, more effective conservation work, such as political organizing, resource monitoring and public education. If their best skills are evaluating documents and developing the facts and legal theories to litigate bad projects, they can continue to do that—but for actual litigation, not administrative appeals.

Their skills would also be useful to public interest law firms, in which case their time might eventually be compensated under attorney fee and cost award provisions under several federal laws. Successful plaintiffs can often recover fees and costs associated with the litigation, including, in some cases, those associated with an administrative appeal that was required before bringing the litigation. Winning an administrative appeal yields no recovery of costs and fees.

An argument for keeping the administrative appeal process is that it is the way to build the administrative record upon which subsequent litigation is based and decided. Few attorneys like the administrative record of an administrative appeal not handled by them. The alternative is that the record is built after the litigation is filed, by discovery and other means.

If Forest Service administrative appeals were traded for substantive legislated protection for forests, one would still need a statutory framework that provides citizens time to get to court before the Forest Service proceeds with an action that is illegal. Congress, in ending administrative appeals within a specified area in exchange for specified protections would also need to enact a provision that states:

- a Forest Service decision cannot be implemented for 10 days after it is made;
- if a notice of intent to sue is filed with the deciding officer within that 10-day period, the stay of implementation continues for a total of 60 days;
- a meeting between the potential plaintiff and deciding officer for the purposes of attempting to reach settlement shall occur within 10 days of the notice of intent to sue being filed; and
- if litigation is filed in federal district court, the agency shall further stay the implementation another 45 days from the date of filing to allow the plaintiff to seek a preliminary injunction of the project.

The timber industry and their allies in Congress have effectively framed the issue of national forest management as paperwork paralysis. While the Forest Service is actually paralyzed more by other factors, the result is that conservationists appear more interested in process than substance.

By offering to trade administrative process that isn't working particularly well to protect national forests, conservationists can reframe the debate from paperwork compliance to actual protection of roadless areas, streams, old growth trees, wildlife habitat, water quality, water quantity and scenery. The public overwhelmingly agrees with conservationists on these matters. Let's play to our strengths.

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