

**Forest Service Manual  
National Headquarters - Washington Office  
Washington, DC**

**Forest Service Manual 1500 – External Relations**

**Chapter 1570 - Appeals and Litigation**

**Amendment:** 1500-1994-2

**Effective date:** October 19, 1994

**Duration:** This amendment is effective until superseded or removed.

**Superseded Directive:** Amendment 1500-91-12 to FSM 1570

**Approved by:** Jack Ward Thomas, Chief

**Date approved:**

**Responsible Staff:**

**Explanation of changes:** Following is an explanation of the changes throughout the directive by section.

**1570:** This amendment adds new direction to FSM 1572 - 1572.43 concerning authorizations for the appearance of Forest Service employees as witnesses in litigation. It also incorporates in FSM 1571-1571.21, without changes, the direction formerly in interim directive (ID) 1570-93-1 regarding agreements to settle administrative appeals and in ID 1570-93-3, which clarifies when directives must be signed at the same time as the decision documents.

There are no substantive changes to the rest of this chapter.

**1571.03:** Adds a policy in paragraph 4 (formerly in ID 1570-93-3) clarifying that when decisions covered by a Decision Notice/Finding of No Significant Impact (DN/FONSI) or Record of Decision (ROD) are to be incorporated as amendments, supplements, or interim directives, the directive must be signed at the same time as the decision document. The intent is to preserve the exemption of Forest Service Manual (FSM) and Handbook (FSH) material from administrative appeal pursuant to Title 36, Code of Federal Regulations, section 217.4(a)(12) (36 CFR 217.4(a)(12)). The direction also makes clear that implementation of such a decision cannot occur on the basis of the DN/FONSI or ROD.

**1571.04b:** In paragraph 1, incorporates direction (formerly in ID 1570-93-1) removing the authority of the Reviewing Officer to suspend the appeals process if settlement agreements are not in compliance with legal authorities and agency direction. This authority is removed since it is the responsibility of the Deciding Officers.

**1571.04f:** Adds the responsibility of Deciding Officers (formerly in ID 1570-93-1) to ensure that provisions agreed to in settlement agreements and actions resulting from settlement agreements are in compliance with applicable legal authorities and agency direction prior to signing a settlement agreement. The appeal regulations at 36 CFR Part 217 allow Reviewing Officers to extend the time period for appeals to allow negotiations and settlement discussions (FSM 1571.04b, para. g).

**1571.2-1571.21:** Adds direction (formerly in ID 1570-93-1) to guide Deciding Officers when they are attempting to resolve an appeal through settlement agreement.

**1572-1572.43:** Reorganizes and revises section on Litigation to comply with 1990 and 1993 revisions to 7 CFR 1.210-1.219, concerning appearance of USDA employees as witnesses in judicial or administrative proceedings. Revises direction to be consistent with a new regulation in 7 CFR 1.219, concerning delegations to other officials for responsibilities formerly reserved to the Chief relating to notification and approval procedures for appearances of witnesses.

**1572:** Broadens the scope of this section to include direction on appearance of employees as witnesses in judicial or administrative proceedings in which the U.S. Government is not a party. Formerly, this section provided guidance only on litigation in which the Government is defendant.

**1572.01-1572.01d:** Adds codes and revises authorities to incorporate revisions in 7 CFR 1.210-1.219 as follows: FSM 1572.01a, Legal Services to the Forest Service (formerly in para. 1); FSM 1572.01b, Forest Service Management of Litigation (formerly in para. 2); FSM 1572.01c, Official Participation of Employees as Witnesses in Litigation (formerly in para. 3); and FSM 1572.01d, Forest Service Participation in Suits in State Courts (formerly in para. 4).

**1572.04a-1572.04b:** Revises and recodes responsibilities of Washington Office (FSM 1572.04a) and field unit positions (FSM 1572.04b) for approval of Forest Service employees as witnesses in litigation to incorporate delegations authorized by 7 CFR 1.219 that were formerly reserved to the Chief. Incorporates responsibilities formerly coded to FSM 1572.04c-1572.04e, which have been removed.

**1572.2:** Changes caption to Reporting Requirements.

**1572.21-1572.21b:** Recodes direction on Litigation Reports (formerly in FSM 1572.2 - 1572.22).

**1572.22-1572.22b:** Recodes direction on Litigation Reporting and Tracking System (formerly in FSM 1572.4 - 1572.42).

**1572.4-1572.43:** Adds direction on authorization and reporting procedures for employees appearing as witnesses in litigation. Exhibit 01 in FSM 1572.4 contains a sample of a completed Form FS-1500-4, Clearance for Witness or Deposition Services.

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This chapter sets forth broad authority, objectives, policy, responsibility, and procedures for coordinating and managing appeals of Forest Service decisions and Forest Service participation in litigation.

## **1571 - Appeals**

### **1571.01 - Authority**

Regulations at Title 36, Code of Federal Regulations, section 211.18 (36 CFR 211.18) provide a process by which individuals or groups may appeal decisions of forest officers concerning the National Forest System.

### **1571.02 - Objectives**

The objectives of the Forest Service appeal process are to:

1. Afford any affected or interested individual(s) or group(s) dissatisfied with a decision of a forest officer an opportunity to have the decision reviewed by higher levels of Forest Service officials.
2. Review administrative appeals objectively, quickly, and informally.
3. Seek to resolve conflicts over disputed policies, proposals, and activities.

### **1571.03 - Policy**

1. Ensure, to the extent feasible, that parties affected by decisions of forest officers concerning the National Forest System are informed about the decision and the appeal procedures set forth in the regulations.
2. Review, in a fair and timely manner, forest officers' decisions that are appealed under 36 CFR 211.18.
3. As appropriate, work with an appellant to attempt to resolve a conflict, even while the appeal is in progress.
4. When decisions covered by a Decision Notice/Finding of No Significant Impact (DN/FONSI) or Record of Decision (ROD) are to be incorporated as policy and/or procedure in amendments, supplements, or interim directives to the Forest Service Manual or Handbook, ensure that the directive is prepared and signed at the same time as the decision document. This simultaneous action is necessary to avoid challenges to the exemption of Forest Service Manual and Handbook material from administrative appeal as provided in 36 CFR 217.4(a)(12). In this situation, implementation of the decision cannot occur on the basis of the DN/FONSI; issuance of the corollary directive is required to initiate implementation.

## **1571.04 - Responsibility**

### **1571.04a - General Administration of Appeals Process**

1. The Deputy Chief for the National Forest System has the responsibility for Service-wide program administration for all appeals. Staff support for Service-wide coordination and administration of the appeals process is assigned to the National Forest System Staff Assistant for Operations (Washington Office).

This responsibility includes, but is not limited to, advising Regional Offices on appeals administration, developing, reviewing, and maintaining appropriate rules and attendant directives, tracking the overall appeals workload and process, and carrying out other day-to-day communications and oversight activities.

2. Regional Foresters and Forest Supervisors are responsible for administering the appeals process for their levels. Specific responsibilities are set forth in 36 CFR 211.16 through 211.18 and FSH 1509.12, Appeals Handbook.

Regional and Forest-level Appeals Coordinators are responsible for coordinating the appeals process at their levels to ensure consistent application of the rules, policies, and procedures governing appeals and for conducting such caseload coordination, communication, and analysis for appeals as their Regional Foresters or Forest Supervisors may require.

### **1571.04b - Conduct of Appeals**

1. Reviewing Officer. It is the responsibility of a Reviewing Officer at each level of appeal to render all procedural decisions on an assigned appeal. Only the Reviewing Officer or, in the absence of the assigned Reviewing Officer, a designated acting may:

- a. Rule on timeliness.
- b. Grant or deny a stay.
- c. Grant or deny intervention.
- d. Grant or deny time extensions.
- e. Grant or deny a request for an oral presentation.
- f. Suspend an appeal for further information.
- g. Extend decision periods beyond limits established in the regulations.

- h. Dismiss an appeal based on a settlement agreement among parties. Prior to dismissing an appeal, it is the responsibility of the Reviewing Officer to verify that the provisions of and actions taken pursuant to a settlement agreement are in compliance with all applicable legal authorities and agency direction (FSM 1571.21, para. 1).

In the absence of the Reviewing Officer, a designated acting may also sign appeals-related correspondence of a routine nature. In the event of prolonged absence of an assigned Reviewing Officer, the appeal should be reassigned to another Reviewing Officer.

Only the assigned Reviewing Officer--not a designated acting--shall review the record preparatory to rendering a decision, and render a substantive decision on the appeal.

2. Staff Support to Reviewing Officer. Staff Directors, and at the Forest level, Staff Officers, are responsible for performing all necessary work required to assist the Reviewing Officer in completing a review and rendering the decision on an appeal.

a. Staff support to the Reviewing Officer includes:

- (1) Making arrangements for oral presentations, such as determining dates available, setting the time and location, confirming arrangements with all parties, and determining the need to include the Office of General Counsel (OGC) staff and notifying them of arrangements.
- (2) Conducting briefing sessions.
- (3) Certifying that the record is complete and closing the record.
- (4) Preparing the appeal record and transmitting it to the Reviewing Officer.
- (5) Assembling correspondence related to the appeal, the decision letter, and decision abstract.
- (6) Disseminating the decision.

In addition, Washington Office staffs are responsible for notifying appellants, intervenors (if any), and Regions whether or not the Secretary will review a decision.

b. Unless otherwise directed by the assigned Reviewing Officer, a Staff Director or Staff Officer may sign the following correspondence for the Reviewing Officer:

- (1) Letters advising parties to an appeal of the date, time, location, and arrangements for the oral presentation.

(2) Letters to parties to the appeal notifying them that the appeal record is closed.

(3) Letters advising the appellant(s) that the period needed by the Reviewing Officer to make the decision will exceed the timelines established in the relevant rules.

#### **1571.04c - Washington Office**

1. Deputy Chiefs. The Deputy Chief for National Forest System is delegated continuing Reviewing Officer responsibility for all appeals to the Chief. The Deputy Chief may reassign specific appeals and associated Reviewing Officer responsibilities to one of the National Forest System Associate Deputy Chiefs, or, upon consultation, transfer an appeal to the Chief, Associate Chief, or another Deputy Chief. In the event of prolonged absence of a Reviewing Officer, the Deputy Chief for National Forest System, shall reassign the appeal to another Reviewing Officer.

2. National Forest System Staff Assistant for Operations. In addition to the Service-wide responsibility for coordination and administration of the appeals process assigned at FSM 1571.04a, the National Forest System Staff Assistant for Operations has the following responsibilities for appeals at the Chief's level:

- a. Reviewing incoming appeals and recommending the appropriate official to serve as Reviewing Officer and the appropriate unit to serve as primary staff on the appeal.
- b. Tracking appeals through the decision process.
- c. Monitoring performance under applicable rules and policies to ensure procedural adequacy of decisions made during the conduct of an appeal at the Chief's level.
- d. Reviewing appeals-related material prepared by functional staffs in the Washington Office for dissemination internally or externally.
- e. Developing procedures, and attendant directives, for managing and conducting appeals at the Chief's and Secretary's levels.

#### **1571.04d - Regional Forester**

The Regional Forester serves as Reviewing Officer for first level appeals of Forest Supervisor decisions and second level appeals of District Ranger decisions. This authority may be delegated to a Deputy Regional Forester. Each Regional Forester shall appoint a Regional Appeals Coordinator (FSM 1571.04a).

### **1571.04e - Forest Supervisor**

The Forest Supervisor serves as Reviewing Officer for first level appeals of District Ranger decisions. This authority may be delegated to a Deputy Forest Supervisor or exercised by a designated acting. Forest Supervisors may appoint an Appeals Coordinator for the forest.

### **1571.04f - Deciding Officer**

The Deciding Officer has the authority to enter into agreements with parties to an appeal to settle issues involved in an appeal of a decision by that officer. Prior to signing a settlement agreement, it is the responsibility of the Deciding Officer to assure that provisions agreed to in settlement agreements and actions resulting from settlement agreements are in compliance with applicable legal authorities and agency direction (FSM 1571.2, para. 1f).

### **1571.1 - Identification of Reviewing Officer**

When preparing correspondence or issuing decisions related to an appeal, identify the Reviewing Officer for appellants and intervenors via the signature block. For example:

/s/ [signature]  
I. M. FORESTER [NAME]  
Reviewing Officer  
Deputy Chief, National Forest System [OFFICIAL TITLE]

Also use this same signature block for correspondence to be signed by a Staff Director or Staff Officer for the Reviewing Officer.

### **1571.2 - Resolution of Appeal Issues**

Pursuant to 36 CFR 217.12, Deciding Officers have the authority and are encouraged to initiate opportunities to resolve issues under appeal by means other than review and decision on the appeal.

### **1571.21 - Agreements for Settling Administrative Appeals**

When attempting to resolve an appeal through settlement agreement, Deciding Officers shall be guided by the following:

1. Ensure that all participants in attempts to resolve appeal issues are apprised of the specific requirements of pertinent laws, regulations, and agency direction, including the following:

- a. Settlement agreements may initiate a process of changing prior Forest Service decisions and can include the withdrawal of these decisions, or portions thereof;

however, settlement agreements shall not make new decisions to which the National Environmental Policy Act of 1969 (NEPA) and the National Forest Management Act of 1976 (NFMA) regulations apply. In the case of appeals of forest land and resource management plans (forest plans), negotiations and settlement agreements may propose amendments to forest plans but appropriate environmental analysis, documentation, and public disclosure must occur before a new decision can be made. Any agreed-upon proposed amendments to forest plans are open to comment by all interested persons, pursuant to 36 CFR 219.10(f) and 40 CFR 1506.6, and may be modified as a result of such comments.

b. Agreements cannot obligate future Federal funds or make commitments that depend on such funding; Congress has final responsibility for appropriation of funds to the Forest Service.

c. All interested persons have the right to request administrative review (appeal) and judicial review of decisions, such as forest plan amendments that are based upon and made subsequent to provisions in settlement agreements. Appeal regulations (36 CFR 211.18, 36 CFR Part 217, and 36 CFR Part 251, Subpart C) do not contain any provisions that would allow settlement agreements to restrict administrative appeal of any future decision.

d. Although settlement agreements are binding to the extent that signing officials acted within delegated authority and the provisions of agreements are not superseded by Congressional actions or subsequent court decisions, settlement agreements are not contracts. Ideally, settlement agreements should encourage parties to withdraw appeals based on mutual interest.

e. Once all parties to an appeal agree in writing to withdraw an appeal and the Reviewing Officer dismisses the appeal, all administrative remedies are exhausted; it is not possible to reopen an appeal once it has been dismissed.

f. All provisions of and actions taken pursuant to settlement agreements must be in compliance with NEPA and its implementing regulations (40 CFR Parts 1500-1508); NFMA and its implementing regulations (36 CFR Part 219); other pertinent laws and regulations, including 36 CFR 211.18, 36 CFR Part 217, or 36 CFR Part 251 Subpart C; where appropriate, the Federal Advisory Committee Act of 1972 (FACA); and applicable agency direction issued in the directive system.

2. Deciding Officers shall not agree to settlement agreements that are counter to or in conflict with agency direction. Deciding Officers shall review proposed settlement agreements for consistency with agency policy and procedure and inform parties to the settlement when proposals are inconsistent.

## **1572 - Litigation**

This section provides direction on:

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Guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract. USDA may not cite, use, or rely on any guidance that is not available through their guidance portal, except to establish historical facts.

1. Litigation (lawsuits and associated legal actions) in which the U.S. Government is a party; that is, lawsuits and legal actions taken against the U.S. Government as well as actions taken by the U.S. Government; and

2. Authorization for the participation of Forest Service employees as witnesses in litigation, whether the U.S. Government is or is not a party (FSM 1572.01c).

Further direction can be found in FSM 5300 for litigation related to law enforcement; FSM 6300 for procurement-related litigation; and FSM 2454 for litigation involving timber sale contracts. Refer to FSM 6170 for direction on employee participation in other judicial activities, such as jury duty, and on legal services available to employees.

### **1572.01 - Authority**

#### **1572.01a - Legal Services to Forest Service**

Regulations at Title 7, Code of Federal Regulations, section 2.31 (7 CFR 2.31) provide for delegation of authority from the Secretary to the Office of General Counsel (OGC) to provide legal services for all activities of the Department, including advice to agencies, and to serve as liaison with the Department of Justice and its attorneys who represent the Government in litigation.

#### **1572.01b - Forest Service Management of Litigation**

Forest Service authority to manage its participation in litigation derives from regulations at 7 CFR 2.60, which delegates to the Chief authority for formulating, directing, and executing Forest Service policies, programs, and activities.

#### **1572.01c - Official Participation of Employees as Witnesses in Litigation**

Department of Agriculture regulations at 7 CFR 1.210-1.219 govern the appearance of USDA employees as witnesses to testify or produce official documents in judicial or administrative proceedings when such appearances relate to their official employment with USDA.

1. The regulation at 7 CFR 1.212 requires that no employee may appear in such proceedings unless authorized in accordance with this subpart.

2. The regulation at 7 CFR 1.219 (published in 58 Federal Register, page 62495, November 29, 1993) provides for the Chief to delegate responsibilities for authorizations concerning employees' appearances (see FSM 1572.04 for these delegations to Forest Service officials and FSM 1572.4 for procedures on authorizations and for direction in cases where requests for appearances are not approved).

3. The regulation at 7 CFR 1.214 requires notification to the General Counsel for a Forest Service employee to appear as a witness on behalf of a party other than the U.S. Government when the U.S. Government is party to the litigation.

4. The regulation at 7 CFR 1.216 requires concurrence by the General Counsel with the authorization for a Forest Service employee to appear as a witness on behalf of a party other than the U.S. Government whether the U.S. Government is or is not party to the litigation. In criminal cases, under certain criteria, law enforcement employees have been granted prior approval by the Chief and prior concurrence by OGC (FSM 1572.42a).

### **1572.01d - Forest Service Participation in Suits in State Courts**

Title 43, United States Code, section 666 (43 U.S.C. 666) provides for the United States to participate in adjudication proceedings in State courts on the priority of water rights, both reserved and acquired. Procedures are found in FSM 2541.

### **1572.02 - Objectives**

The objectives of coordinating Forest Service involvement in litigation are to:

1. Involve line and staff officers in decision-making about litigation.
2. Ensure that agency personnel know, understand, and follow existing laws, regulations, and procedures inherent in litigation.
3. Provide factual information related to active litigation on a timely basis to the Office of General Counsel and the Department of Justice, when requested by OGC.
4. Manage Forest Service involvement in litigation to make effective and efficient use of agency resources.

### **1572.03 - Policy**

It is Forest Service policy to:

1. Avoid unnecessary litigation by carefully following laws, regulations and orders and by obtaining OGC advice in advance of potentially controversial management actions.
2. Seek resolution of disputes through negotiation where it is in the public interest and otherwise appropriate.
3. Consult with OGC early, openly, and fully in all activities related to litigation.
4. Coordinate and manage agency involvement in litigation.

5. Be alert to the potential for wide-ranging impacts or policy implications arising from local litigation or from litigation involving other Federal agencies or private parties.

#### **1572.04 - Responsibility**

##### **1572.04a - Washington Office**

1. Chief.

a. The Chief reserves the authority to designate the responsible line officer to manage Forest Service involvement in each lawsuit involving the Forest Service.

b. The Chief reserves the authority to approve the appearance of the following employees as witnesses in litigation and to obtain necessary concurrence from the Office of General Counsel (OGC) (FSM 1572.4): Associate Chief, Deputy Chiefs, all law enforcement personnel, Regional Foresters, Station Directors, Area Director, and Institute Director.

2. Deputy Chief for National Forest System. The Deputy Chief for National Forest System has the responsibility for approving the appearance of subordinate employees in the Washington Office appearing as witnesses in litigation and for obtaining necessary concurrence from OGC (FSM 1572.4). In addition, the Deputy Chief is responsible for Service-wide coordination of litigation assistance to OGC and for designation of a Litigation Coordinator.

3. Litigation Coordinator. The Litigation Coordinator is responsible for developing and managing a Service-wide control system for tracking, monitoring, and reporting on all litigation.

4. Staff Directors. As assigned by their Deputy Chiefs, Staff Directors are responsible for ensuring that the staff work and needed information on pending litigation is completed and transmitted. Each director must also designate a Case Coordinator as a contact person to provide technical information to the Washington Office Litigation Coordinator when a staff is affected by, or can contribute to, the conduct and resolution of litigation.

5. Case Coordinator. As assigned by the responsible staff director, a Case Coordinator is responsible for overseeing technical aspects of a particular case and maintaining contact with the Litigation Coordinator, OGC, and field personnel.

The Case Coordinator is responsible for obtaining, as appropriate, the advice and assistance of other concerned Washington Office staff, field personnel, and OGC. This involves:

a. Obtaining information about current litigation and related lawsuits and advice about procedural requirements (OGC will contact other agencies' legal staffs). Working with OGC, the Case Coordinator keeps the Litigation Synopsis current.

- b. Alerting the staff director when key decision points involving line management are approaching.
- c. Contacting other staff units and other agencies, such as the Bureau of Land Management and Animal and Plant Health Inspection Service, for evaluation of:
  - (1) Potential effects.
  - (2) The cumulative effects from similar or unrelated programs.
  - (3) Background information regarding adequacy of environmental analysis procedures.
- d. Assessing impact of the lawsuit and its potential at the local, Regional, and national levels.

#### **1572.04b - Field Units**

1. Regional Foresters, Station Directors, Area Director, and Institute Director. The Regional Foresters, Station Directors, Area Director, and Institute Director are responsible for:
  - a. Serving as responsible line officers for cases as assigned by the Chief and ensuring completion of staff work necessary to provide information on pending litigation. To carry out this responsibility, these officers may designate a Litigation Coordinator. They must designate a Case Coordinator (para. 2) for each case assigned and they must designate a Witness Coordinator (para. 5).
  - b. Approving the appearance of subordinate employees appearing as witnesses in litigation and obtaining the necessary concurrence from OGC (FSM 1572.4). This responsibility may not be redelegated.
2. Case Coordinator, Field Unit. The duties of a Case Coordinator in a field unit are the same as those for a Washington Office Case Coordinator (FSM 1572.04a, para. 6).
3. Forest Supervisors. When a National Forest or Grassland is party to or affected by pending litigation, the Forest Supervisor is responsible for designating a contact to work with the Region and OGC to provide necessary information.
4. Forest Service Employees. Employees who receive a summons, subpoena, or other request to testify or produce documents in a legal proceeding shall follow applicable procedures in FSM 1572.4.
5. Witness Coordinators. The Witness Coordinator at each Region, Station, Area, and Institute office is responsible for ensuring that the Office of General Counsel is informed of

subpoenas, obtaining approval or disapproval (FSM 1572.4), and sending notification to the employee. If an employee is not authorized to testify, the Witness Coordinator is responsible for ensuring that the attorney seeking the testimony is notified.

6. Assigned Responsible Line Officers. Specific responsibilities vary with the type of litigation. Generally, the Chief (FSM 1572.04a, para. 1) assigns line officers at the level of the complaint to manage the Forest Service involvement in the litigative process. When assigned specific responsibility for Forest Service involvement in litigation, the assigned line officer is responsible for:

- a. In consultation with OGC and others named in the complaint, analyzing the options and deciding whether to,
  - (1) Defend the case,
  - (2) Agree to the relief requested, or
  - (3) Pursue the possibility of settlement. If the decision is to seek settlement, the assigned line officer helps determine the negotiating strategy and terms of settlements.
- b. Designating one person with primary responsibility to coordinate each case (Case Coordinator).
- c. Keeping the next higher line officer informed of case progress.
- d. Advising the next higher line officer if assistance is needed to meet unanticipated or unfunded expenses of litigation.
- e. When requested by OGC, beginning preparation of a litigation report without delay.
- f. In consultation with OGC, keeping personally involved, as a minimum, in key steps of the litigative process (FSM 1572.1).

### **1572.1 - Key Steps in Defending Against Legal Complaints**

The litigative process is triggered when a complaint is filed and served. The line officer receiving a complaint must notify the next higher line officer. If a decision is made to defend the case, the responsible line officer designates a Case Coordinator and participates in the litigative process as summarized in exhibit O1.

1572.1 - Exhibit 01

**Key Steps in Defending Suits Brought  
Against the Forest Service**

<u>LITIGATION ACTIONS</u>	<u>KEY STEPS FOR LINE OFFICERS</u>
OGC contacts Justice, requests Forest Service to prepare the litigation report, checks for Temporary Restraining Order or injunction.	ENSURE THE LITIGATION REPORT IS TIMELY, COMPLETE AND FACTUAL.
OGC reviews and forwards the litigation report to Justice. OGC and/or Justice drafts the answer to the complaint.	REVIEW ANSWER TO COMPLAINT AND ASSURE STATED FACTS ARE ACCURATE.
Justice files U.S. Government's answer and begins to prepare defense:	PARTICIPATE IN DEVELOPING TRIAL STRATEGY.
(a) If a motion for summary judgment is requested, Justice drafts brief and assembles supporting evidence for review and comment by OGC; or	RECOMMEND SUITABLE WITNESSES AND PROVIDE AMPLE OPPORTUNITY FOR PREPARATION.
(b) If a trial is to be held.	REVIEW TESTIMONY, FACTS AND AFFIDAVITS AND REASSESS STRATEGY.
If depositions or interrogatories are to be taken, OGC and Justice represent the Forest Service.	ENSURE WITNESSES ARE AVAILABLE AND PREPARED.  PRIOR TO TRIAL OR HEARING, AGAIN REVIEW THE SETTLEMENT OPTIONS.
The court rules, either on Summary Judgment or after full trial. If ruling is against the government, Justice and OGC involve the Forest Service.	REVIEW OPTIONS AND MAKE RECOMMENDATIONS ON APPEAL.
Appeal (if any) filed. Justice notifies OGC and drafts the appellate brief.	REVIEW APPELLATE BRIEF FOR COMPLETENESS AND ACCURACY.
Justice or Assistant U.S. Attorney files appellate brief and sends opposing briefs to OGC.	REVIEW OPPOSING BRIEFS AND DEVELOP FACTUAL RESPONSES.

Note: If the case is taken to appeal or higher court, the last three steps involving line officers may be repeated several times.

## 1572.2 - Reporting Requirements

### 1572.21 - Litigation Reports

To adequately represent the Government's interest in a lawsuit, the Department of Justice requires a litigation report which contains all available evidence necessary to apprise Government attorneys of the facts of a case. The report must be prepared by those having the most knowledge of the facts in a case--usually, those who dealt with the matter at the Forest or Regional level. The Office of General Counsel (OGC) makes a formal request for a litigation report from the Forest Service.

A litigation report is a privileged communication between Government attorneys and the Forest Service. It is not discoverable under the Freedom of Information Act (FSM 6270.1).

#### 1572.21a - Content and Format Standards

A litigation report should include all documents and exhibits that relate to the subject of the lawsuit. However, persons compiling the report must take care to avoid including redundant or meaningless information in the report. If the file is too voluminous, sort out the most relevant documents and include a list of those excluded so that readers know what additional information exists. Contact the local OGC office or the assigned OGC attorney for advice on preparing the report.

Prepare a litigation report in accordance with the following format and standards:

1. Cover Page.
  - a. State case name and general subject of the lawsuit.
  - b. Display the name, official position in the Forest Service, address and telephone number of person(s) preparing the report.
2. Index. Prepare a detailed index of the contents of the report so that a person not familiar with the facts and file can easily locate a document, exhibit, or appendix.
3. Statement of Facts. Prepare a statement that will give someone unfamiliar with the case a general background of what the case is about. For example, if a timber sale is involved, describe the area and its topography, the species, the sale planning process, the basis of the contract, the cause of the dispute, and present status of the issue(s) being litigated.
4. List of Witnesses. List the names and addresses of all persons, whether or not employed by the agency, who can testify on behalf of the Government. For each potential witness, give the person's official position, if any, and explain the person's direct connection with the matters in litigation. Briefly summarize those matters on which the witness may testify.

5. Laws, Regulations, and Directives. If possible, correctly cite and attach a copy of all the Federal or State laws, Federal regulations, Executive Orders or proclamations, Comptroller General decisions, and Forest Service Manual and Handbook provisions that apply to the facts of the case. Much of this information can be obtained from the complaint itself. However, consultation with the local OGC office may be necessary to properly identify the applicable laws and regulations.

6. Answers to Complaint or Petition. Comment on each point and give an opinion of the facts and allegations stated therein. State any counterclaim or other demand existing against the plaintiff or claimant that arises from the facts of the suit or from other unrelated matters.

7. Exhibits. Attach copies of all documents or other exhibits that relate to the case including, but not limited to: letters, memorandums, legal documents, appraisals, publications, environmental impact statements, planning reports, maps, or photographs. Organize and index these exhibits so that the reader can understand not only the document or exhibit alone, but also how it relates to the case as a whole.

8. Appendix. Add any statement or document that, in the preparers' opinion, is not adequately discussed in the preceding categories.

#### **1572.21b - Assembly and Distribution**

Bind, tab, or otherwise assemble the documents comprising the report in a compact, logical manner.

Unless directed otherwise, prepare at least four identical copies of the report. Send three completed reports directly to the requesting Office of General Counsel by the most expeditious carrier.

#### **1572.22 - Litigation Reporting and Tracking System**

##### **1572.22a - Notification and Maintenance**

The main informational tool to describe and track each lawsuit is Form FS-1500-3, Litigation Synopsis (ex. 01). This form is available electronically. For all litigation in which the Forest Service is defendant or is consulting with another agency, complete the form and forward it to the Litigation Coordinator in the Washington Office. Provide updates regularly to keep the Chief and Staff up to date on the progress of the case, especially as the status changes. The electronic form includes instructions and definitions of data elements necessary to complete the form.

**1572.22a - Exhibit 01**

**Sample of Completed Litigation Synopsis (Form FS-1500-3)**

USDA - Forest Service

FS-1500-3 (Revised 6/94)

LITIGATION SYNOPSIS		
WO Control No.:	L-56	Last Updated: 9/15/92
Initial Date:	5/14/92	By: J.A.Kelly, WO/NFS
Case Name: National Wildlife Federation/Cascade Holistic Economic Consultants v. United States Forest Service		
Common Name: FOIA/Forplan		
Case No.: 86-1255	Court: DC District	
Court Clerk: James E. Davey	PHONE: ?	
Region: 6 Pacific Northwest National Forest: Mt. Hood, Mt. Baker-Snoqualmie, Wenatchee, Okanogan, Gifford Pinchot, Olympic, Siuslaw, Deschutes, Willamette, Umpqua, Siskiyou, Rogue River, Winema		
Oversight: WO-LMP	Responsible Line Officer: NFS Deputy Chief	
Case Coordinators:	WO - Sharon Heywood FIELD - Stark Ackerman	Phone: 202-382-8014 Phone: 609-423-3317
OGC Coordinators:	WO - Jeff Handy FIELD - ?	Phone: 202-720-7347 Phone: ?
Justice Coordinators:	Melanie Pustay	Phone: (202)724-7341
U.S. Attorney: ?	Phone: ?	
WO And/Or RO Strategy Group:	? ?	Phone: ? Phone: ?
Cause Of Action & Summary Of Issues: Denial under FOIA of certain FORPLAN runs		
Relief Sought: Injunction to produce the documents		
Servicewide Implications if the Plaintiff Should Prevail: Yes. We would be compelled to take a close look and separate, page-by-page and line-by-line, the factual information that is interspersed w/deliberative material on FORPLAN runs.		
Status: Summons received		
Related Cases: Cascade Holistic Economic Consult., Inc. v USFS, Civ. No. 83-6350; National Wildlife Federation v USFS, Civ. No. 84-6069-E		

**1572.22a - Exhibit 01--Continued**

Next Action (Due Date: ?): 30 days to respond Disposition: ?
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## **1572.22b - Operation**

Upon notification of new litigation, the Washington Office Litigation Coordinator logs in the case by its Regional number and sends the information to the appropriate Deputy Chief. The Deputy Chief ensures that the following determinations are made:

1. Responsible line officer.
2. Level of involvement.
3. National significance.
4. Need for Washington Office Case Coordinator.

A case determined to have national significance is assigned an additional Washington Office control number.

All materials prepared for litigation or used in tracking litigation are privileged and confidential and shall not be released without the approval of the Office of General Counsel and Department of Justice.

## **1572.3 - Managing Special Types of Litigation**

### **1572.31 - Mining Claims**

See FSM 2819 for direction on litigation related to mining claims.

### **1572.32 - Tort Claims**

See FSM 6570 for direction on litigation related to tort claims against the United States.

### **1572.33 - Title Claims**

See FSM 5451 for direction on processing title claims.

## **1572.4 - Clearance and Reporting Procedures for Employees Appearing as Witnesses in Litigation**

Except as provided in exhibit 01, any employee whose appearance is sought in a judicial or administrative proceeding, including providing an affidavit or a deposition, shall complete Form FS-1500-4, Clearance for Witness or Deposition Services (ex. 01), and shall obtain the necessary authorizations. Follow the procedures in FSM 1572.41 or 1572.42, as applicable.

1572.4 - Exhibit 01

Sample of Completed Form FS-1500-4,  
Clearance for Witness or Deposition Services

FS-1500-4 (Revised 6/94)

CLEARANCE FOR WITNESS OR DEPOSITION SERVICES	
1. Employee's Name, Title, Duty Station (including electronic mail address) and Telephone Number:	John Doe, Information Assistant, Malheur NF, R06f04A 503-575-0000
2. Subpoena for:	<input checked="" type="checkbox"/> Appearance _____ Deposition _____ Documents _____ Affidavit in Hearing or Trial
3. Name and Location of Court:	State of Oregon, County of Marion, Salem, OR
4. Effective date, time, and place:	June 13, 1994, 9 a.m., Salem, OR
5. Subpoena No: 9999448 (Send copy of subpoena to Witness Coordinator) If employee is not served with subpoena, indicate manner in which appearance was requested and attach documentation.	
6. Litigants:	<u>State of Oregon</u> v. <u>David Johnson</u> Plaintiff(s) Defendant(s)
7. Attorney Issuing Subpoena or Request:	Charles Johnson   On behalf of <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
8. Brief Description of Court Case (attach additional page if necessary):	Kidnapping/Recklessly endangerment
9. Nature of Testimony and/or Official Records To Be Given (attach additional page if necessary):	To tell the court what I witnessed happen during a kidnapping. I witnessed a man holding a woman against her will by force until police arrived.
10. How was Forest Service employee involved in this case?	I witnessed the incident until authorities arrived. Just a witness.
ANSWER QUESTIONS 11-15 IN CASES WHERE THE U.S. IS NOT A PARTY	
11. What interest of USDA/FS would be promoted by this employee's testimony?	No interest to the USDA/FS.
12. Will the appearance result in an unnecessary interference with the duties of this employee?	No
13. Will this employee's testimony result in the appearance of improperly favoring one litigant over another?	No

**1572.4 - Exhibit 01--Continued**

14. Does any person other than the Forest Service employee have this knowledge or information? If so, who?

Yes. There were several other witnesses at the scene.

1572.4 - Exhibit 01--Continued

CLEARANCE FOR WITNESS OR DEPOSITION SERVICES

15. Clearance for Appearance as Witness Where the U.S. Is NOT a Party

Field Units

Washington Office

Immediate Supervisor:

Name: Mary Graver

Title: Supervisory Prog. Analyst

I recommend employee testify

I recommend employee decline to testify

Authorizing Official:

Name: /s/ XXXXX

I approve

I do not approve and have advised employee

General Counsel:

Name: /s/ XXXXX

I concur with the authorizing official

I do not concur with the authorizing official

Immediate Supervisor:

Name:

Title:

I recommend employee testify

I recommend employee decline to testify

Authorizing Official:

Name:

I approve

I do not approve and have advised employee

General Counsel:

Name:

I concur with the authorizing official

I do not concur with the authorizing official

NOTE: If the request for this witness was made without service of a valid summons, subpoena, or other process, obtain additional clearance as follows (7 CFR 1.216(b)(2) unless these officials have already signed in previous parts of block 15:

Chief:

Name:

I recommend employee testify

I do not recommend employee testify

USDA General Counsel (if not already obtained in preceding clearances):

Name:

I approve

I do not approve

USDA Assistant Secretary, Under Secretary, or Other Official:

Name:

Title:

I approve

I do not approve

1572.4 - Exhibit 01--Continued

CLEARANCE FOR WITNESS OR DEPOSITION SERVICES

16. Clearance for Appearance as Witness Where the U.S. IS a Party AND Appearance Is on Behalf of United States.

Field Units

Immediate Supervisor:

Name:

Title:

The employee has my permission to testify

The employee does not have my permission to testify

Washington Office

Immediate Supervisor:

Name:

Title:

The employee has my permission to testify

The employee does not have my permission to testify

17. Clearance for Appearance as Witness Where the U.S. IS a Party AND Appearance Is on Behalf of Party Other than United States

TO BE FILLED OUT BY WITNESS COORDINATORS

Regional Forester, Station Director, Area Director, or Institute Director has been notified

OGC has been notified

OUTCOME: (Did DOJ/US Attorney move to quash subpoena? Did employee testify?)

## **1572.41 - Litigation in Which U.S. Government Is Party.**

### **1572.41a - Appearance on Behalf of United States**

(7 CFR 1.213). For cases in which the U.S. Government is a party, Forest Service employees may appear as witnesses on behalf of the United States Government with or without the issuance of a summons, subpoena, or other compulsory process. Employees shall complete Form FS-1500-4, Clearance for Witness or Deposition Services (ex. 01); obtain permission from their immediate supervisors; and notify the General Counsel through their regional, station, and area line officers of such appearance.

### **1572.41b - Appearance on Behalf of Party Other Than United States**

(7 CFR 1.216).

1. Employees Served With Summons, Subpoena, or Other Process. Forest Service employees who are served with a valid summons, subpoena, or other compulsory process to appear or produce documents as a witness on behalf of a party other than the United States in litigation where the United States is a party must promptly notify the Office of General Counsel through the Washington Office Staff Director, Regional Forester, Station Director, Area Director, or Institute Director and provide information as specified on Form FS-1500-4 (ex. 01).

2. Employees Requested To Appear Without Service of Summons, Subpoena, or Other Process. (7 CFR 1.216(b)(2)).

a. Forest Service employees who are requested, without the service of a valid summons, subpoena, or other compulsory process, to appear as a witness or produce records on behalf of a party other than the United States in litigation where the United States is a party may not appear or produce records without prior authorization by the Department of Justice, U.S. Attorney, or other counsel representing the U.S. Government.

b. The Forest Service authorizing official for witness appearances shall consult with the Office of General Counsel to determine whether there are grounds to oppose employee's attendance.

c. For those cases where the authorizing official opposes the employee's appearance, the employee shall follow direction by the Department of Justice, U.S. Attorney, or other counsel representing the U.S. Government.

## **1572.42 - Litigation in Which United States Is Not Party**

### **1572.42a - Appearance of Law Enforcement Employees as Witnesses in Certain Criminal Litigation with Prior Approval by Chief and Prior Concurrence by the Office of General Counsel**

For certain types of litigation meeting the criteria in exhibit 01, law enforcement employees have prior approval by the Chief and prior concurrence by the Office of General Counsel to appear as witnesses.

**1572.42a - Exhibit 01**

United States                      Forest                      Washington                      14th & Independence SW  
Department of                      Service                      Office                      Washington, DC 20250  
Agriculture

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Reply to: 1570

Date: June 23, 1994

Subject:            Approval for Law Enforcement Employees To Appear as Witnesses  
                         in Criminal Prosecutions in Which United States Is Not a Party

To:                    Director, LE&I, and Field Components

I have determined that it is in the interest of USDA for the Forest Service to cooperate in criminal prosecutions. The majority of subpoenas received by the Forest Service are for appearances of law enforcement employees. The workload and workforce costs for processing these subpoenas have remained high. Therefore, approval is hereby given to law enforcement employees who have been subpoenaed to appear as witnesses in litigation in which the United States is not a party if all the following criteria are met:

1. The employee is in a law enforcement position;
2. The employee has received a subpoena issued on behalf of the prosecution in a criminal case; and
3. The employee's testimony arises out of or relates to his or her employment at USDA and relates to a matter in which the employee was a witness, or participated in investigation or enforcement.

Where the above criteria are not met, an officer shall refer the matter to this office and shall not provide testimony unless this office specifically provides authorization and the Office of the General Counsel specifically concurs in that authorization.

Where the above criteria are met, and in the employee's judgment, there are factors that weigh against providing testimony, the employee may refer the matter to this office for review.

/s/ David G. Unger for

/s/ James P. Perry

JACK WARD THOMAS  
Chief

JAMES P. PERRY, OGC  
In Concurrence

## **1572.42b - Appearance of Non-Law Enforcement Employees as Witnesses on Behalf of Party Other Than United States**

(7 CFR 1.214).

### **1. Employees Served With Summons, Subpoena, or Other Process. (7 CFR 1.214(a)-(b)(1), (c)-(e)).**

a. Forest Service employees served with a valid summons, subpoena, or other compulsory process to appear as a witness on behalf of a party other than the United States, where the United States is not a party to the litigation, may not testify without prior written approval by the authorizing official for witness appearances, with the concurrence of the Office of the General Counsel (except for employees in certain law enforcement positions, as provided in FSM 1572.42c).

b. Approval shall be based upon a determination that such an appearance is in the interest of USDA.

c. For those cases where appearance is not authorized following consultation and advice from the Office of General Counsel, the Witness Coordinator shall notify employees not to testify. Unless the subpoena is withdrawn or the Office of General Counsel advises otherwise, employees shall appear at the scheduled time and place, produce a copy of the regulations, and respectfully decline to testify.

The Witness Coordinator shall notify and provide a copy of the denial letter to the attorney for the party seeking the testimony.

### **2. Employees Requested To Appear Without Service of Summons, Subpoena, or Other Process. (7 CFR 1.214(b)(2),(c)-(e)).**

a. Forest Service employees requested to appear as a witness without service of a valid summons, subpoena, or other compulsory process to appear as a witness on behalf of a party other than the United States, where the United States is not a party to the litigation, shall promptly notify the Chief's Office and may not appear without prior written approval by the Assistant Secretary for Natural Resources and Environment with the concurrence of the Office of the General Counsel.

b. Approval shall be based upon a determination that such an appearance is in the interest of USDA.

### **1572.42c - Subpoenas Duces Tecum for Department or Agency Records**

(7 CFR 1.215). Subpoenas duces tecum for USDA and/or Forest Service records in proceedings in which the United States is not a party are considered to be requests for records under the Freedom of Information Act (FOIA). Follow direction in FSM 6270 and FSH 6209.13 in regard to such requests.

The authorizing officials for witness appearances shall not approve employees to produce such records in litigation. They shall advise employees to: appear; respectfully decline to produce the records on the grounds that it is prohibited by 7 CFR 1.214; and state that the production of the records involved will be handled in accordance with laws and regulations governing public disclosure. If the matter has already been processed pursuant to FOIA, employees shall state that fact to the court at the time of appearance. Employees need not appear if the attorney for the party seeking the records withdraws the subpoena.

### **1572.43 - Identification of Authorizing Official for Witness Appearances**

When preparing correspondence related to a witness clearance, identify the approving officer in the signature block. For example:

/s/ [signature]  
I. M. FORESTER [NAME] for  
Chief