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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 212, 214, 215, 222, 228, 241, 251, 254, and 292

RIN 0596-AB45

Postdecisional Administrative Review Process for Occupancy or Use of National Forest System Lands and Resources

AGENCY: USDA, Forest Service.

ACTION: Final rule.

SUMMARY: The United States Department of Agriculture (Department) is issuing this final rule to update, rename, and relocate the administrative appeal regulations governing occupancy or use of National Forest System (NFS) lands and resources. The appeal process for decisions related to occupancy or use of NFS lands and resources has remained substantially unchanged since 1989. This final rule simplifies the appeal process, shortens the appeal period, and reduces the cost of appeal while still providing a fair and deliberate procedure by which eligible individuals and entities may obtain administrative review of certain types of Forest Service (Agency) decisions affecting their occupancy or use of NFS lands and resources. The final rule also moves the provision entitled “Mediation of Term Grazing Permit Disputes” to a more appropriate location in the range management regulations. Finally, conforming technical revisions to other parts of the Code of Federal Regulations (CFR) affected by this final rule are being made.

DATES: This rule is effective [**insert date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Deb Beighley, Assistant Director, Appeals and Litigation, Ecosystem Management Coordination Staff, 202-205-1277, or Mike McGee, Appeals Specialist, Ecosystem Management Coordination Staff, 202-205-1323.

SUPPLEMENTARY INFORMATION:

Background and Need for the Final Rule

On January 23, 1989, the Department adopted an administrative appeal rule at 36 CFR part 251, subpart C (54 FR 3362) (251 Appeal Rule). The 251 Appeal Rule sets procedures for holders of or, in some cases, applicants for a written authorization to occupy and use NFS lands and resources to appeal certain Forest Service decisions with regard to the issuance, approval, or administration of the written instrument. The 251 Appeal Rule establishes who may appeal, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various timeframes that govern the conduct of an appeal. The appeal procedures vary depending on whether the decision subject to appeal was made by a District Ranger, Forest or Grassland Supervisor, Regional Forester, or the Chief. Except for the addition of a section governing mediation of term grazing permit disputes in 1999, the 251 Appeal Rule has changed little since its adoption in 1989.

As a result of technological advances, communications improvements, and the Agency's experience administering the 251 Appeal Rule for more than 20 years, the Forest Service identified several modifications to simplify the appeal process, shorten the

appeal time period, and achieve cost savings. This final rule relocates the 251 Appeal Rule to a new part 214 entitled, “Postdecisional Administrative Review Process for Occupancy or Use of National Forest System Lands and Resources,” and reserves 36 CFR part 251, subpart C. In addition, the final rule makes minor, nonsubstantive changes to 36 CFR part 251, subpart B, for clarity and to distinguish terms in that subpart from part 214. This final rule also moves the provision governing mediation of term grazing permit disputes to a new subpart B under the range management regulations found at 36 CFR part 222, since mediation is unique to the range management program and is not part of the administrative review process under the 251 Appeal Rule.

Public Involvement and Changes Made in Response to Public Comments

Proposed part 214 was published in the **Federal Register** on October 11, 2011 (76 FR 62694). The 60-day public comment period ended December 12, 2011. The Forest Service received comments from 43 respondents. The Agency analyzed the comments and considered them in developing the final rule.

Following is a summary of the comments and the Agency’s response. The responses to the public comments are divided between general comments and those that involve specific sections of the proposed rule.

General Comments

Comment: One respondent expressed concern about the lack of public notice provided by the Forest Service regarding the change in the 251 Appeal Rule and noted that publication in the **Federal Register** is the bare minimum requirement to be met in public notification procedures and that the Agency should have sent letters to all interested parties and circulated notice broadly.

Response: The Administrative Procedure Act (5 U.S.C. 553(b)) specifies publication in the **Federal Register** as the required means of providing public notice of proposed rules. The exception is for rules that name particular persons, who must be personally served or provided actual notice of the proposed rule. This exception does not apply to proposed part 214, which does not name any particular persons. In addition to publishing the proposed rule in the **Federal Register**, the Agency sent a letter to 25 national organizations representing holders of all types of written authorizations covered by the proposed rule. The letter asked the organizations to share information regarding publication of the proposed rule with their constituencies.

Comment: One respondent suggested the Forest Service change the 251 Appeal Rule to mirror the appeal procedures of the Department's National Appeals Division or the U. S. Department of the Interior (DOI), Office of Hearings and Appeals. A second respondent supported these alternatives and added the Interior Board of Land Appeals procedures as another example of a preferred approach. Another respondent suggested that the Forest Service eliminate the 251 Appeal Rule and replace it with review procedures similar to those used by other agencies in the Department.

Response: The Forest Service's intent is and always has been to have an informal administrative appeals process for occupancy or use of NFS lands and resources. The Agency's belief that a formal administrative appeals process is not appropriate in this context has remained unchanged since the process was established in 1988. At that time, the Agency stated that establishing an independent board to rule on administrative appeals might appear to be attractive from the standpoint of obtaining more objective decisions. However, these boards require highly structured, formalized rules of procedure

which complicate, rather than simplify, the appeals process. Complex administrative procedures are not in the best interest of appellants who lack the resources to hire legal representation.

Comment: One respondent noted that the proposed rule simplifies the appeal process, shortens the appeal period, and reduces the cost of appeal only for the Forest Service, not appellants. Another respondent commented that under the proposed rule, appellants would bear most of the burden resulting from shorter timeframes, and that the proposed process would be more complicated and expensive. Another respondent noted that to justify the need for streamlined procedures, the Agency should review the appeals database, ascertain the number of administrative appeals filed under the 251 Appeal Rule, and reconsider whether and to what extent streamlined procedures are necessary. This respondent stated that the Agency should explain why the 251 Appeal Rule presents a significant administrative burden and should balance that burden against the interests of special use permit holders. One respondent commended the proposed rule, noting that in many instances it would provide cost savings, more clearly establish timelines, and clarify agency discretion.

Response: The administrative review process in part 214 is not more complicated and expensive than the administrative review process in the 251 Appeal Rule. One of the most common complaints regarding the 251 Appeal Rule is that it is confusing and that it takes too long to process an appeal. The Department believes part 214 improves significantly upon the 251 Appeal Rule by providing greater clarity and reducing timeframes.

Comment: One respondent organization noted that it attempts to work

collaboratively where possible to resolve issues arising out of Federal land management decisions without filing an administrative appeal, but that at times an administrative appeal is the only option remaining to address decisions that adversely affect the respondent's members.

Response: This comment is beyond the scope of this rulemaking to the extent the comment addresses appeal of decisions by organizations on behalf of their members. Organizations do not have standing to appeal on behalf of their members under part 214.

The Forest Service first promulgated administrative appeal procedures in 1936 in recognition of the need to provide an administrative process for disputing Agency decisions. Part 214 encourages informal dispute resolution. Section 214.6(b) in the final rule requires the Responsible Official to notify the affected holder, operator, or solicited applicant of the opportunity to meet to discuss an appealable decision and, where applicable, inform term grazing permit holders of the opportunity to request mediation.

Comment: One respondent commented that annual grazing allotment meetings between the Forest Service and grazing permittees should be open to the public and that the proposed rule should be revised to reflect this move towards greater transparency and support for public involvement in agency decision-making.

Another respondent noted that American citizens have a vested interest in management decisions affecting Federal lands, expressed concern about livestock grazing decisions, and stated that the Forest Service delayed adopting a grazing mediation regulation until 7 years after enactment of the governing law. Another respondent noted that the Agricultural Credit Act (ACA) grants a right to mediation to all livestock producers and others adversely affected by a Forest Service grazing decision and that the

ACA does not limit mediation to decisions involving cancellation of a grazing permit.

Response: These comments are beyond the scope of this rulemaking, as they address administration of grazing permits and mediation of grazing permit decisions, rather than administrative appeal of decisions pertaining to grazing permits. The proposed part 214 rule did not make changes to the provisions governing mediation of term grazing permit disputes. Rather, proposed part 214 moved the mediation provisions from the 251 Appeal Rule to part 222, governing livestock grazing, since the mediation provisions relate only to mediation of term grazing permit disputes, not to appeals of written authorizations.

The issue of whether decisions other than cancellation of term grazing permits should be subject to mediation was raised in comments on the proposed mediation regulations. The **Federal Register** notice for the final mediation regulations contains a thorough explanation of why certain grazing permit decisions were made subject to mediation and why others were not (64 FR 37843-37844 (July 14, 1999)).

Comment: Several respondents suggested abandoning a two-track appeals process, one for decisions implementing a land management plan and one for decisions affecting a written authorization. One of these respondents recommended consistency with the Bureau of Land Management's (BLM) administrative appeal process. Another respondent noted that all Americans have equal stakes in the management of Federal lands. Another respondent noted that the proposed changes to the 251 Appeal Rule develop a more streamlined private administrative appeal process, with the public unable to participate in any way other than to learn about the process and results through potential access to the appeal record via the Freedom of Information Act. Another

respondent stated that the dual-track process was wasteful and unnecessary and the Forest Service should treat all parties that are interested in participating alike. Another respondent noted that under the 251 Appeal Rule, permit holders affected by a decision have an appeal process that is closed to participation by other interested parties. One respondent stated that the proposed part 214 appeal process should remain open and deliberate and should be used to address disputes that arise in the day-to-day management of NFS lands.

Two respondents commented that the Appeals Reform Act requires the Forest Service to provide for administrative appeal of all decisions implementing a land management plan and that the proposed 214 rule will preclude appeal of many of these decisions. One of these respondents also contended that proposed part 214 is inconsistent with the ACA.

One respondent stated that proposed part 214 does not provide for independent review and noted that there is an implicit, if not explicit, conflict in the Agency acting as the arbiter of its own decisions. Another respondent stated that the 251 Appeal Rule has long perpetuated an unfair appeal process in which the Forest Service employees who helped develop a decision also review it. One respondent stated that many of the revisions in the proposed rule favor the Forest Service and do not provide a “fair and deliberate process” for appellants.

Response: Prior to adoption of the 251 Appeal Rule, the Agency had one appeals process for both decisions implementing a land management plan and decisions pertaining to written authorizations. In 1989, the Agency established separate appeal procedures for these two types of decisions, primarily because of the disparity in terms of

their scope and the procedures that are appropriate for administrative review. Given these differences, it is more efficient and effective to have separate appeals procedures for these two types of decisions.

Forest Service decisions implementing a land management plan affect the public in general. Therefore, it is appropriate for the administrative appeal process for these decisions to be open to the public and for the appeal procedures to provide for public participation. Accordingly, notice of an appealable decision implementing a land management plan is given in a newspaper of record.

In contrast, once a decision has been made to authorize a particular land use, subsequent Forest Service decisions involving the associated written authorization uniquely affect the holder, operator, or solicited applicants. Consequently, it is appropriate for the administrative appeal process for these decisions to be available only to the holder, operator, or solicited applicants and for the appeal procedures to provide for that level of participation. Notice of an appealable decision involving a written authorization is therefore given to the affected holder, operator, or solicited applicants.

Part 214 does not preclude appeal of decisions implementing land management plans. Rather, part 214 does not provide for appeal of these decisions because appeal of these decisions is provided for under another part.

Part 214 is not inconsistent with the ACA with respect to mediation of term grazing permit disputes. Part 214 does not make any substantive changes to the mediation provisions in the 251 Appeal Rule. Part 214 merely moves these provisions to 36 CFR part 222, which governs livestock grazing.

The Department believes that part 214 provides a fair administrative appeals

process for appellants. Part 214 remains an informal process. There is no trial under these procedures. For this kind of informal administrative process, the decisionmaker is not a judge, but rather a higher-level agency line officer. Like the 251 Appeal Rule, part 214 provides for review of appealable decisions by an Agency official who is one level above the decision-maker. This procedure prevents bias and conflicts of interest.

The Department believes that the streamlining in part 214 will benefit both the Forest Service and appellants, as the efficiencies will expedite the appeals process and make it less costly, both in terms of resources expended and the time it takes for both the Agency and appellants to know the outcome.

Comments Related to Specific Sections of the Proposed Rule

214.2 – Definitions.

Comment: Several respondents stated that Responsible Officials, Appeal Deciding Officers, and Discretionary Reviewing Officers should be line officers according to the corresponding definitions for “Deciding Officer” and “Reviewing Officer” in 36 CFR 251.81.

Response: The Department agrees and in the final rule has replaced the word “employee” with the phrase “line officer” in the definitions for “Responsible Official” and “Appeal Deciding Officer.” The Department has made corresponding changes to the definitions for “Appeal Deciding Officer” in 36 CFR 215.2. In the definition for “Discretionary Reviewing Officer” in the final rule, with respect to USDA, the Department has replaced the term “employee” with the term “official,” and with respect to the Forest Service, the Department has replaced the term “employee” with the term “line officer.”

Comment: One respondent stated that the definition for “revocation” in the proposed rule applies to a written authorization, other than a term grazing permit or an instrument for the disposal of mineral materials; that “suspension” is defined as a temporary revocation of a written authorization, including term grazing permits, and therefore the two definitions appear to be in conflict.

Response: The definitions for “revocation” and “suspension” in part 214 are not contradictory. “Revocation” is defined as “the cessation, in whole or in part, of a written authorization, other than a grazing permit or an instrument for the disposal of mineral materials, by a Responsible Official before the end of the specified period of occupancy or use.” “Cancellation” is defined as “the invalidation, in whole or in part, of a term grazing permit or an instrument for the disposal of mineral materials.” The terms “revocation” and “cancellation” are defined separately because in existing regulations the term “revocation” applies to written authorizations other than a grazing permit or an instrument for the disposal of mineral materials, whereas the term “cancellation” applies to term grazing permits and instruments for the disposal of mineral materials. “Suspension” is defined as “a temporary revocation or cancellation of a written authorization.” Thus, the term “suspension” applies to written authorizations other than a grazing permit or an instrument for the disposal of mineral materials, which are subject to revocation, and term grazing permits and instruments for the disposal of mineral materials, which are subject to cancellation.

214.3 – Parties to an appeal.

Comment: Several respondents commented that this provision is discriminatory because it excludes those who are not holders, operators, or solicited applicants from the

administrative appeal process. In particular, one respondent noted that this limitation allows those who are not holders, operators, or solicited applicants to ignore the administrative appeal process and file suit directly in Federal district court. Another respondent indicated that there was no basis for treating holders, operators, and solicited applicants differently from other parties. Another respondent wanted the Agency to ensure that the administrative appeal process was open to other members of the public who have different, but still significant interests, and who should have standing to appeal decisions that would harm these interests. This respondent noted that these parties might have recourse under 36 CFR part 215, but that the regulations were not clear in this regard. Another respondent stated that limiting appeal under part 214 to the private entity that holds a grazing permit and the Forest Service official who makes decisions regarding that permit is legally and socially indefensible.

One respondent noted that this proposed section is especially commendable and noted that on several occasions, interest groups were allowed to appeal under the 251 Appeal Rule based on the unclear language of § 251.86.

One respondent asked whether a decision may be appealed only by the holder whose permit is the subject of that decision, or whether another permit holder could appeal the decision if it impairs that holder's interests, even if the holder whose permit is the subject of the decision does not appeal.

Response: Like § 251.86 in the 251 Appeal Rule, § 214.3 in part 214 limits parties to an appeal to holders, operators, solicited applicants, intervenors, and the Responsible Official. These comments are therefore beyond the scope of this rulemaking.

In 1989, the Agency established separate appeal procedures for decisions

implementing a land management plan and decisions pertaining to written authorizations, primarily because of the disparity in terms of their scope and the procedures that are appropriate for administrative review. Given these differences, it is more efficient and effective to have separate appeals procedures for these two types of decisions.

Forest Service decisions implementing a land management plan affect the public generally. Therefore, it is appropriate for the administrative appeal process for these decisions to be open to the public and for the appeal procedures to provide for public participation.

In contrast, Forest Service decisions involving a written authorization concern the holder's, operator's, or solicited applicants' use, rather than the land management decision to authorize the use. Consequently, it is appropriate for the administrative appeal process for these decisions to be available only to the holder, operator, or solicited applicants and for the appeal procedures to provide for that level of participation.

Part 214 does not preclude appeal of decisions implementing land management plans. Rather, part 214 does not provide for appeal of these decisions because appeal of these decisions is provided under another part.

A permit holder who claims an interest relating to a decision regarding another holder's permit may not appeal that decision under part 214, even if the other holder does not appeal. However, the permit holder who claims an interest relating to the decision may request to intervene per § 214.11 in the final rule in an appeal filed by the other permit holder. To clarify this intent, the Department has revised § 214.3, Parties to an Appeal, in the final rule to read: "Parties to an appeal under this part are limited to the holder, operator, or solicited applicants who are directly affected by an appealable

decision, intervenors, and the Responsible Official.”

214.4 – Decisions that are appealable.

Comment: Several respondents objected to the list of decisions that are appealable. In particular, one respondent noted that the narrow and self-serving restriction on the type of decisions that are appealable is not in the best interests of the American people who use and enjoy NFS lands. Another respondent stated that the limited list makes it appear as if the Forest Service wants to avoid dealing with disputes involving day-to-day management of grazing on NFS lands. One respondent stated that the approach taken on appealable decisions in the proposed rule would ensure more, not less, litigation. One respondent stated that the very restrictive list of decisions that are appealable under the proposed rule would make the appeal process under part 214 almost meaningless. Another respondent noted that the simplest approach would be to provide that all Forest Service decisions are appealable unless Federal law precludes it. Three respondents commented that the proposed rule should state which decisions are not appealable and allow appeal of all other decisions. One respondent commented that the Forest Service needs to return to the approach in the 251 Appeal Rule, which enumerates 15 types of decisions that are not appealable and allows appeal of the remainder, or expand the list of decisions that are appealable in the proposed rule.

One respondent commented that like the 251 Appeal Rule, part 214 should allow appeal of permit administration decisions generally, including decisions about ski area master development plans and project proposals.

Several respondents commented that part 214 should include acceptance of an operating plan as an appealable decision so that holders of a special use authorization can

challenge any operating plan requirements that may be unreasonable or impracticable. One of these respondents noted in proposed §214.4(c)(1) that the use of the word “acceptance” in the phrase, “modification, suspension, or revocation of a special use authorization, other than acceptance of an operating plan,” was unclear and if the word “acceptance” was removed from this phrase, an operating plan could never be appealed.

Response: Based on technological advances, communications improvements, and the Agency’s experience administering the 251 Appeal Rule for more than 20 years, the Forest Service identified several modifications that would simplify the appeal process and achieve cost savings, including clarifying the types of decisions that are appealable. When § 214.4 is read together with § 214.5, part 214 provides that a decision is not appealable unless it is expressly set forth in § 214.4. As a result, the list of appealable decisions in § 214.4 is considerably more extensive than the list of appealable decisions in § 251.82. Enumerating all types of appealable decisions will minimize potential confusion regarding whether a decision is appealable.

Section 214.4 is subdivided by the type of written authorization. Paragraph (a) lists four types of appealable decisions involving the administration of livestock grazing; paragraph (b) lists nine types of appealable decisions involving the administration of mineral exploration and development activities; paragraph (c) lists five types of appealable decisions involving the administration of special uses; and paragraph (d) lists one additional type of appealable decisions associated with other land uses. The contents of these lists reflect the types of decisions that are typically appealed by existing holders, operators, and solicited applicants and the Agency’s intent regarding the types of decisions for which an appeal right should be granted.

Acceptance of a ski area master development plan should not be appealable because it does not constitute approval to construct new facilities. Rather, proposals for specific projects, including those implementing a ski area master development plan, are analyzed pursuant to applicable environmental law and, if appropriate, approved by the Forest Service. A decision regarding a proposed project would be subject to administrative review under another part rather than under part 214.

Acceptance of an operating plan is not included in the list of appealable decisions because an operating plan is not a decision document and does not permanently modify a special use authorization. Rather, an operating plan merely implements a prior management decision that is subject to administrative review under another part and provides direction for the upcoming operating season. To the extent feasible, operating plans should be developed in consultation with the Responsible Official. The phrase, “other than acceptance of an operating plan,” follows the phrase, “modification, suspension, or revocation of a special use authorization” in § 214.4(c)(1) because the Agency wants to make clear that acceptance of an operating plan, which is not appealable, does not constitute modification of a special use authorization, which is appealable.

Comment: One respondent stated that it is unclear whether land use fee determinations based on the Cabin User Fee Fairness Act (CUFFA) or S. 1906, introduced on November 18, 2011, in the 112th Congress, 1st session, would be appealable under part 214. Another respondent commented that CUFFA-based land use fee determinations and land use fee determinations under any future fee system for recreation residence permits should be appealable under part 214.

Response: It is not appropriate for the Department to address appealability of land use fee determinations under S. 1906 because that bill has not become law.

Land use fee determinations based on CUFFA are appealable under § 214.4(c)(3) of the final rule, which includes in the list of appealable decisions:

Implementation of new land use fees for a special use authorization, other than:

(i) Revision or replacement of a land use fee system or schedule that is implemented through public notice and comment; and

(ii) Annual land use fee adjustments based on an inflation factor that are calculated under an established fee system or schedule in accordance with the terms and conditions of a written authorization;

Land use fee determinations based on CUFFA involve case-specific appraisals and, as a result, do not constitute revision or replacement of a land use fee system or schedule or annual land use fee adjustments based on an inflation factor. The appealability of land use fee determinations under future fee systems for recreation residence permits would depend on whether the land use fee determinations meet either of the exceptions in § 214.4(c)(3).

Comment: One respondent noted that the Forest Service uses annual operating instructions (AOIs) as a second permitting system to supplement or replace the allotment management plan (AMP) in adjusting livestock grazing rates, numbers of livestock, and seasons of use, and that AOIs therefore constitute an appealable permit modification. This respondent also commented that the Forest Service has acquiesced with this position by treating noncompliance with AOIs as a permit violation. Another respondent commented that issuance of AOIs is a permit modification, that any reference to AOIs in the proposed rule should be removed, and that the proposed rule should not preclude

appeal of a decision just because it is contained in a document that is specifically named in the regulation. Another respondent commented that AOIs modify the grazing permit and denial of a right to appeal AOIs leaves permittees vulnerable to abusive and punitive measures without any avenue of relief and establishes a dictatorial process for management of livestock grazing on NFS lands.

A respondent commented that the proposed rule should allow appeal of denial, modification, and maintenance of range improvements and determinations of unauthorized grazing use.

One respondent recommended moving the provisions pertaining to AOIs to § 214.5. Another respondent stated that the Forest Service should make absolutely clear that AOIs are not appealable decisions by moving all references to AOIs from § 214.4, which specifies the decisions that are appealable, to § 214.5, which enumerates the decisions that are not appealable.

Response: Annual operating instructions (AOIs) are not an appealable decision because they are not decision documents and do not permanently modify a grazing permit. Rather, AOIs merely implement prior management decisions that are subject to administrative review under another regulation and provide instructions for the upcoming grazing season. To the extent feasible, AOIs should be developed in cooperation with the permittee.

Activities identified in AOIs must be within the scope of the AMP and the grazing permit. The annual bill for collection identifies the number, kind, and class of livestock authorized to graze on an allotment and any adjustments to season of use for that allotment. Failure to comply with provisions of the AMP or instructions issued by the

Responsible Official, including the AOI, is a violation of the terms and conditions of a term grazing permit.

New decisions concerning denial, modification, and maintenance of range improvements are not made in AOIs. Changes in allocation of maintenance responsibilities for range improvements are modifications of term grazing permits and are appealable decisions under 36 CFR 214.4(a). Decisions to suspend or cancel part or all of a term grazing permit for unauthorized use are also appealable under 36 CFR 214.4(a).

The statement, “Issuance of annual operating instructions does not constitute a permit modification and is not an appealable decision;” is placed in § 214.4(a)(1), which provides for appeal of modification of a term grazing permit, rather than § 214.5, which enumerates the decisions that are not appealable, to clarify that issuance of AOIs does not constitute a permit modification.

Comment: One respondent commented that reductions in the number of authorized livestock and the authorized season of use should be added to cancellation and suspension as an appealable decision in § 214.4(a)(2) relating to term grazing permits.

Response: “Cancel” and “suspend,” as applied to grazing permits, are defined in 36 CFR 222.1(b). Both terms encompass reductions in the number of authorized livestock and the authorized season of use. “Cancel” means action taken to permanently invalidate a term grazing permit in whole or in part (36 CFR 222.1(b)(4)). “Suspend” means temporary withholding of a term grazing permit privilege, in whole or in part (36 CFR 222.1(b)(22)). Permanent changes in the number of authorized livestock or the authorized season of use are permit modifications that are appealable under 36 CFR 214.4(a). Annual adjustments in response to resource conditions, as provided for in Part 2, Section

8(c), of the term grazing permit, are not permit modifications and are not appealable under 36 CFR 214.4(a).

Comment: One respondent noted that if the Forest Service were really interested in a collaborative relationship with the public and permit holders, the Agency would embrace mediation and recognize that all of its decisions should be appealable.

Response: Regulations governing implementation of changes to the ACA regarding mediation were developed through a public rulemaking process, like the one being used to develop part 214. No changes were proposed to the mediation provisions. Rather, the Agency proposed moving the provisions from the 251 Appeal Rule to the livestock grazing regulations in 36 CFR part 222, since the mediation provisions do not relate to other types of written authorizations.

Comment: One respondent stated that the proposed rule violates the Administrative Procedure Act, 5 U.S.C. 558(c), by denying any right of appeal by a special use permit holder if the permit terminates before the Agency has acted on a request for renewal. Two respondents commented that successful solicited applicants should remain eligible to appeal the terms and conditions in their special use authorization. Another respondent stated that any type of applicant for a special use authorization should be able to appeal the terms and conditions of the authorization and noted that under the proposed rule a landowner applicant would not be able to appeal denial or the terms and conditions of a special use authorization granting access to the landowner's property, despite the landowner's statutory right of access.

Response: With respect to renewal, an appeal right is available only when an authorization provides for renewal and the holder requests renewal before the

authorization expires. Whether the Agency has acted on a request for renewal is irrelevant to a right of appeal.

The Forest Service has broad authority to impose terms and conditions in special use authorizations that are necessary to protect NFS lands and other interests (36 CFR 251.56). With respect to access to private property, Section 1323(a) of the Alaska National Interest Lands Conservation Act provides owners of non-Federal property within the boundaries of the NFS certain rights of access across NFS lands. The Responsible Official may prescribe such terms and conditions as the official deems adequate to secure to non-Federal property owners the reasonable use and enjoyment of their property (16 U.S.C. 3210(a); 36 CFR 212.6(b) and 251.110(c)). Terms and conditions in special use authorizations implement the Forest Service's statutory and regulatory authority and directives. The Department does not believe it is appropriate to allow any holders, including holders of an authorization issued in connection with exercise of a right of access to non-Federal property, to appeal the terms and conditions in their authorization.

Comment: One respondent stated that decisions and direction communicated to permit holders should be in writing, either hard copy or electronically.

Response: Appealable decisions must be in writing, per § 214.4. Decisions issued by the Appeal Deciding Officer or Discretionary Reviewing Officer must be in writing, per §§214.2 and 214.19(d). In addition, §214.14(g)(2) has been revised to clarify that decisions and orders issued by the Appeal Deciding Officer must be in writing.

214.5 – Decisions that are not appealable.

Comment: One respondent commented that the proposed rule was confusing

because it intermingles a long list of decisions that cannot be appealed with decisions that can be appealed. Another respondent noted that this section should state, “Holders, operators, and solicited applicants may appeal any decision that is not expressively [sic] not appealable.”

Response: Section 214.4 states that to be appealable under part 214, a decision must be issued by a Responsible Official in writing and must fall into one of the enumerated categories in that section. The list of types of decisions that are appealable in limited cases includes exceptions to clarify the Agency’s intent, such as in § 214.4(a)(1) regarding issuance of AOIs and § 214.4(c)(1) regarding acceptance of an operating plan. Section 214.5 states that decisions issued by a Responsible Official that are not expressly set forth in § 214.4 are not appealable. The Department believes that these two sections are unambiguous and need no clarification.

214.6 – Election of appeal process.

Comment. One respondent stated that decisions that are appealable under part 214 should be appealable under part 215.

Response. This provision in the proposed rule would allow the holder of a written authorization who had standing under both parts 214 and 215 to elect between the two, but not both. On December 23, 2011, President Obama signed into law the Consolidated Appropriations Act, 2012, Public Law 112-74, for the U. S. Department of the Interior and related agencies, including the Forest Service. Section 428 of Public Law 112-74 (Section 428) requires a predecisional objection process for proposed actions of the Forest Service concerning projects and activities implementing land management plans and documented with a record of decision or decision notice, in place of a postdecisional

appeal process in this context. The Forest Service is in the process of drafting regulations to implement Section 428.

Since Section 428 requires a predecisional administrative review process, and part 214 provides for a postdecisional administrative review process, the two review procedures will not run in tandem. Therefore, there is no longer a need to provide for election between appeal procedures for proposed actions of the Forest Service concerning projects and activities implementing land management plans and documented with a record of decision or decision notice. Accordingly, the Department has removed the election provision from the final rule. The Department has made a corresponding change to part 215 by removing § 215.11(d).

214.7 – Notice of an appealable decision.

Comment: One respondent stated that publication in 2-point type in one State newspaper, especially when this newspaper is not online, is not adequate notice of an appealable decision.

Response: This comment is beyond the scope of this rulemaking, as the comment pertains to notice of an appealable decision provided under part 215, not part 214. Part 215 provides for notice of an appealable decision to be published in the applicable newspaper of record (36 CFR 215.5(b)(2) and 215.7(b)), since appealable decisions under part 215 pertain to projects implementing a land management plan and affect the public generally. Part 214 provides for notice of an appealable decision to be given to the affected holder, operator, or solicited applicants in the appealable decision (36 CFR 214.6(a)), as appealable decisions under part 214 uniquely affect the holder, operator, or solicited applicants.

Comment: Several respondents commented that parties other than those who are directly affected by an appealable decision should receive notice. One respondent stated that the Forest Service should not limit the Responsible Official's notice obligation to the parties who are directly affected by the decision and make it "the responsibility of individuals or entities who are not directly affected by the appealable decision to obtain a copy of the decision and to evaluate whether to request participation as an intervenor." Five respondents stated that holders of similar instruments who have made a written request to be notified of a specific decision should continue to receive notice as provided under the 251 Appeal Rule. One of these respondents noted that individuals and small organizations do not monitor the **Federal Register** or stay connected to entities that have the mechanisms in place to monitor these developments regularly. Another respondent commented that anyone who requests notification when the Forest Service makes an appealable decision should receive notice.

One respondent noted that each written appealable decision will notify affected parties of their right to appeal, but the Forest Service does not need to inform the public of affected parties' right to appeal.

Response: The Department recognizes the need to be open and transparent in applying the appeals process. The Department agrees with respondents' concerns that it is reasonable for the Responsible Official to notify any holder of a similar written authorization who has made a written request to be notified of a specific decision and has reinstated this requirement from the 251 Appeal Rule in § 214.6 of the final rule.

Comment: One respondent suggested that instead of just stating the Responsible Official's willingness to meet with the affected holder, operator, or solicited applicant to

discuss the decision, the proposed rule should use the wording from § 214.15(a) to express the willingness of the Responsible Official to “discuss an appeal with a party or parties to narrow issues, agree on facts, and explore opportunities to resolve one or more of the issues in dispute by means other than the issuance of an appeal decision.” Another respondent commented that Responsible Officials rarely include the right to seek informal resolution and appeal rights in an appealable decision. This respondent believed that Responsible Officials do not offer an opportunity for informal resolution because they do not believe they are wrong.

Response: Section 214.7 addresses the opportunity to discuss an appealable decision with the Responsible Official. Notices of an appealable decision must include a statement indicating the Responsible Official’s willingness to meet with the affected holder, operator, or solicited applicants to discuss the decision. In contrast, § 214.15(a) addresses the opportunity to discuss informal resolution of issues in a pending appeal with the Responsible Official. The wording differs in the two sections in accordance with the context of the discussions.

214.8 – Levels of review.

Comment: One respondent noted the proposed rule does not provide for independent review, since the Appeal Deciding Officer comes from the same agency as the Responsible Official. Another respondent suggested adding a provision that prohibits any ex parte contact—direct or indirect—between the Appeal Deciding Officer and the Responsible Official concerning an appeal to enhance objectivity and transparency in the appeal process and to meet the stated objective of a “fair and deliberate process.”

Several respondents urged the Forest Service to retain two levels of appeal for

appealable decisions made by District Rangers, as provided in the 251 Appeal Rule. One of these respondents noted that although the proposed change may simplify and expedite the appeal process, the proposed change also injects a significant and unwarranted inconsistency into the process. Another respondent commented that the second level of review is extremely important and should be provided for all decisions below the regional level. Another respondent suggested that District Ranger and Forest Supervisor decisions both be appealable to the Regional Forester. One respondent stated the final rule should retain opportunities for mandatory review of Forest Supervisor decisions by regional offices.

Response: Limiting appeal to one level responds to concerns about the appeal process taking too long. The Department believes the nature of decisions relating to written authorizations are of such specificity and detail that two levels of review are excessive. In addition, part 214 provides for discretionary review by the next higher line officer. The Department believes by limiting appeal to one level and providing for discretionary review for all appeal decisions, the appeal process is simplified and expedited. Providing for one level of appeal for all decisions, rather than two levels for some and one level for others, enhances consistency in the appeal process. Appealable decisions of Forest Supervisors are appealed to the Regional Forester per §214.7. The review of all appeals at the level of the Regional Forester does not necessarily enhance expertise and efficiency in processing 214 appeals. Therefore, at this time, the Department is not making this change.

214.9 – Appeal content.

Comment: One respondent stated that other than a copy of the decision being

appealed, appellants should not have to include Forest Service documents, such as an appraisal. This same respondent noted that appellants should not have to submit documents in their possession and that referencing them should be sufficient.

Another respondent stated that it was a waste of paper to require submission of the appealable decision when the Forest Service already has it.

Response: The Department believes that it is essential for appellants to include any documents or other information upon which they rely in their appeal so that the Appeal Deciding Officer can make a fully informed appeal decision. This provision does not exclude documents in the Agency's possession, as both appellants and the Agency cannot be sure that the Agency possesses documents upon which appellants rely.

The Department agrees that requiring submission of a copy of the decision being appealed is unnecessary. Section 214.8(a)(2) has been revised to require "a brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision." In addition, § 214.8(a)(3) has been revised to require the identification number for the written authorization, if applicable.

Comment: Several respondents objected to the 30-day timeframe for filing an appeal and requested that the 45-day timeframe in the 251 Appeal Rule be reinstated. Several respondents stated that the timeframe should be at least 45 days. One respondent noted that since more information must be submitted in an appeal under the proposed rule than under the 251 Appeal Rule, the timeframe should be lengthened to perhaps 60 days. One respondent stated that if the the 30-day timeframe is retained, the Agency must allow prospective appellants to request an extension of the deadline. One respondent stated that since the Forest Service generally still mails appealable decisions, receipt takes several

days after the date of the decision. This respondent further stated that while the proposed rule shortens the timeframe for filing an appeal based on the assumption that electronic media makes it feasible, the proposed rule does not impose an obligation on the Forest Service to transmit appealable decisions electronically. This respondent believed this discrepancy is not only unfair but also unworkable and is calculated to disqualify or discourage appellants. Another respondent stated that the shorter appeal period in the proposed rule is calculated to impede appellants' exercise of appeal rights. Another respondent expressed appreciation for the goal of expediting the appeal process, but stated that the proposed timeframe for filing an appeal would be very problematic for complex appeals, particularly given the additional information the Agency requires appellants to submit under the proposed rule. Another respondent commented that the proposed changes to filing deadlines and discretionary review does not sufficiently accommodate the procedural rights of special use permit holders.

Response: One of the common frustrations of appellants and the Agency in connection with the 251 Appeal Rule for over 20 years is the amount of time required to issue an appeal decision. To address this concern, numerous changes intended to shorten timeframes were included in the proposed rule. One reduced the timeframe for filing an appeal from 45 to 30 days. However, the Agency recognizes the respondents' concerns that shortening the timeframe for filing an appeal to 30 days may be burdensome, therefore, the 45-day timeframe is reinstated. Changes to discretionary review do not affect appeal rights, since discretionary review is not an appeal right, but rather an additional review that is conducted at the discretion of the Forest Service.

Comment: One respondent proposed posting a notice of all appeal periods on the

Forest Service's website. Another respondent noted that the Forest Service does not regularly post environmental assessments and findings of no significant impact on the internet.

Response: The Department believes that the Forest Service's administrative appeal regulations give sufficient notice of applicable appeal periods. The comment regarding posting of environmental decision documents on the internet is beyond the scope of this rulemaking, which does not govern appeal of these decisions.

Comment: One respondent strongly recommended that the Forest Service follow the example of the Interior Board of Land Appeals (IBLA) and the Federal court system and set a reasonable page limit on appeals.

Response: The Department is considering the merits of a page limit, including the need to seek further public input on the issue and has decided not to establish a page limit in part 214. at this time.

214.11 – Intervention.

Comment: One respondent suggested that interested parties be able to request notification of all livestock grazing or mining appeals as soon as they are filed. Another respondent stated that the proposed rule should provide for notifying all interested parties that an appeal has been filed and should base the intervention deadline upon the date of notification, rather than within 15 days after an appeal has been filed, as provided in § 214.11(a)(2) of the proposed rule. This respondent noted that Bureau of Land Management's (BLM's) appeals process provides better notice of appeals, as the process requires appellants to serve notice of their appeal on all parties named in the grazing decision, including those identified in the copies circulated list in the decision document.

This respondent further noted that posting appeals online is insufficient and the Agency should notify parties of the filing of appeals and appeal decisions.

Several respondents expressed concern about the 15-day timeframe for intervention in part 214 and they requested the Agency retain the timeframe in the 251 Appeal Rule. One of these respondents noted that 15 days may not be enough time to review relevant materials and file an intervention request, particularly if there is a slight delay in the notification of the appeal.

One respondent noted that limiting the intervention process to 10 days-5 days for the appellant and Responsible Official to file a response and 5 days for the Appeal Deciding Officer to make a decision on the intervention request problematic, given that the Forest Service makes no effort to notify the public in a timely fashion of appeals that have been filed.

Another respondent proposed that interested parties be able to intervene by claiming “an interest relating to the subject matter of the decision being appealed” and providing direct or indirect evidence that their interest could be impaired by the disposition of the appeal.

Another respondent suggested revising the proposed rule to state that intervenors must have an interest relating to the subject matter of the decision being appealed, which may be impaired by the disposition of the appeal.

One respondent requested examples of when intervention would be appropriate outside of a competitive offering asked if a special use permit holder could intervene in an appeal where issuance of a new permit implicates recreational carrying capacity.

Response: Appeals under part 214 are limited to the holder, operator, or solicited

applicants who are directly affected by an appealable decision, intervenors, and the Responsible Official. Intervenors are accordingly limited to a holder, an operator, or solicited applicants who claim an interest relating to the subject matter of the decision being appealed and are so situated that disposition of the appeal may impair that interest. Because of the limits on who can be a party to an appeal and intervention under part 214, the Department believes it is unnecessary to notify the public of appeals that have been filed, or to allow intervention by all those who claim an interest relating to the subject matter of the decision being appealed that could be impaired by disposition of an appeal. Per § 214.14(i), the Agency will notify the public of final appeal decisions by posting the decisions on the website of the national forest, national grassland, or region that issued the appealable decision, or for Chief's decisions, on the website of the Washington Office.

The 251 Appeal Rule allows an intervention request to be filed at any time before the closing of the appeal record. It is inefficient for an intervention request to be filed after the appeal process is underway. The Department believes the 15-day timeframe for requesting intervention is sufficient, especially now that the Department has reinstated the requirement to notify any holder who has made a written request to be notified of a specific decision. The opportunity to participate as an intervenor applies to a limited few, and those potential intervenors are usually familiar with the issues associated with a decision being appealed. Limiting the time for filing, responding to, and ruling on an intervention request facilitates the orderly and expeditious handling of appeals.

A holder who claims an interest relating to the subject matter of the decision being appealed and is so situated that disposition of the appeal may impair that interest

may request to intervene. For example, if the holder of a term grazing permit appeals a decision arising from administration of the holder's permit, a holder of a term grazing permit on a neighboring allotment might also be affected by the appeal decision and could request to intervene in the appeal. Additionally, the holder of an outfitting and guiding permit may have an interest that could be affected by administration of another outfitting and guiding permit. However, a decision regarding issuance of a new special use permit that implicates recreational carrying capacity generally would not be appealable under part 214, which generally does not provide for appeal of issuance of special use permits, and therefore generally would not afford an opportunity to intervene. A decision regarding issuance of a new special use permit that implicates recreational carrying capacity would be appealable only if the decision involves denial of renewal of a special use permit that specifically provides for renewal and if the holder requests renewal before the permit expires, per § 214.4(c)(5). Intervention in such an appeal might be appropriate if the effect on carrying capacity of the decision being appealed were such that disposition of the appeal may impair the interest of a holder of a similar special use permit.

214.12 – Responsive statement and reply.

Comment: Several respondents objected to the 10-day timeframe for appellants and intervenors to reply to a responsive statement. One respondent commented that appellants and intervenors should be given at least 15 days to file a reply to a responsive statement. Another respondent requested reinstatement of the 20-day period for filing a reply to a responsive statement and noted that the appeal process should not be shortened at the expense of appellants. One respondent stated that the Forest Service has failed to

meet its deadline for a responsive statement and the notion that appeals should not take more than 60 days makes a mockery of the stated objective to provide a fair and deliberative process.

Response: Replying to the responsive statement is optional for appellants and intervenors. Reducing the timeframe for a reply to 10 days provides enough time for appellants and intervenors to address contentions in the responsive statement succinctly, without restating the entire appeal. The Responsible Official's time period for filing a responsive statement has also been shortened by 10 days, and the Agency takes appeal timeframes very seriously. The Department is retaining the timeframes for intervention in the proposed rule to provide for more orderly and expeditious handling of appeals.

214.13 – Stays.

Comment: One respondent stated that the final rule should clarify whether an intervenor can request a stay. Another respondent recommended removing the provision in the proposed rule allowing a non-party to an appeal to request that a stay be modified or lifted.

Response: The proposed and final rules are clear that only the appellant may request a stay of the decision being appealed. Section 214.13(b)(1) of the proposed and final rules limits a request for a stay to the appellant. Per § 214.13(b)(2), intervenors may support, oppose, or take no position in their intervention request regarding the appellant's stay request.

The Department agrees that § 214.13(e) could be interpreted to allow a non-party to request that a stay be modified or lifted because this provision states that "a party," rather than "a party to the appeal," may submit the request. Accordingly, § 214.13(e) in

the final rule has been revised to allow only a party to an appeal to request that a stay be modified or lifted.

214.14 – Conduct of an appeal.

Comment: One respondent did not understand the intent of the phrase, “the date of the U.S. Postal Service postmark for an appeal received before the close of the fifth business day after the appeal filing date,” in paragraph (b)(1) of the proposed rule.

Response: This phrase is also included in paragraph (b)(3) with respect to timely filing of an appeal that is delivered by private carrier. Adding 5 business days after the appeal filing date allows sufficient time for an appeal filed through the U.S. Postal Service or a private carrier to be received by the Appeal Deciding Officer.

Comment: One respondent stated that appeals should be consolidated only when the issues in the appeals are identical.

Response: The Department believes it is appropriate to allow consolidation of multiple appeals of the same decision or of similar decisions involving common issues of fact and law, even if not all of the issues in the appeals are identical, as provided in the 251 Appeal Rule.

Comment: One respondent supported the new provision in the proposed rule requiring all parties to an appeal to send a copy of all documents filed in an appeal to all other parties to the appeal at the same time the original is filed with the Appeal Deciding Officer. This respondent believed that this provision could be improved by stating that prospective intervenors—who are not yet parties—also need to send a copy of all documents filed in an appeal to all parties to the appeal.

Response: The Department agrees and has added a provision to § 214.14 in the

final rule stating that prospective intervenors must send a copy of their request to intervene to all parties to the appeal. The provision in the proposed and final rules requiring all parties to an appeal to send a copy of all documents filed in an appeal to all other parties to the appeal includes intervenors, as they are parties to an appeal under § 214.3.

Comment: Two respondents commented that the Forest Service should notify interested parties of appeal decisions. One of these respondents noted that permit holders have a legal right to be notified of appeal decisions that may impair their interests.

Response: Part 214 provides for the public, including permit holders, to receive notice of appeal decisions. Part 214 requires the availability of final appeal decisions and discretionary review decisions to be posted on the website of the national forest, national grassland, or region that issued the appealable decision or for Chief's decisions, on the website of the Washington Office. The Department does not believe that permit holders have a legal right to be notified of appeal decisions that may impair their interests.

Comment: A respondent supported the provision requiring posting of final appeal decisions on the internet, but stated that the provision could be enhanced by requiring the decisions to be searchable.

Response: Final appeal decisions that are posted on the internet must include the signature of the Appeal Deciding Officer and are scanned and posted in a portable document format (PDF). A *.pdf is searchable, depending on the software that is used to view the document.

214.15 – Resolution of issues prior to an appeal decision.

Comment: A respondent commented that the statement in the corresponding

provision in the 251 Appeal Rule, “The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision,” was omitted from the the proposed rule and should be reinstated.

Response: The quoted statement is referencing issues or concerns that may arise before an appealable decision is made, which is addressed in § 214.7(b) of the proposed and in § 214.6(b) of the final rule. Accordingly, the phrase, “to discuss any issues related to the decision,” from the quote has been inserted in § 214.6(b). Resolution of issues prior to issuance of an appeal decision is addressed in § 214.15(a).

214.16 – Oral presentation.

Comment: A respondent recommended retaining the wording in the corresponding provision in the 251 Appeal Rule. Another respondent stated that it was unfair of the Forest Service to schedule the oral presentation early in the appeal process, since appellants usually want to wait until the end of the appeal process to make a final presentation of their appeal.

Response: Oral presentations are limited to clarifying or elaborating upon information that has already been filed with the Appeal Deciding Officer. New information may be presented only if it could not have been raised earlier in the appeal and if it would be unfair and prejudicial to exclude it. Oral presentations are scheduled within 10 days of the date a reply to the responsive statement is due. At this point in the appeal process, the parties to the appeal have submitted all their substantive filings, allowing appellants to clarify or elaborate upon the information they have provided based on the filings of other parties.

Comment: One respondent recommended that this section be amended to address whether oral presentations may be conducted electronically and to state that they are not evidentiary proceedings. Another respondent objected to the lack of an opportunity to test the evidence in the record and commented on the need for the Appeal Deciding Officer and appellants to question Forest Service employees.

Response: The Department believes that the Appeal Deciding Officer should have the option to conduct oral presentations in person, telephonically, or via videoconferencing. Conducting oral presentations telephonically or via videoconferencing facilitates more meeting options. The Department does not believe it is appropriate to address specific operating procedures in the final rule, as §§ 214.14(d) and 214.16(f) already authorize the Appeal Deciding Officer to establish procedures for oral presentations.

Oral presentations are not evidentiary proceedings involving examination and cross-examination of witnesses and are not subject to formal rules of procedure. To clarify this intent, the Department has added the following statement to the final rule at § 214.16(b): “Oral presentations are not evidentiary proceedings involving examination and cross-examination of witnesses and are not subject to formal rules of procedure.”

Comment: One respondent stated that the Forest Service should create a transcript of oral presentations at the Agency’s expense, include the transcript in the appeal record, and provide a copy without cost to all parties to the appeal.

Response: Per § 214.17(b), all information filed with the Appeal Deciding Officer, including a transcript of an oral presentation, becomes part of the appeal record. Oral presentations are limited to clarifying or elaborating upon information that has

already been filed with the Appeal Deciding Officer. New information may be presented only if it could not have been raised earlier in the appeal and if it would be unfair and prejudicial to exclude it. In addition, § 214.14(i) of the final rule requires parties to an appeal to bear their own expenses, including costs associated with participating in an oral presentation. Under these circumstances, the Department believes that it is appropriate for the parties requesting a transcript to pay for it.

214.17 – Appeal Record.

Comment: A respondent stated there is no opportunity to confirm the contents of the appeal record and that it is critical that the appeal record and the administrative record be the same. Another respondent commented that the proposed rule would preclude appellants from responding to evidence in the appeal record.

Response: The appeal record includes all of the documents filed with the Appeal Deciding Officer, including the appealable decision, appeal, intervention requests, responsive statement, reply, oral presentation summary or transcript, procedural orders and other rulings, and any correspondence or other documentation related to the appeal as determined by the Appeal Deciding Officer. Since Part 214 provides an informal appeal process, the appeal record does not have to adhere to the requirements for lodging an administrative record in a formal proceeding. Part 214 affords appellants the opportunity to respond to intervention requests and to reply to the responsive statement.

Comment: One respondent commented that the proposed rule would allow the Forest Service to deny appellants access to the file for a proposed action concerning projects and activities implementing land management plans and documented with a record of decision or decision notice. This respondent noted that this is a significant

problem because the Forest Service often adds information to its file in light of an appeal.

Another respondent recommended amending this section to identify how and when the appeal record can be supplemented by the parties to an appeal and by Forest Service officials.

Response: The first comment is beyond the scope of this rulemaking, which does not address appeals of proposed actions concerning projects and activities implementing land management plans and documented with a record of decision or decision notice. At the time an appellant prepares an appeal of one of these proposed actions, the project file is available from the Forest Service office that issued the decision.

The appeal record does not close until the day after the date the reply to the responsive statement is due, if no oral presentation is conducted; the day after the oral presentation is conducted, if no transcript of the oral presentation is prepared; or the day after the date a transcript of the oral presentation is due, if one is being prepared. In addition to the appealable decision, appeal, intervention requests, responsive statement, reply, and oral presentation summary or transcript, the appeal record includes any correspondence or other documentation related to the appeal as determined by the Appeal Deciding Officer. Moreover, the Appeal Deciding Officer may ask a party for additional information to clarify appeal issues and may extend appeal time periods to allow for submission of additional information and to give the other parties an opportunity to review and comment. Therefore, the Department does not believe it is necessary to provide clarification on supplementation of the appeal record in the final rule.

214.18 – Appeal Decision.

Comment: One respondent stated that if an appealable decision is modified as a

result of an appeal, the revised decision should also be available for appeal by all interested members of the public.

Response: Decisions that are appealable are listed in § 214.4. Appealable decisions that are revised as a result of an appeal are not included in the list of appealable decisions. The Department does not believe it would be productive to allow appeal of decisions that are revised as a result of an appeal.

Comment: One respondent was concerned about potential ambiguity in the finality provision. This respondent believed that the provision suggests that an appeal filed by a permittee or other special-status stakeholder could be resolved by the Appeal Deciding Officer and become the final administrative decision of the Department, without any further appeal by any parties. This respondent stated that if this interpretation is not what the Agency intended, the provision should be revised to add the phrase, “shall constitute USDA’s final administrative decision on the appeal.” This respondent further stated that if the Agency did intend the finality implied in the original statement, the finality is wholly unacceptable and encourages secret deals between the Agency and livestock operators with no recourse other than litigation available to the public.

Response: Section 214.18(e) states that the appeal decision constitutes USDA’s final administrative decision, except where a decision to conduct discretionary review has been made and a discretionary review decision has been issued. The Department believes that this provision clearly reflects the intent for the appeal decision to be USDA’s final administrative decision, unless discretionary review is conducted and a discretionary review decision is issued. It is important for part 214 to state when an administrative decision becomes final under the rule, so that appellants know when they have exhausted

their administrative remedies. Part 214 limits parties to an appeal to holders, operators, solicited applicants, intervenors, and the Responsible Official. Other members of the public cannot be parties to an appeal under part 214.

214.19 – Procedures for discretionary review.

Comment: One respondent recommended reinstating the provision in the 251 Appeal Rule providing for petitions or requests for discretionary review to be considered by the Reviewing Officer.

Response: The determination to conduct discretionary review is not triggered by a request from an appellant. Rather, the time period for deciding whether to conduct discretionary review starts to run upon receipt of the appeal decision, appeal, and appealable decision or Chief's decision by the Discretionary Reviewing Officer.

Part 214 helps appellants by clarifying that they do not have to request discretionary review to initiate the process.

214.20 – Exhaustion of Administrative Remedies.

Comment: One respondent suggested that this provision specifically reference that it is subject to the exhaustion requirements of 7 U.S.C. 6912(e).

Response: The Department agrees with this suggestion and has added a citation to 7 U.S.C. 6912(e) to this section in the final rule.

Other Parts of the CFR

222.60 – Decisions subject to mediation.

Comment: Several respondents objected to limiting mediation to cancellation or suspension of term grazing permits. One respondent commented that any decisions pertaining to grazing permits, not just suspensions and cancellations, should be subject to

mediation. Another respondent objected to limiting mediation to cancellation or suspension of term grazing permits on the grounds that the stated rationale for the limitation, that the state process must be confidential, contradicts the language of the governing statute and makes no sense. One respondent stated that all issues arising in connection with management of NFS lands should be subject to mediation. Another respondent stated that the Forest Service generally ignores requests for mediation.

Response: These comments are outside the scope of the proposed rule. No changes were proposed to the provisions governing mediation of term grazing permit disputes. Rather, these provisions were merely moved from one part of the CFR to another.

Summary of Changes to the Proposed Rule

Unless otherwise noted, the sections listed below are from the final rule.

Section 214.2 Definitions.

Appeal Deciding Officer. The term “employee” was replaced with the term “line officer.” In addition, the phrase, “and who is authorized to issue an appeal decision under this part,” was replaced with the phrase, “or the respective Deputy Forest Supervisor, Deputy Regional Forester, or Associate Deputy Chief with the delegation of authority relevant to the provisions of this part.” The same changes were made to the definition of “Appeal Deciding Officer” in 36 CFR 215.2.

Discretionary Reviewing Officer. With respect to USDA, the term “employee” was replaced with the term “official,” and with respect to the Forest Service, the term “employee” was replaced with the term “line officer.”

Responsible Official. The term “employee” was replaced with the term “line officer,” and the phrase, “has the delegated authority to make and implement,” was added to make the definition for this term consistent with its use in other parts of Title 36 of the CFR.

214.3 Parties to an appeal.

To clarify that holders, operators, and solicited applicants who are not directly affected by an appealable decision may not appeal that decision, the Department has revised this section to read: “Parties to an appeal under this part are limited to the holder, operator, or solicited applicants who are directly affected by an appealable decision, intervenors, and the Responsible Official.”

214.4 Decisions that are appealable.

Paragraph (c)(1)(ii) was revised for clarity.

214.6 Election of Appeal Process.

This provision in the proposed rule would allow the holder of a written authorization who had standing under both parts 214 and 215 to elect between the two, but not both. On December 23, 2011, President Obama signed into law the Consolidated Appropriations Act, 2012, Public Law 112-74, for the United States Department of the Interior and Related Agencies, including the Forest Service. Section 428 of Public Law 112-74 (Section 428) requires a predecisional objection process for proposed actions of the Forest Service concerning projects and activities implementing land management plans and documented with a record of decision or decision notice, in place of a postdecisional appeal process in this context. The Forest Service is in the process of drafting regulations to implement Section 428.

Since Section 428 requires a predecisional administrative review process and part 214 provides for a postdecisional administrative review process, the two review procedures will not run in tandem. Therefore, there is no longer a need to provide for election between appeal procedures for proposed actions of the Forest Service concerning projects and activities implementing land management plans and documented with a record of decision or decision notice. Accordingly, the Department has removed the election provision from the final rule. The Department has made a corresponding change to part 215 by removing § 215.11(d).

Section 214.6 Notice of an appealable decision.

Paragraph (a) has been changed to track its counterpart in the 251 Appeal Rule. Paragraph (a) now reads: “The Responsible Official shall promptly give written notice of decisions subject to appeal under this part to the affected holder, operator, or solicited applicants and to any holder of a similar written authorization who has made a written request to be notified of a specific decision.”

Section 214.8 Appeal content.

Paragraph (a)(2) has been revised to require a brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision, rather than a copy of the decision being appealed. The requirement to include the name of the project has been removed, as part 214 does not involve project appeals. Paragraph (a)(3) has been revised to require the identification number for the written authorization, if applicable.

Consistent with removal of the provision governing election of appeal procedures, the Department has removed paragraph (b)(4) in the proposed rule, which would have

required appellants to cite the appeal regulation under which they are filing if they could file under more than one. A corresponding change has been made to part 215 by removing § 215.14(b)(5).

New Section 214.9 Filing of an appeal.

A new § 214.9 has been added governing filing of an appeal. This section addresses the timeframe for filing an appeal, which formerly was addressed in the section on content of an appeal, and the method for filing and responsibility for timely filing of an appeal, both of which were addressed in the section of the proposed rule governing conduct of an appeal.

The timeframe for filing an appeal has been changed from 30 to 45 days. In addition, the Department has removed the exception providing for a 60-day timeframe for appeal of a decision revoking an easement for abandonment pursuant to the Act of October 13, 1964 (16 U.S.C. 534), since revocation of an easement is not subject to appeal under part 214. Rather, revocation of an easement is subject to appeal under 7 CFR part 1, subpart H.

Section 214.11 Intervention.

Consistent with § 214.8 governing appeal content, this section has been revised to add to the submission requirements the requester's name, mailing address, daytime telephone number, and e-mail address, if any; a brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision; and the title or type and, if applicable, identification number for the written authorization, and the date of application for or issuance of the written authorization, if applicable.

Section 214.13 Stays.

Paragraph (e) of this section has been revised to allow only a party to the appeal to request that a stay be modified or lifted.

Section 214.14 Conduct of an appeal.

The introductory clause in the second sentence of paragraph (b), relettered as paragraph (a) in the final rule, has been changed from, “Questions regarding whether an appeal document has been timely filed shall be resolved by the Appeal Deciding Officer based on the following indicators,” to “The Appeal Deciding Officer shall determine timeliness by the following indicators.”

Paragraphs (c)(1) and (c)(3) have been revised to refer to “parties to an appeal,” rather than “parties.”

The Department has removed paragraph (e)(2), which provided for consolidation of appeals filed under part 214 and other parts of the CFR that involve common issues of fact and law, since the Section 428 predecisional administrative review process and art 214 postdecisional administrative review process will not run in tandem. The remaining paragraph has been renumbered.

Paragraph (g)(1) has been revised to provide for documentation of service of filings in an appeal by stating that they must be accompanied by a signed and dated certificate of service attesting that all other parties have been served. In addition, paragraph (g)(1) has been revised to state that filings in an appeal will not be considered by the Appeal Deciding Officer unless they are accompanied by a certificate of service.

Paragraph (h)(1), relettered as paragraph (g)(1) in the final rule, has been modified to require prospective intervenors to send a copy of their request to intervene to all parties to the appeal.

Section 214.16 Oral presentation.

A new paragraph (b), entitled “Procedure,” has been added, which states that “oral presentations are not evidentiary proceedings involving examination and cross-examination of witnesses and are not subject to formal rules of procedure.” The remaining paragraphs have been renumbered as appropriate.

Paragraph (c) has been modified to state that oral presentations shall be conducted in an informal manner.

Paragraph (h) has been revised to refer to “parties to an appeal,” rather than “parties.”

Section 214.20 Exhaustion of administration remedies.

A reference to 7 U.S.C. 6912(e), the statute governing exhaustion of administrative remedies provided by USDA, has been added.

Part 222—RANGE MANAGEMENT

The sequence of the subparts in part 222 has been changed in the final rule. Subpart D, Mediation of Term Grazing Permit Disputes, in the proposed rule has been relettered as subpart B in the final rule, since mediation involves decisions to cancel or suspend a term grazing permit, and subpart A governs cancellation and suspension of grazing permits. Subpart B, Management of Wild Free-Roaming Horses and Burros, in the current rule has been moved to subpart D, after subpart C, Grazing Fees, since the subpart governing wild free-roaming horses and burros does not relate to grazing permits.

Regulatory Certifications

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866, Regulatory Planning and Review. It has been determined that this is not a significant rule. This final rule will not have an annual effect of \$100 million or more on the economy, nor will the final rule adversely affect productivity, competition, jobs, the environment, public health or safety, or State and local governments. This final rule will not interfere with any action taken or planned by another agency or raise new legal or policy issues. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of beneficiaries of those programs.

Moreover, the Department has considered this final rule in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department has determined that the final rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this final rule.

Environmental Impact

This final rule revises the procedures and requirements for the administrative appeal of certain decisions related to written authorizations for the occupancy or use of NFS lands and resources. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement “rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instruction.” The Department has determined that this final rule falls within

this category of actions and that no extraordinary circumstances exist which require preparation of an environmental assessment or environmental impact statement.

Energy Effects

The Department has reviewed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Department has determined that this final rule does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Forest Service requested and received approval of a new information collection requirement for part 214: *OMB Number*: 0596-0231. During the public comment period for proposed part 214, comments were sought on the information collection requirement associated with the administrative appeal process in part 214; no comments on the information collection requirement were received.

Federalism

The Department has considered this final rule under Executive Order 13132 on federalism. The Department has determined that this final rule conforms with the federalism principles set out in this executive order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that this final rule does not have federalism implications.

Consultation and Coordination with Indian Tribal Governments

In accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, the Forest Service is committed to government-to-government consultation on Agency policy that could have an impact on tribes. In that spirit, information about the proposed rule was sent to the Regional Offices, with guidance to distribute the information to tribes in their region and to follow up with visits to tribes if requests for consultation were received. A total of 120 days was provided for this process.

Two comments from tribes were received, and no requests for government-to-government consultation were made. One respondent asked for early notification and consultation on actions affecting tribal treaty or other legal rights, and another respondent inquired whether part 214 would affect administration of a Preservation Trust Area. No changes were made to the proposed rule in response to these comments.

The Department has determined that this final rule does not have substantial direct or unique effects on Indian tribes. This final rule is revising administrative appeal regulations for decisions relating to occupancy or use of NFS lands and resources. In accordance with part 214, tribal governments may participate in the administrative appeal process either as appellants or intervenors.

No Takings Implications

The Department has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The Department has determined that this final rule will not pose the risk of a taking of private property.

Civil Justice Reform

The Department has reviewed this final rule under Executive Order 12988 on civil justice reform. Upon adoption of this final rule, (1) all State and local laws and regulations that conflict with this rule or that impede full implementation of the rule will be preempted; (2) no retroactive effect will be given to this final rule; and (3) this final rule will not require the use of administrative proceedings before parties can file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Department has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This final rule will not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

List of Subjects

36 CFR Part 212

Highways and roads, National forests, Public lands—rights-of-way, and Transportation.

36 CFR Part 214

Administrative practice and procedure, National forests.

36 CFR Part 215

Administrative practice and procedure, National forests, National grassland.

36 CFR Part 222

Range management, National forests, National grassland.

36 CFR Part 228

Environmental protection, Mines, National forests, Oil and gas exploration, Public lands–mineral resources, Public lands–rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

36 CFR Part 241

Fish, Intergovernmental relations, National forests, Wildlife, Wildlife refuges.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands–rights-of-way, Reporting and recordkeeping requirements, Water resources.

36 CFR Part 254

Community facilities, National forests.

36 CFR Part 292

Mineral resources, Recreation and recreation areas.

Therefore, for the reasons set forth in the preamble, the Forest Service is amending Chapter II of Title 36 of the CFR as follows:

PART 212–ADMINISTRATION OF THE FOREST TRANSPORTATION SYSTEM

1. The authority citation for part 212 continues to read as follows:

Authority: 16 U.S.C. 551, 23 U.S.C. 205.

2. In § 212.8, revise paragraph (d)(5) to read as follows:

§ 212.8 Permission to cross lands and easements owned by the United States and administered by the Forest Service.

* * * * *

(d) * * *

(5)(i) The Chief may revoke any easement granted under the provisions of the Act of October 13, 1964 (78 Stat. 1089, 16 U.S.C. 534):

(A) By consent of the owner of the easement;

(B) By condemnation; or

(C) Upon abandonment after a 5-year period of nonuse by the owner of the easement.

(ii) Before any easement is revoked upon abandonment, the owner of the easement shall be given notice and, upon the owner's request made within 60 days after receipt of the notice, shall be given an appeal in accordance with the provisions of 36 CFR part 214.

3. Add part 214 to read as follows:

**PART 214—POSTDECISIONAL ADMINISTRATIVE REVIEW PROCESS FOR
OCCUPANCY OR USE OF NATIONAL FOREST SYSTEM LANDS AND
RESOURCES**

Sec.

- 214.1 Purpose and scope.
- 214.2 Definitions.
- 214.3 Parties to an appeal.
- 214.4 Decisions that are appealable.
- 214.5 Decisions that are not appealable.
- 214.6 Notice of an appealable decision.
- 214.7 Levels of review.
- 214.8 Appeal content.
- 214.9 Filing of an appeal.
- 214.10 Dismissal of an appeal.
- 214.11 Intervention.
- 214.12 Responsive statement and reply.
- 214.13 Stays.
- 214.14 Conduct of an appeal.
- 214.15 Resolution of issues prior to an appeal decision.
- 214.16 Oral presentation.

- 214.17 Appeal record.
- 214.18 Appeal decision.
- 214.19 Procedures for discretionary review.
- 214.20 Exhaustion of administrative remedies.
- 214.21 Information collection requirements.
- 214.22 Applicability and effective date.

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 472, 551.

§ 214.1 Purpose and scope.

(a) *Purpose.* This part provides a fair and deliberate process by which holders, operators, and solicited applicants may appeal certain written decisions issued by Responsible Officials involving written instruments authorizing the occupancy or use of National Forest System lands and resources.

(b) *Scope.* This part specifies who may appeal, decisions that are appealable and not appealable, the responsibilities of parties to an appeal, and the time periods and procedures that govern the conduct of appeals under this part.

§ 214.2 Definitions.

Appeal. A document filed with an Appeal Deciding Officer in which an individual or entity seeks review of a Forest Service decision under this part.

Appeal Deciding Officer. The Forest Service line officer who is one organizational level above the Responsible Official or the respective Deputy Forest Supervisor, Deputy Regional Forester, or Associate Deputy Chief with the delegation of authority relevant to the provisions of this part.

Appeal decision. The final written decision issued by an Appeal Deciding Officer on an appeal filed under this part which affirms or reverses a Responsible Official's appealable decision in whole or in part, explains the basis for the decision, and provides additional instructions to the parties as necessary.

Appeal record. Documentation and other information filed with the Appeal Deciding Officer within the relevant time period by parties to the appeal and upon which review of an appeal is conducted.

Appellant. An individual or entity that has filed an appeal under this part.

Cancellation. The invalidation, in whole or in part, of a term grazing permit or an instrument for the disposal of mineral materials.

Discretionary Reviewing Officer. The U.S. Department of Agriculture (USDA) or Forest Service official authorized to review an appeal decision by an Appeal Deciding Officer or a decision by the Chief under this part.

Holder. An individual or entity that holds a valid written authorization.

Intervenor. An individual or entity whose request to intervene has been granted by the Appeal Deciding Officer.

Modification. A Responsible Official's written revision of the terms and conditions of a written authorization.

Operator. An individual or entity conducting or proposing to conduct mineral operations.

Oral presentation. An informal meeting conducted by the Appeal Deciding Officer during which parties to an appeal may present information in support of their position.

Prospectus. An announcement published by the Forest Service soliciting competitive applications for a written authorization.

Responsible Official. The Forest Service line officer who has the delegated authority to make and implement a decision that may be appealed under this part.

Responsive statement. The document filed by the Responsible Official with the Appeal Deciding Officer that addresses the issues raised and relief requested in an appeal.

Revocation. The cessation, in whole or in part, of a written authorization, other than a grazing permit or an instrument for the disposal of mineral materials, by action of Responsible Official before the end of the specified period of occupancy or use.

Solicited applicant. An individual or entity that has submitted a competitive application in response to a prospectus.

Suspension. A temporary revocation or cancellation of a written authorization.

Termination. The cessation of a written authorization by operation of law or by operation of a fixed or agreed-upon condition, event, or time as specified in the authorization, which does not require a decision by a Responsible Official to take effect.

Written authorization. A term grazing permit, plan of operations, special use authorization, mineral material contract or permit, or other type of written instrument issued by the Forest Service or a lease or permit for leasable minerals issued by the U.S. Department of the Interior that authorizes the occupancy or use of National Forest System lands or resources and specifies the terms and conditions under which the occupancy or use may occur.

§ 214.3 Parties to an appeal.

Parties to an appeal under this part are limited to the holder, operator, or solicited applicants who are directly affected by an appealable decision, intervenors, and the Responsible Official.

§ 214.4 Decisions that are appealable.

To be appealable under this part, a decision must be issued by a Responsible Official in writing and must fall into one of the following categories:

(a) *Livestock grazing*. (1) Modification of a term grazing permit issued under 36 CFR part 222, subpart A. Issuance of annual operating instructions does not constitute a permit modification and is not an appealable decision;

(2) Suspension or cancellation, other than cancellation resulting from the permittee's waiver to the United States, of a term grazing permit issued under 36 CFR part 222, subpart A;

(3) Denial of reauthorization of livestock grazing under a term grazing permit if the holder files an application for a new permit before the existing permit expires; or

(4) Denial of a term grazing permit to a solicited applicant under 36 CFR part 222, subpart C.

(b) *Minerals*. (1) Approval or denial of an initial, modified, or supplemental plan of operations or operating plan; requirement of an increase in bond coverage; requirement of measures to avoid irreparable injury, loss, or damage to surface resources pending modification of a plan of operations or operating plan; or issuance of a notice of noncompliance pursuant to 36 CFR part 228, subpart A or D, or part 292, subpart D, F, or G;

(2) Approval or denial of an operating plan, issuance of a notice of noncompliance, or extension, suspension, or cancellation, other than cancellation by mutual agreement, for or of contracts, permits, or prospecting permits for mineral materials issued under 36 CFR part 228, subpart C;

(3) Approval or denial of a surface use plan of operations, request to supplement a surface use plan of operations, suspension of oil and gas operations, or issuance of a notice of noncompliance pursuant to 36 CFR part 228, subpart E;

(4) Consent or denial of consent to the U.S. Department of the Interior's administration of previously issued leases or permits for leasable minerals other than oil and gas resources;

(5) Suspension or revocation of an operating plan for Federal lands within the Sawtooth National Recreation Area pursuant to 36 CFR part 292, subpart D;

(6) Suspension of locatable mineral operations on National Forest System lands within the Hells Canyon National Recreation Area pursuant to 36 CFR part 292, subpart F;

(7) Suspension of locatable mineral operations on National Forest System lands within the Smith River National Recreation Area or approval of an initial or amended operating plan for exercise of outstanding mineral rights on National Forest System lands within the Smith River National Recreation Area pursuant to 36 CFR part 292, subpart G;

(8) Except as provided in paragraph (7), determinations of the acceptability of an initial or amended operating plan for exercise of outstanding mineral rights on National Forest System lands; or

(9) Determinations of the acceptability of an initial or amended operating plan for exercise of reserved mineral rights located on National Forest System lands.

(c) *Special uses.* (1) Modification, suspension, or revocation of a special use authorization, other than acceptance of an operating plan, including:

(i) A special use authorization issued under 36 CFR part 251, subpart B or D, other than modification, suspension or revocation of a noncommercial group use permit, suspension or revocation of an easement issued pursuant to 36 CFR 251.53(e) or 251.53(l), or revocation with the consent of the holder;

(ii) A special use authorization issued under 36 CFR part 212, subpart A, for ingress and egress to private lands that are intermingled with or adjacent to National Forest System lands;

(iii) A special use authorization issued under 36 CFR part 251, subpart A, that authorizes the exercise of rights reserved in conveyances to the United States;

(iv) A permit and occupancy agreement issued under 36 CFR 213.3 for national grasslands and other lands administered under Title III of the Bankhead-Jones Farm Tenant Act;

(v) A permit issued under 36 CFR 293.13 for access to valid occupancies entirely within a wilderness in the National Forest System.

(vi) A permit issued under the Archaeological Resources Protection Act of 1979 and 36 CFR part 296 for excavation or removal of archaeological resources; and

(vii) A special use authorization governing surface use associated with the exercise of outstanding mineral rights;

(2) Denial of a special use authorization to a solicited applicant based on the process used to select a successful applicant;

(3) Implementation of new land use fees for a special use authorization, other than:

- (i) Revision or replacement of a land use fee system or schedule that is implemented through public notice and comment; and
- (ii) Annual land use fee adjustments based on an inflation factor that are calculated under an established fee system or schedule in accordance with the terms and conditions of a written authorization;
- (4) Assignment of a performance rating that affects reissuance or extension of a special use authorization; or
- (5) Denial of renewal of a special use authorization if it specifically provides for renewal and if the holder requests renewal of the authorization before it expires.
- (d) *Other land uses*. Denial or revocation of a certification of compliance issued under 36 CFR part 292, subpart C, related to the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area.

§ 214.5 Decisions that are not appealable.

Holders, operators, and solicited applicants may not appeal under this part any decisions issued by a Responsible Official that are not expressly set forth in § 214.4.

§ 214.6 Notice of an appealable decision.

(a) The Responsible Official shall promptly give written notice of decisions subject to appeal under this part to the affected holder, operator, or solicited applicants and to any holder of a similar written authorization who has made a written request to be notified of a specific decision.

(b) If the decision is appealable, the notice must specify the contents of an appeal, the name and mailing address of the Appeal Deciding Officer, and the filing deadline.

The notice shall also include a statement indicating the Responsible Official's willingness to meet with the affected holder, operator, or solicited applicants to discuss any issues related to the decision and, where applicable, informing term grazing permit holders of the opportunity to request mediation in accordance with 36 CFR 222.20 through 222.26.

(c) If the decision is not appealable, the Responsible Official must include a statement in the written decision informing the affected holder, operator, or solicited applicants that further administrative review of the decision is not available.

§ 214.7 Levels of review.

(a) *Appeal.* (1) One level of appeal is available for appealable decisions made by District Rangers, Forest or Grassland Supervisors, and Regional Foresters. If a District Ranger is the Responsible Official, the appeal is filed with the Forest or Grassland Supervisor. If a Forest or Grassland Supervisor is the Responsible Official, the appeal is filed with the Regional Forester. If a Regional Forester is the Responsible Official, the appeal is filed with the Chief of the Forest Service.

(2) No appeal is available for decisions made by the Chief.

(b) *Discretionary review.* (1) Appeal decisions issued by Forest or Grassland Supervisors, Regional Foresters, or the Chief are eligible for discretionary review. If a Forest or Grassland Supervisor is the Appeal Deciding Officer, discretionary review is conducted by the Regional Forester. If a Regional Forester is the Appeal Deciding Officer, discretionary review is conducted by the Chief. If the Chief is the Appeal Deciding Officer, discretionary review is conducted by the Under Secretary for Natural Resources and Environment.

(2) Decisions made by the Chief that fall into one of the categories enumerated in 36 CFR 214.4 are eligible for discretionary review by the Under Secretary for Natural Resources and Environment.

§ 214.8 Appeal content.

(a) *General requirements for the contents of an appeal.* All appeals must include:

(1) The appellant's name, mailing address, daytime telephone number, and e-mail address, if any;

(2) A brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision;

(3) The title or type and, if applicable, identification number for the written authorization and the date of application for or issuance of the written authorization, if applicable;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the relevant facts underlying the decision being appealed;

(6) A discussion of issues raised by the decision being appealed, including identification of any laws, regulations, or policies that were allegedly violated in reaching the decision being appealed;

(7) A statement as to whether and how the appellant has attempted to resolve the issues under appeal with the Responsible Official and the date and outcome of those efforts;

(8) A statement of the relief sought;

(9) Any documents and other information upon which the appellant relies; and

(10) The appellant's signature and the date.

(b) *Specific requirements for the contents of an appeal.* In addition to the general requirements in § 214.8(a), the following specific requirements must be included in an appeal, where applicable:

(1) A request for an oral presentation under § 214.16;

(2) A request for a stay under § 214.13; and

(3) A request to participate in a state mediation program regarding certain term grazing permit disputes under 36 CFR part 222, subpart B.

§ 214.9 Filing of an appeal.

(a) *Timeframe for filing an appeal.* An appeal must be filed with the Appeal Deciding Officer within 45 days of the date of the decision.

(b) *Method of filing.* Appeal documents may be filed in person or by courier, by mail or private delivery service, by facsimile, or by electronic mail. Parties to an appeal are responsible for ensuring timely filing of appeal documents.

§ 214.10 Dismissal of an appeal.

(a) The Appeal Deciding Officer shall dismiss an appeal without review when one or more of the following applies:

(1) The appeal is not filed within the required time period.

(2) The person or entity that filed the appeal is not a holder, an operator, or a solicited applicant of a written authorization that is the subject of the appealable decision.

(3) The decision is not appealable under this part.

(4) The appeal does not meet the content requirements specified in § 214.8(a), provided that an appeal may not be dismissed for failure to include an appraisal report which has not been completed by the filing deadline.

(5) The appellant withdraws the appeal.

(6) The Responsible Official withdraws the written decision that was appealed.

(7) An informal resolution of the dispute is reached pursuant to § 214.15 or a mediated agreement of a term grazing dispute is achieved pursuant to 36 CFR part 222, subpart B.

(8) The requested relief cannot be granted under applicable facts, laws, regulations, or policies.

(b) The Appeal Deciding Officer shall give written notice of the dismissal of an appeal and shall set forth the reasons for dismissal.

§ 214.11 Intervention.

(a) *Eligibility to intervene.* To participate as an intervenor in appeals under this part, a party must:

(1) Be a holder, an operator, or a solicited applicant who claims an interest relating to the subject matter of the decision being appealed and is so situated that disposition of the appeal may impair that interest; and

(2) File a written request to intervene with the Appeal Deciding Officer within 15 days after an appeal has been filed.

(b) *Request to intervene.* A request to intervene must include:

(1) The requester's name, mailing address, daytime telephone number, and e-mail address, if any;

(2) A brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision;

(3) The title or type and, if applicable, identification number for the written authorization and the date of application for or issuance of the written authorization, if applicable;

(4) A description of the requester's interest in the appeal and how disposition of the appeal may impair that interest;

(5) A discussion of the factual and legal allegations in the appeal with which the requester agrees or disagrees;

(6) A description of additional facts and issues that are not raised in the appeal that the requester believes are relevant and should be considered;

(7) A description of the relief sought, particularly as it differs from the relief sought by the appellant;

(8) Where applicable, a response to the appellant's request for a stay of the decision being appealed;

(9) Where applicable, a response to the appellant's request for an oral presentation;

(10) Where applicable, a response to the appellant's request for mediation of a term grazing permit dispute under 36 CFR part 222, subpart B; and

(11) The requester's signature and the date.

(c) *Response to a request to intervene.* The appellant and Responsible Official shall have 5 days from receipt of a request to intervene to file a written response with the Appeal Deciding Officer.

(d) *Intervention decision.* The Appeal Deciding Officer shall have 5 days after the date a response to a request to intervene is due to issue a decision granting or denying the request. The Appeal Deciding Officer's decision shall be in writing and shall briefly explain the basis for granting or denying the request. The Appeal Deciding Officer shall deny a request to intervene or shall withdraw a decision granting intervenor status as moot if the corresponding appeal is dismissed under § 214.10.

§ 214.12 Responsive statement and reply.

(a) *Responsive statement.* The Responsible Official shall prepare a responsive statement addressing the factual and legal allegations in the appeal. The responsive statement and any supporting documentation shall be filed with the Appeal Deciding Officer within 20 days of receipt of the appeal or the unsuccessful conclusion of mediation conducted pursuant to 36 CFR part 222, subpart B, whichever is later.

(b) *Reply.* Within 10 days of receipt of the responsive statement, the appellant and intervenors, if any, may file a reply with the Appeal Deciding Officer addressing the contentions in the responsive statement.

§ 214.13 Stays.

(a) *Implementation.* An appealable decision shall be implemented unless an authorized stay is granted under § 214.13(b) or an automatic stay goes into effect under § 214.13(c).

(b) *Authorized stays.* Except where a stay automatically goes into effect under § 214.13(c), the Appeal Deciding Officer may grant a written request to stay the decision that is the subject of an appeal under this part.

(1) *Stay request.* To obtain a stay, an appellant must include a request for a stay in the appeal pursuant to § 214.8(b)(2) and a statement explaining the need for a stay. The statement must include, at a minimum:

(i) A description of the adverse impact on the appellant if a stay is not granted;

(ii) A description of the adverse impact on National Forest System lands and resources if a stay is not granted; or

(iii) An explanation as to how a meaningful decision on the merits of the appeal could not be achieved if a stay is not granted.

(2) *Stay response.* The Responsible Official may support, oppose, or take no position in the responsive statement regarding the appellant's stay request. Intervenors may support, oppose, or take no position in the intervention request regarding the appellant's stay request.

(3) *Stay decision.* The Appeal Deciding Officer shall issue a decision granting or denying a stay request within 10 days after a responsive statement or an intervention request is filed, whichever is later. The stay decision shall be in writing and shall briefly explain the basis for granting or denying the stay request.

(c) *Automatic stays.* The following decisions are automatically stayed once an appeal is filed by a holder, operator, or solicited applicant:

(1) Decisions to issue a written authorization pursuant to a prospectus;

(2) Decisions to recalculate revenue-based land use fees for a special use authorization pursuant to an audit issued after **[insert date of publication in the FEDERAL REGISTER]**; and

(3) Decisions to cancel or suspend a term grazing permit subject to mediation under 36 CFR 222.20 and for which mediation is requested in accordance with that provision.

(d) *Stay duration.* Authorized stays and automatic stays under § 214.13(c)(1) and (c)(2) shall remain in effect until a final administrative decision is issued in the appeal, unless they are modified or lifted in accordance with § 214.13(e). Automatic stays under § 214.13(c)(3) shall remain in effect for the duration of the mediation period as provided in 36 CFR 222.22.

(e) *Modification or lifting of a stay.* The Appeal Deciding Officer or a Discretionary Reviewing Officer may modify or lift an authorized stay based upon a written request by a party to the appeal who demonstrates that the circumstances have changed since the stay was granted and that it is unduly burdensome or unfair to maintain the stay.

§ 214.14 Conduct of an appeal.

(a) *Evidence of timely filing.* The Appeal Deciding Officer shall determine the timeliness of an appeal by the following indicators:

- (1) The date of the U.S. Postal Service postmark for an appeal received before the close of the fifth business day after the appeal filing date;
- (2) The electronically generated posted date and time for e-mail and facsimiles;
- (3) The shipping date for delivery by private carrier for an appeal received before the close of the fifth business day after the appeal filing date; or
- (4) The official agency date stamp showing receipt of hand delivery.

(b) *Computation of time.* (1) A time period in this part begins on the first day following the event or action triggering the time period.

(2) All time periods shall be computed using calendar days, including Saturdays, Sundays, and Federal holidays. However, if a time period ends on a Saturday, Sunday, or Federal holiday, the time period is extended to the end of the next Federal business day.

(c) *Extensions of time.* (1) *In general.* Parties to an appeal, Appeal Deciding Officers, and Discretionary Reviewing Officers shall meet the time periods specified in this part, unless an extension of time has been granted under paragraph (c)(3) of this section. Extension requests from parties to an appeal shall be made in writing, shall explain the need for the extension, and shall be transmitted to the Appeal Deciding Officer.

(2) *Time periods that may not be extended.* The following time periods may not be extended:

(i) The time period for filing an appeal;

(ii) The time period to decide whether to conduct discretionary review of an appeal decision or a Chief's decision; and

(iii) The time period to issue a discretionary review decision.

(3) *Time periods that may be extended.* Except as provided in paragraph (c)(2) of this section, all time periods in this part may be extended upon written request by a party to an appeal and a finding of good cause for the extension by the Appeal Deciding Officer. Written requests for extensions of time will be automatically granted by the Appeal Deciding Officer where the parties to an appeal represent that they are working in

good faith to resolve the dispute and that additional time would facilitate negotiation of a mutually agreeable resolution.

(4) *Decision.* The Appeal Deciding Officer shall have 10 days to issue a decision granting or denying the extension request. The decision shall be in writing and shall briefly explain the basis for granting or denying the request.

(5) *Duration.* Ordinarily, extensions that add more than 60 days to the appeal period should not be granted.

(d) *Procedural orders.* The Appeal Deciding Officer may issue procedural orders as necessary for the orderly, expeditious, and fair conduct of an appeal under this part.

(e) *Consolidation of appeals.* (1) The Appeal Deciding Officer may consolidate multiple appeals of the same decision or of similar decisions involving common issues of fact and law and issue one appeal decision.

(2) The Responsible Official may prepare one responsive statement for consolidated appeals.

(f) *Requests for additional information.* The Appeal Deciding Officer may ask parties to an appeal for additional information to clarify appeal issues. If necessary, the Appeal Deciding Officer may extend appeal time periods per paragraph (c)(3) of this section to allow for submission of the additional information and to give the other parties an opportunity to review and comment on it.

(g) *Service of documents.* (1) Parties to an appeal shall send a copy of all documents filed in the appeal to all other parties, including the appellant's sending a copy of the appeal to the Responsible Official, at the same time the original is filed with the Appeal Deciding Officer. All filings in an appeal must be accompanied by a signed and

dated certificate of service attesting that all other parties have been served. Prospective intervenors shall send a copy of their request to intervene to all parties to the appeal at the same time the original is filed with the Appeal Deciding Officer. Each party and prospective intervenor is responsible for identifying the parties to the appeal and may contact the Appeal Deciding Officer for assistance regarding their names and addresses. Filings in an appeal shall not be considered by the Appeal Deciding Officer unless they are accompanied by a certificate of service.

(2) All decisions and orders issued by the Appeal Deciding Officer and the Discretionary Reviewing Officer related to the appeal shall be in writing and shall be sent to all parties to the appeal.

(h) *Posting of final decisions.* Once a final appeal decision or discretionary review decision has been issued, its availability shall be posted on the website of the national forest or national grassland or region that issued the appealable decision or on the website of the Washington Office for Chief's decisions.

(i) *Expenses.* Each party to an appeal shall bear its own expenses, including costs associated with preparing the appeal, participating in an oral presentation, obtaining information regarding the appeal, and retaining professional consultants or counsel.

§ 214.15 Resolution of issues prior to an appeal decision.

(a) The Responsible Official may discuss an appeal with a party or parties to narrow issues, agree on facts, and explore opportunities to resolve one or more of the issues in dispute by means other than issuance of an appeal decision.

(b) The Responsible Official who issued a decision under appeal may withdraw the decision, in whole or in part, during an appeal to resolve one or more issues in

dispute. The Responsible Official shall notify the parties to the appeal and the Appeal Deciding Officer of the withdrawal. If the withdrawal of the decision eliminates all the issues in dispute in the appeal, the Appeal Deciding Officer shall dismiss the appeal under § 214.10.

§ 214.16 Oral presentation.

(a) *Purpose.* The purpose of an oral presentation is to provide parties to an appeal with an opportunity to discuss their concerns regarding the appealable decision with the Appeal Deciding Officer.

(b) *Procedure.* Oral presentations are not evidentiary proceedings involving examination and cross-examination of witnesses and are not subject to formal rules of procedure.

(c) *Scope.* Oral presentations shall be conducted in an informal manner and shall be limited to clarifying or elaborating upon information that has already been filed with the Appeal Deciding Officer. New information may be presented only if it could not have been raised earlier in the appeal and if it would be unfair and prejudicial to exclude it.

(d) *Requests.* A request for an oral presentation included in an appeal shall be granted by the Appeal Deciding Officer unless the appeal has been dismissed under § 214.10.

(e) *Availability.* Oral presentations may be conducted during appeal of a decision, but not during discretionary review.

(f) *Scheduling and rules.* The Appeal Deciding Officer shall conduct the oral presentation within 10 days of the date a reply to the responsive statement is due. The

Appeal Deciding Officer shall notify the parties of the date, time, and location of the oral presentation and the procedures to be followed.

(g) *Participation.* All parties to an appeal are eligible to participate in the oral presentation. At the discretion of the Appeal Deciding Officer, non-parties may observe the oral presentation, but are not eligible to participate.

(h) *Summaries and transcripts.* A summary of an oral presentation may be included in the appeal record only if it is submitted to the Appeal Deciding Officer by a party to the appeal at the end of the oral presentation. A transcript of an oral presentation prepared by a certified court reporter may be included in the appeal record if the transcript is filed with the Appeal Deciding Officer within 10 days of the date of the oral presentation and if the transcript is paid for by those who requested it.

§ 214.17 Appeal record.

(a) *Location.* The Appeal Deciding Officer shall maintain the appeal record in one location.

(b) *Contents.* The appeal record shall consist of information filed with the Appeal Deciding Officer, including the appealable decision, appeal, intervention request, responsive statement, reply, oral presentation summary or transcript, procedural orders and other rulings, and any correspondence or other documentation related to the appeal as determined by the Appeal Deciding Officer.

(c) *Closing of the record.* (1) The Appeal Deciding Officer shall close the appeal record on:

(i) The day after the date the reply to the responsive statement is due if no oral presentation is conducted;

(ii) The day after the oral presentation is conducted if no transcript of the oral presentation is being prepared; or

(iii) The day after the date a transcript of the oral presentation is due if one is being prepared.

(2) The Appeal Deciding Officer shall notify all parties to the appeal of closing of the record.

(d) *Inspection by the public.* The appeal record is open for public inspection in accordance with the Freedom of Information Act, the Privacy Act, and 7 CFR part 1.

§ 214.18 Appeal decision.

(a) Appeal decisions made by the Appeal Deciding Officer shall be issued within 30 days of the date the appeal record is closed.

(b) The appeal decision shall be based solely on the appeal record and oral presentation, if one is conducted.

(c) The appeal decision shall conform to all applicable laws, regulations, policies, and procedures.

(d) The appeal decision may affirm or reverse the appealable decision, in whole or in part. The appeal decision must specify the basis for affirmation or reversal and may include instructions for further action by the Responsible Official.

(e) Except where a decision to conduct discretionary review has been made and a discretionary review decision has been issued, the appeal decision shall constitute USDA's final administrative decision.

§ 214.19 Procedures for discretionary review.

(a) *Initiation.* (1) One day after issuance of an appeal decision, the Appeal Deciding Officer shall send a copy of the appeal decision, appeal, and appealable decision to the Discretionary Reviewing Officer to determine whether discretionary review of the appeal decision should be conducted.

(2) One day after issuance of a Chief's decision that is eligible for discretionary review under § 214.7(b)(2), the Chief shall send the decision to the Discretionary Reviewing Officer to determine whether discretionary review should be conducted.

(b) *Criteria for determining whether to conduct discretionary review.* In deciding whether to conduct discretionary review, the Discretionary Reviewing Officer should, at a minimum, consider the degree of controversy surrounding the decision, the potential for litigation, and the extent to which the decision establishes precedent or new policy.

(c) *Time period.* Upon receipt of the appeal decision, appeal, and appealable decision or Chief's decision, the Discretionary Reviewing Officer shall have 30 days to determine whether to conduct discretionary review and may request the appeal record or the record related to the Chief's decision during that time to assist in making that determination. If a request for the record is made, it must be transmitted to the Discretionary Reviewing Officer within 5 days.

(d) *Notification.* The Discretionary Reviewing Officer shall notify the parties and the Appeal Deciding Officer in writing of a decision to conduct discretionary review. The Discretionary Reviewing Officer may notify the parties and the Appeal Deciding Officer of a decision not to conduct discretionary review within 30 days. If the Discretionary Reviewing Officer takes no action within 30 days of receipt of the appeal decision,

appeal, and appealable decision or Chief's decision, the appeal decision or Chief's decision shall constitute USDA's final administrative decision.

(e) Scope of discretionary review and issuance of a discretionary review decision.

Discretionary review shall be limited to the record. No additional information shall be considered by the Discretionary Reviewing Officer. The Discretionary Reviewing Officer shall have 30 days to issue a discretionary review decision after notification of the parties and Appeal Deciding Officer has occurred pursuant to § 214.19(d). The Discretionary Reviewing Officer's decision shall constitute USDA's final administrative decision. If a discretionary review decision is not issued within 30 days following the notification of the decision to conduct discretionary review, the appeal decision or Chief's decision shall constitute USDA's final administrative decision.

§ 214.20 Exhaustion of administrative remedies.

Per 7 U.S.C. 6912(e), judicial review of a decision that is appealable under this part is premature unless the plaintiff has exhausted the administrative remedies under this part.

§ 214.21 Information collection requirements.

The rules of this part governing appeal of decisions relating to occupancy or use of National Forest System lands and resources specify the information that an appellant must provide in an appeal. Therefore, these rules contain information collection requirements as defined in 5 CFR part 1320. These information collection requirements are assigned Office of Management and Budget Control Number 0596-0231.

§ 214.22 Applicability and effective date.

This part prescribes the procedure for administrative review of appealable decisions and Chief’s decisions set forth in § 214.4 issued on or after **[insert date of publication the FEDERAL REGISTER]**.

PART 215–NOTICE, COMMENT, AND APPEAL PROCEDURES FOR NATIONAL FOREST SYSTEM PROJECTS AND ACTIVITIES

4. The authority citation for part 215 continues to read as follows:

Authority: 16 U.S.C. 472, 551; sec. 322, Pub. L. 102-381 (Appeals Reform Act), 106 Stat. 1419 (16 U.S.C. 1612 note).

5. In § 215.1, revise paragraph (b) to read as follows:

§ 215.1 Purpose and scope.

* * * * *

(b) *Scope.* Notice of proposed actions and opportunity to comment provide an opportunity for the public to provide meaningful input prior to the decision on projects and activities implementing land management plans. The rules of this part complement other opportunities to participate in the Forest Service’s project and activity planning, such as those provided by the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations at 40 CFR parts 1500–1508 and 36 CFR part 220; the National Forest Management Act (NFMA) and its implementing regulations at 36 CFR part 219; and the regulations at 36 CFR part 216 governing public notice and comment for certain Forest Service directives.

6. In § 215.2, revise the definitions for “Appeal,” “Appeal Deciding Officer,” “Appeal record,” “Appellant,” and “Responsible Official” to read as follows:

§215.2 Definitions.

* * * * *

Appeal—A document filed with an Appeal Deciding Officer in which an individual or entity seeks review of a Forest Service decision under this part.

Appeal Deciding Officer—The U.S. Department of Agriculture (USDA) official or Forest Service line officer who is one organizational level above the Responsible Official or the respective Deputy Forest Supervisor, Deputy Regional Forester, or Associate Deputy Chief with the delegation of authority relevant to the provisions of this part.

* * * * *

Appeal record—Documentation and other information filed with the Appeal Deciding Officer within the relevant time period by parties to an appeal and upon which review of an appeal is conducted.

* * * * *

Appellant—An individual or entity that has filed an appeal of a decision under this part.

* * * * *

Responsible Official—The Forest Service line officer who has the delegated authority to make and implement a decision that may be appealed under this part.

* * * * *

§ 215.11 [Amended]

7. In § 215.11, remove paragraph (d).

§ 215.14 [Amended]

8. In § 215.14, remove paragraph (b)(5), and redesignate paragraphs (b)(6) through (9) as paragraphs (b)(5) through (8).

9. In § 215.15, revise paragraph (c) to read as follows:

§215.15 Appeal time periods and process.

* * * * *

(c) *Evidence of timely filing.* Parties to an appeal are responsible for ensuring timely filing of appeal documents. Questions regarding whether an appeal document has been timely filed shall be resolved by the Appeal Deciding Officer based on the following indicators:

(1) The date of the U.S. Postal Service postmark for an appeal received before the close of the fifth business day after the appeal filing date;

(2) The electronically generated posted date and time for e-mail and facsimiles;

(3) The shipping date for delivery by private carrier for an appeal received before the close of the fifth business day after the appeal filing date; or

(4) The official agency date stamp showing receipt of hand delivery.

* * * * *

PART 222—RANGE MANAGEMENT

10. The authority citation for part 222 is revised to read as follows:

Authority: 7 U.S.C. 1010-1012, 5101-5106; 16 U.S.C. 551, 572, 580l; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).

Subpart B [Redesignated as Subpart D]

11. Redesignate subpart B, consisting of §§ 222.20 through 222.36, as subpart D, consisting of §§ 222.60 through 222.76, and revise the newly redesignated subpart D authority citation to read as follows:

Subpart D—Management of Wild Free-Roaming Horses and Burros

Authority: 7 U.S.C. 1011; 16 U.S.C. 551, 1331-1340; 43 U.S.C. 1901 note.

12. Add a new subpart B to read as follows:

Subpart B—Mediation of Term Grazing Permit Disputes

Sec.

- 222.20 Decisions subject to mediation
- 222.21 Parties.
- 222.22 Stay of appeal.
- 222.23 Confidentiality.
- 222.24 Records.
- 222.25 Costs.
- 222.26 Ex parte communications.

Authority: 7 U.S.C. 5101-5106; 16 U.S.C. 472, 551

Subpart B—Mediation of Term Grazing Permit Disputes

§ 222.20 Decisions subject to mediation.

The holder of a term grazing permit issued in a State with a mediation program certified by the U.S. Department of Agriculture may request mediation of a dispute relating to a decision to suspend or cancel the permit as authorized by 36 CFR 222.4(a)(2)(i), (ii), (iv), and (v) and (a)(3) through (6). Any request for mediation must be included in an appeal of the decision to suspend or cancel the permit filed in accordance with 36 CFR part 214.

§ 222.21 Parties.

Only the following may be parties to mediation of a term grazing permit dispute:

- (a) A mediator authorized to mediate under a State mediation program certified by the U.S. Department of Agriculture;

(b) The Chief, Forest Service, or other Forest Service employee who made the decision being mediated or his or her designee;

(c) The holder whose term grazing permit is the subject of the decision and who has requested mediation in an appeal filed in accordance with the procedures at 36 CFR part 214;

(d) That holder's creditors, if applicable; and

(e) Legal counsel, if retained. The Forest Service will have legal representation in the mediation only if the holder has legal representation in the mediation.

§ 222.22 Stay of appeal.

If an appellant requests mediation of a decision subject to mediation under § 222.20 in an appeal filed under 36 CFR part 214, the Appeal Deciding Officer shall immediately notify all parties to the appeal that all appeal deadlines are automatically stayed for 45 days to allow for mediation. If a mediated agreement is not reached in 45 days, the Appeal Deciding Officer may extend the automatic stay for another 15 days if there is a reasonable possibility that a mediated agreement can be achieved within that timeframe. If an agreement is not achieved at the end of the 45- or 60-day mediation process, the Appeal Deciding Officer shall immediately notify all parties to the appeal that mediation was unsuccessful, that the stay has expired, and that the time periods and procedures applicable to an appeal under 36 CFR part 214 are reinstated.

§ 222.23 Confidentiality.

Mediation sessions and dispute resolution communications as defined in 5 U.S.C. 571(5) shall be confidential. Any mediation agreement signed by a Forest Service official and the holder of a term grazing permit is subject to public disclosure.

§ 222.24 Records.

Notes taken or factual material shared during mediation sessions shall not be included in the appeal record prepared in accordance with the procedures at 36 CFR part 214.

§ 222.25 Costs.

The Forest Service shall cover only those costs incurred by its own employees in mediation sessions.

§ 222.26 Ex parte communications.

The Chief of the Forest Service or other Forest Service employee who made the decision being mediated, or his or her designee, shall not discuss mediation with the Appeal Deciding Officer, except to request an extension of time or to communicate the results of mediation.

Subpart C [Amended]

13. The authority citation for subpart C of part 222 is revised to read as follows:
Authority: 16 U.S.C. 551; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).

PART 228—MINERALS

14. The authority citation for part 228 is revised to read as follows:
Authority: 16 U.S.C. 478, 551; 30 U.S.C. 226, 352, 601, 611; 94 Stat. 2400.

Subpart A—Locatable Minerals

15. Revise § 228.14 to read as follows:

§ 228.14 Appeals.

Appeal of decisions of an authorized officer made pursuant to this subpart is governed by 36 CFR part 214 or 215.

Subpart C—Disposal of Mineral Materials

16. In § 228.65, revise paragraph (b)(4) to read as follows:

§ 228.65 Payment for sales.

* * * * *

(b) * * *

(4) If the purchaser fails to make payments when due, the contract will be considered breached, the authorized officer will cancel the contract, and all previous payments will be forfeited without prejudice to any other rights and remedies of the United States.

* * * * *

17. In § 228.66 revise paragraph (c) to read as follows:

§ 228.66 Refunds.

* * * * *

(c) *Cancellation.* (1) If the contract is cancelled by the authorized officer for reasons which are beyond the purchaser's control; or

(2) If the contract is cancelled by mutual agreement. This refund provision is not a warranty that a specific quantity of material exists in the sale area.

Subpart E—Oil and Gas Resources

18. In § 228.107, revise paragraph (c) to read as follows:

§ 228.107 Review of surface use plan of operations.

* * * * *

(c) *Notice of decision.* The authorized Forest officer shall give public notice of the decision on a surface use plan of operations and include in the notice that the decision is subject to appeal under 36 CFR part 214 or 215.

* * * * *

PART 241—FISH AND WILDLIFE

19. The authority citation for part 241 continues to read as follows:

Authority: 16 U.S.C. 472, 539, 551, 683.

Subpart B—Conservation of Fish, Wildlife, and Their Habitat, Chugach National Forest, Alaska

20. In § 241.22, revise paragraphs (e) and (f) to read as follows:

§ 241.22 Consistency determinations.

* * * * *

(e) Subject to valid existing rights, the responsible Forest Officer may revoke, suspend, restrict, or require modification of any activity if it is determined that such measures are required to conserve wildlife, fish, or their habitat within areas of the Chugach National Forest subject to this subpart. Prior to taking action to revoke, suspend, restrict, or require modification of an activity under this section, the responsible Forest Officer shall give affected parties reasonable prior notice and an opportunity to comment, unless it is determined that doing so would likely result in irreparable harm to conservation of fish, wildlife, and their habitat.

(f) Decisions made pursuant to this section are subject to appeal only as provided in 36 CFR part 214.

* * * * *

PART 251–LAND USES

21. The authority citation for part 251 continues to read as follows:

Authority: 16 U.S.C. 472, 479b, 551, 1134, 3210, 6201-13; 30 U.S.C. 1740, 1761-1771.

Subpart A–Miscellaneous Land Uses

22. The authority citation for part 251, subpart A, continues to read as follows:

Authority: 7 U.S.C. 1011; 16 U.S.C. 518, 551, 678a; Pub. L. 76-867, 54 Stat. 1197.

23. Amend § 251.15 by revising paragraphs (a)(2)(iv) and (a)(3) to read as follows:

§ 251.15 Conditions, rules, and regulations to govern exercise of mineral rights reserved in conveyances to the United States.

(a) * * *

(2) * * *

(iv) Failure to comply with the terms and conditions of the permit shall be cause for revocation of all rights to use, occupy, or disturb the surface of the lands covered by the permit, but in the event of revocation, a new permit shall be issued upon application when the causes for revocation of the preceding permit have been satisfactorily remedied and the United States has been reimbursed for any damages it has incurred from the noncompliance.

(3) All structures, other improvements, and materials shall be removed from the lands within one year after the date of revocation of the permit.

* * * * *

Subpart B–Special Uses

24. The authority citation for part 251, subpart B, continues to read as follows:
Authority: 16 U.S.C. 460l–6a, 460l–6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1771.24.

25. In § 251.51 revise the definitions for “Holder,” “Revocation,” “Special use authorization,” and “Termination” to read as follows:

§ 251.51 Definitions.

* * * * *

Holder—an individual or entity that holds a valid special use authorization.

* * * * *

Revocation—the cessation, in whole or in part, of a special use authorization by action of an authorized officer before the end of the specified period of use or occupancy for reasons set forth in § 251.60(a)(1)(i), (a)(2)(i), (g), and (h) of this subpart.

* * * * *

Special use authorization—a written permit, term permit, lease, or easement that authorizes use or occupancy of National Forest System lands and specifies the terms and conditions under which the use or occupancy may occur.

* * * * *

Termination—the cessation of a special use authorization by operation of law or by operation of a fixed or agreed-upon condition, event, or time as specified in the authorization, which does not require a decision by an authorized officer to take effect, such as expiration of the authorized term; change in ownership or control of the authorized improvements; or change in ownership or control of the holder of the authorization.

* * * * *

26. In § 251.54, revise the last sentence of paragraph (g)(3)(iii) to read as follows:

§ 251.54 Proposal and application requirements and procedures.

* * * * *

(g) * * *

(3) * * *

(iii) * * * A denial of an application in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section constitutes final agency action, is not subject to administrative appeal, and is immediately subject to judicial review.

* * * * *

27. In § 251.60, revise paragraphs (a)(1)(ii), (a)(2)(ii), and (h)(2) to read as follows:

§ 251.60 Termination, revocation, and suspension.

(a) * * *

(1) * * *

(ii) *Judicial review.* Revocation or suspension of a special use authorization under this paragraph constitutes final agency action, is not subject to administrative appeal, and is immediately subject to judicial review.

* * * * *

(2) * * *

(ii) *Administrative review.* Except for revocation or suspension of an easement issued pursuant to § 251.53(e) or § 251.53(l) of this subpart, revocation or suspension of

a special use authorization under this paragraph is subject to appeal pursuant to 36 CFR part 214.

* * * * *

(h) * * *

(2) Before any such easement is revoked upon abandonment, the owner of the easement shall be given notice and, upon the owner's request made within 60 days after receipt of the notice, shall be given an appeal in accordance with the provisions of 36 CFR part 214.

* * * * *

28. Revise § 251.61 to read as follows:

§ 251.61 Applications for new, changed, or additional uses or area.

(a) Holders shall file a new or amended application for authorization of any new, changed, or additional uses or area, including any changes that involve any activity that has an impact on the environment, other uses, or the public. In approving or denying new, changed, or additional uses or area, the authorized officer shall consider, at a minimum, the findings or recommendations of other affected agencies and whether to revise the terms and conditions of the existing authorization or issue a new authorization. Once approved, any new, changed, or additional uses or area must be reflected in the existing or a new authorization.

(b) A holder may be required to furnish as-built plans, maps, or surveys upon completion of construction.

Subpart C—[Removed and Reserved]

29. Remove and reserve subpart C, consisting of §§ 251.80 through 251.103.

Subpart E—Revenue-Producing Visitor Services in Alaska

30. The authority citation for part 251, subpart E, continues to read as follows:

Authority: 16 U.S.C. 3197.

31. Revise § 251.126 to read as follows:

§ 251.126 Appeals.

Decisions related to the issuance of special use authorizations in response to written solicitations by the Forest Service under this subpart or related to the modification of special use authorizations to reflect historical use are subject to administrative appeal under 36 CFR part 214.

PART 254—LANDOWNERSHIP ADJUSTMENTS

Subpart A—Land Exchanges

32. The authority citation for part 254, subpart A, is revised to read as follows:

Authority: 7 U.S.C. 428a(a) and 1011; 16 U.S.C. 484a, 485, 486, 516, 551, 555a; 43 U.S.C. 1701, 1715, 1716, 1740.

33. In § 254.4, revise paragraph (g) to read as follows:

§ 254.4 Agreement to initiate an exchange.

* * * * *

(g) The withdrawal from an exchange proposal by the authorized officer at any time prior to the notice of decision pursuant to § 254.13 of this subpart is not appealable under 36 CFR part 214 or 215.

34. In § 254.13, revise paragraph (b) to read as follows:

§ 254.13 Approval of exchanges; notice of decision.

* * * * *

(b) The decision to approve or disapprove an exchange proposal shall be subject to appeal as provided under 36 CFR part 214 or 215 for 45 days after the date of publication of a notice of availability of the decision.

35. In § 254.14, revise paragraph (b)(6) to read as follows:

§ 254.14 Exchange agreement.

* * * * *

(b) * * *

(6) In the event of an appeal under 36 CFR part 214 or 215, a decision to approve an exchange proposal pursuant to § 254.13 of this subpart is upheld; and

* * * * *

36. In § 254.15, revise the last sentence of paragraph (c)(2) to read as follows:

§ 254.15 Title standards.

* * * * *

(c) * * *

(2) * * * If an agreement cannot be reached, the authorized officer shall consider other alternatives to accommodate the authorized use or shall determine whether there are specific and compelling reasons in the public interest for revoking the authorization for that use pursuant to 36 CFR 251.60.

PART 292—NATIONAL RECREATION AREAS

Subpart C—Sawtooth National Recreation Area—Private Lands

37. The authority citation for part 292, subpart C, continues to read as follows:

Authority: Sec. 4(a), Act of Aug. 22, 1972 (86 Stat. 613).

38. In § 292.15, revise paragraph (l) to read as follows:

§ 292.15 General provisions–procedures.

* * * * *

(l) *Appeals.* Denial or revocation of a certification of compliance under this subpart is subject to appeal under 36 CFR part 214.

Subpart D–Sawtooth National Recreation Area–Federal Lands

39. The authority citation for part 292, subpart D, is revised to read as follows:

Authority: 16 U.S.C. 460aa-10, 478, 551.

40. In § 292.18, revise paragraph (f) to read as follows:

§ 292.18 Mineral resources.

* * * * *

(f) *Operating plans–suspension, revocation, or modification.* The authorized officer may suspend or revoke authorization to operate in whole or in part where such operations are causing substantial impairment which cannot be mitigated. At any time during operations under an approved operating plan, the operator may be required to modify the operating plan to minimize or avoid substantial impairment of the values of the SNRA.

* * * * *

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U.S. Forest Service

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