



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 222

RIN 0596-AD45

Assessing Fees for Excess and Unauthorized Grazing

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Agency), is proposing to amend its existing regulations to provide for nonmonetary settlement when excess or unauthorized grazing is determined to be non-willful, a standard consistent with practices of the Bureau of Land Management, as recommended by the July 2016 Government Accountability Office (GAO) in its report to the Committee on Natural Resources, House of Representatives, *Unauthorized Grazing, Actions Needed to Improve Tracking and Deterrence Efforts* (GAO-16-559).

DATES: To be ensured consideration, comments must be received in writing on or before

[INSERT DATE 30 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*]

ADDRESSES: You may send comments using one of the following methods:

1. Submit comments electronically by following the instructions at the Federal eRulemaking portal at <http://www.regulations.gov>.
2. *Mail:* U. S. Forest Service, Director, Forest Management, Range Management and Vegetation Ecology, 201 14th Street SW, Suite 3SE, Washington, DC 20250-1124.

3. *Hand Delivery/Courier:* U. S. Forest Service, Director, Forest Management, Range Management and Vegetation Ecology, 201 14th Street SW, Suite 3SE, Washington, DC 20250-1124.

All comments, including all content, will be placed in the record and will be available for public inspection and copying. Therefore, the Agency recommends that commenters remove personal information such as Social Security Numbers, personal addresses, telephone numbers, and email addresses included in their comments as such information may become easily available to the public.

Also, please note that, due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, the Agency encourages the public to submit comments electronically.

FOR FURTHER INFORMATION CONTACT: Myra Black, Program Manager, Forest Management, Range Management and Vegetation Ecology, 202-650-7365, myra.black@usda.gov. Individuals who use telecommunication devices for the deaf may call the Federal Relay Service at 800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service is responsible for managing National Forest System (NFS) lands that provide forage for domestic livestock grazing. The Forest Service's authority to regulate livestock grazing comes from the Organic Administration Act of 1897, which named grazing as an early use of lands administered by the Forest Service. The Forest Service managed grazing under its general authorities until 1950, when Congress enacted the Granger-Thye Act,

specifically authorizing the Secretary of Agriculture to issue grazing permits on NFS lands and other lands administered by the U.S Department of Agriculture. The Forest Service permits the occupancy and use of NFS lands by domestic livestock through Term Grazing Permits pursuant to 36 CFR 222.3. The regulations at 36 CFR 222.50(a) require the Agency to charge fees “for all grazing or livestock use of National Forest System lands, or other lands under Forest Service control.”

Congress asked the Government Accountability Office (GAO) to examine what is known about the frequency and extent of unauthorized grazing on federal lands, and its effects, as well as review the Bureau of Land Management’s (BLM) and Forest Service’s efforts to detect, deter, and resolve unauthorized grazing. Excess use is when livestock stray outside of their permitted area and graze in an unauthorized area or a permittee intentionally overstays the permitted grazing period. Unauthorized use is when livestock, owned or controlled by a non-permittee, graze on National Forest System lands. In July 2016, GAO issued a Report to the Committee on Natural Resources, House of Representatives, *Unauthorized Grazing, Actions Needed to Improve Tracking and Deterrence Efforts* (GAO-16-559). The Report recommended that the Forest Service amend its regulations on range management (36 CFR Part 222) to provide an option for nonmonetary settlement when unauthorized or excess grazing is non-willful, in addition to the option of following its existing regulations at 36 CFR 222.50(a) and (h). The GAO report also recommended that the Forest Service record all incidents of unauthorized grazing, including those resolved informally. The Agency will develop direction for implementing the latter recommendation in the Forest Service Manual and Handbook for Rangeland Management at a later date.

Need for Proposed Rule

The GAO found that the frequency and extent of unauthorized grazing on NFS lands is largely unknown because, according to Agency officials, the Agency handles most incidents informally (e.g., with a telephone call) and does not document them. The incidents that were recorded involved formal action taken by the Agency rangeland management program or law enforcement staff., such as issuance of a Notice of Non-Compliance and/or a Bill for Collection.

The proposed rule provides the flexibility to resolve incidents informally without charging unauthorized grazing penalties, while retaining the option for monetary relief for willful excess or unauthorized grazing. Informal resolution involves the permittee or non-permittee removing the livestock following a phone call from or face-to-face conversation with the authorized officer. The incident should be noted in the files as non-willful, and the settlement would be considered nonmonetary as no Bill for Collection would be issued.

Informal resolution, such as a phone call or face-to-face conversation, is an effective way to resolve non-willful unauthorized grazing. Amending the Agency's grazing regulations to provide for the informal resolution and nonmonetary settlement of infractions allows the Agency to achieve the objective of effectively and efficiently resolving such incidents, and it effectively addresses one of GAO's recommendations.

Discussion of Proposed Regulatory Revisions

Section 36 CFR 222.50 of the current grazing regulations describes the general procedures for charging grazing fees for all livestock grazing or livestock use of National Forest System lands. Specifically, section 222.50(h) describes the unauthorized use rate and how it applies to: excess number of livestock grazing by permittees; livestock grazed outside the permitted grazing season; or livestock grazed under an unvalidated permit.

The Forest Service proposes to amend 36 CFR 222 subpart C, to allow the authorized officer to approve nonmonetary settlement for excess or unauthorized grazing use when the use is non-willful. The authorized officer may approve non-monetary settlement for excess or unauthorized grazing use only when certain conditions set forth in the regulation are met.

The proposed language is consistent with the language used by BLM to describe non-willful grazing use. In order to ensure that the proposed language is clear, the Forest Service proposes to add the definition of non-permittee and non-willful to the definitions section found at 36 CFR 222.1(b). In addition, the definitions section is restated to remove numbering, consistent with the Federal Register Document Drafting Handbook (August 2018 Edition, Revision 1.1 dated August 9, 2019; National Archives and Records Administration).

The proposed language removes reference to the fee being adjusted by the same indexes used to adjust the regular fee since the first sentence already describes that the rate is determined by establishing a base value. In addition, the current rule language refers to an unvalidated permit, which describes a new permit's status prior to being validated. Validation occurs by stocking the allotment for the first time with at least ninety percent of the permitted livestock during the first season of grazing use under the new permit. The proposed language removes the reference to an unvalidated permit and replaces it with the four most common situations in which the Forest Service encounters excess or unauthorized use. Those examples of excess and unauthorized use include but are not limited to: excess number of livestock grazed; livestock grazed outside the permitted grazing season; livestock grazed in areas not authorized under a grazing permit and bill for collection; or livestock grazed without a permit.

Regulatory Certifications

Executive Order 12866

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13771

This proposed rule has been reviewed in accordance with E.O. 13771 on reducing regulation and controlling regulatory costs and has been designated as an “other action” for purposes of the E.O.

Civil Rights Impact Analysis

A Civil Rights Impact Analysis (CRIA) was conducted in accordance with USDA Departmental Regulation (DR) 4300-4, to determine if implementation of the proposed rules (and accompanying rangeland management directives) would have disproportionate effects or adverse impacts on employees or program beneficiaries, because of membership in protected groups identified in USDA DR 4300-4 and DR 5600-002, particularly women, ethnic and racial minorities, and people with disabilities. The proposed rules and directives have been analyzed to ensure compliance with USDA’s DR 4300-4, and it is determined that no adverse impacts on protected groups are expected as a result of implementation of the proposed rules or directives.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

The proposed rule would allow an authorized officer to determine that a nonmonetary settlement is appropriate when excess or unauthorized livestock use was non-willful on behalf of the permittee or non-permittee and add clarity to what the agency means by the term non-willful.

Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or environmental impact statement, as well as in a decision memo, rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions. The revisions to §222.50(h) and §222.1(b) address the penalty for non-willful actions taken on National Forest System land and provide a definition for a term used in the revised language. The proposed language removes reference to an unvalidated permit and replaces it with the four most common situations that the Forest Service considers excess or unauthorized use, which is not intended to be an exclusive list. As the regulation is limited to determination of waiver of excess or unauthorized use fees (nonmonetary settlement), no ground disturbing activities are implicated by these revisions. Thus, the Agency has concluded that the proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Flexibility Act Analysis

The Agency has considered the impacts of the proposed rule on small entities consistent with the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Flexibility Enforcement Fairness Act of 1996 (SBREFA), and Executive Orders 13272 (Proper Consideration of Small Entities in Agency Rulemaking). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Additionally, it reduces the administrative burden on livestock operators by allowing for informal nonmonetary resolution of

a situation that would typically require an administrative process to resolve. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Agency has considered the proposed rule under the requirements of E.O. 13132, *Federalism*. The Agency has determined that the proposed rule conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the states; and would 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 Agency has concluded that the proposed rule does not have Federalism implications.

Consultation with Tribal governments

In accordance with Executive Order 13175, the Agency is conducting Tribal consultation for the proposed rule. To ensure tribal perspectives are heard and fully considered during rulemaking, the Agency contacted all federally recognized Indian tribes and Alaska Native corporations in accordance with E.O. 13175, (Consultation and Coordination with Indian Tribal Governments); USDA Departmental Regulation 1350-02 (Tribal Consultation, Coordination and Collaboration); and Forest Service Handbook 1509.13, Chapter 10 (Consultation with Indian Tribes and Alaska Native Corporations). The Agency initiated formal consultation on the rulemaking by contacting the Indian tribes and Alaska Native Corporations by mail.

No Takings Implications

The Agency has analyzed the proposed rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property*

Rights. The Agency has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Agency has reviewed the proposed rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Agency has determined that the proposed rule would not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Forest Service has analyzed the proposed rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. The Agency has not identified any State or local laws or regulations that conflict with this regulation or that would impede full implementation of this rule. Nevertheless, if such conflicts were to be identified, the proposed rule, if implemented, will preempt the State or local laws or regulations that are found to be in conflict. However, in that case of a conflict, (1) no retroactive effect will be given to this final rule; and (2) USDA will not require the use of administrative proceedings before parties could 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), signed into law on March 22, 1995, the Agency has assessed the effects of the proposed rule on state, local, and Tribal governments and the private sector. The proposed rule would 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.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 222

Grazing and Livestock Use on the National Forest System, Mediation of Term Grazing Permit Disputes, Grazing Fees, Management of Wild Free-Roaming Horses and Burros.

For the reasons discussed in the preamble, the Forest Service proposes to amend part 222, subparts A and C, of Title 36 of the Code of Federal Regulations as follows:

PART 222 – RANGE MANAGEMENT

Subpart A – Grazing and Livestock Use on the National Forest System

1. The authority citation for part 222, subpart A, continues to read as follows:

Authority: 92 Stat. 1803, as amended (43 U.S.C. 1901), 85 Stat. 649, as amended (16 U.S.C. 1331-1340); sec. 1, 30 Stat. 35, as amended (18 U.S.C. 551); sec. 32, 50 Stat. 522, as amended (7 U.S.C. 1011).

2. In §222.1(b), revise paragraph (b) to to read as follows:

§ 222.1 Authority and definitions.

* * * * *

(b) *Definitions.*

Allotment means a designated area of land available for livestock grazing.

Allotment management plan means a document that specifies the program of action designated to reach a given set of objectives. It is prepared in consultation with the permittee(s) involved and:

- (i) Prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives as determined for the lands, involved; and
- (ii) Describes the type, location, ownership, and general specifications for the range improvements in place or to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and
- (iii) Contains such other provisions relating to livestock grazing and other objectives as may be prescribed by the Chief, Forest Service, consistent with applicable law.

Base property means land and improvements owned and used by the permittee for a farm or ranch operation and specifically designated by him to qualify for a term grazing permit.

Cancel means action taken to permanently invalidate a term grazing permit in whole or in part.

Grazing permit means any document authorizing livestock to use National Forest System or other lands under Forest Service control for the purpose of livestock production including:

- (i) *Temporary grazing permits* for grazing livestock temporarily and without priority for reissuance.

(ii) *Term permits* for up to 10 years with priority for renewal at the end of the term.

Land subject to commercial livestock grazing means National Forest System lands within established allotments.

Lands within the National Forest in the 16 contiguous western States means lands designated as National Forest within the boundaries of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming (National Grasslands are excluded).

Livestock means animals of any kind kept or raised for use or pleasure.

Livestock use permit means a permit issued for not to exceed one year where the primary use is for other than grazing livestock.

Modify means to revise the terms and conditions of an issued permit.

National Forest System lands means the National Forests, National Grasslands, Land Utilization Projects, and other Federal lands for which the Forest Service has administrative jurisdiction.

Non-permittee means a person who owns or controls livestock and does not have a grazing permit to graze livestock on National Forest System lands.

Non-willful means an action which is inadvertent or accidental, and not due to gross negligence.

On-and-off grazing permits means permits with specific provisions on range only part of which is National Forest System lands or other lands under Forest Service control.

On-the-ground expenditure means payment of direct project costs of implementing an improvement or development, such as survey and design, equipment, labor and material (or contract) costs, and on-the-ground supervision.

Other lands under Forest Service control means non-Federal public and private lands over which the Forest Service has been given control through lease, agreement, waiver, or otherwise.

Permittee means any person who has been issued a grazing permit.

Permitted livestock means livestock authorized by a written permit.

Person means any individual, partnership, corporation, association, organization, or other private entity, but does not include Government Agencies.

Private land grazing permits means permits issued to persons who control grazing lands adjacent to National Forest System lands and who waive exclusive grazing use of these lands to the United States for the full period the permit is to be issued.

Range betterment means rehabilitation, protection and improvement of National Forest System lands to arrest range deterioration and improve forage conditions, fish and wildlife habitat, watershed protection, and livestock production.

Range betterment fund means the fund established by title IV, section 401(b)(1), of the Federal Land Policy and Management Act of 1976. This consists of 50 percent of all monies received by the United States as fees for grazing livestock on the National Forests in the 16 contiguous western States.

Range Improvement means any activity or program designed to improve production of forage and includes facilities or treatments constructed or installed for the purpose of

improving the range resource or the management of livestock and includes the following types:

(i) Non-structural which are practices and treatments undertaken to improve range not involving construction of improvements.

(ii) Structural which are improvements requiring construction or installation undertaken to improve the range or to facilitate management or to control distribution and movement of livestock.

(A) Permanent means range improvements installed or constructed and become a part of the land such as: dams, ponds, pipelines, wells, fences, trails, seeding, etc.

(B) Temporary means short-lived or portable improvements that can be removed such as: troughs, pumps and electric fences, including improvements at authorized places of habitation such as line camps.

Suspend means temporary withholding of a term grazing permit privilege, in whole or in part.

Term period means the period for which term permits are issued, the maximum of which is 10 years.

Transportation livestock means livestock used as pack and saddle stock for travel on the National Forest System.

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Subpart C – Grazing Fees

3. The authority citation for part 222, subpart C, continues 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).

4. In § 222.50, revise paragraph (h) to read as follows:

§ 222.50 General Procedures

* * * * *

(h) The excess and unauthorized grazing use rate will be determined by establishing a base value without giving consideration for those contributions normally made by the permittee under terms of the grazing permit. This rate is charged for unauthorized forage or forage in excess of authorized use and is separate from any penalties that may be assessed for a violation of a prohibition issued under 36 CFR part 261 or from an administrative permit action. This rate will apply, but not be limited to the following circumstances: excess number of livestock grazed; livestock grazed outside the permitted grazing season; livestock grazed in areas not authorized under a grazing permit and a bill for collection; or livestock grazed without a permit. The authorized officer may approve nonmonetary settlement for excess or unauthorized grazing use only when all of the following conditions are satisfied:

- (1) The excess or unauthorized use was non-willful on behalf of the permittee or non-permittee;
- (2) The forage consumed by the excess or unauthorized use is not significant;
- (3) National Forest System lands have not been damaged significantly by the excess or unauthorized use; and
- (4) Nonmonetary settlement is in the interest of the United States.

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Angela Coleman,

Acting Associate Chief,

USDA Forest Service.

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