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Federal Appeals Handbook

GUIDANCE FOR APPEALING GRAZING DECISIONS



Photo by Ashley Wright (University of Arizona)

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Appealing Grazing Decisions in the Federal System

Introduction

This handbook is meant to guide ranchers who are navigating the appeal procedures in either the Forest Service (USFS), housed in the United States Department of Agriculture (USDA), or the Bureau of Land Management (BLM), housed in the Department of the Interior (DOI). It does not substitute for an attorney, but it does provide a comprehensive view of the appeals process, as well as helpful practice tips. The handbook is divided into two sections: 1) a general overview of USFS and BLM administrative appeals with practice tips, and 2) a detailed breakdown of the step-by-step procedures in reference to the applicable regulations. These regulations are available online to the public at <http://ecfr.io/>.

This handbook is meant to be used wherever disputes arise where grazing permits are held or applied for on federal land. The processes discussed here also will apply when a federal agency takes an official action implemented through an official decision, such as a change in permitted livestock numbers.

It does not cover every issue that may arise for a federal grazing permit holder. It does not discuss separate regulations that the BLM applies to grazing in Alaska nor does it discuss the interplay between tribal issues and grazing. It also does not address issues arising from the National Environmental Policy Act (NEPA) and grazing.

The University of Arizona Cooperative Extension has many resources for ranchers, including handbooks that cover other considerations during the grazing permitting process. One such resource is the NEPA for Ranchers Handbook, available at (<https://globalrangelands.org/dlio/37011>). Ranchers with further questions are encouraged to contact their local University of Arizona Cooperative Extension office.



I. Overview of the Appeals Process and Practice Tips

1. The Road to an Appeal

A. What You Need to Know Before the Appeal

The grazing permitting process or any official dispute between the permittee and the agency can be long and complicated. It takes time and work before you get an agency decision that may impact you. Long before this process ever starts, you should get to know the people in your local BLM or USFS office. Additionally, at every step prior to and throughout the process you should keep clear records. There is always an option to resolve disputes informally with your local office, even once an appeal has begun. There is always an option to resolve disputes informally with your local office, although once an appeal has begun, the local manager may not have authority to resolve the dispute. If it is clear that an issue cannot be resolved informally, legal counsel may make it easier to navigate the process.

You should work to settle a dispute informally, as once an appeal has begun, the local manager may not have the authority to resolve the dispute.

(1) Importance of Recording Keeping

A permit holder or applicant should keep a good record of what happens during their application, renewal process and other official actions on their permit. The local office will also keep their own record which will become part of the official record for an appeal, and therefore the record impacts how the appeal is substantively resolved. Generally, prior to an appeal, a person should be able to look at their own records in the agency office. It can become more difficult to access those documents once an appeal has begun. It is important to know what is in your record. If there is a dispute over something in your record, the proper time to fix is prior to an agency decision and initiation of the appeal process. It is always best to keep your records current and accurate.

The strongest appeal starts with a good record.

Keeping thorough records and knowing what is in your file at the agency office helps you navigate the process and allows you to build the strongest appeal possible. Make sure you keep notes of your interactions with your local office and have copies of your applications and other documents related to disputes. Examples may be a range improvement permit or other authorization in dispute besides a grazing permit or application. Keeping track of documents and interactions at every step may help to prevent a negative decision and will help you build your appeal, if needed.

(2) Getting to Know Your Local Office

Getting to know your local office often is the best way to resolve issues. Just speaking with your local officials can prevent or resolve many difficulties. The local office will be involved in most decisions and

subsequent appeals process. It can save both sides a lot of time by trying to work things out together before getting to a formal decision and appeal process. Keeping strong relationships will make it easier in the long run. These relationships can and should start well before the decisions and appeals. It will make it easier to access your documents and to know the right people who can help resolve disputes informally. Remember that these decisions are all made by regular people who also want to avoid formal disputes and the headache of an appeals process. At any time during the process, the parties may come to an agreement on their own, even once a formal appeal has begun. However, depending on the stage of the process, a formal settlement is more difficult to execute.

Get to know your local office and maintain a strong relationship.

(3) Importance of Legal Counsel

If you do appeal, it is important to have legal counsel if possible. Although the USFS and the BLM use different levels of formality, in both situations legal counsel will help you navigate the process. You can help your counsel by keeping good records and knowing your office, but counsel will have a better grasp of the applicable law and how to make an appeal based on law and facts. The USFS will only have an attorney during the appeal process if you do, while the BLM will have a lawyer regardless of if you have one.

(4) Pre-decisional Objections

You are not required to informally object to a proposed decision under either the USFS or BLM system prior to an appeal, but it can be a good way to let the agency know about issues and problems you have with their decision. It gives them time to review their

decision prior to the final decision and formal appeals process. In the BLM, this is called a “protest” and will be discussed below. For example, in the BLM, if a protest is made either in person or in writing within 15 days, the agency has to reconsider their decision in light of the protest. If nothing is resolved, a final decision will be issued at which point the appeals process clock starts.



A. Bureau of Land Management

The BLM has a more formal process for decisions and appeals than the USFS. The BLM process is sometimes initiated with a proposed decision. While not required you may protest the proposed decision. A protest gives you one more time to try to resolve the dispute. Once the proposed decision become final, the appeal process starts.

Protests are more informal and take place with local agency officials in most cases, whereas the formal appeal process is heard either by the Interior Board of Land Appeals or can be initially referred to an administrative law judge (ALJ) if factual disputes must be resolved. An ALJ acts like a judge and can make similar decisions to a judge. If you have a hearing, the BLM will typically be represented by a lawyer (a Solicitor from the Office of the Solicitor). It is your choice whether to be represented by a lawyer.

It is typically wise to request a stay of the decision;² stay requests must be made at the time you submit your appeal. The ALJ will rule on a request for a stay.

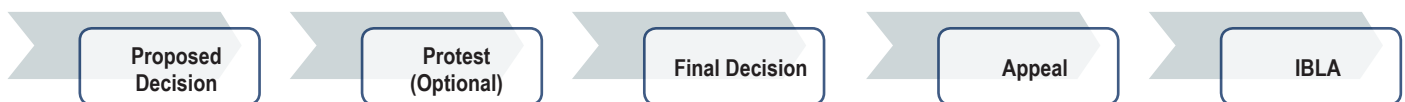
After the ALJ makes a decision, you can appeal that decision to the Interior Board of Land Appeals (IBLA). IBLA proceedings are only a review of the record in most cases. There, all parties file statements explaining their case and can be as long as 30 pages. The IBLA will review the record and statements and make a decision. There may be a lengthy time before the IBLA issues a decision. The IBLA's decision may be reconsidered at the request of any party, but only under special circumstances. The IBLA decision is final for the BLM. However, an IBLA decision can be appealed to a federal district court.

2. Two Agencies: Different Regulations, Different Issues

Your appeal will be either with the BLM or the USFS. The procedures in each case are different, although there are some commonalities.

Be aware that with both agencies, the regulations allow for intervenors to file an appeal or join in the appeal. Intervenors are interested members of the public or people with a stake in the land. Accordingly, your appeal process may not be just between you and the agency; it may have intervenors, other interested applicants, or even amicus curiae.¹ To give you a better understanding of those procedures, this handbook includes information about intervenors.

Figure 1 - BLM Process



¹ Anyone who has an interest in the appeal can file a motion to intervene within 30 days after the person "knew or should have known that the decision had been appealed to the Board." If granted, the intervenor may be allowed to participate as a party or the participation may be limited. However, even if the motion to intervene is denied, under the BLM regulations, a person can file a motion to appear as an "amicus curiae" (friend of the court) at any time, which, the Board may grant if the brief is relevant to the issues under appeal. 43 C.F.R. § 4.406.

² A "stay" stops the decision from being implemented. Also see Part II (1)(A)(3)(d)

Figure 2 - USFS Process



B. United States Forest Service

In contrast to the BLM, the USFS review process does not involve an office of hearings and appeals or an appeals board. Decisions are appealed to the next highest officer within the USFS. The USFS encourages alternative dispute methods like mediation and attempts by the parties to settle. If your decision is appealable, the USFS will notify you and explain what needs to be included in the appeal. During the appeal, you can request mediation and a stay at the same time. You will not receive a stay unless you request one. You will also have an opportunity give an oral presentation. These are meant to be informal, and the USFS will only be represented by an attorney if you are.

After the appeals decision is made, it is eligible for Discretionary Review. The discretionary reviewer, the next highest officer from the Appeal Deciding Officer, decides whether to review the decision. If that person does not review the decision, it becomes final for the USFS. If that person reviews the decision, the new decision is the final decision. Following this step, the decision can be appealed to federal district court.



II. Step-by-Step Appeals Before the BLM and USFS

1. Appeals with the Bureau of Land Management

A. When is a Decision Appealable?

Only final agency decisions are appealable. In the absence of a protest, the proposed decision becomes the final agency decision of the authorized officer.³ Under BLM regulations, the “authorized officer” is any person authorized by the Secretary to administer grazing regulations.⁴ A proposed decision is served on affected applicant, permittee, lessees and any lien holder on record.⁵ Copies will also be sent to the interested public.⁶ That decision will include the reasons for the action and will reference the applicable regulations.⁷

³ 43 C.F.R. § 4160.3 (a)(Current through Nov. 2, 2018).

⁴ 43 C.F.R. § 4100.0-5 Definitions, “Authorized Officer.”

⁵ 43 C.F.R. § 4160.1(a).

⁶ 43 C.F.R. § 4160.1(a). The interested public means an individual, organization or group that has submitted a written request to the BLM to be involved with the decision-making process and followed up that request with a written comment about the management of the allotment or otherwise participated; or has submitted writing comments to the authorized officer regarding the management of livestock grazing on the allotment. 43 C.F.R. § 4100.0-5 Definitions, “Interested Public.”

⁷ 43 C.F.R. § 4160.1(b).

Any applicant, permittee, lessee, or other interested public can protest the proposed decision in writing or in person within 15 days of receipt of the proposed decision.⁸

Where there is a protest, the same authorized officer will review the proposed decision and will reconsider their decision in light of the statement of reasons and any other pertinent information submitted by the protestor.⁹ At the end of the review (for which there is no set deadline) the authorized officer will issue a final decision affirming or revising the proposed decision on the protestor and the interested public.¹⁰ That decision remains in effect unless a stay is granted.¹¹

What is the Appeal Process?

(1) Levels of Appeal

(a) Administrative Law Judge

The first level of appeal is with an administrative law judge (ALJ). Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an ALJ.¹²

(b) Interior Board of Land Appeals

Any person who has been adversely affected by an ALJ's decision to grant or deny a stay may appeal to the Interior Board of Land Appeals (IBLA).¹³ Any party adversely affected by an ALJ decision on the merits (rather than based on procedure) has the right to appeal to the IBLA.¹⁴

(2) Parties to Appeal

a) Role of the Administrative Law Judge

During the appeals process, an ALJ oversees the case. ALJs are able to act as regular judges and have many of the same responsibilities and duties.

The ALJ has a duty to conduct the hearing in an orderly, impartial, and judicial manner. The ALJ can subpoena witnesses, recognize intervenors, administer oaths and affirmations, call and question witnesses, regulate the course and order of the hearing, rule on matters of proof and relevancy of evidence, and take or cause depositions to be taken. The ALJ can issue findings of fact, conclusions of law, and a decision.¹⁵

The ALJ may consolidate multiple appeals into one when they have a common issue or issues.¹⁶ The ALJ can grant or order continuances, as well as set the time and place of hearings.¹⁷

(3) Requirements of an Appeal

An appeal must be filed with the BLM field office that issued the decision and a copy of the appeal must be served on any person named in the decision.¹⁸ The appeal must state clearly and concisely the reasons why you, the appellant, think the BLM grazing decision is wrong.¹⁹ Any issue that is not included is waived, and may not be brought up during the hearing unless permitted or ordered by the ALJ.²⁰ An appeal on its own does not stay the BLM decision; if you desire a stay of the decision during your appeal, you must include a petition for stay with the appeal, as described below.²¹



Any issue not included is waived.

(a) Timing

An appeal must be filed, along with any petition for a stay, within 30 days after receipt of a final grazing decision from the BLM or within 30 days after the proposed decision becomes final.²² Anyone who does not appeal on time may not later challenge the matters adjudicated in the final BLM decision.²³

⁸ 43 C.F.R. § 4160.2.

⁹ 43 C.F.R. § 4160.3(b).

¹⁰ 43 C.F.R. § 4160.3(b).

¹¹ 43 C.F.R. § 4160.3(c).

¹² 43 C.F.R. § 4.470(a).

¹³ 43 C.F.R. § 4.478(a); 43 C.F.R. § 4.410(a). Alternatively, any other party than the BLM may seek judicial review of a final BLM grazing decision if the ALJ denies a petition for stay, either directly or by failing to meet the deadline. 43 C.F.R. § 4.478(b).

¹⁴ 43 C.F.R. § 4.478(e).

¹⁵ 43 C.F.R. § 4.474(a).

¹⁶ 43 C.F.R. § 4.474(d).

¹⁷ 43 C.F.R. § 4.474(b).

¹⁸ 43 C.F.R. § 4.470(a).

¹⁹ 43 C.F.R. § 4.470(b).

²⁰ 43 C.F.R. § 4.470(c).

²¹ 43 C.F.R. § 4.470(e).

²² 43 C.F.R. § 4160.4(a). See Section II-1-(A) of this handbook.

²³ 43 C.F.R. § 4.470(d).

(b) Grace Period for Filing

If a document is not received in time, the delay in filing will be waived if the document is filed less than 10 days after it was required to be filed and it can be determined that the document was sent (or probably sent) to the office before the end of the period in which it was supposed to be filed.²⁴ The officer deciding the appeal will make the determination of when the document was sent or probably sent.²⁵

(c) Service

Proof of service to all named individuals in the decision must be filed in the same office where the appeal was filed within 15 days after the service unless it is filed with the appeal.²⁶

(d) Request for Stay

The request for stay must be filed with the appeal.²⁷ Within 15 days after filing the appeal and petition for stay, the appellant must serve copies on any other named person in the decision and the appropriate Office of the Solicitor.²⁸ The petition must include:

- Relative harm to parties if stay is granted or denied;
- The likelihood of the appellant's success on the merits;
- The likelihood of immediate and irreparable harm if the stay is not granted; and
- Whether the public interest favors granting the stay.²⁹

The appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted.³⁰

A stay is not automatic and should be requested. The request must be made at the same time as the appeal.

When the Office of Hearings and Appeals stays a decision that affects a grazing permit or lease, BLM authorizes grazing in specific ways:

- Decision to Suspend or Cancel Permit – BLM will continue to authorize grazing under the lease or permit that was in effect immediately before the decision was issued subject to any relevant portions of the stay order. This authorization will last until resolution of the administrative appeal. This continued authorization is not subject to protest or appeal.³¹
- Decision to Issue or Deny Permit or Lease to Preference Transferee – BLM will issue the preference applicant³² a permit or lease with the same terms and conditions as the most recent permit or lease applicable to the allotment or portion of the allotment in question, subject to any relevant provisions of the stay order. The temporary permit expires upon resolution of the administrative appeal. Issuance of a temporary permit is not a decision subject to protest or appeal.³³
- Decision to Issue or Deny Permit or Lease to Preference Transferee with Different Terms and Conditions – Where the issued terms and conditions are different from the most recent applicable permit or lease on the allotment or portion of the allotment, BLM will issue the preference applicant a permit or lease that, with respect to the stayed term or condition, is the same as the terms and conditions of the most recent permit or lease subject to any relevant portions of the stay order. The temporary permit expires upon resolution of the administrative appeal. Issuance of a temporary permit is not a decision subject to protect or appeal.³⁴

²⁴ 43 C.F.R. § 4.401(a).

²⁵ 43 C.F.R. § 4.401(a).

²⁶ 43 C.F.R. § 4.475.

²⁷ 43 C.F.R. § 4.471(a).

²⁸ 43 C.F.R. § 4.471(b). The appropriate Office of the Solicitor can be found in 43 C.F.R. § 4.413.

²⁹ 43 C.F.R. § 4.471(c).

³⁰ 43 C.F.R. § 4.471(d).

³¹ 43 C.F.R. § 4160.4(b)(1).

³² Preference applicants have a superior or priority position against others when trying to obtain a grazing permit or lease. The grazing preference (or simply, preference) is the total number of animal unit months (AUMs) on public lands apportioned and attached to base property owned or controlled by the lessee, permittee, or applicant for a permit or a lease. Grazing preference includes both active use and use held in suspension.

³³ 43 C.F.R. § 4160.4(b)(2).

³⁴ 43 C.F.R. § 4160.4(b)(3).

(4) Procedure

(a) Where there is a petition to stay

10 days after receipt of the appeal and the petition to stay, the BLM will transmit any documents received to the Hearings Division, Office of Hearings and Appeals. The BLM can also include its response. Additionally, the BLM must include: the application, permit, lease, or notice of unauthorized use underlying the grazing decision; the proposed BLM grazing decision; any protest filed by the appellant; the final BLM grazing decision; and any other documents the BLM wants the ALJ to consider in deciding the petition for stay. The BLM must serve a copy of any such response to the appellant and any other person named in the decision.³⁵

(b) Intervenors

Any person named in the decision from which an appeal is taken who wants to file a response to the appellant's petition for a stay may file a motion to intervene and a response with the Hearings Division within 10 days of receiving the petition. Within 15 days after filing the motion to intervene and response, the intervenor must serve copies on the appellant, the appropriate Office of the Solicitor, and any other person named in the decision.³⁶

(c) Timeline of the Petition for Stay

Within 45 days after the expiration of the time for filing a notice of the appeal, the ALJ may grant or deny the petition to stay in whole or in part, as well as any motion to intervene filed with a response.³⁷

If the petition for a stay is denied or the ALJ fails to act on the petition, any decisions not already in effect become effective immediately.³⁸

(d) Where there is no petition to stay.

Where a petition for a stay has not been filed, the BLM must promptly send documents from the case file to the ALJ assigned to the appeal. Those documents are: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant; and the final BLM grazing decision.³⁹

(e) Motion to Dismiss or Other Motion

At any appropriate time, a party may file with the Hearings Division a motion to dismiss the appeal or other appropriate motion. The appellant and any other party may file a response to the motion within 30 days after receiving a copy.⁴⁰ Within 15 days of such a motion or response, the moving or responding party must serve a copy on every other party. Service on the BLM must be made with the appropriate Office of the Solicitor.⁴¹

(f) Time and Place of Hearing

At least 30 days in advance, the authorized officer will notify the appellant of the time and place of the hearing. The hearing will be located within or near the district. The regulations also direct the authorized officer to notify any other person who the officer thinks may be directly affected. That person may appear at the hearing or appear by attorney and, if that person shows a proper interest, may be recognized by the ALJ as an intervenor at that time.⁴²

(g) Conduct of Hearing

To the extent possible, the appellant, State Director or BLM representative, and recognized intervenors will agree in the form of a stipulation all material facts and the issue or issues involved. The ALJ will then state any other issues on which the ALJ may want the parties to present evidence. The ALJ will exclude any issues that are not necessary to the resolution of the dispute. The parties may still briefly state for the record the proof that would have been offered, if those issues had been heard. A party cannot discuss any facts or legal issues that were not in their appeal unless the State Director or representative agrees to it. Alternatively, the ALJ may rule that the new facts or issues are essential and allow them to be discussed anyway. The parties are also given an opportunity to submit offers of settlement and proposals of adjustment for the consideration of the ALJ and other parties.⁴³

Usually, the State Director or representative will make the opening statement and explain the facts of the appeal, although the ALJ can order otherwise. Next, the appellant gives an opening statement which must be consistent with the filed appeal. ALJs do not

³⁵ 43 C.F.R. § 4.472(a).

³⁶ 43 C.F.R. § 4.472(b).

³⁷ 43 C.F.R. § 4.472(d).

³⁸ 43 C.F.R. § 4.472(e).

³⁹ 43 C.F.R. § 4.472(c).

⁴⁰ 43 C.F.R. § 4.472(f).

⁴¹ 43 C.F.R. § 4.472(g).

⁴² 43 C.F.R. § 4.473.

⁴³ 43 C.F.R. § 4.476(a).

like when appellants try to raise new or unrelated issues during their opening statement. After that, or if the appellant does not give a presentation, the ALJ may order summary dismissal with prejudice if the case is not sufficient. If that happens, the ALJ must provide a written order that explains the reasoning behind it. A summary dismissal is a decision that may be appealed, like any other final determination from an ALJ.⁴⁴

If the appellant does not give a presentation or the case is not sufficient, the case can be dismissed.

If the appeal is not dismissed and the ALJ decides it is necessary, the State Director or representative, the appellant and any recognized intervenors may present evidence relevant to the issues. Oral testimony is under oath, and witnesses may be subject to cross-examination. The ALJ may also question witnesses. Documentary evidence that is pertinent to an issue may also be given to the ALJ and be made part of the record, or the evidence may be entered by stipulation. There is no need to object to rulings, as every ruling of the ALJ is subject to review on appeal. A party whose evidence is excluded can give a brief written statement describing the evidence to be entered into the record and an opposing party may offer proof in rebuttal. The ALJ can stop examination of a witness if the issue has already been decided with the same parties, or if it is irrelevant to the issues on the appeal.

At the end of the testimony, the parties will have a reasonable opportunity to offer a proposed finding of fact and conclusion of law to the ALJ, or they can agree to waive such findings and conclusions.⁴⁵

(h) Expenses

Reporter's fees for the hearing will be paid by the federal government. The Government will file the

original transcript with the case record. Each party must pay for any copies that they request.⁴⁶

(5) Decision

As promptly as possible, the ALJ will make a decision. It will include the reasons for the decision and become part of the record for further appeal. It will be sent by certified mail to all of the parties.⁴⁷ The ALJ decision must be made with consideration of the full record or the portions cited by the parties and in accordance with reliable, probative and substantial evidence.⁴⁸

No adjudication of grazing preference will be overturned on appeal if it appears to substantially comply with grazing regulations.⁴⁹

B. What Happens After the Appeal?

(1) Interior Board of Land Appeals (IBLA) Procedures

(a) Who May Appeal?

Anyone who is adversely affected by an ALJ decision may appeal to the IBLA.⁵⁰

(b) Appeal from a grant or denial of a stay

If a party appeals to the IBLA for a grant or denial of a petition to stay, the IBLA must issue an expedited briefing schedule and decide the appeal promptly.⁵¹ The stay appeal does not suspend the effectiveness of the ALJ's decision or suspend further proceedings before the ALJ.⁵²

(c) How the Appeal Is Taken

(i) Timing & Service

A person who is going to appeal must file a notice of appeal in the office of the deciding officer, not with the IBLA itself.⁵³ The notice must be transmitted in time to be received by that office no later than 30 days after the date of service of the decision.⁵⁴ There is no extension of time for the appeal.⁵⁵ If not received in time, the case will

⁴⁴ 43 C.F.R. § 4.476(b).

⁴⁵ 43 C.F.R. § 4.476(c).

⁴⁶ 43 C.F.R. § 4.476(d).

⁴⁷ 43 C.F.R. § 4.477.

⁴⁸ 43 C.F.R. § 4.480(a).

⁴⁹ 43 C.F.R. § 4.480(b).

⁵⁰ 43 C.F.R. § 4.410(a)(2).

⁵¹ 43 C.F.R. § 4.478(c).

⁵² 43 C.F.R. § 4.478(d).

⁵³ 43 C.F.R. § 4.411(a)(1).

⁵⁴ 43 C.F.R. § 4.411(a)(2)(i). If the decision is published in the federal register, then 30 days after the date of publication. 43 C.F.R. § 4.411(a)(2)(ii).

⁵⁵ 43 C.F.R. § 4.411(c).

There is no extension of time for the appeal. If not received in time, the case will be closed.

be closed by the officer who decided the case.⁵⁶ If the appellant files within the 10-day grace period but the delay in filing is not waived, the appeal will be dismissed by the IBLA.⁵⁷

The notice of appeal must then be served on each person named in the underlying decision, and on either the attorney from the Office of Solicitor who represented the Bureau or Office at the hearing, or if there was no hearing, the attorney who was served with a copy of the ALJ's decision.⁵⁸ If the Office of Solicitor files a Notice of Appearance or Substitution of Counsel, that attorney should be served instead.⁵⁹

A document other than a notice of appeal may be granted an extension of additional time, if a party requests it no later than a day before the document is due with a showing of good cause upon motion.⁶⁰

Any party may, at any time, file a motion as an *amicus curiae*.⁶¹

(ii) Requirements of Appeal

The notice of appeal must have the serial number or identification number of the case.⁶² It may include a statement of reasons for the appeal.⁶³ After receiving the appeal, the deciding officer will promptly forward to the IBLA the notice of the appeal, any statement of reasons, standing, or other documents included with the notice of appeal, and the complete administrative record compiled during the officer's consideration of the decision being appealed.⁶⁴

(iii) Statement of Reasons

The statement of reasons may be included with the notice of appeal or may be filed no later than 30 days after the notice of appeal is filed.⁶⁵ Unless the IBLA orders otherwise upon motion for good cause, the text of the statement of reasons may not be longer than 30 pages, including exhibits, declarations or any attachments.⁶⁶ Requirements also include 8 1/2 by 11 inch paper printed on one side, 11 point or large type, and double spaced, except for longer quotations and footnotes, which can be single spaced.⁶⁷ Failure to file a statement of

Failure to file a timely statement of reasons will lead to dismissal.

reasons in a timely manner will lead to summary dismissal, unless delay in filing is waived under the grace period.⁶⁸

(iv) Answer

Any person served with a notice of appeal who wants to participate in the appeal must file an answer or appropriate motion with the IBLA within 30 days after service of the statement of reasons. The answer responds directly to the statement of reasons for the appeal.⁶⁹ Unless the IBLA rules otherwise on a showing of good cause, the answer may not exceed 30 pages including exhibits, declarations, or other attachments and the party may not file any other pleadings.⁷⁰

Failure to file an answer or motion will not result in a default judgment. If an answer or motion is filed after the time required, the IBLA may disregard it unless delay in filing is waved under the grace period.⁷¹

⁵⁶ 43 C.F.R. § 4.411(c).

⁵⁷ 43 C.F.R. § 4.411(c).

⁵⁸ 43 C.F.R. § 4.413(a); 43 C.F.R. § 4.413(e).

⁵⁹ 43 C.F.R. § 4.413(f).

⁶⁰ 43 C.F.R. § 4.405.

⁶¹ 43 C.F.R. § 4.406(d).

⁶² 43 C.F.R. § 4.411(b).

⁶³ 43 C.F.R. § 4.411(b).

⁶⁴ 43 C.F.R. § 4.411(d).

⁶⁵ 43 C.F.R. § 4.412(a).

⁶⁶ 43 C.F.R. § 4.412(a).

⁶⁷ 43 C.F.R. § 4.401(d).

⁶⁸ The grace period is 10 days if it can be actually determined that it was sent in time. For more discussion on the grace period see above, section II-1-(A)-(3)-(b).

⁶⁹ 43 C.F.R. § 4.414(a).

⁷⁰ 43 C.F.R. § 4.414(b).

⁷¹ 43 C.F.R. § 4.414(c). The grace period is 10 days if it can be actually determined that it was sent in time. For more discussion on the grace period see above, section II-1-(A)-(3)-(b).

FIGURE 3 - TIMELINE FOR BLM APPEALS



(v) Reply Brief

The BLM regulations discourage reply briefs, but if the appellant wishes to file one they may do so within 15 days of service of the answer.⁷² The reply brief can only address issues that were raised in the answer and cannot exceed 20 pages unless the IBLA orders otherwise on a motion for good cause.⁷³

(d) Motion for a Hearing

Any party can file a motion asking the IBLA to refer the matter to an ALJ for a hearing.⁷⁴ The motion must state what issues of material fact need a hearing, what evidence for those issues must be presented by oral testimony or be subject to cross-examination, what witnesses need to be examined and what documentary evidence requires explanation.⁷⁵ Either in response to the motion or on its own, the IBLA can order a hearing if there are issues of material fact or significant legal issues where the record is insufficient to make a decision without a hearing.⁷⁶

If there is a hearing, the IBLA has to specify what issues the hearing will address and request that the ALJ issue proposed findings of fact on the issue presented at the hearing, a recommended decision with findings of fact and law, or a decision that will be final for the Department unless notice of appeal is filed.⁷⁷ The IBLA can stay the pending decision if it finds good cause, authorize the ALJ to specify additional issues, or authorize parties to agree to additional material issues with the approval of the ALJ.⁷⁸

(e) Finality of Decision

The IBLA's decision is the final agency action and is effective on the date it is issued, unless the decision provides otherwise.⁷⁹ In extraordinary circumstances, the IBLA may reconsider its decision.⁸⁰ A party requesting reconsideration must do so within 60 days of the decision.⁸¹ There is no need to file a motion to reconsider as part of the obligation to exhaust

administrative remedies before filing in federal district court.⁸²

2. Appeals with the Forest Service

A. Optional Procedures

The Forest Service has two optional procedures to avoid the appeals process. The first is mediation, which allows the parties to work through a formal process with a mediator to come to a resolution. The second procedure is alternative resolution, which allows the parties to settle at any time during the appeals process and is more informal.

(1) Mediation

Mediation is a formal tool to resolve disputes. The parties work with a mediator, an unbiased party who is unrelated to either side. The mediator cannot make unilateral decisions like a judge or an arbitrator can. Instead, the mediator's job is to talk with both sides and hear their stories to try and come up with an answer that makes everyone happy. Mediation can be accomplished in one session or over the course of a few sessions. Everything that is said in mediation is confidential and does not affect the appeal process. It can be helpful for parties to hear an outsider's perspective. Generally, parties must pay for the mediation program in order to participate, but any dispute with an agency of the USDA is paid for through the Farm Services Agency with no cost to the appellant.

(a) Who May Use Mediation?

Only the holder of the permit in a state where there is a mediation program certified by the U.S. Department of Agriculture (USDA) may ask for mediation.⁸³ In Arizona, that program is Arizona Ag Mediation Institute, Inc. in Gilbert.⁸⁴ The permit holder must be involved in a dispute to suspend or cancel the permit.⁸⁵

⁷² 43 C.F.R. § 4.412(d).

⁷³ 43 C.F.R. § 4.412(d)(1)-(2).

⁷⁴ 43 C.F.R. § 4.415(a).

⁷⁵ 43 C.F.R. § 4.415(a).

⁷⁶ 43 C.F.R. § 4.415(b).

⁷⁷ 43 C.F.R. § 4.415(c).

⁷⁸ 43 C.F.R. § 4.415(d).

⁷⁹ 43 C.F.R. § 4.403(a).

⁸⁰ 43 C.F.R. § 4.403(b).

⁸¹ 43 C.F.R. § 4.403(b)(1).

⁸² 43 C.F.R. § 4.403(b)(5).

⁸³ 36 C.F.R. § 222.20 (Current through Nov. 2, 2018); a list of approved programs is available online at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2018/agricultural_mediation_program_jan2018.pdf

⁸⁴ This information is current as of January 2018.

⁸⁵ Such a dispute must be authorized under 36 C.F.R. § 222.4(a)(2)(i), (ii), (iv) and (v) and (a)(3)-(6).

(b) How Does Someone Ask for Mediation?

A request for mediation must be included with an appeal.⁸⁶ The mediation request will stay an appeal for 45 days in order to complete the mediation. That means that all of the deadlines related to the appeal are on hold for 45 days. In cases where mediation is not reached, but it seems reasonable that it might be, the appeal can be stayed an additional 15 days.⁸⁷

A request for mediation must be included with the appeal.

(c) Who Else is Involved in the Process? Is it Confidential?

Aside from the permit holder, mediation involves:

- a mediator;
- the Responsible Official from the USFS who made the decision or that person's designee;
- the permit holder's creditors, if applicable; and
- legal counsel.

The USFR will only have legal representation if the permit holder also has legal representation during the mediation.⁸⁸ Everything that happens in mediation is confidential and will not be included in the record on appeal.⁸⁹ USFS employees may not discuss mediation with the Appeal Deciding Officer except to request an extension of time or to communicate the results of the mediation.⁹⁰

Aside from the cost of the mediation itself, the Forest Service will only pay for costs incurred by its own employees during mediation. Other costs will be paid by the parties themselves.⁹¹

(2) Alternative Resolution

At any time before the appeal decision, the Responsible Official and the holder of the permit may

discuss the issues and look for opportunities to come to a solution.⁹² The Responsible Official can withdraw a decision in whole or part to resolve any of the issues in the dispute. If that happens, the Official will notify the parties and the Appeal Deciding Officer. If withdrawing the decision clears up all of the issues on appeal, the Appeal Deciding Officer will dismiss the appeal.⁹³

Alternative resolution is a useful option for permit holders. Unlike mediation, alternative resolution does not require spending any money or contacting a

At any time before the appeal decision the parties can come together to try and find a solution.

specific program. More importantly, if permit holders want to keep grazing in the same areas, those permit holders will likely be interacting with the same officers again. By using alternative resolution rather than working through an Appeal Deciding Officer, everyone can come to an agreement. A permit holder should keep this in mind throughout the process: it is never too late to reach out to the deciding official and try to come to an agreement informally.

B. Which Decisions May Be Appealed?

Generally, decisions which modify, suspend, cancel, or deny reauthorization of livestock or a term grazing permit may be appealed.⁹⁴ Certain conditions will prevent a decision from being appealable. For example, annual operating instructions do not constitute a permit modification and cannot be appealed.⁹⁵ If a permit is cancelled because a permit holder gave waiver to the United States, that cancellation cannot be appealed.⁹⁶ Additionally, if a holder wants to appeal a denial of reauthorization of livestock grazing under a term permit, the holder must file an application for a new permit before the existing permit expires.⁹⁷

⁸⁶ 36 C.F.R. § 222.20.

⁸⁷ 36 C.F.R. § 222.22.

⁸⁸ 36 C.F.R. § 222.21.

⁸⁹ 36 C.F.R. § 222.23; 36 C.F.R. § 222.24.

⁹⁰ 36 C.F.R. § 222.26.

⁹¹ 36 C.F.R. § 222.25; 36 C.F.R. § 214.14(2)(i).

⁹² 36 C.F.R. § 214.15(a).

⁹³ 36 C.F.R. § 214.15(b).

⁹⁴ 36 C.F.R. § 214.4(a); the term grazing permit must have been issued under 36 C.F.R. § Part 222 Subpart A.

⁹⁵ 36 C.F.R. § 214.4(a)(1).

⁹⁶ 36 C.F.R. § 214.4(a)(2).

⁹⁷ 36 C.F.R. § 214.4(a)(3). Additionally, there are other types of decisions that may not be appealed found in 36 C.F.R. § 214.5.

The Responsible Official for the decision is required to give prompt written notice of decisions subject to appeal to the affected holder or solicited applicants and to any holder of a similar written authorization⁹⁸ who has made a written request to be notified of a specific decision.⁹⁹ Anyone who is interested in knowing whether a decision is appealable should provide a written request so that they will be notified.

If the decision is appealable, the notice from the Responsible Official must contain the contents of an appeal, the name and mailing address of the Appeal Deciding Officer and the filing deadline. The notice will also contain a statement of the Responsible Official's willingness to meet to discuss any issues that are related to decision, and where applicable, let the permit holders know about the opportunity for mediation, which is discussed in more detail above.¹⁰⁰

If the decision is not appealable, then the Responsible Official will include a statement in the written decision indicating that further administrative review of the decision is not available.¹⁰¹

C. What is the Appeal Process?

(1) Levels of Appeal

There are two levels of appeal with the USFS. One is an "appeal" and the other is "discretionary review." Discretionary Review follows appeal and is not mandatory, so the USFS decides whether it should be conducted. To decide, the regulations direct the reviewing officer to look at the degree of controversy surrounding the decision, the potential for litigation, and the extent to which the decision establishes new precedent or policy.¹⁰²

(a) Appeal

An appeal is available for 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. There is no appeal for decisions made by the Chief, although discretionary review may be available, as described later.¹⁰³ The name and address of the Appeal Deciding Officer will be specified in written notice provided by the Responsible Official.¹⁰⁴

(b) Discretionary Appeal

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 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.¹⁰⁵

(2) Parties to Appeal

The parties in an appeal may include the holder of the permit or solicited applicants who are directly affected by the appealable decision, intervenors, and the Responsible Official.¹⁰⁶

(a) Appeal Deciding Officer

The Appeal Deciding Officer is 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 to decide appeals.¹⁰⁷

(3) Requirements of an Appeal

All appeals must include:

- Appellant's name, mailing address, daytime telephone number, and email address;

⁹⁸ A written authorization is defined as "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." 36 C.F.R. § 214.2, defining "Written Authorization."

⁹⁹ 36 C.F.R. § 214.6(a).

¹⁰⁰ 36 C.F.R. § 214.6(b).

¹⁰¹ 36 C.F.R. § 214.6(c).

¹⁰² 36 C.F.R. § 214.19(b).

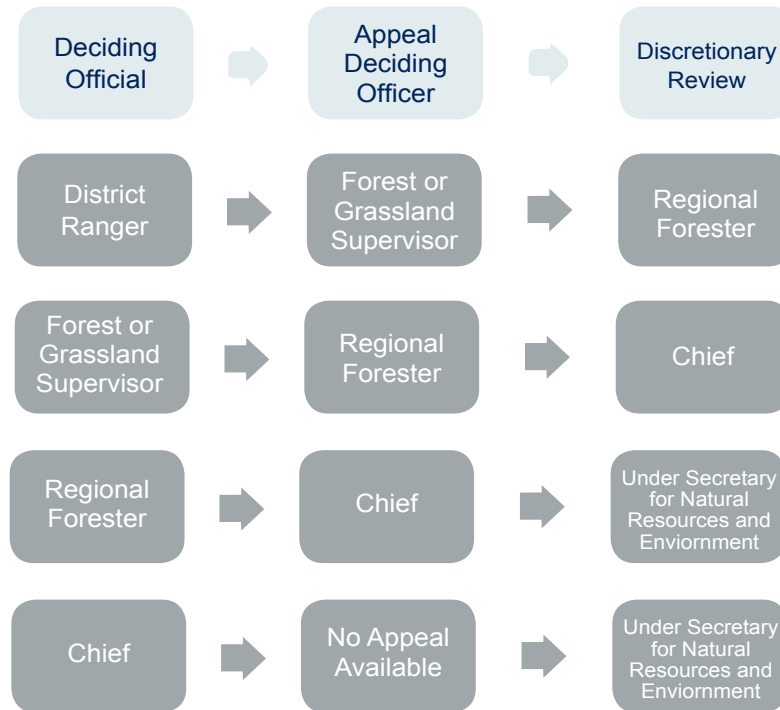
¹⁰³ 36 C.F.R. § 214.7(a).

¹⁰⁴ 36 C.F.R. § 214.6(b).

¹⁰⁵ 36 C.F.R. § 214.7(b).

¹⁰⁷ 36 C.F.R. § 214.2.

FIGURE 4 - USFS: WHO HEARS AN APPEAL AND CONDUCTS DISCRETIONARY REVIEW



- A brief description of the decision, including the name and title of the Responsible Official and the date of the decision;
- 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;
- A statement of how the appellant is adversely affected by the decision;
- A statement of relevant facts underlying the decision;
- A discussion of issues raised by the decision, including identification of any laws, regulations, or policies that were allegedly violated in reaching the decision being appealed;
- 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;
- A statement of the relief sought;
- Any documents and other information upon which the appellant relies; and
- The appellant's signature and the date.¹⁰⁸

Additionally, when requesting the following, you must include in the appeal:

- A request for oral presentation;
- A request for stay;
- A request for mediation.¹⁰⁹

(a) Timing

These documents must be filed within 45 days of the date of decision. They may be filed in person or by courier, mail, private delivery service, fax, or e-mail. Appellants must ensure timely filing of appeal documents.¹¹⁰

▶ Failure to file on time can result in an appeal being dismissed. Extra care should be taken to file on time.

The Appeal Deciding Officer will determine whether the appeal is on time by looking at the: date of the postmark for an appeal received before the close of the fifth business day after the appeal filing date; electronic date and time for email or fax; shipping date for private carrier for appeal received before the

¹⁰⁸ 36 C.F.R. § 214.8(a).

¹⁰⁹ 36 C.F.R. § 214.8(b).

¹¹⁰ 36 C.F.R. § 214.9.

close of the fifth business day after the appeal filing date; or the official agency date stamp showing receipt of hand delivery.¹¹¹

The time periods for the appeal start on the first day following the event or action that triggers the time period. The time periods include Saturdays, Sundays and federal holidays, but if the time period ends on one of those days, then the time period is extended to the end of the next federal business day.¹¹²

(b) Extensions of Time

Extension requests must be written, explain the need for an extension, and given to the Appeal Deciding Officer.¹¹³ Not all periods may be extended. The time periods for filing an appeal, deciding whether to conduct discretionary review of an appeal decision or a Chief's decision, and issuing a discretionary review decision may not be extended.¹¹⁴ Other periods may be extended if there is good cause. An extension will automatically be granted where both parties show that they are working in good faith to resolve the dispute and the extension will help facilitate that negotiation.¹¹⁵

The Appeal Deciding Officer has 10 days to issue a decision granting or denying the request. The Appeal Deciding Officer must explain the basis of the grant or denial.¹¹⁶ Extension requests to add more than 60 days to the appeal period will generally not be granted.¹¹⁷

(c) Request for Stay

An appealable decision is implemented unless an authorized stay is granted or an automatic stay goes into effect.¹¹⁸ A stay remains in effect until a final administrative decision is issued in the appeal, unless the stay is modified or lifted. Stays based on mediation remain in effect for the duration of the mediation period.¹¹⁹

The Appeal Deciding Officer or 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 it is unduly burdensome or unfair to maintain the stay.¹²⁰

(i) Authorized Stay

To obtain an authorized stay, an appellant must include a request for a stay in the appeal and a statement explaining the need for the stay. The statement must include:

- A description of the adverse impact on the appellant if a stay is not granted;
- A description of the adverse impact on National Forest System lands and resources if a stay is not granted; or
- An explanation as to how a meaningful decision on the merits of the appeal could not be achieved if a stay is not granted.¹²¹

The Responsible Official may support, oppose, or take no position in the responsive statement regarding the stay request. Intervenors may do the same in their intervention request.¹²²

The Appeal Deciding Officer must issue a decision granting or denying a stay request within 10 days after a responsive statement or intervention is filed, whichever is later. The decision will be in writing and explain the basis for granting or denying the stay.¹²³

(ii) Automatic Stay

Certain decisions are automatically stayed once an appeal is filed,¹²⁴ including:

- Decisions to issue a written authorization pursuant to a prospectus;
- Decisions to recalculate revenue-based land use fees for a special use authorization pursuant to an audit issued after June 5, 2013; and
- Decisions to cancel or suspend a term grazing permit subject to mediation and for which

¹¹¹ 36 C.F.R. § 214.14(a).

¹¹² 36 C.F.R. § 214.14(b).

¹¹³ 36 C.F.R. § 214.14(c)(1).

¹¹⁴ 36 C.F.R. § 214.14(c)(2).

¹¹⁵ 36 C.F.R. § 214.14(c)(3).

¹¹⁶ 36 C.F.R. § 214.14(c)(4).

¹¹⁷ 36 C.F.R. § 214.14(c)(5).

¹¹⁸ 36 C.F.R. § 214.13(a).

¹¹⁹ 36 C.F.R. § 214.13(d).

¹²⁰ 36 C.F.R. § 214.13(e).

¹²¹ 36 C.F.R. § 214.13(b)(1).

¹²² 36 C.F.R. § 214.13(b)(2).

¹²³ 36 C.F.R. § 214.13(b)(3).

¹²⁴ 36 C.F.R. § 214.13(c).

mediation is properly requested at the time of the appeal.¹²⁵

(4) Intervenor

In order to intervene in an appeal, a party must be a holder or solicited applicant who claims an interest relating to the subject of the decision where the appeal might impair that interest. The intervenor has to file a written request to intervene within 15 days after an appeal has been filed.¹²⁶

(a) Request to Intervene

A request to intervene must include:

- Requester's name, mailing address, day time telephone number, and email address;
- A brief description of the decision being appealed, including the name and title of the Responsible Official and the date of the decision;
- 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;
- A description of the requestor's interest in the appeal and how disposition of the appeal may impair that interest;
- A discussion of the factual and legal allegations in the appeal with which the requester agrees or disagrees;
- A description of additional facts and issues that are not raised in the appeal that the requester believes are relevant and should be considered;
- A description of the relief sought, particularly as it differs from the relief sought by the appellant;
- Where applicable, a response to the appellant's request for stay of the decision being appealed;
- Where applicable, a response to the appellant's request for mediation; and
- Requester's signature and the date.¹²⁷

(b) Response to Request to Intervene

The Appellant and Responsible Official have 5 days

from receipt of request to intervene to file a written response with the Appeal Deciding Officer.¹²⁸

(c) Intervention Decision

The Appeal Deciding Officer shall have 5 days after the date the response is due to issue a decision granting or denying the request. The Appeal Deciding Officer's decision will be in writing and will briefly explain the basis for granting or denying the request to intervene. The Appeal Deciding Officer must deny a request to intervene or withdraw a decision granting intervenor status where the appeal is dismissed.¹²⁹

(5) Response and Reply

The Responsible Official will prepare a response that addresses the factual and legal allegations in the appeal. The response and any supporting documentation must be filed with the Appeal Deciding Officer within 20 days of receipt of the appeal or conclusion of an unsuccessful mediation.¹³⁰

Appellant and intervenors have the option to submit a reply with the Appeal Deciding Officer to address the response. It must be filed within 10 days of receipt of the response.¹³¹

(6) Dismissal of an Appeal

An appeal will be dismissed without review if any of the below criteria apply:

- The appeal is not filed within the required time period.
- The person or entity that files the appeal is not a holder or a solicited applicant of a written authorization that is the subject of the appealable decision.
- The decision is not appealable under applicable regulations.
- The appeal does not meet the content requirements.
- The appellant withdraws the appeal.
- The Responsible Official withdraws the written decision that was appealed.

¹²⁵ See Section II-2-A-(1) of this handbook.

¹²⁶ 36 C.F.R. § 214.11(a).

¹²⁷ 36 C.F.R. § 214.11(b).

¹²⁸ 36 C.F.R. § 214.11(c).

¹²⁹ 36 C.F.R. § 214.11(d).

¹³⁰ 36 C.F.R. § 214.12(a).

¹³¹ 36 C.F.R. § 214.13(c).

- An informal resolution is reached through alternative resolution or a mediated agreement of a term grazing dispute is achieved.
- The requested relief cannot be granted under applicable facts laws, regulations or policies.¹³²

Where an appeal is dismissed, the Appeal Deciding Officer must give written notice of the dismissal and give the reasons why it is dismissed.¹³³

(7) Procedure

Throughout the appeal, the Appeal Deciding Officer may issue procedural orders as necessary to make the appeal more orderly, expeditious, or fair.¹³⁴ The Appeal Deciding Officer may consolidate multiple appeals of the same or similar decisions that have common issues of fact and law. In those cases, the Responsible Official is only required to prepare one responsive statement.¹³⁵

The Appeal Deciding Officer may ask parties for additional information to clarify the issues. If necessary, the Appeal Deciding Officer may extend the time periods in order to allow for submission of additional information and give the other parties a chance to review and comment on that information.¹³⁶

(a) Service

Parties must send copies of all documents filed in the appeal to all other parties. The appellant must send a copy of the appeal to the Responsible Official at the same time that the original is filed with the Appeal Deciding Officer. Every filing has to be accompanied by a signed and dated certificate attesting that all of the other parties have been served.

A prospective intervenor must also send a copy of the 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 but may

contact the Appeal Deciding Officer for assistance regarding their names and addresses. No filings will be considered unless they are accompanied by a certificate of service.¹³⁷

(b) Expenses

Each party will bear their own expenses, including costs associated with preparing the appeal, participating in oral presentation, obtaining information regarding the appeal, and retaining professional consultants or counsel.¹³⁸

The decisions or orders issued by the Appeal Deciding Officer and the Discretionary Reviewing Officer will be in writing and will be sent to all of the parties to the appeal.¹³⁹

(8) Oral Presentation

Oral presentation is an opportunity for parties to discuss their concerns with the Appeal Deciding Officer.¹⁴⁰ The oral presentation is informal and can only clarify or elaborate on information that was already given to the Appeal Deciding Officer. New information may only be presented if it could not have been raised earlier in the appeal and it would be unfair and prejudicial to exclude it.¹⁴¹

A request for oral presentation included in an appeal will be granted unless the appeal has been dismissed.¹⁴² Oral presentations may take place during appeal, but not during discretionary review.¹⁴³

The oral presentation is conducted within 10 days after the reply to the responsive statement is due. The Appeal Deciding Officer will tell the parties of the date, time, and location of the oral presentation and what procedures will be followed.¹⁴⁴

All parties to an appeal are eligible to participate in the oral presentation. The Appeal Deciding Officer may let non-parties observe, but they are not eligible to participate.¹⁴⁵

¹³² 36 C.F.R. § 214.10(a).

¹³³ 36 C.F.R. § 214.10(b).

¹³⁴ 36 C.F.R. § 214.14(d).

¹³⁵ 36 C.F.R. § 214.14(e).

¹³⁶ 36 C.F.R. § 214.14(f).

¹³⁷ 36 C.F.R. § 214.14(g)(1).

¹³⁸ 36 C.F.R. § 214.14(i).

¹³⁹ 36 C.F.R. § 214.14(g)(2).

¹⁴⁰ 36 C.F.R. § 214.16(a).

¹⁴¹ 36 C.F.R. § 214.16(c). Additionally, these oral presentations are not subject to the formal rules of procedure. 36 C.F.R. § 214.16(b).

¹⁴² 36 C.F.R. § 214.16(d).

¹⁴³ 36 C.F.R. § 214.16(e).

¹⁴⁴ 36 C.F.R. § 214.16(f).

¹⁴⁵ 36 C.F.R. § 214.16(g).

A summary of the oral presentation may be included in the appeal record only if a party submits it to the Appeal Deciding Officer at the end of the oral presentation. A transcript may be included if it is prepared by a certified court reporter and filed with the Appeal Deciding Officer within 10 days of the date of the oral presentation and paid for by the party who requested it.¹⁴⁶

(9) Record on Appeal

The Appeal Deciding Officer will maintain the appeal record in one location.¹⁴⁷ The record will contain 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.¹⁴⁸

The Appeal Deciding Officer will close the record so that nothing more may be added on the day after the reply to the responsive statement is due if no oral presentation is conducted; the day after the oral presentation if no transcript of the oral presentation is being prepared; or the day after the date a transcript is due if one is being prepared. The Appeal Deciding Officer will notify all parties of closing of the record.¹⁴⁹

The appeal record is open for public inspection.¹⁵⁰

(10) Decision

Appeal decisions shall be issued 30 days after the appeal record is closed.¹⁵¹ It is based only on the appeal record and oral presentation, if one is conducted.¹⁵² The decision must conform with all applicable laws, regulations, policies, and procedures.¹⁵³ The appeal decision can affirm or reverse the underlying decision in whole or in part. It must specify the basis and may include instructions for further action by the Responsible Official.¹⁵⁴ Except where a decision to

conduct discretionary review has been made and a discretionary review decision has been issued, the appeal constitutes the USDA's final administrative decision.¹⁵⁵

Once a final appeal decision or discretionary review decision has been issued, its availability will be posted on the website of the national forest, national grassland, or region that issued the appealable decision, or on the website of the Washington Office for Chief's decisions.¹⁵⁶

D. What Happens After Appeal?

(1) Discretionary Review

One day after issuance of an appeal decision, the Appeal Deciding Officer will send a copy of the appeal decision, appeal, and appealable decision to the Discretionary Reviewing Officer to determine whether discretionary review of the appeal should be conducted.¹⁵⁷ One day after issuance of a Chief's decision, the Chief shall send the decision to the Discretionary Reviewing Officer to determine whether discretionary review should be conducted.¹⁵⁸

To decide whether discretionary review should be conducted, the Discretionary Reviewing Officer should look at the degree of controversy surrounding the decision, the potential for litigation, and the extent to which the decision establishes new precedent or policy.¹⁵⁹

The Discretionary Reviewing Officer has 30 days to determine whether to conduct the review and may request the appeal record or the record related to the Chief's decision to assist with that determination.¹⁶⁰ The Discretionary Reviewing Officer will notify the parties and the Appeal Deciding Officer in writing of a decision to conduct discretionary review. The Discretionary Reviewing officer may, but does not need to, notify parties of a decision not to review. If there is no action within 30 days, then the appeal decision or the Chief's decision becomes USDA's final administrative decision.¹⁶¹

¹⁴⁶ 36 C.F.R. § 214.16(h).

¹⁴⁷ 36 C.F.R. § 214.17(a).

¹⁴⁸ 36 C.F.R. § 214.17(b).

¹⁴⁹ 36 C.F.R. § 214.17(c).

¹⁵⁰ 36 C.F.R. § 214.17(d).

¹⁵¹ 36 C.F.R. § 214.18(a).

¹⁵² 36 C.F.R. § 214.18(b).

¹⁵³ 36 C.F.R. § 214.18(c).

¹⁵⁴ 36 C.F.R. § 214.18(d).

¹⁵⁵ 36 C.F.R. § 214.18(e).

¹⁵⁶ 36 C.F.R. § 214.14(h).

¹⁵⁷ 36 C.F.R. § 214.19(a)(1).

¹⁵⁸ 36 C.F.R. § 214.19(a)(2).

¹⁵⁹ 36 C.F.R. § 214.19(b).

¹⁶⁰ 36 C.F.R. § 214.19(c).

¹⁶¹ 36 C.F.R. § 214.19(d).

Discretionary Review, where granted, is limited to the record and no additional information will be considered. The Discretionary Reviewing Officer has 30 days to issue a discretionary review decision after notifying the parties that the decision is to be reviewed. The Discretionary Reviewing Officer's decision is the USDA's final administrative decision. If discretionary review is granted but no decision is made after 30 days, the appeal decision or Chief's decision becomes the USDA's final administrative decision.¹⁶²

Before challenging a decision in court on the basis of the Administrative Procedure Act (APA), these administrative remedies must be exhausted.¹⁶³

3. Appeals Under the Administrative Procedure Act

After a final decision is made by an agency, the decision can be appealed under the Administrative Procedure Act¹⁶⁴ to a court. This can be a lengthy and expensive process with a lot of formality. An appellant should, at this point, consult a lawyer.



III. References

Practice Tips

General:

- You can always work to settle a dispute informally, even if the appeal has already started.
- The strongest appeal starts with a good record.
- Get to know your local office and keep a strong relationship.

BLM Specific:

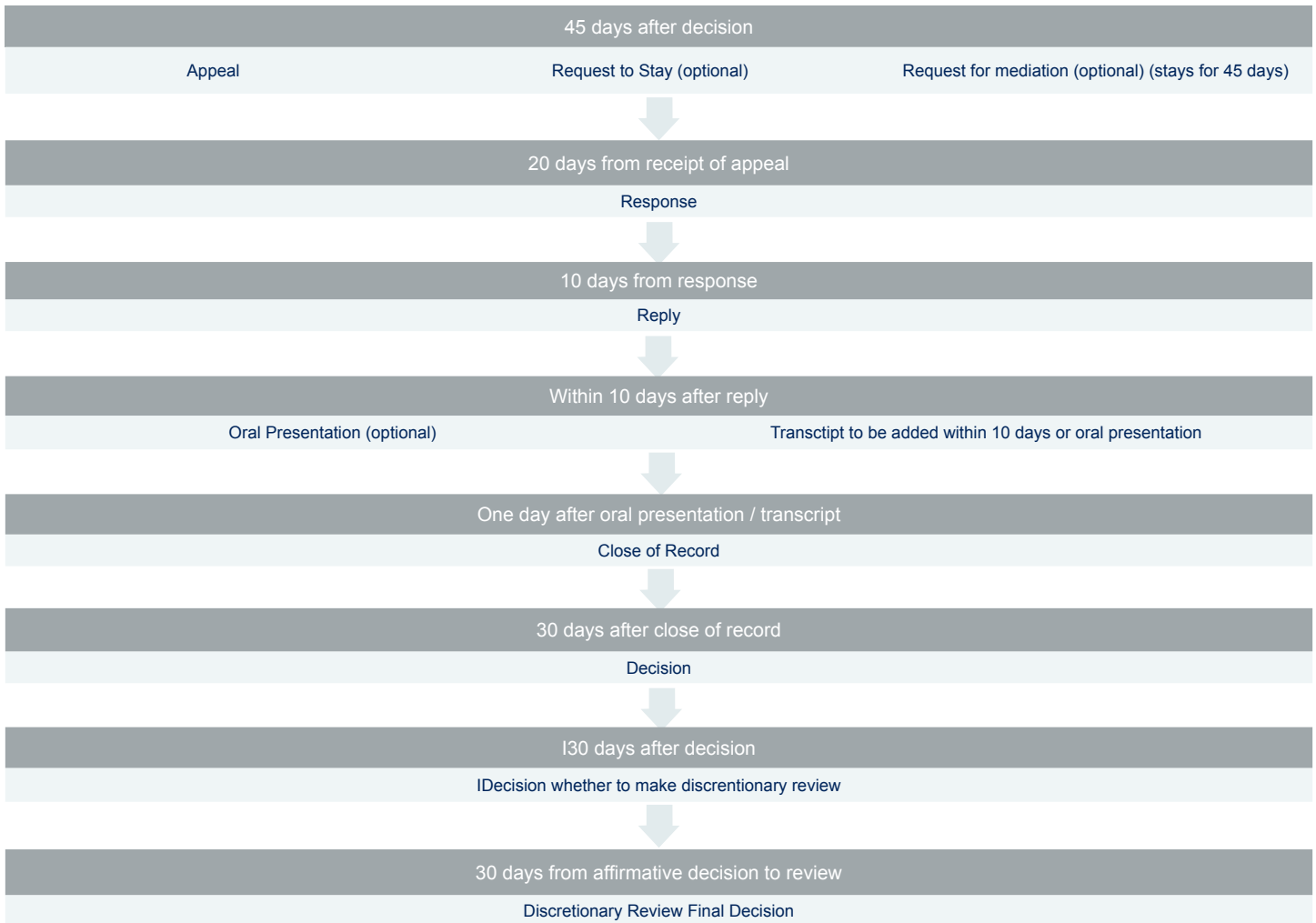
- Any issue not included in the appeal is waived.
- A stay is not automatic and should be requested. The request must be made at the same time as the appeal.
- If the appellant does not give a presentation at the hearing or if the case is not sufficient, the case can be dismissed.
- Before the IBLA, there is no extension of time for the appeal. If the appeal is not received in time, the case will be closed.
- Before the IBLA, failure to file a statement of reasons in time will lead to dismissal.

¹⁶² 36 C.F.R. § 214.19(e).

¹⁶³ 36 C.F.R. § 214.20.

¹⁶⁴ 5 U.S.C. § 500 et seq.

FIGURE 5 - TIMELINE FOR USFS APPEALS



USFS Specific:

- A request for mediation should be included with the appeal.
- At any time before the decision the parties can come together to try and find a solution.
- It is important that there has been an attempt to resolve issues independently. You should take care to document any attempts at resolution for the appeal.
- Failure to file on time can result in an appeal being dismissed. Extra care should be taken to file on time.
- Another way mediation is beneficial is that the decision is automatically stayed until the end of mediation.

Terms and Definitions

Administrative Law Judge (ALJ) – Under the BLM process, the first level of review is with an ALJ. The ALJ acts like a judge would in a courtroom.

Administrative Procedure Act (APA) – The APA is the legal framework for taking a case to US District Court. In order to do so, applicants must exhaust all of their administrative remedies.

Alternative Resolution – Although in either process you can work with the agency to come to a resolution even once the appeal has started, the USFS has specific regulations encouraging what they call “alternative resolution” – the informal process of working with USFS to resolve a dispute.

Appeal Deciding Officer – In the USFS, the Appeal Deciding Officer is the Forest Service Line Officer

who is one organizational level above the responsible official who made the decision about the permit.

Appellant – The appellant is the person who is appealing a decision.

Appellee – The appellee is the person responding to the appeal, in this case the agency.

Amicus Curiae – Briefs from “friends of the court” that help clarify the issues for the judge. These briefs are often filed by organizations and may not be directly involved in the dispute.

Authorized Officer – In the BLM, the authorized officer is anyone who is granted authority by the Secretary to carry out grazing regulations.

Bureau of Land Management (BLM) – The BLM is one of two agencies that has programs to graze on public lands. It is housed within the Department of the Interior. Appeals with the BLM tend to be more formal and the regulations are very specific.

Discretionary Review – The process in the USFS for review after the appeal. Discretionary review is conducted by the Forest Service Line Officer who is the next organizational level above the Appeal Deciding Officer.

Hearing – In BLM appeals, the hearing is a presentation in front of an ALJ. If no presentation is made by the appellant, the case can be dismissed.

Interested Public – Under the BLM process, the interested public means an individual, organization or group that has submitted a written request to the BLM to be involved with the decision-making process and followed up that request with a written comment about the management of the allotment or otherwise participated; or has submitted written comments to the authorized officer regarding the management of livestock grazing on the allotment.

Interior Board of Land Appeals (IBLA) – For the BLM, the second level of appeal after the ALJ is to the IBLA. The IBLA has some processes that are different than the first appeal and those should be followed closely.

Intervenor – Under both systems, an interested member of the public or someone whose interest has been adversely affected may join the appeal the appeal as an intervenor, another party to the appeal.

Mediation – The USFS allows parties to go through a mediation process. There, a mediator will listen to both sides and try and help them come to a decision as an unbiased third party. During mediation, the decision is stayed. Mediation should be requested and that must be done at the time of the appeal.

Oral Presentation – With the USFS, a presentation during the appeal of the reasons for the appeal.

Responsible Official – In the USFS, the official who made the decision on the permit or lease.

Stay - A stay stops a decision from being implemented, leaving in place whatever happened before the decision. A stay should always be requested.

United States Department of Agriculture (USDA) – The Department that houses the USFS.

United States Forest Service (USFS) – One of the two public agencies which allow for grazing on public land. The USFS is housed within the USDA. Appeals with the USFS are less formal, and the USFS encourages alternative resolution and mediation.

Written Authorization – This will usually mean the term grazing permit, but can also cover plan of operations, special use authorization, mineral material contract or permit or other type of writing issued by the Forest Service. This can also include a lease or permit for minerals from the U.S. Department of the Interior that authorizes use or occupancy of Forest Service System lands.

Credits

Photos courtesy of University of Arizona College of Agriculture & Life Sciences and Bureau of Land Management.

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