

# Appendix D – Alternative B Appeal Procedures

## Optional Appeal Procedures Available During the Planning Rule Transition Period

August 2009

### Introduction

This document sets out the optional administrative appeal and review procedures allowed by Title 36, Code of Federal Regulations (CFR), Part 219–Planning, Subpart A–National Forest System Land Management Planning (36 CFR part 219, subpart A or 2000 planning rule). Under 36 CFR 219.35(b) of the 2000 planning rule and a 2001 interpretive rule the responsible official may elect to use these procedures for land management plans and amendments approved during the planning rule transition period. See 65 FR (Federal Register) 67514 (November 9, 2000) and 66 FR 1864 (January 10, 2001). The appeal and review regulations at 36 CFR part 217 were effectively repealed by the 2000 Planning Rule and removed from the Code of Federal Regulations in 2001. Because it is inappropriate to refer to these procedures as if they were still in the Code of Federal Regulations, these “Optional Appeal Procedures Available during the Planning Rule Transition Period” are set out here with references to 36 CFR part 217 removed and wording and numbering changes made so the procedures do not read as a regulation. None of these changes are substantive changes to the appeal process.

The source of the “Optional Appeal Procedures Available during the Planning Rule Transition Period” is the Federal Register (FR), at 54 FR 3357 (January 23, 1989), as amended at 54 FR 13807 (April 5, 1989); 54 FR 34509 (August 21, 1989); 55 FR 7895 (March 6, 1990); 56 FR 4918 (February 6, 1991); 56 FR 46550 (September 13, 1991); and 58 FR 58915 (November 4, 1993).

## Optional Appeal Procedures Available During the Planning Rule Transition Period

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SOURCE: 54 FR 3357, Jan. 23, 1989, unless otherwise noted.

Appeal of land management plan development, plan revision, or plan amendment under transition procedures of Title 36 CFR 219.35(b) (2000). These procedures are to be used when the responsible official decides to use the administrative appeal option under 36 CFR 219.35(b) as further described in an interpretive rule at 66 FR 1864 (January 10, 2001).

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### **SECTION 1 – PURPOSE AND SCOPE.**

(a) This procedure provides a process by which a person or organization interested in the management of the National Forest System may administratively appeal decisions to approve, amend, or revise a national forest land and resource management plan or approve or amend a regional guide prepared pursuant to 36 CFR part 219. This procedure establishes who may appeal such decisions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply. This procedure provides a review of such decisions by an official at the next administrative level.

(b) This procedure complements, but does not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA) and the associated implementing regulations and procedures in 40 CFR parts 1500-1508, 36 CFR parts 215, 216, and 219, Forest

Service Manual chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15.

[58 FR 58915, Nov. 4, 1993]

## **SECTION 2 – DEFINITIONS.**

For the purposes of this procedure--

*Appellant* is the term used to refer to a person or organization (or an authorized agent or representative acting on their behalf) filing a notice of appeal under this procedure.

*Deciding officer* means the Forest Service line officer who has the delegated authority and responsibility to make the decision being questioned under these rules.

*Decision document* means a written document that a deciding officer signs to execute a decision subject to review under this procedure. Specifically a record of decision or a decision notice.

*Decision documentation* refers to the decision document and all relevant environmental and other analysis documentation on which the deciding officer based a decision that is at issue under the rules of this procedure. Decision documentation includes, but is not limited to, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

*Decision notice* means the written document signed by a deciding officer when the decision was preceded by preparation of an environmental assessment (40 CFR 1508.9).

*Decision review* or *review* is the term used to refer to the process provided in this procedure by which a higher level officer reviews a decision of a subordinate officer in response to a notice of appeal.

*Forest Service line officer* is the Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this procedure. Specifically, for the purposes of this procedure, a Forest Service employee who holds one of the following offices and titles: forest supervisor, deputy forest supervisor, regional forester, deputy regional forester, deputy chief, associate deputy chief, associate chief, or the Chief of the Forest Service.

*Intervenor* is an individual who, or organization that, is interested in or potentially affected by a decision under appeal pursuant to this procedure, who has made a timely request to intervene in that appeal.

*Legal notice* is notice of a decision appealable under this procedure published in the *Federal Register* or in the legal notices section of a newspaper of general circulation as required by section 5 of this procedure.

*Notice of appeal* is the written document filed with a reviewing officer by one who objects to a decision covered by this procedure and who requests review by the next higher line officer.

*Participants* include appellants, intervenors, the deciding officer, and the reviewing officer.

*Record of decision* is the document signed by a deciding officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

*Reviewing officer* is the line officer one administrative level higher than the deciding officer or, in the case of a discretionary review, one level higher than the line officer who issued a first-level appeal decision.

[54 FR 3357, Jan. 23, 1989; 54 FR 13807, Apr. 5, 1989, as amended at 55 FR 7895, Mar. 6, 1990; 58 FR 58915, Nov. 4, 1993]

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### **SECTION 3 – DECISIONS SUBJECT TO APPEAL.**

(a) The following decisions are subject to appeal under this procedure:

(1) Decisions to approve, amend, or revise a national forest land and resource management plan including project or activity decisions for which environmental effects have been analyzed and disclosed within a final environmental impact statement (EIS) and documented in a record of decision including approval, significant amendments, or revisions of a land and resource management plan.

(2) Decisions to approve or amend a regional guide prepared pursuant to 36 CFR part 219 and documented in a decision notice or record of decision are subject to appeal under this procedure, except as provided in section 4.

(b) Decisions as defined in paragraph (a) of this section and documented in a decision notice or a record of decision that are made by a subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer.

[58 FR 58915, Nov. 4, 1993]

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### **SECTION 4 – DECISIONS NOT SUBJECT TO APPEAL.**

The following decisions are not subject to appeal under this procedure.

(a) Decisions on projects or activities implementing national forest land and resource management plans including project decisions that include a non-significant amendment to a national forest land and resource management plan.

(b) Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act or National Forest Management Act processes made prior to release of final plans, guides, and environmental documents.

(c) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendations in question, such as wilderness and wild and scenic river recommendations.

[58 FR 58915, Nov. 4, 1993]

## **SECTION 5 – GIVING NOTICE OF DECISIONS SUBJECT TO APPEAL.**

(a) For decisions subject to appeal under this procedure, deciding officers shall promptly mail the appropriate decision document (sec. 3(a)(1)) to those who, in writing, have requested it, and to those who are known to have participated in the decisionmaking process.

(b) The deciding officer shall also give notice of decisions appealable under this procedure as follows:

(1) For all initial decisions of the Chief, notice shall be published in the *Federal Register*.

(2) For all other decisions, legal notice of the decision shall be published in a newspaper of general circulation identified pursuant to the requirements of paragraph (d) of this section. Deciding officers may, at their discretion, also publish notice of their decisions in additional newspapers. Where a deciding officer elects to publish such additional notices, they shall be published after an initial legal notice has been published in the principal newspaper identified in the biannual Federal Register notice provided for in paragraph (d) of this section. Any such additional newspaper notices shall indicate the date that the appeal period ends, which shall be calculated based on the date of publication of the initial notice in the principal newspaper identified in the biannual Federal Register notice.

(c) All notices published pursuant to this section shall include a concise description of the decision made by title or subject matter, the date of the decision, the name and title of the official making the decision, and information on how to obtain a copy of the decision, and shall specify that the appeal period begins the day following the notice's publication as provided for in section 8(b)(1).

(d) At least twice annually, in April and in October, each responsible Forest Service officer shall, through Federal Register notice, advise the public of the principal newspaper to be utilized for publishing legal notices required by this section. The Federal Register notice shall also list all additional newspapers which the deciding officer expects to use for purposes of providing additional notice pursuant to paragraph (b) of this section.

[54 FR 3357, Jan. 23, 1989, as amended at 55 FR 7895, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991]

## **SECTION 6 – PARTICIPANTS.**

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this procedure and request a review by the Forest Service line officer at the next administrative level.

(b) An intervenor as defined in section 2 of the procedure.

## **SECTION 7 – LEVELS OF APPEAL.**

(a) Decisions made by the Chief. If the Chief of the Forest Service is the deciding officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall

determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

(b) Decisions made by forest supervisors and regional foresters. The levels of available review are as follows:

(1) If the decision is made by a forest supervisor, the notice of appeal is filed with the regional forester;

(2) If the decision is made by a regional forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) Discretionary review of dismissal decisions. Dismissal decisions rendered by Forest Service line officers pursuant to this procedure (sec. 11) are subject to discretionary review as follows:

(1) If the initial reviewing officer was the regional forester, the Chief has discretion to review.

(2) If the reviewing officer was the Chief, the Secretary of Agriculture has discretion to review.

(d) Discretionary review of appeal decisions. Appeal decisions rendered by regional foresters and the Chief pursuant to this procedure are subject to discretionary review as follows:

(1) If the reviewing officer was the regional forester, the Chief has discretion to review.

(2) If the reviewing officer was the Chief, the Secretary of Agriculture has discretion to review.

[54 FR 3357, Jan. 23, 1989, as amended at 54 FR 34509, Aug. 21, 1989; 58 FR 58915, Nov. 4, 1993]

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## **SECTION 8 – APPEAL PROCESS SEQUENCE.**

(a) Filing procedures. To appeal a decision under this procedure, a person or organization must:

(1) File a written notice of appeal, in duplicate, with the next higher line officer in accordance with the provisions of section 9 of this procedure.

(2) File the notice of appeal within 45 days of the date specified in the published legal notice for non-significant amendments to land and resource management plans documented in a decision notice or record of decision.

(3) File the notice of appeal within 90 days of the date specified in the published legal notice for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions documented in a record of decision.

(b) Computation of time periods. (1) The day after the published notices required in section 5(b) is the first day of the appeal period provided for in paragraphs (a)(2) and (a)(3) of this section. All other time periods applicable to this procedure are tied to the filing of a notice of appeal and begin on the first day following that filing.

(2) All time periods in this procedure are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing a notice of appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(c) Evidence of timely filing. It is the responsibility of the appellant to file the notice on or before the last day of the filing period. In the event of question, a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the reviewing officer shall rule on the timely filing of the appeal. Notices of appeal that are filed before the filing period specified in the published legal notice shall be accepted, but premature filing does not affect timeframes specified in this procedure.

(d) Time extensions.

(1) The 45-day/90-day filing periods for a notice of appeal are not extendable.

(2) Time extensions are not permitted except as provided in sections 12, 13, and 17 of this procedure.

(e) Upon receipt of a timely notice of appeal, the reviewing officer shall immediately forward a copy of it to the deciding officer.

(f) Appeal decision. Unless time has been extended as provided for in sections 12 and 13, the reviewing officer shall not exceed the following time periods for rendering an appeal decision:

(1) An appeal of a land and resource management plan approval, significant amendment, or revision, or on a programmatic decision documented in a record of decision, not more than 160 days from the date the notice of appeal was filed.

(2) In the event of multiple appeals of the same decision, the appeal decision date shall be calculated from the filing date of the last notice of appeal.

[54 FR 3357, Jan. 23, 1989, as amended at 55 FR 7895, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991; 58 FR 58916, Nov. 4, 1993]

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## **SECTION 9 – CONTENT OF A NOTICE OF APPEAL.**

(a) It is the responsibility of those who appeal a decision under this procedure to provide a reviewing officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a written notice of appeal filed with the reviewing officer must:

(1) State that the document is a notice of appeal filed pursuant to 36 CFR 219.14(b)(2);

(2) List the name, address, and telephone number of the appellant;

(3) Identify the decision about which the requester objects;

(4) Identify the document in which the decision is contained by title and subject, date of the decision, and name and title of the deciding officer.

(5) Identify specifically that portion of the decision or decision document to which the requester objects;

(6) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy; and

(7) Identify the specific change(s) in the decision that the appellant seeks.

[54 FR 3357, Jan. 23, 1989, as amended at 55 FR 7895, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991]

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## **SECTION 10 – IMPLEMENTATION AND STAYS OF DECISIONS.**

(a) Implementation of any decision subject to appeal pursuant to this procedure shall not occur for 7 calendar days following publication of the legal notice of the decision as required in this procedure.

(b) Requests to stay the approval of land and resource management plans prepared pursuant to 36 CFR part 219 shall not be granted. However, requests to stay implementation of a project or activity included in such a plan will be considered as provided for in paragraph (c).

(c) Where a project or activity would be implemented before an appeal decision could be issued, the reviewing officer shall consider written requests to stay implementation of that decision pending completion of the review.

(d) To request a stay of implementation, an appellant must—

(1) File a written request with the reviewing officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), intervenor(s), and to the deciding officer; and

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the reviewing officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped; and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(e) The reviewing officer shall rule on stay requests within 10 days of receipt of a request.

(f) In deciding a stay request, a reviewing officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section;



- (2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;
  - (3) Any information provided by the deciding officer or other party to the appeal in response to the stay request; and
  - (4) Any other factors the reviewing officer considers relevant to the decision.
- (g) A reviewing officer must issue a written decision on a stay request.
- (1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.
  - (2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.
  - (3) A copy of a decision on a stay request shall be sent to the appellant(s), intervenor(s), and the deciding officer.
- (h) A decision may be implemented during a review unless the reviewing officer has granted a stay.
- (i) A reviewing officer's decision on a request to stay implementation of a project or activity included in a land and resource management plan or significant amendment or revision to the plan is not subject to discretionary review at the next administrative level.
- [54 FR 3357, Jan. 23, 1989, as amended at 55 FR 7896, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991; 58 FR 58916, Nov. 4, 1993]

## **SECTION 11 – DISMISSAL WITHOUT REVIEW.**

- (a) A reviewing officer shall dismiss an appeal and close the appeal record without decision on the merits when—
- (1) The notice is not filed within the time specified in section 8 of this procedure;
  - (2) The requested relief or change cannot be granted under law, fact, or regulation existing when the decision was made.
  - (3) The notice of appeal fails to meet the minimum requirements of section 9 of this procedure to such an extent that the reviewing officer lacks adequate information on which to base a decision;
  - (4) The decision at issue is being appealed under another administrative proceeding;
  - (5) The decision is excluded from appeal pursuant to section 4 of this procedure;
  - (6) The appellant(s) withdraws the appeal;
  - (7) The deciding officer withdraws the appealed decision; or
  - (8) The Chief has invoked the provisions of section 18 of this procedure.
- (b) The reviewing officer shall give written notice of a dismissal to all participants that includes an explanation of why the appeal is dismissed.
- (c) A reviewing officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in section 7(d) of this procedure, except when a

dismissal decision results from withdrawal of an appeal by an appellant or withdrawal of the initial decision by the deciding officer.

[54 FR 3357, Jan. 23, 1989, as amended at 55 FR 7896, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991]

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## **SECTION 12 – RESOLUTION OF ISSUES.**

(a) When a decision is appealed, appellants or intervenors may request meetings with the deciding officer to discuss the appeal, either together or separately, to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. Reviewing officers may, on their own initiative, request the deciding officer to meet with participants to discuss the appeal and explore opportunities to resolve the issues. However, reviewing officers may not participate in such discussions. At the request of the deciding officer, or on their own initiative, reviewing officers may extend the time periods for review to allow for conduct of meaningful negotiations. Such extensions may occur only after the time period for intervention and for the deciding officer to transmit the decision documentation has elapsed. In granting an extension, the reviewing officer must establish a specific time period for the conduct of negotiations.

(b) The deciding officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a deciding officer decides to withdraw a decision, all participants to the appeal will be notified that the case is dismissed. A deciding officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to appeal under this procedure.

[54 FR 3357, Jan. 23, 1989, as amended at 56 FR 46550, Sept. 13, 1991]

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## **SECTION 13 – REVIEWING OFFICER AUTHORITY.**

(a) Discretion to establish procedures. A reviewing officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the appeal process as long as they are in accordance with all the applicable rules and procedures of this procedure.

(1) In appeals involving intervenors, the reviewing officer may prescribe special procedures to conduct the appeal.

(2) In case of multiple appeals of a decision, the reviewing officer may prescribe special procedures as necessary to conduct the review.

(3) All participants shall receive notice of any procedural instructions or decisions governing conduct of an appeal.

(4) Procedural instructions and decisions are not subject to review by higher level officers.

(b) Consolidation of multiple appeals.

(1) The reviewing officer shall determine whether to issue one appeal decision or separate decisions in cases involving multiple notices of appeal under this procedure, or if

the same decision is also under appeal pursuant to 36 CFR part 251. In the event of a consolidated decision, the reviewing officer shall give advance notice to all who have appealed the decision.

(2) Decisions to consolidate an appeal decision are not subject to review by higher level officers.

(c) Requests for information. At any time during the appeal process, the reviewing officer at the levels specified in section 7 (a), (b), or (c)(1) of this procedure may extend the time periods for review to request additional information from an appellant, intervenor, or the deciding officer. Such requests shall be limited to obtaining and evaluating information needed to clarify issues raised. The reviewing officer shall notify all participants of such requests and provide them opportunity to comment on the information obtained.

[54 FR 3357, Jan. 23, 1989, as amended at 54 FR 34509, Aug. 21, 1989]

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## **SECTION 14 – INTERVENTION.**

(a) For a period not to exceed 20 days following the filing of a notice of appeal, the reviewing officer shall accept requests to intervene in the appeal from any interested or potentially affected person or organization. Requests to intervene in an appeal during the discretionary review (sec. 7(d)) shall not be accepted.

(b) Upon receiving such a request, the reviewing officer shall promptly acknowledge the request, in writing, and mail the notice of appeal to the intervenor.

(c) The reviewing officer shall accept into the appeal record written comments about the appeal from an intervenor for a period not to exceed 30 days following acknowledgement of the intervention request (sec. 14(b)).

(d) Intervenors must concurrently furnish copies of all submissions to the appellant. Failure to provide copies may result in removal of a submission from the appeal record.

(e) An intervenor cannot continue an appeal if the appeal is dismissed (sec. 11).

[54 FR 3357, Jan. 23, 1989, as amended at 58 FR 58916, Nov. 4, 1993]

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## **SECTION 15 – APPEAL RECORD.**

(a) Upon receipt of a copy of the notice of appeal, the deciding officer shall assemble the relevant decision documentation (sec. 2) and pertinent records, and transmit them to the reviewing officer within 30 days in appeal of non-significant amendments to land and resource management plans or within 60 days for appeals of land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions. The time period for forwarding the decision documentation is not extendable.

(b) In transmitting the decision documentation to the reviewing officer, the deciding officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The deciding officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this procedure focuses on the documentation developed by the deciding officer in reaching decisions. The records on which the reviewing officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the deciding officer in the decisionmaking process, the deciding officer's letter transmitting those documents to the reviewing officer, and any appeal related correspondence, including additional information requested by the reviewing officer pursuant to section 13 of this procedure.

(d) It is the responsibility of the reviewing officer to maintain in one location a file of documents related to the decision and appeal.

(e) Closing the record.

(1) In appeals with intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor, but not later than the end of the 30-day period provided for intervenors to submit comments (sec. 14(c)).

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the deciding officer, unless time has been extended as provided for in sections 12 and 13.

(f) The appeal record is open to public inspection at any time during the review.

(g) In appeals involving initial decisions of the Chief (sec. 7(a)), the establishment of an administrative record as defined in paragraph (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

[54 FR 3357, Jan. 23, 1989, as amended at 54 FR 34509, Aug. 21, 1989; 55 FR 7896, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991; 58 FR 58916, Nov. 4, 1993]

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## **SECTION 16 – DECISION.**

(a) The reviewing officer shall not issue a decision prior to the record closing (sec. 15(e)).

(b) The reviewing officer's decision shall, in whole or in part, affirm or reverse the original decision. The reviewing officer's decision may include instructions for further action by the deciding officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The reviewing officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a receiving officer's decision as provided at section 7(d), the reviewing officer's decision is the final administrative decision of the Department of Agriculture and the decision is not subject to further review under this procedure.

[54 FR 3357, Jan. 23, 1989, as amended at 58 FR 58916, Nov. 4, 1993]

## **SECTION 17 – DISCRETIONARY REVIEW.**

- (a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a reviewing officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.
- (b) As provided for a sections 7 (c) and (d), 10(h), and 11, certain dismissal decisions rendered by Forest Service line officers, and appeal decisions rendered by regional foresters and the Chief (sec. 16) are subject to discretionary review at the next highest administrative level. Within one day following the date of any decision subject to such discretionary review, the reviewing officer shall forward a copy of the decision and the decision documents (sec. 2) upon which the appeal was predicated to the next higher officer.
- (c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a reviewing officer's decision (sec. 17(d)). If the higher level officer decides to review the reviewing officer's decision, the stay will remain in effect until a decision is issued (sec. 17(f)), or until the end of the 30-day review period provided in section 17(g) whichever is less.
- (d) The higher level officer shall have 15 days from date of receipt to decide whether or not to review a lower level appeal decision, and may request and use the appeal record in deciding whether or not to review the decision, including decisions to dismiss. If the record is requested, the 15-day period is suspended at that point. The lower level reviewing officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the 15-day period or the additional 15-day period following receipt of the record, the decision of the reviewing officer stands as the final administrative decision of the Department of Agriculture. All participants shall be notified by the discretionary level whether or not the decision will be reviewed.
- (e) Where an official exercises the discretion in section 7 (d) or (e) of this procedure to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level reviewing officer's appeal decision. The record shall not be reopened to accept additional submissions from any source including the reviewing officer whose appeal decision is being reviewed.
- (f) The discretionary level reviewing officer shall conclude the review within 30 days of the date of the notice issued to participants that the lower decision will be reviewed, and shall send a copy of the review decision to all participants.
- (g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, the participants shall be notified by the discretionary level.

[54 FR 3357, Jan. 23, 1989; 54 FR 13807, Apr. 5, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 55 FR 7896, Mar. 6, 1990; 58 FR 58916, Nov. 4, 1993]

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### **SECTION 18 – POLICY IN EVENT OF JUDICIAL PROCEEDINGS.**

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this procedure is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this procedure. This position may be waived upon a written finding by the Chief.

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### **SECTION 19 – APPLICABILITY AND EFFECTIVE DATE.**

- (a) The appeal procedures established in this procedure apply to all appealable decision documents published on or after February 6, 1991.
- (b) Notices of appeal filed under 36 CFR 211.16, 36 CFR 211.18, 36 CFR 228.14, and 36 CFR 292.15 prior to February 22, 1989, remain subject to those procedures.

[54 FR 3357, Jan. 23, 1989, as amended at 56 FR 46550, Sept. 13, 1991]

