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Federal Land Management: Appeals and Litigation

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February 26, 1997

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CRS Report for Congress

Federal Land Management: Appeals and Litigation

Overview Prepared for a Workshop Held by the Senate Committee on Energy and Natural Resources

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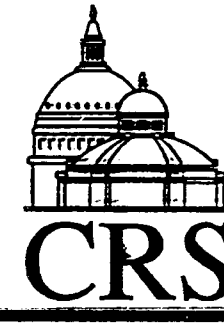

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Federal Land Management: Appeals and Litigation

Overview Prepared for a Workshop held by the Subcommittee on Forests and Public Land Management of the Senate Committee on Energy and Natural Resources

SUMMARY

The Forest Service in the Department of Agriculture and the Bureau of Land Management in the Department of the Interior each currently have a system of administrative appeals for most agency land management decisions. Critics assert that administrative and judicial appeals are stopping or unacceptably slowing the decision-making processes and the use of federal lands and resources; that many appeals are "frivolous" and brought for the purpose of frustrating rather than improving land management actions, and that appeals greatly increase the costs of management. Others respond that appeals have not been excessive or unwarranted, that few appeals are frivolous and there currently are means to deal with such appeals, and that Congress intended the federal land management systems to include review of the agencies' decisions in order to ensure public participation and that the agencies actually and adequately take into account the various factors and policies Congress intended be implemented.

The December 5, 1996 draft of the "Public Land Management Responsibility and Accountability Restoration Act" would affect administrative and judicial appeals of land management decisions of the Forest Service and the Bureau of Land Management in several ways. Some of the bill provisions are procedural -- for example, those that would specify time limits within which certain actions must be taken. Other provisions would change the nature of the "appeal" action -- for example, those that would limit an appeal to the filing of a petition to amend a plan. Still other provisions would significantly modify the substance of the current land planning and management requirements and processes so that the grounds for appeals would be significantly changed.

This report presents an overview of the current appeal systems of the Forest Service and the Bureau of Land Management, includes current statistics on judicial review of agency actions, and discusses how the draft bill might affect appeals and litigation of agency decisions.

This overview was prepared at the request of the Subcommittee on Forests and Public Land Management of the Senate Committee on Energy and Natural Resources as background for one of its series of workshops on proposed legislation on federal land management.

TABLE OF CONTENTS

Workshop on Public Land Management Legislation: Appeals and Litigation

INTRODUCTION

The number and costs of administrative and judicial appeals of land management plans and of particular project and activity-related decisions of the Forest Service and the Bureau of Land Management have been controversial since appeal statistics burgeoned in the late-1980's. Critics assert that so many appeals are filed that land management by these agencies is stymied; that many of the appeals are "frivolous," or are motivated by the desire to frustrate land management rather than to improve it; and that the resulting costs are exorbitant. Others assert that appeals provide an essential avenue for meaningful public participation in the management of the national lands; appeals have helped to compel the agencies to follow the laws more closely; and that appeal procedures can be improved without eliminating meaningful appeals.

The December 5, 1996 draft of the "Public Land Management Responsibility and Accountability Restoration Act" would affect administrative and judicial appeals of land management decisions of the Forest Service and the Bureau of Land Management in several ways. This bill is the subject of a workshop/hearing held by the Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee on February 26, 1997, as part of its series of workshops on the proposed legislation. This report presents an overview of appeals of decisions of the Forest Service and the Bureau of Land Management, prepared as background for the February 26th Workshop.

BACKGROUND

The Forest Service (FS) in the Department of Agriculture and the Bureau of Land Management (BLM) in the Department of the Interior are two of the principal land management agencies of the federal government. Each manages the lands in their care under different but similar statutes that require each agency to manage its lands under the "multiple use-sustained yield" concept, by which a diversity of uses will be made of the lands without impairment of their long-term productivity. Each agency is to prepare land management plans that take into account the features and resources of particular areas. Particular projects and activities consistent with the plans may be implemented.

The principal land management statutes and associated regulations provide for considerable public participation in the planning processes. In addition, the

Federal Land Policy and Management Act (FLPMA)[1] directs the Secretary of the Interior to "structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking."[2] The National Forest Management Act (NFMA), the principal management statute for the National Forest System, does not contain similar express language but does require public participation, especially as to the development of forest plans.[3]

The statutes do not specifically address judicial review; neither statute contains citizen suit provisions. Therefore, judicial review is basically available as authorized in the Administrative Procedures Act.[4]

Since the 1980's, critics have asserted that administrative and judicial appeals are stopping or unacceptably slowing the decision-making processes and the use of the federal lands and resources; that many appeals are "frivolous" and brought for the purpose of frustrating rather than improving land management actions; and that appeals greatly increase the costs of management. Others respond that appeals have not been excessive or unwarranted; that few appeals are frivolous and there currently are means to deal with such appeals; and that Congress intended the federal land management systems to include review of the agencies' decisions in order to ensure public participation and that the agencies actually and adequately take into account the various factors and policies Congress intended be implemented.

This report presents an overview of the current administrative appeal systems of the FS and the BLM, sets out some of the statistics on appeals provided to us by the FS and the BLM, and describes the provisions of the draft Senate bill that relate to appeals and litigation. More information is available on FS appeals than on BLM appeals.

FOREST SERVICE ADMINISTRATIVE APPEALS

FS Appeal Regulations

Until recently, the Forest Service was not expressly required by law to provide administrative appeals of its programs and activities, but nonetheless has had an appeals system since 1906. FS regulations provide for three types of appeals: 36 C.F.R. Part 215 regulations govern appeals of most projects and

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1 Pub. L. No. 94-579, 90 Stat. 2744, codified at 43 U.S.C. §1701 *et seq.*

2 *Id.*, 43 U.S.C. §1701(a)(5).

3 Pub. L. No. 94-588, 90 Stat. 2949 (amended Pub. L. 93-378, 88 Stat. 476), codified at 16 U.S.C. §§1600 *et seq.*. See public participation provisions at 16 U.S.C. §§1601(c), 1604(d), (f), 1612.

4 Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 392, codified at 5 U.S.C. §701 *et seq.*

activities, such as timber sales; 36 C.F.R. Part 217 regulations govern appeals of forest plans and standards and guidelines; and 36 C.F.R. Part 251 regulations govern appeals of permits and other actions involving particular persons doing business in the forest or using forest lands. Congress recently required new regulations on appeals of projects and activities, in accordance with streamlined requirements set out in law.[5] These new (Part 215) regulations were adopted in November, 1993.[6]

FS Appeal Statistics

The following FS statistics on administrative appeals have been provided to us by the FS. Some figures were provided in connection with a 1989 Workshop hosted by CRS;[7] recent figures were provided in preparation for this Committee Workshop. The statistics fluctuate from year to year as to the type and numbers of appeals. The numbers indicate an upsurge in administrative appeals in the late 1980s that coincided with the promulgation of a great many of the first round of forest management plans required by NFMA. All of the first round of forest management plans are now completed. In recent years, total new administrative appeals of *plans* have averaged about 50 per year, though Part 217 figures may be higher because appeals of regional standards and guidelines are included in that Part as well.[8]

There are many different ways to record and display appeal numbers and a reader should always note whether particular numbers represent comparable things -- e.g. whole or partial years; fiscal or calendar years; all pending appeals or only new appeals filed; appeals under all appeal regulations or only one Part, etc. We have made an effort to obtain comparable figures whenever possible; follow-up questions should be addressed to the agencies.

The following chart shows the number of *new* administrative appeals to the FS in fiscal years 1983 - 1996, as reported to us by the agency.[9]

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[5] Pub. L. No. 102-381, 106 Stat. 1419.

[6] 58 Fed. Reg. 58910, November 4, 1993.

[7] CRS Report 90-104A, *Appeals of Federal Land management Plans and Activities: A Report on a CRS Research Workshop*, by Pamela Baldwin, February 20, 1990.

[8] The Part 217 figures for FY 1994 were quite high (1,395) because the new Part 215 regulations did not fully take over appeals of projects and activities until almost 6 months into that year, so appeals of projects and activities appear under Part 217 in addition to appeals of plans.

[9] The figures on new administrative appeals were reported to us by an agency representative by telephone on February 21, 1997.

FY 83 -	584		FY 88 -	1,609		FY 93 -	2,902
FY 84 -	439		FY 89 -	1,291		FY 94 -	1,802
FY 85 -	581		FY 90 -	1,991		FY 95 -	900
FY 86 -	1,081		FY 91 -	1,386		FY 96 -	1,054
FY 87 -	874		FY 92 -	1,659			

The number of appeals originated under each of the three sets of regulations varies greatly. In FY 96, only 31 of the total 1,089 appeals *pending* at the end of the fiscal year were appeals of plans under Part 217 regulations. In contrast, Part 251 (involving permittees and others doing business with the FS) accounted for 163 appeals and there were 882 appeals of projects and activities under Part 215.

Multiple appeals may relate to the same decision and raise the same issues, which can make the appeals easier to dispose of and reduce the impacts of the appeal numbers. For example, in FY 1996, a total of 526 decisions nationwide were involved in the 1,089 pending appeals. Of these 526 decisions, 374 decisions were under Part 215 (projects); 16 were under Part 217 (plans); and 136 were under Part 251 (permittees, etc.).

The geographical source of appeals can vary year to year, depending on where decisions occur in which the public has an interest. Regions 5, 6, 8, and 9 accounted for 74% of new appeals filed in FY 89, while regions 3 and 10 alone accounted for more than 40% of appeals in FY 1996.

Effects of Appeals on Resource Uses

Even if relatively few decisions may be appealed, one could also ask what the effects of appeals are in terms of forest resources in general and timber in particular.

Although the FS reports receiving an estimated 30-40 new appeals of forest plans annually, appeals of forest plans in areas of high timber production obviously could have significant impacts on that part of the area economy dependent on federal timber resources. Although plans go into effect despite an administrative appeal,[10] implementation may be enjoined by a court. Since projects and activities must be consistent with the applicable plan, they may also be halted.[11] This is what happened in the Pacific Northwest, with adverse effects on mills and timber-related workers in the affected areas. On the other hand, some of these appeals in the Pacific Northwest resulted in the protection

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10 36 C.F. R. §217.10(b).

11 36 C.F.R. §219.10(e).

of non-timber forest resources and halted what one court said was "a deliberate and systematic refusal" by the FS to comply with the relevant laws.[12]

Similarly, appeals of regional standards and guidelines may also have far-reaching effects. For example, we are advised that management guidance related to the bull trout may affect 36 national forests.

At the project level, fiscal years 1995 and 1996 present an interesting contrast because §2001 of the Rescissions Act[13] eliminated administrative appeals of salvage and certain other timber sales subject to its provisions and imposed severe constraints on judicial review of such sales during FY 1996. Therefore, FY 1995 and FY 1996 present a contrast between a year with normal appeals numbers and a year with constrained opportunity for appeals that nonetheless triggered appeals.

In FY 1995, there were a total of 1,021 appeals pending, including 740 under Part 215 (projects and activities); 115 under Part 217 (plans) and 166 under Part 251 (permittees, etc.) Of a reported total of 1,897 timber sales, 379 (19%) were appealed.[14] Of these appealed timber sales decisions, 10 were withdrawn, making 38 MMBF of timber unavailable as a result of the administrative appeals.[15]

In FY 1996, 1,035 timber sales reportedly were *subject* to appeal; 3,612 were not subject to appeals, principally because of the §2001 Rescission Act limitations. Of the timber sales that were subject to challenge, 148 (14%) were appealed. Of these 148 timber sale decisions, 45 were withdrawn, resulting in 58 MMBF of timber not available because of the appeals.

As to appeals of other resources and use decisions, the FS figures for FY 1994 and 1995 break out project appeals by type and indicate significant fluctuations year by year. Although it is impossible to tell whether many appeals related to a few particularly controversial decisions, project appeals included:

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[12] Seattle Audubon Society v. Robertson, 771 F. Supp. 1081, 1089-1090 (W.D. Wash 1991).

[13] Pub. L. No. 104-19, 109 Stat. 194, 240.

[14] This number of timber sales differs significantly from the number reported in *USDA Report of the Forest Service*, Fiscal Year 1995 (June, 1996).

[15] Similarly, in FY 1994, 360 out of 2,382 timber sales were appealed (15% of the total); 21 were withdrawn, affecting a volume of 39 MMBF of timber.

FY 1995		FY 1994
Land Exchanges	15	87
Recreation	141	698 [16]
Minerals projects	21	55
Timber sales	433	634

Frivolous Appeals

An appeal-deciding officer may dismiss an appeal without review for various reasons,[17] but FS regulations do not specifically mention dismissal of "frivolous" appeals. A total of 230 administrative appeals were dismissed in FY 1996 on various grounds such as:

1) the appeal was not timely filed -- 11
2) relief could not be granted -- 24
3) the appellant lacked standing -- 165
4) it was a non-appealable decision -- 10
5) the appellant was not eligible and did not participate (not clear how this differs from the other standing category) -- 4
6) the appeal lacked content -- 16

It is difficult to state how many of the above grounds could be considered indicative of "frivolous" appeals, but note that 165 of the 230 appeals were dismissed because of a lack of standing and 16 were dismissed because of "lack of content."

Lawsuits may be dismissed by a court for lack of standing, failure to state a claim upon which relief may be granted, or other specified reasons. Under Rule 11 of the Federal Rules of Civil Procedure, if an attorney signs and files papers with the court that are shown not to be well grounded in fact and warranted by existing law or a good faith argument, that attorney and the attorney's client may be subject to sanctions, including the paying the expenses of the other side. Statistics on how many federal land management-related lawsuits have been dismissed on such grounds and information on sanctions imposed are not available to us.

Informal Appeals

Two types of opportunities exist to resolve disputed decisions other than through the formal appeal process and the FS informs us that it is making increasing use of these alternatives. Proposed project and activity decisions accompanied by an Environmental Assessment must go through a notice and comment period before finalization that provides an opportunity to modify the

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[16] Most of these recreation-related appeals were from Region 9, which contains the Boundary Waters Canoe Area and involved many appeals from outfitters.

[17] 36 C.F.R. §215.15 re project appeals; §217.11 re plans, etc.; and §251.92 re permits, etc.

proposed decisions and hence avoid at least some appeals.[18] Even after a decision is finalized and appealed, the new Part 215 regulations provide an opportunity for an informal disposition through meeting with the appellant to discuss possible resolution of the issues raised. The FY 1996 FS statistics indicate that 60 appeals were resolved in this way out of 222 appeals in which informal disposition was attempted.

Lawsuits

One of the purposes given for having a system of administrative appeals is to provide an avenue of redress for members of the public who are dissatisfied with agency decisions. Typically, administrative appeals are far less costly than judicial suits. The relationship of the number of administrative appeals to lawsuits filed reflects these statements. In FY 1996, there were a total of 1,089 administrative appeals pending on September 30, 1996. In contrast, the Department of Justice informs us that there were 78 FS-related court cases received and active during 1996 and a total of 299 FS-related cases currently pending.[19] Unfortunately, no break-out of this number is available and the 299 cases include contract and personnel suits in addition to those related to forest plans and their implementation. This number also reflects the fact that court cases typically are pending over more than one fiscal year. The Office of General Counsel at the FS estimates that there are approximately 100 cases pending involving forest plans and implementing activities, divided approximately 50/50 between the two categories.

BUREAU OF LAND MANAGEMENT APPEALS

The Department of the Interior has had some system of appeals for a very long time.[20] The Office of Hearings and Appeals was created in 1970 in response to studies by the Public Land Law Review Commission, which in that year recommended that the investigative, prosecutorial and judicial functions of the Department of the Interior should be separated.[21] In 1976, the policies section of FLPMA declared that the Secretary should develop independent adjudication procedures to assure objective administrative review:

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18 36 C.F.R. §215.9.

19 The DOJ reports 42 FS-related court cases received and active in FY 1994 and 60 FS-related cases in FY 1995.

20 The Department of the Interior was created in 1849 in part to remove the General Land Office from the Treasury Department in order to resolve disputed land and title claims.

21 *One Third of the Nation's Land*, A Report to the President and to the Congress by the Public Land Law Review Commission, 1970.

> (a) The Congress declares that it is the policy of the United States that -- ...
>
> (5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking.[22]

The Office of Hearings and Appeals is an arm of the Secretary that adjudicates legal disputes filed with the Secretary, other than decisions made by or on behalf of the Secretary, such as approval of resource management plans. Appeal from such decisions is directly to court. The Office currently has three standing boards of appeal, the largest of which is the Interior Board of Land Appeals (IBLA). Decisions of BLM managers generally are appealable to the IBLA, with some exceptions. An agency decision that is immediately effective need not be appealed to the IBLA, but may be taken directly to court. Classification decisions, such as designation of areas of critical environmental concern or suitability of various land areas for different types of uses also are not appealed to the Board and may go directly to court.

IBLA Appeals

The IBLA has provided the following statistics on the number of appeals from BLM decisions:

Fiscal Year	Cases pending beginning FY	Cases received during FY	Cases disposed during FY	Cases pending at end FY
1992	539	614	464	689
1993	689	647	562	774
1994	774	795	521	1,088[23]
1995	1,088	624	551	1,161
1996	1,161	518	407	1,272
1997 (to date)	1,272	157	217	1,212

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22 43 U.S.C. § 1701(a)(5).

23 The upsurge in new appeals in 1994 is attributed to Congressional enactments concerning mining claim rental and maintenance fees.

The numbers of appeals of specific types of BLM management activities to the IBLA varies. As noted above, many of the appeals in 1994 were related to mining claims and their maintenance. The IBLA currently has only 8 appeals pending that involve timber sales. Of these, one was docketed during FY 1994; two were docketed during FY 1995; four during FY 1996 and one during the current fiscal year. Between FY 1992 through FY 1996, the IBLA disposed of a total of 71 BLM timber management cases. Of these, the Board reversed or remanded 15 agency decisions and dismissed 6 cases.

The Board also disposed of 68 grazing-related cases over the same years. Of these, the Board reversed or remanded 35 agency decisions and dismissed 10 cases. There currently are 41 grazing decisions pending before the Board.

The Department does not have different systems of appeals comparable to those of the FS's plans/projects/permittee regulations. Therefore, direct comparisons of FS and BLM appeal processes and numbers are difficult. There are some Departmental regulations that relate to appeals in general; other regulations relate to appeals in the context of particular types of resource decisions. Many of the lands managed by BLM are rangelands and 43 C.F.R. Part 4100 regulations relate to grazing issues and appeals of grazing decisions. BLM also manages some significant commercial timber lands, primarily in Washington, Oregon, and California and some regulations relate to timber sale appeals. BLM also is the mineral manager for the United States and some particular appeal provisions relate to that subject area.

Protests

Some BLM regulations provide for a "protest" of certain proposed decisions. This process is in the nature of a pre-decisional appeal in that interested parties have an opportunity to question and modify the decision. For example, land and resource management plans can be protested before finalization.[24] Any person who participated in the planning process and has an interest which is or may be adversely affect by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process.[25] The process is informal and may address a wide range of issues. Issues raised by a protest to a proposed plan are decided by the BLM Director and then may go to court.[26]

Other types of proposed BLM decisions may also be protested, including proposed grazing-related decisions. Recent changes to the grazing regulations

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[24] 43 C.F.R. §1610.5-2.

[25] *Id.*, subsection (a).

[26] *Id.*, (b) to end. The notice and comment opportunity provided for FS projects and activities regarding which an Environmental Assessment was prepared under the National Environmental Policy Act is somewhat analogous to this protest system.

expanded those who are notified of and may protest proposed decisions to include "the interested public," a broader opportunity than is true with respect to protests of plans.[27]

Frivolous Appeals

Under Departmental regulations, appeals are filed with the authorized officer and forwarded to the Director in the relevant state. The Director may move that the appeal be dismissed for the various reasons listed in the regulation, such as timeliness of the appeal, etc. Frivolousness is expressly listed as a grounds for dismissal of grazing-related appeals.[28]

As stated in the FS section, at p. 6 above, lawsuits may be dismissed for lack of standing or failure to state a claim upon which relief may be granted, etc. Under Rule 11 of the Federal Rules of Civil Procedure, if an attorney signs and files papers with the court that are shown not to be well grounded in fact and warranted by existing law or a good faith argument, that attorney and the attorney's client may be subject to sanctions, including the paying the expenses of the other side. Statistics on how many federal land management-related lawsuits have been dismissed on such grounds and information on sanctions imposed are not available to us.

Lawsuits

The IBLA figures do not give a complete picture with respect to timber sales. Filing an administrative appeal of a timber decision does not result in an automatic stay of the decision and BLM may proceed with the timber action pending administrative appeal.[29] As noted, a full force and effect decision need not be appealed to the IBLA, but may go directly to court. Therefore, the number of timber sales that were litigated for each fiscal year is also relevant.

The Department of Justice could only provide an overall number of BLM-related cases pending, which currently is 228. This figure includes all BLM-related appeals, including suits related to mineral claim determinations, navigability determinations and certain native land selections, contract actions, and personnel suits and also reflects cases pending since before the current fiscal year. However, BLM personnel estimate that there were approximately 3 cases over the last five fiscal years challenging resource management plans and approximately 7 cases involving activities implementing plans during those same years.

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27 43 C.F.R. §§4160.1 and 4160.2. *See also,* 43 C.F.R. §4.450-2.

28 43 C.F.R.§4.470(d).

29 43 C.F.R. §5003.1.

DECEMBER 5, 1996 DRAFT BILL

The December 5, 1996 draft bill has several provisions that would affect administrative and judicial appeals of land management actions of the FS and BLM. Some of these provisions are procedural -- for example, those that would specify time limits within which certain actions must be taken. Other provisions would change the nature of the "appeal" action -- for example, those that would limit an appeal to the filing of a petition to amend a plan. Still other provisions would significantly modify the substance of the current land planning and management requirements and processes so that the grounds for appeals would be significantly changed. Detailed discussion of this last subject is beyond the scope of this report.

Administrative appeals

Section 115 would call for new agency regulations on administrative appeals to comport with the act. New agency regulations would have to cover administrative appeals of decisions to approve resource management plans, amendment and revisions of plans, and decisions on management activities implementing plans.

> Comment: This requirement would appear to require significant changes to the Department of the Interior administrative appeals system in that resource management plans are not currently appealable to the IBLA, but rather go straight to court.

The new regulations would also be required to set times within which challenges to plans or activities must be brought and by which times final decisions on appeals must be rendered. Appeal decision deadlines may not be more than 180 days after the filing date for an appeal of a plan or revision; 120 days after the filing date for appeal of a plan amendment; and 90 days after the filing date for appeals of activities. Failure to reach a final decision by the deadline would be deemed a denial of the appeal or petition.

> Comment: The fact that failure to decide an appeal results in a denial of an appeal could provide an incentive for agencies not to decide appeals, thereby achieving denials of them and forcing the public to pursue more expensive judicial review. On the one hand, this would expedite agency actions. On the other hand, it could result in the implementation of a greater number of possibly unwise or harmful agency actions. Because this provision could also force more appellants to file lawsuits, it could frustrate one of the purposes of administrative appeals -- that of affording the public a reasonable avenue of redress to governmental decisions -- and could be costly to the agencies as well as appellants. The possible burdens of this provision could fall on permittees as well as environmental appellants.

New regulations also would have to include a standing requirement such that if there was an opportunity to submit comments, a person could appeal only if he or she had submitted written comments during the preparation of the

plan, amendment, revision, or activity *on the issue or issues* for which administrative review is sought.

Comment: This requirement would solve the problem of appellants who do not participate fully or at all in the development of a decision and then file an appeal after the decision is finalized. On the other hand, it appears likely to result in comments that raise every conceivable issue in order to preserve full appeal rights. This could slow the decisionmaking process significantly and add to costs. Also, some issues only become evident as time and application of policies and proposals reveal consequences. In these circumstances, appeals would be under §112 on appeals based on new information, which would present other issues as discussed below.

Section 112 would provide that after the time for filing an appeal has run, one could challenge a plan or activity only on the basis of new information, law, or regulation. A challenge based on new information must take the form of a petition to the Secretary to amend or revise the relevant plan. Management activities could proceed during the time it would take to process the petition and to amend or revise the plan. New information sufficient to bring an action would have to be "material and significant" information that was not known to and considered by the Secretary or any law or regulation not in effect when the decision in question was made.

Comment: This provision would provide stability and certainty for decisions made in accordance with an existing plan, which many will see a good result. On the other hand, because management activities would go forward during the time it takes to process a petition to change a plan and while the plan is being changed, it could be argued that the result could be less timely, responsive, or adaptive management and the lands and resources may be damaged during the time needed to respond to new information.

Under §115, administrative appeals of plans could not raise issues related to management activities, and appeals of activities could not challenge analyses or decisions related to plans. This provision must be read together with section 103(b), which sets out what plans must encompass and what constitutes activities.

Comment: These provisions would help clarify how an appellant is to raise different types of issues and would clarify what plans are to include. This greater statutory specificity as to what plans must address or include could help alleviate some of the struggles courts have had in identifying the nature of plans and at what point plaintiffs are to raise certain challenges. For example, when and how to challenge analyses of cumulative effects of various activities has been a point of diverse court opinions. Section 103 would require that analyses of the cumulative effects of decisions and management activities "shall be conducted" in the plans. On the one hand, the bill would provide greater clarity. On the other hand, it appears to slow changes based on cumulative effects in that a challenge to the

accuracy of a plan's assessment of cumulative effects is likely to have to be brought under §112 as a petition to change the plan, which, as already noted, could be a slow process. Therefore, the draft provisions may provide greater clarity, but arguably at the price of agency flexibility to respond in a timely fashion to new scientific knowledge or a better understanding of the effects of agency actions.

It could also be argued that the dividing line between issues more related to "plans" and those related to "activities" is likely to remain unclear because plans necessarily speak somewhat generally as to where and how different activities may be conducted and the appropriateness of such decisions only becomes clear as site-specific activities are implemented.

Section 115 specifies that the new agency appeal regulations should provide that the Secretary is to consider and balance environmental or economic injury to any affected persons in determining whether to issue a stay pending an appeal or petition.

Comment: This provision directs the Secretary to balance two types of injuries that are stated in the disjunctive -- it is not clear whether the Secretary is to balance environmental and economic injuries in deciding whether to grant a stay.

Current agency regulations vary on the granting of stays during administrative appeals. When decisions are to be effective immediately, there are provisions allowing stays if findings are made as to serious threats to resources. The new language would add a consideration of economic factors into stay decisions.

The new regulations would also be required to prohibit appeals or petitions filed "for any improper purpose" defined in the regulations, including "to raise frivolous issues, to harass or needlessly increase the costs of the government or any other affected person, or to cause unwarranted delay in effecting such decision." The relevant Secretary may also impose a civil penalty not to exceed $10,000 to compensate the United States.

Comment: Some assert that a great many nonsense appeals are filed. As discussed earlier in this report, current regulations authorize the dismissal of appeals on various grounds, but the number dismissed is low. The current grounds for dismissal seem to involve more objective criteria -- appeals that are flawed in some way, such as those that are filed beyond the time limits or that fail to state a claim in law or on which relief can be granted. The BLM regulations also expressly allow for dismissal of "frivolous" grazing-related appeals by the relevant BLM State Director. The bill language would appear to use more subjective criteria than the current regulations do - whether the appeal was filed for an improper purpose such as raising frivolous issues, or harassing the government, or causing "unwarranted" delay. An appellant can suffer not only dismissal but also significant penalties. However, similar provisions occur elsewhere in the

Code.[30] The new regulations also would have to allow penalties for an appeal that "needlessly increases the costs of any other affected person." The scope of this provision is not clear.

The new regulations are to establish categories or criteria of activities that will not to be subject to administrative appeals, but rather would go straight to court.

Comment: Current regulations already allow some types of cases to go directly to court, but would appear to benefit from a more complete articulation of which cases may be litigated immediately.

Judicial Review.

Section 116(a) would establish that the forum for suits challenging plans, amendments and revisions to plans will be the United States Court of Appeals for the circuit in which the federal lands to which the plan applies are located.

Comment: Several commentators have suggested this as a means of shortening the time it takes to finalize plans and allow their implementation. Appealing plans directly from the agency to the Courts of Appeal would help save time by eliminating the appeal to the federal district courts. One possible drawback is that appeals courts are not fact-finding courts, so steps would need to be taken to ensure that the record reaching the court was full and complete. In this regard, an Environmental Impact Statement is currently required of both the FS and BLM for plans, and an administrative appeal would have been completed, so perhaps an adequate record for the Court of Appeals would exist. On the other hand, many cases involving plans have entailed considerable additional fact-finding by the district courts. Other provisions in the draft bill may lessen this problem by reducing the issues before the court.

Section 116(b) would include persons who sustain economic injury among those who may sue for violations of the new Act, FLPMA or RPA.

Comment: Some courts have limited standing under some statutes to those who are within the "zone of interest" intended to be protected by the statute. Typically, this issue has arisen in connection with environmental protection statutes where the courts have limited plaintiffs to those who seek to carry out the protective purposes of the acts and denied standing to those who would suffer economic injury. This issue received recent attention in connection with the Endangered Species Act (ESA).[31] The

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[30] *See,* 26 U.S.C. §§6702 on filing frivolous tax returns and §6673 on tax court proceedings.

[31] A case raising these issues in the context of the ESA, Bennett v. Spear, is currently awaiting decision by the Supreme Court.

question of breadth of standing would be answered in the draft bill by allowing those with economic injuries to sue.

The references to the three statutes to which the broadened standing applies is ambiguous in that other significant statutes applicable to management of the FS and BLM lands are not mentioned, but may have been intended to be included. In addition, because of other substantive provisions in the bill, standing may be broadened for other issue areas and statutes as well. For example, under §203, the FS and BLM will carry out the consultation functions of the ESA themselves. Therefore, arguably, under §116, standing to challenge the results of those ESA consultations would be broadened to include those sustaining only economic injury. Also, to the extent any of the referenced acts require preparation of documents under the National Environmental Policy Act (NEPA), §116 may also open NEPA-related challenges to those suffering only economic injury.

The references to broad standing to the full extent permitted by the Constitution in order to remedy any violation of "such" act in §116(b)(1)(A)(i) is ambiguous, but may refer back to the draft act itself, FLPMA and RPA.

The broad standing may also apply to intervention as a matter of right in any suit for an action that "threatens to cause injury to the person or *relates to* any injury sustained by the person ...." (Emphasis added.) This provision may give even broader standing to intervenors than to plaintiffs.

Under §116(b)(2), standing to obtain judicial review of a plan, amendment, or revision of a management activity would only be available to persons who participated in the preparation of the plan through submission of written comments, if comments were allowed, and who must have raised the appealed issues during administrative review.

Comments: As discussed in connection with administrative appeals, this requirement would solve the problem of appellants who do not participate fully or at all in the development of a decision and then file an appeal after the decision is finalized. On the other hand, it might result in comments that raise every conceivable issue in order to preserve full appeal rights. This could slow the decisionmaking process significantly and add to costs.

Section 116(c) would establish filing deadlines for various types of suits.

Under §116(c)(2) and (d), lawsuits based on new information cannot be brought until the relevant Secretary has denied a petition to amend a plan or has approved such a petition and has completed the changes to the plan. Under §112, administrative appeals related to issues not capable of being raised during the comment period would be limited to petitions for plan changes.

Comment: One problem discussed in connection with current planning and appeals processes has been that finalization of plans has been such a slow

process that plans often are obsolete by the time they are final. As a result, many challenges to the adequacy of plans are based on "new information" that indicates plans need to be changed. Many have perceived a need to develop ways to facilitate plan amendment or revision in order to have management that is more adaptive to changing knowledge and circumstances. On the other hand, such flexibility may be at odds with desires to encourage types of forest uses, particularly those requiring capital investments, that need to continue with some certainty over a span of years.

The remedy available under the bill to seek changes to existing plans based on new information appears likely to be more limited and slower than currently is the case. Appellants would have to raise material and significant information and petition the Secretary to amend or revise a plan. No standards are set out for the Secretary's review of petitions and therefore there may not be any judicial review available of a decision denying a petition. If a petition to amend or revise a plan is granted, an appellant would have to postpone judicial review of the issues until after the amendment or revision processes are completed, which could take a significant length of time.

Therefore, arguably the bill would resolve the issues of certainty vs. flexibility in favor of certainty at the expense of management flexibility and timely responsiveness.

Section 116(e) would provide that if a court enjoins part of a plan or activities conducted pursuant to part of a plan, management shall be subject to the immediately prior version of the plan and cannot be challenged or enjoined except as provided in the Act.

Comment: Currently, when part or all of a plan is enjoined, activities that can only be taken in accordance with that plan may also be halted until the violative part of the plan is resolved. The bill would have the relevant part of the previous plan spring to life to govern activities, even though a previous plan is likely to be even less appropriate than the newer plan being enjoined. Challenges to the older plan could only be brought as allowed in the new Act. Because challenges to an older plan almost certainly would be based on "new information", it appears that an appellant would be forced into the petition process, with the problems discussed above. Because many of the changes to plans over the last decade have moved toward reduced commodity outputs and greater emphasis on other values and resources, this provision appears likely to result in reversal of these trends in favor of restoration of even greater commodity outputs whenever a current plan is enjoined.[32]

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[32] *See, e.g.* the President's Plan for the Pacific Northwest, which significantly reduced sales of timber compared to previous plans governing those areas; CRS Report for Congress 93-664 ENR, *The Clinton Administrations's Forest Plan for the Pacific Northwest*, by Ross W. Gorte, July 16, 1993.

These are the provisions of the draft bill that relate specifically to appeals and litigation. Other provisions of the bill would make other substantive changes to current land management that would also modify the relief that appeals could achieve. The overall effect of the provisions on appeals, especially appeals based on new information, combined with other parts of the bill that appear to favor commodity outputs in the planning process,[33] appears to be to give greater emphasis to commodity production than to other values and uses in the decisional and appeals processes. A more detailed analysis of the bill as a whole is beyond the scope of this report.

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[33] *See, e.g.* the provisions of §103 that reduce environmental requirements to policies but not prescriptions, §105 that allow management activities to continue during plan revisions, §106 that require the continuation of the "balance" among uses and similar levels of outputs, and §108 on community stability.