



# Administrative Appeals in the Bureau of Land Management and the Forest Service

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March 28, 2012

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R40131

## Summary

Congress has expressed an interest in the appeals processes of the Bureau of Land Management (BLM) and the Forest Service because of its complexity, and because of allegations that the appeals processes have restricted the ability of the agencies to manage the resources under their care. In 2011, Congress changed the Land Resources Management Plan review process from one that provided for automatic stays and multiple levels of review to a 30-day pre-decisional objection process (P.L. 112-74 §428). In replacing the 1992 Forest Service Decisionmaking and Appeals Reform Act process with that of the Healthy Forests Restoration Act of 2003, Congress aimed to expedite agency review. This change, however, will not take effect until final regulations are issued, for which Congress did not set a deadline.

Administrative appeals are challenges to agency actions that agencies attempt to resolve themselves. Agencies set up hearing processes and regulations to meet the requirements guaranteed by the Fifth Amendment of the U.S. Constitution—that no person will be deprived of property without the due process of the law. This report describes the appeals processes of the BLM of the Department of the Interior (DOI), and the Forest Service of the Department of Agriculture. These appeals are not all formal adjudicatory proceedings under the Administrative Procedure Act (although some have similar procedures), but are defined primarily by agency regulation.

BLM has many different types of administrative appeals. The type of appeal depends, in large part, on the type of action taken by BLM. Decisions regarding land use plans have one type of review that differs slightly for challenges by governors. Decisions regarding minerals, oil and gas, forests, and grazing have a different appeals process, sometimes even having different processes within those categories. Many, but not all, BLM decisions have a final agency review by an appeals board under the Department of the Interior. Sometimes the final review is completed by an Administrative Law Judge.

The Forest Service also has multiple types of reviews, although it does not have an appeals board. For the most part, Forest Service administrative appeals are based on the type of decision being challenged. Forest plans have one process. However, projects implementing those plans have different types of administrative appeals depending on the underlying statute from which the project was authorized. Decisions regarding use and occupancy of forests have another appeals process, which differs depending on the level of employee who made the decision being challenged.

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## Background

The Bureau of Land Management (BLM) and Forest Service have similar management responsibilities for their lands, and many key issues affect both agencies' lands.<sup>1</sup> By law, BLM and Forest Service lands are to be administered for multiple uses, although slightly different uses are specified for each agency. In practice, the lands of the agencies are used for recreation, grazing, timber, minerals, watershed, wildlife and fish, and conservation. Most rangelands are managed by the BLM, and the BLM administers mineral development on all federal lands. Most federal forests are managed by the Forest Service. Despite the many parallels, the administrative appeal structures for the two agencies are not the same—an appeal of a BLM timber sale is different from an appeal of a Forest Service timber sale. In fact, the administrative appeals are not even the same within the same agency, but change depending on the type of agency decision or type of resource.

Neither agency has a statutory mandate to provide formal adjudications on the record for its agency decisions. Accordingly, their appeals processes are not defined by the Administrative Procedure Act, which would require an administrative law judge to preside over a hearing conducted on the record.<sup>2</sup> Instead, regulations describe the appeals.

Congress has a continued interest in agency management, especially to the extent that public participation may be thwarted by confusing administrative processes. Additionally, some have claimed that the appeals process is burdensome, asking Congress to eliminate portions of it. Congress has acted to address administrative appeals on at least two occasions: in 1992, when it established a Forest Service appeals process by statute,<sup>3</sup> and in 2003, when it directed a new appeals process for the Forest Service for certain types of projects.<sup>4</sup>

This report uses a number of acronyms and abbreviations. For the reader's convenience, a glossary of acronyms is provided at the end of this report.

## Bureau of Land Management (BLM)

### The Agency Structure for Appeals

The Office of Hearings and Appeals (OHA) oversees the Department of the Interior's (DOI's) administrative appeals. OHA was created in 1970 to consider appeals related to contracts, public land, and Indian lands. This report will discuss only those appeals related to public lands. This report follows the definition of public lands in the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. §§1701-1712): any lands outside of Alaska owned by the United States and administered by the Secretary of the Interior through the Bureau of Land Management

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<sup>1</sup> For more information on the agencies' management responsibilities, see CRS Report RL33792, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 110<sup>th</sup> Congress*.

<sup>2</sup> 5 U.S.C. §554(a): "This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with certain exceptions]."

<sup>3</sup> Forest Service Decisionmaking and Appeals Reform Act (ARA) P.L. 102-381, §322; 16 U.S.C. §1612 note.

<sup>4</sup> Healthy Forests Restoration Act of 2003 (P.L. 108-148); 16 U.S.C. §§6511-6518.

(BLM), except lands held for the benefit of Indians. (Different procedures apply to BLM lands in Alaska and those held for the benefit of Indians.)

OHA is divided into two principal components: the appeals boards and the hearings division. The appeals board for public lands disputes is the Interior Board of Land Appeals (IBLA or the Board). The Board is the final step for most challenges of BLM agency actions (as distinguished from those based on land use plans).<sup>5</sup> The Board is made up of Administrative Judges, which are distinct from Administrative Law Judges (ALJs). The BLM Director is an ex officio<sup>6</sup> member. A majority of the Administrative Judges on the Board must agree for a decision to pass. The BLM Director may “participate” in the appeal, but the regulations do not indicate that the Director has a vote.<sup>7</sup> The hearings division consists of ALJs, and is used where the law or the regulations allow or require an ALJ. For example, grazing challenges are reviewed by an ALJ before the Board’s review, and challengers of certain oil and gas decisions have the option to seek an ALJ review. These two processes will be discussed in detail later in this report (see “Grazing Actions” and “Oil and Gas Development”).

BLM officials also have authority to review disputes, typically at the early levels of a challenge. They include Deciding Officials, State Directors, and the Director of BLM.

## **The Process**

BLM has different administrative review processes for different types of resources at issue—forests, grazing, oil and gas, and minerals—and for disputes based on a land use plan. When development of a land use plan is the basis of a challenge, there is one appeals path, regardless of the resource. However, when the challenge is to a decision implementing those plans, BLM has provided different types of reviews.<sup>8</sup> To explain the BLM appeals process, each of these administrative reviews must be examined separately.

BLM regulations provide for different types of challenges with different names. This report will use the terms as they are used in the regulations. Even though each of these challenges is an appeal of some sort (meaning it is seeking the reversal of a decision), the term *appeal* will be used only for challenges brought to the Board or an ALJ. The term *protest* applies only to those challenges brought before the BLM Director. A *request for review* applies to certain mineral and oil and gas challenges brought to a State Director. A *contest* is only that type of challenge provided for under 43 C.F.R. Section 4.450, as explained below. The term *challenge* will be used generally to describe any of the above actions.

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<sup>5</sup> 43 C.F.R. §4.1(b)(3): “The Board is the final agency decision maker for the following issues ... (a) the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf...” See also 43 C.F.R. §4.403: “A decision of the Board shall constitute final agency action and be effective upon the date of issuance ...”; 112 Departmental Manual (DM) 13.9. The decisions of the Board are available on Lexis, Westlaw, or via the DOI online: <http://www.oha.doi.gov/IBLA/findingIBLA.html>.

<sup>6</sup> By virtue of his or her office.

<sup>7</sup> 43 C.F.R. §4.2.(b).

<sup>8</sup> According to the BLM Land Use Planning Handbook, an implementing decision is generally BLM’s final approval allowing an on-the-ground action to proceed. p. 29.

The regulations define who may bring an appeal. Generally, a person who has “participated in the process leading to the decision under appeal” may bring a challenge.<sup>9</sup> However, there are numerous exceptions that will be discussed later in this report.

## **Land Use Planning Appeals**

Land use planning is the process by which BLM determines how federal lands will be used according to FLPMA. Land use plans are developed by BLM to ensure that federal lands are managed under the principles of multiple use and sustained yield.<sup>10</sup> FLPMA states that the appeals process for those plans should ensure third party participation,<sup>11</sup> and makes reference to notice and hearing regarding revocations of use and occupancy permits,<sup>12</sup> but otherwise imposes no procedure for appeals.<sup>13</sup>

According to the BLM Land Use Planning Handbook, land use plans have two purposes: to establish goals and objectives for resource management; and to establish the measures needed to achieve those goals and objectives.<sup>14</sup> The plans establish allowable uses, and those uses are put into effect by implementing decisions. Only the challenges to the implementing decisions involve the OHA; challenges of land use plans are not brought before an ALJ or the IBLA, but are ultimately decided by the Director of BLM.

## **Protests**

Challenges to land use plans are termed *protests*. The protest process is provided for in 43 C.F.R. Section 1610.5-1 and Section 1610.5-2. The process begins with publication of a proposed land use plan in the *Federal Register*. The publication will give information on how to file a protest of that plan with the BLM Director. The protest must be filed within 30 days of publication.<sup>15</sup> According to the BLM Handbook, the protest is reviewed by the State Office to see if it was filed by a party with standing. To have standing to protest a land use decision, a person must show an interest that was or may be harmed by the land use decision. Additionally, the protesting party must have participated in the planning process in some way, for example, by submitting written comments or attending a public meeting.<sup>16</sup> To make a valid protest, the issues must have been raised on the record during the planning process, although they can have been raised by another party. This ensures that BLM has had a chance to consider an issue, so that the challenge is genuinely of a decision BLM made, rather than an item BLM had not known about.

The protest is reviewed by the Director of BLM, although in practice this authority has been delegated to the Assistant Director. The BLM Director must consider whether the land use plan

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<sup>9</sup> 43 C.F.R. §4.410(a).

<sup>10</sup> 43 U.S.C. §1701(a)(7).

<sup>11</sup> 43 U.S.C. §1701(a)(5): “[Congress declares it is the policy of the United States] to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking.” FLPMA does provide for an APA hearing regarding easements.

<sup>12</sup> 43 U.S.C. §1732(c).

<sup>13</sup> 43 U.S.C. §1766.

<sup>14</sup> Handbook, p. 11.

<sup>15</sup> 43 C.F.R. §1610.5-2(a)(1).

<sup>16</sup> Handbook Appx. E, p. 5.

complied with established procedure, the relevant information, and whether it is “consistent with BLM policy regulation, and statute.”<sup>17</sup> The BLM Director is authorized to dismiss the protest or remand it to the State Director to correct any problems discovered. If the issue is remanded, it may be subject to a new review under the National Environmental Policy Act (NEPA)<sup>18</sup> and a new protest period upon revision, depending on the significance of the remanded matter, ranging from the plan’s lacking complete information to the plan’s violating existing laws.<sup>19</sup>

BLM’s stated goal is that all protests will be resolved within 90 days.<sup>20</sup>

## **Consistency Review**

A separate avenue is provided for governors to challenge a proposed plan if it is not consistent with state, local, and tribal laws, policies, and procedures. Governors may submit a response based on consistency to the BLM State Director within 60 days.<sup>21</sup> If it is not resolved at that level, the governor may appeal to the Director of BLM within 30 days.<sup>22</sup> The Director will review the governor’s comments to see if they “provide for a reasonable balance between the national interest and the State’s interest.”<sup>23</sup> The regulations do not provide for a stay during the time the governor’s consistency review is being considered. The Director’s determination on state consistency will be published in the *Federal Register*.<sup>24</sup>

After the protests and any consistency issues are resolved, BLM may issue a record of decision, which is the final agency action under the process established by NEPA. Challenges based on the record of decision would go directly to federal district court and not through an agency appeal process.

## **Final Step**

Land use planning challenges do not advance to the Board. The final agency decision maker is the Director of BLM.<sup>25</sup> Any challenge of the Director’s decision would be made in federal court.

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<sup>17</sup> Handbook, Appx. E, p. 1.

<sup>18</sup> 42 U.S.C. §§4321-4347).

<sup>19</sup> See Handbook, Appx. E, pp. 2, 6-7.

<sup>20</sup> BLM Land Use Planning Handbook, H-1601-1, Appx. E, p. 1 (March 3, 2005) (hereinafter Handbook), online at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_handbook.Par.38665.File.dat/h1601-1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38665.File.dat/h1601-1.pdf).

<sup>21</sup> 43 C.F.R. §1610.3-2(e).

<sup>22</sup> For example, Governor Kulongoski of Oregon filed an appeal on December 8, 2008, with BLM challenging the consistency of the Western Oregon Plan Revision that designated how BLM’s forests in Oregon would be managed.

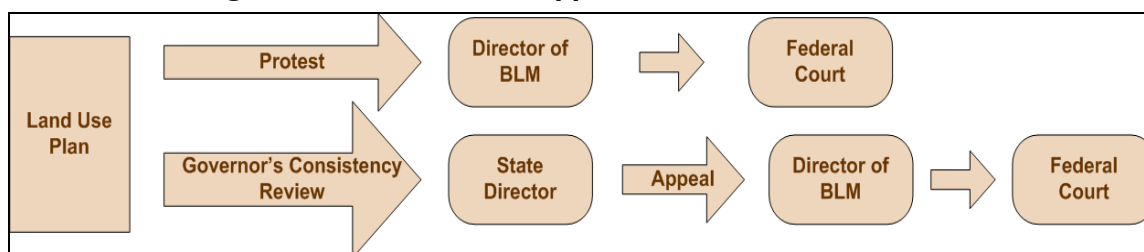
<sup>23</sup> 43 C.F.R. §1610.3-2(e).

<sup>24</sup> See, e.g., Notice of BLM Director’s Response to an Appeal From the Governor of New Mexico, 70 Fed. Reg. 3550 (January 25, 2005).

<sup>25</sup> 43 C.F.R. §1610.5-2(b).



**Figure 1. Administrative Appeals of BLM Land Use Plans**



Source: Bureau of Land Management.

As mentioned above, the protest process for land use plan decisions is different from the administrative appeal for implementing decisions, such as timber sales, oil and gas lease sales, and grazing decisions. It is not uncommon for BLM to combine the two decisions in one effort—this would have the benefit of using one combined NEPA review. When it does so, however, BLM is required to identify which decisions are land use plan decisions, and thus subject to protests under the planning regulations, and which are implementation decisions that have separate appeals regulations.<sup>26</sup> In the alternative, two decision documents can be used.

## Appeals of Implementing Decisions

In broad strokes, the BLM appeals process for implementing decisions consists of two steps: a challenge to an agency action, which is reviewed by an agency official; and then an appeal, which is reviewed by the Interior Board of Land Appeals, or the Director of the BLM. Upon the decision by the Board or the Director, the challenger may take the issue to federal court.

Administrative remedies for implementing decisions provide for an internal agency review before the challenge can advance. The first step in the process is filing a *protest* or a *request for review*, which is reviewed by the deciding official of BLM, in many cases the State Director. This gives the agency the chance to review the issues before the matter is brought before the Board. If the challenging party is not satisfied with the result of the deciding officer's decision, an appeal can be brought to the IBLA.

Challenges before the Board are trial-type proceedings, with the presentation of evidence and witnesses. Some challenges are brought before an administrative law judge (ALJ) who is isolated from the decision-making area of the agency.<sup>27</sup> An ALJ functions as an independent, impartial trier of fact, similar to a judge.<sup>28</sup> Review of a Board or ALJ decision is by a federal court.

There are exceptions to this general process, which shall be discussed during the review of the individual categories.

<sup>26</sup> Handbook p. 30.

<sup>27</sup> One requirement of FLPMA is that the administration of public lands include an "objective administrative review of initial decisions." 43 U.S.C. §1701(a)(5).

<sup>28</sup> For more on ALJs, see CRS Report RL34607, *Administrative Law Judges: An Overview*, by Vanessa K. Burrows.

## Forest Management

Approximately 69 million acres of the land managed by BLM is forested, although some of this land is designated wilderness.<sup>29</sup> Forest management decisions include timber sales, thinning projects, and other actions that affect forest conditions. These decisions are published in local newspapers in the area of the affected lands. Protests of forest management decisions must be filed within 15 days of either the notice of decision or notice of sale.<sup>30</sup> An appeal following an adverse protest decision must be filed within 30 days of issuance of the letter denying the protest.

Unlike challenges for other types of actions, filing a protest does not automatically suspend a forest management decision.<sup>31</sup> A stay must be requested. Filing a request for a stay with the Board gives the appellant an automatic 45-day stay. The decision to grant a stay is based on the appellants' being able to prevail on the merits; stays are customarily granted, but are not automatic beyond the initial 45 days. Some factors in determining whether a stay should be granted are whether the stay is in the public interest, what the balance of harms is in granting the stay, and the likelihood of immediate and irreparable harm.

The regulations impose deadlines for the Board to decide issues regarding wildfire management made under either forests or grazing regulations. The regulations require the Board to decide appeals within 60 days after all pleadings have been filed, which cannot be greater than 180 days after the appeal was filed.<sup>32</sup>

**Figure 2. Administrative Appeals of BLM Forest Management Decisions**



Source: Bureau of Land Management.

## Grazing Actions

Challenges of grazing actions still begin with a protest that is reviewed by the deciding official, but they have an additional level of review, which occurs after the deciding official issues a decision. Protests must be filed within 15 days after receipt of a proposed decision, copies of which are sent to the affected applicant, permittee, lessee, agents, lien holders, and members of the interested public.<sup>33</sup> A proposed decision may pertain to leases, applications, or range improvement permits. If there is no protest, the proposed decision becomes final and is subject to the next steps of the appeals process. If the protesting party is dissatisfied with the proposed decision (or the proposed decision becomes final without a protest), the next step is an appeal reviewed by an ALJ, which must be brought within 30 days of the final decision.<sup>34</sup> The appeal

<sup>29</sup> BLM Forest Lands Report: 2006 Status and Conditions, BLM/ST/ST-07/001+5000, online at [www.fs.fed.us/rm/pubs\_other/rmrs\_2006\_bottomley\_t001.pdf].

<sup>30</sup> 43 C.F.R. §5003.3.

<sup>31</sup> 43 C.F.R. §5003.1.

<sup>32</sup> 43 C.F.R. §4.421.

<sup>33</sup> 43 C.F.R. §4160.1.

<sup>34</sup> 43 C.F.R. §4.470(a).

does not automatically stay the proceeding; a stay must be requested.<sup>35</sup> If the protesting party still is not satisfied, another appeal is allowed to the Board. This can be an appeal of a denial of a stay, or an appeal on the merits.<sup>36</sup> Further recourse is through the federal courts.

When stays are issued, the grazing permits or leases in effect before the new decision are applicable until the dispute is resolved.<sup>37</sup> If the stay is being disputed on appeal, the matter before the ALJ is not suspended unless ordered by the Board or the court.<sup>38</sup>

**Figure 3. Administrative Appeals of BLM Grazing Decisions**



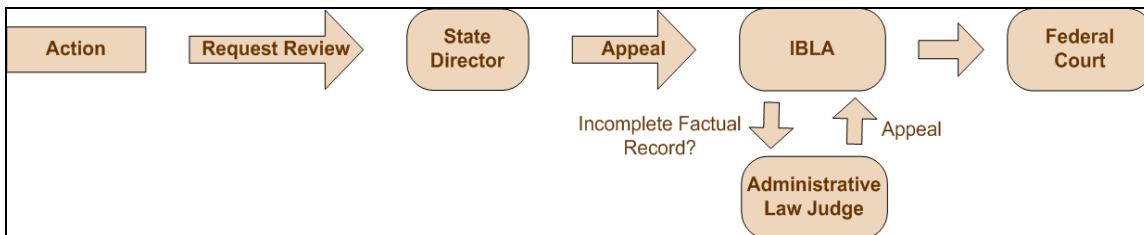
Source: Bureau of Land Management.

### Minerals (but not Oil and Gas)

The minerals appeals process applies to all minerals—locatable, leasable, or saleable—except oil and gas. For surface management issues, such as operation or reclamation permitting disputes, the process begins not with a protest, as for the other challenges, but with a *request for review* made to the State Director. The State Director has discretion whether to accept the review. If an adverse finding is made, the appeal is brought to the Board. In instances where the administrative record is not clear and a factual determination must be made, the Board will refer the action to an ALJ for a hearing.<sup>39</sup> Otherwise, the Board makes its determination. The ALJ decision may be appealed to the Board. The Board’s decision is the BLM’s final action and may be challenged in federal court.

**Figure 4. Administrative Appeals of BLM Minerals Decisions**

Excluding Oil and Gas



Source: Bureau of Land Management, with revisions by Congressional Research Service.

<sup>35</sup> 43 C.F.R. §4.471. A petition for a stay is filed, not with the ALJ, but with the BLM field office that issued the decision.

<sup>36</sup> 43 C.F.R. §4.478.

<sup>37</sup> 43 C.F.R. §4160.4(b).

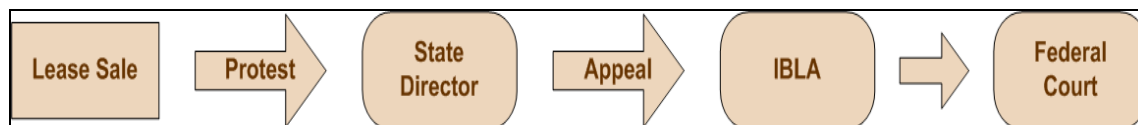
<sup>38</sup> 43 C.F.R. §4.478(d). *Smithsfork Grazing Ass’n v. Salazar*, 564 F.3d 1210 (10<sup>th</sup> Cir. 2009) (burden of proof is on challenger to obtain stay).

<sup>39</sup> 43 C.F.R. §4.415.

## Oil and Gas Development

Oil and gas development has a different appeals process than for other minerals. There are two routes, depending on the stage at which the BLM decision was made. Challenges based on a lease sale follow the two-step protest route: a protest is made to the State Director,<sup>40</sup> and an appeal of the State Director's decision is made to the Board. Appeals may be filed by lessees, bidders on the lease, and interested third parties. The Board's decision is reviewable by a federal court.

**Figure 5. Administrative Appeals of BLM Oil and Gas Decisions—Lease Sale Issues**



Source: Bureau of Land Management.

A challenge to BLM actions made after the lease is sold at auction is termed a *request for review*. The term *request for review* is not defined within the regulations, and it does not appear to have a substantive meaning distinct from a *protest*, although procedurally, in some circumstances, a request for review could go to an ALJ, rather than the Board. A request for review is made to the State Director within 20 days of the notice of the adverse decision.<sup>41</sup> Requests are generally based on a technical aspect of the drilling program, such as challenging a decision based on an application for a permit to drill (APD).<sup>42</sup> Also, requests for review may be made where penalties are imposed by BLM for failure to meet the terms of a permit, where an application has been made to modify the royalty provision of the lease, or for an application for relief from operating and producing requirements.<sup>43</sup>

Requests for reviews based on proposed penalties have different options than for other issues.<sup>44</sup> Parties contesting a notice of proposed penalty may challenge the State Director's decision by going either to an ALJ, for a hearing on the record,<sup>45</sup> or to the IBLA. Appeals of decisions on other issues go only to the IBLA. The ultimate review of a decision by either the ALJ or the Board is by a federal court.

<sup>40</sup> 43 C.F.R. §4.410.

<sup>41</sup> 43 C.F.R. §3165.3(b).

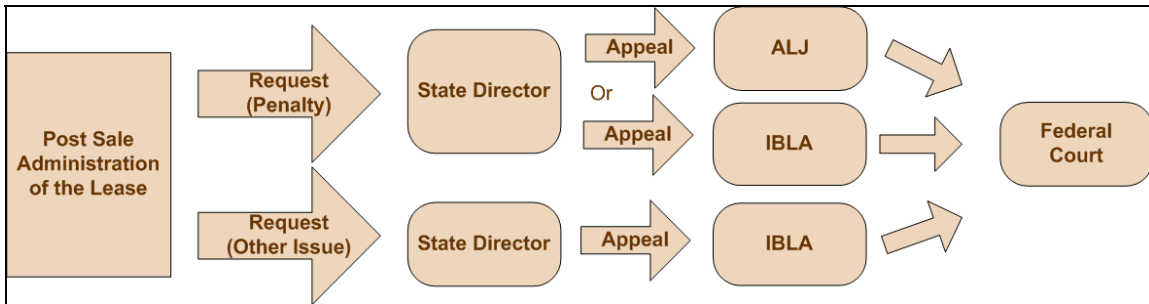
<sup>42</sup> If a challenge is made by a third party to an APD, for example disputing the location of the well, that challenge is a protest, not a request for review.

<sup>43</sup> 43 C.F.R. part 3165.

<sup>44</sup> 43 C.F.R. §3165.3(c).

<sup>45</sup> The Federal Oil and Gas Royalty Management Act provides that no civil penalty can be imposed without the opportunity for a hearing on the record. 30 U.S.C. §1719(e).

**Figure 6. Administrative Appeals of BLM Oil and Gas Decisions**  
 For Challenges Regarding Administration of the Lease After the Sale



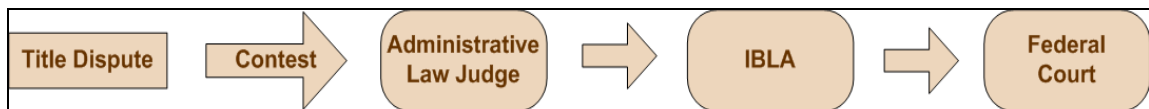
Source: Congressional Research Service.

## BLM Contests

Certain types of actions challenging BLM decisions are termed contests, rather than appeals. Contests occur in three situations: title and patent disputes over lands; mineral claims validity; or certain grazing issues regarding trespass of cattle. The distinction from a protest is that a person making a contest is asserting title to or an interest in land adverse to any other person claiming title or interest, as opposed to challenging a decision of the agency.<sup>46</sup> The regulations for contests are found at 43 C.F.R. Section 4.450.

The contest process is similar to the appeals process, except that there is no lower-level review, such as by the State Director. The action is brought directly before an ALJ for a formal hearing. Review of an ALJ decision is before the Board. Board decisions may be challenged in federal court.

**Figure 7. Administrative Appeals of Title Disputes**



Source: Congressional Research Service.

## Forest Service

The Forest Service also has different appeals processes based on the type of action that is being appealed. Unlike the BLM, the Forest Service does not have a distinct body like the IBLA to hear appeals, and generally, the path for appeals has fewer steps. Many final decisions are made by the agency after the initial challenge and offer no additional agency review, meaning the next step is federal court. A challenge to a decision is termed an *appeal*, although where the review is made before a decision is final, the challenge is called an *objection*. Reviews of objections are known as *predecisional*, as a final decision is issued only after the objection has been considered.

<sup>46</sup> 43 C.F.R. §4.450-1.

The Forest Service has had an appeals process in place since 1906. That process has evolved significantly in the last two decades. In 1992, in response to a regulatory effort to limit appeals, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (ARA) in the FY1993 Interior appropriations act (P.L. 102-381, §322; 16 U.S.C. §1612 note), creating a statutorily mandated appeals process for land and resource management plans. The statutory mandate came two decades after the Forest and Rangeland Renewable Resources Planning Act of 1974 provisions for public input into forest plans.<sup>47</sup>

Appeals are based on the type of Forest Service project in dispute. The Forest Service prepares forest management plans for each forest (called land and resource management plans (LRMPs) or Forest Plans), and implements projects within those plans. Different processes apply to challenging an LRMP than for challenging projects; and different processes apply to project challenges, depending on the type of project. Forest Service regulations also provide a separate appeals process for challenges based on use and occupancy of the national forests, rather than for plans or projects. Finally, a special, predecisional review process applies to the limited administrative review for hazardous fuel reduction projects defined in the Healthy Forests Restoration Act of 2003 (P.L. 108-148; 16 U.S.C. §§6511-6518).

Four different regulatory sections provide for appeals, depending on the type of administrative action that is being challenged. Those sections of Title 36 C.F.R. are parts 215, 218, 219, and 251. Appeals under part 219 are made for challenges to LRMPs. If a project decision is being challenged, an appeal is brought under part 215, unless that project decision was made under the Healthy Forests Restoration Act, in which case part 218 applies. Where the challenge is about using the forests, such as via a special use permit, part 251 applies.

## **Part 219—Appeals of Plans under the National Forest Management Act**

The National Forest Management Act (NFMA) requires the Forest Service to produce Forest Plans for units of the National Forest System.<sup>48</sup> Forest Plans are required to be revised at least every 15 years and address all aspects of forest stewardship. Two sets of regulations were promulgated under the NFMA, first under part 217 (finalized December 9, 2000), and then in 2008, part 219, which replaced part 217 (although references to part 217 can still be found in the regulations).

The regulations in part 219 provide for predecisional *objections*. They are termed predecisional because even though a plan has been produced, it is not yet final. The Responsible Official publishes a notice of the availability of a proposed plan, providing 30 days for serving an objection. The Reviewing Officer determines whether an objection has merit.<sup>49</sup> The decision of the Reviewing Officer is the final review within the Forest Service.<sup>50</sup> Further challenges based on the objection must be made in federal court. If the Reviewing Officer decides the objection has

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<sup>47</sup> P.L. 93-378; 16 U.S.C. §1604.

<sup>48</sup> 16 U.S.C. §§1601-1606.

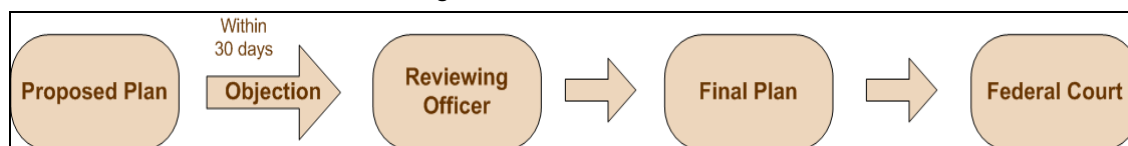
<sup>49</sup> 36 C.F.R. §219.13(c).

<sup>50</sup> 36 C.F.R. §219.13(c)(2).

merit, the forest plan is revised. The regulations provide for a 30-day objection period for plan revisions, suggesting a subsequent predecisional review is available.<sup>51</sup>

**Figure 8. Administrative Appeals Under Part 219**

Challenges of Forest Plans Under NFMA



Source: Congressional Research Service.

In some cases, part 219 actions overlap with actions under parts 215 and 218. The overlap occurs when a plan amendment is approved at the same time as a project or activity decision and the plan amendment applies just to that project or decision. Part 215 applies in such cases, unless the plan amendment is not significant and addresses a hazardous fuel reduction project, in which case the review is under part 218.

## Part 218—Predecisional Administrative Reviews of Projects Implementing the Healthy Forests Restoration Act

Part 218, which was promulgated in 2004, applies to the limited administrative review for hazardous fuel reduction projects (HFRPs) defined in the Healthy Forests Restoration Act of 2003 (HFRA).<sup>52</sup> HFRA provided a predecisional review process for projects made under the act. HFRPs are not required to follow the notice, comment, and appeal procedures under part 215, which applies to projects implementing LRMPs, if brought under part 218. However, once the Forest Service has chosen which decision and review process to use for the project (either part 215 or part 218) challenges must be based on that part.<sup>53</sup>

Challenges to HFRPs under part 218 are known as *objections*. The objections are predecisional, similar to the process under part 219. Once the final agency action has been taken, there is no administrative review. This is somewhat confusing because an objection is made after completion of the final environmental document—either an EA or an EIS—but that document is not the final agency action for the project. (Under the HFRA regulations, the final agency action can take two forms: a decision notice, following an EA; or a record of decision, following an EIS.<sup>54</sup>) Upon completion of the EIS or EA, but before the decision notice or record of decision, the Forest Service publishes legal notice of the opportunity to object in a local newspaper.<sup>55</sup> This starts the

<sup>51</sup> 36 C.F.R. §219.13(a).

<sup>52</sup> 16 U.S.C. §§6501 et seq.

<sup>53</sup> 36 C.F.R. §218.1. See “Replacement of Part 215 Appeals with Part 218 Objections,” below, for discussion of how P.L. 112-74, §428 will change Part 215 appeals.

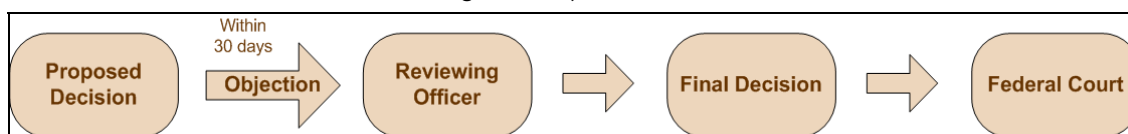
<sup>54</sup> According to Section 218.3 only HFRPs that were analyzed under an EA or an EIS are subject to the objection process.

<sup>55</sup> Efforts to have notice posted on the internet, in addition to being published in a local newspaper were rejected by the Forest Service, despite the agency’s having noted that this method of publication had been adequate since 1993. 73 Fed. Reg. at 53708.

30-day period during which an objection may be filed.<sup>56</sup> Because NEPA does not require a comment period for EAs, the objection time may be the first opportunity for the public to provide input on HFRPs, even though it is not technically a comment period.

**Figure 9. Administrative Appeals Under Part 218**

Challenges of Projects Under HFRA



**Source:** Congressional Research Service.

Some HFRPs are exempt from even the predecisional objections. Under Section 218.4, if no comments were received on the project, no objections will be accepted. This situation will be noted in the record of decision or the decision notice by the Responsible Official.

Part 218 limits who can object. Only parties who submitted comments specific to the proposed hazardous fuel reduction project, either during scoping or during any comment period that is requested, or during the comment period for a draft EIS, may file an objection.<sup>57</sup> Those parties are known as objectors. Objections are filed with the Reviewing Officer, who is the immediate supervisor of the Responsible Official.<sup>58</sup> After filing a challenge, an objector may request a meeting to discuss the issues, and the regulations suggest that the Reviewing Officer may refuse a meeting only if there is not adequate time within the review period to have the meeting.<sup>59</sup> Those meetings are open to the public.

The implementing regulations in part 218 also carve out an exception to the part 219 regulations regarding appeals to land management plans, which are discussed below. According to the Forest Service,

non-significant amendments to a land management plan, when approved for a specific HFRA project at the same time the project decision is made, should be subject to the predecisional review process. This is consistent with the administrative review of non-significant amendments associated with non-HFRA projects (36 CFR part 215) and the objection process under the planning regulations at 36 CFR part 219.<sup>60</sup>

The decision of the Reviewing Officer is not reviewable within the agency. That means any additional challenge would have to be brought in federal court. The regulations describe the limited judicial review, which requires exhaustion of administrative remedies. According to Section 218.14, any judicial challenge of a hazardous fuels reduction project is “premature and inappropriate” unless written comments were submitted to the agency during scoping or other public comment periods. Judicial review is then limited to only those issues raised during the objection process, except in exceptional circumstances.

<sup>56</sup> 36 C.F.R. §218.2: definition of Objection Period.

<sup>57</sup> 36 C.F.R. §218.7(a).

<sup>58</sup> 36 C.F.R. §218.2.

<sup>59</sup> 36 C.F.R. §218.11(a).

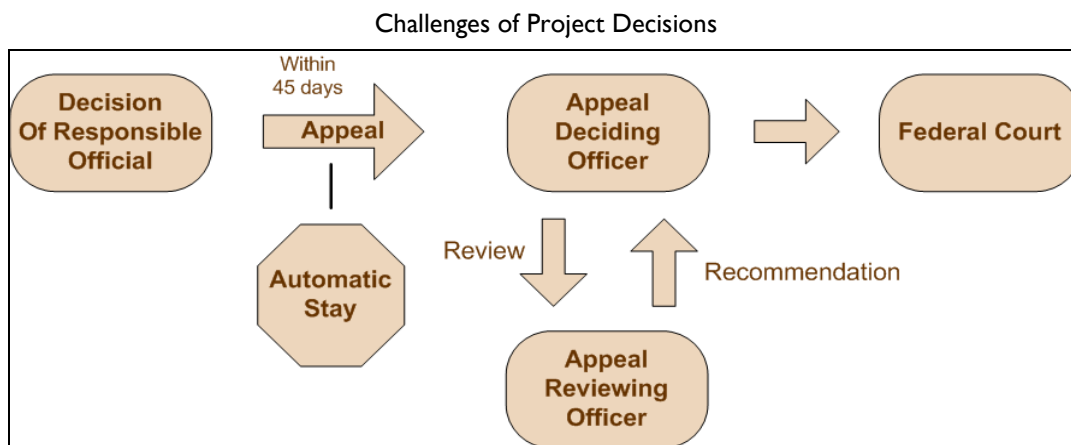
<sup>60</sup> 73 Fed. Reg. 53707 (September 17, 2008).



## Part 215—Appeals of Projects Implementing Land and Resource Management Plans

Regulations promulgated under the Forest Service Decisionmaking and Appeals Reform Act (ARA),<sup>61</sup> as revised by the Forest Service in response to the Healthy Forests Restoration Act (HFRA),<sup>62</sup> apply to appeals of projects implementing LRMPs. The regulations are found in 36 C.F.R. part 215. When the Forest Service approves projects (such as timber sales), it does so in conjunction with the review process under NEPA. This leads to three types of decision documents from the Forest Service: a decision memorandum that follows a categorical exclusion (CE) under NEPA; a decision notice that follows an environmental assessment; and a record of decision following an environmental impact statement (EIS). Each of these decisions is appealable at the agency level under part 215, as a result of the ARA. The ARA, enacted in 1992, requires that the Forest Service provide a notice and comment period for projects that implement LRMPs.<sup>63</sup> The statute also gives challengers 45 days from the date of a decision to bring an appeal. The regulations allow only parties who have made substantive comments during the comment period to submit an appeal.<sup>64</sup>

**Figure 10. Administrative Appeals Under Part 215**



Source: Congressional Research Service.

Appeals are made to the *Appeal Deciding Officer*. That officer is the immediate supervisor of the official who implemented the decision, the Responsible Official.<sup>65</sup> (See **Table 1**, below.) Thus, the Appeal Deciding Officer can range from a Forest Supervisor to the Secretary of Agriculture.<sup>66</sup>

<sup>61</sup> 16 U.S.C. §1612 note.

<sup>62</sup> 16 U.S.C. §§6501 et seq. The changes were challenged in court, but ultimately left in place by the U.S. Supreme Court. *Earth Island v. Pengilly*, 276 F. Supp. 2d 994 (E.D. Cal. 2005), *remanded in part sub nom.*, *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9<sup>th</sup> Cir. 2007) (holding that regulatory changes eliminating appeals violated the ARA), *rev'd in part sub. nom.*, *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009) (holding that the challengers lacked standing to dispute the regulations).

<sup>63</sup> 16 U.S.C. §1612 note.

<sup>64</sup> 36 C.F.R. §215.2. The statute says that an appellant must make written or oral comments, but does not require that they be substantive. P.L. 102-381, §322(c).

<sup>65</sup> 36 C.F.R. §215.8.

<sup>66</sup> 36 C.F.R. §215.2.

Even though the Responsible Official does not decide the appeal, that person may conduct an informal meeting with the appellant, and documentation from that meeting is part of the appeal record.<sup>67</sup> There is also an intermediate layer of review by a person known as the Appeal Reviewing Officer, who makes recommendations to the Appeal Deciding Officer. The Appeal Reviewing Officer reviews the issues and writes an opinion for the Deciding Officer's approval.

**Table I. Forest Service Appeal Deciding Officers**

<b>If the Responsible Official who made the decision is:</b>	<b>Then the Appeal Deciding Officer is:</b>
Forest Supervisor	Regional Forester
Regional Forester or Station Director	Chief of the Forest Service
Chief of the Forest Service	Secretary of Agriculture

**Source:** Congressional Research Service.

### **Replacement of Part 215 Appeals with Part 218 Objections**

As part of the Consolidated Appropriations Act of 2012, Congress directed the end of the ARA appeals process. The law provides that upon issuance of final regulations, appeals of projects implementing LRMPs will follow the pre-decisional objection process created under the Healthy Forests Restoration Act of 2003 and implemented under Part 218. Essentially, once regulations are issued, the appeals described in **Figure 10** will be replaced by the process described in **Figure 9**. However, in emergencies, no review will be available.

Once in place, the change will limit agency review from a process that imposes automatic stays of projects and reviews by multiple officials, to a one-review process that must be initiated within 30 days of a final environmental document. The change could speed projects to completion by limiting the opportunity to appeal. On the other hand, the change will shorten the path for objecting parties to bring suit in federal court. Notably, P.L. 112-74, Section 428 does not establish a time frame for issuing the regulations, and the Forest Service has not announced plans to develop regulations.

### **Part 251—Appeals of Decisions Related to Occupancy and Use of Forests**

Part 251 applies to appeals for special use permits and other contract-like disputes, as opposed to the development of plans or implementation of projects. Here are some examples:

- permits for ingress and egress to private lands across Forest Service lands;
- permits and occupancy agreements on grasslands under the Bankhead-Jones Farm Tenant Act (P.L. 75-210);
- grazing and livestock use permits;
- permits authorizing exercise of mineral rights reserved after conveyance;

<sup>67</sup> 36 C.F.R. §215.2.

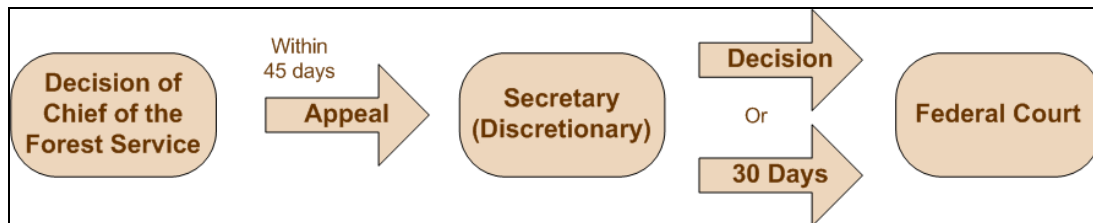
- permits for uses in wilderness areas; and
- approval or non-approval of Surface Use Plans of Operations related to use and occupancy of particular sites.<sup>68</sup>

A list of decisions that are not appealable under this section is provided in Section 251.83 and includes administrative and personnel decisions.<sup>69</sup> One notable exception is for actions related to rehabilitating Forest Service lands after natural disasters such as wildfires, severe wind, flooding, or earthquakes. The Chief of the Forest Service can exempt those actions from review.<sup>70</sup>

The regulations define who may appeal under part 251. Only applicants for authorization, or signatories and holders of authorizations may appeal.<sup>71</sup> Interveners may appeal if they can demonstrate how their interests are affected by the appeal.<sup>72</sup> Any appeals must be filed within 45 days of the written decision.<sup>73</sup> Stays are not automatically granted, unlike for many part 215 appeals. However, in the case of appeals of grazing decisions, the action is stayed if the grazing permit holder requests mediation simultaneously with the appeal.<sup>74</sup> Otherwise, stays may be requested using the procedure in Section 251.91.

Another difference in part 251 appeals is that certain appeals may be heard at more than one level, while others are heard at only one, and still another type of appeal is discretionary, and so may not be reviewed at all. Appeals to be heard by the Secretary—those appealing a decision of the Chief of the Forest Service—are at the discretion of the Secretary.<sup>75</sup> Where no review decision is issued after 30 days of the discretionary review period, the written decision that was being appealed is treated as a final decision by the agency and ripe for review by the federal courts.<sup>76</sup> If the Secretary has decided not to review the Chief’s decision, the Secretary’s office will notify the requester of the fact within 15 days of receiving the appeal.

**Figure 11. Administrative Appeals Under Part 251 of Forest Service Chief Decisions**



**Source:** Congressional Research Service.

<sup>68</sup> 36 C.F.R. §251.82(a).

<sup>69</sup> Section 251 discusses in several places that part 217 appeals cannot also be brought under part 251. However, part 217 was revoked.

<sup>70</sup> 36 C.F.R. §251.84(m).

<sup>71</sup> 36 C.F.R. §251.86. Interveners are also allowed to appeal. They are defined as individuals or organizations that hold the written instrument or who have applied for the written instrument. 36 C.F.R. §251.81.

<sup>72</sup> 36 C.F.R. §251.81.

<sup>73</sup> 36 C.F.R. §251.88(a).

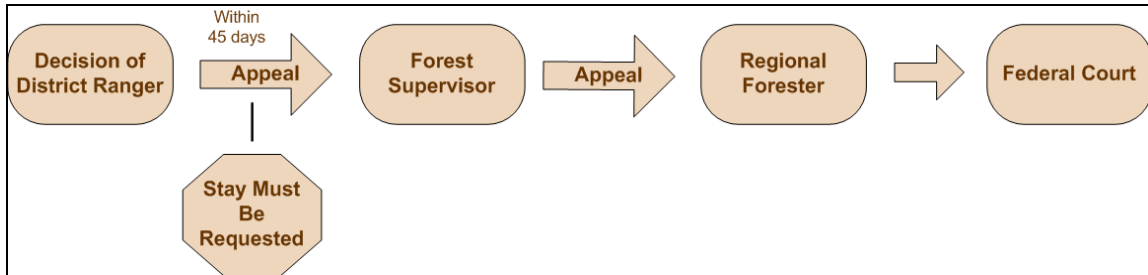
<sup>74</sup> 36 C.F.R. §§251.91(a), 251.103.

<sup>75</sup> 36 C.F.R. §251.87(a).

<sup>76</sup> 36 C.F.R. §251.100(g).

Decisions made by the District Ranger may be reviewed by the Forest Supervisor as a first review, and then by the Regional Forester, based on the record from the first review.<sup>77</sup>

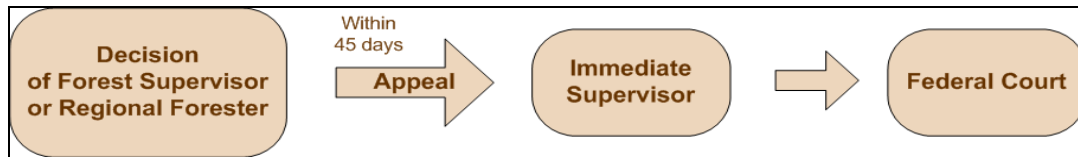
**Figure 12. Administrative Appeals Under Part 251 of District Ranger Decisions**



Source: Congressional Research Service.

If the decision was made by the Forest Supervisor or the Regional Forester, only one level of review is available under part 251, to their immediate supervisor.<sup>78</sup>

**Figure 13. Administrative Appeals Under Part 251 of Forest Supervisor or Regional Forester Decisions**



Source: Congressional Research Service.

Part 251 provides for oral presentation of the issues, if requested by the appellant. The regulations provide that an oral presentation will automatically be provided if requested as part of the notice of appeal.<sup>79</sup> The presentations may be open to the public. Mediation sessions of grazing permits, however, are confidential, although the final decision resulting from the mediation is a public document.<sup>80</sup>

<sup>77</sup> 36 C.F.R. §251.87(c).

<sup>78</sup> 36 C.F.R. §251.87(b).

<sup>79</sup> 36 C.F.R. §251.97(b).

<sup>80</sup> 36 C.F.R. §251.103(d).

## Appendix. Glossary of Acronyms

<b>ALJ</b>	Administrative Law Judge (decision makers in certain BLM challenges)
<b>APD</b>	Application for a Permit to Drill
<b>ARA</b>	Forest Service Decisionmaking and Appeals Reform Act (16 U.S.C. §1612 note)
<b>BLM</b>	Bureau of Land Management of the Department of the Interior
<b>CE</b>	Categorical Exclusion (a decision under NEPA that, based on previously determined criteria, no significant adverse environmental impacts will occur as a result of the agency action)
<b>CFR</b>	Code of Federal Regulations
<b>EA</b>	Environmental Assessment (a NEPA document assessing environmental impacts to see if an EIS is needed)
<b>EIS</b>	Environmental Impact Statement (a NEPA document demonstrating a hard look at the environmental consequences of a federal agency action)
<b>FLPMA</b>	Federal Land Policy and Management Act (43 U.S.C. §§1701-1712)
<b>HFRA</b>	Healthy Forests Restoration Act (16 U.S.C. §§6501 et seq.)
<b>HFRP</b>	Hazardous Fuels Reduction Projects
<b>IBLA</b>	Interior Board of Land Appeals
<b>LRMPs</b>	Land and Resource Management Plans (also known as Forest Plans)
<b>NEPA</b>	National Environmental Policy Act (42 U.S.C. §§4321 et seq.)
<b>NFMA</b>	National Forest Management Act (16 U.S.C. §§1601-1606)
<b>OHA</b>	Office of Hearings and Appeals (oversees IBLA appeals within the Department of the Interior)

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## Acknowledgments

The author would like to thank Pat McClaughry, a Graphics Specialist at CRS, for creating the flow charts in this report.