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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB59

Land Uses; Appeal of Decisions Relating To Occupancy and Use of National Forest System Lands; Mediation of Grazing Disputes

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Forest Service requests comment on a proposed rule that would modify the agency's administrative appeal regulations relating to occupancy and use of National Forest System lands to offer mediation of certain grazing permit disputes in those States that have USDA certified mediation programs. This action is authorized by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. The intended effect is to incorporate mediation for certain grazing disputes into established agency dispute resolution processes. Public comment is invited and will be considered in adoption of a final rule.

DATES: Comments must be received in writing by April 28, 1998.

ADDRESSES: Send written comments to Director, Range Management Staff, Mail Stop 1103, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090.

The public may inspect comments received on this proposed rule in the Office of the Director, 3rd Floor, South Central Wing, Auditor's Building, 14th and Independence Avenue, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m. Those wishing to inspect comments are encouraged to call ahead (202/205–1462) to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Berwyn L. Brown, Range Management Staff, Forest Service, (202) 205–1457.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 502 of the Agricultural Credit Act of 1987 (Pub. L. 100–233) (7 U.S.C. 5101, *et seq.*), the Department of Agriculture offers a mediation program that provides borrowers and creditors an opportunity to resolve disputes prior to bankruptcy or litigation. This Act authorizes USDA to help States develop certified mediation programs and to participate in them.

Section 282 of Title II of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (1994 amendments) amended the 1987 Act to expand the number and type of issues subject to mediation under the State Mediation Program. One of the issues subject to mediation in the 1994 amendments was grazing on National Forest System lands. The Secretary must promulgate regulations to interpret the mediation provisions of the 1994 amendments.

Under the Secretary's grazing rules at 36 CFR 222.4, the Chief of the Forest Service may cancel a permit when one or more of the following conditions exist:

When a permittee refuses to accept modification of the terms and conditions of an existing permit (§ 222.4(a)(2)(i));

When a permittee refuses or fails to comply with eligibility or qualification requirements (§ 222.4(a)(2)(ii));

When a permittee fails to restock the allotted range after full extent of approved personal convenience non-use has been exhausted (§ 222.4(a)(2)(iv)); and

When a permittee fails to pay grazing fees within established time limits (§ 222.4(a)(2)(v)).

The provisions of this section also authorize the Chief to cancel or suspend a permit when one or more of the following conditions exist:

When a permittee fails to pay grazing fees within established time limits (§ 222.4(a)(3));

When a permittee does not comply with provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based (§ 222.4(a)(4));

When a permittee knowingly and willfully makes a false statement or representation in the grazing application or amendments thereto (§ 222.4(a)(5)); and

When a permittee is convicted for failing to comply with Federal laws or regulations or State laws relating to protection of air, water, soil and vegetation, fish and wildlife, and other environmental values when exercising the grazing use authorized by the permit (§ 222.4(a)(6)).

These cancellation or suspension actions are generally referred to as ''permit enforcement actions'' and may be appealed under part 251, subpart C, of Title 36 of the Code of Federal Regulations, which pertain generally to enforcement actions by an authorized officer regarding written instruments authorizing occupancy and use of National Forest System lands. Since only holders of such authorizations may appeal under 36 CFR part 251, subpart C, it is this rule that the Forest Service proposes to amend to incorporate a mechanism for the mediation of certain grazing disputes, as required by the 1994 amendments.

Section 5101(c)(3)(D) of the Agriculture Credit Act, as amended, specifies that, in order to be certified, States shall provide for confidential mediation sessions. This statutory requirement necessitates a rule of rather narrow parameters. The types of decisions subject to mediation under this proposed rule are not subject to public disclosure and, therefore, can be mediated in confidence, since they relate to grazing permits and involve only the Deciding Officer or designee, the holder of a term grazing permit who seeks relief from a written decision to cancel or suspend a permit, and, in some circumstances, the holder's creditors.

Holders of other written authorizations to occupy and use National Forest System lands who may appeal written decisions of Forest Service line officers (§ 251.86) will not be affected by the modifications in this proposed rule.

Proposed section 251.103 Mediation of Term Grazing Permit Disputes

This proposed rule would add a new section § 251.103 that focuses solely on mediation of certain term grazing permit disputes and integration of mediation into the appeal process.

Proposed paragraph (a) specifies that in those States with USDA certified mediation programs, any holder of a term grazing permit may request mediation as part of an administrative appeal when a Deciding Officer issues a decision to suspend or cancel a term grazing permit, in whole or in part, in accordance with 36 CFR 222.4(a)(2)(i), (ii), (iv), (v) and (a)(3)–(a)(6). The States with mediation programs currently certified by USDA for fiscal year 1998 include Alabama, Arkansas, Arizona, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Proposed paragraph (b) of new § 251.103 would limit the parties who may participate in mediation of term grazing permit disputes to those persons directly affected by the action. Since the 1994 amendments specify that mediation sessions must be confidential, this paragraph would permit only the State certified mediator, the Deciding Officer or designee, the

holder of the term grazing permit who seeks relief from a written decision to cancel or suspend a permit, creditors of the permittee, and legal counsel to participate in a mediation. Broader participation would pose a risk to the need to maintain confidentiality.

Proposed paragraph (b) makes clear that a permittee may be accompanied or represented by legal counsel. The Forest Service will be accompanied by legal counsel only if the permittee does also. This provision is necessary to ensure that one party does not have an unfair advantage over another party in the mediation process.

Proposed paragraph (c) specifies that, when an appellant simultaneously requests mediation at the time an appeal is filed (§ 251.84), the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that, in order to allow for mediation , the appeal is suspended for 30 calendar days. If agreement has not been reached at the end of 30 calendar days but it appears to the Deciding Officer that a mediated agreement may soon be reached, the Reviewing Officer may extend the period for mediation up to 15 calendar days from the end of the 30-day appeal suspension period. If an agreement cannot be reached under the specified time periods, the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that mediation was unsuccessful and that the appeal procedures and timeframes are reinstated as of the date of such notice. This provision is necessary to ensure that meaningful mediation can take place and, at the same time, that the Agency's administrative review process can be completed in a timely manner in the event mediation is unsuccessful in resolving a dispute. Without fixed time periods for mediation, and adverse decision to cancel or suspend a permit for cause could be postponed indefinitely. In many cases, this delay could result in damage to National Forest System resources.

Proposed paragraph (d) specifies that, as required by the Act, mediation sessions shall be confidential. However, consistent which the public disclosure provisions of the National Environmental Policy Act and the National Forest Management Act, this proposed rule makes clear that the final terms of any mediated agreement are subject to public disclosure after mediation ends.

Proposed paragraph (e) specifies that notes and factual material from mediation sessions are not to be entered as part of the appeal record. This is consistent with the confidentiality requirement of 7 U.S.C. 5101(c)(3)(D) and with the administrative appeal procedures of 36 CFR part 251, subpart C.

Proposed paragraph (f) specifies that the United States Government shall cover only the expenses incurred by its own employees in mediation sessions. This provision recognizes USDA's ongoing contribution of annual funding through grants to the States to develop and administer state certified mediation programs, as authorized by the Agriculture Credit Improvement Act of 1992.

Proposed paragraph (g) makes explicit that, except for the purpose of authorizing a time extension or of communicating the results of mediation, the Deciding Officer, or designee, shall not discuss mediation and/or appeal matters with the Reviewing Officer.

Conforming Amendments

In order to integrate mediation with the appeal procedures of part 251, subpart C, a number of conforming amendments to other sections of subpart C are necessary. A description of these proposed revisions follows.

Proposed Revision of § 251.84 Obtaining Notice

Under this section, the Deciding Officer must give written notice of an adverse decision subject to appeal under subpart C to applicants and holders as defined in § 251.86 and to any holder of like instruments who has made a written requests to be notified of a specific decision. The notice must include a statement of the Deciding Officer's willingness to meet with applicants or holders to discuss issues (§ 251.93), specify the name and address of the officer to whom an appeal of the decision may be filed, and the deadline for filing an appeal.

The proposed rule would redesignate the current text of 0251.84 as paragraph (a) and add a new paragraph (b) to require that, when a Deciding Officer suspends or cancels a term grazing permit pursuant to 36 CFR 222.4(a)(2)(ii), (iv), (v) and (a)(3)–(a)(6) in a State with a USDA certified mediation program, the Deciding Officer must give written notice of the opportunity for the affected term grazing permit holder to request mediation.

Under proposed paragraph (b), the Deciding Officer must notify a permit holder that a request for mediation must be incorporation in the notice of appeal.

Proposed Revision of § 251.90 Content of Notice of Appeal

This section specifies the information that an appellant must include in a notice of appeal. The proposed rule would amend § 251.90(c) to allow the holder of a term grazing permit being cancelled or suspended to request mediation pursuant to § 251.103 with filing of the appeal in those States with USDA certified mediation programs.

Proposed Revision of § 251.91 Stays

Paragraph (a) of this section of the appeal rule specifies that a decision may be implemented during the appeal process, unless the Reviewing Officer grants a stay. The proposed rule would modify paragraph (a) of § 252.91 to provide for an automatic stay when a term grazing permit holder appeals a decision and simultaneously requests mediation. As provided in proposed § 251.103, in the event mediation fails, the stay would be lifted and appeal procedures and timeframes would be reinstated for the remainder of the appeal period. This requirement is necessary in order to allow for meaningful mediation prior to implementation of the decision.

Proposed Revision of § 251.92 Dismissal

This section of the appeal rule lists the actions that warrant closing an appeal record without a decision on the merits of an appeal. Under this proposed rule, paragraph (a) would be revised to provide that the Reviewing Officer would close an appeal if a mediated agreement is reached.

Paragraph (c) of this section currently provides for discretionary review of a Reviewing Officer's dismissal decision, except when a dismissal decision results from withdrawal of an appeal by an appellant or withdrawal of the initial decision by the Deciding Officer. This proposed rule would modify this paragraph to also exempt a mediated agreement from discretionary review. Without such an exemption, any mediation agreement could be reopened at the discretion of the next higher level officer and, thus, undermine resolution of issues through mediation.

Proposed Revision of § 251.93 Resolution of Issues

Paragraph (b) of this section of the appeal rule specifies that when decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review, except at the discretionary level, and specify a

reasonable duration to allow for conduct of meaningful negotiations. This proposed rule would revise paragraph (b) by making clear that the Reviewing Officer may extend additional time to resolve grazing disputes only for 15-additional days, as provided in § 251.103.

Proposed Revision of § 251.94 Responsive Statement

Paragraph (b) of this section specifies that, unless the Reviewing Officer has granted an extension or dismissed the appeal, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal. If a mediated agreement is reached, the Reviewing Officer would close the appeal (§ 251.92), and no responsive statement would be necessary. Therefore, a conforming amendment is necessary to allow a Deciding Officer to delay the preparation of a responsive statement until mediation is concluded.

Summary

This proposed rule would implement the requirements of 7 U.S.C. 5101, as amended, by integrating a process for mediating certain types of National Forest System grazing permit disputes into the appropriate administrative appeal procedures. The proposed rule is limited in scope and applicability to holders of Forest Service term grazing permits that have been cancelled or suspended in those States with USDA certified mediation program.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations of recipients of such programs. Accordingly, this proposed rule is not subject to OMB review under Executive Order 12866.

Moreover, this proposed rule has been considered in light of the limited number of States and grazing permits involved and the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), and it is hereby certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act. The proposed rule does not compel small entities to do anything. Election of mediation of grazing disputes is strictly at the option of an individual permittee. The requirements of the proposed rule are the minimum necessary to protect the public interest, are not administratively burdensome or costly to meet, and are well within the capability of individuals and small entities to perform.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any new recordkeeping or reporting requirements or other new information collection requirements as defined in 5 CFR part 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq) and implementing regulations at 5 CFR part 1320 do not apply.

Environmental Impact

This proposed rule would establish uniform direction to allow for mediation of certain types of grazing disputes. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 41380; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The agency's preliminary assessment is that this proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Civil Justice Reform Act

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule were adopted, (1) all state and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the rule does not pose the risk of a taking of Constitutionally-protected private property.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this proposed rule on State, local, and tribal governments and the private sector. This proposed rule does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

List of Subjects in 36 CFR Part 251

Electric power, Mineral resources, National forests, Public lands-rights-of-way, Water resources.

Therefore, for the reasons set forth in the preamble, Subpart C of Part 251 of Title 36 of the Code of Federal Regulations is proposed to be amended as follows:

PART 251—LAND USES

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

1. The authority citation for subpart C is revised to read as follows:

Authority: 7 U.S.C. 5101–5106; 16 U.S.C. 472, 551.

§ 251.84 [Amended]

2. Amend § 251.84 by designating the existing text as paragraph (a) and by adding a paragraph (b) to read as follows:

§ 251.84 Obtaining notice.

* * * * *

(b) In States with USDA certified mediation programs, a Deciding Officer shall also give written notice of the opportunity for the affected term grazing permit holder to request mediation of decisions to suspend or cancel term grazing permits, in whole or in part, pursuant to 36 CFR 222.4(a)(2)(i), (ii), (iv), (v) and (a)(3) through (a)(6). Such notice must inform the permit holder that, if mediation is desired, the permit holder must request mediation as part of the filing of an appeal.

§ 251.90 [Amended]

3. Amend § 251.90 by revising paragraph (c) to read as follows:

§ 251.90 Content of notice of appeal.

* * * * *

(c) An appellant may also include one or more of the following in a notice of appeal: a request for oral presentation (§ 251.97); a request for stay of implementation of the decision pending decision on the appeal (§ 251.91); or, in those States with a USDA certified mediation program, a request for mediation of grazing permit cancellations or suspensions pursuant to § 251.103.

4. Amend § 251.91 by revising paragraph (a) to read as follows:

§ 251.91 Stays.

(a) A decision may be implemented during the appeal process, unless the Reviewing Officer grants a stay or unless a term grazing permit holder appeals a decision and simultaneously requests mediation pursuant to § 251.103. In the case of mediation requests, a stay is granted automatically upon receipt of the notice of appeal for the duration of the mediation period as provided in § 251.103 of this subpart.

* * * * *

5. Amend § 251.92 by adding a new paragraph (a)(8) and by revising paragraph (c) to read as follows:

§ 251.92 Dismissal.

(a) * * *

(8) A mediated agreement is reached (§ 251.103).

* * * * *

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 251.87(d) of this subpart, except when a dismissal decision results from withdrawal of an appeal by an appellant, withdrawal of the initial decision by the Deciding Officer, or a mediated resolution of the dispute.

6. Amend § 251.93 by revising paragraph (b) to read as follows:

§ 251.93 Resolution of issues.

* * * * *

(b) When decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal, including mediation pursuant to § 251.103. At the request of the Deciding Officer, the Reviewing Officer may extend the time period to allow for meaningful negotiations, except for appeals under review at the discretionary level. In the event of mediation of a grazing dispute under § 251.103, the Reviewing Officer may extend the time for mediation only as provided in § 251.103.

* * * * *

7. Amend 251.94 by revising paragraph (b) to read as follows:

§ 251.94 Responsive statement.

* * * * *

(b) *Timeframe.* Unless the Reviewing Officer has granted an extension or dismissed the appeal, or unless mediation has been requested under this subpart, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal. Where mediation occurs but fails to resolve the issues, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of the reinstatement of the appeal timeframes (§ 251.103(c)).

* * * * *

8. Add a new § 251.103 to subpart c to read as follows:

§ 251.103 Mediation of term grazing permit disputes.

(a) *Decisions subject to mediation.* In those States with USDA certified mediation programs, any holder of a term grazing permit may request mediation, if a Deciding Officer issues a decision to suspend or cancel a term grazing permit, in whole or in part, as authorized by 36 CFR 222.4(a)(2) (i), (ii), (iv), (v), and (a)(3) through (a)(6).

(b) *Parties.* Notwithstanding the provisions addressing parties to an appeal at 36 CFR 251.86, only the following may participate in mediation of term grazing permit disputes under this section:

(1) A mediator authorized to mediate under a USDA state certified mediation program;

(2) The Deciding Officer who made the decision being mediated, or designee;

(3) The holder whose term grazing permit is the subject of the Deciding Officer's decision and who has requested mediation in the notice of appeal;

(4) The holder's creditors, if applicable; and

(5) Legal counsel, if applicable. The Forest Service will have legal counsel participate only if the permittee chooses to have legal counsel.

(c) *Timeframe.* When an appellant simultaneously requests mediation at the time an appeal is filed (§ 251.84), the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that, in order to allow for mediation, the appeal is suspended for 30 calendar days from the date of the Reviewing Officer's notice. If agreement has not been reached at the end of 30 calendar days, but it appears to the Deciding Officer that a mediated agreement may soon be reached, the Reviewing Officer may notify, by certified mail, all parties to the appeal that the period for mediation is extended for a period of up to 15 calendar days from the end of the 30-day appeal suspension period. If a mediated agreement cannot be reached under the specified timeframes, the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that mediation was unsuccessful, that the stay granted during mediation is lifted, and that the timeframes and procedures applicable to an appeal (§ 251.89) are reinstated as of the date of such notice.

(d) *Confidentiality.* Mediation sessions shall be confidential; moreover, dispute resolution communications, as defined in 5 U.S.C. 571(5), shall be confidential. However, the terms of a final mediated agreement are subject to public disclosure.

(e) *Records.* Notes taken or factual material received during mediation sessions are not to be entered as part of the appeal record.

(f) *Cost.* The United States Government shall cover only the incurred expenses of its own employees in mediation sessions.

(g) *Exparte Communications.* Except to request a time extension or communicate the results of mediation pursuant to paragraph (d) of this section, the Deciding Officer, or designee, shall not discuss mediation and/or appeal matters with the Reviewing Officer.

Dated: February 12, 1998.

Robert Lewis, Jr.,

Acting Associate Chief.

[FR Doc. 98–5102 Filed 2–26–98; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AJ03

Reconsideration of Denied Claims

AGENCY: Department of Veterans Affairs.