Federal Register

Thursday,
June 5, 2003

Part III

Department of the Interior

Office of the Secretary

Bureau of Land Management

43 CFR Parts 4, 4100, and 5000

Special Rules Applicable to Public Land Hearings and Appeals; Grazing Administration—Exclusive of Alaska, Administrative Remedies; Grazing Administration—Effect of Wildfire Management Decisions; Administration of Forest Management Decisions; Final Rule

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

Bureau of Land Management

43 CFR Parts 4100 and 5000

RIN 1090–AA83

Special Rules Applicable to Public Land Hearings and Appeals; Grazing Administration—Exclusive of Alaska, Administrative Remedies; Grazing Administration—Effect of Wildfire Management Decisions; Administration of Forest Management Decisions

AGENCY: Office of Hearings and Appeals; Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals (OHA) is amending its existing regulations governing hearings and appeals to codify who has a right of appeal, to expedite its review of wildfire management decisions, and to simplify proof of service. The Bureau of Land Management (BLM) is adding regulations allowing BLM to make its wildfire management decisions effective immediately when BLM determines that vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire, and to expedite review of those decisions. The amendments to both the OHA and BLM regulations are needed to clarify and expedite administrative review procedures.

EFFECTIVE DATE: July 7, 2003.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203, Phone: 703–235–3750, or Michael H. Schwartz, Group Manager, Regulatory Affairs, Bureau of Land Management, U.S. Department of the Interior, 1849 C Street, NW., Room 401 LS, Washington, DC 20240, Phone: 202–452–5198. Persons who use a telecommunications device for the deaf (TDD) may contact either individual by calling the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 16, 2002, the Office of Hearings and Appeals (OHA) and the Bureau of Land Management (BLM) jointly proposed rules that would make BLM wildfire management decisions effective immediately and would expedite OHA decisions on appeals from such BLM decisions. 67 FR 77011 (Dec. 16, 2002). OHA also proposed to amend its existing rules governing the right to appeal and proof of service.

The Department received approximately 9,000 comments on the proposed rule. Of these, the great majority were divided between nearly identical form communications expressing general support for the proposal and nearly identical form communications expressing general opposition to the proposal. The remainder were specific and substantive comments from trade and governmental associations, commercial public land users, environmental interest groups, local and tribal governmental entities, and individuals. We have summarized and paraphrased the comments in order to keep this final rulemaking document manageable and comprehensible.

We have organized our discussion of topics in the order they were presented in the preamble to the proposed rule, *i.e.*, (A) standing to appeal, (B) effectiveness of BLM wildfire management decisions, (C) expedited OHA review of appeals from those decisions, and (D) proof of service. *See* 67 FR 77011, 77012–13 (Dec. 16, 2002).

A. Standing to Appeal

OHA proposed to codify decisions of the Interior Board of Land Appeals (IBLA) that have determined whether a person had a right to appeal a BLM decision. OHA proposed to define the phrases ''party to a case'' and ''adversely affected,'' both of which appear in the existing regulation governing who may appeal, 43 CFR 4.410(a). ''Party to a case'' was defined in proposed § 4.410(b) to mean ''one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, *e.g.*, by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.'' ''Adversely affected'' was defined in proposed § 4.410(d) to mean that ''a party has a legally cognizable interest, and the decision on appeal has caused, or will cause, injury to that interest.'' OHA also proposed to reflect in § 4.410(c) the limitation found in IBLA decisions that a party may only raise on appeal to IBLA issues it previously presented to BLM.

Some comments stated that only persons who can show direct economic damage should have a right of appeal, while others suggested that the scope of ''legally cognizable interest'' should be broadened. While many comments approved of the proposals, several expressed a concern that the proposals would do away with or limit public participation in BLM's decisionmaking or restrict access to the appeals process.

We emphasize that the proposed rules were—and these final rules are—intended to codify existing IBLA precedents, not to either restrict or expand who has a right to appeal. We therefore decline either to limit or extend that right in this rulemaking.

If in the circumstances of a particular appeal, a person or organization can demonstrate that a BLM decision has caused or has a substantial likelihood of causing injury to a ''legally cognizable interest'' as IBLA has interpreted and applied that phrase in numerous decisions, then that person or organization is adversely affected under § 4.410(d). If a person or organization with an adversely affected legally cognizable interest has also been a party to the case, as defined in § 4.410(b), then that person or organization has a right of appeal. See, *e.g.*, *San Juan Coal Co.*, 155 IBLA 389, 393 (2001); *Legal and Safety Employer Research, Inc.*, 154 IBLA 167, 171–72 (2001); *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992); and cases cited. The definition of ''party to a case'' in § 4.410(b) does not affect a person's ability to participate in BLM's decisionmaking; rather, it defines one of the two requirements for standing to appeal a BLM decision to IBLA.

Some comments expressed concern that the selection of the three IBLA decisions cited above implied that other decisions in which appellants were found to have a right of appeal, *e.g.*, *National Wildlife Federation* v. *Bureau of Land Management*, 129 IBLA 124 (1994); *Donald K. Majors*, 123 IBLA 142 (1992); and *High Desert Multiple-Use Coalition*, 116 IBLA 47 (1990), were now discredited. No such implication was intended. The three decisions were cited in the preamble to the proposed rule to illustrate circumstances that IBLA has encountered in determining whether a particular appellant did or did not have a right to appeal. Other IBLA decisions are also relevant in making such determinations, including those holding that an organization may have a right of appeal on behalf of its members and that not only an interest in the land but also an interest in resources affected by a decision may be legally cognizable.

Some comments correctly pointed out that the language in proposed

§ 4.410(d)—''has caused, or will cause, injury'' to a legally cognizable interest—does not reflect the holding in *San Juan Coal Co., supra*, and other decisions that a ''substantial likelihood'' of causing injury is sufficient. We have modified the language in the final § 4.410(d) to provide ''and the decision on appeal has caused or is substantially likely to cause injury to that interest.''

Some comments requested clarification of the statement in the preamble to the proposed rule that a person who uses land in trespass, without claim or color of right, would not have a legally cognizable interest. That statement is illustrated by IBLA's decision in *Fred J. Schikora*, 89 IBLA 251 (1985), which held that the interest of a trespasser who made improvements upon land in Alaska, without color or claim of right, was not a legally cognizable interest for a right to appeal a BLM decision that granted a conflicting Native allotment application for the land. The statement was not intended to imply that a member of the public who accesses public lands from private lands or uses public lands for recreational or other purposes would be in trespass and would not have a right of appeal from a decision involving the public lands, assuming he or she were a party to the case and had a legally cognizable interest that would be adversely affected by the decision.

A comment from a state governor was ''concerned with the apparent lack of standing for states and local governments under the proposed changes. The amendments to this section of regulations are silent as to whether or not states and local governments will have standing based on their sovereignty alone.'' Similar comments came from associations of counties and a county board of supervisors. For example: ''It is important that local government be recognized as an entity that does have standing to appeal. It is becoming more and more common for county government to become involved in those federal land planning decisions that affect their citizens, tax [rolls], or the local economy.'' We are codifying IBLA's decisions on who has a right of appeal. IBLA's decisions have not granted standing to state or county governments when they have not been adversely affected but have sought to represent their citizens in a *parens patriae* role. *Blaine County Board of Commissioners*, 93 IBLA 155, 157–158 (1986); *The Klamath Tribes*, 135 IBLA 192, 194 (1996); *State of Missouri Department of Natural Resources*, 142 IBLA 201, 207 (1998). Therefore, we do not accept the suggestion that we provide standing to state or local governments based on their sovereignty alone. Of course, if a state or local government demonstrates that it was a party to a case and was adversely affected, it would have a right of appeal.

Some comments were concerned that proposed § 4.410(c) would limit a party's ability to raise on appeal issues that could not have been raised during the party's participation in BLM's decisionmaking process. For example, the comments suggested, BLM might include information in a decision that was not available during the comment period on the draft decision, the decision might differ from the alternatives considered during that period, or the circumstances on the ground may have changed during the decisionmaking or after the decision is issued. We agree that a party should be able to raise additional issues in such circumstances, and in the final rule we have amended § 4.410(c) accordingly.

Some comments expressed concern that limiting a party to presenting only those issues on appeal that it had raised before the agency would force every party to raise every issue it could conceive of and that this could ''not possibly save the agency any time in the appeals process. The agency would have already considered the comments initially and the appellant would certainly not be raising a completely new issue if it had been raised by someone else, it would be something the agency had already considered (and rejected). This provision will likely increase the number, length, and volume of comments, since no one would be able to rely on the comments of others.''

We believe this concern is more hypothetical than real. Under existing precedent, IBLA will not adjudicate issues raised for the first time on appeal, except in extraordinary circumstances. *See Henry A. Alker*, 62 IBLA 211 (1982). Since a party cannot assume that IBLA will find extraordinary circumstances in any given appeal, the party has every incentive to raise with BLM any issues it deems significant. Nor can a party assume that someone else will raise the party's issues on its behalf, unless two or more parties coordinate their comments, which they are free to do. Parties may submit joint comments or may incorporate others' comments by reference. If an issue was not important enough to a party to raise with BLM, IBLA should not be obligated to consider it on appeal.

In summary, §§ 4.410(b) is adopted as proposed and §§ 4.410(c) and (d) are adopted as amended. Also, we have amended the cross-reference in § 4.410(a)(4) to reflect the changes made in this section.

B. Effectiveness of BLM Wildfire Management Decisions

BLM proposed to add two provisions, in 43 CFR 4190.1 and 5003.1, that would make its wildfire management decisions affecting rangelands and forests effective immediately, that is, when issued. The proposal defined ''wildfire management'' as including but not limited to (1) fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods and (2) projects to stabilize and rehabilitate lands affected by wildfire.

In the following paragraphs, we will discuss the substantive comments that addressed the BLM portion of the proposed rule, that is, the proposed addition of 43 CFR 4190.1 and the proposed revision of 43 CFR 5003.1. These comments addressed four principal topics:

- Placing BLM wildfire management decisions in full force and effect pending appeals;
- How BLM defines wildfire management decisions;
- Where and to what lands the new regulations should apply; and
- How the changes BLM proposed in these areas relate to the regulations of the Office of Hearings and Appeals and the proposed changes to those regulations.

Accordingly, we will discuss the comments under headings based on these topics.

1. How Should BLM Put Fire Management Decisions Into Effect?

Many of the substantive comments supported the proposed rule placing BLM fire management decisions in full force and effect pending appeal. These comments, from logging interests, grazing interests, forestry associations, and local government organizations, basically agreed with the preamble statement in the proposed rule that the faster BLM is able to take action to reduce future threats of wildland fires, the more likely BLM can safeguard public and firefighter health and safety, protect property, and improve environmental baseline conditions in the wildland-urban interface and other priority areas. They agreed that wildfire management decisions are by their nature urgent, both to prevent or reduce catastrophic wildfires in upcoming dry seasons, and to speed recovery from past fires and thereby prevent erosion, water pollution, and other harmful legacies that they have caused.

In a comment supporting the proposed rule, a professional forestry society said that wildfire management decisions to perform fuels reduction and fire rehabilitation and stabilization should be implemented efficiently to protect communities, watersheds, wildlife habitat, and adjacent properties from the potentially devastating effects of wildfire. The comment said, however, that these decisions should remain consistent with the pre-defined objectives and goals outlined in the applicable Resource Management Plan and should adhere to all applicable environmental laws. We agree with this comment. Our fire management projects will be consistent with our Resource Management Plans and applicable environmental laws. No change is necessary in the final rule.

Other comments, mainly from national and regional environmental organizations, raised specific objections and concerns that require discussion. This discussion follows.

One comment stated that the proposed rule would discourage public appeals from agency actions, which are essential to public participation. The comment cited the Federal Land Policy and Management Act (FLPMA), at Section 309(e), which requires the Secretary to give the public adequate notice and ''opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.'' 43 U.S.C. 1739(e). The comment went on to say (1) that the proposed rule would allow a project to begin before a decision is made on the appeal, effectively discounting public opinion; (2) that a decision on appeal to reject a proposed project has less effect if the project has already commenced and the negative effects of the action have already occurred; and (3) that the public is less likely to participate in the decisionmaking process when it can have no real or immediate effect on a proposed project. The comment concluded that a ''policy discouraging public involvement should not be adopted because it contradicts the spirit of FLPMA, which encourages public comment on proposed actions and participation in the appeal process for a management decision.''

Another comment addressing the same theme said that the purpose of a stay pending appeal is to allow project planners the opportunity to review citizen concerns and modify the project's parameters to address such concerns, as warranted, prior to project implementation. The comment went on to say that project stays have two fundamental benefits: (1) To ensure that potentially unsound environmental ramifications of project decisions, as identified by interested parties, do not compromise the landscape in question; and (2) to promote trust between those citizens who have sought to comment on the management of public lands and the agency responsible for carrying out those actions. The comment concluded by saying that the rule change undermines the value of public comment by allowing citizen concerns to be effectively ignored, further eroding the trust citizens have in public land management agency decisions.

The appeal process is not part of the public participation required by Section 309(e) of FLPMA. The rule may discourage some appeals; but contrary to the concern expressed in the comment, it encourages public participation by making it more essential at the project design/environmental review stage. It is at this stage that BLM gathers evidence and public input upon which to base its fire management plans/projects and decisions. Also, the purpose of staying a decision pending appeal is not to give the BLM further opportunity to consider issues raised by the appellant, but to protect the interests of the appellant and the public while IBLA is considering the appeal. Finally, while the proposed provision made these decisions effective immediately, an adversely affected party may appeal the decision and petition the Office of Hearings and Appeals for a stay of the decision pending appeal under 43 CFR 4.21(b), which, if granted, would minimize whatever harm the appellant alleges.

One comment said that the proposed revision is entirely unnecessary, since BLM and the Office of Hearings and Appeals already have the authority to make a decision effective immediately if it is determined to be in the ''public interest'' to do so. The comment went on to say that the authority for this determination should remain with IBLA on a case-by-case basis to avoid any abuse of the provision by line officers in the field. Another comment from an environmental interest group also stated that the new provisions were unnecessary, since in appropriate circumstances OHA or an appeals board could find that the public interest requires that particular fire management decisions should be placed in full force and effect notwithstanding the filing of appeals.

The final rule eliminates a bureaucratic step—requesting OHA to place a decision in full force and effect—in making often very urgent decisions to help reduce the severity of upcoming fire seasons, without unduly impairing the ability of persons to appeal those decisions and to seek stays of the decisions pending appeal.

The authorities to which the first of these comments refers are 43 CFR 4160.3(f), which allows BLM to place certain grazing decisions into effect immediately or on a date certain and to remain in effect pending appeal; 43 CFR 5003.1 (paragraph (a) as this section is revised in the proposed rule), which provides that appealing does not automatically suspend the effect of a forest management decision; and 43 CFR 4.21, which authorizes the OHA Director or IBLA to stay a decision in the public interest pending appeal. Of these authorities, section 4160.3(f) limits full force and effect to certain decisions unrelated to wildfire management.

In light of the disastrous fire seasons in recent years and the ongoing drought in much of the West, BLM views its ability to carry out fire management practices as a matter of great urgency. We also view the fire management practices we contemplate, mentioned in the proposed rule and listed in sections 4190.1(a) and 5003.1(b) of this final rule, as scientifically justified. Therefore, we think that these fire management decisions need to be effective immediately if BLM finds a substantial risk of wildfire due to such problems as drought and fuels buildup, or an immediate risk of erosion due to wildfire. We have added language to sections 4190.1 and 5003.1 requiring BLM to make such a threshold finding before making a decision effective immediately.

If wildfire has destroyed the vegetation on a tract of land, especially sloped land, it is clear that wind or rain will cause erosion. It is also clear that wind or rain or both are common occurrences in most environments covered by these regulations. Therefore, the time-related standard of ''immediate risk'' is appropriate for determining whether a decision to rehabilitate a denuded slope, for example, especially one situated in a sensitive circumstance like above a trout stream or a salmon spawning ground, should be made effective immediately.

However, it is not so obvious whether prescriptive decisions aimed at preventing or reducing catastrophic wildfires would routinely meet a threshold of ''immediate risk.'' We therefore believe it is appropriate to use a qualitative threshold of ''substantial risk'' for these decisions. In deciding whether there is a substantial risk of wildfire, BLM field managers will analyze the situation based on the Fire

Condition Class of the tract of range or forest land in question.

BLM recognizes three Fire Condition Classes, found in the Implementation Plan for the 10-Year Comprehensive Strategy, A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, May 2002.

Fire Condition Class 1 refers to lands that have experienced burns in their normal range of fire frequency. The risk of losing key ecosystem components from the occurrence of fire remains relatively low, and the lands will be subject to maintenance management.

Fire Condition Class 2 refers to lands that have been moderately altered from their historical range of fire frequency by either increased or decreased fire frequency. BLM has identified a moderate risk of losing key ecosystem components, as well as human property, in these lands. To restore their historical fire regimes, these lands may require some level of restoration through prescribed fire, mechanical or chemical treatments, and the subsequent reintroduction of native plants.

Fire Condition Class 3 lands have been significantly altered from their historical range. Because fire regimes have been extensively altered (*i.e.*, fire has not occurred for far longer than normal frequency would predict), risk of losing key ecosystem components from fire is high. We consider such lands to be at high risk because of the danger posed to people and property and the severe, long-lasting damage likely to result to species and watersheds when a fire burns on these lands, particularly during drought years. To restore their historical fire regimes—before BLM can employ prescribed fire to manage fuel or obtain other desired benefits—these lands may require multiple mechanical or chemical restoration treatments, or reseeding.

Under this rule, Fire Condition Class 3 would be considered to pose substantial risk of wildfire, and BLM would make wildfire management decisions for these lands effective immediately. Most Fire Condition Class 2 lands would also be regarded this way, but field managers would decide on a case-by-case basis whether to make these decisions effective immediately (or on a date established in the decision). BLM would generally not make maintenance decisions for lands in Fire Condition Class 1 effective immediately.

Two comments stated that BLM already has several categorical exclusions under the National Environmental Policy Act (NEPA) that we may utilize for fuel reduction strategies and other wildfire management activities, referring to the Departmental Manual of the Department of the Interior at 516 DM 6, Appendix 5. One comment said that this rendered the proposed regulation change unnecessary. The other comment stated that BLM should continue to utilize these categorical exclusions where they are appropriate to protect communities from loss of life and property, so long as these projects will not individually or cumulatively cause significant environmental effects; but it urged us to withdraw the proposed rule lifting the automatic stay provision for wildfire management decisions.

There are categorical exclusions that pertain to some of the techniques that BLM would likely use for fire management:

- Precommercial thinning and brush control using small mechanical devices;
- Sale and removal of individual trees and small groups of trees that are dead, diseased, injured, or that pose a safety hazard, where no new roads are necessary;
- Reforestation; and
- Disposal for Christmas trees, personal firewood use, etc.

However, categorical exclusions have nothing to do with the appeals process, but merely allow BLM to perform expedited NEPA reviews as set forth in CEQ regulations. Under a categorical exclusion, BLM must still document its environmental review and must still consider circumstances such as endangered species, air quality, and cultural resources. Categorical exclusions do not provide for an immediate effective date or expedited administrative review of decisions to implement these practices. Further, the categorical exclusions do not cover such techniques as prescribed burns and more extensive thinning that might be necessary in a fire management program.

2. How Should BLM Define a Wildfire Management Decision?

One comment from a state farm bureau federation said that the role of livestock grazing needs to be further defined in this process, and suggested that livestock grazing can be an effective fuels reduction technique and can also be a tool to control noxious weeds. The comment urged that livestock grazing be incorporated into fuel reduction projects as one element of effectively controlling wildfire, disease, or invasive species.

The language in the proposed rule does not rule out the incorporation of livestock grazing in a fuel reduction (or pest or disease control) program. Under 43 CFR 4160.3, BLM has the discretion to make a grazing decision connected to wildfire management effective immediately. However, such decisions will not routinely be made effective immediately under this rule. Decisions as to pest or disease control are beyond the scope of this rule.

The same comment went on to relate grazing to open space preservation and other desirable social results. However, these ideas go beyond the narrow focus of this rule, which is wildfire management.

One comment suggested that the list of types of fire management decisions that BLM should make effective immediately pending appeal should include removal of lightning-attracting snags. The comment stated that removing snags proved to be the key to stopping the Tillamook burns. Only after an enormous number of such snags were felled were the fires subject to control, according to the comment.

The language in the rule, ''Fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods,'' is certainly broad enough to include removal of snags (or dead trees) when appropriate (leaving aside the question whether snags attract lightning more than living trees). However, due to the recognized value of snags (wildlife habitat, nutrient cycling, longer-term source of large woody debris, etc.) many land management plans contain best management practices or project design features that specifically require retention of an appropriate number of snags. The removal of snags is best reviewed in the context of an overall forest health restoration or post-fire salvage project. In order to preserve the field manager's ability to make reasoned decisions based on the particular circumstances at hand, we do not want to list specific fire management tactics in these regulations.

One comment from a lumber company suggested that BLM replace the word ''thinning'' with the word ''removal'' because, depending on the ecosystem and landscape, some wildfire management actions may include more than just thinning, and ''removal'' is a broader term. We have amended this provision to allow thinning with or without removal. Whether the thinned material is removed from the site is determined by the local BLM manager based on how best to achieve the primary objective of the action: Forest health or fuels hazard reduction or both. Thinning activities not related to these objectives will continue to be subject to section 5003.1(a) of the final rule.

Several comments from environmental interest groups stated

that the proposed rule was overbroad in characterizing fire management decisions that would be made effective immediately. These comments said that the proposed rule did not require any determination that the proposed action will safeguard public and firefighter health and safety, protect property, or improve conditions in the wildland-urban interface, and that the proposed rule thus threatens to allow projects having no appreciable fire reduction benefit to go forward before there is any opportunity for administrative review.

We have amended the rule to require that BLM determine that vegetation, soil, or other resources on the public land are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire, before making wildfire management decisions effective immediately. Further, the decisions that BLM will implement under this rule are still analyzed under the National Environmental Policy Act during their development. If BLM prepares an Environmental Impact Statement or Environmental Assessment, the ''Purpose'' and ''Need'' sections of those documents will clearly make the link to the project's fire hazard reduction benefits. Similarly, the criteria for use of the categorical exclusion for fuels hazard reduction clearly specify that the project must be for this purpose. Finally, this rule does not prohibit a petition for a stay under section 4.21(b).

Another comment stated that the proposed revision of section 5003.1 is overly broad and vague, providing unhampered discretion to BLM line officers to remove large trees far from human habitation in thinning projects. It went on to say that, in recent history, many BLM projects purporting to reduce fire danger have included removal of large trees, which is an extremely controversial and scientifically unjustifiable action. The comment concluded that, while thinning of small trees and removal of brush are generally acceptable as fuel reduction treatment in the vicinity of homes and communities, there is no scientific evidence to suggest that logging of large trees, which are more fire resistant, reduces fire danger in the forest or other areas.

The text of the regulation in question defines wildfire management as including: ''Fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods.'' We have not adopted a one-size-fits-all diameter limit on tree size in this rule, although tree size may have a bearing on the decision. BLM intends the fuel reduction contemplated in this language to refer to projects that we implement with fuels hazard reduction or forest health as the primary objective. Further, BLM follows the NEPA process in reaching and justifying its decisions.

Another comment expressed concern that the proposed rule would cause and exacerbate adverse environmental impacts of wildfire in extremely sensitive areas, including soil erosion and water pollution. The comment went on to suggest that salvage logging could be authorized as a ''wildfire management decision,'' but would have a devastating effect on recently burned landscapes. It said that a 1995 report prepared by a group of independent scientists, known as the Beschta Report, concludes that logging in recently burned areas will have significant adverse impacts on the environment, causing soil compaction and erosion, loss of habitat for cavity nesting species, and loss of structurally and functionally important large woody debris, and that leaving large woody debris will not significantly increase the risk of reburn. According to the comment, the U.S. Forest Service confirmed the findings of the Beschta Report in its report entitled ''Environmental Effects of Postfire Logging: Literature Review and Annotated Bibliography,'' stating that ''[f]ollowing Beschta and others (1995) and Everett (1995), we found no studies documenting a reduction in fire intensity in a stand that have [sic] previously burned and then been logged.''

The second element of wildfire management stated in the proposed rule, ''[p]rojects to stabilize and rehabilitate lands affected by wildfire,'' contemplates reseeding and soil stabilization, not salvage logging as suggested in the comment. BLM may authorize salvage logging in appropriate circumstances, after conducting the appropriate level of NEPA review. We do not normally consider salvage logging as constituting a stabilization and rehabilitation activity. We do not agree that the Forest Service literature review confirms the findings of the Beschta Report, which to our understanding has never been subject to peer review. Salvage logging will continue to be subjected to required environmental review and implemented on a case-by-case basis.

One comment stated that ''mechanical'' thinning is not defined in the proposed rule, and that the proposal purports to ''apply only to fire management decisions, not to other decisions relating to grazing or timber sales.'' It went on to say that if mechanical thinning techniques include cutting trees, this contradicts the statement that this action does not apply to timber sales. The comment concluded by saying that unless the cut trees are disposed of, rather than sold, the action will qualify as a timber sale, and that appeals of timber sale decisions must go through the current administrative appeals process. Another comment along the same lines said that, if the BLM's own record is an appropriate reference, this definition will include large scale commercial green tree logging as well as salvage logging.

A timber sale, planned for as such in BLM Resource Management Plans, is not a wildfire management project, and would not be covered by section 5003.1(b). However, sales of small amounts of lumber may be incidental to fire management thinning projects. Thinning stands of timber is more difficult and expensive than clearcutting the same stands, and less profitable for companies engaged in such activities, for two reasons: the small trees are less valuable, and cutting them down individually is more labor intensive and expensive. Such incidental sales may be authorized as part of a wildfire management project under the new regulations. The key to the application of the rule is the intent of the project. As long as the primary objective of the action is fuels hazard reduction, this rule applies.

The same comment went on to say that it is a generally accepted conclusion that the sciences of fuel reduction and post-fire restoration are not well-advanced and that there is a great deal of uncertainty that logging large trees can in fact reduce the probability of undesirable fire behavior. On the contrary, the comment said, removing large trees increases the probability of catastrophic fire by opening up the canopy, warming and drying the forest floor and producing large amounts of fuels. The comment also stated that there is a great deal of scientific uncertainty that salvage logging can be considered ecologically beneficial and a genuine form of rehabilitation. It also challenged the effectiveness of thinning by citing both Federal and academic scientists who have recently doubted that thinning actually reduces fire severity. It quoted a September 17, 2002, letter by 12 leading academic scientists in the field of forest ecology:

> The most debated response to alleviating destructive fires in the future—mechanically thinning trees—has had limited study, and that has been conducted primarily in dry forest types. Thinning of overstory trees, like building new roads, can often exacerbate the

situation and damage forest health. * * * Although a few empirically based studies have shown a systematic reduction in fire intensity subsequent to some actual thinning, others have documented increases in fire intensity and severity.

Franklin, J., *et al.* 09/17/02 letter to President Bush and Members of Congress.

We agree that more research would be useful, as scientists agree that there is a lack of science-based information about what specific fuel treatments to apply to balance a complex and conflicting mix of objectives. However, there is general consensus from more than 90 years of fire research that fires burn hotter and faster when there is more fuel available to feed them. The basic objective of fuels hazard reductions treatment is to remove this fuel. Fuels treatment programs prescribed under the 10-Year Comprehensive Strategy and Implementation Plan for the National Fire Plan do not prescribe a thin-only strategy. Thinning is accompanied by follow-up treatments. The scientific rationale for the fire behavior benefits of slash treatment after thinning and of understory prescribed burning are well-documented and longstanding. There is peer-reviewed science and general consensus in the scientific community that properly implemented and maintained fuel treatments that include prescribed burning will result in reduced fire severity within the treated areas. Fire reduction benefits outside the treated areas will depend on a number of variables. Understanding the effect of these variables will increase with additional research.

However, the problem of uncharacteristically intense and volatile wildfire behavior in certain ecosystems is getting worse. We cannot afford to wait until every conceivable scientific study is completed before we take action.

One comment requested an expansion of the definition for wildfire management under proposed sections 4190.1 and 5003.1 to add mention of restoration treatment of unburned acres. The comment stated that wildfire restoration of lands may not always deal with fuel treatments, but rather may require other management actions that would return the land to its historical fire regimes. It gave the example of altering species composition through tree planting. It suggested adding some language on landscape restoration treatments related to wildfire to these two proposed sections. Another comment stated that the list of wildfire decisions should be expanded to include decisions necessary to mitigate insect and disease outbreaks, the control of invasive species, and the impacts of other natural disasters such as severe weather events and seismic activity. The comment went on to say that these outbreaks are affecting millions of acres of the nation's forests and rangelands and are easily spread to nearby lands, and that, in many cases, adjacent landowners are powerless to address the problem without action from their Federal neighbors.

We believe that changes to reflect these comments would be too far beyond the scope of the proposed rule to be adopted in this final rule, and unnecessary. We agree that, in many instances, forest or rangeland restoration treatments are complementary to fuels management decisions. We also agree that forest and rangeland restoration is more than simple fuels hazard reduction, as it includes other components such as species composition, re-introduction of native plants in the understory, control of exotic or invasive species, and density management to improve the vigor of residual vegetation for resistance to insects and disease. A well-designed fuels hazard project, with interdisciplinary input, may be a highly cost-effective and efficient way to begin to address a range of issues relating to forest health. A fuels hazard project designed with such interdisciplinary input and made effective immediately may serve as an important first step, and follow-up actions to implement the non-fuels-reduction aspects of the project will be subject to appropriate review and administrative appeal. Existing section 5003.1 (section 5003.1(a) of this rule) provides that filing an appeal does not automatically suspend the effect of forest management decisions, which would include such follow-up actions. This provision has long been available to help expedite such projects.

3. Where and to What Lands Should the Regulations Apply?

One comment, questioning language in the preamble of the proposed rule, asked what BLM meant when we intimated that the new provisions would be implemented in ''wildland-urban interface and other priority areas'' (67 FR 77011, 77012), but did not specify in the regulatory text any particular lands to be covered. The comment stated that ''priority area'' is not defined in the proposal, and that if the scope of the project is truly limited to two types of areas, wildland-urban interface and priority areas, then ''priority area'' should be defined. If, however, the comment said, the rules affect all BLM land, the scope should be clearly stated. Additionally, the comment concluded, clarifying these definitions will allow the rules to be construed narrowly and avoid inclusion of areas not intended to be covered by the rule.

As the proposed rule stated, BLM will first use its limited wildfire management resources in priority areas, including wildland-urban interface lands. The rule does not define ''priority areas''; BLM has discretion to identify such areas based on site-specific circumstances. In general, priority areas will include lands containing or near human habitation and business structures, sensitive resources such as archaeological sites, endangered species habitat, municipal watersheds, and burned-over watersheds subject to erosion. BLM will choose many wildfire management projects in a collaborative process as defined in BLM's 10-Year Comprehensive Strategy and Implementation Plan for implementation of the National Fire Plan. Local conditions and resources will guide the field manager in making wildfire management decisions.

Several comments faulted the proposed rule for not being limited to or not focusing on the wildland-urban interface, where wildfires have the greatest potential for property damage and for impacts on human health and safety. Some of the same comments questioned how, even if the wildland-urban interface were to be specifically targeted, the public would interact in good faith with such management activities when they proceed on the ground immediately, potentially without NEPA review, offering to the public only the judicial system for recourse.

We recognize the urgency of dealing with fire management issues on forest land near developed areas, but it would be unduly narrowing to limit the effect of the rule to those lands. Other resources, such as endangered species habitat, archaeological or other cultural features, or sensitive watersheds, may make fuel reduction or treatment under section 5003.1(b)(1) or land stabilization and rehabilitation under section 5003.1(b)(2) equally urgent on more remote lands.

A categorical exclusion does not exempt an agency action from environmental review. Rather, it requires the agency to scrutinize the proposed action to see whether it meets the criteria for categorical exclusion, that is, whether it is the type of action that the agency has decided, through its procedures adopted under 40 CFR 1507.3 of the regulations of the Council on Environmental Quality, does not individually or cumulatively have a

significant effect on the human environment. In practice, this will normally be done through a documented checklist of criteria.

As we stated earlier in this preamble, making decisions effective immediately encourages public participation by making it more essential at the project design/environmental review stage. It is at this stage that BLM gathers evidence and public input upon which to base its decisions.

One comment from an association of professional foresters suggested that BLM should give priority to areas outside the wildland-urban interface area when dangerous fuel buildup or post-wildfire conditions originating on BLM-administered public lands could have impacts on adjacent private lands.

We are not stating any priorities in this rule. The local field manager will determine where to initiate wildfire management projects, and will consult with appropriate local interests, including state and local government agencies, private property owners, academic experts, and environmental interest groups, in order to identify resources or properties that need protection.

In practice, BLM plans and implements forest health and fuel reduction treatments both within and outside the wildland-urban interface. Targeting of appropriated dollars for both fiscal year 2002 and 2003 was apportioned approximately 60 percent to wildland-urban interface and 40 percent to non-wildland-urban interface lands. Also, BLM selects all fuels and hazard reduction projects with input from a variety of Federal and non-federal stakeholders. Thus, a wide variety of parties aids in the project priorization process.

The same comment went on to suggest that BLM lands for which state forestry agencies have initial attack responsibilities (due to the location or situation of the land, or under cooperative agreements or other arrangements) should also be included in the immediate implementation of fire management decisions. Since the rule applies to all fire management decisions, the decisions that the comment refers to will be effective immediately when BLM makes the determination required by section 4190.1(a) or 5003.1(b).

4. How Should BLM's Wildfire Management Procedures Relate to the Regulations of the Office of Hearings and Appeals?

One comment said that, because public lands decisions often involve irretrievable natural resources, such as wildlife habitat, BLM should at least defend its actions in the internal appeals process before moving forward with a disputed action.

The problem of uncharacteristically intense and volatile wildfire behavior in certain ecosystems is getting worse. The intensity of some of these fires can result in post-fire conditions that limit the ability of the site to be rehabilitated/restored. It is precisely because wildfire management decisions often involve irretrievable natural or cultural resources, or human habitations, that these decisions must be made effective immediately and the appeals process expedited.

One comment stated that the proposed rule failed to explain its relationship with 43 CFR 4.21(a)(2)–(3) and (b), dealing with requests for stays of bureau decisions. It said that the preamble stated only that ''the BLM decision will not be subject to the automatic stay of 43 CFR 4.21(a).'' Under current regulations, the comment continued,

> A decision becomes effective on the day after the appeals period expires, unless a petition for stay pending appeal is filed. The proposed regulation does not state that its intent is to eliminate the possibility of the IBLA's granting a stay under the standards of 43 CFR § 4.21(b). Yet it is silent as to the effect of filing a petition for such a stay. If the intent of the rule is to eliminate the 45-day stay triggered, under current regulations, by the filing of such a petition, then it effectively eliminates any possibility of meaningful IBLA review of ''wildfire management decisions.'' If the BLM can proceed to implement a decision despite the filing of a petition for a stay, that decision may well be implemented before the IBLA ever rules on the petition, effectively eliminating any opportunity for administrative review. Parties adversely affected will have no alternative but to proceed immediately to federal court.

The comment has uncovered a drafting error in the proposed rule. Rather than exempting wildfire management decisions from the provisions of all of section 4.21, it should have referred specifically to section 4.21(a)(1). The final rule corrects this error. The stay provisions of section 4.21(b) will apply to decisions made effective immediately under this final rule.

OHA is developing a proposed rule reorganizing section 4.21. When that rule is published in final form, it will include conforming amendments to correct any cross-reference discrepancies in the regulations promulgated today in this rule.

C. Time Limit for Decisions on Appeals From BLM Wildfire Management Decisions

OHA proposed to add a new section, 43 CFR 4.416, requiring IBLA to decide appeals from BLM wildfire management decisions within 60 days after all pleadings have been filed. Some comments stated that the 60-day deadline that the proposed rule sets for the IBLA to decide appeals in ''wildfire management'' cases is unreasonable for several reasons: (1) It may not be possible for the IBLA to decide ''wildfire management'' cases within the time period provided; (2) expediting these cases may impose additional delays on the remainder of the Board's cases; and (3) the rule imposes no consequences for the IBLA's failure to meet the 60-day deadline, so that the result of the Board's failure to meet the deadline would simply be for the challenged decision to continue in effect indefinitely, frustrating any opportunity for meaningful administrative review prior to a project's implementation and its potentially irreversible effects. Other comments said that the effect of the rule would be to moot the issues involved in the decision before an objective decisionmaker can resolve them.

The possibility of such delay in other appeals does exist, depending on how many appeals from BLM wildfire management decisions there are; but the trade-off in the use of IBLA's resources is appropriate in view of the necessity for rapid implementation of wildfire management decisions. The severity of the effects of recent fire seasons on the land and resources, and on the national and local economies, justifies whatever impacts the rule may have on other cases on IBLA's docket. Imposing a 60-day deadline on an IBLA decision on the merits has no effect on the ability of an appellant to petition for a stay of the decision appealed. Petitioning for a stay is the mechanism for preventing a decision from remaining in effect indefinitely pending appeal, if the appellant can demonstrate a sufficient basis for staying the decision.

One comment suggested adding to proposed § 4.416, ''and within 180 days after the appeal is filed.'' We have adopted this suggestion in the final rule. The added language will provide a definite deadline for deciding appeals from wildfire management decisions.

Proposed section 4.416 is adopted as amended.

D. Proof of Service

OHA also proposed to amend three sections—43 CFR 4.401(c)(2), 4.422(c)(2), and 4.450–5—to provide

that proof of service of documents on other parties may be made by a statement certifying that service has been or will be made in accordance with the applicable rules and specifying the date and manner of such service. Although some comments said these provisions should not be amended, on the grounds that it is not unreasonable to require an appellant to provide hard proof that it has filed a timely appeal, most comments approved the proposed amendments as bringing IBLA's practice into line with current rules in Federal and state courts.

The amendments to these sections are adopted as proposed.

II. Review Under Procedural Statutes and Executive Orders

A. Regulatory Planning and Review (Executive Order 12866)

Under the criteria in Executive Order 12866, this document is not a significant rule. The Office of Management and Budget has not reviewed this rule under Executive Order 12866.

1. This rule will not have an annual economic effect of $100 million or more or adversely affect in a material way an economic sector, productivity, competition, jobs, the environment, public health or safety, or other units of government or communities. A cost-benefit and economic analysis is not required. These amended regulations will have virtually no effect on the economy because they merely simplify proof of service, codify who has a right of appeal, allow BLM to make wildfire management decisions effective immediately, and expedite review of those decisions. Any economic effects should be positive, as expedited fuel reduction projects reduce the scope and intensity of wildfire conflagrations, in turn reducing the destruction of natural resources and man-made improvements.

2. This rule will not create inconsistencies with or interfere with other agencies' actions. This rule amends existing regulations of the Office of Hearings and Appeals and the Bureau of Land Management so that they will continue to be consistent with each other.

3. This rule will not alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. These regulations have to do only with the procedures for hearings and appeals of BLM land management decisions, not with entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. These regulations merely simplify proof of service, codify who has a right of appeal, allow BLM to make wildfire management decisions effective immediately, and expedite review of those decisions.

4. This rule does not raise novel legal or policy issues. These regulations merely simplify proof of service, codify who has a right of appeal, allow BLM to make wildfire management decisions effective immediately, and expedite review of those decisions.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions will have no appreciable effect on small entities. A Small Entity Compliance Guide is not required.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

1. This rule will not have an annual effect on the economy of $100 million or more. Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions should have no effect on the economy.

2. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies, or geographic regions. Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions will not affect costs or prices for citizens, individual industries, government agencies, or geographic regions.

3. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions will have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*):

1. This rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. Small government entities rarely appeal BLM wildfire management decisions. Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions will neither uniquely nor significantly affect these governments. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.* is not required.

2. This rule will not produce an unfunded Federal mandate of $100 million or more on State, local, or tribal governments or the private sector in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

E. Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule will not have significant takings implications. A takings implication assessment is not required. These amendments to existing regulations that will simplify proof of service, codify who has a right of appeal, allow BLM to make wildfire management decisions effective immediately, and expedite review of those decisions will have no effect on property rights. The rule should have the effect of enabling BLM better to protect private property from catastrophic wildfire.

F. Federalism (Executive Order 13132)

In accordance with Executive Order 13132, these final regulations do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. There is no foreseeable effect on states from simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions. A Federalism Assessment is not required.

G. Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This rule, by merely simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire

management decisions effective immediately, and expediting review of those decisions, will not unduly burden either administrative or judicial tribunals.

Comments from environmental interest groups addressed this issue by saying that, because the proposed rule will allow BLM to move forward with projects despite a pending appeal, the proposed rule would force citizens to go directly to court to prevent activities that they believe adversely affect the environment. These comments concluded that, for reasons of time, expense, and the necessity of retaining counsel, the Federal courts represent an impracticable and even unavailable venue for many members of the public to resolve these issues.

However, the final rule has been amended to make it clear that it does not prevent appellants from seeking a stay of the decision being appealed. Also, we do not believe that the wildfire management decisions we contemplate making will be appealed as frequently as the comment writers expect. Finally, if BLM's wildfire management projects are properly planned, with extensive public participation in the spirit of the Secretary of the Interior's philosophy of coordination, communication, and consultation in support of conservation, there should be few administrative or court challenges. Even if the final rule leads to increased resort to the Federal courts, the urgency of wildfire management justifies the arguable increased burden on the courts.

H. Paperwork Reduction Act

These regulations do not require an information collection from 10 or more parties, and a submission under the Paperwork Reduction Act is not required. An OMB form 83–I has not been prepared and has not been approved by the Office of Policy Analysis. These regulations simplify proof of service, codify who has a right of appeal, allow BLM to make wildfire management decisions effective immediately, and expedite review of those decisions. They do not require the public to provide information.

I. National Environmental Policy Act

The Department has analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, Council on Environmental Quality (CEQ) regulations, 40 CFR part 1500, and the Department Manual (DM). CEQ regulations, at 40 CFR 1508.4, define a ''categorical exclusion'' as a category of actions that the Department has determined ordinarily do not individually or cumulatively have a significant effect on the human environment. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3. The Department has determined that the final rule is categorically excluded from further environmental analysis under NEPA in accordance with 516 DM 2, Appendix 1, which categorically excludes ''[p]olicies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.'' In addition, the Department has determined that none of the exceptions to categorical exclusions, listed in 516 DM 2, Appendix 2, applies to the final rule. The final rule is an administrative and procedural rule, relating to the timing of the effectiveness of BLM wildfire management decisions and the Department's administrative appeals process. The rule will not change the requirement that projects must comply with NEPA. Therefore, an environmental assessment or environmental impact statement under NEPA is not required.

One comment expressed concern about the cumulative impacts of the proposed rule and other elements of the President's ''Healthy Forests Initiative.'' It cited—

- Changes in Forest Service regulations implementing the Appeals Reform Act,
- Direction to expedite Endangered Species Act consultation on fuel treatment projects, and guidance from the Council on Environmental Quality on conducting environmental assessments of such projects,
- The proposed revision of the National Forest Management Act regulations,
- The proposed Categorical Exclusions for salvage logging projects up to 250 acres, and
- The proposed Categorical Exclusions for fuel reduction projects on both Forest Service and BLM administered lands.

The comment went on to say that the Categorical Exclusion proposals would exempt Forest Service and BLM fuel reduction projects from NEPA documentation requirements, and that the proposed BLM wildfire regulations would not provide for a project stay on BLM-specific wildfire projects pending appeal. Consequently, the comment said, the cumulative effect of these two proposed rule changes is to eliminate environmental review of purported fuel reduction projects while allowing them to proceed on the ground during an administrative review. The comment concluded that it is critical to evaluate the cumulative effect of these numerous rule changes. Another comment stated that this rule ''may result in significant effects that are unknown and thus require at least an EA.''

This rule is strictly procedural in nature, and is a small part of the overall wildfire management and Healthy Forests Initiative. It does not change any environmental review process that BLM must follow before implementing a wildfire management decision. The rule expedites the implementation of Federal decisions that still require proper NEPA documentation. BLM is preparing an Environmental Impact Statement to address the overall environmental effects of other aspects of the Initiative. We decline to address those concerns in this procedural final rule.

J. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

As required by Executive Order 13175 and 512 DM 2, the Department of the Interior has evaluated potential effects of the final rule on Federally recognized Indian tribes and has determined that there are no potential effects. The final rule will not affect Indian trust resources; it simplifies proof of service, codifies who has a right of appeal, allows BLM to make wildfire management decisions effective immediately, and provides for expedited review of those decisions.

We received one comment from a commission representing the interests of several Indian Tribes with respect to fishing, hunting, and gathering, and pasturing livestock. The comment expressed some of the same concerns shown in the comments of environmental organizations discussed elsewhere in this preamble as to the cumulative effects of this rule and other initiatives of the Administration affecting the environment. The comment said that the cumulative effect of these proposals would ''allow potentially harmful projects to be planned and implemented without adequate tribal consultation, environmental review, or opportunity for appeal or public oversight.'' The comment went on to say:

> These proposed regulations cannot be reviewed in a vacuum, but must be considered together with the Departments [sic] recent addition of a categorical exclusion from NEPA review for ''hazardous fuel reduction'' activities. The categorical exclusions have the potential to allow logging and even grazing projects to proceed without environmental review or adequate consultation with Tribes. The proposed appeal changes then would allow these

projects to proceed and start implementation despite the concerns or an appeal. Coupled together, this will greatly reduce the Tribes', or any interested party's, ability to provide substantive input on the adverse effects of a proposed project.

We recognize these concerns. While we do not believe there is a necessity to consult with specific Tribes or their representatives about this rule beyond accepting their public comments about it, there certainly may be need to consult with them regarding specific wildfire management projects if they may have impacts on Indian trust resources. Further, as stated earlier in this preamble, BLM is preparing an Environmental Impact Statement reviewing the possible impacts of the Healthy Forests Initiative, and these tribal concerns will be considered there.

K. Effects on the Nation's Energy Supply (Executive Order 13211)

In accordance with Executive Order 13211, we have found that this final rule will not have a significant effect on the nation's energy supply, distribution, or use. Simplifying proof of service, codifying who has a right of appeal, allowing BLM to make wildfire management decisions effective immediately, and expediting review of those decisions will not affect energy supply or consumption.

L. Authors

The principal authors of this final rule are Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, and Michael H. Schwartz and Ted Hudson, Bureau of Land Management, assisted by Michael Hickey and Amy Sosin, Office of the Solicitor, Department of the Interior.

List of Subjects

43 CFR Part 4

Administrative practice and procedure, Grazing lands, Public lands.

43 CFR Part 4100

Administrative practice and procedure, Grazing lands, Livestock, Penalties, Range management, Reporting and recordkeeping requirements.

43 CFR Part 5000

Administrative practice and procedure, Forests and forest products, Public lands.

Dated: May 19, 2003.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

Dated: May 14, 2003.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

■ For the reasons set forth in the preamble, part 4, subpart E, and part 5000, subpart 5003 of Title 43 of the Code of Federal Regulations are amended, and part 4100, subpart 4190 of Title 43 of the Code of Federal Regulations is added, as set forth below:

43 CFR Subtitle A—Office of the Secretary of the Interior

PART 4—[AMENDED]

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

■ 1. The authority for 43 CFR part 4, subpart E, continues to read:

Authority: Sections 4.470 to 4.478 also issued under authority of sec. 2, 48 Stat. 1270; 43 U.S.C. 315a.

■ 2. In § 4.401, revise paragraph (c)(2) to read as follows:

§ 4.401 Documents.

* * * * *

(c) * * *

(2) At the conclusion of any document that a party must serve under the regulations in this part, the party must sign a written statement certifying that service has been or will be made in accordance with the applicable rules and specifying the date and manner of such service.

* * * * *

■ 3. In § 4.410, redesignate paragraph (b) as (e), and revise paragraph (a)(4) and add paragraphs (b), (c), and (d) to read as follows:

§ 4.410 Who may appeal.

(a) * * *

(4) As provided in paragraph (e) of this section.

(b) A party to a case, as set forth in paragraph (a) of this section, is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, *e.g.*, by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.

(c) Where BLM provided an opportunity for participation in its decisionmaking process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues:

(1) Raised by the party in its prior participation; or

(2) That arose after the close of the opportunity for such participation.

(d) A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.

* * * * *

■ 4. Section 4.416 is added under the undesignated center heading ''actions by board of land appeals'' to read as follows:

§ 4.416 Appeals of wildfire management decisions.

The Board must decide appeals from decisions under § 4190.1 and § 5003.1(b) of this title within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.

■ 5. In § 4.422, revise paragraph (c)(2) to read as follows:

§ 4.422 Documents.

* * * * *

(c) * * *

(2) At the conclusion of any document that a party must serve under the regulations in this part, the party or its representative must sign a written statement certifying that service has been or will be made in accordance with the applicable rules and specifying the date and manner of such service.

* * * * *

■ 6. In § 4.450–5, revise the introductory paragraph to read as follows:

§ 4.450–5 Service.

The complaint must be served upon every contestee in the manner provided in § 4.422(c)(1). Proof of service must be made in the manner provided in § 4.422(c)(2). In certain circumstances, service may be made by publication as provided in paragraph (b)(1) of this section. When the contest is against the heirs of a deceased entryman, the notice must be served on each heir. If the person to be personally served is an infant or a person who has been legally adjudged incompetent, service of notice must be made by delivering a copy of the notice to the legal guardian or committee, if there is one, of such infant or incompetent person. If there is no guardian or committee, then service must be by delivering a copy of the notice to the person having the infant or incompetent person in charge.

* * * * *

43 CFR Chapter II—Bureau of Land Management, Department of the Interior

PART 4100—GRAZING ADMINISTRATION—EXCLUSIVE OF ALASKA

■ 7. The authority citation for part 4100 continues to read:

Authority: 43 U.S.C. 315, 315a–315r, 1181d, 1740.

■ 8. Add subpart 4190, consisting of 4190.1, to read as follows:

Subpart 4190—Effect of Wildfire Management Decisions

§ 4190.1 Effect of wildfire management decisions.

(a) Notwithstanding the provisions of 43 CFR 4.21(a)(1), when BLM determines that vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire, BLM may make a rangeland wildfire management decision effective immediately or on a date established in the decision. Wildfire management includes but is not limited to:

(1) Fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods (with or without removal of thinned materials); and

(2) Projects to stabilize and rehabilitate lands affected by wildfire.

(b) The Interior Board of Land Appeals will issue a decision on the merits of an appeal of a wildfire management decision under paragraph (a) of this section within the time limits prescribed in 43 CFR 4.416.

PART 5000—ADMINISTRATION OF FOREST MANAGEMENT DECISIONS

■ 9. The authority citation for part 5000 continues to read as follows:

Authority: 43 U.S.C. 1181(a); 43 U.S.C. 1701; 30 U.S.C. 601 *et seq.*

Subpart 5003—Administrative Remedies

■ 10. Revise § 5003.1 to read as follows:

§ 5003.1 Effect of decisions; general.

(a) Filing a notice of appeal under part 4 of this title does not automatically suspend the effect of a decision governing or relating to forest management as described under sections 5003.2 and 5003.3.

(b) Notwithstanding the provisions of 43 CFR 4.21(a)(1), when BLM determines that vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire, BLM may make a wildfire management decision made under this part and parts 5400 through 5510 of this chapter effective immediately or on a date established in the decision. Wildfire management includes but is not limited to:

(1) Fuel reduction or fuel treatment such as prescribed burns and mechanical, chemical, and biological thinning methods (with or without removal of thinned materials); and

(2) Projects to stabilize and rehabilitate lands affected by wildfire.

(c) The Interior Board of Land Appeals will issue a decision on the merits of an appeal of a wildfire management decision under paragraph (b) of this section within the time limits prescribed in 43 CFR 4.416.

[FR Doc. 03–14103 Filed 6–2–03; 12:53 pm]

BILLING CODE 4310–79–P