



File Code: 1570

Date: MAY 01 2006

Route To:

**Subject:** Recent Adverse District Court Decision in The Wilderness Society v. Rey, a Challenge to 2003 Amendments to Forest Service Administrative Appeal Regulations at 36 CFR 215

**To:** Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs, WO Staff Directors

The United States District Court in Montana issued an order on April 24, 2006, (enclosed) in The Wilderness Society v. Rey case which enjoins the Forest Service from enforcing 36 CFR 215.13(a). This provision, among other things, provides that only those who submit "substantive comment" on a Forest Service project will be eligible to appeal the Agency's decision related to that project. The Court specified that its injunction applies nationwide, and causes the previous regulation at 215.11(a) to take effect. The ruling stated that the injunction will be applied from the time of the order; therefore, any appeals dismissed prior to April 24, 2006 need not be revisited.

We are actively reviewing available options in light of this nationwide ruling. In the meantime, **the following steps must be taken immediately**. Appeal Deciding Officers pursuant to the Court's order:

- (1) shall not dismiss appeals for failure of the appellant to have submitted substantive comments pursuant to 36 CFR 215.13(a); and
- (2) shall apply the former 36 CFR 215.11(a) in place of 36 CFR 215.13(a). The text of the previous 215.11(a) regulation is enclosed.

In addition, the District Court issued a final declaratory judgment that 36 CFR 215.12(f) and 215.20(b) are invalid under the Appeal Reform Act. These two provisions state decisions based upon categorical exclusions are not subject to appeal, and decisions of the Secretary and Under Secretary not subject to notice, comment, and appeal. The judge issued declaratory relief only in light of the decision in Earth Island Institute v. Ruthenbeck, which has been appealed to the U.S. Court of Appeals for the Ninth Circuit. Therefore, my enclosed October 20, 2005, instruction letter regarding these provisions remains in effect.

Additional information will be provided as it becomes available. Any questions regarding this direction should be directed to Bill Supulski at 202-205-0948 or Eric Olson at 202-205-1014.

DALE N. BOSWORTH  
Chief

Enclosures

