



ADVOCATES for the West

## PUBLIC LANDS ADVOCACY: 101

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**Advocacy** – An activity by an individual or group which aims to influence decisions within the political, economic, and social systems and institutions

Legislative Advocacy

Administrative Advocacy

Grassroots Advocacy

Legal Advocacy

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**Legal Advocacy** – Using state and federal legal tools, processes and procedures to influence agency decisions

- I. Public Engagement in Agency Decisions
- II. Engagement in the Administrative Process
- III. Federal Court Litigation

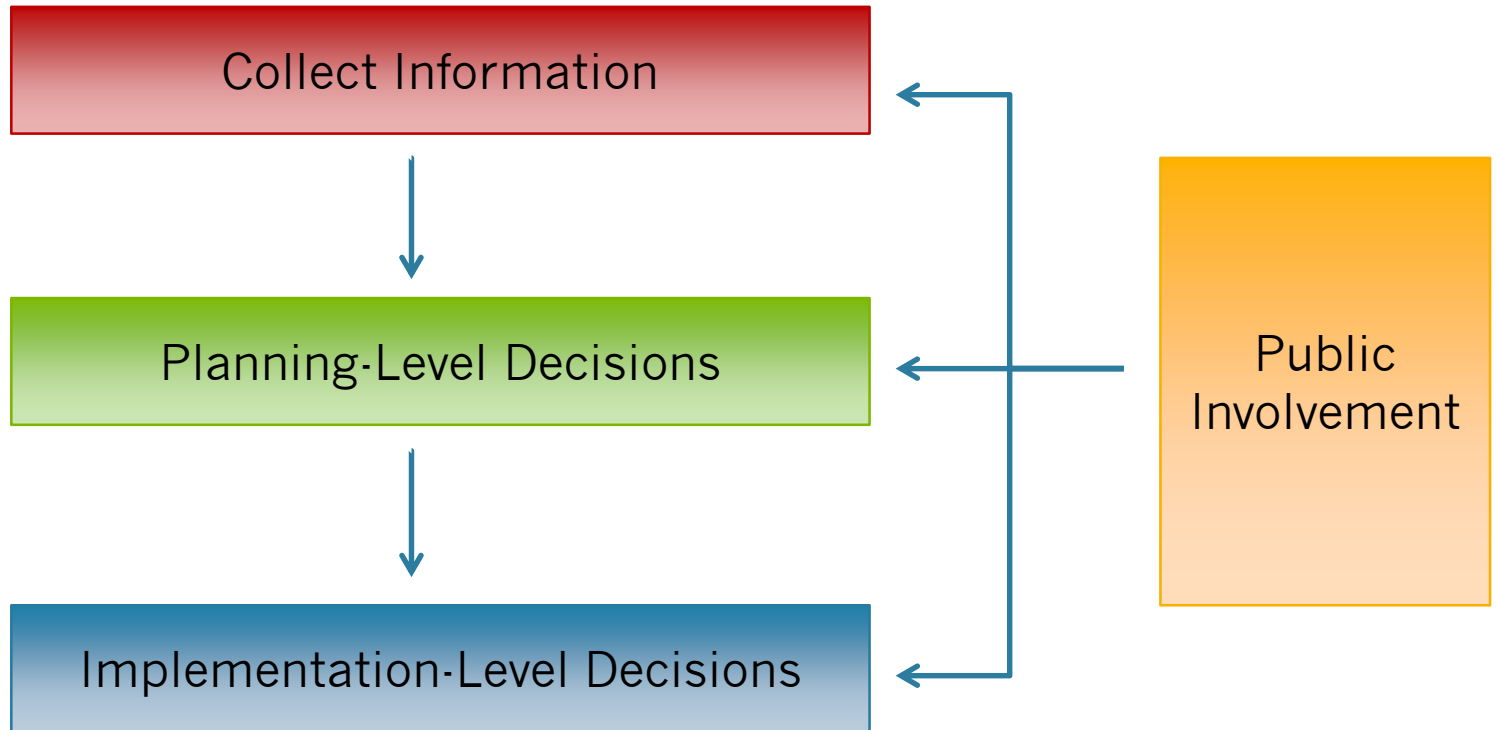
## **I. Public Engagement in Agency Decisions**

Agencies are required by law to allow involvement

Several opportunities to engage

Specific opportunities depends on type of decision

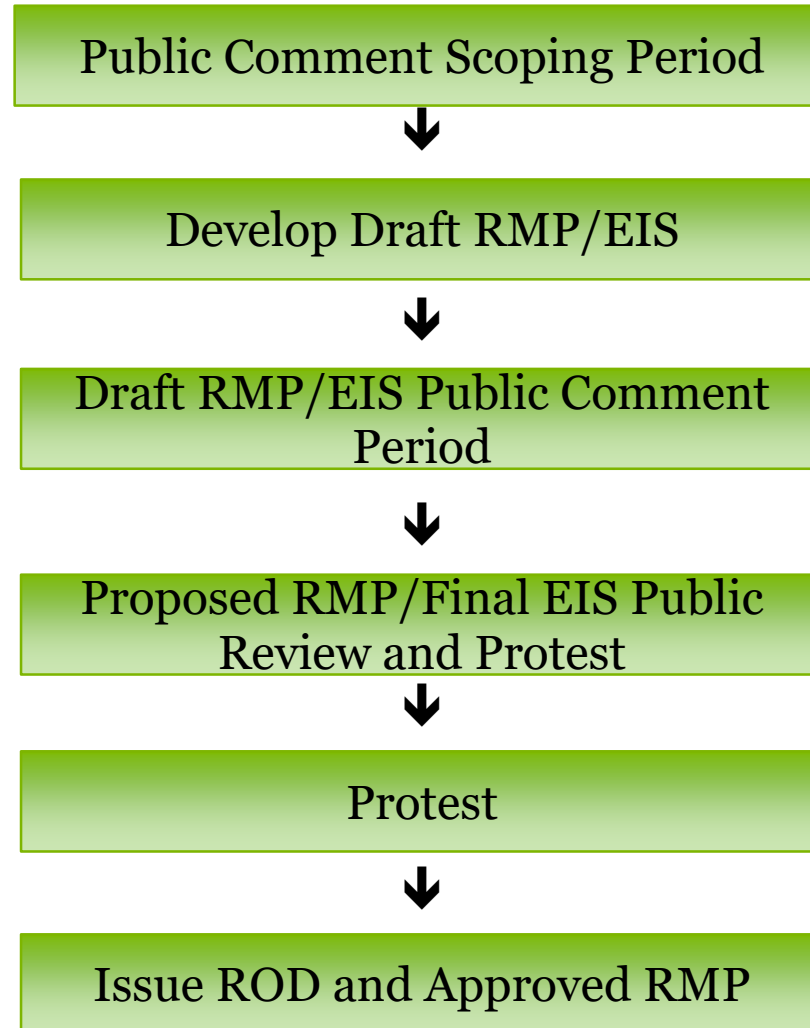
# I. Public Engagement - BLM Planning and Decisionmaking Process



# I. Public Engagement - Resource Management Plans

- **Legally required** - “the Secretary shall, with public involvement and consistent the the terms of [FLPMA], develop, maintain, and when appropriate, revise land use plan. 43 U.S.C. 1712(a)
- “The Secretary shall allow an opportunity for public involvement and . . . shall establish procedures, including public hearings when appropriate, to give Federal, State and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of [land use] plans . . . .” 43 USC 1712(f)
- Public Involvement – the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, . . . . 43 U.S.C. 1702(d).

# Overview of RMP Planning Process





# I. Public Engagement - Implementation-Level Decisions

- Opportunities for public engagement in all BLM implementation-level decisions
- Grazing decision
- Oil and Gas Leasing
- Oil and Gas Operational decision
- Geothermal leasing
- Forest Management decision
- ROWs, roads and ORV decisions
- Hard-rock mining
- Vegetation treatments
- Range developments
- Public engagement available at both the agency decisionmaking stage and administrative appeal

# I. Public Engagement - BLM Grazing Decisions

- BLM must follow 43 C.F.R. § 4160
- Proposed Decision
- Protest
- Final Decision
- Proposed Decisions usually coordinated with Draft EA
- Final Decision usually issued with Final EA, FONIS and DN

# I. Public Engagement - BLM Oil and Gas Decisions

- Competitive Oil and Gas Leasing Process – 43 C.F.R. § 3120
- RMP allocates lands for O&G leasing
- Industry nominates parcel for lease – no longer than 6 months to review parcel nominations
- BLM selects lease parcels and prepares NEPA analysis (DNA)
- BLM publishes Notice of Lease Sale posted/hid in eplanning website– 45 days before auction
- Protest period – 10 days (IM 2018-034)
- Lease sale proceeds with/without resolving protest, but lease issuance waits 60 days for protest review

# I. Public Engagement – Implementation-Level Decisions

- FLPMA ROWs – 43 C.F.R. § 2801
- Forest Management Decisions – 43 C.F.R. § 5000
- Geothermal Leasing – 43 C.F.R. § 3200
- Oil and Gas Operational Decision – 43 C.F.R. § 3160
- Coal Decisions – 43 C.F.R. § 3400
- Hard-Rock Mining – 43 C.F.R. § 3800
- Oil Shale – 43 C.F.R. § 3900

## **II. Engagement in the Administrative Process**

What is the administrative process?

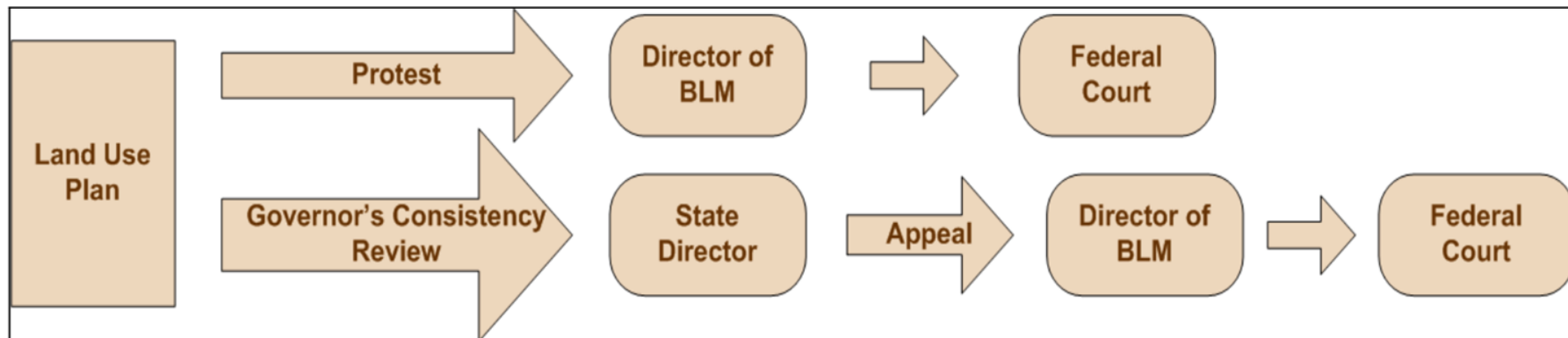
Different agencies/decisions have different processes

Technical processes and subject to exclusions and exceptions

## **II. Administrative Engagement - What is the Administrative Process?**

- .Once an agency makes a decision, the agency has a detailed set of procedures allowing challenges to agency decision that the attempts to resolve itself
- .Different agencies/decisions have different processes depending on the resource at issue – e.g., grazing, timber, wild horses, etc.
- .Technical processes and subject to strict timeframes and requirements
- .In BLM parlance, a challenge to an agency decision is an “appeal”
  - .Or “protest”
  - .Or “request for review”
  - .Or “contest”

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



**Source:** Bureau of Land Management.

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



**Source:** Bureau of Land Management.

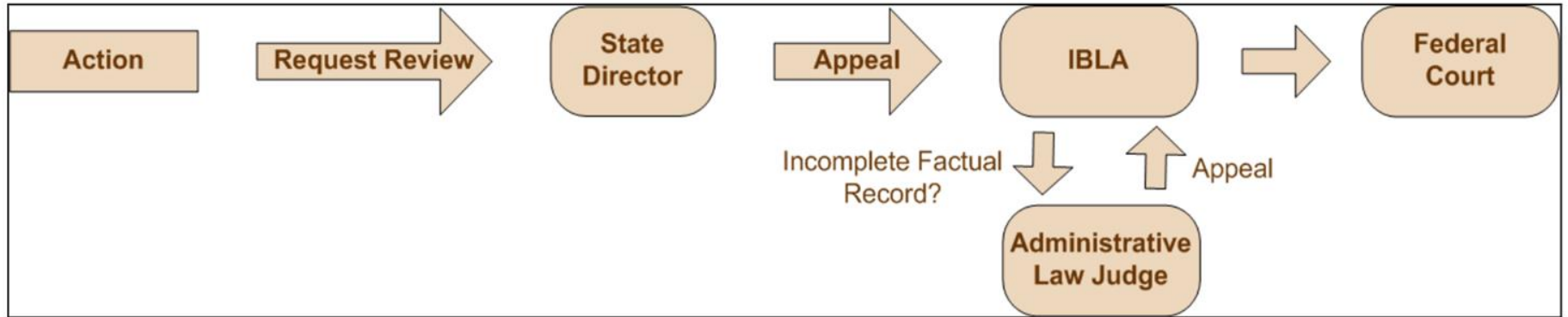
**Figure 3. Administrative Appeals of BLM Grazing Decisions**



**Source:** Bureau of Land Management.

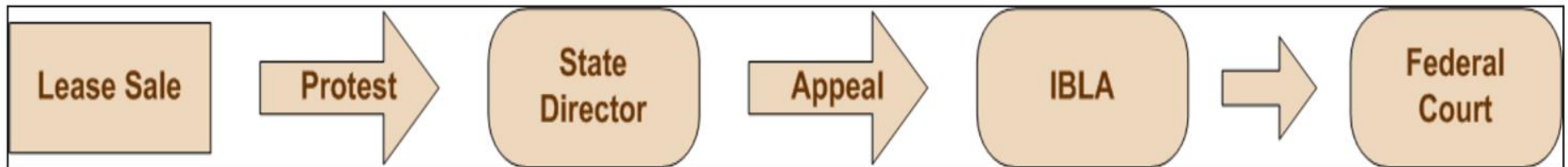
**Figure 4. Administrative Appeals of BLM Minerals Decisions**

Excluding Oil and Gas



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

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

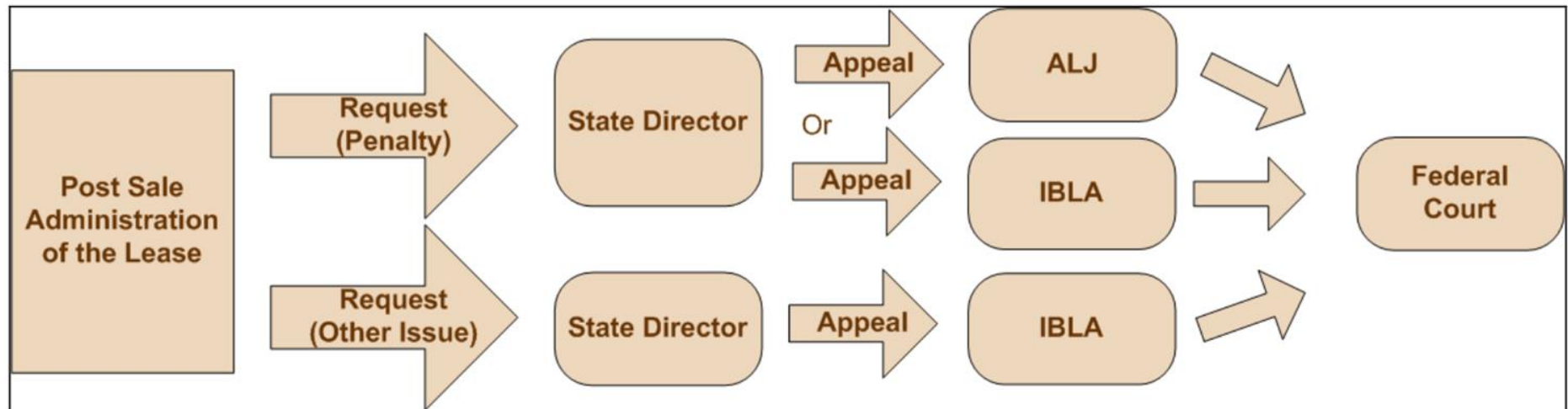


**Source:** Bureau of Land Management.



## Figure 6. Administrative Appeals of BLM Oil and Gas Decisions

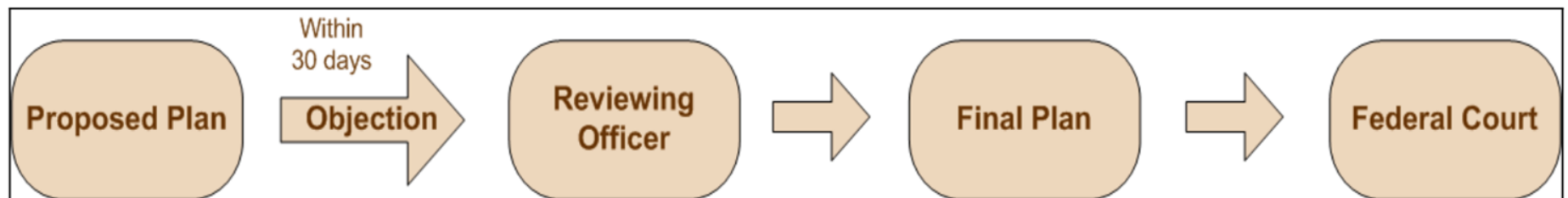
For Challenges Regarding Administration of the Lease After the Sale



**Source:** Congressional Research Service.

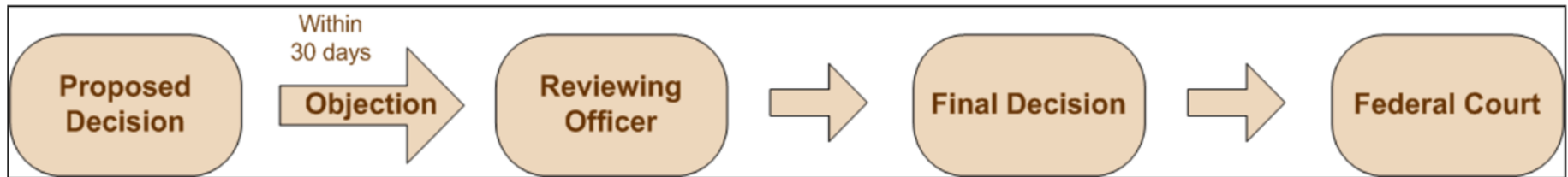
## Figure 8. Administrative Appeals Under Part 219

Challenges of Forest Plans Under NFMA



**Source:** Congressional Research Service.

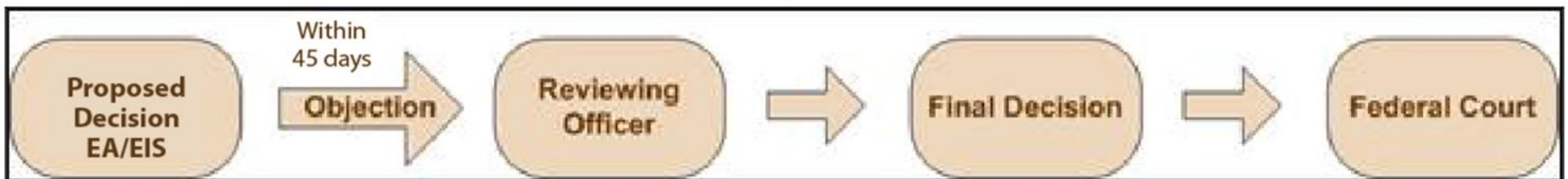
**Figure 9. Administrative Appeals of Projects Under HFRA**



**Source:** Congressional Research Service.

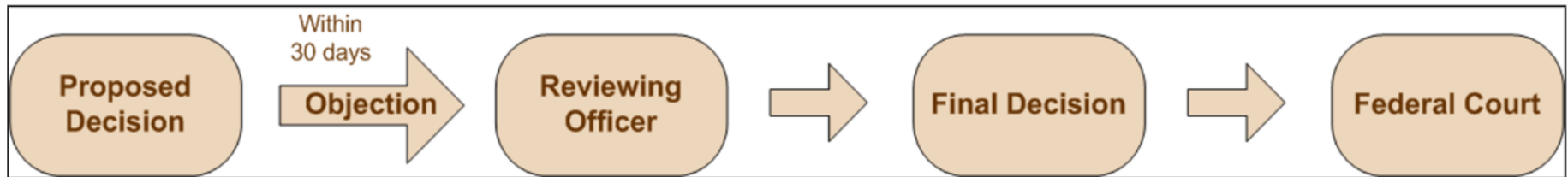
**Note:** 36 C.F.R. subparts A and C.

**Figure 10. Administrative Appeals of Non-HFRA Projects**



**Source:** Congressional Research Service.

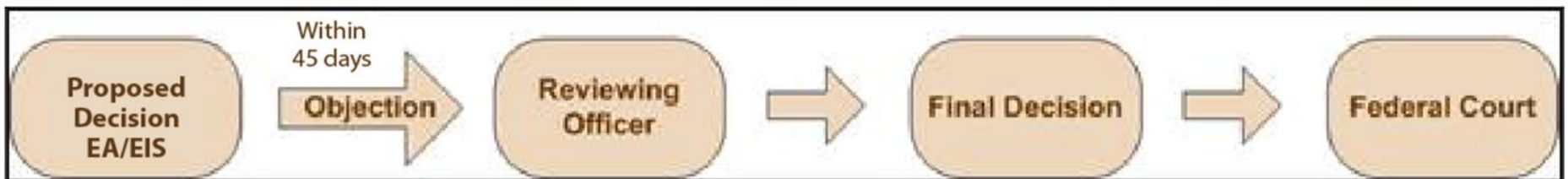
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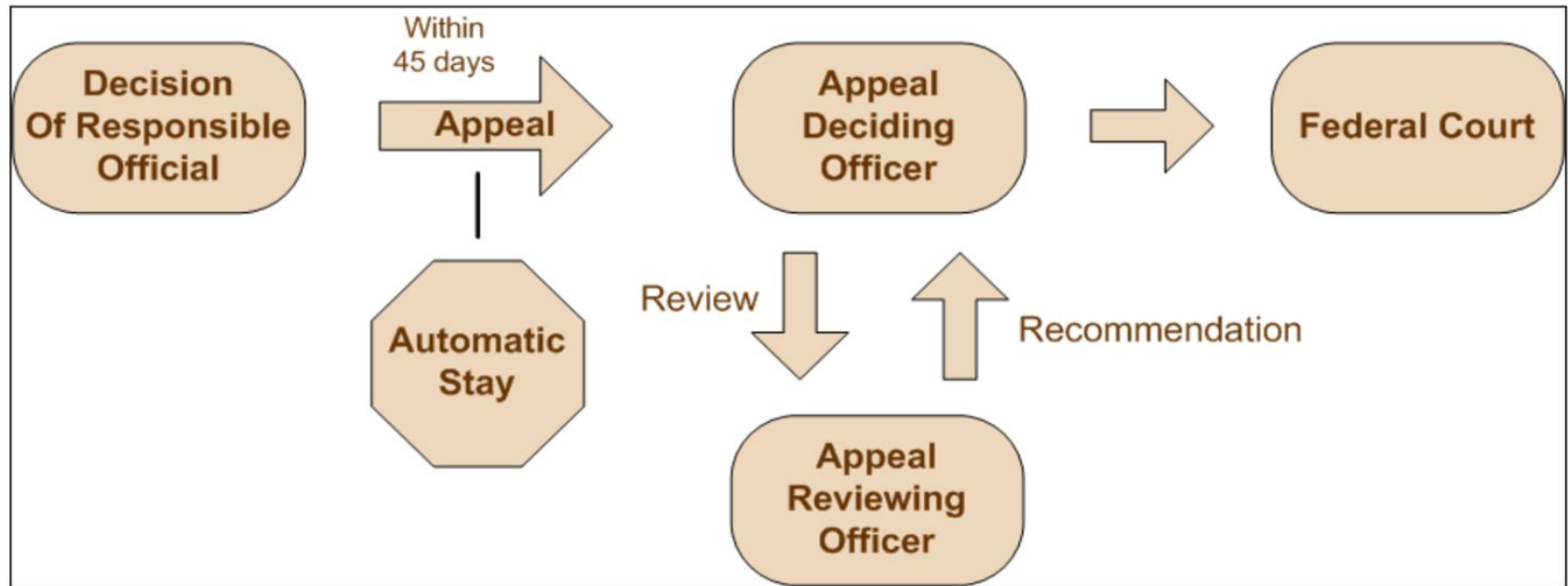
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**Source:** Congressional Research Service.

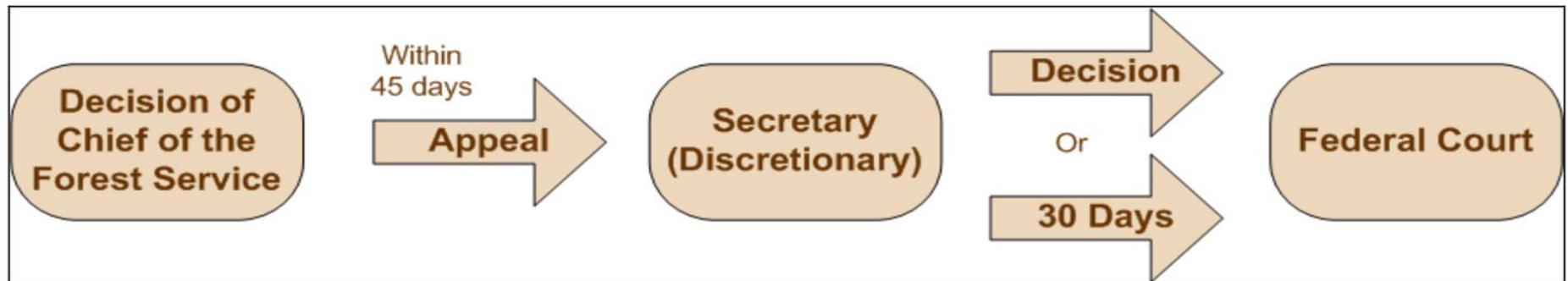
**Figure 11. Administrative Appeals Under Part 215**

Challenges of Project Decisions



**Source:** Congressional Research Service.

**Figure 12. Administrative Appeals Under Part 251 of Forest Service Chief Decisions**



**Source:** Congressional Research Service.

## II. Administrative Engagement - Appeals Generally

- **Type of BLM decision** dictates procedures and setting
- Most to Interior Board of Land Appeals (“IBLA”)—within Office of Hearings and Appeals (“OHA”), some to State BLM Director
- **BLM/Interior Appeal Regs are complex:** 43 C.F.R. Part 1 & 4
- Court-like procedures with potential for hearing to present evidence and witnesses. 43 C.F.R. § 4.415
- Attorneys not required: full-time employee or officer can represent corporation (but not another). 43 C.F.R. § 1.3(b)(3)
- **Appeal period too late to get involved:**
- Must meet administrative exhaustion & standing requirements
- ID appeal procedures & arguments *before* appeal clock starts
- Involvement an *amicus curiae* might be possible. 43 C.F.R. § 4.3(c)
- **Consult** with *Advocates for the West* early in decision making process to analyze issues

### **III. Federal Court Litigation**

The Law is the Last Bastion of Opposition to  
Executive Decisions

### III. The Role Litigation Can Play in Protecting Public Lands

- **Backstop/Defensive Litigation** – challenge ill-conceived agency decisions that will harm landscapes that we care about, one-off attempt to stop project
- **Assertive/Offensive Litigation** – challenge ill-conceived agency decision, but not one-off approach - instead part of a larger litigation strategy to achieve client goals
- **Hybrid** – sometimes trying to simply bring defensive litigation to stop a project, and before you know it you are on the offense

### III. Federal Court Litigation - Substantive and Procedural Cases

- FLPMA consistency – arguing that approved agency decision is inconsistent with the governing RMP
- FLPMA substantive claims (MUSY, UUD, Non-impairment, permanent impairment)
- NEPA – Procedural cases –
  - failed to take a “hard look” at the ecological consequences of an agency decision
  - Failed to prepare an EIS
  - No examination of direct, indirect and cumulative impacts



### III. Federal Court Litigation - Remedies

- **Vacate and Reinstate**
- **Remand and Redo**
- **Delay** – in the Age of Trump – is a tactical victory
- **Run out the clock**
- **Assertive/Substantive Litigation** – Affirmative, enforceable changes on the ground looking forward, create new standards and obligations for agency in the future, and more process

# Understanding the Legal Landscape – FLPMA Process

- § 101 - National interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts
- § 201 – Prepare and Maintain Inventory of PL
- § 202 – Develop, Maintain and Revise LUPs with public involvement

# The Legal Landscape – FLPMA Substance

- 43 C.F.R. § 1610.5-3(a) – **Consistency provision** - FLPMA requires that all resource management decisions “shall conform to the approved [land use] plan.”
- § 302(a) – Manage PL under principles of MUSY – manage PL without **permanent impairment** to the productivity of the land and the quality of the environment
- § 302(b) - In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent **unnecessary or undue degradation** of the lands.
- § 603(c) – WSAs – Manage WSAs lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness – **non-impairment standard**

## The Legal Landscape – NEPA Process Only

- Prepare EIS for every major federal action significantly impacting the human environment
- Prepare an EA/FONSI taking a “hard look” at the ecological impacts of project – direct, indirect and cumulative; alternatives; baseline data and analysis
- Engage the public in the decisionmaking

# Questions

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