

Term Grazing Permit Issuance Authorities Review and Guidance

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Introduction: The purpose of this white paper is to:

- answer questions about the two authorities for issuing term grazing permits that are available per the recent amendment to section 402 of the Federal Land Policy Management Act (FLPMA),
- provide information that supports those answers,
- facilitate a consistent and durable approach to applying the authorities; and
- describe what requirements apply relative to determining the priority and timing for completion of environmental analysis and clarify that the Rescissions Act of 1995 no longer applies

This document is intended to serve as guidance that can be referenced while making recommendations or informed decisions about which authority to apply. Guidance is provided in the form of questions and answers, a decision tree, a checklist, and appendices. *Many may find that the decision tree on page 4 to be the most useful resource to guide them through the various authorities available.* It is recommended that readers review the table of contents and navigate to those portions of the white paper that address their specific need and/or question.

Please note that this white paper does not serve as legal advice. When a legal opinion is required, those specific questions should be directed to your local Office of the General Counsel in coordination with your Forest/Grassland rangeland management program lead and/or Rangeland Management Representative Program Lead.

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Background: Section 3023 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291) amended Section 402 of FLPMA by modifying one provision and adding six new provisions. Two of those provisions provide authorities for the issuance of term grazing permits. The authorities are codified in the United States Code as follows:

- 43 U.S.C. §1752(c)(2) – CONTINUATION OF TERMS UNDER NEW PERMIT OR LEASE
- 43 U.S.C. §1752(h)(1) – ISSUANCE OF A GRAZING PERMIT MAY BE CATEGORICALLY EXCLUDED

One of the provisions addressed the priority and timing for completion of environmental analysis and is now codified in the United States Code as follows:

- 43 U.S.C. §1752(i) – PRIORITY AND TIMING FOR COMPLETION OF ENVIRONMENTAL ANALYSIS

Question 1: What opportunities are available for issuing a Term Grazing Permit?

Answer 1: The opportunities provided by Pub. L. 113-291 include the following:

1. **Continuation of terms under new permit or lease** – “The terms and conditions in a grazing permit or lease that has expired, or was terminated due to a grazing preference transfer, shall be continued under a new permit or lease until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under the NEPA and other applicable laws”.
 - This opportunity is provided by 43 U.S.C. §1752(c)(2). The opportunity is similar to authorities provided in past legislation beginning with Sec. 504(b) of the Rescissions Act of 1995 (P.L. 104-19) and perpetuated through various appropriations acts since 1996. The 2015 amendment serves to codify the language and opportunity provided in those acts and provides a mechanism to issue a new permit **with the same terms and conditions** for those lands subject to section 402 of the FLPMA.
 - Please note that for lands **NOT** subject to section 402 of the FLPMA¹, authority to issue a new permit **with the same terms and conditions** has continued to be provided in appropriations acts. The most recent being the Consolidated Appropriations Act of 2021 (P.L. 116-260). Specifically, Sec. 417 states that *“The terms and conditions of section 325 of Public Law 108–108 (117 Stat. 1307), regarding grazing permits issued by the Forest Service on any lands not subject to administration under section 402 of the Federal Lands Policy and Management Act (43 U.S.C. 1752), shall remain in effect for fiscal year 2021.”* **Similar language has been included in appropriations acts in recent years. However, it is not known if Congress will grant this authority for fiscal years.**
2. **Under certain circumstances, the issuance of a grazing permit(s) may be categorically excluded** – The new CE applies when certain conditions are met as now described within 43 U.S.C. §1752(h)(1) (see Appendix 1). Application of this CE is discretionary and may be used to manage grazing permit administration workload. The use of the CE is subject to meeting the conditions described within 43 U.S.C. §1752(h)(1) and is still subject to regulatory requirements or other program-specific policies, including the obligation to issue a Findings of Applicability and No Extraordinary Circumstances (FANEC).
 - The CE may be used when the issued permit or lease continues the **“current grazing management” of the allotment** and the criteria summarized in Appendix 1 are met. Please note that “current grazing management” is an important phrase in this context. Although a statutory definition was not provided for the term directly within Pub. L. 113-291, one is available in the legislative history (see appendix 4 for a summary of the legislative history). The CE can be used to issue new grazing permits even when minor

¹ Lands NOT covered by Sec. 402 include those NFS lands that are outside the National Forests in the 16 western states (e.g., National Grasslands).

modifications to the terms and conditions are made if those modifications do not result in a departure from the current grazing management of the allotment and the conditions set forth in 43 U.S.C. §1752(h)(1) are met (see appendix 4 for more details on this interpretation).

Question 2: What is the definition of current grazing management?

Answer 2: For the purposes of this guidance, continuation of current grazing management means “grazing management in accordance with the terms and conditions of an existing permit or any minor modifications to those terms and conditions that are consistent with the applicable Land Management Plan (LMP).”

Question 3: What level of modifications are we able to make to terms and conditions that fit within the definition of current grazing management?

Answer 3: Minor modifications that do not result in a departure from the current grazing management of the allotment and meet the conditions set forth in 43 U.S.C. §1752(h)(1) would fit within the definition of current grazing management. The checklist within appendix 2 includes a list of factors that are intended to aid in determining if a proposed modification is minor or not. Rationale about why the authority affords the opportunity to make minor modifications is detailed within appendix 4.

Question 4: What are some examples of minor modifications that could be made to terms and conditions when using the Grazing Permit CE (the authority at 43 U.S.C. §1752(h)(1))?

Answer 4: There are several scenarios that may be encountered where slight adjustments to the terms and conditions of a permit would augment our ability to meet grazing and resource objectives while continuing current grazing management. Site specific information should be used along with the guidance contained within this white paper to determine if the desired modifications can be considered minor. The following are a few hypothetical examples of minor modifications that would fit within the Grazing Permit CE authority (please note, this is not an exhaustive list):

- A permit may have highly prescriptive terms and conditions that require a 3-pasture rotation system with each pasture being assigned a particular season of use. The terms and conditions could be modified to provide an opportunity to alternate which pasture is used 1st, 2nd and so on while still requiring a 3-pasture rotation². This would maintain the required rotation along with other management requirements (i.e., current grazing management) while allowing for improved conditions resulting from not grazing each pasture during the same period year in and year out.
- The permittee requests to change the class of livestock that is reflected on the permit. The terms and conditions of the permit could be modified to change the class of livestock (e.g., from cow/calf to yearlings) to adjust his/her operation to meet business needs and/or objectives. The modification in the class of livestock could be made while maintaining the other terms and conditions and current grazing management.

Question 5: What are the key aspects that should be considered and included in the proposal record when choosing to use the Grazing Permit CE (the authority at 43 U.S.C. §1752(h)(1))?

Answer 5: Appendix 2 provides a list of guidelines to consider when using the statutory CE provided under 43 U.S.C. §1752(h)(1). The appendix is intended to:

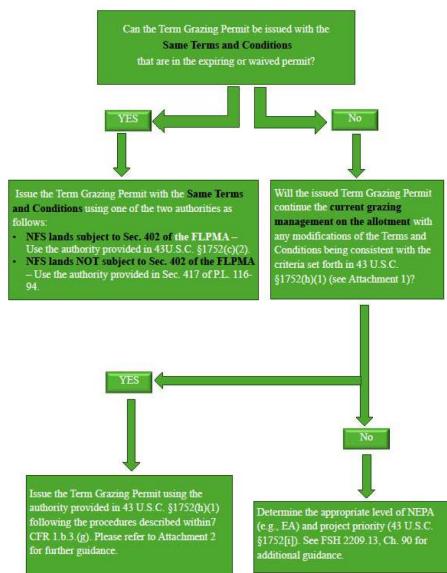
- Clarify the Forest Service’s interpretation of the authority.
- Provide some guidelines on how to take a stepwise and consistent approach to applying it.
- Provide some guidelines on how to document the associated rationale and supporting information in a proposal record.

² Seasons of use should not be changed for pastures associated with prescriptive rotation schedules that are based on specific resource needs or direction in the Land Management Plan.

Question 6: How do I know which opportunity is appropriate to use under certain scenarios?

Answer 6: Before investing time in deciding which authority to use, administrative units should first determine if the requirements of NEPA have already been met relative to livestock grazing on the allotment in question. Activities which merely implement a decision previously analyzed under NEPA are not new Federal actions requiring independent analysis (7 CFR 1(e)). If the requirements of NEPA have not been met, use the decision tree shown in Figure 1 below to navigate the different opportunities to issue term grazing permits. The decision tree is intended to communicate the different authorities available and help the field determine which authority to apply to a respective situation.

Figure 1: Term Grazing Permit Issuance Decision Tree (Double click the image to open)



Question 7: Are we required to provide updates to and/or maintain a standalone “allotment NEPA schedule” or “Rescissions Act schedule”?

Answer 7: No, the Rescissions Act of 1995 no longer applies, and a standalone schedule will no longer be used. Per 43 U.S.C. §1752(i), the priority and timing for completing each required environmental analysis with respect to a grazing allotment or permit shall be based on:

- the environmental significance of the grazing allotment or permit; and
- the available funding for the environmental analysis

Administrative units should complete the following actions as they plan and/or accomplish work related to satisfying the requirements of NEPA with respect to grazing allotments:

- Determine the priority and timing for allotments³ by applying site specific information to the criteria identified at 43 U.S.C. 1752(i).
- Maintain up to date information within the Rangeland Information Management System (RIMS) to accurately reflect those allotments where NEPA requirements have been met.

³ If an allotment is vacant and the unit has no plans to issue a term grazing permit or is planning to close an allotment, capturing a planned completion date is less important.

Appendix 1: Summary of Criteria in 43 U.S.C. §1752(h)(1) for Application of Categorical Exclusion used to Issue a Term Grazing Permit (Section 3023 of Pub. L. 113-291)

Section (h)(1) Criteria

1. The issued permit continues the current grazing management of the allotment(s).
2. An assessment and evaluation has been completed for the grazing allotment(s) associated with the permit.
3. Based on the assessment and evaluation, it is determined that the allotment(s):
 - a. is meeting objectives in the applicable land and resource management plan; or
 - b. is not meeting the objectives in the applicable land resource management plan due to factors other than existing livestock grazing.

Full Text of Section 3023 of Pub. L. 113-291 (*double click to open*)

PUBLIC LAW 113-291—DEC. 19, 2014

128 STAT. 8783

“(3) COMPLETION OF PROCESSING.—As of the date on which the Secretary concerned completes the processing of a grazing permit or lease in accordance with paragraph (2), the permit or lease may be canceled, suspended, or modified, in whole or in part.

“(4) ENVIRONMENTAL REVIEWS.—The Secretary concerned shall seek to conduct environmental reviews on an allotment or multiple allotment basis, to the extent practicable, if the allotments share similar ecological conditions, for purposes of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws:

“(B) by redesignating subsection (h) as subsection (j); and

“(C) by inserting after subsection (g) the following:

“(h) NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—

“(1) IN GENERAL.—The issuance of a grazing permit or lease by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if—

“(A) the issued permit or lease continues the current grazing management of the allotment; and

“(B) the Secretary concerned—

“(i) has assessed and evaluated the grazing allotment associated with the lease or permit; and

“(ii) based on the assessment and evaluation under clause (i), has determined that the allotment—

“(D) with respect to public land administered by the Secretary of the Interior—

“(aa) is meeting land health standards;

or

“(bb) is not meeting land health standards due to factors other than existing livestock grazing; or

“(II) with respect to National Forest System land administered by the Secretary of Agriculture—

“(aa) is meeting objectives in the applicable land and resource management plan; or

“(bb) is not meeting the objectives in the applicable land resource management plan due to factors other than existing livestock grazing.

“(2) TRAILING AND CROSSING.—The trailing and crossing of livestock across public land and National Forest System land and the implementation of trailing and crossing practices by the Secretary concerned may be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

“(G) PRIORITY AND TIMING FOR COMPLETION OF ENVIRONMENTAL ANALYSES.—The Secretary concerned, in the sole discretion of the Secretary concerned, shall determine the priority and timing for completing each required environmental analysis with respect to a grazing allotment, permit, or lease based on—

Appendix 2: 43 U.S.C. §1752(h)(1) Grazing Permit CE Use and Documentation Considerations

The following checklist is intended to facilitate a stepwise and consistent approach for the use and documentation of the grazing permit CE:

- The issued permit will continue current grazing management on the allotment. For the purposes of this guidance, continuation of current grazing management means “grazing management in accordance with the terms and conditions of an existing permit or any minor modifications to those terms and conditions that are consistent with the applicable Land Management Plan (LMP)”. When determining if a proposed modification(s) is considered minor, the Line Officer should review the following factors:
 - The proposed modification(s) would not result in a change in the kind or level of adverse impacts.
 - The proposed modification(s) would not result in an increase in the overall amount of permitted use (i.e., HMs).
 - The proposed modification(s) does not conflict with any specific resource needs or direction (e.g., Biological Opinion) within the allotment and/or particular pastures and would not conflict with direction in the LMP.

It is recommended that a brief statement describing any minor modifications made, along with rational as to why they are considered minor be included in the proposal record.

- Available monitoring information is reviewed and assessed. Information in that assessment concludes that the allotment(s) is meeting objectives in the applicable land and resource management plan, or if the allotment(s) is not meeting objectives, it can be documented that it is due to factors other than existing livestock grazing. The assessment and the supporting monitoring information should be included in the proposal record.
 - If monitoring information is not available, stop and complete any monitoring needed to assess the condition of the allotment in relation to applicable LMP objectives.
- Complete and document an extraordinary circumstances review. That review must consider all the resource conditions listed at [7 CFR 1b.3](#) to determine whether the action warrants further analysis and documentation in an environmental analysis. Appendix 3 contains an example form that may be used to document the review. Regardless of the method used to document the review, it should be included in the proposal record. Refer to 7 CFR 1b.3 (f) for further guidance on completing an extraordinary circumstances review.
- If the aforementioned considerations are met, document the action and the associated rationale in a Findings of Applicability and No Extraordinary Circumstances (FANEC). The document should cite the authority as 43 U.S.C. §1752(h)(1).

Appendix 3: Findings of Applicability and No Extraordinary Circumstances (FANEC)

You can find the most up-to-date FANEC and other CE-DM templates on the NEPA SharePoint Site:
[CE-DM Templates](#)

Appendix 4: Applicable Legislative History, Interpretation of the Legislative Provisions and Differentiation Between the Two Opportunities (43 U.S.C. §1752 [c][2] and 43 U.S.C. §1752 [h][1])

The following are the core aspects that were used in the interpretation of Pub. L. 113-291 and the resulting language in Sec. 402 of the FLPMA which is codified at 43 U.S.C. §1752:

- A. the text of the statute
- B. the context and structure of the statute
- C. the purpose of the statute
- D. the legislative history

The following is an explanation of how the core aspects were used in the interpretation of the revised language contained within 43 U.S.C. §1752:

- B. The text contained within the amended language is important. The following two phrases can be found within the respective sections.
 - Continuation of **terms and conditions** (43 U.S.C. §1752 (c)(2)) – the definition of “terms and conditions” is clearly known and routinely used by the agency (see FSH 2209.13, Ch. 10). 43 U.S.C. §1752 (c)(2) codifies language included in recent Appropriations Acts providing for the issuance of grazing permits until the appropriate NEPA analysis and documentation is complete and uses very similar text as those previous pieces of legislation.
 - Continues the **current grazing management of the allotment** (43 U.S.C. §1752 (h)(1)) – the definition of “current grazing management” is not a specific agency term. In this instance it is important to consider the phrase in its full context as well as to examine the legislative history for any information such as a statutory definition. In its full context, one will see that this refers to the management of the allotment and is not purely focused on the terms and conditions of the permit. Information contained within the legislative history provides more clarity to what is meant by the phrase. That information includes such things as a statutory definition, Forest Service testimony, etc. pairing the existing text, legislative history and the canons of construction described in C below, make it clear that the meaning is much broader than purely the terms and conditions of a permit and that the statute does allow for minor modifications to be made.
- C. Paying attention to the context and structure is a critical part of interpreting a statute. You should consider the whole Act, presume that a word or phrase means the same thing through the whole text and acknowledge the bearing that associated words have on each other (i.e., the canons of construction). The canons of construction were applied when consideration the following aspects related to the text contained in the amended language of the FLPMA:
 - The statute was purposefully organized in sections. One section (43 U.S.C. §1752 (c)(2)) focused specifically on the issuance of grazing permits that continue the same terms and conditions as the expired or waived permit (i.e., continuation of terms and conditions). The other [separate] section (43 U.S.C. §1752 (h)(1)) focused on continuing current grazing management. This structure has bearing on how the statute should be interpreted. One does not require NEPA (i.e., 43 U.S.C. §1752 (c)(2)) and the other affords the use of a CE (i.e., 43 U.S.C. §1752 (h)(1)).
 - If Congress was intending both opportunities to only allow for the continuation of the existing terms and conditions, the statute would have likely used the same term/phrase within both sections. It is important to remember that it is very rare/unlikely that Congress would create duplicative opportunities within the same legislation or use two different terms/phrases with the same meaning instead of using a consistent term throughout.
 - Lastly, associated words are important. In 43 U.S.C. §1752 (c)(2), Congress uses “grazing permit” in association with “terms and conditions,” In 43 U.S.C. §1752 (h)(1), Congress uses “allotment” in association with “current grazing management.”

D. Reviewing the purpose of the legislation is valuable when interpreting its provisions. A review of the legislative history is needed to find the purpose of the provisions as they were brought in as a rider to Pub. L. 113-291. The language was first introduced in the Grazing Improvement Act of 2012. The purpose of that act was to amend FLPMA to improve the management of grazing leases and permits. In reviewing the purpose and the associated background, it's clear the language is intended to provide efficiencies relative to the issuance of grazing permits.

E. Legislative history can provide useful insights when determining Congress's intent and the meaning of somewhat ambiguous statutory language. Though the legislative history does not dictate how a statute is applied, it is helpful to review the various pieces of history such as committee reports, testimony and other statements found in the Congressional record. The following is a summary of the legislative history pertaining to the two authorities described within this white paper:

- The legislative history includes a statutory definition of "current grazing management." That definition is "the term current grazing management means grazing in accordance with the terms and conditions of an existing permit or lease and includes any modifications that are consistent with an applicable Department of Interior resource management plan or Department of Agriculture land use plan".
- It includes testimony from the Forest Service that offers insights to the difference between "continuation of terms and conditions" (43 U.S.C. §1752 (c)(2)) and "continues current grazing management" (43 U.S.C. §1752 (h)(1)). In particular, James Peña, Associate Deputy Chief, National Forest System offered the following during his testimony to the Subcommittee on Public lands, Forest, and Mining on July 30, 2013:
 - i. "While we support providing the line officer with the option to use a categorical exclusion category where the parameters of what constitutes a minor adjustment are narrowly defined, we do not support requiring use of categorical exclusions."

The testimony clarifies that the CE described within 43 U.S.C. §1752 (h)(1) provides the authority to satisfy NEPA requirements when the action meets the conditions set forth in the statute and that the authority includes making minor modifications to the terms and conditions so long as the modifications do not result in a departure from the current grazing management of the allotment and the conditions set forth in 43 U.S.C. §1752 (h)(1) of the FLPMA are met.

- It includes statements that confirm that the authority provided by 43 U.S.C. §1752 (c)(2) serves to codify language included in previous Appropriations Acts (e.g., Pub. L. 104-19, Pub. L. 108-108, etc.) providing for "the automatic renewal of grazing permits until the appropriate NEPA analysis and documentation is complete".