

# Embracing Obligation & Increasing Opportunity

Achieving Accountability Through Innovation &  
Collaboration

*36 C.F.R. 216:*

*Public Notice and Comment for Standards, Criteria, and Guidance  
applicable to Forest Service programs.*



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“We hear some consistency in how people in communities across the Nation define conservation, but we hear much less clarity in how they describe what the Forest Service does and why.”



# The Forest Service: More Than Just Forest Fires...

- Responsible for managing the nation's public lands:
  - 155 national forests
  - 20 national grasslands
- Covers more than 193 million acres of public land.
- Oversees 80 experimental forests and ranges, five research and development stations, and 18 job corps centers.





# Public Participation in the Creation of Law and Policy

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- Public notice requirements first appeared in the Organic Act (1897), the first statute to lay out the rules for how federal forest reserves should be administered.
- Modern public participation principles are set out in the Administrative Procedure Act (1946) (APA) and the National Forest Management Act (1976) (NFMA).

## Notice and Comment and You!

Raise your hand if you have any experience with Notice and comment or you are familiar with the APA.

Anyone care to share your experience?



# *Forest Service Trivia...*

## **True or False:**

1. FS Directives are guidance documents created for both employees and external stakeholders.
2. Directives are binding and carry full effect of force of law.
3. The Forest Service is not subject to the requirements of the Administrative Procedure Act
4. Directives are subject to public notice and comment, but only if they cause controversy amongst the public.
5. Despite the difference in the names, the FS Manual (FSM) and FS handbook (FSH) are considered as functional equivalents by the courts, so they are both excluded from notice and comment.

1. FS Directives are guidance documents created for both employees and external stakeholders.

False

Directives are not guidance documents unless they have the legal effect of a regulation, i.e., a directive that has a future effect on regulated parties.

2. Directives are binding and carry full effect of force of law.

False

Directives can be binding on those outside the agency, but only if they carry the force and effect of a rule and have been treated by the agency as a regulatory item.

3. The Forest Service is not subject to the requirements of the Administrative Procedure Act

True

As a land Management Agency, like HUD, FS is exempt from the APA requirements.

4. Directives are subject to public notice and comment, but only if they cause controversy amongst the public.

False

Directives are subject to notice and comment only when they have a substantial future effect on regulated parties or when they create, alter, or impact the standards, criteria, and guidelines of Agency programs that also impact the public.

5. Despite the difference in the names, the FS Manual and FS handbook are considered as functional equivalents by the courts, so they are both excluded from notice and comment.

False

The courts have found that the FSM & FSH are functional equivalents, however, the FSM is meant to specify responsibilities and include guidance of a general application, while the FSH is intended to be more specialized and technical in nature. None the less, both the FSM & FSH are subject to notice and comment if they trigger the requirements of the National Forest Management Act.



# Notice and Comment Requirements

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- The APA requires the public be provided **Notice** of most Federal administrative rule makings. Also required by the APA is that the implementing agency provide the public opportunity to **Comment** on the proposed regulations, and that the agency must take these comments into consideration when crafting the final rule (5 U.S.C. § 553).
- The NFMA expands further on the APA's public notice and comment requirements, by requiring the Forest Service to offer a public Notice and Comment period on the "formulation of standards, criteria, and guidelines applicable to Forest Service programs."

# 36 CFR 216: A Barrier to External Communication and Collaboration

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## Prior to revision:

- Utilized a “controversy” test to determine if a proposed revision to a directive in the Forest Service Manual is likely to elicit significant public interest;
- Only required notice and comment on directives published in the FSM; and
- Provided automatic exemption to notice and comment if directive is published in the FSH instead of the FSM.

*A **directive** is a policy that directs Agency action and/or implements regulations.*

# Back Country Horsemen

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- In the 2006 case, *Back Country Horsemen of America v. Johanns*, the District Court for the District of Columbia found that the current iteration of 36 CFR 216 fails to articulate a reasonable explanation of NFMA's public notice and comment requirements. (424 F. Supp. 2d 89, 96 (D.D.C. 2006)).
- The court also rejected any distinction between how this provision is applied to directives published in the FSM and the FSH (*id.*).
- Given the court's holding, it became imperative that the Forest Service update 36 CFR 216.

# Key Revisions to 36 CFR 216

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- All directives, both in the FSM or the FSH, will be subject to the Notice and Comment requirements if they are:
  - “formulations of standards, criteria, and guidelines through the issuance, amendment, or repeal of Forest Service directives regarding management of the National Forest System, the State and Private Forestry program, and any other directive that substantively affects natural resources on National Forest System lands or adjacent State and private land.”
- This newly defined scope replaces the “interest and controversy” test rejected by the court in *Back Country Horsemen*.

“*Natural resources*” was added to the rule as a consideration to public participation because 6 of the 7 findings by Congress listed in the NFMA as motivations for the public participation requirements emphasize natural resource management.

# Procedural Revisions to 36 CFR 216

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The Agency is *expanding* the public's accessibility to public participation, to which they have a statutory right under NFMA, but leaving that right intact. The new process includes:

- Notice of changes that will be published on a dedicated Forest Service website, creating a one-stop-shop for members of the public to see what directive changes are being considered and are open for public comment;
- Utilization of modern outreach technology to supplement official notice, such as social media and email alerts; and
- Opportunity for public comments that will be collected and analyzed in a process that mirrors public participation in the National Environmental Policy Act, allowing members of the public to submit comments via an online form, email, or hard copy sent through United States Postal Service.

Just as in the APA, the revisions to 36 CFR 216 provide a standard 30 day comment period.

# Stakeholder and Community Collaboration and Engagement

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- Agency Efforts began in 2014.
- Partner Engagement in 216 Rule helped to shape the 216 Notice and Comment System.
- Included a variety of partners, such as: Western Governors Association / The Wilderness Society / Defenders of Wildlife.
- Utilized Webinars/Focus Groups/Public Meetings.
- No opposition to rule.

# Communication Planning Included:



## Internal Engagement

- Meetings with Directors
- Leadership Briefings (ongoing)
- Administrative Management Council
- Webinars

## External Engagement

- Preliminary Calls with Stakeholders
- Congressional Outreach
- Publication In *Federal Register* and on Website
- GovDelivery Notification
- Public Webinars
- Public Meetings

# Incorporating Feedback From Our Partners

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- Quarterly publication of upcoming directives to provide an early alert about what to expect;
- Publish Notices of Availability in the *Federal Register*;
- Focus on public outreach for all directives undergoing notice and comment; and
- 60-day comment period for proposed 216 Directive chapter 30.





# Stakeholders And Community Engagement Contributed To And Affirmed Agency Decision-making....

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- Procedures for Providing Public Notice and Opportunity to Comment in Directive System;
- “216 Directive,” New Chapter in the Directive System Handbook;
- Agency-wide Directive Work Plans;
- Templates / Checklists;
- Training; and
- Identifying topics for mandatory inclusion in public notice and comment.

## And Also Caused Some Barriers To Communication And Collaboration...

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- Availability of resources needed for successful outreach and engagement.
- Difficulty coordinating among and between various federal, state, and local government and other entities as well as the public, generally.
- Lack of understanding and recognition among communities and individuals of their status as stakeholders and what that role looks like in action.

# But Also Contributed To A Public Comment Requirement On Topics Such As....

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Good Neighbor Authority

Stewardship Contracting

Leasing Forest Service  
Administrative Sites

Recreation Special Uses Handbook

Hazardous Fuels CE

Good Samaritan Search and  
Recovery

Special Uses Fee Determination

Range Management Directives

Landscape Scale Restoration  
Directives

Threatened and Endangered Species

Watershed Condition Framework

Sage Grouse/Mule Deer CE

# ...Resulting In The Agency Developing New Infrastructure

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This includes:

- People (new requirements, roles and skills);
- Content Analysis and Response Application (CARA) System to manage comments – Leveraging Existing System <https://dev-cms.fs.usda.gov/hq4d8/about-agency/regulations-policies/pending-proposed-directives>;
- Forest Service website <https://dev-cms.fs.usda.gov/hq4d8/about-agency/regulations-policies>; and
- Email subscription service.

# Actual Outcomes

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The revisions to 36 CFR 216 has improved access, cost savings, and administrative efficiency to modifications of the Agency's directive system by:

- **Expanding** the number of directives that undergo public participation;
- **Saving costs** through administering the public participation in-house, as *Federal Register* notices cost a significant amount of money to publish;
- **Speeding up** the process making changes to directives;
- **Leveraging** new communication technologies and social media to increase actual public notice of policy changes; and
- **Motivating** the Agency to ensure program areas update directive content frequently.

# Lessons Learned About Community Engagement and Collaboration

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Long-term community engagement is critical to sustaining the involvement of diverse communities in decision-making around Agency actions impacting the public.

# Lessons Learned About Community Engagement and Collaboration

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We identified the following **Critical Elements** as vital to outreach and collaboration success:

- A two-way process of distributing and receiving information;
- A process that aims to increase the number of community members who recognize themselves and their communities as stakeholders in the issues at hand;
- A system of processes and mechanisms for community outreach, input, and involvement at different levels;
- Quality of information over Quantity of information; and
- Outreach and communication methods, processes, and information should be targeted.

The biggest takeaway was coming to understand that Agency approaches to collaboration and engagement should be tailored to the audience.

It became apparent fairly quickly that a one size fits all approach to engagement is a sure way to ensure that stakeholders disengage and it fuels distrust.





*Smokey says...*

“Only you can prevent community collaboration and engagement mishaps...

As long as it's with the support of internal and external collaborators!”

# Questions?

