

Cattle Producer's Handbook

National Environmental Policy Act (NEPA) for Ranchers

Jim Sprinkle, Area Extension Agent, Animal Sciences, University of Arizona
George Ruyle, Professor and Rangeland Management Specialist, University of Arizona
Carolyn Eppler, U.S. Forest Service (retired), Action Analysis Partners, LLC, Payson, Arizona
David Cook, DC Cattle Company, LLC, Globe, Arizona
Missy Merrill-Davies, Livestock and Natural Resources Advisor, University of California Extension

What is NEPA?

The National Environmental Policy Act (NEPA) is a statute that substantially altered the manner in which federal agencies make decisions. Enacted into law on Jan. 1, 1970, NEPA laid the foundation for a coherent national approach to the environment. Through NEPA, the federal government began requiring three vital processes, collectively known as the NEPA Process, during federal project planning that had not been consistently undertaken before. These requirements are:

1. All federal agencies consider the environmental impacts of their proposed action and alternatives,
2. The public be informed of the potential environmental impacts of the proposed action and alternatives, and
3. The public be involved in planning and analysis relevant to actions that impact the environment.

When reissuing federal grazing permits, an *Environmental Assessment* (EA) or an *Environmental Impact Statement* (EIS) are the procedural documents used (Fig. 1). Proposed federal actions having potential to **significantly affect** the quality of the human environment (which by definition includes people's relationship with the natural and physical environment) requires an EIS. Most proposed grazing permit renewals are prepared using an EA.

Environmental consequences of no action, proposed action, and/or any action

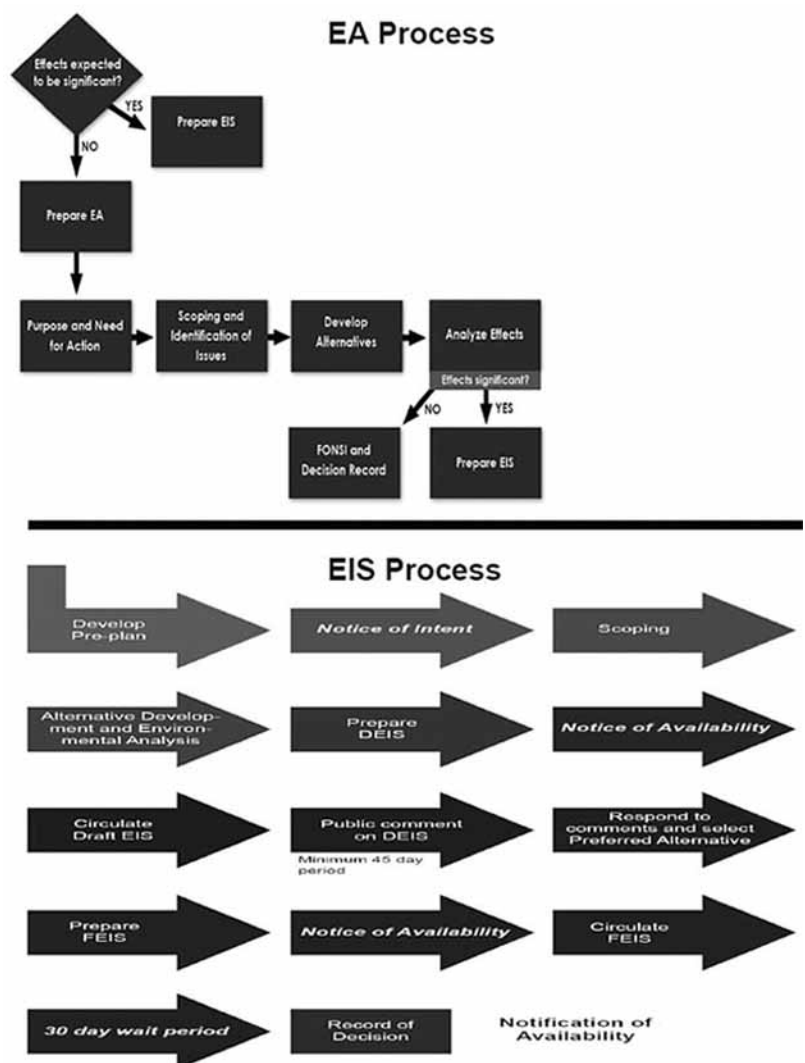


Fig. 1. Adapted from BLM H-1790-1, National Environmental Policy Act Handbook.

alternatives, of which may include several management actions, are fully considered in both documents (BLM National Environmental Policy Act Handbook H-1790-1, 8.3.4.2). No specific number of alternatives is required for an EA (36 CFR 220), but in the case of an EIS a “no action” alternative is required to be present in the document (40 CFR 1502).

In practice, most EAs include the “no action” alternative. This provides a baseline comparison of environmental effects and demonstrates the consequences of not meeting the need for action, which would be met by choosing the proposed action or any other action alternatives (BLM National Environmental Policy Act Handbook H-1790-1, 6.6.2). It is important to note, the range of alternatives required may vary in each state as directed by the State Office. Contact your local office to determine what is required for your area.

Though the United States Forest Service (USFS) is under the U.S. Department of Agriculture and the Bureau of Land Management (BLM) is under the U.S. Department of Interior, both agencies follow similar NEPA processes as defined by the Council on Environmental Quality (CEQ) and NEPA regulations. The differences are found in each agency’s policies and manuals and are referenced in the references section of this article.

Management Review or Plan-to-Project Analysis

NEPA for the reissuance of grazing permits often begins with a review or an allotment evaluation of the grazing history (including actual numbers and use) and management over the past 10 years. This review should be facilitated through Annual Operating Instructions between range staff and the permittee(s). See Fig. 2 for applying the NEPA process on USFS grazing allotments and Fig. 3 for timing of permittee involvement; both figures are a diagrammatic explanation of the entire NEPA process.

Identification of Possible Practices to Address Resource Needs

New range improvements are considered that may help the operation be more successful both ecologi-



Fig. 2. NEPA Action Triangle.

cally and financially. Monitoring data should be summarized and used to provide background information about existing and desired conditions. Discrepancies between existing and desired conditions may be due to a variety of reasons such as climate, invasive plant species encroachment, poor livestock distribution, and a myriad of other factors that may or may not be under a permittee or land manager’s control.

As reasons for management shortcomings are discussed, accompanying management practices are identified to address these concerns such as invasive plant treatment, new range improvements, changing seasons of use, and herding. Much of the documentation and communication between agency personnel and ranchers is outlined on the “left side of the triangle” (Fig. 2).

Desired and Existing Conditions

When documenting Existing Conditions, be sure to display all aspects, not limiting your description only to issues of concern. Past management practices or unique features of the allotment that have resulted in beneficial attributes for the action area (such as improved wildlife habitat) should also be included to assist in developing the proposed action.

Through the course of allotment analysis, if deficits between *Desired* and *Existing Conditions* are identified by the permittee, land management agency, or other interested parties, three events must occur:

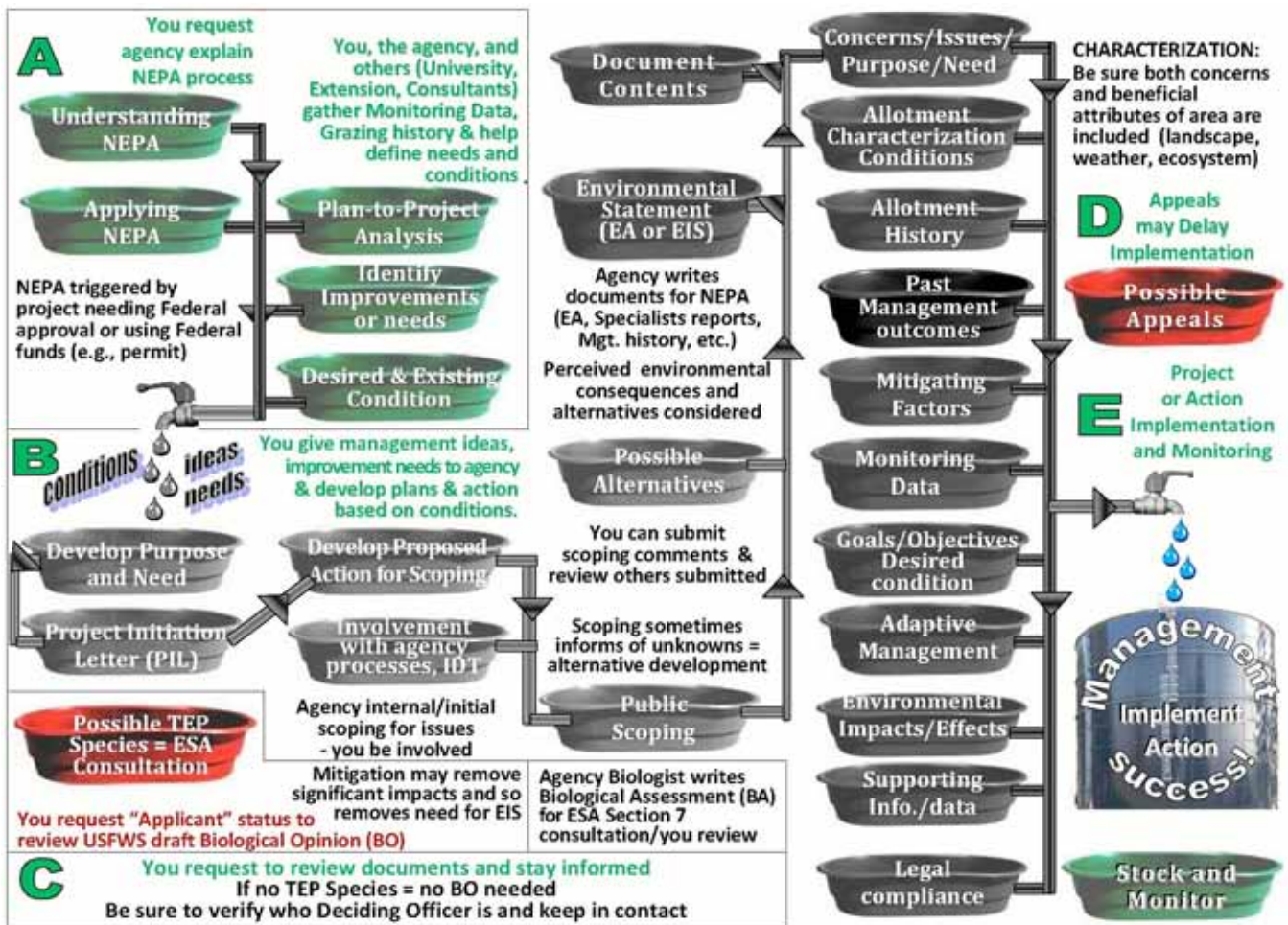


Fig. 3. Ranch manager's NEPA flowchart.

1. An examination of discovery to discern if there is agreement for the gap between desired and existing conditions;
2. Determine if existing data fully describe the long-term trend and extent of the deficit between desired and existing conditions; and
3. Come to agreement, with the assistance of data collection and sound biological, economic, legal, and resource principles, on some practical management actions or *alternatives* that could be applied on the grazing allotment to narrow the deficit between Desired and Existing Conditions.

These discussions and data summary activities provide the framework for identifying resource needs and development of the proposed action and management actions that will be analyzed in the NEPA document. Internal agency documents provide a framework for the development of a proposed action.

Proposed Action and Project Initiation Letter

Permittees and agencies should fully coordinate in developing proposed actions. When an issue is raised,

it is critical that sufficient data fully describe the nature and reasons for differences between the grazing allotment's actual conditions and the biologically obtainable desired conditions. In this case, the NEPA process should not progress beyond the left side "frontloading" part of the NEPA triangle until sufficient data are collected to assist in the development of sound proposed management actions.

When both agency staffs and the permittee feel that adequate data and ancillary information exist to form a purpose and need statement and subsequent proposed action, a Project Initiation Letter (PIL) is executed by the agency and an interdisciplinary team is formed (USFS NEPA Handbook 1909.15; Zero Code).

In recent years, federal agencies have more fully recognized the importance of public participation, adaptive management, coordination, and collaboration. According to the Zero Code, the proposed action exists when an agency gives public notice. With these concepts recognized, affected parties or permittees, not just specialists, become a greater participant in NEPA processes—before public notice. Hence, many NEPA writers use the term proposal in the PIL

and then define the sideboards (purpose and need for action) that the team must use to prepare a suitable “Proposed Action.”

Permittee Involvement in Agency Processes

From a technical perspective, a livestock grazing permittee is not considered a member of the NEPA interdisciplinary (ID) team. The challenge then is the constant need to *ask* to be involved, for information, and for updates. A permittee should be able to stay abreast of project development through collaborative efforts with agency representatives.

As the proposal is further developed, the permittee should insist on full involvement by reviewing drafts and providing comments, especially when endangered species are involved. With threatened, endangered, or proposed (TEP) species, Section 7 Consultation under the Endangered Species Act with the United States Fish and Wildlife Service (USFWS) is concurrent with much of the NEPA process. Informal consultation can occur with the USFWS during the early stages of the proposed action development.

A certified biologist will prepare a *Biological Assessment* (BA) to document a determination of any effect the proposal may have on the species. If effects are determined to exist, the agency is required to consult with the USFWS. The land management agency initiates formal consultation of the proposed action with the USFWS in writing, accompanying this letter with the BA. Formal consultation takes 145 days. Informal consultation usually runs 30 to 60 days. This can be reduced with early and continuous involvement of the USFWS in the process.

A good idea is for the biologist to collaborate with agency range staff and the permittee in the preparation of the BA. A signed BA must precede the final decision from the line officer. If the proposed action is determined to be a “major federal action” (EIS), the BA should analyze alternatives.

Early in this process the permittee should apply for “applicant” status through the USFS to have opportunity to provide comments on the USFWS’s draft *Biological Opinion* (BO). This allows the permittee to review and provide input during consultation between the USFS and the USFWS. Working together with staff biologists, the agency range specialists and the permittee collaboratively will evaluate resource conditions and provide findings that will be incorporated in the BA for the grazing allotment. If the biological determination is a “may effect” or is “likely to adversely affect,” the BA is sent to the USFWS for review. If the USFWS finds the management action is “likely to affect” or “adversely affect” TEP species, mitigation measures to address these concerns will be provided in a BO authored by the USFWS.

In the BO, guidance from the USFWS will be provided as to whether the proposed management action will negatively affect species of concern under the Endangered Species Act (ESA). Mitigation measures, reasonable and prudent measures, and any terms and conditions from the BO are coupled with the agency BA and incorporated into the NEPA document sent out for public comment. If there are potential adverse effects to a TEP species, an EIS may be required; otherwise, an EA may be prepared.

Specifically, an EIS is written when there *may be* extraordinary circumstances or significant impacts to the human environment; notification of the process is published in the Federal Register (FR) with a *Notice of Intent* (NOI) starting the scoping or comment period. The Draft EIS (DEIS) is made available for review before or at the time of transmittal to the Environmental Protection Agency (EPA). The EPA will issue a *Notice of Availability* (NOA) in the FR. The review period is calculated from the day after the EPA’s NOA appears in the FR as per regulations [36 CFR 215.6(a)(1)(ii); FSH 1909.15_20 Sec. 24.1; 40 CFR 1506.9-10].

If you want to be a part of NEPA development for your allotment, you should be proactive in the development of the proposed action and any alternatives. Consult with agency partners, consultants, university personnel, family members, or other parties you feel would provide helpful information. For more information on how to write your own alternative, view fact sheet 575.

Public Scoping

Under legal requirements engendered by the National Environmental Policy Act of 1970, major proposed management actions must be sent out to the public for examination and comment. Public scoping is required for all USFS proposed actions (36 CFR 220) including EAs. Under BLM regulations, only EIS documents are specifically required to have a public scoping period. A BLM EA is subject to the authorized line officer’s discretion as to whether the action is major; thus requiring public scoping. Public scoping allows interested parties to express issues or concerns that may have been overlooked by the ID team or agency when the proposed action was developed. Alternative management actions may be developed after receipt of comments during public scoping.

Environmental Statement (EA or EIS)

After public scoping, an EA or a *Draft* EIS with appropriate alternatives is developed and made available to those who responded to public scoping with comments or who communicated a desire to be involved. At the end of the public scoping period, comments received are compiled and examined by agency personnel and evaluated for suitability within the param-

eters of the proposed action. If additional alternatives are needed to satisfy comments, then those alternatives are developed and incorporated into the EA or draft EIS, which is submitted to the public for review.

At a minimum, there is a 30-day comment period, which may be extended, for an EA within the USFS (may be less days for BLM) and 45 days for a DEIS. The comments and responses to the comments are included in the final document along with a decision document from the land management agency line officer who makes the final decision as to the management action(s) that will be implemented.

An EA is written when no significant impacts on the human environment are expected from the action. In this case, the decision document is a *Decision Notice* (DN) for the USFS and a *Decision Record* (DR) for the BLM (Fig. 1). A DN or DR must be coupled with a *Finding of No Significant Impact* (FONSI). Proposed actions resulting in significant impacts to the human environment require preparation of a DEIS. After the review period prescribed in the FR for the DEIS, a Final EIS (FEIS) is then written and also published in the FR, and the decision document is a *Record of Decision* (ROD).

Please see Fig. 1 for more clarification of the process involved for both an EA and EIS. After the decision document and a sufficient time for appeals, actions associated with the right side of the NEPA triangle (Fig. 2) have been completed and the chosen action can be implemented.

Once the action is implemented, there is a tendency to think that the NEPA process has ended. However, mistakes, new information, changed conditions, or unanticipated effects may occur. To evaluate management and related factors, two types of monitoring are necessary (base of NEPA triangle): implementation and effectiveness.

1. The management action must be monitored to see if it is being implemented properly (implementation monitoring) and
2. The effectiveness of the action chosen must be monitored (is it working?). If the action chosen is producing undesirable results, then the agency shouldn't proceed forward with the action.

Monitoring is vital to adaptive management and provides information that is imperative to gauge success and guide future management decisions. As the bottom side of the NEPA triangle is traversed, then information on the applied action is gained. Other accompanying issues or objectives may be identified for future proposed action and management actions (left side of NEPA triangle).

As described above, the more common NEPA process requires a BA (if TEP species are involved) to be conducted preceding the EA, DN or DR, and FONSI. If the proposed action might have extraordinary cir-

cumstances or significant impacts on the human environment, there is a BA coupled with an EIS and ROD. If TEP species are a concern, then a BO from the USFWS is written providing mitigation measures, reasonable and prudent measures, and terms and conditions that become additional management actions in the EA or EIS.

Appeals

Before formal appeals, always consider further communication and consensus. Often, an informal meeting with the district ranger, forest supervisor, or BLM district manager will solve the problem.

When communication fails, understand how to use the appeals process. Several alternatives are available depending upon the agency and level of your dissatisfaction. You can challenge agency decisions without a lawyer using procedures by the agencies and their parent agencies; the USFS and the U.S. Department of Agriculture; the BLM and the U.S. Department of Interior.

A variety of reasons may be used to file a formal appeal, but the following are possible candidates:

1. Establishing unattainable goals for the allotment that are beyond the site potential.
2. Failure to adequately document (i.e., monitoring data) negative effects that are ascribed to livestock grazing. One example would be a major reduction in grazing due to presence of a "management indicator species" without clearly establishing linkages to livestock grazing and changes in preferred habitat or species survival.
3. Use of computer modeling techniques to establish stocking rates independent of any site-specific data. Failure to provide site-specific monitoring data to support conclusions on the need for action.
4. Exclusion of data that contradict hypotheses on the need for action, or in other words, "cherry picking" data.
5. Using data inappropriately to support conclusions. For example, using subjective, one-time qualitative (visual categorization) inventory data as trend data. The inventory data may present a need for action (such as a low percentage of perennial grass ground cover on heavy cracking clay soils) but without comparison to prior conditions (data), it is impossible to establish trend and attribute current conditions to livestock management.
6. Failure to fully consider the economic and/or ecological effects of the proposed action.
7. Ascribing field conditions solely to livestock grazing that may in fact be influenced by more powerful drivers, such as tree encroachment. In this case, the adjustment of livestock grazing may not have a major effect on problems that need resolving in another fashion (such as woody plant thinning).

8. Failure to consider other low cost alternatives that may achieve similar results without undue hardship upon the permittee. These alternatives should be fully explored through collaborative processes with the permittee and other interested parties before issuing the NEPA scoping letter. For example, it may be possible to winter graze livestock in riparian pastures instead of building 10 miles of fence or to exclude livestock totally.
9. Failure to follow due process in the NEPA decision, such as choosing an alternative that was not analyzed in the NEPA document.
10. Failure to adequately include the permittee in the process.

Many unfavorable agency decisions can be forestalled using the recommendations set forth in this paper. It all begins with open and honest communication, setting reasonable resource objectives, and then monitoring progress. As responsible land stewards it is up to you to take the lead in communication with land management agency personnel, stressing proper resource management, documenting results, and creating a positive image with the non-ranching public.

BLM Appeals

BLM decisions have two different administrative remedies: protests and appeals. A protest is a formal request for reconsideration by a BLM official of any Proposed Decision and the appeal is for any Final Decision. The Environmental Assessment DR becomes a Proposed Decision under the BLM grazing regulations (43 CFR). Stakeholders and the interested public are notified by certified mail of Proposed Decisions.

Upon receipt of the Proposed Decision, the administrative clock starts ticking. Affected entities have 15 days to protest the Proposed Decision for an EA. In the absence of any protests, the Proposed Decision becomes a Final Decision. If a protest is received, the BLM may incorporate pertinent protest points into a Final Decision and avoid litigation. However, if the Proposed Decision proceeds to a Final Decision it can be appealed to an Administrative Law Judge (ALJ). Affected parties have 30 days to appeal a Final Decision to the ALJ. If a permittee is unsatisfied with the decision of an ALJ, a higher appeal can be pursued with the Interior Board of Land Appeals (43 CFR).

USFS Appeals

Decisions that can be appealed in the USFS are called planned actions. These are written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of NEPA and the National Forest Management Act. Before the decision can be appealed, it must be in writing. **However, if you did not submit written substantive**

comments to the proposed action or scoping letter, you will not be eligible to appeal.

To appeal a decision, a person must file a written notice of appeal with the next higher line officer and simultaneously send a copy of the notice of appeal to the Deciding Officer (the line officer whose decision is being questioned). This must be done within the specified period allowed for appeals, most often 45 days from the date of publication of legal notice. The time the agency takes to process the appeal is typically 60 to 90 days. The USFS offers an explanation of their appeal procedures at Forest Service Environmental Appeals.

The website at AZ Rangelands West NEPA offers more guidance on USFS appeals and NEPA documents. They suggest that:

Grazing permittees may appeal a decision in an EA under subpart 215 but will most likely want to use the guidance found in sections 36 CFR 251. These regulations contain procedures established in July 1999 allowing permittees to seek mediation of disputes involving cancellation of permits in whole or in part through USDA certified mediation programs. However, mediation ONLY comes into play for decisions that suspend or cancel, in whole or in part, the permit as the result of violations of the terms and conditions of the permit. It is not an option when the permitted use would change because of an analysis conducted under NEPA.

In the event that mediation is not applicable or unsuccessful, permittees may continue with the appeal process. An appeal must be filed within 45 days of official notice of the decision. A written appeal should contain the following:

- Permittee's name, address, daytime phone number, and date.
- Should be labeled as an appeal, cite the appeal regulations applied, the title and date of the decision being appealed, and name of the reviewing officer.
- Description of the decision and name of the deciding officer for the decision being appealed.
- A statement describing how the appellant is adversely affected by the decision.
- A statement of the facts and issues involved in the case.
- Reference to any laws, regulations, or policies the appellant believes have been violated in issuance of the decision and reasons for such allegation.
- Statement as to whether and how the appellant has sought to resolve the issue with the deciding officer, date of any discussions, and the outcome of those contacts.
- A statement of the relief being sought by the appellant.

The written appeal may also include a request for an oral presentation (generally most effective) with the reviewing officer as per 36 CFR 251.97 and/or in states

with certified programs, a request for mediation pursuant to 36 CFR 251.103. In the event that implementation of the decision would cause immediate damage to the appellant, the appellant may also request a stay of the decision. Such a request must be sent to the deciding officer and the reviewing officer and should include all the elements described at 36 CFR 251.91.

In the event that the permittee has sought mediation, a stay is granted automatically. The appeal process under normal circumstances will take about a month. Decisions made by the district ranger are appealed to the forest supervisor. An unsatisfied permittee may then appeal to the regional forester.

Implementing Actions

For USFS NEPA based decisions, a grazing permit shall be modified or a new permit issued within 90 days of final agency action consistent with the NEPA decision. Allotment Management Plans (AMPs) are developed that include livestock grazing strategies, range improvement construction and maintenance, monitoring, maps, and goals and objectives.

Developed within the scope of the NEPA decision, Annual Operating Instructions (AOI) are developed each grazing season to achieve livestock grazing management objectives.

Conclusion

It is important to become involved early in the NEPA renewal for your grazing permit. Since it often takes at least 2 years to prepare and initiate a new NEPA document, it is best to be active at the start of the process instead of the end when alternatives have already been decided. You should also do the following:

- Maintain open lines of communication with the range specialists and line officers for your grazing permit.
- Find out what issues are of concern for the allotment and then work collaboratively to gather data to identify possible reasons for the issues.
- Work with resource specialists, scientists, and other ranchers to identify options to address the concerns.
- Package your recommendations with preexisting data and request an audience with agency specialists and the deciding line officer to present your preferred alternative.

Since the future of the ranch is dependent upon the outcome of the NEPA document, be involved!

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