



Cattle Producer's Handbook

Range and Pasture Section

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Endangered Species Act (ESA) for Ranchers A Look at Section 7: Interagency Consultation

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Most ranchers in the West are dependent, in one way or another, on federal and/or state grazing permits. The U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) are the two primary federal land management agencies which administer lands that are grazed by livestock in the western United States. The BLM, which administers about 245 million acres of public lands, manages livestock grazing on 157 million acres of those lands as guided by Federal Law. Further, livestock grazing is permitted on over 81 million acres of National Forest lands spread across 28 states. Grazing use on these lands is administered through a grazing permit system.

The government of the United States is directly responsible for managing 29 percent of the nation's land area. Most western states have a high percentage of federal lands. Ranking in order are: Nevada (83.1%), Utah (64.5%), Idaho (63.8%), Alaska (62.7%), Oregon (52.6%), Wyoming (49.9%), Arizona (45.4%), California (44.9%), Colorado (36.2%), New Mexico (34.2%), Washington (28.5%), and Montana (28.0%).

Livestock grazing, which was one of the earliest uses of rangelands when the West was settled, continues to be an important use of those same lands today. Managed grazing on public lands provides numerous environmental benefits. Grazing can be used to change vegetation, including decreasing invasive species and reducing fuel loads that can lead to catastrophic wildfires. Besides providing traditional products such as meat and fiber, rangelands and associated private ranch lands support healthy watersheds, wildlife habitat, and numerous recreational opportunities.

Livestock grazing on public lands helps maintain the private ranches that, in turn, preserve the open spaces that we enjoy today. However, livestock grazing now competes with more uses than it did in the past, as other industries and the general public look to public

lands as sources of both conventional and renewable energy and as places for outdoor recreational opportunities. Some of the key issues that face public land managers today are global climate change, severe wildfires, invasive plant species, dramatic population increases, endangered species protection, and litigation.

Legal Mandates Relating to Grazing on Public Lands

Many laws apply to the management of grazing on public lands. Some of these include the Taylor Grazing Act of 1934, the National Environmental Policy Act (NEPA) of 1969, the Endangered Species Act (ESA) of 1973 as amended, the Federal Land Policy and Management Act of 1976, and the Public Rangelands Improvement Act of 1978. In an attempt to summarize one of the most common subjects of grazing on public lands, we will discuss the ESA, specifically Section 7, known as "*Interagency Consultation*."

Endangered Species Act

The Endangered Species Act, passed by Congress on Dec. 28, 1973 with subsequent amendments, is a broad and powerful law designed to conserve threatened and endangered (T&E) species and their habitats. Section 2(b) of ESA states "*The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate.*" A species is considered *endangered* if it is in danger of extinction throughout all or a significant portion of its range. A species is considered *threatened* if it is likely to become endangered in the foreseeable future.

Slightly more than 2,000 species are listed under the ESA. Of these, approximately 1,400 are found in

part or entirely in the U.S. and its waters; the remainder are foreign species. This article will use four common T&E fish species that occur on and adjacent to many BLM and USFS lands in the West: bull trout, steelhead, chinook salmon, and sockeye salmon.

The ESA identifies two regulatory agencies responsible for administering the Act: The U.S. Department of the Interior's Fish and Wildlife Service (FWS) and the U.S. Department of Commerce's National Oceanic and Atmospheric Agency's (NOAA) National Marine Fisheries Service (NMFS), often times referred to as NOAA Fisheries. These two agencies are often referred to as the "Services." They are regulatory agencies because the ESA empowers them to design implementation procedures by following formal rule-making processes that result in administrative law codified in federal regulations.

The NMFS manages marine and anadromous species (species that live their adult lives in the ocean but move into freshwater streams to reproduce or spawn). The NMFS has jurisdiction over 67 listed species, including chinook salmon and steelhead. The FWS is responsible for plants, land and freshwater species and has jurisdiction over the remainder of the listed species, including bull trout.

When action agencies (or land management agencies as they are called), such as the USFS and the BLM, propose projects and activities in the vicinity of protected species, they are required to consult with the Services if the action may adversely affect a T&E species. The Services are required to provide biological opinions (BO) about "jeopardy" (i.e., risk of extinction) and to ensure that such proposals do not adversely modify designated critical habitat. The process by which these BOs are developed is called "consultation," which is covered in Section 7 of the ESA.

Section 7: Consultation

Federal agencies are directed, under Section 7 of the ESA, to utilize their authorities to carry out programs for the conservation of T&E species. Additionally, Federal agencies like the USFS and BLM must consult with NMFS and FWS on activities (grazing in this example) that may affect a listed species. These consultations are designed to assist action agencies in fulfilling their duty to ensure federal actions do not jeopardize the continued existence of a species (steelhead, salmon, or bull trout in this example) or destroy, or adversely, modify critical habitat.

Consultation Process

The preparation of a biological assessment (BA) is required for proposed projects (grazing in this example) when T&E species may be affected. The BA is a report prepared by the action agency (USFS or BLM) and includes the evaluation of potential effects of the

action (grazing) on the T&E species present and their habitat. If the BA determines the proposed project *may affect, but is not likely to adversely affect* listed species or their habitat, then the consultation process (informal to this point) is concluded and the Services (NMFS, FWS) will issue a Letter of Concurrence (LOC).

If the BA determines the proposed project *may affect, or is likely to adversely affect*, listed species or their habitat, then formal consultation is required. The consultation process occurs in a designated time period of 90 days, after which the Services have 45 days to prepare a BO. BOs document the Service's analysis and opinion as to whether the action (grazing) is likely to jeopardize the continued existence of a listed species (steelhead, salmon, or bull trout, in this example), or result in the destruction or adverse modification of critical habitat. If the Services decide jeopardy exists with the proposed action, the BO will identify any reasonable and prudent alternatives (RPAs) that could allow the project (grazing) to move forward and avoid the jeopardy.

The BA and other information submitted by the action agency must contain sufficient detail to allow the Services to accurately and fully evaluate the determination made by the action agency with regards to direct, indirect, and cumulative effects of the proposed action. Without this, action agencies remain vulnerable to challenges that they have failed to fulfill their Section 7 responsibilities. In addition, if it turns out the Services' analysis is incomplete for any reason, including a lack of information provided by the action agency to develop an accurate opinion, Section 7 consultation may have to be reintiated.

Formal consultation is a mandatory process for proposed projects that may adversely affect listed species. It is initiated in writing by the action agency, and concludes with the issuance of a BO by the Services. *Informal* consultation is an optional process that is designed to help the action agency determine whether formal consultation is needed. It includes all discussions, correspondence, etc., between the Services and the action agency and has no specified time frame for completion.

Although Section 7 outlines timeframes for formal consultation, there is potential for delays in the process. Due to the workload involved in conducting consultations, submittal of inadequate BAs, or other setbacks, many consultations cannot be completed within the regulatory timeframe. However, extensions can be requested, as necessary, based on recommendations from agency members.

Applicant Status

Grazing permittees are entitled to participate and should be involved in the consultation process. Section 7(a)(3) of the ESA provides that: "*Subject to such guidelines as the Secretary may establish, a Federal*

Agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant....". This is referred to as applicant status.

Meet with your range management specialist and fisheries biologist. Develop long-term grazing strategies for your allotment. These will be used as the basis (Proposed Action) for evaluation in the BA and consultation with the Services. Applicant status is not required to participate in these activities. Applicant status is only used after the consultation process has progressed to the stage of reviewing the draft BO written by the Services on only those allotments determined "likely to adversely affect" a listed species or habitat.

Requests to have applicant status must be made in writing. Once applicant status has been conferred by the action agency, the applicant is:

1. Entitled to submit information for consideration during consultation.
2. Must be informed by the action agency of the estimated length of any extension of the 180-day time frame for preparing a BA, along with a written statement of the reasons for the extension, and must concur with any decisions to extend the 60-day time frame to conclude a formal consultation.
3. Entitled to review draft BOs received from the Services and to provide comments.
4. Entitled to have the Services discuss the basis of the biological determination with them and to have the Services seek the applicants' expertise in identifying reasonable and prudent alternatives to the action if likely jeopardy or adverse modification of critical habitat is determined.
5. Entitled to have the Services provide a copy of the final BO to them.

Common Sense Solutions

Grazing management on public lands does not come without conflicts and frustrations. Ruyle et al. (2001) identified six general areas that provide ranchers a process to improve range management and their ability to reduce and/or mitigate public land management conflicts.

1. Maintain open lines of communication with agency personnel associated with your grazing allotment.
2. Gather and organize available information.
3. Design and implement a monitoring plan to document vegetation changes over time.
4. Locate and study problem areas.
5. Evaluate alternatives for management.
6. Know your legal rights, responsibilities, and appeals procedures.

Be proactive and keep the lines of communication open with your local agency representatives. Technical assistance can be obtained from the Natural Resource Conservation Service (NRCS), local Cooperative Extension, private consultants, and other sources. Before formal appeals, always consider further communication and consensus.

Reference

Ruyle, G., L. Smith, and P. Odgen. 2001. Strategies for Managing Grazing Allotments on Public Lands. *In* R. Gunn, G. Ruyle, and R. Price (eds.). *Arizona Ranchers' Management Guide* (pp. 47-54). Univ. of Arizona Coop. Ext.



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