

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
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EMS
Instruction Memorandum No. ID-2004-083
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To: District Managers
From: State Director
Subject: Endangered Species Act, Section 7 Consultation for Reissuing and Issuing
Livestock Grazing Permits and Leases

Program Area: Threatened and Endangered Species Management and Range Management

Purpose: To provide consistent procedures for the Endangered Species Act (ESA) Section 7 Consultation when reissuing or issuing livestock grazing permits and leases.

Policy/Action: All Bureau of Land Management (BLM) authorized actions in allotments that have listed aquatic species or designated critical habitat within a 6th field hydrologic unit (sub-watershed) that contains a listed species or designated critical habitat must meet the requirements of Section 7 of ESA. Listed upland species, their habitats, or plants that occur within the allotment must also meet the requirements of Section 7 of the ESA. The BLM is the action agency responsible to provide the proposed action and the information necessary to evaluate the effects on listed species. A biological assessment (BA) is prepared to document this analysis. The BA contains only one alternative, the proposed action.

The field office (FO) technical specialist, i.e., botanist, fisheries, and wildlife biologist, with input from the Interdisciplinary (ID) Team, determines if the proposed action has "no effect" or if it "may affect" the listed species or designated critical habitat (DCH). The field office specialist documents "no effect" determinations as part of normal environmental review procedures, and in this case, no consultation is necessary. Level 1 team review or consulting agency technical assistance may be requested by BLM when the distinction between "no effect" and "may affect" is unclear. If it is determined that the proposed action "may affect" adversely or positively the listed species or designated critical habitat, consultation is initiated with the appropriate consulting agency, such as U.S. Fish and Wildlife Service (FWS) and/or the National Oceanic and Atmospheric Administration-Fisheries (NOAA-Fisheries).

The appropriate technical specialist prepares the BA. To maintain consistency, the technical

specialist who will prepare the BA should complete the analysis for the environmental assessment (EA). Although the analysis and documentation in the BA is usually more comprehensive than the EA, conclusions in the EA must be consistent. Other resource specialists, e.g., ecologists, rangeland management specialists, hydrologists, and soil scientists should be included in the consultation process when those technical skills are needed. When a technical specialist is not “journey level,” (i.e., grade GS-11 with knowledge of the habitat and/or the listed species) they must obtain review and approval of a journey level technical specialist. This individual may be a member of the Level 1 team. The non-journey level technical specialist signs the BA as the “Preparer,” and the journey level biologist, or Level 1 Team member may sign the BA as “Approved by.” Names of members of the ID Team providing input into the environmental baseline and effects analysis should be listed on the BA.

Consultation may be conducted informally when the proposed action is not likely to adversely affect the listed species, or is not likely to adversely modify designated critical habitat. When the proposed action is likely to adversely affect the listed species, or is likely to adversely modify its designated critical habitat, formal consultation is required. Formal consultation is requested by the BLM (action agency), but may be recommended by the consulting agencies and results in a biological opinion (BO). The BO determines whether the proposed action would jeopardize the continued existence of the species. If so, it includes a list of reasonable and prudent alternatives to the action, or it may include an incidental take statement authorizing any incidental take associated with the action, and may also contain non-discretionary terms and conditions which must be included in the final decision and grazing permit.

Livestock grazing permittees qualify as applicants under ESA. Permittees must be notified in writing, prior to beginning the rangeland health assessment that ESA Section 7 consultation is required, and that they will be granted applicant status upon their written request. When a request is received, the consulting agency(ies) and the permittee(s) will be promptly notified that “applicant status” has been granted.

Permittees with “applicant status” are to be involved in the ESA conference or consultation process if the action “may affect” a federally threatened, endangered, or proposed species as described below. BLM must promptly inform FWS and/or NOAA Fisheries if there is an applicant identified for a project that has been or will be submitted for consultation. Local managers must also provide applicants the opportunity to submit information for consideration during the consultation process. Under the Streamlined Consultation Procedures of 1999, applicants and consulting agencies need to be involved early-on in the development and design of the proposed action, therefore the ESA consultation process begins in the early phases of the National Environmental Policy Act (NEPA) compliance process, and concludes before the final decision is completed and signed. Attachment 1 summarizes the process. Attachment 1 summarizes the consultation process.

Informal Consultation

Informal consultation occurs when the BLM proposes and the FWS and/or NOAA-Fisheries concur that a proposed action is not likely to adversely affect a listed species, or is not likely to adversely modify designated critical habitat. Permittee(s) will be given the opportunity to actively participate in the development of the proposed action and any recommended changes to the proposed action during informal consultation.

After the alternatives are analyzed in the EA, the preferred alternative forms the proposed action for the BA. The BLM then works with the ESA Level 1 Team to review the proposed action and determine if there is agreement with BLM's conclusion that the proposed action is "not likely to adversely affect" the listed species, or that it is "not likely to adversely modify designated critical habitat." If the ESA Level 1 Team identifies issues that do not satisfy ESA requirements for a "not likely" determination, and proposes other alternatives or measures needed to reach a "not likely" determination, these will be provided to the applicant/proponent for consultation and coordination to try to resolve the issue. Field managers must ensure that when the Level 1 Team is at an impasse, the issue does not languish, but is promptly raised to the Level 2 Team.

Unlike NEPA, which is built on public participation and involvement, the ESA Section 7 regulations limit participation by outside interested parties to "applicants." BLM will work to implement the streamlining process that involves both the consulting agencies and the permittees (applicants) in early involvement in the planning and design of proposed actions, or the NEPA phase of action development. In the event that completion of the consultation is delayed for any reason, the regulations require that if a BA is not completed within the 180 day time period, BLM will provide the applicant with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

Consultation is concluded after FWS/NOAA-Fisheries issue a concurrence letter. If changes to the proposed action in the BA were not analyzed in the EA, the results of consultation are incorporated and analyzed. After completing the EA, the BLM selects the appropriate alternative and completes a Finding of No Significant Impact (FONSI) and issues a final livestock grazing decision that incorporates the management requirements contained in the proposed action and concurrence. The livestock grazing permit, with its appropriate terms and conditions, is issued.

Formal Consultation

When formal consultation is requested, the BLM is responsible for notifying the applicant(s) in writing that they have the right to be an applicant under Section 7 of the ESA. Upon receipt of a written request from the applicant/proponent, the field manager will grant applicant status. The regulations provide that: "If requested by the applicant, the BLM should request a copy of the draft biological opinion from the FWS and/or NOAA - Fisheries, provide a copy to the applicant, and forward any applicant comments to the FWS and/or NMFS;" and: "The BLM should encourage the FWS and/or NMFS to discuss the basis for the biological determination in the biological opinion to enhance the applicant's understanding of the outcome." BLM will also involve the applicant in discussions with FWS and/or NMFS to develop reasonable and prudent alternatives to the proposed action in instances where a proposed action is determined to be likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat."

The field manager will complete the following actions:

- € Notify in writing the FWS and/or NOAA-Fisheries that the applicant has been granted applicant status.

- € Notify the applicant in writing that applicant status has been granted and provide a

description of how they may be involved. This will include the following:

- Provide the applicant an opportunity for input into the proposed action contained in the BA.
 - Provide the applicant any changes proposed by the Level 1 team and an opportunity to make comments for consideration in the consultation process.
 - When appropriate, meet with the Level 1 team to discuss and provide input into the BA.
 - During the consultation process, the applicant must be given an opportunity to assist developing any reasonable and prudent alternatives that are being considered by the consulting agency(ies).
 - Inform the applicant of any extension beyond the 180 day statutory requirement for preparing the biological assessment. Provide a written statement of the reasons for the requested extension.
 - Time frames for concluding consultation cannot be extended beyond 60 days without the concurrence of the applicant.
 - Ensure that the applicant receives a copy of the draft BO and has an opportunity to provide comments through the BLM to the regulatory agency(ies).
 - Review the draft BO and submit comments along with the applicant's comments to the consulting agency. Ensure that any reasonable and prudent measures in the BO are within the scope of the proposed action.
- ≠ The proposed action, incidental take statement terms and conditions, and reasonable and prudent measures/alternatives contained in the BO will be incorporated into the EA and an analysis prepared, if necessary, and an alternative selected. A FONSI and the proposed grazing decision (PGD) are prepared and sent to the applicant, state agencies, and interested publics.
- ≠ If there are no changes to the proposed action after resolution of protests, a final grazing decision is prepared based on the existing EA and BO.

Timeframe: Implement these instructions immediately.

Background: Compliance with Section 7 of the ESA is an integral part of renewing livestock grazing permits and leases for allotments where there are proposed and listed species or designated critical habitat. The livestock grazing permit/lease application is the basis for developing the proposed action in the EA. Field managers must consult and coordinate with the applicant to attempt to refine their application to meet ESA requirements. If an agreement is reached and the application is refined to meet ESA requirements, the EA proposed action is also the preferred alternative. If after consultation, coordination, and cooperation, an agreement with the applicant cannot be reached, the field manager will develop an alternative that will meet the requirements of ESA and it becomes the EA preferred alternative. The EA preferred alternative is the proposed action in the biological assessment (BA).

The Interior Board of Land Appeals (IBLA) has found that the Taylor Grazing Act and the Public Rangelands Improvement Act (PRIA) requires BLM to “consult, coordinate, and cooperate” with permittees when developing BAs for consultation under Section 7 of the ESA. The ESA implementing regulations define an applicant as “any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action” (50

CFR 402.02). Therefore, livestock grazing permittees are applicants under ESA and should be afforded all requirements of “applicant status.”

Manual/Handbook Sections Affected: These instructions supplement BLM Manual and Handbook sections 4100 and 6800 and H-4100.

Coordination: Extensive coordination has taken place between the planning and environmental; range management; threatened, endangered, and special status species; fisheries; and wildlife programs in the Idaho State Office. All three resource advisory councils (RAC) have been briefed, and opportunities for comments and suggestions provided. All field offices have had an opportunity to review and comment on two drafts. The second draft was reviewed at the statewide Idaho 2004 Range Management Workshop. These procedures will be reviewed and evaluated periodically to determine their effectiveness and need for further modifications based on actual field experience.

Contact: Direct questions to Tim Burton at (208) 373-3819 or Ervin Cowley at (208) 373-3810.

Lower Snake River District with Union: No contacts or negotiations are required.

Signed
K Lynn Bennett
State Director

Authenticated
Melissa Starr
Staff Assistant

1 Attachment:
ESA and the Process for Renewing or Changing a Livestock Grazing Permit

Attachment 1

ESA and the process for renewing or changing a livestock grazing permit.

PHASE	ESA CONSULTATION	APPLICANT (permittee) INVOLVEMENT
I. Rangeland Health Assessment and Alternative Formulation	Early involvement of L1 team in project planning & design under the Streamlining Agreement	Early involvement in project planning & design
II. Analyze alternatives & select preferred alternative	<p>Draft Biological Assessment (BA) on the preferred alternative. L1 Team reviews BA per the Streamlining Agreement, leading to a pre-decisional determination (one that still requires legal review). The determination is:</p> <p>“Not likely to adversely affect” (NLAA) – leading to the informal consultation process, or</p> <p>“Likely to adversely affect” (LAA) – leading to the formal consultation process.</p>	<p>Actively participates in development of the preferred alternative.</p> <p>Reviews and comments on any changes proposed by L1 Team.</p> <p>Provides input to development of the BA.</p>
III. Final EA, FONSI, and the permit	<p>INFORMAL – submit final BA to consulting agency, which issues a concurrence letter.</p> <p>FORMAL – Submit final BA to Consulting agency which drafts a Biological Opinion (BO). After review BO is finalized and all reasonable and prudent alternatives, and/or terms and conditions are included in the FONSI and in the permit</p>	<p>If final BA is not completed within 180 days, inform Applicant of the length of the extension and why.</p> <p>Reviews the draft BO providing comments to BLM.</p> <p>Concurrence of Applicant is required to extend time limit for preparing the final BO.</p>