



United States  
Department of  
Agriculture

Forest  
Service

R3 Regional Office

333 Broadway SE  
Albuquerque, NM 87102  
FAX (505) 842-3800  
V/TTY (505) 842-3292

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File Code: 1570-1/2200

Date: August 14, 2002

William and Loretta Rabenau  
Box 121  
Winston, NM 87943

**CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED**

Re: Appeal #02-03-06-0006-A251, Black Range Allotment, Black Range Ranger District, Gila National Forest

Dear «FirstName»:

This letter documents my second-level review decision of the appeal you filed on July 28, 2002. The appeal is in regard to District Ranger Paxon's February 28, 2002 annual operating instructions for the Black Range Allotment. The appeal was filed and has been processed under the provisions of 36 CFR 251, subpart C.

### **BACKGROUND**

On February 28, 2002, Ranger Paxon (Deciding Officer) issued annual operating instructions for the Black Range Allotment. On April 15, 2002, you filed your first-level appeal, including a request for stay. On April 25, 2002, Forest Supervisor Andre (first-level Reviewing Officer) denied your request for stay. Under the provisions of 36 CFR 251.94, the Deciding Officer completed his written responsive statement to your appeal on May 10, 2002. On June 5, 2002, you submitted your comments to the Responsive Statement. On June 28, 2002, the first-level Reviewing Officer closed the record. Based on the review of the record, the Deciding Officer's decision was affirmed on July 17, 2002.

Your second-level appeal was received in this office on August 2, 2002. Upon receipt of your appeal I indicated my review would be made within 30 days from the date the appeal record was received.

### **POINTS OF APPEAL**

My review of this appeal was confined to the substantive points raised in the appeal, the appeal record, federal regulations, and the policies and operational procedures as set out in the directives system of the USDA Forest Service.



**ISSUE 1:** If more recent information had been used, there would have been no need to protect threatened and endangered species habitat.

**Discussion:** Under Section 7(a)(2) of the Endangered Species Act (ESA) each federal agency must ensure that any action “authorized, funded, or carried out by such agency” is “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. To achieve this objective, the ESA requires the action agency to consult with the U.S. Fish and Wildlife Service (USFWS) whenever a federal action “may affect” an endangered species or designated critical habitat. Furthermore, the regulations implementing the ESA dictate that Section 7(a)(2) obligations “apply to all actions in which there is discretionary Federal involvement or control.”

During the 1990’s a number of species in the Southwestern Region were added to the federal list of threatened and endangered species. Consequently, the Region fell behind on consulting on federally listed species as required under Section 7(a)(2) of the ESA. In order to allow the Forest Service to continue to authorize grazing on National Forest System lands until it could complete long-term consultation (10 years for term grazing permits), the Forest Service and USFWS executed an agreement that established an effective and cooperative process for complying with Section 7(a)(2) of the ESA on all allotments lacking long-term consultation. The consultation agreement provided for a three-year cycle for ongoing grazing on all allotments lacking long-term consultation.

The Mexican spotted owl (MSO) was added to the federal list of Endangered and Threatened Species on March 16, 1993. Grazing by livestock and wildlife occurs throughout the range of the MSO. Depending on the intensity, grazing has the potential to influence habitat composition and structure and affect food availability and diversity for the owl.

A review of the record indicates the Black Range Allotment underwent ongoing grazing consultation during November 2001. Consultation forms document that utilization standards were exceeded during 2001 by 20 to 25 percent on the uplands and 25 percent in riparian areas. Additionally, 92 percent of the allotment is above soil loss tolerance and riparian and watershed conditions on the allotment continue to be in poor and unsatisfactory condition, with upland grasses in key areas displaying poor vigor. In order to mitigate the effects of domestic livestock grazing on the Mexican spotted owl, the proposed action consulted on reduced numbers to 200 cattle yearlong and provided additional fencing and a monitoring plan to ensure utilization standards would be met during 2002. Based on the mitigation in the proposed action, the grazing consultation team concluded ongoing grazing on the Black Range Allotment would meet the **May Affect, Not Likely to Adversely Affect** criteria, as described in the Guidance Criteria dated February 13, 1998 (Doc 13).

**Finding:** The Forest Service is mandated to manage federally listed species in accordance with the ESA. The record demonstrates that the Deciding Officer used current information to ensure the protection and recovery of the Mexican spotted owl on the Black Range Allotment.

**ISSUE 2:** We, as the permittees, only saw the grazing consultation forms after their completion and review with the USFWS even after requesting applicant status.

**Discussion:** Consultation may be formal or informal. In “informal consultation” the USFWS assists the action agency in determining whether the proposed action is likely to affect any listed

species or critical habitat and helps determine whether “formal consultation” is required. If, during informal consultation, the action agency determines that an activity is not likely to adversely affect listed species or critical habitat, and the USFWS concurs in this determination, consultation is completed.

If a federal action is “likely to adversely affect” a listed species, the action agency and the USFWS enter into “formal consultation”. It is at this point that permittees may apply for and be granted applicant status under USFWS regulations. Most agencies initiate “formal consultation” by preparing a biological assessment (BA). In the BA, the action agency describes the proposed action and evaluates any effects the action may have on listed species and critical habitat. In “formal consultation” the USFWS uses the BA, along with other information, to prepare a biological opinion (BO). In the BO, the USFWS determines whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. If the action is likely to jeopardize the continued existence of a listed species, the USFWS must set forth reasonable and prudent alternatives to the action, if any. While formal consultation is proceeding, Section 7(d) of the ESA prohibits action agencies from making an “irreversible or irretrievable” commitment of resources that has the effect of foreclosing the formulation of any reasonable and prudent alternative to the agency action. The Section 7(d) prohibition becomes applicable after the initiation of consultation and continues until consultation is concluded.

A review of the record indicates that in November of 2000, the ongoing grazing consultation team reached a **Likely to Adversely Affect** conclusion for the Mexican spotted owl on the Black Range Allotment. The proposed action was to graze 275 head of cattle yearlong with no mitigation measures (Doc 7). However, the record does not indicate that the Forest Service ever entered into formal consultation with the USFWS based on the likely to adversely affect conclusion. Rather the Black Range Allotment was included in another round of ongoing grazing consultation in November of 2001. As stated in the discussion of Issue 1, in order to mitigate the effects of domestic livestock grazing on the Mexican spotted owl, the proposed action consulted on reduced numbers to 200 cattle yearlong and provided additional fencing and a monitoring plan to ensure utilization standards would be met during 2002. Based on the mitigation in the proposed action the grazing consultation team concluded ongoing grazing on the Black Range Allotment would meet the **May Affect, Not Likely to Adversely Affect** criteria, as described in the Guidance Criteria dated February 13, 1998 (Doc 13). As a consequence, the 2001 ongoing grazing consultation **did not rise to the level of initiating formal consultation with the USFWS**. That would have been the point at which the permittee could have applied for and been granted applicant status under USFWS regulations.

A review of the record also revealed that the permittee was involved in the various steps in the Forest Service, ESA consultation processes, from the initial phase of identifying the proposed action through the conclusion of informal consultation with the USFWS (Docs. 19, 21).

**Finding:** The Deciding Officer followed Forest Service procedures and the permittee was appropriately included during informal consultation for ongoing grazing on the Black Range Allotment.

**Decision:** Based on my review of the record and your appeal issues, I find that the Deciding Officer's Decision to amend your operating plan allowing 200 head of livestock yearlong was appropriate for the Black Range Allotment. The Deciding Officer's February 28, 2002 operating plan decision is affirmed. This decision is the final administrative determination of the Department of Agriculture.

Sincerely,

/s/ Abel M. Camarena  
ABEL M. CAMARENA  
Appeals Reviewing Officer, Deputy Regional Forester  
cc:  
Forest Supervisor, Gila NF  
District Ranger, Black Range RD  
Director Rangeland Management, R3  
Appeals and Litigation, R3

Note: This letter was also sent out to  
Sterling and Judith Carter, James And Kristie Forrister