

U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

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BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

December 12, 2008

In Reply Refer To:
6840 (230) PEMS TRANSMISSION 12/17/2008
Instruction Memorandum No. 2009-039
Expires: 09/30/2010

To: All Field Officials

From: Assistant Director, Renewable Resources and Planning

Subject: Transmittal of Revised 6840 Special Status Species Manual and Direction for
State Directors to Review and Revise Existing Bureau Sensitive Species Lists**Program Area:** Fish, Wildlife and Plant Conservation**Purpose:** This Instruction Memorandum (IM) transmits a new manual for the Bureau of Land Management (BLM) special status species program and provides direction for updating existing Bureau sensitive species lists.**Policy/Action:** This IM transmits updated guidance pertaining to management of special status species on BLM lands. One feature of this revised manual is modification of the criteria applied to designation of Bureau sensitive species on BLM lands. Each State Director is instructed to review and revise their current list of Bureau sensitive species in accord with the revised criteria. This revision is to be completed no later than 1 year from the date of this IM.**Timeframe:** The policy and procedures set forth in the revised manual 6840 are effective immediately.**Budget Impact:** None.**Background:** The BLM 6840 Manual is the principal policy instrument detailing BLM management of special status species. Special status species include those species listed or proposed for listing under the Endangered Species Act (ESA) together with species designated internally as Bureau sensitive. The manual identifies how Field Offices are to meet their responsibilities under the ESA and its implementing regulations, as well as how to go about designating and ensuring the conservation of Bureau sensitive species on public lands.

Since the current 6840 Manual was issued in 2001, a number of regulatory agency policy revisions and court decisions have been issued warranting revisions to the current BLM policies. The BLM envisions that its revised policies will help to focus the agency efforts on those listed or rare species where BLM actions can most effectively contribute to successful conservation.

Manual/Handbook Sections Affected: The existing 6840 Manual is replaced in its entirety.**Coordination:** Interaction with State Offices and other Washington Office directorates, as well as review and consultation with the Solicitor's Office, has taken place.**Contact:** Please direct any questions to Steve Hodapp, T&E Program Lead, Division of Fish, Wildlife and Plant Conservation, WO-230 at 202-452-7746 or steve_hodapp@blm.gov.Signed by:
Edwin L. Roberson
Assistant Director
Renewable Resources and PlanningAuthenticated by:
Robert M. Williams
Division of IRM Governance, WO-560

1 Attachment

1 - 6840-Special Status Species Manual (47 pp)

Last updated: 10-20-2009

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release

6-125

Date

12/12/2008

Subject

6840 – Special Status Species Management

- 1. Explanation of Materials Transmitted:** This release transmits a complete revision of Manual 6840, the Special Status Species Management Manual for the Bureau of Land Management. This manual establishes policy for management of species listed or proposed for listing pursuant to the Endangered Species Act and Bureau sensitive species which are found on BLM-administered lands.
- 2. Reports Required:** None
- 3. Materials Superseded:** Manual pages superseded by this release are listed under “REMOVE” below. No other directives are superseded.
- 4. Filing Instructions:** File as directed below

REMOVE

All of 6840 (Rels. 6-121)

(Total: 26 Sheets)

INSERT

6840

(Total: 24 Sheets)

/s/ James Caswell
Director

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Glossary of Terms

.01 Purpose. The purpose of this manual is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.

.02 Objectives. The objectives of the BLM special status species policy are:

A. To conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species.

B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.

.03 Authority.

A. Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), as amended.

B. Sikes Act, Title II (16 U.S.C. 670g et seq.), as amended.

C. Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), as amended (FLPMA).

D. Departmental Manual 235.1.1.A, General Program Delegation, Director, Bureau of Land Management.

E. Departmental Manual 632.1.1-1.6, Endangered Species Management.

F. Secretarial Order 3206 (American Indian Tribal Rights, Federal– Tribal Trust Responsibilities, and the Endangered Species Act).

G. Information Quality Act (44 U.S.C 3504(d)(1) and 3516).

H. Oregon and California Lands Act (43 U.S.C. 1181a, et seq.).

.04 Responsibility.

A. The Director is responsible for overseeing implementation of Special Status species policies on BLM-administered lands, coordinating as needed with State Directors on select, multi-State species conservation issues, and making any

applications for project exemptions under Section 7(g) of the ESA to the Secretary of the Interior.

B. The Assistant Director for Renewable Resources and Planning is responsible for the timely development, approval, and implementation of procedures for carrying out the BLM special status species policies.

C. The Chief, Division of Fish Wildlife and Plant Conservation, is responsible for initiating and recommending policies, objectives, general procedures, and priorities relating to Bureau sensitive species, federally proposed and listed species, federally proposed and designated critical habitat, and overall coordination of the special status species policies. The Division Chief is also responsible for designating a National Program Lead whose responsibilities are:

1. Developing and maintaining up-to-date policies pertaining to management of special status species on BLM lands.
2. Developing agency budget documents pertaining to special status species management, and determining funding allocations to States.
3. Coordinating with State program leads in all phases of implementation of the Bureau special status species program.
4. Providing technical assistance and guidance to other BLM Washington Office programs to ensure proper consideration of BLM special status species matters in those programs.
5. Maintaining appropriate interactions with the headquarters of other Federal agencies and bureaus, national conservation organizations, international conservation groups, and individual authorities to advance the objectives of the BLM special status species program.
6. Maintaining a thorough knowledge of the legislation, regulations, court rulings, and litigation actions relative to Bureau sensitive species, federally proposed and listed species, and proposed and designated critical habitat, and communicating the implications of these actions to BLM decision makers and staff.
7. Working with the National Training Center and other agencies to develop training and orientation materials relevant to this policy.

D. The State Directors are responsible for:

1. Developing and implementing procedures for the conservation of special status species on BLM-administered lands within their States.

2. Coordinating the BLM special status species conservation efforts with adjoining BLM State Offices, State and other Federal agencies, various private organizations, and BLM stakeholders.
3. Inventorying BLM lands to determine which BLM special status species occur on public lands, the condition of the populations and their habitats, and how discretionary BLM actions affect those species and their habitats.
4. Designating Bureau sensitive species within their respective jurisdictions and, at least once every 5 years, reviewing and updating the Bureau sensitive species list in coordination with State agencies that are responsible for fisheries, wildlife, and botanical resources.
5. Ensuring that when BLM engages in the planning process, land use plans and subsequent implementation-level plans identify appropriate outcomes, strategies, restoration opportunities, use restrictions, and management actions necessary to conserve and/or recover listed species, as well as provisions for the conservation of Bureau sensitive species. In particular, such plans should address any approved recovery plans and conservation agreements.
6. Ensuring that all actions comply with the ESA, its implementing regulations, and other directives associated with ESA-listed and proposed species, including compliance with Section 7 consultations and conferences with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS).
7. Providing an annual summary of ESA-related expenditures, and other program performance and related information to the Washington Office on an as-needed basis.
8. Designating State Program Leads, whose responsibilities are to:
 - a. Initiate and provide technical support to other BLM personnel in the development of conservation strategies for special status species on BLM lands.
 - b. Monitor implementation of Bureau sensitive species activities and policies within the state, and develop state level policies as needed to ensure program objectives are met.
 - c. Collaborate with other program leads at the state level to ensure objectives of the BLM special status species program are integrated in those programs as appropriate.
 - d. Maintain a cooperative working relationship with State and Federal agencies and local conservation groups, especially their respective state agencies with authority for listed species, wildlife, fish, and plants, and the

regional and local offices of the FWS and NMFS.

e. Recommend funding allocations that will best achieve the objectives of this policy and track expenditures to determine if the allocated funds have been appropriately expended.

f. Recommend and develop training material to keep field and district offices current on policies and direction changes.

E. District Managers and Field Managers are responsible for implementing the BLM special status species policies and program within their area of jurisdiction by:

1. Implementing conservation strategies for BLM special status species as contained in approved recovery plans, cooperative agreements, and other instruments the BLM has cooperatively participated in the development of.
2. Conducting and maintaining current inventories of BLM special status species on BLM-administered lands.
3. Ensuring that all actions undertaken comply with the ESA, its implementing regulations, and other directives associated with ESA-listed and proposed species.
4. Ensuring that the results of formal Section 7 consultations, including mandatory terms and conditions in incidental take statements that are consistent with 50 CFR 402 regulations, are implemented and documented in the administrative record.
5. Coordinating field office activities with Federal, State, and local groups to ensure the most effective program for BLM special status species.
6. Ensuring that land use and implementation plans fully address appropriate conservation of BLM special status species.
7. Monitoring populations of Bureau special status species to determine whether management objectives are being met. Records of monitoring activities are to be maintained and used to evaluate progress relative to such objectives. Monitoring shall be conducted consistent with the principles of adaptive management as defined in Department of the Interior policy, as appropriate.

.05 References.

- A. 50 CFR Part 17—Endangered and Threatened Wildlife and Plants.
- B. 50 CFR Part 17—Subpart H—Experimental Population.

- C. 50 CFR Part 226—Designated Critical Habitat.
- D. 50 CFR Part 402—Interagency Coordination—Endangered Species Act of 1973, as amended.
- E. 50 CFR Part 424—Listing Endangered and Threatened Species and Designating Critical Habitat.
- F. 50 CFR Part 451—Application Procedure.
- G. 43 CFR 4180—Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration.
- H. 68 FR 68255 (December 8, 2003)—Joint Counterpart Endangered Species Act Section 7 Consultation Regulations.
- I. BLM Manual Section 1601—Land Use Planning.
- J. BLM Handbook H-1601—Land Use Planning Handbook.
- K. BLM Manual 1745—Introduction, Transplant, Augmentation, and Reestablishment of Fish, Wildlife, and Plants.
- L. BLM Manual 1740—Renewable Resource Improvements and Treatments.
- M. BLM Handbook H-1740-2—Integrated Vegetation Management Handbook.
- N. BLM Handbook H-4180-1—Rangeland Health Standards Handbook.
- O. FWS and NMFS Endangered Species Consultation Handbook (March 1998).
- P. FWS Director, June 25, 2002, Memorandum on Arizona Cattle Growers Decision and Solicitor's opinion.
- Q. Norton v SUWA, 542 US 55 (2004).
- R. National Association of Homebuilders v Defenders of Wildlife, 127 S. Ct. 2518 (2007).
- S. Forest Guardians v Forsgren, 478 F.3d 1149 (10th Cir 2007).
- T. Western Watersheds Project v Bureau of Land Management, 552 F. Supp. 2d 1113 (D. N.V. 2008).
- U. Western Watersheds Project v Matejko, 468 F.3d 1099 (9th Cir 2006).

V. Arizona Cattle Growers Association v Fish and Wildlife Service, 273 F.3d 1229 (9th Cir 2004).

W. Gifford Pinchot Task Force v Fish and Wildlife Service, 378 F.3d 1059 (9th Cir 2004).

X. Application of the Endangered Species Act to proposals for access to non-Federal lands across lands administered by the Bureau of Land Management and the U.S. Forest Service, signed January 2003.

- .06 Policy. Actions authorized by the BLM shall further the conservation and/or recovery of federally listed species and conservation of Bureau sensitive species. Note that “conservation” has a different meaning depending on whether it is referring to ESA listed species or Bureau sensitive species. See glossary. Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA.

The BLM shall retain in Federal ownership those habitats essential for the conservation of any listed species, particularly those that are part of a broader, logical public land ownership management unit. The BLM may dispose of lands providing habitat for listed species, including critical habitat, only following consultation with the FWS or NMFS and upon a determination that such action is consistent with relevant law. This policy does not apply to any lands conveyed pursuant to the Alaska Native Claim Settlement Act.

- .1 Administration of the ESA. The administration portion of this manual is divided into three separate parts: (1) species and habitats listed under the ESA, (2) species identified by BLM as Bureau sensitive and (3) general cooperation on BLM special status species management. The BLM shall conserve federally listed species by fulfilling the requirements of the ESA as described in this section. The Bureau sensitive species shall be conserved through the use of management practices as described in Section .2.

Various provisions of the ESA, as amended, apply to plants and animals that have been listed as endangered or threatened, those proposed for being listed, and designated and proposed critical habitat. The BLM shall conserve listed species through administration of the various sections of the ESA that apply to Federal agencies. When administering the ESA, the BLM shall use the best scientific and commercial data available. The BLM shall comply with all applicable sections of the ESA as follows:

A. Section 2 (Findings, purposes, and policy). The BLM shall, consistent with Section 2 of the ESA, seek to conserve endangered and threatened species and shall utilize its authorities in furtherance of the purposes of the ESA. In addition:

1. Federal Agency Cooperation. The BLM will cooperate with other Federal agencies as follows:

- a. Seek to improve efficiency by combining efforts with other Federal agencies to foster better working relationships and promote the conservation of listed species.
- b. Establish or participate in existing regional interagency working groups that identify geographic areas within which the groups will coordinate agency actions, create opportunities, and overcome barriers to conserve listed species and the ecosystems upon which they depend.
- c. Participate in national ESA working groups to coordinate the implementation of the ESA.

2. State and Local Agency Cooperation. As specifically addressed in Section 2 of the ESA, the BLM shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species. The BLM should:

- a. Participate on watershed councils.
- b. Provide technical assistance to State and local agencies on species, critical habitats, and resources.
- c. Actively engage in the Federal Energy Regulatory Commission licensing and relicensing process for hydropower projects affecting ESA-listed and proposed species on BLM-administered lands.

B. Section 4 (Determination of endangered species and threatened species, designation of critical habitat and development of recovery plans). While it is the responsibility of the FWS and/or NMFS to list threatened or endangered species and designate critical habitat, the BLM should provide relevant information to the FWS and/or NMFS on species or habitats proposed for listing and may petition to add a species to, or to remove a species from, the threatened or endangered species list. In addition, the BLM should provide information to the FWS and/or NMFS on proposed critical habitat for BLM-administered lands as per the policy at .1.B.3 of this Manual, and cooperate, as appropriate, with the FWS and/or NMFS in developing recovery plans for listed species that occur on BLM-administered lands. In the development of BLM comments on recovery plans, listing proposals, or critical habitat proposals involving species distributed across more than one state, the BLM will consider designation of a lead State Office or the Washington Office to prepare consolidated agency comments. The decision on preparation of such comments will be jointly agreed to among the affected State Offices and the Washington Office.

1. Determination of endangered or threatened status. Determination of endangered or threatened status of species by the FWS and/or NMFS is provided

for in Section 4 of the Endangered Species Act and the procedures in 50 CFR Part 424. BLM should provide assistance to the FWS and/or NMFS for actions that affect BLM-administered land, including as follows:

a. Responsibilities. The BLM is responsible for preparing and maintaining, on a continuing basis, a current inventory of the public land and its resources (FLPMA, 43 U.S.C. 1701 Sec.201 (a)). This inventory information, along with monitoring data collected under a variety of programs, shall be used to evaluate the current status and trends of plants and animals and their habitats on BLM-administered lands, and to respond to FWS and/or NMFS *Federal Register* Notices of species status review (e.g., 90-day, 12-month, 5-year, and annual candidate reviews).

b. Petitions. When conditions warrant, the BLM Director may petition the FWS and/or NMFS to change the status of any species or revise critical habitat. These petitions shall contain appropriate biological evidence to substantiate any proposed change.

(1) A petition to delist a species or downlist a species from endangered to threatened must demonstrate clearly that the recovery plan objectives have been met or that there is new evidence to show that the conditions on which the initial listing was based no longer exist. Petitions to delist should also include a statement on how the BLM intends to manage the species to ensure that the provisions of the ESA will not be required in the future.

(2) Petitions to list or delist a species must be based solely on substantial scientific information for the species and its habitat, and must address the five factors for listing included in Section 4 of the ESA.

(3) All petitions shall be coordinated with the appropriate State agency having responsibility for the species involved.

2. Recovery plans. Recovery plans are prepared by the FWS and/or NMFS and establish recovery objectives for a species, provide a listing of tasks necessary to achieve those objectives, and recommend assignments to involved agencies to carry out these tasks. A primary function of recovery plans is to combine programs of all agencies involved in managing a species into a coordinated management effort. The BLM will incorporate objectives and actions identified in recovery plans into BLM documents, as appropriate. Examples of such documents include land use plans, implementation level plans, and species conservation plans or agreements.

a. Recovery Teams. The FWS and/or NMFS often request that the BLM provide representatives to serve as members on recovery teams to assist in preparation of recovery plans for species where public land has a significant

role in recovery. These requests usually include a suggestion for a particular employee with special qualifications.

- (1) State Directors should make employees with special expertise available and provide support as appropriate to help ensure timely completion of recovery plans.
- (2) BLM employees should accept these nominations. The role of the team member is to be a technical expert and advisor, to provide biological input for the species and its habitat, and to inform the recovery team of BLM policies, programs, and procedures.
- (3) For species that range across multiple states, the BLM employee on the recovery team shall coordinate with the other affected BLM State Offices.
- (4) BLM employee participation in recovery plan preparation does not indicate BLM Director or State Director endorsement of the plan.

b. Technical Review Drafts. The appropriate State Office or selected BLM representative should review technical review drafts of recovery plans to ensure that the information is biologically correct and complete. This review and input represents State Director formal response to the review draft.

c. Agency Review Drafts. All BLM offices that will be involved in implementation of a particular recovery plan should review draft plans. The State Director(s) in the affected State(s) shall designate a BLM lead office to complete the following analysis using field office input:

- (1) Determine whether measurable objectives are stated clearly.
- (2) Identify any conflicts with other laws, regulations, and policies governing BLM programs and activities.
- (3) Identify constraints on other BLM programs, activities, or practices mentioned or implied in the plan.
- (4) Evaluate the effects of planned actions carried out by other cooperators on BLM programs.
- (5) Identify any inconsistencies with other BLM plans, ongoing programs, or ongoing practices. Initiate efforts to make appropriate adjustments to meet recovery needs.
- (6) Check accuracy of cost estimates for BLM tasks, and evaluate economic feasibility of accomplishing the assigned tasks within existing

and prospective staffing and budgetary constraints.

3. Critical Habitat Proposals on BLM-administered Lands. Whenever the FWS and/or NMFS propose to designate critical habitat on BLM-administered lands, the State Director(s) should provide a written response to the *Federal Register* notice that identifies any special management considerations that are in place on BLM lands. Where the State Director determines that adequate conservation measures are in place, and that the benefits, including economic benefits, of excluding BLM lands from critical habitat designation exceed the benefits of inclusion of BLM lands, the State Director shall request exclusion of BLM lands from the critical habitat designation pursuant to Section 4(b)(2) and/or Section 3(5)(A) of the ESA. For proposals across multiple States, the Director will coordinate with the States and submit such information.

4. Delisted Species. The objectives of recovery plans and actions should ultimately be species recovery and removal from the Federal threatened or endangered species list (delisting). Pursuant to the ESA, FWS and/or NMFS are required to monitor delisted species for a minimum of 5 years. The BLM shall work with partners such as the FWS, NMFS, State agencies, and others, as appropriate, to monitor delisted species.

C. Section 5 (Land Acquisition). This section authorizes the Secretary of the Interior to use Land and Water Conservation funds to acquire lands to conserve fish, wildlife, and plants, including those that are listed as endangered species or threatened species. When the BLM engages in the land use planning process, it will identify appropriate opportunities for acquisition by purchase, donation, land exchange, conservation easement, or other means, of land, water, or interests therein for the purpose of conserving fish, wildlife and plants, including listed species.

D. Section 6 (Cooperation with States). This section authorizes the Secretary to cooperate to the maximum extent practicable with States, including entering into management agreements and cooperative agreements for the conservation of threatened and endangered species. The BLM should implement this section through a State level memorandum of understanding by providing technical assistance to, and coordinating with, State agencies responsible for the conservation of endangered and threatened species.

E. Section 7(a)(1) (Conservation Programs). Section 7(a)(1) requires the BLM to use its authorities to further the purposes of the ESA by implementing programs for the conservation of threatened and endangered species and the ecosystems upon which they depend. Ways in which the BLM can carry out these responsibilities include, but are not limited to:

1. Developing and implementing activities that provide for the conservation and recovery of species listed pursuant to the ESA.

2. Undertaking actions designed to maintain the integrity of the primary constituent elements of federally designated critical habitat on BLM-administered lands.
3. Ensuring that BLM actions are not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify designated critical habitat.
4. Determining, to the extent practicable, the occurrence, distribution, population, and habitat condition of all ESA-listed species on BLM-administered lands, and evaluating the significance of BLM-administered lands in the conservation of those species.
5. Developing and implementing agency land use plans, implementation plans, and actions in a manner consistent with conservation and/or recovery of listed species.
6. Monitoring and evaluating ongoing management activities to ensure conservation objectives for listed species are being met.
7. Cooperating with the FWS and/or NMFS and other interested parties in species recovery and conservation as provided in species recovery plans. Such actions may include species reintroductions, which shall be carried out in conformance with BLM Manual 1745.
8. Implementing conservation recommendations included in biological opinions if they are consistent with relevant law and policy and are technologically and economically feasible.

F. Section 7(a)(2) (Consultation). The procedures for carrying out Section 7(a)(2) are included in 50 CFR Part 402, Interagency Cooperation and the counterpart regulations developed for National Fire Plan projects (50 CFR Part 402.30-34). Whenever the BLM is considering a discretionary action that may affect a listed or proposed species or designated or proposed critical habitat, the BLM should consider engaging the FWS and/or NMFS early in the project development process and seek recommendations designed to minimize or avoid potential adverse affects to resources protected under the ESA.

1. Discretionary and Nondiscretionary Agency Actions. Section 7(a)(2) applies to affirmative “agency actions” that are authorized, funded, or carried out by the BLM. The BLM must also have discretion to undertake the action. See Part b, below. Illegal and prohibited actions (e.g., trespass grazing) are not Federal actions and therefore do not require consultation.

- a. Consultation requirements apply to all discretionary actions that are

authorized, funded, or carried out by the BLM, whether or not:

- (1) The species or critical habitat occurs on BLM-managed lands.
- (2) The proposed action occurs, either wholly or in part, on BLM-managed lands.
- (3) The BLM itself carries out the proposed action.
- (4) The species occurs on non-Federal surface lands and the BLM manages the subsurface mineral estate (split-estate lands).

b. Determining if an Action is Discretionary or Nondiscretionary.

(1) Generally, actions that the BLM is statutorily required to perform, with no discretion to take an action to inure to the benefit of, including limiting the impacts of action on, a listed species or designated critical habitat, are not discretionary, and therefore initiation of consultation is not required. Reinitiation of consultation is slightly different and is discussed in section .1.F.5.h. However, if the BLM's discretion is constrained by its own regulation or otherwise, initiation of consultation is generally still required. Examples of statutory nondiscretionary activities include patenting of mining claims and land conveyances pursuant to the Alaska Native Claims Settlement Act. When field managers are uncertain whether particular actions are nondiscretionary for purposes of ESA consultation, they should seek guidance from their respective State Office.

(2) Pre-ESA authorizations to Private Parties. When the BLM has authorized actions by private parties on public lands before the enactment of the ESA, it only has to consult on post-ESA activities conducted by those private parties if it retains discretionary involvement or control over those private actions sufficient to take some action to inure to the benefit of, including limiting the impacts of action on, a listed species or designated critical habitat. If the BLM did not retain such discretionary involvement or control, consultation on further BLM action is not required. For example, the BLM need not consult on activities conducted by private parties on BLM rights-of-way granted before the ESA if the right-of-way does not grant it sufficient discretionary control to take actions that inure to the benefit of, or limit the impacts of action on, a listed species or designated critical habitat.

c. Even if an action is determined to be nondiscretionary on behalf of the BLM, provisions of the ESA may be applicable to the outside entity involved with the activity. In such situations, the BLM's responsibilities are as follows:

- (1) If the BLM has reason to believe a nondiscretionary action involving

BLM-administered lands may affect listed species or designated critical habitat, the BLM shall provide written notification to any person or persons involved that ESA-listed species or designated critical habitat are present.

(2) If the outside entity involved with the nondiscretionary action wishes to develop measures that would eliminate effects on listed species or designated critical habitat, the BLM shall arrange for the participation of BLM specialists and, if needed, specialists from the FWS and/or NMFS during the process of developing such measures.

2. Characterizing the Proposed Action, Action Area, Interrelated and Interdependent Actions, Effects of an Action, and the Environmental Baseline.

When the BLM is carrying out its consultation and conference responsibilities under Section 7(a)(2) (see Sections 3, 4, and 5), it is critical to properly characterize the proposed action, the action area, the environmental baseline, and effects. Cumulative effects are considered in relation to the requirements of the ESA only during the formal consultation process and are discussed in Section .1.F.2.e.(3).

a. **Proposed Action.** The proposed action includes any species conservation measures. These actions can include both on-site actions to minimize or avoid effects to listed species or critical habitat and off-site conservation actions for the benefit of listed species. Although off-site compensatory mitigation may not be used as a means of reducing the effects on the listed species at the site, such actions can be used by the BLM as a means of furthering its conservation objectives under Section 7(a)(1) of the ESA and as a means of meeting resource objectives under land use plans.

b. **Action Area.** The action area includes those areas affected directly or indirectly by the action, not merely the footprint of the action. For example, noise disturbance resulting from the action that may be transmitted beyond the immediate project area must be assessed as part of the proposed action.

c. **Interrelated and Interdependent Actions.** Interrelated actions are those actions that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration. The “but for” test should be used to assess whether an action is interrelated or interdependent to the proposed Federal action. If the activity would not occur “but for” the proposed Federal action, then the activity is interrelated or interdependent and must be considered during consultation on the proposed Federal action. If the Federal action merely facilitates the implementation of a subsequent action that may cause an effect on a listed species, those subsequent effects are not effects of the Federal action and are not subject to consultation. If however, the Federal action is essential for implementing a subsequent action, the effects of both

the Federal action and subsequent action need to be analyzed in the consultation.

(1) Rights-of-Way. If the Federal action is an authorization for a right-of-way to private land, yet there is alternative access for the project proponent, only effects from the Federal right-of-way need to be analyzed. If there is no alternative access, effects from both the Federal action and private action need to be analyzed in the consultation. Unless otherwise requested by an applicant (see section .1F.8.), the consultation process associated with the Federal action can only be used to condition activities on Federal lands.

(2) Split-Estate Federal Minerals. When necessary to comply with the ESA, the BLM or project proponent shall collect information to support an analysis of the effects to listed and proposed species as part of an effect determination for the proposed action in a biological assessment. This may include the need for conducting inventory of either ESA listed or proposed species on private surface lands. The BLM or the Federal mineral lessee has the right to enter the property for this purpose, since it is a necessary prerequisite to development of the dominant mineral estate. When sufficient information already exists, the BLM may proceed through the Section 7 consultation process using the existing information and determine appropriate measures to avoid and minimize effects on listed species and their habitats.

The BLM will take the lead in completing consultation on the proposed action unless the surface estate is administered by another Federal agency that elects to serve as the lead for consultation, or the project proponent is designated as the non-Federal representative by the Federal agency managing the surface or by the BLM (see section .1.F.8).

d. Environmental Baseline. The environmental baseline is the condition of a species or critical habitat at a specified time within the action area. The baseline does not include effects of the action under review for consultation. It does include the Federal, tribal, State, local, and private actions already affecting a species or critical habitat, or those that will occur while the consultation is in progress. Federal actions unrelated to the action under consultation that have affected or are affecting the species or critical habitat and have a completed formal, informal, or early consultation are part of the baseline.

e. Types of Effects. There are three types of effects that are considered under Section 7(a)(2) of the ESA: direct effects, indirect effects, and cumulative effects. Each type of effect is described below. In addition, when considering the effects of a proposed action under Section 7(a)(2), the BLM is required to consider the effects of interrelated or interdependent actions.

(1) Direct Effects. Those effects caused by the action and that occur in the same time and place. Direct effects are immediate, natural causes of taking the proposed action. Effects of future federal actions cannot be direct effects.

(2) Indirect Effects. Those effects caused by the action that are later in time, but reasonably certain to occur.

(a) “Caused by.” For a particular effect on a species or critical habitat to be caused by a particular action, there must be a close causal connection between the action and the effect. This means that the particular effect must not be able to occur “but for” the action under consultation. Thus, if the effect may occur without the action under consultation taking place, the “but for” portion of the test is not met and the effect need not be considered.

(b) “Reasonably Certain to Occur.” For a particular effect to be an effect subject to consultation, it must be reasonably certain to occur. This determination cannot be based on speculation or the mere possibility of an effect on a listed species or critical habitat. In the context of indirect effects, “reasonably certain to occur” may be evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken in the action area; or they are the logical extensions of the proposed action.

(3) Cumulative Effects. In accordance with Section 7 regulations, the FWS and/or NMFS is required to consider cumulative effects in formal consultation when determining whether or not an action is likely to jeopardize the continued existence of a species. The regulations require the BLM to provide an analysis of cumulative effects for projects entering formal consultation. Cumulative effects, as defined for the purposes of the ESA, involve those effects from future non-Federal actions (tribal, State, local, private and other entities) that are reasonably certain to occur within the action area. See the discussion under indirect effects for an explanation of “reasonably certain to occur.” Future Federal actions are not considered as they will be subject to consultation when they are proposed. When making the “reasonably certain to occur” determination in the context of cumulative effects, the BLM must examine the effects of these actions that are likely to occur, bearing in mind the economic, administrative, or legal hurdles that remain to be cleared. Indications of this likelihood include approval of the action by the appropriate government unit(s), evidence of funding having been obtained by project sponsors, or the initiation of contracts. These future non-Federal actions are reasonably certain to occur if approval by all non-Federal agencies or governments granting authority for the action is reasonably certain and

economically viable. Past and ongoing effects are considered part of the environmental baseline and are not considered cumulative effects.

(4) Distinguishing between National Environmental Policy Act (NEPA) effects and ESA effects. NEPA and the ESA have different purposes and impose different analytical standards. While the NEPA and ESA standards for direct effects are very similar, there is an important difference between the acts regarding the standards for indirect and cumulative effects. Under NEPA, indirect or cumulative effects must be reasonably foreseeable. In contrast, the ESA and its regulations require that such effects be reasonably certain to occur. Thus, effects that may be required to be considered under the NEPA analysis standard may not necessarily require consideration under the ESA. In addition, under NEPA, cumulative effects include the effects of both Federal and non-Federal actions, whereas under ESA, cumulative effects do not include Federal actions.

3. “May Affect” Determination. If the BLM is taking a discretionary agency action, it must determine if the action “may affect” a listed species or designated critical habitat. If the BLM determines that ESA-listed species or designated critical habitat may be affected by an action, either positively or negatively, then the BLM must engage in either informal or formal consultation. In addition, the FWS and/or NMFS may request that the BLM enter into consultation if they identify an action for which there has been no consultation that may affect a listed species or designated critical habitat. If the BLM determines, after a review of the project and any interrelated or interdependent actions, that there is no reasonable likelihood that listed species are in the action area, or that there will be no direct or indirect effects to the species in the action area, the action is determined to have “no effect” on listed species or critical habitat. No consultation is required under these circumstances. The administrative record should document these conclusions.

4. Informal Consultation. Informal consultation is a process that includes all discussions and correspondence between the FWS and/or NMFS and the BLM or its designated non-Federal representative. Its purpose is to assist the BLM in determining if formal consultation is required.

If the BLM determines that its particular discretionary agency action “may affect” a listed species or designated critical habitat, it must then determine whether the action is likely to adversely affect (LAA) any listed species or designated critical habitat or not likely to adversely affect (NLAA) such resources.

The consultation regulations at 50 CFR 402.12 only require preparation of a biological assessment (BA) when an action agency proposes a “major construction activity,” which is defined as an action requiring preparation of an

environmental impact statement pursuant to the National Environmental Policy Act. However, the BLM will prepare a BA for submittal to FWS and/or NMFS when seeking concurrence on an NLAA determination. The scope and content of a BA prepared by the BLM shall be directly related to the level of potential effect on listed species or designated critical habitat. See Section .1F.5.a.(2) for guidance on the preparation of a BA.

Not likely to adversely affect (NLAA) is the appropriate conclusion when a causal mechanism for creating an effect exists, and the effect is 1) discountable, 2) insignificant, or 3) completely beneficial. These effects have an extremely low probability of occurrence (discountable); cannot be translated into any significant measurable effect on the species even when effects on habitat can be measured (insignificant); or are completely beneficial. For discountable and insignificant, the risk of harm or harassment is so low that a reasonable person would not consider it a factor in making a decision on the proposed action.

Likely to adversely affect (LAA) is the appropriate conclusion if a causal mechanism exists within the action area that creates a direct or indirect effect, or an effect from an interrelated or interdependent activity, that is not discountable, insignificant, or completely beneficial. Adverse effects are those where the likelihood of “take” resulting from the action is not insignificant, and evidence is present in a logical analysis to support this determination to the extent that a reasonable person would agree with the determination.

If the BLM determines that the action is LAA, formal consultation is required. If the BLM determines a proposed action is NLAA a listed species or designated critical habitat, the agency must request that the FWS and/or NMFS concur in that determination. If the FWS and/or NMFS indicate they are unlikely to support an NLAA determination, the BLM should consider further discussion with the Services directed at resolution of outstanding questions and possible development of additional measures to reduce potential effects on listed species or designated critical habitat. If the FWS and/or NMFS refuse to concur in a BLM determination that an action is NLAA, formal consultation is required. Similarly, if the BLM determines that an action is LAA, formal consultation is required.

Informal consultation does not conclude until the BLM has written concurrence of its determination from the FWS and/or NMFS, until the procedures specified under counterpart regulations at 50 CFR 402.34 have been fulfilled, the BLM makes a determination of no effect, or until the BLM enters formal consultation with the FWS and/or NMFS.

5. Formal Consultation. Formal consultation is required on all actions that may affect a listed species, or any designated critical habitat, unless written concurrence that an action is not likely to adversely affect the species is received from FWS and/or NMFS, or the action qualifies for an alternative consultation

under an alternative consultation agreement pursuant to the counterpart regulations for national fire plan projects. When it is determined by the BLM that a proposed action may affect and is likely to adversely affect a listed species or designated critical habitat, the BLM shall initiate formal consultation. Formal consultation is conducted to determine if 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. Formal consultation is initiated with submission of a completed biological assessment and a written request to initiate formal consultation.

a. Providing Information. During formal consultation, the BLM shall provide the FWS and/or NMFS with the best scientific and commercial information available for an adequate review of the effects that a proposed action may have on a listed species or designated critical habitat. If information is lacking, the FWS and/or NMFS can request that the BLM conduct additional surveys or studies to better address listed species issues. Although additional surveys or studies are not required by the ESA, and in many situations may not be practicable, they can be in the BLM's best interest, as the FWS and/or NMFS generally err on the side of conserving listed species when rendering a biological opinion based on limited information. In some situations, it may be necessary to enter consultation with the presently available best scientific and commercial data.

(1) The BLM shall request in writing a list from the FWS and/or NMFS of listed species and designated critical habitat in the action area of a major construction activity. The BLM may request in writing from FWS and/or NMFS a list of species or designated critical habitat for any other agency action. In lieu of requesting such a list, the BLM may determine the presence of listed species or designated critical habitat within the action area and request concurrence from the FWS and/or NMFS.

(2) The BLM shall prepare a biological assessment (BA), as described in 50 CFR 402.12 and 402.14, as the means of providing the best scientific and commercial information available to the FWS and/or NMFS.

(a) When to prepare a BA. A biological assessment shall be prepared for all actions on which formal consultation is necessary. In some instances, the BLM may satisfy the requirement to prepare a BA by incorporating by reference material from a previous biological assessment pertaining to a similar action or through preparation of an environmental assessment or environmental impact statement.

(b) BA contents. By regulation, the contents of a BA are at the discretion of the Federal action agency; however, they shall be based on the best available scientific and commercial data, and shall clearly document the logic used by BLM in reaching its determination of

effects. The consultation regulations (50 CFR 402.12.j) contain recommended contents of a BA. The content of a BA prepared by the BLM for either informal or formal consultation will contain the same information, except that a BA prepared for informal consultation will not include a discussion of cumulative effects. BAs prepared by the BLM will contain the following information:

- (i) A clear, thorough description of the action, including any actions to minimize or avoid adverse effects on listed species or designated critical habitat.
- (ii) A description of the area that may be directly or indirectly affected by the action.
- (iii) Identification of any interrelated or interdependent actions.
- (iv) A description of any listed species or designated critical habitat that may be affected, including the results of any on-site inspection(s) of the action area to determine if listed or proposed species are present or occur seasonally.
- (v) A review of the literature, and any other pertinent information, including available views of recognized experts on the species at issue.
- (vi) An analysis of the direct and indirect effects of the action and any interrelated or interdependent actions on the listed species and critical habitat.
- (vii) A determination of effects that is clearly supported by the analysis of effects.
- (viii) Identification of any alternate actions considered by the Federal agency for the proposed action.
- (ix) For formal consultation only, an analysis of cumulative effects.

While it is important to analyze and document the effects of actions on Bureau sensitive species and “no effect” determinations for listed species in NEPA documents, these analyses will not be included in BAs provided to the FWS and/or NMFS.

b. Irreversible and Irretrievable Commitment of Resources. Under Section 7(d) of the Act, once a request for formal consultation is made or consultation is reinitiated and until the requirements of Section 7(a)(2) are satisfied, the

BLM shall ensure that the agency and any of its applicants do not make any irreversible or irretrievable commitments of resources on agency land with respect to the agency action that have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives that could avoid jeopardy to listed species or destruction or adverse modification of designated critical habitat. For ongoing actions subject to formal consultation, the BLM shall conduct and document an analysis pursuant to Section 7(d) of the ESA pertaining to agency actions to determine if there will be any such irreversible or irretrievable commitments of resources. Any BLM discretionary actions with such irreversible or irretrievable commitments of resources shall be immediately suspended until consultation has concluded.

c. Reasonable and Prudent Alternatives. If the FWS and/or NMFS conclude that an action is likely to jeopardize the continued existence of a listed species or is likely to result in the destruction or adverse modification of designated critical habitat, it will prepare a biological opinion that identifies any reasonable and prudent alternatives needed to avoid jeopardy or destruction or adverse modification of critical habitat. Reasonable and prudent alternatives are those that can be implemented in a manner consistent with the intended purpose of the action, can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, are economically and technologically feasible, and would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of designated critical habitat. As the development of reasonable and prudent alternatives is necessitated when the FWS and/or NMFS concludes that an agency action is likely to cause jeopardy or adverse critical habitat modification, the scope of recommended alternatives will be based on the full range of discretion available to the agency.

d. Draft biological opinion. During formal consultation, the BLM should request a draft copy of the biological opinion and incidental take statement (ITS) (if applicable) for review. In any instance involving a potential jeopardy opinion, this review should include an analysis to determine whether any reasonable and prudent alternative is within the scope of the BLM's authority, can be implemented in a manner consistent with the intended purpose of the proposed action, and is economically and technically feasible. The BLM review should also evaluate whether any reasonable and prudent measures, and their implementing terms and conditions, contained in any ITS do not cause more than a minor change to the proposed Federal action. Minor changes cannot alter the basic design, location, scope, duration, or timing of the action. The ITS provided with a draft biological opinion does not constitute a statement of anticipated take under Section 10 of the ESA unless it is confirmed by the FWS and/or NMFS as the final biological opinion.

(1) The BLM should provide expertise to the FWS and/or NMFS in determining the availability and development of reasonable and prudent

alternatives, although the FWS and/or NMFS retains the final decision on which alternatives are included in the biological opinion. The BLM should encourage applicant participation in the development of reasonable and prudent alternatives.

(2) The BLM should forward a copy of the draft biological opinion to applicants upon their request, and inform them that any comments they may have for the FWS and/or NMFS must go through the BLM, although they may provide copies to the FWS and/or NMFS directly.

(3) The BLM should forward applicant comments to the FWS and/or NMFS.

(4) The BLM should ensure that any ITS with reasonable and prudent measures and mandatory terms and conditions provides the agency protection from any and all prohibited takings under Section 9 of the Act that are reasonably certain to occur. Reasonable and prudent measures imposed by the FWS and/or NMFS can include only actions that occur within the action area, and are consistent with a project's basic design, location, scope, duration, and timing. Since the FWS and/or NMFS have determined that any take associated with the agency action will not result in jeopardy, any changes to the project as a result of reasonable and prudent measures imposed by FWS and/or NMFS must be minor and directly related to reduction in the level of take. For example, it would be inappropriate for the FWS and/or NMFS to recommend relocation of a project as a reasonable and prudent measure. Incidental take statements should comport with the Department of the Interior policy, specifically:

(a) If there is no reasonable certainty of take, there should be no ITS and no reasonable and prudent measures with terms and conditions. Terms and conditions must have an articulated, rational connection to the taking of a species.

(b) Terms and conditions must give clear guidance to the holder of the ITS of what is expected of him or her and how the condition can be met, and must provide a clear standard for determining when the authorized level of take has been exceeded.

(5) By regulation, incidental take statements and associated reasonable and prudent measures with accompanying terms and conditions do not apply to, nor are they issued for, ESA-listed plant species.

e. Termination of the Consultation Procedures. Formal consultation may terminate as follows:

(1) The FWS and/or NMFS issues a biological opinion.

(2) During any stage of consultation, the BLM notifies the FWS and/or NMFS in writing that the proposed action is not likely to occur.

(3) During any stage of consultation, the BLM determines, with the written concurrence of the FWS and/or NMFS, that the proposed action is not likely to adversely affect any listed species or critical habitat.

f. Consultation Timelines. Consultation regulations require that formal consultation be concluded 90 days after it is initiated, unless otherwise agreed to between the FWS and/or NMFS and the BLM. However, the FWS and/or NMFS does not consider the consultation process initiated until it determines that information provided by the BLM represents the best scientific and commercial data available. The regulations provide that the biological opinion is to be transmitted to the Federal agency no later than 45 days after the conclusion of consultation. As consultation deadlines approach, the BLM should contact the FWS and/or NMFS to determine whether consultation deadlines will be met.

g. BLM responsibility after issuance of the biological opinion. After the FWS and/or NMFS issues the biological opinion, the BLM determines how it will proceed.

(1) The BLM shall notify the FWS and/or NMFS in writing of its final decision on any proposed actions that receive a jeopardy or adverse modification of critical habitat determination in the biological opinion. If the BLM determines that it cannot comply with the requirements of Section 7(a)(2) (no jeopardy) of the ESA, it may apply for an exemption, as outlined in .1.F.10.

(2) After acceptance of the biological opinion, the BLM shall implement the proposed action or reasonable and prudent alternative as described, and shall implement all mandatory terms and conditions identified in the ITS. The exemption from listed species take prohibitions, as specified in Section 9 of the ESA, are only valid on the basis of full implementation of these requirements. The BLM shall review conservation recommendations in biological opinions and implement them if they are consistent with BLM land use planning and policy and if they are technologically and economically feasible.

(3) The ITS will specify the effect (i.e., the amount or extent of such incidental take); specify those reasonable and prudent measures that the FWS and/or NMFS considers necessary or appropriate to minimize such effect; set forth implementing terms and conditions (including reporting requirements) that must be complied with by the BLM or any applicant; specify procedures to be used to handle or dispose of any individuals of

a species actually taken; and outline the required monitoring and reporting requirements to be implemented over the life of the action. The responsible BLM line officer will ensure these reporting requirements are documented in the administrative record.

(4) Biological opinions for plants will not have an accompanying ITS, but may contain conservation recommendations. The BLM shall review such conservation recommendations and implement them if they are consistent with BLM land use plans and policy and if they are technologically and economically feasible.

(5) An ITS provided with a conference opinion does not become effective unless the FWS and/or NMFS adopts the conference opinion as the final biological opinion once the species listing is final. The BLM must request in writing that a conference opinion be adopted as a biological opinion once a proposed species has been listed.

h. Reinitiation. Reinitiation of formal consultation is required and shall be requested by the BLM or the FWS and/or NMFS where discretionary control over the action has been retained and (1) the amount or extent of incidental taking specified in the ITS is exceeded, (2) new information reveals that effects of the action may affect listed species or designated critical habitat in a manner or extent not previously considered, (3) the action is modified in a way that may affect listed species or critical habitat in a way not considered in the biological opinion, and/or (4) a new species is listed or critical habitat is designated that may be affected by the action. The appropriate line officer shall monitor the amount or extent of authorized incidental take and should reinitiate consultation in a timely way if it appears that the level of take will be exceeded over the life of the action. If the amount or extent of incidental take is met or exceeded, the activity must be terminated until additional consultation is concluded. The State Director or Field Manager of the administrative unit that received the biological opinion shall also determine if any other reinitiation condition has occurred and, if so, shall reinitiate the consultation with the appropriate FWS and/or NMFS office.

There is no duty to reinitiate consultation unless there is an ongoing agency action. In the context of a land use plan, the agency action of approving a plan is complete upon approval and a plan is therefore not an ongoing action over the life of the plan. For this reason, reinitiation of consultation is not required if, for example, a new species is listed or critical habitat is designated after a plan is approved.

i. Incremental Step Consultation. The BLM may request that the FWS and/or NMFS conduct consultation in incremental steps when by statute the BLM is allowed to take incremental steps toward completion of the action (e.g.,

issuance of oil and gas or geothermal leases that involve subsequent permitting processes). The biological opinion will include the FWS and/or NMFS views on the entire action (50 CFR Part 402.14(k)).

(1) The initial consultation using the incremental step approach must be formal (see .1.F.5).

(2) The BLM may proceed with the incremental step provided that the FWS and/or NMFS finding for the incremental step is not a jeopardy opinion; the BLM continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step; the BLM fulfills its obligation to obtain sufficient data upon which to base the final biological opinion on the entire action; the incremental step does not result in the irreversible or irretrievable commitment of resources; and there is reasonable likelihood that the entire action will not result in jeopardizing the continued existence of a listed species or destruction or adverse modification of designated critical habitat.

6. Conference on Proposed Species and Proposed Critical Habitat. Section 402.10 of 50 CFR provides the procedures necessary for compliance with Section 7(a)(4) of the ESA, which establishes requirements for conferencing on proposed species and proposed critical habitat.

a. The ESA requires BLM to conference with the FWS and/or NMFS on actions that are likely to jeopardize a proposed species or cause destruction or adverse modification to proposed critical habitat. Since the BLM is generally not in a position to determine jeopardy, BLM policy is to confer on all discretionary actions that are determined to be May Affect, Likely to Adversely Affect. Conversely, BLM policy is to not confer on actions determined Not Likely to Adversely Affect.

b. For proposed species, the BLM should request conference in anticipation of future listing. The BLM should request that the conference follow the procedures for formal consultation when deemed advantageous to the agency. The conference opinion issued at the conclusion of a conference may be adopted as the biological opinion if the species or critical habitat is listed or designated, provided the project proposal has not changed and no new pertinent information exists. The FWS and NMFS usually provide advisory recommendations on ways to avoid or minimize adverse effects.

c. The BLM should consider the advisory recommendations for minimizing or avoiding adverse effects to proposed species or proposed critical habitat that are provided by the FWS and/or NMFS in the conference report or conference opinion. Implementation of recommendations is at the discretion of the BLM.

7. Programmatic and Plan Level Consultations. The BLM should invite the FWS and/or NMFS to participate early in the planning process to ensure that effective, agreed on conservation measures are included in the design of any plan to improve the efficiency of the Section 7 consultation process and to assist BLM in meeting its objectives under section 7(a)(1) of the ESA.

The adoption, revision, or amendment of a land use plan is an agency action subject to Section 7(a)(2) of the ESA. Thus, for new land use plans, plan revisions, or plan amendments, the BLM must determine whether the plan “may affect” listed species or designated critical habitat. If the BLM determines that the plan may affect listed species or critical habitat, then the BLM must engage in either informal or formal consultation with the FWS and/or NMFS. When determining whether a plan may affect listed species or critical habitat, the BLM must carefully evaluate whether any effects of the actions, as defined by the ESA, are caused by the adoption, revision, or amendment of the land use plan and are reasonably certain to occur. This analysis should be rigorously documented in the administrative record.

There is no duty to reinitiate consultation unless there is an ongoing agency action. In the context of a land use plan, the agency action of approving a plan is complete upon approval and a plan is therefore not an ongoing action over the life of the plan. For this reason, reinitiation of consultation is not required if, for example, a new species is listed or critical habitat is designated after a plan is approved.

8. Applicants, Designation of non-Federal Representatives, and Early Consultation.

a. Applicant. An applicant is defined as any person who requires formal approval or authorization (such as for permits, licenses, leases, or letters of authorization or approval) from the BLM as a prerequisite to conducting an action. An applicant can be an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States. The applicant is involved in the ESA conference or consultation process if the applicant’s specific action that requires approval or authorization by the BLM may affect a federally threatened, endangered, or proposed species.

(1) The BLM shall identify and determine who is an applicant for the purposes of ESA consultation. The BLM does not typically identify applicants in association with programmatic consultations, (e.g., land use plan-level consultation) because no specific action that may require authorization or approval is involved. Under programmatic consultations,

the BLM usually retains the discretion to provide formal authorization or approval for more specific actions. If consultation for a more specific action is required, applicants for that specific action will be identified at that time.

(2) The BLM shall promptly inform FWS and/or NMFS if there is an applicant identified for a project that has been or will be submitted for consultation.

(3) The BLM shall notify known applicants promptly of their opportunities for participation in the consultation and/or conference process.

(a) The BLM shall provide any applicant the opportunity to submit information for consideration during the consultation process and should provide the same opportunity during the conference process.

(b) If, after receipt of or concurrence with the species list received from the FWS and/or NMFS, a required BA will not be completed within the 180-day period, the BLM shall 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. An extension is not allowed unless the BLM notifies the applicant before the 180-day deadline.

Once initiated, consultation involving an applicant must be concluded within 90 days, unless the FWS and/or NMFS and the BLM mutually agree to extend the consultation, provided that the FWS and/or NMFS submits to the applicant, before the close of the 90 days, a written statement setting forth: (1) the reasons why a longer period is required, (2) the information that is required to complete the consultation, and (3) the estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant.

(c) If requested by the applicant, the BLM should request a copy of the draft biological opinion from the FWS and/or NMFS, provide a copy to the applicant, and forward any applicant comments to the FWS and/or NMFS.

(d) 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. The BLM may also involve the applicant in discussions with the 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.

b. Designation of non-Federal Representative. For each consultation involving an applicant, the appropriate BLM line manager will consider designating the applicant as the non-Federal Representative for purposes of conducting informal consultation and/or preparing a biological assessment under 50 CFR Part 402.08. In making this determination, the line manager should evaluate (1) whether the applicant has sufficient expertise to prepare a biological assessment, or can reasonably secure such expertise, and (2) whether such designation is advantageous to the government.

The BLM can assign the non-Federal representative to prepare the biological assessment, conduct informal consultation, or both. The non-Federal representative may be an applicant, contractor or other party as appropriate. The non-Federal Representative is not permitted to conduct formal consultation beyond preparation of a biological assessment, and shall not subject the BLM to any obligation without specific consent of the agency. The BLM shall furnish available information pertaining to the consultation, guidance, and supervision to the extent required, and must independently review and evaluate the scope and contents of the biological assessment prepared by the non-Federal Representative.

Even with designation of a non-Federal Representative, the ultimate responsibility for compliance with Section 7 of the ESA remains with the BLM. Although there are similarities, a non-Federal representative is not the same as an applicant. Whereas an applicant has the opportunity to participate in consultation alongside the BLM, a non-Federal representative acts in the BLM's place to prepare the BA and/or conduct informal consultation.

(1) The BLM shall provide written notice to the FWS and/or NMFS if it designates a non-Federal representative.

(2) An applicant may be designated as the non-Federal representative. If an applicant is involved and is not the designated non-Federal representative, then the applicant and the BLM must agree on the choice of the designated non-Federal representative.

(3) The BLM shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the BA prepared by the designated non-Federal representative. If the BLM review finds the BA prepared by a non-Federal representative is inadequate, it should either be returned to the preparer for corrections, or revised by the

BLM before submission to the FWS and/or NMFS.

(4) Written correspondence requesting concurrence or formal consultation shall be prepared by the appropriate BLM official.

c. **Early Consultation.** Section 7(a)(3) of the ESA and implementing regulations provide the means (referred to as “early consultation”) for a prospective applicant for public land use to request an early consultation if the prospective applicant has reason to believe that the prospective action may affect listed species or designated critical habitat (50 CFR Part 402.11). For early consultation, the BLM shall:

(1) Receive in writing the prospective applicant’s certification that it has a definitive proposal outlining the action and its effects, and that it intends to implement its proposal, if authorized.

(2) Upon receipt of the prospective applicant’s certification, initiate early consultation in writing with the FWS and/or NMFS and provide all of the information required under initiation of formal consultation (50 CFR Part 402.14(c)).

(3) For a major construction activity, include a BA at the time early consultation is initiated.

(4) Provide any prospective applicant with the opportunity to submit information for consideration during early consultation.

(5) If the prospective applicant requests through the BLM a copy of the draft preliminary biological opinion, forward the request and the prospective applicant’s comments on the draft preliminary biological opinion to the FWS and/or NMFS.

(6) Not consider the ITS of the preliminary biological opinion as authority to take listed species.

(7) Request in writing to the FWS and/or NMFS confirmation of the preliminary biological opinion as the final biological opinion if the BLM believes that there have been no significant changes in the action as planned or in the information used during the early consultation. If the FWS and/or NMFS do not confirm the preliminary biological opinion, they must request that the BLM initiate formal consultation.

9. **Counterpart Regulations.** Counterpart regulations provide the BLM an alternative approach for completing informal Section 7 consultation on actions that qualify for use under an ACA and are determined to be NLAA. Presently, such regulations have only been adopted for use on National Fire Plan projects.

Qualifying projects include prescribed fire (including naturally occurring wildland fires managed to benefit resources), mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. State Offices will periodically review the administrative records of proposed actions to ensure conformance with the ACA.

10. Exemption. The ESA allows opportunity to apply for an exemption from the requirements of Section 7(a)(2) if, after consultation, the FWS and/or NMFS determines an agency action would jeopardize the continued existence of a listed species or result in the adverse modification of critical habitat. Procedures for applications for exemption are found in 50 CFR Part 451. Use of the exemption process is rare.

a. The Director has sole authority to make an application for exemption under Section 7(g) of the ESA on behalf of BLM. If any State Director has reason to believe a project deserves consideration for an exemption, a complete briefing package shall be presented to the Director for a final decision.

b. The application for an exemption shall be submitted to the Secretary of the Interior or Secretary of Commerce, as appropriate, within 90 days following the termination of the consultation process.

11. Emergency Consultation. In certain emergency circumstances, special consultation procedures apply. These emergency circumstances are typified by natural disasters, the most common of which on BLM lands is wildfire. When a wildfire occurs on BLM-administered lands, the BLM is responsible for conducting any necessary emergency consultation. In these situations, agency actions must be immediately undertaken to protect life and property, thereby precluding the typical consultation approach in which consultation is concluded in advance of an agency undertaking, which may affect listed species or critical habitats. The first step in emergency consultation is to contact the FWS and/or NMFS by telephone or facsimile to explain the nature of the emergency. The BLM will make every attempt to contact the FWS and/or NMFS within 3 days of onset of an emergency. During this initial contact, the FWS and/or NMFS may suggest conservation recommendations to avoid or reduce potential effects on listed species or critical habitat. The BLM will implement any conservation recommendations that do not substantially interfere with the execution of emergency operations.

As soon as practicable after the emergency is under control, the BLM will initiate consultation with the FWS and/or NMFS if there is reason to believe that a listed species or critical habitat has been adversely affected. In addition to the information normally contained in a biological assessment, the BLM will provide the following information: (1) a description of the emergency, (2) a justification

for the expedited consultation, and (3) an evaluation of the response to and the effects of the emergency on the listed species and critical habitat, including documentation of how the FWS and/or NMFS recommendations were implemented. The ITS prepared by the FWS and/or NMFS will not include reasonable and prudent measures or terms and conditions unless the BLM has an ongoing action related to the emergency.

12. Consultation and Conference Approaches. A number of approaches for improving the efficiency and effectiveness of Section 7 consultation and conference have been taken by various BLM offices. The overall goal is to enhance compliance with Section 7(a)(1) and 7(a)(2). The Director, State Directors, District Managers, and Field Managers, in cooperation with other Federal agencies, should develop and use techniques to further the consultation and conference process. Examples of these approaches are:

- a. Contacting and engaging, where possible, the FWS and/or NMFS reviewing office(s) early in the project development process. Experience has shown that, in general, the earlier in the processes the FWS and/or NMFS are engaged, the easier it is to accommodate listed species needs into project design. Similarly, early dialog and exchange of information on project design and components has made it easier to communicate to the FWS and/or NMFS the specific purposes and needs for individual projects, and those areas where flexibility does or does not exist. That is, the earlier project designers become aware of listed species associated needs and issues, the easier it is to address those needs and issues, thereby shortening the consultation process and even potentially avoiding the need for formal consultation.
- b. Completing and using national, ecosystem, or regional level programmatic consultations and conferences that address broad-scale programs or wide-ranging species or critical habitats. The BLM should tier to and use the information, analysis, and determinations of the effects of these consultations and conferences to the greatest extent practicable when consulting or conferring at more local or project-specific levels.
- c. Consulting and conferring jointly with other Federal agencies on programs or actions affecting the same species or critical habitats in the same project or geographic area.
- d. Designating the applicant as the non-Federal representative for preparation of biological assessments, rather than relying on cost recovery to prepare the document in-house, allows limited biological staff time to be directed toward species recovery and other higher priority work.
- e. Completing combined consultations and conferences with the FWS and NMFS together when programs or actions include effects on species or critical habitats under both agencies' jurisdictions (e.g., an action affects both listed

plants and anadromous fish).

f. When programmatic consultation results in biological opinions that provide conservation recommendations or design criteria for future agency proposals, considering these recommendations or design criteria in the development of future proposals. If these future proposals are designed to be consistent with these recommendations or criteria, consultation will be facilitated and compliance with Sections 7(a)(1) and 7(a)(2) furthered.

g. Completing batched consultations or conferences on logical groupings of activities or programs of a similar nature. Typically, these batched actions would be in the same geographic area (watershed or administrative unit). Batched consultations can be conducted on a quarterly or annual basis, or longer.

h. Using streamlined processes. Streamlining agreements provide the BLM with alternative ways of meeting their Section 7 consultation obligations. Streamlining may provide expedited consultation times for completing consultation. While streamlining is not intended for use at the project level, other multi-State Memoranda of Understanding (MOUs) have been developed to address streamlining processes at this scale. The use of streamlining processes is designed to make the consultation process more efficient. In instances where the intended benefits of streamlining are not being (or are unlikely to be) realized, the streamlining process should not be used, and the BLM should follow the standard consultation process.

i. For large or complex actions (e.g., energy corridor, promulgation of regulations) use consultation agreements to define agency roles, responsibilities, timeframes, and information requirements needed to complete consultation on the proposed action.

j. It is not necessary to consult or confer on candidate or Bureau sensitive species. However, States or offices may wish to seek technical assistance from the FWS and/or NMFS when it is determined to be advantageous to a species' conservation or BLM management options.

k. When new or novel effective approaches to consultation and conference are developed at the field and State levels, those approaches should be shared with State and national program leads. Similarly, when State and national program leads become aware of new or novel approaches being employed at the Field Office level, they should share those effective approaches with other State and Field Offices.

G. Section 9 (Prohibited Acts). The BLM shall not allow actions that result in take of endangered animals or threatened animals that have take prohibitions established under Section 4(d) of the Act, or the removal or possession of endangered plants,

except as provided for under Section 7(o) or Section 10(a) of the ESA.

Section 9 of the ESA prohibits take of all individuals of listed fish or wildlife. For plants, there is no “take” prohibition, but Section 9 makes it unlawful for anyone to remove and reduce to possession any endangered plant species; maliciously damage or destroy any endangered plant species on Federal lands; remove, cut, dig up, or damage or destroy any such species from any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; or violate any regulations pertaining to threatened plants.

H. Section 10 (Exceptions to the ESA). Section 10 of the ESA provides for exceptions to the requirements and prohibited acts of other sections of the ESA.

1. Take of listed species. Section 10 (a)(1)(A) of the ESA provides exceptions for activities otherwise prohibited. The BLM shall obtain Section 10 permits from the FWS and/or NMFS if take of listed fish or wildlife species or the removal or reduction to possession of listed plants is anticipated for scientific purposes or to enhance the propagation or survival of the affected species. Authorization for take can occur in several ways. The exceptions to the requirement of permission for take are as follows and shall be reported to the FWS and/or NMFS as described in 50 CFR Part 17.21(4):

a. Any BLM employee may take endangered wildlife in defense of his or her own life or the lives of others.

b. Any BLM employee may, when acting in the course of his or her official duties, take endangered wildlife without a permit if such action is necessary to: (1) aid a sick, injured, or orphaned specimen; or (2) dispose of a dead specimen; or (3) salvage a dead specimen that may be useful for scientific study; or (4) remove specimens that constitute a demonstrable but non-immediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area.

c. Any BLM employee may, when acting in the course of his or her official duties, remove and reduce to possession a federally endangered plant without a permit if such action is necessary to (1) care for a damaged or diseased specimen; (2) dispose of a dead specimen; or (3) salvage a dead specimen that may be useful for scientific study.

2. Experimental Populations.

a. General. The FWS and/or NMFS can designate experimental populations of listed plants and animals. With rare exceptions, these populations can only be released outside the species' current range, but within its probable

historical range if the Secretary determines that such release will further the conservation of the species. The intent is to ensure separation between experimental and natural populations. The Secretary of the Interior or Commerce must determine whether the experimental population is:

- (1) “Essential”—Necessary for the continued existence of a listed species in the wild.
- (2) “Nonessential”—Not necessary for the continued existence of a listed species.

b. Management. The BLM shall cooperate and assist in establishing experimental populations of listed species on BLM-managed lands when such establishment is consistent with BLM land use plans and policy and is technologically and economically feasible. The BLM shall treat essential experimental populations as threatened species and nonessential experimental populations as proposed species for purposes of Section 7 (other than subsection 7(a)(1)). For nonessential experimental populations, this means:

- (1) Incidental take can occur without specific authorization by the FWS and/or NMFS.
- (2) Conferencing is required if the action is determined to be Likely to Adversely Affect (LAA).
- (3) As required by Section 7(a)(1), the BLM shall use its authorities to conserve these populations.

c. Planning. Planning efforts must reflect those actions necessary for the recovery of species to the extent that BLM management can influence recovery, including the establishment of experimental populations of listed species when appropriate. State Directors and Field Managers shall:

- (1) Keep informed on recovery plan development so needs can be addressed during planning.
- (2) Ensure participation with the FWS and/or NMFS in developing recovery needs for species that may have experimental population designation.

d. Reintroduction of Listed Species into Congressionally Designated Areas. In some instances, it is appropriate to transplant and reintroduce listed species into their historical ranges within designated wilderness, wilderness study areas, or other congressionally designated areas. The BLM shall use only the minimum actions necessary and the methods most appropriate to protect and enhance the values for which the areas are identified or designated. Further

information on guidelines for fish and wildlife translocation are contained in BLM Manual 1745 and in the 2006 Association of Fish and Wildlife Agencies, BLM and Forest Service Fish and Wildlife Management Policy in Designated Wilderness MOA, and in the 2005 BLM Interim Management Guidelines for Fish and Wildlife Management in Wilderness Study Areas.

I. Section 11 (Penalties and Enforcement). The BLM shall exercise all of its authorities to ensure compliance with the ESA. Within its authority, BLM shall modify, suspend or revoke the lease, license, permit or other agreement authorizing the use of BLM-managed lands, of any person who is convicted of a criminal violation of the ESA or any regulation, permit, or certificate issued pursuant to the ESA.

J. Section 18 (Annual Cost Analysis by the U.S. Fish and Wildlife Service). Upon request of the FWS, the BLM shall provide to the FWS a species-by-species summary of its expenditures on the conservation of listed species for the FWS annual expenditure report to Congress.

.2 Administration of Bureau Sensitive Species. This section establishes procedures for the management of species designated as BLM sensitive, and their habitat. It is in the interest of the BLM to undertake conservation actions for such species before listing is warranted. It is also in the interest of the public for the BLM to undertake conservation actions that improve the status of such species so that their Bureau sensitive recognition is no longer warranted. By doing so, the BLM will have greater flexibility in managing the public lands to accomplish native species conservation objectives and other legal mandates. When administering the Bureau sensitive species program, all information shall conform to the standards and guidelines established under the Information Quality Act.

In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species.

A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate. Species designated as Bureau sensitive must be native species found on BLM-administered lands for which the BLM has the capability to significantly affect the conservation status of the species through management, and either:

1. There is information that a species has recently undergone, is undergoing, or is predicted to undergo a downward trend such that the viability of the species or a distinct population segment of the species is at risk across all or a significant portion of the species range, or
2. The species depends on ecological refugia or specialized or unique habitats on BLM-administered lands, and there is evidence that such areas are threatened with alteration such that the continued viability of the species in that area would be at risk.

B. Planning. When BLM engages in the planning process, it shall address Bureau sensitive species and their habitats in land use plans and associated NEPA documents (as per BLM 1610 Planning Manual and Handbook, Appendix C). When appropriate, land use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with Bureau sensitive species without deferring conflict resolution to implementation-level planning. Implementation-level planning should consider all site-specific methods and procedures needed to bring species and their habitats to the condition under which management under the Bureau sensitive species policies would no longer be necessary.

C. Implementation. On BLM-administered lands, the BLM shall manage Bureau sensitive species and their habitats to minimize or eliminate threats affecting the status of the species or to improve the condition of the species habitat, by:

1. Determining, to the extent practicable, the distribution, abundance, population condition, current threats, and habitat needs for sensitive species, and evaluating the significance of BLM-administered lands and actions undertaken by the BLM in conserving those species.
2. Ensuring that BLM activities affecting Bureau sensitive species are carried out in a way that is consistent with its objectives for managing those species and their habitats at the appropriate spatial scale.
3. Monitoring populations and habitats of Bureau sensitive species to determine whether species management objectives are being met.
4. Working with partners and stakeholders to develop species-specific or ecosystem-based conservation strategies (see .2D Agreements, Assessments and Cooperative Strategies for Conservation).
5. Prioritizing Bureau sensitive species and their habitats for conservation action based on considerations such as human and financial resource availability, immediacy of threats, and relationship to other BLM priority programs and activities.
6. Using Land and Water Conservation Funds, as well as other land tenure

adjustment tools, to acquire habitats for Bureau sensitive species, as appropriate.

7. Considering ecosystem management and the conservation of native biodiversity to reduce the likelihood that any native species will require Bureau sensitive species status.

8. In the absence of conservation strategies, incorporate best management practices, standard operating procedures, conservation measures, and design criteria to mitigate specific threats to Bureau sensitive species during the planning of activities and projects. Land Health Standards should be used for managing Bureau sensitive species habitats until range-wide or site-specific management plans or conservation strategies are developed. Off-site mitigation may be used to reduce potential effects on Bureau sensitive species.

D. Agreements, Assessments, and Cooperative Strategies for Conservation. The BLM should work cooperatively with other agencies, organizations, governments, and interested parties for the conservation of sensitive species and their habitats to meet agreed on species and habitat management goals. Cooperative efforts are important for conservation based on an ecosystem management approach and will improve efficiency by combining efforts and fostering better working relationships. Addressing species' habitat management needs before a species is listed under the ESA will allow more management flexibility, reduce conflicts, and reduce the cost of conservation.

1. The FWS, NMFS, State agencies, universities, or others may have additional information on Bureau sensitive species. To help ensure that the best information is available in the BLM decision-making process, the BLM should request species information from these agencies as needed.

2. State Directors and line managers should make available employees with appropriate skills and expertise to support cooperative efforts for the development and implementation of habitat conservation assessments, strategies, and agreements.

3. State Directors and line managers should initiate the development of these conservation assessments, strategies, and agreements for the purpose of furthering the conservation of the subject species on BLM-administered lands where significant conservation benefits can be achieved through such an effort. Strategies and agreements should identify the role of the BLM and be proportionate to the resource values on BLM-administered lands.

4. The BLM should use habitat conservation assessments based on regional ecosystem assessments, where available, to develop conservation strategies and agreements that outline the program of work necessary to reduce, eliminate, or mitigate specific threats to sensitive species; to develop an ecosystem management approach to conservation on BLM-administered lands; and to

facilitate coordination and cooperation with others, such as States and private entities, to achieve species and habitat conservation across the range of the species.

5. The BLM should be signatory to conservation strategies and agreements if public land or BLM authorization is involved.

6. Habitat and species conservation assessments, strategies, and agreements should be consistent with existing BLM land use plans and describe in sufficient detail management objectives, treatments, and means for assessing accomplishment. Where existing land use plans are not adequate, use plan maintenance, plan conformance reviews, or plan amendments as a means of integrating conservation strategies into existing land use plans.

7. The BLM should consider successful implementation of the program in evaluating line officer performance. Key leaders who contribute to notable successes should be recognized on a continuing basis.

8. The BLM should participate in and coordinate with State natural heritage programs and State comprehensive wildlife management plans as per the Sikes Act (16 U.S.C. 670g et seq.), Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and 43 CFR parts 24.1-4. Detailed guidance for management of species identified in State comprehensive wildlife management plans, which are not designated by the Bureau as special status species, is contained in BLM Manual 6500.

E. Management of Bureau Sensitive Species with the Oregon and California Lands Act.

In *Headwaters v. BLM* (1990), the Ninth Circuit held that, under the Oregon and California Sustained Yield Act (O&C Act), former Oregon and California Railroad Company Lands in western Oregon are assigned timber production as a dominant use. The application of the special status species policy to provide specific protection to species that are listed by the BLM as sensitive on lands governed by the O&C Act must be consistent with timber production as the dominant use of those lands. Subsequent litigation on O&C lands regarding timber production and endangered species establishes that timber production actions are still subject to the provisions of the Endangered Species Act, including consultation under Section 7.

.3 General Cooperation for BLM Special Status Species. The BLM shall cooperate with other government and nongovernment agencies to further the conservation of federally proposed and listed species, and will coordinate with the appropriate agencies on conservation of Bureau sensitive species. Specifically:

A. Coordination and Cooperation with Tribes. The relationship between the United States and Indian Tribes is defined by treaties, statutes, executive orders, judicial

decisions, and agreements and differentiates Tribes from other entities that deal with, or are affected by, the Federal government. Tribes are self-governing with fundamental rights to set their own priorities and make decisions affecting their resources and distinctive ways of life. However, as with other entities, coordination on the conservation and management of resources would benefit the tribal resources and public resources as they relate to Bureau sensitive species and federally proposed and listed species.

1. Secretarial Order 3206 on American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the ESA. The Secretarial Order, signed on June 5, 1997, by the Secretary of the Interior and Secretary of Commerce clarifies the responsibilities of agencies of the Department of the Interior and Department of Commerce when actions taken under the authority of the ESA and associated implementing regulations affect, or may affect, Indian land, tribal trust resources, or the exercise of American Indian tribal rights. The Secretarial Order does not apply to Alaska. In addition to BLM Policy 8160, the BLM shall administer the conservation provisions of the Secretarial Order as follows:

- a. Whenever the BLM is aware that its actions planned under the ESA may affect tribal trust resources, the exercise of tribal rights, or Indian lands, the BLM shall consult (as defined in BLM Handbook H8160-1 and distinct from ESA consultation procedure) with the Tribes that are affected and seek their participation to the maximum extent practicable. This shall include providing affected Tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes.
- b. The BLM shall assist Indian Tribes in developing and expanding tribal programs that promote the health of ecosystems upon which Bureau sensitive species and federally proposed and listed species depend. This includes:
 - (1) Offering and providing such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement, and health of the ecosystems upon which Bureau sensitive species and federally proposed and listed species depend.
 - (2) Cooperatively identifying appropriate management measures to address concerns for such species and their habitats.
- c. The BLM shall give deference to tribal conservation and management plans for tribal trust resources that govern activities on Indian lands and that address the conservation needs of listed species.
- d. At the earliest indication that it is considering management actions that may be restrictive to Tribes, for the conservation of any species, the BLM shall promptly notify all potentially affected Tribes, and assist Tribes in

identifying and implementing tribal conservation and other measures necessary to protect such species.

e. The BLM should assist the FWS and/or NMFS and other Federal agencies with their required actions under the Secretarial Order regarding the conservation of species.

f. The BLM shall coordinate with the affected Tribes and the Bureau of Indian Affairs on BLM Section 7 consultations of which it is aware that tribal rights or tribal trust resources may be affected.

g. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA), and the Department's ability to continue to assert FOIA exemptions, the BLM shall make available to a Tribe all information held by the BLM that is related to a Tribe's Indian lands and tribal trust resources.

h. The BLM shall, when appropriate and at the request of a Tribe, pursue intergovernmental agreements to formalize arrangements involving Bureau sensitive species and federally proposed and listed species.

2. BLM 8160 Policy. The BLM should use any opportunity available under its 8160 Policy to seek coordinated conservation activities with Tribes.

B. Other Cooperation and Coordination. Conservation activities in general would benefit from cooperation and coordination with other agencies, organizations, governments, and interested parties.

1. The BLM, in coordination with the FWS and/or NMFS and other interested entities, should develop habitat conservation assessments and conservation agreements for any BLM special status species that the BLM believes would benefit from such an agreement.

2. The BLM should provide technical assistance to, and coordinate with, appropriate state agencies and other agencies, organizations, or private landowners developing and implementing conservation plans.

3. The BLM should seek partnerships and cooperative relationships with other agencies, organizations, governments, and interested parties for the purposes of conservation of sensitive species and compliance with the ESA. The BLM already has MOUs with several agencies and organizations. Partnerships beyond existing MOUs are encouraged. Partnerships and cooperative relationships should be sought with agencies that include the following:

a. Other resource management and regulatory agencies, such as the Natural Resource Conservation Service, State fish and wildlife agencies, State forestry

agencies, State water quality agencies, and municipal parks and recreation agencies.

b. State and local governments, such as governor's offices, County commissioners, and City councils; County extension units, watershed councils, and resource conservation districts; and interested landowners.

c. Federal advisory groups, such as the Sporting Conservation Council, resource advisory councils, and provincial advisory boards.

d. Research entities, such as the Biological Resource Division of the U.S. Geological Survey, U.S. Forest Service, Agricultural Research Service, Cooperative Ecosystem Studies Units, and university researchers.

e. Professional societies, such as The Wildlife Society, the American Fisheries Society, Society for Range Management and the Botanical Society of America.

f. Groups representing private sector interest in resources and resource uses, such as Trout Unlimited, Center for Plant Conservation, National Audubon Society, The Nature Conservancy, National Cattlemen's Beef Association, and American Sports Tackle Manufacturers.

4. The BLM's role in partnerships and cooperative relationships should include developing conservation programs based on ecosystem management, providing expertise for programs affecting lands outside of the public land when benefits to BLM-managed resources are expected to result, and developing grant and cost-shared (e.g., challenge cost-share) projects to support conservation activities.

Glossary of Terms

This glossary is provided for the convenience of the reader and the terms are defined for the purpose of this manual only.

-A-

action: all discretionary activities or programs of any kind authorized, funded, or carried out by the BLM in whole or in part. Examples include (1) projects intended to conserve Bureau sensitive species and federally proposed and listed species or their habitat; (2) the promulgation of regulations; (3) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (4) projects directly or indirectly causing modifications to the land, water, or air.

animals: any member of the animal kingdom, including without limitation any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and any part, product, egg, or offspring thereof, or the dead body or parts thereof. As used here, the words “animals,” “fish or wildlife,” and “wildlife” are interchangeable.

-B-

biological assessment (BA): information prepared by, or under the direction of, a Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and may be affected by the proposed action. A biological assessment presents the BLM’s determination of whether any such species or habitat is likely to be adversely affected by the action.

biological opinion (BO): document that includes (1) the opinion of the FWS and/or NMFS as to whether or not a Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat. A BO may be accompanied by an incidental take statement.

BLM-administered lands: collectively, BLM-managed lands and split-estate lands.

-C-

candidate species: plant and animal taxa considered for possible addition to the list of endangered and threatened species under the Endangered Species Act. These are taxa for which the FWS or NMFS has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is presently precluded by higher priority listing actions. Separate lists for plants, vertebrate animals, and invertebrate animals are published periodically in the *Federal Register*. Candidate species and their habitats are managed as Bureau sensitive species.

conservation (also conserve and conserving): 1) definition from ESA Section 3(3) and as applied to threatened, endangered, and proposed species in this policy: to use, and the use of, all methods and procedures that are necessary to bring a listed species to the point at which the measures provided pursuant to the ESA are no longer necessary. Methods and procedures of conservation include all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation; 2) as applied to Bureau sensitive species, the use of programs, plans, and management practices to reduce or eliminate threats affecting the status of the species, or improve the condition of the species' habitat on BLM-administered lands.

conservation agreement or strategy: formal, written document agreed to by the FWS and/or NMFS or another Federal agency, State agency, local government, or the private sector to achieve the conservation of Bureau sensitive species and federally proposed, listed, and candidate species through voluntary cooperation. It documents the specific actions and responsibilities for which each party agrees to be accountable. The objective of a conservation agreement or strategy is to reduce threats to a Bureau sensitive species and federally proposed and listed species or its habitat. An effective conservation agreement or strategy may lower species' listing priority or eliminate the need for listing.

conservation recommendations: suggestions of the FWS and/or NMFS regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

critical habitat (CH): (1) the specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon determination by the FWS and/or NMFS that such areas are essential for the conservation of the species. Critical habitats are designated in 50 CFR Parts 17 and 226. The constituent elements of critical habitat are those physical and biological features of designated or proposed critical habitat essential to the conservation of the species, including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historical geographic and ecological distributions of a species.

-D-

distinct population segment (DPS): subdivision of a vertebrate species (excluding Pacific salmon stock, see definition of evolutionarily significant unit) that is treated as a species for purposes of listing under the Endangered Species Act. To be so recognized, a potential distinct population segment must satisfy standards specified in a FWS or NMFS policy statement (see the February 7, 1996, *Federal Register*, pages 4722–4725). The standards require it to be separable from the remainder of and significant to the species to which it belongs.

-E-

endangered species: any species that is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta, determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

evolutionarily significant unit (ESU): a Pacific salmonid stock that is substantially reproductively isolated from other stocks of the same species and that represents an important part of the evolutionary legacy of the species. Life history, ecological, genetic, and other information can be used to determine whether a stock meets these two criteria. The NMFS uses this designation.

-F-

fish or wildlife: see animals.

formal consultation: a component of the consultation process under Section 7 of the ESA that commences with the BLM's written request for consultation after it has determined that its action may affect and is likely to adversely affect listed species or designated critical habitats and concludes with the issuance of biological opinion.

-H-

habitat conservation assessment: a comprehensive, state-of-knowledge technical document that describes life history, habitat requirements, and management considerations for a species or group of species throughout its occupied range on the lands managed by the cooperating agencies. Habitat conservation assessments are often made as a forerunner to preparation of a conservation strategy or agreement.

-I-

implementation plan: a site-specific plan written to implement decisions made in a land use plan. An implementation plan usually selects and applies best management practices to meet land use plan objectives and is synonymous with an activity plan. Examples of implementation plans include habitat management plans and allotment management plans.

incidental take: see take.

incidental take statement (ITS): under the ESA, a document that accompanies a biological opinion in which some incidental take of listed species is reasonably certain to occur. Such take would not rise to a level that would jeopardize the listed species. An ITS exempts a specific level of take associated with the action from the prohibitions on take under Section 9 of the ESA. An ITS often includes reasonable and prudent measures and their implementing terms and conditions, which are intended to reduce or minimize the take associated with the action or monitor the progress of the action and associated take. A biological opinion will not have an ITS

if no take is reasonably certain to occur.

informal consultation: a component of the consultation process that includes all discussions, correspondence, or other contact between the FWS and/or NMFS and the BLM or the designated non-Federal representative, prior to formal consultation, to determine if a proposed action may affect listed species or critical habitat and to use FWS and/or NMFS expertise, if necessary, to modify the proposed action to avoid potential adverse effects.

-J-

jeopardize the continued existence of (also jeopardize, cause jeopardy to): engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of listed species in the wild by reducing the recruitment, numbers, or distribution of a listed species.

-L-

listed species: species that are designated under the ESA as either threatened or endangered, which may include members of the Plant, Animal or Fungi–Lichen Kingdoms.

-M-

multiple use: a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment, with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output (FLPMA).

-N-

native species: as per February 3, 1999, Executive Order 13112 (Invasive Species), native species means, with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or presently occurs in that ecosystem.

-P-

plant: any member of the plant kingdom, including seeds, roots, flowers, and other parts thereof.

-R-

recovery: improvement in the status of listed species to the point at which listing is no longer appropriate under the ESA.

request for technical assistance: communication with the FWS and/or NMFS concerning actions that will potentially have an adverse effect on a BLM special status species or its habitat. The objectives of these requests are to obtain as much biological information as possible about the species involved and its habitat and the FWS and/or NMFS recommendations on how the proposed management action might be carried out without contributing to the further deterioration of the species or its habitat.

-S-

species: any species or subspecies (and regarding plants, any varieties), and any distinct population segment or evolutionarily significant unit of any species of vertebrate, fish, or wildlife that interbreeds when mature.

- (A) Federally listed endangered—an animal or plant species in danger of extinction throughout all or a significant portion of its range.
- (B) Federally listed threatened—an animal or plant species likely to become endangered within the foreseeable future throughout all or a significant portion of its range.
- (C) Federally proposed—a species of animal or plant that is proposed in the *Federal Register* to be listed under Section 4 of the Endangered Species Act.
- (D) Federal candidate species—a plant or animal species for which FWS or NMFS has on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened. All Federal candidates shall be included in the Bureau sensitive species category.
- (E) Bureau sensitive species—species that require special management consideration to avoid potential future listing under the ESA and that have been identified in accordance with procedures set forth in this manual

special status species: collectively, federally listed or proposed and Bureau sensitive species, which include both Federal candidate species and delisted species within 5 years of delisting.

split-estate: subsurface mineral resources managed by the BLM where the surface resource is managed by a different public or private entity, as opposed to BLM-managed lands.

status review: process of examination by FWS and/or NMFS to determine if a species situation warrants protection under the ESA. Results of a status review are published in the *Federal Register*.

survival: for determination of jeopardy or adverse modification, the species' persistence as listed or as a subset identified by the FWS and/or NMFS for recovery management purposes, beyond the conditions leading to its endangerment, with sufficient resilience to allow for the potential recovery from endangerment. It is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a

species with a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

-T-

take: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The term applies only to fish and wildlife.

(A) incidental take: take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant. [50 CFR §402.02] Incidental take of listed plant species is neither defined nor prohibited by the Act.

(B) harm: as defined by the FWS, harm includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. As defined by the NMFS, harm means an act that actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding, or sheltering.

(C) harass: defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns that include breeding, feeding, or sheltering Tribes (Indian Tribes): any federally recognized Indian Tribe, band, nation, pueblo, community, or other organized group within the United States that the Secretary of the Interior has identified on the most recent list of federally recognized Tribes maintained by the Bureau of Indian Affairs.

-W-

wildlife: see animals.