

TC-1

6840 - BLM SPECIAL STATUS SPECIES MANAGEMENT

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Glossary of Terms

- .01 Purpose. The purpose of this Manual Section is to provide policy and guidance, consistent with applicable laws and regulations, for the conservation of BLM special status species and the ecosystems upon which they depend. Special status species are those species listed under the Endangered Species Act (ESA), officially proposed for listing under the ESA, or designated as BLM sensitive species. BLM sensitive species are all Federal candidates for listing as threatened or endangered under the provisions of the ESA; and those designated by the Director or individual State Directors as BLM sensitive. Conservation of proposed and listed species (pursuant to the ESA) means the use of all methods and procedures which are necessary to bring federally listed and proposed species and their habitats to a point where the provisions of the ESA are no longer necessary. Conservation of BLM sensitive species means the use of programs, plans, and management practices to minimize or eliminate threats affecting the overall condition of the species, and/or improve the condition of the species habitat.
- .02 Objectives. The objectives of the BLM special status species policy are:
- A. To conserve and recover ESA-listed and proposed species and the ecosystems upon which they depend.
  - B. To initiate proactive conservation programs which minimize the potential for listing of BLM designated sensitive species under the ESA, and to ensure that actions requiring authorization or approval by the BLM are consistent with the conservation of BLM sensitive species as defined in this manual.
- .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. National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (NEPA).
  - E. Fish and Wildlife Coordination Act of 1934 (16 U.S.C. 661 et seq.), as amended.
  - E. Departmental Manual 235.1.1.A, General Program Delegation, Director, Bureau of Land Management.
  - F. Departmental Manual 632.1.1-1.6, Endangered Species Management.
  - G. Secretarial Order 3206 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act).
  - H. Information Quality Act (44 U.S.C 3504(d)(1) and 3516).

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

.04 Responsibility.

A. Director is responsible for the overall conservation of BLM sensitive species and the conservation and recovery of federally proposed and listed species and designated critical habitat, oversees implementation of the ESA on BLM administered lands, may designate BLM sensitive species, coordinates with State Directors on sensitive species designations for species spanning multiple states, and makes any applications for project exemptions under Section 7 of the ESA to the Secretary of the Interior.

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

C. Chief, Division of Fish Wildlife and Plant Conservation is responsible for initiating and recommending policies, objectives, general procedures, and priorities relating to the conservation of BLM sensitive species, federally proposed and listed species, and federally designated critical habitat, and overall coordination of the program at the national level. The Division Chief is also responsible for designating National Program Lead(s) whose responsibilities are:

1. Reviewing and recommending necessary changes to objectives and policies for their Programs.
2. Identifying opportunities to conserve listed and BLM sensitive species and the ecosystems upon which those species depend within existing BLM programs or authorities.
3. Maintaining appropriate interactions with BLM Offices and Groups, headquarters of other Federal agencies and bureaus, national conservation organizations, international conservation groups and individual authorities.
4. Maintaining a thorough knowledge of the legislation, regulations, court rulings, and litigation actions relative to BLM sensitive species and federally proposed and listed species and designated critical habitat and understanding how these may affect BLM programs. This includes ensuring, through directives and training, that all Field Offices are notified of any changes in a species' status or agency policy on BLM sensitive species and federally proposed and listed species and designated critical habitat.
5. Providing centralized review and analysis of present and future needs related to research, management, and information transfer for BLM sensitive species and federally proposed and listed species and designated critical habitat.
6. Developing and recommending budget documents, including budget justifications and the Annual Work Plan.

7. Work with the National Training Center and other agencies to develop training and orientation materials relevant to this policy.

E. State Directors are responsible for:

1. Developing and implementing programs for the conservation of BLM sensitive species and the conservation and recovery of federally proposed and listed species within their states.
2. Coordinating the BLM special status species programs with adjoining BLM State Offices, State and other Federal agencies, various private organizations, and BLM constituents.
3. Establishing programs to determine which BLM sensitive species and federally proposed and listed species occur on public land, the condition of the populations and their habitats, and how discretionary BLM actions affect those species and their habitats.
4. Designating BLM sensitive species within their respective jurisdictions and reviewing and updating the BLM sensitive species list, as appropriate, in coordination with State agencies that are responsible for fisheries, wildlife, and botanical resources including State Natural Heritage programs.
5. Ensuring that provisions for the conservation of BLM sensitive species and conservation and recovery of federally proposed and listed species, particularly the objectives from approved recovery plans and conservation agreements, are incorporated in new land use plans and subsequent activity and interdisciplinary level plans.
6. Ensuring that all actions comply with applicable laws, including 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. Designating State Program Leads whose responsibilities are:
  - a. To 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.
  - b. To recommend policy and guidance changes when necessary to maintain consistency with national level direction and to ensure compliance with the ESA and other applicable laws.
  - c. To recommend and develop training material to keep Field Offices current on policies and direction changes.
  - d. To monitor implementation of the BLM sensitive species and federally proposed and listed species program and recommend changes to ensure compliance with law, regulation, and policy and maintain effectiveness of the program.

- e. To coordinate proposed conservation strategies and agreements with the appropriate National Leads to ensure consistency in species management across state boundaries and consistency with national policies.
- f. To recommend funding allocations that will best achieve the mandates of this policy and track expenditures to determine if the allocated funds have been appropriately expended.
- g. Provide to the Threatened and Endangered Species Program Lead an annual species-by-species summary of BLM expenditures within the state on the conservation of ESA listed species for the FWS annual expenditure report to Congress.

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

1. Conducting and maintaining current inventories for BLM sensitive species and federally proposed and listed species on BLM administered lands.
2. Providing for the conservation of BLM sensitive species and conservation and recovery of federally proposed and listed species in the preparation and implementation of approved recovery plans, and those interagency plans and conservation agreements with which BLM has concurred.
3. Ensuring that all actions comply with the applicable laws, regulations, and BLM policies, including ESA, the implementing regulations, and other directives associated with conserving ESA proposed and listed species, and BLM sensitive species
4. Coordinating Field Office activities with Federal, State, and local groups to ensure the most effective program for BLM sensitive species and federally proposed and listed species conservation.
5. Monitoring actions to determine if BLM sensitive species management objectives (identified in habitat management plans or .06.C.2.f of this manual) are being met. Records of monitoring activities are to be maintained and used to evaluate progress relative to such objectives (e.g., in response to new listing petitions). Monitoring shall be conducted consistent with the principles of adaptive management as defined in Departmental policy, as appropriate.
6. Ensuring all discretionary actions authorized, funded or carried out by BLM follow the interagency consultation procedures as outlined in 50 CFR Part 402- Interagency cooperation - Endangered Species Act of 1973, as amended; alternative consultation procedures developed through counterpart regulations; or interagency streamlining agreements developed with FWS and NMFS.
7. Ensuring results of formal section 7 consultations, including mandatory terms and conditions in incidental take statements that are consistent with the 50 CFR 402 regulations,

are implemented.

.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. Memorandum of Understanding (MOU) entered into with the U. S. Dept. of Agriculture Forest Service, U. S. Dept. of Defense, U. S. Dept. of the Army Corps of Engineers, U.S. Dept. of Commerce National Marine Fisheries Service, U. S. Dept. of the Interior Fish and Wildlife Service, Bureau of Land Management, Bureau of Reclamation, Minerals Management Service, National Park Service, Bureau of Mines, U. S. Dept. of Transportation Coast Guard, Federal Aviation Administration, Federal Highway Administration, and U. S. Environmental Protection Agency on Implementation of the Endangered Species Act, September 29, 1994.
- J. Memorandum of Understanding (MOU) (94-SMU-058) - U. S. Dept. of Agriculture and the U.S. Dept. of the Interior Fish and Wildlife Service, Bureau of Land Management, National Park Service, U.S. Dept. of Commerce National Marine Fisheries Service on candidate species conservation, January 25, 1994.
- K. Memorandum of Agreement ESA Section 7 Programmatic Consultations and Coordination among Bureau of Land Management, Forest Service, National Marine Fisheries Service, and Fish and Wildlife Service dated August 30, 2000.
- L. BLM Manual Section 1601 -Land Use Planning.
- M. BLM Handbook H-1601 - Land Use Planning Handbook.
- N. BLM Handbook H-1790-1- NEPA Handbook.

- O. BLM Handbook H-8160-1 - General Procedural Guidance for Native American Consultation.
- P. BLM Handbook H-8560-1 - Management of Designated Wilderness Areas.
- Q. BLM Handbook H-8550-1 - Interim Management Policy and Guidelines for Lands Under Wilderness Review.
- R. BLM Manual 1745 - Introduction, Transplant, Augmentation, and Reestablishment of Fish, Wildlife, and Plants.
- S. BLM Handbook X-XXXX-X Integrated Vegetation Management Handbook.
- T. BLM Handbook H-4180-1 – Rangeland Health Standards Handbook.
- U. FWS Director June 25, 2002 Memorandum on Arizona Cattle Growers Decision and Solicitor’s opinion.
- V. Supreme Court Decision in Norton v SUWA – 542 US 55 (2004).

.06 Policy. Actions authorized by BLM shall further the conservation of federally listed and proposed species and BLM designated sensitive species. BLM sensitive species will be managed consistent with species and habitat management objectives identified in habitat management plans or section .06.C.2.f of this manual, to minimize the likelihood and need for listing under the ESA. The policy of the BLM in managing federally listed and proposed species and federally designated and proposed critical habitat is described below in sections A and B. The policy for managing BLM sensitive species is described below in section C, the policy on information standards for managing the special status species program is described in section D, section E provides the policy on conferencing on candidate species, and section F provides the policy on implementation of counterpart regulations.

A. Federally Listed Threatened and Endangered Species and Designated Critical Habitats.

1. Under section 7(a)(1) of the ESA, the BLM shall conserve listed species and the ecosystems upon which they depend and shall use existing authority in furtherance of the purposes of the ESA. Specifically the BLM shall:
  - a. Determine, to the extent practicable, the occurrence, distribution, population and habitat condition of all ESA listed species on BLM administered lands, and evaluate the significance of BLM administered lands in the conservation of those species.
  - b. Ensure that plans and programs maintain the integrity of the principal constituent elements identified at designation of federally designated critical habitat on BLM administered lands.
  - c. Develop and implement plans, programs, and actions in a manner consistent with conservation and recovery of listed and proposed species and federally designated and proposed critical habitat, to the degree practicable and consistent with project purposes.

- d. Monitor and evaluate ongoing management activities to ensure conservation objectives for listed species are being met.
  - e. Under section 7(a)(1) carry out programs supporting the conservation and recovery of listed species.
  - f. Implement conservation recommendations included in biological opinions if they are consistent with BLM land use planning and policy and are technologically and economically feasible.
  - g. Ensure that land use plans incorporate conservation objectives and actions for listed and proposed species and critical habitat.
  - h. Ensure to the degree feasible and consistent with the principles of multiple-use, that adequate conservation measures are in place on BLM managed lands to effectively conserve listed species, such that these conservation measures support exclusion from Federal designation of critical habitat by the FWS and/or NMFS under 3(5)(A) and 4(b)(2) of the ESA.
2. In compliance with section 7(a)(2) of the ESA, ensure that actions authorized, funded, or carried out by the BLM are in compliance with the ESA. To accomplish this, the BLM shall:
- a. Evaluate these proposed actions to determine if individuals or populations of listed species or their habitat, including designated critical habitat, may be affected.
  - b. In consultations involving an applicant (as defined in .11.E.6.j), the BLM will consider designating the applicant as the non-Federal representative (as detailed in .11.E.6.k) for the purposes of conducting informal consultation and/or preparing any biological assessment.
  - c. Initiate consultation with the FWS and/or NMFS, including preparation of biological assessments, as appropriate, for those discretionary actions that BLM determines “may affect” listed species or their habitats, unless such actions qualify for an Alternative Consultation Agreement. Actions that are determined by the BLM to have “no effect” on listed species and their habitats shall not undergo consultation.
  - d. Until consultation proceedings are completed, BLM shall not carry out any action that would cause an irreversible or irretrievable commitment of resources such that it would foreclose the formulation or implementation of any reasonable and prudent alternative that might avoid jeopardy to listed species and/or prevent the adverse modification of critical habitat. For ongoing actions that are in the consultation process, the BLM shall conduct and document a 7(d) analysis (as described in section .11.E.6.c of this manual) and determination to ensure compliance with this section of the Act.
  - e. For discretionary activities on split-estate lands where the subsurface mineral estate is administered by BLM, proposed activities shall conform to the requirements of section 7 of the ESA.

f. Accept and implement final incidental take statements and their accompanying reasonable and prudent measures and mandatory terms and conditions that are in conformance with the 50 CFR 402 regulations. Refer to section .11.E.6.e for guidance in reviewing draft Biological Opinions (BO) and Incidental Take Statements (ITS).

3. Cooperate with the FWS and NMFS in planning and providing for the recovery of listed species. To accomplish this, the BLM shall:

a. As appropriate, participate on recovery teams and in recovery plan preparation, in addition to participating on State or regional working teams responsible for listed species recovery.

b. Review technical and agency drafts of recovery plans for species affected by BLM management to ensure that proposed actions assigned to BLM are technically, economically and administratively feasible, scientifically defensible and consistent with BLM's mission and authority.

c. Cooperate with FWS and NMFS and non-Federal entities, as appropriate, in preparation of Habitat Conservation Plans and Conservation Agreements.

d. Ensure that decisions, standards and guidelines, and best management practices in resource management plans and site-specific plans prepared for BLM administered lands covered by approved recovery plans are consistent with attainment of recovery plan objectives.

4. Retain in Federal ownership those habitats essential for the survival and recovery of any listed species, particularly those that are part of a broader, logical public land ownership management unit. Disposal of fragmented, isolated parcels containing habitat for listed species, including designated critical habitat, is not precluded by this policy if lands acquired as a result of the disposal can provide at least equivalent conservation benefit to listed species.

B. Federally Proposed Species and Proposed Critical Habitats. The BLM shall manage species proposed for listing as threatened or endangered and proposed critical habitat consistent with the requirements of 50 CFR 402.10. Specifically, the BLM shall:

1. Confer with the FWS and/or NMFS on any action that is likely to adversely affect a proposed species or proposed critical habitat to ensure that the action does not jeopardize a proposed species or result in the destruction or adverse modification of proposed critical habitat.

2. State Directors shall provide a written response to FWS and/or NMFS Federal Register Notices proposing to designate critical habitat, identifying any conservation measures, such as resource management plans, habitat management plans, and/or species/habitat conservation strategies, that provide for the conservation of proposed critical habitat such that the benefits to the species of exclusion from designation may exceed the benefits of inclusion under section 4(b)(2) of the Act. For proposals across multiple states, the Director will coordinate with the states and submit such information.

C. BLM Designated Sensitive Species. Consistent with the principles of multiple use and in compliance with existing laws, the BLM shall designate sensitive species and implement species management plans to conserve these species and their habitats and shall ensure that discretionary actions authorized, funded, or carried out by the BLM would not result in significant decreases in the overall range-wide species population and their habitats. Specifically:

1. State Directors shall designate species within their respective states as BLM sensitive using the following criteria. For species inhabiting multiple states, State Directors shall coordinate with one another and the Director in the designation of BLM sensitive species, so that species status is consistent across the species' range on BLM administered lands, where appropriate.

a. All federally designated candidate species.

b. All other native species, regardless of designated status as defined by other sources such as NatureServe, State Listings, State Heritage Programs, etc., for which BLM administered lands are sufficiently important to the species is that changes in populations on such lands would result in appreciable changes in the overall species population, and either:

(1) There must be information that a species is undergoing, or has recently undergone, a downward trend such that survival of the species in all or a significant portion of its range is at risk, or

(2) Must depend upon ecological refugia, or specialized or unique habitats on BLM administered lands, and there is evidence that the habitat is at risk.

2. On BLM administered lands, manage BLM sensitive species and their habitats to minimize or eliminate threats affecting the overall condition of the species and/or improve the condition of the species habitat, by:

a. 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.

b. Ensuring BLM sensitive species and their habitats are appropriately considered in land use plans and associated NEPA documents (as per BLM 1610 Planning Manual and Handbook, Appendix C), and in activity level and project level NEPA documents.

c. Developing and implementing range-wide or site-specific management plans, conservation strategies, and assessments for sensitive species that include specific habitat and population management objectives designed for conservation, as well as management strategies necessary to meet those objectives.

d. Ensuring that BLM activities affecting the habitat of sensitive species are carried out in a manner that is consistent with the objectives for managing those species and the ecosystems on which they depend, and potential impacts to habitat would not be likely to result in long-term decreases in the overall range-wide species population and their habitats.

e. Monitoring populations and habitats of BLM sensitive species to determine whether species management objectives are being met.

f. Utilizing Land Health Standards to provide a temporary mechanism for managing lands in absence of established habitat plans, conservation plans, or strategies, understanding that Land Health Standards do not constitute a long-term substitute for species conservation plans.

D. All federally proposed and listed species and BLM sensitive species. For consultation under ESA the BLM shall utilize the best scientific and commercial data available. All information associated with the implementation of the special status species policy shall conform to the standards and guidelines established by the BLM under the Information Quality Act (IQA).

E. Section 7 consultation or conference. It is not necessary or appropriate to consult or conference on Federal candidate species or BLM sensitive species, notwithstanding current terms of interagency Memoranda of Understanding (MOA's).

F. Counterpart Regulations (CR's). The BLM will promote effective utilization of counterpart regulations for actions eligible under established Alternative Consultation Agreements (ACA's). Projects using the CR's will be reviewed by the respective State Office for conformance with the requirements of the ACA prior to project approval.

.1 Administration. The BLM shall conserve federally listed and proposed species by fulfilling the requirements of the ESA as described in section .11. BLM sensitive species shall be conserved through the use of programs and management practices to minimize or eliminate threats to the species as a whole from BLM activities and improve overall species condition as described in section .12.

.11 Administration of the ESA. On December 28, 1973, the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) became law and superseded earlier endangered species legislation, passed in 1966 and 1969, which focused on animals and which provided only limited protection to listed species. The Endangered Species Act of 1973 was the first Federal legislation to include a comprehensive effort to conserve plants and wildlife. The 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 responsibility for carrying out the ESA was assigned to the Federal Government (50 CFR Part 402). The BLM shall conserve listed species, designated critical habitat, proposed species, and proposed critical habitat through administration of the various sections of the ESA that apply to Federal agencies. There are a total of eighteen sections within the ESA, nine of which contain requirements or authorizations for the BLM. The BLM shall comply with all applicable sections of the ESA as follows:

A. Section 2 (Findings, purposes and policy). The policy of the ESA, as stated in Section 2, is that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species. In addition:

1. The BLM will continue its cooperative role first outlined in the Memorandum of Understanding (MOU) on the implementation of the ESA, entered into with the U. S. Forest Service, U. S. Department of Defense, U. S. Army Corps of Engineers, NMFS, FWS, Bureau of Reclamation, Minerals Management Service, National Park Service, U. S. Coast Guard, Federal Aviation Administration, Federal Highway Administration, and U. S. Environmental Protection Agency (Implementation of the Endangered Species Act, dated September 29, 1994). While the MOU expired in 1999, the BLM remains committed to following the intent and purpose of the MOU, to establish a general framework for cooperation and participation among the cooperators in the exercise of their responsibilities under the ESA. To meet this purpose and the requirements of Section 2 of the ESA, the BLM will, whenever appropriate:
  - a. Seek to improve efficiency by combining efforts with the other cooperators of the MOU to foster better working relationships and promote the conservation of listed species.
  - b. Use its authorities to further the purposes of the ESA by carrying out cooperative programs for the conservation of listed species.
  - c. Identify opportunities to conserve listed species and the ecosystems upon which those species depend within existing BLM programs or authorities.
  - d. Determine whether BLM planning processes effectively help conserve listed species and the ecosystems on which they depend.
  - e. Use existing programs, or establish a program if needed, to evaluate, recognize, and reward the performance and achievements of personnel who are responsible for planning or implementing programs to conserve or recover listed species or the ecosystems on which they depend.
  - f. Establish or participate in existing regional interagency working groups that identify geographic areas within which the groups will coordinate agency actions and create opportunities, and overcome barriers, to conserve listed species and the ecosystems upon which they depend and, to the extent practicable, protect sensitive species and the ecosystems upon which they depend.
  - g. Participate in national ESA working groups to coordinate the implementation of the ESA.
2. 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 FERC 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 predominately the responsibility of the FWS and/or NMFS, BLM should provide relevant information to 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, BLM shall provide information to the FWS and/or NMFS on proposed critical habitat for BLM administered lands as per the policy at .06.B.2 of this Manual, and cooperate, as appropriate, with FWS and/or NMFS in developing recovery plans for listed species that occur on BLM administered lands.

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 public land, including as follows:

a. Responsibilities. 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, shall be used to evaluate the current condition 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 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 to do so have been met or that there is new evidence to show that the conditions on which the initial listing or categorization was based no longer exist. Petitions to delist should also include a statement on how 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 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 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. BLM should incorporate appropriate objectives and actions identified in recovery plans into the respective land use and activity plans.

a. Recovery Teams. The FWS and/or NMFS often request that 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 whatever support is necessary 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 utilizing Field Office input:

(1) Determine whether measurable objectives are stated clearly and whether BLM can realistically meet its proposed recovery efforts within existing and prospective staffing and budgetary constraints.

(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 personnel and funding needs.

3. 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). A minimum 5-year monitoring commitment is required for delisted species under the ESA. 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 to use Land and Water Conservation funds to acquire lands to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species. The BLM shall consider the acquisition by purchase, donation, land exchange, conservation easement, or other means, land, water, or interests for the purpose of conserving listed species, designated critical habitat, proposed species, or proposed critical habitat.

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 assist with this as follows:

1. The BLM should provide technical assistance to, and coordinate with, State agencies responsible for the conservation of endangered and threatened species at the state level.
2. The BLM shall comply with State laws protecting listed species for all programs and actions to the extent that State laws are consistent with FLPMA and other Federal laws.

E. Section 7 (Interagency Cooperation). Section 7(a)(1) requires the BLM to utilize their authorities in furthering the purposes of the Act by implementing programs for the conservation of threatened and endangered species. To meet the requirements of Section 7(a)(1) the BLM shall identify conservation components for listed species of proposed actions, land use plans, and conservation plans and agreements in the NEPA document for actions affecting listed species.

The requirements of Section 7(a)(2) are to be carried out in consultation with and with the assistance of the Secretary of the Interior and the Secretary of Commerce. The procedures for carrying out this consultation 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). The need to initiate a consultation or conference is usually determined by the BLM and is based on an analysis to determine if a listed species or its habitat may be affected by a proposed action. If BLM determines that individuals, populations, or designated critical habitat may be affected by an action, either positively or negatively; then BLM must initiate consultation. FWS and/or NMFS may request BLM to 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. The BLM shall notify known applicants (as defined in .11.E.6.j) promptly of their opportunities for participation in the consultation and/or conference process.

1. Types of Activities. Section 7 applies to all actions for which there is discretionary BLM involvement or control. All actions that are authorized, funded, or carried out by the BLM that may

affect listed or proposed species or designated or proposed critical habitat are subject to the provisions of the ESA.

a. This includes 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 BLM manages the subsurface mineral estate (split-estate lands).

b. If BLM approval or authorization is for the entire action, (e.g. authorizing a right-of-way for a powerline installation across public land for a powerline route extending beyond public land), 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. 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 .11.E.6).

(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.

2. Characterizing the Proposed Action, Environmental Baseline, Direct Effects, Indirect Effects, and Interrelated and Interdependent Actions and Effects. To decide if consultation or conference under Section 7 is necessary, the BLM needs to determine if its action may affect a listed species or designated critical habitat or is likely to adversely affect a proposed species or proposed critical habitat. The effects can be adverse or beneficial to the listed or proposed species and critical habitat. The BLM shall evaluate the direct and indirect effects of the proposed action and the effects of any interrelated and interdependent actions on the listed or proposed species and designated or proposed critical habitat as compared to the environmental baseline. Cumulative effects are considered relative to the requirements of the ESA only during the formal consultation process and are discussed in Section .11.E.6.b. The proposed action, baseline and effects are defined as:

a. The proposed action 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. The proposed action should incorporate measures to minimize impacts to listed and proposed species and can include both on-site mitigation and off-site compensatory mitigation. Use of off-site compensatory mitigation may not be used as a means to reduce the effects to the listed species at the site. Off-site compensatory mitigation, however, can be used by the BLM as a means of meeting the conservation requirements of section 7(a)(1) of the Act.

b. Environmental Baseline. The environmental baseline is the condition of a species or critical habitat at a specified point in 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. The baseline is utilized by the FWS and/or NMFS in their analysis of jeopardy and is not required for the action agencies' effects determination for the proposed Federal action.

c. Direct Effects. Those effects caused by or resulting from the action and are reasonably certain to occur in the same time and place.

d. Interrelated and Interdependent Actions and Effects. 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 implementation of a subsequent action that may cause an effect to 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 (as defined in the glossary), the consultation process associated with the Federal action can only be used to condition activities on Federal lands.

(2) Split-Estate Federal Minerals: the BLM or project proponent shall collect information to support an analysis of effects to listed and proposed species as part of the effect determination for the proposed action in a biological assessment. At the site scale, project proponents may provide written proof of a surface owner's refusal to allow inventory of

either ESA-listed or proposed species that may occur on the surface owner's property; and BLM will proceed through the Section 7 consultation process in a timely manner, using other sources to obtain the best available species and habitat information and to determine appropriate mitigation. BLM will take the lead in completing consultation on the proposed action unless the surface estate is administered by another Federal agency which elects to serve as the lead for consultation or the project proponent is designated as the Federal representative by the Federal agency managing the surface or by the BLM.

e. Indirect Effects. Those effects caused by or that will result from the action and are later in time, but are reasonably certain to occur.

3. Determination of "no effect". If after a review of the project and any interrelated or interdependent actions, 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 be "no effect". 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 or a conference is required. Actions which provide a net benefit to listed species still require informal consultation.

a. The BLM should engage the FWS and/or NMFS early in the project development process and seek recommendations and consider reasonable modification of actions that will minimize or avoid the likelihood of adverse effects and contribute to achieving recovery and conservation objectives.

b. If the BLM determines that the proposed action may affect but is not likely to adversely affect listed species, designated critical habitat, proposed species or proposed critical habitat, the BLM has the opportunity to conclude Section 7 consultation informally with the FWS and/or NMFS' written concurrence. This includes proposed actions that may have beneficial, discountable, or insignificant effects. Informal consultation does not conclude until the BLM has written concurrence of its determination from the FWS and/or NMFS, until the procedures specified at 50 CFR 402 (including counterpart regulations, subpart 402.34) have been fulfilled, or the BLM enters formal consultation with the FWS and/or NMFS.

Not likely to adversely affect (NLAA) is the appropriate conclusion when a causal mechanism for creating an effect exists, and the effect is either: 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 to the species even when impacts on habitat can be measured (insignificant); or are completely beneficial. In the case of 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 action. The appropriate scale to evaluate effects to listed plants is at the population level, rather than at the individual level, as incidental take is neither defined nor prohibited for plants under the Act. It is important to note, however, that there are other specific prohibitions relating to listed plants

under section 9(a)(2), including those pertaining to listed plants on Federal lands.

c. The BLM shall continue the Section 7 consultation/conference process until written concurrence is received from the FWS and/or NMFS. If the BLM determines that the proposed action may affect and is likely to adversely affect listed species, designated critical habitats, proposed species, or proposed critical habitats, BLM shall initiate formal consultation.

5. 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.

a. BLM shall confer with the FWS and/or NMFS on any action that is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. In order to determine whether or not jeopardy or destruction/adverse modification may occur, BLM shall confer on all discretionary actions that are determined May Affect, Likely to Adversely Affect, but will not confer on actions determined Not Likely to Adversely Affect.

b. For proposed species, the BLM should request conference in anticipation of future listing. A conference may follow the procedures for formal consultation. The conference opinion issued at the conclusion of a conference may be adopted as the biological opinion once 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.

6. Formal Consultation. Formal consultation is required on all actions that may affect a listed species, or any designated critical habitat (50 CFR Part 402.14), 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 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, BLM shall initiate formal consultation. Formal consultation is conducted to determine if the proposed action, taken together with cumulative effects, 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 final biological assessment and a written request to initiate formal consultation. For purposes of formal consultation, “likely to adversely affect” is the appropriate conclusion if a causal mechanism exists within the action 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.

a. Providing Information. During formal consultation, BLM shall provide the FWS and/or NMFS with the best scientific 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 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 BLM's best interest, as the FWS and/or NMFS have interpreted case law to require them to err on the side of conserving listed species when rendering a biological opinion based upon limited information. In some situations it may be necessary to enter consultation with the currently 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, as defined in NEPA. In lieu of this, the BLM may determine these and request concurrence from the FWS and/or NMFS. If listed species and/or designated critical habitat are present in the action area, BLM shall prepare a biological assessment.

(2) The BLM shall prepare a biological assessment (BA), as described in 50 CFR 402.12 and 402.14, as the means of providing information to the FWS and/or NMFS. A BA is a means to provide information and analysis, and is not a decision document subject to protest or appeal.

(a) When to prepare a BA. A biological assessment shall be prepared for all actions on which formal consultation is necessary. The FWS and/or NMFS often request a BA to be prepared in order to concur with BLM findings of May Affect, but Not Likely to Adversely Affect (NLAA). Such preparation is recommended, but is not required by regulation unless the action is a major construction activity (50 CFR part 402.12). In situations where BLM actions would result in a NLAA determination and BLM elects not to prepare a BA, sufficient detail to demonstrate the logic behind such a conclusion shall be maintained in the Administrative Record, and should be provided to the FWS and/or NMFS in order to assist them in reaching concurrence with such a determination. The regulations also allow the action agency to utilize the NEPA document as the rationale and documentation for an effects determination for the purposes of section 7 consultation.

(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 available, and shall clearly document the logic used by BLM in reaching their determination of effects. To enter formal consultation the following elements are required, and will allow the Federal decision maker to initiate formal consultation with the submission of the BA (as per 50 CFR 402.12.j). They are recommended to be included in any BA, and will facilitate the FWS and/or NMFS review:

(A) A clear, thorough description of the action and various components of the

- action as they may relate to listed species, and the area of effect (action area).
- (B) Identification of any interrelated or interdependent actions.
  - (C) Results of any on-site inspection(s) of the action area to determine if listed or proposed species are present or occur seasonally;
  - (D) A review of the literature, and any other pertinent information, including available views of recognized experts on the species at issue;
  - (E) An analysis of the effects of the direct and indirect effects of the action on the species and habitat, including consideration of cumulative effects, and including the effects of any interrelated or interdependent actions, and the results of any related studies;
  - (F) A determination of effects that is clearly supported by the analysis of effects; and
  - (G) Identification of any alternate actions considered by the Federal agency for the proposed action.
  - (H) While it is important to analyze and document effects of actions on BLM sensitive species and “no effects” determinations for listed species in NEPA documents, these will not be included in BAs provided to the FWS and/or NMFS.

b. Cumulative Effects. In accordance with Section 7 regulations, the FWS and/or NMFS is required to consider cumulative effects in 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 in its BA 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 in the action area under consideration. 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 are economically viable. Past and ongoing effects are considered as part of the environmental baseline and are not considered cumulative effects. Cumulative effects analyses conducted under NEPA are not to be submitted as a substitute for ESA cumulative effects analyses as their definitions are quite different.

c. Irreversible and Irretrievable Commitment of Resources. Under section 7(d) of the Act, once a request for formal consultation is made, BLM shall ensure that the agency and any of its applicants do not make any irreversible or irretrievable commitments of resources on public 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 consultation, BLM shall immediately evaluate those 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.

d. 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/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.

e. Draft biological opinion. During formal consultation, the BLM should request a draft copy of the biological opinion and incidental take statement (if applicable) for review to ensure any reasonable and prudent alternative (for a potential jeopardy opinion) is within the scope of BLM's authority, that it can be implemented in a manner consistent with the intended purpose of the proposed action, and is economically and technically feasible; and to ensure that reasonable and prudent measures and their implementing terms and conditions contained in any incidental take statement (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.

- (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 (if applicable, see Glossary) participation in the development of reasonable and prudent alternatives.
- (2) The BLM should forward a copy of the draft biological opinion to any applicant 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 (as defined in .11.E.6.j) comments to the FWS and/or NMFS.
- (4) BLM should ensure any incidental take statement 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. Incidental take statements should comport with Department of the Interior policy as identified by the General Solicitor based on the Ninth Circuit Court Decision in *Arizona Cattle Grower's Association v FWS*; specifically:
  - (a) If there is no reasonable certainty of take, there should be no incidental take statement 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 them, 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 issued for ESA-listed plants, as the Act does not define nor prohibit incidental take for plants.

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

(1) The FWS and/or NMFS issue 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.

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) BLM shall notify 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 exemption, as outlined in .11.E.7.

(2) After acceptance of the biological opinion, 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. BLM shall review conservation recommendations in biological opinions and implement them if they are consistent with BLM land use planning and policy and they are technologically and economically feasible.

(3) The ITS will specify the impact, (i.e. the amount or extent of such incidental take); specify those reasonable and prudent measures that FWS and/or NMFS considers necessary or appropriate to minimize such impact; set forth implementing terms and conditions (including, but not limited to, 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 monitor and report the impact on the species to FWS and/or NMFS.

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

(5) An incidental take statement 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.

(6) With early consultation, the incidental take statement provided with a preliminary 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.

h. Reinitiation. In any of four of the following circumstances, the BLM must reinitiate consultation. 1) If the amount or extent of incidental take is exceeded, consultation must be reinitiated immediately. Otherwise, consultation is reinitiated when: 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 manner that may affect listed species or critical habitat in a manner not considered in the biological opinion; and/or, 4) a new species is listed or critical habitat is designated which may be affected by the action. The State Director or Field Manager of the administrative unit that received the biological opinion shall determine if a reinitiation condition has occurred and if so, shall reinitiate the consultation with the appropriate FWS and/or NMFS office.

i. Plan Level Consultations. For new Land Use Plans, plan revisions, or plan amendments on all BLM administered lands, consultation is required if the BLM determines the plan “may affect” listed species or designated critical habitat.

j. Applicants. 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. 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) BLM responsibilities relative to applicants in the context of early consultation are described in Section .11.E.6.1.(1)

(2) The BLM shall identify and determine who is an applicant for the purposes of ESA consultation. The BLM does not 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.

(3) 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.

(4) 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 time 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 prior to 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. BLM may also involve the applicant in discussions with FWS and/or NMFS to develop reasonable and prudent alternatives to the proposed action in instances where a proposed action is determined to be likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

k. Designation of non-Federal Representative. The BLM may designate a non-Federal representative to conduct informal consultation and/or prepare a biological assessment under 50 CFR Part 402.08. However, the ultimate responsibility for compliance with Section 7 of the ESA remains with the BLM. While there are similarities, a non-Federal representative is not the same as an applicant. A non-Federal representative is designated by the BLM, and may be an applicant, contractor, or other party as appropriate. While 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 BLM must agree on the choice of the designated non-Federal representative.

(3) If an applicant is present, the BLM shall designate the applicant as the non-Federal representative if the BLM line-officer determines that the applicant has sufficient expertise to prepare the BA, and such designation is advantageous to the government.

(4) The BLM can assign the non-Federal representative to prepare the BA, conduct informal consultation, or both. Non-Federal representatives shall not conduct formal consultation beyond preparation of a BA, and shall not subject the BLM to any obligation without specific consent.

(5) 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.

1. Early Consultation. Section 7(a)(3) of the ESA and Secretarial exercise of authority in regulations provides 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, BLM shall:

(1) Receive in writing the prospective applicant’s certification that it has a definitive proposal outlining the action and its effects and 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 of initiating early consultation.

(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 incidental take statement of the preliminary biological opinion as authority to take listed species.

(7) Request in writing to FWS and/or NMFS confirmation of the preliminary biological opinion as the final biological opinion if the BLM feels 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 BLM initiate formal consultation.

m. Consultation timeframes. Timelines for formal consultation can vary with applicant and agency agreement. However, absent any agreement, the regulations are clear in the expectation in completing the consultation process. See 50 CFR 402.12 and 402.14 for regulatory time frames.

7. Exemption. The ESA allows opportunity to apply for an exemption from the requirements of section 7(a)(2). Use of the exemption process is rare.

a. The Director has sole authority to make an application for exemption if the BLM is the exemption applicant.

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.

c. Procedures for applications for exemption are in 50 CFR Part 451.

8. Consultation and Conference Approaches. A number of approaches to improve the efficiency and effectiveness of Section 7 consultation and conference have been utilized in various areas of the BLM. The overall goal is to enhance compliance with obligations under 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 utilize 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, where appropriate. 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. In simplest terms, 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 utilize the information, analysis, and determinations of 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 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 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 program or activity types. This can be done on a quarterly, annual or longer time frame.
- h. Using streamlined processes. Streamlining agreements provide the BLM with alternative ways of meeting their section 7 consultation obligations. Streamlining may provide expedited consultation timeframes for completing consultation. While it is not intended for use at the project level, other multi-state MOA's have been developed to address streamlining processes at this scale. Use of streamlining processes is designed to make the consultation process more efficient. In instances where the intended benefits of streamlining are not being realized, the streamlining process should not be used, and the BLM should follow the standard consultation process.
- i. For large and/or complex actions (e.g., energy corridor, promulgation of regulations, etc.) use consultation agreements to define agency roles, responsibilities, time frames and information requirements needed to complete consultation on the proposed action.
- j. 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 field levels, they should share those effective approaches with other state and Field Offices.

**F. Section 9 (Prohibited Acts).** The BLM shall not allow actions that result in take of endangered animals, threatened animals that have take prohibitions established under section 4(d) of the Act, remove or reduce to possession endangered plants, or violate any regulations pertaining to threatened plants, except as provided for under Section 7(o) or Section 10(a) of the ESA.

- 1. **Plants.** 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.

G. 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.

a. 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):

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

(2) 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: (i) aid a sick, injured or orphaned specimen; or (ii) dispose of a dead specimen; or (iii) salvage a dead specimen which may be useful for scientific study; or (iv) remove specimens which 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.

(3) 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 (i) care for a damaged or diseased specimen; (ii) dispose of a dead specimen; or (iii) salvage a dead specimen which may be useful for scientific study.

2. Experimental Populations.

a. General. FWS and/or NMFS can designate experimental populations of listed plants and animals. These populations can only be released outside the species current range but within its probable historic range if the Secretary determines that such release will further the conservation of the species (with rare exceptions). 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” -Essential to the continued existence of a listed species in the wild.

(2) “Nonessential” -Not essential to the continued existence of a listed species.

b. Management. The BLM shall cooperate and assist in establishment of 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. 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 FWS and/or NMFS.
- (2) Conferencing is required if the action is determined to be 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 recovery of species to the extent BLM management can influence recovery, including 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 FWS and/or NMFS in developing recovery needs for species that may have experimental population designation.

d. Wilderness. In some cases, it is appropriate to transplant and reintroduce listed species into their historic ranges within designated wilderness and wilderness study areas. BLM shall use only the minimum actions necessary and the methods most appropriate for wilderness areas. Further information on guidelines for fish and wildlife is contained in the 2006 AFWA, 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.

H. 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.

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

J. Activities for which BLM has no discretion. Some activities that involve BLM may not require BLM approval, and therefore are not subject to BLM consultation under section 7 (e.g. reciprocal road rights-of-way in Oregon O&C counties, patenting of mining claims, mining notices pursuant to the 3809 regulations (under 5 acres) etc.). Illegal and prohibited actions (e.g., trespass) are non-discretionary, and therefore not subject to consultation. If an action is not authorized, funded, or

carried out by BLM, or BLM no longer retains discretionary authority over the activity, including revocation of authorization, it is considered to be non-discretionary with respect to the ESA and BLM is not responsible for conducting a Section 7 consultation. However, provisions of the ESA may be applicable to the person or persons involved with the activity. In such situations, BLM's responsibilities are as follows.

1. If BLM has reason to believe a non-discretionary activity involving BLM administered lands may affect listed or proposed species, BLM should notify the person or persons involved of the possible conflict with the ESA.
2. Although non-discretionary actions are not subject to consultation under section 7, to whatever degree that the BLM can affect the manner in which such actions are carried out, BLM shall take all actions within its authority allowed or required under regulations, law, and policy that would result in avoiding or minimizing adverse effects on listed or proposed species and designated or proposed critical habitat.
3. If the person or persons involved with the non-discretionary activity wish to develop measures that would eliminate conflicts with the ESA, the BLM shall arrange for the participation of BLM specialists and, if needed, specialists from FWS and/or NMFS during the process of developing such measures.

K. Counterpart Regulations. Counterpart regulations provide the BLM an alternative approach for completing informal section 7 consultation on actions that qualify for use under an Alternative Consultation Agreement (ACA) and are determined to be NLAA. Currently, these regulations are appropriate for use on National Fire Plan projects, and their use may be expanded in the future. 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.

- .12 Administration of BLM Sensitive Species. This section establishes procedures and requirements for the management of species designated by the BLM as sensitive. It is in the interest of BLM to undertake conservation actions for such species before listing is warranted. It is also in the interest of the public and the affected BLM sensitive species for BLM to undertake conservation actions that improve the status of such species to the point where their BLM sensitive recognition is no longer warranted. By doing so, BLM will have greater flexibility in managing the public lands to accomplish native species conservation objectives and other FLPMA mandates.

A. Planning. The BLM should use the best available information to evaluate the status of BLM sensitive species in areas affected by land use plans or other proposed actions and to develop and implement conservation actions and minimize adverse impacts from management activities. Land use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with BLM sensitive species without deferring conflict resolution to implementation-level planning. Implementation-level planning should consider all site-specific methods and procedures needed to bring the species and their habitats to the condition under which management under the BLM sensitive

species category would no longer be necessary.

**B. Implementation:**

1. At the State level, utilize the BLM sensitive species selection criteria (.06.C.1) to develop the State sensitive species list.
2. Develop and implement programs to manage these species and habitats. These programs should include inventory, assessment of condition, development of conservation plans and strategies, project level planning, and implementation and monitoring of actions. Prioritize BLM sensitive species and their habitats for program development based on considerations such as human and financial resource availability, immediacy of threats, and relationship to other BLM priority programs and activities.
3. In absence of conservation strategies, incorporate best management practices, standard operating procedures, conservation measures, and/or design criteria to mitigate specific threats to BLM sensitive species during the planning of activities and projects. Off-site mitigation may be necessary if no alternatives for minimizing impacts are available within the project area. Utilize Land and Water Conservation Funds, as well as other land tenure adjustment tools, to acquire habitats for BLM sensitive species.
4. BLM management should take into consideration ecosystem management and the conservation of native biodiversity to reduce the likelihood that any native species require BLM sensitive species status.
5. For rangelands, the BLM shall take actions that progress towards the conditions indicating attainment of the Fundamentals of Rangeland Health (described in 43 CFR 4180.1) and associated Standards (43 CFR 4180.2). Such actions would include management that restores, protects or enhances those resources necessary to support, as site potential and BLM authorities allow, a full complement of native species in their historical range.
6. 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.

**C. 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 established 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 BLM 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 respective 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 BLM land use plans and describe in sufficient detail management objectives, treatments and means for assessing accomplishment. Where existing land use plans lack specificity, utilize conservation strategies as a means to establish best management practices, standard operating procedures, conservation recommendations, and program priorities. Utilize plan maintenance or plan conformance reviews as a means of integrating conservation strategies into 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.

D. Management of BLM Sensitive Species with the Oregon and California Lands Act (O&C Act). The Ninth Circuit Court of Appeals affirmed in *Headwaters v BLM* (1990) that former Oregon and California Railroad Company Lands in western Oregon assigned timber production as a dominant use. The court affirmed that Congress intended timber production and forest production to be used synonymously, and found nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O&C Act at all. The application of the special status species policy to provide specific protection to species that are listed by the BLM as sensitive must be done in a way that is consistent with the O&C Act and must not conflict with the management of timber resources on O&C 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.

.13 General Cooperation. BLM shall cooperate with other government and non-government agencies to

further the conservation of federally proposed and listed species, and will coordinate with the appropriate agencies on conservation of BLM 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 BLM 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 impact 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 BLM 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 BLM 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 should coordinate with the affected tribes and the Bureau of Indian Affairs on BLM's Section 7 consultations of which it is aware that tribal rights or tribal trust resources may be affected.

g. Consistent with the provisions of the Privacy Act, the Freedom of Information Act, 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 BLM 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 sensitive species and federally proposed and listed species that the BLM feels 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 administration of the ESA. The BLM already has MOU's with several agencies and organizations. Partnerships beyond existing MOU's are encouraged. Partnerships and cooperative relationships should be sought with agencies that include, but are not limited to, 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, Provincial Advisory Boards, and Grazing Advisory Boards.

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

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

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, but not be limited to, 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

### -A-

action: all discretionary activities or programs of any kind authorized, funded, or carried out by BLM in whole or part. Examples include, but are not limited to: (1) actions intended to conserve BLM 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) actions directly or indirectly causing modifications to the land, water, or air.

action area: areas to be affected directly or indirectly by the action, not merely the footprint of the action. For example, noise disturbance resulting from the action may be transmitted beyond the immediate project area.

adversely (adverse) affect: The appropriate conclusion in a biological assessment if a causal mechanism exists within the action 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 risk of “incidental take” resulting from the action is not insignificant, and evidence is present in a logical analysis to support this conclusion to the extent that a reasonable person would agree with the determination. Actions that are “likely to adversely affect” require the initiation of formal consultation. In the case of listed plants, the appropriate scale to evaluate effects to listed plants is at the population level, rather than at the individual level, as incidental taking of individual plants is neither defined nor prohibited by the Act.

advisory recommendations: non-binding recommendations provided by the FWS and/or NMFS during informal consultation, conferences, or as technical assistance on candidate species, proposed species, or proposed critical habitat that assist in minimizing or avoiding effects of proposed actions.

animals: any member of the animal kingdom, including without limitation any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes 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.

applicant: any person who requires formal approval or authorization from BLM as a prerequisite to conducting an action. This can include 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. BLM responsibilities to applicants during formal consultation under section 7 of the ESA are defined in section .11.E.6.j of this manual.

alternative consultation agreement (ACA): An agreement entered into by the FWS and/or NMFS and a Federal action agency(s) to implement counterpart regulations. For example, the FWS and NMFS have an alternative consultation agreement with the BLM that outlines the procedures to be used in implementing the

counterpart regulations for National Fire Plan Projects, as per 50 CFR parts 402.30-34.

**-B-**

batched consultation or batched conference: a single consultation or conference effort and BA on a logical grouping of projects, activities, or programs of a similar nature. Projects, activities, or programs typically should occur in the same watershed, geographic area, and administrative units or have other elements in common. The BA may be interagency (e.g., BLM and FS). The intent is to facilitate the consultation and conference process.

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 BLM's determination of whether any such species or habitat are likely to be adversely affected by the action and as such, is used in determining whether formal consultation or a conference is necessary. Biological assessments must be prepared for "major construction activities."

biological opinion (BO): document which 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.

BLM managed lands: public lands managed by BLM whether they are held in fee title or BLM manages the surface resources, as opposed to 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 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 currently 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 BLM sensitive species.

conference: a process of early interagency cooperation involving informal discussions between a Federal agency and the FWS and/or NMFS pursuant to section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid adverse effects. Conferences are: (1) required for proposed Federal actions likely to jeopardize proposed species, or destroy or adversely modify proposed critical habitat; (2) required for non-essential experimental populations of listed species (3) designed to help Federal agencies identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (4) designed to develop recommendations to minimize or avoid adverse effects to proposed species or proposed critical habitat. The Federal agency can request conferencing procedures be in accordance with the procedures of formal consultation and an opinion

that is completed for the conference could be adopted as a biological opinion at the time the proposed species is listed.

conference opinion: document issued by the FWS and/or NMFS as a result of conference, similar to a biological opinion. The document may be adopted by the FWS and/or NMFS as a biological opinion when the proposed species becomes listed or critical habitat becomes designated if no significant new information is developed and no significant changes to the action are made that would alter the content of the opinion.

conference report: document issued by the FWS and/or NMFS as a result of conference process that includes conclusions and advisory recommendations to the Federal agency and applicant.

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 of the ESA no longer apply. Methods and procedures of conservation include, but are not limited to, 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 BLM sensitive species, the use of programs, plans, and management practices to minimize or eliminate threats from BLM activities affecting the overall condition of the species (including genetic factors, where known), and/or improve the condition of the species habitat.

conservation agreement/strategy: A formal written document agreed to by FWS and/or NMFS or another Federal agency, State agency, local government, or the private sector to achieve the conservation of BLM 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/strategy is to reduce threats to a BLM sensitive species and federally proposed and listed species or its habitat. An effective conservation agreement/strategy may lower species' listing priority or eliminate the need for listing.

conservation plan: Any of a number of formal or informal documents having in common that they outline specific steps to maintain or improve the condition of a species or population, habitat type, or ecosystem.

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. Conservation recommendations are advisory and are not intended to carry any binding legal force.

consultation agreement: An interagency agreement between the action agency(s) and consulting agency that defines agency roles, responsibilities, time frames and information requirements needed to complete consultation on the proposed action.

consultation with tribes: As defined in BLM Handbook H8160-1, the active, affirmative process of (1) identifying and seeking input from appropriate Native American governing bodies, community groups, and individuals and (2) considering their interests as a necessary and integral part of the BLM's decision making process.

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 historic geographic and ecological distributions of a species.

cumulative effects (ESA definition): are those effects of future tribal, State, local or private activities, not involving Federal actions that are reasonably certain to occur within the action area of the Federal action subject to consultation. This definition applies only to section 7 formal consultation analyses and should not be confused with the broader use of this term in the National Environmental Policy Act (NEPA) or other environmental laws.

**-D-**

designated critical habitat: see critical habitat.

destruction or adverse modification: The existing regulatory definition of destruction or adverse modification of critical habitat was invalidated by the 9<sup>th</sup> circuit court of appeals in Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service 378 F.3d 1059. The FWS Director issued interim guidance on December 9, 2004 (which can be found on the FWS website) on the appropriate conduct of the destruction or adverse modification habitat analysis in section 7 consultation, but has not yet revised their regulations at the time of issuance of this manual.

direct effects: Those effects caused by or resulting from the action and are reasonably certain to occur in the same time and place.

discountable effect: effects that have an extremely low probability of occurrence.

discretionary action: Any action in which there is discretionary (i.e., not specifically mandated or defined by statute or ordered by the courts) Federal involvement or control. Examples of actions which the courts have found to be non-discretionary are found at .11.J in this manual.

distinct population segment (DPS): A subdivision of a vertebrate species 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-**

early consultation: a component of the consultation process that has been requested by the Federal agency on behalf of a prospective applicant after it has been determined that the proposed action may affect listed species or designated critical habitat.

effects of the action: Effects of the action refers to the direct and indirect effects of an action on the species and/or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. These effects can include both adverse and beneficial effects. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Direct effects are those effects caused by or resulting from the action and are reasonably certain to occur at the same time. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those 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.

endangered species: means any species which 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.

Environmental baseline (also baseline): The environmental baseline is the condition of a species or critical habitat at a specified point in 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 included as part of the baseline. Federal actions need not be included in the baseline analysis if alternatives have been implemented that remove all adverse effects. The baseline is utilized by the FWS and/or NMFS in their analysis of jeopardy and is not required for the action agencies' effects determination for the proposed Federal action in the biological assessment.

experimental populations: an introduced population (including any offspring arising solely therefrom) that has been so designated in accordance with the procedures of 50 CFR Subpart H Section 17.80 but only when, and at such times as, the population is wholly separate geographically from non-experimental populations of the same species. Where a part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g. fixed migration patterns, natural, or manmade barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

essential experimental population: an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.

nonessential experimental populations: those populations whose loss would not appreciably affect the continued existence of the species.

evolutionarily significant unit (ESU): A Pacific salmonid stock that is substantially reproductively isolated from other stocks of the same species and which 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. 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 done as a forerunner to preparation of a conservation strategy or agreement.

**-I-**

incidental take: see take.

incidental take statement (ITS): Under the ESA, a document that accompanies a biological opinion where some incidental take of listed species is reasonably certain to occur. Such take would not rise to the 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.

indirect effects: see effects.

informal consultation: a component of the consultation process that includes all discussions, correspondence, etc., between the FWS and/or NMFS and the BLM agency 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.

interdependent action: see effects.

interrelated action: see effects.

insignificant effect: an impact that may be measurable on habitat, but can't be translated into any meaningfully measurable or observable effect on species.

**-J-**

jeopardize the continued existence of (also jeopardize, cause jeopardy to): engage in an action which 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 reproduction, numbers, or distribution of a listed species.

**-L-**

listed species: Species that are designated under the ESA as either threatened or endangered.

**-M-**

major construction activity: a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in NEPA. These include dams, buildings, pipelines, roads, water developments, channel improvements, dredging, blasting, and other such undertakings which significantly modify the physical environment.

may affect: the conclusion that a proposed action may pose either a beneficial or adverse effect on listed species or designated critical habitat.

mitigation (off-site): compensating for resource impacts by replacing or providing substitute resources or environments away from the project area.

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, but not limited to, 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 currently occurs in that ecosystem.

**-P-**

person: an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, or any State or political subdivision thereof, or of any foreign government.

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

preliminary biological opinion: an opinion issued by the FWS and/or NMFS as a result of early consultation.

programmatic consultation: consultation addressing an agency's multiple actions on a program, regional or other basis.

proposed critical habitat: habitat proposed in the Federal Register to be designated as critical habitat under Section 4 of the Endangered Species Act.

proposed species: Species proposed in the Federal Register to be listed under Section 4 of the ESA.

**-R-**

reasonable and prudent alternatives (RPA): those alternatives identified during consultation 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.

recovery: improvement in the status of listed species to the point at which the measures provided by the ESA are no longer necessary.

request for technical assistance: communication with the FWS and/or NMFS concerning actions that will potentially have an adverse effect on a 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, the reasons the species is designated as a candidate species, and their recommendations on how the proposed management action might be carried out without contributing to the further deterioration of the species habitat.

**-S-**

species: any species or subspecies (and in the case of plants, any varieties), and any distinct population segment or evolutionarily significant unit of any species of vertebrate fish or wildlife which 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 BLM sensitive species category.
- (E) BLM sensitive species - those designated by a State Director within his or her respective state using the following criteria. For species inhabiting multiple states, State Directors will coordinate with one another and the Washington Office in the designation of BLM sensitive species, so that species status is consistent across the species' range on BLM administered lands, as appropriate.
  - 1. All federally designated candidate species.
  - 2. All other native species, regardless of designated status as defined by other sources such as Natureserve, State Listings, State Heritage Programs; that meet the following criteria:
    - (a) The relative importance of BLM administered lands is such that changes in populations on such lands would result in significant changes in the overall range wide species population, and either:
      - (1) There must be information that a species is undergoing, or has recently undergone, a significant downward trend, such that survival of the species in all or a significant portion of its range is at risk, or
      - (2) Must depend upon ecological refugia, or specialized or unique habitats on BLM administered lands.

special status species: Collectively, listed, proposed, and BLM sensitive species.

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 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 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 NMFS means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which 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 which include, but are not limited to, breeding, feeding or sheltering

tribes (Indian tribes): any federally recognized Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of federally recognized tribes maintained by the Bureau of Indian Affairs.

(A) tribal trust resources: those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(B) tribal rights: those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(C) Indian lands: any lands title to which is either 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

**-W-**

wildlife: see animals.