Application of the Endangered Species Act to proposals for access to non-federal lands across lands administered by the Bureau of Land Management and the Forest Service

Effective immediately, the following applies to proposals for access to non-federal land across federal land administered by the Bureau of Land Management (BLM) and the Forest Service (FS) (hereinafter referred to as "federal land").

Not all proposals for access to non-federal land across federal land (hereinafter "rights-of-way" or "ROW") are the same. Application of the ESA to a ROW proposal depends on the discretion available to BLM and the FS under applicable statutory ROW authorities and on the nature of legal rights held by the applicant. If BLM or the FS has a mandatory duty to issue a ROW with no discretion under applicable law, no consultation is required under the ESA. This does not affect the applicability of other provisions of the ESA or other federal or State laws protecting species and habitat.

When BLM or the FS has discretionary authority to issue or condition a ROW, the agency must determine whether the proposed federal action "may affect" listed species or designated critical habitat. If a "no effect" determination is made, ESA compliance is complete. This finding should be placed in the record and processing of the application may continue in accordance with agency authority.

When the BLM or the FS cannot make a "no effect" determination, the agencies will consult either formally or informally with the Fish and Wildlife Service and/or the National Marine Fisheries Service (the "Service") when considering whether to authorize access to private lands across public land. The following applies during such consultation:

* The "proposed federal action" is the authorization of access across federal land and includes the location and method of access, e.g., the character of the road, where it will lie, the method of road building and the use of the right of way. The proposed federal action does not include any private action on private land.

* The "action area" is the area that will be affected directly or indirectly by the proposed action.

* The "effects of the action" are the direct and indirect effects to the species caused by the access across federal lands. Indirect effects are those effects to the species that are caused by the proposed action, are later in time, and are reasonably certain to occur.

* "Reasonably certain to occur" requires existence of clear and convincing information establishing that an effect that will be caused by the proposed action is reasonably certain to occur. This is a rigorous standard; it is not based on speculation or the mere possibility that effects to the species may occur. Nor is this a forseeability standard as is commonly used in NEPA analysis. If no such information exists, or is speculative or not credible, then that effect is not reasonably certain to occur and should be disregarded. In no event should a conclusion be reached that some effect is reasonably certain to occur absent clear and convincing information to support that finding in the record.

* A finding that an "indirect effect" is "caused by a federal proposed action" requires an actual cause-effect relationship between the proposed federal action to authorize access across federal land and the effect to the species. When the authorization of access is essential in causing an effect to the species, the effect should be viewed as an indirect effect subject to consultation if it is reasonably certain to occur. If the authorization of access is not essential in causing an effect to the species, but merely facilitates such an effect, then it is not an effect subject to consultation. Consequently, the effect to a species from subsequent action on non-federal land that is facilitated, but not actually caused by the authorization of access, is not an effect of the proposed federal action.

Informal consultation may result in a determination by the BLM or the FS that the proposed federal action "may affect, is not likely to adversely affect" listed species or critical habitat, with written concurrence from the Service in this determination. As a part of this process, the BLM and the FS may suggest modifications to the proposed action the applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat, but these suggestions must be limited to the federal action itself – the right-of-way across federal lands. The modification or regulation of activities on private lands is not authorized unless the applicant requests the consultation to include activities on private land, as discussed below. Written concurrence of the Service terminates the consultation process and no further action is necessary. This finding and concurrence should be placed in the record and processing of the application may continue in accordance with agency authority.

A finding of "may affect, likely to adversely affect" requires formal consultation. Formal consultation resulting in a no jeopardy conclusion may include discretionary conservation recommendations. Conservation recommendations must be limited to the proposed federal action itself – the right-of-way across federal lands. Recommendations with regard to activities on non-federal lands are not authorized unless the applicant requests that the consultation include activities on non-federal land, as discussed below.

Formal consultation resulting in a finding of jeopardy or likely to adversely modify designated critical habitat includes the Service's recommendation of "reasonable and prudent alternatives" unless there are no reasonable and prudent alternatives. The Service is required to utilize the expertise of BLM, the FS and the applicant in identifying these alternatives. Alternatives must be consistent with the intended purpose of the proposed federal action and within the scope of the BLM's or FS's legal authority.

Jeopardy and no jeopardy determinations also will include a statement concerning incidental take if take is anticipated. An incidental take statement includes reasonable and prudent measures the Service considers necessary or appropriate to minimize the impact of incidental take. Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes. Further, both the reasonable and prudent measures and the terms and conditions must serve the purpose of minimizing the take of the proposed federal action under consideration. BLM and FS authorities and the nature of the "action" itself also will affect the reasonable and prudent measures and terms and conditions that may be a part of an incidental take statement.

An applicant has a right to receive an incidental take statement, with reasonable and prudent measures, if take is anticipated from the access itself. The applicant also may desire to include reasonable and prudent measures in the incidental take statement for take resulting from activities on non-federal land. If the applicant requests an incidental take statement for take resulting from activities on non-federal lands, the activities on non-federal land may be analyzed in the section 7 consultation for the access application. If the applicant chooses to be covered through the section 7 consultation, then the incidental take statement can include reasonable and prudent measures related to activities on non-federal land. If the applicant abides by these measures, the applicant has ESA coverage for any associated take. If the applicant chooses not to include activities on non-federal land, then there is no ESA coverage from the access consultation for any take associated with those activities.

Except when requested by the applicant, the consultation process associated with the proposed federal action to authorize access across federal land may not be used to condition activities on non-federal land. BLM and the FS may not deny or condition access across federal lands based on the implementation of measures or conditions related to the use of non-federal land. Further, the Service may not request re-initiation of consultation based on subsequent activities on non-federal land.

Consultation also includes consideration of the destruction or adverse modification of critical habitat. For this purpose, only habitat formally designated as "critical habitat" by a Service rule making is included. Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. The concept of "take" does not apply to critical habitat, but only to the listed species itself.

Approved by:

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1/27/03
Date

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Jan 13, 2003
Date

Steven A. Williams, Director
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1/17/03
Date

William T. Hogarth, Assistant Administrator for Fisheries
National Marine Fisheries Service
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1/30/03
Date