# United States Department of the Interior

**FISH AND WILDLIFE SERVICE**
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July 10, 2008
File Nos. 84320-2008-F-0078,
84320-2008-I-0079 and
84320-2008-TA-0080

Memorandum

To: District Manager, Ely District Office, Bureau of Land Management, Ely, Nevada

From: Field Supervisor, Nevada Fish and Wildlife Office, Reno, Nevada

Subject: Programmatic Biological Opinion, Informal Consultation, and Technical Assistance for Implementation of Actions Proposed in the Ely Proposed Resource Management Plan, Lincoln, White Pine, and Portions of Nye Counties, Nevada

The attached programmatic biological opinion (Attachment 1, File No. 84320-2008-F-0078) is based on our review of programmatic activities proposed for implementation by the Bureau of Land Management (BLM), as described in your October 2007 biological assessment (BA; BLM 2007a), in accordance with section 7 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) and potential effects on:

- the threatened Mojave desert tortoise (*Gopherus agassizii*) and its designated critical habitat;
- the threatened Big Spring spinedace (*Lepidomeda mollispinis pratensis*) and its designated critical habitat;
- the endangered White River springfish (*Crenichthys baileyi baileyi*) and its designated critical habitat;
- the endangered Pahrump poolfish (*Empetrichthys latos*); and
- the endangered southwestern willow flycatcher (*Empidonax traillii extimus*).

BLM, in coordination with the Service, determined that implementation of activities associated with at least one program may result in adverse effects to the five species identified above (Table 1). The effects determination in Table 1 changed from the effects determination identified in the BA as a result of discussions of the proposed action between BLM and Service. In addition to formal consultation, BLM requested informal consultation (File No. 84320-2008-I-0079) and our concurrence that implementation of programs identified in Table 1 for informal consultation, *may affect but are not likely to adversely affect* the five species identified above.

The Programmatic Informal Consultation is included as Attachment 2. Further, BLM determined their proposed action would result in *no effect* to the endangered Hiko White River springfish (*Crenichthys baileyi grandis*), endangered Pahranagat roundtail chub (*Gila robusta jordani*), endangered White River spinedace (*Lepidomeda albivallis*), threatened Railroad Valley springfish (*Crenichthys nevadae*), and threatened Ute lady's tresses (*Spiranthes diluvialis*).

**Table 1. BLM's effects determination by program for species included in this consultation[1]**

| PROGRAM | Desert Tortoise | Critical habitat | Big Spr. Spinedace | Critical Habitat | White R. Springfish | Critical Habitat | Pahrump Poolfish | SW Willow Flycatcher |
|---|---|---|---|---|---|---|---|---|
| Vegetation Management | F | * | I | N | N | N | I | F |
| Special Status Species | N | N | F | * | N | N | F | N |
| Weed Management | F | * | F | * | F | * | I | F |
| Wild Horse Management | I | N | N | N | N | N | N | I |
| Lands, Realty, and Renewable Energy | F | * | N | N | I | N | N | F |
| Travel and Off-Highway Vehicle Management | F | * | I | N | F | * | I | F |
| Recreation | F | N | N | N | F | * | I | F |
| Livestock Grazing Management | F | * | F | * | N | N | F | F |
| Geology and Mineral Extraction | F | * | I | N | N | N | N | F |
| Fire Management | F | * | F | * | F | * | F | F |
| Special Designations | N | N | N | N | N | N | N | N |

[1]Effects determinations presented here were modified from those presented in the BA, following discussions between BLM and the Service.

F = *may affect, likely to adversely affect* (formal consultation, biological opinion)
I = *may affect, not likely to adversely affect* (informal consultation); includes beneficial effects
N = *no effect* (no further consideration) or beneficial effects incorporated into other programs
* = adverse effects to critical habitat anticipated

The decisions in the Special Designations program provide net benefits to listed species or offset the potential effects of other programs. BLM's proposed Watershed Management Program included two decisions, neither of which would result in effects to listed species not described in other programs. Implementation of BLM's Forest/Woodland and Other Plant Products Program is not anticipated to result in effects to listed species. With the exception of potential harvest of seed and desert vegetation, most actions under this program would occur outside listed species habitats. If BLM identifies or proposes a future action under the Forest/Woodland and Other

Plant Products Program that may affect listed species, the Service shall be contacted to determine the appropriate consultation action.

The attached biological opinion does not rely on the regulatory definition of "destruction or adverse modification" of critical habitat at 50 CFR 402.02. Instead, we have relied upon the statutory provisions of the Act to complete the following analysis with respect to critical habitat.

The attached biological opinion, informal consultation, and technical assistance are based on information provided by BLM including the October 2007 BA (BLM 2007a); June 11, 2007, memorandum from the Service to BLM providing comments on the draft BA; references cited; draft Service guidance for programmatic biological opinions (Service 2003); discussions between the Service and BLM staff; and our files. Other information provided by BLM includes the November 2007 Ely Proposed Resource Management Plan and Final Environmental Impact Statement (RMP/Final EIS; BLM 2007b); and correspondence identified in the Consultation History of the attached biological opinion. A complete administrative record of this consultation is on file in the Nevada Fish and Wildlife Office in Las Vegas.

The Service anticipates that future BLM actions that may adversely affect the desert tortoise, Big Spring spinedace, White River springfish, Pahrump poolfish, or southwestern willow flycatcher will be appended to the biological opinion in accordance with Service guidance for programmatic formal consultations.

BLM also requested technical assistance (File No. 84320-2008-TA-0080) for the bald eagle (*Haliaeetus leucocephalus*), western yellow-billed cuckoo (*Coccyzus americanus occidentalis*), western burrowing owl (*Athene cunicularia hypugaea*), greater sage grouse (*Centrocercus urophasianus*), pygmy rabbit (*Brachylagus idahoensis*), Meadow Valley Wash speckled dace (*Rhinichthys osculus* ssp.), Meadow Valley Wash desert sucker (*Catostomus clarki* ssp.), Southwestern toad (*Bufo microscaphus*), banded Gila monster (*Heloderma suspectum cinctum*), and Sunnyside green gentian (*Frasera gypsicola*). Through technical assistance, the Service provides management recommendations to address potential effects to these species of concern. Our technical assistance memorandum is included in Attachment 3.

If we can be of any further assistance, please contact Janet Bair in the Nevada Fish and Wildlife Office in Las Vegas, at (702) 515-5230.

Jacky E. Brown
for Robert D. Williams

Attachments

## D. Programmatic Reasonable and Prudent Measures with Terms and Conditions

The Service believes that the following reasonable and prudent measures (RPMs) with terms and conditions stated below or incorporated by reference are necessary and appropriate to minimize the incidental take for ongoing actions and may be relevant for future actions to be appended to this biological opinion. In order to be exempt from the prohibitions of section 9 of the Act, BLM must comply with RPMs as implemented by terms and conditions. For future actions to be appended to this biological opinion, terms and conditions will be provided at the project-level consultation and are non-discretionary. Terms and conditions will be based on measures proposed by BLM in this document and the October 2007 BA to minimize the potential impacts to desert tortoise, Big Spring Spinedace, White River Springfish, Pahrump poolfish, and southwestern willow flycatcher. **These measures below may not apply to all future actions; they may apply with modification; and/or additional measures may be required when specific actions are proposed for appendage to this programmatic biological opinion. Where proposed measures or decisions vary from measures in this biological opinion, measures in this biological opinion shall take precedence.**

All species

**RPM** 1. BLM shall implement measures to ensure **compliance** with the reasonable and prudent measures, terms and conditions, project reporting requirements, and reinitiation requirements contained in this biological opinion.

**Terms and Conditions:**

1.a. BLM shall keep an up-to-date log of all actions taken under this consultation including acreage affected; number of listed species taken and form of take; and fees paid for each action. BLM will provide the log information to the Service on an annual basis. Information will be cumulative throughout the term of this consultation. The first annual report will cover the period through December 31, 2008, and will be due to the Service by February 15, 2009. Subsequent annual reports will cover the calendar year and be due on February 15 of the following year.

Desert tortoise

**RPM 2:** BLM shall implement measures to minimize the incidental take of desert tortoises that may result from **implementation of all programs**.

**Terms and Conditions:**

2.a. Prior to initiation of an activity within desert tortoise habitat, a desert tortoise awareness program shall be presented to all personnel who will be onsite,

including but not limited to contractors, contractors' employees, supervisors, inspectors, and subcontractors. This program will contain information concerning the biology and distribution of the desert tortoise and other sensitive species, their legal status and occurrence in the project area; the definition of "take" and associated penalties; speed limits; the terms and conditions of this biological opinion including speed limits; the means by which employees can help facilitate this process; responsibilities of workers, monitors, biologists, etc.; and reporting procedures to be implemented in case of desert tortoise encounters or non-compliance with this biological opinion.

2.b. Tortoises discovered to be in imminent danger during projects or activities covered under this biological opinion, may be moved out of harm's way.

2.c. Desert tortoises shall be treated in a manner to ensure that they do not overheat, exhibit signs of overheating (*e.g.*, gaping, foaming at the mouth, *etc.*), or are placed in a situation where they cannot maintain surface and core temperatures necessary to their well-being. Desert tortoises will be kept shaded at all times until it is safe to release them. No desert tortoise will be captured, moved, transported, released, or purposefully caused to leave its burrow for whatever reason when the ambient air temperature is above 95°F. Ambient air temperature will be measured in the shade, protected from wind, at a height of 2 inches above the ground surface. No desert tortoise will be captured if the ambient air temperature is anticipated to exceed 95°F before handling and relocation can be completed. If the ambient air temperature exceeds 95°F during handling or processing, desert tortoises will be kept shaded in an environment that does not exceed 95°F and the animals will not be released until ambient air temperature declines to below 95°F.

2.d. Desert tortoises shall be handled by qualified individuals. For most projects, an authorized desert tortoise biologist will be onsite during project activities within desert tortoise habitat. Biologists, monitors, or anyone responsible for conducting monitoring or desert tortoise field activities associated with the project will complete the Qualifications Form (Appendix D) and submit it to the Service for review and approval as appropriate. The Service should be allowed 30 days for review and response.

2.e. A litter-control program shall be implemented to minimize predation on tortoises by ravens drawn to the project site. This program will include the use of covered, raven-proof trash receptacles, removal of trash from project areas to the trash receptacles following the close of each work day, and the proper disposal of trash in a designated solid waste disposal facility. Appropriate precautions must be taken to prevent litter from blowing out along the road when trash is removed from the site. The litter-control program will apply to all actions. A litter-control program will be implemented by the responsible federal agency or their

contractor, to minimize predation on tortoises by ravens and other predators drawn to the project site.

**RPM 3:** BLM shall implement measures to minimize the incidental take of desert tortoises that may result from **habitat disturbing activities**, including mineral extraction activities and activities authorized by BLM on rights-of-way.

**Terms and Conditions:**

3.a. BLM shall implement measures in the RMP/Final EIS, proposed for Special Status Species (**SS**), Lands and Realty (**LR**), Renewable Energy (**RE**), and Geology and Mineral Extraction (**MIN**) unless modified below or at the project-level consultation.

3.b. Prior to vehicle and equipment travel on a right-of-way or project area, authorized biologists shall survey for desert tortoises and their burrows using Service-approved protocols unless determined to be unnecessary by the Service at the project-level consultation. Timing of the survey will be determined at the project-level consultation. All potential desert tortoise burrows will be examined to determine occupancy of each burrow by desert tortoises in accordance with Service-approved protocol.

3.c. Companies controlling new road segments shall be required to restrict access to the general public. This restriction could be in the form of closed gates and will not apply to authorized agents of the operator or their subcontractor(s), the land managing agency, and other agencies with a legitimate access need.

3.d. When a permitted or approved activity, including unauthorized disturbances such as may occur during OHV events, results in residual impacts to desert tortoise habitat, remuneration fees shall be required. The fee rate will be determined during the NEPA process for each proposed action. Fees for disturbance of desert tortoise critical habitat will be calculated according to the formula identified in the document, Compensation for the Desert Tortoise (Hastey *et al.* 1991). The section 7 fees will be indexed for inflation based on the Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (CPI-U) and becomes effective March 1 of each year. Information on the CPI-U can be found on the internet at: http://stats.bls.gov/news.release/cpi.nws.htm.

3.e. Prior to starting operations each day on any project that is not totally enclosed by tortoise-proof fencing and cattleguards, the project proponent shall be responsible for conducting a desert tortoise inspection by authorized desert tortoise biologists using techniques approved by the Service and BLM. The inspection will determine if any desert tortoises are present in the following locations:

- Around and under all equipment;
- In and around all disturbed areas to include stockpiles and reject materials areas;
- In and around all routes of ingress and egress; and
- In and around all other areas where the operation might expand to during that day.

If a tortoise is discovered during this inspection or later in the day, the operator will immediately cease all operations in the immediate vicinity of the tortoise and will immediately notify BLM authorized officer.

3.f. Within desert tortoise ACECs: Mineral exploration shall be allowed only on existing roads and trails unless a route can be identified that results in no substantial habitat disturbance as determined at the project-level consultation. All proposed surface disturbance and vehicular travel will be limited to the approved operation plan and access route. Upon determination of an impending field development, a transportation plan will be prepared and submitted to the Service for activity-level consultation. No blading or other dirt work will be allowed without prior approval of BLM authorized officer. An authorized biologist will monitor cross-country travel for tortoise and will move them as needed.

3.g. Drilling fluids and cuttings shall be contained in portable mud pits or lined reserve pits in all operations.

3.h. Vibriosis, drill hole shot, or surface shot shall not be completed within 100 yards of known tortoise burrows.

3.i. No surface activity for fluid minerals leasing shall be allowed within desert tortoise habitat from March 1 to October 31 without concurrence from the Service.

3.j. Upon completion or temporary suspension of mining operations, the project proponents shall backfill all holes and trenches and re-contour the pit to the natural slope, if possible, with pit walls greater than 3 feet in height knocked down and sloped at 3 horizontal to 1 vertical or to the original topography, whichever is less.

3.k. BLM will include stipulations for future rights-of-way grants, renewals, and amendments for towers authorized under this biological opinion to require that structures be inspected annually for nesting ravens and observations of raven nests. All nests shall be reported to the Service. The right-of-way grantee will

cooperate with the Service to discuss the necessity to remove any nests determined by the Service to threaten tortoise populations in the area.

**RPM 4:** BLM shall implement measures to minimize the incidental take of desert tortoises that may result from **travel, OHV, and recreation management**.

**Terms and Conditions:**

4.a. BLM shall implement measures in the RMP/Final EIS, proposed for Travel Management and OHV Use (**TM**) and Recreation Management (**REC**) unless modified below or at the project-level consultation.

4.b. Desert washes shall be managed as avoidance areas for OHV activity.

4.c. Until site-specific implementation plans and route designations are complete, motorized travel shall be limited to existing roads and trails except when cross-country travel is needed for safety, required for government (federal, state, and local) administrative needs, as authorized on a permit, for big game retrieval, or as otherwise officially approved. Upon completion of route designations, BLM will produce a map depicting the designated roads, primitive roads, and trails post it on a BLM website. A printed map will be available for the public at BLM offices as soon as funding is available and printed copies have been made..

4.d. Establishment of new permanent roads and trails shall be avoided in desert tortoise habitat. New access routes may be allowed outside desert tortoise critical habitat if BLM and the Service determine that the road is compatible with tortoise conservation efforts.

4.e. Event routes shall be designated and additional measures developed at the activity level. Habitat disturbed by event-related vehicles will require remuneration fees in accordance with Hastey *et al.* 1991.

4.f. For all events: Any desert tortoise found on or adjacent to the event course shall be temporarily penned if in a burrow or moved into undisturbed desert within 2 miles by a authorized tortoise biologist or BLM personnel experienced or trained in the handling of tortoises, according to current Service-approved protocol. Currently, the Service-approved protocol is "Guidelines for Handling Desert Tortoises during Construction Projects (Desert Tortoise Council 1994, revised 1999)."

Occupied desert tortoise burrows along the event route during a period of reduced tortoise activity (*e.g.,* winter), may be temporarily penned to ensure the tortoise is confined to the burrow and immediate area. Tortoises should not be penned in