



## United States Department of the Interior



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Memorandum

To: State Supervisor, Nevada Fish and Wildlife Office, Reno, Nevada

From: Penelope Dunn Woods, Project Manager, Nevada Groundwater Projects Office,  
Bureau of Land Management, Reno, Nevada *dwoods*

Subject: BLM Response to Conservation Recommendations Provided in the Final  
Biological Opinion for Consultation Pursuant to Section 7 of the Endangered  
Species Act and 50 CFR 402.14 for the Clark, Lincoln, and White Pine Counties  
Groundwater Development Project

The U.S. Fish and Wildlife Service (Service) submitted the Final Biological Opinion (BO) for the Southern Nevada Water Authority (SNWA) Clark, Lincoln, and White Pine Counties Groundwater Development (GWD) Project on November 19, 2012. The BO provided Terms and Conditions for desert tortoise (Chapter 6), which will be included in full in the BLM Record of Decision (ROD) as conditions of the right-of-way (ROW). Also included in the BO were several Conservation Recommendations (contained mainly in Chapter 15, with some additional Recommendations specific to desert tortoise provided in Chapter 6). These Conservation Recommendations are discretionary, meaning the Bureau of Land Management (BLM) may review them and determine if they warrant being carried forward.

Per the Service's Endangered Species Consultation Handbook (March 1998) and 50 CFR 402.02, Conservation Recommendations are "non-binding suggestions that: 1) identify discretionary measures a Federal agency can take to minimize or avoid the adverse effects of a proposed action on listed or proposed species, or designated or proposed critical habitat; 2) identify studies, monitoring, or research to develop new information on listed or proposed species, or designated or proposed critical habitat; and 3) include suggestions on how an action agency can assist

species conservation as part of their action and in furtherance of their authorities under section 7(a)(1) of the Act.” The Service’s Handbook also states that these recommendations are “never a precondition for a subsequent finding of ‘no jeopardy’ or to reduce the impacts of anticipated incidental take.”

Conservation Recommendations that are carried forward by the BLM are typically presented as a refinement to an existing mitigation measure already described in the Environmental Impact Statement (EIS), or as a new mitigation measure. This particular project is unique in that the BLM is taking a tiered approach (described in Sections 1.3.6 and 1.3.7 of the Final EIS). Under this approach, the BLM will be completing future environmental compliance documents under the National Environmental Policy Act (NEPA) for this project. Coordination with the project proponent, interagency partners, and the public will be on-going as the BLM moves forward with Tier 1 and subsequent tiers of the project. The BLM has decided to use a Construction, Operation, Maintenance, Monitoring, Management, and Mitigation (COM) Plan process for these coordination efforts. The framework of this process is provided in Chapter 3.20 of the Final EIS. Since many of the Conservation Recommendations provided by the Service are relevant to future tiers of the project, the BLM has also identified the COM Plan process as an appropriate vehicle to carry forward some Conservation Recommendations.

Both approaches to carrying forward a Conservation Recommendation (through mitigation or through the COM Plan process) will be terms and conditions of the ROW. In other words, when BLM chooses to carry forward a Conservation Recommendation, it is done so as a requirement of the ROW that the project proponent must adhere to. The BLM considered several factors when determining whether Conservation Recommendations would become conditions of the ROW. These considerations include:

- Adequately addressed in an existing document: Is the concern being expressed in the recommendation already addressed in an existing document, such as the EIS or ROD?
- Appropriateness as a condition of the ROW: Is the recommendation appropriate to carry forward as a condition of the ROW, or is it more appropriately addressed through a different process (e.g., BLM land use planning, FWS listing review process)?
- Jurisdiction: Is the recommendation consistent with BLM jurisdiction? Is the recommendation asking BLM to release its authority to another agency, or is it asking BLM to enforce actions outside of BLM’s jurisdiction?
- Connection to the project: Is there a distinct connection between the measure and potential impacts of the project? Does the recommendation need to be adopted as a response to potential project impacts, or is action something the agency would need to complete even if the project did not occur?
- Reasonableness and feasibility: Is the measure a reasonable and feasible method of addressing the impact (considering the time, effort, and cost compared to the benefit received)?

For this project, the BLM also considered the specificity of the Conservation Recommendation. In a tiered process, it is appropriate to defer detailed consideration for those issues not yet ripe for analysis due to uncertainty or lack of sufficiently detailed description of the proposed development. By deferring identification of the specific details the BLM will be able to tailor the measures to best address the impacts by: 1) using information gathered for the subsequent analyses, 2) utilizing the interagency process to benefit from the expertise of other agencies and governments, and 3) considering information provided by the public during scoping and EIS comment periods. The BLM has established the COM Plan framework, which documents the BLM's intent with respect to how future tiered analyses will be conducted and what will be expected of BLM, SNWA, and interagency partners. The BLM has also developed mitigation and monitoring related to impacts from future tiers of the project. These have been developed based on a conceptual understanding of future project components, and are therefore objective-based with the understanding and commitment that the details will be defined when future project components are known. Conservation Recommendations that offered specific suggestions related to these future tiers were therefore evaluated to determine if the *objective* has been adequately addressed.

Since these Conservation Recommendations are discretionary, the BLM need not address them with any formality; however, the BLM is providing this response letter to document how the Conservation Recommendations were used within our decision.

## CONSERVATION RECOMMENDATIONS CARRIED FORWARD

### *Refined Mitigation*

Some Conservation Recommendations provided by the Service resulted in the refinement of existing mitigation measures presented in the Final EIS (none resulted in the need to introduce new mitigation). Some of these refinements offered clarity (such as changing the title of measure **GW-VEG-4** to clarify the intent). Others, however, provided changes that made the measure more valuable, especially with regard to the section 7 process:

- A common theme the BLM recognized in reviewing the Conservation Recommendations was the suggestion to add a requirement to complete certain measures prior to the initiation of ESA section 7 consultation, the goal being that the data collected would inform the ESA analysis. The BLM accepted this Conservation Recommendation for mitigation measures **GW-WR-3a**, **GW-VEG-3**, and **GW-VEG-4**. The text was changed to read "Prior to completion of subsequent NEPA..." This would allow for the monitoring plans called for under these measures to be completed in time for the ESA analysis to consider the specific information and commitments provided for in the plans, while at the same time allowing flexibility for the plans to be written in consideration of information learned during the NEPA and informal ESA consultation processes.
- The BLM also refined mitigation measure **ROW-WR-3** regarding Construction Water Supply. The language in this measure was improved to address potential impacts to

listed species and their habitats from construction water usage. This concern was not identified in a Conservation Recommendation; the Service brought this concern to the attention of the BLM through consultation discussions. It did, however, result in the refinement of a mitigation measure, which we felt was worthy of discussion here.

- Several Conservation Recommendations offered suggestions to identify specific locations where monitoring will be required under mitigation measures **GW-MN-AB-1**, **GW-MN-AB-2**, and **GW-MN-AB-3**. The measures have been updated to include a list of locations where monitoring will be required, and the language also allows for additional sites to be included if identified during the interagency process. The Conservation Recommendations also offered specific details addressing how monitoring should be accomplished; these details will be defined through the interagency process and therefore did not result in a refinement to the mitigation measures.
- Mitigation measure **GW-VEG-5** was updated to include language that new occurrences of Ute ladies'-tresses found during monitoring efforts will be reported to the Service and the appropriate State natural heritage program.

The language for all refined mitigation measures will appear in the ROD.

The Conservation Recommendations that have been addressed, either partially or in whole, through refinement of mitigation measures are: **COMM-5; COMM-H11; COMM-H12; COMM-H13; COMM-H14; COMM-H16; WRS-1; WRS-H6; WRS-H7; WRS-H8; WRS-H9; PP-1; PP-3; PP-4; PP-H7; PRC, WRSF, SWF-H5, SWFL-2; SWFL-H3; SWFL-H5; ULT-1; ULT-6; ULT-H8; ULT-H9; ULT-H10; ULT-H11.**

### ***COM Plan Process***

Some Conservation Recommendations provided by the Service resulted in changes to the language provided in the COM Plan framework. These changes added clarity to the process, solidified the BLM's intentions, and addressed future coordination within the COM Plan process given the unique role of the Service relative to the ESA, Migratory Bird Treaty Act (MBTA), and Bald and Golden Eagle Protection Act (BGEPA):

- Some Conservation Recommendations requested that BLM coordinate or seek input from the Service related to certain decisions. The Final EIS provides a framework for the COM Plan (Section 3.20), which already addresses many aspects of these Conservation Recommendations. For example, the framework provides a commitment by the BLM to coordinate with other agencies/governments and to solicit interagency input on various documents and information needs. With respect to the Service's unique role, the COM Plan framework presented in the Final EIS provided a statement that the BLM would coordinate with the Service relative to listed species. The BLM also added language to the COM Plan process to clarify that the BLM, prior to approval, will coordinate with the Service regarding elements of the Plan of Development (POD) relating to the ESA, MBTA, and BGEPA.

- The Service provided information through their Conservation Recommendations regarding data gap information needed to inform subsequent NEPA and ESA analyses. In the COM Plan framework presented in the Final EIS (pg. 3.20-22), the BLM provides a bullet list of data gaps that had been identified at the time the document was published. The Service provided specific details regarding data gap needs and how they should be resolved. These specific details will not be included in the updated COM Plan framework, but the BLM did identify and add data gap needs suggested within the Conservation Recommendations.
- The Service provided a Conservation Recommendation which suggests the BLM involve statisticians in the development of monitoring sampling designs and protocols. The intent of this Conservation Recommendation has been captured in the updated COM Plan framework with new language stating that the BLM would include the use of statistically rigorous methods when developing monitoring sampling designs and protocols.
- The Service provided a Conservation Recommendation that the BLM require a qualified botanist to document vegetation conditions. The BLM added clarification language to the updated COM Plan framework to better define the Compliance Inspector Contractor (CIC) process and explain that the CIC interdisciplinary team will consist of appropriate specialists such as botanists, weed management specialists, wildlife biologists, archaeologists, and soil scientists.

The updated COM Plan framework language will appear in the ROD.

The Conservation Recommendations that have been addressed, either partially or in whole, through updating the language in the COM Plan process are: **COMM-1; COMM-H22; WRS-1; WR-2; WRS-3; WRS-10; WRS-H13; WRS-H14; PP-2; PP-5; ULT-2; ULT-3; ULT-4; ULT-6; Desert Tortoise Conservation Recommendation #2.**

## **CONSERVATION RECOMMENDATIONS NOT CARRIED FORWARD**

### ***Adequately Addressed in the EIS, ROD, or ROW***

Several of the Conservation Recommendations provided to the BLM have already been adequately addressed in the EIS, ROD, or ROW, either in part or in full:

#### **Addressed in full:**

The EIS or ROD addressed some Conservation Recommendations in full. For example, **COMM-9** recommends that data and reports be available on a website and provided in a timely manner to the Service for review. In the EIS and ROD, the BLM has committed to providing copies of the COM plans, compliance and monitoring reports, supporting documents, and data on the BLM GWD Project website. In addition, any documents that the Service is being asked to review would have to be provided by the BLM in an efficient and effective manner, and the BLM would not move forward until the review period is complete. The specifics of each review

will be tailored to the complexity and amount of material to be reviewed; these details are not only unknown at this time but are also most appropriately defined through the interagency process described on page 3.20-22 of the Final EIS.

One Recommendation, **Desert Tortoise Conservation Recommendation #5**, will be addressed in the ROW grant at the time it is issued, but is not currently addressed in the EIS or ROD. This Conservation Recommendation provides the suggestion that the BLM ensure restoration of desert tortoise habitat previously disturbed from existing projects, to offset the residual impacts from the permanent loss of desert tortoise habitat. It is important to note that habitat restoration of areas disturbed by past projects should have been the responsibility of those project proponents (not SNWA), but with respect to this project, BLM will look for opportunities to work with SNWA to complete on-site mitigation. The goal of the BLM is to first avoid, minimize, or mitigate (in that order) impacts to desert tortoise habitat. If mitigation is required, on-site mitigation is the priority. If mitigation fees are collected for this project, the BLM will use at least a portion of those fees for on-the-ground habitat restoration (as described in the BO, a portion may also be provided to the Service to support the Desert Tortoise Recovery Office). This information will be included in the ROW grant.

The Conservation Recommendations that have been adequately addressed in full in the EIS or ROD are: **COMM-2; COMM-9; COMM-H18; COMM-H21; WRS-H5; Desert Tortoise Conservation Recommendation #5.**

**Addressed in part:**

The majority of Conservation Recommendations that fall into this category relate to future tiers of the project. As described above, these Conservation Recommendations offered specificity that is not yet ripe for consideration. The BLM identified that objective-based measures provided in the Final EIS adequately address these Conservation Recommendations. Because the objectives of the Conservation Recommendations are already addressed in the EIS or ROD, the BLM has determined it is best to not carry forward these Conservation Recommendations at this time, and reconsider them 1) when project details are known, 2) when they can be further informed by subsequent NEPA, or 3) when the details can be discussed and perfected with the benefit of other interagency partners. The BLM encourages the Service to bring forward this valuable information to the interagency process identified in the COM Plan framework and to the subsequent NEPA processes.

The Conservation Recommendations that were not carried forward at this time, but which will be considered at a future point in the COM Plan process when the specificity provided by the Service is ripe for decision, are: **COMM-3; COMM-4; COMM-5; COMM-H11; COMM-H12; COMM-H13; COMM-H14; COMM-H16; COMM-H17; WRS-1; WRS-H6; WRS-H7; WRS-H8; WRS-H9; WRS-10; WRS-H13; WRS-H14; PP-3; PP-4; PP-H7; PV-PRC-1; PRC, WRSF, SWF-H5; SWFL-1; SWFL-H3; SWFL-H4; SWFL-H5; SWFL,MD H-6; ULT-1; ULT-H8; ULT-H9; ULT-H10; ULT-H11.**

### *Unnecessary to Include as a Condition of the ROW*

Some Conservation Recommendations may be further considered by the BLM, but it would be inappropriate or unnecessary to consider them for inclusion as a condition of the ROW. For example, **COMM-8** suggests that the BLM provide for Service participation in BLM's hydrologic oversight team. The BLM will consider this suggestion when developing the team, but it would be inappropriate and unnecessary to make this a term and condition of the ROW.

The Conservation Recommendations that were not carried forward because they are unnecessary to include as a condition of the ROW are: **COMM-6; COMM-7; COMM-8; COMM-H20; COMM-H21; COMM-H23; WRS-5; WR-H11; WRS-H12; ULT-5.**

### *Jurisdictional Concerns*

Some Conservation Recommendations requested that BLM make certain decisions in consultation with the Service, select staff or contractors in coordination with the Service, or to allow the Service to make final decisions on some aspects. The BLM will continue consulting with the Service under section 7 of the ESA (including reinitiation of section 7 consultation when warranted); outside of this process the BLM will coordinate with the Service as described in the COM Plan process. The BLM must retain decision-making authority on those aspects that fall within BLM's jurisdiction. In addition, the BLM will follow established guidelines for hiring consultants, including procedures for evaluating qualifications. These guidelines do not provide for solicitation of input from other agencies, and require strict control of who is allowed to look at submittals from bidders.

Conversely, some Conservation Recommendations include suggestions that are outside the authority of the BLM. For example, several Conservation Recommendations suggest soliciting input from Stipulated Agreement Work Groups, and providing final recommendation/decision authority to the Service and BLM representatives on those work groups. The BLM will solicit input from the interagency groups, as identified in the COM Plan process. Agencies that will be asked to participate include those agencies that are also signatories to the Stipulated Agreement. However, the agencies will determine if they wish to participate and to what degree, and who they will provide as a representative to the COM Plan process. The BLM has no way to guarantee that the agencies will participate, or that they will provide the same person who serves on the Stipulated Agreement work groups. Within BLM's COM Plan process, the BLM will maintain decision authority. The BLM provided, in the Final EIS, a description of how the NEPA process will interact with the Stipulated Agreement process. The BLM may require monitoring that is also committed to through the Stipulated Agreement process; in this case, the BLM is requiring the monitoring only because the EIS analysis identified that this monitoring is necessary (not as a method of enforcing decisions made by the Stipulated Agreement groups). The BLM will ensure that the two processes are coordinated to prevent duplicative or excess monitoring that would result in more disturbance to the land and resources than what is necessary.

The Conservation Recommendations that were not carried forward, with the respect to portions requesting consulting with or releasing authority to the Service, are: **COMM-1; COMM-3; COMM-4; COMM-H11; COMM-H13; COMM-H14; COMM-H15; COMM-H18; COMM-H22; WRS-2; WRS-3; WRS-4; WRS-H6; WRS-H7; WRS-H9; WRS-10; WRS-H13; WRS-14; PRC, WRSF, SWF-H5; SWFL, MD-H6; ULT-7; ULT-H10; ULT-H11.**

### ***Connection to the Project***

The Service provides many Conservation Recommendations that suggest the BLM assist the Service in achieving overall recovery goals for listed species potentially affected by this project and often involve taking actions on a scale broader than the project area or completing analyses that the Service should be doing as part of their species listing reviews. These Conservation Recommendations are scarcely connected to the project, if at all. Without a more distinct connection to the potential impacts of this project, the BLM believes it cannot place these responsibilities on the project proponent as a term and condition of the ROW. If appropriate, the BLM will bring some of these Conservation Recommendations to the attention of the project proponent and coordinate with them regarding partial assistance in completing these actions. In addition, the BLM encourages the Service to initiate conversations directly with the project proponent (separate from the NEPA or ESA processes) to seek assistance with actions that may best be accomplished through conservation agreements. It should be noted that, as a land management agency, the BLM is already actively working toward achieving recovery goals for listed species, participating on RITs, and taking recovery or conservation actions. These commitments are defined in the BLM guidance, policy, and Resource Management Plans.

The Service also provided some Conservation Recommendations for species that the EIS analysis did not identify as being at moderate or high risk from implementation of this project. These Conservation Recommendations were identified as not having a connection with the project, because the BLM cannot justify requiring monitoring and mitigation for areas not expected to be impacted. However, all of the Conservation Recommendations that fell into this category for this reason are related to future components of the project, and will therefore be analyzed at a more local scale in subsequent NEPA documents. If the subsequent NEPA analyses show a potential impact to these sites from the project, these Conservation Recommendations will be reconsidered at that time as potential mitigation.

The Conservation Recommendations that were not carried forward because do not have a distinct connection to the ROW are: **COMM-10; WRS-4; PV-PRC-2; PV-PRC-3; Desert Tortoise Conservation Recommendation #3; Desert Tortoise Conservation Recommendation #4; Desert Tortoise Conservation Recommendation #5.**

***Reasonableness and Feasibility of the Conservation Recommendation***

As described above, the BLM must consider reasonableness and feasibility of the Conservation Recommendation in determining whether it should be adopted as a term and condition of the ROW. For example, **COMM-10** suggests the deployment of GPS collar technology on wild horses and trail cameras at water sources. This Conservation Recommendation is infeasible and, the BLM believes, beyond the scope of the section 7 consultation.

The Conservation Recommendations that were not carried forward because they are unreasonable or infeasible are: **COMM-10; COMM-H19; WRS-H9; PP-6; PRC, WRSF, SWF-H5; Desert Tortoise Conservation Recommendation #1.**

In closing, the BLM would like to express our appreciation for the time and effort that the Service took to develop these Conservation Recommendations. The BLM reviewed and thoughtfully considered each Conservation Recommendation. Please note that the majority of the Conservation Recommendations fell into the category of “addressed in part”, and that the BLM feels confident that the objectives suggested by the Service are captured in our mitigation measures and COM Plan framework that will be presented in the ROD. Some of the Conservation Recommendations also fell into multiple categories, so they cannot be addressed in one simple or specific way. The specific details provided by the Service are deferred and the BLM will consider them at the appropriate time in the process. The Service has, through these detailed Conservation Recommendations, provided the BLM with a good starting point for discussions of the best methods for carrying out our objectives. We appreciate the Service’s ideas and suggestions, and we look forward to the Service bringing them forward to the COM Plan and subsequent NEPA interagency processes.

cc:

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