

In Reply Refer To:

6840 (930) P

May 22, 2000

Instruction Memorandum No. WY-2000-44
Expires 09/30/2001

To: Rawlins Field Manager and DSDs

From: Associate State Director

Subject: Compliance with the Endangered Species Act (ESA) - Section 7 Opinion on Non-Federal Lands in the Continental Divide/Wamsutter II Natural Gas Project Area (CD/Wam)

An issue regarding compliance with the Biological Opinion (BO) for the CD/Wam Project under Section 7 of the ESA has been raised because of the interspersed pattern of land ownership in the CD/Wam area. Oversight of compliance on the non-Federal lands is the issue being questioned by the U.S. Fish and Wildlife Service (FWS). This Instruction Memorandum is a follow-up to IM No. WY-99-24 - *The Extent of Federal Authority over Actions Occurring on Private Lands - Plants & Wildlife*, dated Feb 23, 1999. IM WY-99-24 gives the basis for what authority the BLM has on non-Federally owned lands.

The Endangered Species Act (ESA) of 1973, as amended, directs every Federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the existence of any proposed or listed species or destroy or adversely modify these species critical habitat (50 CFR ' 400, BLM 6840 Manual and Sec. 7. (a)(1) of the ESA). More specifically, the BLM has the discretionary authority to authorize actions on public lands in large Aproject areas@ (50 CFR ' 402.02 uses the term Aaction area@ instead of project area - for the rest of this document the terms will be used interchangeably) for oil and gas development, coal mining, coalbed methane development, etc. Section 7 of the ESA and the requirements of 50 CFR ' 402 apply to all actions in which there is discretionary Federal involvement or control (50 CFR ' 402.03). The task BLM must face is how to direct actions which BLM authorizes on public lands, that must also take place on adjacent non-Federal lands to make the project viable, in light of the ESA. This would include authorizations for roads, pipelines, drilling, etc.

Interrelated/Interdependent Actions:

Because of the scope of the actions on these project areas, large amounts of Federal, State, and private lands can be involved. In projects with mixed land ownership, actions on the public lands often drive the project and become the causal agent for all of the actions in the project area. Thus the likelihood of a project occurring only on the non-Federal lands would be remote - due to economics, the ability to produce, and the need for lineal features such as roads and pipelines. The Federal and non-Federal activities then meld together forming an **interrelated** and **interdependent** (I/I) relationship to each other. This relationship requires BLM to expand its scope of analysis to determine the *direct* and *indirect effects* on a proposed or listed species under the ESA, or its critical habitat within the entire project area (50 CFR ' 402.02). Thus, if a project wouldn't occur about for BLM's authorization, then BLM would operate under I/I reasoning.

interrelated ----- actions that are part of a larger action and depend on the larger action for their justification (these actions are **related** to one another as part of a larger action)

interdependent - actions having no independent utility apart from the proposed action (these actions **depend** on the Federal action for their justification/being)

indirect effects - are those effects that are caused by the proposed action and are later in time, but still are reasonably certain to occur
(all definitions are found in 50 CFR ' 402.02)

Compliance with Section 7:

When BLM authorizes actions on public lands through the issuance or granting of: licenses, contracts, leases, easements, ROWs, or permits, and those actions directly or indirectly cause modifications to the land, water, or air (50 CFR ' 402.02), the ultimate responsibility for compliance with Section 7 of the ESA remains with the BLM (50 CFR ' 402.08). An applicant can partner with the BLM when they are requesting an action (Section 7. (a)(3) of the ESA and 50 CFR ' 402.10 (c) and ' 402.11 (a)). An incidental take statement is often included in the BO (50 CFR ' 402.14 (i)) which permits the taking of listed species, other than plants, that result from, but are not the purpose of, carrying out an otherwise lawful activity by the BLM and/or its applicant (50 CFR ' 402). The applicant is protected from Section 9 of the ESA (Prohibited Acts) when adhering to the terms and conditions of a Section 7 incidental take permit (50 CFR ' 402.14 (i)) issued to the BLM.

Because the BLM has a responsibility/obligation to provide for the recovery of proposed and listed species, this responsibility drives the BLM to require adherence of certain protective measures for these species or their critical habitats occurring within a project area. For actions in the project area to be in compliance with the ESA, the BLM would apply the reasonable and prudent measures prescribed in the BO to each individual

action, and where applicable, place these measures as terms and conditions of the action.

For example, on a lineal feature such as a road, powerline, or pipeline which crosses both BLM and non-Federal lands, the BLM would reference the reasonable and prudent measures language prescribed in the BO in the applicant's plan of development (POD), and terms and conditions would be placed in the ROW grant that make the grant subject to the POD. If proposed or listed species are determined or thought to occur along any point of the ROW, regardless of land ownership, the issue must be resolved before BLM can grant the ROW.

Because the CD/Wam project invokes the I/I reasoning and a project level BO is issued, applicant(s) must adhere to the reasonable and prudent measures listed in the BO through the Section 7 consultation process, regardless of land ownership, as there is no provision to conduct any other ESA process (i.e.; Section 10 - habitat conservation plan (HCP)) on non-Federal land. The only exception would be to withdraw the application for the overall project and conduct actions only on non-Federal land, then the Section 10 HCP process would apply.

The BLM may receive an incidental take permit in a BO if such take would not jeopardize the continued existence of a species. The applicant and BLM must cooperate and adhere to the reasonable and prudent measures in the BO to minimize take and if take does occur, to stay within the designated amount of take. This cooperation would place the same restrictions on all the cooperating parties, on all lands (regardless of ownership) included in the BO.

The BLM may also deny an authorization on the Federal land portion of an action due to impacts to a proposed or listed species or their critical habitats occurring on non-Federal land within the affected area of an action area if the applicant refuses to comply with the reasonable and prudent measures spelled out in the BO. Thus the BLM must analyze an action to the best of its ability, and provide protection for listed and proposed species, and if designated, their critical habitats to the extent of its legal authority within these project areas - even if they occur on non-Federal lands.

Monitoring Actions in the CD/Wam Project Area:

The best way to ensure the needs of proposed or listed species and/or their critical habitats are met on all lands within the CD/Wam project area, is to monitor compliance of the reasonable and prudent measures listed in the BO. A monitoring plan would be agreed to and carried out by all of the parties involved, including the BLM, FWS, the applicants(s), Wyoming Oil and Gas Conservation Commission (WO&GCC) and other pertinent parties on non-Federal lands. The plan would be designed for the CD/Wam project area to monitor compliance of the reasonable and prudent measures which would be spelled out in an authorizing document (i.e., ROWs, APDs, etc.) as terms and conditions. A likely result of a monitoring plan is the creation of a team to conduct

periodic field compliance examinations (the frequency to be determined by the cooperators). This team would select and visit projects on any or all lands within the project area. A short report of the compliance examination findings would be shared and distributed to all cooperating parties and operators in the area. The WO&GCC has an internet web site listing all the recently permitted actions for oil and gas within the State. A list of new well/facility locations could be downloaded and included in the report and also used as a possible itinerary for sites for the monitoring team to visit.

If an operator is found to be in non-compliance, a letter to the operator explaining the issue and a solution from the monitoring team should be sent asking for a response from the operator explaining what would be accomplished to regain compliance. The FWS should be promptly notified when non-compliance is detected by sending them a copy of the letter. In the event the non-compliance continues on non-Federal lands, compliance with the agreed upon terms and conditions/reasonable and prudent measures will be the shared responsibility of the FWS and the other cooperating parties. A variety of actions could occur if an operator continues to remain in non-compliance, up to the revocation of an authorization issued on adjacent public lands when appropriate. The FWS would remain the responsible party for the enforcement of unlawful actions under Section 9 of the ESA.

If you have any questions or comments please contact Jeff Carroll (775-6090) or Dave Roberts (775-6099) in the Division of Resource Policy and Management (WY-930).

s/Alan L. Kesterke

Procedures for Section 7 Consultation:

The Section 7 analysis begins with a written request for a list of proposed and listed species to the U.S. Fish and Wildlife Service (FWS) (50 CFR ' 402.12(c)). If in the written response the FWS states that proposed or listed species occur within the project area, a biological assessment (BA) is prepared to address the impacts to these species (refer to NEPA, 42 U.S.C. 4332(2)(C) and 50 CFR ' 402.12). If the interrelated/interdependent reasoning is used, an entire project and its actions are analyzed and the BA will apply to all lands in the entire project area (a programmatic BA). All of the analysis/ Section 7 consultation, conferencing, and BA procedures as follows can be done concurrently with, and combined into, the NEPA document (50 CFR ' 402.06). The analysis in the assessment then hinges on one of the following venues:

1. If proposed species occur within the project area and impacts will jeopardize the species, or their critical habitat is destroyed or adversely modified - initiation of conferencing with the FWS is required (if it is questionable, i.e., Ayou don't know@ - go ahead and initiate conferencing)(50 CFR ' 402.10 and Section 7. (a)(4) of the ESA). The FWS will assist the BLM through conferencing in identifying and resolving potential conflicts. These species and proposed critical habitat shall be managed by the BLM on public lands with the same level of protection provided for listed species (except formal consultations are not required). Until the conference proceedings are completed, the BLM shall ensure that all actions authorized or carried out do not cause any irreversible or irretrievable commitment of resources or reduce the future management options for the species involved (BLM Manual 6840 and 50 CFR ' 402.10). The BLM has a responsibility to provide protection for proposed species, and if designated, their critical habitats to the extent of our legal authority within these project areas.

2. If listed species occur within the project area and:

a. impacts will affect the species or its critical habitat in a beneficial, discountable, or insignificant manner - informal consultation with the FWS is required (50 CFR ' 402.13 and Sec. 7. (a)(4) of the ESA). If the FWS concurs, the BLM is finished with consultation and no further action is necessary (50 CFR ' 402.13(a)).

b. impacts will affect the species or its critical habitat will be adversely affected - formal consultation with the FWS is required (50 CFR ' 402.14 and Sec. 7. (a)(2) of the ESA). The final outcome of formal consultation is the issuance of a biological opinion (BO) by the FWS (50 CFR ' 402.14 (g) & (h)). Because of the interrelated/interdependent reasoning under which many of these projects/actions are analyzed, the FWS provides language in the BO which applies to all lands in the entire project area (a programmatic BO). The language in the BO would be very specific to cover the protocols to recover/protect each proposed or listed species found in the project area. This allows actions such as ROWs, APDs, etc.

within the scope of the project area to fall under the programmatic BO so additional Section 7 consultation would not be needed for each individual action. If the BO finds the action to jeopardize the existence of a listed species, the FWS either finds reasonable and prudent alternatives for the action and BLM redefines the action, or the FWS can find no way for the action to occur and the action is not approved as proposed (50 CFR ' 402.14 (h) and Sec. 7. (a)(2) of the ESA). If a reasonable alternative or initial BO finds the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat - a no jeopardy BO, the BLM can allow the action to proceed by undertaking the reasonable and prudent measures listed in the BO to minimize the amount or extent of incidental take (50 CFR ' 402.14 (i) and Sec. 7. (B)(4) of the ESA).

3. If a species becomes listed during the course of the Section 7 consultation process, then it can be included in the ongoing analysis. If a species is listed after the Section 7 consultation process is completed, a reinitiation of the consultation process is required and the BLM and any applicant (operator) shall make no irreversible or irretrievable commitment of resources with respect to the BLM's approved action, which may include ceasing or revoking the approved action until the consultation process is completed (50 CFR ' 402.09 and Sec. 7.(d) of the ESA).

Commonly Asked Questions:

1. What legal authority does the BLM have to enforce the ESA on non-Federal lands, i.e., private lands (both private surface and private mineral estate) where interrelated/ interdependent actions occur due to actions approved by the BLM on Federal Lands?

The BLM has no authority to enforce the ESA on non-Federal lands, including private lands. This means that BLM has no authority to do anything on private lands without the explicit permission of the land owner and project proponent utilizing those private lands. However, if the BLM issues an authorization within a project area (50 CFR ' 402.02 uses the term action area - meaning all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the actions, the term project area will be used synonymously with action area throughout this appendix) occurring on both private and public lands, and if the project wouldn't occur but for BLM's authorization, then we come under interrelated/interdependent (I/I) reasoning. This I/I requires the BLM to increase its scope of analysis (to determine the effects of an action - which refers to the direct and indirect effects on a proposed or listed species, or its critical habitat) to encompass the entire project area - which includes the past and present impacts on Federal, State, or private actions and other human activities in a project area. Because the BLM has a responsibility/obligation to provide for the recovery of proposed and listed species, this responsibility can drive the BLM to require adherence of certain protective measures for these species or their critical habitats occurring on adjacent non-Federal lands within a project area. The BLM requires these protective measures on non-Federal lands when a project proponent operating on non-Federal lands becomes a cooperator with the BLM through the BLM's Section 7 consultation/ incidental take statement from the US Fish and Wildlife Service (FWS). This cooperation would place the same restrictions on all cooperating parties, including BLM, over an entire project area which would include the non-Federal land under cooperation. These restrictions would stem from the specific requirements of each of these proposed or listed species and their critical habitats, if designated, found in the project area and would be spelled out in the reasonable and prudent measures found in the Biological Opinion (BO) given to the BLM in response to BLM's submission of a Biological Assessment. The reasonable and prudent measures would then be used as terms and conditions of an specific authorization (pipeline, road, powerline, etc.). The BLM can also deny an authorization on Federal lands due to impacts to a proposed or listed species or their critical habitats occurring on non-Federal land within or outside a project area (see Scenario One in attachment 4).

2. Who has the liability/responsibility to comply with the provisions of the ESA - the mineral holder or surface holder or project proponent/operator? Does the operator requesting the BLM authorization have the responsibility of enforcing the mandates of the ESA on non-Federal (i.e., private) lands?

All of the parties mentioned in the question have the liability/responsibility to comply with the ESA, especially Section 9 (Prohibited Acts), but most appropriately those folks conducting actions (project proponent/operator) which could impact proposed or listed species or their critical habitats would be a responsible party. If the non-Federal land is covered by a Biological Opinion (BO)/ incidental take statement under a BLM Section 7 consultation, the non-Federal land operator will have already agreed to adhering to the terms and conditions spelled out in the reasonable and prudent measures portion of the BO in BLM's authorizing document for the project area. A monitoring plan agreed to by the BLM and the non-Federal land operator(s) to monitor compliance to the terms and conditions spelled out in the authorizing document would be carried out and would be a good way to provide for the needs of proposed or listed species and their critical habitats.

If the BLM is the mineral holder, but not the surface holder, they still have the responsibility to protect proposed or listed species or their critical habitats in any actions they authorize.

If an operator requesting the BLM authorization has no ties to the non-Federal lands (i.e., is only operating on BLM lands), then they would not be responsible for any mandates of the ESA on non-Federal lands.

3. On actions occurring on non-Federal land that BLM has no authority over, what is the cutoff point for consultation under the ESA for future actions (foreseeable or possibly unforeseeable) -or- when does BLM's liability end? What legal authority/recourse does the BLM have for future actions where we have authorized access across BLM land for a present action occurring on non-Federal land?

BLM's liability for carrying out the provisions of the ESA never ends. When analysis shows that the BLM must enter into Section 7 consultation with the FWS on a project, the best information available must be analyzed. The entire scope of the project or entire project area must also be analyzed. Future actions are also analyzed to the best extent possible. When the BLM analyzes an action, it must consider both direct and indirect effects (see question #1 above).

Analysis must be as complete as possible, but if the scope of the project grows (i.e., if the proposed spacing of an oil and gas field grows from 4 wells per section to 16 wells per section) then consultation with FWS must be reinitiated to account for any increased impacts.

If a small action (scope is small) such as a single new well is drilled on adjacent non-Federal land (i.e.; a private land in-holding or checkerboard land pattern) that was unforeseen in the initial/ approval planning stage, then BLM's role is tempered by the type of consultation the non-Federal land operation(s) was covered by. If the non-Federal land operations are covered by a Biological Opinion (BO)/ incidental take statement under a BLM Section 7 consultation, the oil and gas operator on non-Federal land will have already agreed to adhering to the terms and conditions spelled out in the terms and conditions in BLM's authorizing document for actions occurring in the project area. If in the future, new proposed or listed species are found in the project area, then reinitiation of consultation would have to occur. Any new actions taking place in the project area will be subject to existing terms and conditions and new terms and conditions applied due to the reinitiation of consultation.

A monitoring plan agreed to by the BLM and any operators to monitor compliance of the terms and conditions spelled out in the authorizing document would be carried out. If any noncompliance were noted through monitoring (even on non-Federal lands), the monitoring team would request by letter to the operator in non-compliance what actions will be taken to regain compliance to the terms and conditions, with a copy sent to the FWS and noted in the monitoring report. If an operator refuses to comply with the terms and conditions of the authorization, a variety of actions could occur if an operator continues to remain in non-compliance, up to the revocation of an authorization issued on adjacent public lands when appropriate. Portions of the project up to the entire project could possibly be ceased until compliance is reached as BLM would itself then be in noncompliance with our Section 7 consultation. If the operator complies with the requirements, then this should also be noted in the monitoring report and an occasional Attaboy letter may even be sent to the operator with a copy sent to FWS.

If the non-Federal land is covered by a Section 10 Habitat Conservation Plan (HCP)/incidental take permit, the BLM has no enforcement authority. Although BLM is not the enforcement agency for the ESA, we as a Federal agency still have a responsibility/obligation to provide for the recovery of listed species. Therefore, if a BLM employee were to observe a breach of the ESA, even on non-Federal lands, the proper protocol would be to contact the FWS in a timely manner explaining the situation and allowing them to contact to the offending party. BLM's role is not enforcement, but one of enlightenment.

4. BLM writes a biological assessment (BA) for an oil and gas full field development

(analyzed for example at 8 wells/section) which assesses the impacts of the action on both BLM and non-Federal lands and an oil and gas operator decides that no consultation will be initiated on the private portion, how does or would the provisions of Sections 9 & 10 of the ESA apply?

If the BLM issues an authorization for the public lands in a project area, and if the project would not occur (or the scope of the project would be considerably reduced), but for BLM's authorization, then we come under the *interrelated/interdependent* (I/I) reasoning. This I/I reasoning requires the BLM to increase its scope of analysis (to determine the effects of an action - which refers to the direct and indirect effects on a proposed or listed species or its critical habitat) to encompass the entire project area - which includes the past and present impacts on Federal, State, or private actions and other human activities in a project area. Because the BLM has a responsibility/obligation to provide for the recovery of proposed and listed species and will conduct a biological assessment (BA) on the entire project area and submits this document to the FWS. The BLM must use the best available data for non-Federal lands (or collect data only if it is essential and permission is granted to gather that data) in writing the BA.

Due to this *interrelated/interdependent-ness* of the BLM-non-Federal lands, the biological opinion (BO) given to BLM in response to the BA would cover ALL lands within the project area. The Section 7 incidental take statement would cover ALL lands in the project area. In order for an operator to conduct actions within this project area, they would have to comply to the reasonable and prudent measures in the BO which would then be used as terms and conditions of a specific authorization (pipeline, road, powerline, etc.).

5. Using an oil and gas development scenario, how would wells drilled on non-Federal lands outside a project area (i.e., wildcat wells) be treated in the interest of the ESA?

If the oil and gas well requires no BLM associated authorization, then the BLM only has a general responsibility/obligation to contribute to for the recovery of proposed or listed species as a Federal agency. As a good neighbor we might contact the operator reminding them of their responsibility to not violate Section 9 of the ESA (Protected Acts) and to contact the FWS to get an incidental take permit in situations where proposed or listed species may occur. If an obvious violation of the ESA were noted, the proper protocol would be to contact the FWS (by phone or letter) in a timely manner a letter explaining the situation. In these situations, BLM's role is not one of enforcement, but rather one of enlightenment.

6. What types of alternatives can BLM pursue when a project proponent or private landowner is reluctant to work with the U.S. Fish and Wildlife Service (FWS) to initiate a section 10 Habitat Conservation Plan (HCP) on their private lands or

comply with conditions of an ESA section 7 incidental take statement - does BLM deny the authorization?

If a Section 10 HCP is conducted by the FWS and an applicant, and the BLM has no associated authorization, there is no authorization to deny. If the authorization is under Section 7 and a private operator is reluctant to comply with the terms and conditions of an authorization (associated with either public or non-public lands), then the BLM can also deny that authorization on Federal lands due to impacts to a proposed or listed species or their critical habitats occurring off public land within or even outside a project area (see Scenario One in attachment 4). If the authorization is already granted and an operator does not comply with the agreed upon terms and conditions of the authorization, a variety of actions could occur if an operator continues to remain in non-compliance, up to the revocation of an authorization issued on adjacent public lands when appropriate.

7. Which laws take precedence over the ESA?

While other laws such as the Mineral Leasing Act (MLA) may take operational precedence over the ESA, the ESA is a law that usually Aconditions@ or Atempers@ (i.e., where, when, how, etc.) a project, it rarely says Ano@ - usually there is a way to conduct business and still provide for protection of proposed or listed species. Concerning laws of egress/ingress and access, from Federal to private lands, the Federal government doesn't Aguarantee@ physical access (this is true in cultural as well as T&E issues) so preserving an important natural resource could preclude some types of physical access (see scenario one in attachment 4). In the case of the MLA, it doesn't say BLM Ahas@ to prevent drainage (we just do so to try and conserve/protect Federal assets).

8. Which agency - BLM or FWS - is the enforcement agency for ESA matters on private lands. If the FWS is the enforcer and BLM completes section 7 consultation under ESA and the operator chooses to initiate a section 10 habitat conservation plan on the private lands, can BLM be held hostage by an action that takes or jeopardizes a threatened or endangered species on the private lands portion of the project?

BLM does not have regulatory authority for ESA matters on private lands and thus is not the proper enforcement agency. However, the goal and responsibility of the BLM along with the FWS and our private land neighbors and users is, and should be, to keep listed species from heading down the path to extinction. The role of the BLM would best be defined as a partner! We would welcome the sharing of the use of our Section 7 consultation by our private land neighbors when a project area is considered to be interrelated/interdependent (I/I). All partners must agree to adhere to the same terms and conditions we (BLM) are subject to under the reasonable and prudent measures found in a BO rendered by the FWS to obtain our incidental take statement if needed/authorized. A private land owner/user is subject to the same requirements under section 9 of the ESA - Prohibited Acts as the BLM is.

If a specified number is determined as a take of a listed species in an incidental take statement, and that number is reached (or exceeded) on public or non-public lands, then an immediate reinitiation of Section 7 consultation by BLM with FWS must occur - and possibly the ceasing of operations on a project (if FWS believes it is warranted) until a new incidental take statement is obtained. While this may be construed as FWS holding us hostage, BLM would be out of compliance with the conditions of the incidental take statement and must do everything in its authority to stay within the law.

Although BLM is not the enforcement agency for the ESA, we as a Federal agency still have a responsibility/obligation to provide for the recovery of listed species. Therefore, if a BLM employee were to observe a breach of the ESA, even on non-Federal lands, the proper protocol would be to contact the FWS in a timely manner explaining the situation and allowing them to contact the offending party. BLM's role is not enforcement, but one of enlightenment.

9. How does the authority/responsibility argument apply to other Federal actions (such as grazing, mining, etc.) which BLM authorizes and which invoke the interrelated/interdependent (but for) clause under the ESA and occurs over both BLM and private lands? (See also #1 above for I/I issues)

All Federal actions are covered by the same rules, regulations, laws and policies where applicable. Many of the examples used in this IM are geared to an oil and gas scenario, but the logic of the responses applies to any action authorized by the

BLM. So whether an action is a ROW to carry water through a pipeline, a fiber optic or other communication line, a grazing allotment that has private land in holdings, a cooperative weed management project, or other project encompassing private lands - the BLM again doesn't have any specific authority off of its public lands (i.e., on private or other non-Federal lands). However, because the BLM does have a responsibility/ obligation to contribute to the recovery of proposed or listed species, this responsibility can drive BLM to require adherence of certain protective measures for listed species or their critical habitats occurring on adjacent private lands within a project area as a condition of an authorization or to deny an authorization on public lands within a project area due to impacts to proposed or listed species occurring on private lands within a project area.

10. Does BLM have the option of not issuing a right-of-way (ROW) on Public Land due to the ESA?

Yes, the BLM has the Aoption,@ even obligation, of not issuing a ROW on Public Lands (see scenario one in attachment 4) if issuing the ROW would adversely affect the likelihood of recovery of a proposed or listed species, detrimentally affect a listed species= critical habitat, or possibly cause a Atake@ of a listed species. However, the BLM has the responsibility to try to provide Areasonable access@ wherever possible.

11. Can a BLM wildlife biologist collect data on proposed or listed species on non-Federal lands?

The BLM does not have any independent, universal authority to conduct baseline inventories for proposed or listed species on non-Federal surface lands (see I.M. No. WY-99-24, P.4 Split Estate). Only if in the best interest of the Federal Government would a BLM specialist consider gathering data on non-Federal lands. If it is determined to be in the best interest of the Federal Government, then the specialist must seek permission from the private landowner to collect data. If permission is not granted, and it is not possible for a BLM specialist to gather the information via other methods (ocular, records research, literature review, view of recognized experts, other agency data, etc.), and it is imperative that information be available for compiling a BA or issuance of an authorization, then either; the applicant or operator must obtain the information needed, or the FWS must utilize the best scientific and commercial data available (50 CFR ' 402.14 (g)(8)) when formulating their BO. If the available data is poor or lacking, then the FWS may have to err on the conservative side in their choice of reasonable and prudent alternatives and reasonable and prudent measures.

Other Sources of Information:

- The Endangered Species Act of 1973 (As Amended through the 100th Congress) (Oct. 7, 1988)

- 50 CFR 402 - Interagency Cooperation - Endangered Species Act of 1973, As Amended

(The CFRs can be found on the internet @ -----> <http://www.access.gpo.gov/nara/cfr>)

- Endangered Species Consultation Handbook - *Procedures for Conducting Consultation and*

Conference Activities Under Section 7 of the Endangered Species Act - US Fish & Wildlife

Service and National Marine Fisheries Service, March 1998 Final, (for sale by the Govt. Printing

Office ISBN 0-16-049596-2) about 3@ worth!!!

- BLM-s 6840 Manual - Special Status Species Management

Explanatory Scenarios:

Scenario One

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| p | v | p |

In this scenario an operator wants to put a gas well (●) in a private land section and access it with a ROW road (-----) off of BLM land. The chosen well location is within 50 feet of an active bald eagle (an endangered species) nest (⚙️). The FWS says 50' is too close and will constitute a *Take* under section 9 of the ESA. The BLM has a **responsibility** under the ESA and its own 6840 manual guidance to ensure that any action it authorizes will not adversely affect the likelihood of recovery of a listed species. Because BLM has the discretionary **authority** to approve/deny a ROW on Public Lands, it should then deny the ROW as requested even though the gas well affecting the eagle occurs on private land. If the operator can move the well so that it does not impact the eagle (by FWS criteria), then BLM can go ahead and issue the ROW with terms and conditions (T&C) in the plan of development for the ROW to protect the eagle (thus allowing *Reasonable* access). If the operator does not comply with the T&Cs, then the ROW can be revoked due to noncompliance.

Scenario Two & Three

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Scenario Two: In this scenario Sam the oil and gas operator wants to put a road ROW (-----) across some *Acheckerboard* lands. The entire project area was analyzed and the ROW was conditioned in accordance with the outcome of the Section 7 consultation. Terms & conditions (T&C) are imposed on the ROW, which the ROW grantee must adhere to even on private lands. By adhering to these T&Cs, the grantee is allowed full partnership in the incidental take statement. Other tertiary parties are not protected under the incidental take statement. The T&Cs may have lots of latitude - including: monitoring, inventories, ROW management, etc. Sam adheres to the T&Cs and is granted the ROW.

Scenario Three: In this scenario Billy-Bob decides to travel down Sam's approved ROW road late one afternoon and notices the bald eagle nest. He drives off of the road and decides that since he's heard that bald eagles taste just like chicken, he shoots the eagle. The local BLM petroleum engineering technician is out checking gas wells on the BLM and sees Billy-Bob and reports his dastardly deed to the local game warden and because T&E species have been *Ataken* the game warden calls the FWS wildlife agent.
Who gets the citation?

Since Sam and the BLM have followed the terms and conditions of the BO and ROW and Billie-Bob is not authorized under the incidental take statement - good ol- Billie-Bob gets an all-expense-paid (Billie-Bob actually pays \$50,000 of those expenses), one-way trip to visit the penitentiary in Rawlins for a one year vacation!

Scenario Four

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| v |  p | v |
| p | v | p |

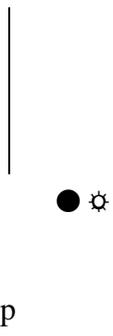
It is now 5 years later and Jake the private land oil & gas operator has bought out Sam, decides that since oil is now \$35 a barrel he would like to place a well (●) from a point on private land utilizing the ROW road. The local BLM wildlife biologist sees the drill rig driving into the site one day when she's conducting Mtn. Plover surveys on the BLM. Through her binoculars she sees that the flagged drill site is going to cause a Atake® of an endangered species as it is too close to the active bald eagle nest (✨). Even though no Federal action is taking place here - what does she do?

1. Since she and Sam had worked together 5 years ago and Jake agreed with what she had worked out with Sam - to cooperate under BLM's Section 7 incidental take statement and no new wells were allowed off of the ROW road without agreement of the monitoring team, she contacts the monitoring team and they request he move the well 3,500' to the north, Jake moves the well site and Anoproblemo.®

- or -

2. She didn't start working with BLM until 3 years ago and the previous biologist forgot to stip the ROW for future T&E species impacts (oops!). She now contacts the FWS and lets them know about this potential violation of Section 9 of the ESA.

Scenario Five

| | | |
|------------------|--|---|
| p | v | p |
| v |  p | v |
| County Road #218 | v | p |
| p | v | p |

In this scenario Sue the private land oil & gas operator decides that since oil is now up to \$40 a barrel, she would like to place a well (●) utilizing County Road #218 (-----)to access the private land. No actions take place or are authorized on/by the BLM. The local BLM wildlife biologist sees the drill rig driving into the site one day when he's conducting Blowout Penstemon plant surveys on the BLM. He knows that the flagged drill site is going to cause a Atake® of an endangered species as it is too close to the active bald eagle nest (✨). What does he do?

As a Good neighbor® he contacts Sue and tells her she may be violating Section 9 of the ESA and calls the FWS to inform them of the action. Sue contacts the FWS, they request moving the well site 3,500' to the south, she moves the drill pad and all is well again in the oil patch!