

# Streamlining

- ▣ Exploring a variety of methods and tools for designing and implementing projects for Threatened and Endangered Species and improving efficiencies of consultation
- ▣ Advantages:
  - Decreased time needed for consultation in the long term
  - Conservation of listed species
  - Consistency among agencies
- ▣ Disadvantages:
  - Initial time investment



# Mechanisms for Streamlining

- ▣ Level 1 teams
- ▣ Early coordination at the project planning stage
- ▣ Programmatic consultations
- ▣ Design criteria
- ▣ Screens



•Essential to all streamlining techniques is early coordination and cooperation among the agencies, preferably well before entering section 7

•Most effective when used to develop design criteria that ensure that future actions are consistent with the long-term conservation needs of species

•Instructive in developing other 'tools' such as design criteria, screens, etc to remember the roles and information needs of the agencies in evaluating projects and completing a section 7 consultation.

The action agencies provide:

1. A description of the action to be considered;
2. A description of the specific area that may be affected by the action;
3. A description of any listed species or critical habitat that may be affected by the action;
4. A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
6. Any other relevant available information on the action, the affected listed species, or critical habitat.

The Services and action agencies have found that by engaging in early planning and coordination while compiling the above information, the Services' Endangered Species specialists and the action agencies' technical experts can identify and address issues and make appropriate adjustments while there is the maximum flexibility to modify project designs. Such early coordination allows managers to make appropriate adjustments to proposed activities during the project design phase to incorporate species' habitat needs, thus facilitating and expediting the section 7 consultation process.

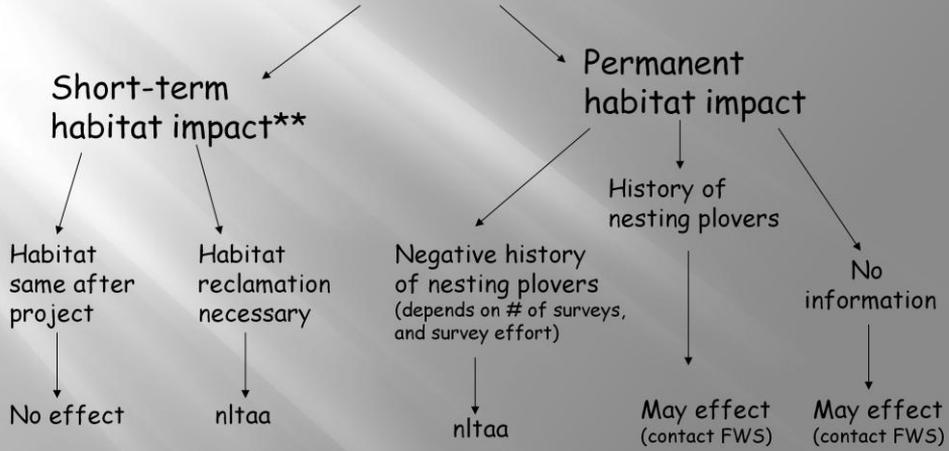
## Level 1 teams

- ▣ Colorado Teams - NW, SW, Front Range (North and South working groups)
- ▣ Wyoming Teams - NW, NE, Southern
- ▣ Value of:
  - Raising awareness
  - Ensuring consistency
  - Interagency involvement
  - Multi-discipline involvement

*HAVING LEARNED WELL  
THE OLD WAY OF  
DOING SOMETHING  
CAN KEEP YOU FROM  
NOTICING  
THAT THERE MAY BE  
A BETTER WAY*

# Mtn Plover Suitable Habitat

Unoccupied this breeding season\*

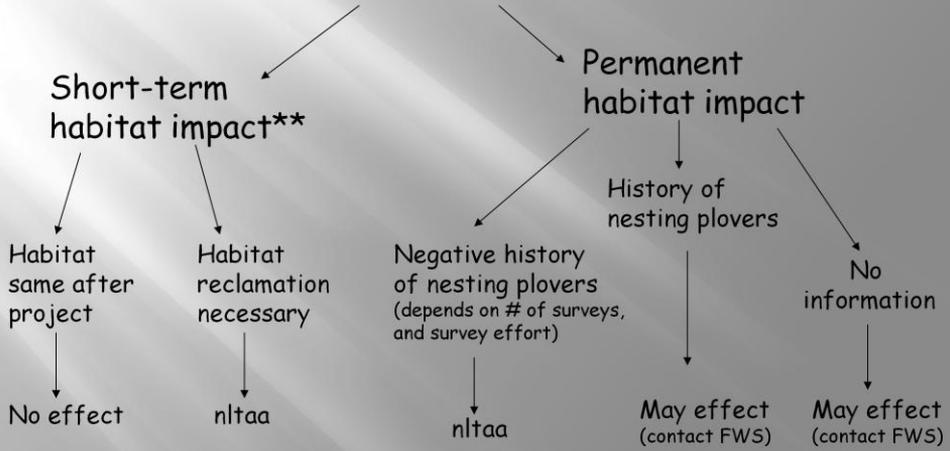


\* occupied = positive survey

\*\*short-term = disturbance completed prior to following breeding season, with no permanent habitat alteration

# Mtn Plover Suitable Habitat

Unoccupied this breeding season\*



\* occupied = positive survey

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# Suitable habitat

Occupied\*

Short-term\*\*  
habitat impact

Permanent  
habitat impact

Impact during  
breeding season

Impact outside  
breeding season

May effect  
(contact FWS)

Adverse  
effect

Habitat  
reclamation  
necessary

Habitat  
same after  
project

nltaa

No effect

\* occupied = positive survey

\*\*short-term = disturbance completed prior to following breeding season, with no permanent habitat alteration

## **Section 7(a)(2) Programmatic Consultations**

## Programmatic Consultations

Evaluate the potential for “programs” to produce future actions that may affect listed resources.



Photo: Norbert Dreier  
National Geographic Society

# Inter-Agency Colorado Lynx Project Decision Screens



**U.S. Fish and Wildlife Service**  
Colorado Field Office, Lakewood, CO

**Bureau of Land Management**  
Colorado State Office, Lakewood, CO



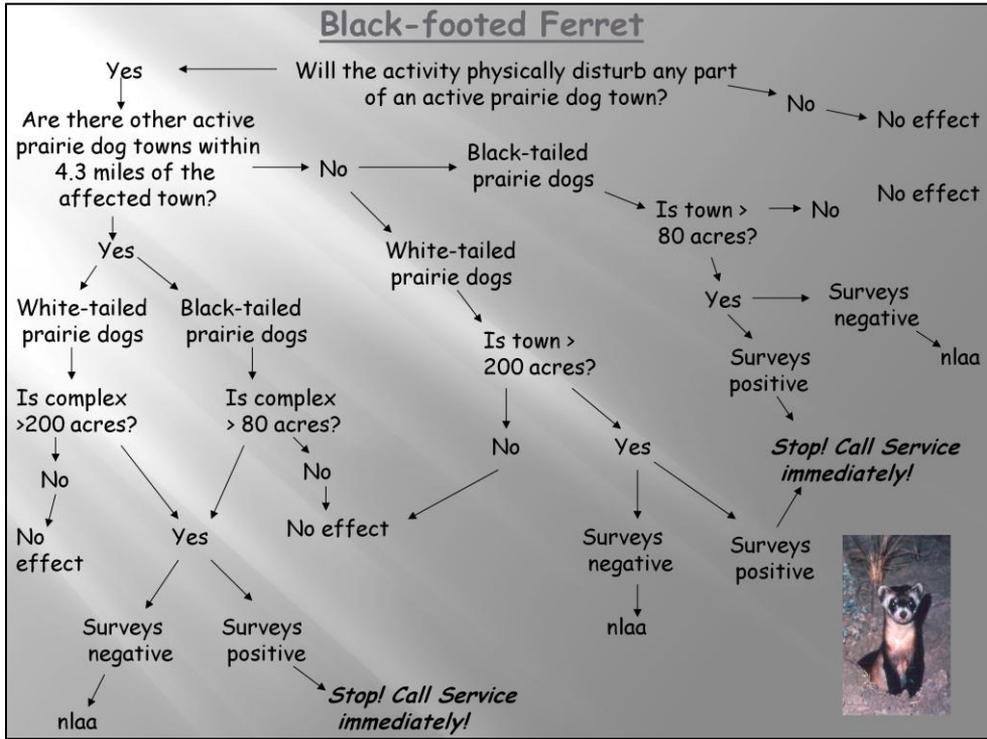
**U.S. Forest Service**  
Rocky Mountain Regional Office  
Lakewood, CO

**National Park Service**  
Intermountain Regional Office  
Lakewood, CO



June 2010

## Black-footed Ferret



## Programmatic Consultations

These programs guide implementation of future actions by establishing standards, guidelines, or governing criteria to which future actions must adhere.

One of the great advantages of doing programmatic consultations is that they generally involve the development of a conservation strategy or program based on the needs of the species rather than simply trying to build the needs of the species into already created projects.

## Programmatic Consultation

- ▣ Federal agencies must consult on such programs, plans, or strategies.
- ▣ Each “tier” of Federal agency action must complete the appropriate level of section 7 consultation.

- (1) see Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1052 - 1053 (9<sup>th</sup> Cir. 1994); Lane County Audubon Society v. Jamison, 958 F.2d 290, 293 (9<sup>th</sup> Cir. 1992); Silver v. Babbitt, 924 F.Supp. 976 (D. Ariz. 1995); Silver v. Thomas, 924 F.Supp. 976 (D. Ariz. 1995).

It has been asserted by some that the case Ohio Forestry Association v. Sierra Club can be used to support the proposition that the Forest Service does not have to consult on Land and Resource Management Plans. However, in Ohio Forestry, the Supreme Court decided whether a forest plan was judicially ripe for review. Consultation requirements under the ESA were neither raised nor discussed.

- (2) see Lane County Audubon v. Jamison, at 293; Pacific Coast Federation of Fishermen’s Association v. National Marine Fisheries Service; Pacific Coast Federation of Fishermen’s Association v. National Marine Fisheries Service, 71 F.Supp. 2d 1063 (W.D. Wa. 1999); Pacific Coast Federation of Fishermen’s Association v. National Marine Fisheries Service, No. 99-36027 (9<sup>th</sup> Cir. 2001); Silver v. Babbitt, Silver v. Thomas, Conner v. Burford, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988), Conner v. Burford, 605 F.Supp. 107 (D.Mont.1985).

## Programmatic Consultation

- ▣ Programmatic consultation may be completed for both formal and informal consultations.

(1) Silver v. Babbitt, Silver v. Thomas, Conner v. Burford, 848 F.2d 1441

## Programmatic Consultation

- ▣ Where uncertainty regarding future actions exists, the Service must project the potential effects of future actions while providing the benefit of the doubt to the species.

(1) Congressional record.

(2) Conner v. Burford, 848 F.2d 1441 (?)

## Programmatic Consultation

- ▣ Incidental take statements can be provided at the programmatic level, but specific take is not exempted until information about site-specific actions is known.

This is worked out for the appended approach, but we're still working on the procedures for the tiered approach.

Spatial and temporal uncertainty (how, where, when)

## Programmatic Consultation

- ▣ The Service must ensure that the environmental baseline is appropriately tracked during implementation of programmatic consultations.

Recent NSO Forest Plan litigation.

## **Programmatic Consultation and the Section 7 Handbook**

The Section 7 Handbook provides direction that has since been found to be inappropriate.

## Programmatic Consultation and the Section 7 Handbook

“...a programmatic consultation will not substitute for an individual project consultation, unless the programmatic analysis lays out the species-specific standards within which all individual activities will be conducted.” [Incorrect]

## Programmatic Consultation and the Section 7 Handbook

Allows for “blanket clearance” of minor construction projects falling into specific categories that are not likely to adversely affect listed species or designated critical habitat.  
[Incorrect]

## Types of Programmatic Consultations

- ▣ Tiered
- ▣ Appended

The programmatic biological opinion produced for each method is similar; the difference is in how future consultations are handled.

## Tiered Programmatic Consultation

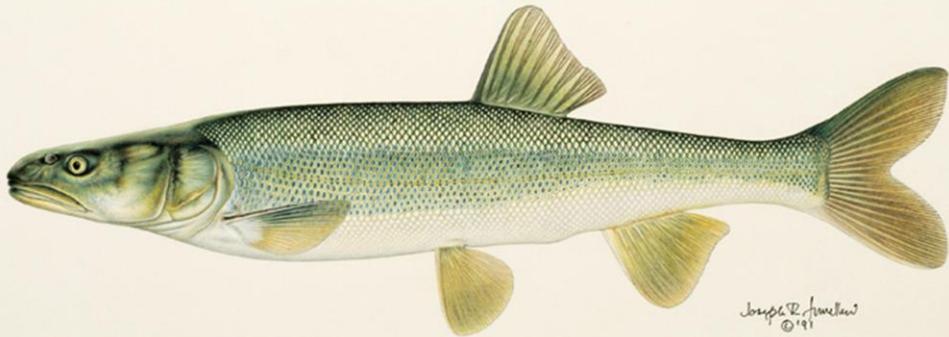
- ▣ Future project-level biological opinions “tier” to the programmatic biological opinion.
- ▣ Stand alone biological opinions are produced for each future project.

# Colorado River Programmatic Biological Opinion

**FINAL PROGRAMMATIC BIOLOGICAL OPINION  
FOR BUREAU OF RECLAMATION'S OPERATIONS AND  
DEPLETIONS, OTHER DEPLETIONS, AND FUNDING AND  
IMPLEMENTATION OF RECOVERY PROGRAM ACTIONS  
IN THE UPPER COLORADO RIVER ABOVE THE  
CONFLUENCE WITH THE GUNNISON RIVER**



## Colorado pikeminnow



About a year ago the Service completed a programmatic biological opinion on the Colorado River addressing 4 endangered fish species. The Colorado pikeminnow

# Razorback sucker



The razorback sucker.

# Bonytail



The bonytail.

## Humpback chub



And humpback chub. People have described these fish as awkward looking, with strange names. Well this programmatic consultation was also an awkward process with a strange name.

## Section 7 Under the PBO

- ▣ **Federal agency initiates consultation with the Service.**
- ▣ **The Service provides a Recovery Agreement and the stipulations of the PBO.**
- ▣ **The agency returns the signed Recovery Agreement.**
- ▣ **The Service provides documentation that section 7 has been completed under the PBO.**

## Appended Programmatic Consultation

- ▣ Future project-level documentation is attached to the programmatic biological opinion in an appendix.
- ▣ The programmatic BO together with all appended documentation represents the complete BO for each future project.

## Elements of a Programmatic Consultation (upper level consult.)

- ▣ Consultation history
- ▣ EBL/Status of the species
- ▣ Project description
- ▣ Effects analysis (two levels)

Consultation history: standard

Project description: describes the design criteria or standards of the proposed program, all types of future activities that may result, and any limits regarding the distribution, extent, timing, etc. of future projects as identified by the action agency.

Effects analysis: Individual impacts; landscape impacts.

# Yampa River PBO

- ▣ Similar to Colorado River PBO
- ▣ “Management Plan for Endangered Fishes in the Yampa River Basin”
- ▣ No Bureau of Reclamation projects involved



## Programmatic Consultation Effects Analysis

- ▣ First evaluate how species may be affected by individual projects implemented in accordance with the program standards and guidelines.

In this step we look at the type of projects that can be implemented under the action agencies' program and evaluate the types of effects that may result.

During the Service's analysis, all potential effects that may result from future actions that meet the standards of the action agency's program must be evaluated and a "conservative" effects analysis must be conducted; that is, the benefit of the doubt must be provided to the species and any effects that are likely to may result from future actions must be analyzed.

At times this may result in an assessment of effects that the action agency believes will not occur because they will not implement actions in a manner that result in such effects.

It's essential that the action agency and Service work together in pre-consultation to ensure that the action agency's program contains standards that will ensure that such effects will not occur; **if it is possible for an action to meet the standards of the program and result in such effects, these potential effects must be analyzed.**

## Programmatic Consultation Effects Analysis (Cont.)

- ▣ Evaluate potential landscape-level impacts to listed species that may occur from implementation of individual treatment projects in accordance with the program standards and limits.

Again, it's essential that the action agency and Service work together to ensure that the program contains standards that will limit potential effects; **if it is possible for actions to meet the standards of the program and result certain effects, these potential effects must be analyzed.**

The effects analysis must show that when the program standards are applied to each project, the net additive effect of **all** projects will not likely result in JAM.

## Elements of a Programmatic Consultation (Cont.)

- ▣ Procedures for completing project-level consultation on future actions.
- ▣ Incidental take statement.

We'll talk about the ITS a little later, but depending on the method you choose, you may or may not exempt part or all of the potential take.

## Elements of a Programmatic Consultation (Cont.)

- ▣ Procedures for monitoring implementation of future projects and associated impacts (environmental baseline tracking).

## Elements of Project-level Consultation (Tiered Approach)

- ▣ Explanation of the programmatic consultation and its relationship with the project-level consultation.

The following slides identify the elements that should be in the project-level biological opinion for the tiered approach.

## Elements of Project-level Consultation (Tiered Approach)

- ▣ Reference to the information used to develop the programmatic opinion and a summary of the additional information used to evaluate the effects of the proposed project.

## Elements of Project-level Consultation (Tiered Approach)

- ▣ EBL/Status of the species
- ▣ Project description.
- ▣ Detailed discussion of effects incorporating specified portions of the programmatic consultation effects analysis.

Effects: Should identify specific locations (page numbers and sections) within the effects analysis of the programmatic consultation.

Typically the effects section will identify the effects to both the landscape and individuals of the species within the action area.

While the effects section can refer back to the programmatic BO's discussion of the types of impacts, it will provide additional information on how these impacts will affect species and habitat within the action area affected by this specific project and how these specific effects will affect the species' conservation.

## Elements of Project-level Consultation (Tiered Approach)

- ▣ A statement regarding the consistency (or inconsistency) of the effects of the proposed project with the effects analyzed in the programmatic biological opinion.

## Elements of Project-level Consultation (Tiered Approach)

- ▣ JAM conclusion.
- ▣ Project-specific ITS.
- ▣ Procedures for monitoring implementation and impacts.

A JAM determination may require reinitiation of the programmatic consultation.

ITS should tier back to the programmatic biological opinion ITS.

## Elements of Project-level Consultation (Tiered Approach)

- ▣ Environmental baseline tracking and reaffirmation of the programmatic biological opinion conclusions (if appropriate).

EBL: within the context of the programmatic consultation's action area. This should include a restatement of the amount of take anticipated and a tally of the overall impacts to the EBL (including the amount of take) from all projects implemented under the programmatic biological opinion.

## Elements of Project-level Consultation (Appended Approach)

- ▣ Explanation of the programmatic consultation and its relationship with the project-level consultation.

The following slides identify the elements that should be in the project-level documentation for the appended consultation approach.

## Elements of Project-level Consultation (Appended Approach)

- ▣ Reference to the information used to develop the programmatic opinion and a summary of the additional information used to evaluate the effects of the proposed project.

## Elements of Project-level Consultation (Appended Approach)

- ▣ Project summary.
- ▣ Detailed discussion of effects incorporating specified portions of the programmatic consultation effects analysis.

Effects: Should identify specific locations (page numbers and sections) within the effects analysis of the programmatic consultation.

Typically the effects section will identify the effects to both the landscape and individuals of the species within the action area.

While the effects section can refer back to the programmatic BO's discussion of the types of impacts, it will provide additional information on how these impacts will affect species and habitat within the action area affected by this specific project and how these specific effects will affect the species' conservation.

## Elements of Project-level Consultation (Appended Approach)

- ▣ Environmental baseline tracking.
- ▣ Additional project-specific RPMs, if any, needed to minimize the impacts of the take resulting from this specific project.

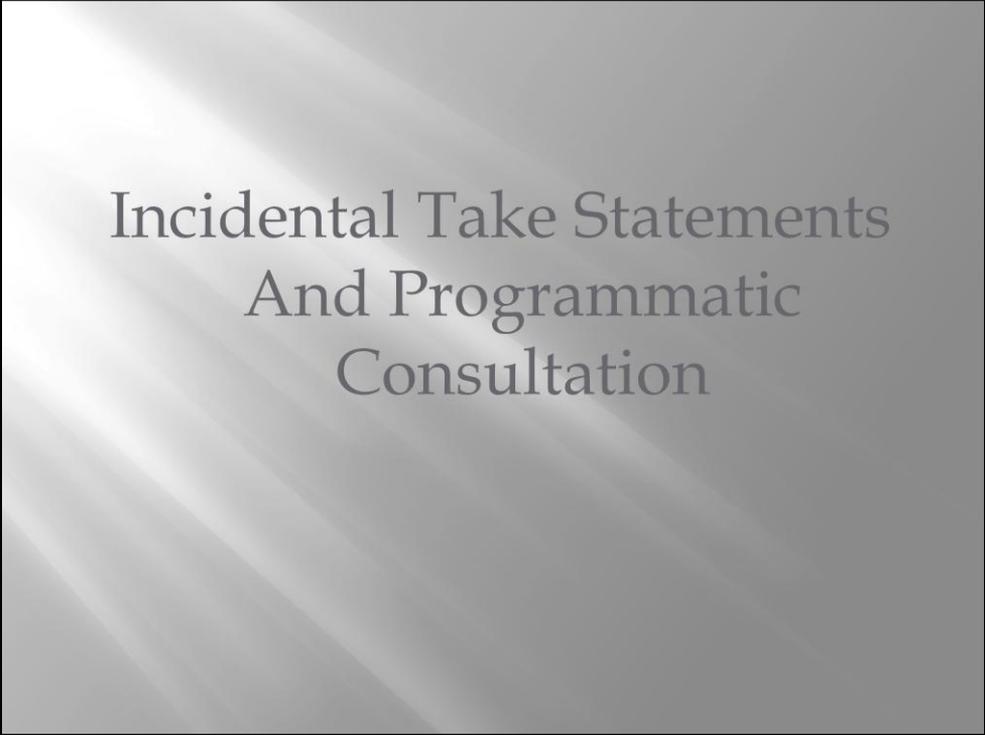
Note that the environmental baseline in this situation is the entire area covered by the programmatic consultation.

EBL tracking should include a restatement of the amount of take anticipated and a tally of the overall impacts to the EBL (including the amount of take) from all projects implemented under the programmatic biological opinion to date.

## Elements of Project-level Consultation (Appended Approach)

- ▣ Language appending the project to the programmatic biological opinion and associated ITS.

Assuming this is appropriate.



# Incidental Take Statements And Programmatic Consultation

Very complex issue

## Incidental Take Statements

- ▣ Conner v. Burford, Silver v. Babbitt, and Silver v. Thomas identified the need for a biological opinion to be produced for each action “likely to adversely affect” listed resources.

Act

Furthermore, in Silver v. Babbitt and Silver v. Thomas, the court specifies, in accordance with the regulations implementing section 7 of the ESA, that not only must each action that is “likely to adversely affect” a listed species or designated critical habitat complete formal consultation, but that this “...requires the consulting agency to issue a biological opinion determining whether the action is likely to jeopardize the listed species...” Citing James R. Conner et al. v. Robert Burford, et al., 848 F.2d 1441 the court comes to the conclusion that there is no exception to the statutory requirement of a “comprehensive biological opinion” on the basis of inexact information.

The Ninth Circuit also has stated that restrictions in the scope of a programmatic document in reliance upon staged decision making is impermissible. Conner v. Burford, 848 F.2d 1441, 1453-54 (9<sup>th</sup> Cir. 1988)(the agency must look at all the possible ramifications of the agency action); also see Conner v. Burford, 605 F.Supp. 107 (D.Mon.1985) (The potential for piecemeal invasion of habitat is present when the agency fails to analyze the consequences of all stages of oil and gas activity on the forests by issuing a less than comprehensive biological opinion).

The court goes on to cite the regulations at 50 CFR 402.14(h) to identify the contents of a “complete” biological opinion as:

## Incidental Take Statements (Cont.)

- ▣ ESA requires that each biological opinion contain an ITS (if there is going to be take).

(h) Biological opinions. The biological opinion shall include:

- (1) A summary of the information on which the opinion is based;
- (2) A detailed discussion of the effects of the action on listed species or critical habitat; and
- (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion")...

Finally, the court identifies the requirement that each biological opinion that determines that take is likely to occur when the action under consideration is implemented include an incidental take statement that "specifies the impact of the incidental taking on the species; the reasonable and prudent measures necessary or appropriate to minimize such impact; sets forth the terms and conditions that the agency must comply with to implement the measures and specifies the procedures to be used to handle or dispose of any individuals of a species actually taken. 50 C.F.R. § 402.14(i)(1995)." The court goes on to cite the preamble to the 402 regulations and the Congressional Record to specify that "when developing an incidental take statement for an action that has insufficient information to make specific determinations for future activities at the plan level, the Services must provide the benefit of the doubt to the species and "develop projections indicating potential conflicts between activities and the preservation of protected species...."

## Incidental Take Statements (Cont.)

Ninth Circuit (Arizona Cattle  
Growers):

“...if the [FWS] cannot satisfy the court to a reasonable certainty that a take will occur, then it is arbitrary and capricious for it to issue an [ITS] imposing conditions...”

How do we reconcile these conditions?

## Programmatic Level Incidental Take Statements

- ▣ General in nature.
- ▣ Describe the manner in which incidental take is anticipated to occur.
- ▣ Set the upper bound of incidental take.

How do we reconcile the conditions on the previous three slides?

(3) This maximum level of anticipated take is derived from information presented in the effects analysis conducted for the programmatic biological opinion.

Background again: In Silver v. Babbitt and Silver v. Thomas the court cites the preamble to the 402 regulations and the Congressional Record to specify that “when developing an incidental take statement for an action that has insufficient information to make specific determinations for future activities at the plan level, the Services must provide the benefit of the doubt to the species and “develop projections indicating potential conflicts between activities and the preservation of protected species....”

## Incidental Take Statements (Appended Approach)

- ▣ The programmatic biological opinion contains a single ITS that all future actions are appended to as appropriate.
- ▣ If appropriate, the ITS will contain RPMs and T&Cs that can be implemented on a broad scale.

Therefore, there is only one ITS.

Think of this as a vessel that is filled by the addition of each project.

(2) May include minor adjustments or additions to the design criteria.

## Incidental Take Statements (Appended Approach)

- ▣ Programmatic level RPMs and T&Cs may only be pertinent to some projects, but not others.
- ▣ Some projects may require additional RPMs and T&Cs.

(2) This is because while the design criteria will be established at the time of programmatic consultation, the specifics of individual projects (e.g., precise locations, exact methods and procedures, etc.) will not; therefore, it may not be possible to develop meaningful T&Cs at the programmatic level.

## Incidental Take Statements (Appended Approach)

- ▣ As individual projects are proposed and evaluated, additional project-specific RPMs and T&Cs will be developed as appropriate.
- ▣ The take exemption does not take effect until each specific project is appended to the programmatic ITS. (RPMs and T&Cs)

(1) The project-level documentation will identify the appropriate RPMs and T&Cs from the programmatic BO.

(2) Arizona Cattle Growers.

(2) This concept is important to deal with the issue of having to exempt IT to have RPMs.

## Incidental Take Statements (Appended Approach)

- ▣ When the ITS is “full” reinitiate (or quit).

Vessel concept

## Incidental Take Statements (Tiered Approach)

- ▣ Two “stand alone” ITS.
  - Programmatic-level
  - Project-level

## Incidental Take Statements (Tiered Approach)

- ▣ Sets the upper bound of incidental take.
- ▣ Cannot exempt the incidental take at this level unless there is sufficient information to allow identification of the specific take that is reasonably certain to occur.

- (1) We mentioned this earlier. Provide your justification for this number in the “Effects of the Take” section of the ITS.
- (2) This is typically not the case. (batched) Specifics of the individual projects will affect the take. While you may be reasonably certain that take will occur, you have spatial and temporal uncertainties that do not allow you to meet the requirements of Az. Cattle Growers.

## Incidental Take Statements (Tiered Approach)

- ▣ Provide the action agency with the RPMs and T&Cs that are likely to be contained in project-level ITS.
- ▣ In the project-level ITS, identify the needed RPMs and T&Cs from the prog. BO (and any additional ones).

- (1) For planning purposes.
- (2) For planning purposes. These don't come into force yet. (can't require RPMs if no exemption; can't provide an exemption until you know what you're exempting – relates to Arizona Cattle Growers).
- (3) May need to add additional RPMs/T&Cs once specific projects are developed.

## Monitoring and Review

- ▣ Complete periodic reviews to:
  - Evaluate how the programmatic consultation is working.
  - Ensure that the implementing procedures are being complied with.
  - Reevaluate the environmental baseline and programmatic-level effects analysis.

During this process it may be determined that the programmatic biological opinion is functioning as anticipated and, therefore, activities should continue, or that adjustments should be made.

Although this comprehensive review should be conducted periodically, programmatic consultation should be reinitiated if at any time during implementation of hazardous fuels treatment activities it is determined that: (1) the amount or extent of incidental take exempted by the programmatic biological opinion is exceeded; (2) new information reveals effects of the actions that may affect listed and proposed resources in a manner or to an extent not considered in the programmatic biological opinion; (3) the action agency's activities are subsequently modified in a manner that causes effects to listed and proposed resources that were not considered in the programmatic biological opinion; or (4) a new species is listed or critical habitat is designated that may be affected by the action.

- So what happens if you discover a project that meets the program standards, but whose effects are different than you anticipated? Reinitiate the programmatic.