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Memorandum

To: Regional Director, Region 2, USFWS, Albuquerque, New Mexico (ARD-ES)
(Attn: Susan Jacobsen)

From: Field Supervisor

Subject: Findings and Recommendations on Issuance of an Incidental Take Permit for the
Malpai Borderlands Habitat Conservation Plan to Malpai Borderlands Group
(TE-155587-0)

I. DESCRIPTION OF PROPOSAL

We, the U.S. Fish and Wildlife Service (FWS), propose to issue an Incidental Take Permit (Permit) to the Malpai Borderlands Group (MBG) under the authority of section 10(a)(1)(B) and section 10(a)(2) of the Endangered Species Act of 1973 (ESA), as amended for a period of 30 years. Documents used in the preparation of this Statement of Findings and Recommendations include the Malpai Borderland Habitat Conservation Plan (MBHCP), Environmental Assessment (USFWS 2008), the Implementation Agreement (IA), and our Biological Opinion on the issuance of the Permit (TE-155587-0). All of these documents are incorporated by reference as described in 40 CFR 1508.13.

Under the Permit, the MBG would receive incidental take authorization for certain activities as identified in the MBHCP submitted as part of their Permit application. The MBG would have the ability to extend take to third parties (i.e., ranchers within the Malpai Borderlands), through signing of a Certificate of Inclusion (which would establish MBG's direct control). The Certificate of Inclusion would require that the ranchers incorporate avoidance, minimization, and mitigation measures to the maximum extent practicable into the covered Grassland Improvement Activities and Ranch Management Activities.

Covered Species

The Permittee is requesting incidental take coverage (under the Permit) for a total of 19 species (Covered Species). The Permit would cover incidental take for two endangered animal species: Yaqui chub (*G. purpurea*) and Yaqui topminnow (*P. o. sonoriensis*); five threatened animal species:

Chiricahua leopard frog (*Lithobates [=Rana] chiricahuensis*), beautiful shiner (*Cyprinella formosa*), Yaqui catfish (*Ictalurus pricei*), Mexican spotted owl (*Strix occidentalis lucida*), New Mexico ridge-nosed rattlesnake (*Crotalus willardi obscurus*), and the nonessential experimental population of the northern aplomado falcon (*Falco femoralis*).

The Permit would also cover 10 currently unlisted animal species, including the candidate western yellow-billed cuckoo (*Coccyzus americanus*) and the unlisted Yaqui sucker (*Catostomus bernardini*), Mexican longfin dace (*Agosia spp*) (Miller *et al.* 2005) (referred to in the public review draft as the longfin dace – Yaqui form (*Agosia chrysogaster*)), Mexican stoneroller (*Campostoma ornatum*), lowland leopard frog (*Lithobates [=Rana] yavapaiensis*), northern Mexican gartersnake (*Thamnophis eques megalops*), black-tailed prairie dog (*Cynomys ludovicianus*), western burrowing owl (*Athene cunicularia hypugaea*), white-sided jackrabbit (*Lepus callotis*), and western red bat (*Lasiurus blosseveillii*), should they become listed in the future during the term of the Permit. The Permit would become effective to authorize incidental take of the currently unlisted Covered animal species concurrent with their listing under the ESA.

One endangered plant species, Huachuca water umbel (*Lilaeopsis schaffneriana* var. *recurva*), would also be considered a Covered Species and included on the Permit. Although take of plant species is not prohibited under the ESA and, therefore cannot be authorized under an incidental take permit, the plant species would be included on the Permit in recognition of the conservation benefits provided to the species under the MBHCP. Assurances provided under the “No Surprises” rule at 50 CFR 17.3, 17.22(b)(5), and 17.32(b)(5) would extend to all Covered Species.

Actions conducted under the MBHCP will comply with the provisions of the Migratory Bird Treaty Act (MBTA) with avoidance measures for actions affecting Mexican spotted owl, northern aplomado falcon, western yellow-billed cuckoo, and western burrowing owl. The MBTA prohibits the taking, killing, or possessing of migratory birds. The MBTA identifies a variety of prohibited actions including the taking of individual birds, young, feathers, eggs, and nests. Two Covered Species (northern aplomado falcon and Mexican spotted owl) are listed under the ESA and subject to a MBTA Special Purpose Permit. The Permit constitutes a MBTA Special Purpose Permit for the Covered Species for a three-year term as specified under 50 CFR 21.27, subject to renewal by MBG.

Proposed Activities

The Permit would authorize for a period of 30 years, the incidental take of Covered Species associated with the carrying out of Grassland Improvement Activities (Section 3.5.1 of the MBHCP) and Ranch Management Activities (Section 3.5.2 of the MBHCP) within the approximately 828,000-acre Permit area:

Grassland Improvement Activities are defined as those expressly designed and carried out to correct, ameliorate, or improve a specific adverse grassland condition and to meet the long-term interests of ecosystem health, watershed function, and grassland stability and productivity.

The Grassland Improvement Activities include:

- fire management (Section 3.5.1.1 of the MBHCP),
- erosion control (Section 3.5.1.2 of the MBHCP), and
- mechanical brush control (Section 3.5.1.3 of the MBHCP).

Ranch Management Activities include livestock management, linear facilities construction, and stocktank maintenance and use. Among these activities are the placement and movement of livestock in and between pastures and locations in accordance with season, forage availability, water availability.; construction of perimeter fencing, cross-fencing, and corrals; construction of livestock watering facilities (e.g., stocktanks, stockponds, troughs, water wells, and waterlines); and maintenance and use of stocktanks. These facilities and activities are routine on a ranch, and much of this infrastructure is already in place in the Malpai Borderlands. Nevertheless, new structures and facilities occasionally will be needed (primarily for the purpose of better managing livestock herds), and some existing facilities require periodic maintenance. MBG included these activities in the MBHCP to assist area ranchers should they wish to seek coverage for these activities.

The Ranch Management Activities include:

- livestock management (Section 3.5.2.1 of the MBHCP),
- linear project construction (Section 3.5.2.2 of the MBHCP), and
- stocktank maintenance and use (Section 3.5.2.3 of the MBHCP).

Conservation Program Activities consist of activities and measures established by the MBHCP pursuant to the ESA to minimize and mitigate to the maximum extent practicable effects to proposed Covered Species in the course of carrying out the Covered Activities described above. The MBHCP conservation program consists of: goals and objectives (Section 5.1 of the MBHCP); incidental take minimization measures (Section 5.5 of the MBHCP); mitigation measures (Section 5.6 of the MBHCP); a monitoring program consisting of compliance monitoring measures and biological effectiveness monitoring measures (Section 5.7 of the MBHCP); an Adaptive Management program (Section 5.8 of the MBHCP); a Technical Advisory Committee to help implement the plan (Section 5.9 of the MBHCP); and an annual report (Section 5.10 of the MBHCP).

Relation of MBHCP to Section 7 Consultations

Private or public actions that are Covered Activities under the MBHCP may also be subject to separate Section 7 review if those actions are authorized, funded, or carried out by Federal agencies. Incidental take for Covered Activities carried out by the Permittee or third party ranchers acting under a Certificate of Inclusion will be granted under the Permit and will be subject to the take mitigation, minimization, and avoidance measures provided for under the MBHCP. Incidental take coverage for the Federal action agency will be granted through the incidental take statement issued with our Section 7 biological opinion.

Natural Resources Conservation Service (NRCS) requested programmatic section 7 consultation for their funding and implementation of activities covered by the MBHCP within the action area. We

included their proposed action in our section 7 consultation on our issuance of the section 10(a)(1)(B) permit, and we thus provided them with an incidental take statement that is consistent with the terms of the Permit for MBG. NRCS will implement all minimization measures that are associated with covered activities in the MBHCP to minimize incidental take of listed species and covered species, as applicable.

Term of the Permit

The Permit would be in effect for a period of 30 years. Section 13.5 of the IA and section 9.2 of the MBHCP describe provisions for termination of the Permit. Under these provisions, should the Permittee request early termination of the Permit, the Permittee would be required to ensure that it fulfills its mitigation obligations for all authorized take in accordance with the MBHCP and the IA. The USFWS may suspend or revoke the Permit as a result of a violation of the Permit and/or pursuant to any applicable Federal laws or regulations. If the Permit is revoked or suspended, the permittee remains obligated to fulfill all of its responsibilities under the Permit for any permitted activity authorized, funded, or carried out by the Permittee between the effective date of the Permit and the date of the Permit suspension or revocation.

MBHCP Conservation Strategy

Biological Goals and Objectives

The goals of the MBHCP are:

- To maintain and, where necessary, enhance and improve three attributes of ecological health in the Malpai Borderlands (soil stability, biotic integrity, and watershed function);
- To ensure the covered grassland improvement activities necessary to achieve the preceding goal, and the covered ranch management activities referred to in the following goal, are undertaken in a manner consistent with protection of the Covered Species and their habitats; and,
- To ensure the measures necessary to protect the Covered Species are undertaken in a manner consistent with the effective carrying out of the covered grassland improvement activities, the covered ranch management activities, and the preservation of ranching and vigorous ranching economies in the Malpai Borderlands over the long-term.

The MBHCP's grassland conservation objectives are:

- To minimize sheet erosion and identify, abate, and repair areas exhibiting acute erosion (e.g., channel downcutting, floodplain downcutting, and headcutting) in the Malpai Borderlands, as appropriate;
- To halt the encroachment of woody brush species into the area's historical grasslands and correct or reverse such encroachment where it has already occurred; and,

- To conserve and restore grassland habitats and grassland productivity in the Malpai Borderlands and, where appropriate, re-establish native grasses and forbs

The MBHCP's species conservation objectives are:

- To ensure that the effects of take of the Covered Species are minimized and mitigated to the maximum extent practicable in the course of grassland improvement and ranch management activities carried out under the plan;
- To ensure that loss or degradation of the habitats of the Covered Species are also minimized or reversed in the course of these activities; and,
- Where possible and consistent with the MBHCP's other purposes and goals, to assist in recovery of the Covered Species and the conservation of other wildlife and plants native to the Malpai Borderlands

Incidental Take Avoidance, Minimization, and Mitigation Measures

The MBHCP minimizes take through the incorporation of Take Minimization Measures for the Covered Species potentially present in the project area for the relevant Covered Activity (Section 5.5 of MBHCP). This approach is based upon the assumption of species presence, and incidental take minimization measures are organized by "Species Associations" based upon vegetation community types. This approach is taken to minimize the need for costly pre-activity surveys and still minimize take to the maximum extent practicable. However, if during the planning process the assumption of species presence is too restrictive, pre-activity surveys may be performed, per approved protocol or other methodologies approved by the USFWS. If presence is not demonstrated, minimization measures for that species are not required for implementation of that activity (Section 5.4.2), except for landscape level minimization measures for Fire Management (Section 5.5.2.1(A)(1-4)), Erosion Control (Section 5.5.2.2(A)(2-4)) and Mechanical Brush Control (Section 5.5.2.3.(A)(2-3)).

Minimization Measures

Avoidance of Critical Time Periods

Critical time periods are those portions of the year that Covered Species, or specific life stages of a Covered Species, are most vulnerable to the effects of Covered Activities. These critical periods typically involve times of the year when breeding, nesting, or the rearing of young occur and when vulnerable life stages, such as egg, larvae, tadpoles, nestlings, and pups may be present in the action area. These life stages are most vulnerable to the potential effects of the Covered Activities in the MBHCP. Detailed descriptions of these critical time periods are in Section 5.5.1 of the MBHCP.

Fire Management

Fire management activities in the MBHCP include measures that limit the amount, extent, and frequency of fire. In addition, prescription parameters are included from which prescribed fire and

wildland fire use decisions may be made to ensure desired fire behavior and effects. Post fire grazing rest is also included to ensure successful recovery of vegetation to meet MBG goals in preventing and decreasing erosion through watershed and grassland improvements. Measures to reduce the effects of fire camps and staging areas are also included. These minimization measures are based primarily on a watershed level. A detailed description of these minimization measures are in Section 5.5.2.1 of the MBHCP.

Erosion Control

Erosion control activities are proposed in the MBHCP to reduce sediment transport and improve watershed conditions that have developed over time. The erosion control structures proposed are simple, low impact structures that primarily use natural materials (Zeedyk and Jansens 2006). Minimization measures for erosion control activities include avoiding critical time periods, buffers around aquatic and riparian habitats, restriction on use of heavy equipment, and avoidance of covered species known in the area. Detailed descriptions of these minimization measures are in Section 5.5.2.2 of the MBHCP.

Mechanical brush control

Mechanical brush control activities are proposed in the MBHCP to reduce shrub invasion of upland grassland communities. This will allow these vegetation communities to increase in herbaceous and grass cover, slow surface run-off, and hold soils in place. Minimization measures for mechanical brush control activities include avoiding critical time periods, buffers around aquatic and riparian habitats, restriction on use of heavy equipment in sensitive areas, and avoidance of covered species known in the area. Detailed descriptions of these minimization measures are in Section 5.5.2.3 of the MBHCP.

Livestock management

Livestock management is not an activity that MBG carries out or funds, but because their members are ranchers, they proposed to include it in the MBHCP as a voluntary provision for their members. In addition, the relative impact of livestock grazing on the covered species is minor and specific to a few locations in the Covered Area. Because of this, the minimization measures are a commitment by the enrolled rancher and MBG to work to reduce effects to Covered Species related to livestock management on an enrolled ranch. Detailed descriptions of these minimization measures are in Section 5.5.3.1 of the MBHCP.

Linear Facility Construction/Maintenance

Linear Facility Construction and Maintenance projects are typically not funded by MBG, but because these types of improvements (fences, pipelines, ranch access roads, etc.) are part of normal ranch management, MBG proposed to include them in the MBHCP as a voluntary provision for their members. Minimization measures include limiting disturbance width to 35 feet; restrictions on the use of heavy equipment; avoiding destruction of, significant damage to, or disturbance of the habitats of the covered species by avoiding critical time periods for species in the covered area; and routing fencelines, waterlines, roads, and utility lines to avoid areas known to be occupied by the

covered species or known habitat features of the covered species. Detailed descriptions of these minimization measures are in Section 5.5.3.2 of the MBHCP.

Stocktank Maintenance/Use/Repair

Livestock tank maintenance, use, and repairs are also not activities that MBG carries out or funds, but because their members are ranchers they proposed to include it in the MBHCP as a voluntary provision for their members. The minimization measure for these activities is primarily giving notice to the MBG to allow salvage of Chiricahua and lowland leopard frogs and northern Mexican gartersnakes prior to maintenance activities. Detailed descriptions of these minimization measures are in Section 5.5.3.3 of the MBHCP.

Mitigation Measures

Mitigation Measures for the effects of incidental take under the MBHCP are largely based upon the long-term, ecological benefits of the Covered Activities on a landscape level (Section 5.6 of the MBHCP). The purposes of both types of activities (grassland improvement activities and ranch management activities) are to maintain, and, where necessary, improve ecological conditions in the Malpai Borderlands; to maintain the area in a natural, undeveloped condition; and to return periodic fire to the Malpai Borderlands as a functioning component of the ecology of the area.

The effects of the MBHCP's proposed grassland improvement activities on the Covered Species and their habitats, while potentially adverse in the short-term, are expected to be beneficial over the long-term by correcting processes, such as erosion and brush encroachment that are detrimental to those habitats. The construction and maintenance of linear facilities include fences, water development, and the roads needed to maintain those facilities, which are typically related to improvements in livestock management. Specifically, these facilities should result in better distribution of livestock over a pasture, and livestock rotation practices should also improve conditions on a landscape level for the habitats of Covered Species. Therefore, it is anticipated that the landscape-level benefits (i.e. reduced erosion, restoration of grasslands, and improvements to the watershed) identified in the MBHCP over the 30-year period of the ITP, should mitigate for the temporal and small-scale effects of the incidental take of the proposed Covered Species from the Covered Activities identified within the MBHCP.

Monitoring and Reporting

Two types of monitoring are provided for under the MBHCP: compliance (implementation) monitoring and biological effectiveness monitoring (biological monitoring). The purpose of compliance monitoring is to ensure that the minimization and mitigation measures established by the MBHCP to meet the requirements of the Act are fully and appropriately carried out. This is accomplished under the plan primarily through coordination, documentation, and reporting (Section 5.7.1 of the MBHCP). Biological monitoring involves monitoring of the Covered Species, including take as a result of the Covered Activities, the biological effectiveness of the MBHCP, the MBHCP's ability to meet the species conservation objectives, and, in light of the preceding, the Adaptive Management program (Sections 5.7.2.1, 5.7.2.2, and 5.8 of the MBHCP).

The reporting responsibilities and commitments for the MBHCP will include results of implemented activities, compliance monitoring, biological monitoring, and adaptive management decisions. These results will be reported on an annual basis along with any other Permit reporting requirements (Section 5.10 of the MBHCP).

Adaptive Management

Adaptive Management (AM) is a process that allows the specific terms of an HCP's conservation program to be revised and adjusted through time to ensure that the plan's objectives are being met and that the most up-to-date scientific information available is utilized by the program. The MBHCP's AM provisions enable the plan to respond to new information relevant to such questions, and where appropriate to incorporate such information into the MBHCP in a planned, structured fashion. Without this, the MBHCP would be a static, inflexible document. The MBHCP describes an AM process that involves detection of new circumstances or the availability of new information, triggers that would initiate AM, notification of MBHCP participants, evaluation of the circumstance to determine if AM is warranted, and AM response if it is warranted.

Technical Advisory Committee

A Technical Advisory Committee will be formed to advise MBG in the implementation of the MBHCP and its effectiveness at achieving the stated goals of the MBHCP (Section 5.9 of the MBHCP).

Changed and Unforeseen Circumstances

Changed and unforeseen circumstances are described in Section 8 of the MBHCP. The MBHCP provides for nine situations involving the possibility of changed circumstances: Escape of managed fire into riparian vegetation communities; occurrence of high-severity managed fire and occurrence of large-acreage wildfire; drought; occurrence of significant flooding; termination of the FWS's 4(d) rule for Chiricahua leopard frogs; termination of FWS's special rule for northern aplomado falcon; inability of MBG to fund monitoring; new listing of an uncovered species; new critical habitat designation; and development or subdivision of ranches in the covered area. As long as the terms of the HCP are being properly implemented, FWS shall not require the implementation of any conservation and mitigation measures by the Permittee in response to Changed Circumstances, other than those measures specified in the MBHCP and Section O of Permit TE155587-0.

In the event that it is demonstrated by FWS that Unforeseen Circumstances exist during the life of this Permit, and additional conservation and mitigation measures are deemed necessary to respond to Unforeseen Circumstances, FWS may require additional measures of the Permittee where the HCP is being properly implemented, but only if such measures are limited to modifications to the HCP's operating conservation program for the Covered Species, and maintain the original terms of the HCP to the maximum extent possible. Notwithstanding the foregoing

Pursuant to the "No Surprises" rule, the USFWS shall not:

- Require the commitment of additional land, water, or financial compensation by the Permittee without the consent of the Permittee; or

- Impose additional restrictions on the use of land, water, or natural resources otherwise available for use by the Permittee under the original terms of the HCP, including additional restrictions on the Covered Activities and restrictions on the Permittee's operation of other dams outside the Permit Area to mitigate the effects of the Covered Activities.

If the USFWS determines that an unforeseen circumstance has occurred and that additional land, land restrictions, or financial compensation beyond that required under the MBHCP are needed to conserve the Covered Species, then the MBG will not be obligated to provide the additional measures without their consent. Pursuant to 50 CFR 17.22(b)(3) and 17.32 (b)(8), the USFWS retains the authority to revoke the Permit, in response to an unforeseen circumstance or otherwise, if we find that continuation of the take permitted under the Permit would appreciably reduce the likelihood of the survival and recovery of a listed species.

Changes made between Draft and Final MBHCP

Based upon the analysis of the Intra-Service Consultation and the publication of the Chiricahua leopard frog recovery plan (USFWS 2007), the following additions to the avoidance, minimization, and mitigation measures were made:

- Minimization measures were added to reduce the potential spread of Amphibian Chytrid through implementation of covered activities. These include an education component for crews, and the washing and drying or sterilizing tools and equipment before moving from project site to project site.
- An additional minimization measure was added to inform Wildfire Incident Command Teams of occupied sites for the covered species to assist in minimization and avoidance during suppression activities.

Analysis of Effects

A detailed analysis of the effects of issuance of the proposed Permit and approval of the MBHCP is found in the Effects of Action section of the Intra-Service Biological and Conference Opinion for the MBHCP (AESO/SE 22410-2006-F-0408). We have determined that the effects likely to result to listed and unlisted Covered Species as a result of issuance of the proposed Permit and approval of the MBHCP would not jeopardize or reduce the likelihood of recovery of the Covered Species or adversely modify designated critical habitat for the beautiful shiner, Yaqui catfish, and Yaqui chub, Huachuca water umbel, Mexican spotted owl, and New Mexico ridge-nosed rattlesnake. This analysis of effects 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 ESA to complete the analysis with respect to critical habitat.

Implementation of the MBHCP may result in incidental take of Covered Species as discussed in Sections 5.5 and 7.1 of the MBHCP. This incidental take may be in the form of direct mortality, harm, and harassment. It is anticipated that through the implementation of the MBHCP minimization measures, the level of incidental take would be minimal and limited in time and scope. Adverse effects are not expected to affect the Covered Species at a population level,

although some individuals will be lost. Long-term beneficial effects of the MBHCP are also expected, as discussed below.

The MBHCP addresses four habitat-related issues connected with the MBHCP: those involving the limited amount of species habitat that might be temporarily adversely affected by erosion control, livestock management, and stockpond use and maintenance activities; those involving the more extensive, but still temporary, adverse habitat effects of managed fire and mechanical brush control; those involving the potentially more significant, but unlikely and unplanned, adverse effects of fire on riparian and montane species' habitats should managed fire inadvertently escape into such areas; and the limited, but potential permanent loss of habitat related to the construction and maintenance of some linear facilities and fire control lines. Of these effects, those resulting from erosion control, livestock management, and stockpond use and maintenance activities would be so minor as to be negligible (Section 7.2 MBHCP); those resulting from fire management and mechanical brush control activities would be transitory (Section 7.2 MBHCP); those resulting from inadvertent escape of fire into riparian and montane areas would be addressed if they do occur as Changed Circumstances (Section 8.3 MBHCP); and the potentially long-term loss of habitat from linear facilities and fire control lines would involve so small an area over the life of the plan as to be negligible (Section 5.5.3 MBHCP).

Aquatic Covered Species

The Yaqui chub, Yaqui catfish, Yaqui topminnow, Yaqui sucker, long-fin dace, Mexican stoneroller, beautiful shiner, and Huachuca water umbel are known primarily to occur on the San Bernardino NWR, which is downstream of the Permit Area. Effects to these species would occur from downstream sedimentation, transport of ash, and post-fire debris related to fire management, mechanical brush control, livestock management, and construction and maintenance of linear facilities, but will be limited to fish in Black Draw and not source populations in the perched ponds on the San Bernardino NWR. The only place where the fish species may be impacted directly by these activities would be off the San Bernardino NWR at Astin Spring. This site is an ephemeral site that is occupied during wet years, and the populations usually disappear during drought years. The lowland leopard frog, northern Mexican gartersnake, and Chiricahua leopard frog would be similarly affected by sedimentation, transport of ash, and post-fire debris related to fire management, mechanical brush control, livestock management, and construction and maintenance of linear facilities; but, due to their current distribution and ability to use and disperse across terrestrial habitats, they could be taken directly through heavy equipment and vehicle use, livestock presence, and spread of amphibian chytrid. The primary activity resulting in these effects would be livestock tank use and management. However, because the leopard frog species have the life histories of an r-selected species, which maximize reproductive effort (e.g., female frogs lay hundreds to thousands of eggs per reproductive effort) to offset relatively high natural mortality, the potential effects are anticipated to be minor in comparison with natural mortality and be more than compensated on a population level by these species reproductive potential. Northern Mexican gartersnakes are not clumped in distribution, and direct take is likely to be only a few individuals at any one location, which is not likely to significantly effect the population in light of the overall conservation program.

In addition, the Chiricahua leopard frog is already covered by a 4(d) rule promulgated when the species was listed. Some population sites are also covered by a Safe Harbor Agreement (SHA) and section 10(a)(1)(A) permit held by MBG. Both the 4(d) rule and the SHA address the effects of stocktank management on non-Federal lands on the Chiricahua leopard frog. The Chiricahua leopard frog is included in the MBHCP in case it is reclassified as an endangered species in the future, at which point the 4(d) rule would no longer apply, and to address individuals that are part of a property's baseline condition on properties enrolled in the SHA, and/or if the SHA is no longer in effect.

Grassland Covered Species

Black-tailed prairie dogs, western burrowing owls, northern aplomado falcons, and white-sided jackrabbits are most likely to be affected by fire management, mechanical brush control, and construction and maintenance of linear facilities. However, where native plants dominate (as on Diamond A Ranch) and in prairie dog towns (typified by bare ground and low-cropped vegetation), fire is typically slow-moving and of low severity; such fires typically burn in a mosaic pattern (i.e., do not affect the entire burn unit) and fire is part of the natural processes of this biotic community. Adults of all four grassland species also have effective capabilities for surviving such fires (e.g., by taking refuge in deep burrow systems or by flying or running away), and the habitat effects of fire on grasslands are usually minor and transitory with generally beneficial effects overall. The juveniles and young of all grassland species are significantly more vulnerable than adults to the potential effects of these activities because of their relative inability to escape such effects by flying or running away. Black-tailed prairie dogs are unlikely to be directly affected by mechanical brush control because the activity is unlikely to be undertaken in prairie dog colonies. Mechanical brush control is carried out prior to the breeding cycles of the grassland species; therefore, the potential for disturbance-related effects as a result of this activity would be unlikely. Livestock management activities may result in an infrequent loss of northern aplomado falcon nests and nest structures based upon documented occurrences in New Mexico, but this should only result in incidental take rarely during the life of the Permit. While livestock management may result in effects to the other grassland species, it should not rise to the level of incidental take. The effects of erosion control and livestock tank maintenance and use will also not rise to the level of incidental take.

Montane Covered Species

New Mexico ridge-nosed rattlesnake and Mexican spotted owl only occur in the montane community, and would only be affected by fire management activities in the Animas Mountains. Prescribed fire in this area would only be used to reduce fuel accumulations to protect habitat for these species, and all prescribed fire would occur during the cool season, outside of the critical time periods for these two species. Other fire management activities would include wildfire use for resource benefit, and there is potential for escaped prescribed fire to move into the montane community. In both these instances, incident command teams will be notified of known species locations and the need to minimize the impact of these events on these species and their habitat.

Riparian Covered Species

The effects of implementation of the Covered Activities in the MBHCP may result in incidental take, in the form of mortality, harm, and harass, of the riparian Covered Species. Western yellow-billed cuckoo and western red bat roost and nest only in riparian areas, which may be affected by fire management, mechanical brush control (harassment only), and construction and maintenance of linear facilities. Fire Management activities and mechanical brush control are not planned for riparian areas, but effects may result from fire escaping into riparian vegetation and noise disturbance from mechanical brush control equipment. Construction of linear facilities may need to cross riparian areas, but will do so in a manner that causes the least amount of disturbance both to habitat and to the covered species through avoidance of critical time periods, minimizing vegetation and soil disturbance to the minimum need to complete the project. Livestock management, erosion control, and livestock tank use and maintenance may result in some disturbance, but they are not anticipated to result in incidental take.

Summary

These potential effects described above are based upon full implementation of the MBHCP, including minimization measures that would minimize the amount and extent of the effects described above. The effects of fire management, mechanical brush control, and construction and maintenance of linear facilities are primarily minimized by limits on the acres of disturbance, both spatially and temporally. The types of projects and how they will be implemented, such as erosion control, are generally low impact as well. In addition, the timing of activities and the use of buffers areas around sensitive habitats will further minimize the extent of these effects.

II. PUBLIC COMMENT

The Environmental Assessment (EA) was prepared in compliance with the FWS's responsibility under the National Environmental Policy Act (NEPA) to analyze the effects of the proposed action on the human environment. The EA analyzes the effects of the no-action alternative (the conditions that would accrue if the Permit was not issued), and preferred alternative (issuance of the Permit and approval of the MBHCP).

Public notification of the availability of the Application, Draft MBHCP, and Draft EA was published in the *Federal Register* on July 2, 2007, initiating a 60-day public comment period. All concerned agencies and entities were provided a copy for review and comment upon request. Seven comments were received. Appendices B and C of the final EA contain our Final Response to Public Comments and copies of the Public Comments.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The proposed taking will be incidental to otherwise lawful activities

We find that the taking of Covered Species under the MBHCP will be incidental to otherwise lawful activities. The activities for which incidental take coverage are sought under the Permit include Grassland Management activities (fire management, erosion control, and mechanical brush control)

and Ranch Management activities (livestock management activities, linear facility construction/maintenance, and stocktank maintenance/use), and monitoring associated with these activities. Any take of Covered Species resulting from these activities will be incidental to, and not the purpose of, these lawful activities.

2. The Permittee will, to the maximum extent practicable, minimize and mitigate for the effects of taking of covered animal species and the effects to other Covered Species that may occur within the Permit Area.

The effects of the incidental take of each of the Covered Species anticipated under the MBHCP is described above under Section I, Analysis of Effects. We find that the MBG will minimize and mitigate the effects of incidental take of the Covered Species to the maximum extent practicable. MBG has developed the MBHCP, pursuant to the incidental take permit requirements codified at 50 CFR 17.22(b)(1) and 50 CFR 17.32(b)(1), which require measures to minimize and mitigate the effects of issuing the Permit. Under the provisions of the MBHCP, the effects of take will be minimized, mitigated, and monitored to the maximum extent practicable in accordance with the Permit requirements of Permit No. TE-155587-0.

To make a finding that the MBHCP minimizes and mitigates the effects of the take to the maximum extent practicable, we must first find that the minimization and mitigation measures provided under the MBHCP are rationally related to the level of incidental take anticipated under the MBHCP. In effect, the minimization and mitigation measures need to address the biological needs of the Covered Species in a manner that is commensurate with the effects to the species allowed under the MBHCP. The minimization measures proposed by MBG were developed based on a comprehensive evaluation of effects to Covered Species that would result from Covered Activities that will occur in the Permit Area. The mitigation for the MBHCP derives from the long-term benefits realized on a landscape level from implementation of the Grassland Improvement activities and the Ranch Management Activities. Both groups of activities will, in the long-term, enhance the ecological value of the Permit Area for the Covered Species, although some take will occur in the short-term. As previously described, the Monitoring Plan will monitor the effectiveness of the conservation plan over the life of the Permit. We have determined that the effects of incidental take likely to occur to the 19 Covered Species under the MBHCP are low, primarily due to: (1) the low densities and scattered distribution of many of the species, (2) the Permit Area constitutes an insignificant portion of some of the species' ranges, (3) the clustered and easily avoidable distribution of other species, (4) the relatively minor effects of Covered Activities on Covered Species and their habitats, and (5) the amount of habitat that will be permanently lost as a result of Covered Activities (i.e., construction of linear facilities) is insignificant. The long-term ecological benefits from the implementation of the Covered Activities will benefit the Covered Species and their habitats and are consistent with recovery actions in the existing recovery plans for the listed species (USFWS 1985, 1990, 1995a, 1995b, 2007) and will, therefore, contribute to the conservation and maintenance of viable populations of these species in the Permit Area. Therefore, we find that the long-term benefits of the minimization and mitigation measures are rationally related to, and commensurate with, the levels of incidental take anticipated for the covered species.

We further conclude that, with respect to all of the Covered Species, the effects of incidental take will be effectively minimized by the proposed conservation measures and mitigated through the

long-term benefits to the habitat from implementation of the Covered Activities, which are intended to improve the ecological condition of habitat in the Permit Area. Our conclusion is based on the MBHCP measures that: (1) limit the timing of the activity – to avoid vulnerable life stages, (2) require acreage caps on some Covered Activities (managed fire, mechanical brush control, and linear facilities) and impose buffers around sensitive areas – to limit extent and spatial distribution of effects, (3) limit the type of equipment used – to limit the noise, type, and extent of ground disturbance, and temporary loss of habitat, and (4) limit intensity, severity, and configuration of fires. As a consequence, the loss of habitat resulting from implementation of the MBHCP is not expected to significantly impair the essential behavior patterns of these species resulting in their injury or death, (i.e., is not expected to result in incidental take of the Covered Species to a significant degree). Furthermore, as discussed above, the long-term benefits of implementing the Covered Activities on the habitat of the Covered Species will effectively mitigate the effects of the unavoidable incidental take.

In addition to evaluating the effectiveness of the minimization and mitigation provided under the MBHCP, we must also evaluate whether these measures minimize and mitigate the effects of incidental take “to the maximum extent practicable.” This requires evidence in the record that additional mitigation would not be feasible. However, the FWS does not believe that feasibility can be divorced from considerations of proportionality; that is, the mitigation under the MBHCP must be proportional to the effects of incidental take under the MBHCP. Thus, when considering whether additional minimization and mitigation measures are feasible, the FWS, first and foremost, must consider the adequacy of the mitigation provided to compensate for the effects of incidental take and determine that the mitigation is sufficient and fair. As discussed above, we find that incidental take of covered species will be low and the mitigation provided in the MBHCP adequately compensates for the effects of incidental take of the covered species, and thus we find it to be biologically sufficient.

MBG has also provided substantial evidence that additional mitigation would be impracticable. The Covered Activities under the MBHCP will result in an insignificant amount of permanent habitat loss – that which would occur only from the construction of linear facilities, specifically any new ranch access roads, fences, and water distribution lines, and any permanent fire breaks that may be established. While it is possible that these facilities may result in some habitat damage/loss, the total width of the area cleared will be no greater than 35 feet. In the case of fences, these features will allow the ranchers to better manage their livestock to further improve ecological conditions. The other proposed Covered Activities will not result in permanent habitat loss, but rather short-term effects to the habitat, and perhaps some loss of individuals of the Covered Species, which will be ameliorated by long-term ecological improvements at the landscape level, which will benefit the Covered Species, as discussed below. These effects include, primarily, temporary removal or reduction of vegetation as a result of prescribed fire, erosion control, and mechanical brush control activities, and ground surface disturbance as a result of mechanical brush and erosion control activities. However, the ultimate goal of the grassland improvement activities under the MBHCP is to correct and ameliorate ecological problems currently existing in the Malpai Borderlands (Section 2.2.2 of the MBHCP) and to improve overall ecological conditions in the area. Thus, the MBHCP’s grassland improvement activities represent a trade-off between short-term adverse effects and long-term beneficial effects, with the balance being in favor of the long-term benefits, and this is true for both grassland conditions generally and the habitats of the Covered Species specifically. While

these long-term benefits and recovery actions may be accomplished through the No Action Alternative on a localized level, they are not likely to be accomplished on the landscape level that is expected through implementation of the MBHCP, and they may or may not be allowed to occur on private lands in the Malpai Borderlands without the assurances of the MBHCP and Permit.

Among the likely long-term benefits to the Covered Species of the grassland improvement activities are the following:

- Properly managed fire and brush control will result in reduced fuel loads and fire intensities, which will benefit Covered Species' habitats that might otherwise be severely damaged by more destructive fires. It will also reduce brush encroachment and densities in the area's grasslands, which will benefit all the covered grassland species.
- Properly managed fire and brush control will promote regeneration and restoration of grasses and forbs (especially those that are native), which will benefit the grassland species as well as the aquatic species by reducing sheet erosion and its potential for downstream sedimentation of aquatic habitats.
- Erosion control will reduce downstream sedimentation of aquatic habitats that results from stream channel and gully erosion and result in improvements to the watershed.
- Ranch management activities will benefit Covered Species by promoting the ability of Malpai-area ranchers to better manage livestock—and the range—as a result of fence and waterline construction (fencing by increasing rest-rotation grazing capabilities, waterline construction by increasing livestock watering locations). The ranch management activities will also benefit Chiricahua leopard frogs, lowland leopard frogs, and northern Mexican gartersnakes through the maintenance and use of livestock tanks in the Malpai Borderlands, which are an important habitat resource for these species.

We find that the MBHCP minimizes and mitigates the effects of incidental take of the Covered Species to the maximum extent practicable, based on the information provided above because: (1) the long-term benefits of the minimization and mitigation measures are rationally related to, and commensurate with, the levels of incidental take anticipated for the Covered Species; (2) the effects of incidental take will be effectively minimized by the proposed conservation measures and mitigated through the long-term benefits to the habitat from implementation of the Covered Activities, which are intended to improve the ecological condition of habitat in the Permit Area; (3) the plan provides for adaptive management to adjust to changing habitat conditions; (4) actual habitat loss will be insignificant in relation to the long-term improvements in watershed conditions and resulting habitat condition, and (5) MBG provided substantial evidence that the implementation of the Covered Activities will provide long-term benefits to the Covered Species; thus, further mitigation is not necessary.

3. The Applicant ensures that adequate funding for the plan will be provided.

We find that the MBG will ensure funding adequate to carry out the MBHCP. MBG is a non-profit organization supported by tax-exempt contributions from individuals and organizations and grants

from public agencies and private foundations. MBG already undertakes and funds all administrative functions required by state law and its own By Laws. MBG has funded and undertaken numerous programs and activities related to its objectives and goals and those of its members (Section 1.2 MBHCP). Furthermore, most conservation activities proposed in the MBHCP are not new, but represent a continuation or expansion of existing programs (e.g., fire management, erosion control, monitoring of the existing 200 permanent monitoring blocks). In addition, as an organization, MBG has attracted numerous funding partners that, to date, have helped support and maintain these programs, as well as partners and cooperators who are often supported by their own funding (e.g., Rocky Mountain Research Station).

Thus, MBG already has substantial funding mechanisms supporting it, and, while its responsibilities under the MBHCP will increase to some extent:

- Activities proposed by the MBHCP (e.g., prescribed burns) will not be undertaken unless funding to support them has been secured in advance.
- Secured funding for a project includes all necessary funds for implementation of the action, incidental take monitoring, and minimization measures.
- Mitigation for the effects of incidental take on the Covered Species will result from the long-term ecological benefits from the implementation of the proposed activities.

In this manner, MBG will ensure that adequate funding for the MBHCP is secured prior to implementation of an activity covered by the Permit. In addition, the increases in funding needed to implement the monitoring, minimization measures, and mitigation measures will likely be relatively modest, since most programs proposed by the MBHCP are already underway and can be absorbed within currently available funding mechanisms.

Also, if MBG fails to secure adequate funding to implement the associated monitoring, minimization, and mitigation measures required for a Covered Activity, the coverage of the activity by the Permit will be invalidated, and the Permit may be suspended or revoked.

Funding by Participating Ranchers

As with MBG, Malpai ranchers electing to participate in the MBHCP will incur some additional costs as a result of that participation. Malpai-area ranchers who participate in the MBHCP understand therefore:

- that upon enrollment in the MBHCP, they are responsible for the costs of implementing measures they have voluntarily accepted that are not satisfied by other funding mechanisms; and
- that any failure to meet such obligations as a result of inadequate funding or other factors reasonably within their control would be grounds for suspension or revocation by MBG (or FWS) of their COI.

The costs of implementing MBHCP measures required of participating ranchers are expected to be relatively minor—consisting primarily of incidental take minimization (e.g., pre-project surveys), notification and reporting requirements, and in some cases measures they would likely undertake irrespective of the plan (e.g., installing waterlines in roadbeds where feasible), and it is assumed that the costs of such measures can be absorbed within ranchers’ current operational and financial resources. Some of these costs may also be offset by external funding sources. Alternatively, Malpai ranchers also have the option of not participating in the MBHCP if they prefer not to take on these responsibilities.

Changed and Unforeseen Circumstances

We find that the MBHCP includes procedures for determining the occurrence of and for addressing changed circumstances. MBG identified, described, and provided responses in the MBHCP for eleven changed circumstances that may affect Covered Species or their habitats and can reasonably be anticipated and planned for in the MBHCP (see section I. above). In accordance with the FWSs’ “no surprises” regulations at 50 CFR 17.22(b)(5) and 17.32(b)(5), in the event of an unforeseen circumstance, and assuming the MBHCP is being properly implemented, the MBG may be required to make modifications to the plan’s Operating Conservation Program, but only if such modifications will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level agreed to under the MBHCP, unless the MBG consents to such additional mitigation.

After reviewing the MBHCP, we find that the MBG has ensured adequate funding for the reasons described in this section of the Findings.

4. The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

We find that incidental taking to be authorized under the proposed Permit will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild. The ESA’s legislative history establishes the intent of Congress that this issuance criterion be identical to a finding of “no jeopardy” pursuant to section 7(a)(2) of the ESA and the implementing regulations pertaining thereto (50 CFR 402.02). As a result, we have reviewed the MBHCP under section 7 of the ESA. In a Biological and Conference Opinion (USFWS 2008), which is incorporated herein by reference, we conclude that the issuance of the proposed Permit is not likely to jeopardize the continued existence of the 19 species covered under the Permit. Critical habitat for the beautiful shiner, Yaqui catfish, Yaqui chub, Huachuca water umbel, Mexican spotted owl, and New Mexico ridge-nosed rattlesnake will not be destroyed or adversely modified. Our findings are summarized below:

Chiricahua leopard frog

- The MBHCP minimization measures general to all species, specifically acreage caps and buffers around riparian areas, and measures specific to the Chiricahua leopard frog, including avoidance of critical time period, salvage and temporary holding of frogs prior to

activities, and other measures identified in the MBHCP should reduce the potential and extent of incidental take of this species.

- The amount of incidental take anticipated will be offset through the high reproductive potential of this species.
- The long-term effects of the MBHCP taken as a whole will reduce sediment load in the run-off water and improve water retention in the watershed in the action area, resulting in less sediment deposition in aquatic habitats.
- Participation in the MBHCP will continue to promote implementation of Chiricahua leopard frog recovery actions on private lands within the Malpai Borderlands.

Huachuca water umbel

- Huachuca water umbel habitat only occurs on the San Bernardino NWR in the Permit Area.
- The MBHCP minimization measures general to all species, specifically acreage caps and buffers around riparian areas, should reduce the potential and extent of effects on this species.
- Implementation of the MBHCP should assist in efforts to reestablish Huachuca water umbel in Black Draw and therefore, assist in its recovery. However, short-term effects of the MBHCP are likely to increase the scouring effects within Black Draw, which is needed for dispersal of this species.
- The long-term effects of the MBHCP taken as a whole will reduce sediment load in the run-off water, but increase water retention in the watershed feeding Black Draw. It may reduce the scouring effects of run-off events, but could provide more permanent wetted soils for reestablishment in Black Draw.
- No critical habitat occurs within the Permit Area.

Beautiful shiner, Yaqui Catfish, Yaqui Chub, Yaqui Topminnow

- The beautiful shiner, Yaqui catfish, and Yaqui chub only occur on the San Bernardino NWR within the Permit Area.
- Yaqui topminnow are found on the San Bernardino NWR and Astin Spring within the Permit Area.
- Beautiful shiners, Yaqui catfish, Yaqui chub, and Yaqui topminnow have been reestablished in the perched rearing ponds that flow into Black Draw, but only beautiful shiner, Yaqui chub and Yaqui topminnow have been detected in Black Draw. As aquatic sites within Black Draw continue to improve, it is reasonably certain that all four species will reestablish in the channel of Black Draw during the 30-year Permit duration.

- The short-term effects of the MBHCP on all four species, should they occur in Black Draw in the future, will be from temporary increases in the sediment load, ash, and debris in runoff water in Black Draw.
- Incidental take of beautiful shiner, Yaqui catfish, and Yaqui chub would be limited to individuals that may disperse into the Black Draw channel over the 30-year term of the Permit. Incidental take of Yaqui topminnow would include individuals that may disperse into the Black Draw channel over the 30-year term of the Permit and may also affect individuals in Astin Spring that originated from Black Draw. The source populations in the rearing ponds are not anticipated to be affected by this action.
- The MBHCP minimization measures common to all species, specifically acreage caps and buffers around riparian areas, should reduce the potential and extent of incidental take of these species.
- The long-term effects of the MBHCP taken as a whole will reduce sediment load in the runoff water and increase water retention in the watershed feeding Black Draw.
- The long-term effects of the MBHCP, as a whole, should increase the perennial water availability within Black Draw and other connected drainages upstream of San Bernardino NWR and should promote re-establishment of Yaqui topminnow, beautiful shiner, Yaqui catfish, and Yaqui chub.
- Critical habitat for these species does not occur within the Covered Area of the MBHCP, but is within the Permit Area, as it could be affected by downstream ash, debris, and sediment flows, which would have temporary effects on primary constituent elements. Long-term effects of watershed improvements should be beneficial to the development and maintenance of primary constituent elements in Black Draw downstream from the covered area.
- Primary constituent elements of critical habitat for beautiful shiner, Yaqui catfish, and Yaqui chub are currently missing from the aquatic habitat within the channel of Black Draw on the San Bernardino NWR, but could occur there in the future as a result of current management and watershed improvements resulting from implementation of the MBHCP.
- The long-term effects of the MBHCP, as a whole, should increase the area in Black Draw where the primary constituent elements are found and increase the duration of their presence and the ability of beautiful shiner, Yaqui catfish, and Yaqui chub to inhabit Black Draw; therefore, implementation of the MBHCP should promote the recovery of the beautiful shiner, Yaqui catfish, and Yaqui chub.

Northern aplomado falcon

- Currently, there are no known breeding pairs of northern aplomado falcons nesting in the Permit Area; however, they may be reestablished in the Permit Area through the ongoing reestablishment program in New Mexico.
- Northern aplomado falcon in New Mexico and Arizona are covered by a special rule designating them as an experimental nonessential population and exempting them from take prohibitions of section 9 of the ESA for any non-Federal activities.
- The long-term effects of the MBHCP taken as a whole will improve the grassland community used by northern aplomado falcons by providing more open areas conducive to hunting and improving habitat of prey species which should promote successful reestablishment.
- If northern aplomado falcons are reestablished in the area, minimization measures that are general to all Covered Species, such as acreage caps and avoidance of critical time periods, will reduce the short-term adverse effects of the MBHCP activities on this species.
- Species specific recommendations are included in the MBHCP that would further minimize effects of implementation of the MBHCP on northern aplomado falcon.

Mexican spotted owl

- The only known occupied montane community in the Permit Area is in the Animas Mountains, which is a relatively small portion of the range of Mexican spotted owls.
- The only covered activity that is planned for implementation in the Animas Mountains is cool season burning. Long-term benefits will result in reducing the potential for large, high-severity fires to occur in the montane community through reduction of fuels.
- Incidental take may occur from fire management activities if prescribed fire escapes into an occupied habitat or wildfire use in the montane community results in extreme fire behavior and unexpected fire-related effects.
- Minimization measures that are general to all Covered Species, such as acreage caps and avoidance of critical time periods, and specific to this species, will reduce the likelihood of an escaped fire occurring in Mexican spotted owl habitat and reduce the potential for incidental take and short-term adverse effects of the MBHCP activities on this species.
- No critical habitat occurs in the Permit Area.

New Mexico ridge-nosed rattlesnake

- The Animas Mountains are one of three mountain ranges known to make up the range of the New Mexico ridge-nosed rattlesnake.

- The only covered activity that is planned for implementation in the Animas Mountains is cool season burning. Long-term benefits will result from reducing the potential for large, high-severity fires to occur in the montane community through reduction of fuels.
- Incidental take may occur from fire management activities, if a fire escapes into occupied habitat or wildfire use in the montane community results in extreme fire behavior and unexpected fire-related effects occur in the montane community.
- Minimization measures that are general to all covered species, such as acreage caps and avoidance of critical time periods, and minimization measures that are specific to this species, will reduce the likelihood of an escaped fire occurring in New Mexico ridge-nosed rattlesnake habitat and reduce the potential for incidental take and short-term adverse effects of the MBHCP activities on this species.
- Critical habitat for this species lies entirely within the Permit Area. The primary constituent elements were removed or altered from a majority of the designated critical habitat in 2007 during the Adobe Fire, a wildland fire. The MBHCP proposes the use of cool season fires within the montane community specifically to limit the spatial impact and the potential for effects of wildland fires or escaped managed fires. The use of cool season fires should reduce the area impacted by such fires, assist in protecting the regrowth of cover vegetation, assist in the reestablishment of prey populations, and reduce the effects of erosion on denning sites. The effects of prescribed fire management are likely to be beneficial in protecting the reestablishment of primary constituent elements of New Mexico ridge-nosed rattlesnake critical habitat through reducing fuels that increase the potential for extreme fire behavior and severe adverse effects of wildland fire. Thus, implementation of the MBHCP would help promote the recovery of the New Mexico ridge-nosed rattlesnake.

Unlisted Covered Species

In the Biological/Conference Opinion, we found that, should the western yellow-billed cuckoo, Yaqui sucker, Mexican longfin dace, Mexican stoneroller, lowland leopard frog, northern Mexican gartersnake, black-tailed prairie dog, western burrowing owl, white-sided jackrabbit, and western red bat be listed in the future, issuance of the Permit will not appreciably reduce the likelihood of the survival and recovery of these species because: (1) the Malpai Borderlands comprises only a minor portion of some of the ranges of these species; (2) effective impact avoidance and minimization measures are proposed for all species including pre-activity surveys and timing restrictions to avoid critical periods; (3) incidental take levels anticipated for each of the Covered Species under the MBHCP are expected to be low; (4) permanent loss of habitat from implementation of the MBHCP is expected to be insignificant; (5) implementation of Covered Activities is expected to provide long-term ecological benefits at a landscape level, enabling many of these species to expand their distributions and become more established as resident and breeding populations in the Permit Area; and (6) the MBHCP Monitoring Plan and Adaptive Management Plan will allow adjustments to the conservation program as necessary to meet the biological goals and objectives of the MBHCP.

5. The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting.

We find that all additional measures required as necessary or appropriate for the MBHCP are included in the MBHCP, IA, and/or the Permit. In particular, the IA, an agreement among the FWS, MBG, Natural Resources Conservation Service, Arizona State Land Department, Arizona Game and Fish Department, New Mexico State Land Office, and New Mexico Department of Game and Fish that governs implementation of the MBHCP, binds the MBG to fully implement and fund the MBHCP.

6. The USFWS has received assurances that the plan will be implemented.

We find that the MBHCP and IA provide the necessary assurances that the conservation plan will be carried out by the MBG. By accepting their Permit, the MBG is bound to fully implement the provisions of the MBHCP in accordance with the IA.

7. Alternatives.

The EA describes the MBHCP Alternative (identified as the Preferred Alternative and Proposed Action in the EA), which is to issue the Permit as requested by the prospective Permittee as described above, and the No Action Alternative. Under the No Action Alternative, no Section 10(a)(1)(B) permit would be issued for incidental take of listed species as a result of grassland improvement and ranch management activities and no HCP would be implemented. In the absence of a comprehensive HCP program, the needs of listed species would be addressed on a project-by-project basis. The landscape-level recovery and conservation benefits for the listed and unlisted species that are expected under the MBHCP Alternative would not be realized under the No Action Alternative.

A more detailed description and analysis of the following Alternatives are contained in the EA/HCP and Finding of No Significant Impact.

IV. MIGRATORY BIRD SPECIAL PURPOSE PERMIT

Pursuant to the MBTA, 16 U.S.C. 703 – 712, and 50 CFR 21.27, we find that the MBG has made a sufficient showing that each of the four Covered Species (Mexican spotted owl, northern aplomado falcon, western yellow-billed cuckoo, and western burrowing owl) currently listed under the MBTA will benefit from the conservation measures included in the MBHCP to minimize disturbance and enhance the habitat of these species. The Section 10(a)(1)(B) permit application submitted by MBG, including the MBHCP, provide detailed information regarding the MBTA related activities, the purpose of such activities, the Permit Area, the effects of those activities on the MBTA Covered Species, and other information relevant to the issuance of the Special Purpose Permits required under 50 CFR 21.27. Therefore, the Section 10(a)(1)(B) permit, if issued, shall also constitute a Special Purpose Permit under the MBTA and 50 CFR 21.27 for each MBTA Covered Species that is or may become listed under the ESA during the term of the Section 10(a)(1)(B) permit. Such Special Purpose Permit shall become effective concurrent with issuance of the Permit for MBTA

Covered Species currently listed or the future listing of the unlisted MBTA Covered Species under the ESA.

V. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the Permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). The Applicant has met the criteria for the issuance of the Permit and does not have any disqualifying factors that would prevent the Permit from being issued under current regulations.

VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, I recommend approval of the issuance of Permit Number TE-155587-0 in accordance with the MBHCP and its supporting IA.



Deputy Regional Director

Acting

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