

BIOLOGICAL OPINION SUMMARY  
Reconstruction of BIA Road N-64 (1-1)

**Date of opinion:** July 13, 2000

**Action agency:** Bureau of Indian Affairs, Gallup, NM

**Project:** The BIA proposed to conduct reconstruction work on 22.6 kilometers (14.1 miles) of N-64 from Chinle toward Tsaille, Arizona. Reconstruction work includes resurfacing of the existing pavement, and the removal of some existing curbing which will be replaced with paved ditches. Curb work will require the cutting of back slopes. Work will also include constructing or reconstructing turnouts, the installation of cattleguards, and the placement of riprap in appropriate locations.

**Location:** Apache County, Arizona.

**Listed species affected:** Mexican spotted owl (*Strix occidentalis lucida*) (MSO), a listed threatened species.

**Biological opinion:** Nonjeopardy

**Incidental take statement:**

Level of take anticipated: Anticipated take of four MSO (two pairs) located in the inadequately surveyed habitat proximate to the N-64 roadway. Exceeding this level would require re-initiation of formal consultation.

Reasonable and prudent measures: One reasonable and prudent measure is provided in order to minimize adverse effects of the reconstruction activity.

Terms and Conditions: Two mandatory terms and conditions are included to implement the reasonable and prudent measure. These include conducting one year of survey for MSO in 2000 prior to conducting reconstruction activities along two segments of the N-64 roadway, and conducting a second year of survey for MSO in 2001 if reconstruction work continues into the 2001 MSO breeding season.

Conservation recommendations: One conservation recommendation is provided. Implementation of conservation recommendations are discretionary.

AESO/SE  
2-21-00-F-187

July 13, 2000

Memorandum

To: Navajo Regional Director, Bureau of Indian Affairs, Gallup, New Mexico

From: Field Supervisor

Subject: Biological Opinion for Navajo Route N64 (1-1)

This document represents the Service's biological opinion on the effects of the BIA Road Project Navajo Route N-64 (1-1), on the Mexican spotted owl (*Strix occidentalis lucida*) (MSO) in accordance with section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.). Your May 11, 2000, request for formal consultation was received at our office on May 15, 2000.

N-64 (1-1) consists of a pavement rehabilitation project starting in Chinle, Arizona and extending 22.6 kilometers (14.1 miles) toward Tsaile, Arizona. According to your May 11, 2000, letter, the Bureau of Indian Affairs (BIA) has determined that the proposed action "may effect, and is likely to adversely affect" the MSO. Your May 11, 2000, letter also indicates that a determination of "no effect" has been made regarding the southwestern willow flycatcher (*Empidonax trailii extimus*) with implementation of specific mitigation as outlined in your February 22, 2000 letter.

This biological opinion is based on information provided in your May 11, 2000, letter to the Service with attached Design Analysis Report and maps, the Service's March 17, 2000, letter regarding this project and effects to the MSO and flycatcher, your February 22, 2000, letter to the Service, your January 18, 2000, letter to the Service which requested concurrence and included the MSO Suitable Habitat Evaluation for N-64 (1-1) report and the Addendum to the Suitable Habitat Evaluation. In addition, this opinion is based on numerous conversations conducted by Michele James of the Service and Gary Morrison, BIA, as well as a conversation between Michele James and David Mikesic of the Navajo Natural Heritage Program. Literature cited in this biological opinion does not represent a complete bibliography of literature available on the MSO or the effects of disturbance on this species, or other subjects that may have been considered in this opinion. A complete administrative record of this consultation is on file in the Arizona Ecological Services Field Office.

It is the Service's biological opinion that the proposed pavement rehabilitation of Navajo Route N-64 (1-1) is not likely to jeopardize the continued existence of the MSO.

## CONSULTATION HISTORY

Informal consultation regarding the N-64 project began in early 1999 when the Service was contacted by Navajo Fish and Wildlife to discuss the proximity of canyon habitat which may provide habitat for the MSO and peregrine falcon. At that time, Navajo Fish and Wildlife understood that BIA would hire a consultant to evaluate the quality of adjacent habitat for listed species. This work was completed and the report was provided to the Service in a January 18, 2000, letter. The January 18, 2000, letter also included proposed mitigation measures and a request for concurrence. The Service contacted the BIA in early February and indicated that we would not be able to concur with the determination of “may affect, not likely to adversely affect” for the MSO given the mitigation measures proposed in their January 18, 2000, letter. Specifically, the Service indicated that, since an estimated 6 kilometers (3.7 miles) of potential MSO nesting habitat was located within 1/4 mile of the road, the Service would only be able to concur if: 1) two years of survey to protocol was conducted; or, 2) a breeding season restriction (March 1 - August 31) was in place for construction work at those areas of the road within 1/4 mile of such habitat.

On February 15, 2000, the BIA confirmed in a phone conversation that they were willing to place a breeding season restriction on project activities located within 1/4 mile of all potential MSO nesting habitat. This commitment is discussed in detail in the BIA’s February 22, 2000, letter. Specifically, the letter states the final decision of the Navajo Regional Branch of Roads was to conduct reconstruction activities outside the MSO breeding season (work conducted from September 1 - February 28 only) from station 2+100m to station 9+100m (a distance of 7.0 km; 4.3 miles) and from station 14+000m to station 15+300m (a distance of 1.3 km; 0.80 miles). The letter also indicates that no mixed conifer restricted habitat will be removed from inside or outside the N-64 right-of-way. Mitigation for the southwestern willow flycatcher included a restriction of reconstruction activities during the breeding season (May 15 - August 7) along 0.5 km (0.3 miles) of the N-64 (from stations 0+000m to 0+500m). The Branch of Roads indicated that, with the above described mitigation measures affecting a total of 10.4 kilometers (6.5 miles) of N-64 (1-1), all direct and indirect affects of the proposed action on federally listed species would be eliminated. Thus, a “no effect” determination was made.

As current policy of Region 2 of the Service does not allow for either concurrence or nonconcurrence with determinations of no effect to listed species made by action agencies, the Service provided comments regarding technical aspects to the BIA in a letter dated March 17, 2000. Specifically, the Service stated that the inclusion of the mitigation measures as detailed in the BIA’s February 22, 2000, letter are the actions recommended by the Service during informal consultation and are consistent with other similar projects with a no effect determination.

On May 9, 2000, Michele James of the Service was contacted by Gary Morrison of BIA regarding the need to enter into formal consultation on N-64 due to extra costs associated with implementation of mitigation measures agreed upon for the MSO. The BIA’s May 11, 2000, letter states that compliance with the established breeding/nesting season for the MSO would

cost hundreds of thousands of dollars above and beyond the accepted bid amount. The BIA further states that in order to avoid legal issues regarding who should pay for these extra costs, the BIA requests formal consultation for this project.

## **BIOLOGICAL OPINION**

### **DESCRIPTION OF PROPOSED ACTION**

The BIA proposed action is the reconstruction of BIA road N64, from Chinle toward Tsaile, Arizona for 22.6 kilometers (14.1 miles). According to a January 18, 2000, letter from the BIA, the proposed work will include resurfacing of the existing pavement, and the removal of some existing curbing which will be replaced with paved ditches. Curb work will require the cutting of back slopes. Work will also be done within the existing right-of-way to construct or reconstruct turnouts, install cattleguards, and place riprap in appropriate locations. The work is anticipated to be completed in one construction season (approximately 9 months) beginning in the spring of 2000, with completion by December 2000. In a February 22, 2000, letter the BIA indicates that no mixed conifer trees would be removed from inside or outside of the right-of-way.

### **STATUS OF THE SPECIES**

A detailed account of the taxonomy, biology, and reproductive characteristics of the MSO is found in the Final Rule listing the MSO as a threatened species (USDI 1993) and in the Final MSO Recovery Plan (USDI 1995). The information provided in those documents is included herein by reference. Although the MSO's entire range covers a broad area of the southwestern United States and Mexico, much remains unknown about the species' distribution and ecology. This is especially true in Mexico where much of the MSO's range has not been surveyed. The MSO currently occupies a broad geographic area but does not occur uniformly throughout its range. Instead, it occurs in disjunct localities that correspond to forested isolated mountain systems, canyons, and in some cases, steep, rocky canyon lands. The primary administrator of lands supporting MSO in the United States is the U.S. Forest Service. Most owls have been found within Forest Service Region 3 (including 11 National Forests in Arizona and New Mexico). Forest Service Regions 2 and 4 (including 2 National Forests in Colorado and 3 in Utah) support fewer owls. According to the Recovery Plan, 91% of MSO known to exist in the United States between 1990 and 1993 occurred on lands administered by the Forest Service.

Surveys have revealed that the species has an affinity for older, well-structured forest, and the species is known to inhabit a physically diverse landscape in the southwestern United States and Mexico. The range of the MSO has been divided into six Recovery Units (RUs), as discussed in the MSO Recovery Plan (USDI 1995). The Recovery Plan reports an estimate of owl sites. An owl "site" is defined as a visual sighting of at least one adult owl or a minimum of two auditory detections in the same vicinity in the same year. This information was reported for 1990-1993. The greatest known concentration of known owl sites in the United States occurs in the Upper

Gila Mountains RU (55.9%), followed by the Basin and Range-East RU (16.0%), Basin and Range-West RU (13.6%), Colorado Plateau RU (8.2%), Southern Rocky Mountain-New Mexico RU (4.5%), and Southern Rocky Mountain-Colorado RU (1.8%). Owl surveys conducted from 1990 through 1993 indicate that the species persists in most locations reported prior to 1989.

A reliable estimate of the numbers of owls throughout its entire range is not currently available (USDI 1995) and the quality and quantity of information regarding numbers of MSO vary by source. USDI (1991) reported a total of 2,160 owls throughout the United States. Fletcher (1990) calculated that 2,074 owls existed in Arizona and New Mexico.

At the end of the 1995 field season, the Forest Service reported a total of 866 management territories (MTs) established in locations where at least a single MSO had been identified (U.S. Forest Service, *in litt.* November 9, 1995). The information provided at that time also included a summary of territories and acres of suitable habitat in each RU. Subsequently, a summary of all territory and monitoring data for the 1995 field season on Forest Service lands was provided to the Service on January 22, 1996. There were minor discrepancies in the number of MTs reported in the November and January data. For the purposes of this analysis we are using the more recent information.

From 1991 through 1997, Gutierrez *et al.* (1997, 1998) studied the demographic characteristics of two Mexican spotted owl populations in the Upper Gila Mountains Recovery Unit. The owl populations studied were located on the Coconino and Gila National Forests. Results of this several-year study have shown a decline in the population trend of Mexican spotted owls within these areas. The reason for the reported decline is unknown. According to Gutierrez *et al.* (1997), such a trend could be a result of: 1) density dependent responses to an increase over carrying capacities; 2) a response to some environmental factor; or 3) senescence. The latter (i.e. senescence) seems unlikely because there was also a negative linear trend in survival estimates for owls less than three years of age. Regarding carrying capacities, responses to density dependence are difficult to prove in the absence of removal or addition experiments. Environmental factors undoubtedly play a role in owl survival, either through weather events causing direct mortality or indirectly through reduced habitat or prey (Gutierrez *et al.* 1997). This study found that the ability of adult birds to survive successive years of poor environmental conditions may be low (Gutierrez *et al.* 1998).

The Forest Service has converted some MTs into PACs following the recommendations of the Draft MSO Recovery Plan released in March 1995. The completion of these conversions has typically been driven by project-level consultations with the Service and varies by National Forest.

N-64 (1-1) is located within the Colorado Plateau Recovery Unit. The Colorado Plateau RU includes most of southern and south-central Utah, plus portions of northern Arizona, northwestern New Mexico, and southwestern Colorado. Grasslands and shrub-steppes dominate the Colorado Plateau at lower elevations, but woodlands and forest dominate the higher

elevations. Forest types in the woodland zone include ponderosa pine, mixed conifer, and spruce-fir. Conifers may extend to lower elevations in canyons. Deciduous woody species dominate riparian communities, and are most common along major streams (USDI 1995).

MSO habitat appears to be naturally fragmented in this RU, with most owls found in disjunct canyon systems or on isolated mountain ranges. In southern Utah, breeding owls primarily inhabit deep, steep-walled canyons. These canyons are typically surrounded by terrain that does not appear to support breeding MSO. Owls apparently prefer canyon terrain in southwestern Colorado, particularly in and around Mesa Verde National Park. In northern Arizona and New Mexico, MSO have been reported in both canyon and montane situations. Recent records of MSO exist for the Grand Canyon and Kaibab Plateau in Arizona, as well as for the Chuska Mountains, Black Mesa, Fort Defiance Plateau, and the Rainbow/Skeleton Plateau on the Navajo Reservation. In addition, records exist for the Zuni Mountains and Mount Taylor in New Mexico. Federal lands account for 44% of this RU. Tribal lands collectively total 30%, with the largest single entity being the Navajo Reservation (USDI 1995). Threats in the southeastern portion of this RU according to the MSO Recovery Plan (USDI 1995) include timber harvest, overgrazing, catastrophic fire, oil, gas, and mining development, and recreation.

## ENVIRONMENTAL BASELINE

The environmental baseline includes past and present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all proposed Federal actions in the action area that have undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation process. The environmental baseline defines the current status of the species and its habitat to provide a platform to assess the effects of the action now under consultation. On the Navajo Nation, past and present Federal, State, private, and other human activities that occur in the project area include fuelwood gathering activities, homesite development, sheep and cattle grazing, development of recreation sites, timber sales, road construction and maintenance activities, mining, oil and gas development, and power line construction.

### Status of the Mexican Spotted Owl and its Habitat in the Project Area

The area in which Navajo Route N-64 (1-1) traverses is bisected by sandstone canyons with steep walls. In the canyons, there are cottonwoods, box elder, ponderosa pine, sumac and other shrubs and trees (Ecosystem Management, Inc. 1999). The elevation of the project area ranges from 5,567 feet to 6,999 feet. Portions of the project area are located within the Canyon de Chelly National Monument. A survey of potential nesting/roosting habitat located within 1/4 mile of N-64 determined that habitat is located within Slim, Cottonwood, and Spiral Canyons, and an unnamed drainage near Rough Rock Springs for a total of approximately 3.6 miles (5.8 kilometers) of road segment (Ecosystem Management, Inc. 1999). The BIA indicates that the two sections of road involve potential nesting habitat: From station 2+100m to 9+100m (7.0

kilometers; 4.3 miles) and from station 14+000m to 15+300m (1.3 kilometers; 0.80 miles) (*in litt.* February 22, 2000).

The BIA committed to conducting the first year of surveys for the MSO according to Forest Service protocol within the potential nesting habitat in 2000. Gary Morrison, BIA, communicated to Michele James of the Service on July 5, 2000, that four visits had been completed, and no MSO were located. As two years of survey are required in order for the potential nest/roost habitat to be considered adequately surveyed according to accepted protocol, the Service must consider the habitat located within 1/4 mile of the N-64 roadway potentially occupied for consultation purposes.

A total of 223 projects have undergone formal consultation for the owl. Of that aggregate, 83 projects resulted in a total anticipated incidental take of 185 owls plus an additional unknown number of owls. These consultations have primarily dealt with actions proposed by the Forest Service, Region 3, but have also addressed the impacts of actions proposed by the Bureau of Indian Affairs, Department of Defense (including Air Force, Army, and Navy), Department of Energy, National Park service, and Federal Highway Administration. These proposals have included timber sales, road construction, fire/ecosystem management projects (including prescribed natural and management ignited fires), livestock grazing, recreation activities, utility corridors, military overflights, and other construction activities.

#### EFFECTS OF THE ACTION

Existing nest/roost habitat adjacent to and within 1/4 mile of the N-64 roadway has the potential to be occupied by MSO. The BIA indicates that potential nesting habitat is located along two sections of the N-64 roadway: From station 2+100m to 9+100m (7.0 kilometers; 4.3 miles) and from station 14+000m to 15+300m (1.3 kilometers; 0.80 miles) (*in litt.* February 22, 2000). The BIA also indicates that they are unable to restrict roadway reconstruction work to outside the MSO breeding season between these stations (*in litt.* May 11, 2000).

The Service believes that if MSO are present proximate to the roadway, they may be disturbed by noise and movement proximate to the nest site during the breeding season. Specifically, the Service believes actions such as use of heavy equipment within 1/4 mile of a nest site or potential nest site during the breeding season may have an effect on the ability of MSO to forage, nest and fledge young. The history of the 1/4 mile restriction in the Southwest goes back to 1992 where it was included in the draft conservation strategy being worked on by the Service and Forest Service for the MSO. The Forest Service's Interim Directive Number 2 recommended that no management activities occur at any time in the 450-acre core areas of the management territories. The Service's biological opinions for the MSO have stated that incidental take is likely if proposed actions are located in such proximity to MSO nest sites and/or core areas that disturbance of the birds is probable. This was specified as treatments that occur during the breeding season within 1/4 mile of a nest tree, or, if the nest site is unknown, within 1/4 mile of a core, or within 1/4 mile of unsurveyed suitable habitat (Fish and Wildlife Service, August 23, 1993, biological opinion, to present). Although research, primarily on the northern spotted owl

to date, suggests that most individuals may be relatively tolerant of disturbance, there are not quantitative data to evaluate the impacts of disturbance due to various forest management activities (Fish and Wildlife Service biological opinion for the Rogue Valley and South Coast of Oregon, October 18, 1996). The Service's July 1, 1996, internal policy on conducting section 7 consultation on the MSO states that the current policy of restricting activities that have the potential to disturb nesting owls should continue. These restrictions apply to protected activity centers (PACs) as well as unsurveyed/inadequately surveyed habitat.

As potential nesting/roosting habitat located along 8.3 kilometers (5.2 miles) of N-64 has received only one year of survey to date, the Service considers this habitat inadequately surveyed. Inadequately surveyed habitat is considered occupied for purposes of consultation, therefore, the Service believes the proposed reconstruction of N-64 during the 2000 MSO breeding season between the above mentioned stations has the potential to adversely affect MSO.

#### CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, local, or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Endangered Species Act.

Tribal lands are held in "trust" by the Federal Government for the beneficial use of the Tribes. They are not considered public lands or part of the public domain. Tribes are sovereign governments with management authority over wildlife and other Tribal land resources. For purposes of this biological opinion, Tribal management of MSO habitat that does not involve Federal agency actions is considered non-Federal and therefore is considered under this cumulative effects analysis (USFWS 1996).

Non-Federal actions which may effect MSO habitat in the action area include cattle and sheep grazing, homesite development, recreational development, construction of non-BIA roads, and fuelwood cutting.

#### CONCLUSION

After reviewing the current status of the MSO, the environmental baseline for the action area, the effects of the proposed reconstruction, and the cumulative effects, it is the Service's biological opinion that the reconstruction of Navajo Route N-64, as proposed, is not likely to jeopardize the continued existence of the MSO. The proposed road reconstruction will adversely affect any MSO located in inadequately surveyed habitat proximate to the roadway. Adverse effects will be caused by construction actions occurring during the MSO breeding season adjacent to inadequately surveyed canyon habitat.

## INCIDENTAL TAKE STATEMENT

Sections 4(d) and 9 of ESA, as amended, prohibit taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or the applicant. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be implemented by the agency so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The BIA has a continuing responsibility to regulate the activity covered by this incidental take statement. If the BIA (1) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

In past Biological Opinions, the management territory was used to quantify incidental take thresholds for the MSO (see Biological Opinions provided by the Service to the Forest Service and BIA from August 23, 1993 to date). The current section 7 consultation policy provides for incidental take if an activity compromises the integrity of a PAC. Actions outside PACs will generally not be considered incidental take, except in cases involving areas that may support owls have not been adequately surveyed.

Using available information as presented within this document, the Service has identified conditions of anticipated take for the MSO located in the inadequately surveyed habitat adjacent to the 8.3 kilometers (5.2 miles) of roadway along N-64 within the project area. Based on the best available information concerning the MSO, habitat needs of this species, the project description, and information furnished by the BIA and Navajo Fish and Wildlife Department, take is considered likely for the MSO as a result of the following:

- 1) Reconstruction activities occurring during the MSO breeding season in and adjacent to the inadequately surveyed MSO nest/roost habitat along 8.3 kilometers (5.2 miles) of the N-64 roadway [from station 2+100m to 9+100m (7.0 kilometers; 4.3 miles) and from station 14+000m to 15+300m (1.3 kilometers; 0.80 miles)].

## AMOUNT OR EXTENT OF TAKE

The Service anticipates that the proposed reconstruction of Navajo Route N-64 may result in incidental take of four (two pairs) MSO located in the inadequately surveyed habitat proximate to the roadway. Incidental take is in the form of harassment due to disruption of normal reproduction and behavior. The Service has set the take statement at four owls primarily due to the presence of high quality habitat located within Slim Canyon. The Service believes that some potential exists for owls to occupy Cottonwood Canyon and the unnamed canyon near Rough Rock Spring. However, review of maps provided by the BLM as well as a conversation with David Mikesic, Navajo Natural Heritage Program, indicates that portions of Slim Canyon proximate to the roadway contain habitat that has the highest likelihood of being occupied.

## EFFECT OF THE TAKE

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the MSO.

## REASONABLE AND PRUDENT MEASURES

The Service believes the following reasonable and prudent measure is necessary and appropriate to minimize take.

- 1) The BIA shall minimize adverse effects of the reconstruction of Navajo Route N-64 to the inadequately surveyed MSO habitat in the project area.

## TERMS AND CONDITIONS

In order to be exempt from the prohibitions of section 9 of ESA, the BIA must comply with the following terms and conditions, which implement the reasonable and prudent measure described above. These terms and conditions are nondiscretionary.

- 1.1 At least one year of MSO surveys will be conducted (four visits) in 2000 according to U.S. Forest Service Region 3 inventory protocol prior to reconstruction activity occurring during the MSO breeding season (March 1 - August 30) along 8.3 kilometers (5.2 miles) of the N-64 roadway (from station 2+100m to 9+100m and from station 14+000m to 15+300m).
- 1.2 If reconstruction activity continues beyond February 28, 2001, between stations 2+100m to 9+100m and stations 14+000m to 15+300m, a second year of MSO surveys will be conducted in 2001 according to Forest Service Region 3 protocol, using the same calling points as those established in 2000. Reconstruction work between the above stations will be halted from March 1 - August 30 until the second year of survey is complete (4 visits). If reconstruction activity continues beyond 2001, surveys will be conducted every second year (i.e. 2003, etc.) prior to reconstruction activities between the above stations. If

additional MSO are located, no reconstruction activity will occur within 1/4 mile of the nest/roost site during the breeding season. A PAC will be drawn for any additional MSO located as specified in the MSO Recovery Plan.

The reasonable and prudent measure, with its implementing terms and conditions, is designed to minimize incidental take that might otherwise result from the proposed action. With the implementation of this measure, the Service believes that no more than four MSO (two pairs) associated with the inadequately surveyed habitat along 8.3 kilometers (5.2 miles) of N-64 will be incidentally taken. If, during the course of the action, this level of incidental take is exceeded, such incidental take would represent new information requiring review of the reasonable and prudent measure provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

The Fish and Wildlife Service will not refer the incidental take of any migratory bird or bald eagle for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. Sections 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. Sections 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

### **DISPOSITION OF DEAD, INJURED, OR SICK MSO**

Upon locating a dead, injured, or sick MSO, initial notification must be made to the Service's Law Enforcement Office, Federal Building, Room 8, 26 North McDonald, Mesa, Arizona (telephone: 602/835-8289) within three working days of its finding. Written notification must be made within five calendar days and include the date, time, and location of the animal, a photograph if possible, and any other pertinent information. The notification shall be sent to the Law Enforcement Office with a copy to this office. Care must be taken in handling sick or injured animals to ensure effective treatment and care, and in handling dead specimens to preserve the biological material in the best possible state. If possible, the remains of intact owl(s) shall be provided to this office. If the remains of owl(s) are not intact or are not collected, the information noted above shall be obtained and the carcass left in place. Injured animals should be transported to a qualified veterinarian by an authorized biologist. Should treated owls survive, the Service should be contacted regarding the final disposition of the animal.

### **CONSERVATION RECOMMENDATIONS**

Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

1. The BIA should attempt to minimize disturbance effects to the MSO along the 8.3 kilometers (5.2 miles) of inadequately surveyed MSO habitat through instituting a breeding season restriction (through August 30) on all reconstruction activities in 2000.

## REINITIATION - CLOSING STATEMENT

This concludes formal consultation on the action outlined in the draft biological evaluation and draft environmental assessment. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

Thank you for your consideration of the threatened Mexican spotted owl. If we can be of further assistance with this project or if there are questions, please contact Michele James (520/527-3042) or Bruce Palmer (602/640-2720).

David L. Harlow

cc: Field Supervisor, Fish and Wildlife Service, Albuquerque, NM  
Navajo Fish and Wildlife Department, Window Rock, AZ (Attn: John Nystedt)

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## LITERATURE CITED

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