

**FINDINGS AND RECOMMENDATIONS
REGARDING ISSUANCE OF ENHANCEMENT OF SURVIVAL PERMITS
IN ACCORDANCE WITH THE TEMPLATE SAFE HARBOR AGREEMENT
FOR THE COLUMBIA BASIN PYGMY RABBIT**

I. DESCRIPTION OF PROPOSAL

The U.S. Fish and Wildlife Service (Service) and the Washington Department of Fish and Wildlife (WDFW), collectively referred to as the Agencies, have developed a Template Safe Harbor Agreement (Template SHA or Agreement) for the Columbia Basin distinct population segment of the pygmy rabbit (*Brachylagus idahoensis*), hereafter referred to as the Columbia Basin pygmy rabbit (CBPR). The purpose of the Agreement is to facilitate a streamlined process for evaluating permit applications that incorporate the Agreement. This set of findings addresses whether the measures outlined in the Agreement would meet the issuance criteria for Enhancement of Survival Permits (Permits) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act).

The Template SHA establishes general guidelines and identifies minimum management responsibilities for prospective land owners and managers applying for a Permit (referred to hereafter as Participants). The Template SHA also clarifies management responsibilities and expectations of the Agencies. In addition, the Template SHA documents background biological information on the CBPR, ongoing conservation actions and Federal recovery objectives for this species, the net conservation benefits expected with implementation of the Agreement, and the overall area and the types of land use activities that would be covered by the Agreement. With a Template SHA, the documentation needs and decision-making process for Permit applications are expected to be significantly streamlined as applicants would be able to utilize and incorporate by reference the information contained in the Agreement and associated NEPA and Endangered Species Act compliance documents, such as an Environmental Assessment and the Service's Biological Opinion.

The Template SHA was developed to be a comprehensive agreement that could serve as the basis for the Service to issue Permits to Participants. To receive a Permit, each prospective Participant would complete and submit to the Service a Federal Fish and Wildlife Permit Application that would incorporate the Template SHA. In addition to submitting a Permit application, each prospective Participant would also need to develop an individual Site Plan for the properties proposed to be covered by the Permit (referred to herein as enrolled lands or properties). To be considered consistent with the Template SHA, at a minimum, each Site Plan would need to include the following:

- a. Accurately identify the property to be enrolled under the Agreement by providing a legal description and a map of the property boundaries that would include the total acreage, and documentation of ownership, management, and lease authorities, as applicable.
- b. Document the appropriate baseline conditions (see below) for the CBPR on the property to be enrolled and identify how the baseline conditions were determined (e.g., when and

how surveys for the CBPR and/or habitat assessments were conducted, whether the baseline was established in terms of previously-known information, or other factors).

- c. Describe the conservation measures that will be undertaken on the enrolled property to achieve the expected net conservation benefit(s) for the CBPR.
- d. Identify the existing land-use activities that could result in incidental take of the CBPR on the enrolled property.
- e. To the extent possible, generally describe the expected future land-use activities that would be expected to return the enrolled property, in whole or in part, to baseline conditions.
- f. Identify the term of the Site Plan and requested Permit (not to extend beyond the October 24, 2026, duration of the Template SHA).

Upon completion of the Permit application review process, approval of individual Site Plans that are consistent with the Template SHA, and compliance with other applicable legal requirements, the Service intends to issue Permits to Participants that would exempt incidental take of the CBPR, which would otherwise be prohibited by section 9 of the Act, that could result from the Participants' land-use activities. The Permits would authorize incidental take of CBPRs that are above the "baseline" of the Participants' enrolled properties. Baseline represents the number of CBPRs that are present on a given piece of property at the time a Permit is issued. Upon issuance of Permits, Participants would be provided with assurances that no additional or different management activities would be required for the CBPR if the terms of the Permit and the Template SHA are being properly implemented on their enrolled lands.

Non-Federal and non-WDFW properties that are eligible for Permit coverage under the Template SHA include those that will be actively managed to help conserve the CBPR, which are referred to as recovery emphasis areas, and intervening properties that occur outside of the recovery emphasis areas yet within the CBPR's historical distribution (see Recovery Strategy). Recovery emphasis areas contain habitat characteristics that could currently, or potentially through appropriate enhancement measures, sustain a viable subpopulation of the CBPR. Intervening properties may not be actively managed to conserve the CBPR but nevertheless could provide a net conservation benefit to the CBPR and contribute to recovery efforts if suitable CBPR habitat is present and maintained on the enrolled properties during the term of the associated Permit and/or any CBPRs that are found on these properties are captured and removed for recovery purposes (see Analysis of Effects).

The Template SHA will be in effect for 20 years, unless new information becomes available that indicates substantive changes are warranted. The overall area covered by the Agreement encompasses the historical distribution of the CBPR and totals roughly 2,650,000 acres. However, potentially occupied or suitable habitat that still exists within the historical distribution

and which could conceivably receive intermittent use by CBPRs totals roughly 750,000 acres. The Service intends to prioritize the processing of Permit applications that involve properties that occur on or within five miles of a recovery emphasis area, where captive-reared CBPRs have been released. These properties are most likely to receive use by dispersing CBPRs and encompass less than 160,000 acres of the CBPR's historical distribution. The two currently identified recovery emphasis areas total approximately 7,130 acres.

Recovery Strategy

The Service has worked closely with WDFW to address conservation of the CBPR since the late 1990s. One of the Service's main objectives during this period has been to ensure that Federal recovery planning efforts complement existing and developing State conservation measures. In accordance with Federal recovery policy, the Service assembled a multi-party Recovery Team to assist with development of a Federal Recovery Plan for the CBPR, and to otherwise advise the Service concerning recovery actions for the CBPR. Finally, the Service has undertaken a number of efforts to involve various stakeholders and other interest groups in recovery planning for the CBPR. Coordination with all of the above parties has contributed to the development of the following Federal recovery strategy.

Due to a number of information gaps and other uncertainties in currently available information, the Recovery Team adopted a phased approach for CBPR recovery planning. The three general phases identified are: 1) removal or abatement of imminent threats to the CBPR in order to prevent the extinction of the population; 2) reestablishment of an appropriate number and distribution of free-ranging subpopulations to further reduce threats over the near-term (i.e., 10 years); and 3) establishment and protection of a sufficiently resilient, free-ranging population that would be expected to withstand foreseeable long-term threats.

This phased approach would allow for formulation and implementation of appropriate adaptive management measures as more information is gathered about the conservation needs of the CBPR. Adaptive management represents the continual process of planning, investigation, implementation, monitoring, and evaluation of recovery actions so that future adjustments can be made to fully achieve recovery objectives. The Service anticipates that the recovery strategy for the CBPR will be a dynamic process. To facilitate such a strategy, the current implementation schedule identified in the Draft Recovery Plan represents the first of what could become a series of near-term implementation plans. Revised implementation schedules would be developed, as necessary, to reflect the knowledge gained, accomplishments met, potential future constraints encountered, and consequent refinements to near-term recovery objectives, criteria, and/or actions as recovery progresses.

The original aim of WDFW's captive breeding program for the CBPR, which was initiated in 2001, was to achieve necessary population growth by augmenting existing, free-ranging subpopulations with captive-bred animals as soon as possible. At the time, this was determined

to be the most efficient, cost-effective strategy. However, this approach was not feasible due to the sudden extirpation of all known wild subpopulations and the poor reproductive performance of the captive, purebred CBPRs.

It is now considered likely that the last known subpopulation of CBPRs that was used to establish the captive population was already experiencing a significant level of inbreeding by the late 1990s. Securing additional purebred CBPRs from the wild remains a high priority for the captive breeding program, as well as for other recovery considerations (e.g., direct translocation). However, the available information indicates that substantially increasing the genetic diversity of the captive population through the inclusion of additional purebred animals would be very unlikely. Therefore, intercross breeding with Idaho pygmy rabbits was determined to be necessary to facilitate genetic restoration of the Columbia Basin population, and is considered essential to meet Federal recovery objectives. Currently, captive-bred pygmy rabbits that are considered appropriate for release include those with at least 75 percent Columbia Basin ancestry.

At the time of the Service's emergency listing action in 2001, the CBPR was imminently threatened by its small population size, loss of genetic diversity, and inbreeding depression, coupled with a lack of suitable, protected habitats in the wild. Since emergency listing, the captive breeding program, genetics management efforts, habitat acquisition, and identification of appropriate recovery emphasis areas have significantly reduced the immediacy of these threats. As a result, the following objectives established to address the first phase of recovery have largely been accomplished:

1. Removal and abatement of imminent threats to the CBPR population due to inbreeding and small population size through implementation of captive breeding and genetics management measures.
2. Establishment of a captive population of CBPRs that can ensure maintenance of the population's genetic and demographic status, and which is also considered capable of facilitating future reintroduction and augmentation efforts.
3. Identification of at least two recovery emphasis areas capable of supporting reintroduced, free-ranging subpopulations of CBPRs that would be considered secure over the near-term.
4. Development of a Reintroduction Plan that identifies specific techniques to be undertaken during future release efforts and appropriate post-release monitoring measures and research objectives.
5. Development and implementation of appropriate measures to engage the full range of potential stakeholders and other interested parties in voluntary, proactive conservation efforts for the CBPR.

A key objective for the second phase of recovery planning is to release captive-bred pygmy rabbits at one or both of the currently identified recovery emphasis areas to begin the process of recovering the CBPR in the wild. However, even with successful genetic restoration and initial reintroduction efforts, any free-ranging subpopulations of CBPRs will face continuing risks from inbreeding and loss of genetic diversity if they remain small and isolated. Therefore, it will be important to increase the numbers and distribution of free-ranging CBPRs as soon as possible to prevent future inbreeding and to retain their increased genetic diversity. As such, two important, near-term considerations for reintroduction efforts are: (1) the desired number of free-ranging animals to be reestablished at recovery emphasis areas; and (2) a minimum size estimate for recovery emphasis areas that would be considered necessary to support them.

A general approximation of minimum viable population sizes is referred to as the 50/500 rule. This rule states that an effective population (N_e) of 50 individuals is the minimum size required to avoid imminent risks from inbreeding. N_e represents the number of animals in a population that actually contribute to reproduction, and is often much smaller than the total number of individuals in the population (N). Furthermore, the rule states that the long-term fitness of a population requires an N_e of at least 500 individuals so that it will not lose its genetic diversity over time, and will maintain an enhanced ability to adapt to changing conditions. Recovery emphasis areas, therefore, must be large enough and contain a sufficient amount of shrub-steppe habitat to be considered capable of supporting a CBPR subpopulation comprised of at least 500 individuals.

Density estimates for pygmy rabbits occupying sites under variable habitat conditions range from roughly 0.15 to 1.10 pygmy rabbits per acre. Considering these density estimates as an initial approximation of the range in area required by pygmy rabbits, a subpopulation of at least 500 individuals would require between roughly 500 and 3,300 acres. The two currently identified recovery emphasis areas total 3,740 acres and 3,390 acres, respectively. Therefore, they are considered of an appropriate size necessary to help meet the recovery objectives and criteria that are currently established for the CBPR.

Initial releases of captive-bred CBPRs are proposed to take place during the spring of 2007 at one of the currently identified recovery emphasis areas, which is managed by WDFW. If the properties that comprise the other recovery emphasis area can be enrolled under the Template SHA and a Safe Harbor Permit is issued, captive-bred animals would also be released at this site if the captive breeding program can support additional releases. Depending on the results of post-release monitoring and future assessments of how recovery is progressing at these two sites, and what conservation benefits for the CBPR may be realized on intervening properties (see following), other recovery emphasis areas may be formally identified and managed to support additional free-ranging subpopulations of CBPRs. Efforts to increase the size of the two currently identified recovery emphasis areas may also be undertaken, as considered necessary and feasible.

Intervening properties outside of recovery emphasis areas, while not actively managed to conserve the CBPR, may nevertheless contribute to recovery efforts. Any such property that

could be managed to provide a net conservation benefit to the population would be considered for enrollment under the Template SHA. Currently, it is not possible to estimate the level of participation in the Template SHA from all land owners and managers of intervening properties that occur within the covered area. However, based upon stakeholder involvement and levels of interest expressed to date, the Service anticipates that a large proportion of the eligible lands within five miles of the recovery emphasis areas could eventually be enrolled under the Agreement. Furthermore, the Service anticipates that the conservation benefits to the CBPR provided from cooperative management of all intervening properties (to include any Federal lands, as appropriate) would be roughly equivalent to those that could be provided from one additional recovery emphasis area, which is reflected in the recovery criteria that are currently identified in the Service's Draft Recovery Plan.

The actual, agreed-upon conservation measures to be implemented by Participants and the specific land-use activities to be covered on their enrolled property would be documented in each Participant's individual Site Plan. The Service would not issue Permits to Participants unless their Site Plans and Permit applications are determined to be in accordance with the measures prescribed by the Template SHA, their applications have been noticed in the Federal Register, and a satisfactory determination that all other legal requirements have been met for issuance of a Safe Harbor Permit.

Federal agencies with management authority over intervening properties outside of recovery emphasis areas must consider the contributions that their Federal authority may provide towards recovery of the CBPR. Management measures potentially contributing to recovery of the CBPR on properties where Federal management authority exists will be considered in accordance with the Service's and other Federal agencies' requirements pursuant to sections 7(a)(1) and 7(a)(2) of the Act. Potential conservation benefits for the CBPR that could be realized on intervening properties are addressed below.

Analysis of Effects

Consistent with the Service's Safe Harbor Agreement Policy, any Permits that are issued would authorize incidental take of CBPRs that are above the baseline conditions of the enrolled lands and that could result from Participants' otherwise lawful activities. The primary goal of the Template SHA is to facilitate collaboration between the Service, WDFW, and prospective Participants to implement conservation measures that would be expected to provide a net conservation benefit to the CBPR. The Service has determined that any adverse effects to the CBPR that would be associated with Permits issued in accordance with the Template SHA would not jeopardize the continued existence of the CBPR. Effects to the CBPR caused by implementation of the Template SHA are fully analyzed in the Service's Biological Opinion, which is incorporated herein by reference. The following summaries of information discussed in the Biological Opinion describe how the CBPR would be expected to benefit from implementation of the Template SHA, and what adverse effects could occur as a result of the incidental take that would be exempted by the associated Permits.

Beneficial Effects

Under the Template SHA, Participants can voluntarily contribute to State and Federal recovery efforts for the CBPR by either providing properties for inclusion within a recovery emphasis area or by providing cooperation and coordination for management actions on intervening lands. In return for their contributions, Participants would be provided with assurances that no additional or different management activities would be required for the CBPR if the terms of the Permits, Site Plans and the Template SHA are being properly implemented on their enrolled lands.

The net conservation benefits to the CBPR that are expected to result from implementation of the Template SHA and issuance of the associated Permits include:

1. Suitable habitats would be maintained on enrolled properties and would be available for use by captive-bred CBPRs that are released to recovery emphasis areas. Furthermore, due to concerns regarding the potential for increased regulatory burdens to their neighbors, it is likely that additional land owners that have suitable CBPR habitat would enroll their properties as recovery emphasis area if incidental take exemptions could be provided to eligible land owners of neighboring intervening properties. As a result, more properties would likely be enrolled as recovery emphasis area and actively managed to conserve the CBPR.
2. Maintenance of suitable CBPR habitat on enrolled properties will facilitate the dispersal of newly released CBPRs and will enhance connectivity between recovery emphasis areas. Furthermore, eligible landowners of intervening properties would be more likely to enroll and maintain suitable habitats if they could be provided with incidental take exemptions.
3. New subpopulations of CBPRs may become established on enrolled properties through natural population expansion and dispersal.
4. Additional purebred CBPRs may be located on properties being considered for enrollment and could be secured for captive breeding and/or translocation efforts, which could improve the overall recovery outlook for the CBPR.
5. Monitoring and future collection of biological information concerning the CBPR (e.g., information on CBPR dispersal, survival, and productivity) would be improved through the cooperative management efforts and facilitated access to enrolled properties prescribed by the Template SHA.
6. Research and adaptive management for the CBPR could be made more comprehensive if implemented at a broader scale through the cooperative management efforts and facilitated access to enrolled properties prescribed by the Template SHA.
7. Successful implementation of proactive, cooperative, and flexible management efforts in accordance with the measures prescribed by the Template SHA will increase public

awareness and support for CBPR recovery efforts.

The minimum responsibilities expected of Participants which would achieve one or more of the above conservation benefits for the CBPR are identified in section 7.3 of the Template SHA. The net conservation benefits likely to result from implementation of the Template SHA would contribute to the survival and recovery of the CBPR because they are likely to facilitate an increase in the size of the CBPR population, maintenance of its genetic diversity, maintenance and enhancement of suitable habitats on recovery emphasis areas and intervening properties, and development of improved adaptive management measures and research objectives to better address the CBPR's overall conservation.

Adverse Effects

Existing and future land-use activities that would be covered by Permits on enrolled lands are generally identified in section 1 of the Template SHA, and will be specifically detailed in each Participant's individual Site Plan. The following describes how the CBPR may be adversely affected by these covered activities on intervening properties and on recovery emphasis areas.

Intervening Properties – Ranching activities may impact potentially suitable shrub-steppe habitat on enrolled properties due to adverse effects on the forage and cover requirements of CBPRs as a result of certain livestock grazing practices. In addition, livestock grazing and other ranching-related activities (e.g., herding, transport) may disturb or damage new burrow systems of CBPRs and, in some cases, could even cause direct injury or mortality of newly established or dispersing CBPRs due to trampling. Finally, various range management activities (e.g., brush beating, prescribed fire) may alter the vegetation characteristics of existing, unoccupied habitats and could potentially make them less suitable or unsuitable for the CBPR. However, there is currently a lack of information addressing the specific effects that livestock grazing and other ranching-related activities may have on the life history requirements of the CBPR. Appropriately managed livestock grazing may have little effect on the vegetation communities used by the CBPR, and it may be possible to implement adaptive management measures on enrolled lands (e.g., exclusion fencing, timing of use) to avoid or reduce potential direct effects due to trampling by livestock or other ranching-related activities.

Certain farming practices (e.g., equipment staging and storage, field access, pest control) on suitable, undeveloped habitats adjacent to crop fields could also potentially impact the CBPR as a result of disturbance or damage to new burrow systems and direct injury or mortality of newly established or dispersing individual animals. In addition, it is possible, although considered very unlikely, that farming activities on existing crop fields could directly injure or kill dispersing CBPRs, or make them more vulnerable to predation due to a lack of cover on these developed lands. Finally, it is possible that some potentially suitable habitats on currently unoccupied lands, including those that are enrolled under the Federal Conservation Reserve Program administered by the U.S. Department of Agriculture, may be converted for crop production in the future.

Most residential upkeep and recreational activities outside of recovery emphasis areas are not likely to adversely affect the CBPR. However, any CBPRs that disperse into residential areas or sites used for recreational activities may be vulnerable to certain adverse effects, including predation or harassment by pets, direct injury or disturbance of individual animals (e.g., from off-road vehicle use, horseback riding, hunting), and possible impacts to suitable, unoccupied shrub-steppe habitats in undeveloped areas (e.g., from conversions for future residential development, increased fire danger).

The potential adverse effects from the above land-use activities that are likely to take place on intervening properties would be minimized through the establishment of recovery emphasis areas that will be actively managed to support viable subpopulations of CBPRs. In addition, if the distribution and abundance of CBPRs increase on enrolled intervening lands in the future, the cooperative management efforts and facilitated access to enrolled properties prescribed by the Template SHA would lead to improved monitoring, research, and adaptive management efforts for the CBPR. Furthermore, if future land-use activities on enrolled intervening properties will significantly alter or convert suitable habitats that have become occupied by the CBPR, Participants must provide a minimum 30-day notice to the Service prior to undertaking the activities so that translocation efforts for any affected CBPRs may occur. Finally, all Participants must immediately notify the Service if they locate any dead or injured CBPRs on their enrolled properties, which will allow the Agencies to evaluate and further address any such occurrences. All of the above measures will help avoid or reduce potential adverse effects to the CBPR and lower the level of exempted incidental take that could occur on enrolled intervening properties.

Recovery Emphasis Areas – Recovery emphasis areas will be managed, first and foremost, to support viable subpopulations of the CBPR. However, efforts to create, enhance, or restore suitable shrub steppe habitat sometimes requires impacting existing habitats (e.g., by plowing, weed treatments, reseeding) to bring about desired changes. In addition, other management activities associated with Participants' conservation programs at recovery emphasis areas could adversely affect the CBPR. These other activities may include managing infrastructure at the site (e.g., fencing, firebreaks, access roads), providing public outreach and education (e.g., signage, informational field tours), allowing recreation (e.g., wildlife viewing, hunting), conducting pilot habitat treatments (e.g., botanical experiments), and conservation actions implemented for other species of concern, such as the Washington ground squirrel (*Spermophilus washingtoni*) and greater sage grouse (*Centrocercus urophasianus*).

In the short-term, it is possible that adverse effects to the CBPR may occur as a result of the above activities at recovery emphasis areas, and could include temporary declines in forage availability or quality, a decrease in hiding cover, and possible disturbance, injury, or mortality of individual CBPRs that may be present. These potential impacts are minimized by measures prescribed in the Template SHA, primarily through the documentation of baseline (i.e., existing) habitat conditions on the area. As such, the amount of suitable CBPR habitat on recovery emphasis areas at the time they are enrolled will be maintained and, in the long-term, additional benefits to the CBPR will be realized by the increasing the quantity and/or quality of available

CBPR habitat at these sites. In addition, in accordance with the measures prescribed by the Template SHA, Participants whose properties comprise a recovery emphasis area, in whole or in part, would coordinate their management activities with the Agencies to minimize or avoid adverse effects to the CBPR through monitoring and future implementation of adaptive management measures. Finally, as with intervening properties, Participants managing recovery emphasis areas must provide a minimum 30-day notice to the Service prior to undertaking habitat-altering activities that may adversely impact the CBPR, and must immediately notify the Service if they locate any dead or injured CBPRs.

II. PUBLIC COMMENT

On September 7, 2006, the Service published a notice in the Federal Register announcing the availability for public review and comment of the draft Template SHA, which was jointly developed by the Service and WDFW, and a draft Environmental Assessment (EA), which was developed by the Service pursuant to Federal responsibilities under the National Environmental Policy Act (NEPA). The notice also announced the Service's receipt of three initial Permit applications, submitted by The Nature Conservancy (TNC), Mr. Peter Lancaster, and Billingsley Ranch, that were developed pursuant to the draft Template SHA. Publication of the Federal Register notice opened a 30-day public comment period that extended through October 10, 2006. The Service received three comment letters as a result of the notice. The Service's response to substantive comments are presented below.

Comment: The Service should develop a "programmatic" Safe Harbor Agreement and issue a single permit, with the Service or WDFW acting as the "master" permit holder.

Response: During development of the Template SHA, the Service considered several alternative approaches, including issuing one Permit to a single entity capable of implementing the provisions of a comprehensive Safe Harbor Agreement. After further evaluation of the possible alternatives, we determined that a Template SHA would better fit the needs of the Agencies and would provide similar efficiencies to a "master" permit holder approach, with the primary differences being additional noticing in the Federal Register of all future Permit applications received and the issuance of multiple Permits. We anticipate that the Template SHA will result in only minor increases in the required workloads of prospective Participants compared to a single, master permit holder scenario. Furthermore, the Template SHA approach will allow the Service to review each permit application for compliance with the section 10(a)(1)(A) issuance criteria and, at the same time, will significantly streamline the Permit review and issuance process.

Comment: The description of baseline in the Template SHA is confusing, application of the baseline concept is inconsistent with the Service's Safe Harbor Agreement Policy, and the incidental take exemptions sought under Permits issued pursuant to the Template SHA would violate the prohibitions prescribed by section 9 of the Act.

Response: Conceptually, baseline represents the number of individuals of a covered species on a given piece of property at the time it is enrolled under a Safe Harbor Agreement. However for most species, including pygmy rabbits, it is often difficult or impossible to determine the precise number of individuals in an occupied area. Therefore, in practice and consistent with the Service's Safe Harbor Agreement Policy, baseline is typically expressed as "population estimates and distribution" of the covered species or "habitat characteristics and determined area...that sustain seasonal or permanent use by the covered species" on an enrolled property. Baseline is defined within the Template SHA using both of these indices of abundance for the following reasons.

Determining the number of active burrows present currently represents the most reliable way to estimate pygmy rabbit population abundance and distribution in a given area, and is the most efficient method for documenting the species' overall presence or absence in an area. Therefore, baseline for eligible intervening properties would be established in terms of the number of active CBPR burrows present at the time a given property is enrolled under the Template SHA (see following).

Considering past declines in the CBPR population and ongoing survey efforts, the Service and WDFW anticipate that it is unlikely any CBPRs currently remain in the wild. However, in the unlikely event that some purebred CBPRs do still occur in the wild, one of the potential conservation benefits from eligible intervening properties would be the opportunity to locate and secure these animals for ongoing captive breeding and/or future translocation efforts. Currently, the number of additional CBPRs considered appropriate to remove from the wild or directly translocate is 30.

Under the Template SHA, up to 30 purebred CBPRs could be removed from intervening properties through cooperation with the prospective Participant(s) involved, and prior to enrolling the Participant's property under the Template SHA and issuance of a Permit. All future capture, transportation, and holding operations would be conducted in accordance with WDFW's existing Federal Recovery Permit and/or take authority pursuant to section 6 of the Act, and as consistent with the Agencies' recovery objectives for the CBPR. As such, the incidental take of CBPRs that may be associated with these activities has previously been addressed by the Service pursuant to section 7 responsibilities under the Act. Any conservation benefits from these actions would only occur through the voluntary cooperation of the prospective Participant involved, and would be realized prior to formalizing the Participant's other potential commitments under a Permit and prior to the provision by the Service of regulatory assurances to the Participant becoming effective. Under the Template SHA, therefore, any purebred CBPRs removed from intervening properties by the Agencies (up to the current limit of 30) prior to the properties' enrollment would not be considered part of the properties' baseline (see Recovery Strategy).

In contrast to recovery emphasis areas (see below), the Service and WDFW do not anticipate actively reintroducing CBPRs to intervening properties. In addition, while we

anticipate that intervening properties may contribute to overall conservation efforts for the CBPR, we do not agree with the presumption that the habitats on any currently occupied intervening properties should be considered necessary for the recovery of the CBPR. Many populations of declining species may actually occur in areas of marginal habitats, and other potential threat factors in occupied areas (e.g., small population size, isolation, inbreeding) may be of much greater importance with regard to recovery of the species than the areas' existing habitat conditions, per se. The Service found this to be the case for the CBPR during the Federal listing process under the Act, and does not consider management of currently occupied habitat on intervening properties to be essential to the recovery of the CBPR (see Recovery Strategy).

As discussed above, the Service and WDFW anticipate that it is unlikely that any CBPRs actually remain in the wild. In particular, surveys of eligible properties that comprise one of the recovery emphasis areas have determined that no CBPRs are currently present at this site. As such, the baseline for these properties could conceivably be set at "zero" CBPRs. However, a key feature of recovery emphasis areas is the existing habitat they contain, or could contain through appropriate enhancement measures, that would be considered capable of supporting a viable subpopulation of CBPRs. Furthermore, the Service and WDFW anticipate releasing captive-bred CBPRs at two recovery emphasis areas to initiate recovery of the CBPR population in the wild. Therefore, under the Template SHA, baseline for eligible properties comprising recovery emphasis areas would be established in terms of the amount of suitable habitat that currently exists on these properties, rather than "zero" CBPRs.

Without the willing contributions from Participants pursuant to the provisions of the Template SHA, it would not be possible to achieve many of the currently identified recovery objectives for the CBPR, or many of the expected net conservation benefits that could result from implementation of the associated Site Plans. We recognize that the treatment of baseline within the Template SHA may be more involved compared to certain other existing Safe Harbor Agreements. However, each species listed pursuant to the Act presents a unique set of circumstances that must be addressed to ultimately achieve their recovery. Based on the above discussions, we believe that the proposed issuance of Permits in association with the Template SHA, and implementation of any future Site Plans that are developed in accordance with the Template SHA, would be fully consistent with the Service's Safe Harbor Agreement Policy and the take prohibitions prescribed by section 9 of the Act.

Comment: The Permits proposed to be issued by the Service in association with the Template SHA would jeopardize the CBPR, and the minimum 30-day notification requirement of Participants prior to their undertaking habitat conversion activities is insufficient.

Response: The Service anticipates that the actual level of exempted incidental take of the CBPR due to issuance of the Permits would be relatively low because the Template SHA includes measures to avoid or minimize adverse effects to the CBPR, as detailed above

and in the Service's Biological Opinion. The Service also anticipates that the amount of incidental take that could occur over the term of the Template SHA would vary depending on the broader management objectives for the areas potentially occupied by CBPRs (i.e., recovery emphasis areas versus intervening properties), as follows:

1. For enrolled properties that comprise, in whole or in part, each recovery emphasis area, the Service anticipates that for the term of the Template SHA no more than 5 CBPRs would be incidentally taken due to direct mortality; no more than 10 CBPRs would be incidentally taken due to activities that may harm or harass; and no more than 25 CBPRs would be incidentally taken due to capture efforts in response to future notifications of planned habitat conversions.
2. For all enrolled intervening properties, the Service anticipates that for the term of the Template SHA no more than 10 CBPRs would be incidentally taken due to direct mortality; no more than 20 CBPRs would be incidentally taken due to activities that may harm or harass; and no more than 125 CBPRs would be incidentally taken due to capture efforts in response to future notifications of planned habitat conversions.

The Service has determined that the amount of incidental take described above that could be exempted pursuant to the issuance of Permits would not jeopardize the continued existence of the CBPR. The Service reached this determination primarily because as free-ranging subpopulations of CBPRs become reestablished and expand through reintroduction and augmentation efforts, the overall number of free-ranging CBPRs and the inevitable deaths of this relatively short-lived mammal from all causes of mortality would be expected to increase in the action area. The anticipated amount of exempted incidental take due to killing, injury, and disturbance of reestablished CBPRs would likely be compensatory to natural mortality and other disturbance factors affecting free-ranging CBPRs. Furthermore, any CBPRs incidentally taken due to capture efforts in response to future notifications of planned habitat conversions would still be available for additional conservation actions such as captive breeding and translocation. Rather than jeopardize the CBPR, the Agencies feel that implementation of the Template SHA would provide net conservation benefits to the CBPR, contribute to the CBPR's survival and recovery in the wild, and would be consistent with the Service's preliminary Draft Recovery Plan and other ongoing recovery actions of the Agencies.

Concerns were expressed by prospective Participants and other stakeholders during development of the Template SHA that "open-ended" agency commitments should be minimized to help ensure that the Agencies remain responsive during implementation of the Agreement, and that precisely defining such commitments would be more consistent with the safe harbor assurances anticipated. In addition, the Template SHA prescribes various requirements for monitoring the status of implementation efforts, notifications between the parties, reporting requirements, and contingencies to address future needs. Furthermore, the WDFW has developed considerable expertise in capture and handling techniques for the CBPR and has demonstrated their commitment to coordinating with

landowners in a timely manner. Finally, and as consistent with the Service's Safe Harbor Agreement Policy, removing free-ranging CBPRs from intervening properties in response to future notifications of habitat conversions would be conducted at the discretion of the Agencies, and would only be conducted to the extent that such actions would contribute to overall recovery of the CBPR. In light of the above, and pursuant to Federal regulations (50 CFR § 17.22), we have determined that a 30-day advance notice to the Service by Participants of when they expect to incidentally take the CBPR due to future habitat conversions (i.e., return their enrolled property to its baseline conditions) will provide a reasonable opportunity to relocate any affected individuals, as feasible and appropriate.

In accordance with the requirements of section 7 of the Act, the Service will reinstate formal consultation on the proposed Federal action if: 1) the amount or extent of anticipated incidental take is exceeded; 2) new information reveals that effects of the agency action may affect listed species or critical habitat in a manner or to an extent not considered in the Service's Biological Opinion; 3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in the Service's Biological Opinion; or 4) a new species is listed or critical habitat designated that may be affected by the proposed action.

Comment: Under the Template SHA, there are no minimum habitat management measures for Participants to carry out in order to enroll their properties, and baseline determinations should not be considered as required conservation measures for participation in the Template SHA because they must be completed prior to issuance of the associated Permits.

Response: The Service's Safe Harbor Agreement Policy requires that a net conservation benefit be expected from implementation of a Safe Harbor Agreement. However, the policy does not require active management of the habitats used by the covered species, nor does the Template SHA require Participants to undertake any habitat enhancement or restoration measures.

The primary benefits of the Template SHA would be derived through: maintenance of suitable habitats and the opportunity to reintroduce and actively conserve CBPRs on eligible lands comprising the recovery emphasis areas; the ability to conduct monitoring and research on all enrolled lands; an increased likelihood of securing additional purebred CBPRs that would contribute to the Agencies' conservation efforts; maintenance of suitable habitats on intervening properties; an increased potential to implement adaptive management measures that would benefit the CBPR through cooperative management on all enrolled lands, which could include active habitat enhancement and restoration activities; and future opportunities to reduce or avoid adverse effects due to exempted incidental take through capture and removal of CBPRs from occupied habitats if Participants chose to return their enrolled property to its baseline conditions.

The Template SHA provides a list of minimum conservation measures that must be implemented by Participants to enroll their properties, and that would be expected to provide net conservation benefits to the CBPR. All Permit applications will be reviewed by the Service to ensure that they meet the issuance criteria and other regulatory requirements, and the Service would notice all future Permit applications in the Federal Register to allow the opportunity for interested parties to provide input prior to the Service making a decision on the Permit application.

We do not concur that baseline determinations are not requirements for participation in the Template SHA simply because they must be made prior to issuing Permits. On the contrary, we have emphasized in the Template SHA that determining baseline conditions for properties that may be enrolled under the Agreement must occur prior to the Service's issuance of Permits. Furthermore, as addressed above, conducting evidence searches for CBPRs associated with baseline determinations for properties of prospective Participants would generate valuable information and could provide opportunities to secure additional purebred animals for conservation purposes, both of which would be expected to provide net benefits towards recovery of the population.

Comment: The Template SHA has too much flexibility and allows prospective Participants too much discretion during development of their Site Plans.

Response: The primary objective of the Service's Safe Harbor Agreement program is to facilitate collaboration with non-Federal land owners and managers to implement conservation measures that would be expected to benefit threatened and endangered species. In addition, participation in Safe Harbor Agreements is voluntary. Furthermore, pursuant to the Service's Safe Harbor Agreement Policy, the Service should make every effort to include neighboring landowners as signatories to an agreement, and all parties must mutually agree with the protocols for determining baseline conditions. As such, the Service believes that there should be some flexibility to meet the needs of individual landowners.

Under the Template SHA, approved Site Plans will specify each Participant's agreed-upon commitments and the conservation measures they will implement for the CBPR on their enrolled properties. These measures will then be incorporated into the terms and conditions of their associated Permits. However, prospective Participants to the Template SHA have the discretion to decide the timing and nature of various actions prior to formally enrolling their properties, including: 1) when their property, and which portions, will be enrolled under the Agreement and, thus, when its baseline will be determined; 2) who would be allowed access to their property to conduct any necessary baseline surveys; 3) how baseline is determined with respect to whether their property would be enrolled as a recovery emphasis area or an intervening land; and 4) whether any CBPRs that currently occupy their property could be removed. Upon request, the Service will assist Participants with undertaking the above actions and, ultimately, both parties must mutually agree with all the information contained in final Site Plans. However,

such proactive management actions cannot be mandated by the Service. Furthermore, the Service must ensure that the issuance criteria and all other Federal responsibilities will be fully met prior to approving Participant Site Plans or issuing Permits. We believe that the proactive, cooperative, and flexible approach prescribed by the Template SHA is fully consistent with the Service's Safe Harbor Agreement Policy and applicable regulatory requirements.

III. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The taking will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Safe Harbor Agreement.

Any taking that would be exempted pursuant to Permits issued in association with the Template SHA would be incidental to otherwise lawful activities and would be above the baseline conditions of the enrolled property. All of the existing and, as available, proposed future land-use activities to be covered under the Template SHA are identified in section 1 of the Agreement, and will be specifically detailed in each Participant's Site Plan. The covered activities may include, but are not limited to, those associated with ranching, farming, residential upkeep, recreation, conservation programs for the CBPR, and direct management of shrub steppe habitats that are potentially suitable for the CBPR, including habitat maintenance, enhancement, restoration, and conversion actions. Any taking, including return to baseline, will be conducted in conformance with the requirements set forth in the Template SHA.

2. Implementation of the terms of the Safe Harbor Agreement would be expected to provide a net conservation benefit to the listed species included in the permit, and the Safe Harbor Agreement otherwise complies with the Service's Safe Harbor Agreement Policy.

The Service expects that implementation of the Template SHA will provide a net conservation benefit to the CBPR through: maintenance of suitable habitats and the opportunity to reintroduce and actively conserve CBPRs on lands comprising the recovery emphasis areas; the ability to conduct monitoring and research on all enrolled lands; an increased likelihood of securing additional purebred CBPRs that would contribute to the Agencies' conservation and recovery efforts; maintenance of suitable habitats on intervening properties that can be used by dispersing CBPRs; an increased opportunity to implement adaptive management measures gained through monitoring and research activities that will benefit the CBPR on all enrolled lands; and future opportunities to reduce or avoid adverse effects due to exempted incidental take through capture and removal of CBPRs from occupied habitats if Participants chose to return their enrolled property to its baseline conditions. The Template SHA provides a list of minimum conservation measures that must be implemented by Participants if they wish to enroll their properties, and that would be expected to provide a net conservation benefit to the CBPR. These conservation measures would also contribute to the survival and recovery of the CBPR in the wild. All Permit applications would be reviewed by the Service to ensure that they meet the issuance criteria and

other regulatory requirements, and the Service would notice all future Permit applications in the Federal Register to allow the opportunity for interested parties to provide input prior to the Service making a decision on the Permit application.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species.

In accordance with section 7 of the Act, the Service's proposed issuance of Permits in association with the Template SHA was reviewed by the Service's Upper Columbia Fish and Wildlife Office. The Service's Biological Opinion determined that the anticipated amount of incidental take that would be exempted pursuant to issuance of the Permits would not jeopardize the continued existence of the CBPR. We reached this conclusion because implementation of the Template SHA, and any individual Site Plans that are consistent with the Agreement, would be expected to result in net conservation benefits to the CBPR for the duration of the associated Permit. Furthermore, the Service determined that the proposed issuance of Permits would not affect any other threatened and endangered species listed pursuant to the Act. It is, therefore, the opinion of the Service that Permits issued in association with the Template SHA will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species. Monitoring will be used to evaluate the effects of the covered land-use activities on the CBPR and the condition of available habitats on enrolled lands. In addition, we will review each Permit application and any information that may become available in the future to consider the site-specific effects and to ensure that issuance of any Permits would be consistent with Service responsibilities under section 7 of the Act.

4. Implementation of the terms of the Safe Harbor Agreement is consistent with applicable Federal, State, and Tribal laws and regulations.

The Template SHA is consistent with all applicable Federal laws and regulations. In accordance with section 7 of the Act, the Service determined that the anticipated amount of incidental take that would be exempted pursuant to the Permits would not jeopardize the continued existence of the CBPR. In accordance with NEPA, the Service prepared a final EA and found that implementation of the Template SHA and proposed issuance of the Permits would have no significant impact on the human environment. The Service will also review the above finding under NEPA in the context of individual Permit applications prior to issuance, as appropriate, of each Permit.

The Washington Wildlife Commission designated the pygmy rabbit as a State endangered species in 1993. This State classification makes it illegal to hunt, possess, maliciously harass or kill, or to maliciously destroy the nests of pygmy rabbits, unless otherwise authorized by the Washington Wildlife Commission. However, this State designation does not provide regulatory protection from activities that may incidentally take the CBPR, nor does it provide regulatory mechanisms to protect habitat that may be considered essential to the long-term security of the CBPR. The proposed issuance of Permits in accordance with the Template SHA would only exempt take of CBPRs that would be incidental to otherwise lawful activities and, therefore,

would be consistent with applicable Washington State laws and regulations. WDFW was also extensively involved with development of the Template SHA and is a signatory to the Agreement.

There are no Tribal lands within the area proposed to be covered under the Template SHA, and we are not aware of any Tribal laws or regulations applicable to implementation of the Template SHA and the proposed issuance of associated Permits.

5. Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit.

The Template SHA will not be in conflict with any ongoing conservation and recovery programs for the CBPR. In fact, it will further facilitate many of the ongoing programs for the CBPR and ultimately will be instrumental in the recovery of the CBPR. The overall recovery strategy currently identified for the CBPR includes, among other goals: reestablishment of viable subpopulations at recovery emphasis areas; research on the biology of the CBPR; development and implementation of adaptive management measures for the population; and increasing stakeholder involvement in, and public awareness of, recovery efforts for the CBPR. Implementation of the Template SHA and the proposed issuance of associated Permits will facilitate and contribute to the overall recovery strategy for the CBPR.

6. Applicants have shown capability for and commitment to implementing all of the terms of the Safe Harbor Agreement.

In general, through the development, approval, and signing of their individual Site Plans, Participants will have demonstrated that they are committed to implementing the provisions of the Template SHA. Participants' primary responsibilities under the Template SHA are to implement the agreed-upon conservation measures and other provisions of their individual Site Plans, to provide sufficient resources and funds necessary to implement their Site Plans, and to adhere to the terms and conditions of their Permits. The Service will review individual Permit applications to ensure that this criterion is met in the course of making a decision on the Permit application.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

The Service will review all Permit applications and Site Plans for consistency with the Template SHA and this Findings document and will deny those applications that do not meet the criteria and conditions set forth in 50 CFR 13.21(b)-(c). This will ensure that all issuance criteria are met and that there are no disqualifying factors that would prevent the Site Plans from being approved and subsequent Permits issued under current regulations.

V. DOCUMENTS INCORPORATED BY REFERENCE

Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit.

Final Environmental Assessment for Issuance of Endangered Species Act Section 10(a)(1)(A) Enhancement of Survival Permits and Implementation of a Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit.

Finding of No Significant Impact for Issuance of Endangered Species Act Section 10(a)(1)(A) Enhancement of Survival Permits and Implementation of a Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit.

Biological Opinion Regarding the U.S. Fish and Wildlife Service's Proposed Issuance of Endangered Species Act Section 10(a)(1)(A) Enhancement of Survival Permits Under a Template Safe Harbor Agreement for the Columbia Basin Pygmy Rabbit (Reference Number: 1-9-07-F-0035).


Deputy Regional Director

3/08/07
Date