Living with the Endangered Species Act in Colorado

by Lawrence J. MacDonnell

Thirty-three federally listed, threatened, or endangered species of animals, fish, and plants are believed to be found in Colorado. One species is proposed for listing, and eleven additional species are candidates for listing. The state lists thirty-two threatened or endangered species and identifies an additional forty-three as species of special concern. Development almost anywhere in the state is likely to be subject to the legal responsibilities set out in the federal Endangered Species Act ("ESA").

This article reviews the application of the ESA in Colorado and examines differences that apply to activities with and without federal involvement. The article also discusses the specific application of the ESA to water uses in Colorado and to activities affecting the Preble’s meadow jumping mouse along the Colorado Front Range.

requirements for Activities with a Federal Nexus

Section 7 of the ESA requires federal agencies to ensure that their actions (including the financing or approval of other actions) are not likely to: (1) jeopardize the continued existence of a listed species, or (2) result in the destruction or adverse modification of designated critical habitat. Any public or private activities dependent on federal discretion are subject to this requirement. Common examples include activities requiring federal approvals, such as dredge or fill permits from the Army Corps of Engineers or special use permits from the U.S. Forest Service.

The federal action agency is responsible for complying with this provision of the ESA. However, as a practical matter, the agency will expect the project proponent itself to do the compliance work by: (1) identifying the potential or actual presence of protected species; (2) preparing a biological assessment; (3) undergoing formal consultation if necessary; (4) identifying ways to avoid jeopardizing endangered species and avoiding “take”; and (5) proposing measures to mitigate impacts, if applicable. These steps are covered in more detail below.

Identify Potential Endangered Species

The project proponent should first determine if there is any reason to believe a proposed or listed species might utilize the area in which the activity is planned, or if the area is designated critical habitat. The Colorado office of the U.S. Fish and Wildlife Service ("FWS") is the best place to get this information.
Prepare Biological Assessment

Assuming one or more listed or proposed species might utilize the general area, the next step for the project proponent is either to prepare a "biological assessment" or otherwise analyze if the planned activity "may" affect a protected species or habitat. If FWS concurs with a "no effect" finding, the process ends. A "may affect" finding leads to initiation of the formal consultation process with FWS.

Formal Consultation Process For Biological Opinion

By statute, the formal consultation process is to be completed by FWS within ninety days of receiving a final application. Within forty-five days following conclusion of the formal consultation, FWS is to issue its written "biological opinion" as to whether the action (including its direct, indirect, and cumulative effects) is likely to jeopardize the continued existence of the species as a whole. It also specifies reasonable and prudent "measures" (as distinguished from alternatives) to minimize the impact of such taking on the species generally, as well as terms and conditions necessary to implement the measures.

During the biological assessment, it is critical to identify ways that jeopardy can be avoided and take avoided or minimized. It may be possible to design a project in a manner that completely avoids impacts in sensitive areas, once such areas are fully identified and potential impacts are understood. The need for a formal consultation thereby may be avoided.

Mitigating Impacts

If total avoidance is not possible, effort should be made to identify ways to minimize impacts that might constitute jeopardy or take. Measures to mitigate those impacts also should be identified. The biological assessment or other studies should document all analyses of potential measures to minimize and mitigate impacts. If particular measures are found to be cost-effective, the project description should be modified to include them. In this way, FWS will conduct its formal consultation on a proposed project that is most likely to lead to a no-jeopardy opinion.

Requirements for Activities Without a Federal Nexus

The ESA prohibits any person subject to the jurisdiction of the United States from taking a species of fish or wildlife listed as endangered. It is important to understand the definitions set forth in the ESA and its regulations.

Definitions: Take, Harm, and Harass

"Take" is defined in the statute as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." "Harm" is further defined in regulations as "an act which actually kills or injures wildlife." Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

Incidental Take Permits

The ESA provides for issuance of permits that authorize "incidental take" of a protected species—that is, take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. The permit applicant must submit a conservation plan, commonly referred to as a habitat conservation plan ("HCP") specifying any impacts likely to result from the taking, proposed measures to minimize and mitigate such impacts, funding available to implement the measures, and alternatives considered.

Approval of an HCP is contingent on findings that any taking is incidental; that the applicant will, to the maximum extent practicable, minimize and mitigate impacts; that adequate funding is available; and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

Other measures considered "necessary or appropriate" also may be required. Non-federal landowners can obtain a "no surprises" assurance that no additional conservation will be required in the event that impacts to the species are caused by "unforeseen circumstances.

Activities without a federal nexus still may implicate the ESA if they involve any taking of protected wildlife species. Because take may result from significant habitat modification, an initial consideration is whether the proposed activity will modify habitat potentially utilized by a protected species. Generally, this means evaluating the area in which the activity is to occur to determine its habitat characteristics. If the habitat type matches that utilized by a protected species and the proposed activity would involve significant modification, a more detailed study is warranted.

If there is clear evidence that the species does not in fact utilize this area, despite its apparently favorable habitat, a permit is probably unnecessary. In the absence of such evidence, the preferred option is to move the activity outside of the potential habitat.
habitat area. Alternatively, the activity’s impacts can be analyzed to determine whether, despite the anticipated modification of habitat, the activity will directly or indirectly actually kill or injure any protected species. If not, a permit is likely to be legally unnecessary.\textsuperscript{24} However, should take of a protected species in fact result from the activity, both civil and criminal penalties may apply.\textsuperscript{24}

Provision is made for so-called “low effect” HCPs, defined as those involving (1) minor or negligible effects on federal listed, proposed, or candidate species and their habitats; and (2) minor or negligible effects on other environmental values or resources.\textsuperscript{25} Expedited processing is promised for such HCPs, including a categorical exclusion from the requirements of the National Environmental Policy Act.\textsuperscript{26}

**Depletion of Water in Colorado and South Platte River Basins**

In the late 1970s, FWS issued several biological opinions for proposed Bureau of Reclamation water development projects in the Upper Colorado Basin. FWS concluded that the projects would jeopardize the continued existence of several native fish listed as endangered under the ESA.\textsuperscript{27} Because FWS believed that any additional depletion of water would cause jeopardy, it proposed as a reasonable and prudent alternative that the Bureau of Reclamation release from storage an amount of water at least equal to the amount of depletion related to each project.

For subsequent non-federal water development proposals, FWS proposed a depletion charge. This fee per acre-foot of associated depletion would help pay for the implementation of a conservation program for the fish. Since 1988, FWS has been issuing non-jeopardy opinions, which provide legal determination by the agency that no jeopardy exists. Non-jeopardy opinions may be issued for activities involving depletions of less than 3,000 acre-feet of Upper Colorado River Basin water as long as: (1) satisfactory progress continues to be made in the fish recovery program, and (2) the applicant pays a one-time depletion charge (in 2001, the cost was $14.75 per acre-foot, adjusted for inflation).\textsuperscript{28}

Since 1978, FWS has taken the position that additional depletions of water in the Platte River Basin will jeopardize the continued existence of the endangered whooping crane and other protected species in central Nebraska. U.S. Forest Service re-

**Activities Affecting Riparian Areas Along the Colorado Front Range**

The Preble’s meadow jumping mouse was listed as a threatened species by FWS in 1998.\textsuperscript{29} This species of mouse is found in Colorado only in foothills-to-plains riparian areas from Larimer County on the north to El Paso County on the south.\textsuperscript{30} FWS issued a so-called 4(d) rule for the Preble’s mouse in 2001 to provide guidance pending development of a more comprehensive conservation strategy.\textsuperscript{31} This rule exempts four types of activities from regulation under the take provisions of the ESA: (1) rodent control inside or within ten feet of any structure; (2) ongoing agricultural activities; (3) maintenance and replacement of existing landscaping; and (4) existing uses of water.

An earlier draft rule had proposed establishing Mouse Protection Areas (“MPAs”) and Potential MPAs—zones within which activities potentially causing take of mice to be regulated. MPAs were based on field trapping surveys for mice since 1992. They extended one linear stream mile above and below the point of capture and included 300 feet on either side of the centerline of the stream. Subsequent information indicated that Preble’s mice sometimes move greater lateral distances, so FWS now informally suggests utilizing a protective zone extending 300 feet beyond the edge of the 100-year floodplain boundary.

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Consequently, activities proposing to significantly alter land surfaces within or adjacent to the 100-year floodplain in Front Range streams and not exempted by the 4(d) rule are potentially subject to the requirements of the ESA. Activities in known or potential mouse habitat with a federal nexus generally face formal consultation. Activities without a federal nexus may require an incidental take permit.

Even before the Preble’s mouse was listed, the state of Colorado initiated a collaborative planning process to identify and implement measures for the mouse’s protection. That process evolved into a series of processes, primarily at the county level, seeking to develop regional habitat conservation plans covering some or all of the activities within the county that might involve incidental take of the mouse.

Assuming the plans are found to be sufficient, FWS will issue incidental take permits for some specified period of time covering activities governed by the plans. Holders of the take permits, generally the counties, will be responsible for implementation of the plans. Activities covered by a plan that potentially involve incidental take of mice (primarily based on significant alteration of mice habitat) will not need a separate incidental take permit. Activities involving incidental take not covered by a plan will require preparation of a habitat conservation plan to obtain a permit. No regional plan has yet been approved by FWS.

Conservation Banking

For some activities, impacts to a protected species still may remain after all practicable efforts to avoid and minimize those impacts have been made. Historically, there has been a preference to require additional on-site mitigation to offset the impacts. In the context of wetlands regulation, this approach has been found to be extremely expensive, difficult to implement successfully, and of limited environmental value in many cases.

Mitigation banking has emerged as an alternative mechanism for offsetting certain wetland impacts. Credits can be purchased from an approved bank to offset certain otherwise unavoidable impacts at another location but within the “service area” of the mitigation bank. In 1995, five federal agencies issued uniform guidance for wetland mitigation banks.

A parallel mechanism, known as “conservation banking,” has developed for offsetting impacts to species protected under the ESA. FWS has not yet issued official guidance for such banks. However, as they have been implemented in California and a few other states, the conservation banks closely follow the wetlands model. Thus, for example, a landowner needing to build a driveway through Preble’s mouse habitat could, rather than being required to obtain an incidental take permit, potentially offset this impact by purchasing credit from a Preble’s mouse conservation bank. Active efforts to establish such banks in Colorado are now under way.

Safe Harbor for Voluntary Habitat Improvements

FWS promulgated a “safe harbor” policy in 1999 to give private and non-federal public landowners an incentive to maintain, and even enhance, protected species habitat on their lands. A landowner can enter into an agreement with FWS limiting incidental take responsibility to the existing habitat baseline. Assurances are given that good conservation practices, which increase use of the land by protected species, will not result in additional legal obligations under the ESA. For example, a landowner wishing to restore a stream corridor through his or her property in the Front Range foothills could obtain assurances that there would be no additional legal responsibilities in the event of increased use by Preble’s mice.

Anticipating Listings

Species proposed for listing through a Federal Register announcement are afforded much the same legal protection applying to listed species. Only the mountain plover currently holds this status in Colorado.

Activities with a federal nexus likely to jeopardize a proposed species require a conference with FWS, which will make “advisory recommendations” on ways to minimize or avoid impacts. Should the species become listed, FWS still may require a formal consultation. Alternatively, it may choose to regard its recommendations as a biological opinion.

At the option of the applicant, a habitat conservation plan for a listed species may address ways to minimize impacts to other species utilizing the area that might become listed. The incidental take permit also will specifically include the unlisted species, with a delayed effective date pending listing. Should this species eventually be listed, the activity will require no additional compliance as long as the plan is being implemented.

In 1999, FWS announced a final policy governing “candidate conservation agreements with assurances.” Non-federal landowners can enter into an agreement with FWS, committing to implementation of specific conservation measures for unlisted species on their property, and receive assurances that, should the species be listed, no additional conservation measures will be required. This policy is intended to provide incentives for non-federal landowners to take proactive measures that might help preclude the need for listing. For landowners, such an agreement can eliminate or reduce the uncertainties potentially associated with future listings.

Protected Species of Plants

Plants are covered under the ESA. Species identified as in danger of extinction or likely to become so in the foreseeable future may be listed. Thirteen species of plants thought to exist in Colorado are now federally listed as either threatened or endangered.

A proponent for an activity with a federal nexus should check for possible existence of protected plant species within the action area. Activities posing potential jeopardy to such species or possibly significantly modifying designated critical habitat will be required to go through a formal consultation process. By statute, the prohibition against take applies only to listed fish and wildlife species. Thus, an incidental take permit is not required for activities potentially taking listed plant species.

Conclusion

With thirty-three federally listed species, Colorado has not yet been faced with the challenges encountered by states such as California, with 276 listed species, or Florida, with 100 listed species. Nevertheless, development activities in Colorado—particularly those involving federal discretion—are increasingly affected by the ESA.

Requirements for addressing water depletions in the Colorado and South Platte have been established, and procedures for dealing with the Preble’s meadow jumping mouse are under development. Less progress has been made in working through the needs in Colorado for such listed species as the Canada lynx, southwestern willow flycatcher, and Mexican spotted owl; or for candidate species such as the black-tailed prairie dog. Increasingly,
new development will have to be planned with protection of endangered species in mind.

NOTES

1. Listings by state are maintained by the U.S. Fish and Wildlife Service ("FWS") at http://ecos.fws.gov/webpage_usa_lists.html; see also www.fws.gov.

2. The Colorado Division of Wildlife maintains this list at http://wildlife.state.co.us/T&E/list.asp.

3. 16 U.S.C.A. §§ 1531 to 1544. Colorado law directs the Colorado Wildlife Commission to identify and list by regulation species of wildlife indigenous to this state determined to be threatened or endangered. CRS § 33-2-105(1). It is unlawful to "take, possess, transport, export, process, sell or offer for sale" listed wildlife. CRS § 33-2-105(3) and (4).

4. The Preble's meadow jumping mouse is found only in riparian areas along the Colorado Front Range and is regarded as threatened with extinction.


6. "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect..." 16 U.S.C.A. § 1532(19).

7. A biological assessment must be prepared by a project proponent for "major construction activities," defined by regulation as a construction project or other undertaking having similar physical impacts that would be regarded as a major federal action significantly affecting the quality of the human environment under the National Environmental Policy Act. 50 C.F.R. § 402.02. A biological assessment is optional if only a proposed species or proposed habitat is involved.

8. 50 C.F.R. §§ 402.12(j) and 402.14(b).


10. 16 U.S.C.A. § 1536(b)(1)(A). By regulation, a consultation involving an applicant cannot be extended for more than forty-five days without consent of the applicant. 50 C.F.R. § 402.14(e).


12. 16 U.S.C.A. § 1536(b)(4). By regulation, reasonable and prudent measures "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2).

13. 16 U.S.C.A. § 1538(a)(1)(b). By regulation, this prohibition has been extended as well to fish or wildlife species listed as threatened. 50 C.F.R. § 17.31(a).


15. 50 C.F.R. § 17.3. The validity of this regulatory interpretation was upheld in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 132 (1995).

16. 50 C.F.R. § 17.3.


22. To be safe, it may be appropriate to obtain a letter from FWS agreeing with this determination.

23. E.g., in Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000), construction of a school complex within designated critical habitat for the endangered cactus ferruginous pygmy owl was found not to constitute take.


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28. A similar program, but without the depletion charge, exists for water development in the San Juan River Basin. The program is called the “San Juan Basin Recovery Implementation Plan, Principles for Conducting Endangered Species Act Section 7 Consultations on Water Development and Water Management Activities Affecting Endangered Fish Species in the San Juan River Basin” (June 19, 2001). Information is available online at www.bvs.gov.

29. Total basin depletions are estimated to be three million acre-feet. Acquisition and management of an additional 386,000 acre-feet of water at an annual cost of $5.50/acre-foot and 20,000 acres of riverine habitat at $2,500 per acre were assumed to be needed for recovery.


31. Small populations also may exist in southern Wyoming near Cheyenne.


36. 50 C.F.R. § 402.10.

37. HCP Handbook, supra, note 18 at ch. 4.


39. The first such agreement has been reached for improvements made on the Three Forks Ranch in Wyoming and Colorado. 66 Fed. Reg. 58513-58514 (Nov. 21, 2001).

40. This can be accessed online at: http://cos.fws.gov/webpage/webpage_lists.html?state=CO; see also www.fws.gov.


42. 16 U.S.C.A. § 1538(a)(1). However, it is illegal to remove an endangered plant from areas under federal jurisdiction. 16 U.S.C.A. § 1538(a)(2).

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