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Laws Influencing Community-Based Conservation in Colorado and the American West: A Primer

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LAWS INFLUENCING COMMUNITY-BASED CONSERVATION IN COLORADO AND THE AMERICAN WEST: A PRIMER (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2000).

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Laws Influencing Community-Based Conservation in Colorado and the American West: A Primer



Natural Resources Law Center
University of Colorado School
of Law

2000

FEATURING CONCISE DISCUSSIONS OF:

National Environmental Policy Act
National Forest Management Act
Federal Land Policy & Management Act
Endangered Species Act
Clean Water Act
Federal Advisory Committee Act
State Prior Appropriation Law
And more ...

“A working knowledge of natural resources and environmental law can be indispensable to efforts in community-based conservation. Many of the relevant laws are designed to provide concerned citizens and stakeholders with access to decision-makers and decision-making processes. The first step in taking advantage of these opportunities is to identify and understand them.”

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Acknowledgements

This report has traveled a long and complicated path, beginning in 1995 as a case study of Colorado's Yampa River Basin, but evolving into a more broadly relevant study of the laws influencing community-based conservation in Colorado and the West. This broader focus was useful for integrating the project with other ongoing studies at the Natural Resources Law Center—in particular, the update of *The Watershed Source Book* (1996). Much of the content herein is reprinted in chapter 3 of *The New Watershed Source Book* (2000), available from the Natural Resources Law Center.

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Executive Summary

In recent years, hundreds of community-based groups have emerged in the West to promote improved conservation and management of land and water resources. Many of these efforts in “community-based conservation” are located in Colorado. By promoting collaborative, multi-stakeholder processes, these efforts are an attempt to move past existing laws and management practices typically viewed as inflexible, uncoordinated and/or misdirected. Of particular concern to many groups are the procedures associated with federal laws, a byproduct of the high percentage of federal lands in the West and the salience of federal environmental laws. At the state level, water law is of special concern. An understanding of these relevant natural resources and environmental laws is often a precursor to successful community-based conservation.

Two of the most important federal laws pertain to rules of decision-making. The first of these is the Federal Advisory Committee Act (FACA). FACA is important in that it specifies the terms under which federal agencies can establish, utilize, and/or participate in multi-stakeholder groups. While considerable confusion surrounds the applicability of FACA to community-based conservation groups, violations can normally be avoided if the provisions of the act are carefully considered. Of even greater significance is the National Environmental Policy Act (NEPA), which specifies the decision-making process utilized to consider all major land use and environmental management decisions made by the federal government. The environmental impact statement (EIS) process, especially the “scooping phase,” can be an excellent entry point for concerned citizens into public decision-making processes involving natural resources.

The structure provided by NEPA is followed closely in several public land planning processes. For the National Forest system, forest-level planning under the National Forest Management Act provides a key opportunity for community groups to influence subsequent activities undertaken by the Forest Service. Similarly for lands managed by the Bureau of Land Management, the development of resource management plans under the Federal Land Policy and Management Act (FLPMA) requires and encourages public

participation. Planning processes are extremely important in that they guide subsequent land-use and management activities for several years. As mentioned earlier regarding NEPA processes, often the best opportunity for advocates of community-based conservation come during the scoping phase of these efforts.

Many of the most important federal laws are regulatory programs. The Endangered Species Act (ESA) is among the most powerful and complex of all federal environmental laws, and is frequently center stage in many conservation debates. The act does not, however, generally provide many opportunities for public input or involvement, as decisions are, in theory, largely technical. The role of citizens is usually limited to bringing lawsuits challenging listing decisions, but occasionally involves more cooperative exercises regarding species recovery planning and implementation. Greater citizen involvement is provided by the Clean Water Act. Also a highly powerful and complex statute, the Clean Water Act requires a number of permitting activities that can be opened to public scrutiny, and explicitly requires public input at three-year intervals in the revising of water quality standards. Perhaps the most important connection between these acts and community-based conservation, however, is as a stimulus for the formation of these efforts. This is particularly true for watershed-based initiatives.

Other potentially relevant federal laws include the Wild and Scenic Rivers Act; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and various laws pertaining to agricultural management. The Wild and Scenic Rivers Act provides a system for protecting riparian corridors, and can therefore be an important conservation tool. The best opportunities for public input are in the designation of new stream segments, and in the development of associated management plans through NEPA-like processes. CERCLA, on the other hand, guides the clean-up of sites polluted by hazardous wastes. CERCLA actions tend to be long, complex efforts, featuring many opportunities for public comment. More direct public involvement is often possible through many of the agricultural management programs, such as the soil conservation programs of the Natural Resources Conservation Service (formerly the Soil Conservation Service).

At the state level in Colorado, as in most western states, the most important element of the state legal framework is the prior appropriation doctrine, which allocates water rights to private interests for recognized uses. Given that most waterways in the West are already fully appropriated and that non-rightsholders have few opportunities to influence patterns of use or transfer, water management practices can pose difficult challenges to community-based conservation. However, programs that allow rights to be acquired for instream flows can be highly effective conservation tools. Colorado also has a special program (H.B. 1041) to limit water exports from localities wishing to keep resources in local control. Other western states undoubtedly also have unique programs and opportunities for influencing water management practices. Identifying such opportunities can be an essential component of a strategy for community-based conservation, especially in arid and semi-arid regions.

The application of these laws and associated programs is perhaps best illustrated and understood through the use of a case study—such as resources management in the White-Yampa Region in extreme northwestern Colorado. Of particular salience in that region has been public land planning exercises by the Bureau of Land Management and the U.S. Forest Service, endangered species management (as part of a comprehensive program for the entire Upper Colorado River system), and ongoing efforts regarding instream flow protection and a potential Wild and Scenic River designation.

A working knowledge of natural resources and environmental law can be indispensable to efforts in community-based conservation. Many of the relevant laws and their associated administrative programs described herein are designed to provide concerned citizens and stakeholders with access to decision-makers and decision-making processes. The first step in taking advantage of these opportunities is to identify and understand them.

Introduction

Much of the West is driven economically, politically, and socially by its natural resources. More than half of the West is federal public lands, managed primarily by the U.S. Forest Service, Bureau of Land Management, and National Park Service. Many activities and resources on private lands are also subject to various degrees of federal control. Accordingly, federal natural resources laws and regulations play a central role in the management of the West's natural resources. The federal government is also involved in many facets of western water management, although water allocation is predominantly the domain of state law and is based on the private rights orientation of the prior appropriation doctrine.

One byproduct of this legal framework is that many local “stakeholders” who have an obvious interest in the management of the West's natural resources often feel excluded from management decisions. Additionally, many management programs have not been as effective as desired in solving problems on the ground level. Largely in response to these and related concerns, many stakeholders have banded together in recent years to form various types of partnerships, many of which pursue the goals of environmental protection and restoration. These efforts are frequently described as “community-based conservation.” While not without historical precedent, most community-based conservation efforts in the West are relative newcomers to the institutional landscape, and are notable in part for frequently bringing together a wide diversity of interested parties, including local residents, industry representatives, farmers, ranchers, recreational users, environmentalists and representatives from local, state, and federal governments.¹

The Ponderosa Pine Forest Partnership ("Ponderosa Partnership") is an example of one such local resource management collaborative effort. The Ponderosa Partnership began as informal discussions between a local mill owner, a National Forest Service

¹ D.S. Kenney, Historical and Sociopolitical Context of the Western Watersheds Movement, *Journal of the American Water Resources Association*, 35(4):493.

District Ranger, and a County Commissioner. The discussions focused on the unhealthy forest conditions in the San Juan-Rio Grande National Forest in southwestern Colorado associated with years of heavy logging and fire suppression. The result of the collaboration has been the pursuit of innovative solutions tied to the partnership's common interest, namely the reestablishment of a healthy and productive forest.

Other local resource management initiatives focus on managing the quality, and occasionally the quantity, of water in a particular watershed. Such efforts are often called "watershed initiatives." "Watershed" is an imprecise term, but it generally refers to a catchment or drainage basin with a common outlet, such as a river. More specifically, the term "watershed" is usually used to refer to a basin with an outlet smaller in scale than, for example, the Colorado River, and larger than a "creek" or "stream." There are at least 350 watershed initiatives in the West. While the Pacific Northwest features the West's highest concentration of watershed initiatives, dozens of community-based conservation groups can be found in Colorado watersheds, including those associated with the Alamosa River, Animas River, Badger Creek, Bear Creek, Big Dry Creek, Big Thompson River, Boulder Creek, Chalk Creek, Cherry Creek, Clear Creek, Dolores River, Eagle River, French Gulch, Fountain Creek, Gunnison River, James Creek, North Fork River, Pine River, Poudre River, Roaring Fork River, San Juan River, San Miguel River, Snake River, South Platte River, Strawberry Creek, Upper Arkansas River, Upper Rio Grande, Willow Creek, and Yampa River.²

It is largely impossible for a community-based conservation group to function effectively in the West without some understanding of the legal framework imposed by federal environmental and public lands law, and by state water law. Each law is unique in its structure, and offers widely different opportunities and constraints for local stakeholders wishing to influence decision-making and management activities. This report provides an overview of the most relevant statutes.

² A list of western watershed initiatives is maintained by the Natural Resources Law Center. See *The New Watershed Source Book*, 2000.

Federal Laws

Federal laws often play a significant role in the management of natural resources. In the West, the presence of large amounts of federal land absolutely requires the participation of federal agencies in any community-based conservation effort. Federal law affects both how an agency can participate in a community-based conservation effort and how local stakeholders can participate in the agency's management activities. Furthermore, federal laws often limit how a group of local stakeholders may manage resources that are not on federal land. In other cases, federal law mandates the management of resources by local users in specific ways.

Most of the relevant laws were not drafted with local stakeholders in mind. As a result, many of the laws present obstacles to community-based conservation efforts. The periodic reauthorization of some of the laws, such as the Clean Water Act and the Endangered Species Act, and the revising of some regulations, such as the Forest Service and Bureau of Land Management planning procedures, provide local groups with some opportunities to advance favorable changes in these laws and regulations. However, in lieu of fundamental reform, it is wise for community-based conservation groups to learn how to best utilize the existing legal framework.

The following discussion reviews the important aspects of the federal laws that are most likely to have a significant influence on stakeholders involved in community-based conservation efforts.

Major Laws Governing Decision-Making Processes

Federal Advisory Committee Act (FACA)

Overview. Enacted in 1972, the Federal Advisory Committee Act³ (FACA) was established primarily to reduce the “wasteful expenditure of public funds for worthless committee meetings and biased proposals.”⁴ While this is an honorable goal, FACA has also had the unintended effect of discouraging many efforts in community-based conservation. The act is frequently misunderstood and, not surprisingly, frequently violated. A better understanding of the law suggests that it need not be a deterrent to community-based conservation.

FACA regulates all “advisory committees” that are “established or utilized” by the President, one or more federal agencies, or by a federal statute or reorganization plan.⁵ Under FACA, “advisory committee” is broadly defined as “any committee, board, commission, council, conference, panel, task force, or other similar group.”⁶ Although FACA applies equally to those committees that are “established by” and those that are “utilized by” the federal government, the determination of when a group is “utilized” is considerably less clear.

The FACA rules indicate that a group is “utilized” when it is a “committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the ... agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or

³ 5 U.S.C.A. app. 2 §§ 1-15 (West Supp. 1996).

⁴ Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453 (1989).

⁵ 5 U.S.C.A. app. 2 §§ 3(2)(B)-(C) (West Supp. 1996).

⁶ 5 U.S.C.A. app. 2 § 3(2).

policy....”⁷ Based on this definition there are three requirements that must be satisfied in order for a "utilized" advisory group to come within the mandates of FACA: (1) there must be a committee (i.e., more than one individual), (2) the committee must formulate consensus advice, and (3) the committee's advice must be "utilized" by a federal agency.⁸

Committees that come within the scope of FACA because they are "established by" or "utilized by" the federal government are subject to a number of requirements. The committee must be chartered by the Administrator of General Services Administration and/or the Director of the Office of Management and Budget in Washington D.C.,⁹ and a federal employee may not participate in any advisory committee until a charter has been filed.¹⁰ Furthermore, a charter will only be approved if the advisory committee is "essential to the conduct of agency business and in the public interest," and has "fairly balanced membership."¹¹ The chartering process often takes many months.

A group that is within the scope of FACA is also subject to numerous ongoing procedural requirements, which include, in part, that:

- 1) "[e]ach advisory committee meeting shall be open to the public;"
- 2) "timely notice of each such meeting shall be published in the Federal Register;"
- 3) "[d]etailed minutes of each meeting . . . shall be kept;"
- 4) "[t]here shall be a designated officer or employee of the Federal Government to chair or attend each meeting," and no meeting shall be conducted "in the absence of that officer or employee;" and
- 5) "[a]dvisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the

⁷ 41 C.F.R. § 101-6.1003 (1996).

⁸ 41 C.F.R. § 101-6.1004 (1995).

⁹ 5 U.S.C.A. app. 2 § 9(c).

¹⁰ 5 U.S.C.A. app. 2 § 9(c).

¹¹ 41 C.F.R. §§ 101-6.1007(b)(2)(i), (iii).

Federal Government, . . . with an agenda approved by such officer or employee."¹²

There are, however, at least five exceptions to FACA. First, FACA does not apply to any committee composed wholly of federal employees.¹³ Second, FACA does not apply to meetings "held between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf)."¹⁴ Third, FACA does not apply to teams appointed to develop or implement recovery plans under the Endangered Species Act.¹⁵ Fourth, FACA does not apply to meetings in which only individual, as opposed to consensus, advice is given.¹⁶ Fifth, FACA does not "apply to any civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee . . . established to advise or make recommendations to State or local officials or agencies."¹⁷

Application to Community-Based Conservation. Community-based conservation groups have found both benefits and burdens associated with FACA. FACA's benefits may include its requirement for balanced membership and provisions for public participation. However, even though these benefits are theoretically binding, they are rarely actually enforced. The burdens of FACA, on the other hand, can be disabling. As a result of the significant time and cost of complying with FACA's procedural requirements, many local collaborative efforts would simply be unable to comply. Moreover, in some

¹² 5 U.S.C.A. app. 2 § 10.

¹³ 41 C.F.R. § 101-6.1004(a) (1995).

¹⁴ Unfunded Mandates Reform Act of 1995 § 204, 2 U.S.C.A. § 1534(b) (West Supp. 1996).

¹⁵ Endangered Species Act § 4(f), 16 U.S.C. § 1533(f) (West Supp. 1996).

¹⁶ 41 C.F.R. § 101-6.1004(i) (1995).

¹⁷ 5 U.S.C.A. app. 2 § 4(c).

ways, FACA is directly contrary to the philosophy of such collaborative efforts. For example, FACA's requirement that a federal employee be appointed the chairperson of the committee, or at least be present at all meetings and approve the agenda, may be contrary to a group's desire to ensure each member has an equal voice.

The determination of whether a group falls within FACA will often depend on a court's interpretation of "utilized." Fortunately for community based conservation groups, the courts have generally recognized the disabling burdens FACA might place upon the group process. As a result, the courts that have addressed the issue have adopted even more stringent definitions of "utilized" than the FACA rules. For example, one Supreme Court decision interpreted the phrase "utilized by" to mean "organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status."¹⁸ Another court defined "utilized by" to mean, "something along the lines of actual management or control of the advisory committee" by the federal agency.¹⁹ These strict interpretations allow a community-based group to argue, quite persuasively, that they do not fit the contours of FACA, giving them full control over their own structure.

If getting around the word "utilized" proves too difficult, a group can also structure its meetings to fall within one of the exceptions discussed above. For example, meetings could be run with the aim of soliciting individual views, rather than formulating consensus advice. Furthermore, meetings in which merely information, instead of advice, is exchanged are not subject to FACA's procedural requirements. However, if not careful, meetings that may not initially trigger FACA can easily transform into meetings that violate the statute.

FACA may also be a hurdle even when it does not actually apply. Because FACA is in many respects unclear and often misunderstood, federal agency employees may err on the side of conservatism. As a result, agency representatives, who may be essential to the

¹⁸ See, Public Citizen, *supra* note 4 at 464.

¹⁹ See, e.g., Washington Legal Found. v. American Bar Ass'n Standing Comm. on Fed. Judiciary, 17 F.3d. 1446, 1450 (D.C. Cir. 1994).

success of the group, may needlessly refuse to participate in order to avoid a perceived risk of violating FACA. Additionally, even if FACA is not applicable in a given situation, the involvement of federal agency representatives may be discouraged by other rules designed to prevent potential conflicts of interest.

FACA provides no provisions concerning the remedies that are employed to address violations. Although the courts have begun to create such remedies, a party will not be permitted to sue for a remedy unless the party can show that it has been "injured" by a violation of FACA. Therefore, unless the agency actually uses advice that it has obtained in violation of FACA, the violation cannot be remedied. This is troubling to certain activist groups, who worry about the effect of "closed door" meetings with federal officials. Unless even representation at the bargaining table occurs, exiled groups are likely to bring a FACA challenge.

Most suits in which a party has shown that it has been "injured" by a violation of FACA have merely resulted in a reprimand of the agency involved. In such cases, the agency is still permitted to use the advice. In at least one case, however, an agency was enjoined from using any advice obtained in violation of FACA.²⁰

Under these circumstances, it is easy to see why FACA may be violated with regularity. Groups are often faced with a choice between risking a lawsuit as a result of violating FACA and giving up the effectiveness of their efforts. As a result, FACA is often simply disregarded. The situation regarding FACA may clear in coming months, however, due to new rules proposed by the General Services Administration that have the potential to reduce the potential of "utilized by" infractions.²¹

²⁰ See Alabama-Tombigbee Rivers Coalition v. Department of Interior, 846 F.Supp. 1009 (D.D.C. 1994).

²¹ 65 F.R. 2504 (January 14, 2000).

National Environmental Policy Act of 1969 (NEPA)

Overview. The National Environmental Policy Act of 1969²² (NEPA) is the nation's formal declaration of environmental policy. NEPA affects every major land use and management decision made by the federal government. Although NEPA may not directly control any decisions made by community-based conservation groups, it has important implications for these efforts, particularly when federal lands are involved.

NEPA "declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in productive harmony."²³ NEPA goes on to list various responsibilities of the federal government to carry out this policy, such as assuring that all Americans have "safe, healthful, productive, and esthetically and culturally pleasing surroundings."²⁴ To achieve this, "[NEPA] makes environmental protection a part of the mandate of every federal agency and department."²⁵

NEPA's mandate includes "action-forcing" provisions to ensure that the federal government acts in accordance with the letter and spirit of NEPA.²⁶ To promulgate these provisions, NEPA provided for the creation of the Council on Environmental Quality (CEQ).²⁷ The provisions promulgated by the CEQ are binding regulations that must be followed by every agency in the federal government.²⁸ These regulations constitute the

²² 42 U.S.C.A. §§ 4321-4370 (West 1994 & Supp. 1996).

²³ 42 U.S.C.A. § 4331(a).

²⁴ 42 U.S.C.A. § 4331(b)(2).

²⁵ Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d. 1109, 1112 (D.C. Cir. 1971).

²⁶ See 42 U.S.C.A. § 4332.

²⁷ See, e.g., 42 U.S.C.A. § 4321.

²⁸ See 40 C.F.R. 1500-1508 (1995).

framework for the "NEPA process."

The "NEPA process" requires federal agencies to determine what level of investigation is necessary for a proposed action. Unless an agency action is exempted, as in an emergency action,²⁹ or excluded because it does not "individually or cumulatively have a significant effect on the human environment,"³⁰ the agency must generally prepare an Environmental Analysis (EA).³¹ An EA is an overview of the anticipated environmental effects of the proposed action.³² If the EA shows that the proposed action "will not have a significant effect on the human environment," then the agency must prepare a "[f]inding of no significant impact" (FONSI).³³

However, if the EA shows that the proposed action would significantly affect the quality of the environment, then an "environmental impact statement" (EIS) must be prepared.³⁴ In the EIS, the agency must include a "full and fair discussion of significant environmental impacts" from, and reasonable alternatives to, the proposed action.³⁵ Although very few projects require going beyond EAs, agencies typically must produce EISs for all major planning processes: e.g., during preparation of a forest plan by the Forest Service or a resource management plan by the Bureau of Land Management.³⁶

²⁹ 40 C.F.R. § 1506.11.

³⁰ 40 C.F.R. § 1508.4.

³¹ 40 C.F.R. § 1501.3-4.

³² 40 C.F.R. § 1508.9.

³³ 40 C.F.R. § 1508.13.

³⁴ 40 C.F.R. § 1502.3.

³⁵ 40 C.F.R. § 1502.1.

³⁶ 36 C.F.R. § 219.10(b) (1995); 43 C.F.R. § 1601.0-6 (1995). Forest plans and resource management plans are discussed later in this report.

During the preparation of an EIS, the agency must follow the following procedures:

1. A Notice of Intent (NOI) to undertake the action and an EIS must be published in the Federal Register.³⁷
2. The agency must "scope" with other agencies and any interested public in order to identify the significant issues that the EIS should address. The scoping process includes the lead agency inviting "the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)."³⁸
3. When a draft EIS is complete, the lead agency must invite comments on the draft.³⁹
4. The agency circulating the EIS must then respond to any comments it receives.⁴⁰
5. A final EIS must be produced.⁴¹
6. Finally, the decision-maker must sign a Record of Decision (ROD) that identifies all considered alternatives, analyzes them for environmental preference, and discusses factors used by the agency to choose its final course of action.⁴²

Application to Community-Based Conservation. Since NEPA is intended to govern federal actions, it is important to examine how the major federal land management agencies implement NEPA's directives and how local stakeholders can influence their decisions by participating in the NEPA process. Agencies are required to "[m]ake diligent

³⁷ 40 C.F.R. § 1501.7.

³⁸ 40 C.F.R. § 1501.7.

³⁹ 40 C.F.R. § 1503.1.

⁴⁰ 40 C.F.R. § 1503.4.

⁴¹ 40 C.F.R. § 1506.10(b).

⁴² 40 C.F.R. § 1505.2.

efforts to involve the public in preparing and implementing their NEPA procedures."⁴³ The EIS procedures listed above are an example of the minimum effort that an agency must make to include local stakeholders.

Beyond these minimums, however, an area manager or forest supervisor does not have to do very much to involve the public or address their concerns. The paradigm of an agency conceiving a plan and then allowing public comment on it does not guarantee that local interests will actually be represented by the plan. As a result, some local stakeholders have complained that their role is merely advisory even though they are the persons directly affected by the decision. Accordingly, it may be important to remember that the agency retains the ultimate decision-making authority and may have priorities with which the local community does not agree. Another factor to remember is that an agency cannot hope to please all of the wildly differing viewpoints that a given "public" will express, and may come up with a compromise that pleases no interest. Nonetheless, most agency field personnel do seem to make an effort to involve and notify the public, and to address their concerns.

If the local federal agency is cooperative, a community-based conservation group can use the NEPA process to its advantage. Perhaps the greatest opportunity for stakeholders to have a significant impact in the NEPA process is during the scoping phase of EIS preparation. For example, although scoping is generally only required before beginning an EIS,⁴⁴ the Forest Service has broadened the scoping requirement to include all of their proposed actions.⁴⁵

NEPA also provides for public participation by allowing for comment upon the various versions of a particular EIS.⁴⁶ Although the manuals and personnel at both the

⁴³ 40 C.F.R. § 1506.6(a).

⁴⁴ 40 C.F.R. § 1501.7.

⁴⁵ *United States Forest Service Handbook* 1909.15.11 (1992) (hereafter "*Forest Service Handbook*").

⁴⁶ 40 C.F.R. § 1503.1-4.

Forest Service and Bureau of Land Management state that they respond to comments at all times during the NEPA process, they are only required to solicit comments following publication of a draft EIS.⁴⁷ In addition to seeking comments from other affected federal agencies, the lead agency producing the document must "[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected."⁴⁸ Accordingly, the Forest Service must provide notice of publication of the draft report in the Federal Register, in press releases, in copies sent to persons on a mailing list, and at public meetings/hearings.⁴⁹ In the case of an EIS, the agencies' responses to the comments must either result in a modification of the EIS or an explanation of why the comment does "not warrant further agency response."⁵⁰

Choices and attitudes at the agencies' local level seem to be the most significant variable in gauging the level of input that a community-based conservation group can have in affecting NEPA decisions. However, if agency personnel refuse to involve the public or make project implementation decisions that seem contrary to NEPA's purpose, a group can appeal for administrative review.⁵¹ If the appeal is denied, the appellant may be able to bring a civil lawsuit. For example, FONSI's have been overturned by courts because they contained insufficient evidence to support their findings.⁵²

An agency's actions are usually safe from judicial review so long as they have complied with NEPA's procedural requirements; "NEPA merely prohibits uninformed—

⁴⁷ 40 C.F.R. § 1503.1.

⁴⁸ 40 C.F.R. § 1503.1(a)(4).

⁴⁹ *Forest Service Handbook* § 1909.15.11.52.

⁵⁰ 40 C.F.R. § 1503.4.

⁵¹ See 36 C.F.R. § 215.11-.20 (FS provisions); 43 C.F.R. §§ 4.400-.478 (BLM provisions).

⁵² See, e.g., Van de Kamp v. Marsh, 687 F.Supp 495 (N.D. Cal. 1988).

rather than unwise—agency action."⁵³ Additionally, a community-based conservation group generally can not bring a lawsuit unless it can show that the agency action did or will cause them to suffer some recognizable injury that a lawsuit could remedy. However, this alternative is not only risky, it is also very expensive.

Although NEPA is primarily a procedural tool for requiring environmental consideration in making certain federal decisions, it can nonetheless be a powerful tool for community-based conservation. Stakeholder groups can use NEPA to force federal agencies to at least consider the impact of its proposed activities on the local watershed, as well as to provide for notice and some degree of participation.

Major Laws Governing Public Lands Planning and Management

National Forest Management Act (NFMA)

Overview. The National Forest Management Act of 1976⁵⁴ (NFMA) codifies the planning and land-use structure for U.S. Forest Service lands. NFMA states that forest management should be "designed to secure the maximum benefits of multiple use sustained yield management in accordance with land management plans."⁵⁵ Multiple use sustained yield management includes "managing the various renewable surface resources . . . so that they are utilized in the combination that will best meet the needs of the American people; . . . and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land."⁵⁶

Accordingly, the Forest Service is required to formulate "national, regional, and

⁵³ Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

⁵⁴ 16 U.S.C.A. §§ 1600-14 (West 1985 & Supp. 1996).

⁵⁵ 16 U.S.C.A. § 1601(d)(1).

⁵⁶ Multiple-Use Sustained-Yield Act of 1960 § 4, 16 U.S.C.A. § 531 (West 1985).

forest" management plans.⁵⁷ The creation of the Forest Plan, also called "land and resource management plans"⁵⁸ (LRMP's), is the most important planning activity from the standpoint of local communities and public land users. Once a Forest Plan is in place, all future actions must be consistent with the plan.⁵⁹ Therefore, it is crucial that local stakeholders influence the development of the Forest Plan in order to effectively impact later actions.

Application to Community-Based Conservation. NFMA requires the Forest Service to give "the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs."⁶⁰ In developing, reviewing, or revising a Forest Plan, the Forest Service must cooperate with local, state, and other federal agencies, as well as "provide for public participation," including, but not limited to, holding public meetings "or comparable processes."⁶¹ As a result, the Forest Service must not only publish notice of a proposed Forest Plan in the Federal Register but must also "publish notice . . . in a newspaper of general circulation" and notify "any person who has requested notice."⁶² To comply with these rules, the Forest Service prepares public participation plans.⁶³

The interdisciplinary team assigned to prepare a Forest Plan also must identify the issues requiring discussion. The Forest Service accomplishes this through a process similar to NEPA scoping.⁶⁴ This process should include "those [issues] identified

⁵⁷ 36 C.F.R. § 219.4 (1995).

⁵⁸ 16 U.S.C.A. § 1604.

⁵⁹ 16 U.S.C.A. § 1604(i).

⁶⁰ 16 U.S.C.A. § 1612(a).

⁶¹ 16 U.S.C.A. §§ 1604(a), (b), (d).

⁶² 36 C.F.R. §§ 215.5(a)-(b).

⁶³ *Forest Service Manual* § 1609.13.

⁶⁴ 36 C.F.R. § 219.12(b).

throughout the planning process during public participation activities" and suggestions from other agencies and governments.⁶⁵ The opportunities for public involvement at later planning stages generally mirror the comment processes following various NEPA actions.

There has been widespread dissatisfaction with the rather restricted role for community-based conservation efforts in the management of the national forests. Some see the Forest Service as merely going through the motions regarding public participation, and there have been several studies calling for an increased role for public participation.⁶⁶ The problem facing reformers, however, is trying to balance the public role with the private role. There are some who argue that the federal government must maintain the professional autonomy of the Forest Service, and thus maintain the current level and form of public participation. Many others, however, suggest that a new era in "community forestry" is needed to address complex, long-term challenges associated with resource stability and community sustainability. Many community-based conservation groups are contributing to this dialogue. However, until reform actually occurs, groups must continue to work within the rules provided by the traditional NFMA framework.

Federal Land Policy and Management Act (FLPMA)

Overview. The Federal Land Policy and Management Act of 1976⁶⁷ (FLPMA) provides the central structure for Bureau of Land Management activities. FLPMA establishes uniform guidelines for the acquisition, sale, and exchange of federal lands; calls for land use planning; and lays out management principles and procedures. FLPMA's planning directives fit into a tiered planning system: national policies govern all Bureau of Land Management lands, Resource Management Plans (RMP's) provide guidance for

⁶⁵ 36 C.F.R. § 219.12(b).

⁶⁶ For and in-depth discussion of current efforts to reform forest policy, *see Seeing the Forest Service for the Trees: A Survey of Proposals for Changing National Forest Policy*, Natural Resources Law Center, June 2000.

⁶⁷ 43 U.S.C.A. §§ 1701-84 (West 1986 & Supp. 1996).

large Resource Areas, and individual project plans are implemented consistent with the governing RMP.

Like the development of Forest Plans under NFMA, RMP's are the most important tier of the Bureau of Land Management's planning system from the standpoint of local stakeholders. In developing and revising a RMP, the agency must observe nine general criteria.⁶⁸ Most of these criteria are too vague to contribute to specific review of a RMP, but they do help understand the agency's mission in crafting its land use plans. For example, the criteria require the "use and observ[ance of] the principles of multiple use and sustained yield; . . . consider[ation of] present and potential uses of the public lands; . . . [and] weigh[ing] long-term benefits to the public against short-term benefits."⁶⁹ As this section contains FLPMA's only major planning directives, FLPMA allows the Bureau of Land Management great latitude in devising the regulations governing RMP planning. Once a RMP is adopted, the Bureau of Land Management lands must be managed in accordance with the plan.⁷⁰

Application to Community-Based Conservation. Because project plans must correspond with the governing RMP, agency discretion and public opportunities to affect decisions are limited once a RMP has been approved. Thus, to have a say in land management decisions, it is important for local stakeholders to influence the development of the RMP. FLPMA explicitly calls for "public involvement" in the RMP planning process.⁷¹ As a result, the Bureau of Land Management must notify "individuals and groups known to be interested in or affected by a resource management plan," and give appropriate governments and the public the opportunity to "participate in the formulation of plans and programs relating to management of the public lands."⁷²

⁶⁸ See 43 U.S.C.A. § 1712(c).

⁶⁹ 43 U.S.C.A. §§ 1712(c)(1), (5), (7).

⁷⁰ 43 U.S.C.A. § 1712.

⁷¹ 43 U.S.C.A. § 1712(a).

⁷² 43 U.S.C.A. §§ 1610.2(d), 1712(f).

Furthermore, since RMP's are prepared with accompanying EIS's and require NEPA compliance, the public involvement provisions concerning RMP's are very similar to those mandated by the NEPA process discussed above. When preparing a plan, the Bureau of Land Management must publish a formal Notice of Intent (NOI) "in the Federal Register and appropriate media, including newspapers of general circulation in the State."⁷³ There are also opportunities for public involvement, paralleling NEPA's scoping process. These opportunities often take the form of public meetings or workshops in which local persons can ask questions and offer comments to Bureau of Land Management personnel.⁷⁴ Other Bureau of Land Management activities may include requests for written comments, hearings, or simple surveys.⁷⁵ The comment and appeal process also closely follows the NEPA process.

Once a RMP is in place, the Bureau of Land Management will plan and implement various projects in accordance with the governing RMP. The agency's regulations are generally not as concerned with providing for public participation on the project planning level because the public has presumably already had a number of opportunities to comment on the proposed action during the RMP process. In fact, the controlling public involvement regulations barely mention the project planning stage.

Much like the Forest Service, the Bureau of Land Management is also working to revise its planning procedures and implementation regulations. One of the ways they are considering increasing public participation is through the generation of NEPA-like standards. An example of this came when the Bureau of Land Management issued its final rule on "Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration." In the rule, the Bureau noted, "an important element of rangeland improvement involves facilitating effective public participation in the management of public lands. To implement this goal, the term 'affected interests' is removed throughout

⁷³ 43 C.F.R. § 1610.2(c).

⁷⁴ 43 C.F.R. § 1610.4-1.

⁷⁵ See, e.g., 43 C.F.R. § 1610.2(c)(6).

the [old] rule and replaced with the term ‘interested public.’ The rule also removes the authorized officer’s discretion to determine whether an individual meets the standards for ‘affected interest’ status.”⁷⁶ Whether the Bureau of Land Management will continue to open FLPMA to public participation remains an open question.

Key Regulatory Programs for Resources Protection

Endangered Species Act (ESA)

Overview. The Endangered Species Act of 1973⁷⁷ (ESA) seeks to conserve, restore, and protect endangered and threatened species, and their ecosystems.⁷⁸ In general, the U.S. Fish and Wildlife Service (FWS) administers the ESA for terrestrial and non-anadromous fish (e.g., trout), while the U.S. National Marine Fisheries Service (NMFS) administers the ESA for marine species and anadromous fish (e.g., salmon).⁷⁹ The ESA can be a powerful tool for promoting regional (e.g., watershed-based) resources management. Although the ESA is driven by a species-specific focus, it can also provide protection for a species' entire habitat. However, the ESA only applies to species that are determined to be "threatened" or "endangered." As a result, the ESA provides only reactive protection. The ESA is essentially comprised of five main components: (1) the listing of species, (2) the consultation process for federal actions, (3) the prohibition on the unauthorized "taking" of species, (4) the permitting process for "taking" species, and (5) enforcement.

The first essential component in the ESA process is the listing of species. Under

⁷⁶ 60 F.R. 9894, 9897 (1995).

⁷⁷ 16 U.S.C.A. §§ 1531-1543 (West 1985).

⁷⁸ 16 U.S.C.A. § 1531(b).

⁷⁹ See 50 C.F.R. § 402.01(b) (citing which species lists are under the jurisdiction of each Service).

the ESA, "species" is broadly defined to include species, subspecies and "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."⁸⁰ Species are directly protected by the ESA only if they are formally listed as "endangered" or "threatened" under section 4.⁸¹ However, federal agencies must hold a "conference" with the FWS or NMFS (collectively "the Service") in undertaking "any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat."⁸² Furthermore, species that have been proposed for listing (i.e., "candidate species") are often given extra consideration under Clean Water Act (CWA) and NEPA implementations.

The determination of whether a species must be listed is made by the Secretary of the Interior (for the FWS) or the Secretary of Commerce (for the NMFS), "solely on the basis of the best scientific and commercial data available."⁸³ If "the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, . . . the Secretary shall promptly commence a review of the status of the species concerned."⁸⁴ A species must be listed as "endangered" if the Secretary determines that it "is in danger of extinction throughout all or a significant portion of its range."⁸⁵ A species must be listed as "threatened" if the Secretary determines that it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."⁸⁶ In determining whether a species must be listed, the

⁸⁰ 16 U.S.C.A. § 1532(16).

⁸¹ 16 U.S.C.A. § 1533.

⁸² 50 C.F.R. § 402.10(a) (1995).

⁸³ 16 U.S.C.A. § 1533(b)(1)(A).

⁸⁴ 16 U.S.C.A. § 1533(b)(3)(A).

⁸⁵ 16 U.S.C.A. § 1532(6).

⁸⁶ 16 U.S.C.A. § 1532(20).

economic impacts of the listing may not be considered. The ESA also requires, with two exceptions,⁸⁷ that the Secretary designate the critical habitat of the species "concurrently" with the listing of the species.⁸⁸ In practice, however, critical habitat is often not designated.

The second main component of the ESA is the section 7 consultation process for federal actions.⁸⁹ Once a species is listed, every federal agency action that is "authorized, funded, or carried out by such agency" is subject to the section 7 process.⁹⁰ Initially, an "informal" consultation may be held between the Service and the federal agency seeking to undertake an action.⁹¹ The purpose of an informal consultation is to determine whether any listed species are present in the area of the federal action.⁹² If a federal agency action may adversely affect listed species or critical habitat, then the agency must enter into "formal consultation" with the Service.⁹³

Formal consultation generally results in the completion of a "biological opinion."⁹⁴ The biological opinion determines whether the federal agency action "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."⁹⁵ This conclusion is termed a "jeopardy" or "no jeopardy" opinion. If a jeopardy opinion is issued, then the Service will work with the agency to find

⁸⁷ 16 U.S.C.A. § 1533(b)(6)(C)(i)-(ii).

⁸⁸ 16 U.S.C.A. § 1533(a)(3)(A).

⁸⁹ 16 U.S.C.A. § 1536.

⁹⁰ 16 U.S.C.A. § 1536(a)(2).

⁹¹ 50 C.F.R. § 402.13.

⁹² 50 C.F.R. § 402.13.

⁹³ 50 C.F.R. § 402.14.

⁹⁴ 50 C.F.R. § 402.14(g)(4).

⁹⁵ 50 C.F.R. § 402.14(g)(4).

"reasonable and prudent alternatives" to avoid harming the species.⁹⁶ If there is no reasonable and prudent alternative to jeopardizing the continued existence of the species, then the agency action must be abandoned, unless the Endangered Species Committee (nicknamed the "God Squad") issues an exemption.⁹⁷ However, this exemption process has only been invoked on rare occasions.

Additionally, the biological opinion generally includes an "incidental take statement." The statement determines whether the agency's action will result in a section 9 "take" of the listed species (see below) and whether an "incidental take" should be permitted.⁹⁸ If the Service determines that a take will not occur, then the Service can "[f]ormulate discretionary conservation recommendations . . . to assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat."⁹⁹ If the federal agency's action will result in a taking of listed species, then the Service must specify the "reasonable and prudent measures that . . . [are] necessary and appropriate to minimize" the impact of the action on the listed species.¹⁰⁰

The third main component of the ESA is section 9's prohibition from unauthorized "takings" of a member of a listed species.¹⁰¹ The term "take" is defined broadly as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹⁰² Furthermore, the ESA regulations broadly define "harass" and "harm." "Harass" is defined as any "act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal

⁹⁶ 16 U.S.C.A. § 1536(b)(3)(A).

⁹⁷ 16 U.S.C.A. §§ 1536(g)-(h).

⁹⁸ 50 C.F.R. § 402.14(i).

⁹⁹ 50 C.F.R. § 402.14(g)(6).

¹⁰⁰ 50 C.F.R. § 402.14(i)(1).

¹⁰¹ 16 U.S.C.A. § 1538.

¹⁰² 16 U.S.C.A. § 1532(19).

behavioral patterns."¹⁰³ "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns."¹⁰⁴ Section 9's general prohibition on "taking" listed species applies to all individuals, on both private and public land.¹⁰⁵

The fourth main component of the ESA is the permitting process for authorizing the taking of species. It is unlawful to take a listed species without a "permit."¹⁰⁶ An individual may obtain a permit to take a listed species if the taking is for "scientific purposes or to enhance the propagation or survival of the affected species."¹⁰⁷ A take may also be permitted if it "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."¹⁰⁸ Under section 7, a federal agency may be permitted to incidentally take a listed species if the taking will not jeopardize the continued existence of the species.¹⁰⁹ Under section 10, a private landowner may be permitted to incidentally take a listed species if the Service approves a habitat conservation plan (HCP) specifying the conservation measures that the owner will undertake to mitigate the affects of such takings.¹¹⁰

The fifth main component of the ESA is its enforcement. The Service is responsible for enforcing the ESA. The mandates of the ESA can be strictly enforced with

¹⁰³ 50 C.F.R. § 17.3.

¹⁰⁴ 50 C.F.R. § 17.3. See also, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407 (1995) (upholding the regulatory definition of "harm").

¹⁰⁵ 16 U.S.C.A. § 1538(a)(1)(B).

¹⁰⁶ 16 U.S.C.A. § 1538(a)(1)(B).

¹⁰⁷ 16 U.S.C.A. § 1539(a)(1)(A).

¹⁰⁸ 16 U.S.C.A. § 1539(a)(1)(B).

¹⁰⁹ 16 U.S.C.A. § 1536(b)(4).

¹¹⁰ 16 U.S.C.A. § 1539(a)(2)(A).

significant monetary and criminal penalties.¹¹¹ Additionally, any citizen can seek to enjoin any other individual or agency from violating the ESA.¹¹²

Application to Community-Based Conservation. For efforts in community-based conservation, the ESA can be both a tool and an obstacle. Indeed, the ESA is often a major factor in the formation of community-based conservation groups and the selection of objectives. As a tool, the ESA can be very effective in providing conservation mandates to government and private interests alike. As an obstacle, the ESA may limit a community group's ability to adequately address its diverse objectives.

The ESA provides comparatively few opportunities for public participation and collaboration. The scientific foundation of the ESA was specifically intended to be exempt from any other pressures, including political and economic. Although any person may petition the Secretary to list a species, and much of the listing process is open in the sense that information is available to the public, listing is not an inclusive process.¹¹³ However, any interested citizen may seek judicial review of the denial of a petition to list a species.¹¹⁴ On the whole, however, there are very few opportunities for local stakeholders to effect the listing process.

The development and implementation of ESA regulations is somewhat more inclusive. For example, the Secretary must, if requested, hold a public hearing concerning any proposed regulation to "list, delist, or reclassify a species."¹¹⁵ "[I]n developing and implementing recovery plans," under section 4, the Secretary "may procure the services of appropriate public and private agencies and institutions, and other qualified persons."¹¹⁶

¹¹¹ 16 U.S.C.A. § 1540.

¹¹² 16 U.S.C.A. § 1540.

¹¹³ 16 U.S.C.A. § 1533(b).

¹¹⁴ 16 U.S.C.A. § 1533.

¹¹⁵ 50 C.F.R. § 424.16(c)(vi)(3).

¹¹⁶ 16 U.S.C.A. § 1533(f)(1)(2).

Recovery teams that are appointed under this provision are explicitly exempted from the mandates of FACA.¹¹⁷ This FACA exemption allows community-based conservation groups to play an important and effective role in the substantive implementation of the ESA. With this exception, however, FACA will otherwise apply. Furthermore, the Secretary is required to "provide public notice and an opportunity for public review and comment" before a final recovery plan is approved.¹¹⁸ The information submitted during this comment period must be considered by the federal agency prior to implementing the plan.¹¹⁹

Because a federal agency "action" may invoke both NEPA and the ESA, there is some uncertainty as to which ESA "actions" are also subject to NEPA's procedural requirements. Although the courts and the agencies have clarified some of these uncertainties, others remain. As NEPA requires opportunities for public participation, its potential applicability can be very important for stakeholders that are interested in participating in the ESA process.

NEPA does not apply to the ESA listing process because the Secretary cannot consider any political or economic factors when determining whether to list a species. Additionally, the federal agencies do not follow NEPA in developing or implementing recovery plans because they do not consider such plans a federal "action." However, the 1988 Amendments to the ESA now provide for public comment and review of such plans.

On the other hand, as of this publication, the courts are presently split as to whether NEPA applies to critical habitat designations.¹²⁰ Development of habitat conservation plans (HCP's) are subject to the NEPA processes, but the Service has

¹¹⁷ 16 U.S.C.A. § 1533(f)(2).

¹¹⁸ 16 U.S.C.A. § 1533(f)(4).

¹¹⁹ 16 U.S.C.A. § 1533(f)(5).

¹²⁰ Compare Catron County Bd. of Comm'rs v. United States Fish and Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) (holding that NEPA does apply to ESA critical habitat designations) and Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995) (holding that NEPA does not apply to ESA critical habitat designations).

granted a categorical NEPA exclusion to low-effect HCP's. Recently, however, the Service decided to expand public participation in the HCP process. This is to "provide greater opportunity for the public to assess, review, and analyze HCPs and associated documents (e.g., National Environmental Policy Act (NEPA) documents)."¹²¹ To provide this opportunity, the Service proposes to expand the current 30 day public comment period to 60 days. The Service will keep the 30 day period for the low-effect, NEPA-exempt HCPs.¹²²

Further, the Service noted that, "during the public comment period, any member of the public may review and comment on the HCP and the accompanying NEPA document, if applicable. If an EIS is required, the public can also participate during the scoping process. When practicable, the Services will seek to announce the availability of HCPs in electronic format and in local newspapers of general circulation. The Services will encourage potential applicants to allow for public participation during the development of an HCP, particularly if non-Federal public agencies (e.g., State Fish and Wildlife agencies) are involved."¹²³

Overall, the ESA is one of the most powerful conservation tools. Although the ESA's procedural processes are relatively closed, local stakeholders can play an important role in the substantive implementation of the ESA. Many of the most successful species recoveries under the ESA have included strong public participation and support. Community-based conservation groups can also potentially play an important advocacy function, as restructuring and/or reauthorization of the ESA is a seemingly chronic issue.

¹²¹ 64 F.R. 11485, 11490 (1999).

¹²² Id.

¹²³ Id.

Clean Water Act (CWA)

Overview. The Federal Water Pollution Control Act,¹²⁴ now called the Clean Water Act (CWA),¹²⁵ was passed in 1972. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹²⁶ The CWA has been amended several times, but most of the original aspects of the 1972 law remain intact.

The CWA includes a system of "goals" to improve water quality across the country. The goals of the CWA include decreasing water pollution in order to obtain minimum water qualities by a certain date. Section 303 of the CWA requires the states to set water quality standards and to develop programs to insure compliance with such standards.¹²⁷ Although the states are primarily responsible for implementing and enforcing the provisions of the CWA, the federal government also retains enforcement power.

To obtain these goals, the National Pollutant Discharge Elimination System (NPDES) was created, which requires that any "point source" polluter of any of the nation's surface waters obtain an NPDES permit from an Environmental Protection Agency (EPA) approved state program (or, in some cases, the EPA itself).¹²⁸ Even if such a program is approved, however, the EPA retains both a permit veto power and the power to sue permittees for violations. In some cases, water users may also have to obtain a separate federal permit.¹²⁹ If such a permit is required, the applicant must first obtain a state certification that the discharge will comply with the state's CWA plans and standards.

The CWA defines a "point source" as "any discernible, confined and discrete

¹²⁴ 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1996).

¹²⁵ See Pub. L. No. 95-217, sec. 2, § 518, 91 Stat. 1566, 1566 (1977).

¹²⁶ 33 U.S.C.A. § 1251(a).

¹²⁷ 33 U.S.C.A. § 1313.

¹²⁸ 33 U.S.C.A. § 1342.

¹²⁹ 33 U.S.C.A. § 1341.

conveyance, including but not limited to any pipe, ditch, [etc.] . . . from which pollutants are or may be discharged."¹³⁰ It is unlawful to discharge any point source pollutant into surface waters¹³¹ without a permit. Section 208 of the CWA requires states to develop and implement "areawide waste treatment management plans" for areas with "substantial water quality control problems."¹³² Once an areawide plan is approved, "no permit under [the NPDES system] shall be issued for any point source that is in conflict with [the] plan."¹³³

In order to receive a permit the discharger must meet both federal effluent standards and stricter state water quality standards. Additionally, dischargers must implement control technology to mitigate the adverse environmental effects of such discharges. An issued permit contains all of the conditions with which the discharger must comply, such as discharge limits, regular report filing, and allowing for inspections. The NPDES also prohibits "backsliding"; once a permit has been issued, no subsequent permit may be less stringent.¹³⁴

Although "nonpoint source" polluters are exempt from the NPDES program, the CWA does provide for regulation of nonpoint source pollution.¹³⁵ "[N]onpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."¹³⁶ Nonpoint source pollution must be regulated where attainment of

¹³⁰ 33 U.S.C.A. § 1362(14).

¹³¹ Groundwater is largely covered by the Safe Drinking Water Act, 42 U.S.C.A. §§ 300(f)-300(j) (West 1991 & Supp. 1996).

¹³² 33 U.S.C.A. § 1299(a).

¹³³ 33 U.S.C.A. § 1288(e).

¹³⁴ 33 U.S.C.A. § 1342(o).

¹³⁵ See, 33 U.S.C.A. § 1329(1)(A).

¹³⁶ Office of Water, U.S. Environmental Protection Agency, Nonpoint Source Guidance 3 (1987).

applicable water quality standards for a body of water "cannot reasonably be expected" without such regulation.¹³⁷ The state must identify all such bodies of water and establish a management program with the objective of bringing the pollution levels into compliance with the CWA.¹³⁸ All nonpoint source management programs, many of which are funded by the federal government, must be approved by the EPA.¹³⁹

Application to Community-Based Conservation. The CWA provides for public participation on a number of different levels. Most basically and effectively, the public can intervene during the permitting process to make their concerns regarding a particular watercourse or watershed heard.¹⁴⁰ Furthermore, any person who is interested in seeing permitting and monitoring records can do so under the Freedom of Information Act. If the public does not like what it sees, one does have the right to file an administrative appeal with the permitting agency. If such an appeal is denied, then citizens can sue to enforce the limitations provided for in a permit. People may also sue to enforce nondiscretionary EPA regulatory duties and orders.¹⁴¹

People can also bring perceived water quality violations to the attention of the regulatory agencies, in the hopes of addressing or revising the overall standards. The EPA is required to hold regular public meetings every three years on the adequacy of the water quality standards for a particular watercourse.

Generally speaking, it is the duty of the public to be involved at every possible stage of the NPDES permitting process. From setting TMDLs¹⁴² to federal regulation of

¹³⁷ 33 U.S.C.A. § 1329(a)(1)(A).

¹³⁸ 33 U.S.C.A. § 1329(a)(1)(A).

¹³⁹ See 33 U.S.C.A. § 1329(d).

¹⁴⁰ For a very good introduction to the Clean Water Act, with an emphasis on the public's role, see *The Clean Water Act: An Owners Manual*, River Network, March 1999.

¹⁴¹ 33 U.S.C.A. § 1365.

¹⁴² Essentially, a TMDL (Total Maximum Daily Load) is a calculation of a stream's ability to assimilate pollutants—a limit defined mostly by biophysical factors. TMDLs are

dredge-and-fill activities regarding wetlands (Section 404), the agencies involved, be they state or federal, must provide an opportunity for public notice and comment. Local watershed management groups should seize these opportunities to affect the outcomes of these agency processes. This requires paying a fair amount of attention to both the quality and status of a particular watershed, but staying informed can increase the chances of getting involved during the crucial permitting stages.

Other Potentially Relevant Federal Laws

In addition to those laws already discussed, many other federal statutes and programs are potentially influential in specific community-based conservation efforts. A few of the most obvious candidates are described below.

Wild and Scenic Rivers Act (WSRA)

Enacted in 1968, the Wild and Scenic Rivers Act¹⁴³ (WSRA) was intended to protect "for the benefit and enjoyment of present and future generations" those rivers of the Nation that possess "outstandingly remarkable" values (e.g., scenic, recreational, geologic, fish and wildlife, historic, cultural, etc.).¹⁴⁴ Any river section designated under WSRA is subject to limitations on further development that would have an adverse effect on "the values which caused it to be included in" in the system of Wild and Scenic rivers.¹⁴⁵ Designated stream segments are managed by one of four federal agencies: the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife

required in non-attainment areas where the NPDES system has been insufficient to meet water quality goals. Once a TMDL standard is established, then this "allowable" level of pollution must be allocated among all polluters.

¹⁴³ 16 U.S.C.A. §§ 1271-1287 (West 1985).

¹⁴⁴ 16 U.S.C.A. § 1271.

¹⁴⁵ 16 U.S.C.A. § 1281(a).

Service, and the U.S. Forest Service.

River sections may be added to the system in two ways: (1) by an act of Congress, or (2) by approval of an application from the governor of a state that has already protected the river section.¹⁴⁶ Eligibility of a section depends on a number of factors. The river must possess at least one "outstandingly remarkable" value (as determined by the judgment of the study team).¹⁴⁷ Although the river section must be "free-flowing" (or restorable to free-flowing), there are no specific requirements concerning length or flow level of the segment.¹⁴⁸ An eligible river section must be classified in one of the following three categories:

- **Wild river area** - free of impoundments; is generally inaccessible except by trail; shows little evidence of human activity; has high water quality.
- **Scenic river area** - free of impoundments; is accessible in places by roads; shows no substantial evidence of human activity (could include timber harvesting if no substantial adverse effect of natural appearance of river).
- **Recreational river area** - may have undergone some impoundment or diversion in the past; readily accessible; some development along shorelines.¹⁴⁹

The provisions for the management of a designated river section are vague, but revolve around the central principle of protecting the values for which the section was designated.¹⁵⁰ Thus, to be able to later impact management decisions, local stakeholders

¹⁴⁶ 16 U.S.C.A. § 1273(a).

¹⁴⁷ See 16 U.S.C.A. § 1273(b).

¹⁴⁸ 16 U.S.C.A. § 1273(b).

¹⁴⁹ 16 U.S.C.A. § 1273(b).

¹⁵⁰ 16 U.S.C.A. § 1278(a).

must first influence the study process and its determination of which values are "remarkable."

WSRA mandates that a management plan be created specifically for designated sections.¹⁵¹ The decisions regarding the management plan will be made by the land management agency with jurisdiction over the designated section. The plan will almost always be formulated using a NEPA-type process, with the attendant minimum standards for public involvement. As a result, the public may have an opportunity to participate in decisions such as:

- ◆ setting the boundaries of the protected section;
- ◆ developing a plan to protect the "remarkable values";
- ◆ providing for public use of the proposed river section;
- ◆ deciding where to put any needed public facilities, such as restrooms or docks; and,
- ◆ deciding which activities will be permitted within the boundaries, such as grazing.

The land area protected under WSRA is not very large: no more than 320 acres per mile of river can be designated. This is intended (and generally works out) to protect about 1/4 mile on both sides of the river. Therefore, although WSRA may be extremely effective in preserving the values of the river itself, it is not a very useful tool for watershed-wide protection.

¹⁵¹ 16 U.S.C.A. § 1281(a).

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹⁵² (CERCLA) directs the cleaning up of leakage from hazardous wastes that, when released into the environment, may pose a substantial danger to the public health or welfare, or to the environment. Under CERCLA, owners or operators of hazardous substance facilities, people who arrange for the transportation or disposal of hazardous substances, or the actual transporters of hazardous substances, may be liable for all response costs, including cleanup and natural resource damages.¹⁵³ CERCLA is also interesting because it applies retroactively, and without regard for the legality of the original action. For example, if a company in the 1950s used a cleaning solvent legally, and then disposed of it by dumping it onto the ground, also legally, if that pollution is discovered now, the company is still liable for cleanup costs.

The CERCLA definition of "hazardous substance" is quite broad.¹⁵⁴ Moreover, a community-based conservation group that is involved with any "hazardous substance" may be deemed an "operator."¹⁵⁵ Therefore, these groups must be careful to avoid incurring liability for any activities related to "hazardous" substances. This issue is particularly salient in regions populated by abandoned hardrock mines.

CERCLA also established the infamous "Superfund," which is designed to help states and private parties mitigate cleanup costs in areas that are either orphaned (no solvent potentially responsible parties still exist) or pose such an emergency that they must be cleaned up immediately.

The public does have a few opportunities to affect CERCLA decisions. Before any remedial cleanup plan is undertaken, including listing on the national Superfund list,

¹⁵² 42 U.S.C.A. §§ 9601-9675 (West 1995 and Supp. 1996).

¹⁵³ 42 U.S.C.A. § 9607.

¹⁵⁴ See 42 U.S.C.A. § 9601(14) (defining "hazardous substance").

¹⁵⁵ See 42 U.S.C.A. § 9601(20)(A) (defining "operator").

the government must provide notice and an opportunity for public comment at every stage.¹⁵⁶ This includes both the proposed and final plans, and before any final judgments are entered into. Additionally, the public has the right to sue individuals in violation of the standards or requirements of CERCLA, or the government for failing to undertake a nondiscretionary duty.¹⁵⁷

Laws Pertaining to Agricultural Management

A variety of federal agricultural laws and programs can influence efforts in community-based conservation. At the core of these diverse programs is the Soil Conservation Act of 1935 (SCA).¹⁵⁸ The SCA established the Soil Conservation Service (SCS), whose mandate was to “provide permanently for the control and prevention of soil erosion, and thereby to preserve natural resources....”¹⁵⁹ At the time of enactment, soil erosion from improper farming was linked to water quality problems, loss of productivity of the land, and flood problems. The SCS was charged with conducting surveys, investigations, demonstration projects and other research, and was told to publish all of their findings. The SCS was also given the responsibility of carrying out preventative measures designed to improve stewardship of the land, which included direct aid to and cooperation with local governments and individuals in order to produce more efficient, productive farms.¹⁶⁰

With the cooperation of private landowners, the SCS—since renamed the Natural Resources Conservation Service (NRCS)—has proceeded to establish technical and financial assistance programs to reduce the amount of soil loss caused by farming. If such

¹⁵⁶ 42 U.S.C.A. § 9617.

¹⁵⁷ 42 U.S.C.A § 9659.

¹⁵⁸ 16 U.S.C.A § 590.

¹⁵⁹ 16 U.S.C.A § 590(a).

¹⁶⁰ Id.

efforts are not successful, then the effects of poor land management may be actionable under one or more of the statutes discussed above. For example, excess agricultural runoff can be taken into account when setting TMDLs for a particular river under the Clean Water Act. Of course, the preferred management approach is to use best management practices that prevent such violations. It appears that public support for conservation-oriented farming is rapidly growing, as community-based conservation efforts increasingly seek to incorporate good farm stewardship into their overall conservation plans. In this way, they avoid isolating large private landholders who can have a drastic effect on the land. As the NRCS notes, “a search for consensus then becomes the foundation for effective land stewardship in communities and watersheds across the country.”¹⁶¹

¹⁶¹ *America's Private Land: A Geography of Hope*, United States Department of Agriculture, Natural Resources Conservation Service, December, 1996.

Colorado Laws

A variety of state laws, county and city regulations, ordinances, resolutions and procedures can also affect community-based conservation efforts. Given the diversity seen from state to state, and even within states, it is not possible to provide a comprehensive discussion of all potentially relevant laws and programs. Rather, this discussion focuses primarily on those state laws that are of particular relevance to community-based conservation in Colorado. To some extent, the Colorado situation is similar to that seen in other western states. For example, all western states have some form of the prior appropriation doctrine, and instream flow programs have become relatively common throughout the West in recent decades. Each state, however, has its own nuances that should be considered by groups operating outside Colorado. As shown below, it is state water law that is typically most salient.

Water Resources Law and Management

Prior Appropriation: An Overview

State water law provides an important part of the legislative framework within which community-based conservation efforts must operate. In some cases, water law is sufficiently flexible to accommodate innovative water management strategies championed by community-based initiatives. However, in other situations, water law can provide a difficult obstacle to such efforts, largely since the doctrine of prior appropriation is designed mainly to define and protect the private rights of water rightsholders rather than to address collective public interests. In these cases, collaboration with water rightsholders is essential. Even with collaboration, however, some obstacles posed by Colorado water law may prove too great to overcome.

Colorado water law is based on the doctrine of prior appropriation, within which a "water right" can be defined as "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same."¹⁶² The doctrine rests on the idea of "first in time, first in right." In other words, one can obtain a water right only by diverting water and applying it to a beneficial use, typically defined in terms of consumptive uses such as irrigation, municipal or industrial uses (with the sole exception of the acquisition of an instream flow right by the Colorado Water Conservation Board, as discussed later). In order to use the water, however, the holder of a water right must also have "priority."¹⁶³ Holders of water rights that are more "senior" are entitled to divert the full amount of their rights, even if the result is that there is insufficient water left in the river to satisfy the holders of more "junior" water rights. Conversely, a more junior holder may not divert water if the diversion will leave insufficient water in the river for a senior holder downstream to appropriate his entire right. Priority is generally determined by the date of appropriation, but all rights must be adjudicated by one of Colorado's water district courts.

In general, one cannot "change" an existing water right if such action might harm other existing water rights. A "change" in a water right includes, for example, changing the point of diversion or the time of use.¹⁶⁴ In most developed areas of Colorado every drop in every body of water is already subject to existing water rights. The result is that even minor changes in a water right have the potential to materially harm other water rights.

These basic tenets of prior appropriation are fairly standard—i.e., the Colorado situation is not markedly different than what is found in other western states. Where Colorado is more unique is in the administration of prior appropriation. For administrative

¹⁶² Colo. Rev. Stat. § 37-92-103(12) (1990).

¹⁶³ § 37-92-103(10) (defining "priority").

¹⁶⁴ See § 37-92-103(5).

purposes, Colorado is divided into seven water divisions,¹⁶⁵ each roughly encompassing one of Colorado's major watersheds and each governed by its own water court.¹⁶⁶ If a water right is changed in any way that might affect water quantity, including the implementation or modification of water treatment measures, the change must be approved by a water court.¹⁶⁷ As a result, modifying water uses to mitigate impacts on water quality or quantity can be complicated and expensive. Consequently, watershed-based resources management often implicates, and is limited by, Colorado water law.

Colorado Instream Flow Program

In recent decades, virtually all the prior appropriation states have taken steps to modify the scope of the appropriation doctrine to allow for the preservation of water “instream” to serve environmental and related public values. These programs vary considerably from state to state, but often employ strategies such as: sweeping prohibitions on new diversions; requiring environmental and other public interests to be considered as part of the review of new withdrawal permits; and/or the formal recognition of instream flow rights, acquired either through appropriation, state reservation, and/or through market-based transfers.¹⁶⁸

In Colorado, the Water Right Determination and Administration Act of 1969¹⁶⁹ (the Act) recognizes "the need to correlate the activities of mankind with some reasonable preservation of the natural environment."¹⁷⁰ To achieve this, the Act gives the exclusive

¹⁶⁵ § 37-92-201.

¹⁶⁶ § 37-93-203.

¹⁶⁷ § 37-92-302(a).

¹⁶⁸ L. MacDonnell et al., *Instream Flow Protection in the West* (1989), Natural Resources Law Center, University of Colorado School of Law.

¹⁶⁹ Colo. Rev. Stat. §§ 37-92-101 to -602 (1990).

¹⁷⁰ § 37-92-102(3).

authority to acquire instream flow water rights to the Colorado Water Conservation Board (the Board).¹⁷¹ An instream flow right is a property right used to satisfy minimum instream flows for river conservation by not diverting the water associated with the right.

To acquire an instream flow right, the Board must determine that (1) "the natural environment will be preserved to a reasonable degree" by the water right, (2) "there is a natural environment that can be preserved to a reasonable degree" by the water right, and (3) "such an environment can exist without material injury to" private water rights.¹⁷² To determine this, the Board must seek recommendations from the Division of Wildlife, the Division of Parks and Outdoor Recreation, the Division of Water Resources, the Bureau of Land Management, and the U.S. Forest Service.¹⁷³

The Board can acquire an instream flow right through purchase or gift, but cannot condemn another water right.¹⁷⁴ Instream flow rights are subject to the same "priority" determination under state water law as any privately held water right. Furthermore, the Board can not acquire a water right if the Board's combined water rights will exceed that necessary "to preserve the natural environment to a reasonable degree" in any given stretch of river.¹⁷⁵

The procedures to be followed by the Board in obtaining instream flow rights are set forth in the Colorado Instream Flow and Natural Lake Level Program (Instream Flow Regulations).¹⁷⁶ Prior to acquiring instream flow rights, the Board must follow a public review process.¹⁷⁷ The public review process requires that the Board provide official

¹⁷¹ § 37-92-102(3).

¹⁷² § 37-92-102(3)(c).

¹⁷³ See § 37-92-102(3).

¹⁷⁴ See § 37-92-102(3).

¹⁷⁵ See § 37-92-102(3).

¹⁷⁶ 2 Colo. Code Regs. § 408-2 (1994).

¹⁷⁷ § 408-2-6.10.

notice of all instream flow actions (provided in the notice and agenda of all Board meetings), as well as mail notice to "any person requesting notification."¹⁷⁸ Furthermore, the Board must accept public comment either directly or through its staff.¹⁷⁹

Water Quality Management

Section 208 of the federal Clean Water Act requires the states to develop and implement management plans for watersheds with water quality problems.¹⁸⁰ The Colorado Water Quality Control Act provides for the development of these regional watershed plans by "designated planning agencies."¹⁸¹ Prior to submitting a proposed management plan or amendment to the Division of Administration of the Department of Health for approval, the designated planning agency must hold a public hearing concerning the proposed plan or amendment.¹⁸² The agency must also provide notice to the public through publication in a newspaper of general circulation in the area of the proposed plan and to any person requesting such notice.¹⁸³

Following the hearing, the Colorado Water Quality Control Commission (the Commission), must approve or reject the plan.¹⁸⁴ Although the Commission need not comply with its formal rulemaking procedures when deciding whether to approve or reject a regional management plan, the Commission does hold informational hearings at which it accepts comments. Only those provisions of the plan that are adopted as regulations are

¹⁷⁸ § 408-2-12.01(a).

¹⁷⁹ § 408-2-12.02.

¹⁸⁰ 33 U.S.C.A. § 1288(a)(2).

¹⁸¹ Colo. Rev. Stat. § 25-8-105(1)(a) (1989).

¹⁸² § 25-8-105(1)(b).

¹⁸³ § 25-8-105(1)(d).

¹⁸⁴ § 25-8-105(3).

binding for the purposes of federal law.¹⁸⁵

Another important function of the Commission is "classifying" State waters. The classification of a water segment impacts the resulting water quality standards, which in turn drive much of the river's management. "Classification should be for the highest water quality attainable," but must be based upon the "present beneficial uses of the water, or the beneficial uses that may be reasonably expected in the future."¹⁸⁶ The classifications include: recreation, agriculture, aquatic life, domestic water supply, and wetlands.¹⁸⁷ The Commission may also designate waters that meet certain criteria as "outstanding waters."¹⁸⁸ Such a designation requires that the waters be "maintained and protected at their existing quality."¹⁸⁹

Any interested person has the "right to petition the Commission to assign or change a stream classification."¹⁹⁰ Such petitions are "open to public inspection."¹⁹¹ Furthermore, in considering a proposed assignment or change of classification, the Commission's evidence must be presented at a public hearing.¹⁹²

The Commission also implements the water quality provisions of section 303¹⁹³ of the federal Clean Water Act.¹⁹⁴ The Commission sets water quality standards based upon

¹⁸⁵ § 25-8-105(3)(a).

¹⁸⁶ 5 Colo. Code Regs. § 1002-8-3.1.6(1)(e) (1995).

¹⁸⁷ § 1002-8-3.1.13.

¹⁸⁸ § 1002-8-3.1.8.

¹⁸⁹ § 1002-8-3.1.8.

¹⁹⁰ § 1002-8-3.1.6(3).

¹⁹¹ § 1002-8-3.1.6(3).

¹⁹² § 1002-8-3.1.6(3).

¹⁹³ 33 U.S.C.A. § 1313 (West 1986 & Supp. 1996).

¹⁹⁴ Colo. Rev. Stat. § 25-8-204.

a numeric (or narrative) level of organic pollutants that provides a "suitable limit for protecting the classified use" of a certain stretch of river."¹⁹⁵ One of the means of enforcing the water quality standards adopted by the Commission is the section 401 certification program.¹⁹⁶

Although the Commission is responsible for adopting the regulations governing section 401 certification,¹⁹⁷ the Colorado Water Control Division ("Division") implements the certification processes. The section 401 certification program is one of the means by which the state can enforce the water quality standards mandated by section 303. In deciding whether to certify a water project or diversion that might affect water quality, the Division may impose water quality requirements as a condition on the certification. However, the Colorado Water Quality Control Act prohibits the Division from imposing minimum stream flow requirements or otherwise interfering with the water rights of the water user.¹⁹⁸ But although the State may not have the power to impose flow limits on diversions or water projects in order to protect water quality, the EPA can still recommend that the permitting agency suspend the necessary permit or license.

H.B. 1041: Local Protection of Water and Other Resources

One of the more unique programs in Colorado is known as H.B. 1041,¹⁹⁹ which provides a mechanism for localities to prevent the development and/or export of valuable natural resources, including water resources. The statute provides that "a local

¹⁹⁵ 5 Colo. Code. Regs. § 1.002-8-3.1.7.

¹⁹⁶ See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 114 S.Ct. 1900 (1994).

¹⁹⁷ 33 U.S.C.A. § 1341.

¹⁹⁸ Colo. Rev. Stat. § 25-8-104.

¹⁹⁹ Colo. Rev. Stat. § 24-65.1-101 to -502 (1988 & Supp. 1995).

government may designate matters of state interest within its jurisdiction" in order to protect its natural resources from development and insure the "[e]fficient utilization of municipal and industrial water projects."²⁰⁰ The designation of areas and activities of state interest are subject to public participation requirements. For example, the local government must "hold a public hearing before designating an area or activity of state interest and adopting guidelines for administration thereof."²⁰¹ Notice of the public hearing must be published "in a newspaper of general circulation in the county" and "[a]ny person may request . . . to receive notice of all hearings."²⁰²

In order to develop in an area of state interest or engage in an activity of state interest a person must obtain a permit from the local government.²⁰³ If the permit does not comply with the local government's guidelines and regulations for that area or activity, then the permit must be denied.²⁰⁴

Numerous cities on Colorado's Front Range have attacked H.B. 1041 in court in an attempt to free up water resources that are protected by Western Slope municipalities. For example, the city of Denver sued Grand County, challenging the withholding of H.B. 1041 permits and the constitutionality of the act in general. The court rejected the challenges, and noted that H.B. 1041 was a proper delegation of power to local governments. The city of Denver sued Eagle County, again challenging the withholding of permits. Denver was in the process of extending its municipal water collection, and had acquired water rights in Eagle County. When Denver attempted to get permits to draw the water out of the basin, Eagle County denied the permits. Despite the property rights at stake, the Colorado Supreme Court upheld Eagle County's permit denials, and again

²⁰⁰ § 24-65.1-202, 203.

²⁰¹ § 24-65.1-404(1).

²⁰² § 24-65.1-404(1).

²⁰³ § 24-65.1-501(1)(a).

²⁰⁴ § 24-65.1-501(3).

upheld the constitutionality of the act.

Thus, H.B. 1041 has become a powerful tool for those forward-thinking localities wishing to maintain local control of water resources. As such, it can be a powerful tool for community-based conservation in a subject area—water allocation—where prior appropriation provides relatively few protections for community or environmental interests.

Application of Conservation Laws in Northwestern Colorado

The laws that prove most influential in conservation efforts vary from case to case. The way in which those laws are applied is also subject to some variability. To illustrate, consider extreme northwestern Colorado, a sparsely populated agricultural region drained mostly by the Yampa and White Rivers, tributaries to the Green River and part of the massive Colorado River system. These rivers run parallel in a westerly direction toward Utah, draining parts of Moffat, Garfield, Routt, and Rio Blanco Counties. The Yampa is the larger of the two systems, both in terms of drainage area and average annual discharge. The Yampa-White subregion (of the Upper Colorado Region) contains about 8 percent of Colorado's land area.

Like many parts of the West, this region includes a wealth of federal public lands, including Dinosaur National Monument, managed by the National Park Service; Routt and White River National Forests, which are managed by the Forest Service; and rangelands under the control of the Bureau of Land Management. The management of these lands, and their related water resources, frequently invokes several of the laws summarized above. A few recent examples are provided below to illustrate some of these laws in practice.

One important process began in June of 1990, when the Bureau of Land Management announced through press releases and in the Federal Register (June 21) their intent to prepare a Resource Management Plan (RMP) for the White River Resource Area.²⁰⁵ As mentioned earlier, the preparation of a RMP also requires NEPA compliance, including the preparation of an EIS. To ensure adequate public involvement in the scoping process, a newsletter was mailed to 1,235 individuals, organizations, special interest groups, business interests, academic institutions, agencies, and the media, inviting participation of all interested parties. This led to public meetings in Meeker, Rangely, and Grand Junction, the three largest cities in the planning area. A stakeholder working group

²⁰⁵ 55 Fed. Reg. 25,381 (1990).

was also established to provide continuous input to Bureau of Land Management planners. This process indicated a strong local interest in off-highway vehicle access and limits on oil and gas development, themes that became central elements in the draft EIS completed in October of 1994.²⁰⁶

Later in the decade, attention shifted to the Forest Service, as it embarked on a revision of the original forest plan for the White River National Forest adopted in 1984. The White River National Forest is one of the most popular National Forests nationally among recreationists, with over 9 million visitor days in 1997.²⁰⁷ In addition to eleven ski areas, the region features hundreds of trails (many unauthorized) used both by hikers and motorized recreationists. In early August 1999, the Forest Service released the Proposed Revised Forest Plan and Draft Environmental Impact Statement (DEIS) for public comment, and initiated a series of 10 open houses in local towns. In the proposed plan and DEIS, the agency has generated a firestorm by recommending a management option (Alternative D) that primarily emphasizes biological and watershed protection, in some cases at the expense of development and recreational access—particularly for motorized recreation. Due to extreme public interest, the initial deadline for comments of November 5, 1999 was soon extended to February 9, 2000, then again to May 9, 2000, at which time a “comment analysis” is scheduled.²⁰⁸ As many as 5,000 signed comments are expected as the process moves forward, generating a host of national attention due to the potential precedent-setting nature of the plan.

In addition to these land planning efforts, the region also has an interesting history with implementation of the Endangered Species Act (ESA). The Upper Colorado River

²⁰⁶ See 59 Fed. Reg. 55,129 (1994).

²⁰⁷ See Homepage of the White River National Forest:
<http://www.fs.fed.us/r2/whiteriver/>.

²⁰⁸ See Press Releases of the White River National Forest:
<http://www.fs.fed.us/r2/whiteriver/planning.html>.

system is home to four endangered fish species: the Colorado River pike minnow²⁰⁹ (formerly the squawfish), the humpback chub, the bonytail chub²¹⁰, and the razorback sucker.²¹¹ Critical habitat for these species includes the Yampa River (from Craig, Colorado to the river's confluence with the Green) and the White River (from Rio Blanco Dam to the Green River). In an effort to recover these species while minimizing economic impacts and human disturbances, a diverse coalition came together in 1988 to form the Upper Colorado River Endangered Fish Recovery Program.²¹² Members in the group include the U.S. Fish and Wildlife Service, U.S. Bureau of Reclamation, Western Area Power Administration, State of Colorado, State of Utah, State of Wyoming, The Nature Conservancy, Environmental Defense Fund, Colorado Water Congress, Utah Water Users Association, Wyoming Water Development Association, and the Colorado River Energy Distributors Association.

Operating through consensus, this group helped to establish the Recovery Implementation Program (RIP) for the Upper Colorado River, which is an attempt to pursue species recovery while allowing for some new uses (i.e., diversions) from the river.²¹³ Through negotiations between many of the stakeholders, a Recovery Action Plan (RIPRAP) was also developed.²¹⁴ The objective of the RIPRAP is to "achieve naturally self-sustaining populations [of the four species] and to protect the habitat on which they

²⁰⁹ 32 Fed. Reg. 4,001 (1967).

²¹⁰ 45 Fed. Reg. 27,713 (1980).

²¹¹ 56 Fed. Reg. 54,967 (1991).

²¹² See, Homepage of the Upper Colorado River Endangered Fish Recovery Program: <http://www.r6.fws.gov/coloradoriver/>.

²¹³ See, *Final Recovery Implementation Plan for Endangered Fish in the Upper Colorado River Basin*, United States Fish and Wildlife Service (1987).

²¹⁴ See, *Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin: Section 7 Consultation, Sufficient Progress, and Historic Projects Agreement, and Recovery Action Plan (RIPRAP)*, United States Fish and Wildlife Service § 2.2 (1994) (hereafter RIPRAP).

depend."²¹⁵ The RIPRAP was created as a "reasonable and prudent alternative" under section 7.²¹⁶ As a result, agencies have been able to proceed with several water development projects. While this approach to ESA compliance is not viewed universally as a success²¹⁷, and the recovery of the four species remains a largely unrealized goal, this process is notable in involving a wide spectrum of interests in ESA implementation and has encouraged a very flexible management strategy—qualities not found in many ESA disputes.

Fish recovery efforts in the basin have brought the Colorado instream flow program into play. In December of 1995, the Colorado Water Conservation Board ("the Board") applied to Colorado Water Division 6 for two instream flow rights on the Yampa River.²¹⁸ These requests were based on preliminary recommendations provided by the U.S. Fish and Wildlife Service regarding flows needed to protect the endangered fish species. The evaluation of the proposed instream flow rights by the Board was done in conjunction with local stakeholders, including the Yampa River Basin Partnership. Largely due to local opposition and a lack of support by the U.S. Fish and Wildlife Service, the Colorado Water Conservation Board decided to withdraw the filings in January 1999, pending additional studies by the Colorado Division of Wildlife and other interested parties. Future filings are likely.

The region also has had recent experience with the Wild and Scenic Rivers Act,

²¹⁵ RIPRAP II.1.

²¹⁶ RIPRAP I.2-3.

²¹⁷ For example, some county commissioners, ranchers, power plant representatives, and others have objected to what they perceive as human needs being placed second to fish needs. Additionally, there are indications that some Fish and Wildlife officials in the Washington D.C. office fear that too much power has been given to local interests in creating the plan.

²¹⁸ *Application for Water Rights of the Colorado Water Conservation Board on Behalf of the People of the State of Colorado: In the Yampa River*; Cases No. 95CW155 and 95CW156 (Water Division 6, December 26, 1995).

which identified the Yampa (within the boundaries of Dinosaur National Monument) as a potential addition to the national wild and scenic rivers system.²¹⁹ As a result, a draft study was initiated for the Yampa and Green Rivers with the intention of leading to Congressional designation of selected river sections. However, as is frequently the case in implementation of this program, the river's status remains somewhat in limbo, as the President has not taken the required next step of giving a recommendation to Congress regarding the river's inclusion into the wild and scenic system.

The “under study” status of the Yampa has significant implications for resource management, as the responsible agency—in this case, the National Park Service—must manage the site as if a formal designation had occurred.²²⁰ According to National Park Service officials, designation of the studied section of the Yampa would probably have little impact on how the agency manages the river. Existing management is very strict because the Park Service's main mission within the boundaries of the monument is the preservation of natural resources, not the multiple-use goals of other federal land management agencies. Formal designation would, however, provide an additional opportunity for stakeholders to become involved in resource conservation, as part of management plan development.

The Yampa-White Region has not exhibited some of the more potentially contentious problems associated with Colorado water law administration. Water supplies are generally adequate, and occasionally even abundant, thereby eliminating the need for a strict enforcement of water right priorities. Additionally, water quality in the region is generally good. Major water quality issues in the Yampa include salinity and trace-element contamination associated with coal mining.²²¹ These same issues are also of concern in the White River, in addition to concerns associated with oil shale development.

²¹⁹ 16 U.S.C.A. § 1276(a)(55).

²²⁰ 16 U.S.C.A. § 1278(b).

²²¹ *National Water Summary 1990-91, Hydrologic Events and Stream Water Quality*, U.S. Geological Survey, Water Supply Paper 2400, 1993.

It appears that recreation, agriculture, wildlife management (including ESA issues), and potentially energy development will likely dominate future conservation debates. Of these, recreation, including resort development, promises to raise many of the most difficult issues, as evidenced by the ongoing debate regarding the revision of the White River National Forest Plan. This observation appears equally relevant to dozens of other regions in Colorado and the West. These issues implicate several of the federal and state laws discussed herein, but also suggest a role for programs focused on broad issues such as growth management and quality of life preservation.

One such program can already be found in the Yampa Basin, funded by a \$6 million Legacy Grant awarded by Great Outdoors Colorado (GOCO), a state agency supported by lottery revenues. The 1996 GOCO grant has four stated goals:

- (1) Conserve the Yampa River System and surrounding lands using voluntary, incentive-based land conservation techniques that protect private property rights;
- (2) Explore and develop innovative, voluntary techniques to successfully integrate and manage public recreation demands with agricultural operations and other private lands in the Yampa Valley System;
- (3) Improve coordination of recreation in the Yampa River System through consistent and/or consolidated management of existing access sites and develop other projects which accomplish local vision and plans and resolve conflicts on private lands;
- (4) Build appreciation for the Yampa River System's open space resources and the agricultural, recreational and wildlife it supports.²²²

²²² See Yampa River System Legacy Project, (visited May 5, 2000); www.csn.net/~mhermes/hayden/legacy.htm.

Concluding Thought

The federal and state laws reviewed herein are those that are most likely to have significant impacts on community-based conservation, especially in the West where public lands are such an important feature. This is admittedly not a comprehensive review of all laws that could possibly influence these efforts. Preparing such a review is simply not practical, given that a tremendous variety of distinct state and local laws can prove important in some cases, and that special interagency programs or pilot projects may overshadow the standard legal framework in other situations. Additionally, the practical application of the law often does not exactly follow the scheme outlined in legislation, as budgetary and personnel limitations, and political realities, all combine to shape the behavior of resource managers. Each case is, to some degree, unique, a finding aptly illustrated by the brief review of activities in the Yampa-White Basin in extreme northwestern Colorado.

The existence of special programs and unique local politics, however, does not invalidate the need for conservationists to possess a solid understanding of the law. To the contrary, a working knowledge of natural resources and environmental law can be indispensable to successful community-based conservation. Many of these laws and their associated administrative programs, after all, are designed to provide concerned citizens and stakeholders with access to decision-makers and decision-making processes. The first step in taking advantage of these opportunities is to identify and understand them.