



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE Mountain-Prairie Region



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DEC 08 2005

### Memorandum

To: Regional Director, Region 6

From: Assistant Regional Director, Ecological Services, Region 6

Subject: Findings and Recommendations on Issuance of an Incidental Take Permit for the Preble's Meadow Jumping Mouse to the Livermore Area Landowners Group, Colorado (TE-079479-0) for the Livermore Area Habitat Conservation Plan

This statement of Findings and Recommendations documents the conclusions of the Fish and Wildlife Service (Service) with respect to issuance of an Incidental Take Permit under section 10 (a)(1)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531-1544), in response to an application from the Livermore Area Landowners Group, Larimer County, Colorado.

### I. DESCRIPTION OF PROPOSAL

The Livermore Area Landowners Group (the Applicant) has applied to the Service for a Permit to authorize incidental take of the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) in accordance with section 10(a)(1)(B) of the Act. The Applicant has prepared an Environmental Assessment (EA) and Habitat Conservation Plan (HCP) for the Livermore Area, which has been submitted in support of their permit application.

We propose to issue a permit to the Livermore Area Landowner's Group to incidentally take Preble's during the course of agricultural activities, limited new construction in support of agricultural activities and residences, and other appurtenant activities and structures. A thorough description of the action can be found in the HCP itself (section 4, pages 20 to 25) and is incorporated herein by reference (Livermore Area Landowners Group 2003). As a point of clarification, the HCP references several activities that are covered in a 4(d) rule finalized by the Service on May 20, 2005 (69 FR 29101). These activities will not be covered by the incidental take permit, because they are not considered to be take.

The HCP includes several conservation measures that also are considered to be part of the proposed action. These conservation measures are contained in section 5 of the HCP and also are incorporated by reference. The total project planning area for the HCP encompasses

approximately 283,346 acres; however, only a subset of Livermore Area known as the Conservation Zone (CZ) 21,316 acres along 201.6 stream miles is considered to have the habitat features necessary to support Preble's. The permitted activity will impact a maximum of 3,356.7 acres along 28.8 stream miles would be permanently impacted. Because it is unlikely that all private landowners within the planning area will sign up for the HCP, we anticipate that the actual impacted area will be much smaller than the maximum allowed. Regardless of the total acreage impacted, no more than 20 percent of the enrolled habitat would be impacted throughout the life of the permit. The incidental take would be in the form of potential disturbance to, and loss of, habitat used by Preble's.

The HCP proposes to minimize and mitigate adverse effects associated with any expected take of Preble's. As outlined in the HCP, private landowners can impact the first 3 percent of their land without mitigation and will mitigate the impacts of the remaining 17 percent to the maximum allowed of 20 percent of each property. The remaining 80 percent of Preble's habitat will be untouched.

The biological goals and objectives of the proposed mitigation plan for enhancement activities are--(1) continued protection of potential Preble's habitat on The Nature Conservancy and Colorado Division of Wildlife lands within the CZ; (2) preservation of at least 80 percent of the remaining lands owned by other participating private landowners within the CZ; and 3) maintenance of key corridors and linkages within the CZ. Upon full enrollment of landowners and land managers within the HCP area, it is anticipated that at least 50 miles of Preble's habitat, which may potentially support a population of approximately 2,500 mice, will be protected.

Documents reviewed in the preparation of these findings and recommendations include the HCP (Livermore Area Landowners Group 2003), the EA, and the intra-Service section 7 Biological Opinion (File No. 6-CO-05-FW-1). All documents are incorporated by reference, as described in 40 CFR § 1508.13.

## **ANALYSIS OF EFFECTS**

The proposed project would result in the loss of up to 3,356.7 acres along 28.8 stream miles of Preble's habitat. Project activities may result in mortality of Preble's if they are unable to get out of the way of project equipment. The Applicant has committed to implementing measures to offset and minimize effects to the Preble's as described under the Description of Proposal above. The revegetation of habitat with plant materials and in-kind services provided by the Applicant will offset impacts to the Preble's and improve overall habitat conditions within the 80 percent of lands untouched by project activities. The project site occurs within designated critical habitat for the Preble's and will result in adverse effects to critical habitat. Because of the protective measures proposed in the plan, the project would not result in destruction or adverse modification of critical habitat.

The effects of the proposed action on Preble's are fully analyzed in the Service's Biological Opinion for the proposed action, herein incorporated by reference. At maximum potential enrollment, the project would impact 3,356.7 acres along 28.8 stream miles. Regardless of total enrolled acreage, no more than 20 percent of the enrolled habitat would be impacted throughout the life of the permit.

## II. PUBLIC REVIEW

The Service published a Notice of Availability of the Draft Environmental Assessment and Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit for the Livermore Area, Larimer County, Colorado, in the *Federal Register* (69 FR 1998) on January 13, 2004. Publication of the notice initiated a 60-day comment period, which closed on March 15, 2004. Copies of the Livermore Area HCP and EA were sent to 20 individuals, organizations, and agencies, including environmental organizations, the Colorado Division of Wildlife, County governments, and the Governor of Wyoming. We received two comment letters regarding the proposed action during the public comment period, one from a private individual and one on behalf of the Center for Native Ecosystems.

Our responses to the comments are addressed in our Finding of No Significant Impact pursuant to the National Environmental Policy Act. Their comments and our responses can be found in that document, and are incorporated herein by reference.

## III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

Section 10(a)(2)(A) of the Act specifically mandates that “no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant submits to the Secretary a conservation plan that specifies--(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures as the Secretary may require as being necessary or appropriate for the purposes of the plan.”

Section 10(a)(2)(B) of the Act mandates that the Secretary shall issue a permit if she finds “...after opportunity for public comment, with respect to a permit application and the related conservation plan that--(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will assure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and she has received such other assurances as he may require that the plan will be implemented.”

With regard to this specific project, permit actions, and section 10(a)(2)(B) requirements, the Service makes the following findings:

### 1. The taking will be incidental.

Any take of the Preble's will be incidental to otherwise lawful traditional activities of the region, including ranching and farming, as specified in the Livermore Area HCP. To this end, the Livermore Area landowners will obtain all permits and approvals from the appropriate Federal, State, and local agencies, and other necessary approvals prior to activities covered in their HCP.

**2. The Applicant will, to the maximum extent practicable, minimize and mitigate the impact of taking.**

Section 5 of the HCP contains measures to minimize and mitigate impacts to Preble's that shall occur under the permit. These measures include--1) avoid conducting activities in the CZ, where possible; 2) limiting impacts on any covered lands to 20 percent of the property; 3) minimizing project footprints and putting them as far from riparian areas as practicable; 4) scheduling activities during periods of Preble's inactivity; 5) minimizing periods of construction; 6) conserving in perpetuity at a 4:1 ratio any permanent habitat impacts exceeding 3 percent on private lands and 1 percent on Colorado Division of Wildlife, State Land Board, and The Nature Conservancy lands; 7) creating habitat at a 2:1 ratio for habitat within the CZ and conserving those areas under permanent protection; mitigating temporary impacts at a 1:1 ratio; and 8) monitoring effectiveness.

Compared with the October 2003 draft HCP, earlier versions of the draft HCP proposed fewer acres conserved and managed in perpetuity without the 20 percent "cap" on the number of acres impacted, and contained fewer and less detailed measures to minimize the effect and extent of take. The Livermore Area Landowners Group increased their proposed avoidance, minimization and mitigation in order to achieve this standard while still maintaining the applicant's needs of farming and ranching on working landscapes.

Landowners that sign on to the Livermore Area HCP will be able to impact the first 3 percent of their enrolled lands without mitigation. These impacts will be considered to be mitigated by commitments made by The Nature Conservancy on behalf of the Livermore Area Landowners Group. Activities conducted on the 1,696 acres of lands under The Nature Conservancy ownership or conservation easements are expected to result in a net benefit to Preble's and its habitat. The Nature Conservancy management that will provide a net benefit to the Preble's includes--activities to restore habitat for native species, including prescribed grazing, fire, plantings, and seeding; management and monitoring of invasive non-native species; and research. The Nature Conservancy also conducts educational activities.

We conclude that the Livermore Area Landowners Group and The Nature Conservancy have minimized and mitigated the impacts of take to the maximum extent practicable. These conclusions were reached in recognition of the following considerations--1) effects of the action, including increased (over original proposed HCP) conservation, minimization, and avoidance measures for the covered activities as proposed; 2) the importance of the proposed conservation within the Livermore area to the regional survival and recovery of the Preble's; 3) the threatened status of the Preble's; 4) the fact that the proposed activities take a landscape approach that will allow the Preble's to survive and recover in the area; 5) the compatible nature of many of the activities with conservation of the Preble's; and 6) the environmental baseline. The project-related effects of the proposed action are offset by the conservation and management measures proposed by the applicants, such that the undisturbed and restored open-space portions within the planning area are expected to function in a manner that is conducive to maintaining and restoring habitats for the Preble's.

**3. The Applicant will ensure adequate funding for the HCP and provisions to deal with unforeseen circumstances will be provided.**

The Applicant will cover any cost necessary to implement the HCP and reach mitigation success as defined in the HCP, as described in Section 6.3 of the HCP. The costs associated with preparing and recording deed restrictions and conservation easements are expected to be minimal. Monitoring and reporting will be accomplished in a coordinated effort led by the Livermore Area HCP Board, in cooperation with enrolled landowners, The Nature Conservancy, and Colorado Division of Wildlife. Covered landowners will pay to accomplish the proposed monitoring and reporting efforts. Charter landowners will pay a \$300 start-up fee upon enrollment and an annual fee of \$100. Private landowners that enroll after 2 years or more will pay a \$600 start-up fee and an annual fee of \$100. The applicant has ensured that this funding will be sufficient by increasing the required amount by 5 percent annually to track inflation. The annual fees were determined by the Livermore Area HCP Board in cooperation with The Nature Conservancy, which has years of experience conducting these activities and is knowledgeable about the associated costs.

**4. The taking will not appreciably reduce the likelihood that the species will survive and recover in the wild and will not adversely modify critical habitat.**

The Act's legislative history establishes the intent of Congress that this issuance criteria be based on a finding of "not likely to jeopardize" under section 7(a)(2) (50 CFR § 402.02). As a result, approval of the Livermore Area permit application has been reviewed by the Service under section 7 of the Act. In the Biological Opinion, which is incorporated by reference, the Service concluded that issuance of the Permit to the Applicants would not likely jeopardize the continued existence of Preble's and would not be likely destroy or adversely modify critical habitat.

We made this determination based on--(1) conservation measures proposed as part of the project description; (2) anticipated value of restored habitat to the Preble's; (3) the plan's biological goal and objective of maintaining key habitat corridors and linkages; (4) the anticipation that, upon full enrollment, the HCP would protect 50 miles of Preble's habitat, which may potentially support a population of 2,500 mice; (5) the proposed limits on permanent habitat loss. Furthermore, proactive management of conserved areas will enhance opportunities for Preble's and reduce the threats posed by spread of non-native vegetation.

**5. Other measures, as required by the Director of the Service, have been met.**

The HCP incorporates all elements determined by the Service to be necessary for approval of the HCP and issuance of the Permit.

#### **ALTERNATIVES**

Four alternatives were identified in the proposed HCP--1) preferred (proposed) alternative; 2) full avoidance of Preble's habitat (no action); 3) sale of conservation easements or fee lands to conservation entities; and 4) participation in the regional HCP. The HCP details these alternatives as well as the reason the proposed alternative was chosen and the other three alternatives were rejected as infeasible.

#### IV. SPECIES ASSURANCES - ANALYSIS AND RECOMMENDATIONS

In addition to receiving incidental take authorization for the listed species, the Livermore Area Landowners Group and The Nature Conservancy have requested assurances that no additional measures beyond those agreed to in the HCP will be necessary. The Department of the Interior's "No Surprises" regulations (50 CFR § 17.22(b)(5) and 17.32(b)(5)) provide assurances to non-Federal landowners participating in Habitat Conservation Planning that, except under extraordinary circumstances, no additional mitigation beyond that in the HCP will be required from an HCP permittee for species adequately covered by a properly implemented HCP. This policy applies to species adequately covered, and makes no distinction between listed and unlisted species. Species are adequately covered if the HCP addresses the conservation of the species and its habitat as if it is listed and if all section 10 issuance criteria have been met.

The Biological Opinion prepared by the Service includes the Service's assessment of the Preble's. The Service has determined that the Preble's is adequately conserved by Livermore Area HCP, and that the section 10 issuance criteria have been met for this species. Likewise, our analysis concludes that designated critical habitat is not adversely modified under the plan as proposed.

#### V. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

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

#### VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings and analyses with respect to the proposed action, I recommend issuance of a section 10(a)(1)(B) incidental take permit number TE-079424-0 to the Livermore Area Landowners Group and The Nature Conservancy in accordance with the HCP for incidental take of the Preble's. I recommend assurances of no further mitigation requirements from the Livermore Area Landowners Group and TNC for covered species as provided for in the HCP.

Bridget F. Fry 11/28/05  
 HCP COORDINATOR, REGION 6 DATE

CONCUR: Wendy Henry 12/8/05  
 ASSISTANT REGIONAL DIRECTOR, ECOLOGICAL SERVICES DATE