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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket ID FWS-R6-ES-2011-0062]

[92220-1113-0000; ABC Code: C6]

RIN 1018-AX93

**Endangered and Threatened Wildlife and Plants; Reinstatement of Listing
Protections for the Preble's Meadow Jumping Mouse**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are issuing this final rule to comply with a court order that vacates our most recent rule and reinstates the

regulatory protections under the Endangered Species Act of 1973, as amended (Act), for the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) in Wyoming. The United States District Court for the District of Colorado, by order dated July 7, 2011, vacated and remanded the 2008 Final Rule to Amend the Listing for the Preble's Meadow Jumping Mouse To Specify Over What Portion of Its Range the Subspecies is Threatened (2008 Amended Listing Decision) and reinstated the 1998 Final Rule Listing the Preble's Meadow Jumping Mouse as Threatened Throughout Its Range, effective August 6, 2011. This rule reinstates the listing of Preble's in Wyoming. It also reinstates the special rule that exempts activities related to rodent control, ongoing agricultural activities, landscape maintenance, existing uses of water, noxious weed control, and ongoing ditch maintenance activities from the take provisions of the Act throughout the entire range of the Preble's.

DATES: This action is effective August 6, 2011.

ADDRESSES: This final rule and the U.S. District Court decision is available on the Internet at <http://www.regulations.gov> at Docket No. FWS-R6-ES-2011-0062.

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, U.S. Fish and Wildlife Service, Colorado Ecological Services Office, 134 Union Boulevard, Suite 670, Lakewood, CO 80225; telephone: 303-236-4773; facsimile: 303-236-4005. Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at (800) 877-8337 for TTY.

SUPPLEMENTARY INFORMATION:

Background

On July 10, 2008, we published a final rule amending the listing determination for the Preble's to remove protections for the mouse in Wyoming (73 FR 39790). In that rule, we determined that the Preble's was not threatened throughout all of its range, but the portion of its range located in Colorado represented a significant portion of the range where the Preble's should retain its threatened status. The 2008 Amended Listing Decision relied on a March 2007 Memorandum Opinion from the Department of the Interior's Office of the Solicitor (Opinion M-37013) and applied Opinion M-37013's interpretation of the Act's term "significant portion of the range" (SPR) to determine that a difference in status was warranted between the Wyoming and Colorado portions of the range.

On June 23, 2009, a petition for review of the 2008 amended listing decision was filed in the United States District Court for the District of Colorado. Petitioners challenged, among other things, our interpretation of SPR as applied to the Preble's decision. In the time since that lawsuit was filed, two courts vacated final listing decisions that relied on the same statutory interpretation contained in Opinion M-37013 and applied in the Preble's 2008 Amended Listing Decision. On May 4, 2011, after careful review of the statutory interpretation contained in Opinion M-37013 and those two court decisions, the Solicitor of the Department of the Interior issued a memorandum

(“M–37024”) withdrawing Opinion M–37013, and the Service announced its intent to propose in the near future, for notice and comment, a joint policy with the National Marine Fisheries Service (“NMFS”) regarding the interpretation and implementation of the Act’s statutory phrase “in danger of extinction throughout all or a significant portion of its range” (“SPR Language”). This announcement is available at: http://www.fws.gov/home/feature/2011/pdf/Wolf_Actions_FAQs.pdf.

The Service determined it necessary to reconsider the Preble’s status in light of recent court decisions and the subsequent withdrawal of Opinion M–37013. Accordingly, the Service filed a motion for voluntary remand and vacatur of the Preble’s 2008 Amended Listing Decision, and requested that the special rule promulgated pursuant to Section 4(d) of the Act and published in the **Federal Register** in 2001 (66 FR 28125, May 22, 2001), amended in 2002 (67 FR 61531, October 1, 2002), and extended indefinitely in 2004 (69 FR 29101, May 20, 2004), be reinstated throughout the species’ range. On July 7, 2011, the United States District Court for the District of Colorado granted this motion and ordered the 2008 Amended Listing Decision vacated as of August 6, 2011 (*Center for Native Ecosystems, et al. v. Salazar, et al.*, 09–cv–01463–AP–JLK, 2011 U.S. Dist. LEXIS 72664 (D. Colo. July 7, 2011)).

This court ruling reinstates the 1998 Final Rule listing the Preble’s as threatened throughout its range (63 FR 26517), effective August 6, 2011. Accordingly, Federal protections that were in place prior to our 2008 Amended Listing Decision are reinstated for the Preble’s in Wyoming. Further, the special rule promulgated pursuant to section

4(d) of the Act and published in the **Federal Register** in 2001, amended in 2002, and extended indefinitely in 2004, is reinstated throughout the species' range (50 CFR 17.40(l)). The Service must complete its status review of the Preble's and publish a 12-month finding in the **Federal Register** for two petitions submitted by the State of Wyoming and Coloradans for Water Conservation and Development to delist the Preble's by the sooner of either 12 months after its formulation of the new joint policy with NMFS interpreting "significant portion of its range" language or June 1, 2013.

We published a statement on our web site to notify the public of the ruling and its impact shortly after the order was released. We intend to notify the public again when this notice is published to ensure awareness of the ruling.

Administrative Procedure

This rulemaking is necessary to comply with the July 7, 2011, court order. Therefore, under these circumstances, the Director has determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and unnecessary. The Director has further determined, pursuant to 5 U.S.C. 553(d)(3), that the agency has good cause to make this rule effective August 6, 2011.

Effects of the Rule

As of August 6, 2011, the Preble's is again listed as threatened in Wyoming (50

CFR 17.11(h)) and the section 4(d) rule is reinstated throughout the species' range (50 CFR 17.40(l)). Please see the above-cited **Federal Register** publications for more detailed information regarding the Preble's listing and the special rule.

This rule will not affect the status of the Preble's under State laws or suspend any other legal protections provided by State law.

Lists of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, in order to comply with the court orders discussed above, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below.

Part 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245;

Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11 by revising the entry in the table at paragraph (h) for “Mouse, Preble’s meadow jumping” to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

SPECIES

Common name	Scientific name	Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Mouse, Preble's meadow jumping	<u>Zapus hudsonius preblei</u>	U.S.A. (CO, WY)	Entire	T	636	17.95(a)	17.40(l)

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3. In § 17.40, revise paragraphs (1)(2)(vi)(E) and (1)(4) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(1) * * *

(2) * * *

(vi) * * *

(E) Any future revisions to the authorities listed in paragraphs (1)(2)(vi)(A) through (D) of this section that apply to the herbicides proposed for use within the species' range.

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(4) *Where does this rule apply?* The take exemptions provided by this rule are applicable within the entire range of the Preble's meadow jumping mouse.

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Dated: July 27, 2011

Signed: James J. Slack

Acting Director, U.S. Fish and Wildlife Service

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