

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2011–0030]

[92220–1113–0000–C6]

RIN 1018–AW02

Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog

AGENCY: Fish and Wildlife Service, Interior

ACTION: Proposed rule.

SUMMARY: Under the Endangered Species Act of 1973, as amended (ESA), we (the U.S. Fish and Wildlife Service (Service/USFWS)) are proposing to revise our special regulations for the conservation of the Utah prairie dog. We are proposing to revise the

existing limits on take, and we also propose a new incidental take exemption for otherwise legal activities associated with standard agricultural practices. All other provisions of the special rule not relating to these amendments would remain unchanged. We seek comment from the public and other agencies, and welcome suggestions regarding the scope and implementation of the special rule. After the closing of the comment period, a draft environmental assessment will be prepared on our proposed actions.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**), the deadline for submitting an electronic comment is Eastern Standard Time on this date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. In the box that reads “Enter Keyword or ID,” enter the Docket number for this proposed rule, which is FWS–R6–ES–2011–0030. Check the box that reads “Open for Comment/Submission,” and then click the Search button. You should then see an icon that reads “Submit a

Comment.” Please ensure that you have found the correct rulemaking before submitting your comment.

- U.S. mail or hand-delivery: Public Comments Processing, Attention: FWS–R6–ES–2011–0030; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Request for Information** section below for more details).

FOR FURTHER INFORMATION CONTACT: For information on Utah prairie dogs see: <http://www.fws.gov/mountain-prairie/species/mammals/UTprairiedog> or <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?socode=A04A>, or contact Larry Crist, Field Supervisor, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119 (telephone 801–975–3330; facsimile 801–975–3331). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: Under the ESA, we are proposing to revise our existing special rule for the conservation of the Utah prairie dog in the Code of Federal Regulations (CFR) at 50 CFR 17.40(g). The current special rule, administered by the Utah Division of Wildlife Resources (UDWR), was established in 1991. Since that

time, we have evaluated the take authorized by this rule and the methods used to implement it.

We are considering the available information and proposing to revise established limits to permitted take administered by the UDWR. We propose to revise the regulations for where take is allowed to occur, the amount of take that may be permitted, and methods of take that may be permitted. This proposed amendment is largely consistent with past and current practices and permitting as administered by the UDWR under the current special rule. Utah prairie dog populations have remained stable to increasing throughout implementation of the current special rule implemented under the UDWR permit system. We also propose a new incidental take exemption for otherwise legal activities associated with standard agricultural practices.

We seek comment on our proposed rule from the public and other agencies, and welcome suggestions regarding the scope and implementation of the special rule. After the closing of the comment period for this proposed rule, a draft environmental assessment will be prepared on our proposed action.

Request for Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by email or fax or to an address not listed in the **ADDRESSES** section. If you

submit a comment via <http://www.regulations.gov>, your entire comment—including your personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Peer Review

We will seek independent review of the science in this proposed rule to ensure that our final rule is based on scientifically sound data, assumptions, and analyses. We will initiate the peer review immediately following publication of this proposed rule in the **Federal Register**.

We will take into consideration all comments, including peer review comments and any additional information we receive on this proposed rule, during our preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

Requests for public hearings must be received no later than the date given in **DATES**. Such requests must be made in writing and be addressed to the Field Supervisor at the address in the **FOR FURTHER INFORMATION CONTACT**

section above.

Special Rules Under ESA Section 4(d)

A 4(d) rule functions by prescribing those regulations that are necessary and advisable to conserve a threatened species. The Service has elected to extend all prohibitions under section 9 of the Act to threatened species through a "blanket 4(d) rule" unless otherwise specified in a separate 4(d) rule. Because the blanket rule effectively extends all available prohibitions to threatened species, separate 4(d) rules could be viewed as "exempting," "allowing," or "permitting" acts that would otherwise be prohibited. Instead, it is more accurate to say that a species-specific 4(d) rule supersedes the blanket 4(d) rule for the species at issue, and extends a more tailored set of prohibitions to the species. As a result, there may be some prohibitions that apply to other threatened species that do not apply to the threatened species at issue. In the interest of providing a clear rule with simple language, we will be using "exempt" and "allow" in order to convey that the 4(d) rule will not prohibit certain actions. It is important to note that this use of language is for clarity only. The 4(d) rule will still function by prescribing the regulations necessary and advisable to conserve the Utah Prairie Dog.

Previous Federal Actions

The Utah prairie dog (*Cynomys parvidens*) was listed as an endangered species on June 4, 1973 (38 FR 14678), pursuant to the Endangered Species Conservation Act of 1969. On January 4, 1974, this listing was incorporated into the ESA of 1973, as amended (39 FR 1158; see page 1171).

On May 29, 1984, the Service reclassified the Utah prairie dog from endangered to threatened (49 FR 22330) and developed a special rule under section 4(d) of the ESA that allowed regulated take of up to 5,000 animals annually on private lands in Iron County, Utah. On June 14, 1991, we amended the special rule to allow regulated take of up to 6,000 animals annually on private lands throughout the species' range (56 FR 27438).

On February 3, 2003, we received a petition to reclassify the Utah prairie dog from threatened to endangered (Forest Guardians 2003, entire). The petition was based in part on threats to the species associated with the current 4(d) special rule (Forest Guardians 2003, pp. 104–108). On February 21, 2007 (72 FR 7843), we found that the petition did not provide substantial scientific or commercial information indicating that reclassification may be warranted. This decision was challenged by WildEarth Guardians in litigation (described below).

On February 4, 2005, we received a petition under the Administrative Procedure Act (APA) requesting that we issue a rule to restrict the translocation of Utah prairie dogs and to terminate the special 4(d) rule allowing regulated take of Utah prairie dogs (Forest

Guardians 2005, entire). On April 6, 2005, we acknowledged receipt of this petition. On February 23, 2009, we issued a final decision in which we denied the petitioned action (USFWS 2009, entire). However, this response acknowledged that we had initiated a process to amend the special 4(d) rule and that we anticipated that a proposed amended special 4(d) rule would soon be published in the **Federal Register** for public comment (USFWS 2009, p. 1). This decision was also challenged by WildEarth Guardians.

On September 28, 2010, United States District Court for the District of Columbia vacated and remanded our February 21, 2007 (72 FR 7843), not-substantial petition finding back to us for further consideration (*WildEarth Guardians vs. Salazar*, Case 1:08-cv-01596-CKK (D.D.C.), 2010). In the same order, the court upheld our February 23, 2009, decision on the APA petition. This ruling noted that although the level of take allowed in the 1991 special rule may not be biologically sound, some permitted take is advantageous to the Utah prairie dogs' recovery. The court specifically noted that controlled take can stimulate population growth, reduce high-density populations prone to decimation by plague, and, consequently, curb the species' boom-and-bust population cycle. The court declined to weigh in on the precise level of take that should be permitted, concluding that this is a matter squarely within the Service's technical and scientific expertise.

Background

Species Description

Prairie dogs belong to the Sciuridae family of rodents, which also includes squirrels, chipmunks, and marmots. There are five species of prairie dogs, all of which are native to North America, and all of which have non-overlapping geographic ranges (Hoogland 2003, p. 232). The Utah prairie dog is the smallest species of prairie dog, with individuals that are typically 250 to 400 millimeters (mm) (10 to 16 inches (in.)) long (Hoogland 1995, p. 8). Weight varies from 300 to 900 grams (g) (0.66 to 2.0 pounds (lb)) in the spring and 500 to 1,500 g (1.1 to 3.3 lb) in the late summer and early fall (Hoogland 1995, p. 8). Utah prairie dogs range in color from cinnamon to clay. The Utah prairie dog is distinguished from other prairie dog species by a relatively short (30 to 70 mm (1.2 to 2.8 in.) white- or gray-tipped tail (Pizzimenti and Collier 1975, p. 1; Hoogland 2003, p. 232) and a black “eyebrow” above each eye. They are closely related to the white-tailed prairie dog (Hoogland 1995, p. 8).

Life History

Utah prairie dogs are hibernators and spend 4 to 6 months underground each year during the harsh winter months, although they are seen above ground during mild weather (Hoogland 1995, pp.18–19). Adult males cease surface activity during August and September, and females follow suit several weeks later. Juvenile prairie dogs remain above ground 1 to 2 months longer than adults and usually go into hibernation by late November. Emergence from hibernation usually occurs in late February or early March (Hoogland 2003, p. 235).

Mating begins 2 to 5 days after the females emerge from hibernation, and can continue through early April (Hoogland 2003, p. 236). Female Utah prairie dogs come into estrus (period of greatest female reproductive responsiveness, usually coinciding with ovulation) and are sexually receptive for several hours for only 1 day during the breeding season (Hoogland 2003, p. 235). However, on average, 97 percent of adult female Utah prairie dogs are in breeding condition each year and do successfully produce a litter (Mackley 1988, pp. 1, 9).

The young are born after a 28-to-30-day gestation period, in April or May (Hoogland 2003, p. 236). Litters range in size from one to seven pups; mean litter size is 3.88 pups; litter sizes vary directly with maternal body mass (Mackley 1988, pp. 8–9; Hoogland 2001, p. 923). Young prairie dogs depend almost entirely on nursing while in their burrow (Hoogland 2003, p. 236). The young emerge above ground by early to mid-June, and by that time they primarily forage on their own (Hoogland 2003, p. 236). Because of the relatively large litter sizes, the observed summer population numbers of prairie dogs are much greater than the number of animals seen above ground in the spring.

Prairie dog pups attain adult size by October and reach sexual maturity at the age of 1 year (Wright-Smith 1978, p. 9). Less than 50 percent of Utah prairie dogs survive to breeding age (Hoogland 2001, p. 919). Male Utah prairie dogs frequently cannibalize juveniles, which may eliminate 20 percent of the litter (Hoogland 2003, p. 238). After

the first year, female survivorship is higher than male survivorship, though still low for both sexes. Only about 20 percent of females and less than 10 percent of males survive to age 4 (Hoogland 2001, Figures 1 and 2, pp. 919–920). Utah prairie dogs rarely live beyond 5 years of age (Hoogland 2001, p. 919). The sex ratio of juveniles at birth is 1:1, but the adult sex ratio is skewed towards females, with adult female:adult male sex ratios varying from 1.8:1 (Mackley 1988, pp. 1, 6–7) to 2:1 (Wright-Smith 1978, p. 8)

Natal dispersal (movement of first-year animals away from their area of birth) and breeding dispersal (movement of a sexually mature individual away from the areas where it copulated) are comprised mostly of male prairie dogs. Thus, individual male prairie dogs have a high mortality rate through predation. Young male Utah prairie dogs disperse in the late summer, with average dispersal events of 0.56 kilometers (km) (0.35 mile (mi)) and long distance dispersal events of up to 1.7 km (1.1 mi) (Mackley 1988, p. 10). Most dispersers move to adjacent territories (Hoogland 2003, p. 239).

Utah prairie dogs are organized into social groups called clans, consisting of an adult male, several adult females, and their offspring (Wright-Smith 1978, p. 38; Hoogland 2001, p. 918). Clans maintain geographic territorial boundaries, which only the young regularly cross, although all animals use common feeding grounds.

Major predators include coyotes (*Canis latrans*), badgers (*Taxidea taxus*), long-tailed weasels (*Mustela frenata*), various raptor species (*Buteo* spp., *Aquila chrysaetos*), and snakes (*Crotalus* spp., *Pituophus* spp.) (Hoogland 2001, p. 922). In established

colonies, predators probably do not exert a controlling influence on numbers of prairie dogs (Collier and Spillett 1972, p. 36).

Habitat Requirements and Food Habits

Utah prairie dogs occur in semiarid shrub-steppe and grassland habitats (McDonald 1993, p. 4; Roberts et al. 2000, p. 2; Bonzo and Day 2003, p. 1). Within these habitats, they prefer swale-type formations where moist herbaceous vegetation is available (Collier 1975, p. 43; Crocker-Bedford and Spillett 1981, p. 24). Plentiful high-quality food found in swales enables prairie dogs to attain a large body mass, thus enhancing survival and increasing litter sizes and juvenile growth rates (Hoogland 2001, p. 923).

Soil characteristics are an important factor in the location of Utah prairie dog colonies (Collier 1975, p. 53). A well-drained area is necessary for home burrows. The soil should be deep enough to allow burrowing to depths sufficient to provide protection from predators and insulation from environmental and temperature extremes. Prairie dogs must be able to inhabit a burrow system 1 meter (m) (3.3 feet (ft)) underground without becoming wet.

Prairie dogs are predominantly herbivores, though they also eat insects (Crocker-Bedford and Spillett 1981, p. 8; Hoogland 2003, p. 238). Grasses are the staple of their annual diet (Crocker-Bedford and Spillett 1981, p. 8; Hasenyager 1984, p. 27), but other

plants are selected during different times of the year. Utah prairie dogs only select shrubs when they are in flower, and then only eat the flowers (Crocker-Bedford and Spillett 1981, p. 8). Forbs are consumed in the spring. Forbs also may be crucial for the survival of prairie dogs during drought (Collier 1975, p. 48).

Utah prairie dogs prefer areas with deep, productive soils. These are the same areas preferred by agricultural producers. Agricultural tilling practices create unusually deep, soft soils optimum for burrowing; irrigation increases vegetative productivity; and plantings of favored moist forb species (such as alfalfa) likely make these areas more productive than they were historically (Collier 1975, pp. 42–43). Additionally, Utah prairie dogs grow faster and attain larger body weights (Crocker-Bedford and Spillett 1981, p. 1), and thus have higher overwinter survival, in alfalfa crops versus native habitats (Crocker-Bedford and Spillett 1981, p. 16). Reproduction and weaning of young also may be more successful in agricultural areas that provide abundant forage resources that are otherwise unavailable in drier native habitats (Crocker-Bedford and Spillett 1981, p. 17). Similarly, colonies in agricultural areas expand more rapidly than those in native habitats (Crocker-Bedford and Spillett 1981, p. 16). Finally, predator mortality is generally low for Utah prairie dogs in agricultural fields (see **Life History**), because farmers control badgers and coyotes in these areas (Crocker-Bedford and Spillett 1981, p. 17).

While we believe that the valley bottoms have probably always supported more prairie dogs than surrounding drier sites, it is likely that the high densities and

abundances occurring in these areas are unnaturally augmented by today's agricultural practices (Collier 1975, pp. 43, 53; Crocker-Bedford and Spillett 1981, pp. 15–17, 22).

Overall, agricultural lands can provide valuable habitats for Utah prairie dogs. However, if the prairie dog populations become too dense, these same areas may be more prone to outbreaks of plague, a nonnative disease that occurs across the entire range of the Utah prairie dog and can extirpate entire colonies (Cully 1989, p. 48; Cully 1993, p. 40; Biggins and Kosoy 2001, p. 62; Cully and Williams 2001, p. 895). The rate of the spread of plague is likely dependent in part on the density of the host (e.g., Utah prairie dog) population (Rayor 1985, entire; Cully 1993, p. 43; Cully and Williams 2001, p. 899–901; Biggins et al. 2010, p. 18)—populations with higher densities likely have higher plague transmission rates and higher rates of epizootic (rapidly spreading die-off cycle) outbreaks. Thus, we conclude that, if left unmanaged, the unnaturally high densities of Utah prairie dogs on some agricultural lands increase their susceptibility to plague outbreaks.

Distribution and Abundance

The Utah prairie dog is the westernmost member of the genus *Cynomys*. Historically, the species' distribution extended much further north than it does today (Collier 1975, pp. 15–17; Pizzimenti and Collier 1975, p. 1). Utah prairie dog populations declined dramatically when control programs to eradicate the species were initiated in the 1920s. The actual numeric population reduction is not known, because

historical population figures were not scientifically derived (Collier and Spillett 1973, pp. 83–84). However, poisoning is estimated to have removed prairie dogs from approximately 8,094 hectares (ha) (20,000 acres (ac)) of their range prior to 1963 (Collier and Spillett 1972, pp. 33–35). Other factors that resulted in the historical decline of Utah prairie dogs were drought, habitat alteration from conversion of lands to agricultural crops, unregulated shooting, and disease (Collier and Spillett 1972, pp. 32–35).

The species' range is now limited to the southwestern quarter of Utah in Iron, Beaver, Garfield, Wayne, Piute, Sevier, and Kane Counties. The Utah prairie dog has the most restricted range of the four prairie dog species in the United States.

The best available information concerning Utah prairie dog habitat and population trends comes from survey and mapping efforts conducted by the UDWR annually since 1976. These surveys (hereafter referred to as “counts” or “spring counts”) count adult Utah prairie dogs on all known and accessible colonies annually, in April and May, after the adults have emerged, but before the young are above ground in June (see “Life History”). Some non-Federal lands with active Utah prairie dog colonies are not surveyed due to lack of access. However, we believe that over 90 percent of prairie dog colonies are known and annually surveyed (Brown, pers. comm., 2010). Therefore, actual rangewide prairie dog numbers may be somewhat higher than reported, though probably not substantially higher.

Utah prairie dog surveys are completed in the spring (“spring counts”) by visually scanning each colony area and counting the numbers of prairie dogs observed. Only 40 to 60 percent of Utah prairie dogs are above ground at any one time (Crocker-Bedford 1975 in USFWS 1991, p. 5). Therefore, spring counts represent approximately 50 percent of the adult population. Total population estimates are larger than the estimated adult population because they include reproduction and juveniles. Based on the male to female ratio, number of breeding females, average litter size, and observed spring count versus spring population (see the “Life History” section; Wright-Smith 1978, p. 8; Mackley 1988, pp. 1, 6–9; Hoogland 2001, pp. 919–920; 923), the total population estimate can thus be calculated from spring counts as follows: $[(2 \times \text{spring adult count}) \times 0.67 \text{ (proportion of adult females)} \times 0.97 \text{ (proportion of breeding females)} \times 4 \text{ (average number of young per breeding female)}]$ plus $(2 \times \text{spring adult count})$. Thus, the total population estimate is about $7.2 \times$ the spring count.

It should be noted that spring count surveys and population estimates are not censuses. Rather, they are designed to monitor population trends over time. Based on the spring counts, rangewide population trends for the Utah prairie dog are stable to increasing over the last 30 years (see Figure 1).

In addition to population trend information, the UDWR surveys provide information on the amount of mapped and occupied habitat across the species’ range. We define mapped habitat as all areas within the species’ range that were identified and delineated as being occupied by Utah prairie dogs in any year since 1972. These areas

may or may not be occupied by prairie dogs in any given year. The database of all mapped habitat is maintained by the UDWR and updated annually. Occupied habitats are defined as areas that support Utah prairie dogs (i.e., where prairie dogs are seen or heard or where active burrows or other signs are found).

The UDWR has mapped 24,142 ha (59,656 ac) of habitat rangewide (UDWR 2010a, entire). The Utah prairie dog occurs in three geographically identifiable areas within southwestern Utah, which are identified as recovery areas in our 1991 Recovery Plan (USFWS 1991, pp. 5–6) and as recovery units in our 2010 Draft Revised Recovery Plan (USFWS 2010, pp. 1.3.3, 3.2–7, 3.2–8), including: (1) the Awapa Plateau; (2) the Paunsaugunt Plateau, and (3) the West Desert. The Awapa Plateau recovery unit encompasses portions of Piute, Garfield, Wayne, and Sevier Counties. The Paunsaugunt Plateau recovery unit is primarily in western Garfield County, with small areas in Iron and Kane Counties. The West Desert recovery unit is primarily in Iron County, but extends into southern Beaver County and northern Washington County. Table 1 provides information on each recovery unit, including average percentage of the rangewide population and average percentage of prairie dogs occurring on non-Federal land (averages for 2000 to 2009). Additional information on each recovery unit’s distribution, abundance, and trends can be found in our 2010 Draft Revised Recovery Plan (USFWS 2010, section 1.3)

Table 1: Population and Occupancy Data for Each Recovery Unit.

	Average Percentage of Rangewide Population	Average Percentage of Prairie Dogs Occurring on Non-Federal Land
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Awapa Recovery Unit	8.9	47.6
Paunsaugunt Recovery Unit	16.9	71.0
West Desert Recovery Unit	74.2	85.1

Note: Averages calculated from 2000 to 2009.

Source: UDWR 2009, 2010b.

Application of the Prairie Dog Special Rule Through the Present

As explained above in the “Special Rules Under ESA Section 4(d)” section, pursuant to section 4(d) of the ESA, the Secretary of the Interior may extend to a threatened species those protections provided to an endangered species as deemed necessary and advisable to provide for the conservation of the species. When the Utah prairie dog was reclassified from endangered to threatened status in 1984, we issued a special rule applying all of the ESA’s prohibitions to the Utah prairie dog except for take occurring in specific delineated portions of the Cedar and Parowan Valleys in Iron County, Utah, when permitted by the UDWR and in accordance with the laws of the State of Utah, provided that such take did not exceed 5,000 animals annually and that such take was confined to the period from June 1 to December 31 (49 FR 22330; see page 22334, May 29, 1984). The rule required quarterly reporting by UDWR and allowed us to immediately prohibit or restrict such taking as appropriate for the conservation of the species if we received substantive evidence that the allowed take was having an effect that was inconsistent with the conservation of the Utah prairie dog (49 FR 22330, May 29, 1984).

In 1991, we amended the special rule (56 FR 27438, June 14, 1991), expanding the authorized taking area to include all private land within the species' range, and raised the maximum allowable take to 6,000 animals annually (50 CFR 17.40(g)). The rule required UDWR to maintain records on permitted take and make them available to the Service upon request (50 CFR 17.40(g)). Under this rule, we retained the ability to immediately prohibit or restrict such take as appropriate for the conservation of the species if we received substantive evidence that the permitted take was having an effect that is inconsistent with the conservation of the species (50 CFR 17.40(g)).

Both rules (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991) were intended to relieve Utah prairie dog population pressures in overcrowded portions of the range that could not otherwise be relieved. The rules indicated that agricultural practices were making the habitat more productive than it was historically, thus allowing the prairie dog population to achieve unnaturally high densities. The resulting overpopulation pressures increase the risk of sylvatic plague (*Yersinia pestis*) outbreaks (see "Habitat Requirements and Food Habits," above; 49 FR 22333, May 29, 1984; 56 FR 27439–27440, June 14, 1991). The rules also concluded that removing individuals during summer when populations were highest would reduce competition in overpopulated areas and result in increased overwinter survival among remaining animals (49 FR 22334, page 22333, May 29, 1984; 56 FR 27439–27441, June 14, 1991).

Finally, these rules were necessary and advisable to address the growing conflicts between landowners and prairie dogs by providing for ecologically based population

control that also alleviated some of the impacts to agricultural operations (49 FR 22330, May 29, 1984; 56 FR 22330, pages 27439–27440, June 14, 1991). The rules expressed concern that without control actions, these factors could have a substantially negative effect on populations and reverse the recovery progress made since listing (49 FR 22330, page 22333, May 29, 1984; 56 FR 27440, June 14, 1991). The 1991 rule referenced data that demonstrated that Utah prairie dog population levels in areas with controlled take under the 1984 special rule increased 88 percent during the first 4 years (1985–1989) of implementation (56 FR 27438, June 14, 1991; see page 27440).

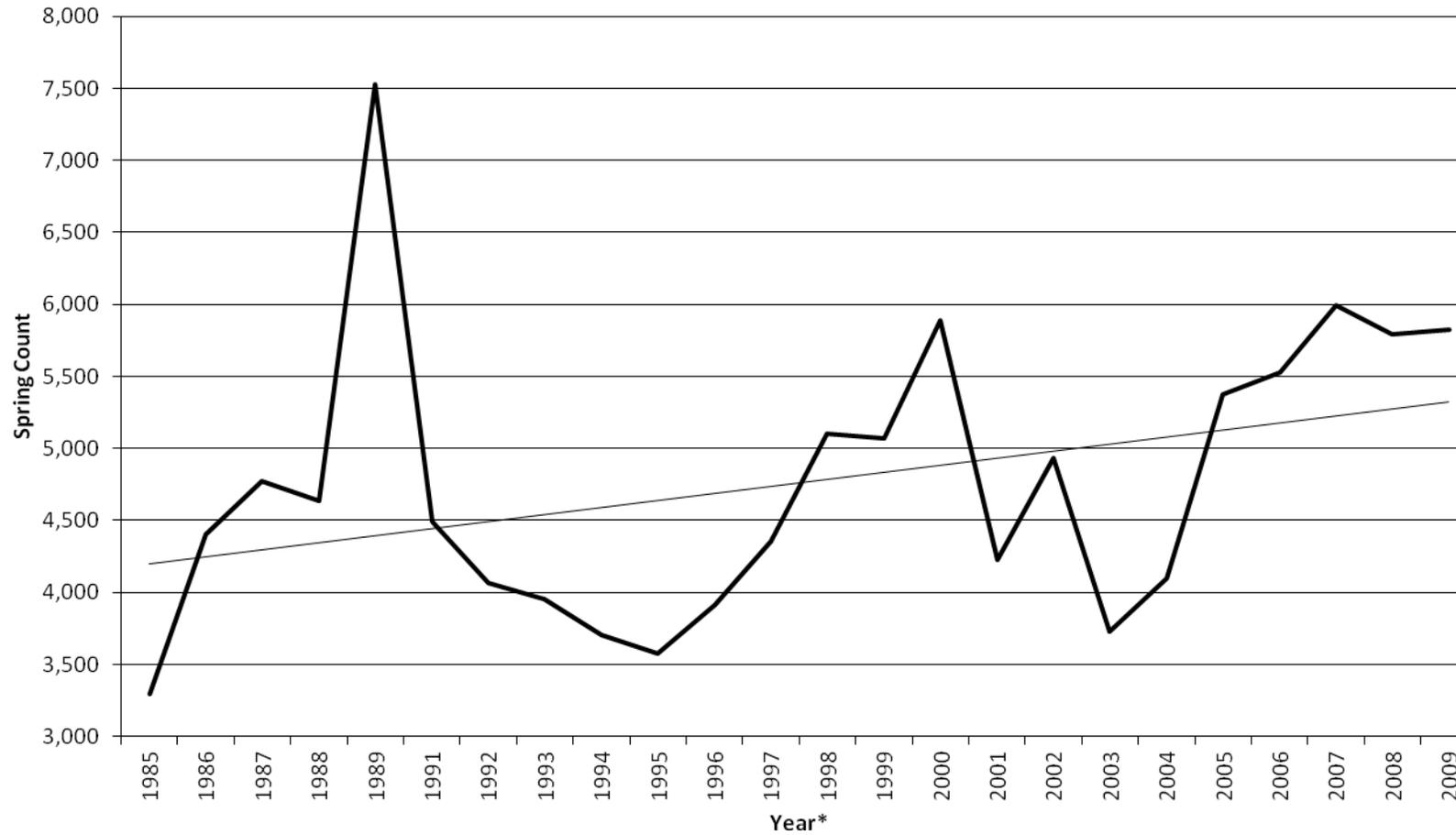
In practice, the UDWR currently permits taking only by shooting or trapping on agricultural lands where prairie dogs are causing damage and limits the number of animals taken on an individual colony to no more than half of a colony's estimated productivity for that year. Over time, UDWR has permitted take averaging 5.7 percent of the total rangewide estimated population annually (range equals 1.8 to 12.9 percent); actual take has averaged 2.5 percent of the total rangewide estimated population (range equals 0.9 to 5.3 percent). Table 2 provides detailed information on permitted and reported take as a percent of the total rangewide population from 1985 to 2009 (UDWR 2010b, entire). Figure 1 illustrates annual rangewide population estimates from 1985 to 2009 with a population trend line. Throughout implementation of the current special rules (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991; 50 CFR 17.40(g)), both the rangewide population estimates and numbers of prairie dogs in individual colonies subject to control remain stable to increasing (Figure 1; Day, pers. comm., 2010).

Table 2. Amount of Utah Prairie Dog Take Permitted and Reported Under the ESA 4(d) Rule by UDWR, 1985–2009 (UDWR 2010b).

Year*	Spring Count	Rangewide Population Estimate	Permitted Take	Permitted Take Percentage of Rangewide Population Estimate	Reported Take	Reported Take Percentage of Rangewide Population Estimate
1985	3,299	23,752	845	3.5	426	1.8
1986	4,400	31,680	2,040	6.4	1,247	3.9
1987	4,771	34,351	975	2.8	370	1.1
1988	4,640	33,408	2,415	7.2	528	1.6
1989	7,527	54,194	3,050	5.6	838	1.5
1991	4,492	32,342	4,200	12.9	1,632	5.0
1992	4,067	29,282	3,520	12.0	1,543	5.3
1993	3,954	28,469	1,050	3.7	599	2.1
1994	3,702	26,654	1,190	4.5	779	2.9
1995	3,576	25,747	630	2.4	461	1.8
1996	3,917	28,202	520	1.8	436	1.5
1997	4,359	31,385	1,065	3.4	589	1.9
1998	5,106	36,763	1,220	3.3	717	1.9
1999	5,068	36,490	2,496	6.8	1233	3.4
2000	5,892	42,422	3,700	8.7	1386	3.3
2001	4,223	30,406	3,719	12.2	1626	5.3
2002	4,933	35,518	3,781	10.6	1760	4.9
2003	3,729	26,849	2,620	9.8	1195	4.4
2004	4,102	29,534	1,360	4.6	363	1.2
2005	5,375	38,700	1,470	3.8	673	1.7
2006	5,524	39,773	1,060	2.7	343	0.9
2007	5,991	43,135	944	2.2	482	1.1
2008	5,791	41,695	1,204	2.9	561	1.3
2009	5,827	41,954	1,532	3.6	558	1.3
AVG	4,761	34,279	1,942	5.7	848	2.5

* In 1990, colonies on private lands were not counted, due to staffing and budget limitations. Thus, these incomplete estimates are excluded from this table. In addition, take from 1985 to 1990 occurred only on non-Federal lands in Cedar and Parowan Valleys, Iron County. Take from 1991 to present was authorized on non-Federal lands rangewide.

Figure 1. Utah Prairie Dog Spring Counts, with Rangewide Population Trend Line, 1985–2009 (UDWR 2010b).



* Surveys from 1990 are not included, because they were incomplete (i.e., they did not include private lands), due to staffing and budget limitations.

Proposed Amendments

Based on new scientific information and 25 years of available data, we believe the existing 4(d) special rule should be amended. This proposed amendment includes limiting the direct take prohibitions authorized in 1984 and as amended in 1991, and provides additional incidental take authorization for otherwise legal activities associated with standard agricultural practices. The proposed amendments are largely consistent with the past practices and permitting as administered by UDWR under the current special rule. Utah prairie dog populations have remained stable to increasing throughout implementation of the current special rule as implemented under the UDWR permit system. Below we analyze both the new proposed restrictions on direct take and the new incidental take provision.

Limiting Where Direct Take Can Be Permitted by the State

The current special rule allows UDWR to permit take on private lands anywhere within the range of the Utah prairie dog. In practice, however, UDWR currently permits take only on agricultural lands where prairie dogs are causing damage. In this revision to the special rule, we propose to limit the locations where UDWR can permit take to agricultural lands and private property neighboring conservation properties.

The first situation where UDWR would be allowed to permit take is on agricultural land. This is consistent with current UDWR permitting procedures under the

current special rule. However, our proposed revision would provide a specific definition for agricultural lands for clarification purposes. Specifically, this rule proposes that the above activities would be exempted from the take prohibition only on lands meeting the Utah Farmland Assessment Act of 1969 definition of agricultural lands (Utah Code Annotated Sections 59–2–501 through 59–2–515). Thus, to be considered agricultural land under this proposed amendment, lands must (1) meet the general classification of irrigated, dryland, grazing land, orchard or meadow; (2) be capable of producing crops or forage; (3) be at least 2 contiguous ha (5 contiguous ac) (smaller parcels may qualify where devoted to agriculture use in conjunction with other eligible acreage under identical legal ownership); (4) be managed in such a way that there is a reasonable expectation of profit; (5) have been devoted to agricultural use for at least 2 successive years immediately preceding the year in which application is made; and (6) meet State average annual (per-acre) production requirements. Limiting UDWR-permitted take to agricultural lands is consistent with the justification provided in the previous special rules for the species (as summarized above).

Additionally, agricultural operators must demonstrate to UDWR that their land is being physically or economically impacted by Utah prairie dogs. Before an application can be approved, UDWR must conduct a visual census of the applicant's property to verify that the land is being physically or economically impacted by Utah prairie dogs. The visual census will count prairie dogs on the applicant's property and determine a population estimate for the colony. A minimum spring count of five animals is required to ensure that permits are authorized only where resident prairie dogs have become

established on agricultural lands (Day, pers. comm. 2011). Thus, lands being minimally impacted by dispersing prairie dogs would not be covered. These proposed restrictions are consistent with past UDWR practice. Utah prairie dog populations have remained stable to increasing throughout implementation of the current special rule and past practices, as implemented under the UDWR permit system. Therefore, consistent with past practice and data that indicate these restrictions will support the ongoing conservation of the species, we propose to adopt these restrictions.

The second situation where UDWR would be allowed to permit take is on private property within 0.8 km (0.5 mi) of Utah prairie dog conservation lands. Although the current special rule already allows for take in this situation, such take is not currently authorized by UDWR practices. However, we believe the continuation of this provision is important for Utah prairie dog recovery efforts. Permitting take by UDWR in this manner on private property near conservation lands promotes landowner and community support for Utah prairie dog recovery on non-Federal lands.

Conservation lands are areas set aside for the preservation of Utah prairie dogs and are managed specifically or primarily toward that purpose. Conservation lands may include, but are not limited to, non-federal properties set aside as conservation banks, fee title purchased properties, properties under conservation easements, or properties subject to a safe harbor agreement. In order to be recognized as Utah prairie dog conservation land, the parcel must be accompanied by documentation that clearly defines the conservation benefits to the Utah prairie dog. In addition, documentation must be

available describing the location of all neighboring private properties within 0.8 km (0.5 mi) of the conservation land parcel; the baseline populations of prairie dogs on the neighboring private properties (the highest estimated population size of the last 5 years prior to the establishment of the conservation property); and the methods of Utah prairie dog control that will be allowed on the neighboring private properties. The amount of UDWR-permitted take on properties that neighbor conservation lands, discussed further below, will be limited each year to the number of animals that exceed the baseline population size.

Continuing to allow permitted take on agricultural lands and lands bordering conservation lands is critical to facilitating the species' recovery. As previously described, Utah prairie dogs can reach unnaturally high densities and abundance on agricultural lands because of increased forage quantity and quality, and lower predator numbers (see "Habitat Requirements and Food Habits" section above). If prairie dog populations on agricultural lands are left uncontrolled, the consequent crowding may result in diminished forage resources, leading to decreased reproduction and survival or increased emigration (Crocker-Bedford and Spillett 1981, pp. 21–22; Reeve and Vosburgh 2006 pp. 122–123). Controlling populations by removing some prairie dogs decreases competition for limited food resources, consequently resulting in increased reproduction and decreased mortality (Reeve and Vosburgh 2006, p. 122).

Controlled removal also may help mediate the potential for plague outbreaks on prairie dog colonies. Plague is a nonnative disease that periodically erupts in epizootic

events when increased population densities cause additional stress among individuals. High animal densities facilitate transmission of the disease between individuals (Cully 1989, p. 49; Anderson and Williams 1997, p. 730; Gage and Kosoy 2005, pp. 509 and 519–520).

Allowing control on agricultural lands will thus enhance the long-term conservation of the Utah prairie dog on these lands by maintaining more sustainable populations (i.e., more natural animal densities are less likely to degrade their forage resources, and less likely to have large scale plague outbreaks). Utah prairie dog populations have remained stable to increasing under the current special rule since 1984.

We also have concluded that allowing some control of Utah prairie dogs will increase the participation of landowners and local communities in the species conservation and recovery. Until recently, Utah prairie dog recovery efforts focused on habitat enhancements and translocation of the animals to Federal lands (USFWS 1991, pp. 19–33). Consequently, recovery was largely dependent on achieving sufficient population numbers on Federal lands, without considering the potential for conservation benefits that could be achieved on private lands. We now have concluded that recovery will be achieved more rapidly if we increase conservation efforts on private and other non-Federal lands (where the majority of the species' occupied habitat occurs) (USFWS 2010, p. 2.3–2). We are in the process of revising the Recovery Plan to reflect this new direction (USFWS 2010, entire).

New or increased Federal regulations can be disincentives for recovery efforts. These disincentives may be nearly insurmountable for State, tribal, and private landowners. Many agricultural producers claim that Utah prairie dogs impact their operations through loss of forage for their cattle; equipment damage from driving across burrows; livestock injury if animals step in burrows; and decreased crop yields (e.g., prairie dogs eat crop vegetation such as alfalfa) (Elmore and Messmer 2006, p. 9). We expect that increased focus on establishing and managing non-Federal conservation lands will likely increase the size and extent of prairie dog colonies on and adjacent to these conservation lands. Thus, as recovery becomes more and more successful on non-Federal lands, regulatory relief will become increasingly important.

To achieve recovery, we will need to encourage private landowners and local communities to participate in prairie dog habitat improvement and protection measures. We can achieve this only if we demonstrate that the benefits of prairie dog conservation outweigh the costs to the landowner, and if control programs or other damage compensation is available when needed (Elmore and Messmer 2006, p. 13). Some producers are interested in working with us on habitat and range improvement projects that benefit livestock and Utah prairie dogs simultaneously, or participating in conservation easements that benefit the species (Elmore and Messmer 2006, pp. 10–11, 13). However, agricultural producers want the ability to control or translocate prairie dogs to minimize levels of damage (Elmore and Messmer 2006, pp. 10, 13).

Our recent experiences show that if we are mindful of landowners' needs, and provide mechanisms to control Utah prairie dogs where they conflict with human land uses, we can gain landowner and local community support for species conservation. For example, in a 2005 safe harbor agreement, a landowner agreed to restore habitat and allow the establishment of a new colony of prairie dogs on his property through translocations (USFWS 2005, entire), but conditioned his willingness to accept translocated animals on the fact that his safe harbor agreement allowed him to control animals if they impacted his livestock operations (USFWS 2005, pp. 5–6). We have completed six similar Utah prairie dog safe harbor agreements, all of which include the ability for a landowner to control some prairie dogs where they may impact their agricultural activities.

Additionally, there may be opportunities to protect Utah prairie dogs and their habitats through fee-title purchase or conservation easements with willing landowners. We are more likely to gain community support for these land protection mechanisms if we can provide regulatory flexibility for neighboring landowners. For example, in 2001, the UDWR and Iron County purchased 73 ha (180 ac) in Parowan Valley, and renamed the area as the Parowan Valley Wildlife Management Area, designating it for the protection of a large Utah prairie dog colony. At the time, there was concern that neighboring landowners would be negatively impacted if prairie dog management activities resulted in the growth and expansion of the existing prairie dog colony. Therefore, to support the purchase and protection of this important colony, we worked with the landowner to allow the control of prairie dogs (above a 2001 baseline number on

each property) for properties within 0.8 km (0.5 mi) of the Parowan Valley Wildlife Management Area. Because of the issuance of this permit, the local community supported the purchase and management of the property for conservation of the Utah prairie dog.

Another opportunity to promote the use of conservation easements is the Utah prairie dog habitat credit exchange program (hereafter referred to as the “credit exchange program”) or similar conservation banking opportunities. The credit exchange program will allow a program administrator (in this case, the Panoramaland Resource Conservation and Development Council, Inc.) to enroll willing landowners in a Utah prairie dog conservation bank that is beneficial to landowners, developers, and prairie dogs. A pilot program implemented in 2010 will pay landowners to conserve Utah prairie dogs. Conservation on private lands can then be used to mitigate development in Utah prairie dog habitat. The credit exchange program, or other conservation banking opportunities, can help us promote mitigation in a way that provides a net benefit to the species by incorporating private lands and protecting prairie dogs on these lands with perpetual conservation easements (Environmental Defense 2009, p. 1). Again, we believe that we are more likely to gain community support for these land protection mechanisms if we can provide regulatory flexibility for neighboring landowners.

The protection of many conservation lands will occur as mitigation required under section 10(a)(1)(B) incidental take permits and habitat conservation plans (HCPs). The existing Iron County HCP allows the use of mitigation banks to offset the impacts of

development to Utah prairie dogs (Iron County 2006). We are working with the counties and local communities to develop a rangewide HCP to replace the Iron County HCP. It is too early to describe specific mitigation scenarios under a new rangewide HCP, other than to summarize our intent that a new HCP contribute to recovery and simultaneously accommodate urban growth. Conservation banking agreements and conservation easements to conserve Utah prairie dog habitats on private or other non-Federal lands are likely tools that we will use under this new HCP. We believe that local support for any conservation lands set aside for the species in association with HCPs, especially in urban or agricultural areas, will be greatly enhanced by our ability to control the expansion of colonies or dispersal of individual prairie dogs onto neighboring lands.

Many of the enrolled conservation lands will likely be in or adjacent to agricultural production. The goal in establishing conservation lands is to increase prairie dog populations. As such, we believe there will be site-specific needs to control some animals adjacent to the enrolled conservation lands, on neighboring agricultural and other private properties. Our ability to provide sufficient control measures is essential if we are to gain increased interest on the part of private landowners and local communities in the long-term conservation of the Utah prairie dog.

Collectively, the available information indicates it would be prudent to limit where UDWR can permit take to (1) agricultural lands being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is five or more individuals and (2) private properties within 0.8 km (0.5 mi) of Utah prairie dog

conservation land. Limiting the existing take authority to agricultural lands is consistent with UDWR permitting practices under the current special rule. It is in these areas that prairie dogs achieve population densities and abundances that are higher than their counterparts in native semiarid grassland communities. In addition, allowing take on private property near conservation lands would promote landowner and community support for Utah prairie dog that is necessary to achieve recovery on non-Federal lands. The ability to allow some control of prairie dogs is prudent from a biological and social context, and has and will continue to enhance our ability to recover the species. Utah prairie dog populations have remained stable to increasing throughout implementation of the current special rule and past practices, as implemented under the UDWR permit system.

Limiting the Amount and Distribution of Direct Take That Can Be Permitted

The current special rule allows UDWR to permit take for a maximum of 6,000 animals annually between June 1 and December 31, without additional restrictions as long as such take is not having an effect that is inconsistent with Utah prairie dog conservation. According to the literature, fixed harvest rates can lead to extirpation of prairie dog colonies, at least in the case of black-tailed prairie dogs (Reeve and Vosburgh 2006, pp. 123–125). This colony loss will occur more rapidly with larger fixed annual harvests (Reeve and Vosburgh 2006, pp. 123–125). From 1985 through 2009, the total estimated rangewide population (including juveniles) ranged from 23,752 to 54,194 animals (see Table 2). Thus, since 1991, if UDWR had authorized the maximum amount

of allowed take (6,000 animals), it would have represented 11 to 25 percent of the total estimated annual rangewide population (adults and juveniles). The UDWR has never authorized the current rule's maximum allowed take (6,000 animals). Actual reported take has always been considerably below the maximum allowance. Nevertheless, when considered alongside the specific existing data for the Utah prairie dog, the information from available literature that pertains to harvest of prairie dogs in general seems to indicate that additional safeguards would be prudent.

According to the literature, a harvest rate based on a percentage of the known population can help ensure maintenance of a sustainable population, with no risk of extinction (Reeve and Vosburgh 2006, p. 123). This rule proposes to maintain the current special rule's annual upper permitted take limit of 6,000 animals. However, this rule proposes to limit the maximum allowable total permitted take to no more than 10 percent of the estimated rangewide population annually. Take associated with agricultural lands could never exceed 7 percent of the estimated annual rangewide population. The remaining allowable take would be reserved for properties neighboring conservation lands.

In practice, UDWR implementation of the current special rule has followed a fluctuating harvest-rate model. Under the UDWR system, permitted take has averaged 5.7 percent of the total rangewide population estimate (range equals 1.8 to 12.9 percent), with actual take averaging 2.5 percent of the rangewide population (range equals 0.9 to 5.3 percent). With these levels of permitted and reported take, rangewide Utah prairie

dog populations have, to date, remained stable to increasing (see Figure 1). While our proposed limit on allowable take is above the average actual take, UDWR-permitted take associated with agricultural lands has exceeded the proposed standard for agricultural lands (7 percent) seven times since 1985. Thus, this proposal would be more restrictive than past practice in some years and less restrictive than past practice in other years. On the whole, we believe the proposed limit on take would ensure that this rule does not negatively impact the stable-to-increasing Utah prairie dog population trends of the last 25 years. Continuing to allow sufficient take limits will help ensure that private landowners and local communities are willing to work with us on prairie dog conservation efforts.

Furthermore, the proposal would limit within-colony take on agricultural lands to not exceed one-half of a colony's estimated annual productivity (approximately 36 percent of the total estimated colony population). This limit is consistent with UDWR's past practice, which has successfully controlled prairie dogs in site-specific locations without negatively impacting recovery of the species (Day, pers. comm. 2010). In fact, since 1985 we have never verified the loss of a prairie dog colony because of take permitted by UDWR (Day, pers. comm. 2010). Furthermore, according to UDWR personnel, prairie dog counts have remained stable to increasing on sites where permits are repeatedly requested, indicating a self-sustaining population and, sometimes, the expansion of these colonies despite long-term control efforts (Day, pers. comm. 2010). Consequently, we believe the proposed actions are sufficient to address prairie dog control issues and Utah prairie dog recovery simultaneously.

Based on available models, we considered a more restrictive standard. The proposed standard equates to permitted take of up to 36 percent of the total estimated colony population. Modeling for black-tailed and Gunnison prairie dog colonies indicates that harvest rates of 25 percent and less than 20 percent, respectively, are sustainable (Reeve and Vosburgh 2006, p. 123; Colorado Division of Wildlife 2007, pp. 135–137). However, in our view, the Utah prairie dog situation differs from the ones modeled. One major difference is that prairie dog productivity and survivorship, key assumptions for these models, are substantially higher in colonies occurring on irrigated agricultural land than they are on native semiarid grasslands (Collier 1975, pp. 42–43, 53; Crocker-Bedford and Spillet 1981, p. 1, 15–17). These differences suggest that existing models for black-tailed and Gunnison prairie dogs are poor predictors of likely impacts to Utah prairie dogs. Thus, the suggested sustainable harvest rates recommended by these models are not directly applicable to agricultural lands occupied by Utah prairie dogs. Instead, we believe a more reliable indicator of likely future impacts is the 25 years of data from UDWR that indicate that this standard will provide for the conservation of the species (UDWR 2010b, entire). Utah prairie dog populations have remained stable to increasing throughout implementation of the current special rule and past practices, as implemented under the UDWR permit system. Thus, this rule’s proposal to limit within-colony take on agricultural lands to not exceed one-half of a colony’s estimated annual productivity (approximately 36 percent of the total estimated colony population) is consistent with UDWR’s past practice.

We are requesting comments on this issue and may consider a stricter within-colony take limit in a final rule if available data indicate such restrictions would be necessary and advisable to provide for the conservation of the species. We plan to work with the UDWR to parse the available data to assist in further evaluating this issue in time for the final rule. We request data, analysis, or expert opinion which might assist in this evaluation.

As noted above, under this proposal, a maximum of 7 percent of the 10-percent take limit can be allocated to agricultural lands. The remaining take (3 percent or more, depending on the percent of take associated with agricultural lands) would be reserved for UDWR-permitted take on private property within 0.8 km (0.5 mi) of Utah prairie dog conservation lands. This level of take will allow us to address impacts to private lands associated with increased prairie dog distribution and numbers that is likely to result from the rangewide protection of conservation properties. Without such ability, private landowners and local governments would likely not support, and could prevent, much if not all recovery progress on private lands. We have determined that the ability to respond to this need, in a carefully regulated environment, is necessary and advisable for the conservation of the Utah prairie dog.

The extent of take on property adjacent to conservation lands would be further limited to not reduce populations below the baseline estimated total (summer) population size that existed on the adjacent lands prior to the establishment of the conservation property. This provision provides assurances to the landowners that they will not incur

new Federal regulatory restrictions as a result of their habitat improvements and the reintroduction of prairie dogs on a conservation property. Conversely, this provision assists us with the creation of conservation properties by allowing landowners to take prairie dogs down to, but not below, the established baseline population—the property’s baseline is the highest estimated population size on the property during the 5 years prior to establishment of the conservation property. Thus, this provision will provide a conservation benefit for Utah prairie dogs by promoting landowner support for such efforts while not reducing populations below the established baseline. Similar provisions have been incorporated into all previously approved Utah prairie dog safe harbor agreements.

Limiting Methods Allowed to Implement Direct Take

The current special rule does not restrict the method or type of take UDWR can permit. In practice, UDWR has permitted the control of Utah prairie dogs through translocation efforts, trapping intended to lethally remove prairie dogs, and shooting. This proposal would limit methods of take that can be permitted to be consistent with this past practice.

Translocations of Utah prairie dogs are used to increase the numbers of prairie dog colonies in new locations across the species’ range. Translocation of Utah prairie dogs occurs within and between recovery units in part to address the species’ limited levels of genetic diversity (USFWS 1991; Roberts *et al.* 2000). Translocation efforts

include habitat enhancement at selected translocation sites and live trapping of Utah prairie dogs from existing colonies to move them to the selected translocation sites. In short, translocations play an important role in establishing new colonies and facilitating gene flow.

Thus, translocation will be one of the approved methods of taking Utah prairie dogs. Currently, only UDWR performs Utah prairie dog translocations. This proposal would allow all properly trained and permitted individuals to translocate prairie dogs to new colony sites in support of recovery actions, provided these parties comply with current Service-approved guidance. Translocated prairie dogs count toward the take limits established by the existing special rule and will continue to count toward the more restricted take limits proposed in this rule. Translocation activities must comply with current Service approved guidelines (at present, the approved guidelines are the 2006 Recommended Translocation Procedures (USFWS 2010, appendix D)) in order for the provisions of this proposed rule to apply.

While translocation is and shall continue to be the preferred take option, largely due to its contribution to recovery, finite staff resources and a limited availability of suitable translocation sites require that other tools also be available. Thus, this proposal would limit methods of intentional lethal take to forms with a proven success record as demonstrated by past UDWR permitting, including lethal removal through trapping and shooting. Such UDWR-permitted controlled take can be carried out by the landowner or the U.S. Department of Agriculture—Wildlife Services with the landowner's permission.

Use of these methods has occurred over the past 25 years, and rangewide population and individual colonies subject to take have remained stable to increasing (Day, pers. comm. 2010).

This rule proposes to specifically prohibit drowning and poisoning as methods of permissible lethal control. Drowning or poisoning are typically applied across large areas and usually kill large numbers of prairie dogs (Collier 1975, p. 55). These techniques have not been employed by UDWR under the existing rule and are explicitly prohibited by this proposal because they do not allow control agents to target a specific number of prairie dogs or track actual take.

Most studies on the impacts of shooting are related to recreational hunting on black-tailed prairie dog colonies. This information indicates that recreational shooting of other prairie dog species can cause localized effects on a population (Stockrahm 1979, pp. 80–84; Knowles 1988, p. 54; Vosburgh 1996, pp. 13, 15, 16, and 18; Vosburgh and Irby 1998, pp. 366–371; Pauli 2005, p. 1; Reeve and Vosburgh 2006, p. 144), but populations typically rebound thereafter (Knowles 1988, p. 54; Vosburgh 1996, pp. 16, 31; Dullum et al. 2005, p. 843; Pauli 2005, p. 17; Cully and Johnson 2006, pp. 6–7). Extirpations due to recreational shooting, while documented, are rare (Knowles 1988, p. 54).

Impacts to other species of prairie dog from unregulated or minimally regulated recreational shooting, as cited above, are likely to be more pronounced than impacts to

Utah prairie dog UDWR-permitted control, given timing and take restrictions. In terms of timing, the existing special rule restricts UDWR-permitted taking to June 1 to December 31. Shooting from March to May would likely kill pregnant or lactating females so that neither they nor their offspring would reproduce the following year (Knowles 1988, p. 55). If the timing of shooting is restricted to times outside of the breeding and young-rearing (lactating) periods, then impacts can be minimized (Vosburgh and Irby 1998, p. 370; Colorado Division of Wildlife 2007, pp. 135–137). In fact, as described in this and previous rules (49 FR 22333, May 29, 1984; 56 FR 27439–27441, June 14, 1991), controlling prairie dogs when populations are at high densities (i.e., particularly, during the summer months when the aboveground prairie dog population explodes as the juveniles emerge from their burrows) may enhance long-term population growth rates by reducing competition for limited resources and increasing overwinter survival (see “Limiting Where Direct Take Can Be Permitted”). This information is supported by observations that Utah prairie dog colonies are maintained at high levels on properties that have received multiple annual control permits despite over 25 years of permitted control under the current special rule (Day, pers. comm. 2010). According to the literature and on-the-ground experience with Utah prairie dogs, the current regulation regarding timing of permitted Utah prairie dog control, when combined with other take limitations outlined elsewhere in this rule (e.g., a harvest rate based on a percentage of the known population and restrictions on lands where take is allowed), is sufficient to allow long-term stable-to-improving population trends to continue.

Another potential concern is lead poisoning as an indirect impact from shooting. Specifically, shooting may increase the potential for lead poisoning in predators and scavengers consuming shot prairie dogs (Reeve and Vosburgh 2006, p. 154). This risk may extend to prairie dogs, which have occasionally been observed scavenging carcasses (Hoogland 1995, p. 14). Expanding bullets leave an average of 228.4 milligrams (mg) (3.426 grains) of lead in a prairie dog carcass, while nonexpanding bullets averaged 19.8 mg (0.297 grains) of lead (Pauli and Buskirk 2007, p. 103). The amount of lead in a single prairie dog carcass shot with an expanding bullet is potentially sufficient to acutely poison scavengers or predators, and may provide an important portal for lead entering wildlife food chains (Pauli and Buskirk 2007, p. 103). A wide range of sublethal toxic effects is also possible from smaller quantities of lead (Pauli and Buskirk 2007, p. 103).

At the present time, we do not have information to indicate that these theoretical concerns are translating into impacts on Utah prairie dogs. UDWR-permitted take is limited to agricultural lands where prairie dogs are causing physical or economic damage, and private lands adjacent to conservation lands. Therefore, any potential site-specific impacts are limited in scope and likely of minor consequence to the Utah prairie dog. Limitations on the timing of allowed control further limit the scope of potential impacts. Our December 3, 2009, black-tailed prairie dog status review came to a similar conclusion when it found use of expandable lead shot did not pose a substantial risk of lead poisoning to surviving prairie dogs due to scavenging carcasses (74 FR 63343).

Given these findings, this rule does not propose to prohibit certain types of shot (expandable vs. nonexpandable or lead vs. nonlead). However, we are accepting comments on this issue and may consider shot-type restrictions in a final rule if available data indicate such restrictions would be necessary and advisable to provide for the conservation of the species.

Incidental Take from Normal Agricultural Practices

Normal agricultural practices can result in the unlawful incidental take (harm, harass, or kill) of Utah prairie dogs. For example, agricultural equipment can accidentally crush burrows or individual animals. Similarly, burrows also can be flooded by normal irrigation practices and thus made uninhabitable for Utah prairie dogs, or result in incidental mortality. Although the incidental take permit for the Iron County HCP (Iron County 2006, entire) authorizes normal agricultural practices as a form of non-permanent take in Iron County, this incidental take permit does not extend to address these issues for agricultural users across the entire range of the Utah prairie dog.

This rule proposes to exempt incidental take resulting from agricultural practices on legitimately operating agricultural lands. Exempted practices would include plowing to depths not exceeding 46 centimeters (cm) (18 in.), discing, harrowing, irrigating crops, mowing, harvesting, and bailing, as long as the activities are not intended to eradicate Utah prairie dogs. These are traditional practices on this landscape.

While it is possible that some incidental mortality or harassment results from these activities, no available information indicates sizable or noteworthy impacts. Similarly, the available information (namely, annual Utah prairie dog surveys conducted by UDWR rangewide; see Distribution and Abundance, above) does not indicate impacts at the colony or species level. The continued presence of large, persistent colonies on agricultural lands despite ongoing agricultural uses indicates any negative impacts are minor and temporary. Agricultural operations make the land more productive than it would be in its natural state. Provided that careful regulation of direct take continues, this increased productivity appears, based on individual colony persistence and abundance data, to more than offset any temporary negative impacts that are created by the incidental take of individual prairie dogs.

Because such incidental take would not be limited in quantity, it is imperative we build in safeguards to prevent abuse. Therefore, this rule proposes that the above activities would be exempted from incidental take prohibitions on agricultural lands, only in accordance with the previously described Utah Farmland Assessment Act of 1969 (Utah Code Annotated Sections 59-2-501 through 59-2-515). To be considered agricultural land under this proposed rule, lands must meet the following requirements: They must meet the general classification of irrigated, dryland, grazing land, orchard, or meadow; must be capable of producing crops or forage; must be at least 2 contiguous ha (5 contiguous ac) (smaller parcels may qualify where devoted to agriculture use in conjunction with other eligible acreage under identical legal ownership); must be managed in such a way that there is a reasonable expectation of profit; must have been

devoted to agricultural use for at least 2 successive years immediately preceding the year in which application is made; and must meet State average annual (per acre) production requirements.

Limiting the take to such lands ensures only legitimately operating agricultural producers will be able to apply the provisions in this proposed rule. As previously discussed, available information indicates that prairie dog populations on agricultural lands are not negatively affected by ongoing standard agricultural practices. In fact, 25 years of data under the current special rule show stable-to-increasing rangewide prairie dog population trends. Providing the safeguard of specifically defining agricultural lands ensures that we limit the allowable incidental take to specific types of agricultural uses, of which any possible resulting negative impact would be only a minor and temporary accompaniment to the continued long-term benefits to the species.

Effects of These Proposed Rules

The existing special rule (56 FR 27438, June 14, 1991; 50 CFR 17.40(g)) authorizes UDWR to permit take of up to 6,000 animals on private land within the species' range annually. This amendment proposes new restrictions on direct take previously authorized and proposes a new incidental take authorization. Table 3 illustrates the current regulatory restrictions alongside those proposed in this rule.

Table 3. Comparison of Current Special Rule, Current Practice, and Proposed Amendments.

	Current Rule and Practice	Proposed Amendments
Where Direct Take Can Be Permitted	Private lands.	Direct take permitted by the State would be limited to: Agricultural land being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is five or more individuals; and private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation land.
Amount of Rangewide Direct Take Allowed	6,000 animals annually.	The upper permitted take limit of 6,000 animals annually remains unchanged, but would be limited as follows: May not exceed 10 percent of the estimated rangewide population annually; and, on agricultural lands, may not exceed 7 percent of the estimated annual rangewide population annually.
Site-Specific Limits on Amount of Direct Take	No restrictions specified.	On agricultural lands, within-colony take would be limited to one-half of a colony's estimated annual production (approximately 36 percent of estimated total population). On properties neighboring conservation lands, take would be restricted to animals in excess of the baseline population. The baseline population is the highest estimated total (summer) population size on that property during the 5 years prior to establishment of the conservation property.
Timing of Permitted Direct Take	June 1 to December 31.	Unchanged.
Methods Allowed to Implement Direct Take	No restrictions specified.	Direct take would be limited to activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance, trapping intended to lethally remove prairie dogs, and shooting. Actions intended to drown or poison prairie dogs would be prohibited.
Service Ability to Further Restrict Direct Take	The Service may immediately prohibit or restrict such taking as appropriate for the conservation of the species.	Unchanged.

Incidental Take	Not authorized.	Utah prairie dogs may be taken when take is incidental to otherwise legal activities associated with standard agricultural practices (see rule for specifics).
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First, this proposal would restrict where direct take can be permitted by the UDWR to: (1) Agricultural land being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is five or more individuals; and (2) on private property within 0.8 km (0.5 mi) of Utah prairie dog conservation land.

Second, this proposal would limit the amount and distribution of direct take that can be permitted by UDWR. Total take would not exceed 10 percent of the estimated annual rangewide population, with an upper permitted take limit of 6,000 animals. On agricultural lands, permitted take would be limited to 7 percent of the estimated annual rangewide population and within colony take would be limited to one-half of a colony's estimated annual productivity. On properties neighboring conservation lands, the remaining take (3 percent of the estimated annual rangewide population or more, depending on the amount permitted on agricultural lands) would be restricted to animals in excess of the baseline population.

Third, this proposal would limit methods of take that can be permitted by the UDWR to include: (1) Activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance; (2) trapping intended to lethally remove prairie dogs; and (3) shooting. Regarding shooting, we are accepting comments on whether to limit the type of shot allowed.

These limitations on direct take are largely consistent with past UDWR practice. Slight modifications are proposed where implementation data indicate modifications are warranted.

Additionally, this proposal would exempt standard agricultural practices from incidental take prohibitions on private property meeting the Utah Farmland Assessment Act of 1969 (Utah Code Annotated Sections 59–2–501 through 59–2–515) definition of agricultural lands. These mortalities are in addition to the direct or intentional take described above. Allowable practices would include plowing to depths that do not exceed 46 cm (18 in.), discing, harrowing, irrigating crops, mowing, harvesting, and bailing, as long as the activities are not intended to eradicate Utah prairie dogs.

Finally, the Service maintains the right, as laid out under the existing special rule, to immediately prohibit or restrict UDWR-permitted taking. Restrictions on permitted taking could be implemented without additional rulemaking, as appropriate for the conservation of the species, if we receive evidence that taking pursuant to the special rule is having an effect that is inconsistent with the conservation of the Utah prairie dog.

These proposed new restrictions on direct take and the proposed new incidental take provision will support the conservation of the species while still providing relief and conservation incentives to private landowners. On the whole, we believe the proposed rule, if finalized, would help maintain the stable-to-increasing (more likely increasing)

long-term population trends we have seen over the last 25 years, and facilitate the recovery of the Utah prairie dog.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) Whether the rule will create inconsistencies with other Federal agencies' actions;

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever

an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). Based on the information that is available to us at this time, we certify that this regulation will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

Utah prairie dogs have been Federally listed under the ESA since the early 1970s (38 FR 14678, June 4, 1973; 39 FR 1158, January 4, 1974). A 4(d) special rule has been in place since 1984 that provides protections deemed necessary and advisable to provide for the conservation of the species (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991). These special regulations allow limited take of Utah prairie dogs on private land from June 1 through December 31, as permitted by UDWR (50 CFR 17.40(g)). While this proposed rule places limits on the current special rule, the proposed changes are largely consistent with current UDWR permitting practices. Because this proposal largely institutionalizes current practices, there should be little or no increased costs

associated with this proposed regulation compared to the past similar special rules that were in effect for the last several decades.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that if promulgated, the proposed amendment would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(a) If adopted, this proposal will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or [T]ribal governments,” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal

program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

This proposed rule would not impose a legally binding duty on non-Federal Government entities or private parties. Instead, this proposed amendment to the existing special rule proposes to establish take authorizations and limitations deemed necessary and advisable to provide for the conservation of the Utah prairie dog. Application of the provisions within this proposed rule, as limited by existing regulations and this proposed amendment, is optional.

(b) We do not believe that this rule would significantly or uniquely affect small governments. The State of Utah originally requested measures such as this proposed regulation to assist with reducing conflicts between Utah prairie dogs and local landowners on agricultural lands (49 FR 22331, May 29, 1984). In addition, the UDWR actively assists with implementation of the current special rule, and would do the same under this proposed regulation, through a permitting system. Thus, no intrusion on State

policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the States and the Federal government. Furthermore, the proposed limitations on where permitted take can occur, the amount of take that can be permitted, and methods of take that can be permitted, are largely consistent with current UDWR practices. Therefore, the rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act is not required.

Takings

This action is exempt from the requirements of E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights). According to section VI (D) (3) of the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, regulations allowing the take of wildlife issued under the ESA fall under a categorical exemption. This proposed amendment pertains to regulation of take (defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct") deemed necessary and advisable to provide for the conservation of the Utah prairie dog. Thus, this exemption applies to this action.

Regardless, we do not believe this action would pose significant takings implications. This rule will substantially advance a legitimate government interest (conservation and recovery of listed species). However, it will not deny property owners economically viable use of their land, and will not present a bar to all reasonable and expected beneficial use of private property. We believe the existing special regulation and the proposed amendments provide substantial flexibility to our partners while still providing for the conservation of the Utah prairie dog. Should additional take provisions be required, an applicant has the option to develop a Habitat Conservation Plan and request an incidental take permit (see Section 10(a)(1)(B) of the ESA). This approach would allow permit holders to proceed with an activity that is legal in all other respects, but that results in the "incidental" take of a listed species.

We have concluded that this proposed action would not result in any takings of private property. Should any takings implications associated with the proposed amendment be realized, they will likely be insignificant.

Federalism

In accordance with E.O. 13132 (Federalism), this proposed rule would not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed amendment with, appropriate State resource agencies in Utah. The State of Utah originally requested

measures such as this proposed regulation to assist with reducing conflicts between Utah prairie dogs and local landowners on agricultural lands (49 FR 22331, May 29, 1984). In addition, the UDWR actively assists with implementation of the current special rule, and would do the same under this proposed regulation, through a permitting system. Thus, no intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change, and fiscal capacity will not be substantially directly affected. The special rule operates and, if amended, would continue to operate to maintain the existing relationship between the State and the Federal government. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed this amendment to the existing special rule for the Utah prairie dog in accordance with the provisions of the ESA. Under section 4(d) of the ESA, the Secretary may extend to a threatened species those protections provided to an endangered species as deemed necessary and advisable to provide for the conservation of the species. The amendments proposed here satisfy this standard.

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that National Environmental Policy Act (NEPA) documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA. The Service subsequently expanded this determination to section 4(d) rules. A section 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. It is our view that NEPA procedures unnecessarily overlay NEPA's own matrix upon the ESA section 4 decisionmaking process. For example, the opportunity for public comment—one of the goals of NEPA—is already provided through section 4 rulemaking procedures. This determination was upheld in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, No.04-04324 (N.D. Cal. 2005).

However, out of an abundance of caution, we intend to comply with the provisions of NEPA for this rulemaking. Thus, we are analyzing the impact of this proposed modification to the existing special rule and will determine if there are any new significant impacts or effects caused by this proposed rule. A draft environmental assessment will be prepared on this proposed action, and will be available for public inspection and comments when completed. All appropriate NEPA documents will be finalized before this rule is finalized.

Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers

of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. Therefore, we intend to coordinate with affected Tribes within the range of the Utah prairie dog. We will fully consider all of the comments on the proposed special regulations that are submitted by Tribes and Tribal members during the public comment period, and we will attempt to address those concerns, new data, and new information where appropriate.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect this action to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this rulemaking is available upon request from our Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

For the reasons stated in the preamble, the Service proposes to amend part 17, 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 § 17.40 by revising paragraphs (g)(1) and (g)(3) and adding paragraphs (g)(4) and (g)(5) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(g) * * *

(1) Except as noted in paragraphs (g)(2) through (g)(4) of this section, all prohibitions of § 17.31(a) and (b) and exemptions of § 17.32 apply to the Utah prairie dog.

* * * * *

(3) *Direct or intentional take permitted by the Utah Division of Wildlife Resources.* Methods for controlling Utah prairie dogs are limited to activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance, trapping intended for lethal removal, and shooting. Actions intended to drown or poison Utah prairie dogs are prohibited. Under the provisions of

paragraph (g)(2) of this section and permitted by the Utah Division of Wildlife Resources, direct or intentional take is limited to agricultural land and private property near conservation land as follows:

(i) *Agricultural land.* (A) Take may be permitted only on agricultural land being physically or economically affected by Utah prairie dogs, and only when the spring count on the agricultural lands is five or more individuals; and

(B) The land must:

(1) Meet the general classification of irrigated, dryland, grazing land, orchard, or meadow;

(2) Be capable of producing crops or forage;

(3) Be at least 2 contiguous ha (5 contiguous ac) in area (smaller parcels may qualify where devoted to agricultural use in conjunction with other eligible acreage under identical legal ownership);

(4) Be managed in such a way that there is a reasonable expectation of profit;

(5) Have been devoted to agricultural use for at least 2 successive years immediately preceding the year in which application is made; and

(6) Meet State average annual (per-acre) production requirements.

(ii) *Private property near conservation land.* (A) Take may be permitted on private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation land.

(B) Conservation lands are defined as non-federal areas set aside for the preservation of Utah prairie dogs and are managed specifically or primarily toward that purpose. Conservation lands may include, but are not limited to, properties set aside as conservation banks, fee- title purchased properties, properties under conservation

easements, and properties subject to a safe harbor agreement (see §17.22.). Conservation lands do not include federal lands.

(iii) *Permitted take on agricultural lands and private property near conservation land.* (A) The Utah Division of Wildlife Resources will ensure that permitted take does not exceed 10 percent of the estimated rangewide population annually.

(B) On agricultural lands, the Utah Division of Wildlife Resources will limit permitted take to 7 percent of the estimated annual rangewide population and will limit within-colony take to one-half of a colony's estimated annual production.

(C) In setting take limits on properties neighboring conservation lands, the Utah Division of Wildlife Resources will consider the amount of take that occurs on agricultural lands. The State will restrict the remaining permitted take (the amount that would bring the total take up to 10 percent of the estimated annual rangewide population) on properties neighboring conservation lands to animals in excess of the baseline population. The baseline population of neighboring lands is the highest estimated population on that property during the 5 years prior to establishment of the conservation property.

(D) Translocated Utah prairie dogs will count toward the take limits in paragraphs (g)(3)(iii)(B) and (g)(3)(iii)(C) of this section.

(4) *Incidental take.* Utah prairie dogs may be taken when take is incidental to otherwise-legal activities associated with standard agricultural practices on agricultural lands. These mortalities are in addition to the direct or intentional take provisions in paragraphs (g)(2) and (g)(3) of this section. Acceptable practices include plowing to depths that do not exceed 46 cm (18 in.), discing, harrowing, irrigating crops, mowing,

harvesting, and bailing, as long as the activities are not intended to eradicate Utah prairie dogs.

(5) If the Service receives evidence that take pursuant to paragraphs (g)(2) through (g)(4) of this section is having an effect that is inconsistent with the conservation of the Utah prairie dog, the Service may immediately prohibit or restrict such take as appropriate for the conservation of the species.

* * * * *

Dated: May 18, 2011

Signed: Jane Lyder

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310–55-P

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