Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

[Docket No. OST–96–1505]

RIN 2105–AB39

Withdrawal of Proposed Rulemaking Action; Statement of Enforcement Policy on Rebating

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws an Office of the Secretary (OST) notice of proposed rulemaking (NPRM), which has been superseded by various changes that make the proposed action no longer necessary.

FOR FURTHER INFORMATION CONTACT: Jennifer Abdul-Wali, Office of the General Counsel, 400 Seventh Street, SW., Washington, DC 20590; (202) 366–4723; fax: (202) 366–9313; E-mail: *Jennifer.Abdul-Wali@ost.dot.gov.*

ADDRESSES: You may obtain a copy of this document from the DOT public docket through the Internet at *http://dms.dot.gov,* docket number OST–96–1505. If you do not have access to the Internet, you may obtain a copy of the notice by United States mail from the Docket Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. You must identify docket number OST–02–13179 and request a copy of the document entitled ''Withdrawal of Proposed Rulemaking Actions.''

You may also review the public docket in person in the Docket office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket office is on the plaza level of the Department of Transportation. Additionally, you can also get a copy of this document from the **Federal Register** Web site at *http://www.gpo.gov.*

SUPPLEMENTARY INFORMATION: Airlines are required by 49 U.S.C. § 41510, formerly section 403 of the Federal Aviation Act, to file tariffs with the Department that state their passenger fares, cargo rates, and associated charges in foreign air transportation. Under these requirements, it is unlawful for a carrier or ticket agent to charge a purchaser of foreign air transportation any amount other than that stated in their tariff. This prohibition also applies to cargo agents, as well as any other intermediaries providing for the carriage of passengers or cargo. The prohibition applies not only to overcharges, but also to undercharges, including what are commonly known as rebates. For example, a literal reading of the statute would prohibit a travel agent from sharing its commission on international tickets with the purchaser.

Subsequent to the enactment of Section 41510, the Airline Deregulation Act of 1978 was enacted. It resulted in direct competition among air carriers instead of governmental determination of fares and services. Following deregulation, the Department and its predecessor, the Civil Aeronautics Board, exercised prosecutorial discretion in pursuing matters relating to the rebating requirements of the Act. The Department's goals were to encourage competition and encourage low fares for consumers. As a way of reaching these goals, the Department asserted its discretion by pursuing sanctions for rebating only in instances of fraud, invidious discrimination, or conduct that would violate the antitrust laws.

On October 21, 1988, the Department issued an NPRM entitled ''Statement of Enforcement Policy on Rebating'' (OST Docket No. 45884; 53 FR 41353). The NPRM was in response to concerns raised by travel agents concerning the rebating of international airline prices. The NPRM proposed to establish an enforcement policy concerning the rebating of international airline prices.

The Department received various comments in response to the NPRM. Travel agents complained that, by obeying the law, they were losing business to competitors who ignored it. Other nations said that the Department should enforce the prohibition against rebating more rigorously.

Since publication of the NPRM, many conditions in the airline industry related to rebating have changed. The United States has increasingly negotiated with success for liberal pricing regimes in our bilateral agreements with foreign nations. As a result, in July of 1999, the Department adopted 14 CFR part 293, International Passenger Transportation, a rule that effectively exempts all United States and most foreign carriers (1) from filing any tariffs for travel to and from countries with which the United States has agreements in force that contain double-disapproval pricing rules and (2) from filing tariffs for all but normal economy fares for travel to and from countries without double-disapproval pricing regimes that in practice give carriers unfettered pricing discretion. Additionally, current practice for many air carriers is not to pay a base commission for transportation originating in the United States.

For the reasons outlined above, the Department believes that the proposed enforcement policy is no longer necessary and is withdrawing the 1988 NPRM.

Issued in Washington, DC on November 26, 2002.

Norman Y. Mineta,

Secretary of Transportation.

[FR Doc. 02–30851 Filed 12–4–02; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI45

Endangered and Threatened Wildlife and Plants; Threatened Status and Special Regulation for the Mountain Plover

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of new information and reopening of the comment period.

SUMMARY: We, the Fish and Wildlife Service (Service), are reopening the comment period for our proposal to list the mountain plover (*Charadrius montanus*) as a threatened species. The proposed listing action was published in the **Federal Register** on February 16, 1999 (64 FR 7587), and new information

has become available that is pertinent to the species' biology and the listing factors we are required to consider under the Endangered Species Act of 1973, as amended (Act). We are reopening the comment period to share new information we have acquired and provide the public a new opportunity to provide comments on this listing proposal.

We are also proposing a special rule under the authority of section 4(d) of the Act, containing the prohibitions necessary to provide for the conservation of the mountain plover. The prohibitions we propose do not include a prohibition against the take of mountain plover during certain routine farming practices until December 31, 2004, in Colorado, Kansas, Nebraska, Oklahoma, and Laramie and Goshen Counties, Wyoming. During this period, research will be conducted to determine the impact of farming practices on cultivated fields to mountain plover nesting success within the southern portion of the breeding range. The finalization of this rule is contingent upon a final listing of the mountain plover as threatened.

DATES: We must receive comments from all interested parties by February 3, 2003. We must receive requests for public hearings by January 21, 2003.

ADDRESSES: Send comments and materials concerning this proposal to the Western Colorado Field Supervisor, U.S. Fish and Wildlife Service, 764 Horizon Drive, Building B, Grand Junction, CO 81506–3946. You also may e-mail your comments to *al_pfister@fws.gov.* We will make comments and materials we receive available for public inspection, by appointment, during normal business hours at the above address. You also may obtain a copy of the 1999 proposed rule to list the mountain plover (64 FR 7587) from this office, or access it at our Web site at *http://www.r6.fws.gov/mtnplover/.*

FOR FURTHER INFORMATION CONTACT: Robert Leachman, at the above address, telephone 970–243–2778, facsimile 970–245–6933, or e-mail *robert_leachman@fws.gov.* A copy of this notification and other information on the mountain plover can be found on the World Wide Web at *http://www.r6.fws.gov/mtnplover/.*

SUPPLEMENTARY INFORMATION:

Background

This supplementary proposed rule abbreviates the background, life history, and listing factor discussions published in the 1999 proposed rule. Most of the information we reported in 1999 remains substantially valid. New information that represents a significant addition to the mountain plover biology, abundance, and distribution as previously reported is included in this document. We also report new information relating to threats or existing conservation actions that significantly influence evaluation of the listing factors. We have not reported all new information that only affirms previously reported findings, nor do we cite all new information that represents a continuation of ongoing research cited in the 1999 proposed rule that has not materially changed the knowledge of mountain plover biology, distribution, abundance, or conservation needs. We have revised the References Cited to include the new information we have reviewed since 1999. Our References Cited document is available on request (see **ADDRESSES**). We have retained the organization of the 1999 proposed rule in this document to make review and comparison more efficient. Briefly, we have summarized the text of some sections of the 1999 proposed rule followed by pertinent new information, or simply provided a statement for other sections that new information did not materially change findings reported in the 1999 proposed rule. In this supplemental proposed rule document, we also propose to amend the table at 50 CFR 17.11(h) to reflect the proposed special rule for mountain plover.

The mountain plover is similar in size and appearance to a killdeer (*Charadrius vociferus*), eats primarily insects, and is associated with short grass and shrub-steppe landscapes throughout its breeding and wintering range. It is commonly reported on heavily grazed sites, prairie dog colonies, and some cultivated fields. It is known to occur from Canada south across the high plains to Mexico. During the breeding season (late March through August), plovers can be found in Montana, Wyoming, and Colorado, and to a lesser extent in Utah, New Mexico, Arizona, Kansas, Nebraska, Oklahoma, and Texas. Nesting also has been reported in Canada and Mexico. During winter, plovers can be found primarily in the Central Valley and Imperial Valley of California. A few birds winter in Arizona, Texas, and Mexico.

New information now confirms a few breeding mountain plovers in Mexico (Knopf and Rupert 1999a; F. Knopf, U.S. Geological Survey-Biological Resources Division, in litt. 1999), and successful breeding on some cultivated lands in Colorado (T. McCoy, Colorado Natural Heritage Foundation, in litt. 2001). We also have new information describing the population trend of the mountain plover relative to other grassland endemics, based on new Breeding Bird Survey (BBS) data. The BBS information is provided later in this document.

Habitat Characteristics

Short vegetation, bare ground, and a flat topography are recognized as habitat-defining characteristics of the mountain plover, at both breeding and wintering locales. Suitable breeding and wintering habitat characteristics can be provided by naturally occurring physiographic features, grazing by native mammalian herbivores (*e.g.*, prairie dogs) or domestic livestock (*e.g.*, sheep), or some agricultural practices. We now report that mountain plovers also are found on white-tailed (*Cynomys leucurus*) and Gunnison's (*Cynomys gunnisoni*) prairie dog colonies (P. Deibert, Service, pers. comm. 2002; Hawks Aloft, Inc. 2001b). There also is new literature further describing a strong association of mountain plovers with prairie dogs (Dinsmore 2001, Kotliar *et al.* 1999). We also have learned that due to the absence of naturally vegetated suitable habitat, irrigated farmlands and grazed alfalfa fields have become the predominant winter habitat for mountain plovers in the Imperial Valley of California (Wunder and Knopf In draft). While in the Imperial Valley, plovers move onto fields for short periods following harvest, especially where the fields are turned over, burned, or grazed by sheep. Insect availability, furrow depth, size of dirt clods, and the vegetation of contiguous land parcels are believed to influence the suitability of individual cultivated fields (E. Marquis-Brong in litt. 1999a, F. Knopf pers. comm. 2000). Therefore, while cultivated lands are abundant throughout the Central and Imperial Valleys of California, not all of them are suitable wintering habitat.

Life History

We described the mountain plover's life history in 1999 by addressing migration periods, nesting chronology, and common habitat features. Briefly, the mountain plover arrives on its breeding grounds from late March to late April and typically lays three eggs in a shallow depression. Mountain plover nests are loosely congregated, suggesting some colonialization. Chicks begin to fledge in June, and fall migration to winter habitat is well under way in August. Important new information includes a study completed in Montana predicting that 1.9 years is the mean lifespan of a mountain plover and that the observed longevity record is 8 years (Dinsmore 2001). This research also documented that 55

percent of nests are incubated by males and 45 percent by females (Dinsmore 2001).

Breeding Distribution and Abundance

In 1999, we presented our understanding of the historic and current distribution and abundance of mountain plovers for individual States within their breeding range and for wintering habitat locations in California, Arizona, and Mexico. Briefly, most mountain plovers breed in Montana, Wyoming, and Colorado, and most mountain plovers spend about 5 months on winter habitat in California. New information now shows that the Pawnee National Grassland (Pawnee) population in northeast Colorado has significantly declined since 1991, with fewer than 100 individuals now present at this location (Knopf pers. comm. 2002). More mountain plovers than previously estimated now appear to be in South Park, Park County, Colorado (Granau and Wunder 2001). We provide the following summaries and new information for breeding and wintering locations:

Colorado: We have no better estimate of breeding mountain plover numbers in Colorado than the estimate of about 7,000 individuals provided in the 1999 proposed rule. However, we believe it is important to note some additional information regarding Weld County, Colorado, which was reported in 1999 to be a historic breeding stronghold for the mountain plover. In 1991, Knopf estimated a population of 1,280 mountain plovers on the Pawnee. As we reported in 1999, the Pawnee has experienced several exceptionally wet, cold weather events through June of each year since 1995, which has significantly changed the vegetation. These vegetation conditions continued through 1996 and 1997. The number of successfully nesting mountain plovers counted on transects monitored on the Pawnee declined from 77 in 1990 to 2 in 2001 (F. Knopf in litt. 2001). Knopf (pers. comm. 2002) currently estimates a population of less than 100 individuals on the Pawnee. Consequently, few adult birds and very little reproduction has been observed through 2002. Preliminary results on the Pawnee from 2002, a drought year, indicate success at 69 percent of 13 nests on the native prairie. Fifty nests on experimental burns were 54 percent successful (F. Knopf pers. comm. 2002).

As we reported in 1999, mountain plover research has continued in South Park, Park County, with the most current population estimate there being 1,500 to 2,000 breeding adults (Granau and Wunder 2001). In 2002, 68 nests were identified, with a nest success of 90 percent (F. Knopf pers. comm. 2002).

There also is new information about breeding mountain plovers on short grass prairie pastures and cultivated lands. Nesting habitat was modified by burning, and successful nesting by mountain plovers was documented on burned pastures on the Comanche National Grassland in Baca County in southeastern Colorado in 1999 (Svingen and Giesen 1999, K. Giesen in litt. 1999) and in South Park for several years (Granau and Wunder 2001). As we reported in 1999, mountain plovers are nesting on cultivated fields in southeast Colorado and adjacent States. To further address the implications of cultivated land to mountain plover conservation, new research was initiated in five eastern Colorado counties to better describe nest success and productivity on cultivated lands (T. McCoy in litt. 2001). In 2001, 44 nests were located on cultivated croplands in these counties, but reliable estimates of nest success, productivity, and population recruitment will require additional years of research (T. McCoy in litt. 2001).

During 2002, researchers continued to monitor the breeding activity throughout eastern Colorado. The length of the breeding season varied between 2001 and 2002, with the 2001 season ending in July and the 2002 season continuing into August. The longer 2002 season was attributable to extreme drought conditions in the eastern half of the State. Nest success did not vary substantially between cropland and rangeland in 2001 but did show slightly higher nest success on rangeland in 2002. Predation was the major cause of nest failure, except in 2001, when agricultural practices destroyed more nests on croplands. Of rangeland nests, nest success was slightly higher on grassland with prairie dog colonies than on grasslands without prairie dog colonies (F. Knopf pers. comm. 2002). The researchers suggest that the direction in 2003: (1) Focus studies more precisely on locales where plovers nest in higher densities to maximize sample sizes, (2) rigorously test the emerging pattern of comparable nest success between rangeland and croplands, and (3) test the predictions that plover densities and nest success are highest on prairie-dog towns (F. Knopf pers. comm. 2002).

There is no comprehensive science to precisely document whether the entire Colorado population is declining, stable, or increasing. Data collected from nesting sites in Colorado are not comparable to make such a cumulative State-wide trend assessment. However, credible information documents that nearly all mountain plovers have abandoned the Pawnee, a historically recognized breeding stronghold. Graul and Webster (1976) estimated that there may have been as many as 21,000 mountain plovers on the Pawnee in the early 1970s; Knopf (1991) estimated about 1,280 individuals in 1991, while presently the Pawnee population is less than 100 individuals (F. Knopf pers. comm. 2002).

Montana: Important new information is available from Montana. Mountain plovers no longer occur in Carbon, Teton, and Toole Counties (L. Hanebury pers. comm. 2002). Knowles and Knowles (1996) estimated fewer than 2,000 mountain plovers in Phillips and Blaine Counties, and fewer than 800 individuals at the other 8 occupied locations in the State. Following 6 years of research, Dinsmore (2001) estimated a population of 95 to 180 individual breeding mountain plovers in his study area in southern Phillips County, and he believes it is unlikely that there are more than 700 mountain plovers throughout all of Phillips and Blaine Counties. Dinsmore (2001) now concludes that, while the current mountain plover abundance in south Phillips County is stable, it is not known whether the number of individuals can persist in the long term, and their abundance is entirely dependent on the viability of the resident population of black-tailed prairie dogs. He also believes the estimate of 800 mountain plovers in other areas of Montana made by Knowles and Knowles (1996) is reasonable. Therefore, we believe the best information currently available indicates the total population in Montana is less than 1,500 mountain plovers (Knowles and Knowles 1996, Knowles and Knowles 1998, Dinsmore 2001, Dinsmore pers. comm. 2002). Although the Montana Department of Game, Fish, and Parks provided no data regarding mountain plover distribution and abundance in response to the 1999 proposed rule, department officials stated that, while the mountain plover population may fluctuate, it is still substantial (P. Graham, Montana Game, Fish and Parks, in litt. 1999).

Wyoming: As we reported in 1999, the mountain plover is classified as common in Wyoming, with breeding known or suspected in 20 of 28 latitude/longitude blocks and an estimated population of 1,500 individuals. Additional inventories have been conducted in Wyoming that confirm the current presence of mountain plovers at many of the previously reported locations. For example, surveys

conducted in the Powder River Basin in 2001 in preparation for the Wyodak Coal Bed Methane project found 15 mountain plovers (Good *et al.* 2001, Keinath and Eble 2001), and surveys conducted on the Thunder Basin National Grassland found about 20 adults in 2001 (P. Deibert, Service, pers. comm. 2002). Knopf (in litt. 2001) reported that mountain plovers may be more common than previously believed, particularly in Carbon County. From 1999 and 2000, totals of 159 and 105 mountain plover adults were reported from Sweetwater and Carbon Counties respectively, with many fewer individuals reported from Albany, Bighorn, Fremont, Lincoln, Natrona, Park, Sublette, and Washakie Counties (P. Deibert in litt. 2002). This is the best available population estimate for Wyoming.

New Mexico: The 1999 proposed rule reported that most current mountain plover records were from northern New Mexico locations. Additional surveys have confirmed mountain plovers in the locations previously reported (Reeves 1998, 1999, 2000), which included 11 plovers on Navajo Nation Tribal lands. Surveys conducted by Hawks Aloft (2001a, b) found mountain plovers in previously unsurveyed areas of Cibola and Sandoval Counties, and in Taos County. Five of the confirmed breeding sites in Taos County were on Gunnison's prairie dog towns (Hawks Aloft 2001b). Hawks Aloft (2001b) concluded that there is potential for large numbers of mountain plovers in Taos County.

Nebraska: In 2002, the Rocky Mountain Bird Observatory located 64 sites along 320 km (200 mi) of roads and private holdings with 116 adults (F. Knopf pers. comm. 2002). The Observatory estimates that there are approximately 100 nests in the area, and upgrades the estimate of the Nebraska mountain plover population estimate to probably 200 birds.

Other Breeding Areas

Mountain plover breeding was confirmed on a Mexican prairie dog town in 1999, in Nuevo Leon, Mexico (F. Knopf in litt. 1999). We have no substantive additional information to provide regarding other breeding areas reported in the 1999 proposed rule.

Winter Distribution

The 1999 proposed rule provides detailed information regarding the distribution and abundance of mountain plovers on their winter habitat. We concluded that mountain plovers are most numerous in the Central and Imperial Valleys of California. All new information we have reviewed confirms the findings in the 1999 proposed rule. Some of the additional inventories include Wunder and Knopf (in draft) reporting 4,037 mountain plovers in the Imperial Valley in 2001, and a total of 3,421 mountain plovers found during a 9-day survey in the Imperial Valley beginning in late January 2002 (S. Myers, AMEC-Earth and Environmental, pers. comm. 2002).

Total Mountain Plover Population Abundance and Trend Estimates

As previously reported, Knopf (1996b) estimated the North American mountain plover population to be between 8,000 and 10,000 birds. At the time of his estimate, only a 1994 count from California was available. Applying the same assumptions using the more recent winter counts would yield a similar estimate (Hunting *et al.* (in press), Shuford *et al.* 2000, Wunder and Knopf (in draft), S. Myers pers. comm. 2002). We are not aware of any other total population estimates. It now appears that more mountain plovers are wintering in the Imperial Valley than the Central Valley, which is probably the result of habitat loss at other California historic wintering areas (Wunder and Knopf (in draft)). Edson and Hunting (1999) reviewed recent search efforts and records for the Central Valley in California, and classified the mountain plover as rare and local, exceedingly rare, or accidental, for all locations, but admitted that the difficulty in locating mountain plovers may partially contribute to the lack of records.

New research now reports that mountain plover numbers at two historically recognized breeding strongholds (*i.e.*, Phillips County, Montana, and the Pawnee in Colorado) are now small or nearly absent (Dinsmore 2001, F. Knopf pers. comm 2002).

Breeding on Cultivated Fields

The mountain plover is attracted to manmade landscapes (*e.g.*, sod farms and cultivated fields) that mimic their natural habitat associations, or sites with little vegetative cover (*e.g.*, other agricultural lands and alkali flats). Land management practices on cultivated fields may include periods when fields are fallow, idle, or barren. If these fields remain fallow, idle, or barren during April and May, mountain plovers may choose these fields for nesting. Agricultural fields with residual cover less than 10 centimeters (4 inches) tall from March through May also may be attractive to plovers. Spring tilling practices to plant crops or control weeds may then destroy mountain plover nests and eggs (Tim McCoy, Colorado Natural Heritage Program, in litt. 2001; Shackford and Leslie 1995; Shackford *et al.* 1999; Knopf 1996; Knopf and Rupert 1999). Because adults are able to escape from farm machinery, adult survival is considered to be high. While mountain plovers may re-nest on these fields, re-nesting by birds is rarely as successful as first attempts, and mountain plovers will likely abandon nests when the crop grows too tall (Knopf 1996).

Breeding adults, nests, and chicks have been observed on cultivated fields in Colorado, Kansas, Nebraska, Oklahoma, and Wyoming (T. McCoy in litt. 2001, Shackford and Leslie 1995, Shackford *et al.* 1999). Between 1986 and 1995, Shackford *et al.* (1999) inventoried cultivated fields in 8 States within the breeding range of the mountain plover; 97 percent of all nests observed were in Colorado, Kansas, Oklahoma, and southeastern Wyoming. During this inventory, 52 nests were found in these 4 States, with 50 percent of the nests on fallow or bare fields, 23 percent on wheat fields, and the remainder on milo, forb, and corn fields. Although mountain plovers are nesting on cultivated fields in eastern Colorado and adjacent States, a study (Shackford *et al.* 1999) of 46 nests on cultivated fields found that 31 nests failed. The fate of the remaining 15 nests was undetermined. Of the 31 failed nests, 22 nests (48 percent of total) were destroyed by farm machinery. None of the nesting attempts could be documented as successful.

As a result of the inventory, Shackford *et al.* (1999) concluded that fewer birds nest in cultivated fields in northern latitudes because cropland acreage is relatively sparse in Montana and all but the southeastern corner of Wyoming, there is a shorter growing period, and spring wheat planted in northern latitudes is disturbed more frequently than the winter wheat planted in the south. They also noted that the short intervals between disturbances for spring wheat in the north would not normally allow enough time for breeding, nesting, and rearing young. Therefore, it appears that little risk to mountain plovers is posed by farming practices in Montana or Wyoming (except southeastern Wyoming), or by farming practices for dryland winter wheat or irrigated crops at other locations (J. Shackford pers. comm. 1999, F. Knopf pers. comm. 1999).

Previous Federal Action

We addressed the previous Federal actions in the 1999 proposed rule.

Higher priority listing actions precluded listing work on the mountain plover during Fiscal Years 2000 and 2001. On October 16, 2001, Earthjustice (representing the Biodiversity Legal Foundation, Biodiversity Associates, and Center for Native Ecosystems) submitted a 60-day Notice of Intent to sue to the Secretary of the Department of the Interior and the Fish and Wildlife Service Regional Director for failure to meet listing deadlines for the mountain plover, as required by section 4(b)(6)(A) of the Act. The Service responded to Earthjustice on December 21, 2001, with a commitment to reopen the comment period on the listing proposal by September 30, 2002. This date was subsequently extended to November 30, 2002.

In the February 16, 1999, proposed rule (64 FR 7587) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. The comment period for the proposed rule was scheduled to end on April 19, 1999, but was extended to June 21, 1999 (64 FR 19108) to ensure all interested parties had an opportunity to submit comments on the proposal. Appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties were contacted and requested to comment. Several newspaper articles appeared in Montana, Wyoming, and Colorado following our distribution of background materials to print media. The Service also solicited the expert opinions of three independent specialists regarding pertinent scientific or commercial data and issues relating to the biological and ecological information for the mountain plover. We received a total of 194 written comments on the 1999 proposed rule. We have reviewed each of these comments and will consider them in developing a final rule.

Public hearings were requested in Nebraska by the U.S. Forest Service; in Montana by the Phillips County Prairie Ecosystem Action Council, the Phillips County Board of County Commissioners, and Erin Crowder; and in Wyoming by the Park County Board of County Commissioners, Wheatland Irrigation District, Wyoming Farm Bureau Federation, Laramie County Conservation District, Platte County Resource District, Antelope Grange, Mountain Valley Livestock, Inc., Ultra Resources, and John and Phyllis Thalken.

Public hearings were held at the following locations and dates:

- Billings, Montana, May 26, 1999.
- Malta, Montana, May 25, 1999.
- Greeley, Colorado, May 25, 1999.
- Lamar, Colorado, May 26, 1999.
- Casper, Wyoming, June 2, 1999.

Notifications of these public hearings were advertised in the following newspapers:

- Greeley Tribune, Greeley, Colorado, May 5, 1999.
- Lamar Daily News, Lamar, Colorado, May 6, 1999.
- Pueblo Chieftain, Pueblo, Colorado, May 6, 1999.
- Billings Gazette, Billings, Montana, May 7, 1999.
- Bozeman Daily Chronicle, Bozeman, Montana, May 7, 1999.
- Great Falls Tribune, Great Falls, Montana, May 7, 1999.
- Independent Record, Helena, Montana, May 7, 1999.
- Lewistown News Argus, Lewistown, Montana, May 5, 1999.
- Phillips County News, Malta, Montana, May 5, 1999.
- Wyoming Tribune Eagle, Cheyenne, Wyoming, May 3, 1999.
- Casper Star-Tribune, Casper, Wyoming, May 7, 1999.

We received written and verbal comments from State and Federal elected officials, State and Federal agencies, non-governmental organizations, and private citizens. Those who have submitted comments on this subject do not need to resubmit their comments. We will respond to all comments received when we issue a final rule.

Peer Review

In compliance with the July 1, 1994, Service Peer Review Policy (59 FR 34270), we solicited the expert opinions of three independent specialists regarding pertinent scientific or commercial data and issues relating to the supportive biological and ecological information for the mountain plover proposed listing rule published in 1999. We considered the responses received from the reviewers in developing this document. To satisfy our peer review policy for this document, and to implement a pilot process adopted by us on August 21, 2000, we have solicited the assistance of Sustainable Ecosystems Institute of Portland, Oregon, to provide the required independent peer review. The purpose of such peer review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this supplemental proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed listing and special regulations.

We will consider all comments and information received during the 60-day comment period on this supplemental proposed rule in a final decision on the listing action. Accordingly, the final determination may differ from the proposed rule and this document.

Summary of Factors Affecting the Species

Section 4 of the Act and regulations promulgated to implement the listing provisions of the Act (50 CFR part 424), set forth the procedures for adding species to the Federal lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). We addressed each of these factors in the 1999 proposed rule. Here, we provide only new pertinent information for each of these factors.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Historical and Current Conversion of Grassland in Breeding Range

In the 1999 proposed rule, we provided statistics from the NRCS to show rangeland conversion from 1982 to 1992. We have now reviewed the most current records of rangeland conversions from 1992 to 1997 also available from the NRCS (*http://www.nhq.nrcs.usda.gov/NRI;* K. Musser, NRCS, in litt. 2000). Rangeland decreased during this period by 28,531 ha (70,500 ac) in Colorado; 2,428 ha (6,000 ac) in Kansas; 45,730 ha (113,000 ac) in Montana; 6,880 ha (17,000 ac) in Nebraska; 3,157 ha (7,800 ac) in Oklahoma; and 7,851 ha (19,400 ac) in Wyoming (Service in litt. 2000). Further, a moratorium on sodbusting on State school lands in Montana was rescinded in 1998, which may promote additional conversions in an effort to maximize revenue on State school lands, and meet the objective for acres in production recommended by the Governor's Vision 2005 Task Force on Agriculture (L. Hanebury pers. comm. 2002). The total conversion reported for 1992 to 1997 is small (about 0.07 percent) relative to the total rangeland reported from the above States, and the area of mountain plover habitat converted is unknown due to the lack of vegetative and topographic details regarding each grassland parcel that was converted. While we cannot quantify the acres of mountain plover habitat that have been converted, the records we examined show that

grassland conversion continues at present. For example, grassland conversion in Blaine County, Montana, has recently occurred, with about 809 ha (2,000 ac) converted in 2000, and another 809 to 1,012 ha (2,000 to 2,500 ac) scheduled for conversion in 2002 (J. Peters, BLM, pers. comm. 2002). While mountain plovers were not known to occur on any of the parcels converted in Blaine County in 2000, the conversions occurred contiguous to grasslands with known nesting sites. Knowles (pers. comm. 2001) reports that a total of 13 percent of the land area in his Central Montana study area has been sod-busted from 1991 to 1999, and that mountain plovers have abandoned all but one of the sites that were converted.

In 1999, we also provided information regarding the conversion of grasslands to housing subdivisions, citing South Park, Park County, Colorado, as an example. We now have new information that increases our concern that housing development in South Park is a potential threat to mountain plovers and their habitat. Park County is one of the fastest growing counties in Colorado; population growth may double between 1998 and 2005, and may reach 102,600 people by 2020 (Granau and Wunder 2001). The population of mountain plovers in South Park is now estimated to be from 1,500 to 2,000 individuals, making this one of the largest remaining populations of mountain plovers known throughout their breeding range. Sixty-eight percent of mountain plover habitat is privately owned, and 32 percent of this has already been subdivided (Granau and Wunder 2001). The number of residential building permits in Park County tripled between 1991 and 1997. Most of these permits were issued in areas of Park County that are not occupied by mountain plovers, but some were issued in known breeding habitat (Hanson 1997; G. Nichols, Park County, Colorado, in litt. 1998). However, beginning in 1999, the number of building permits issued in areas considered to be mountain plover habitat (*i.e.*, South Park) exceeded those issued in other parts of the county (Granau and Wunder 2001). Both Sherman *et al.* (1996) and Granau and Wunder (2001) identified the vulnerability of known breeding sites to ongoing and residential development. The mountain plover is one of the species addressed during current conservation planning efforts in Park County, but full build-out of those sites currently subdivided would be detrimental to mountain plovers (Granau and Wunder 2001).

Cultivated Areas in Breeding Range as Potential Population Sinks

In the 1999 proposed rule, we stated that we believed that certain cultivated lands created population sinks for the mountain plover, which contributed to species decline. In an effort to better define the implications to mountain plover survival by nesting attempts in cultivated fields, research has been initiated on cultivated fields and rangelands in five counties in eastern Colorado (T. McCoy in litt. 2001). Field research completed in 2001 found 44 nests on cultivated fields and 48 nests on rangeland, confirming the Shackford *et al.* (1999) finding that croplands may represent suitable nesting habitat for mountain plovers. Analysis of research results will begin in 2003, following completion of field data collection, and evaluation of implications to mountain plover survival will be available in 2004. Because current agricultural practices conflict with the mountain plover nesting cycle, we believe they may represent a threat to mountain plover reproduction.

Historical Conversion of Grassland in Winter Range

We provided important details of grassland conversion in California in the 1999 proposed rule. We have learned that since 1997, an additional 3,966 ha (9,800 ac) of grasslands have been converted to dairy farming, orchards, and vineyards in the Central Valley (C. Davis, Service, in litt. 1999). Most of the conversion reported by Davis (in litt. 1999) occurred in the eastern part of the Central Valley, where historically fewer mountain plover sightings have occurred. However, we believe the anticipated urbanization of the Central Valley (see Hunting *et al.* (in press)) will result in the loss of habitat currently occupied by wintering mountain plovers.

We also have learned that the Imperial Valley of California is likely an example of the shift of mountain plover wintering use following loss of grassland habitat. Wunder and Knopf (in draft) believe that greater than 50 percent of all mountain plovers now winter in the Imperial Valley. They believe this shift to agricultural lands in the Imperial Valley probably followed the rapid and nearly complete loss of grassland habitat at historic wintering sites at California's interior and coastal locations. Much of the deterioration of natural habitat was ongoing while the Imperial Valley was being converted to agriculture, and migrating mountain plovers began exploiting the newly available cultivated lands in the Imperial Valley, rather than continuing west to historic wintering locales (*i.e.*, they were "shortstopped" (Wunder and Knopf (in draft)). Mountain plovers in the Imperial Valley now exclusively use alfalfa fields grazed by domestic livestock, or fallow fields, burned sod farms, and sprouting wheat fields. Water conservation, water transfer projects, burning restrictions, and urbanization associated with the North American Free Trade Agreement (NAFTA) may result in changes to agricultural practices (S. Vissman, Service, in litt. 2001). NAFTA is expected to generate increased trade growth in the Imperial Valley, and highway projects are now being planned to improve transportation efficiency (California Department of Transportation 2001). As a result of NAFTA, the Imperial County population is expected to nearly double by 2020 (California Department of Transportation 2001). As a result of the anticipated population growth and impacts to prime farmland, the American Farmland Trust designated Imperial County as 1 of the top 20 threatened major land resource areas in the nation (California Department of Transportation 2001). Between 1982 and 1992, 7,689 ha (19,000 ac) of land in Imperial County were converted to urban uses. The loss of farmland associated with the current level of urbanization in Imperial County has had no measurable impact to wintering mountain plovers, but we believe anticipated growth will result in additional loss of farmland and influence agricultural practices on remaining farmlands (S. Vissman in litt. 2001). Wunder and Knopf (in draft) believe that the modification of agricultural practices, cessation of domestic livestock grazing, or addition of more restrictions on agricultural burning would be detrimental to mountain plovers in the Imperial Valley.

Effects of Range Management on Mountain Plover Habitat

In 1999, we stated that currently accepted domestic livestock grazing management can be detrimental to mountain plover breeding habitat. We have learned mountain plover winter habitat on the Carrizo Plain Natural Area in California also has been adversely impacted by the failure to continue domestic livestock grazing activities. Historically, as much as 50 percent (50,587 ha (125,000 ac)) of these lands were suitable wintering habitat. Following consolidation of properties to establish the Carrizo Plain, livestock grazing rates were adjusted to promote restoration of native plant communities.

Following an increase in rainfall associated with El Niño events in recent years, the density of vegetation and dry residual matter now exceeds the limits tolerated by mountain plovers. The resistance to livestock grazing expressed by some segments of the public and the emphasis on native plant conservation have adversely affected opportunities to enhance mountain plover habitat. Recently, grazing has been restored to some areas of the Carrizo Plain and mountain plovers have begun to reoccupy these sites (S. Fitton pers. comm 2002). However, there probably is little more than 10 percent (10,117 ha (25,000 ac)) of the Carrizo Plain Area that is currently suitable habitat for mountain plovers (E. Marquis-Brong, BLM, in litt. 1999a).

Mountain plovers on the Pawnee in Colorado are closely associated with heavily grazed, drier sites. The Forest Service is beginning to review grazing management plans for the Pawnee to identify actions that would benefit the mountain plover (J. Sidle, Forest Service, pers. comm. 2002). Currently, there is no schedule for adoption or implementation of revised grazing management prescriptions.

Effects of the Decline of Burrowing Mammals on Mountain Plover Habitat

The 1999 proposed rule cited published literature to describe a strong association of mountain plovers with prairie dogs and kangaroo rats at numerous locations in their breeding and wintering range, and reported the historic losses and potential threats to prairie dogs and kangaroo rats. All new information we have describing the association of mountain plovers and prairie dogs confirms a strong association of mountain plovers with prairie dogs at numerous locations. We also now report that mountain plovers are found on white-tailed and Gunnison's prairie dog colonies (P. Deibert, Service, pers. comm. 2002; Hawks Aloft, Inc. 2001a).

On July 31, 1998, we were petitioned by the National Wildlife Federation to list the black-tailed prairie dog as a threatened species. On February 4, 2000, we published our 12-month finding on this petition (65 FR 5476) and estimated the historic and current population of the black-tailed prairie dog in Montana, Wyoming, and Colorado. This document supports our previous findings regarding the historic decline of prairie dogs. Sylvatic plague now appears to be the greatest threat to prairie dogs and mountain plover habitat, as the amount of prairie dog control and land use conversion impacting prairie dogs have appeared to decline.

We have no new information relating to burrowing rodents on mountain plover wintering range.

Oil, Gas, and Mineral Development in Mountain Plover Breeding Habitat

We addressed the potential for development of mineral resources and the associated impacts to mountain plovers in the 1999 proposed rule. We are now aware of nine authorized or proposed active natural gas and coal bed methane projects in Wyoming that occupy either known or potential mountain plover nesting habitat (*e.g.*, Continental Divide/Wamsutter II Natural Gas Project, Seminoe Road Coal Bed Methane) (P. Deibert in litt. 2002). We also have more thoroughly reviewed mountain plover nesting records from existing mining locations, and have determined they are not adequate to determine the effects of mine development and operation on mountain plover nesting success (P. Deibert pers. comm 2002). It also is conceivable that construction of drill pads and roads could possibly create additional mountain plover habitat, but only when human activities at the sites are compatible with mountain plover nesting behavior. Due to the anticipated rate of growth in this industry, we continue to believe that oil and gas development if not adequately mitigated, represents a potential threat to breeding mountain plovers.

B. Overutilization for Commercial, Recreational, Scientific or Educational Purposes

There is no new information relating to this listing factor.

C. Disease or Predation

There is no new information substantially changing the information presented in the 1999 proposed rule.

D. The Inadequacy of Existing Regulatory Mechanisms

There is no new substantial information relating to the value of other regulatory mechanisms to the conservation of the mountain plover. We have learned that the United States Shorebird Conservation Plan now assigns its highest conservation category score (5) to the mountain plover, one of five shorebirds receiving this ranking (Brown *et al.* 2001). The mountain plover also is designated as threatened by Mexico (S. Jewell, Service, in litt. 2000).

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Natural Factors

New literature now reports that the predicted mean lifespan of a mountain plover is 1.92 years, and females can produce more than one clutch of eggs each year (Dinsmore 2001). The mountain plover's entire lifespan appears to be shorter than that of either the snowy plover (*Charadrius alexandrinus*) (Page *et al.* 1995) or piping plover (*Charadrius melodus*) (Haig 1992), but there is no mean lifespan prediction for any other shorebird (S. Haig, Clemson University, pers. comm. 2002). We are not aware of the implications of total lifespan for species persistence, but we believe a mean lifespan of less than 2 years influences opportunities to reproduce, seek alternate breeding and wintering sites, and engage in intraspecific behavior that may influence population recruitment. Further, the mountain plover's narrow range of habitat requirements combined with high degree of site fidelity (see the 1999 proposed rule) increases its vulnerability to impacts at traditional breeding locales. For example, Graul (1973, 1975) discussed the influence of climatic events on nesting mountain plovers during his research on the Pawnee. While he attributed as much as a 14 percent loss of nests to weather, and also reported the death of chicks to heat, he did not note any population level effects. However, because the average life span of a mountain plover is less than 2 years, and breeding does not occur until 1 year of age, an individual mountain plover will likely have only one breeding season to contribute to population recruitment. An individual mountain plover's contribution to recruitment may therefore be reduced or completely negated by the loss of nest, eggs, or young by natural or manmade events. Consequently, a short lifespan may aggravate the events that influence mountain plover conservation.

Manmade Factors

We have no new substantial information to provide relating to manmade factors.

Critical Habitat

In the 1999 proposed rule, we concluded that designation of critical habitat for the mountain plover was not prudent. Several court cases rendered since 1999 regarding critical habitat now require us to reevaluate the merits of critical habitat for the mountain plover. If designation of critical habitat

is prudent, we will develop a proposal to designate critical habitat for the mountain plover as soon as feasible, considering our workload priorities and available funding.

Available Conservation Measures

We summarized the potential conservation measures for the mountain plover in the 1999 proposed rule to include: Management of cultivated lands, implementing grazing plans, changing management of Conservation Reserve Program tracts, modifying seeding criteria for Conservation Reserve Program tracts, and providing habitat modification incentives to private landowners. Also as we reported in 1999, we are coordinating with the NRCS to explore ways to implement these measures on private land. We also summarized other conservation opportunities available under sections 4, 7, 9, and 10 of the Act, listed those Federal agencies we believe are most likely to be affected by a listing action (including the types of actions that may require section 7 consultation), and gave examples of some actions that either may be allowed, or prohibited, under section 9.

Special Rule

When a wildlife species is listed as threatened, the general regulations at 50 CFR 17.31 apply the section 9 prohibitions of the Act, including the take prohibitions, to the species. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to ''take'' any listed wildlife species (*i.e.*, to harass, harm pursue, hunt, shoot, wound, kill, trap, or collect any threatened or endangered species or attempt to engage in any such conduct) (16 U.S.C. 1532 (19)).

Section 4(d) of the Act (16 U.S.C. 1533) provides that, whenever a species is listed as a threatened species, the Secretary of the Department of the Interior will issue regulations deemed necessary and advisable to provide for the conservation of the species. This can be accomplished through a ''special rule'' tailored to meet the needs of a particular threatened species. In that case, the general regulations applying most section 9 prohibitions to threatened species do not apply to that species, and the special rule contains the prohibitions necessary and appropriate to conserve that species.

Such regulations generally are issued and published as special rules in the **Federal Register** along with or following a listing. In this case, we have chosen to concurrently publish this proposed special rule along with the reopening of the comment period for our proposal to list the mountain plover as threatened. We are proposing this special rule under the authority of section 4(d) of the Act containing the prohibitions necessary to provide for the conservation of the mountain plover. The prohibitions we propose do not include the take of mountain plover during certain routine farming practices until December 31, 2004, in the southern portion of the breeding range. During this period, ongoing research will be completed to determine the impact of farming practices on cultivated fields to mountain plover nesting success within the southern portion of the breeding range. The finalization of this special rule is contingent upon the results of research now under way and the final listing of the mountain plover as a threatened species. If this proposed special rule is finalized, the general regulations at 50 CFR 17.31 would not apply to the mountain plover. However, almost all of the prohibitions contained in the general regulations are included in this proposed special rule. Our rationale for a proposed special rule follows.

The February 16, 1999, proposal to list the mountain plover as a threatened species (64 FR 7587) identifies the take of mountain plovers on cultivated fields as one of many possible reasons for the decline of the mountain plover population. The proposed listing rule cites literature describing the loss of mountain plovers to spring tilling practices (see 64 FR 7587). Briefly, the mountain plover is attracted to manmade landscapes that mimic its natural habitat associations. Land management practices on cultivated fields in their breeding range may include periods when fields are fallow, idle, or barren. If these fields remain fallow, idle, or barren during April and May, mountain plovers may choose these fields for nesting, and subsequent spring tilling practices may then destroy mountain plover nests and eggs (Shackford and Leslie 1995, Knopf 1996, Shackford *et al.* 1999, Knopf and Rupert 1999, T. McCoy in litt. 2001).

Because mountain plover nests, eggs, and chicks are being taken by spring tilling practices, but the implications of this loss to the mountain plover population are not known, the USGS–BRD, in coordination with the Service, the Colorado Division of Wildlife, and the Colorado Farm Bureau, initiated scientific research in 2001 on cultivated fields and rangelands. Field research will not be completed until 2003, and analysis of results will not be initiated until 2004.

Justification

We have had numerous discussions with Dr. Fritz Knopf with the U.S. Geological Survey-Biological Resources Division and agricultural producers regarding the significance of spring tilling losses to the mountain plover population. The reasons for our identification of spring tilling as a potential threat are: The general observation by many farmers that the birds are nesting on their fields, the widespread application of these farming practices throughout the southern portion of the mountain plover's breeding range, and the observation of mountain plovers being taken by routine farming practices (T. McCoy in litt. 2001, Shackford *et al.* 1999). However, because there is no current literature comparing mountain plover productivity on noncultivated, traditionally used grasslands with productivity on cultivated fields, the influence of tilling practices on mountain plover recruitment cannot be estimated at this time.

The Colorado Farm Bureau, the Wildlife Management Institute, the U.S. Geological Survey-Biological Resources Division, and the Service recognize that nest success on cultivated fields deserves further study (R. Leachman pers. comm. 2000). Consequently, the USGS–BRD initiated field research in 2001 to evaluate the effects of farming practices on mountain plovers by comparing productivity on cultivated fields with that occurring at noncultivated, traditionally used grassland sites (T. McCoy in litt 2001). In order to generate sufficient data for analysis, the research will continue for 3 consecutive years. We are proposing that incidental take of nesting mountain plovers on cultivated fields in the southern portion of the plover's breeding range be exempt from the prohibitions of section 9 of the Act while the research is being conducted, and for 1 year following to allow data analysis. We believe this interim exemption will allow completion of research to help define the influence of agriculture on nesting mountain plovers, encourage private landowners to participate in research directed at a declining species (*e.g.*, allow researchers access to privately owned land), and contribute to the conservation of the species on private land by further defining farming practices that can have positive or negative effects on the species.

This proposed special rule will allow us to work with the Colorado Farm Bureau, local agricultural producers, and local government representatives to

determine the specific types of agricultural practices occurring within the breeding range of the mountain plover, determine which of these practices have an effect on mountain plover nesting success, and identify mechanisms that can be implemented to minimize or preclude the impact of the take on the species.

During 2002, researchers continued to monitor the breeding activity of mountain plovers throughout eastern Colorado. The length of the breeding season varied between 2001 and 2002 with the 2001 season ending in July and the 2002 season continuing into August. The longer 2002 season was attributable to extreme drought conditions in eastern Colorado. Nest success did not vary substantially between cropland and rangeland in 2001, but did show slightly higher nest success on rangeland in 2002. Predation was the major cause of nest failure, except in 2001, when agricultural practices destroyed more nests on croplands. Of rangeland nests, nest success was slightly higher on grassland with prairie dog colonies than on grasslands without prairie dog colonies. The researchers suggest that direction in 2003: (1) Focus studies more precisely on locales where plovers nest in higher densities to maximize sample sizes, (2) rigorously test the emerging pattern of comparable nest success between rangeland and croplands, and (3) test the predictions that plover densities and nest success are highest on prairie-dog towns (F. Knopf in litt 2002).

Provisions of the Proposed Rule

Term

We propose to exempt specific types of agricultural practices from the prohibitions on take under 50 CFR 17.31 until December 31, 2004. During this time, the research now ongoing will be continued to determine the effects of different types of farming practices on mountain plover nesting productivity. The finalization of this special rule is contingent upon a final listing of the mountain plover and the results of the scientific research.

Take Prohibitions

We propose that virtually all of the prohibitions under section 9 of the Act that apply to threatened species continue to apply to the mountain plover, to the same extent that they apply to other threatened species under our general regulations at 50 CFR 17.31, except that certain activities would be exempted.

Exempted Activities

We propose to include in this rule the following exemptions from take until December 31, 2004:

The incidental take of mountain plovers during routine farming practices by non-Federal entities on existing summer fallow, cropland idle, or cropland harvested (as defined by U.S. Department of Agriculture, National Agricultural Statistics Service (USDA–NASS) 1997 Census of Agriculture—Appendix (1)), from April 1 to June 30 in Colorado, Kansas, Nebraska, Oklahoma, and Laramie and Goshen Counties, Wyoming.

During the term of this special rule, research will be ongoing on existing summer fallow, cropland idle, and cropland harvested (as defined by U.S. Department of Agriculture, National Agricultural Statistics Service (USDA–NASS) 1997 Census of Agriculture—Appendix (1)) to compare productivity at these sites with that at noncultivated, traditionally used grassland sites to determine the influence that different farming practices have on mountain plover reproductive success. We are targeting these types of activities because previous researchers (Shackford *et al.* 1999, Knopf and Rupert 1999, T. McCoy in litt. 2001) have demonstrated some loss of mountain plover nests on cultivated fields due to agricultural activities.

This special rule would allow us to develop a better understanding of potential conflicts between agricultural practices and nesting mountain plovers, as well as assist in the development of management recommendations that can either preclude or mitigate the effects of these agricultural practices. Situations where mountain plovers coexist with ongoing agriculture may provide valuable insight into habitat conditions required by them, and the specific types of agricultural practices that are compatible with or enhance successful mountain plover reproduction.

We have maintained records of known occurrences of mountain plovers, as well as information on areas that may have high potential for habitat enhancement to improve nesting success throughout their breeding range. We have accumulated information regarding the historic and current distribution of mountain plovers. This information, combined with the information gained from the research discussed in this proposed rule, will assist in development of conservation actions that make the best use of the mountain plover's demonstrated nest site fidelity and in identification of those lands that have the highest potential for habitat enhancement. With this knowledge, our ability to implement an effective long-term recovery program will be enhanced.

Application of Research Results

The proposed exemptions in this proposed special rule would provide for the development of meaningful long-term conservation efforts for the mountain plover on private land. We are optimistic that this rule would invite participation by State and local governments, agricultural interests, and the general public to help minimize risks to the mountain plover. The 3-year research project will provide information that may eventually lead to one or more of the following possibilities:

(1) Extension of the exemption of take resulting from farming practices covered by this rule beyond December 31, 2004;

(2) Identification of management recommendations that avoid "take" under 50 CFR 17.31;

(3) Modification of the scope of exemptions under the 4(d) rule (such as changes to the area covered by the exemption, the seasonal time periods during which the exemption is in effect, or the farming practices covered by the exemption);

(4) Development of Habitat Conservation Plans or Safe Harbor Agreements under section 10 of the Act; or,

(5) Expiration of this 4(d) rule without renewal (*i.e.,* no special regulations providing exemptions to the take prohibitions).

We will provide notice in the **Federal Register** of any such outcomes, and we will propose further rulemaking if appropriate.

Effects of the Special Rule

Future Section 7 Consultations

This special rule does not change the obligation of Federal agencies to consult with us under section 7 of the Act concerning actions they authorize, fund, or carry out that may affect listed species, including the mountain plover.

We believe that the exemption proposed in this special rule will allow completion of scientific research to help define the influence of agriculture on the mountain plover population, encourage private landowners to participate in research efforts directed at this declining species, and contribute to the conservation of the species on private land by further defining farming practices that can have negative and positive effects on the species.

Once completed, this research will assist us in the implementation of

available conservation strategies, such as Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, or Safe Harbor agreements. The research findings will help identify farming practices that may either enhance or prove detrimental to mountain plover nesting success. We intend to pursue and encourage the development of these conservation strategies using recommendations derived from this research.

Section 10(a)(1)(B) authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities such as agriculture, surface mining, and urban development. Incidental take permits must be supported by a Habitat Conservation Plan that identifies conservation measures that the permittee agrees to implement to conserve the species, usually on the permittee's lands. Such conservation measures may include, for example, no-till practices that leave stubble too tall to be attractive to breeding mountain plovers. On summer fallow, cropland idle, or cropland harvested, the type of farm implement used and the timing of the use may be significant in reducing harm to plovers. These and other techniques to avoid take of plovers or protect plovers can be examined by producers in the development of a Habitat Conservation Plan, Candidate Conservation Agreement with Assurances, or Safe Harbor agreement. A key element in our review of each of these conservation strategies is a determination of the plan's effect upon the long-term conservation of the species. We would approve a Habitat Conservation Plan, and issue a section 10(a)(1)(B) permit, as appropriate, if the plan would minimize and mitigate the impacts of the take and would not appreciably reduce the likelihood of the survival and recovery of that species in the wild.

Public Comments Solicited

We intend that any final action resulting from this document will be as accurate and as effective as possible. Therefore, we are again seeking comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this document, particularly concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to the mountain plover;

(2) The location of any additional breeding, wintering, or migration sites, including areas in Mexico and Canada;

(3) Additional information concerning mountain plover distribution, population size, and/or population trend;

(4) Information regarding current or planned land uses, and their possible beneficial or negative impact to the mountain plover or its habitat (*e.g.*, agricultural conversions, oil and gas development, land exchanges, range management, conservation plans, conservation easements);

(5) Information regarding mountain plovers on their wintering habitats (*e.g.*, preferential use of natural versus agricultural habitats, habitat distribution and abundance, daily routines, night roosts, site fidelity, population abundance);

(6) Additional biological or physical elements that best describe mountain plover habitat and that could be considered essential for the conservation of the mountain plover (*e.g.*, burrowing rodent colonies, vegetation, food, topography);

(7) Information relative to mountain plover distribution and productivity on cultivated lands, short grass prairie, and shrub-steppe habitats;

(8) Alternative farming practices that will reduce or eliminate the take of mountain plovers;

(9) Other management strategies that will conserve the species throughout its range;

(10) Information regarding the benefits of critical habitat designation;

(11) Comments regarding the adverse or beneficial consequences of adopting special regulations regarding take of the mountain plover on cultivated lands in their breeding range;

(12) The types of agricultural practices on cultivated fields that are compatible with maintenance of mountain plover breeding habitat;

(13) Any evidence of successful and/or unsuccessful nesting by mountain plovers on cultivated fields;

(14) Any evidence indicating that additional areas of cultivated lands should be considered for inclusion in this rule;

(15) Any evidence of mountain plovers nesting on cultivated fields on Native American Tribal lands; and

(16) Information regarding grazing practices on Federal lands within the range of the mountain plover and the impacts of this on the plover.

In addition to the information solicited above, we are seeking private landowners interested in participating in the research discussed in the section of this document that explains the proposed special rule. As discussed previously, finalization of the special rule is contingent upon the results of continuing research. Permission from private landowners to allow access to their lands is a critical component of conducting this research project.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations, or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the address in **ADDRESSES.**

Final promulgation of the protective regulations on this species will take into consideration the comments and any additional information received by us. Such communications may lead to a final regulation that differs from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be made at least 15 days prior to the close of the public comment period.

Clarity of the Proposed Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping or order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Execsec@ios.doi.gov.*

Required Determinations

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We also have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act, need not be prepared in connection with regulations adopted pursuant to section 4(d) when they accompany listing actions. The proposed special regulation for the mountain plover is being developed as an integral component of the mountain plover listing action we proposed in 1999 (64 FR 7587), and for which we are giving notification of the reopening of the comment period today. Consequently, we have determined that neither an Environmental Assessment nor Environmental Impact Statement is necessary for this proposed special regulation to comply with the National Environmental Policy Act and 516 DM.

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act and assigned Office of Management and Budget clearance number 1018–0094, which expires July 31, 2004. 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 number. For additional information concerning permit and associated requirements for endangered species, see 50 CFR 17.21 and 17.22.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (Executive Order 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statements of Energy Effects is required.

References Cited

As we stated above, we have a complete list of all references cited in this document, as well as others, that are pertinent to the mountain plover. You may request this list from the Assistant Field Supervisor at the Grand Junction, Colorado Field Office (see **ADDRESSES**).

Author

Numerous Service biologists contributed to this document. You should direct any questions to Robert Leachman (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend 50 CFR part 17, 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. 1531–1554; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under ''BIRDS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
	*	*	*	*	*	*	
BIRDS							
	*	*	*	*	*	*	
Plover, mountain	*Charadrius montanus.*	U.S.A. (western)	Entire	T	.....	NA	17.41(c)
	*	*	*	*	*	*	

3. Amend § 17.41 by adding paragraph (c) to read as follows:

§ 17.41 Special rules-birds.

* * * * *

(c) Mountain plover (Charadrius montanus).

(1) *What activities are restricted or not allowed to protect the mountain plover?* All of the prohibitions of § 17.31 (a) and (b) and exemptions of § 17.32 are applicable to take of the mountain plover except where identified in paragraph (c)(2) of this section.

(2) *What activities are allowed under this special rule for the mountain plover?* The take prohibitions of § 17.31 will not apply to the following:

(i) The incidental take of mountain plovers during routine farming practices on summer fallow, cropland idle, or cropland harvested between April 1 and June 30 in Colorado, Kansas, Nebraska, Oklahoma, and Laramie and Goshen Counties, Wyoming, while the rule in this paragraph (c) is in effect; and,

(ii) Activities covered under a valid permit issued by the Fish and Wildlife Service for conducting research, educational purposes, scientific purposes, enhancement of or propagation for survival of the mountain plover, zoological exhibition, and other conservation purposes in accordance with § 17.32 and under a cooperative agreement with a State under section 6 of the Act (16 U.S.C. 1535), if applicable.

(3) *How long is this special rule in effect?* The rule in this paragraph (c) is effective until December 31, 2004.

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(4) *Does this special rule apply to mountain plovers throughout their range?* This special rule applies only to mountain plovers in certain areas of the southern portion of their breeding range (see paragraph (c)(2) of this section). It does not apply to wintering range.

(5) *What types of agricultural activities are covered under this rule?* Agricultural activities conducted on summer fallow, cropland idle, or cropland harvested are covered under the rule in this paragraph (c). Agricultural activities include mechanical practices such as tilling and other machinery-type activities that are used to prepare soil, plant crops, and control weeds.

Dated: November 29, 2002.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI25

Endangered and Threatened Wildlife and Plants; Determinations of Prudency for Two Mammal and Four Bird Species in Guam and the Commonwealth of the Northern Mariana Islands and Designations of Critical Habitat for One Mammal and Two Bird Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period and notice of availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft economic analysis of the proposed designations of critical habitat for the Mariana fruit bat and the Micronesian kingfisher on Guam, and the Mariana crow on Guam and Rota. The proposed designations of critical habitat were published in the **Federal Register** on October 15, 2002 (67 FR 63738). The draft economic analysis shows that over a 10-year period, the estimated total direct cost on Guam would be approximately $1.4 million and the estimated total direct cost on Rota would be approximately $149,000. We are now providing notice of extending the comment period to allow peer reviewers and all interested parties to comment simultaneously on the proposed rule and the associated draft economic analysis. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this extended comment period and will be fully considered in preparation of the final rule.

DATES: We will accept public comments until January 6, 2003.

ADDRESSES: Written comments and information should be submitted to Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850–0001. Copies of the draft economic analysis are available on the Internet at *http://pacificislands.fws.gov* or by request from the Field Supervisor at the above address and telephone 808/541–3441. Copies of the draft economic analysis also are available on Guam at the Nieves M. Flores Memorial Library, East O'Brien Drive, Hagatna, Guam, phone 671/475–4753, and on Rota at the Northern Marianas College, Songsong, Rota, telephone 670/532–9477. For further instructions on commenting, refer to Public Comments Solicited section of this notice.

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, Pacific Islands Office, at the above address (telephone: 808/541–3441; facsimile: 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

A review of the status of 12 Guam and Commonwealth of the Northern Mariana Islands (CNMI) vertebrate species was published on May 18, 1979 (44 FR 29128). This review, which led to the listing of nine species in 1984, resulted from three separate petitions to the Service filed by three Governors or Acting Governors of Guam in 1978, 1979, and 1981, and a fourth petition filed by the International Council for Bird Preservation in 1980. In a proposed rule published on November 29, 1983 (48 FR 53729), the Service determined endangered status for 9 of the 12 species in the 4 petitions. The final listing rule for the nine species, including the six species treated in the current proposed rule, was published on August 27, 1984 (49 FR 33881).

We published a proposed rule to designate critical habitat for these six endangered species on Guam in the **Federal Register** on June 14, 1991 (56 FR 27485). However, we withdrew this proposed rule on April 4, 1994 (59 FR 15696), because most of the lands proposed as critical habitat had by this time been incorporated into the Guam National Wildlife Refuge overlay lands. The Service, therefore, determined that critical habitat designation was not prudent because it would not provide these species with any benefit beyond that already provided by the refuge overlay lands.

Since the withdrawal of the proposed critical habitat, several judicial decisions in court cases examining critical habitat determinations have rejected rationales used by the Service in "not prudent" findings. These cases included *Natural Resources Defense Council* v. *U.S. Department of the Interior,* 113 F. 3d 1121 (9th Cir. 1997) involving the threatened coastal California gnatcatcher, and *Conservation Council for Hawaii* v. *Babbitt,* 2 F. Supp.2d 1280 (D. Haw. 1998) involving 245 listed plant species. The decisions in these cases rejected the Service's rationales of "increased threat" and "no benefit" in the case of the gnatcatcher, and of "increased threat," "no benefit on private lands," and "no additional benefit on federal lands" in the case of the Hawaiian plants.

On April 3, 2000, the Marianas Audubon Society and the Center for Biological Diversity filed a suit to challenge the Service's 1994 withdrawal of critical habitat for the six species. On September 7, 2000, the Service filed a motion to voluntarily remand the withdrawal and non-prudency decision based on the subsequent court decisions. This motion set a deadline of June 3, 2003, for the Service to determine prudency and designate final critical habitat, if prudent, for these six species. On January 25, 2002, the Government of Guam filed a motion for preliminary injunction against the Service to prevent our re-consideration of the 1994 "not prudent" critical habitat determinations for the six species. On February 8, 2002, the Service filed its opposition to the Government of Guam's motion for preliminary injunction. On April 16, 2002, the Guam District Court dismissed the Government of Guam's motion for preliminary injunction and issued a ruling upholding the settlement based on a voluntary remand.

On December 7, 2001, we mailed letters to four major landowners (Chamorro Land Trust Commission, U.S. Air Force, U.S. Navy, and Guam National Wildlife Refuge) on Guam informing them that the Service was in the process of determining the prudency of designating critical habitat for the little Mariana fruit bat, Mariana fruit bat, Mariana crow, Guam broadbill, Micronesian kingfisher, and the bridled white-eye and requested from them information on management of lands that currently support or recently