DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ26

Endangered and Threatened Wildlife and Plants; Extension of Amended Special Regulations for the Preble's Meadow Jumping Mouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: On May 22, 2001, the Fish and Wildlife Service (Service) adopted special regulations governing take of the threatened Preble's meadow jumping mouse (*Zapus hudsonius preblei*). The special regulations provide exemption from take provisions under section 9 of the Endangered Species Act for certain activities related to rodent control, ongoing agricultural activities, landscape maintenance, and existing uses of water. On October 1, 2002, the Service amended those regulations to provide exemptions for certain activities related to noxious weed control and ongoing ditch maintenance activities. On February 24, 2004, the Service proposed permanent extension of the amended special regulations. This action extends the special regulations permanently.

DATES: This rule is effective May 20, 2004.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Ecological Services, 755 Parfet Street, Suite 361, Lakewood, Colorado 80215.

FOR FURTHER INFORMATION CONTACT: In Colorado, contact the Field Supervisor, at the above address, or telephone (303) 275–2370. In Wyoming, contact the Field Supervisor, Cheyenne, Wyoming, at telephone (307) 772–2374.

SUPPLEMENTARY INFORMATION:

Background

The final rule listing the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) as a threatened species under the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), was published in the **Federal Register** on May 13, 1998 (63 FR 26517). Section 9 of the Act prohibits take of endangered wildlife. The Act defines take to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. However, the Act also provides for the authorization of take and exceptions to the take prohibitions. Take of listed species by non-Federal property owners can be permitted through the process set forth in section 10 of the Act. For federally funded or permitted activities, take of listed species may be allowed through the consultation process of section 7 of the Act. While section 9 of the Act establishes prohibitions applicable to endangered species, the Service has issued regulations (50 CFR 17.31) applying those same prohibitions to threatened wildlife. These regulations may be tailored for a particular threatened species through promulgation of a special rule under section 4(d) of the Act. When a special rule has been established for a threatened species, the general regulations for some section 9 prohibitions do not apply to that species, and the special rule contains the prohibitions, and exemptions, necessary and advisable to conserve that species.

On May 22, 2001 (66 FR 28125), we adopted a final section 4(d) special rule for the Preble's that provided exemptions from section 9 take prohibitions for certain rodent control activities, ongoing agricultural activities, maintenance and replacement of existing landscaping, and existing uses of water. On October 1, 2002 (67 FR 61531), we amended this rule to provide exemptions for certain noxious weed control and ongoing ditch maintenance activities. The final special rule, as amended, is effective until May 22, 2004. We are now extending the amended special rule permanently.

We believe that the special rule, as amended, is necessary and advisable to provide for the conservation of the Preble's. The special rule has been shown to provide for the conservation of the Preble's by allowing activities that help to maintain the habitat characteristics needed by the species. Although such activities, including ditch maintenance and noxious weed control, may result in limited levels of take, they support the continued presence of occupied habitat that might otherwise be lost to succession or invasive species. Also, by offering flexibility to private landowners for ongoing activities that will not impede the conservation of the species, the special rule provides an incentive for landowners to pursue voluntary conservation efforts and advance our understanding of the species. The rule has garnered support of State and local governments, private landowners, and other interested parties, and we believe that the permanent extension of the special rule will contribute to a lasting, cooperative approach for the recovery of the species.

The special rule is best understood in the context of other regulations and actions, already in place or in development, to provide for conservation of the Preble's. First, section 10(a)(1)(B) of the Act allows the public to obtain from us, in appropriate circumstances, permits allowing take of Preble's, providing that the take is incidental to, and not the purpose of, each action or project. One of the purposes of the special rule is to make, in advance, general decisions that certain types of activities are consistent with the conservation of the Preble's without requiring people to seek additional section 10 permits authorizing those activities. This purpose will be continued by the permanent extension. Additional activities that result in take of Preble's that are not exempted by the special rule may still be permitted by the Service under section 10 of the Act.

Currently, the State of Colorado, the Service, and various local governments in Colorado and Wyoming are working together to develop plans to conserve the Preble's and its habitat. This collaborative approach is expected to result in the development of Habitat Conservation Plans (HCPs) and applications to the Service for incidental take permits under section 10 of the Act. These HCPs will provide an important component of a lasting, effective, and efficient recovery program for the Preble's.

Second, section 7 of the Act requires Federal agencies, in consultation with and with the assistance of the Service, to use their authorities to conserve listed species and ensure that actions authorized, funded, or carried out by the agency are not likely to jeopardize the Preble's. On private land, Federal actions in Preble's habitat that may require consultation include the issuance of section 404 permits by the Army Corps of Engineers for dredge and fill activities regulated under the Clean Water Act. A section 7 consultation was conducted on the current special rule, and the ensuing biological opinion addressed a wide array of potential effects from private actions, some of which have unknown timeframes, some of which occur sporadically, and some of which occur on a regular schedule. The biological opinion found that the special rule would not jeopardize the continued existence of the species, and that the level of take from the rule was not biologically significant. The analysis for this consultation considered effects

that could occur within the 36-month period of the existing special rule but also recognized the adverse effects being considered could occur at any time in the future. Therefore, making this special rule permanent does not affect the Preble's or its critical habitat in a way not previously considered in the biological opinion. We have accordingly determined that reinitiation of consultation on the permanent extension of the special rule is not necessary.

Third, a variety of Federal, State, and local programs are available to help preserve the Preble's through the acquisition, preservation, and management of its habitat. These include the Service's Partners for Fish and Wildlife Program, the Natural Resource Conservation Service's wetland/riparian habitat protection programs, grant programs administered by Great Outdoors Colorado, city and county open space programs, and activities of local land trusts. In particular, our Partners for Fish and Wildlife Program has proven to be an especially effective approach for wildlife conservation on agricultural lands by providing funding for restoration of wetlands and riparian habitats.

Fourth, we are committed to development of a recovery program for the Preble's that achieves recovery of the species and provides solutions to conflicts between the species' recovery and economic activities, including agriculture. We believe that a recovery program that integrates both biological and social factors will have the highest chance of success. The Service has established a Recovery Team for the Preble's, and a draft recovery plan will be available for public review in the near future.

The May 22, 2001, special rule and the October 1, 2002, amendment recognized that the take exemptions provided by the rule would support the development of meaningful conservation efforts for the Preble's by State and local governments, agricultural interests, and the general public. The rule and the amendments identified the following conservation benefits to the Preble's—(1) Exemptions regarding rodent control and landscaping would elicit support from landowners for Preble's conservation and recovery; (2) exemptions for ongoing agricultural practices and the exercise of existing water rights would provide a positive incentive for agricultural interests to participate in voluntary conservation activities and advance our understanding of species biology and ecology; (3) exemptions for noxious weed control would facilitate maintaining desirable natural vegetation on which the Preble's depends for survival; and (4) exemptions for ditch maintenance would help assure that currently existing Preble's habitat along ditches remains functionally viable.

Provisions of the Rule

The special rule for the Preble's found at 50 CFR 17.40(l) will expire on May 22, 2004. With this rule we are permanently extending the amended special rule to continue the benefits it provides. We recognize that additional information on the Preble's will become available in forthcoming years. We will evaluate this information regarding possible impacts from exempted activities to determine whether any changes, up to and including discontinuance, should be made to the special rule.

Additionally, we are making a correction to the entry for the Preble's on the List of Endangered and Threatened Wildlife in 50 CFR 17.11(h). When the special rule for the Preble's was added to 50 CFR 17.40(l) on May 22, 2001 (66 FR 28125), we failed to amend the table in 50 CFR 17.11(h) to reflect the existence of the new special rule. Therefore, we are making the correction to the table in 50 CFR 17.11(h) in this rulemaking action.

Public Comments Received

A proposed rule permanently extending the existing special rule was published in the **Federal Register** on February 24, 2004 (69 FR 8359), and public comments were solicited. A public hearing was held on April 1, 2004, in Wheatland, Wyoming. Twenty-two public comments were received, primarily supporting the extension. A few asked for expansion of take exemptions to cover additional activities. Only one opposed the extension on general disagreement over the killing of threatened and endangered species. Comments were received from the State of Wyoming supporting the extension of the special rule and also requesting that additional kinds of activities be exempted under the special rule. In order to add exemptions to a rule, we must first propose them through a proposed rule published in the **Federal Register** that provides an opportunity for public comment. However, because we did not include exemptions for additional new activities in our February 24, 2004, proposal, it is not possible for us to include them in this final rule. In the future, it may be appropriate for us to consider proposing additional exemptions. At that time, we will need to evaluate the conservation benefit to the species and prepare a proposed rule for public comment.

Effective Date

In accordance with 5 U.S.C. 553(d)(1), we are making this rule effective upon publication because it grants or recognizes an exemption or relieves a restriction. This rule provides exemptions from the take provisions under section 9 of the Act for persons engaging in rodent control, ongoing agricultural activities, landscaping, ongoing use of existing water rights, noxious weed control, and ditch maintenance activities.

Required Determinations

We prepared a Record of Compliance for the May 22, 2001, final rule that exempted the four activities of rodent control, ongoing agricultural activities, landscaping, and ongoing use of existing water rights from the take prohibitions listed in section 9 of the Act. A Record of Compliance certifies that a rulemaking action complies with the various statutory, Executive Order, and Department Manual requirements applicable to rulemaking. Amendment of the May 22, 2001, rule to include the two additional exemptions (noxious weed control and ditch maintenance activities) did not add any significant elements to this Record of Compliance. Permanent extension of the amended special rule also does not add any significant elements to this Record of Compliance.

Without this extension, activities included in the special rule, as amended, would no longer be exempted from the take prohibitions. This rule continues the exemptions and allows landowners to engage in certain activities, as identified in the rule, that may result in take of Preble's. Without this extension, anyone engaging in those activities might need to seek an authorization from us through an incidental take permit under section 10(a)(1)(B) or an incidental take statement under section 7(a)(2) of the Act. This process takes time and can involve an economic cost. This rule allows these landowners to avoid the costs associated with abstaining from conducting any such activities that may result in take, modifying these activities to prevent take from occurring, or seeking an incidental take permit from us.

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, the Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action as this rule may raise

novel legal or policy issues. This rule will not have an annual economic impact of more than $100 million, or significantly affect any economic sector, productivity, jobs, the environment, or other units of government. This rule reduces the regulatory burden of the listing of the Preble's under the Act as a threatened species by continuing certain exemptions to the section 9 take prohibitions that would otherwise apply throughout the Preble's range.

Preble's habitat, which overlaps farming and ranching businesses, primarily affects four southeast Wyoming counties—(1) Converse; (2) Laramie; (3) Platte; and (4) Albany. This four-county area contains 1,739 farms and ranches covering 3.6 million hectares (8.9 million acres). The average size of an agricultural operation is about 2,064 hectares (5,100 acres), although individual operations vary greatly in size. The total marketing value of livestock and crops, measured as cash receipts, is about $182.5 million.

As previously discussed, the Service has adopted special regulations pursuant to section 4(d) of the Act for Preble's, and these regulations are currently set to expire on May 22, 2004. Specifically, these regulations provide exemption from take provisions under section 9 for certain activities related to rodent control, ongoing agricultural activities, landscape maintenance, perfected water rights, certain noxious weed control, and ditch maintenance activities. Should this regulation expire, such activities could result in the incidental take of Preble's, which is prohibited under section 9 of the Act. However, section 10 of the Act does allow landowners to obtain a permit to conduct otherwise lawful activities that may result in incidental take of a listed species. The incidental take permit requires the applicant to prepare, and the Service approve, a habitat conservation plan (HCP). The HCP may include certain restrictions to agricultural activities to minimize incidental take of Preble's.

The types of restrictions the Service might impose on agricultural activities to minimize take are expected to vary significantly from one application to another, depending on the specific situation. However, Service guidelines call for mitigating the take of Preble's to the maximum extent practicable. Examples of mitigation conditions include fencing, planting willows, or other measures intended to create a buffer zone along waterways in riparian areas. The Service also may impose restrictions on the methods or timing of activities associated with irrigation ditch maintenance.

The primary economic impacts to landowners associated with enforcement of the Act, should this section 4(d) rule expire, are the costs of preparing HCPs for the Preble's and the costs associated with any activity restrictions imposed by the Service to minimize take of the Preble's. These impacts would potentially affect agricultural operations in southeast Wyoming. The primary land use activities likely to be impacted by sections 9 and 10 of the Act are haying and grazing, and irrigation ditch maintenance. A short discussion follows of the impacts farmers and ranchers could incur should this regulation lapse.

Irrigation Canal and Ditch Maintenance Activities

The three commonly used methods of ditch maintenance are burning, flushing (flowing water through a ditch to clear blockages), and dipping (mechanically clearing blockages). Of these three options, the most cost effective is burning, which also may be the most likely to result in incidental take of Preble's. Because of this, some landowners are concerned that the burning could be prohibited after the expiration of the special rule, which would impact their irrigation activities.

An example of the potential impacts to irrigation canal and ditch maintenance is illustrated using estimates developed by the Wheatland Irrigation District. The Wheatland Irrigation District estimates that its annual irrigation ditch maintenance costs would increase by approximately 250 percent if burning is reduced by 50 percent. If all burning were prohibited, irrigation ditch maintenance costs could increase by approximately 400 percent annually.

Haying and Grazing Activities

Haying and grazing activities also would be subject to sections 9 and 10 of the Act to minimize take of the Preble's. To avoid violating this provision, landowners would have to either cease activities that might result in incidental take, or they may need to submit an application to the Service for an incidental take permit, including an HCP. As with irrigation canal and ditch maintenance activities, landowners could expect some restrictions or conditions on haying and grazing activities as mitigation for the incidental take of Preble's.

The types of restrictions or conditions would vary depending upon the situation. In situations where riparian areas have been degraded by intensive grazing activity, mitigation measures for an incidental take permit may include restrictions on the number of Animal Unit Months or AUMs (an AUM is the amount of forage needed to sustain one cow and her calf, one horse, or five sheep or goats for a month) within riparian areas, the construction of fencing with water gaps to keep herds out of riparian areas, and planting willows along stream banks. In situations where riparian areas are not degraded, mitigation measures may be minimal. The economic impacts of sections 9 and 10 of the Act on haying and grazing activities should this regulation expire can thus be expected to vary widely from landowner to landowner.

By permanently extending this section 4(d) rule, farm and ranch operators will avoid future costs associated with ensuring that their otherwise legal activities avoid incidentally taking Preble's. Consequently, the economic effect of the rule benefits landowners and the economy. This effect does not rise to the level of ''significant'' under Executive Order 12866.

This rule should not create inconsistencies with other Federal agencies' actions. Other Federal agencies are mostly unaffected by this rule.

This rule should not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Because this rule would allow landowners to continue otherwise prohibited activities without first obtaining individual authorization, the rule's impacts on affected landowners is positive.

We have previously promulgated section 4(d) special rules for this and other species, including the amended special rule for the Preble's pertaining to rodent control, ongoing agricultural activities, landscaping, existing uses of water, noxious weed control, and ongoing ditch maintenance activities. This rule permanently extends the effective period of the amended special rule for the Preble's. However, OMB has determined that this proposed rule may raise novel legal or policy issues. Therefore, in accordance with Executive Order 12866, OMB has reviewed this rule.

Regulatory Flexibility Act

We have determined that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A final regulatory flexibility analysis is not required, and a Small Entity Compliance Guide is not required. This rule reduces the regulatory burden of

the listing of the Preble's as a threatened species. Without an extension of the amended special rule, all of the take prohibitions listed in section 9 of the Act would apply throughout the range of the Preble's. This rule allows certain affected landowners to continue to engage in certain activities that may result in take of Preble's, and to avoid the costs associated with abstaining from conducting these activities to avoid take of Preble's or seeking incidental take permits from us.

As previously discussed, this rulemaking will primarily affect farm and ranch operations within four counties in southeastern Wyoming. Although the precise numbers of affected operations are not known, the total number of farms and ranches in the area is estimated to be 1,739. The 2002 total cash receipts for these operations were approximately $182.5 million, which represents about 25 percent of the State total. Based on the State ratio of net farm income to animal and crop cash receipts (12 percent), the estimated average net farm income in this area would be $21,900.

The Office of Advocacy for the Small Business Administration defines small entities in the farm and ranch sector as those each having less than $750,000 in annual receipts. This qualifies most of the farms and ranches in the area as small businesses, according to data published in 1998 by the U.S. Department of Agriculture.

The permanent extension of the section 4(d) rule will allow these small entities to avoid incurring costs associated with the development of an HCP and the administrative costs that would reflect the effort to obtain an incidental take permit. Administrative costs alone could cost between $3,000 and $4,000, according to a recent economic analysis conducted by the Service as part of the critical habitat designation for the Preble's. Depending on how such costs are expensed, the cost to obtain a permit could be relatively significant.

This rulemaking avoids such impacts by providing an exemption from the take provisions under section 9 for certain activities related to rodent control, ongoing agricultural activities, landscape maintenance, use of perfected water rights, certain noxious weed control, and ditch maintenance activities. Consequently, pursuant to 5 U.S.C. 605(b), we are certifying that this rulemaking will not have a significant economic effect on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. As described above, this rule will continue to reduce regulatory burdens on affected entities, who are mostly agricultural producers.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), this rule will not impose an unfunded mandate on State, local, or tribal governments, or the private sector, of more than $100 million per year. This rule will not have a significant or unique effect on State, local, or tribal governments, or the private sector. A Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. By continuing reductions in the regulatory burden placed on affected landowners resulting from the listing of the Preble's as a threatened species, this rule reduces the likelihood of potential takings. Affected landowners will continue to have more freedom to pursue certain activities that may result in take of Preble's without first obtaining individual authorization.

Federalism

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. Currently, the State of Colorado, the Service, and various local governmental entities in Colorado and Wyoming are working together to develop plans to conserve the Preble's and its habitat. This collaborative approach is expected to result in the development of HCPs that should support a lasting, effective, and efficient conservation program for the Preble's. To support such efforts, we wish to permanently extend the special rule. The current amended special rule would otherwise expire on May 22, 2004.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

Paperwork Reduction Act

We have examined this rule under the Paperwork Reduction Act of 1995 and found it to contain no requests for information. 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

The National Environmental Policy Act (NEPA) analysis has been conducted. An Environmental Assessment was prepared for the May 22, 2001, final special rule, and for the additional exemptions covered in the amended rule. The extension of the October 1, 2002, amended special rule does not alter the analyses made in the Environmental Assessment. The Environmental Assessment discussed impacts to the mouse that are not specific to any time period, that is, they apply equally to both the short term and the long term. This is due to the fact that any possible take from year to year is not cumulative, because the species has a short life-span, and the types of activities allowed under the special rule are not related to any particular timeframe. This rule was not found to be significant under NEPA as these exemptions reduce regulatory burdens for activities that result in minimal levels of take allowing conservation efforts to be focused on those actions that will provide the greatest conservation benefit for the species. Therefore, no modification of the Environmental Assessment is needed.

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) and Executive Order 13175, we have evaluated possible effects on federally recognized Indian Tribes. We have determined that, because no Indian trust resources occur within the range of the Preble's, this rule has no effects on federally recognized Indian Tribes.

Executive Order 13211

We have evaluated this rule in accordance with Executive Order 13211 and have determined that this rule has

no effects on energy supply, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

■ Accordingly, the Service amends 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. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Section 17.11(h) is amended by revising the entry for Preble's meadow jumping mouse, under ''Mammals,'' on the List of Endangered and Threatened Wildlife 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						
MAMMALS							
*	*	*	*	*	*		*
Mouse, Preble's meadow jumping.	Zapus hudsonius preblei.	U.S.A. (CO, WY)	.....do	T	636	17.95(a)	17.40(l)
*	*	*	*	*	*		*

§ 17.40 [Amended]

■ 3. Amend paragraph (l) of § 17.40 by removing paragraph (l)(4) and redesignating paragraph (l)(5) as paragraph (l)(4).

Dated: May 13, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–11441 Filed 5–19–04; 8:45 am]

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