DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2011–0030: FXES11130900000C6–123–FF09E30000: 92220–1113–0000–C6]

RIN 1018–AW02

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: Under the Endangered Species Act of 1973, as amended (ESA), we, the U.S. Fish and Wildlife Service (Service/USFWS), revise our special regulations for the conservation of the Utah prairie dog. We are revising our special regulations to provide limits to the allowable take, including limits to where permitted take can occur—agricultural lands, properties within 0.8 kilometers (km) (0.5 miles (mi)) of conservation lands, and areas where Utah prairie dogs cause serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites; the amount of take that can be permitted; methods of take that can be permitted; and seasonal limitations on direct lethal take. We are also allowing entities other than the Utah Division of Wildlife Resources to permit take. We are also issuing new incidental take exemptions for otherwise legal activities associated with standard agricultural practices. All other provisions of the special rule not relating to these amendments remain unchanged.

DATES: The effective date of this rule is September 4, 2012.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov,* Docket No. FWS–R6–ES–2011–0030. Comments and materials received, as well as supporting documentation used in the preparation of this rule, are available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, West Valley City, UT 84119; telephone 801–975–3330; facsimile 801–975–3331. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800–877–8339.

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119 (telephone 801–975–3330; facsimile 801–975–3331). Individuals who are hearing-impaired or speech-impaired may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

Under the ESA, we revise our previous special rule for the conservation of the Utah prairie dog in the Code of Federal Regulations (CFR) at 50 CFR 17.40(g). The previous special rule, administered by the Utah Division of Wildlife Resources (UDWR), was established in 1984, and amended in 1991. Since that time, we have evaluated the take authorized by this rule and the methods used to implement it.

We considered the available information and public and peer review comments, and we revise the established exemptions to prohibited take. We are revising the regulations for where take is allowed to occur, who may permit take, the amount of take that may be permitted, and methods of take that may be permitted. We include a take exemption for areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural and human burial sites. We also provide an exemption for incidental take for otherwise legal activities associated with standard agricultural practices.

This amendment is largely consistent with past and current practices and permitting as administered by the UDWR and Utah Code (R657–19–6, R657–19–7) under the 1984 special rule, as amended in 1991 (hereafter referred to as ''the previous special rules''). Utah prairie dog populations have remained stable to increasing throughout implementation of these special rules, as implemented under the UDWR permit system.

Summary of the Major Provisions of the Regulatory Action

Table 1 describes the previous 1984 special rules, as amended in 1991, and this final rule.

TABLE 1—COMPARISON OF THE PREVIOUS SPECIAL RULE AND PRACTICE (1991) AND THIS FINAL RULE

	Previous rule and practice (1991)	Final rule (2012) *
Who Can Allow Take	UDWR	UDWR, or other entities with the Service's written approval. Add that no permit is needed where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. Written approval from the Service is sufficient in these circumstances.
Where Direct Take Is Allowed	Existing Special Rule—private lands Utah Code—agricultural lands	Retain agricultural lands. Add properties where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. Add properties within 0.8 km (0.5 mi) of conservation lands.
Amount of Rangewide Direct Take Allowed.	6,000 animals annually	The upper annual permitted take limit of 6,000 animals annually is removed. The upper permitted take limit may not exceed 10 percent of the estimated rangewide population annually; and, on agricultural lands, may not exceed 7 percent of the estimated annual rangewide population annually. Take in areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites does not contribute to the take allowance.
Site-specific Limits on Amount of Direct Take.	No restrictions specified	Add limits for agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands.

TABLE 1—COMPARISON OF THE PREVIOUS SPECIAL RULE AND PRACTICE (1991) AND THIS FINAL RULE—Continued

	Previous rule and practice (1991)	Final rule (2012) *
		Add that there are no limits on the amount of direct take where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.
Timing of Allowed Direct Take	June 1 to December 31	June 15 to December 31 seasonal limits on agricultural lands and properties neighboring conservation lands. Add that there is no timing restriction where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, except that translocations will be conducted before lethal measures of control are allowed.
Methods Allowed to Implement Direct Take.	Existing Special Rule—no restrictions specified.	Add restrictions on methods of allowed take on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands to conform to Utah Code.
	Utah Code—limited to firearms and trapping, and chemical toxicants specifically prohibited.	Add that no restrictions on methods to implement direct take are applied to areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, except that translocations will be conducted before lethal measures of control are allowed.
Service Ability to Further Restrict Direct Take.	The Service may immediately prohibit or restrict such taking as appropriate for the conservation of the species.	Unchanged.
Incidental Take for Agricultural Activities.	Not authorized	Provide an exemption for incidental take for otherwise legal activities associated with standard agricultural practices.

Special Rules Under ESA Section 4(d)

A 4(d) special rule functions by prescribing those regulations that are necessary and advisable to conserve a threatened species. We have elected to extend all prohibitions under section 9 of the ESA (16 U.S.C. 1531 *et seq.*) to threatened species through a ''blanket 4(d) rule'' unless otherwise specified in a separate 4(d) rule (see 50 CFR 17.31). Section 9 prohibitions make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as endangered, without written authorization. It also is illegal under section 9(a)(1) of the ESA to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally.

We have the option of creating tailored 4(d) regulations rather than using the blanket 4(d) rule. In those cases, the species-specific 4(d) regulation replaces the blanket regulation. Because the blanket rule effectively extends all available prohibitions to threatened species, separate 4(d) rules could be viewed as ''exempting,'' ''allowing,'' or ''permitting'' acts that would otherwise be prohibited under the blanket rule. As a result, there may be some prohibitions that apply to other threatened species that do not apply to the threatened species at issue. In the interest of providing a clear rule with simple language, we will be using ''exempt'' and ''allow'' in order to convey that this Utah prairie dog 4(d) rule will not prohibit certain actions. It is important to note that this use of language is for clarity only. The 4(d) rule will still function by prescribing the regulations necessary and advisable to conserve the Utah prairie dog.

Background

Previous Federal Actions

The Utah prairie dog (*Cynomys parvidens*) was listed as an endangered species on June 4, 1973 (38 FR 14678), pursuant to the Endangered Species Conservation Act of 1969. On January 4, 1974, this listing was incorporated into the ESA of 1973, as amended (39 FR 1158; see page 1175).

On May 29, 1984, the Service reclassified the Utah prairie dog from endangered to threatened (49 FR 22330) and developed a special rule under section 4(d) of the ESA, applying the prohibitions for threatened animals (50 CFR 17.31) to the Utah prairie dog except: allowing regulated take of up to 5,000 animals annually on private lands in Iron County, Utah. On June 14, 1991, we amended the special rule to allow regulated take of up to 6,000 animals annually on private lands throughout the species' range (56 FR 27438).

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

On February 4, 2005, we received a petition under the Administrative Procedure Act (APA) requesting that we issue a rule to restrict the translocation of Utah prairie dogs and to terminate the special 4(d) rule allowing regulated take of Utah prairie dogs (Forest Guardians 2005, entire). On April 6, 2005, we acknowledged receipt of this petition. On February 23, 2009, we issued a final decision in which we denied the petitioned action (USFWS 2009, entire). However, this response acknowledged that we had initiated a process to amend the special 4(d) rule and that we anticipated that a proposed amended special 4(d) rule would be published in the **Federal Register** for public comment (USFWS 2009, p. 1). This decision also was challenged by WildEarth Guardians.

On September 28, 2010, United States District Court for the District of Columbia vacated and remanded our

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

On June 2, 2011 (76 FR 31906), we announced a proposed rule to revise our 4(d) special regulations for the conservation of the Utah prairie dog. Our proposed rule included limits to the allowable take, and new incidental take exemptions for otherwise legal activities associated with standard agricultural practices. We sought comments from the public and other agencies regarding the scope and implementation of the special rule. We also sought independent peer review of the science in the proposed rule to ensure that our final rule is based on scientifically sound data, assumptions, and analyses. We requested public and peer review comments be received or postmarked on or before August 1, 2011.

On June 21, 2011 (76 FR 36053), we announced our revised 90-day finding on a petition to reclassify the Utah prairie dog from threatened to endangered under the ESA. As we concluded in our 90-day finding published on February 21, 2007, we found that the February 3, 2003, petition did not present substantial information indicating that reclassifying the Utah prairie dog from threatened to endangered may be warranted. Therefore, we did not initiate a status review in response to the February 3, 2003, petition.

On April 26, 2012 (77 FR 24195), we notified the public that we were making changes to our proposed rule of June 2, 2011, to revise the 4(d) special rule for the Utah prairie dog. These changes included allowing take where Utah prairie dogs cause serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, allowing entities other than the UDWR to permit take, and changes to the seasonal and numeric limits for take. We reopened the comment period for 30 days, ending May 29, 2012, and we considered and incorporated as appropriate all comments for this final rule.

Species Information

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

Life History

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

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

The young are born after a 28- to 30-day gestation period, in April or May (Hoogland 2003, p. 236). Litters range in size from 1 to 7 pups; mean observed litter size after emergence of juveniles from their burrows ranges from 3.64 pups to 5.5 pups (Pizzmenti and Collier 1975, p. 2; Elmore *et al.* 1976, p. 6; Wright-Smith 1978, p. 10; Mackley 1988, pp. 8–9; Hoogland 2001, p. 923). Young prairie dogs depend almost entirely on nursing while in their burrow (Hoogland 2003, p. 236). The young emerge above ground by approximately mid-June, and by that time they are no longer dependent on their mother and primarily forage on their own (Hoogland 2003, p. 236). Because of the relatively large litter sizes, the observed summer population numbers of prairie dogs are much greater than the number of animals seen above ground in the spring.

Prairie dog pups attain adult size by October and reach sexual maturity at the age of 1 year (Wright-Smith 1978, p. 9). Less than 50 percent of Utah prairie dogs survive to breeding age (Hoogland 2001, p. 919). Male Utah prairie dogs frequently cannibalize juveniles, which may eliminate 20 percent of the litter (Hoogland 2003, p. 238). After the first year, female survivorship is higher than male survivorship, though still low for both sexes. Only about 20 percent of females and less than 10 percent of males survive to age 4 (Hoogland 2001, Figures 1 and 2, pp. 919–920). Utah prairie dogs rarely live beyond 5 years of age (Hoogland 2001, p. 919). The sex ratio of juveniles at birth is 1:1, but the adult sex ratio is skewed toward females, with adult female:adult male sex ratios varying from 1.8:1 (Mackley 1988, pp. 1, 6–7) to 2:1 (Wright-Smith 1978, p. 8).

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

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

food resources that are within calling distance. These units are genetically similar and vulnerable to local catastrophes including epizootic disease outbreaks.

Major predators include coyotes (*Canis latrans*), badgers (*Taxidea taxis*), long-tailed weasels (*Mustela frenata*), various raptor species (*Buteo* spp., *Aquila chrysaetos*), and snakes (*Crotalus* spp., *Pituophus* spp.) (Hoogland 2001, p. 922). In established colonies, predators probably do not exert a controlling influence on numbers of prairie dogs (Collier and Spillett 1972, p. 36).

Utah prairie dog populations are susceptible to sylvatic plague (*Yersinia pestis*), a bacterium introduced to the North American continent in 1899 (Cully 1993, p. 38). Plague occurs in prairie dog colonies as enzootic and epizootic events. Enzootic plague is an infection that is persistent in the population over time and causes a low rate of mortality. Epizootic plague occurs when the disease spreads from enzootic hosts to more susceptible animals, resulting in a rapidly spreading die-off cycle (Barnes 1993, pp. 28–32; Cully and Williams 2001, pp. 898–899; Gage and Kosoy 2005, p. 506). During epizootic plague events, large numbers of animals can die within a few days (Lechleitner *et al.* 1962, entire; Cully 1993, p. 39). Plague results in local extirpations, reduced colony sizes, increased variation in local population sizes, and increased distances between colonies (Cully and Williams 2001, p. 895).

There is a limited understanding of the variables that determine when sylvatic plague will impact prairie dog populations. Enzootic plague may be influenced by factors including genetics, prairie dog immunity and physiologic state, and interactions with other bacteria (Gage and Kosoy 2005, p. 509). The factors that result in epizootic plague outbreaks are still being researched, but may include host density, flea density, and climatic conditions (Cully 1989, p. 49; Parmenter *et al.* 1999, pp. 818–820; Cully and Williams 2001, pp. 899–901; Enscore *et al.* 2002, p. 192; Stapp *et al.* 2004, pp. 236–237; Gage and Kosoy 2005, pp. 509, 513; Ray and Collinge 2005, pp. 204, 206–208; Stenseth *et al.* 2006, entire; Snäll *et al.* 2008, pp. 244–246; Biggins *et al.* 2010, pp. 21–24).

Habitat Requirements and Food Habits

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

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

Prairie dogs are predominantly herbivores, though they also eat insects (Crocker-Bedford and Spillett 1981, p. 8; Hoogland 2003, p. 238). Grasses are the staple of their annual diet (Crocker-Bedford and Spillett 1981, p. 8; Hasenyager 1984, p. 27), but other plants are selected during different times of the year. Utah prairie dogs only select shrubs when they are in flower, and then only eat the flowers (Crocker-Bedford and Spillet 1981, p. 8). Forbs are consumed in the spring. Forbs also may be crucial for the survival of prairie dogs during drought (Collier 1975, p. 48).

Utah prairie dogs prefer areas with deep, productive soils. These are the same areas preferred by agricultural producers. Agricultural tilling practices create unusually deep, soft soils optimum for burrowing; irrigation increases vegetation productivity; and plantings of favored moist forb species (such as alfalfa) likely make these areas more productive than they were historically (Collier 1975, pp. 42–43). Additionally, Utah prairie dogs grow faster and attain larger body weights (Crocker-Bedford and Spillett 1981, p. 1), and thus have higher overwinter survival, in alfalfa crops versus native habitats (Crocker-Bedford and Spillett 1981, p. 16). Reproduction and weaning of young also may be more successful in agricultural areas that provide abundant forage resources that are otherwise unavailable in drier native habitats (Crocker-Bedford and Spillett 1981, p. 17). Similarly, colonies in agricultural areas expand more rapidly than those in native habitats (Crocker-Bedford and Spillett 1981, p. 16). Finally, predator mortality is generally low for Utah prairie dogs in agricultural fields (see Life History) because farmers control badgers and coyotes in these areas (Crocker-Bedford and Spillett 1981, p. 17). Overall, Utah prairie dog densities are approximately twice as high at sites associated with agriculture compared to sites not associated with agriculture (Crocker-Bedford and Spillett 1981, pp. 16, 23, 26). While we believe that the valley bottoms have probably always supported more prairie dogs than surrounding drier sites, it is likely that the high densities and abundances occurring in these areas are unnaturally augmented by today's agricultural practices (Collier 1975, pp. 43, 53; Crocker-Bedford and Spillett 1981, pp. 15–17, 22).

Distribution and Abundance

The Utah prairie dog is the westernmost member of the genus *Cynomys.* Historically, the species' distribution extended much farther north than it does today (Collier 1975, pp. 15–17; Pizzimenti and Collier 1975, p. 1). Utah prairie dog populations declined dramatically when control programs to eradicate the species were initiated in the 1920s. The actual numeric population reduction is not known, because historical population figures were not scientifically derived (Collier and Spillett 1973, pp. 83–84). However, poisoning is estimated to have removed prairie dogs from approximately 8,094 hectares (ha) (20,000 acres (ac)) of their range prior to 1963 (Collier and Spillett 1972, pp. 33–35). Other factors that resulted in the historical decline of Utah prairie dogs were drought, habitat alteration from conversion of lands to agricultural crops, unregulated shooting, and disease (Collier and Spillett 1972, pp. 32–35).

The species' range is now limited to the southwestern quarter of Utah in Iron, Beaver, Washington, Garfield, Wayne, Piute, Sevier, and Kane Counties (USFWS 2012, p. 1.3–3). The Utah prairie dog has the most restricted range of the four prairie dog species in the United States.

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

Therefore, actual rangewide prairie dog numbers may be somewhat higher than reported, though probably not substantially higher.

Utah prairie dog surveys are completed in the spring (''spring counts'') by visually scanning each colony area and counting the numbers of prairie dogs observed. Biologists spend approximately 8 to 10 weeks with 3 to 5 people per week surveying prairie dog colonies in the field each year in accordance with our survey protocol (USFWS 2012, Appendix H). Only 40 to 60 percent of Utah prairie dogs are above ground at any one time (USFWS 2012, p. 1.3–4). Therefore, spring counts represent approximately 50 percent of the adult population. Total rangewide population estimates are larger than the estimated adult population because they include reproduction and juveniles. Based on the male to female ratio, number of breeding females, average litter size, and observed spring count versus total spring population (see the Life History section) (Wright-Smith 1978, p. 8; Mackley 1988, pp. 1, 6–9; Hoogland 2001, pp. 919–920; 923), the total population estimate (adults and juveniles) can be calculated from spring counts as follows: [(2 × spring adult count) × 0.67 (proportion of adult females) × 0.97 (proportion of breeding females) × 4 (average number of young per breeding female)] plus (2 × spring adult count). Thus, the total population estimate (adults and juveniles) is about 7.2 × the spring count. Hereafter whenever we refer to ''total rangewide population estimate'' or ''total population estimate'' we mean the calculated Utah prairie dog population based on the occurrence of both adult and juvenile animals.

It should be noted that spring count surveys and total population estimates are not censuses. Rather, they are designed to monitor population trends over time. Based on the spring counts, the rangewide population trends for the Utah prairie dog are stable to increasing over the last 30 years (see Application of the Utah Prairie Dog Special Rule Through the Present, below).

In addition to population trend information, the UDWR surveys provide information on the amount of mapped and occupied habitat across the species' range. We define mapped habitat as all areas within the species' range that were identified and delineated as being occupied by Utah prairie dogs in any year since 1972. These areas may or may not be occupied by prairie dogs in any given year. The database of all mapped habitat is maintained by the UDWR and updated annually. Occupied habitats are defined as areas that support Utah prairie dogs (*i.e.,* where prairie dogs are seen or heard or where active burrows or other signs are found).

The UDWR has mapped 24,142 ha (59,656 ac) of habitat rangewide (UDWR 2010a, entire). The Utah prairie dog occurs in three geographically identifiable areas within southwestern Utah, which are identified as recovery units in our Final Revised Recovery Plan (USFWS 2012, pp. 1.3–3, 3.2–1), including: (1) Awapa Plateau; (2) Paunsaugunt, and (3) West Desert. The Awapa Plateau recovery unit encompasses portions of Piute, Garfield, Wayne, and Sevier Counties. The Paunsaugunt recovery unit is primarily in western Garfield County, with small areas in Iron and Kane Counties. The West Desert recovery unit is primarily in Iron County, but extends into southern Beaver County and northern Washington County. Table 2 provides information on each recovery unit, including average percentage of the total rangewide population and average percentage of prairie dogs occurring on non-Federal land (averages for 2000 to 2009). Additional information on each recovery unit's distribution, abundance, and trends can be found in our Final Revised Recovery Plan (USFWS 2012, section 1.3.2).

TABLE 2—POPULATION AND OCCUPANCY DATA FOR EACH RECOVERY UNIT

Recovery unit	Average percentage of rangewide population	Average percentage of prairie dogs occurring on non-federal land
Awapa Plateau	8.9	47.6
Paunsaugunt	16.9	71.0
West Desert	74.2	85.1

Note: Averages calculated from 2000 to 2009. Source: UDWR 2009, 2010b.

Summary of Comments and Recommendations

In our proposed rule published on June 2, 2011 (76 FR 31906), we requested that all interested parties submit written comments on the proposal by August 1, 2011. Similarly, in our revision to the proposed rule on April 26, 2012 (77 FR 24915), we requested that all interested parties submit written comments on the proposal by May 29, 2012. We contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. We did not receive any requests for a public hearing. During the public comment period on the June 2, 2011, proposed rule, we received a total of 10 comment letters. Following the end of that public comment period, we also received a comment letter from the State of Utah. During the public comment period on our April 26, 2012, revision to the proposed rule, we received a total of 11 comment letters.

All substantive information provided during the comment periods (and including the State of Utah's comment letter) was either incorporated directly into this final determination or is addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from six knowledgeable individuals with scientific expertise that included familiarity with prairie dog ecology, population modeling, and lethal control of prairie dogs. We received comments from four of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the Utah prairie dog. In general, the peer reviewers agreed with the value of having a special rule for Utah prairie dogs. They raised some concern regarding our use of the available prairie dog population models and our interpretation of available data. However, the peer reviewers did not provide specific information on how they would improve the final rule based on the available information. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* One peer reviewer stated that we should specify that the mean litter size is really the mean observed litter size after emergence of juveniles from their burrows.

Our Response: We updated the Life History section of the rule accordingly.

(2) *Comment:* One peer reviewer recommended that we add the definition for ''colony'' to the rule.

Our Response: We added descriptions of Utah prairie dog clans and colonies in the Life History section of the rule.

(3) *Comment:* The peer reviewers stated their support for various facets of the rule, including agreement that we used most of the pertinent literature, agreement with our conclusion that landowner and community support is important for species recovery, and appreciation that the rule recognizes the role of the State in managing the Utah prairie dog.

Our Response: We retained the discussions relevant to these points in our final rule.

(4) *Comment:* One peer reviewer stated that the data presented in Figure 1 demonstrates weak support for what is called a fluctuating harvest-rate model.

Our Response: We agree with the peer reviewer and did not intend to imply that Figure 1 (*i.e.,* the permitting process under the previous 1984 and 1991 special rules) showed a fluctuating harvest-rate model. To the contrary, the previous special rules essentially used a potentially fixed rate harvest-model in which 6,000 animals could be taken annually regardless of the Utah prairie dog spring count data. We clarified the rule accordingly (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted*).

(5) *Comment:* One peer reviewer questioned our observation (based on 25 years of data) that colony extinction has not increased under our previous special rules. This peer reviewer said that an assessment of metapopulation dynamics of this species is necessary, including when colonies go extinct from control, disease, or natural predation, and how often and how quickly are they recolonized.

Our Response: While metapopulation dynamics are important to long-term conservation of a species, we do not believe this type of an assessment is needed for analyzing the effects of our special rule. We believe our 25 years of prairie dog population information and take levels under the previous special rules—this is what actually happened on the ground, including the resulting stable to increasing rangewide prairie dog populations—provides a robust dataset on which we can predict future effects associated with this special rule. In addition, we are not aware of any colonies that have been extirpated due to implementation of our special rules.

(6) *Comment:* One peer reviewer concluded that a visual inspection of the line graph presented in Figure 1 suggests that high levels of actual take under the existing special rules are correlated with declines in population abundance in following years. Therefore, the peer reviewer inferred that the data suggest that existing levels of take may be having a larger impact on Utah prairie dog population abundance than acknowledged in the proposed rule revision. Thus, the peer reviewer concluded that our 10 percent take limit is likely not viable long term.

Our Response: Based on this comment, we ran a regression analysis (a statistical technique for the investigation of relationships between variables) on the available data. There was not a significant relationship between rangewide reported take under the 1984 and 1991 special rules and the total rangewide spring counts the following year (Brown 2012). This information combined with 25 years of stable to increasing population trends indicate that these levels of take are not negatively impacting the rangewide Utah prairie dog population.

(7) *Comment:* One peer reviewer was concerned that our 10 percent take limit is higher than actual take that has been reported under the prior special rules.

Our Response: Although our allowable take of up to 10 percent is higher than actual take, available modeling on other prairie dog species (Reeve and Vosburgh 2006, p. 123; Colorado Division of Wildlife (CDOW) 2007, p. 135) shows that fluctuating harvest rates of 20 to 25 percent of the population are sustainable, and our 10 percent take limit is much less than these rates. In addition, it is likely that actual harvest will always be much less than permitted harvest, as our experience over the past 25 years shows, and we added this information to Table 3. The special rule allows us to modify or discontinue take in the future should we experience population effects that are inconsistent with Utah prairie dog conservation.

(8) *Comment:* One peer reviewer recommended that we consider a spatial analysis of prairie dog demographics and the associated impacts of take in different parts of the species' range. This reviewer questioned the potential long-term impacts across the species' range of a spatially clustered take of comparatively higher intensity in one portion of the range, compared to a more uniform and widespread distribution of removal.

Our Response: We added a requirement to the rule that take will be spatially distributed across the three Recovery Units, based on the distribution of the annual total rangewide count within each Recovery Unit (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted,* ''Agricultural Lands,'' below).

(9) *Comment:* A couple of peer reviewers stated that smaller populations are more susceptible to localized extinction and that colony size should be considered when permitting take.

Our Response: We agree that smaller populations are more susceptible to localized extinction. As described in our rule, available modeling on the impacts of shooting to prairie dogs was completed on other prairie dog species, not Utah prairie dogs. However, because this represents the best available information, we reviewed the literature to determine relative impacts based on colony size. Populations of Gunnison's prairie dogs, even in the presence of enzootic plague, showed strong population growth rates with no risk of extinction as long as their initial population sizes were greater than or equal to 50 animals (CDOW 2007, p. 128). Accordingly, our final rule states that a minimum spring count of 7 animals (total population estimate of 50 animals) in each colony is required for the issuance of any permits under this rule. In addition, we added a provision to the rule that directs permitting biologists to consider colony size when issuing permits (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted*). Because we have stable to increasing rangewide Utah prairie dog populations under the previous rules, it is reasonable to assume that restricting permits to even larger colony sizes under this final rule will result in continued positive population trends.

(10) *Comment:* One peer reviewer and a couple of commenters stated that the available literature does not have an accurate assessment of plague risk related to colony density. They stated that there is not sufficient evidence to support our conclusion that taking Utah prairie dogs will lower plague risk by maintaining lower densities. Another peer reviewer recommended that we consider plague as a factor when evaluating the sustainability of a given level of take.

Our Response: We agree that colony density and plague are not always directly related. We revised the rule to include additional literature regarding plague dynamics in prairie dog populations, particularly noting that there are a variety of factors that play a role in the occurrence and extent of enzootic and epizootic plague events. Thus, we are not able to conclude that reducing prairie dog population densities will always result in the reduction of plague occurrence or significance. Plague is considered a factor when evaluating a given level of take to the extent that annual take is based on a percentage of the estimated annual population of prairie dogs. Fluctuations in prairie dog populations due to plague outbreaks could affect the total amount of authorized take in a given year.

(11) *Comment:* One peer reviewer recommended that we consider how competition for resources (*e.g.,* how reduced competition can promote higher reproductive success and survivorship) and plague (*e.g.,*

controlling density can reduce the impact of plague) can be balanced to achieve optimal demographic robustness for long-term conservation of Utah prairie dogs.

Our Response: This special 4(d) rule is not intended to evaluate all conservation aspects for the Utah prairie dog. Under the revised Utah prairie dog Recovery Plan, we consider all demographic and metapopulation dynamics in our efforts to recover the species. The special 4(d) rule does consider how implementation of some level of prairie dog control can positively affect populations by reducing competition for resources and reducing the potential for plague outbreaks in some scenarios (see *Limiting Where Take is Allowed,* ''Conservation Benefits of Allowing Take on Specific Lands,'' below).

(12) *Comment:* One peer reviewer requested that we provide some information regarding the time and effort expended to conduct annual spring count surveys.

Our Response: The UDWR estimates that surveys require 8 to 10 weeks, with 3 to 5 biologists annually. We added this information to the rule.

(13) *Comment:* A couple of peer reviewers recommended we use mean litter size of 3.88 juveniles instead of the 4 juveniles used in our population estimate calculation in the ''Distribution and Abundance'' section of the rule. Mean litter size of 3.88 juveniles is supported by the literature.

Our Response: Based on the available literature, we conclude that the use of 4 juveniles is appropriate in our population estimate calculation. We included additional citations in the rule that show litter sizes varying from 1 to 8 pups, with means varying from 3.64 to 5.5.

(14) *Comment:* One peer reviewer questioned whether maintaining prairie dogs at baseline populations on private lands adjacent to conservation lands would be sufficient to maintain a functioning metapopulation across the boundary between private land and conservation property land.

Our Response: The selection and establishment of conservation lands takes into consideration spatial distribution, colony size, colony persistence, and connectivity between habitats. We make our decisions on the contribution of these lands to recovery for the Utah prairie dog including the assumption that the nearby properties (within 0.8 km (0.5 mile) of the conservation land) would be maintained at baseline prairie dog populations. Therefore, the conservation lands themselves are initially assessed for their ability to contribute to Utah prairie dog metapopulation dynamics and recovery. We added information to the rule that explains how conservation lands are selected.

(15) *Comment:* A couple of peer reviewers recommended that we more closely analyze the applicability of available population models to the Utah prairie dog, in particular a model used by the CDOW (now Colorado Parks and Wildlife) (2007). One peer reviewer gave an example—there is clearly some level of interaction between prairie dogs and agricultural activity in Colorado as there is in Utah, which means that the results of the analysis in CDOW (2007) may have a greater degree of relevance than what is stated in the proposed rule revision.

Our Response: We evaluated the available prairie dog population models in both our proposed and final rules (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted;* Reeve and Vosburgh 2006, entire; CDOW 2007, entire). We considered these models in light of expected differences between habitats and behaviors of the various prairie dog species; we do not believe that the models are strictly applicable to Utah prairie dogs. In addition, we considered these models in conjunction with our own data showing 25 years of stable to increasing rangewide Utah prairie dog populations with implementation of similar special rules that have allowed take on agricultural lands. We reevaluated these models for this final rule and made a couple of changes to the rule, including an increased minimum colony size (spring count = 7 animals) for permitting, and a change in the dates when shooting is allowed (June 15 to December 31). We agree with the peer reviewer that there are likely some similarities between prairie dogs and agricultural activity in Colorado and Utah. However, implementation of this rule is largely for colonies occurring on agricultural lands, whereas the available models include a broad range of habitat types for prairie dog species in other States.

(16) *Comment:* Two peer reviewers expressed concern that the proposed rule had a percent take per colony higher than previously experienced, and questioned if this amount of within-colony take would be viable for the long term. Two peer reviewers supported our requirement that within-colony take would be limited to one-half of a colony's estimated annual production (approximately 36 percent of estimated total population). One peer reviewer recommended we consider that the impact of percent within-colony take will vary based on colony size, and another peer reviewer recommended the most important factor in population stability is seasonal restrictions on shooting.

Our Response: The UDWR has used this same within-colony take limit under the previous special rules, and, as described in the rule, the affected colonies remain viable. Based on the peer review comments, we further evaluated the possible correlation of actual take and declines in population abundance at a sample of colonies that have had numerous take permits under our previous special rules. Although we only had small sample sizes, our regression analysis of the available data showed that there is no correlation between actual take in 1 year and spring counts the following year at specific colonies (Brown 2012); the permitted take in these situations was determined by UDWR using one-half of a colony's estimated annual production. However, we agree that the overall impact of within-colony take may vary based on colony size. We added a condition to the rule that colony size will be taken into consideration by the permitting biologist when evaluating the permittee's property and determining appropriate take levels. No take can be authorized if the spring count at a colony is less than 7 (population estimate = 50). In addition, the rule provides seasonal restrictions on take.

(17) *Comment:* One peer reviewer was concerned that development of the take limits was based on evaluation of information and modeling of other prairie dog species, not Utah prairie dogs.

Our Response: We acknowledge in the rule that literature from species other than Utah prairie dogs was used in support of the rule revision. However, this is the best available information and is appropriate to review because of the similarity in activities; the models addressed recreational shooting of prairie dogs, and we evaluated controlled lethal take. In addition, we are able to compare the results of these models with over 25 years of data specific to the Utah prairie dog under the previous special rules.

(18) *Comment:* One peer reviewer recommended including gas cartridges, anticoagulants, and explosive devices as prohibited take methods.

Our Response: We revised the document to prohibit the use of gas cartridges, anticoagulants, and explosive devices to control prairie dogs on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands. These techniques were not employed by UDWR under the previous rule and are

explicitly prohibited by this rule because they do not allow control agents to target a specific number of prairie dogs or track actual take.

(19) *Comment:* One peer reviewer recommended that we require any shot prairie dogs be disposed of by burying them outside of the colony boundary.

Our Response: We evaluated the potential effects to the environment of lead in the draft and final environmental assessments. We determined that the use of lead shot for prairie dog control would not have significant effects to the environment based largely on the limited area in which 4(d) permits and lethal take are authorized. Therefore, we did not require measures such as disposing of shot prairie dogs in a specific manner.

Comments From States

(20) *Comment:* The State of Utah and several commenters expressed support for the revised rule and recommended its final adoption and implementation. They concluded that the rule is vital to our continued success of working with private landowners and the recovery of the Utah prairie dogs, and that cooperative efforts between landowners and wildlife agencies offer the best hope for recovery of the species.

Our Response: We agree that the rule is necessary and advisable to address continued conflicts between landowners and Utah prairie dogs by providing for ecologically based population control that also alleviates some of the impacts that prairie dogs can cause to agricultural operations, the safety of operation such as airports, and the sanctity of significant human cultural and human burial sites.

(21) *Comment:* The State of Utah found that one section of the proposed rule said 7 percent of 10 percent is the take limit for agricultural lands. This equals 0.7 percent of overall rangewide population and conflicts with the 7 percent estimate elsewhere.

Our Response: We fixed this sentence to reflect that 7 percent of the rangewide population can be authorized for take on agricultural lands.

(22) *Comment:* The State of Utah said that the terms ''annual rangewide population'' and ''estimated population'' were not always clearly defined in the proposed rule. The commenter recommended that we clarify throughout the rule that the estimated population is number of animals occurring in late spring and summer when both adults and juveniles are present above ground.

Our Response: We revised the text to ensure clarity in the use of terms associated with spring counts (adult prairie dogs) versus estimated population sizes (adults and juveniles).

(23) *Comment:* The State of Utah recommended that the rule should allow for entities other than the UDWR to issue permits for control of Utah prairie dogs.

Our Response: We revised the special rule to allow for other entities to evaluate and permit properties for take, if those entities are approved in writing by our agency.

(24) *Comment:* The State of Utah was concerned that the inclusion of two maximum annual take limits—6,000 animals and 10 percent of the estimated rangewide population—may be confusing to some readers.

Our Response: We removed the upper limit of 6,000 animals from the final rule. The maximum allowable total annual permitted take will be no more than 10 percent of the estimated rangewide population.

(25) *Comment:* The State of Utah suggested that the cumulative annual take be 10 percent of the rangewide population regardless of the source (*i.e.,* agricultural lands or conservation lands).

Our Response: We retained a 7 percent take on agricultural lands and the remaining take (totaling 10 percent) to lands within 0.8 km (0.5 mi) of Utah prairie dog conservation lands. We determined the 7 percent take limit on agricultural lands based on evaluating the permitted and actual levels under the previous rules (56 FR 27438, June 14, 1991; 49 FR 22330, May 29, 1984).

(26) *Comment:* The State of Utah asked for clarification whether all agricultural lands within 0.5 mile of a conservation property automatically fall into the Properties Near Conservation Lands take category.

Our Response: We added a statement to the rule (see *Limiting Where Take is Allowed*) clarifying that all private properties within 0.8 km (0.5 mi) automatically fall into the Properties Near Conservation Lands take category.

(27) *Comment:* The State of Utah and a couple of commenters recommended expanding the rule to include take authorization for areas such as cemeteries, schools, athletic facilities, golf course, airports, and ballparks.

Our Response: We modified the rule to allow control on areas where prairie dogs are creating serious human safety hazards or disturbing the sanctity of significant human cultural or human burial sites. Lethal take in all cases is only a last resort and is only allowable after all practicable measures to resolve the conflict are implemented. We agree with the commenters that the species benefits when the public supports recovery efforts and prairie dog conflicts are reduced in some public gathering areas. However, excluding all areas where there are impacts to recreation only rather than serious health and safety concerns is not consistent with recovery of the Utah prairie dog.

Comments From Elected Officials

(28) *Comment:* One commenter thought that fence specifications should be provided on a case-by-case basis instead of relying on a one-size-fits-all fence.

Our Response: We agree that fencing specifications will not be the same for each situation. Our final rule does not preclude site-specific prairie-dog-proof fence designs. For example, the most recent fence designs at the Parowan Airport and Paragonah Cemetery are different because of site-specific needs.

(29) *Comment:* One commenter requested that the seasonal sex and weight limits of translocated prairie dogs be removed for sites under this special rule given the severity of impacts to human safety or disruption to cultural or burial sites.

Our Response: We have revised the final rule to remove the seasonal sex and weight limits for translocations from fenced sites. Any prairie dogs not removed from these areas would be allowed to be lethally removed following the translocation effort; therefore, the sex and weight of the animals is not meaningful.

(30) *Comment:* One commenter wanted to know what criteria we would use to determine the areas where prairie dogs create safety hazards or disturb the sanctity of significant human cultural or human burial sites under this rule.

Our Response: Because there are likely to be differing circumstances resulting in the need for take at certain sites, the criteria will be determined largely on a site-specific basis. However, the rule is clear in stating that take will only be allowed in areas where a credible, serious public safety hazard or harm to significant human cultural or human burial sites can be clearly demonstrated. We certainly agree that prairie dogs are a concern at the Parowan Airport and Paragonah Cemetery, and we have already helped to meet the needs of fencing at these locations.

(31) *Comment:* One commenter asked what we would do if the number of prairie dogs within a fenced area is ''more than small''—will lethal take still be allowed? The rule states that ''these sites are relatively small areas, would be fenced, and prairie dogs would be removed by translocation prior to the permitting of lethal take. Thus we

expect that the numbers of Utah prairie dogs lethally removed would be small.''

Our Response: The intent of this discussion in the rule is to identify in part why we believe these areas are not important for the conservation of the Utah prairie dog. We can expect that properly maintained fencing will keep out the majority of prairie dogs. Thus, lethal take will be allowed as long as the conditions of the rule are followed. If numerous prairie dogs are breaching the fence, we would inspect the fence to determine why the breaches are occurring, at which time some fence maintenance may be required in order for lethal take to be allowed to continue.

(32) *Comment:* One commenter supported giving local government entities, such as counties, management authority under this rule.

Our Response: The ability for entities other than UDWR to permit take was added in this final rule.

(33) *Comment:* One commenter said that we should not limit within-colony take on agricultural lands. If an entire colony is not translocated, then the remaining animals will continue causing damage, and it is inevitable the numbers will continue to increase.

Our Response: It is not the intent of this rule to extirpate colonies that occur on agricultural lands. The intent of this special rule is to support the conservation of the Utah prairie dog by managing unnaturally high populations that occur in areas such as agricultural lands. We conclude in this rule that our ability to manage these populations will assist with recovery efforts for the Utah prairie dog.

(34) *Comment:* A couple of commenters, including one elected official, were concerned that two fences have already been constructed at the Paragonah Cemetery in accordance with Service specifications, and now they are being asked to build a third fence, 6 feet deep. The uncertainty in adequate fence specifications erodes trust between the government and local communities.

Our Response: The Service was not asked to review and approve the prior fences at the cemetery, one of which is above ground, and the other which is 18 inches below ground. Regardless, the existing fence is ineffective at keeping prairie dogs out of the cemetery. The Service and State of Utah have offered to fund and construct a new fence at the cemetery that will be a more effective prairie dog barrier. Under this rule, after the fence is constructed, the City of Paragonah will be given a permit to lethally take any prairie dogs that breach the fence at any time during the year, following an initial translocation effort. We agree that prairie dogs should not be in the cemetery. We also agree that there should be a standard for fence specifications, recognizing site-specific differences. As such, we have worked with the Utah Prairie Dog Recovery Implementation Team to develop prairie dog-proof fencing specifications.

Public Comments

(35) *Comment:* One commenter questioned the science and intentions behind the ''4(d) program.'' This commenter believes that this action is simply political and is being done because of the ''big money in agribusiness.'' The commenter does not believe that killing prairie dogs is advantageous to the species. The commenter also stated that this action requires an environmental impact statement.

Our Response: Under section 4(d) of the ESA, we are required to issue protective regulations deemed necessary and advisable to provide for the conservation of listed threatened species. This 4(d) rule is based on the best available science and is a regulatory tool to assist in species conservation. This rule is intended to relieve prairie dog population pressures in overcrowded portions of the range as well as alleviate some impacts to agricultural operations, properties within 0.8 km (0.5 mi) of prairie dog conservation lands, and areas where human safety or the sanctity of significant human cultural or human burial sites is a concern. We evaluated the effects of our action in accordance with the National Environmental Policy Act by completing an environmental assessment. We solicited public comments on our environmental assessment (77 FR 24915, April 26, 2012). Based on the comments we received, we completed a finding of no significant impact. Therefore, we will not develop an environmental impact statement on our action, and do not believe an environmental impact statement is required.

(36) *Comment:* One commenter stated that we are wasting time and money working on Utah prairie dog issues because the animals occur everywhere, including central and eastern Utah. Specifically, this commenter stated that our range data are inaccurate because Utah prairie dogs occur in Emery and Carbon Counties.

Our Response: As described in the rule, the distribution of the Utah prairie dog is limited to the southwestern quarter of Utah in Iron, Beaver, Washington, Garfield, Wayne, Piute, Sevier, and Kane Counties. The species that occurs in Carbon and Emery Counties, and other portions of central and eastern Utah, is the white-tailed prairie dog (*Cynomys leucurus*). The Gunnison's prairie dog (*Cynomys gunnisoni*) occurs in the southeastern portion of the State. The best available scientific and commercial information indicates that the Utah prairie dog meets the definition of a threatened species under the ESA.

(37) *Comment:* One commenter stated that climate change may become a real threat to Utah prairie dogs based on work that is being done on black-tailed and Gunnison's prairie dogs in similarly arid grasslands.

Our Response: We agree that climate change may impact Utah prairie dogs. Our Utah Prairie Dog Final Revised Recovery Plan (USFWS 2012, pp. 1.7–15) discusses climate change. In addition, our use of an annual limit based on a percentage of the total estimated annual Utah prairie dog population takes into account changes in prairie dog numbers across the species' range due to climate change or other factors.

(38) *Comment:* One commenter stated that it is very important that prairie dogs on agricultural lands and lands adjacent to conservation areas are allowed to be taken.

Our Response: We agree with this comment. The ability to take prairie dogs in these areas is included in the rule (see *Limiting Where Take is Allowed*).

(39) *Comment:* One commenter stated that maintaining healthy predator populations on grazing land is important to controlling Utah prairie dogs in areas where they are not wanted. Predators can naturally and effectively control prairie dog populations so that there is no need for human control.

Our Response: We agree that predators can naturally control Utah prairie dog populations, and this is described in the rule (see ''Life History'' and ''Habitat Requirements and Food Habits''). However, we do not have the ability to manage predators on the properties to which this rule applies; private agricultural lands are managed systems that usually include predator removal.

(40) *Comment:* One commenter recommended that we revise our timing of permitted take to be June 1 in the West Desert recovery unit and July 1 on the Awapa Plateau and Paunsaugunt recovery units.

Our Response: We reviewed the available literature and discussed these dates with the Utah Prairie Dog Recovery Team members. We concluded that the date of permitted take should be changed to June 15, particularly to

accommodate higher elevations where prairie dog pups often emerge from their dens later as compared to lower elevations, and we changed the date in this final rule.

(41) *Comment:* A few commenters expressed concern that allowing take of up to 6,000 prairie dogs annually is too large of a number because the annual count of prairie dogs does not reach these levels. They were concerned that the take was too high given other aspects of the species' status, including declines in Utah prairie dog populations over the last century, small colony sizes, poor habitat conditions, overgrazing, habitat fragmentation, and plague. One commenter stated that Utah prairie dog populations have declined dramatically in the last 100 years, and thus the level of take provided in the rule is too great.

Our Response: This rule limits the amount of annual take to a maximum of 10 percent of the rangewide population. The upper limit of 6,000 animals is not included in the final rule. Based on the best available science and models, we believe this take limit is consistent with recovery goals for the species. The Utah prairie dog rangewide population trend is stable to increasing over the last 30 years.

(42) *Comment:* One commenter stated that Utah prairie dog recovery efforts have not been successful over the last 25 years. This commenter also stated that our primary goal should be to expand Utah prairie dog populations. This commenter urged us to implement more strategic solutions that work with landowners to implement more strategic solutions to compensate for lost income and encourage support for Utah prairie dog recovery, instead of implementing outdated lethal control methods.

Our Response: This rule emphasizes control of Utah prairie dog in certain locations that we have determined are not essential to the recovery of the Utah prairie dog. However, our recovery effort is a multi-phased approach to species' conservation on a landscape scale. Our new Utah Prairie Dog Final Revised Recovery Plan describes many of the ongoing and newer strategic conservation solutions on public and private lands, including conservation banks, Utah prairie dog Habitat Credit Exchange (a market-based form of mitigation banking), safe harbor program, Utah prairie dog Recovery Implementation Program, habitat conservation planning, translocations, plague management, and habitat conservation plans (HCPs) (USFWS 2012, section 1.9). We believe that the sum of all of these efforts, including allowing control on lands as identified under this rule, will cumulatively work to expand and protect populations and recover the Utah prairie dog.

(43) *Comment:* One commenter agreed that agricultural lands tend to support high numbers of prairie dogs. However, this commenter stated that prairie dog populations do not increase to the same high levels on grazing land. Therefore, the justification that we use for control cannot be applied to both situations.

Our Response: We agree that in many cases prairie dog populations do not increase on grazing lands to the same degree as they do on agricultural lands, particularly if those are public rangelands without improvements. However, under this rule, we more specifically define agricultural lands on which control can be considered; see *Limiting Where Take is Allowed.* Many of the pasturelands that fall under this category are improved landscapes, which likely result in increased prairie dog populations. In addition, to ensure that we only consider control under proper conditions, the rule requires that we verify the land is being physically or economically impacted by prairie dogs.

(44) *Comment:* One commenter requested information on how we estimate rangewide prairie dog populations. This commenter suggested that pups should not be included in the estimate because many do not survive their first year.

Our Response: The equation for estimating Utah prairie dog population size is included in the ''Distribution and Abundance'' section of the rule. The total population estimate includes juveniles. The commenter is correct in stating that many pups do not survive their first year, so for recovery purposes we rely heavily on spring counts (adults only) to determine population trends. We included the calculation for total population estimate (adults and juveniles) in the rule because it helps the reader to understand that the rule allows control on agricultural lands during the summer months when impacts from prairie dogs can increase dramatically due to the high numbers of animals on the landscape.

(45) *Comment:* A few commenters stated that the rule should be expanded to allow all private property owners to remove prairie dogs from their lands because of the high degree of economic and physical impacts (*i.e.,* prairie dog mounds), as well as human safety issues, associated with the presence of prairie dogs. For example, many people cannot find a buyer for their property if it has prairie dogs on it or adjoins a lot with prairie dogs. Many people are forced to purchase and install prairie dog fencing to keep prairie dogs off their lot. There also is a shifting tax burden placed on every resident in the county because people who have prairie dogs on their property have successfully petitioned the State to have the value of their property reduced.

Our Response: We acknowledge prairie dogs can have economic and physical impacts. These impacts contributed to the listing of the species, because prairie dogs were controlled heavily by humans prior to listing. Many private properties are likely to be developed, particularly in the urban areas. Development of private lands results in the permanent loss of prairie dog habitats and populations. Therefore, we believe that retaining the prohibition for take on private lands except where allowed by this rule is necessary and advisable for the conservation of the species. The mechanism to authorize take on private lands that are not included in this rule is the ESA section 10(a)(1)(B) process and implementation of HCPs.

(46) *Comment:* One commenter stated that it is absurd to consider prairie dogs as endangered or threatened because their total estimated population is about 34,000 animals on Federal land. A couple of commenters also were concerned that we only count numbers of prairie dogs on Federal lands toward recovery.

Our Reponse: Rangewide (public and private lands) prairie dog spring counts were as high as 7,527 animals in 1989 (summer population estimate = 54,194) and a low spring count of 1,866 animals in 1976 (summer population estimate = 13,435). The average spring count on all lands for the past 34 years is 4,187 animals (summer population estimate = 30,150). The species is listed as threatened primarily based on threats from development and plague. Plague affects the species rangewide. Development affects the species largely on non-Federal lands through residential and commercial development. Over 70 percent of the Utah prairie dog population occurs on non-Federal lands that will likely be developed in the foreseeable future. To recover the Utah prairie dog, we need both robust population numbers and protection from the threats, in the form of permanent habitat protection. In this regard, private lands are counted toward recovery when they are permanently protected through acquisitions or conservation easements.

(47) *Comment:* One commenter asked why the Federal government cannot move the prairie dogs to Federal land and manage them there, allowing homeowners to rid their properties of these animals.

Our Response: The Utah prairie dog recovery effort includes a 2-tiered approach of establishing and managing prairie dogs on Federal lands and protecting existing colonies on private lands where willing landowners agree to conservation easements or fee title purchases. Because most of the Utah prairie dog population exists on private lands, recovery will be achieved in substantially less time if we are able to protect some of the most important colonies in these areas.

(48) *Comment:* One commenter recommended that prairie dogs be thinned via relocation where they are in conflict with landowners.

Our Response: The special rule allows and encourages live-trapping and translocation of prairie dogs from the lands where take is authorized (see *Limiting Methods Allowed to Implement Direct Take*).

(49) *Comment:* One commenter stated that our proposed revisions to the special rule are flawed because they require ''all practicable measures'' to be taken to remove and keep prairie dogs out of airports and cemeteries. A couple of commenters did not believe that fencing is practical because the fence would need to be several feet subterranean, a few feet high aboveground, and of a material that cannot be chewed through; open gates would need to be monitored; and the fencing is expensive. One commenter said that acceptable fence specification should be made clear to everyone. A couple of commenters expressed concern about who would pay for fencing and the maintenance of that fence.

Our Response: We agree that no fence is likely to be completely impermeable to prairie dogs, and our rule acknowledges this issue. We have worked with the Utah Prairie Dog Recovery Implementation Team to develop fencing specifications that meet some of the commenters' concerns—fencing 6 feet below ground and 3 feet above ground with prairie-dog proof materials. Long-term monitoring and maintenance of any fence is necessary for that fence to maintain its functionality, regardless of the intended purpose of that fence, *e.g.,* prairie dogs or livestock. We, and the State of Utah, have provided funding and equipment to complete prairie-dog proof barriers at the Parowan Airport and Paragonah Cemetery. We will continue to assist with funding as it is available to meet both community and recovery needs for this species; however, we also anticipate that local communities and private entities also may fund fencing projects.

(50) *Comment:* One commenter agreed with the idea of controlling animals that intrude into areas such as cemeteries and airports, and that these prairie dogs should either be killed or translocated to Federal lands.

Our Response: The final rule allows for both lethal take and translocation of prairie dogs from areas where prairie dogs create human safety hazards (*e.g.,* airports) or disturb the sanctity of significant human cultural or human burial sites.

(51) *Comment:* One commenter stated that they would like to be able to trap and translocate prairie dogs in public areas where the safety of visitors is being compromised, such as in public parking areas, public event seating areas, livestock corrals, and non-irrigated pastureland. One related comment from elected officials said that the requirement of a fence should not be a precedent for all private property owners. The commenters stated that fencing areas is not always feasible.

Our Response: We added language to the final rule to allow filling of burrows and translocations of animals from areas where Utah prairie dogs create human safety hazards or disturb the sanctity of significant human cultural or human burial sites, but where fencing of these areas is not practicable. However, a prairie-dog proof fence must first be constructed before we would authorize lethal take in these areas under this final rule.

(52) *Comment:* One commenter was concerned that the shortened timeframe for direct take (changing the start date for take from June 1 to June 15) would be problematic.

Our Response: The purpose of this special rule is to provide for the long-term conservation of the Utah prairie dog. Therefore, the specifications of the special rule are based on the biological needs of the species. Additionally, we consider the 15-day change to be a relatively minor alteration to the rule.

(53) *Comment:* One commenter expressed concern that the take allowance for human safety, cultural, and burial sites would be unnecessarily constrained to ''only areas where a credible, serious public safety hazard or harm to significant human cultural or human burial sites could be clearly demonstrated.''

Our Response: We do not believe that this constraint is impractical or burdensome. The ability to control prairie dogs in these situations is certainly important to local communities, and as such we believe it also is beneficial for Utah prairie dog recovery efforts. However, we intend that the rule is only applied in site-specific situations where there is a credible concern.

(54) *Comment:* One commenter questioned the constitutionality of this 4(d) rule and Federal regulation of the Utah prairie dog, based on the Commerce Clause.

Our Response: We believe this 4(d) rule is constitutional. The courts have issued several rulings on the constitutionality of the ESA under the Commerce Clause. The final environmental assessment evaluates the effects of this final rule to the human environment, including socioeconomics.

Application of the Utah Prairie Dog Special Rule Through the Present

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

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

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

Finally, these rules were necessary and advisable to address the growing conflicts between landowners and prairie dogs by providing for ecologically based population control that also alleviated some of the impacts to agricultural operations (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991). The rules expressed concern that without control actions, these factors could have a substantially negative effect on populations and reverse the recovery progress made since listing (49 FR 22330, May 29, 1984; 56 FR 27440, June 14, 1991). The 1991 rule referenced data that demonstrated that Utah prairie dog population levels in areas with controlled take increased 88 percent during the first 4 years (1985–1989) of implementation of the special rule (56 FR 27438, June 14, 1991).

In practice, and under Utah State Code (R657–19–6, R657–19–7), the UDWR permitted taking only by shooting or trapping on agricultural lands where prairie dogs are causing damage and limits the number of animals taken on an individual colony to no more than half of a colony's estimated productivity for that year. Over time, UDWR has permitted fewer than 6,000 animals every year for the last 25 years. Annual permitted take amounts averaged 5.7 percent of the total rangewide population estimate (range equals 1.8 to 13.0 percent); actual take averaged 2.6 percent of the total rangewide estimated population (range equals 0.9 to 5.3 percent). Table 3 provides detailed information on permitted and reported take as a percent of the total rangewide population from 1985 to 2010 (UDWR 2010b, 2011, entire; Day 2012, pers. comm.). Reported take was always well below permitted take, averaging 48 percent of permitted take across 25 years. As previously described, UDWR could have permitted take of up to 6,000 prairie dogs annually under the 1991 special rule, regardless of the spring count data.

Figure 1 illustrates annual rangewide population estimates from 1985 to 2010 with a population trend line. Throughout implementation of the previous special rules (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991; 50 CFR 17.40(g)), both the rangewide population estimates and numbers of prairie dogs in individual colonies subject to control remain stable to increasing (Figure 1; Day 2010, pers. comm.).

TABLE 3—AMOUNT OF UTAH PRAIRIE DOG TAKE PERMITTED AND REPORTED UNDER THE ESA 4(d) RULE BY UDWR, 1985–2010

[UDWR 2010b, 2011; Day 2012, pers. comm.]

Year *	Spring count	Rangewide population estimate	Permitted take	Permitted take percentage of rangewide population estimate	Reported take	Reported take percentage of rangewide population estimate	Reported take percentage of permitted take
1985	3,299	23,753	845	3.6	426	1.8	50
1986	4,400	31,680	2,040	6.4	1,247	3.9	61
1987	4,771	34,351	975	2.8	370	1.1	38
1988	4,640	33,408	2,415	7.2	528	1.6	22
1989	7,527	54,194	3,050	5.6	838	1.5	27
1991	4,492	32,342	4,200	13.0	1,632	5.0	39
1992	4,067	29,282	3,520	12.0	1,543	5.3	44
1993	3,954	28,469	1,050	3.7	599	2.1	57
1994	3,702	26,654	1,190	4.5	779	2.9	65
1995	3,576	25,747	630	2.4	461	1.8	73
1996	3,917	28,202	520	1.8	436	1.5	84
1997	4,359	31,385	1,065	3.4	589	1.9	55
1998	5,106	36,763	1,220	3.3	717	1.9	59
1999	5,068	36,490	2,496	6.8	1,233	3.4	49
2000	5,892	42,422	3,700	8.7	1,386	3.3	37
2001	4,223	30,406	3,719	12.2	1,626	5.3	43
2002	4,933	35,518	3,781	10.6	1,760	4.9	46
2003	3,729	26,849	2,620	9.8	1,195	4.4	45
2004	4,102	29,534	1,360	4.6	363	1.2	27
2005	5,375	38,700	1,470	3.8	673	1.7	46
2006	5,524	39,773	1,060	2.7	343	0.9	32
2007	5,991	43,135	944	2.2	482	1.1	51
2008	5,791	41,695	1,204	2.9	561	1.3	47
2009	5,827	41,954	1,532	3.6	558	1.3	36
2010	5,648	40,666	1,870	4.7	1,425	3.6	76
AVG	4,796	34,535	1,939	5.7	814	2.6	48

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

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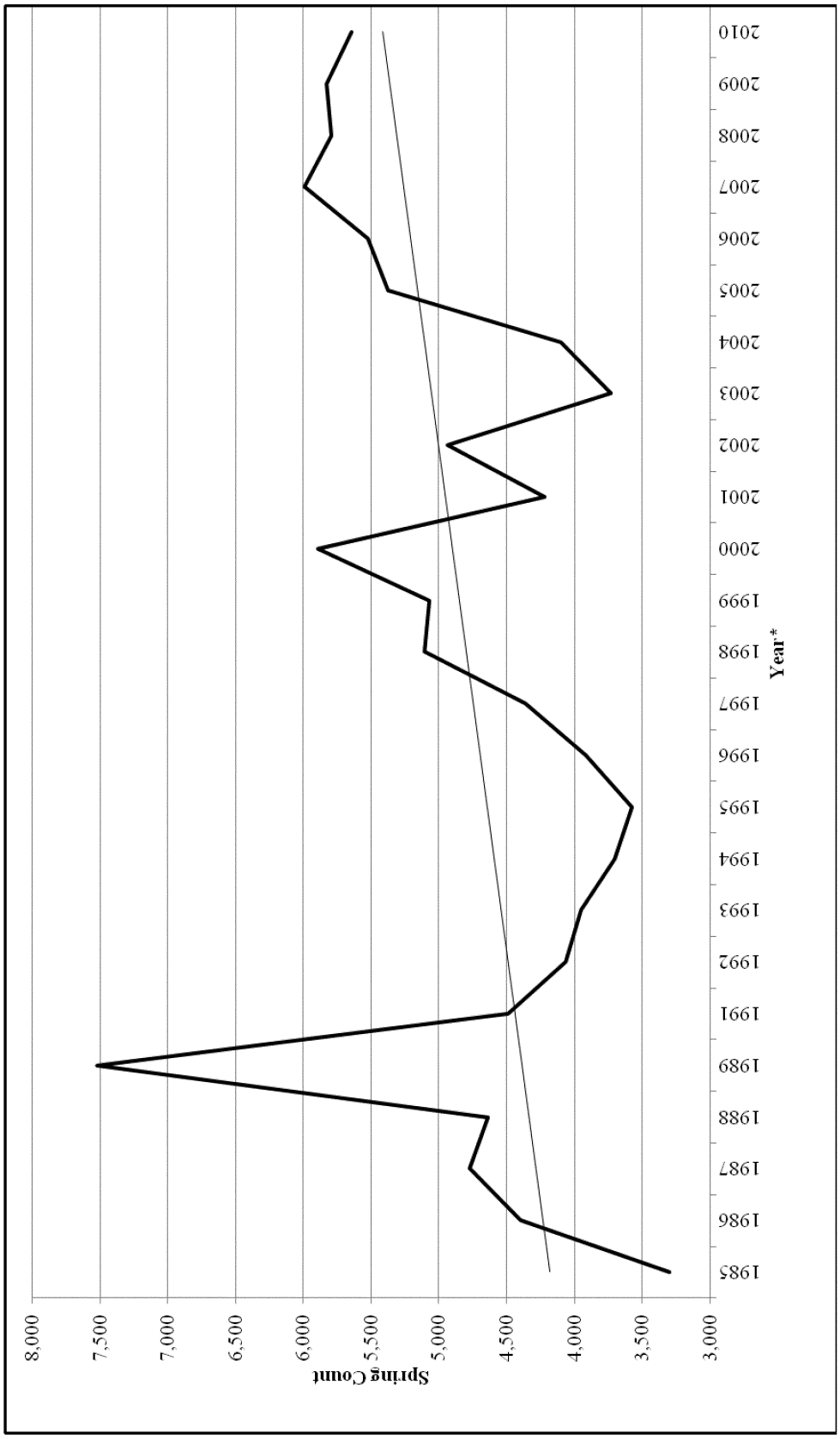

FIGURE 1. Utah Prairie Dog Spring Counts, with Rangewide Population Trend Line, 1985–2010 (UDWR 2010b, 2011).

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

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Amendments to the 4(d) Special Rule for Utah Prairie Dogs

Based on new scientific information and 25 years of available data, we amend the previous 4(d) special rule. This amendment clarifies the previous special rules, by more specifically identifying locations and situations where lethal take is allowed because we have determined it to be compatible with recovery of the species; these are agricultural lands, properties within 0.8 km (0.5 mi) of conservation lands, and areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. We also are providing a take exemption for otherwise legal activities associated with standard agricultural practices. In these circumstances, imposing the take prohibitions is not considered necessary and advisable for the conservation of the Utah prairie dog. In fact, allowing take in these specific situations likely will result in greater conservation gains for the Utah prairie dog than would the application of all section 9 prohibitions (see *Limiting Where Take Is Allowed* and *Incidental Take From Normal Agricultural Practices,* below). We also are providing limits to the amount and methods of take that may be allowed. Finally, we are providing the opportunity for entities other than UDWR to evaluate and permit control on lands specified under this rule.

Our amendments are largely consistent with the past practices and permitting as administered by UDWR under the previous special rules. Utah prairie dog populations have remained stable to increasing throughout implementation of the previous special rules as implemented under the UDWR permit system (see Figure 1). Our amendments are necessary and advisable to ensure sufficient conservation for Utah prairie dogs and the species' continuing stable-to-increasing, long-term population trends. Below we describe the restrictions on direct take and the new take provisions.

This regulation extends the prohibitions in section 9(a)(1) of the ESA to Utah prairie dogs on all other lands across the species' range, where not specifically exempted by this 4(d) rule. We have determined that the regulation of take in the areas specified in this 4(d) rule is necessary and advisable for the conservation of the Utah prairie dog.

Permitting Take

Agricultural Lands

The previous special rules (49 FR 22330, May 29, 1984; 56 FR 27438, June 14, 1991) allowed take of Utah prairie dogs when permitted by UDWR. Under these rules, UDWR biologists were required to count Utah prairie dogs, determine extent of damage, determine level of take, and issue permits to applicants who requested the ability to control prairie dogs on their lands. At the time the previous rules were published, UDWR biologists were likely the only persons with the expertise to perform these permitting tasks. However, we now have a larger partnership effort, in the form of the Utah Prairie Dog Recovery Implementation Program, in which members of other State, Federal, Tribal, and local entities and the public are working together on various programs to facilitate the species' recovery (USFWS 2012, p. 1.9–11). Because of this partnership, we can reasonably assume that other entities may hire biologists or individuals with expertise in Utah prairie dogs, and that these individuals may be available to conduct many of the permitting responsibilities previously undertaken by the UDWR. Approved permitting entities would at a minimum be required to employ a sufficient number of professional wildlife biologists to conduct all permitting responsibilities; request and complete permitting training from the UDWR for staff assigned to permitting; complete the USFWS's annual Utah prairie dog survey training; and maintain a complete reporting and tracking system for take, including annual reports on the number and location of permits issued, spring population counts and boundaries of permitted colonies, number of animals allowed to be taken, number of animals actually taken, method of take, and method of disposal of all Utah prairie dogs taken. Thus, this special rule allows, with the Service's written approval, other entities to perform the UDWR permitting and reporting tasks for control activities. For simplicity, this rule refers throughout to ''permitting entities,'' and thus applies to UDWR or other permitting entities should those entities take over specific responsibilities under this special rule.

Safety Hazards, Human Cultural and Burial Sites

Take would be allowed where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites (see *Limiting Where Take is Allowed,* Safety Hazards, Human Cultural and Burial Sites, below) when Utah prairie dogs are determined, with the written approval of the Service, to be presenting serious human safety hazards (*e.g.,* airport safety areas, recreational sports fields, nursing homes, schools), or disturbing the sanctity of a significant human cultural or human burial site sites (*e.g.,* public cemetery, sacred Tribal sites) if these lands are determined not necessary for the conservation of the species. No permit would be required in these instances.

Limiting Where Take Is Allowed

The 1991 special rule allowed take on private lands anywhere within the range of the Utah prairie dog. However, in practice and in accordance with Utah Code (R657–19–6, R657–19–7), UDWR permitted take only on agricultural lands where prairie dogs were causing damage. In this revision to the special rule, we limit the locations where take is allowed to agricultural lands, private property within 0.8 km (0.5 mi) of conservation lands, and areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.

Agricultural Lands

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

provided in the previous special rules for the species (as summarized above).

Additionally, agricultural operators must demonstrate to the permitting entity that their land is being physically or economically impacted by Utah prairie dogs. Before an application can be approved, the permitting entity must conduct a visual census of the applicant's property to verify that the land is being physically or economically impacted by Utah prairie dogs. The visual census will count prairie dogs on the applicant's property and determine a total population estimate (adults and juveniles) for the colony. A minimum spring count of seven animals is required to ensure that permits are authorized only where resident prairie dogs have become established on agricultural lands (Day 2011, pers. comm.). Thus, lands being minimally impacted by dispersing prairie dogs are not covered. These restrictions are consistent with past UDWR practice. Utah prairie dog populations have remained stable to increasing throughout implementation of the previous special rules and past practices, as implemented under the UDWR permit system. As described below, we also have concluded that allowing take on agricultural lands benefits Utah prairie dog conservation efforts (see ''Conservation Benefits of Allowing Take on Specific Lands''). Therefore, consistent with past practice and data that indicate these restrictions will support the ongoing conservation of the species, we adopt these restrictions.

Properties Near Conservation Lands

Permitting entities will be allowed to issue permits for direct take on private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation lands. All private properties within 0.8 km (0.5 mi) of conservation lands automatically fall into this category even if they also are agricultural lands. Although the 1991 special rule already allowed for take in this situation (*i.e.,* take was allowed on private lands across the species' range), such take was not previously authorized by UDWR practice or Utah Code (R657–19–6, R657–19–7). However, we believe the continuation of this provision in our rulemaking is important for Utah prairie dog recovery efforts. Permitting take in this manner on private property within 0.8 km (0.5 mi) of conservation lands promotes landowner and community support for Utah prairie dog recovery on non-Federal lands.

Conservation lands are areas set aside for the preservation of Utah prairie dogs and are managed specifically or primarily toward that purpose. Conservation lands are generally selected or approved by the Recovery Team, taking into consideration spatial distribution, colony size, colony persistence, connectivity between habitats, and their ability to contribute to the species' recovery (USFWS 2012, p. 3.5–4). Conservation lands may include, but are not limited to, non-Federal properties set aside as conservation banks, fee title purchased properties, properties under conservation easements, or properties subject to a safe harbor agreement. In order to be recognized as Utah prairie dog conservation land, a description of the parcel must be submitted to the permitting entity, accompanied by documentation that clearly defines the conservation benefits to the Utah prairie dog. In addition, documentation must be available describing the location of all private properties within 0.8 km (0.5 mi) of the conservation land parcel; the baseline populations of prairie dogs on the private properties (the highest estimated population size (adults and juveniles) of the last 5 years prior to the establishment of the conservation property); and the methods of Utah prairie dog control that will be allowed on the private properties. If no UDWR surveys were conducted during the previous 5-year period prior to establishment of the conservation property, then the baseline population is the estimated total (summer) population size on that property as determined in the first survey conducted after the establishment of the conservation property. The amount of permitted take on properties within 0.8 km (0.5 mi) of conservation lands, discussed further below, will be limited each year to the number of animals that exceed the baseline estimated population size (adults and juveniles) (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted,* ''Properties Near Conservation Lands,'' below).

As described below (see ''Conservation Benefits of Allowing Take on Specific Lands''), we find that this addition to the special rule is prudent for the conservation of Utah prairie dogs. We can lose recovery opportunities for the species if nearby landowners believe that activities on their lands will be encumbered in the future if prairie dogs migrate from conservation lands to nearby properties. This change to the 4(d) rule should greatly facilitate conservation opportunities by removing opposition to those efforts by other stakeholders that could be affected.

Safety Hazards, Human Cultural and Burial Sites

Take is allowed in areas where Utah prairie dogs are determined, with the written approval of the Service, to be presenting serious human safety hazards (*e.g.,* airport safety areas, recreational sports fields, nursing homes, schools), or disturbing the sanctity of significant human burial or human cultural sites if these lands are determined not necessary for the conservation of the species. Significant human burial sites may include public cemeteries and tribal burial grounds (for example, as described by the Native American Graves Protection and Repatriation Act; Pub. L. 101–601; 25 U.S.C. 3001–3013). Significant human cultural sites may include sacred tribal sites such as Pow Wow grounds and sacred structures. No permit is required in these instances once written approval is received from the Service.

Take will only be allowed by the Service in areas where a credible, serious public safety hazard or harm to significant human cultural or human burial sites could be clearly documented. Areas of serious human safety concern do not include public rangelands or properties being developed for residential, commercial, or transportation uses. In addition, we do not intend for this rule to be used to eliminate prairie dogs because of concerns regarding plague transmission to humans, unless this disease becomes a proven human safety issue in the future, and directly linked to the presence of Utah prairie dogs.

To reduce hazards, prairie dog burrows may be filled with dirt if they are directly creating human hazards or disturbing the sanctity of significant human cultural or human burial sites. Utah prairie dogs also may be translocated from these sites to approved translocation sites by properly trained personnel using a Service-approved translocation protocol. Lethal take in approved situations is considered a last resort, and is only allowable after all practicable measures to resolve the conflict are implemented. All practicable measures means, with respect to these situations, the: (1) Construction of prairie-dog proof fence, above and below grade to specifications approved by the Service, around the area in which there is concern, and (2) translocation of Utah prairie dogs out of the area in which there is a concern. Translocations will include all animals that can be captured within the fenced area, regardless of the weight or sex of that animal. Lethal take is allowed only to remove prairie dogs that remain in

these areas after the measures to fence and translocate are successfully carried out. Despite our best engineering efforts, prairie-dog proof fences may still be breached by prairie dogs. The local communities or private entities are required to maintain the fence, fix any breaches, and modify the fences as necessary to limit access of prairie dogs in order for the lethal take authorization to be sustained long term. These circumstances will be certified in writing by the Service following any necessary site visits and coordination with the requesting entity. As stated above, no permit will be required to allow take under these conditions.

Conservation Benefits of Allowing Take on Specific Lands

Overall, continuing to allow permitted take on agricultural lands, lands within 0.8 km (0.5 mi) of conservation lands, and lands where Utah prairie dogs create serious human safety concerns or disturb the sanctity of significant human cultural or human burial sites is critical to facilitating the species' recovery. As previously described, Utah prairie dogs can reach unnaturally high densities and abundance on agricultural lands because of increased forage quantity and quality, and lower predator numbers (see ''Habitat Requirements and Food Habits'' section, above). If prairie dog populations on agricultural lands are left uncontrolled, the consequent crowding may result in diminished forage resources, leading to decreased reproduction and survival or increased emigration (Crocker-Bedford and Spillett 1981, pp. 21–22; Reeve and Vosburgh 2006 pp. 122–123). Controlling populations by removing some prairie dogs decreases competition for limited food resources, consequently resulting in increased reproduction and decreased mortality (Cully 1997, pp. 153–156; Reeve and Vosburgh 2006, pp. 122–123).

Controlled removal also may help mediate the potential for plague outbreaks on prairie dog colonies in some situations. High animal densities can play a role in facilitating the transmission of the disease between individuals (Cully 1989, p. 49; Anderson and Williams 1997, p. 730; Gage and Kosoy 2005, pp. 509 and 519–520). Therefore, allowing control on agricultural lands may enhance the long-term conservation of the Utah prairie dog on these lands by maintaining more sustainable populations (*i.e.,* more natural animal densities are less likely to degrade their forage resources, and less likely to have large-scale plague outbreaks). However, as previously described (see ''Life History''), there are a variety of factors that play a role in the occurrence and extent of enzootic and epizootic plague events, and thus we are not able to conclude that reducing prairie dog population densities will always result in the reduction of plague occurrence or its resulting impacts to prairie dog colonies.

We have concluded that allowing some control of Utah prairie dogs will increase the participation of landowners and local communities in the species' conservation and recovery. Until recently, Utah prairie dog recovery efforts focused on habitat enhancements and translocation of the animals to Federal lands (USFWS 1991, pp. 19–33). Consequently, recovery was largely dependent on achieving sufficient population numbers on Federal lands, without considering the potential for conservation benefits that could be achieved on private lands. We now have concluded that recovery will be achieved more rapidly if we increase conservation efforts on private and other non-Federal lands (where the majority of the species' occupied habitat occurs). Our new Utah Prairie Dog Revised Recovery Plan emphasizes conservation efforts on private and other non-Federal lands (USFWS 2012, p. 2.3–2).

New or increased Federal regulations can be disincentives for recovery efforts. These disincentives may be nearly insurmountable for State, Tribal, and private landowners. Many agricultural producers feel that Utah prairie dogs impact their operations through loss of forage for their cattle; equipment damage from driving across burrows; livestock injury if animals step in burrows; and decreased crop yields (*e.g.,* prairie dogs eat crop vegetation such as alfalfa) (Elmore and Messmer 2006, p. 9). Local communities and congressional representatives are concerned regarding safety and sacredness issues associated with prairie dogs that occur respectively along airport runways and in local cemeteries. In addition, we expect that increased focus on establishing and managing non-Federal conservation lands will likely increase the size and extent of prairie dog colonies on and adjacent to these conservation lands. Thus, as recovery becomes more and more successful on non-Federal lands, regulatory relief will become increasingly important.

To achieve recovery, we will need to create incentives for private landowners and local communities to participate in prairie dog habitat improvement and protection measures. We can achieve this only if we demonstrate that the benefits of prairie dog conservation outweigh the costs to the landowner and communities, and if control programs that address landowner concerns and opposition are available when needed (Elmore and Messmer 2006, p. 13). Some producers are interested in working with us on habitat and range improvement projects that benefit livestock and Utah prairie dogs simultaneously, or participating in conservation easements that benefit the species (Elmore and Messmer 2006, pp. 10–11, 13). However, agricultural producers want the ability to control or translocate prairie dogs to minimize levels of damage (Elmore and Messmer 2006, pp. 10, 13). Similarly, local communities want the ability to control Utah prairie dogs in specific situations where they cause serious human safety concerns or disturb the sanctity of human cultural or human burial sites.

Our recent experiences show that if we are mindful of landowner, community, and safety needs, and if we provide mechanisms to control Utah prairie dogs where they conflict with certain human land uses or create serious safety hazards, we can improve landowner and local community support for the species' conservation. For example, in a 2005 safe harbor agreement, a landowner agreed to restore habitat and allow the establishment of a new colony of prairie dogs on his property through translocations (USFWS 2005, entire), but conditioned his willingness to accept translocated animals on the fact that his safe harbor agreement allowed him to control animals if they impacted his livestock operations (USFWS 2005, pp. 5–6). Between 2005 and 2007, we completed five individual Utah prairie dog safe harbor agreements, all of which include the ability for a landowner to control some prairie dogs where they may impact their agricultural activities. These five safe harbor agreements provide habitat improvements for Utah prairie dogs on 1,230 ac (497 ha) of habitat.

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

neighboring landowners would be negatively impacted if prairie dog management activities resulted in the growth and expansion of the existing prairie dog colony. Therefore, to support the purchase and protection of this important colony, we worked with the landowner to allow the control of prairie dogs (above a 2001 baseline number on each property) for properties within 0.8 km (0.5 mi) of the Parowan Valley Wildlife Management Area. Because of the issuance of this permit, the local community supported the purchase and management of the property for conservation of the Utah prairie dog.

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

The protection of many conservation lands will occur as mitigation required to obtain incidental take permits under section 10(a)(1)(B) and their associated HCPs. The existing Iron County HCP allows the use of mitigation banks to offset the impacts of development to Utah prairie dogs (Iron County 2006). We are working with the counties and local communities to develop a rangewide HCP to replace the Iron County HCP. It is too early to describe specific mitigation scenarios under a new rangewide HCP, other than to summarize our intent that a new HCP contribute to recovery and simultaneously accommodate urban growth. Conservation banking agreements and conservation easements to conserve Utah prairie dog habitats on private or other non-Federal lands are likely tools that will be employed under this new HCP. We believe that local support for any conservation lands set aside for the species in association with HCPs, especially in urban or agricultural areas, will be greatly enhanced by our ability to control the expansion of colonies onto neighboring lands.

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

Collectively, the available information indicates it is prudent to limit where take may be permitted to: (1) Agricultural lands being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is seven or more individuals (see *Limiting the Amount and Distribution of Direct Take That Can Be Permitted,* ''Agricultural Lands,'' below), (2) private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation lands, and (3) locations where Utah prairie dogs present serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites—*e.g.,* airport safety areas, recreational sports fields, cemeteries, sacred Tribal sites. Limiting the existing take authority to these locations is consistent with UDWR's permitting practices under the previous special rules. Prairie dogs in these areas achieve population densities and abundances higher than their counterparts in native semiarid grassland communities. In addition, allowing take on private property within 0.8 km (0.5 mi) of conservation lands and areas with safety or human cultural concerns will promote landowner and community support for Utah prairie dogs that is necessary to achieve recovery on non-Federal lands. The ability to allow some control of prairie dogs is prudent from a biological and social context, and has and will continue to enhance our ability to recover the species. Utah prairie dog populations have remained stable to increasing throughout implementation of the previous special rule and past practices, as implemented under the UDWR's permit system.

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

Agricultural Lands

The 1991 special rule allowed UDWR to permit take for a maximum of 6,000 animals annually, without additional restrictions as long as such take was not having an effect that was inconsistent with Utah prairie dog conservation. A set maximum take limit such as this could be considered a fixed harvest rate.

According to recent literature, we now conclude that fixed harvest rates can lead to extirpation of prairie dog colonies, at least in the case of black-tailed prairie dogs (Reeve and Vosburgh 2006, pp. 123–125). This colony loss will occur more rapidly with larger fixed annual harvests (Reeve and Vosburgh 2006, pp. 123–125).

From 1985 through 2010, the total estimated rangewide population of Utah prairie dogs (including juveniles) ranged from 23,753 to 54,194 animals (see Table 3, above). Thus, since 1991, if UDWR had authorized the maximum amount of allowed take (6,000 animals), it would have represented 11 to 26 percent of the total estimated annual rangewide population (adults and juveniles). The UDWR has never authorized the 1991 rule's maximum allowed take (6,000 animals). Actual reported take has always been considerably below the maximum allowance. We do not know if a fixed amount of 6,000 animals would negatively affect Utah prairie dog populations over time. Therefore, when considered alongside the specific existing data for the Utah prairie dog, the information from available literature that pertains to harvest of prairie dogs in general seems to indicate that additional safeguards are prudent.

According to the literature, a fluctuating harvest rate based on a percentage of the known population can help ensure maintenance of a sustainable population, with no risk of extinction (Reeve and Vosburgh 2006, p. 123). Available models indicate that harvest rates of 20 to 25 percent of a prairie dog population are sustainable (Reeve and Vosburgh 2006, p. 123; CDOW 2007, p. 135); however, these models were not specific to Utah prairie dogs. In our view, the Utah prairie dog situation differs from the ones modeled. One major difference is that prairie dog productivity and survivorship, key assumptions for these models, are substantially higher in colonies occurring on irrigated agricultural land than they are on native semiarid

grasslands (Collier 1975, pp. 42–43, 53; Crocker-Bedford and Spillet 1981, p. 1, 15–17). These differences suggest that existing models for black-tailed and Gunnison prairie dogs are poor predictors of likely impacts to Utah prairie dogs; the existing models are not specific to agricultural lands as in the case of this special rule. Thus, the suggested sustainable harvest rates recommended by these models are not directly applicable to agricultural lands occupied by Utah prairie dogs. Regardless, we use this available modeling in conjunction with data from 25 years of implementation of the previous special rules to allow take in a manner that promotes the conservation of the Utah prairie dog.

Although the previous special rules did not follow a fluctuating harvest-rate model (*i.e.,* a fixed rate of 6,000 animals could be taken annually), we used the available UDWR implementation data to determine the yearly permitted and actual take numbers as percentages of total annual population estimates. Under the UDWR system, permitted take has averaged 5.7 percent of the total rangewide population estimate (range equals 1.8 to 13.0 percent), with actual take averaging 2.6 percent of the total rangewide population (range equals 0.9 to 5.3 percent). With these levels of permitted and reported take, rangewide Utah prairie dog populations have, to date, remained stable to increasing (see Figure 1, above).

This rule limits the allowable permitted take to no more than 10 percent of the estimated annual rangewide population (adults and juveniles). Take associated with agricultural lands can never exceed 7 percent of the estimated annual rangewide population. The remaining allowable take is reserved for properties within 0.8 km (0.5 mi) of conservation lands (see below).

While our new limit on allowable take is above the average actual take under the previous special rules, UDWR-permitted take associated with agricultural lands previously met or exceeded the standard for agricultural lands (7 percent) eight times since 1985. Thus, this rule is more restrictive than past practice in some years and less restrictive than past practice in other years. We also note that actual take has always been less than permitted take (see Table 3, above), and we expect this trend to continue under this revised special rule. In addition, our new limit on allowable take is well below the standards set by the previously described modeling where harvest rates of 20 to 25 percent are sustainable.

We include additional safeguards. Permitting entities will spatially distribute the 7 percent allowed take on agricultural lands across the three Recovery Units, based on the distribution of the total annual population estimate within each Recovery Unit. This spatial distribution will help ensure that the take is not clustered in one area, and is instead more uniform based on comparative annual population numbers.

Furthermore, we are limiting within-colony take on agricultural lands to one-half of a colony's estimated annual productivity. Annual productivity = [(2 × spring adult count) × 0.67 (proportion of adult females) × 0.97 (proportion of breeding females) × 4 (average number of young per breeding female)], or approximately 36 percent of the total estimated population of the colony. This limit is consistent with UDWR's past practices. Under these practices, since 1985, we have never verified the loss of a prairie dog colony because of take permitted by UDWR (Day 2010, pers. comm.). Furthermore, according to UDWR personnel, prairie dog counts have remained stable to increasing on sites where permits are repeatedly requested, indicating a self-sustaining population and, sometimes, the expansion of these colonies despite long-term control efforts (Day 2010, pers. comm.). Our available data show that reported take in 1 year has not resulted in significant population declines of the colony the following year (Brown 2012). Thus, limiting within-colony take on agricultural lands to no more than one-half of a colony's estimated annual productivity (approximately 36 percent of the total estimated colony population) is consistent with conservation of the Utah prairie dog.

Colony size will be taken into consideration by the permitting biologist when evaluating the permittee's property and determining appropriate take levels, because the impacts of take may be greater on smaller colonies (CDOW 2007, p. 135). Personnel from the permitting entity will count prairie dogs on the applicant's property and determine a total population estimate (adults and juveniles) for each colony. The permitting entity will identify each permitted colony by name or number. A minimum spring count of seven animals (total population estimate = 50 animals) is required to ensure that permits are authorized only where resident prairie dogs have become established on agricultural lands (Day 2011, pers. comm.), and to ensure that lethal take does not result in the elimination of the colony (CDOW 2007, p. 128). If the maximum amount of take (one-half of the colony's productivity = 18 prairie dogs) occurs on this size colony, it would reduce the total colony size to 32 animals prior to the following breeding season. Colonies of at least 25 prairie dogs are likely to show population growth with very little risk of extinction. Populations with 50 or greater animals show no risk of extinction and strong population growth (CDOW 2007, p. 128). Therefore, we expect prairie dog colonies of at least 32 animals to continue to exist long term with annual, regulated lethal take. This conclusion is supported by our observations that we have never verified the loss of a Utah prairie dog colony because of take permitted by UDWR under the previous special rules, and prairie dog counts have remained stable to increasing on sites where permits were repeatedly requested and given since 1985 (Day 2010, pers. comm.).

These limits are largely consistent with UDWR's past practice, which has successfully controlled prairie dogs in site-specific locations without negatively impacting recovery of the species (Day 2010, pers. comm.; Brown 2012). In fact, this rule is more restrictive in that it increases the minimum colony size for permitting from a spring count of five animals (1991 special rule) to a spring count of seven animals (total estimated population size = 50 animals) because that is the best available information we have to ensure continued population growth rates and low extinction risk (CDOW 2007, p. 128).

Properties Near Conservation Lands

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

The extent of take on properties within 0.8 km (0.5 mi) of conservation lands is further limited to not reduce populations below the baseline estimated total population size (adults and juveniles) that existed on these lands prior to the establishment of the conservation property. This provision provides assurances to the landowners that they will not incur new Federal regulatory restrictions as a result of their habitat improvements and the reintroduction of prairie dogs on a conservation property. Conversely, this provision assists us with the creation of conservation properties by allowing landowners to take prairie dogs down to, but not below, the established baseline population. The property's baseline is the highest estimated population size (adults and juveniles) on the property during the 5 years prior to establishment of the conservation property, except that if no UDWR surveys to determine population size on a property were conducted during such 5-year period, the baseline population is the estimated total (summer) population size on that property as determined in the first survey conducted after the establishment of the conservation property. Thus, this provision provides a conservation benefit for Utah prairie dogs by promoting landowner support for such efforts while not reducing populations below the established baseline. Similar provisions were incorporated into all previously approved Utah prairie dog safe harbor agreements.

Safety Hazards, Human Cultural and Burial Sites

We are not limiting the amount of translocation or lethal take on lands where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. These sites are relatively small areas, and for lethal take the areas must be fenced, and prairie dogs removed by translocation prior to the Service's written approval for lethal take. For example, fencing was recently constructed around the Parowan airport runway to preclude prairie dogs from using 53 ac (21 ha) of occupied habitat, and the 5 ac (2 ha) Paragonah cemetery will be fenced in 2012; prairie dogs will be translocated from these sites prior to lethal take. Thus, we expect that the numbers of Utah prairie dogs lethally removed will be small. In addition, as previously described, these areas do not contribute to conservation of the species because they are generally within otherwise developed areas with substantial human activity and habitat fragmentation. Translocation of prairie dogs from these sites also will assist with recovery efforts on Federal lands (USFWS 2012, p. 3.5–7).

Most studies on the impacts of shooting are related to recreational hunting on black-tailed prairie dog colonies. This information indicates that recreational shooting of other prairie dog species can cause localized effects on a population (Stockrahm 1979, pp. 80–84; Knowles 1988, p. 54; Vosburgh 1996, pp. 13, 15, 16, and 18; Vosburgh and Irby 1998, pp. 366–371; Pauli 2005, p. 1; Reeve and Vosburgh 2006, p. 144), but populations typically rebound thereafter (Knowles 1988, p. 54; Vosburgh 1996, pp. 16, 31; Dullum et al. 2005, p. 843; Pauli 2005, p. 17; Cully and Johnson 2006, pp. 6–7). Extirpations due to shooting, while documented, are rare (Knowles 1988, p. 54). Impacts to other species of prairie dogs from unregulated or minimally regulated recreational shooting, as cited above, are likely to be more pronounced than impacts to Utah prairie dog permitted control, given our restrictions on the amount and distribution of take.

On the whole, we believe our limits on the amount and distribution of take ensures that this rule does not negatively impact the stable-to-increasing Utah prairie dog population trends of the last 25 years. Continuing to allow sufficient permitted take limits will help ensure that private landowners and local communities are willing to work with us on prairie dog conservation efforts (see *Limiting Where Take is Allowed,* above). Consequently, we believe this final rule is sufficient to address prairie dog control issues and Utah prairie dog recovery simultaneously.

Limiting Take by Season

Agricultural Lands and Properties Near Conservation Lands

We are limiting take on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands by season. Take is allowed between June 15 and December 31. This is a moderate change from the dates authorized by the previous special rules, but is based on our most current knowledge of the species biology; pups emerge from their burrows by approximately mid-June, at which time they are foraging independently (Hoogland 2003, p. 236; see ''Life History,'' above). Therefore, the loss of female adult prairie dogs to shooting will not negatively affect the survivability of the remaining young. In addition, prairie dog populations with seasonal shooting closures of March 14 to June 15 show positive population growths and low to negligible risk of extirpation (CDOW 2007, p. 135). These seasonal shooting closure dates directly correspond to our timing of June 15 through December 31 for allowing direct lethal take on agricultural lands. Thus, we can conclude that restricting use of this 4(d) rule between the dates of January 1 through June 14 will result in positive population growths with low to negligible risk of extinction. This conclusion is supported by our observations that we have never verified the loss of a Utah prairie dog colony because of take permitted by UDWR, and prairie dog counts have remained stable to increasing on sites where permits were repeatedly requested over the last 25 years (Day 2010, pers. comm.). In this timeframe, UDWR provided permits to landowners beginning June 1. Thus, this revision to June 15 is more conservative than past practice, and is based on the best current available science.

According to the literature and on-the-ground experience with Utah prairie dogs, our timing of permitted Utah prairie dog control, when combined with other take limitations outlined elsewhere in this rule (*e.g.,* a harvest rate based on a percentage of the known population and restrictions on lands where take is allowed), is sufficient to allow long-term, stable-to-improving population trends to continue. Thus, permitted Utah prairie dog control on agricultural lands and properties near conservation lands is allowed from June 15 to December 31.

Lethal take from March to May would likely kill pregnant or lactating females so that neither they nor their offspring would reproduce the following year (Knowles 1988, p. 55). If the timing of lethal take is restricted to times outside of the breeding and young-rearing (lactating) periods, then impacts can be minimized (Vosburgh and Irby 1998, p. 370; CDOW 2007, pp. 135–137). In fact, as described in this and previous rules (49 FR 22333, May 29, 1984; 56 FR 27439–27441, June 14, 1991), controlling prairie dogs when populations are at high densities (*i.e.,* particularly during the summer months when the aboveground prairie dog population explodes as the juveniles emerge from their burrows) may enhance long-term population growth rates by reducing competition for limited resources and increasing overwinter survival (see *Limiting Where Direct Take Can Be Permitted*). This information is supported by observations that Utah prairie dog colonies are maintained at high levels on properties that have received multiple annual control permits despite over 25 years of permitted control under

the previous special rules (Day 2010, pers. comm.).

Safety Hazards, Human Cultural and Burial Sites

We will not restrict lethal take to a specified timeframe in areas where prairie dogs present a serious human safety concern or disturb the sanctity of a significant human cultural or human burial site because the specific intent of lethal take in these areas is to remove all remaining prairie dogs from these areas following implementation of all practicable measures, including fencing and translocations.

Limiting Methods Allowed To Implement Direct Take

The previous special rules did not restrict the method or type of take UDWR could permit. In practice, UDWR previously permitted the control of Utah prairie dogs through translocation efforts, trapping intended to lethally remove prairie dogs, and shooting. This amendment limits methods of take that can be permitted on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands to be consistent with this past practice.

Agricultural Lands and Properties Near Conservation Lands

Translocations of Utah prairie dogs are used to increase the numbers of prairie dog colonies in new locations across the species' range. Translocation of Utah prairie dogs occurs within and between recovery units in part to address the species' limited levels of genetic diversity (USFWS 2012, p. 1.9–1; Roberts *et al.* 2000). Translocation efforts include habitat enhancement at selected translocation sites and live trapping of Utah prairie dogs from existing colonies to move them to the selected translocation sites. In short, translocations play an important role in establishing new colonies and facilitating gene flow.

Thus, translocation will be one of the approved methods of taking Utah prairie dogs. Previously, only UDWR performed Utah prairie dog translocations. This rule allows all properly trained and permitted individuals to translocate prairie dogs to new colony sites in support of recovery actions, provided these parties comply with current Service-approved translocation guidance. Translocated prairie dogs count toward the take limits established by the previous special rules and will continue to count toward the more restricted take limits in this rule. Translocation activities must be in accordance with Service-approved translocation protocol in order for the provisions of this rule to apply.

While translocation is and will continue to be the preferred take option, largely due to its contribution to recovery, finite staff resources and a limited availability of suitable translocation sites require that other tools also be available. Thus, we are limiting the methods of intentional lethal take on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands to forms with a proven success record as demonstrated by past UDWR permitting, including lethal removal through trapping and shooting. Under this rule, permitted lethal take can be carried out by the landowner or the U.S. Department of Agriculture—Wildlife Services with the landowner's permission. Use of these methods has occurred over the past 25 years, while the total population rangewide and within individual colonies subject to take have remained stable to increasing (Day 2010, pers. comm.).

We are specifically prohibiting drowning, poisoning, and the use of gas cartridges, anticoagulants, and explosive devices as methods of permissible lethal control on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands. Drowning or poisoning are typically applied across large areas and usually kill large numbers of prairie dogs (Collier 1975, p. 55). These techniques were not employed by UDWR under the previous rule and are explicitly prohibited by this rule because they do not allow control agents to target a specific number of prairie dogs or track actual take.

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

At the present time, we do not have information to indicate that the concern of potential lead poisoning is translating into impacts on Utah prairie dogs. Allowed take is limited to agricultural lands, properties within 0.8 km (0.5 mi) of conservation lands, and areas where prairie dogs create serious human hazards or disturb the sanctity of significant human cultural or human burial sites. Therefore, any potential site-specific impacts as a result of potential lead poisoning are limited in scope and likely of minor consequence to the Utah prairie dog. Limitations on the timing of allowed control further limit the scope of potential impacts. Our December 3, 2009, black-tailed prairie dog status review came to a similar conclusion when it found use of expandable lead shot did not pose a substantial risk of lead poisoning to surviving prairie dogs due to scavenging carcasses (74 FR 63343).

Given these findings, this rule does not prohibit certain types of shot (expandable vs. nonexpendable or lead vs. nonlead). However, we may consider ammunition-type restrictions in the future if available data indicate such restrictions would be necessary and advisable to provide for the conservation of the species.

Safety Hazards, Human Cultural and Burial Sites

The use of any lethal take methodology will be allowed in areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. At the time that lethal take is authorized at these sites, the areas will have been fenced and prairie dogs translocated off-site. Therefore, we anticipate that relatively small numbers of prairie dogs will remain in these areas. We do not consider these areas important to the conservation of the species because as previously stated they are generally within otherwise developed areas with substantial human activity and habitat fragmentation. It is our intent that these designated areas remain free of prairie dogs, and thus all otherwise lawful methodologies for lethal take are allowable.

Exemption for Incidental Take From Normal Agricultural Practices

Normal agricultural practices can result in the unlawful take (harm, harass, or kill) of Utah prairie dogs. For example, agricultural equipment can accidentally crush burrows or individual animals. Similarly, burrows also can be flooded by normal irrigation practices and thus made uninhabitable

for Utah prairie dogs, or result in incidental mortality. Although the incidental take permit for the Iron County HCP (Iron County 2006, entire) authorizes normal agricultural practices as a form of non-permanent take in Iron County, this incidental take permit does not extend to address these issues for agricultural users across the entire range of the Utah prairie dog.

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

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

Providing a take exemption for otherwise legal activities associated with standard agricultural practices is necessary and advisable to provide for the conservation of the species. This is the case because agricultural users are a key partner in our efforts to recover the Utah prairie dog. As previously described, up to 85 percent of prairie dogs occur on private lands (see Table 2), many of which are in agricultural production (USFWS 2012, p. 1.7–3). Agricultural users are often interested in participating in conservation programs for the species such as safe harbors and conservation easements if they know they have some regulatory flexibility regarding their daily operational activities (see *Limiting Where Take is Allowed,* Conservation Benefits of Allowing Take on Specific Lands, above; Elmore and Messmer 2006, p. 9–13; USFWS 2012, p. 2.3–2). If we can provide regulatory flexibility to these land users, they are more likely to support rangewide conservation programs for the Utah prairie dog.

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

Limiting the take to such lands ensures only legitimately operating agricultural producers will be eligible for the incidental take provisions as described in this rule. As previously discussed, available information indicates that prairie dog populations on agricultural lands are not negatively affected by ongoing standard agricultural practices. In fact, 25 years of data under the previous special rules show stable-to-increasing, rangewide prairie dog population trends. Providing the safeguard of specifically defining agricultural lands ensures that we limit the allowable incidental take to specific types of agricultural uses, of which any possible resulting negative impact would be only a minor and temporary accompaniment to the continued long-term benefits to the species. As described earlier, we conclude that allowing direct lethal take in agricultural areas will increase the participation of landowners and local communities in the species' conservation and recovery (see *Limiting Where Take is Allowed,* ''Conservation Benefits of Allowing Take on Specific Lands''). This same benefit is anticipated with standard agricultural practices because agricultural users are a key partner for Utah prairie dog recovery efforts (see *Exemption for Incidental Take from Normal Agricultural Practices,* above).

Effects of This Rule

The 1991 special rule (56 FR 27438, June 14, 1991; 50 CFR 17.40(g)) authorized UDWR to permit take of up to 6,000 animals on private land within the species' range annually. We amend that rule with new restrictions on direct take previously authorized and add a new incidental take authorization. Table 4 summarizes the amendments finalized by this rule.

TABLE 4—SUMMARY OF OUR FINAL AMENDMENTS

	Final Amendments
Who Can Allow Take	UDWR or, with the Service's written approval, other entities can perform the permitting and reporting tasks for control activities on agricultural lands or properties within 0.8 km (0.5 mi) of conservation lands. No permits are required for take in areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.
Where Direct Take Is Allowed	Direct take is limited to: Agricultural land being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is seven or more individuals; private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation land; and areas where human safety hazards or the sanctity of significant human cultural or human burial sites are a serious concern, but only after all practicable measures to resolve the conflict are implemented.

TABLE 4—SUMMARY OF OUR FINAL AMENDMENTS—Continued

Amount of Rangewide Direct Take Allowed	The upper permitted take limit may not exceed 10 percent of the estimated rangewide population annually for agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands; and, on agricultural lands, may not exceed 7 percent of the estimated annual rangewide population annually. There is no limit for the amount of take in areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, and take in these circumstances does not contribute to the upper permitted take limits described above.
Site-Specific Limits on Amount of Direct Take	On agricultural lands, within-colony take is limited to one-half of a colony's estimated annual production (approximately 36 percent of estimated total population). On properties neighboring conservation lands, take is restricted to animals in excess of the baseline population. The baseline population is the highest estimated total (summer) population size on that property during the 5 years prior to establishment of the conservation property, except that if no UDWR surveys to determine population size on a property were conducted during such 5-year period, the baseline population is the estimated total (summer) population size on that property as determined in the first survey conducted after the establishment of the conservation property. There are no site-specific direct take limits in areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.
Timing of Allowed Direct Take	The timing of permitted direct take on agricultural lands and properties ne within 0.8 km (0.5 mi) of conservation lands is limited to June 15 through December 31. There is no timing restriction where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, except that translocations must be completed prior to conducting any lethal take.
Methods Allowed to Implement Direct Take	On agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands, direct take is limited to activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance, trapping intended to lethally remove prairie dogs, and shooting. Actions intended to drown or poison prairie dogs, and the use of gas cartridges, anticoagulants, or explosive devices is prohibited in these areas. There are no restrictions on methods to implement take in areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or burial sites, except that translocations will be conducted before lethal measures of control are allowed.
Service Ability to Further Restrict Direct Take	Unchanged. The Service may immediately prohibit or restrict take as appropriate for the conservation of the species.
Incidental Take for Agricultural Activities	Utah prairie dogs may be taken when take is incidental to otherwise legal activities associated with standard agricultural practices (see Regulation Promulgation section for specifics).

First, this rule restricts where direct take can be permitted to: (1) Agricultural land being physically or economically impacted by Utah prairie dogs when the spring count on the agricultural lands is 7 or more individuals; (2) private property within 0.8 km (0.5 mi) of Utah prairie dog conservation land; and (3) areas where Utah prairie dogs are determined, with the approval of the Service, to be presenting a serious human safety hazard (*e.g.,* airport safety areas, recreational sports fields, nursing homes, schools), or disturbing the sanctity of significant human cultural or human burial sites if these lands are determined not necessary for the conservation of the species.

Second, this rule limits the amount and distribution of direct take that can be permitted. Total take cannot exceed 10 percent of the estimated annual rangewide population. On agricultural lands, permitted take is limited to 7 percent of the estimated annual rangewide population and within-colony take is limited to one-half of a colony's estimated annual productivity. On properties within 0.8 km (0.5 mi) of conservation lands, the remaining take (3 percent of the estimated annual rangewide population or more, depending on the amount permitted on agricultural lands) is restricted to animals in excess of the baseline population.

Third, this rule limits the methods of take that can be permitted on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands to include: (1) Activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance; (2) trapping intended to lethally remove prairie dogs; and (3) shooting.

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

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

Finally, the Service maintains the right to immediately prohibit or restrict permitted taking. Restrictions on permitted taking could be implemented without additional rulemaking, as appropriate for the conservation of the species, if we receive evidence that taking pursuant to the special rule is having an effect that is inconsistent with the conservation of the Utah prairie dog. If restrictions on permitted taking are required, the Service will immediately notify the permitting entities in writing.

These new restrictions on direct take and the new incidental take provision will support the conservation of the species while still providing relief and conservation incentives to private landowners. On the whole, we believe this rule will help maintain the stable-to-increasing (more likely increasing) long-term population trends we have seen over the last 25 years, and facilitate the recovery of the Utah prairie dog.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. The E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities'' (see 5 U.S.C. 605(b)). Based on the information that is available to us at this time, we certify that this regulation will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

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

In summary, we have considered whether the rule results in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that these amendments do not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments,'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

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

(b) We do not believe that this rule significantly or uniquely affects small governments. The State of Utah originally requested measures such as this regulation to assist with reducing conflicts between Utah prairie dogs and local landowners on agricultural lands (49 FR 22330, May 29, 1984). In addition, the UDWR actively assists with implementation of the 1984 special rule, as amended in 1991, and will do the same under this regulation, through a permitting system. Under this rule, we have included the ability for other permitting entities to perform many of the UDWR's permitting and reporting tasks for control activities. However, this change was in response to a recommendation from UDWR provided in that agency's comments to our proposed rule. Thus, no intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the States and the Federal Government. Furthermore, the limitations on where permitted take can occur, the amount of take that can be permitted, and methods of take that can be permitted are largely consistent with past UDWR practices. Therefore, the rule will not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act is not required.

Takings

This action is exempt from the requirements of E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights). According to section VI(D)(3) of the Attorney General's

Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, regulations allowing the take of wildlife issued under the ESA fall under a categorical exemption. This rule pertains to regulation of take (defined by the ESA as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct'') deemed necessary and advisable to provide for the conservation of the Utah prairie dog. Thus, this exemption applies to this action.

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

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

Federalism

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this amendment with, appropriate State resource agencies in Utah. The State of Utah originally requested measures such as this regulation to assist with reducing conflicts between Utah prairie dogs and local landowners on agricultural lands (49 FR 22330, May 29, 1984). In addition, the UDWR actively assists with implementation of the previous special rules, and will do the same under this regulation, through a permitting system. Under this rule, we have included the ability for other permitting entities to perform many of the UDWR's permitting and reporting tasks for control activities. However, this change was in response to a recommendation from UDWR provided in that agency's comments to our proposed rule. Thus, no intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change, and fiscal capacity will not be substantially directly affected. The special rule operates and, as amended, will continue to operate to maintain the existing relationship between the State and the Federal Government. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a federalism summary impact statement pursuant to the provisions of E.O. 13132.

Civil Justice Reform

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

Paperwork Reduction Act

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

National Environmental Policy Act

In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that National Environmental Policy Act (NEPA) documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA (*http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm*). The Service subsequently expanded this determination to section 4(d) rules. A section 4(d) rule provides the appropriate and necessary take prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. It is our view that NEPA procedures unnecessarily overlay NEPA's own matrix upon the ESA section 4 decisionmaking process. For example, the opportunity for public comment—one of the goals of NEPA—is already provided through section 4 rulemaking procedures.

However, out of an abundance of caution, we complied with the provisions of NEPA for this rulemaking. We analyzed the impact of this modification to the existing special rule and determined that there were no significant impacts or effects caused by this rule. A final environmental assessment was completed for this action, and is available for public inspection (see **ADDRESSES** section).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations With Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the ESA), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. Therefore, we coordinated with affected Tribes within the range of the Utah prairie dog. We did not receive any comments on the proposed special regulations from Tribes or Tribal members during the public comment period.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect this action to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant

energy action, and no Statement of Energy Effects is required.

References Cited

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

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

For the reasons stated in the preamble, the Service amends part 17, chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.40 by revising paragraph (g) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(g) Utah prairie dog (*Cynomys parvidens*).

(1) Except as noted in paragraphs (g)(2) through (g)(6) of this section, all prohibitions of § 17.31(a) and (b) and exemptions of § 17.32 apply to the Utah prairie dog.

(2) A Utah prairie dog may be directly or intentionally taken as described in paragraphs (g)(3) and (4) of this section on agricultural lands, properties within 0.8 kilometers (km) (0.5 miles (mi)) of conservation lands, and areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.

(3) *Agricultural lands and properties near conservation lands.* When permitted by the Utah Division of Wildlife Resources (UDWR), or other parties as authorized in writing by the Service, direct or intentional take is allowed on private properties that are located within 0.8 km (0.5 mi) of conservation land, and on agricultural land. Records on permitted take will be maintained by the State (or other parties as authorized in writing by the Service), and made available to the Service upon request.

(i) *Agricultural land.* (A) Take may be permitted only on agricultural land being physically or economically affected by Utah prairie dogs, and only when the spring count on the agricultural lands is seven or more individuals, and only during the period of June 15 to December 31; and

(B) The land must:

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

(2) Be capable of producing crops or forage;

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

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

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

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

(ii) *Private property near conservation land.* (A) Take may be permitted on private properties within 0.8 km (0.5 mi) of Utah prairie dog conservation land during the period of June 15 to December 31.

(B) Conservation lands are defined as non-Federal areas set aside for the preservation of Utah prairie dogs and are managed specifically or primarily toward that purpose. Conservation lands may include, but are not limited to, properties set aside as conservation banks, fee-title purchased properties, properties under conservation easements, and properties subject to a safe harbor agreement (see § 17.22). Conservation lands do not include Federal lands.

(iii) *Amount of permitted take on agricultural lands and private property near conservation land.* (A) The UDWR, or other parties as authorized in writing by the Service, will ensure that permitted take on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands does not exceed 10 percent of the estimated rangewide population annually.

(B) On agricultural lands, the UDWR, or other parties as authorized in writing by the Service, will limit permitted take to 7 percent of the estimated annual rangewide population and will limit within-colony take to one-half of a colony's estimated annual production. The UDWR, or other parties as authorized in writing by the Service, will spatially distribute the 7 percent allowed take on agricultural lands across the three Recovery Units, based on the distribution of the total annual population estimate within each Recovery Unit.

(C) In setting take limits on properties within 0.8 km (0.5 mi) of conservation lands, the UDWR, or other parties as authorized in writing by the Service, will consider the amount of take that occurs on agricultural lands. The State, or other parties as authorized in writing by the Service, will restrict the remaining permitted take (the amount that would bring the total take up to 10 percent of the estimated annual rangewide population) on properties within 0.8 km (0.5 mi) of conservation lands to animals in excess of the baseline population. The baseline population of these lands is determined in accordance with paragraph (g)(3)(iii)(D) of this section.

(D) Take on properties within 0.8 km (0.5 mi) of conservation lands is restricted to prairie dogs in excess of the baseline population. The baseline population is the highest estimated total (summer) population size on that property during the 5 years prior to the establishment of the conservation property, except that if no UDWR surveys to determine population size on a property were conducted during such 5-year period, the baseline population is the estimated total (summer) population size on that property as determined in the first survey conducted after the establishment of the conservation property. The baseline population will be established by the UDWR, or other parties as authorized in writing by the Service.

(E) Translocated Utah prairie dogs will count toward the take limits in paragraphs (g)(3)(iii)(A) through (D) of this section.

(iv) *Methods of allowed direct take on agricultural lands and private properties near conservation land.* Methods for controlling Utah prairie dogs on agricultural lands and properties within 0.8 km (0.5 mi) of conservation lands are limited to activities associated with translocation efforts by trained and permitted individuals complying with current Service-approved guidance, trapping intended for lethal removal, and shooting. Actions intended to drown or poison Utah prairie dogs and the use of gas cartridges, anticoagulants, and explosive devices are prohibited.

(4) *Human safety hazards and significant human cultural or human burial sites.*

(i) Nonlethal take is allowed where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, if approved in writing by the Service. To reduce hazards, prairie dog burrows may be filled with dirt if they are directly creating human hazards or disturbing the sanctity of

significant human cultural or human burial sites. Utah prairie dogs also may be translocated from these sites to approved translocation sites by properly trained personnel using Service-approved translocation protocols.

(ii) Direct or intentional lethal take is allowed where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, but only after all practicable measures to resolve the conflict are implemented, and only as approved in writing by the Service. A permit is not required to allow take under these conditions.

(A) All practicable measures means, with respect to these situations:

(*1*) Construction of prairie-dog-proof fence, above and below grade to specifications approved by the Service, around the area in which there is concern.

(*2*) Translocation of Utah prairie dogs out of the fenced area in which there is a concern must be conducted prior to allowing lethal take. Lethal take is allowed only to remove prairie dogs that remain in these areas after the measures to fence and translocate are successfully carried out.

(*3*) Continued maintenance or modification of the fence as needed to preclude Utah prairie dogs from entering the fenced sites.

(B) There are no restrictions on the amount, timing, or methods of lethal take allowed on lands where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites, as long as all qualifications in paragraphs (g)(4)(ii)(A)(1)through (3) of this section are met.

(C) The amount of take in areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites does not contribute to the upper permitted take limits described above for agricultural lands and private properties within 0.8 km (0.5 mi) of conservation lands.

(5) *Incidental take associated with agriculture.* Utah prairie dogs may be taken when take is incidental to otherwise-legal activities associated with legal and standard agricultural practices on legitimately operating agricultural lands. Acceptable practices include plowing to depths that do not exceed 46 cm (18 in.), discing, harrowing, irrigating crops, mowing, harvesting, and bailing, as long as the activities are not intended to eradicate Utah prairie dogs. There is no numeric limit established for incidental take associated with standard agricultural practices. Incidental take is in addition to, and does not contribute to, the take limits described in paragraphs (g)(2) through (4) of this section. A permit is not required for incidental take associated with agricultural practices.

(6) If the Service receives evidence that take pursuant to paragraphs (g)(2) through (5) of this section is having an effect that is inconsistent with the conservation of the Utah prairie dog, the Service may immediately prohibit or restrict such take as appropriate for the conservation of the species. The Service will notify the permitting entities in writing if take restrictions are necessary.

* * * * *

Dated: July 17, 2012.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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