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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R6-ES-2009-0064]

[MO 922105 0083-B2]

Endangered and Threatened Wildlife and Plants; 90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered

AGENCY:

Fish and Wildlife Service, Interior.

ACTION:

Notice of 90-day petition finding.

SUMMARY:

We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the distinct population segment (DPS) of American dipper (*Cinclus mexicanus unicolor*) in the Black Hills of South Dakota as threatened or endangered and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). For the purposes of this finding, we evaluated whether the petition presents substantial information to indicate whether the petitioned entity (the American dipper in the Black Hills of South Dakota) is a listable entity. Based on our review of the best available scientific and commercial information, we conclude that the American dipper in the Black Hills of South Dakota is not a listable entity under the Act. Because the petition did not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS, we did not evaluate whether the information contained in the petition regarding threats was substantial. Therefore, we will not initiate a status review to determine if listing this subspecies is warranted in response to this petition. However, the public may submit to us new information concerning the subspecies, its status, or threats to it at any time.

DATES:

You may submit new information concerning this subspecies for our consideration at any time.

ADDRESSES:

This finding is available on the Internet at <http://www.regulations.gov>. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the South Dakota Ecological Services Office, U.S. Fish and Wildlife Service, 420 South Garfield Avenue, Suite 400, Pierre, SD 57501. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT:

Pete Gober, Field Supervisor, South Dakota Ecological Services Office (see ADDRESSES section) (telephone 6052248693). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 et seq.) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of this finding promptly in the Federal Register.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly review the status of the species (status review)

We base this 90day finding on information provided by the petitioners and our evaluation of that information in relation to information available in our files at the time of the petition review. This finding summarizes the information included in the petition and information available to us at the time of the petition review. Under section 4(b)(3)(A) of the Act and our regulations at 50 CFR 424.14(b), our review of a 90day finding is limited to a determination of whether the information in the petition meets the substantial [scientific or commercial] information threshold.

Previous Federal Actions

On March 28, 2003, the Biodiversity Conservation Alliance, Center for Native Ecosystems, and Jeremy Nichols petitioned the Service to list the Black Hills American dipper distinct population segment (DPS) as an endangered or threatened species. We received a Notice of Intent to sue from the petitioners on July 21, 2003, who subsequently filed a complaint with the U.S. District Court for the District of Columbia on August 20, 2004. On January 24, 2005, we reached a settlement agreement to publish a 90day finding in the Federal Register by January 20, 2006. On January 26, 2006, we determined in a 90day finding that the Black Hills American dipper did not meet the elements for being a DPS and, therefore, was not a listable entity under the Act (71 FR 4341).

Petition

On October 2, 2008, we received a petition dated September 29, 2008, requesting that we list the DPS of American dipper in the Black Hills of South Dakota as threatened or endangered under the Act and designate critical habitat for that

DPS. In addition, the petition requested emergency listing of the DPS. The petition, submitted by the Biodiversity Conservation Alliance, Center for Native Ecosystems, Native Ecosystems Council, and Prairie Hills Audubon Society, was clearly identified as a petition for a listing rule, and it contained the names, signatures, and addresses of the requesting parties. Included in the petition was supporting information regarding the subspecies' taxonomy and ecology, historical and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the petition and addressed the request for emergency listing in a letter to Mr. Duane Short, dated December 5, 2008. The letter stated that we determined that the Black Hills population would need to meet our policy criteria as a DPS or a significant portion of the range of the subspecies before we can determine if emergency listing is necessary.

#### Species Information

The American dipper is a small, gray passerine bird that inhabits western Canada, Mexico, and the western United States, including the Black Hills (Pettingill and Whitney 1965, p. 74; Anderson 2002, p. 2) of South Dakota. The American dipper utilizes permanent, clean, cold, and swift mountain streams (Price and Bock 1983, p. 2; Tyler and Ormerod 1994, p. 3; Kingery 1996, p. 4; Feck 2002, p. 2) with abundant and healthy populations of benthic macroinvertebrates, the dipper's prey (Ealey 1977, p. 104; Price and Bock 1983, p. 2; Tyler and Ormerod 1994, p. 38; Kingery 1996, p. 6). Dippers are usually found in streams with rock, sand, and rubble substrates, which also are associated with the highest abundance of aquatic invertebrates. American dippers establish linear territories along a river in early spring (Kingery 1996, p. 11). They remain in or near their territories most of the year, depending upon the availability of open water. Dipper nest sites can be found on streamside rock cliffs, waterfalls, large rocks in midstream, or under bridges (Kingery 1996, p. 14).

#### Distribution and Abundance

The Black Hills are the eastern edge of the American dipper's range. The dipper is a permanent year-round resident of the Black Hills and has historically been known to inhabit nearly all permanent, fast-flowing streams in the area (Pettingill and Whitney 1965, p. 74). There are few records of American dippers making long-distance flights, and these records do not substantiate that these movements contribute to the establishment of new populations (Kingery 1996, p. 4; Muelhausen 1970, p. 136). No instances of long-distance dispersal of dippers between the Black Hills and the next nearest populations of American dipper to the west in the Big Horn Mountains of north-central Wyoming and the Laramie Range of east-central Wyoming have been documented. In addition to the apparent lack of long distance movements, the dipper population in the Black Hills is isolated from other populations by geographical barriers to dispersal in the form of extensive grasslands, poor-quality stream habitat, and the lack of water connections to dipper populations existing west of the Black Hills (Backlund 2001, p. 1).

Verified historical American dipper reports have been recorded on six streams or their tributaries in the Black Hills: French Creek, Rapid Creek, Box Elder Creek, Elk Creek, Whitewood Creek, and Spearfish Creek (Backlund 2001, pp. 2-4). Other streams are unable to support self-sustaining populations of dipper due to habitat degradation, erratic water flows, loss of water flow, poor water quality, and other impacts (Backlund 2001, p. 4). Currently, nesting dippers can be found on only two streams in the Black Hills: Spearfish Creek and Whitewood Creek (Lovett 2008, p. 2).

Dipper nest surveys in the Black Hills were started in 1993 by South Dakota Game, Fish and Parks, and became more extensive from 2003 to 2008. The lowest number of dippers reported on Spearfish Creek was 10 in 1997, with only two nests found (Backlund 2001, p. 4). In 2008, the number of dippers reported on Spearfish Creek was approximately 54 adults, with 38 nest attempts (Lovett 2008, p. 12). This is the second highest number of adults compared to 56 adults in both 2005 and 2006; there were 42 nest attempts in 2005 and 36 nest attempts in 2006. In 2008, Whitewood Creek had six adults observed and four known nest attempts (Lovett 2008, p. 12). Select areas of French Creek, Rapid Creek, and Boxelder Creek were checked for dippers but neither dippers nor active nests were found (Lovett 2008, p. 37).

#### Distinct Vertebrate Population Segment

The petitioners have asked us to consider listing a DPS of the American dipper in the Black Hills of South Dakota. Under the Act, we can consider for listing any species, subspecies, or DPS of any species of vertebrate fish or wildlife that interbreeds when mature. To implement the measures prescribed by the Act and its congressional guidance, we developed a joint policy with the National Oceanic and Atmospheric Administration entitled Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Act (61 FR 4722; February 7, 1996) (DPS Policy). Under the DPS policy, we must consider three elements in making our decision whether an entity qualifies as a DPS that warrants listing as endangered or threatened under the Act. The three elements are: (1) The population segment's discreteness in relation to the remainder of the species to which it belongs; (2) the population segment's significance to the species to which it belongs; and (3) the population segment's conservation status in relation to the Act's standards for listing that is, when treated as if it were a species, is the population segment endangered or threatened? For the purposes of this finding, we evaluated whether the petition presented substantial information to indicate whether the petitioned entity (the American dipper in the Black Hills of South Dakota) is a listable entity.

#### Discreteness

The DPS policy states that a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following two conditions: (1) It must be markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors, or (2) it must be delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Substantial information is presented in the petition to indicate that the Black Hills population may be markedly separated from other populations of the American dipper as a consequence of physical factors. The Black Hills is an isolated mountain range located within the plains of western South Dakota and northeastern Wyoming (Raventon 1994, p. 15). The Great Plains, which entirely surround the Black Hills, create a major physical barrier separating the Black Hills American dipper populations from other Rocky Mountain populations to the west (Hall et al. 2002, p. 3). The Big Horn Mountains, approximately 241 to 322 kilometers (km) (150 to 200 miles (mi)) to the west, is the closest mountain range to the Black Hills (Froiland 1990, p. 11). The expanse of grassland separating the Black Hills from other mountain ranges is incapable of supporting American dippers and represents a significant barrier to dispersal (Backlund

2001, p. 1; Voelker 2002, p. 582). The streams and rivers of the Great Plains are described as typically silt-laden, turbid, alkaline, and subject to erratic flows which precludes their use by dippers (Smith and Hubert 1989, p. 27).

Information in the petition, as supported by information readily available in our files, suggests that there is a substantial physical isolation of the Black Hills population of the American dipper. Therefore, the petition presents substantial information indicating that the Black Hills population of the American dipper meets the condition for discreteness under our DPS policy that the population is markedly separated from other populations of the same taxon. The Black Hills population of the American dipper is located entirely within the United States, therefore the international governmental boundaries provision for discreteness does not apply.

### Significance

Under our DPS policy, if we determine that a population segment is discrete, we further consider that population's biological and ecological significance to the taxon to which it belongs, within the context that the DPS policy be used sparingly while encouraging the conservation of genetic diversity (61 FR 4722; February 7, 1996). This consideration may include, but is not limited to: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the subspecies in its genetic characteristics. These four considerations are addressed here:

(1) Persistence of the population segment in an ecological setting that is unusual or unique for the taxon.

The American dipper occupies permanent, clean, cold, and swift mountain streams throughout the western half of North America, including the Black Hills (Kingery 1996, p. 2). The petition contends that the streams in the Black Hills inhabited by dippers may be a unique ecological setting because the Black Hills themselves are a unique ecosystem. We recognize that the Black Hills have many unique ecological features, but information readily available in our files (Kingery 1996) indicates that the Black Hills are not unusual. These mountain ecosystems share commonalities, such as clean, cold, swift mountain streams with suitable substrate that provide the habitats for invertebrate species used by dippers. In that respect, the Black Hills are similar to other western mountain ecosystems that also support American dippers.

In addition, the petition claims that Black Hills streams have features that make them ecologically unique. Streams throughout the Rocky Mountains vary in many features, including elevation, gradient, substrate, parent geological material, and riparian vegetation, such that virtually every stream could be considered unique. Information readily available in our files (Kingery 1996) indicates that the key features of Black Hills streams used by dippers—cold temperatures, good water quality, suitable substrate, and swift flow—are the same key features of dipper-utilized streams elsewhere throughout the Rocky Mountains. Accordingly, we do not believe the petition presents substantial information that the clean, cold, swift streams of the Black Hills occupied by dippers are an ecological setting that is unusual or unique for this subspecies.

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of taxon.

The petition claims that the Black Hills dipper population is at the eastern edge of its global distribution and its loss would result in a significant gap in the range of the dipper. Information readily available in our files (Kingery 1996, NatureServe.org 2007) states that the American dipper's breeding range extends from western Alaska eastward across north-central Alaska; southward along the Pacific Coast, and throughout the Rocky Mountains into New Mexico. The subspecies is absent from the Great Basin area except for scattered populations. The subspecies' range includes mountain streams in an area that is approximately 5,000 km (3,107 mi) from north to south and approximately 1,800 km (1,118 mi) from west to east at its widest point. Within that range, there are thousands of suitable streams and tens of thousands of kilometers of occupied streams. The Black Hills dipper population, which occupies two streams that represent less than 80 km (50 mi) of occupied stream habitat, is a small population relative to the entire range. Populations of dippers exist throughout suitable streams in the Rocky Mountains. The Black Hills dipper population is small, and there is no information in the petition or readily available in our files to suggest that it makes a significant contribution to the taxa. The dipper-occupied streams in the Black Hills are on the eastern edge of the dipper's overall range in the United States; however, mountain streams in the southern parts of the subspecies' range (the i.e. front ranges of Colorado and, Mexico) are as far or farther east than the Black Hills.

We find that the petition does not present substantial information that loss of the population segment would result in a significant gap in the range of the taxon because it did not provide substantial information that the population in the Black Hills is significant to the taxa as a whole.

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range.

The petition does not address this consideration. As stated above under Distribution and Abundance, the American dipper survives naturally throughout much of western North America. As such, this consideration is not applicable to the Black Hills population of the American dipper.

(4) Evidence that the discrete population segment differs markedly from other populations of the subspecies in its genetic characteristics.

The petition does not address this consideration. We are aware that a genetic analysis was conducted to determine whether the Black Hills population of the American dipper is genetically distinct from other American dipper populations in North America (Anderson et al. 2007). The research analyzed samples from six populations (Black Hills, South Dakota; Big Horn Mountains, Wyoming; and four locations in west-central Montana and east-central Idaho). Information from this research suggests that genetic differences could exist among the dipper populations studied. However, the study did not address the significance of the Black Hills population of American dipper to the taxon as a whole. The results of the study do not lead us to believe there are significant genetic differences to meet the criteria in our DPS policy for significance based on genetics.

The information as provided in the petition does not meet the four considerations for significance. Only the first two considerations are actually addressed in the petition and do not present substantial information in favor of

significance. Little information is available in our files to support the third and fourth considerations, and no information was presented in the petition with respect to those criteria.

#### Conservation Status

We did not need to evaluate whether the information contained in the petition regarding the conservation status in relation to the Act's standards for listing was substantial, because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS and, therefore, a listable entity under the Act.

#### Finding

We have reviewed the information presented in the petition and have evaluated that information in relation to information readily available in our files. On the basis of our review, we find that the petition does not present substantial scientific or commercial information to indicate that listing the American dipper in the Black Hills of South Dakota may be warranted. This finding is based on the lack of substantial scientific evidence to indicate that the American dipper in the Black Hills of South Dakota may meet the elements of being a valid DPS and, therefore, a listable entity under the Act. Although the population appears to meet the criteria for being discrete, neither the information in the petition nor the information readily available in our files suggests that the Black Hills dipper population may be significant in relation to the remainder of the taxon. Therefore, we conclude that the American dipper in the Black Hills of South Dakota does not satisfy the elements of being a DPS under our 1996 policy and, therefore, is not a listable entity under section 3(16) of the Act. Because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS, we did not evaluate whether the information contained in the petition regarding the conservation status was substantial.

Although we will not commence a status review in response to this petition, we will continue to monitor the American dipper's population status and trends, potential threats, and ongoing management actions that might be important with regard to the conservation of the species in the Black Hills of South Dakota. We encourage interested parties to continue to gather data that will assist with these conservation efforts. New information should be submitted to the Field Supervisor, South Dakota Ecological Services Office (see ADDRESSES).

The petitioners also request that critical habitat be designated for the American dipper in the Black Hills of South Dakota. Because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota may be a DPS, we are not required to address the designation of critical habitat, and therefore, will not be doing so.

If you wish to provide information regarding the American dipper in the Black Hills, you may submit your information or materials to the Field Supervisor of the South Dakota Ecological Services Office (see ADDRESSES) at any time.

#### References Cited

A complete list of all references is available upon request from the Field Supervisor (see ADDRESSES).

Author

The primary authors of this document are staff members at the South Dakota Ecological Services Office (see ADDRESSES).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C.1531 et seq.).

Dated: October 9, 2009

Daniel M. Ashe

Acting Director, U.S. Fish and Wildlife Service

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