addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, ''demand'' means the express demand of the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty (1) in the administrative complaint, or (2) elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

(d) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 6.11 [Amended]

7. In § 6.11, paragraph (b) is amended by replacing the figure ''$75.00'' with the figure ''$125.00''.

§ 6.25 [Amended]

8. In § 6.25, paragraph (c) is amended by replacing the words ''an identify'' with the words ''and identify''.

Issued this 31st day of May, 1996 at Washington, D.C.

Federico Peña,

Secretary of Transportation.

[FR Doc. 96–14245 Filed 6–5–96; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition To List the Northern Goshawk in the Western United States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and vacation of the June 25, 1992, finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the northern goshawk (*Accipiter gentilis*) in the Western United States under the Endangered Species Act, as amended. The Service has determined that the petition does not present substantial information that listing the northern goshawk in the Western United States may be warranted. The Service also vacates the previous June 25, 1992, finding for the same petitioned action.

DATES: The finding announced in this document was made on May 28, 1996.

ADDRESSES: Information, comments, or questions concerning this petition may be submitted to the Supervisor, Arizona Ecological Services Field Office, U.S. Fish and Wildlife Service, 2321 W. Royal Palm Rd., Suite 103, Phoenix, Arizona 85021. The petition, finding, and supporting data are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Sam Spiller, Supervisor (see **ADDRESSES** above) (telephone 602/640–2720).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and notice of the finding is to be published promptly in the Federal Register. If a finding is made that substantial information was presented, the Service also is required to promptly commence a review of the status of the species involved.

On September 26, 1991, a coalition of conservation organizations (Babbitt *et al.* 1991) submitted a letter to the Service, requesting to amend a petition under consideration by the Service to list a population of northern goshawk (*Accipiter gentilis*) as endangered in Utah, Colorado, New Mexico, and Arizona (Silver *et al.* 1991). The coalition requested expanding the geographic region under consideration to include the ''forested west.'' The petitioners subsequently refined their definition of the ''forested west'' to mean the forested United States, west of the 100th meridian. Because this letter requested consideration of a substantially different listing action than the previous petition, the Service informed the petitioners that their letter would be considered a separate petition.

On June 25, 1992, the Service published a 90-day finding that the petition had not presented substantial information to indicate that the petitioned action may be warranted. The petitioners subsequently filed a lawsuit to have the finding set aside as arbitrary and capricious under the Administrative Procedures Act. On February 22, 1996, U.S. District Judge Richard M. Bilby found the June 25, 1992 finding to be arbitrary and capricious and remanded the finding to the Service for a new 90-day determination and vacation of the previous finding. This notice serves to inform the public of the Service's new 90-day finding and vacates the Service's June 25, 1992 finding.

A species that is in danger of extinction throughout all or a significant portion of its range may be declared an endangered species under the Act. A species that is likely to become an endangered species in the foreseeable future (as defined above) throughout all or a significant portion of its range may be declared a threatened species under the Act. The term ''species'' is defined by the Act to include ''* * * subspecies * * * and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature * * *'' (16 U.S.C. 1532 (15)).

In reviewing a listing petition, the Service must determine whether the petitioned action includes an entity that is listable under the Act, and, if so, whether the petition presented substantial information that the petitioned action may be warranted. In this case, the Service must consider whether northern goshawks west of the 100th meridian constitute a distinct population segment under 16 U.S.C. 1532 (15). In making this determination, the Service relies upon the National Marine Fisheries Service and Fish and Wildlife Service final Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the

Endangered Species Act (61 FR 4722; February 7, 1996).

The petition as submitted requests that the Service list a distinct population segment of northern goshawks that consists of portions of the ranges of three separate subspecies: *Accipiter gentilis atricapillus*, *A. g. laingi*, and *A. g. apache*. The range of each of the three subspecies extends beyond the area delineated in the petition. Only *A. g. atricapillus* and *A. g. laingi* are recognized by the American Ornithologists' Union (1957). However, *A. g. apache* has been recognized by some biologists and the Service (Brown and Amadon 1968, Hellmayer and Conover 1949, Hubbard 1992 as cited in Whaley and White 1994, Stresemann and Amadon 1979, U.S. Fish and Wildlife Service 1994).

Under the Services' February 7, 1996, final policy, the first step in determining whether the entity petitioned for listing qualifies as a distinct population segment is ''the discreteness of the population segment in relation to the remainder of the species to which it belongs.'' In defining the term ''population,'' the Services' February 7, 1996, final policy provides that in all cases when discussing a population, ''the organisms in a population are members of a single species or lesser taxon.'' Since a subspecies is a taxon, by definition a population segment may not include more than one subspecies. The Service's determination that a ''population'' cannot be composed of more than one recognized subspecies is consistent with the use of these terms in the scientific literature dealing with populations and subspecies (e.g., Mayr 1969).

This principle that a population may not include more than one subspecies is reflected in the wording of the first test for discreteness set forth in the Services' final policy of February 7, 1996. The final policy provides that a population segment is considered to be discrete if ''it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.'' Because the principle concerns the underlying definition of the term ''population,'' it is also an inherent part of the second test for discreteness concerning international boundaries, which is set forth in the final policy. In either case, if the entity petitioned for listing does not qualify as a ''population,'' it does not meet the discreteness test under the final vertebrate population policy.

The Act provides that a single subspecies may be listed as endangered or threatened (16 U.S.C. 1532 (15)). In this case, the entity petitioned for listing includes organisms that are not members of a single taxon, but rather at least two, and possibly three, subspecies. For the reasons discussed above, the Service has determined that the petitioned action does not meet the definition of a distinct vertebrate population and therefore does not meet the discreteness test. Accordingly, no further evaluation was conducted concerning the conservation status of the species.

The processing of this petition finding follows the Service's final listing priority guidance published in the Federal Register on May 16, 1996 (61 FR 24722). The guidance clarifies the order in which the Service will process rulemakings following two related events: (1) the lifting, on April 26, 1996, of the moratorium on final listings imposed on April 10, 1995 (Public Law 104–6), and (2) the restoration of significant funding for listing through passage of the omnibus budget reconciliation law on April 26, 1996, following severe funding constraints imposed by a number of continuing resolutions between November 1995 and April 1996. The guidance calls for prompt processing of draft rules and petition findings that were in the Service's Washington office (already approved by the field and regional offices) prior to the publication of the listing priority guidance on May 16, 1996. A draft of this petition finding was approved by the Service's Southwest Regional Director on May 8, 1996, and received by the Washington office on May 9, 1996.

In summary, the Service has reviewed its policies and guidance along with the petition and has determined that the petitioned entity is not listable under the Act. Therefore, the Service finds that the petition does not present substantial information that listing the northern goshawk in the United States west of the 100th meridian as a distinct population segment may be warranted. The Service also vacates its June 25, 1992, finding on the same petitioned action.

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Author

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Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: May 28, 1996.

John G. Rogers,

Acting Director, Fish and Wildlife Service.

[FR Doc. 96–14048 Filed 6–5–96; 8:45 am]

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