

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

[FWS–R9–IA–2008–0116; 96100–1671–000–B6]

RIN 1018–AW38

Endangered and Threatened Wildlife and Plants; Proposed Rule To List Black-Breasted Puffleg as Endangered Throughout Its Range Under the Endangered Species Act**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list as endangered the foreign species, black-breasted puffleg (*Eriocnemis nigrivestis*—a hummingbird native to Ecuador)—under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. We intend that any final action resulting from this proposal to list this species be as accurate and as effective as possible. Therefore, we request from all interested parties comments or suggestions regarding this proposed rule.

DATES: We will accept comments as indicated in the **SUPPLEMENTARY INFORMATION** section that are received or postmarked on or before February 6, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 22, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R9–IA–2008–0116; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **SUPPLEMENTARY INFORMATION** section below for more information).

FOR FURTHER INFORMATION CONTACT: Rosemarie Gnam, Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203;

telephone 703–358–1708; facsimile 703–358–2276. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:**Public Comments**

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

Background

Section 4(b)(3)(A) of the Act requires us to make a finding (known as a “90-day finding”) on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing actions (this

finding is referred to as the “12-month finding”). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Action

On May 6, 1991, we received a petition (1991 petition) from Alison Stattersfield, of International Council for Bird Preservation (ICBP), to list 53 foreign birds under the Act, including the black-breasted puffleg that is the subject of this proposed rule. On December 16, 1991, we made a positive 90-day finding and announced the initiation of a status review of the species included in the 1991 petition (56 FR 65207). On March 28, 1994 (59 FR 14496), we published a 12-month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act, of which were from the 1991 petition. In that document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the black-breasted puffleg, was warranted but precluded because of other listing activity.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), we identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species in our 2007 ANOR (72 FR 20184), published on April 23, 2007. In that notice, the black-breasted puffleg was designated with an LPN 2 and we determined that listing continued to be warranted but precluded. It should be noted that “Table 1—Candidate Review,” in our 2007 ANOR, erroneously noted the black-breasted puffleg with an LPN of 3. However, the correct LPN in 2007 was “2,” as was discussed in the body of the notice (72 FR 20184, p. 20197).

On January 12, 1995 (60 FR 2899), we reiterated the warranted-but-precluded status of the remaining species from the 1991 petition, with the publication of the final rule to list the 30 African birds. We made subsequent warranted-but-precluded findings for all outstanding foreign species from the 1991 petition, including the black-breasted puffleg, as published in our annual notices of review (ANOR) on May 21, 2004 (69 FR

29354), and April 23, 2007 (72 FR 20184).

On January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which had been previously determined to be warranted but precluded: The Andean flamingo (*Phoenicoparrus andinus*), black-breasted puffleg (*Eriocnemis nigrivestis*), Chilean woodstar (*Eulidia yarrellii*), medium tree finch (*Camarhynchus pauper*), and the St. Lucia forest thrush (*Cichlherminia lherminieri sanctaeluciae*). The court ordered the Service to issue proposed listing rules for these species by the end of 2008.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species (2008 ANOR). In that notice, we announced that listing was warranted for 30 foreign bird species, including the black-breasted puffleg, which is the subject of this proposed rule. The Andean flamingo, Chilean woodstar, medium tree finch, and St. Lucia forest thrush are the subject of separate proposed rules currently under preparation.

Species Information

Species Description

The black-breasted puffleg, endemic to Ecuador and a member of the hummingbird family (Trochilidae), is approximately 3.25 inches (in) (8.5 centimeters (cm)) long (Fjelds  and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). The species is locally known as “*Calzadito pechinegro*” or “*Zamarrito pichinegro*” (United Nations Monitoring Programme-World Conservation Monitoring Centre (UNEP-WCMC) 2008b, p. 1). Black-breasted pufflegs have distinctive white leg plumage (ergo, the name “puffleg”) and straight, black bills. Males have entirely black upperparts, mostly black underparts, and dark steel-blue forked tails. Females have shiny, bronze-green upper plumage, turning blue toward the tail, with golden-green underparts (BirdLife International (BLI) 2007, p. 1).

Taxonomy

This species was first taxonomically described by Bourcier and Mulsant in 1852 and placed in Trochilidae as *Eriocnemis nigrivestis* (BLI 2007, p. 1). According to the species database for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the black-breasted puffleg is also known by the synonym, *Trichilus nigrivestis* (UNEP-WCMC 2008b). Both CITES and BirdLife

International recognize the species as *Eriocnemis nigrivestis* (BLI 2007, p. 1; UNEP-WCMC. 2008b, p. 1). Therefore, we accept the species as *Eriocnemis nigrivestis*, which also follows the Integrated Taxonomic Information System (ITIS 2008, p. 1).

Habitat and Life History

Black-breasted pufflegs prefer humid temperate and elfin forests (Fjelds  and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). This habitat is described as grassy ridges surrounded by stunted montane forest with a dense understory (de Hoyo *et al.* 1999, p. 639), where *Polylepis* trees (no common name) predominate (World Land Trust 2007, p. 1). Altitudinal migrants, the species is found mainly at higher altitudes—above 10,000 feet (ft) (3,100 meters (m))—during the rainy season (November–February) and at lower elevations 9,006–10,000 ft (2,745–3,100 m) the rest of the year (del Hoyo *et al.* 1999, p. 639; Fjelds  and Krabbe 1990, p. 272). However, the species has been recorded at elevations as low as 7,874 ft (2,400 m) up to 11,483 ft (4,570 m) (del Hoyo *et al.* 1999, p. 639; Fjelds  and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 374).

As recently as 1990, researchers were unaware of the puffleg’s breeding habits (Fjelds  and Krabbe 1990, p. 272) and there continues to be little information (BLI 2007, p. 1). Del Hoyo *et al.* (1999, p. 639) reported that the species breeds from October to March, producing a clutch size of 2, and that the female incubates the eggs. Based on the species’ seasonal migration (del Hoyo *et al.* 1999, p. 639; Fjelds  and Krabbe 1990, p. 272), breeding presumably occurs at altitudes above 10,000 ft (3,100 m).

Their altitudinal migration coincides with the flowering of certain plants during the rainy season, including the small rubiad tree (*Palicourea huigrensis* (no common name)), which serves as its primary nectar source (Bleiweiss and Olalla 1983, pp. 657–658; del Hoyo *et al.* 1999, pp. 530–531; Fjelds  and Krabbe 1990, p. 272). The species also feeds on flower nectar of other shrubs and vines, including: *Thibaudia floribunda* (no common name), *Disterigma* sp. (no common name), *Rubus* sp. (no common name), *Tropaeolum* sp. (no common name), and *Psychotria uliginosa* (no common name) (Bleiweiss and Olalla 1983, pp. 657–658; Collar *et al.* 1992, pp. 516–517; del Hoyo *et al.* 1999, pp. 530–531; Phillips 1998, p. 21). Black-breasted pufflegs feed low in the shrubbery along forest margins, often while perched (Fjelds  and Krabbe 1990, p. 272;

Ridgely and Greenfield 2001b, p. 280). The species will frequently perch and will infrequently alight on the ground (del Hoyo *et al.* 1999, p. 639).

Historical Range and Distribution

Historically, the black-breasted puffleg inhabited the elfin forests along the northern ridge-crests of both Volc n Pichincha and Volc n Atacazo in northwest Ecuador (BLI 2007, p. 2; Fjelds  and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9). The species appears to have been extirpated from Volc n Atacazo (World Land Trust 2007, p. 3). It has not been confirmed on Volc n Atacazo since 1902; the possible sighting of a female at treeline (3,500 m; 11,483 ft) in 1983 has never been confirmed (BLI 2007, 2; Collar *et al.* 1992, p. 174; del Hoyo *et al.* 1999, p. 639). Habitat loss, specifically the felling of *Polylepis* wood for conversion to charcoal, was the primary cause of historical black-breasted puffleg declines (Phillips 1998, p. 21) (see Factor A). Following more than 13 years without any observation of the species, the black-breasted puffleg was rediscovered on Volc n Pichincha in 1993 (Phillips 1998, p. 21). The number of specimens in museum collections taken in the nineteenth century up until 1950 is over 100, suggesting the species was once more common (Collar *et al.* 1992, p. 516).

Current Range and Distribution

The black-breasted puffleg is currently known to occur only on the north side of Volc n Pichincha near Quito, Ecuador, in temperate elfin forests at altitudes between 9,350 and 11,483 ft (2,850 and 3,500 m) on the (Fjelds  and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280) Volc n Pichincha peaks at 15,699 ft (4,785 m) (Phillips 1998, p. 21). The current extent of the species’ range is approximately 33 square miles (mi²) (88 square kilometers (km²)) (BLI 2004, p. 2; Hirschfeld 2007, pp. 178–179).

Population Estimates

The black-breasted puffleg is currently restricted to a single population, ranging in size from 50 to no more than 250 adult individuals, with a declining trend (BLI 2007, p. 2; del Hoyo *et al.* 1999, p. 530). BirdLife International, a global organization that consults with and assimilates information from species experts, estimated that the species has experienced a population decline of between 50 and 79 percent in the past 10 years, with more than 20 percent of this loss having occurred within the

past 5 years. This rate of decline is predicted to continue (BLI 2007, p. 4).

Conservation Status

The black-breasted puffleg is identified as a critically endangered species under Ecuadorian law (Ecolex 2003b, p. 36). The black-breasted puffleg is classified as "Critically Endangered" in the 2006 IUCN Red List, because it has an extremely small range and the population is restricted to one location (BLI 2007, p. 1).

Summary of Factors Affecting the Species

Under section 4(a)(1) of the Act (16 U.S.C. 1533(a)(1)) and regulations promulgated to implement its listing provisions of the Act (50 CFR part 424.11), we may list a species as threatened and endangered on the basis of five threat factors: (A) Present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing may be warranted based on any of the above threat factors, either singly or in combination.

Under the Act, we may determine a species to be endangered or threatened. An endangered species is defined as a species which is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as a species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, for the black-breasted puffleg, we evaluated the best available scientific and commercial information under the five listing factors to determine whether it met the definition of endangered or threatened.

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

The black-breasted puffleg is currently restricted to the elfin forests along the northern ridge-crests of the Volcán Pichincha in northwest Ecuador (BLI 2007, p. 2; Fjeldsá and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9). The species has not been confirmed in any other known locality on Volcán Atacazo since 1902 (BLI 2007, 2; Collar *et al.* 1992, p. 174). Within the current range of the black-breasted puffleg, approximately 93 percent of the habitat has been destroyed, and the current extent of the species' range is approximately 88 km² (33 mi²) (BLI

2004, p. 2; Hirschfeld 2007, pp. 178–179).

Deforestation rates and patterns: The ridge-crests within the range of the black-breasted puffleg are relatively level, and local settlers have cleared the majority of forested habitat within the species' range and converted it to potato cultivation and grazing (Bleiweiss and Olalla 1983, p. 656; del Hoyo 1999, pp. 530–531). Some ridges are almost completely devoid of natural vegetation, and even if black-breasted pufflegs still occur in these areas, their numbers are most likely quite low (BLI 2004, p. 2).

The areas outside the Yanacocha Reserve (see Refugia), but still within the range of the black-breasted puffleg, continue to be affected by habitat loss and fragmentation. In an analysis of deforestation rates and patterns using satellite imagery in the western Andean slopes of Colombia and Ecuador, Viña *et al.* (2004, pp. 123–124) found that from 1973 through 1996, a total of 82,924 ha (204,909 ac) of tropical forests within the area studied were converted to other uses. This corresponds to a nearly one-third total loss of primary forest habitat or a nearly 2 percent mean annual rate within the study area. More recent reports identified similar forest habitat losses in Ecuador. Between the years 1990 and 2005, Ecuador lost a total of 2.96 million ha (7.31 million ac) of primary forest, which represents a 16.7 percent deforestation rate and a total loss of 21.5 percent of forested habitat since 1990 (Butler 2006, pp. 1–3; FAO 2003, p. 1).

Other Anthropogenic Factors: Within the range of the black-breasted puffleg, numerous human activities are affecting the current status of the species, including: Clearance of forested habitat for subsistence agriculture or commercial use or grazing (Hirschfeld 2007, pp. 178–179); habitat destruction and alteration as a result of fire (Bird Conservation 2005, p. 12; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; Phillips 1998, pp. 20–21); habitat destruction and pollution due to oil development and distribution (Amazon Watch 2001, pp. 1–16; Cárdenas and Rodríguez 2004, pp. 355; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179); and increased access and habitat destruction resulting from road development (Hirschfeld 2007, pp. 178–179). Roads create barriers to animal movement, expose animals to traffic hazards, and increase human access into habitat, facilitating further exploitation and habitat destruction (Hunter 1996, 158–159).

In 2001, the Ecuadorian government agreed to construct a pipeline to transport heavy oil from the Amazon

basin to Esmeraldas on the Pacific Coast (The Mindo Working Group 2001, p. 1). The environmental impact study revealed that the proposed route went through black-breasted puffleg habitat (The Mindo Working Group 2001, pp. 5, 11). Satellite mapping showed that much of the area in puffleg habitat was already destroyed, with little remaining habitat above 2,800 m (9,186 ft). The Black-breasted Puffleg had previously been found at 3,100 m (10,167 ft), in an upper extension from the likely unsuitable forested zone lower down. The pipeline, as proposed, would pass through pasture slightly above this patch and would further destroy habitat with the construction of a road (The Mindo Working Group 2001, p. 11). The pipeline was recently constructed, transecting every major ecosystem on the Volcán Pichincha, including black-breasted puffleg habitat. The pipeline also deforested pristine habitat, making these areas more accessible and opening them up to further human infiltration (BLI 2007, p. 12).

Refugia: In 2001, the Yanacocha Reserve (reserve) was established on the slopes of Volcán Pichincha (Bird Conservation 2005, p. 12; Phillips 1998, p. 20). The Reserve encompasses approximately 1,250 ha (3,100 ac), including approximately 960 ha (2,372 ac) of elfin (*Polylepis* spp.) forest (Hirschfeld 2007, pp. 178–179; World Land Trust 2007, p. 1). This reserve encompasses habitat that is used seasonally by the black-breasted puffleg, from March to July, when the species is migrating up or down the mountain (Bird Conservation 2005, p. 12; World Land Trust 2007, p. 1). Within the reserve, charcoal production, considered the primary cause for the species' historical decline, was forbidden (Phillips 1998, p. 21). The Yanacocha Reserve is managed for ecotourism, environmental education, and conservation initiatives, including restoration of the *Polylepis* woodland (BLI 2007, p. 8; Fondacion Jocotoco 2006, p. 1). The Reserve is negatively affected by human population pressures, including clearing for agricultural expansion and fires caused by slash-and-burn agricultural practices (Bird Conservation 2005, p. 12; Phillips 1998, p. 21). Hunting, extraction of non-timber resources (such as orchids), and tourism are considered to have a minor impact within the Reserve (BLI 2007, p. 12).

Summary of Factor A

The black-breasted puffleg prefers elfin forests at altitudes between 2,850–3,500 m (9,350–11,483 ft) (Fjeldsá and Krabbe 1990, p. 272; Ridgely and

Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). The current population is small and limited to a narrow elevational band on Volcán Pichinche, which contains fragmented, disjunct, and isolated habitat. Although the species range is partly included in a protected area, the habitat within the reserve continues to be altered or disturbed by human activities. The construction of a pipeline through black-breasted puffleg habitat led to loss and disturbance of pristine habitat and increased human access into the area with the development of infrastructure. Habitat destruction, alteration, and conversion were key factors in the species' historical decline and continue to be factors affecting the status of the species. Therefore, we find that the present destruction, modification, and curtailment of habitat are a threat to the black-breasted puffleg.

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

In 1987, the black-breasted puffleg was listed in CITES Appendix II, which includes species that are not necessarily threatened with extinction, but which require regulation of international trade in order to ensure that trade of the species is compatible with the species' survival. International trade in specimens of Appendix-II species is authorized through permits or certificates under certain circumstances, including verification that trade will not be detrimental to the survival of the species in the wild and that the specimen was legally acquired (UNEP-WCMC 2008a, p. 1).

Since its listing in 1987, there have been five CITES-permitted international shipments of the black-breasted puffleg, consisting of a total of 3 specimens imported into the United States and 14 re-exported through the United States. According to the World Conservation Monitoring Centre trade data (UNEP-WCMC 2008c, p. 1), all of these transactions involved the transport of specimens; 9 for scientific purposes, 6 for commercial trade, and 2 for personal purposes. This trade occurred between 1996 and 2002, and there has been no CITES trade in this species since 2002 (UNEP-WCMC 2008c, p. 1). Although we are concerned that the species' small population size (see Factor E) cannot withstand excessive harvest, we believe that this limited amount of international trade, controlled via valid CITES permits, is not a threat to the species.

We are unaware of any other information currently available that addresses the occurrence of overutilization for commercial,

recreation, scientific, or education purposes that may be affecting the black-breasted puffleg population. As such, we do not consider overutilization to be a threat to the species.

C. Disease or Predation

We are not aware of any occurrence of disease or predation that may be causing a decline of the black-breasted puffleg. As a result, we do not consider disease or predation to be a threat to the black-breasted puffleg.

D. The Inadequacy of Existing Regulatory Mechanisms

The black-breasted puffleg is identified as a critically endangered species under Ecuadorian law and Decree 3,516 of 2003—Unified Text of the Secondary Legislation of the Ministry of Environment (Ecolex 2003b, p. 36). Decree 3,516 summarizes the law governing environmental policy in Ecuador and provides that the country's biodiversity be protected and used primarily in a sustainable manner. Appendix 1 of Decree No. 3,516 lists the Ecuadorian fauna and flora that are considered endangered. Species are categorized as critically endangered (*En peligro critico*), endangered (*En peligro*), or vulnerable (*Vulnerable*) (Ecolex 2003b, p. 17). Resolution No. 105 of January 28, 2000, and Agreement No. 143 of January 23, 2003, regulate and prohibit commercial and sport hunting of all wild bird species, except those specifically identified by the Ministry of the Environment or otherwise permitted (Ecolex 2000, p. 1; Ecolex 2003a, p. 1). The Ministry of the Environment does not permit commercial or sport hunting of the black-breasted puffleg because of its status as a critically endangered species (Ecolex 2003b, p. 17). However, we do not consider hunting (Factor B) to be a current threat to the black-breasted puffleg, so this law does not reduce any threats to the species.

Ecuador has numerous laws and regulations pertaining to forests and forestry management including: The Forestry Act (comprised of Law No. 74 of 1981—Forest Act and conservation of natural areas and wildlife (Faolex 1981, p. 1–54)—and Law No. 17 of 2004—Consolidation of the Forest Act and conservation of natural areas and wildlife (Faolex 2004, pp. 1–29)); a Forestry Action Plan (1991–1995); the Ecuadorian Strategy for Forest Sustainable Development of 2000 (*Estrategia para el Desarrollo Forestal Sostenible*); and, Decree 346, which recognizes that natural forests are highly vulnerable (ITTO 2006, p. 225). However, the International Tropical Timber Organization considered

ecosystem management and conservation in Ecuador, including effective implementation of mechanisms that would protect the black-breasted puffleg and its habitat, to be lacking (ITTO 2006, p. 229).

The governmental institutions responsible for oversight appear to be under-resourced, and there is a lack of law enforcement on the ground. Despite the creation of a national forest plan, there appears to be a lack of capacity to implement this plan due to insufficient political support, unclear or unrealistic forestry standards, inconsistencies in application of regulations, discrepancies between actual harvesting practices and forestry regulations, the lack of management plans for protected areas, and high bureaucratic costs. All these inadequacies have facilitated ongoing habitat destruction, such as widespread unauthorized logging (ITTO 2006, p. 229), forest clearing for conversion to agriculture or grazing (Bleiweiss and Olalla 1983, p. 656; del Hoyo 1999, pp. 530–531; Hirschfeld 2007, pp. 178–179), habitat destruction and alteration as a result of fire caused by slash-and-burn agriculture (Bird Conservation 2005, p. 12; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; Phillips 1998, pp. 20–21), habitat destruction and pollution due to oil development and distribution (Amazon Watch 2001, pp. 1–16; BLI 2007, p. 12; Cárdenas and Rodríguez 2004, pp. 355; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; The Mindo Working Group 2001, p. 1); and increased access and habitat destruction resulting from road development (Hirschfeld 2007, pp. 178–179). In addition, most of Ecuador's forests are privately owned or owned by communities (ITTO 2006, p. 224) and the management and administration of Ecuador's forest resources and forest harvest practices is insufficient and unable to protect against unauthorized forest harvesting, degradation, and conversion (ITTO 2006, p. 229). Thus, Ecuadorian forestry regulations have not mitigated the threat of habitat destruction (Factor A).

The Ecuadorian government recognizes 31 different legal categories of protected lands (e.g., national parks, biological reserves, geo-botanical reserves, bird reserves, wildlife reserves, etc.). Currently, the amount of protected land (both forested and non-forested) in Ecuador totals approximately 4.67 million ha (11.5 million ac) (ITTO 2006, p. 228). However, only 38 percent of these lands have appropriate conservation measures in place to be considered protected areas according to international standards (i.e., areas that are managed for scientific study or

wilderness protection, for ecosystem protection and recreation, for conservation of specific natural features, or for conservation through management intervention (IUCN 1994, pp. 17–20). Moreover, only 11 percent have management plans, and less than 1 percent (13,000 ha (32,125 ac)) have implemented those management plans (ITTO 2006, p. 228).

The black-breasted puffleg occurs within the Yanacocha Reserve (931 ha (2,300 ac)) at least seasonally, from March to July, as it migrates from higher to lower altitudes (Bird Conservation 2005, p. 12; World Land Trust 2007, p. 1). The area is being managed for ecotourism, environmental education, and conservation initiatives, including restoration of the *Polylepis* woodland (Fondacion Jocotoco 2006, p. 1). However, within the Reserve, there are ongoing human population pressures from expanding agriculture, along with slash-and-burn agricultural practices (BLI 2007, p. 12) (Factor A). Thus, regulatory mechanisms associated with protected land do not mitigate the impact of threats from habitat destruction.

The black-breasted puffleg is listed in Appendix II of CITES (UNEP–WCMC 2008b). CITES is an international treaty among 173 nations, including Ecuador and the United States that entered into force in 1975 (UNEP–WCMC 2008a, p. 1). In the United States, CITES is implemented through the U.S. Endangered Species Act (ESA). Under this law, the Secretary of the Interior and the Secretary of Commerce were given the joint responsibility for determining whether to place animals and plants on the Federal list of endangered and threatened species and for taking measures to protect and conserve the listed species. The Secretary of the Interior has delegated the Department's responsibility for CITES to the Director of the U.S. Fish and Wildlife Service (FWS) and established the Scientific and Management Authorities to implement the treaty. Under this treaty, countries work together to ensure that international trade in animal and plant species is not detrimental to the survival of wild populations by regulating the import, export, re-export, and introduction from the sea of CITES-listed animal and plant species (USFWS 2008, p. 1). However, as discussed under Factor B, we do not consider international trade to be a threat impacting the black-breasted puffleg. Therefore, protection under this Treaty does not reduce any threats to the species.

Summary of Factor D

The black-breasted puffleg is protected under CITES. However, overutilization (Factor B) is not a threat to this species. Ecuador has adopted numerous laws and regulatory mechanisms to administer and manage wildlife and their habitat. The black-breasted puffleg is listed as endangered under Ecuadorian law and ranges partly within a protected area (Yanacocha Reserve). However, on-the-ground enforcement of these laws and oversight of the local jurisdictions implementing and regulating activities is insufficient for these measures to be effective in conserving the black-breasted puffleg or its habitat. As discussed under Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the black-breasted puffleg. Therefore, we find that the existing regulatory mechanisms, as implemented, are inadequate to mitigate the primary threat of habitat destruction to the black-breasted puffleg.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Small Population Size: The black-breasted puffleg population has declined as a result of habitat destruction (Bleiweiss and Olalla 1983, pp. 656–661; Collar *et al.* 1992, pp. 516–517) (Factor A). A large collection of museum specimens (over 100) suggests that the species was more common and more widespread than the currently known populations (BLI 2004, p. 2; Collar *et al.* 1994, p. 121). Between 1950 and 1993, only three confirmed sightings of the species were made (Hirschfeld 2007, pp. 178–179). The black-breasted puffleg ranges partly within the Yanacocha Reserve, along a narrow elevational strip between 2,440 and 3,700 m (8,000 and 12,100 ft) (Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, pp. 8–9). The total population size of the black-breasted puffleg is estimated to range from 50 to no more than 250 adult individuals, with the trend of all the populations being in decline (BLI 2007, p. 2).

Small population sizes render species vulnerable to any of several risks, including inbreeding depression, loss of genetic variation, and accumulation of new mutations. Inbreeding can have individual or population-level consequences, either by increasing the phenotypic expression (the outward appearance or observable structure, function or behavior of a living organism) of recessive, deleterious alleles or by reducing the overall fitness of individuals in the population

(Charlesworth & Charlesworth 1987, p. 231; Shaffer 1981, p. 131). Small, isolated populations of wildlife species are also susceptible to demographic problems (Shaffer 1981, p. 131), which may include reduced reproductive success of individuals and skewed sex ratios. Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147–148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64–65; Soulé 1987, p. 181).

Based on genetic considerations, a generally accepted approximation of minimum viable population size is described by the 50/500 rule, where minimum viable population size is defined as the minimum number of individuals that is sufficient to respond over time to unexpected environmental conditions within the species' habitat (Shaffer 1981, pp. 132–3; Soulé 1980, pp. 160–162). This rule states that an effective population (N_e) of 50 individuals is the minimum size required to avoid imminent risks from inbreeding. N_e represents the number of animals in a population that actually contribute to reproduction (i.e., the number of breeding individuals), and is often much smaller than the census, or total number of individuals in the population (N). Furthermore, the rule states that the long-term fitness of a population requires an N_e of at least 500 individuals, so that it will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions. Therefore, an analysis of the fitness of this population would be a good indicator of the species' overall survivability. The total population size of the black-breasted puffleg is estimated to be between 50 and 249 individuals. Fifty just meets the threshold for the minimum effective population size required to avoid risks from inbreeding ($N_e = 50$ individuals). The upper limit of the population, 249 individuals, is well below the minimum threshold ($N_e = 500$ individuals) at which long-term fitness of a population is likely to lose enough genetic diversity over time, thus reducing its capacity to adapt to changing conditions.

The black-breasted puffleg's restricted range combined with its small population size (BLI 2007, p. 2; del Hoyo *et al.* 1999, p. 639; Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9) makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., deforestation, habitat alteration, wildfire) events that destroy individuals and their habitat (Holsinger 2000, pp. 64–65; Primack 1998, pp. 279–308;

Young and Clarke 2000, pp. 361–366). As such, we currently consider the single black-breasted puffleg population to be at risk due to lack of short- and long-term viability.

Summary of Factor E

The black-breasted puffleg is currently limited to one small population; this reduction in range makes it vulnerable to genetic and demographic risks that negatively impact the species' short- and long-term viability. The species' population size has declined considerably within the past 10 years (50–79 percent), and this rate of decline is expected to continue. Based on this information, we have determined that the species is particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic) and manmade (e.g., slash-and-burn agriculture, infrastructural development) events that destroy individuals and their habitat, and that the genetic and demographic risks are exacerbated by the manmade factors (Factor A)

Status Determination for the Black-Breasted Puffleg

There are three primary factors impacting the continued existence of the black-breasted puffleg: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms. The black-breasted puffleg, a small hummingbird known to exist in one population, occupies a narrow range of distribution, preferring temperate elfin forests at altitudes of between 2,850 and 3,500 m (9,350 and 11,483 ft). The species is an altitudinal migrant, spending the breeding season (November–February) in the humid elfin forest and the rest of the year at lower elevations.

The primary threat to this species, habitat loss, has led to widespread deforestation, and conversion of primary forests to human settlement and agricultural uses has led to the fragmentation of habitat throughout the range of the black-breasted puffleg and isolation of the remaining populations. This habitat, which is already disturbed and fragmented, continues to be altered by anthropogenic factors such as habitat alteration, destruction, and fragmentation as a result of agricultural development, oil development and distribution, and road development. Although the puffleg is listed as a critically endangered species under Ecuadorian law and part of its range occurs within a protected area, implementation of existing regulatory

mechanisms is inadequate to protect the species (Factor D), as they have been ineffective in curbing the primary threat to the black-breasted puffleg, which is habitat loss or alteration (Factor A).

The total population size of the black-breasted puffleg is estimated to range from 50 to no more than 250 adult individuals, with a declining trend. The black-breasted puffleg's restricted range, combined with its small population size, makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., deforestation, habitat alteration, wildfire) events that destroy individuals and their habitat.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the black-breasted puffleg. The population of this species has declined between 50 and 79 percent in the past 10 years, with more than 20 percent of this loss having occurred within the past 5 years, including the possible local extirpation of the species from Volcán Atacazo. These rates of decline are expected to continue. Habitat destruction, alteration, conversion, and fragmentation (Factor A) have been and continue to be factors in the black-breasted puffleg's decline. The impacts of habitat loss are exacerbated by the species' already small population size, making the black-breasted puffleg particularly vulnerable to natural and human factors (e.g., genetic isolation, wildfire, agricultural development, increased human settlement, road development, and oil pipeline development) (Factor E). We consider the threats to the black-breasted puffleg to be equally present and of the same magnitude throughout the species' current range. Based on this information, we conclude that the black-breasted puffleg is in danger of extinction throughout all of its range. Based on the best available scientific and commercial information regarding the past, present, and potential future threats faced by the black-breasted puffleg, we determine that the black-breasted puffleg is endangered throughout its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the black-breasted puffleg as an endangered species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through

listing results in public awareness, and encourages and results in conservation actions by Federal and State governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the black-breasted puffleg is not native to the United States, no critical habitat is being proposed for designation with this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the black-breasted puffleg. These prohibitions, pursuant to 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to "take" (take includes: Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species and 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the

Dated: November 25, 2008.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-IA-2008-0108; 96100-1671-0000-B6]

RIN 1018-AW01

Endangered and Threatened Wildlife and Plants; Listing the Medium Tree Finch (*Camarhynchus pauper*) as Endangered Throughout Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the medium tree finch (*Camarhynchus pauper*) as endangered under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. The Service seeks data and comments from the public on this proposed rule.

DATES: We will accept comments received or postmarked on or before February 6, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 22, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R9-IA-2008-0108; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. We will not accept comments by e-mail or fax. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Monica A. Horton, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703-358-1708; facsimile 703-358-2276. If you use a telecommunications device for the deaf (TDD), call the Federal

Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703-358-1708.

Background

Section 4(b)(3)(A) of the Act requires us to make a finding (known as a “90-day finding”) on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal List of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that

the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing actions (this finding is referred to as the “12-month finding”). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petition species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Actions

On May 6, 1991, we received a petition (hereafter referred to as the 1991 petition) from the International Council for Bird Preservation (ICBP) to add 53 species of foreign birds to the List of Endangered and Threatened Wildlife (50 CFR 17.11(h)), including the medium tree finch, which is the subject of this proposed rule. In response to the 1991 petition, we published a positive 90-day finding on December 16, 1991 (56 FR 65207), for all 53 species, and announced the initiation of a status review. On March 28, 1994 (59 FR 14496), we published a 12-month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act (16 U.S.C. 1531 *et seq.*). In that document, we proposed listing 15 of the 53 bird species included in the 1991 petition, and announced our finding that listing the remaining 38 species from the 1991 petition, including the medium tree finch, was warranted but precluded because of other listing activity.

On May 21, 2004 (69 FR 29354) and April 23, 2007 (72 FR 20184), we published in the **Federal Register** notices announcing our annual petition findings for foreign species. In those