



TEXAS GENERAL LAND OFFICE
COMMISSIONER DAWN BUCKINGHAM, M.D.

August 25, 2023

Amy Lueders
Regional Director
U.S. Fish & Wildlife Service
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Shawn Sartorius
Field Supervisor
U.S. Fish & Wildlife Service
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Public Comments Processing
Attn: FWS-R2-ES-2022-0162
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Endangered Species Status for the Dunes Sagebrush Lizard (Docket No. FWS-R2-ES-2022-0162)

Dear Ms. Lueders and Mr. Sartorius:

As Commissioner of the Texas General Land Office, I appreciate the opportunity to comment on the draft rule proposed on July 3, 2023, by the U.S. Fish and Wildlife Service (USFWS) regarding Endangered Species Act status for the Dunes Sagebrush Lizard (DSL) 88 Fed. Reg. 42661 (the Rule).

The General Land Office (GLO) is the oldest state agency in Texas, established by the Republic of Texas in 1836. The agency serves the schoolchildren, veterans, and environment of Texas by maximizing State revenue through innovative administration, and exercising prudent stewardship of State lands, minerals, and natural resources. The GLO is responsible for managing over 13 million acres of State lands and mineral interests dedicated to the Permanent School Fund (School Fund). The School Fund is a perpetual endowment created by the Texas Legislature in 1854 to support public schools. See TEX. CONST., art. VII, § 2. The GLO has a fiduciary duty to maximize revenues from State lands and minerals for the benefit of the School Fund. The agency generates revenue for the School Fund through oil and natural gas production, sales, leases, and other transactions involving the assets under management. The GLO has deposited over \$30 billion into the School Fund since inception, including over \$2.1 billion in oil and natural gas revenues last fiscal year.

As Land Commissioner, I also serve as the Chairwoman of the Board for Lease of University Lands, which oversees lands owned by the Permanent University Fund (PUF). The PUF owns approximately 2.1 million acres in West Texas. Similarly to the School Fund, the PUF is a

constitutionally-created fund that generates substantial revenue for the University of Texas and Texas A&M University Systems.

Although the proposed habitat of the DSL is not well or clearly defined, it appears to be located primarily in the Permian Basin of far West Texas, which is the beating heart of Texas' – and the country's – oil and gas industry and, therefore, one of the primary sources of revenue for education in Texas, by way of the School Fund and the PUF. Listing the DSL will surely bring with it a designation of critical habitat as well as rules strictly limiting, or even prohibiting, surface activities that are absolutely necessary for oil and gas exploration and production. Due to the certainty of diminished oil and gas revenues to both the School Fund and the PUF should the Rule take effect, the listing of the DSL as endangered under the Endangered Species Act will have a significant detrimental impact on education in Texas.

As you know, the Rule is but the latest action by USFWS in the DSL saga dating back to December 30, 1982. Over the past 40 years, a near-constant tug of war has persisted between local landowners and proponents of responsible development of Texas' oil and gas resources on the one hand and out-of-state environmentalists on the other. In fact, USFWS admits the Rule was only published in order to settle a May 19, 2022, complaint filed by the Center for Biological Diversity.¹ Yet, after all this time, the Rule and its summary are still rife with unknowns and missing data. So much so that USFWS found that the designated critical habitat for the DSL is not determinable at this time.² How can stakeholders be expected to provide meaningful comments or dispelling evidence if we do not know where the supposed endangered species critical habitat is located? Paradoxically, though, USFWS lists habitat loss from oil and gas development and frac sand mining (along with climate change, of course) as the justification for the Rule.³ Which leads me to my first substantive objection to the Rule:

USFWS fails to provide meaningful causal data to support the listed threats to the DSL habitat. Oil and gas development in this area is not a new phenomenon. The Hendrick Oilfield was discovered in Winkler County on July 16, 1926. In the nearly one hundred years since, new wells have been drilled constantly and with ever-increasing care and regulatory guidance as time went on. Yet we are to believe that somehow that activity only now presents an existential threat to the DSL? Particularly in light of the fact USFWS found, when withdrawing a similar rule to list the DSL as endangered in 2012, that:

“This withdrawal is based on our conclusion that the threats to the [DSL] as identified in the proposed rule no longer are as significant as believed at the time of the proposed rule. We base this conclusion on our analysis of current and future threats and conservation efforts. We find the best scientific and commercial data available indicate that the threats to the species and its habitat have been reduced to the point that the species does not meet the statutory definition of an endangered or threatened species. Therefore, we are withdrawing our proposal to list the species as endangered.”⁴

¹ Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42663 (July 3, 2023) (to be codified at 50 C.F.R. pt. 17).

² *Id.* at 42661.

³ *Id.*

⁴ Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36871 (June 19, 2012) (emphasis added).

No evidence has been provided by USFWS to illustrate a change to oil and gas development in the area sufficient to justify reversal of its 2012 finding that the DSL does not meet the statutory definition of an endangered or threatened species under the Endangered Species Act.

The second threat listed by USFWS is frac sand mining, a relatively new development in the area with the first commercial frac sand mine established in 2017. The Texas Commission on Environmental Quality currently lists 17 registered facilities in the larger region, but USFWS fails to provide specific data that any one mine, let alone all 17, threaten critical DSL habitat. Even assuming they all happen to operate directly on DSL habitat, these mines are relatively isolated operations spanning a quarter or half mile square section (160 and 320 acres, respectively). Approximately 8.5 square miles is hardly a meaningful threat to the DSL's overall habitat; it's paltry when considering the Bureau of Land Management has closed 300,000 acres to oil and gas leasing and 850,000 acres to wind and solar development to accommodate DSL habitat in New Mexico.⁵ Further, the analysis USFWS uses to estimate future expansion of these mines was not done based on estimated future demand, geology, changes in industry or any science whatsoever. USFWS arbitrarily extrapolated the existing footprint based solely on aerial imagery. USFWS is charged to use the best available science and information, but this approach uses neither of those things.

The final threat to DSL habitat that USFWS uses to justify the Rule is, "Climate change and climate conditions, both resulting in hotter, more arid conditions with an increased frequency and greater intensity of drought throughout the species' geographic range."⁶ Keep in mind the geographic range at issue here is West Texas desert. Yet USFWS itself admits, "The impacts of extreme heat and drought on individual dunes sagebrush lizards is relatively unknown."⁷ Followed unsurely by, "Drought *could* impact food resources, which would then impact lizard productivity,"⁸ and a short discussion about how drought impacts another species of lizard from an entirely different genus. USFWS claims, in essence, that it *could* get hotter and drier which *could* have a negative impact on certain food supply which *could* impact the DSL because it impacts other lizards... but we don't know. Without specific studies on the impact to the actual species at issue, how can such a tenuous claim be supported as the basis for the Rule?

USFWS disregards relevant voluntary conservation efforts in its analysis. USFWS rightly discussed conservation agreements that have been put in place in order to protect the DSL. However, its analysis bifurcates these agreements into those undertaken in New Mexico and those in Texas and then categorically disregards the Texas conservation agreements. The stated reasons are:

"The Texas agreements are voluntary agreements where areas set aside to preserve dunes sagebrush lizard habitat by Participants are not under permanent or long-term protection. Further, they do not provide any property-specific commitments to avoid habitat, only commitments to mitigate for habitat impacts that result from covered activities, for the duration of these agreements. Also, since these are private lands, we would not know the

⁵ Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42672 (July 3, 2023) (to be codified at 50 C.F.R. pt. 17).

⁶ *Id.* at 42662.

⁷ *Id.* at 42668.

⁸ *Id.* (emphasis added).

location of the habitat being avoided. Thus, based on performance of these plans to date, we do not expect these agreements to have a measurable effect in protecting the dunes sagebrush lizard or its habitat in Texas into the future. Therefore, we did not include potential future conservation efforts resulting from these plans in our scenarios projecting the species' future status. We did not adjust our future projections of oil well density or sand mining to account for these agreements."⁹

By this statement, USFWS takes issue with the fact these agreements in Texas are: (i) voluntary; (ii) impermanent; (iii) on private land; and (iv) perhaps don't go as far as USFWS would like in limiting the use of an individual's property. In sum, USFWS does not consider the impacts of conservation efforts unless they're compulsory, permanent, and all-encompassing. That can't be so. This explanation demonstrates the high-handed approach USFWS would prefer, but it certainly does not justify disregarding the impacts of a more cooperative and moderate approach to protecting the DSL.

Nowhere does the Rule or USFWS analysis consider population trends of the DSL. If the underlying reason to list a species under the Endangered Species Act is to protect those at risk of extinction, one assumes there would be at least some indication of declining population numbers which merit federal intervention. Curious, then, that neither the Rule nor USFWS made mention of current population numbers of the DSL. However, a 2022 study cited in the Rule, which was conducted to estimate population density and size of the DSL, found their numbers to be increasing. "DSL captures in 2022 were 1.7 times greater than 2021 and 3 to 4 times greater than in 2019 and 2020."¹⁰ The authors of the study also used "robust multi-season models to estimate demographic parameters"¹¹ of the DSL and found that "demographic parameter values such as survival and immigration were greater in 2022 compared to previous years."¹² This demonstrated increase in population numbers and improved demographic survival and immigration metrics directly contradict certain USFWS contentions, although USFWS does concede that the DSL "still occupies much of its range."¹³ USFWS further concedes that, "In highly degraded areas, remnant populations may persist over the next several decades."¹⁴ With an increasing and thriving population that can even persist in "highly degraded areas", the DSL is not in need of the federal protections offered by the Rule; particularly when doing so risks crippling Texas' oil and gas industry. Unfortunately, USFWS has not yet considered those impacts (as it is required to do): "Careful assessments of the economic and environmental impacts that may occur due to a critical habitat designation are not yet complete."¹⁵

Although charged with using the best available science and information, USFWS's analysis of the Rule is but a mishmash of conclusory statements, disregarded facts and admitted unknowns. Please be advised that the GLO may seek relief in the appropriate court to stop the USFWS from proceeding with implementation of the Rule. Further, as you may be aware, during the 88th

⁹ *Id.* at 42670 (emphasis added).

¹⁰ Acre, M. R. and M. T. Hill. 2023. Demographic monitoring of the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) in New Mexico: 2022. Report to Center of Excellence dba CEHMM. 17 pp.

¹¹ *Id.*

¹² *Id.*

¹³ Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42673 (July 3, 2023) (to be codified at 50 C.F.R. pt. 17).

¹⁴ *Id.*

¹⁵ *Id.* at 42677.

Regular Session of the Texas Legislature, House Bill 33 was passed into law which prohibits the GLO from providing assistance in any manner to a federal agency purporting to regulate oil and gas operations in Texas beyond what is required by Texas law. Accordingly, the GLO will in no way assist USFWS in their efforts to implement the proposed Rule at the expense of vital Texas oil and gas resources. The GLO respectfully requests that the USFWS respond to these comments in writing. Thank you for your careful consideration of these comments.

Respectfully,

A handwritten signature in black ink, appearing to read "D. Buckingham". The signature is fluid and cursive, with a large, sweeping flourish at the end.

DAWN BUCKINGHAM, M.D.
Commissioner, Texas General Land Office