



# Texas Public Policy Foundation

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Via Federal eRulemaking Portal:  
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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: Docket ID No. FWS-R2-ES-2022-0162**

To Whom It May Concern:

Texas Public Policy Foundation offers the following comments on the Proposed Rule “*Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard*,” 88 Fed. Reg. 42661, *et. seq.*, (July 3, 2023) (the “Proposed Rule”). The Proposed Rule seeks to list the dunes sagebrush lizard (“DSL”) as an endangered species under the Endangered Species Act of 1973 (“the ESA”). It does so for two reasons. First, the U.S. Fish and Wildlife Service (“Service”) finds the DSL is losing habitat due to ongoing oil, gas, and frac sand mining. Second, the Service finds that climate change is creating more arid conditions and greater drought within the DSL’s habitat.

This Proposed Rule is unlawful, unnecessary, arbitrary, and capricious. The Service presents next to no scientific data demonstrating that the DSL is presently or will soon be endangered. And the evidence the Service can marshal regarding supposed threats to the DSL’s habitat is insufficient to support listing the DSL. The Service must reconsider this transparent attempt to forestall energy development in the Permian Basin by listing a species as endangered without cause.

The Service primarily argues that “habitat destruction, modification, and fragmentation associated with oil and natural gas production and frac sand mining” warrants listing of the DSL. 88 Fed. Reg. 42667 (July 3, 2023). But the Service never demonstrates that these industries are actively impacting the DSL’s *population*. In

fact, the Service never provides a population estimate for the DSL anywhere in their Federal Register notice for this Proposed Rule. The Service “assessed the current condition of the [DSL]” not by population survey, but by using unspecified “geospatial analysis to estimate the current quantity and quality of available habitat.” *Id.* at 42669. While studies have found the DSL “experiences reductions in abundance and density” with habitat loss or disturbance, this approach treats habitat for the DSL like a limited resource when “habitat patches for dunes sagebrush lizard can shift over time” and DSLs “may not occur in all areas of suitable habitat.” *Id.* at 42666.

Absent any population estimates, the Service can only demonstrate based on existing scientific data that “[o]il and gas development involves activities” that “can all result in direct [DSL] habitat loss by disturbance and removal of shinnery oak duneland.” *Id.* To bolster this conclusion, the Service states that studies show “a negative relationship between oil well pad density and the number of [DSLs] present at a site.” *Id.* at 42668. But the Service knows this fact alone means nothing, as there may be no DSLs at a site because “habitat patches for [DSL] can shift over time.” *Id.* at 42666. Fragmentation of current DSL habitat does not mean that overall DSL habitat vanishes or decreases long-term, and the Service does not know how much DSL habitat is critical to species survival. *Id.* at 42676–42677.

These positions are also implausible because the Service is unsure of the importance of shinnery-oak duneland habitat to the DSL. For instance, the Service states that “[t]he key requirement for long-term viability of the [DSL] is large, intact, shinnery oak duneland ecosystems . . .” *Id.* at 42666. Yet the Service admits that shinnery oak is not necessarily used for DSL dispersal, but is mainly important to the DSL because it stabilizes sand dunes. *Id.* at 42664. The Service never specifies what “large” or “intact” mean in the context of these ecosystems. Additionally, as mentioned *supra*, despite using a dubious projection of habitat loss to find the DSL itself endangered, the Service admits that DSLs “may not occur in all areas of suitable habitat.” *Id.* at 42666.

The Service premises much of its decision to list the DSL on frac sand mining, which “removes shinnery oak and grades and compacts shinnery oak dunelands . . . remov[ing] entire shinnery oak duneland landforms, or portions thereof; alter[ing] dune topography; and produc[ing] large, deep, unnatural pits in the land surface.” *Id.* at 42668. However, this is only true when sand mining occurs “in dunes sagebrush lizard habitat,” and “[s]and mines have” thus far “only been developed in the Texas portion of the [DSL]’s range, specifically the Monahans Sandhills.” *Id.* This is only a small portion of the DSL’s habitat. The Service never finds or demonstrates that frac sand mining in DSL habitat is expanding or increasing, only that it *could* increase.

The Service admits “it is difficult to make projections for [the frac sand mining industry]” due to the industry’s young age. *Id.* at 42664. However, the Service claims it “used imagery that covered a 4-year period, which included the initial startup phase of mine establishment as well as ebbs in the market, during the COVID pandemic” and “observed minimal growth at several mines . . . whereas other expanded eightfold from 2018–2022.” *Id.* Nowhere does the Service provide this imagery in its SSA report or Federal Register notice, and the Service admits that its observations “capture inherent uncertainty in the future development of the industry.” *Id.* The Service even admits “there are not ample published data on past industry trends that could be used to project future growth” of frac sand mining in west Texas. *Id.* at 42670. Yet the Service asserts that such uncertain and scanty information is sufficient to constitute the “best scientific and commercial data available” to list the DSL. *See* 16 U.S.C. § 1533(b)(1)(A).

In addition, when deciding to list the DSL, the Service disregarded “several conservation agreements that have been put in place to minimize the impact of industrial activity on the dunes sagebrush lizard and its habitat” in Texas because they “are voluntary agreements where areas set aside to preserve . . . habitat . . . are not under permanent or long term protection.” 88 Fed. Reg. 42670 (July 3, 2023). They refused to “include potential future conservation efforts resulting from these plans in [their] scenarios” projecting future DSL habitat status, which with those efforts excluded, unsurprisingly, “was projected to decrease.” *Id.* This unilateral decision directly contradicts the Service’s statutory duty under 16 U.S.C. § 1533 and its implementing regulations at 50 C.F.R. § 424, which both require the Service to “take into consideration any efforts by States or other authorities to protect the species and promote its viability.” 88 Fed. Reg. 42673 (July 3, 2023).

Moreover, the Service states “[l]oss of [DSL] habitat may be irreversible,” but never finds that habitat cannot be recovered. The Service never mentions recent scientific studies demonstrating that herbicide and grazing can restore sand shinnery-oak prairies, or that propagation provides a potential avenue for restoring shinnery oak. *See* Jennifer C. Zavaleta *et al.*, *Restoring sand shinnery oak prairies with herbicide and grazing in New Mexico*, THE SOUTHWESTERN NATURALIST Vol. 61 No. 3 (Sept. 2016) at 225–232; J. Matthew Carroll *et al.*, *Propagation of shinnery oak as a framework for restoration*, RANGELAND ECOLOGY & MANAG. Vol. 72 No. 4 (July 2019) at 632–634. Because the Service’s determination that the DSL is endangered rests solely on its supposedly threatened habitat, the Service should have considered these and other similar studies among the “best scientific and commercial data available” when determining whether the DSL warranted listing. 16 U.S.C. § 1533(b)(1)(A).

The Service's remaining reasons for listing the DSL are likewise speculative. As an example, the Service states that "[i]n many areas of oil and gas development . . . [r]oads may also create fugitive dust that can impact shinnery oak growth and alter the grain-size distribution" in sand dunes where DSL live, possibly impacting breathing, breeding, and burying behavior. 88 Fed. Reg. 42668 (July 3, 2023). But while scientific studies have shown that sand grain size can affect DSL abundance, no scientific study establishes that "roads" in general do so. Potential impacts to the DSL that have not been demonstrated by existing scientific literature provide no reason to list the species.

Another reason the Service provides for listing the DSL, climate change, is likewise speculative at best. The Service states that the DSL "occurs in a semiarid climate that experiences extreme heat and droughts, but the species is adapted to contend with such environmental variability." *Id.* While shinnery oak "can lose its leaves or not even leaf-out" due to drought, the Service cites no scientific literature that shows any impact to DSL populations. *Id.* Given the DSL's stated adaptability, increased temperature could lead to a corresponding increase in DSL populations. The Service lacks data to show how climate change could affect the DSL.

Furthermore, the proposed rule would amount to an unconstitutional taking of the private property of those involved in the frac sand mining industry, which, of itself, should convince the Service to rescind the proposed rule.

Finally, the Service refuses to designate critical habitat for the DSL, unilaterally finding it "not determinable" because "[c]areful assessments of the economic and environmental impacts that may occur due to a critical habitat designation are not yet complete . . . ." *Id.* at 42676–42677. The law does not allow the Service to designate a species as endangered before it has completed impact assessments related to its critical habitat, absent a lack of "[d]ata sufficient to perform required analyses" or a lack of information about "[t]he biological needs of the species." *Id.* at 42676 (referencing 50 C.F.R. § 424.12(a)(2)). Neither of these situations exist here, so the Service must wait to designate the DSL as endangered until it can determine the DSL's critical habitat, and should not receive an additional year to make a critical habitat designation under 16 U.S.C. § 1533(b)(6)(C)(ii).

Because the Service does not demonstrate that the DSL is endangered or that its habitat is under threat, listing it under the Endangered Species Act would be arbitrary and capricious, and therefore a violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706. The Service should reconsider its proposed rule, or at least wait until it has the "best scientific and commercial data available" to determine whether the DSL is endangered or to designate the DSL's critical habitat.

Respectfully submitted by,



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ROBERT HENNEKE

rhenneke@texaspolicy.com

CHANCE WELDON

cweldon@texaspolicy.com

THEODORE HADZI-ANTICH

tha@texaspolicy.com

CONNOR MIGHELL

cmighell@texaspolicy.com

*Attorneys for Texas Public Policy Foundation*