

# RECENT DEVELOPMENT

## “REPTILE DYSFUNCTION”: HOW CAN A THREE-INCH LIZARD THREATEN TO SHUT DOWN THE OIL AND GAS INDUSTRY IN THE PERMIAN BASIN?

*Taylor Kilroy*

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### I. INTRODUCTION

Somewhere amidst the sand dunes of West Texas and southeastern New Mexico, a small three-inch lizard scurries from one dune blowout to another. Her coloration blends perfectly with the surrounding sand, allowing her to hide from predators. She spends the majority of her life in the shade provided by a stunted variety of oak called the shinnery oak and is rarely found more than six feet away from one.<sup>1</sup> In finding a place to live, she is fairly picky—she will only live where the dune provides grains of

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1. *Fighting for Survival: Sand Dune Lizard*, WILDEARTH GUARDIANS, available at [http://www.wildearthguardians.org/site/DocServer/Factsheet\\_sand\\_dune\\_lizard.pdf?docID=2323&AddInterest=1103](http://www.wildearthguardians.org/site/DocServer/Factsheet_sand_dune_lizard.pdf?docID=2323&AddInterest=1103) (Jan. 2012).

sand that are neither too coarse nor too fine.<sup>2</sup> She only lives between one and two years, and in that time she lays one or two clutches of eggs with about three to six eggs per clutch.<sup>3</sup> Her diet consists of ants, small beetles, crickets, grasshoppers, and spiders.<sup>4</sup> This little lizard is the Dunes Sagebrush Lizard.<sup>5</sup> Hers is a short, fairly uncontroversial life.

That is, until she and the rest of her kind came up for listing as an endangered species under the Endangered Species Act (ESA). While almost every listing under the ESA has some controversy attached, hers has special issues. Her habitat, found entirely within the Permian Basin, is an area that produces about one million barrels of oil and four billion cubic feet of natural gas each day.<sup>6</sup> When announced that the lizard was a candidate for listing, this little lizard became a metaphorical Godzilla for the oil and gas industry operating in the Permian Basin.<sup>7</sup> With the backing of the federal government, this lizard seemed to become an unstoppable force that threatened the destruction of the industry's livelihoods. The Texas Comptroller of Public Accounts, calling the process "a huge fight for our lives," told the residents of Midland, Texas, to "drill, baby, drill and sue, sue, sue."<sup>8</sup> At the same time, the Texas Land Commissioner equated the listing to "a severe case of reptile dysfunction."<sup>9</sup> This "cute widdle lizard"<sup>10</sup> has found herself in a heap of several battles: between environmentalists and the oil and gas industry, between the state and national governments, between economic

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2. *Id.*

3. *Id.*

4. *Id.*

5. Also known as the sand dune lizard. The binomial name is *Sceloporus arenicolus*.

6. *Permian Basin Statistics*, THE UNIVERSITY OF TEXAS OF THE PERMIAN BASIN, CENTER FOR ENERGY AND ECONOMIC DIVERSIFICATION, available at <http://ceed.utpb.edu/energy-resources/petroleum-library/permian-basin-statistics/> (Jan. 2012).

7. The dunes sagebrush lizard was actually characterized as destroying the town of Midland in the familiar fashion in a recent political cartoon drawn by Norman Johnson. The article named the lizard its "2011 Newsmaker of the Year." Mella McEwen, *It's that D\*\*\* Sagebrush Lizard!*, MIDLAND REPORTER-TELEGRAM, Dec. 24, 2011, available at [http://www.mywesttexas.com/top\\_stories/article\\_68df2954-2db6-11e1-be01-0019bb2963f4.html](http://www.mywesttexas.com/top_stories/article_68df2954-2db6-11e1-be01-0019bb2963f4.html).

8. Kathleen Thurber, *Combs: Residents Need to be 'Fired Up' about Lizard*, MIDLAND REPORTER-TELEGRAM, Oct. 18, 2011, available at [http://www.mywesttexas.com/top\\_stories/article\\_9a245c00-f549-11e0-abd2-001cc4c03286.html](http://www.mywesttexas.com/top_stories/article_9a245c00-f549-11e0-abd2-001cc4c03286.html).

9. Jerry Patterson, *Saving a Lizard or Reptile Dysfunction?: Texas Lizard is Latest Example of Failed U.S. Energy Policy*, TEXAS GENERAL LAND OFFICE (May 2011), available at [http://www.glo.texas.gov/glo\\_news/editorials/2011/dunes-sagebrush-lizard.html](http://www.glo.texas.gov/glo_news/editorials/2011/dunes-sagebrush-lizard.html).

10. Marita Noon, *Trading Your Job for a Cute Widdle Lizard*, WASH. TIMES, Jan. 20, 2011, available at <http://www.washingtontimes.com/news/2011/jan/20/trading-your-job-for-a-cute-widdle-lizard/>.

interests and conservation, between private landowners and government regulation, and between voluntary and government-mandated regulation. The result of this listing process will likely be considered a major victory or defeat in each of these long-stalemated battles.

Part one of this article will explain some of the key provisions of the ESA and how they apply to the dunes sagebrush lizard. Part two will then focus on three of the major threats to the lizard, including habitat loss, off-highway vehicle use, and oil and gas production. Finally, part three will provide an overview of the current state and federal regulatory climate.

## II. THE ENDANGERED SPECIES ACT LISTING PROCESS

The Endangered Species Act was codified in 1973 with the lofty goal of actively conserving biological diversity.<sup>11</sup> Congress viewed biodiversity and species protection as providing “esthetic, ecological, educational, historical, recreational, and scientific value” to the American public.<sup>12</sup> Congress sought to “provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>13</sup>

Section 4 of the ESA provides for a bifurcated process in protecting a species under the Act. First, the species must go through a listing process based on an evaluation of five categories of “natural and manmade factors affecting its continued existence.”<sup>14</sup> This is followed by identification of the critical habitat.<sup>15</sup> These two determinations are not made concurrently; the Secretary has a full year (with the discretion to add another year if deemed prudent) after the listing decision is made to determine where the critical habitat is.<sup>16</sup> Because the dunes sagebrush lizard is still in the listing phase of the ESA, this article will focus primarily on the issues that arise during that stage of the process. Assuming the lizard is listed, new and different issues undoubtedly will develop during the designation of critical habitat. While the issue of how to determine which habitat is critical and which habitat can withstand development is fascinating, the designation of critical habitat is years away even if the lizard is listed successfully as endangered.

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11. 16 U.S.C. §§ 1531-44 (1973); *see* § 1531(b).

12. § 1531(a)(3).

13. § 1531(b).

14. 16 U.S.C. §1533(a)(1), (a)(1)(E) (1988).

15. § 1533(a)(3).

16. § 1533(b)(6)(C). For an interesting discussion of what a court should do if the Secretary fails to designate critical habitat within the statutorily-required two years, *see* *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1268-71 (11th Cir. 2007).

Congress intended this statute to serve as a prevention rather than a cure, by pushing for action to be taken “sooner rather than later.”<sup>17</sup> The listing decision is to be made “solely on the basis of the best scientific and commercial data available.”<sup>18</sup> This decision does not require absolute scientific certainty.<sup>19</sup> This decision is also to be made excluding any concerns for the economic effects the listing decision may have.<sup>20</sup> As Justice Burger wrote for the Supreme Court in 1978, “Congress intended endangered species to be afforded the highest of protections.”<sup>21</sup> With the stroke of his pen, Justice Burger and the Supreme Court upheld the protection of the snail darter, a three-inch long fish, in the face of a nearly-complete, massive dam project that was partially funded by Congress itself, assuring the people of the United States that the federal government intended and planned on enforcing the ESA.<sup>22</sup> In Justice Burger’s view, this was not meant to be a hollow, rarely-enforced law. Years later, this bill would be called the “pit bull of all environmental laws.”<sup>23</sup>

The dunes sagebrush lizard was first petitioned for listing as a species that could possibly merit endangered status in December of 1982, but more data was needed.<sup>24</sup> Once this research was performed, the species was not classified as a candidate species and was dropped from the list altogether. After a new petition for the species in 2002, the lizard’s listing was found to be warranted but precluded by higher priorities.<sup>25</sup> A new proposed rule for listing the lizard was published in December of 2010.<sup>26</sup> After one year of public comment, the United States Fish and Wildlife Service (FWS)

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17. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997).

18. *Endangered Species Act*, 16 U.S.C. § 1531(b)(1)(A) (1988).

19. *Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1236 (W.D. Wash. 2003).

20. *See* 16 U.S.C. § 1533(b)(1)(A) and 50 C.F.R. § 424.11(b) (1989). The economic effects argument does return later on – the Endangered Species Committee (popularly known as the “God Squad”) may allow an exemption to the ESA under certain circumstances detailed under 16 U.S.C. § 1536(e) (1988).

21. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174-88 (1978).

22. By a 6-3 vote. *Id.*

23. Stephanie Brauer, *Arizona Cattle Growers’ Pyrrhic Victory for Critical Habitat*, 38 *ECOLOGY L.Q.* 369, 371 (2011) (citing Gregory T. Broderick, *Towards Common Sense in ESA Enforcement: Federal Courts and the Limits on Administrative Authority and Discretion under the Endangered Species Act*, 44 *NAT. RESOURCES J.* 77, 78 (2004)).

24. *Endangered and Threatened Wildlife and Plants; Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species*, 47 *Fed. Reg.* 58454 (Dec. 1982) (to be codified at 50 C.F.R. pt. 17).

25. *Endangered and Threatened Wildlife and Plants; 12-Month Findings on Resubmitted Petitions to List the Southern Idaho Ground Squirrel, Sand Dune Lizard, and Tahoe Yellow Cress*, 69 *Fed. Reg.* 77167-01 (Dec. 2004) (to be codified at 50 C.F.R. pt. 17).

26. *Endangered Status for Dunes Sagebrush Lizard*, 75 *Fed. Reg.* 77801-01 (Dec. 2010) (to be codified at 50 C.F.R. pt. 17).

extended the public comment by an additional six months<sup>27</sup> after intense demand from politicians,<sup>28</sup> citizens' groups,<sup>29</sup> and industry associations.<sup>30</sup> Resolutions were introduced in both the Texas and New Mexico state legislatures.<sup>31</sup> New Mexico sought a delay in the process, while Texas sought to stop the listing entirely; neither passed.<sup>32</sup>

### III. WHY LIST?: LOOKING AT THE VARIOUS THREATS TO THE DUNES SAGEBRUSH LIZARD

For a species to be listed, the Secretary is required to look at five different factors: present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its continued existence.<sup>33</sup> In the proposed rule for the dunes sagebrush lizard, the FWS considered overutilization "to [not] be a threat now or in the foreseeable future."<sup>34</sup> The FWS does not currently know the magnitude to which disease and predation threaten the survival of the species, so the agency did not consider it when making the proposed rule.<sup>35</sup> Under the fifth criterion of "other factors," the FWS considered exposure to oil and gas pollutants and climate change as possible threats.<sup>36</sup> As such, the FWS essentially looked only to the current proven factor of destruction of habitat and curtailment of range in making the proposed rule. Many of the other potential factors suffered from a lack of data. The primary factors of habitat modification the FWS relied upon were shinnery oak removal, off-highway vehicle use, and energy production as they seemed to provide the most dramatic negative effects on the population of the dunes sagebrush lizard.<sup>37</sup>

27. 6-Month Extension of Final Determination for the Proposed Listing of the Dunes Sagebrush Lizard as Endangered, 76 Fed. Reg. 75858-01 (Dec. 2011) (to be codified at 50 C.F.R. pt. 17).

28. Congressman Steve Pearce, Congressman Pearce Elevates Lizard Listing Issue to Secretary Salazar (Nov. 2011), *available at* <http://pearce.house.gov/press-release/congressman-pearce-elevates-lizard-listing-issue-secretary-salazar>.

29. Peggy Venable, *Guest View: Leapin' Lizard! Speak Up Now!*, ODESSA AMERICAN, Dec. 25, 2011, *available at* <http://www.oaoa.com/articles/texas-78033-lizard-thousands.html>.

30. *Fish and Wildlife to Delay Decision on Lizard*, MIDLAND REPORTER-TELEGRAM, Dec. 1, 2011, *available at* [http://www.mywesttexas.com/top\\_stories/article\\_47d51070-1c40-11e1-93c3-001cc4c03286.html](http://www.mywesttexas.com/top_stories/article_47d51070-1c40-11e1-93c3-001cc4c03286.html).

31. *See* H.R. H. Mem'l 2, 50th Leg., 1st Spec. Sess. (N.M. 2011) and H.R. Res. 1955, 82d Leg., Reg.Sess. (Tex. 2011).

32. *Id.*

33. 16 U.S.C. § 1533(a)(1)(A)-(D) (1988).

34. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77810.

35. *Id.*

36. *Id.* at 77811-12.

37. *Id.*

## IV. SHINNERY OAK REMOVAL

The habitat for the dunes sagebrush lizard is extraordinarily small because its survival is directly linked to the suitability of the available shinnery oak dune habitat.<sup>38</sup> In New Mexico alone, since surveys were done in 1982, the shinnery oak dune habitat that may provide actual or potential lizard habitat has decreased by 40% from one million acres to 600,000 acres.<sup>39</sup> Because of this, the dunes sagebrush lizard has the second smallest range of any lizard native to North America, scattered across a mere 655 square miles.<sup>40</sup> Destruction of habitat acreage alone has been enough for a court to uphold a listing decision.<sup>41</sup> Furthermore, despite efforts to the contrary, studies have repeatedly not been able to show that the lizard will search for more suitable habitat if it involves crossing unsuitable habitat.<sup>42</sup> Because of this, an increasingly fragmented habitat will often mean the loss of any small population of lizards. The lizard faces both a small and a broken-up habitat, both of which decrease the likeliness of the species' survival. Because of these two factors, the habitat tends to be relatively spaced out and isolated, thereby preventing breeding between population groups, which leaves the lizard highly vulnerable to localized disasters or diseases that could wipe out an entire population of lizards overnight.

Moreover, because shinnery oak is considered toxic to cattle, ranchers with shinnery oak on their land have long been removing it.<sup>43</sup> An estimated 100,000 acres of shinnery oak in New Mexico and one million acres in Texas have been lost because of herbicidal spraying, most often of chemicals like tebuthiuron.<sup>44</sup> Herbicidal spraying has been shown to decimate dunes sagebrush lizard populations. In a study performed in New Mexico looking only at sites where the lizard had been found before the application of herbicide, half of those sites no longer contained the lizard after

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38. *Id.* at 77803 (citing LEE FITZGERALD ET AL., NEW MEXICO DEPARTMENT OF GAME AND FISH, THE RANGE, DISTRIBUTION, AND HABITAT OF SCELOPORUS ARENICOLUS IN NEW MEXICO 8 (1997)). Many of the sources relied upon in the proposed ruling were direct reports to the New Mexico Department of Game and Fish, and as such, are not available to the public.

39. *Supra* note 24, at 77805 (citing KIRK C. MCDANIEL ET AL., NEW MEXICO STATE UNIVERSITY, BRUSH CONTROL ON NEW MEXICO RANGELAND 12 (1985)). There has been no specific study of shinnery oak loss in the Texas side of the Permian Basin to date.

40. *Fighting for Survival: Sand Dune Lizard*, *supra* note 1.

41. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). For a more recent ruling from a district court in New Mexico, see *Center for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005).

42. *Endangered Status for Dunes Sagebrush Lizard*, 75 Fed. Reg. at 77805 (citing FITZGERALD ET AL., *supra* note 43, at 26).

43. *Id.* at 77808.

44. *Id.*

being sprayed with herbicide.<sup>45</sup> In addition to direct spraying, the removal of shinnery oak also eliminates the habitat for the dunes sagebrush lizard, thereby preventing any lizard repopulation. Even in sites where the lizard population survived over time, spraying dramatically reduces their numbers. Studies point to population losses of 70 to 94 percent.<sup>46</sup> It is estimated that nearly one-quarter of the lizard's habitat in New Mexico has been lost due to herbicidal spraying.<sup>47</sup> With this data in hand, it becomes clear that protecting shinnery oak dune habitats is critical and essential to protecting the continued existence of the species. Protecting the lizard without protecting its habitat solves nothing and only places the species on cruise control before it crashes.

#### V. OFF-HIGHWAY VEHICLE USE

The FWS considers off-highway vehicle (OHV) use to be a significant threat to the lizard because of the extensive habitat degradation that occurs.<sup>48</sup> The FWS warned against both commercial and recreational OHV activity when making the proposed ruling because they are both equally likely to cause the same harm. The effects of OHV use are numerous. In the short term, soil compaction and decreased plant cover directly affect the day-day-to-day survival of the lizard.<sup>49</sup> In addition, decreased plant cover increases erosion,<sup>50</sup> which may lead to the collapse of a dune structure.<sup>51</sup> In the long term, fragmentation of habitat and decreased animal density<sup>52</sup> dramatically affect the lizard's ability to recover from other environmental stressors. OHV activity not restricted by some form of

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45. *Id.* (citing CHARLES W. PAINTER, NEW MEXICO DEPARTMENT OF GAME AND FISH, ANNOTATED RECOMMENDATIONS BASED ON THE MANAGEMENT PLAN FOR THE SAND DUNE LIZARD, *SCELOPORUS ARENICOLUS*, IN NEW MEXICO 2 (1999), available at [http://nhnm.unm.edu/vlibrary/pubs\\_archive/other/nonsensitive/U99PAI02NMUS.pdf](http://nhnm.unm.edu/vlibrary/pubs_archive/other/nonsensitive/U99PAI02NMUS.pdf)).

46. *Id.* (citing HOWARD L. SNELL ET AL., NEW MEXICO DEPARTMENT OF GAME AND FISH, RESULTS FROM THE FIFTH YEAR (1995) RESEARCH ON THE EFFECT OF SHINNERY OAK REMOVAL ON POPULATIONS OF DUNES SAGEBRUSH LIZARD 8 (1997)).

47. *Id.* (citing PAINTER, *supra* note 42, at 38). Because the lizard is already protected under state law in New Mexico and not in Texas, no studies have been done on the extent of shinnery oak loss in Texas.

48. *Id.* FWS uses the categorization of OHV used by the BLM (citing DOUGLAS S. OUREN ET AL., UNITED STATES GEOLOGICAL SERVICE, ENVIRONMENTAL EFFECTS OF OFF-HIGHWAY VEHICLES ON BUREAU OF LAND MANAGEMENT LANDS, UNITED STATES GEOLOGICAL SURVEY 4 (2007), available at <http://www.fort.usgs.gov/Products/Publications/22021/22021.pdf>). Ouren et al. considered the term OHV to include motorcycles, off-highway motorbikes, ATVs, dune buggies, snowmobiles, some 4-wheel drive automobiles (jeeps, sport utility vehicles), utility vehicles and any other civilian vehicle specifically designed for off-road travel.

49. DOUGLAS OUREN ET AL., *supra* note 54, at 4.

50. *Id.* at 5.

51. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77808.

52. DOUGLAS OUREN ET AL., *supra* note 54, at 5.

conservationist measures essentially could be the straw that breaks the species' back.

Moreover, the nature of OHV use makes it difficult to enforce any sort of restricted use. OHV users tend to believe in the freedom to go anywhere, often shunning marked trails and signs.<sup>53</sup> Moreover, because of the vast expanses of unpopulated land that are popular for OHV users, enforcement is often difficult, costly, and ineffective.<sup>54</sup> OHV use seems to be one of the factors that may be impossible to prevent by the traditional method of posting signage. It would seem that making the taking of a lizard a federal crime and thereby attaching heavy penalties in an attempt to weigh against the commonly-held beliefs of OHV users would help provide the best protection for the lizard.

## VI. OIL AND GAS PRODUCTION

The FWS points to oil and gas production as one of the major factors affecting the lizard's population stability, specifically well and well pad density, roads to and from well pads, pipelines, seismic exploration, and wind and solar energy development.<sup>55</sup> Each "significant[ly] threat[ens]" the continuing survival of the species, relying on this factor of the listing process much more so than the previous two factors.<sup>56</sup>

In New Mexico, approximately 65 percent of occupied or suitable habitat for the species is currently fragmented by roads and well pads.<sup>57</sup> Approximately 70 percent of land within the lizard's habitat in New Mexico has been leased.<sup>58</sup> In Texas, over half of oil production occurs in two oil and gas districts<sup>59</sup> which overlap the known geographic range of the lizard.<sup>60</sup> A shinnery oak habitat located within 600 meters (1,968 feet) from a well supports 31 to 52 percent fewer lizards than a habitat located further out from a well.<sup>61</sup> The same study argued that within a section of 640 acres, lizard

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53. *Id.* at 37.

54. *Id.* at 53-54.

55. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77809-10.

56. *Id.*

57. *Id.* at 77806 (citing E-mail from Debra M. Hill to USFWS, New Mexico Ecological Services Field Office, Albuquerque, NM (2008)). No date or time, other than the year, was given in the citation in the proposed rule. This e-mail was not posted for public review.

58. *Id.*

59. Gary A. Tarver & Purnendu K. Dasgupta, *Oil Field Hydrogen Sulfide in Texas: Emission Estimates and Fate*, 31 ENVTL. SCI. & TECH. 3669, 3670 (1997).

60. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77806.

61. *Id.* at 77806 (citing DON SIAS & HOWARD L. SNELL, NEW MEXICO DEPARTMENT OF GAME AND FISH, THE DUNES SAGEBRUSH LIZARD *SCELOPORUS ARENICOLUS* AND OIL AND GAS DEVELOPMENT IN SOUTHEASTERN NEW MEXICO 3 (1998)).

populations declined by 25 percent if the section had 13 wells or more, and by 50 percent if there were 29 wells or more.<sup>62</sup>

Much of the issues taken with this assertion concern the bare-bones nature of this research. The exact habitat and range of the lizard is largely unknown and based on relatively few studies. In fact, a large part of the references cited by FWS are based on ranges of suitable habitat. The Sias and Snell survey referenced above also stated that lizards were “still easy to find and abundant,” even in oil fields that had been in existence for several decades at the time of the study.<sup>63</sup> In short, the authors concluded that the lizards were “tolerating” the oil field development. It would seem that FWS, in making this ruling, might have cherry-picked supportive research and failed to include important assertions that would go against their intended point.

The proposed ruling also contends that roads and well pads provide an imminent threat to the species due to soil compaction, loss of habitat and habitat quality, and fragmentation of habitat.<sup>64</sup> In making this assertion, FWS relies almost entirely on studies of other species. On the other hand, one of the studies of the lizard cited by FWS seems to come to the opposite conclusion – that “populations of the lizards themselves are dynamic entities that move across the landscape.”<sup>65</sup> The lizards are more likely to come into harm’s way from the traffic on the roads (as mentioned above) than the roads themselves.

The proposed rule also points to pipelines as a potential source of harm to the species, asserting that heavy equipment and OHV use may crush lizards and destroy their habitat.<sup>66</sup> Moreover, pipeline placement exposes the lizards to the danger of leaks and bursts.<sup>67</sup> The FWS is also concerned that pipeline trenches can trap lizards due to a lack of escape ramps. The FWS points to a study in which the New Mexico Department of Game and Fish (NMDGF), during a distribution survey, saw an open pipeline ditch that contained several reptiles.<sup>68</sup> This ditch contained no dunes sagebrush lizards. While FWS contends that surveyors were concerned that the ditch could become a trap for the lizard, their own references cite that the lizard population tends to increase near pipelines, arguing

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62. *Id.*

63. JOHN CLEMA ET AL., ARTESIA CHAMBER OF COMMERCE ROUNDTABLE REVIEW OF THE UNITED STATES FISH AND WILDLIFE SERVICE (USFWS) PROPOSED RULE TO LIST THE DUNES SAGEBRUSH LIZARD, *SCeloporus arenicolus*, AS AN ENDANGERED SPECIES (Aug. 15, 2011), available at <http://www.artesiachamber.com/pdf/duneslizard-petition.pdf>.

64. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77806.

65. CLEMA ET AL., *supra* note 59, at 12 (citing FITZGERALD ET AL., *supra* note 34, at 2).

66. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77807.

67. *Id.*

68. *Id.*

that “pipeline cuts and sand roads serve as preferred habitat where they represent artificial blowouts, new habitats, and possible dispersal corridors.”<sup>69</sup> FWS points to one instance of a pipeline rupturing, “spraying oil into the air and across the landscape.”<sup>70</sup> While this is extremely harmful, one pipeline rupture should not mean protection for an entire species. If that were the case, most marine life in the Gulf should be up for listing after the Deepwater Horizon disaster. Federal protection under the ESA is not required or even necessary to protect against pipeline ruptures. The ESA requires continuing and actual threats, not hypothetical ones after one small event. Moreover, the fragmentation of the species habitat may prove to prevent this factor from helping in the listing process. Any rupture is likely to be fairly localized and will affect only a small number of lizards because the habitat size keeps the numbers low.

The FWS also argues that shock waves from seismic activity in the area may crush individual lizards as well as their eggs. But this argument relies on technology that is outdated by decades of technological advancement. Shock waves are typically generated by small concussive blasts, which is a method that has not been used in the Permian basin for thirty years.<sup>71</sup> The modern method typically uses a vibration, rather than explosions to generate seismic data.<sup>72</sup> Because this method uses sound waves and not shock waves, any potential harm to the lizard or its eggs is simply overblown and entirely exaggerated.<sup>73</sup> The only potential harm that may come to the lizards is from the crew itself driving to location, which was considered in the OHV section.

The FWS also looks to the growing field of wind and solar energy generation, listing fragmentation by infrastructure and vehicle traffic as causes for concern.<sup>74</sup> As referenced above, vehicle traffic is a major factor affecting the species’ recovery. With that said, any new renewable development on public land in New Mexico requires a showing that there will be no negative impacts to the lizard.<sup>75</sup> No such requirement currently exists in Texas.

While the FWS seems to rely on faulty data for its contention that oil and gas operations in and of themselves pose a significant threat to the dunes sagebrush lizard, the sheer amount of habitat destruction and the threats posed by both commercial and

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69. CLEMA ET AL., *supra* note 59, at 13 (citing SIAS & SNELL, *supra* note 57, at 2).

70. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77807.

71. Letter from James C. Manatt, Jr., President/CEO, Providence Technologies, Inc., to Representative Stevan Pearce, N.M. (May 16, 2011) (on file with author), *available at* <http://www.artesiachamber.com/pdf/duneslizard-petition.pdf>.

72. *Id.*

73. *Id.*

74. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77807-08.

75. *Id.*

recreational OHV use point toward the species desperately needing the protections the ESA would afford it.

#### VII. CURRENT REGULATIONS AFFECTING THE LIZARD

State protections for the lizard differ dramatically across state lines. In New Mexico, the species has been listed under the state's Wildlife Conservation Act since January 24, 1995.<sup>76</sup> Moreover, the Bureau of Land Management Pecos District Office developed a Special Status Species Resource Management Plan Amendment (RPMA), which describes specific management practices for the lesser prairie-chicken and the dunes sagebrush lizard while on federal lands.<sup>77</sup> Candidate Conservation Agreements (CCA) and Candidate Conservation Agreements with Assurances (CCAA) were implemented in December of 2008.<sup>78</sup> These agreements allow private landowners to actively participate in the conservation of the species by limiting and protecting against habitat modification as well as encouraging habitat restoration and reclamation. The lizard seems to be well-protected in New Mexico. A listing decision may duplicate many of the efforts already taking place; therefore, New Mexico may be able to avoid the listing the species by pointing to a history of regulation and conservation efforts throughout the lizard's range.

On the other hand, Texas is a different story. The lizard is currently not listed under the Texas Parks and Wildlife Code or the Texas Administrative Code.<sup>79</sup> A draft Texas Conservation Plan (TCP) was developed and published by the Comptroller on September 27, 2011,<sup>80</sup> but it has not been implemented in any meaningful way. The Comptroller's information page tells oil and gas operators and agriculture producers that information is coming soon, and that a TCP administrator will set up an office in Midland at some point.<sup>81</sup> In short, Texas offers no protection for the species other than a promise that help will come eventually. While this is

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76. *Id.* at 77811 (citing PAINTER, *supra* note 42, at 1).

77. Bureau of Land Management, Pecos District Office, Roswell, New Mexico, Special Status Species Proposed Resource Management Plan Amendment/Final Environmental Impact Statement, 5-2 (Nov. 2007), *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/nm/field\\_offices/roswell/rfo\\_planning/special\\_status\\_species.Par.24130.File.dat/pdf\\_rmpa\\_final\\_document\\_11\\_07\\_pecos\\_volume\\_1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.24130.File.dat/pdf_rmpa_final_document_11_07_pecos_volume_1.pdf).

78. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77811.

79. *Id.*

80. Texas Comptroller of Public Accounts, Texas Conservation Plan for the Dunes Sagebrush Lizard (Sept. 2011), *available at* [http://www.texasahead.org/texasfirst/resources/task\\_force/priority/reference\\_docs/dsl/TCP\\_DSL\\_Plan\\_92711.pdf](http://www.texasahead.org/texasfirst/resources/task_force/priority/reference_docs/dsl/TCP_DSL_Plan_92711.pdf).

81. Texas Comptroller of Public Accounts, *Texas Conservation Plan for the Dunes Sagebrush Lizard*, TEXAS AHEAD, *available at* [http://www.texasahead.org/texasfirst/resources/task\\_force/priority/dsl.php](http://www.texasahead.org/texasfirst/resources/task_force/priority/dsl.php) (Jan. 2012).

noble, this mere promise of eventual protection should not and has not historically precluded a listing decision.<sup>82</sup>

As such, New Mexico may be able to avoid listing the lizard because the state already has an adequate system of protecting the species. Texas does not have this safety net, so the listing the lizard is much more likely in Texas. The TCP may simply be another case of too little, too late.

But this seems to come to an odd result – how can a lizard be deemed endangered in one state and be safe in another, when the clear focus of the ESA is to prevent the extinction of the species? While this may seem inconsistent, courts have held that if a species is in danger of extinction in part of its current range, its stability elsewhere should not prevent its protection.<sup>83</sup> Because the ESA allows listing if the species is in danger of extinction in a “significant portion of its range,” and Texas shares a large portion of the lizard’s habitat, the lack of protection from the state could enable federal intervention.

#### VIII. CONCLUSION

In conclusion, some of the bases that FWS relies on for its listing are lacking. Locating the actual habitat locations, particularly in Texas, is essentially a guessing game. Moreover, the threat posed to the lizard from oil and gas operations is largely overblown by the proposed rule. These concerns aside, there is enough of a threat of habitat destruction by frequent OHV use and other factors to the continued existence of the dunes sagebrush lizard to warrant listing. Because of a strong existing regulatory net, New Mexico may be able to avoid the listing, but Texas does not share in that benefit. It seems the lizard has a fairly strong chance of being listed in Texas as an endangered species requiring federal protection.

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82. See *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (holding that reliance on future conservation actions would be arbitrary and capricious); *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1154 (D. Or. 1998) (holding that the Secretary may not rely on plans for future actions and must base listing decision on currently operational conservation efforts).

83. See 16 U.S.C. § 1532(6) (defining “endangered” as “in danger of extinction throughout all or a significant portion of its range”); *Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1277-83 (W.D. Wash. 2003).