



*Via Web*

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Public Comments Processing  
Attn: FWS-R2-ES-2010-0041  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203

RE: FWS-R2-ES-2010-004; Endangered Status for the Dunes Sagebrush Lizard

This letter responds to the February 24, 2012 notice announcing the availability of a conservation agreement for the dunes sagebrush lizard (*Sceloporus arenicolus*) in Texas and soliciting comment “simultaneously on the proposed rule, the new conservation agreement, and a previously completed conservation agreement for the dunes sagebrush lizard in New Mexico.” 77 Fed. Reg. 11061 (Feb. 24, 2012).

On May 28, 2002, the Center for Biological Diversity (“Center”) petitioned the U.S. Fish and Wildlife Service (“Service”) to list dunes sagebrush lizard as endangered under the Endangered Species Act of 1973, as amended (“ESA” – 16 U.S.C. §§ 1531 *et seq.*). Following litigation of the Service’s finding that listing the animal is “warranted but precluded,” the Service issued a draft listing rule on December 14, 2010. *See* 75 Fed. Reg. 77801-17.

On June 2, 2008, the Center commented to the Service regarding the amended resource management plan of the U.S. Bureau of Land Management (“BLM”) Pecos District affecting “Special Status Species,” including dunes sagebrush lizard. We incorporate that comment into this letter by reference and update it herein with new information as appropriate.

The best available scientific and commercial information continues to support listing dunes sagebrush lizard as endangered. The draft listing rule stimulated a number of promises from various parties under the auspices of the Candidate Conservation Agreement with Assurances (“CCAA” – USDI-FWS 2008) that may benefit the animal’s fragmented populations on public lands in New Mexico. However, neither the CCAA nor the newly adopted and wholly voluntary Texas Conservation Plan (“Texas Plan” – Texas Comptroller of Public Accounts 2012) is not sufficient to halt the lizard’s slide to extinction. Both the CCAA and the Texas Plan generally describe actions that participants may take to limit habitat fragmentation and reclaim destroyed habitat, but they are non-regulatory and lack sufficient certainty or effectiveness to obviate the continued need for listing. The insufficiency of voluntary measures is especially significant given that approximately 197,000 acres (one-third) of the lizard’s specialized shinnery oak sand dune habitat is located on private and state-owned lands in west Texas.

## The Texas Conservation Plan

The Texas Conservation Plan is a brand new creation of the Texas Comptroller for Public Accounts (2012), which proposes to use its “procurement authority” to outsource the administration of enrollment and implementation and reporting conservation measures by a “Qualified Third Party Contractor.” The state agency has no prior experience of effective oversight in use of similar authority to accomplish the specific objectives it undertakes in the Texas Plan. Moreover, the plan itself contains no explicit performance standards that will apply to contractors in order to ensure effectiveness of the Texas Plan in conserving habitat of dunes sagebrush lizard. Moreover, the Texas Plan itself contains no incentive for participation or penalty for non-participation in the event that the Service declines to list the species as endangered. Absent a listing under ESA, the Service cannot reasonably expect any certainty of participation or effective implementation. The sole value of the Texas Plan is as the blueprint for a binding Habitat Conservation Plan (“HCP”) that will incentivize participation by providing operational certainty to private parties who otherwise would be liable for take under ESA Section 9.

- A. The Texas Plan is not reasonably certain to be implemented or effective, and it does not form a basis for declining to list dunes sagebrush lizard as endangered.

According to the Texas Plan, “Any participation under the [candidate conservation agreement with assurances – “CCAA”] component of the Plan is purely voluntary and no Potential Participant, landowner or property owner will be forced or required to participate” (Texas Comptroller of Public Accounts 2012: 25). All of its “Conservation Measures” (section 8.6), which are “unique to the CCAA,” are therefore voluntary and non-regulatory.

The Texas Oil and Gas Association (“TxOGA”) admitted to the Service in comments dated May 9, 2011, “New Mexico stakeholders have been substantially engaged in the development of conservation measures for BLM lands. Texas land owners, TxOGA members, and the State of Texas have not been similarly engaged. The result is that there has been a fundamental lack of opportunity for Texas agencies, industry and landowners to engage in a process to protect the DSL.” In other words, none of the participants in the Texas Plan have any experience with implementing effective conservation measures to forestall threats to vulnerable animals such as dunes sagebrush lizard.

The TxOGA went on in the same letter to describe inherent difficulties with establishing certainty of participation in the voluntary conservation agreement for dunes sagebrush lizard:

[T]he rule assumes that surface owners ... have a great level of control over the use of the surface by mineral rights holders. This assumption does not apply to private lands in Texas, where mineral ownership is typically divested from surface ownership and surface owners and mineral owners have different rights

and expectations on current and future uses of the surface. For instance, the Proposed Listing suggests that one property should be enrolled by both the surface owner and the oil and gas operator in a Candidate Conservation Agreement with Assurances (“CCAA”). *See* 75 Fed. Reg. at 77811. Such an expectation may be difficult if not impossible to achieve in Texas, and appropriate conservation measures must allow an oil and gas developer to address impacts to the extent his interest allows it to do so separate from the surface owner. These unique legal issues involved with mineral interests and CCAs on non-federal lands are not adequately evaluated. In a related manner, the Proposed Listing is particularly deficient with regard to protection of DSL on private lands in Texas because it fails to strike the appropriate balance between protection of private property rights and conservation.

[Emphasis added.] To the degree that the TxOGA states (1) actual legal barriers to establishing certainty of participation in the voluntary Texas Plan, or (2) the preferences of its members, the result is the same. The industry either cannot, as a matter of law, or will not, as a matter of preference, voluntarily implement conservation measures with the regularity and effectiveness required to forestall threats to the species. Indeed, the TxOGA flatly refuses to agree to implement conservation measures that currently apply to public lands managed by the Bureau of Land Management (“BLM”) in New Mexico:

[T]he Service cannot assume that what is appropriate for conservation of the DSL on BLM lands is appropriate for Texas. The Service must address differences in property rights and land use goals on BLM and non-federal lands before recommending conservation measures on private lands that are now required on BLM lands. Further, the BLM measures should be given a chance to succeed and be evaluated for effectiveness, given the lack of supporting science, before mandating their use on non-federal lands.

The TxOGA is a primary player whose participation is expected to give credibility to the Texas Plan, but its own statements clearly expose the resistance of its members to providing the Service with any certainty of participation or effective implementation of conservation measures. Instead, “property rights” and “land use goals” come “before” conservation. It is impossible to reasonably conclude, based on these industry statements, that there is any certainty of the Texas Plan’s implementation on private lands absent a formal ESA listing of dunes sagebrush lizard.

In addition, the TxOGA states the obvious point that there is no certainty whether conservation measures currently in effect on BLM lands in New Mexico are effective at reducing threats to dunes sagebrush lizard. In case the Service has any doubt of this point, the TxOGA drills it home:

The Service assumes that conservation measures appropriate for oil and gas activities in New Mexico apply equally in Texas. But differences in land ownership, DSL habitat, and the development of oil and gas fields and other distinct oil- and natural gas-field practices require the Service to more closely examine how DSL populations and habitats will be managed in Texas. For example, the BLM rules regarding well pad placement and well density appear to assume that horizontal drilling from one well pad is always feasible. All

formations in the Permian Basin are not effectively produced with horizontal drilling technology. For example, vertical drilling is necessary to develop thicker hydrocarbon zones. Also, land owners may dictate siting of wells and infrastructure, which adds to the challenge of applying conservation measures developed for federal lands in New Mexico. Our members also question whether elevation of gathering and burial of electrical lines is appropriate, safe or necessary given the lack of conservation data supporting the use of these expensive measures.

Oil and gas developers in Texas simply will not implement conservation measures with any degree of regularity, uniformity, certainty or effectiveness unless incentivized to do so as a means to avoid liability for take under Section 9 of the ESA. The Texas Plan falls short of forming a basis for not listing dunes sagebrush lizard as endangered because there is no certainty of its implementation or effectiveness in the absence of listing.

**B. Conservation measures in the Texas Plan are vague, subject to unlimited discretion of Participants, and cannot reasonably be deemed sufficiently effective to avoid listing dunes sagebrush lizard as endangered**

Apart from the strong unlikelihood of committed and effective participation in the Texas Plan absent formal listing of dunes sagebrush lizard as endangered, a core evaluation criterion before the Service is whether the conservation measures in the Texas Plan would be effective at reducing threats to the animal, even if they were implemented. The “Conservation Measures” in the plan’s CCAA are vague and subject to unlimited discretion of Participants. The five measures related to “Construction” described on page 41 of the plan call for Participants to:

- “Maximize” use of existing developed areas and rights-of-ways in well development.
- Develop well sites outside of lizard habitat “when feasible in the reasonable judgment of the Participant.”
- “Minimize” the footprint of developments such as well sites.
- Schedule surface disturbance in lizard habitat during periods of seasonal inactivity “when feasible.”
- Utilize directional drilling to avoid lizard habitat “when practical.”

The measures cater to the preferences of the TxOGA, as described above, but there is no reasonable basis on which the Service may deem them to be effective at reducing threats to dunes sagebrush lizard identified in the proposed listing rule. They contain no standards, such as maximum well site footprint within lizard habitat, location of developments to maintain habitat connectivity, or any assurance that development will avoid directly killing animals. Leaving all measures up to the judgment of Participants regarding practicality and feasibility ensures that the Texas Plan will prove virtually meaningless as a conservation tool. Neither the Permit Holder nor its contractor has any authority under the Texas Plan to second-guess or overrule the unlimited discretion of Participants to ensure effective implementation of conservation measures.

Jankowitz (2007) commented on proposed mitigation measures in the BLM's resource management plan for dunes sagebrush lizard habitat (described below). In it, the New Mexico Game and Fish Department went on record supporting additional conservation measures beyond what even BLM has adopted:

The SDL occurs only within a small area of shinnery oak habitat in parts of southeast New Mexico and adjacent Texas. In New Mexico, the species is known to exist as fragmented populations within an area of about 900 sq. mi. in parts of Chaves, Eddy, Lea, and Roosevelt counties. However, within this area the potential and occupied habitat consists of only 655 square miles. SDLs are found throughout oil and gas fields, but overall population levels are 31 to 52% lower in oil and gas fields compared to undeveloped areas (20). Other conservation threats include shrub removal and off-road vehicle activity. Sand dune lizards hibernate during colder temperatures (October – April). During hibernation or seasons of inactivity, they are immobile and unable to move about and escape. Seismic exploration in occupied habitat during these periods of inactivity could result in direct killing of individual lizards. Direct kills also could occur during summer months when they are laying eggs in underground nests that could be crushed. The working group recommendations and BLM interim management described for LPC also address conservation of the SDL (ranges of the 2 species overlap). Interim management applicable to SDL includes deferral of new leasing in occupied or suitable habitat; a plan of development for existing leases; and, no surface disturbance in occupied habitat or within 100 meters of associated suitable habitat. NMDGF supports the BLM interim regulations, with the following recommendations for additional conservation measures.

- Limit oil/gas well density to less than 13 well pads per square mile in suitable habitat.
- Stack sand removed during pad construction on one side of the pad to be used later during site reclamation. Clean abandoned well pads and the caliche roads that serve these wells of caliche, rake, and reclaim with native sand.
- Do not reseed abandoned well pads, pipeline corridors and out-of-service roads in dunal areas.
- Reclaim to a rolling topography.
- Don't use seismic "thumper trucks" in occupied and adjacent suitable habitat during hibernation or nesting season.

Jankowitz (2007: 19). The Texas Plan does not come close to addressing ongoing and accelerating threats to dunes sagebrush lizard from oil and gas development. As such, it cannot form a basis for the Service to decline listing the animal as endangered.

**C. Monitoring under the Texas Plan is grossly uncertain and does not form a basis for declining to list dunes sagebrush lizard as endangered**

Compliance monitoring and reporting by the third-party contractor is the sole means proposed in the Texas Plan of ensuring that conservation measures are implemented and effective, if anyone participates. The plan contains no specific monitoring protocols, and states only that they "will" be developed at some future date

with no binding timeframe. “Frequency of monitoring and the number of participants monitored will be determined according to risk assessments, participation level, and other factors determined by the Permit Holder” (Texas Comptroller of Public Accounts 2012: 29-30). Adequate follow-up monitoring and enforcement of environmental stipulations is essential to assure their effectiveness (Jankowitz 2007).

## Federal lands in New Mexico

Approximately half of all dunes sagebrush lizard habitat (~300,000 acres) occurs on BLM-managed public lands on the Roswell and Carlsbad Resource Areas in New Mexico. Within Chaves, Eddy, Lea and Roosevelt counties, it is found mainly on the Mescalero Sands formation, and it is restricted to the vicinity of active and semi-stabilized sand dunes with stands of shinnery oak (*Quercus havardii*). The lizard is in dire need of habitat protection throughout its range, and this protection is not accomplished by the RMP.

In April 2008, the BLM Pecos District adopted a Record of Decision and Approved Special Status Species Resource Management Plan (“RMP” – USDI-BLM 2008). The RMP prescribes mitigation measures intended to reduce impacts of resource management, including oil and gas development, livestock grazing and other activities, to dunes sagebrush lizard. According to the Final Environmental Impact Statement (“FEIS”) supporting the RMP, “Tracts not currently under lease within Lizard Habitat Boundary ... would be closed to new oil and gas leasing until BLM determines that development of tracts nominated for leasing can be developed without impacting dune complexes. Depending on the results of that determination, the closure of a particular tract may continue, or it may be offered for lease with an NSO requirement or other appropriate stipulations” (USDI-BLM 2007b). In addition, “Existing leases would require [plans of development – “POD”] which incorporate the results of the lizard surveys. The purpose of a POD is to assist the operator and BLM with planning for orderly development as a means to reduce or eliminate impacts to special status species habitat” (USDI-BLM 2007b).

The RMP allows continued disturbance and development of dunes sagebrush lizard habitat, which contributes to the persistence of primary factors that jeopardize the existence of the species, including habitat fragmentation. Moreover, it does not include many of the “additional conservation measures” recommended by the New Mexico Department of Game and Fish described above – *see* Jankowitz (2007:19). The RMP should not preclude listing dunes sagebrush lizard as endangered because it fails to provide range-wide protection, and even in the covered portion of the animal’s range, habitat protection is discretionary, and the RMP does not effectively reduce or remove threats to the species.

### A. The RMP does not provide range-wide habitat protection

Approximately half of all dunes sagebrush lizard habitat (~300,000 acres) occurs on BLM-managed public lands on the Roswell and Carlsbad Resource Areas in New

Mexico. By definition, the RMP does not affect the other half of the lizard's habitat. The lizard is in dire need of habitat protection throughout its range, and this protection is not accomplished by the RMP.

#### B. The RMP does not protect lizard from oil and gas development

Oil and gas development is the primary threat to the continued existence of dunes sagebrush lizard (USDI-FWS 2006). The animal is more negatively affected by oil and gas development than other sympatric reptile species (Sias and Snell 1998). Oil and gas development harms the lizard because of surface disturbance, vegetation removal, habitat loss and fragmentation, the release of toxic hydrogen sulfide gas, leaking pipelines, seismic exploration, and residual toxic contamination (USDI-FWS 2006). Indeed, lizard abundance is highest in areas without oil or gas wells (Sias and Snell 1997). At 13 wells per section, populations declined by a minimum of 25 percent, and at 30 wells per section, populations decline by an estimated 50 percent (Sias and Snell 1998). 13 wells per section is the maximum recommended by the New Mexico Department of Game and Fish (Jankowitz 2007), and the RMP does not incorporate this spacing limitation.

Under the RMP, the lizard continues to lose habitat to oil and gas development, which has accelerated in southeast New Mexico compared to the years preceding adoption of the RMP. More than 60 percent of land within the New Mexico range of dunes sagebrush lizard on public land managed by the BLM or the State Land Office is currently under lease for oil and gas exploration (USDI-FWS 2006). Prior to adoption of the RMP, there were 825,346 acres of existing leased federal minerals in the management area covered by the RMP (USDI-BLM 2007a). "Based on the Reasonable Foreseeable Development, [BLM] anticipates the Preferred Alternative would have 49 wells drilled on an annual basis (245 acres of direct disturbance). Over the lifetime of this plan (20-Year projection) there would be approximately 4,900 acres of direct disturbance" to suitable lizard habitat (USDI-BLM 2007b). Indeed, the BLM routinely leases suitable lizard habitat for oil and gas development where RMP-mandated leasing stipulations apply (Lininger and Bradley 2011).<sup>1</sup>

The Center remains concerned that the RMP allows oil and gas development to continue within habitat of dunes sagebrush lizard, causing potentially significant indirect and cumulative impacts to fragmented populations and potentially foreclosing recovery. Fluid mineral leasing and development continue unabated in the shinnery oak flats located between sand dunes, and these ongoing activities contribute to habitat fragmentation and hinder lizard dispersal. The animal is not known to disperse through

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<sup>1</sup> The BLM offered more than 27,000 acres of suitable dunes sagebrush lizard habitat for oil and gas lease on over 100 discrete parcels ranging in size from 80 to 1,880 acres in quarterly sales from January 2009 to January 2012. Oil and gas development is not likely to directly affect all 27,000 acres. However, site-specific indirect and cumulative effects to dunes sagebrush lizard resulting from habitat fragmentation remain unknown because the BLM has never analyzed them in NEPA analysis of the quarterly sales or for any application for permit to drill. Instead, the agency relies on a programmatic impact statement supporting the RMP (USDI-BLM 2007a, 2007b) that fails to consider or disclose site-specific effects of development.

patches of unsuitable habitat. Additional development in suitable habitat outside of “occupied” dunes complexes will compound the isolation fragmented populations and perpetuate the loss of genetic diversity, making the species even more vulnerable to demographic and stochastic perturbations. Further, sand dune habitat is dynamic and areas between dunes that are not currently considered to be suitable habitat need to be protected to allow for future migration of suitable habitat, which may be foreclosed by the development of permanent or semi-permanent infrastructure.

### C. RMP mitigation measures are discretionary and subject to exceptions

Mitigation measures in the RMP do not mandate protection of dunes sagebrush lizard habitat. Rather, oil and gas leasing “may” be deferred or “may” be subject to leasing stipulations, and any stipulations can be removed at the discretion of the BLM (USDI-BLM 2008). The BLM evaluates parcels nominated for lease within the Lizard Habitat Boundary for habitat suitability. The RMP (USDI-BLM 2008:12-13) [emphasis added] states:

Depending on the results of that evaluation, leasing of the tract may be deferred until occupancy surveys can be completed, or the tract may be offered for lease with [a no-surface-occupancy or “NSO”] stipulation, or a Sand Dune Lizard Habitat survey stipulation, or other appropriate stipulations including standard stipulations. . .

If, after acquiring a Federal mineral lease with an NSO stipulation or any other stipulation, the lessee can demonstrate through the use and application of peer-reviewed science that the rationale behind the stipulation is no longer necessary, waivers, exceptions, or modifications to the lease will be considered by the Authorized Officer.

Indeed, the only non-discretionary portion of the RMP quoted above states that the BLM “will” consider “waivers, exceptions, or modifications” of mitigation measures in dunes sagebrush lizard habitat. If lizards are detected on existing leases, “prospective well locations may be moved up to 200 meters to avoid Sand Dune Lizard habitat” (USDI-BLM 2008:13) [emph. added]. The RMP does not prohibit wells in known lizard habitat, it does not require that well sites be relocated, and even if the wells are relocated, moving them 200 meters outside of occupied dunes will fragment suitable but unoccupied habitat, allow for more pollution, and decrease the long-term viability of the species.

Furthermore, the Center remains concerned that the RMP includes loopholes that allow surface disturbances in occupied dune complexes to continue. The FEIS (USDI-BLM 2007a: 2-28) supporting the RMP states: “Surface disturbance would not be allowed in documented occupied sand dune lizard habitat areas, or within up to 100 meters of suitable habitat associated with occupied habitat areas identified through field review. An exception to this restriction would be considered when an on-site evaluation of habitat extent, available species occurrence data, the proposed surface use, and proposed mitigations indicate the proposal would not adversely affect the local population.” Neither the FEIS nor the RMP itself define a standard for “adverse” effects,

nor do they define a “local population,” such that the BLM may arbitrarily characterize any surface disturbance as miniscule and waive the prohibition. Moreover, the RMP fails to define criteria for acceptable proposed surface uses or effective mitigation measures. The Center is concerned that reclamation of destroyed habitat or removal of infrastructure could be accepted as a satisfactory mitigation, even if there is no research showing that lizards can or will move into reclaimed areas. Fitzgerald and others (2005) failed to detect recovery of shinnery oak habitat where it had been removed in the 1980’s and 1990’s. In addition, a 100-meter buffer of surface disturbance from occupied dunes is not likely to contribute effectively to the recovery of the species.

Similarly, the BLM retains discretion under its RMP to exempt new right-of-way passages from so-called “avoidance areas.”

Lands acquired as habitat for Special Status Species would be added to the right-of-way avoidance areas. Rights-of-way for projects and facilities such as fences, range and wildlife water pipelines, power distribution lines, access to oil and gas facilities, or oil and gas collection or distribution pipelines would be considered in avoidance zones on a case-by-case basis.

(USDI-BLM 2008: 50). The equivocal language in the RMP allows continued destruction and degradation of lizard habitat. The BLM is highly likely to exercise its discretion and allow surface disturbances whenever convenient, given its long history of caving to pressure from the highly aggressive industrial and political classes of the Permian Basin. For example, in 1994, in response to concern from scientists and the New Mexico Dept. of Game and Fish, BLM elected to withhold leases from all tracts in the Mescalero Sands ecosystem, but later reversed its decision in response to pressure from industry and state politicians (*see* Emergency Listing Petition discussion citing Oil and Gas letters, pp. 8-9). In regards to a lease information notice requiring lizard surveys and potential restrictions on oil and gas development, the BLM stated to industry that the notice was not a stipulation, had “no legal consequences,” and that the agency had not cancelled any leases or denied any new wells for the Sand Dune Lizard’s protection (*see* 1994-95 Oil and Gas letters at unnumbered pp. 11, 24 in Emergency Listing Petition). Because the RMP is also not a stipulation and is discretionary, it is unlikely to prevent further loss of lizard habitat for oil and gas development.

#### D. The RMP does not comprehensively address threats to the species

The RMP does not in any way diminish ongoing threats to dunes sagebrush lizard from off-road vehicles and livestock grazing.

#### Off-Road Vehicles

ORV use can indirectly decrease lizard abundance (Busack and Bury 1974) and harm lizards directly through maiming, crushing, and causing hearing loss, and indirectly through substrate compaction, erosion, and vegetation damage (Luckenbach and Bury 1983). ORV use erodes the shinnery edges of blowouts and can crush lizards and lizard nests buried in the sand (Painter et al. 1999). Hibernating lizards are especially vulnerable

because they are unable to potentially move out of the way. Laurencio et al. (2007) noted ORV degradation of habitat at an historically occupied dunes sagebrush lizard site in west Texas.

The BLM acknowledged that “OHV use has increased substantially in the Pecos District over the last decade and is an increasing concern for all resource programs” (USDI-BLM 2007a: 2-11). Within the range of dunes sagebrush lizard, the Mescalero Sands North Dune ORV Area receives heavy use. The Square Lake ORV area is also within lizard habitat, as is a portion of the Hackberry Lake ORV area.

The RMP expanded the area of dunes sagebrush lizard habitat accessible to ORV use. It expanded the Mescalero Sands North Dune OHV Area from 562 acres to 1,674 acres, including 694 acres of “open” (unrestricted) use (USDI-BLM 2008: 28-29). Given the importance of the Mescalero Dunes as habitat for the lizard, expanded access for OHV use, especially open use, presents a real threat to the species.

ORV users rarely stay on designated routes. Rand French of the Roswell Resource Area reported that there are few-to-no signs to direct riders to stay out of sensitive areas or to stay on designated trails and roads (pers. comm. March 20, 2002). The BLM also acknowledges that, despite designating areas for ORVs, given foreseeable increased visitor use, “there is a possibility that [ORV] use outside these areas would occur and would lead to degradation of special status species habitat (USDI-BLM 2007a: 4-35).

### Livestock Grazing

Direct effects of livestock grazing on dunes sagebrush lizard have not been formally studied, exclusive of Tebuthiuron (herbicide) treatments. Painter and others (1999) reported that dunes sagebrush lizards were not found in “extensive open sand dunes, a habitat formation potentially associated with heavy grazing.” Peterson and Boyd (1998) noted that high stocking rates likely result in the loss of perennial grasses increase wind erosion and bare ground. Studies of other lizard species in the southwest found that livestock grazing results in decreased lizard abundance (Bock et al. 1991, Jones 1981).

The RMP does nothing to protect dunes sagebrush lizard from potentially significant adverse effects of livestock grazing. Less than three (3) percent of the lizard’s suitable habitat on public land is off-limits to livestock grazing (USDI-BLM 2008: 21). The plan states, “The construction of fence enclosures or barriers will be considered in habitat of special status species,” but does not require such mitigation measures in any case (USDI-BLM 2008: 23).

The RMP exclusively relies on voluntary relinquishment of grazing rights to protect habitat for the lesser-prairie chicken (and, by proxy, dunes sagebrush lizard): “[V]oluntary relinquishment will be one method to meet the goal of establishing habitat reserves for the lesser prairie-chicken within the Planning Area. The decision to relinquish livestock grazing is totally voluntary on the part of the permittee/ lessee” (USDO 2008, p.21). Given the precarious status of the species, livestock grazing should

be subject to consultation under Section 7 of ESA to ensure no take, until scientific studies demonstrate that grazing can maintain or avoid degradation of lizard habitat.

#### E. The RMP does not meet effectiveness criteria in the Policy on Evaluation of Conservation Efforts

The Policy on Evaluation of Conservation Efforts (“PECE Policy”) states that a conservation effort must be “sufficiently certain to be effective so as to have reduced or removed a threat to the species” (68 F.R. 15100, Mar. 28, 2003). The RMP does not effectively reduce or remove threats to the dunes sagebrush lizard from oil and gas development, off-road vehicle use, or livestock grazing.

The first criterion for effectiveness in the PECE Policy is: “The nature and extent of threats being addressed are described, and how the conservation effort reduces the threats.” The RMP describes threats of posed by oil and gas development to dunes sagebrush lizard, but the standards and guidelines it sets forth to address them are not certain to reduce the threats because they are largely discretionary and subject to exemptions. Likewise, the RMP increased ORV access to dunes sagebrush lizard habitat and none of its provisions are likely to be effective at controlling rogue ORV use. Moreover, the RMP subjects more than 96 percent of the lizard’s habitat to cattle grazing with virtually no restriction whatsoever.

The second and third criteria for effectiveness are, “Explicit incremental objectives for the conservation effort and dates for achieving them are stated,” and “Steps necessary to implement the conservation effort are identified in detail.” The RMP does not meet these criteria at all.

The fourth criterion for effectiveness states: “Quantifiable, scientifically valid parameters that will demonstrate achievement of objectives, and standards by which progress will be measured, are identified.” The RMP omits any scientific justification for allowing continued oil and gas development, cattle grazing, or off-road vehicle use within the “Lizard Habitat Area.” It fails to set any parameters for desired lizard population size or distribution and does not include any standards for measuring progress.

Finally, the RMP does not meet the fifth criterion which states, “Provisions for monitoring and reporting progress on implementation and effectiveness are provided.” The RMP contains no explicit provisions for monitoring and reporting the effectiveness of the limited and discretionary mitigation measures applicable to surface disturbing activities in the Lizard Habitat Area.

## Conclusion

Neither the Texas Plan nor the RMP provide range-wide protection for the dunes sagebrush lizard. Even in the portion of the lizard’s range covered by the RMP, which contains the most robust habitat protections, those protections are meager, discretionary, and subject to exemptions. Given the BLM’s history of weakening species’ protection in

response to industry pressure, and indeed the industry's full-throated resistance to implementing any meaningful conservation measures on private lands, it is highly likely that oil and gas development will continue to take precedence over habitat protection. The certainty of effectiveness of any existing or promised habitat protections or mitigations is highly doubtful. None of the existing policies regarding conservation of lizard habitat meet the criteria for effectiveness set forth in the PECE Policy. For these reasons, they do not form a basis to preclude Endangered Species Act protection for the dunes sagebrush lizard.

Sincerely,



Jay Lininger, Ecologist

Att.

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