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Locke Lord QuickStudy: Another Predicament in the Permian: ?USFWS Proposes Renewed Endangered Listing for ?Dunes ?Sagebrush Lizard

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On July 3, 2023, the U.S. Fish and Wildlife Service ("the Service") proposed to list[1] the dunes sagebrush lizard (*Sceloporus arenicolus*) ("DSL"), a species found only in southeastern New Mexico and west Texas, as an endangered species under the Endangered Species Act of 1973 ("ESA").[2] The proposed listing was issued in response to a court order requiring the Service to issue a decision on the DSL's status no later than June 29, 2023. The proposed listing upends the conduct of longstanding conservation plans related to the DSL, agreed to during the Obama administration and most recently updated in 2020 during the final year of the Trump administration. The Service's action, if and when finalized, will have significant consequences for energy and infrastructure projects within the Permian Basin. Many planned and potentially operating projects will need to either implement actions to avoid "take" of the DSL or potentially pursue an incidental take permit ("ITP") to avoid liability under the ESA.

Brief Background on the DSL and its Habitat

The DSL is a species of spiny lizard restricted to shinnery oak sand dunes habitats in southeastern New Mexico and western Texas. It is a narrow "habitat specialist", having the second smallest range of any lizard species endemic to North America, and breeds exclusively in sand dune blowouts. The DSL's range overlaps with the Permian Basin. Surface exploration, exploratory drilling, oil field development, and facility construction can lead to disturbance and removal of shinnery oak duneland, thereby contributing to direct habitat loss. In the preamble to the proposed listing, the Service points to several studies identifying a negative relationship between oil well pad density and the number of DSLs present at a site.[3] The Service asserts that frac sand mining operations, caliche road networks, and other infrastructure in the oil patch can also fragment DSL habitat and further promote the loss and degradation of shinnery oak dunelands.[4]

A Decades-Long DSL Saga

The DSL is no stranger to controversy or conflict. In 2002, the Center for Biological Diversity ("CBD") and others petitioned the Service to list the DSL due to alleged threats to the species' habitat caused by oil and gas development. In 2004, the Service determined that listing the DSL was warranted, but declined to do so owing to higher agency priorities.[5]

In 2010, the Service again proposed to list the DSL as endangered,[6] but in June 2012, the Service withdrew that proposal, citing efforts that were being undertaken to conserve the species, including the voluntary Texas Conversation Plan ("TCP") developed by federal, state, and private stakeholders, including oil and gas and ranching interests.[7] Conservation groups sued the Service in 2013, arguing that the TCP was inadequate to protect the DSL, and that the Service's failure to list the species was arbitrary and capricious. In 2014, the U.S. District Court for the District of Columbia upheld the Service's decision not to list the species.[8]

Undeterred, in 2018 CBD submitted a new petition to the Service, seeking to list the DSL due to ongoing threats from oil and gas development, as well as new threats allegedly caused by sand mining in Texas. In July 2020, the Service published a finding that the petition presented substantial information indicating that listing the DSL "may be warranted".[9] Publication of that finding obligated the Service to publish a 12-month finding on whether listing the DSL as endangered or threatened is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending proposals.[10] However, the Service failed to publish such a finding, prompting the CBD to file yet another lawsuit to compel the Service to complete the 12-month finding by June 29, 2023.[11] On August 25, 2022, the Service and CBD entered into a settlement agreement, pursuant to which the Service agreed to publish a finding by the June 29, 2023 deadline.

Implications of a DSL Listing for Industry

Potential for Take

It is unlawful under the ESA for any person to "take" a threatened or endangered species without a permit, where "take" includes killing, hunting, harassing, and harming the species.[12] "Harm" is defined to include significantly modifying or degrading habitat where doing so actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.[13] The proposed listing identifies a plethora of activities associated with oil and gas development that can lead to prohibited takes, including "surface exploration, exploratory drilling, oil field development, and facility construction, including access roads, well pads, and operation and maintenance."[14] The Service notes that the recent emergence of frac sand mining in the Permian Basin region could also jeopardize the DSL by potentially "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."[15]

Notably, unlike past proposed listings of the DSL,[16] the Service's current proposal does not mention renewable energy as a potential threat to the DSL, even though such facilities typically require more land than oil and gas production. Notwithstanding this omission, renewable energy developers should recognize that the proposed listing, if finalized, will also affect renewable energy projects located in DSL habitat. In particular, above-ground transmission lines, construction and maintenance of transmission line rights-of-way, and solar or battery storage projects have the potential to modify or degrade DSL habitat and interfere with the species' movement, breeding,

and nesting patterns.[17]

Options for Obtaining Take Authorization

Companies engaging in land use activities that are likely to result in incidental take of endangered wildlife should consider their options for obtaining take authorization in the event the proposed listing is finalized. While the traditional form of take authorization involves obtaining an incidental take permit ("ITP") from the Service, which requires developing and obtaining Service approval of a habitat conservation plan ("HCP"), there is another option that is available prior to a final listing that may be less burdensome. Companies that have entered into a candidate conservation agreement with assurances ("CCAA") with the Service prior to the listing rule becoming effective will be granted take authorization upon effectiveness of a final listing.

In New Mexico, the non-profit Center for Excellence (dba CEHMM) administers a CCAA for oil and gas operators on both public and private lands. Before the effective date of any listing decision, an operator may execute a written agreement with CEHMM committing to adhere to certain conservation measures to protect the DSL (*e.g.*, avoiding disturbance of shinnery oak duneland habitat, forgoing spraying of herbicides on shinnery oak, and relocating projects to avoid DSL habitat).

Two conservation plans have been developed in Texas.[18] The first is a CCAA that covers oil and gas activities, agriculture, and ranching activities; the second is a CCAA that covers oil and gas activities, sand mining, linear infrastructure, wind, solar, local governments, agriculture, and ranching. Unlike the New Mexico CCAA, which requires avoidance of DSL habitat, the Texas agreements authorize impacts to its habitat.

If and when the DSL is listed under the ESA, an enhancement of survival permit would become effective and authorize take of the DSL that is incidental to otherwise-lawful activities on properties enrolled in a CCAA.[19] Participants would receive "no surprises" assurance that the Service will not require "the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the Agreement without the consent of the permittee" and participants.[20] Enrollment in the Texas conservation plans has declined in recent years; however, the specter of a final DSL listing could make it appealing for operators and landowners to enroll their properties in these plans prior to a final listing. After the final listing takes effect, the CCAA's will no longer be available and developers will need to prepare an HCP in order to obtain an ITP – generally a much longer and more costly process.

Designation of DSL Critical Habitat is "Prudent" but "Not Determinable at this Time".

Section 4(a)(3) of the ESA requires that, to the maximum extent prudent and determinable, the Secretary of the Interior ("the Secretary") shall designate critical habitat at the same time a species is determined to be endangered or threatened. The Service's ESA regulations[21] state that the Secretary may, but is not required to, determine that a designation would not be prudent in certain situations. In the proposed rule, however, the Service found that designation of DSL critical habitat is "prudent" but cannot be determined at this time because "information sufficient to perform a required analysis of the impacts of the designation is lacking."[22] The ESA allows the Service an additional year to publish a critical habitat designation,[23] meaning that a critical habitat determination should be expected by July 2024.

Next Steps

The Service must issue a final listing rule or withdraw the proposed rule within one year of publication of the proposed rule (*i.e.*, by July 3, 2024).[24] The Service is currently accepting comments on the proposed listing until September 1, 2023. On July 31, 2023, the Service will hold a public informational session from 5 to 6 p.m. and a public hearing from 6 to 8 p.m., Mountain Standard Time. We encourage you to contact the authors with questions about this proposed listing, to seek assistance in drafting comments, or for guidance on the CCAA options and to discuss your company's permitting or compliance needs.

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[1] 88 Fed. Reg. 42661 (July 3, 2023), Docket No. FWS-R2-ES-2022-0162.

[2] 16 U.S.C. § 1531 *et seq*.

[3] 88 Fed. Reg. at 42667 (citing, *inter alia*, a 1998 study that predicted a 25 percent reduction in the abundance of DSLs at a well density of 13.64 well pads per square mile ("well pads/mi2") and a 50 percent reduction at a density of 29.82 well pads/mi2, and recommending that densities in New Mexico be limited to 13 well pads/mi2).

[4] *Id*. at 42668.

[5] 69 Fed. Reg. 77167 (Dec. 27, 2004).

[6] 75 Fed. Reg. 77801 (Dec. 14, 2010).

[7] 77 Fed. Reg. 36871 (June 19, 2012).

[8] *Defenders of Wildlife v. Jewell*, 70 F.Supp.3d 183 (D.D.C. 2014), *aff'd* 815 F.3d 1 (D.C. Cir. 2016).

[9] *See* 85 Fed. Reg. 43,203-43,204 (July 16, 2020).

[10] 16 U.S.C. § 1533(b)(3)(B).

[11] *Center for Biological Diversity v. Haaland et al*., No. 1:22-cv-00387-SMV-LF (August 25, 2022).

[12] 16 U.S.C. § 1532(19).

[13] 50 C.F.R. § 17.3.

[14] 88 Fed. Reg. 42661 at 42667-68.

[15] *Id*. at 42668. The proposed listing observes that sand mines have only been developed in the Texas portion of ?the DSL's range, specifically the Monahans Sandhills.? *Id*. (observing that by the end of 2018, 17 sand mining facilities had registered with the Texas Commission on Environmental Quality, most of which are located in Winkler and Ward Counties).

[16] *See* 77 Fed. Reg. 36871 at 36890-91 (June 19, 2012) ("The infrastructure for solar and wind energy would cause similar habitat fragmentation as that produced by oil and gas development.")

[17] Such impacts, however, were addressed in a 2008 Special Status Species Resource Management ?Plan Amendment (the "2008 Amendment") developed by the Bureau of Land Management ??("BLM") and the State of New Mexico. Since the 2008 Amendment's approval, the BLM has ?closed approximately 850,000 acres to wind and solar development.? *Id*. at 42672. The Texas Conservation Plan for the DSL, approved and finalized in 2012, likewise, covers ?both conventional energy development activities and infrastructure, as well as wind and solar.? *Id*.

[18] The Texas Conservation Plan ("TCP"), developed by the Texas Comptroller of Public ?Accounts and stakeholders and finalized in 2012, authorized impacts to DSL habitat (i.e. ?incidental take of lizards) resulting from oil and gas development, agriculture, and ?ranching activities, and established a conservation program focused on avoiding these ?activities in DSL habitat. The TCP is funded by participants who voluntarily enroll ?acreage in the TCP's permit area and pay an annual fee based on the amount of acreage ?enrolled.? However, after six years of implementation, the Comptroller sought to revise the TCP to ?address issues preventing the plan from achieving its conservation and protection goals. ?In 2018, the Comptroller submitted those proposed revisions to the Service in the form ?of a new CCAA and subsequently ended its

administration of the permit. The Service ?did not approve the proposed new CCAA, and instead revised and transferred the permit ?for the TCP to a new permit holder. Notably, of the 29 participants enrolled in the 2012 ?TCP, only 8 expressed interest in maintaining enrollment under the revised 2020 TCP.?

[19] Although operators are not required to enroll in the CCAA, according to the Service 40 oil and ?gas companies and 37 ranchers have enrolled approximately 85 percent of the DSL's range in ?New Mexico?. 88 Fed. Reg. 42661 at 42672.

[20] ?50 CFR 17.22(d)(5) and 17.33(d)(5).?

[21] 50 C.F.R. 424.12(a)(1).

[22] 88 Fed. Reg. 42661 at 42667.

[23] 16 U.S.C. § 1533(b)(6)(C)(ii).

[24] The ESA allows the Service to extend this deadline by six months if there is substantial ?disagreement about the sufficiency or accuracy of available data relevant to the proposed listing ?rule. ?

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