

Locke Lord QuickStudy: Permian Predicament Comes to Pass: USFWS Promulgates Endangered Listing for Dunes Sagebrush Lizard

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On May 20, 2024, the U.S. Fish and Wildlife Service (Service) published a final rule listing the dunes sagebrush lizard (DSL) as endangered under the federal Endangered Species Act (ESA). The DSL is a small, spiny lizard endemic to the shinnery oak sand dunes of west Texas and southeastern New Mexico, in the heart of the Permian Basin. This final listing rule represents the latest step in a more than 20-year saga pitting the DSL and environmental organizations against the oil and gas and other industries operating in the region. Whether this latest step is the final word remains to be seen, as it almost certainly will be challenged. In the meantime, however, the listing will become effective on June 19, 2024 absent an injunction from a federal court.

Once the listing becomes effective, incidental take of DSL will constitute a violation of section 9 of the ESA, exposing operators to both civil and criminal penalties, as well as potential injunctive relief resulting from federal enforcement or citizen suits authorized by the ESA. Incidental take can result from any activities that disturb or destroy the shinnery oak duneland habitat on which the DSL depends, including oil and gas exploration and production, frac sand mining, solar and battery storage development, and linear project development, to name just a few examples. Companies engaging in any of these activities now have less than 30 days to decide on and implement a strategy to avoid such violations.

We refer you to our previous QuickStudy, *Another Predicament in the Permian*, issued following the Service's proposed listing of the DSL on July 3, 2023, for further background on the DSL and its habitat, the litigation that led to this listing, the implications of the listing for industry, and a description of the options currently available for obtaining authorization for incidental take. Depending on the extent of your impacts, the cost associated with these options may be quite substantial. While bespoke alternatives are also available, those too may require significant costs and time to develop. If you are operating in the Permian Basin and have not already developed a compliance strategy we encourage you to contact legal counsel to discuss your options as soon as possible.

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