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By E-Mail and Certified Mail

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RE: 60-day notice of intent to sue over violations of Section 4 of the Endangered Species Act (“ESA”) for failure to respond within 12 months to listing petition for the Dunes Sagebrush Lizard.

Dear Secretary Bernhardt and Principal Deputy Director Everson:

On behalf of Defenders of Wildlife and the Center for Biological Diversity, I am writing to provide you with notice that the United States Fish and Wildlife Service (“Service”) is in violation of section 4(b) of the Endangered Species Act (“ESA” or “the Act”), 16 U.S.C. § 1533(b), with regard to its failure to make either the mandatory 90-day finding or 12-month finding on the May 8, 2018 Petition to List the Dunes Sagebrush Lizard as a Threatened or Endangered Species and Designate Critical Habitat (the “Petition”).

Background

The dunes sagebrush lizard (Sceloporus arenicolus; hereafter, lizard) is a narrow-ranging habitat specialist that lives in irreplaceable shinnery oak sand dune habitat in parts of southeastern New Mexico and West Texas. Shinnery oak sand dune habitat has declined and is increasingly fragmented. What habitat remains is threatened by herbicides, oil and gas development on public and private lands, and increased frac-sand mining operations, among other things. Existing regulations, or lack thereof, to protect the lizard are inadequate to ensure the continued existence of the species. The species is currently in danger of extinction (endangered species) or is likely to become an endangered species in the foreseeable future (threatened species) throughout all or a significant portion of its range, primarily due to the ongoing threat of habitat loss.

The lizard has been a candidate for listing since 1982 but for many years the Service took no action to list the species under the ESA. In 2001, the Service gave notice that the lizard was a candidate species for listing with a priority of 2, the highest possible priority for a subspecies, “due
to imminent threats of a high magnitude.” 66 Fed. Reg. 54,807, 54,811 (Oct. 10, 2001). In 2002, after seeing no movement to list the species, the Center for Biological Diversity petitioned the Service to list the lizard as endangered or threatened. In response to that petition, the Service issued a 12-month finding in which it concluded that listing was warranted but precluded by higher priority listings. 69 Fed. Reg. 77,167 (Dec. 27, 2004). In 2010, the Service finally issued a proposed rule to list the lizard as endangered, noting at the time that the 3-inch long reptile “faces immediate and significant threats due to oil and gas activities, and herbicide treatments.” 75 Fed. Reg. 77,801 (Dec. 14, 2010). However, in June 2012, the Service reversed course and formally declined to list the lizard, claiming that newly-developed state-led voluntary conservation efforts would adequately protect the lizard. 77 Fed. Reg. 36,871 (June 19, 2012).

In withdrawing the proposed rule to list the lizard under the ESA, the Service relied upon the hastily created Texas Conservation Plan (“TCP”), a candidate conservation agreement with assurances (“CCAA”) developed by the Texas Comptroller of Public Accounts (“Comptroller”) in conjunction with the oil and gas industry.1 77 Fed. Reg. 36,871 (June 19, 2012). In response to serious and chronic implementation and monitoring problems under the TCP, and in recognition of the growing threat of frac-sand mining in lizard habitat, the Comptroller notified the Service on November 8, 2018 that it had discontinued activities under the TCP and surrendered its Enhancement of Survival Permit.2 Recently, the Comptroller submitted a new CCAA for the Service’s consideration that, among other changes from the original TCP, purports to consider the lizard habitat-destroying impacts of increasing frac-sand mining operations.3

With frac-sand mining a growing threat to the survival of the lizard,4 and in response to the failure of previous state-led conservation efforts to protect the lizard, particularly in west Texas, the Center for Biological Diversity and Defenders of Wildlife filed a new petition to list the lizard as a threatened or endangered species and designate critical habitat on May 8, 2018.5 According to an analysis by Defenders of Wildlife, more than 1,600 acres of the lizard’s habitat had been destroyed in the 18 months prior to filing the petition so the situation is urgent.6 The Service claims it received the petition on June 1, 2018. Using that date, under the ESA a 90-day finding was due on or about August 30, 2018, and a 12-month finding was due on or about June 1, 2019. To date the Service has not made any determination on that petition.

As of today, the lizard is without any regulatory protection and is under immediate threat of critical habitat destruction by oil and gas activities, and particularly increasing frac-sand mining, in

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Texas. While we are hopeful that the new CCAA proposed by the Texas Comptroller will be an improvement over the failed TCP, there are several threats to lizard habitat that the plan does not adequately address. The biggest shortcomings include the lack of mandatory participation under the plan, the inability to address property stratification resulting in non-participant habitat destruction on participant land, the lack of compliance transparency of participants, the lack of transition for previous participants, and finally, it has no way to curtail or limit already established sand mines in intermediate and high-quality habitat. Importantly, the new plan still must undergo a public comment process before the Service can adopt it. Even if the Service ultimately approves the newly proposed Texas CCAA, the lizard may still be in peril of extinction, warranting listing under the ESA. In any event, consideration of the proposed CCAA does not absolve the Service of the need to respond to the petition in a timely manner.

Legal Violation

The Service’s failure to issue a 90-day finding or a 12-month finding in response to the May 8, 2018 Petition clearly violates the plain language the ESA. The ESA mandates that within 90 days of receiving a petition to list a species as threatened or endangered, the Secretary shall, to the maximum extent practicable, make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A). The ESA also mandates that within 12 months after receiving a petition that is found to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings: the petitioned action is not warranted, the petition action is warranted, or the petitioned action is warranted but precluded. 16 U.S.C. § 1533(b)(3)(B). The Service has failed to make any finding as required under either of these provisions. The Service’s failure to make these findings leaves the lizard without an important statutory protection that could help protect the species and the habitat it needs for its survival and recovery.

Conclusion

As set forth in this letter, the Service has violated the ESA by failing to make a 90-day finding or a 12-month finding in response to the conservation groups’ petition to list the dunes sagebrush lizard as threatened or endangered. Pursuant to section 11(g)(2)(C) of the ESA, this letter provides you with notice that, unless within 60 days of receipt of this letter the Service makes a requisite finding on the petition for listing pursuant to section 4(b)(3)(B) of the ESA, we intend to challenge the Service’s unlawful conduct in federal district court. If you wish to discuss this matter further, please contact Jason Rylander at (202) 772-3245.

Sincerely,

Jason C. Rylander
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Defenders of Wildlife

Jennifer Loda
Amphibian and Reptile Staff Attorney
Center for Biological Diversity