

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION**

STATE OF TEXAS

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR,
et al.

Defendants.

Civil Action No. 7:24-cv-233-DC-RCG

MOTION TO INTERVENE

The Center for Biological Diversity (“Center”) respectfully moves to intervene as Defendants under Federal Rule of Civil Procedure 24(a) to safeguard its substantial interests in the fate of the endangered dunes sagebrush lizard.

This lawsuit challenges the U.S. Fish and Wildlife Service’s (“Service”) decision to list the dunes sagebrush lizard as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544. The Center has advocated for the lizard’s conservation for many years and its members derive significant benefits and enjoyment from the species and hope to do so in the future. Accordingly, this case substantially implicates and threatens the Center’s interests.

Intervention of right is warranted here because the Center’s motion is timely, the Center has a direct and legally cognizable interest in federal protection of the dunes sagebrush lizard that may be impaired by the relief sought in this litigation, and the existing parties do not adequately represent the Center’s interests. *Entergy Gulf States La. L.L.C. v. U.S. Env’t Prot. Agency*, 817 F.3d 198, 203 (5th Cir. 2016) (citing *Haspel & Davis Milling & Planting Co. v. Bd.*

of Levee Comm'rs of the Orleans Levee Dist., 493 F.3d 570, 578 (5th Cir. 2007). Alternatively, the Center requests permissive intervention under Federal Rule of Civil Procedure 24(b).

In support of this motion, the Center submits the accompanying declarations of Rebecca Brunner, Noah Greenwald, and Scott Trageser. The Center also submits a Proposed Answer to Plaintiff's Complaint.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

The Center for Biological Diversity (“Center”) seeks to intervene as Defendants in this case to safeguard the interests of this organization and its members in protecting and conserving the dunes sagebrush lizard (*Sceloporus arenicolus*) and its habitat. The dunes sagebrush lizard, a small diurnal species, is a narrow-ranging habitat specialist found only in the white sand dunes of southeastern New Mexico and west Texas. *Endangered Species Status for the Dunes Sagebrush Lizard*, 88 Fed. Reg. 42,661, 42,665-66 (July 03, 2023). With habitat loss driving the species to the brink of extinction, the U.S. Fish and Wildlife Service (“Service”) recently listed the dunes sagebrush lizard as endangered under the Endangered Species Act (“ESA”). *Endangered Species Status for the Dunes Sagebrush Lizard*, 89 Fed. Reg. 43,748 (May 20, 2024).

Plaintiff seeks to set aside the listing rule and eliminate the lizard’s federal ESA protection. Moreover, Plaintiff raises issues that could affect how the Service evaluates other species for listing and protection. The Center has a longstanding interest in the ESA listing process and regularly petitions the Service to protect imperiled species. A ruling for Plaintiffs would harm the interests of the Center’s members and erase years of work to protect the lizard and, potentially, other imperiled species.

The Center has no confidence that the Federal Defendants will adequately represent its interests in this case. The government necessarily represents a broader range of stakeholders, and the Trump administration has already signaled through public statements and executive orders, see *infra*, that it will prioritize oil and gas production—the biggest threat to the lizard’s survival—over species conservation. Accordingly, this Court should grant the Center’s motion to defend its substantial interests in this case.

Pursuant to Local Court Rule CV-7(g), the Center conferred with counsel for Plaintiff and Federal Defendants regarding this Motion. Plaintiff and Federal Defendants take no position on the motion at this time.

BACKGROUND

I. The Imperiled Dunes Sagebrush Lizard

The dunes sagebrush lizard is a species of spiny lizard endemic to the shinnery oak dunelands and shrublands of the Mescalero and Monahans Sandhills in a southeastern New Mexico and western Texas. 89 Fed. Reg. at 43,758. The lizard requires a very specific and restricted habitat type. It depends on shinnery oak duneland habitat for all aspects of its life history including to provide appropriate substrate for nests, cover for young, sheltering habitat for thermoregulation, and food for maturation from juvenile to adult. *Id.* at 43,758-43,761. Dunes sagebrush lizards form small, localized populations called neighborhoods that are interconnected through dispersal. *Id.* Long-term population stability is maintained through interconnected neighborhoods that are experiencing localized colonization and extirpation. *Id.*



Due to its reliance on a very specific and restricted habitat type, the lizard is highly susceptible to habitat loss and fragmentation. *Id.* at 43,761. Today, the dunes sagebrush lizard lives in a very small area of West Texas and southeastern New Mexico that includes part of the Permian Basin, which over the last decade has been one of the world's fastest growing oil and gas fields. More than 95% of the original shinnery oak dunes ecosystem has been destroyed by

oil and gas and other development, as well as by herbicide spraying to support livestock grazing. Much of the lizard's remaining habitat is fragmented, which undermines the species' ability to find mates for reproduction. Fragmented sites are less likely to support robust populations, given their large patches of flat open sand and barren ground. These sites also have fewer and more dispersed dune blowouts, which are depressions in sand dunes caused by wind erosion essential to the lizard's reproduction. *Id.*

II. The Endangered Species Act

Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Fifty years later, the ESA remains “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). As the Supreme Court found, the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

For terrestrial species, the Secretary of the Interior (“Secretary”), acting through the Service, must determine whether any species is “endangered” or “threatened.” 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 402.01(b) (2025). A species is designated as “threatened” when it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,” 16 U.S.C. § 1532(20), and “endangered” when it is “in danger of extinction throughout all or a significant portion of its range,” *id.* §1532(6).

To make a listing decision, the Service evaluates five statutory factors: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D)

the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” *Id.* § 1533(a)(1). The Service must make timely listing determinations “*solely* on the basis of the best available scientific and commercial information regarding a species’ status.” 50 C.F.R. § 424.11(b) (2025) (emphasis in original); *see also* 16 U.S.C. § 1533(b)(1)(A).

The protections of the ESA kick in only after a species is listed. These protections generally include the prohibition on “take” of individual members of endangered species, *id.* § 1538, designation of “critical habitat,” *id.* § 1533(a)(3)(A)(i), and a requirement that federal agencies consult with the Service to “insure that any action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [its critical habitat],” *id.* § 1536(a)(2). To “take” a listed species is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” it, “or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). “Harm” in this definition of take “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3 (2025); *see Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696–708 (1995) (upholding “harm” definition to include significant habitat degradation).

The ESA’s protections are not absolute. The Service may issue permits to take listed species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Incidental take permits are issued through the Section 7 consultation process for activities that have a federal nexus, *see* 16 U.S.C. § 1536, and through the Section 10 habitat conservation planning process for activities on private lands. 16

U.S.C. § 1539. The Service may issue an incidental take permit if it finds that the applicant will minimize and mitigate the impacts of the incidental take “to the maximum extent practicable”; that there is adequate funding for the habitat conservation plan; and that the taking “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” *Id.* § 1539(a)(2)(B)(iv).

III. The Dunes Sagebrush Lizard’s Tortuous Path to ESA Listing

The Service first identified the dunes sagebrush lizard as a species in need of protection in 1982. 88 Fed. Reg. at 42,662. In 2002, the Center petitioned the Service to list the dunes sagebrush lizard as threatened or endangered. *Id.* at 42,663. On December 27, 2004, the Service published a 12-month finding that listing was warranted but precluded by higher priorities. *Id.* After the Center sued for unreasonable delay, in 2010 the Service proposed to list the lizard as endangered but again put off making a final determination. *Id.* Two years later, in June 2012, the Service withdrew the proposed listing rule based in large part on a voluntary conservation agreement fashioned by the Texas Comptroller’s Office. *Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard*, 77 Fed. Reg. 36,872, 36,897-98 (June 19, 2012).

In 2013, Defenders of Wildlife (“Defenders”) issued a report that used satellite imagery to show how habitat loss continued under the Texas plan.¹ So in June 2013, Defenders and the Center filed a lawsuit against the Service, alleging—as the groups had previously asserted in comments—that the Texas Conservation Plan was flawed and that the Service’s reliance on it was contrary to the ESA. The court, however, upheld the listing rule, finding that the Service’s

¹ See Defenders of Wildlife, *Habitat Disturbances Under the Texas Habitat Conservation Plan for the Dunes Sagebrush Lizard* (March 2013), <https://defenders.org/publications/habitat-disturbances-under-texas-habitat-conservation-plan-dunes-sagebrush-lizard-0>.

decision to withdraw the proposed listing warranted deference despite the conservation groups' evidence of the plan's inadequacy. *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183 (D.D.C. 2014), *aff'd* *Defs. of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016).

The Texas Comptroller's Office acknowledged the plan was not working. In February 2016, Texas Comptroller Glenn Hegar fired the Texas Habitat Conservation Foundation, the organization responsible for overseeing the plan, for reportedly failing to perform any of the habitat restoration work it was supposed to do.² In August 2017, the Comptroller's Office informed the Service that the sand-mining industry posed a new threat to the lizard that the plan was not designed to address.³ Defenders then published a new satellite analysis of the extent sand mines in and around lizard habitat and predicted the industry could convert as much as 10 percent of lizard habitat.⁴

Based on these new and existing threats, on May 8, 2018, the Center again petitioned the Service to list the species as threatened or endangered.⁵ On June 22, 2018, the Texas

² Associated Press, *Texas Terminates Foundation Formed to Manage Lizard Species*, CBS News (March 25, 2016), <https://www.cbsnews.com/texas/news/texas-terminates-foundation-formed-to-manage-lizard-species/>.

³ Kiah Collier, *Oilfield Sand Miners Encroaching on Threatened West Texas Lizard*, Texas Tribune (Aug. 14, 2017), <https://www.texastribune.org/2017/08/14/comptrollers-office-oilfield-suppliers-threatening-dune-sagebrush-liza/>.

⁴ Shannon Najmabadi, *Report: Sand Miners Disturbing Threatened West Texas Lizard's Habitat*, Texas Tribune (Sept. 25, 2017), <https://www.texastribune.org/2017/09/25/west-texas-lizard-threatened-sand-miners/>.

⁵ Center for Biological Diversity & Defenders of Wildlife, *Petition to List the Dunes Sagebrush Lizard* (May 8, 2018), <https://ecos.fws.gov/docs/petitions/92210/1040.pdf>.

Comptroller's Office conceded the failure of the prior 6-year-old plan and began work on a new conservation plan for the dunes lizard.⁶

The Service declined to list the lizard in 2012 on the belief that the Texas Conservation Plan would be implemented and effective, but despite mounting evidence of the plan's failure and assurances in both the Withdrawal Decision, 77 Fed. Reg. at 36,899, and before the D.C. Circuit, *Defenders of Wildlife*, 815 F.3d at 10-11, that it would revisit the decision if the plan did not work, the Service took no action. Thus, on October 1, 2019, the Center and partners sued the Service over its continued delay. *Defs. of Wildlife v. Bernhardt*, No. 19-cv-2936 (D.D.C. filed Oct. 1, 2019). Two years later, the Service published a new 90-day finding that the lizard may warrant listing. *90-Day Finding for the Dunes Sagebrush Lizard*, 85 Fed. Reg. 43,203 (July 16, 2020). After the Service again failed to make a timely 12-month finding on the petition the Center filed another lawsuit in May 2022. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 22-cv-387 (D.N.M. filed May 19, 2022). The case settled and the Service agreed to publish its 12-month finding by June 29, 2023.

On July 3, 2023, the Service proposed to list the dunes sagebrush lizard as endangered. 88 Fed. Reg. at 42,661. The Final Rule at issue here was published on May 20, 2024—more than two decades after the Center's initial petition and some 40 years after the Service first evaluated the lizard for ESA protection. 89 Fed. Reg. at 43,748.

⁶ Kiah Collier, *Faced With Failure, State to Propose New Plan to Protect West Texas Lizard*, Texas Tribune (June 22, 2018), <https://www.texastribune.org/2018/06/22/texas-propose-new-plan-protect-threatened-lizard/>.

IV. This Lawsuit

Plaintiff alleges that the Service's Final Rule violates the ESA by failing to consider the best scientific and commercial data available and adequately consider voluntary conservation efforts. Pls.' Compl. ¶¶ 2-3, 79-80. Lastly, Plaintiff alleges the Service's take provisions are unreasonably vague. Pls.' Compl. ¶ 84.

V. Proposed Intervenor the Center for Biological Diversity

The Center is a national, nonprofit environmental organization that works through science, law, and media to protect imperiled species and their habitats. Greenwald Decl. ¶ 4. The Center is headquartered in Tucson, Arizona with offices in California, Oregon, and Washington, D.C. *Id.* The Center has more than 93,000 members and 1.8 million online supporters nationwide dedicated to the protection of species hovering on the brink of extinction, including the dunes sagebrush lizard. *Id.* The Center has direct and legally protectible interests in this case.

The Center and its members have recreational, aesthetic, scientific, conservation, and economic interests related to the dunes sagebrush lizard and its habitat. *See generally* Brunner, Greenwald, and Trageser Decl. The Center has worked for decades to achieve federal ESA protection for the lizard. Now that the species is finally listed, the Center and its members have an equally strong interest in seeing it continue to receive the protections needed for its recovery. The Center and its members' interests would be harmed if the Service's listing was invalidated. Brunner Decl. ¶ 16-18, Greenwald Decl. ¶ 10-15, and Trageser Decl. ¶ 22.

ARGUMENT

The Center's intervention motion should be granted. The Center has fought for more than two decades to secure ESA protections for the dunes sagebrush lizard and similarly rare species. The Center seeks a voice in this proceeding to ensure that this Court is fully informed of the

history and legitimacy of the dunes sagebrush lizard protections at issue. The Center’s interests in this species and the proper administration of the ESA are threatened by Plaintiff’s lawsuit and are not adequately represented by any other party to this case. Given the significant impact this case could have on the Center’s substantial and unrepresented interests in the protection and recovery of the dunes sagebrush lizard and similarly situated species, this Court should grant the Center’s intervention request.⁷

I. The Center Is Entitled to Intervene as of Right.

The Center should be permitted to intervene as of right because (1) the motion to intervene is timely, (2) the Center has an interest in the action’s subject matter, (3) the disposition of this matter may impair or impede upon the Center’s interests, and (4) the existing parties do not adequately represent the Center’s interests. Fed. R. Civ. P. 24(a)(2); *see also Aransas Project v. Shaw*, 404 F. App’x 937, 940 (5th Cir. 2010) (citations omitted). “Rule 24 is to be liberally construed.” *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015) (citations omitted). Intervention is typically granted where “no one would be hurt and the greater justice could be attained.” *Id.* at 657. Because the Center satisfies all requirements for intervention of right, and this Circuit’s precedent generally favors intervention, the Court should grant the motion.

⁷ “An intervenor-defendant must show standing only when they seek relief that differs from that requested by the existing parties.” *Texas v. United States DOI*, No. 7:23-cv-47, 2023 U.S. Dist. LEXIS 237959, at *6 (W.D. Tex. Aug. 29, 2023) (citing *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 947 n.3 (N.D. Tex. 2019)). The Center does not seek any additional relief and thus need not demonstrate standing to intervene.

A. The Center for Biological Diversity’s Motion to Intervene is Timely.

The Center’s motion to intervene is timely because the litigation remains at an early stage and this Court has yet to issue any substantive rulings. When evaluating the timeliness of intervention, the Court considers:

(1) how long the potential intervener knew or reasonably should have known of her stake in the case into which she seeks to intervene; (2) the prejudice, if any, the existing parties may suffer because the potential intervener failed to intervene when she knew or reasonably should have known of her stake in that case; (3) the prejudice, if any, the potential intervener may suffer if the court does not let her intervene; and (4) any unusual circumstances that weigh in favor of or against a finding of timeliness.

Doe No. 1 v. Glickman, 256 F.3d 371, 376 (5th Cir. 2001) (citations omitted). “The timeliness inquiry is contextual” and “is not limited to chronological considerations but is to be determined from all the circumstances.” *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 834 F.3d 562, 565 (5th Cir. 2016) (internal quotation marks and citations omitted). The timeliness inquiry is “concerned only with the prejudice caused by the applicants’ delay, not that prejudice which may result if intervention is allowed.” *Edwards v. City of Houston*, 78 F.3d 983, 1002 (5th Cir. 1996) (citations omitted).

The Center’s motion to intervene was submitted at an early stage of the litigation soon after concluding that its interests may be negatively affected by the case. Under the Court’s February 24, 2025, amended scheduling order, additional parties can be joined until June 11, 2025, the Administrative Record is not yet filed, and briefing is not scheduled to begin until at least September 17, 2025, assuming no motions related to the record. ORDER, Dkt. No. 16. Moreover, at this early stage before the administrative record, notices of joinder, or dispositive motions have been filed, intervention would not prejudice any party. *See, e.g., Ass’n of Pro. Flight Attendants v. Gibbs*, 804 F.2d 318 (5th Cir. 1986) (finding motion to intervene timely

where five months passed between interest learned and intervention). Rather, the Center will suffer prejudice should this Court deny intervention, rendering it unable to participate as a party in support of the ESA listing or to appeal any adverse decision that might be issued in this case.⁸

Furthermore, there are no “unusual circumstances” that would weigh against the determination that the Center’s application is timely. To the contrary, as discussed further below, the Center considers the Trump administration’s sweeping and unprecedented environmental regulatory actions since assuming office in January to be “unusual circumstances” that support intervention at this time. For all these reasons, the Center’s motion should be considered timely.

B. The Center for Biological Diversity Has a Substantial Interest in the Continued Protection of the Dunes Sagebrush Lizard.

The Center also satisfies Rule 24(a)’s “interest” requirement because it has a direct stake in the continued protection of the dunes sagebrush lizard under the ESA, which is “the basis of the controversy in the case.” *Glickman*, 256 F.3d at 375 (citations omitted). To intervene under Rule 24(a), a potential movant must show a “direct, substantial, [and] legally protectable” interest in the proceeding. *Texas v. United States*, 805 F.3d at 657 (citations omitted). While there is no “clear definition of the nature of the ‘interest . . .’ that is required for an intervention of right,” *Wal-Mart Stores*, 834 F.3d at 566, the Fifth Circuit has held that “‘public spirited’ civic organizations that successfully petition for adoption of a law may intervene to vindicate their ‘particular interest’ in protecting that law.” *Id.* at 567 (citations omitted).

⁸ The Center was granted intervention in *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711, 715 (W.D. Tex. 2019) nearly 11 months after the original plaintiffs in that case filed their initial complaint. Because intervention was granted, the Center also participated in the appeal of that case, which addressed the ESA protection of the endangered bone cave harvestman. *Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 228 (5th Cir. 2020).

The Center satisfies the interest requirement here because its members have recreational, aesthetic, scientific, conservation, and economic interests in the dunes sagebrush lizard. The Center's members have enjoyed and deeply value the possibility of seeing and experiencing the dunes sagebrush lizard. They have professional, scientific, and conservation interests in the species. Center member and biologist Noah Greenwald has seen the lizard in the wild, an experience which prompted him to write the Center's first petition to list the species. Greenwald Decl. ¶ 6. Center member Scott Trageser is a wildlife photographer who shoots professional images of rare wildlife in the Southwest and around the world. Trageser Decl. ¶ 5, 7-9. He has taken trips to see and photograph the lizard in west Texas and has yet to capture one on film. *Id.* ¶ 10-11. Center member Rebecca Brunner is a herpetologist with personal and professional interests in rare lizards. Brunner Decl. ¶¶ 4, 5, 7. She has also sought to observe the dunes sagebrush lizard in the wild and hopes to see one while they still exist. Brunner Decl. ¶¶ 9-10. The Center's members have plans to continue looking for the lizard in the wild. Brunner Decl. ¶ 10; Trageser Decl. ¶ 11. As these declarations indicate, the loss of the dunes lizard would harm the recreational, aesthetic, scientific, conservation, and economic interests of Center's members. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992) (recognizing that “the desire to use or observe an animal species, even for purely [a]esthetic purposes, is undeniably a cognizable interest for purpose of standing”).

The Center also satisfies Rule 24(a)'s interest requirement because it is dedicated to conserving wildlife like the dunes sagebrush lizard and the habitats on which they depend. As discussed *infra*, the Center has advocated extensively over two decades to secure protection of the lizard, filing multiple listing petitions with the Service, participating in administrative rulemaking processes, and taking legal action when the ESA's mandatory deadlines were

ignored. Greenwald Decl. ¶ 7-10. The Center’s decades long advocacy for the lizard establishes a “direct, substantial, and legally protectable” interest in this proceeding. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (reversing the district court’s denial of intervention). Plaintiff seeks to overturn the very protections for which the Center successfully petitioned. Thus, the Center’s interests are sufficiently related to the “transaction that forms the basis of the controversy in the case” to support intervention as of right. *Glickman*, 256 F.3d at 375.

C. An Adverse Ruling Would Harm the Center’s Interests.

The Center’s interests in the protection of the dunes sagebrush lizard and its habitat will be impaired if Plaintiff succeeds in this lawsuit. In determining whether as a practical matter “the disposition of the case may impair or impede [the Center’s] ability to protect [its] interest[s],” *Glickman*, 256 F.3d at 375 (citations omitted), the Court must consider the “totality of the circumstances.” *Tot Power Control, S.L. v. AT&T Mobility LLC*, No. 6:21-CV-00107, 2021 U.S. Dist. LEXIS 195476, at *5 (W.D. Tex. Oct. 8, 2021) (citing *Edwards*, 78 F.3d at 1000).

A ruling for Plaintiff in this case would cause significant harm to the Center and its members’ interests in maintaining protections for the dunes sagebrush lizard and its habitat. Plaintiff seeks to vacate the listing of the species under the ESA, which would eliminate critical legal protections for the lizard, directly impairing the Center’s and its members’ recreational, aesthetic, conservation, financial, and other interests in the lizard, as well as the Center’s ability to protect those interests. *See supra*, Section I.B. In addition, a ruling for Plaintiff would undermine years of advocacy work by the Center to protect the dunes sagebrush lizard and its habitat. It would also eliminate the Center’s most powerful legal tool to protect the species—the

ESA—at a time when the dunes lizard population is imperiled and industrial development continues to encroach upon its remaining habitat.

If protections were removed, the Center would have to petition for listing yet again, starting the lengthy listing process over. Most likely, the dunes sagebrush lizard will slide further toward extinction, harming the Center’s members’ interest in observing the species in its habitat. *See generally* Trageser Decl. ¶ 10-12; Brunner Decl. ¶ 9-10, 17. Thus, this litigation, “may, as a practical matter, impair or impede [the Center’s] ability to protect [its] interest[s].” *Ross v. Marshall*, 426 F.3d 745, 760 (5th Cir. 2005) (quoting *Espy*, 18 F.3d at 1207).

D. Federal Defendants Do Not Adequately Represent the Center for Biological Diversity’s Interests.

The final requirement for intervention as of right is that “the existing parties do not adequately represent the potential intervenor’s interest.” *Glickman*, 256 F.3d at 375. The Center easily satisfies this requirement. Intervenor’s need only show that the current parties’ representation “‘may be’ inadequate; and the burden for making that showing should be treated as *minimal*.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added; citation omitted).

Federal Defendants have historically opposed the Center’s interests in the lizard’s timely and effective protection. As described above, the Center has filed multiple listing petitions and multiple lawsuits to force the Service to act on this species. In species protection cases, even where Federal Defendants and the Center are aligned on the ultimate outcome, the government rarely has the same objectives as the Center because it must balance multiple interests and

stakeholders. But the risk of diversion of interests is even greater in this case because of the Trump administration's stated positions regarding energy development and species protection.⁹

To our knowledge, President Trump has not made specific comments about the dunes sagebrush lizard, but on his first day in office, in an executive order declaring a "National Energy Emergency," this administration made it easier to bypass ESA protections and directed the federal agencies to "identify obstacles to domestic energy infrastructure specifically deriving from implementation of the ESA or the Marine Mammal Protection Act, to include regulatory reform efforts, *species listings*, and other related matters with the aim of developing procedural, regulatory, and interagency improvements."¹⁰ In a separate executive order entitled "Unleashing American Energy," President Trump called on all federal agencies to "suspend, revise, or rescind" actions that are "unduly burdensome" to energy exploration and development.¹¹ Interior Secretary Doug Burgum, who also oversees the Service, has issued two secretarial orders that aim to boost fossil fuel extraction over endangered species protections.¹² Most recently, on

⁹ Before even taking office, President Trump was posting online about "an essentially worthless fish called a smelt" and later directed the Interior and Commerce Department to reduce its protections purportedly to release water to other parts of California. Benji Jones, *Why Does Trump Hate This Tiny Fish So Much?* Vox (Jan. 21, 2025), <https://www.vox.com/down-to-earth/394283/los-angeles-wildfires-trump-newsom-delta-smelt>. A day one presidential memo then drew a spurious connection between delta smelt protections in the San Francisco Bay and Los Angeles' catastrophic wildfires, The White House, *Putting People Over Fish: Stopping Radical Environmentalism to Provide Water to Southern California* (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/putting-people-over-fish-stopping-radical-environmentalism-to-provide-water-to-southern-california/>.

¹⁰ Exec. Order No. 14,156, 90 Fed. Reg. 8,433 (Jan. 29, 2025) (emphasis added), <https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-energy-emergency/>.

¹¹ Exec. Order No. 14,154, 90 Fed. Reg. 8358 (Jan. 29, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/>.

¹² U.S. DOI, *Secretary Doug Burgum Signs First Round of Secretary's Orders to Unleash American Energy* (Feb. 3, 2025), <https://www.doi.gov/pressreleases/secretary-doug-burgum-signs-first-round-secretarys-orders-unleash-american-energy>.

February 21, 2025, the Federal Defendants requested (and received) a 60-day extension to allow the new leadership at the Defendant agencies to “determine how they wish to respond.” Agreed Motion to Extend, Dkt. No. 15.

In far less politically charged circumstances than this, courts have recognized that government agencies do not adequately represent private parties. *See Trbovich*, 404 U.S. at 538–39 (interests of government and private intervenor were not “identical” because the government “has an obligation to protect” a broader “public interest” than the interests private intervenor sought to vindicate); *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1254–56 (10th Cir. 2001) (“In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.”); *Georgia v. U.S. Army Corps of Eng’rs*, 302 F.3d 1242, 1259–60 (11th Cir. 2002) (“We do not believe that a federal defendant with a primary interest in the management of a resource has interests identical to those of an entity with economic interests in the use of that resource.”).

In this circuit, an intervenor “need not show that the representation by existing parties will be, for certain, inadequate” only that it “may” be so. *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) (quoting *Espy*, 18 F.3d at 1207). Even if the Center and the Federal Defendants were to share the same “ultimate objective” in the lawsuit—which is by no means a given here—the “minimal” presumption of adequate representation can be overcome by showing that the intervenor’s “interests diverge from the putative representative’s interests in a manner germane to the case.” *Entergy Gulf States La. L.L.C. v. U.S. Env’t Prot. Agency*, 817 F.3d 198, 203 (5th Cir. 2016) (permitting the Sierra Club to intervene in a Freedom of Information Act lawsuit where their interests and strategy diverged from EPA’s); *Texas v. United States*, 805 F.3d at 662

(permitting “Jane Does” to intervene even where they shared a common objective in upholding the law at issue in the case). For these reasons, the Center has been granted intervention in prior ESA listing cases including before this very court. *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711 (W.D. Tex. 2019) (conservation groups intervention granted to defend listing of the bone cave harvestman); *see also Colosi v. Charlotte County, Fla.*, No. 24-cv-1004 (M.D. Fla. filed Oct. 29, 2024) (conservation groups intervention granted to defend listing of the Florida scrub jay).

Based on its actions and statements, the Trump administration apparently views ESA listings as “obstacles to energy development” that should be removed. The Center strongly disagrees and seeks to uphold the intent of Congress in enacting the ESA “to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. at 184. Given the stark divide between the Center and Federal Defendants on matters of ESA policy and energy development, and the not insignificant risk of settlement or reversal of position consonant with the administration’s actions to date, intervention of right is appropriate.

II. Alternatively, the Court Should Grant Permissive Intervention.

Alternatively, the Center moves for permissive intervention under Rule 24(b). Permissive intervention “is appropriate when: (1) timely application is made by the intervenor, (2) the intervenor’s claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.” *Endurance Am. Ins. Co. v. Lloyd’s Syndicate 3624*, No. 3:23-CV-0133, 2023 U.S. Dist. LEXIS 75051, at *3-4 (N.D. Tex. Apr. 28, 2023) (quoting *DeOtte v. Azar*, 332 F.R.D. 173, 178 (N.D. Tex. 2019)). Permissive intervention “is wholly discretionary.” *Nat’l Press Photographers Ass’n v. McCraw*, 594 F. Supp. 3d 789, 812 (W.D. Tex. 2022) (citation omitted). As shown

above, the Center's motion is timely and will not cause delay or prejudice any party. And the Center seek to present defenses relevant to this case's central issue: the legality of the Service's listing and protection of the dunes sagebrush lizard under the ESA.

Permissive intervention is also warranted because the Center will contribute to the factual development of a key issue in this case: the adequacy of voluntary conservation measures for the dunes sagebrush lizard. As described above, Center has spent considerable time and resources evaluating, commenting on, and monitoring the effectiveness of these voluntary agreements, and has long disagreed with the Federal Defendants on issues related to their implementation and effectiveness. That history, particularly the failure of voluntary conservation to protect the species, is relevant. Finally, the Center's perspectives on the administration of the ESA and the value of biodiversity conservation often differ from Federal Defendants' and may assist with resolution of this case.

Courts recognize that permissive intervention may be warranted where, as here, prospective intervenors will contribute to the development of factual issues underlying a case. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (intervenor applicant's capacity to "significantly contribute to full development" of factual issues may be grounds for permissive intervention); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (same); *Ass'n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 103 (D. Conn. 2007) (granting permissive intervention to a non-profit organization in part due to its "highly relevant factual perspective"). Accordingly, permissive intervention under Rule 24(b) is warranted.

CONCLUSION

For the reasons set forth above the Center respectfully requests that this Court grant their motion to intervene as of right or, in the alternative, for permissive intervention.

DATED: March 11, 2025

Respectfully submitted,

/s/ Colin Cox

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