

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
DEFENDERS OF WILDLIFE,)	
and)	
THE CENTER FOR)	
BIOLOGICAL DIVERSITY,)	
)	
Plaintiffs,)	No. 13-cv-00919-RC
)	
v.)	Hon. Rudolph Contreras
)	
SALLY JEWEL,)	
Secretary, U.S. Department of Interior,)	
and)	
DANIEL ASHE,)	
Director, U.S. Fish and Wildlife Service)	
)	
Defendants.)	
_____)	

TEXAS COMPTROLLER’S MOTION TO INTERVENE AS DEFENDANT

In accordance with Federal Rule of Civil Procedure 24 and Local Rule 7(j), Susan Combs, Comptroller of Public Accounts of the State of Texas, in her official capacity, seeks to intervene as Defendant as-of-right or in the alternative, for permissive intervention. This lawsuit challenges the U.S. Fish and Wildlife Service’s (FWS) decision that listing the Dunes Sagebrush Lizard as endangered was not warranted. FWS decided listing was not warranted after approving the State of New Mexico’s and the office of the Texas Comptroller of Public Accounts’s comprehensive plans to protect the habitat of the lizard—in Texas’s case, the Candidate Conservation Agreement with Assurances (“Texas Conservation Plan”). Plaintiffs claim in this lawsuit that the Comptroller’s Texas Conservation Plan is inadequate, and therefore FWS’s decision that listing was not warranted on the basis of the Texas Conservation Plan is arbitrary, capricious, and contrary to the federal Endangered Species Act (ESA) and the

Administrative Procedure Act (APA).¹

The Texas Comptroller, the Texas state official responsible for implementing and administering the Texas Conservation Plan and the holder of an Enhancement of Survival permit from the Fish and Wildlife Service, seeks to intervene in this lawsuit to defend against this attack on the Texas Conservation Plan, which balances the interests of protecting the lizard and its habitat with the State's need to protect its economy, which would be adversely affected if Plaintiffs are successful in this lawsuit. Since the Texas Comptroller meets the four-part test for intervention in this action and had standing to participate in this lawsuit as a party Defendant, the Court should grant the Texas Comptroller's motion to intervene as of right. Alternatively, the Texas Comptroller should be granted permissive intervention.

Counsel for the Federal Defendants have consented to the State's participation in this litigation as a Defendant-Intervenor. Counsel for the Federal Defendants have indicated that they will oppose this motion.

In support of this motion, the Texas Comptroller submits:

1. A Memorandum of Points and Authorities in Support of the Texas Comptroller's Motion to Intervene as Defendant, with the Letter from J. Rylander & D. Noah Greenwald to D. Ashe & K. Salazar Re: 60-day notice of intent to sue (Mar. 14, 2013);
2. The Declaration of Lisa Elledge in Support of the Motion to Intervene, with the following exhibits:
 - Exhibit A to the Declaration of Lisa Elledge, the Texas Conservation Plan;
 - Exhibit B to the Declaration of Lisa Elledge, the Enhancement of Survival Permit issued to the Texas Comptroller by the U.S. Fish and Wildlife Service on February 17, 2012;
 - Exhibit C to the Declaration of Lisa Elledge, the U.S. Fish and Wildlife

¹ Plaintiffs have not alleged that the New Mexico Conservation Plan is inadequate. *See* Compl. for Declaratory and Injunctive Relief at ¶ 4–5.

Services's PECE analysis of the Texas Conservation Plan;

- Exhibit D to the Declaration of Lisa Elledge, Letter from S. Combs, Texas Comptroller of Public Accounts, to D. Ashe, Director, U.S. Fish & Wildlife Service (May 10, 2013); and
3. A proposed Order on the Texas Comptroller's Motion to Intervene as a Defendant;
 4. A proposed Answer to the Plaintiffs' Complaint, in accordance with Local Rule 7(j).

August 16, 2013

Respectfully submitted,

/s/ Nancie G. Marzulla
Nancie G. Marzulla
DC Bar No. 400985
Roger J. Marzulla
DC Bar No. 394907
Marzulla Law, LLC
1150 Connecticut Avenue,
NW Suite 1050
Washington, DC 20036
(202) 822-6760
(telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Counsel for Proposed Defendant-Intervenor
Susan Combs, Comptroller of Public
Accounts for the State of Texas, in her
official capacity

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TEXAS
COMPTROLLER'S MOTION TO INTERVENE AS DEFENDANT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

Issues Presented for Review2

Summary of Argument3

Statement of Facts.....4

Interest of proposed intervenor8

Statutory Framework12

Procedural Background.....14

ARGUMENT15

I. Standard of review15

II. The Texas Comptroller has standing to participate in this lawsuit as a party.....17

 A. Article III standing.....17

 B. Prudential standing.....20

III. The Texas Comptroller is entitled to intervene as of right22

 A. This motion is timely22

 B. The Texas Comptroller has interests in the property and transaction at state
in this litigation23

 C. A ruling for Plaintiffs may as a practical matter impair or impede the Texas
Comptroller’s ability to protect her interests27

 D. The Texas Comptroller’s interests are not adequately represented by the
existing parties32

IV. In the alternative, the Court should grant the Texas Comptroller
permissive intervention.....33

Conclusion36

TABLE OF AUTHORITIES

Cases

**Akiachak v. U.S. Dept. of Interior*,
584 F. Supp. 2d 1 (D.D.C. 2008) 20, 23, 25

Am. Horse Protection Ass’n, Inc. v. Veneman,
200 F.R.D 153 (D.D.C. 2001)..... 24

Amgen, Inc. v. Smith,
357 F.3d 103 (D.C. Cir. 2004) 21

Bennett v. Spear,
520 U.S. 154 (1997)..... 20

City of Sault Ste. Marie v. Andrus,
458 F. Supp. 465 (D.D.C. 1978)..... 25

Diamond v. District of Columbia,
792 F.2d 179 (D.C. Cir. 1986)..... 32

EEOC v. Nat’l Children’s Ctr., Inc.,
146 F.3d 1042 (D.C. Cir. 1998)..... 35

Foster v. Gueory,
655 F.2d 1319 (D.C. Cir. 1981)..... 26, 27

**Fund for Animals v. Norton*,
322 F.3d 728 (D.C. Cir. 2003)..... passim

Friends of Animals v. Kempthorne,
452 F. Supp. 2d 64 (D.D.C. 2006).....16, 22

Horizon Lines, LLC v. United States,
No. 05-0952 (D.D.C. Sept. 23, 2005)16

In re Vitamins Antitrust Litigation,
2001 WL 3408808 (D.D.C. Mar. 19, 2001).....16

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....17

**Miami Health Studios, Inc. v. City of Miami Beach*,
491 F.2d 98 (5th Cir. 1974) 34

<i>Mova Pharm. Corp. v. Shalala</i> , 140 F.3d 1060 (D.C. Cir. 1998).....	16, 22, 23
<i>Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs</i> , 519 F. Supp. 2d 89 (D.D.C. 2007).....	16
<i>Natural Resources Defense Council v. Costle</i> , 561 F.2d 904 (D.C. Cir. 1977).....	32
* <i>Nuesse v. Camp</i> , 385 F.2d 694 (D.C. Cir. 1967).....	passim
<i>Otay Mesa Property L.P. v. U.S. Dept. of the Interior</i> , No. 08-cv-00383-RMC (May 20, 2008).....	23
<i>People of the State of Cal. v. United States</i> , 180 F.2d 596 (9th Cir. 1950).....	27
<i>Persinger v. Islamic Rep. of Iran</i> , 729 F.2d 835 (D.C. Cir. 1984).....	26
* <i>Roeder v. Islamic Rep. of Iran</i> , 333 F.3d 228 (D.C. Cir. 2003).....	26
<i>Securities & Exchange Comm’n v. Prudential Securities, Inc.</i> , 136 F.3d 153 (D.D.C. 1998).....	16, 22
<i>Smuck v. Hobson</i> , 408 F.2d 175 (D.C. Cir. 1969).....	15
<i>Trbovich v. United Mine Workers</i> , 404 U.S. 528 (1972).....	32
<i>United States v. AT&T Co.</i> , 642 F.2d 1285 (D.C. Cir. 1980).....	23
* <i>Wildearth Guardians v. Salazar</i> , 272 F.R.D. 4 (D.D.C. 2010).....	20, 24, 33
<i>Wilderness Soc’y v. Babbitt</i> , 104 F. Supp. 2d 10 (D.D.C 2000).....	15
Statutes	
16 U.S.C. § 1531.....	12
16 U.S.C. § 1532.....	13

16 U.S.C. § 1533..... 13, 17, 21,32

26 U.S.C. § 501 9

Tex. Gov’t Code Ann. §§ 403.001..... 8

Texas Tax Code, Section 11.18 9

Regulations

Policy for Evaluation of Conservation Efforts When Making Listing Decisions,
68 Fed. Reg. 15,100 (Mar. 28, 2003)..... 6

Endangered Status for Dunes Sagebrush Lizard,
75 Fed. Reg. 77,801 (Dec. 14, 2010)..... 4, 6, 14

Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard,
77 Fed. Reg. 36,872 (June 19, 2012)..... passim

50 C.F.R. §§ 424.01–424.21 13

50 C.F.R. 17.22..... 13

Federal Rules

Fed. R. Civ. P. 24(b)..... passim

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arbitrary, capricious, and contrary to the federal Endangered Species Act (ESA) and the Administrative Procedure Act (APA).¹

The Texas Comptroller, the Texas state official responsible for implementing and administering the Texas Conservation Plan and the holder of an Enhancement of Survival permit from the Fish and Wildlife Service,² seeks to intervene in this lawsuit to defend against this attack on the Texas Conservation Plan, which balances the interests of protecting the lizard and its habitat with the State's need to protect its economy, which would be adversely affected if Plaintiffs are successful in this lawsuit. Since the Texas Comptroller meets the four-part test for intervention in this action and had standing to participate in this lawsuit as a party Defendant, the Court should grant the Texas Comptroller's motion to intervene as of right. Alternatively, the Texas Comptroller should be granted permissive intervention.

Counsel for the Federal Defendants and counsel for Plaintiffs have each stated that they take no position on the State's participation in this litigation as a Defendant-Intervenor.

Issues Presented for Review

1. To establish standing under Article III, a prospective intervenor must show injury-in-fact, causation, and redressability. Here, the Texas Comptroller alleges recognized imminent injuries if Plaintiffs succeed—impairment of a negotiated federal-state agreement to conserve the lizard and other natural resources and to protect the Texas tax and economic base. Since the Texas Comptroller possesses recognized injuries that are judicially redressable, does the Comptroller have Article III standing to intervene in this case?
2. Plaintiffs claim that FWS's decision that listing the Dune Sagebrush Lizard as an endangered species was not warranted, based primarily on the lizard protections provided by the Texas Conservation Plan, is arbitrary and capricious, and violates the ESA. The Texas Comptroller, who administers the Texas Conservation Plan, timely seeks to intervene to defend Texas's plan to conserve the species and the Texas tax base and economy. Should intervention as of right be granted?

¹ Plaintiffs have not alleged that the New Mexico Conservation Plan is inadequate. *See* Compl. for Declaratory & Injunctive Relief at 17 (Doc. 1) (Jun. 19, 2013).

² *See* Elledge Decl. Ex. B.

3. Under Rule 24(b), the Court can grant permissive intervention if the Court has an independent ground for subject-matter jurisdiction, the motion is timely, and the defense has a question of law or fact in common with the main action. The Texas Comptroller easily meets this standard. Should permissive intervention be granted if intervention as of right is not warranted?

Summary of Argument

This suit seeks to set aside the U.S. Fish and Wildlife Service’s decision that including the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) on the Endangered Species List was not warranted. If the lizard were to be added to the Endangered Species List as Plaintiffs demand, the requirements of the federal Endangered Species Act would undermine the programs of conservation and resource protection developed under the direction of the Texas Comptroller—the Texas Conservation Plan—which seeks to avoid having the lizard reach the brink of extinction at all. If the lizard can be successfully conserved, as the Texas Conservation Plan envisions, there will be no need to list the lizard as endangered and no need to engage in recovery efforts that are at odds with the significant progress the Texas Comptroller has made in protecting both the species and the State’s economy.

Put simply, the Texas Comptroller has worked long and hard with a large stakeholder committee comprised of environmental groups, public representatives, and industry stakeholders to formulate a plan to avoid the catastrophe of having the lizard become extinct. But Plaintiffs assert that the Texas Conservation Plan is inadequate and thus challenge FWS’s conclusion that listing of this species as endangered is “not warranted” based on that plan.³ If Plaintiffs are successful in this lawsuit, the Texas Conservation Plan—which depends on the voluntary participation of landowners and State primacy over the conservation efforts—will be destroyed

³ See Letter from J. Rylander & D. Noah Greenwald to D. Ashe & K. Salazar Re: 60-day notice of intent to sue (Mar. 14, 2013) (Attached as Exhibit A).

along with the plans to avoid extinction. Plaintiffs will be one step closer to their goal of having the lizard listed as endangered, with all the resulting economic harm inflicted on the Texas agricultural, oil and gas industries, and economy, which the Texas Comptroller hopes to avoid.

So in accordance with Federal Rule of Civil Procedure 24 and Local Rule 7(j), Susan Combs, the Texas official responsible for administering the Texas Conservation Plan, for negotiating the Candidate Conservation Agreement with Assurances, and the holder of an Enhancement of Survival permit from the Fish and Wildlife Service, moves to intervene as a Defendant in this suit to protect the substantial interests of the State of Texas and its citizens in the continued successful operation of the Texas lizard habitat protection and restoration plan—as well as the vital economic interests of the Permian basin that account for 57% of Texas’s oil production.

Statement of Facts

On December 14, 2010, the United States Fish and Wildlife Service published a proposed rule to list the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) as an endangered species under the federal Endangered Species Act.⁴ Because the rigid requirements of the federal regulations would detrimentally affect Texas’s economy, the State’s tax revenues, and the State’s lizard conservation efforts, the Texas Comptroller of Public Accounts, acting under authority granted by the Texas Legislature, responded by starting to develop its own State plan for conserving the species while also protecting the State’s economic interests.⁵

Shortly after publication of the proposed listing rule, the Texas Comptroller, Susan Combs, convened a committee of local, State, and Federal officials, along with private and commercial representatives and stakeholders, such as the Texas Parks & Wildlife Department,

⁴ Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77,801 (Dec. 14, 2010).

⁵ Declaration of L. Elledge in Support of Motion to Intervene, ¶8.

the U.S. Department of Agriculture's Natural Resources Conservation Service, Texas A&M University, the Texas Wildlife Association, and members of the public, to develop the Texas Conservation Plan for the Dunes Sagebrush Lizard. This Plan, which was finalized in February 2012, prescribes detailed conservation and management strategies for the lizard over a 30-year period, balancing the interests of the private owners of the lizard's habitat, the economic interests and natural resource interests of the State of Texas, and the interest in protecting endangered species. To achieve these various objectives, the U.S. Fish and Wildlife Service provided technical guidance to the committees, to craft an agreement that would protect the Dunes Sagebrush Lizard without destroying the economic vitality of the region, and reward private landowners for voluntarily agreeing to participate in the goal of protecting the lizard's habitat.⁶ In addition, meetings of the stakeholder committees were open to the public and agendas, documents, and meeting notes were posted on the Texas Comptroller's website.⁷

The product of nearly a year of continuous negotiations, the completed Texas Conservation Plan provides guidance in the development and implementation of a conservation strategy, sets minimum requirements to benefit the Dunes Sagebrush Lizard while accommodating economic development, and includes an adaptive management strategy to address the concerns and future management of the lizard and its associated habitat in Texas.⁸ The plan focuses on the avoidance of activities within lizard habitat that would further degrade habitat, improvement (including reclamation) and re-connection of lizard habitat patches to reduce fragmentation, and, due to the pervasiveness of mesquite in lizard habitat, the removal of mesquite that is encroaching into the shinnery oak dunes where the lizard lives. If avoidance of

⁶ Elledge Decl. ¶9.

⁷ Elledge Decl. Ex. A, Texas Conservation Plan for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) at 2.

⁸ Elledge Decl. ¶10.

lizard habitat cannot be accomplished, a participant may adopt conservation measures that minimize habitat disturbance, and as a last resort, mitigate for the loss of lizard habitat.⁹ A similar plan was developed by New Mexico.¹⁰

The Fish and Wildlife Service then analyzed the Texas Conservation Plan under its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE).¹¹ The Fish and Wildlife Service adopted PECE to ensure consistent and adequate evaluation of recently formalized conservation efforts when making listing decisions.¹² The policy provides guidance on how to evaluate conservation efforts that have not yet been implemented or have not yet demonstrated effectiveness. The evaluation focuses on the certainty that the conservation efforts will be implemented and effective. The policy reviews nine criteria for evaluating the certainty of implementation and six criteria for evaluating the certainty of effectiveness for conservation efforts.¹³

The Fish and Wildlife Service concluded its evaluation of the Texas Conservation Plan by finding that it satisfied all of the policy's criteria for effectiveness and certainty of implementation:

Using the criteria specified in PECE (68 FR 15115, March 28, 2003), we have evaluated the certainty of implementation and effectiveness of the [Texas Conservation Plan]. Based on our evaluation, we have determined that all of the PECE criteria for the certainty of implementation and effectiveness of the conservation effort have been satisfied. We find that the [Texas Conservation Plan] has a high level of certainty of implementation and effectiveness, and can be

⁹ Elledge Decl. ¶10; see also Elledge Decl. Ex. A, Texas Conservation Plan at 46–48.

¹⁰ See Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77,801 at 77,811 (Dec. 14, 2010).

¹¹ See Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003).

¹² *Id.* at 15,112.

¹³ *Id.* at 15,110–15,115.

considered as part of the basis for our listing determination.¹⁴

The Texas Conservation Plan became effective and binding on the date that the Fish and Wildlife Service approved the Plan on February 17, 2012, and the Fish and Wildlife Service issued an Enhancement of Survival permit to the Texas Comptroller of Public Accounts, Susan Combs, in support of the Texas Candidate Conservation Agreement with Assurances.¹⁵

On June 19, 2012, the Fish and Wildlife Service published its notice, challenged in this suit, deciding that listing of the Dunes Sagebrush Lizard as endangered was not warranted, concluding that “the best scientific and commercial data available indicate that the threats to the species and its habitat have been reduced to the point that the species does not meet the statutory definition of an endangered or threatened species,”¹⁶ based primarily on the Texas and New Mexico conservation plans:

After review and analysis of the Texas Conservation Plan pertaining to the dunes sagebrush lizard in Texas, we have determined that the conservation effort will be effective at eliminating or reducing threats to the species, because it first avoids habitat and if necessary, limits development within suitable and occupied habitat as a priority, and it also improves and strives to restore habitat and reduces fragmentation. We are confident that the conservation effort will be implemented on enrolled acres, and the loss of habitat will be limited to 1 percent in the first 3 years of the plan, and not more than 10 percent over the 30-year life of the permit. Mitigation measures, such as habitat improvement and mesquite removal, are priorities in the plan. The agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service and other stakeholders requires regular meetings and involvement of all parties in order to implement the agreements fully. For this reason, we have determined that the Texas Conservation Plan will be implemented and effective at reducing the

¹⁴ Elledge Decl. Ex. C, PECE Evaluation For the New Mexico CCA/CCAA and Texas Conservation Plans at 21.

¹⁵ http://texasahead.org/texasfirst/esa/task_force/priority/pdf/Permit_for_TX_CP_DSL.pdf.

¹⁶ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 at 36,872 (June 19, 2012).

threats to the lizard in Texas¹⁷

Interest of proposed intervenor

The Texas Comptroller has several vital interests that are likely to be adversely affected by a ruling in Plaintiffs' favor, including Texas's sovereign interests in conserving its biological and natural resources and protecting the Texas economy. For this reason proposed intervenor, Susan Combs, moves to intervene in this suit in her official capacity as Comptroller of the State of Texas.

The Office of the Texas Comptroller was created by the Republic of Texas provisional government as an appointed position on December 30, 1835. After statehood, the office became an elected position authorized by Article IV, Section 23, of the Texas Constitution of 1850. The Comptroller serves as the chief financial officer for the State of Texas. Most of the powers and duties of the Comptroller are enumerated in Chapter 403 of the Texas Government Code¹⁸ and the Texas Tax Code.¹⁹ The agency is also the State's chief tax collector, accountant, revenue estimator, and purchasing manager.²⁰

In 2009, the Texas Legislature designated the Comptroller as chair of the Interagency Task Force on Economic Growth and Endangered Species to help local officials implement the regulatory programs of the federal Endangered Species Act, and to coordinate economic development in conjunction with the implementation of the ESA.²¹ The Comptroller actively seeks to balance economic growth and endangered species regulation, and to do so by developing strategic alliances among farmers, ranchers, industry, conservation groups and

¹⁷ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,886.

¹⁸ TEX. GOV'T CODE ANN. §§ 403.001–403.455.

¹⁹ See TEX. TAX CODE ANN.

²⁰ <http://www.window.state.tx.us/about/>.

²¹ Act of May 26, 2009, SB 2534 (available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB02534F.HTM>).

agencies, and universities and research institutions. To further this effort, Article 67 of Texas Senate Bill 1 in the first-called Special Session of the 82nd Texas Legislature (S.B. 1) authorizes the Comptroller to apply for and receive permits under the ESA.²² S.B. 1 further authorized the creation of a Habitat Protection Fund to be held in the Texas State Treasury.²³

Susan Combs, Comptroller of the State of Texas, is the permittee named in the Enhancement of Survival Permit issued by the Fish and Wildlife Service on February 17, 2012, under the federal Endangered Species Act. Comptroller Combs has worked tirelessly, along with other Texas stakeholders and members of the Task Force, to construct a plan that will both conserve the lizard's habitat and also protect the economic and property interests of Texans. To date more than 110,000 acres of lizard habitat—56% of the known lizard habitat in Texas—is enrolled for protection under the Texas Conservation Plan, which calls for loss of no more than 1 percent of lizard habitat over the next 3 years, and no more than a total of 10 percent over the next thirty years.²⁴

In addition, as authorized by the plan, Comptroller Combs has contracted with Texas A&M University to administer the Texas Conservation Plan and to conduct required species research.²⁵ After seeking a qualified candidate through an open and transparent Request for Qualifications process, Texas A&M University delegated several of the administrative functions of the Texas Conservation Plan to the newly formed Texas Habitat Conservation Foundation. This foundation is a non-profit organization (under Section 501(c)(3) of the Internal Revenue Code of 1986 and the Texas Tax Code, Section 11.18), which works to promote the conservation

²² Act of June 28, 2011, SB1 at 218–222 (available at <http://www.legis.state.tx.us/tlodocs/821/billtext/pdf/SB00001F.pdf#navpanes=0>).

²³ *Id.*

²⁴ http://www.texasahead.org/texasfirst/conservation_plan/; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,898.

²⁵ Elledge Decl. ¶5.

of Texas wildlife and sensitive and candidate species and related habitat, as well as other natural resources, including raising and distributing research funds, administering research activities to further scientific knowledge about sensitive and candidate species and related habitat, and implementing and monitoring compliance with voluntary conservation plans.²⁶

The Texas Conservation Plan has been a huge success:

- Over 250,000 total acres are enrolled under the plan. This includes over 110,000 acres of lizard habitat (Texas has a total of 197,000 acres) and over 38,000 acres of habitat buffer enrolled voluntarily by agriculture, oil and gas, and other entities.
- Through proactive conservation efforts by Texas Conservation Plan Participants, habitat is being protected—only 1.5 acres of habitat and 2 acres of buffer out of the more than 21,000 acres available have been disturbed or “taken” since the plan was approved.²⁷

What makes listing of the Dunes Sagebrush Lizard critical to Texas’s economic interests is that its habitat lies in the middle of one of the nation’s most productive oil and gas formations—Texas’s Permian Basin. According to data from the Railroad Commission of Texas, since their discovery in 1921, the Permian Basin oil fields have produced over 29 billion barrels of oil. In 2012, the most recent total production year available, that Texas industry has produced more than 430 million barrels which accounts for 57% of statewide Texas oil production, and 14% of the total United States oil production (approximately 2 billion barrels)

²⁶ Elledge Decl. Ex. C, PECE Evaluation For the New Mexico CCA/CCAA and Texas Conservation Plans at 22.

²⁷ http://texasahead.org/texasfirst/conservation_plan/.

according to data obtained from the United States Energy Information Administration.²⁸

Further, the Permian Basin supports 47,000 jobs in the oil and gas industry. And for every job in oil and gas, three additional jobs are created across Texas that depend on it.²⁹ The oil and gas industry has a very high economic “multiplier,” because these companies buy tremendous amounts of equipment, material and services in Texas, in addition to the direct jobs they create in the oil and gas production industry itself. For that reason, when FWS considered listing the lizard as endangered, a large part of the Texas economy was placed at risk, though most of the state’s population is hundreds of miles from the Permian Basin.³⁰

According to a report the Comptroller’s office published in October of 2012, entitled “Endangered Economy: A Case Study of the Dunes Sagebrush Lizard and the West Texas Oil and Gas Industry,” if all areas of the Permian Basin in which shinnery oak sands exist were off limits to oil and gas development, \$8 billion in annual investment and 31,000 Texas jobs would be lost.³¹

Finally, the Texas Comptroller, Susan Combs, has a substantial interest in the biological and other resource information being developed under the Texas Conservation Plan, and in disseminating that information to all Texans. The Comptroller’s office continues to provide clear, easy-to-use, and timely information to Texas landowners, businesses and communities in response to proposed endangered species regulations to help keep Texans informed and the

²⁸ Elledge Decl. Ex. D, Letter from S. Combs, Texas Comptroller of Public Accounts, to D. Ashe, Director, U.S. Fish & Wildlife Service (May 10, 2013).

²⁹ Elledge Decl. ¶ 16; *Railroad Commission of Texas*, “Permian Basin Information,” available at <http://www.rrc.state.tx.us/permianbasin/index.php> (citing United States Energy Information Administration, Crude Oil Production, http://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbbl_a.htm).

³⁰ Elledge Decl. ¶ 16.

³¹ Elledge Decl. ¶ 16; Texas Comptroller of Public Accounts, *Endangered Economy: A Case Study of the Dunes Sagebrush Lizard and the West Texas Oil and Gas Industry* (2012), <http://texasahead.org/texasfirst/species/pdf/96-1709%20DSL.pdf>.

Texas economy growing.³² The Comptroller has created a comprehensive website, Keeping Texas First,³³ which provides a clearinghouse of information on ESA issues and updates including the Texas Conservation Plan. The most publicly available list and map of species in Texas under review in the multi-district settlement agreements and through other U.S. Fish and Wildlife Service actions as well as relevant economic data are included on this website. This important information is used by state agencies, local communities, businesses and landowners in tracking and analyzing the widespread impact of the Federal Endangered Species Act in Texas, including the Dunes Sagebrush Lizard.³⁴

Statutory Framework

Congress passed the Endangered Species Act 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”³⁵ Section 2 of the ESA allows the Fish and Wildlife Service to enter into a candidate conservation agreement with other cooperating partners. Section 2 of the ESA states that encouraging “interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs is a key to safeguarding the Nation’s heritage in fish, wildlife, and plants.”³⁶

The ESA requires the Secretary of the Interior to maintain a list of endangered species, and to add a species to this list upon a finding that it is “in danger of extinction throughout all or

³² Elledge Decl. ¶18.

³³ <http://texasahead.org/texasfirst/>.

³⁴ Elledge Decl. ¶18.

³⁵ 16 U.S.C. § 1531.

³⁶ 16 U.S.C. § 1531(a)(5).

a significant portion of its range.”³⁷ Section 4 of the Act and its implementing regulations (50 C.F.R. §§ 424.01–424.21) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species if the Service determines that it is in danger of extinction or likely to become so due to one or more of the five factors described in section 4(a)(1) of the Act:

(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.³⁸

The ESA also requires the Secretary to make listing determinations “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction”³⁹

The ESA allows for the take of a listed species, if that take is incidental to an otherwise lawful activities.⁴⁰ Two methods of authorizing the take of a listed species are the issuance of enhancement of survival or incidental take permits.⁴¹ These permits can be obtained through the development of a Candidate Conservation Agreement with Assurances or a Habitat Conservation Plan, and application to FWS.⁴²

A Candidate Conservation Agreement with Assurances is a conservation tool that

³⁷ 16 U.S.C. § 1532(6).

³⁸ 16 U.S.C. § 1533(a)(1).

³⁹ 16 U.S.C. § 1533(b)(1)(A).

⁴⁰ Elledge Decl. Ex. A, Texas Conservation Plan at 4; *see also* 50 C.F.R. 17.22.

⁴¹ *See* 50 C.F.R. § 17.22.

⁴² Elledge Decl. Ex. A, Texas Conservation Plan at 4.

provides regulatory assurances to non-federal property owners who voluntarily agree to manage their land or water in a way that removes or reduces threats to candidate, proposed, or listed species.⁴³ Sections 2, 7, and 10 of the ESA authorize FWS to enter into Candidate Conservation Agreements with Assurances.⁴⁴ Section 10 of the ESA also allows FWS to issue an Enhancement of Survival Permit authorizing the incidental take of listed species as part of a joint conservation plan.⁴⁵

Procedural Background

On December 14, 2010, the United States Fish and Wildlife Service proposed the Dunes Sagebrush Lizard for listing as endangered under the Endangered Species Act.⁴⁶ But after completing an environmental assessment and a thorough review of the Texas Conservation Plan, the Fish and Wildlife Service determined, based on the best available scientific information, that the Dunes Sagebrush Lizard was not, after all, endangered as that term is defined by the Endangered Species Act and withdrew its notice of intention to list the species:

After review and analysis of the Texas Conservation Plan pertaining to the dunes sagebrush lizard in Texas, we have determined that the conservation effort will be effective at eliminating or reducing threats to the species, because it first avoids habitat and if necessary, limits development within suitable and occupied habitat as a priority, and it also improves and strives to restore habitat and reduces fragmentation. We are confident that the conservation effort will be implemented on enrolled acres, and the loss of habitat will be limited to 1 percent in the first 3 years of the plan, and not more than 10 percent over the 30-year life of the permit. Mitigation measures, such as habitat improvement and mesquite removal, are priorities in the plan. The agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service and other stakeholders requires regular meetings and involvement of all parties in order to implement the agreements fully. For this reason, we have determined that the

⁴³ Elledge Decl. Ex. A, Texas Conservation Plan at 4.

⁴⁴ *Id.*

⁴⁵ *Id.* at 25.

⁴⁶ Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77,801 (Dec. 14, 2010).

Texas Conservation Plan will be implemented and effective at reducing the threats to the lizard in Texas, given that the majority (71 percent) of mapped lizard habitat in Texas has been enrolled.⁴⁷

Plaintiffs, Defenders of Wildlife and the Center for Biological Diversity, filed this lawsuit on June 19, 2013, seeking a declaration that FWS's decision not to list the Dunes Sagebrush Lizard violated the Endangered Species Act and the Administrative Procedure Act.⁴⁸ No responsive pleading is yet due and none has been filed. Susan Combs, in her official capacity as the Texas Comptroller of Public Accounts, now seeks to intervene in this case as of right, or in the alternative, permissively.

ARGUMENT

I. Standard of review

The Court must allow intervention as of right to a party who satisfies the requirements of Federal Rule of Civil Procedure 24(a)(2):

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.⁴⁹

This rule requires "a liberal application in favor of permitting intervention."⁵⁰ The rule "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."⁵¹ So, "[w]hen considering a motion

⁴⁷ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,886.

⁴⁸ Compl. for Declaratory & Injunctive Relief at 17.

⁴⁹ Fed. R. Civ. P. 24(a)(2).

⁵⁰ *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *see also The Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (noting that "the D.C. Circuit has taken a liberal approach to intervention").

⁵¹ *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*quoting Nuesse*, 385 F.2d at 700).

to intervene, the burden of proof rests with those opposing intervention.”⁵²

The D.C. Circuit has announced a four-part test to determine if motions to intervene as of right should be granted based on this rule.⁵³ In addition, the intervenor-applicant must demonstrate standing.⁵⁴

Alternatively, Federal Rule of Civil Procedure 24(b) provides for permissive intervention: “On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.”⁵⁵ The requirements for permissive intervention under this rule are to be construed liberally, with all doubts resolved in favor of permitting intervention.”⁵⁶

Rule 24(b) goes on to allow any “state governmental officer or agency to intervene if a party’s claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.”⁵⁷ Intervention under Rule 24(b)(2) “considers the governmental application with a fresh and more hospitable approach” than other forms of permissive intervention.⁵⁸

⁵² *Horizon Lines, LLC v. United States*, No. 05-0952 (D.D.C. Sept. 23, 2005).

⁵³ *Sec. & Exch. Comm’n v. Prudential Secs. Inc.*, 136 F.3d 153, 156 (D.D.C. 1998); *see also Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 68 (D.D.C. 2006); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998).

⁵⁴ *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 91–92 (D.D.C. 2007).

⁵⁵ Fed. R. Civ. P. 24(b)(1).

⁵⁶ *In re Vitamins Antitrust Litigation*, 2001 WL 3408808 at *3 (D.D.C. Mar. 19, 2001).

⁵⁷ Fed. R. Civ. P. 24(b)(2).

⁵⁸ *Nuesse*, 385 F.2d at 705.

II. The Texas Comptroller has standing to participate in this lawsuit as a party

A. Article III standing

To establish standing under Article III, a prospective intervenor must establish (1) injury-in-fact, causation, and redressability.⁵⁹ The Texas Comptroller satisfies this standard because this lawsuit challenges the Texas Candidate Conservation Agreement with Assurances—the Texas Conservation Plan—with the consequent economic injuries to the Texas economy and tax base, and the State’s ability to conserve natural resources within its borders. Plaintiffs claim that the Fish and Wildlife Service was arbitrary and capricious, and violated the Endangered Species Act, when it decided not to list the Dunes Sagebrush Lizard as endangered:

First, the Service’s decision not to list the lizard was not based on a reasonable analysis of the ESA’s five statutory listing factors, 16 U.S.C. § 1533, and was not based on the best scientific data available, *id.* § 1533(b).

Second, the Service’s decision not to list the lizard is arbitrary and capricious and violates the Service’s own policies because it is based on unproven, largely unimplemented, voluntary state conservation plans that do not adequately address threats to the lizard.⁶⁰

The Fish and Wildlife Service decided not to list the Dunes Sagebrush Lizard because of the Candidate Conservation Agreements with Assurances issued to the Texas Comptroller and the State of New Mexico, which together cover almost all of the lizard’s habitat.⁶¹ But Plaintiffs contend that the Texas Conservation Plan is inadequate for a variety of reasons detailed in their complaint.

The Plaintiffs also erroneously assert that “[t]he Service did not make available to the public the certificates of inclusion from the Texas CCAA/HCP, which contain the terms of the

⁵⁹ *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

⁶⁰ Compl. for Declaratory and Injunctive Relief at ¶¶ 9–10.

⁶¹ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,897–36,899.

agreements and detail what, if any, conservation benefits the Texas program may offer for the lizard . . . because the State of Texas has not released that information to the Service, citing confidentiality concerns.”⁶² The Plaintiffs also complain about the membership of Texas Habitat Conservation Foundation, the organization responsible for administering the Texas Conservation Plan:

The Texas Comptroller’s Office, in turn, has delegated authority for the program to a private entity, the Texas Habitat Conservation Foundation. The Foundation negotiates the terms of each certificate of inclusion with the landowner, with no involvement or review from the Service. The Foundation also has the responsibility to oversee and monitor the agreements and issue monthly and annual reports indicating whether any habitat has been disturbed. The Foundation was created for this purpose. The three founding board members of the Texas Habitat Conservation Foundation are all registered lobbyists for the Texas Oil and Gas Association. Thus the entity that is in charge of protecting the lizard, negotiating the terms of conservation agreements, and monitoring and reporting on habitat loss pursuant to those agreements, is controlled by the very industry that the Service has found most threatens the lizard.⁶³

The Plaintiffs also erroneously allege that “[l]andowners in Texas can sign up for a duration of their choosing—there are no minimum terms—and they can also drop out without penalty. Thus the Service not only has no idea how many landowners are committed to participating in the agreement, it also does not know for how long they have committed to participate.”⁶⁴ Finally, the Plaintiffs attack FWS’s reliance on the Texas Conservation Plan, and the effectiveness of the Conservation Plan itself:

First, the Texas CCAA/HCP was only a few months old at the time of the withdrawal of the proposed rule. It had no track record of success. To date, there is no evidence that the plan is, in fact, conserving the lizard or that it has eliminated what the Service had determined were “immediate and significant” threats to the lizard from oil and gas development and other factors. Second, as noted above, participation in the CCAA/HCP is voluntary, so there is no way to know if promises made today will be kept. Indeed, now that the proposed listing

⁶² Compl. for Declaratory and Injunctive Relief at ¶¶ 33–34.

⁶³ *Id.* at ¶¶ 35–36, 38.

⁶⁴ *Id.* at ¶ 43.

has been withdrawn, there is little to no incentive for enrollees to remain in the plan, and in Texas, there is no minimum requirement for participation. Although the Service optimistically suggests that additional landowners will seek to participate in the future, there is no justification for this conclusion. Third, the Texas CCAA/HCP does not specify what on-the-ground conservation measures are required for any particular enrolled landowner. The key avoidance and minimization recommendations for oil and gas developments are vague and filled with discretionary language such as “where possible” or “when feasible in the reasonable judgment of the participant” or “when practical.” In other words, a participant in the plan could entirely fail to take any recommended conservation measures based on a subjective assessment of feasibility and still be counted as a participant. Fourth, the Service does not review or approve any certificates of inclusion before they are finalized. Certificates of inclusion are approved by the Texas Comptroller of Public Accounts, working through the Texas Habitat Conservation Foundation, which is controlled by the oil and gas industry. Fifth, the Service does not even obtain copies of the certificates of inclusion after the fact. Indeed, the Service does not know the number of certificates of inclusion in existence (only the number of acres covered is released) or which areas are covered by the certificates. The CCAA only describes possible areas of enrollment but does not indicate which areas are actually enrolled.⁶⁵

If Plaintiffs succeed in invalidating the Fish and Wildlife Service’s decision not to list the Dunes Sagebrush Lizard based on the inadequacy of the Texas Conservation Plan, then the continued integrity of that Plan is threatened. The consequent and inevitable relief sought by Plaintiffs is plainly for the Fish and Wildlife Service to list the lizard as endangered without the safety-net of an approved conservation plan to protect the species and the State’s economy. The threatened loss of revenue from the oil and gas industry that is currently thriving in the Permian Basin of Texas where the lizard habitat is located will certainly be dramatically affected if the lizard is listed. Likewise, the Conservation Plan that Texas officials, stakeholders, and public representatives worked so hard to craft so that Texas could exercise its authority to conserve and manage its natural resources will be severely undermined.⁶⁶

⁶⁵ Compl. for Declaratory and Injunctive Relief at ¶¶ 51–55.

⁶⁶ Elledge Decl. ¶¶ 8–10.

These injuries are fairly traceable to the regulatory action sought by Plaintiffs in this litigation—FWS’s decision not to list the Dunes Sagebrush Lizard and anticipated subsequent listing of the lizard. And it is likely that a decision favorable to the Federal Defendants—upholding the validity of the decision that listing the lizard was not warranted on the ground that the Texas Conservation Plan adequately protects the lizard—would prevent these injuries from occurring.

For example, in *Wildearth Guardians v. Salazar*, this Court held that the State of Wyoming had standing to intervene in a case “carrie[d] with it potentially broad implications for the leasing of public lands for coal mining operations in Wyoming,”⁶⁷ like this case has for Texas’s oil and gas industry. And in *Akiachak Native Community v. U.S. Department of Interior*, this Court held that Alaska had standing to intervene when a decision in favor of the plaintiffs in that case would result in Alaskan land potentially being taken into trust by the federal government—resulting in a “loss of taxing and regulatory authority . . . sufficient . . . to establish standing.”⁶⁸

Therefore, because the Texas Comptroller possesses recognized injuries that are judicially redressable, she has standing under Article III to intervene as of right a Defendant in this case.

B. Prudential standing

In addition to Article III standing, the Texas Comptroller also can establish prudential standing to participate in this lawsuit as a party.⁶⁹ A party seeking judicial review of an agency action must show an injury that “fall[s] within the ‘zone of interests’ protected or regulated by

⁶⁷ *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 19 (D.D.C. 2010).

⁶⁸ *Akiachak Native Community v. U.S. Dept. of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008).

⁶⁹ *See Bennett v. Spear*, 520 U.S. 154, 162 (1997).

the statutory provision or constitutional guarantee invoked in the suit.”⁷⁰ But the zone-of-interest test “is not meant to be especially demanding.”⁷¹ Rather, the test serves only to exclude those “parties whose interests are not consistent with the purposes of the statute in question.”⁷²

Here, the interests of the Texas Comptroller fall squarely under the federal Endangered Species Act, the substantive statute under which Plaintiffs seek relief.⁷³ The ESA explicitly authorizes the Fish and Wildlife Service to take into consideration the views of the State in “conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species”. Likewise, the ESA authorizes FWS to work with the State as a partner in protecting and conserving potentially threatened or endangered species: “the Secretary shall cooperate to the maximum extent practicable with the States.”⁷⁴

The Texas Comptroller worked closely with the Fish and Wildlife Service to develop a Conservation Plan that was eventually approved by the agency. The Texas Candidate Conservation Agreement with Assurances was approved by the Fish and Wildlife Service under the authority granted to it by Congress:

Sections 2, 7, and 10 of the ESA allow the FWS to enter into a CCAA. Section 2 of the ESA states that encouraging interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs is a key to safeguarding the Nation’s heritage in fish, wildlife, and plants. Section 7 of the ESA requires the FWS to review programs that it administers and to utilize such programs in furtherance of the purposes of the ESA. By entering into a CCAA, the FWS is utilizing its Candidate Conservation programs to further the conservation of the Nation’s fish and wildlife.

⁷⁰ *Bennett*, 520 U.S. at 160.

⁷¹ *Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004).

⁷² *Id.* at 109.

⁷³ *See* Compl. for Declaratory and Injunctive Relief at ¶¶ 62–75.

⁷⁴ 16 U.S.C. § 1533.

In seeking to defend this agreement, the Texas Comptroller is well within the zone of interests protected under the Endangered Species Act.

Consequently, the Texas Comptroller satisfies the prudential standing requirement.

III. The Texas Comptroller is entitled to intervene as of right

The D.C. Circuit uses a four-part test to determine if motions to intervene as of right should be granted:

(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.⁷⁵

This motion should be granted because the Texas Comptroller has standing to participate as a party in this lawsuit and also meets all the requirements of Rule 24(a)(2). The Texas Comptroller's motion is timely, and the Texas Comptroller has vital, legally protected interests at stake in this lawsuit, which are threatened by a favorable ruling for Plaintiffs in this case. In addition, the Texas Comptroller's interests in balancing the competing interests of protecting the lizard and the Texas economy and its tax base, and private land owners on which the lizard's habitat is located, will not be adequately represented by the other parties.

A. This motion is timely

To determine if a motion to intervene is timely under Rule 24 (a), the motion "must be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to

⁷⁵ *Sec. & Exch. Comm'n*, 136 F.3d at 156; *see also Friends of Animals*, 452 F. Supp. 2d at 68; *Mova Pharm. Corp.*, 140 F.3d at 1074.

those already parties in the case.”⁷⁶ As this Court has explained, “[t]he factor is whether any ‘delay in moving for intervention will prejudice the existing parties to the case.’”⁷⁷

In *Fund for Animals v. Norton*, the D.C. Circuit applied this standard and reversed the denial of a motion to intervene as of right, holding that the motion was timely when it was filed “less than two months after the plaintiffs filed their complaint and before the defendants filed an answer.”⁷⁸ Likewise, this Court allowed an environmental group—one of the Plaintiffs in this case—to intervene in a case where “[l]ess than three months have elapsed since the inception of the suit. . . . Because there has been no delay, the Center’s motion is clearly timely.”⁷⁹

Because the Texas Comptroller seeks to intervene at the very start of this case, less than two months after it was filed, this motion is timely. Plaintiffs filed their complaint on June 19, 2013. Federal Defendants have not yet filed an answer. The administrative record has not yet been filed, and no briefing schedule has been submitted by the parties. Likewise, no dispositive motions have been filed, and no discovery has been taken.

B. The Texas Comptroller has interests in the property and transaction at stake in this litigation

The second intervention-of-right factor is whether the Texas Comptroller has “an interest relating to the property or transaction that is the subject of the action.”⁸⁰ The D.C. Circuit has held that a demonstration that intervenor-applicant has standing satisfies this requirement: “standing alone is sufficient to establish that the [intervenor] has ‘an interest relating to the

⁷⁶ *United States v. AT&T Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

⁷⁷ *Akiachak Native Community*, 584 F. Supp. 2d at 5 (quoting 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *Federal Practice & Procedure* § 1916 (3d. ed.)).

⁷⁸ *Fund for Animals v. Norton*, 322 F.3d at 735.

⁷⁹ See *Otay Mesa Property L.P. v. U.S. Dept. of the Interior*, No. 08-cv-00383-RMC (May 20, 2008) (Doc. 8).

⁸⁰ Fed. R. Civ. P. 24(a)(2); see *Mova Pharm. Corp.*, 140 F.3d at 1076.

property or transaction which is the subject of the action [.]”⁸¹ In granting intervention, one magistrate of this Court stated:

[I]t is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient “interest in the litigation” to justify intervention under Fed. R. Civ. P. 24(a)(2). Indeed, it is interesting how the standing inquiry mirrors the Rule 24 inquiry. For example, it is equally difficult to understand how a party could show that agency action caused or will cause injury, the standing inquiry, and not prove that the interest in the transaction will be impaired by agency action, the Rule 24 inquiry. Perhaps in a jurisdiction which requires the intervenor to show standing, the standing inquiry subsumes the Rule 24 inquiry.⁸²

Quite independently of the standing inquiry, the Texas Comptroller also has a significant interest in protecting the State’s twin sovereign interests, embodied in the Texas conservation plan, of regulating environmental quality and also protecting its financial and socioeconomic stake in oil, gas, and agricultural production in the Permian Basin. This Court recognized these two interests as each being sufficient to support Wyoming’s intervention to defend the Interior Department’s decision to issue coal-mining leases in Wyoming:

Wyoming has an interest in preserving its role in regulating environmental quality within its borders, and ensuring that the development of coal mining operations within its territory continues in a safe and environmentally responsible manner.

...

Wyoming has an interest in protecting its financial and socioeconomic stake in the development of coal mining operations in Wyoming.⁸³

In another case, this Court granted Alaska’s motion to intervene to defend Interior’s decision not to take certain native lands into trust, holding that the state had a protectable interest in its sovereign right to tax and to enforce land use, natural resource management, environmental, and public safety regulations:

⁸¹ *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)).

⁸² *Am. Horse Protection Ass’n, Inc. v. Veneman*, 200 F.R.D 153, 157 (D.D.C. 2001).

⁸³ *Wildearth Guardians*, 272 F.R.D. at 18.

Alaska claims an interest in maintaining its sovereignty over plaintiffs' land. Specifically, Alaska alleges the state could lose the rights to tax and to enforce land use, natural resource management, environmental, and public safety regulations on the land taken into trust. (Mot. to Intervene at 7-8.) A government's loss of sovereignty over land within its jurisdiction is a legally protectable interest. *See City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 468 (D.D.C.1978) (finding that "the diminishment of the tax base and impairment of municipal law and zoning enforcement" as a result of the United States taking land within city limits into trust status for an Indian tribe were legally protectable injuries).⁸⁴

The imposition of federal Endangered Species Act jurisdiction over the West Texas habitat of the Dunes Sagebrush Lizard would diminish Texas's jurisdiction to regulate land use, environmental protection, and oil-and-gas production in this region. Under this regime Texas would share jurisdiction with the federal Fish and Wildlife Service, diminishing Texas's sovereignty over a portion of its territory—and almost certainly diminishing oil-and-gas activity and the state revenues derived from it.

The Texas Comptroller also has an interest in preserving the Texas Conservation Plan, embodied in the Candidate Conservation Agreement with Assurances which is at the heart of the transaction that Plaintiffs attack as an arbitrary-and-capricious basis for the Fish and Wildlife Service to withdraw its proposal to designate the lizard as endangered. And this Court has allowed parties to an agreement to intervene as of right to defend their agreements. In *Akiachak Native Community v. United States Department of the Interior*,⁸⁵ for instance, this Court held that the State of Alaska could intervene as of right in a suit to defend "the terms of the settlement reached in [the Alaska Native Claims Settlement Act, because] Alaska has an interest . . . [in] upholding the terms of the ANCSA, to which it was a party."⁸⁶

Likewise, the D. C. Circuit held that the United States should have been allowed to

⁸⁴ *Akiachak Native Community*, 584 F. Supp. 2d at 6.

⁸⁵ *Akiachak Native Community v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 6 (D.D.C. 2008).

⁸⁶ *Id.*

intervene as of right in *Roeder v. Republic of Iran*,⁸⁷ a tort suit by former hostages of the Iranian Government, in which the U.S. intervened to protect its interest in the Algiers Accords, an agreement it negotiated with Iran. The court explained why the United States had a legally protected interest supporting intervention:

The government's interest is in upholding the Algiers Accords, an interest that would be impaired if plaintiffs obtained a judgment in violation of the Accords. We have already decided that the interest of the United States in meeting "its obligations under the executive agreement with Iran" entitled it to intervene as a defendant. *See Persinger*, 729 F.2d at 837.⁸⁸

Here Susan Combs, the Texas Comptroller, was directly responsible for preparing the Texas Conservation Plan, and negotiating the Candidate Conservation Agreement with Assurances with FWS, and holds the Species Survival Permit, all of which Plaintiffs challenge in this case. Therefore, Susan Combs, in her official capacity as the Texas Comptroller, has a direct interest in the transaction that is the subject of this litigation.

Intervention as of right is also proper where the prospective intervenor asserts a claim of ownership to property that is the subject matter of the lawsuit.⁸⁹ Here, the State of Texas leases and manages 3,840 acres of Monahans Sandhills State Park, which is habitat for the Dunes Sagebrush Lizard. If Plaintiffs succeed in requiring that the lizard be listed as endangered, Texas would be directly regulated by the federal government as to use of this property under the federal Endangered Species Act—giving the State yet another interest in the outcome of this suit.

The D. C. Circuit has described the interest-in-the-transaction-or-property factor as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as

⁸⁷ *Roeder v. Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003).

⁸⁸ *Id.* at 233.

⁸⁹ *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981).

is compatible with efficiency and due process.”⁹⁰ The Texas Comptroller, who serves as the Chief Financial Officer of the State of Texas, and is the Presiding Officer for the State’s Task Force on Economic Growth and Endangered Species, and who holds the Survival Permit issued by FWS under the Candidate Conservation Agreement with Assurances, has the requisite protectable interest and real stake in preserving the Conservation Plan that Plaintiffs challenge in this litigation. In short, this second factor supports intervention of right.

C. A ruling for Plaintiffs may as a practical matter impair or impede the Texas Comptroller’s ability to protect her interests

In *Fund for Animals v. Norton*,⁹¹ the D.C. Circuit held that Mongolia had a right to intervene in a case challenging FWS’s decision not to list a species of Mongolian sheep as endangered because the outcome of the case could affect Mongolia’s income from tourism. Mongolia’s conservation program was funded primarily by “fees paid by sport hunters . . . If the Fund succeeds in barring American hunters from bringing their trophies home, some hunters will not travel to Mongolia to hunt . . . and the revenues that support the conservation program will decline.”⁹² A State, too, has a unique interest in protecting and developing its natural resources.⁹³

The Advisory Committee Notes on the impairment requirement of Rule 24(a) state that “[i]f an absentee would be substantially affected in a practical sense by the determination made

⁹⁰ *Nuesse*, 385 F.2d at 700; *see also Foster*, 655 F.2d at 1324.

⁹¹ *Fund for Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003).

⁹² *Id.* at 733.

⁹³ *See People of the State of Cal. v. United States*, 180 F.2d 596, 601 (9th Cir. 1950) (“The State is asserting an interest in the subject matter as the absolute owner of the water, and as *parens patriae* on behalf of all its citizens. That is a sufficient interest in the subject matter to entitle it to be heard, just as much as if the State were joined by the United States originally as a defendant.”).

in an action, he should, as a general rule, be entitled to intervene.”⁹⁴ The Texas Comptroller’s ability to protect her interests at stake in this lawsuit will be impaired if the Plaintiffs are successful in obtaining the relief sought in the complaint. For although directed at FWS—asking for an order to reconsider and presumably list the Dunes Sagebrush Lizard as endangered—the basis for Plaintiffs’ lawsuit targets the Texas Conservation Plan, which they contend is the basis for FWS’s finding that listing the Dunes Sagebrush Lizard was not warranted.

But the overarching purpose of the Plan is to promote the conservation of the lizard in Texas under a state-managed program, to avoid having the lizard listed under the federal Endangered Species Act. As Combs explained in her letter of May 10, 2013 to Dan Ashe, Director of the U.S. Fish and Wildlife Service and Defendant in this lawsuit:

Federal actions under the Endangered Species Act, 16 U.S.C. § 1531 et seq. (ESA), have negatively affected and will continue to negatively affect the Texas economy—and the economic well-being of individual Texans. The ESA can restrict economic activity and use of private property through the listing of species as threatened or endangered. The specific economic impacts of ESA regulation may vary by species, but overarching economic costs of listing occur regardless of the species. Texas businesses that wish to operate in areas where endangered species are located may be forced to incur additional costs—costs which are ultimately passed along to consumers—in the form of additional time and money on scientific surveys, permit applications, project redesigns and legal actions. Critical habitat designations can also result in high costs and delays or even stop certain economic activity entirely. In addition, communities may face lower property values and lost tax revenue.⁹⁵

In Texas, all populations of Dunes Sagebrush Lizard are located on privately owned or State-owned land, primarily in the Permian Basin where oil and gas production occurs.⁹⁶ The productive use of this land will be directly affected by the listing of the lizard under the

⁹⁴ Fed. R. Civ. P. 24 Advisory Committee Notes.

⁹⁵ Elledge Decl. Ex. D, Letter from S. Combs, Texas Comptroller of Public Accounts, to D. Ashe, Director, U.S. Fish & Wildlife Service at 1 (May 10, 2013).

⁹⁶ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,887.

Endangered Species Act.⁹⁷ The State itself owns land that will be directly affected by the listing of the lizard as endangered. The Texas Permanent University Fund, for instance, owns about 75,000 acres of land identified as lizard habitat and the Texas Permanent School Fund owns about 30,000 acres of mineral rights on land identified as lizard habitat.⁹⁸

Here, as the Conservation Plan—the basis of the decision that Plaintiffs are challenging—states: “The goal of the Plan is to facilitate continued and uninterrupted economic activity in the Permian Basin, which accounts for over 20% of national domestic energy production, and to promote conservation of the [lizard.] . . . The Plan will continue economic development and promote habitat protection for the DSL [Dunes Sagebrush Lizard] across its range in Texas.”⁹⁹ But a decision in Plaintiffs’ favor—that the lizard is, in fact, endangered because the Texas Conservation Plan does not adequately protect its habitat and so does not justify FWS’s decision that listing the Dunes Sagebrush Lizard as endangered was not warranted could impose great costs on Texas’s economy and deprive the state of tax revenue.

At bottom, the focus of this lawsuit is an attack on the Texas Conservation Plan which, according to Plaintiffs, does not adequately protect the lizard.¹⁰⁰ Plaintiffs allege erroneously that the Texas Conservation Plan is inadequate because it does not mandate participation in the plan by landowners,¹⁰¹ and allows landowners and the State to develop flexible ways of conserving the lizard’s habitat while also allowing for oil and gas production.¹⁰² Plaintiffs also allege that industry stakeholders are allowed to participate in a group designated to oversee the

⁹⁷ See Elledge Decl. Ex. D, Letter from S. Combs, Texas Comptroller of Public Accounts, to D. Ashe, Director, U.S. Fish & Wildlife Service (May 10, 2013).

⁹⁸ Elledge Decl. ¶7.

⁹⁹ Elledge Decl. Ex. A, Texas Conservation Plan at 1–2.

¹⁰⁰ Compl. for Declaratory & Injunctive Relief at ¶ 51–55.

¹⁰¹ *Id.* at ¶ 52.

¹⁰² *Id.* at ¶ 53.

Texas Conservation Plan,¹⁰³ the State has delegated the authority to implement the plan to the Texas Habitat Conservation Foundation,¹⁰⁴ which, Plaintiffs allege, includes various industry representatives.¹⁰⁵ Plaintiffs also contend that Texas does not make public the conservation agreements entered into by affected landowners.¹⁰⁶ Plaintiffs' complaint devotes page after page to these attacks on the Texas Conservation Plan, and further explanations for why Plaintiffs contend that FWS's reliance on the Texas Plan was arbitrary, capricious, and contrary to the Endangered Species Act.¹⁰⁷

To prevail, Plaintiffs thus must gut the Texas Conservation Plan which, the Texas Comptroller believes, is a superior way of protecting the lizard's habitat while at the same time preserving Texas's vital oil-and-gas industry:

Overall, the Plan will allow for economic development to continue in a seamless manner by providing an efficient mechanism to comply with the ESA. Without the Plan, there could be significant regulatory delays in obtaining incidental take coverage, disruption to economic activity in an area vital to state and national interests, and little incentive to conserve DSL Habitat to potentially preclude listing of the DSL.¹⁰⁸

...

By developing and implementing the Plan and the Conservation Program outlined under Section 8, the Permit Holder will achieve a number of benefits for the DSL and Texas, including:

- Coordinated conservation planning with a long-term focus over a regional scale.
- Minimization of negative impacts to the Texas economy.
- Establishment of a conservation program that proactively encourages conservation and minimizes and mitigates to the

¹⁰³ Compl. for Declaratory & Injunctive Relief at ¶¶ 35–36.

¹⁰⁴ *Id.* at ¶ 35.

¹⁰⁵ *Id.* at ¶¶ 7, 35–38.

¹⁰⁶ *Id.* at ¶ 39.

¹⁰⁷ *Id.* at ¶¶ 5–8, 28–41, 43–60.

¹⁰⁸ Elledge Decl. Ex. A, Texas Conservation Plan at 10–11.

maximum extent practicable the impacts of authorized take of the DSL.

- Research on DSL, DSL Habitat, and threats and effectiveness of Conservation Measures, as described in Section 8.
- Use of a new, streamlined mechanism to comply with the ESA that would be available to private landowners, businesses, and other entities. This new compliance option provides an innovative solution to endangered species issues and recognizes stakeholder concerns by ensuring uninterrupted economic development.
- Reduction in the time and cost associated with obtaining enhancement of survival and incidental take authorization under the ESA, particularly with respect to developing individual CCAAs and HCPs (based on Management Plans, oil and gas development plans, etc.), waiting for applications to be processed by the FWS, and obtaining appropriate mitigation for project impacts.¹⁰⁹

In addition, Texas operates Monahans Sandhills State Park, where one of the populations of dune lizards identified by FWS is located.¹¹⁰ The Monahans Sandhills State Park is a valuable State resource that “consists of 3,840 acres of sand dunes, some up to 70 feet high, in Ward and Winkler Counties, about a half-hour’s drive west of Odessa.”¹¹¹ If FWS lists the lizard as endangered, the requirements and penalties of the federal Endangered Species Act will apply to Monahans Sandhills State Park, forcing Texas to yield to federal control over valuable state resources and lizard habitat, both of which are currently protected under state law and in accordance with the Candidate Conservation Agreement with Assurances and Survival Permit.

In short, the West Texas lizard habitat will be governed either by the Texas Conservation Plan as approved by the Fish and Wildlife Service, or by the federal Endangered Species Act regulations, depending on the outcome of this case. The Texas Comptroller’s huge investment of

¹⁰⁹ Elledge Decl. Ex. A, Texas Conservation Plan at 11–12.

¹¹⁰ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,875.

¹¹¹ http://www.tpwd.state.tx.us/state-parks/monahans-sandhills/park_history.

time and resources in developing that plan will be lost, as will a significant measure of future State jurisdiction to regulate for environmental protection and economic growth in the area.

D. The Texas Comptroller's interests are not adequately represented by the existing parties

The final requirement for intervention as of right is that the Texas Comptroller's interests are not adequately represented by existing parties. The Supreme Court has held that this requirement is satisfied if the proposed intervenor can show that its interests "may be" inadequately represented.¹¹² The D.C. Circuit has described this requirement as "not onerous,"¹¹³ and deemed the requirement met where the interests of the proposed intervenor were merely "different," but not "wholly adverse" from the other parties.¹¹⁴

Here, there is no question that the Texas Comptroller's interests will not be adequately represented in this litigation for the Texas Comptroller has unique interests at stake in this litigation. While presumably both the Federal Defendants and the Texas Comptroller will generally agree on defending the Texas Conservation Plan, even "a shared general agreement . . . does not necessarily ensure agreement in all particular respects. . . ."¹¹⁵ As the *Fund for Animals* court explained, "FWS's obligation is to represent the interests of the American people, as expressed in the ESA, while [the Texas Comptroller's] concern is for [Texas's] people and natural resources."¹¹⁶ As that court further explained, there will obviously be some overlap, since the ESA requires FWS to "tak[e] into account those efforts, if any being made by any" state.¹¹⁷ But as the court also explained, taking the Texas Comptroller's interests into account

¹¹² *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972).

¹¹³ *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

¹¹⁴ *Nuesse*, 385 F.2d at 703.

¹¹⁵ *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

¹¹⁶ *Fund for Animals, Inc.*, 322 F.3d at 736.

¹¹⁷ *Id.* (quoting 16 U.S.C. § 1533(b)(1)(A)).

“does not mean giving them the kind of primacy that the [Texas Comptroller] would give them.”¹¹⁸ And likewise, it is not difficult to imagine here too how the interests of the Texas Comptroller and FWS might diverge during the course of this litigation.

Courts have frequently concluded that state interests are not adequately represented by other parties in litigation, and for that reason, allowed intervention as of right. In *Wildearth Guardians v. Salazar*,¹¹⁹ this Court allowed the State of Wyoming to intervene as of right, holding that even if the Government might take Wyoming’s unique environmental and economic concerns into account, it would not give them the primacy that Wyoming would give them:

The mere fact that other defendants might hypothetically take Wyoming’s interests into account when shaping their arguments does not mean that they would afford the same primacy to Wyoming’s interests in, for instance, maintaining its unique role in regulating coal mining operations and environmental quality or its financial and social economic interests in the development of coal mining operations within its borders.¹²⁰

In *Akiachak Native Community v. U.S. Department of Interior*, this Court held that Alaska had the right to intervene in a case because the Department of the Interior simply had “no clear interest in protecting Alaska’s sovereignty or Alaska’s interest as a party to [the Alaska Native Claims Settlement Act] that would ensure adequate representation of Alaska’s interests.”

Because she has met every requirement for intervention of right under Rule 24(a), this Court should grant the Texas Comptroller’s motion to intervene as of right as a Defendant in this lawsuit.

IV. In the Alternative, the Court Should Grant the Texas Comptroller Permissive Intervention

Alternatively, the Texas Comptroller asks this Court to grant her permissive intervention

¹¹⁸ *Fund for Animals, Inc.*, 322 F.3d at 736.

¹¹⁹ *Wildearth Guardians v. Salazar*, 272 F.R.D. 4 (D.D.C. 2010).

¹²⁰ *Id.* at 20.

under Rule 24(b), which provides: “On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.”¹²¹

The rule goes on to provide specific authority for permissive intervention by a state official when the claim or defense is based on a state statute, agreement or requirement administered by that state official:

On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party’s claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.¹²²

The D.C. Circuit, in reversing the district court’s denial of permissive intervention by a state official, characterized this rule as a more hospitable approach to state officials:

It is a significant fact that the applicant for permissive intervention is a government official. Rule 24(b) was expressly amended in 1946 so as to permit intervention by a state or federal governmental official charged with administering a state statute or regulation on which any party relies for his claim or defense. The amendment was added to avoid ‘exclusionary constructions’ where public officials seek permission to intervene, and ‘the amendment in effect expands the concept of ‘claim or defense’ insofar as intervention by a governmental officer or agency is concerned. It is perhaps more accurate to say that it considers the governmental application with a fresh and more hospitable approach.¹²³

Likewise, in *Miami Health Studios, Inc. v. City of Miami Beach*, the Fifth Circuit held that the Attorney General of Florida should have been allowed to intervene in a case challenging a statutory framework that the Attorney General was responsible for implementing.¹²⁴

¹²¹ Fed. R. Civ. P. 24(b)(1).

¹²² *Id.* at 24(b)(2).

¹²³ *Nuesse*, 385 F.2d at 704–705.

¹²⁴ *Miami Health Studios, Inc. v. City of Miami Beach*, 491 F.2d 98 (5th Cir. 1974).

Here, the Texas conservation plan is an agreement entered into by the Texas Comptroller under authority granted her by the Texas Legislature.¹²⁵ And it is that conservation agreement (along with New Mexico's) that undergirds FWS's decision challenged in this case. It is in fact fair to say that the Comptroller's agreement lies at the heart of the claims and defenses in this case—and that the merits of the case cannot be decided separately from the Texas Conservation Agreement. So Comptroller Combs, the state official responsible for administering that agreement, is entitled to permissive intervention.

And even if Comptroller Combs were not a state official, she would still meet the requirements for permissive intervention, which may be granted at the court's discretion if the proposed intervenor presents "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action."¹²⁶ Permissive intervention is to be liberally granted, applying a "flexible interpretation" of the rule in favor of intervention.¹²⁷

As discussed previously in the context of intervention as of right, this motion is timely and neither existing party will be prejudiced by the granting of this motion. This Court has jurisdiction over the defenses asserted in the Comptroller's proposed Answer to Complaint (which raises no new claims). And the Texas Comptroller's defenses are in common with the Plaintiffs' asserted factual and legal claims, since the lawsuit targets and bases its legal challenge to FWS's decision to withdraw its proposed listing of the lizard almost entirely on the Texas Conservation Plan:

After review and analysis of the Texas Conservation Plan pertaining to the dunes

¹²⁵ Act of June 28, 2011, SB1 at 218–222 (available at <http://www.legis.state.tx.us/tlodocs/821/billtext/pdf/SB00001F.pdf#navpanes=0>).

¹²⁶ *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

¹²⁷ *Id.* at 1045.

sagebrush lizard in Texas, we have determined that the conservation effort will be effective at eliminating or reducing threats to the species, because it first avoids habitat and if necessary, limits development within suitable and occupied habitat as a priority, and it also improves and strives to restore habitat and reduces fragmentation. We are confident that the conservation effort will be implemented on enrolled acres, and the loss of habitat will be limited to 1 percent in the first 3 years of the plan, and not more than 10 percent over the 30-year life of the permit. Mitigation measures, such as habitat improvement and mesquite removal, are priorities in the plan. The agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service and other stakeholders requires regular meetings and involvement of all parties in order to implement the agreements fully. For this reason, we have determined that the Texas Conservation Plan will be implemented and effective at reducing the threats to the lizard in Texas, given that the majority (71 percent) of mapped lizard habitat in Texas has been enrolled.¹²⁸

Having demonstrated that the requirements of Rule 24(b) have been met, this Court should alternatively grant the Texas Comptroller's motion to permissively intervene if the Court concludes that intervention as of right is not warranted.

Conclusion

For all these reasons, this Court should grant this motion to intervene as of right, or alternatively for permissive intervention, allowing Susan Combs, in her official capacity as Comptroller of Public Accounts of the State of Texas, to intervene in this lawsuit as a Defendant.

Respectfully submitted,

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s/ Nancie G. Marzulla
Nancie G. Marzulla
DC Bar No. 400985
Roger J. Marzulla
DC Bar No. 394907
Marzulla Law, LLC
1150 Connecticut Avenue,
NW Suite 1050
Washington, DC 20036

¹²⁸ Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,886.

(202) 822-6760
(telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Counsel for Proposed Defendant-Intervenor
Susan Combs, Comptroller of Public
Accounts for the State of Texas, in her
official capacity