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Via Fax and U.S. Mail

Lynn Scarlett
Acting Secretary of the Interior
Department of the Interior
18th and C Street, NW
Washington, DC 20240

Fax: (202) 208-6956

*Re: Comments on Petition to List Amargosa River DPS of the Mojave
Fringe-toed Lizard as Threatened or Endangered*

Dear Secretary Scarlett:

I represent EcoLogic Partners, Inc., a non-profit corporation that supports rational solutions to difficult land use problems, including those that arise in the deserts of the southwestern United States. On behalf of EcoLogic, I have reviewed the petition to list the Amargosa River Distinct Population Segment (DPS) of the Mojave Fringe-toed lizard as a threatened or endangered species, submitted to the Department of Interior by the Center for Biological Diversity and Ms. Sylvia Papdakos-Morafka ("Petitioners") on April 10, 2006. As my comments below demonstrate, our opinion is that the petition lacks scientific merit and should be denied.

A. SUMMARY OF CHALLENGE TO PETITION

The petition fails to provide sufficient data to support a determination by the Fish and Wildlife Service ("FWS") that the Amargosa River Population of the Mojave Fringe-toed Lizard is a DPS. First, the Petition fails to establish that that the Amargosa River Population of the species is *discrete*. Second, even if FWS were to conclude that the Amargosa River Population is discrete, it is not a population that is significant to the species' taxon as a whole. Consequently, the Amargosa River Population of the Mojave

Fringe-toed Lizard is not a DPS, and therefore does not meet the listing criteria under Section 4(a)(1) of the Endangered Species Act.

B. ARGUMENT

1. The Amargosa River Population of the Mojave Fringe-toed Lizard Fails to Qualify as a Distinct Population Segment.

Under FWS's Policy Regarding the Recognition of Distinct Vertebrate Populations Segments Under the Endangered Species Act, 61 Fed.Reg. 4722(Feb. 7, 1996) ("DPS Policy"), a DPS must be *discrete* "in relation to the remainder of the species to which it belongs" and *significant* "to the species to which it belongs." 61 Fed.Reg. at 4725. The Amargosa River Population of the Mojave Fringe-toed Lizard fails to satisfy either part of this test.

a. Discreteness

A population is discrete if (1) "[i]t is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors"; or (2) "[i]t is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act." *Id.* at 4725. The Petition here does not present a case of an international border dividing populations. Petitioners, therefore, must rely entirely on the "markedly separated" prong of the discreteness test. However, Petitioners have failed to submit evidence adequate to establish that the Amargosa River Population is "markedly separated" from other Mojave Fringe-toed Lizard populations.

Although Petitioners argue that the Amargosa River Population is distinct, they provide little evidentiary in support of this claim. Specifically, Petitioners cite to one study to support the assertion that *U. scoparia* have not been found more than 45 meters from its typical habitat. The supporting study is currently under review and bases its conclusions on an earlier study from 1958. At best, the current study can only conclude that dispersal is "highly improbable." In fact, Petitioners admit that "[D]ispersal of Mojave Fringe-toed Lizard populations is poorly studied." *See* Petition at page 7. Petitioners nevertheless assert that interaction between populations is "unlikely." In the same breath, however, they conclude that conservation of existing habitat is imperative because the species "cannot relocate." They provide no evidence, other than conjecture, to prove marked separateness. Additionally, Petitioners claim the existence of genetic studies that show that the Amargosa River Population is reproductively isolated. Petitioners cite no specific passages from these studies, which themselves are still under review. Such an vague and speculative references do not constitute good or even acceptable science. They certainly cannot justify or otherwise support a formal FWS determination of discreteness.

b. Significance

In addition to failing to support their claim that the Amargosa River Population is discrete, Petitioners have failed to establish that the Amargosa River Population of the Mojave Fringe-toed Lizard is significant to the species' taxon, as a whole.

Under the DPS Policy, if a population is discrete, then the FWS considers the biological and ecological significance of the population to the taxon to which it belongs. *DPS Policy*, 61 Fed.Reg. at 4724-25. The purpose of the significance element of the DPS test is to ensure that the authority to list a DPS be exercised sparingly. Petitioners claim that the Amargosa River Population is significant because: (1) it shows marked genetic differences; and (2) loss of the Amargosa River Population would create a significant gap in the range of the species resulting in a loss of the species from a unique ecological setting.

Petitioners contend that the Amargosa River Population shows marked genetic differences from other Mojave Fringe-toed Lizards. For this proposition, Petitioners rely on the work of the late David Morafka, Ph.D. This reliance, however, is problematic and raises more questions than it answers.

First, it seems odd that Petitioners are making these claims of genetic diversity at this time. If it is true that Dr. Morafka had devoted a substantial amount of time to the study of this species, one would think that much of his work would have been presented for peer review before this Petition was filed. As it is, Dr. Morafka's data and conclusions on the genetic diversity of the Amargosa River Population are presented here for the first time, without benefit of peer review. Perhaps, as Petitioners assert, they have submitted this Petition to honor the memory of Dr. Morafka who passed away in 2004. While such a sympathetic impulse is certainly understandable, it has no place in policy-based, scientifically-supported land management decisions.

Second, even if one were to accept Dr. Morafka's as-yet unreviewed work, it still falls short of making definitive statements on the genetic diversity of the Amargosa River Population. For example, it states that the "presence of distinct haplotypes gives credence to the *possibility* of regional adaptations and incipient speciation." Even Petitioners admit that these unique haplotypes "need further exploration." See *Petition* at page 12. This is hardly a sound or firm basis for declaring, in a formal FWS rule, that the Amargosa River Population is, in fact, "markedly separated" from other Mojave Fringe-toed Lizards.

Petitioners next claim that the loss of the Amargosa River Population would create a gap in the range of the taxon, but they do not clearly explain why the gap would be significant. At page 12 of the document, Petitioners remark that this is a peripheral population and that it is the only population in the Amargosa River drainage.

The fact that this is a peripheral population is of no consequence to the significance assessment. The Ninth Circuit understood the DPS Policy to use the term “significant” to mean important. (*See, National Ass’n of Home Builders*, the Court was only concerned with the location of the population as it related to determining whether there was a gap; location does not by itself import significance.) Additionally, Petitioners claim that the unique haplotypes of this Population “very likely” represent unique regional adaptation.” However, Petitioners also admit that, “[T]hese differences need further exploration.” *See, Petition*, page 12. Thus, Petitioners’ have not provided sufficient evidence and data to demonstrate that the loss of this potentially genetically distinct population would be so significant as to impair the survival of the species.

Petitioners have also misinterpreted the first significance factor: “Persistence of the discrete population segment in *an ecological setting unusual or unique for the taxon.*” (*Emphasis added.*) Petitioners argue in passing that the loss of the Amargosa River Population would result in a loss of the species from a unique ecological setting (Petition, p. 12), but they make no attempt to prove the point. They argue merely that the Amargosa River Population exists at the periphery of the species’ range. The ecological setting referred to in the first significance factor requires that the setting be unusual or unique *for the taxon*. A Mojave Fringe-toed Lizard located in a dune environment or a River drainage area is not unique or unusual for the taxon. The Petition implicitly acknowledges this. For example: At page 4, the Petition states that the Mojave Fringe-toed Lizard is highly adapted to fine sand environments, which means that a variety of fine sand environments would serve and that the Amargosa River basin is not unique in providing support for the species. At page 7, under the heading “Habitat Requirement,” the Petition indicates that Mojave Fringe-toes Lizards inhabit small and large dunes of fine, Aeolian sand, the margins of dry lakes, washes, and hillsides. These fine sand habitats range in elevation from sea-level to 600 meters. Obviously, then, there is nothing unique about the Amargosa River basin. Finally, on page 11, the Petition describes Bristol-Lanfair Basin, Pleistocene Colorado River, Lucerne Trough, and Mojave River Sink as river drainages which, like the Amargosa River, create the sand dunes necessary for the species). Thus, the existence of a Mojave Fringe-toed Lizard in a sand dunes or a river basin is not a unique or unusual ecological setting for the taxon.

In short, the Petitioners have failed to provide sufficient data to enable the FWS to determine that the Amargosa River Population is a discrete and significant population that warrants listing as a threatened or endangered species.

2. The Petition Attempts to Use Argument as Substitute for Adequate Data

Throughout the Petition, the Petitioners attempt to bolster their claims with hyperbolic argument or inapplicable data. These, however, do not qualify as the best scientific evidence available – the standard by which all listing petitions must be measured. Set forth below are examples of the Petition’s misuse of data and/or reliance on inflammatory assertions that have no scientific base.

- At page 2, the Petition states, “The range of the Amargosa River DPS (Dumont Dunes, Ibex Dunes, and Coyote Holes) is highly restricted to fine sand environments, as are all fringe-toed lizards.” This claim attempts to benefit from research and data collected about other lizard species concerning habitat restriction and in doing so, inflates the credibility of the claim as it relates to the Amargosa River Population.
- At page 4, the Petition states, “Unfortunately, this unique lizard, along with many other desert dwelling plants and animals, are threatened by rampant ORV destruction of its habitat.” This statement refers to other species not relevant to the consideration of listing the Mojave Fringe-toed Lizard in this Petition. The purpose of this comment is solely to inflame the reader against ORV (also known as OHV) recreation.
- At page 7, the Petition discusses Habitat Requirements. However, the majority of the discussion focuses on a sister-species and not on the exact species under consideration for listing.
- At page 8, in its discussion of species distribution, the Petition indicates that ORV activity at Ibex Dunes, Dumont Dunes, and Coyote Holes threatens the Mojave Fringe-toed Lizard. Yet, Petitioners fail to provide any quantitative assessment of these potential threats. Thus, the reader has no information as to the number of lizards affected by the ORV activity.
- Petitioners provide no information on population declines, if any, observed or recorded concerning the species. Indeed, Petitioners provide no environmental baseline for the Mojave Fringe-toed lizard from which to assess whether or not there is a decline, and if so, whether any such decline threatens the viability of the species. At page 13, the Petition merely states that the “recent surveys determined that Mojave Fringe-toed Lizards may occur at extremely low densities at Ibex Dunes, placing them at risk of extinction. As support for this claim, Petitioners cite to an 8.5 hour study conducted in 1998.
- At page 14, the Petition states that in 2000 Dr. Morafka conducted extensive surveys (no information is given to explain what “extensive” means) in which he failed to substantiate the presence of the species at Death Valley National Park and Panamint Dunes. Petitioners go on to state that this indicates that the species was either extirpated or misidentified. However, that one person (Dr.

Morafka), conducting a single survey of undisclosed duration, was unable to confirm the presence of a species, especially one with the camouflage capabilities of the Mojave Fringe-toed lizard, does not confirm its absence in an area.

- At page 14, the Petition states that “the Amargosa River Population is limited to three isolated populations, each of which is at risk of extinction primarily because of habitat destruction from ORV.” The Petition does not provide any evidence of a baseline from which to judge a population decline; it fails to provide evidence of direct take or harm from ORVs to the species; and it fails to establish that these populations are, in fact, isolated.
- At page 14, the Petition discusses the first consideration for listing under the ESA, destruction of habitat. However, Petitioners do not provide evidence of habitat damage or loss in Dumont Dunes, Ibex Dunes, or Coyote Holes. Instead, they draw a weak analogy between these areas and alleged destruction of *vegetative* habitat in the Algodones Dunes, which is many miles away and provides no habitat for the Amargosa River Population of the lizard.
- At page 17, the Petition cites ORV induced hearing loss as causing harm to the Mojave Fringe-toed lizard. However, Petitioners cite to an outdated study conducted in 1979. Moreover, the study is not tied to a geographic area and mentions only level of sound (95 dBA) and time (500 seconds). It does not factor in distance. Moreover, the Petition provides no evidence that members of the Amargosa River Population encounter these kinds of noise impacts or otherwise suffer hearing impairments as a result of ORV use.
- At page 17, the Petition states that ORV’s caused tail loss and fatal compression. However, the Petition does not provide data that shows that such events have occurred at Dumont and Ibex Dunes, and/or Coyote Holes. Instead, the Petition cites to observations of sister species. (Although the Petition states that Luckenbach found 11 Fringe-toed lizards found dead in ORV impacted areas in a 1983 survey, it does not indicate where these areas were located. Moreover, the Petition states that this an unusually high percentage of loss, but does not provide any information related to population baseline from which to judge such a loss.)
- At page 18, the Petition states that the increase of ORV use creates a growing threat to the species. However, the information that Petitioner provides are population statistics and vehicle registrations. These numbers do not translate into the same

percentage of increased threat to the species. An increase in population does not necessarily mean more ORV riders, and neither does more vehicle registrations because one rider can register multiple vehicles.

C. CONCLUSION

It is an unfortunate fact, but a fact nonetheless, that the ESA is increasingly misused as a means to eliminate human activities that certain people do not like. The listing process is used as a weapon – not against species loss or extinction – but against citizens exercising their basic rights. From the paucity of scientific data attached to the subject Petition, it is clear that Petitioners have little evidence demonstrating that the Amargosa River Population of the Mojave Fringe-toed lizard is a DPS or is significant to its taxon; nor do they possess much evidence that this population is struggling to survive or is otherwise threatened. Instead, the Petition can only be read as screed against OHV use, which is an activity expressly permitted in many of the areas where the Amargosa River Population resides. In short, the Petitioners hope to use this listing to reduce or eliminate OHV use, not to protect the species necessarily.

This abuse of the ESA's listing process needs to stop. Resources spent reviewing such technically weak and blatantly biased petitions could be better spent on programs designed to actually protect and recover those species that truly are threatened.

Thank you for this opportunity to comment on this important issue. If you have any questions, please do not hesitate to contact me.

Sincerely,

DAVID P. HUBBARD, ESQ.

cc: EcoLogic Partners, Inc. (Board of Directors)