No. 14-31008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C.; PF MONROE PROPERTIES, L.L.C.,

Plaintiffs – Appellants

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

Consolidated with No. 14-31021

WEYERHAEUSER COMPANY,

Plaintiff – Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NOS. 2:13-CV-234, 2:13-CV-362, 2:13-CV-413, SECTION "F," HONORABLE MARTIN L.C. FELDMAN, PRESIDING

JOINT REPLY BRIEF OF THE APPELLANTS

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INTRODUCTION

The fundamental question in this case is whether the Endangered Species Act (the "ESA") can be construed to grant the U.S. Fish and Wildlife Service (the "Service") the power to designate unoccupied land as "critical habitat" when, in fact, it is not habitat at all, but merely a form of contingent habitat. The administrative record here is not disputed. No frog has been seen on Unit 1 lands since 1965. The Unit 1 lands are not adjacent to any frog population, are not reachable by any frog population, and are not in a condition to support a frog population even if frogs were artificially transported there. Stated plainly, Unit 1 plays no supporting role whatsoever to any existing population of frogs, nor can it given its location and current use. To designate these private lands as "essential to the conservation of the species" is beyond any rational interpretation of the ESA, and finds no support in the law or precedent of any Circuit.

The Defendants' argument rests on their oft-repeated and liberal description of Unit 1 as a remarkable "breeding site" and a "refuge" for the frogs from stochastic events that could threaten existing frog populations distantly located in Mississippi. The lands are neither. The undisputed truth from the administrative record is that no frogs are "breeding" in the Unit 1 ponds (and have not been for 50 years); no frog can naturally reach any Unit 1 site from Mississippi, as the lands are not adjacent to any other site and are far outside the natural range of the frog's ability to migrate there; no frog can be moved to Unit 1 because the lands are privately owned; and, even if frogs were to be moved there, they could

not survive because the essential habitat elements that the frogs need to survive are not present on Unit 1. The few ponds observed in Unit 1, therefore, are nothing more than historical artifacts of a long-ago abandoned frog habitat, which today is inaccessible to and unsuitable for the frogs. Nor can the Defendants point to evidence in the record showing that it is reasonably foreseeable that these lands will be converted back to some form of habitat, as the Defendants readily acknowledge that the government cannot coerce owners of private lands to forego other uses of their lands and dedicate them instead to the preservation activities that the government would prefer.

The Defendants never come to grips with the elementary flaw in their position: that the unoccupied lands in Unit 1 that were designated (on the Service's third review) are not currently habitat at all, and do not meet the standard set by Congress that dedications of unoccupied lands must be "essential to the conservation of the species." The Defendants also do not want this Court or any other court to review whether the foreseeable cost of this designation to the private landowners (up to $33.9 million) is disproportionate to any present or foreseeable benefit to the species, which, on this record, is either absent entirely or based upon speculation.

If the Defendants are correct that the ESA authorizes the designation of unoccupied lands in such circumstances, not only would this interpretation grant the Service powers that find no precedent in any prior case, it also would cause the ESA to break free from its constitutional moorings in the Commerce Clause.

Finally, the Service prepared no Environmental Impact Statement under the National Environmental Policy Act ("NEPA") in connection with its Unit 1 designation, based on its assertion that the conversion of these lands back to "habitat" is not presently foreseeable. If that is so, the designation itself must fail, as it becomes irrefutable that the Service truly does not anticipate the changes to the land that would make the land habitat in the first instance, exposing the designation as beyond the scope of any reasonable interpretation of the ESA.

ARGUMENT

I. The Service's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and capricious because the land is not habitat and will not benefit the frog now or in the foreseeable future.

The ESA allows the Service to designate public *and* private land as "critical habitat" for an endangered species but imposes strict statutory limits. Even land that is *actually occupied* by an endangered species cannot be designated unless it contains *all* of the "physical or biological features" that are "essential to the conservation of the species" and "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). As for land that is *unoccupied* by the endangered species, the ESA imposes an even "more onerous procedure": the specific *areas* themselves must be "*essential* for the conservation of the species." *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).[1] These strict limits make

[1] *See also Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2010) ("Designation of unoccupied land is a more extraordinary event that [*sic*] designation of unoccupied lands.").

perfect sense, as critical habitat designations under the ESA extend even to privately-owned land and impose great economic losses on landowners by preventing them from putting their land to other productive uses. In this case, the Service's own analysis determined that the designation of privately-owned Unit 1 as critical habitat could cost its owners up to $33.9 million over 20 years.[2]

Yet the Service now disavows the restraints of the original statutory scheme by adopting a watered-down interpretation of "essential" that would allow it to designate virtually any private lands across the United States as potentially restorable habitat—an expansive interpretation that defies logic and the plain meaning of the Act. The Federal Defendants contend that unoccupied land can be designated as "essential" even if it does not contain *any* of the habitat elements that the Service says are essential to the conservation of the species. Fed. Brief at 33.[3] In their view, all that is needed is some "potential to support recovery," *id.* at 17, even if that potential is entirely speculative.

The Federal Defendants further insist that their power to designate unoccupied land is not limited by "obstacles . . . that could prevent future use of the habitat by a recovering species," or by "uncertainty over whether the area desig-

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[2] *See* Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73–77, 87) (AR.6663–64, AR.6667).

[3] The appellee brief filed by the Federal Defendants (the Service, the U.S. Department of Interior, Daniel M. Ashe, and Sally Jewell) is designated herein as "Fed. Brief." The appellee brief filed by the Intervenors (the Center for Biological Diversity and the Gulf Restoration Network) is designated as "CBD Brief." The appellant brief filed by the Landowners is designated as "Landowners' Brief."

nated will ultimately benefit the species." Fed. Brief at 30, 22; *see also* CBD Brief at 9–10 ("Nothing in the ESA requires that unoccupied critical habitat be utilized for frog conservation 'now' or in the 'foreseeable future.'"). According to the Defendants, the Service is allowed to "determine the bounds of [the term 'essential'] on a case-by-case basis," Fed. Brief at 26, and this so-called "scientific conclusion" is entitled to deference. Fed. Brief at 30–31; *see* CBD Brief at 15 ("[The Service] made the requisite determination that the designated unoccupied area is essential to the conservation of the species, and *the Court must defer to this scientific determination* made within the scope of the agency's expertise.") (emphasis added). And yet, after all this, the Defendants still maintain that the "essential" requirement provides a meaningful limitation that "precludes . . . regulatory overreach." Fed. Brief at 35; *see also* CBD Brief at 15.

Here, the Service relied on this new and expansive interpretation of "essential" to designate Unit 1 as critical habitat for the dusky gopher frog. No dusky gopher frogs are present in Unit 1, and none have been sighted there since the 1960's. Unit 1 also does not play any sort of supporting role to adjacent habitat where frogs are actually present; in fact, the nearest frogs are over 50 miles away, in another state. Even if the frogs were transported artificially to Unit 1, they could not survive because the area lacks elements that the Service has determined to be essential to the frogs. And, most importantly, the record is devoid of any evidence suggesting that Unit 1 will ever be transformed in such a way that it could support the conservation of the dusky gopher frog.

As the Federal Defendants concede, the Service's designation of Unit 1 was based solely on its "*potential* to serve as a breeding area and a *possible* refuge in cases of random catastrophic events." Fed. Brief at 30 (emphasis added). Specifically, Unit 1 was deemed "essential" because it (1) contains several ponds that the Service speculates could be used for frog breeding and (2) is distant from current frog populations, and could therefore be used as "a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events."[4] Yet the Service recognized that, unlike every other designated unit, "the surrounding uplands [in Unit 1] are poor-quality terrestrial habitat for dusky gopher frogs," and would need to be restored before the frogs could live there.[5] The Service also recognized that the frogs would have to be transported and reintroduced to Unit 1 before it could be of any use to them.[6]

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[4] Final Rule, 77 Fed. Reg. at 35,124, 35,133 (ROA.635, ROA.644). According to the Service, "[m]aintaining the five ponds within [Unit 1] as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery." *Id.* at 35,135 (ROA.646). Notably, the Service provided an almost identical rationale for designating each of the 13 other units/subunits that were unoccupied at the time of listing: "Maintaining this area as suitable habitat . . . is essential to decrease the risk of extinction . . . and provide for the species' eventual recovery." *See id.* at 35,136–38 (ROA.647–49).

[5] Final Rule, 77 Fed. Reg. at 35,133 (ROA.644); *id.* at 35,135 (ROA.646) ("Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort.").

[6] *See* Final Rule, 77 Fed. Reg. at 35,135 (ROA.646).

Critically, however, the Service acknowledged that the "voluntary" cooperation of the Landowners would be necessary for any such restoration and reintroduction, because a critical habitat designation "does not allow the government . . . to access private lands" and "does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners."[7] And the record in this case makes clear that the Service's plans for Unit 1 *will not be realized* because the Landowners have no intention of transforming their land into a frog refuge. *See* Landowners' Brief at 7 & n.24. Instead, the Landowners intend to continue using the land as a productive timber plantation and to develop homes and businesses on portions of the land when this becomes feasible. *See id.* at 7–8 & n.25. As the Federal Defendants recognize, Unit 1 cannot serve its intended purpose of frog conservation unless the land is "restored to a more natural condition of open-canopied forest, rather than a closed-canopy tree farm." Fed. Brief at 33. Because the Service is effectively asking the Landowners to donate their private land and bear heavy economic losses as a result, it is no surprise that the Service has reached "no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog."[8]

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[7] Final Rule, 77 Fed. Reg. at 35,123, 35,128 (ROA.634, ROA.639).

[8] Final Rule, 77 Fed. Reg. at 35,123 (ROA.634). As the Landowners pointed out in their opening brief, Landowners' Brief at 41 n.85, the ESA provides the Service with other options—such as purchasing Unit 1—that would allow it to directly manage the land for the conservation of the dusky gopher frog. *See* 16 U.S.C. § 1534. The Defendants notably fail to acknowledge these alternatives in their briefing.

The Federal Defendants fundamentally misunderstand, or mischaracterize, the Landowners' position. The Landowners do not argue that Unit 1 cannot be designated "simply because the current owners are opposed to re-introduction of the species." Fed. Brief at 27–28. As a general matter, the consent or cooperation of private landowners is not necessary for land to be designated as critical habitat. But in this case, the Service has explicitly recognized that its intended use of Unit 1 cannot be achieved without the Landowners' cooperation and sacrifice. In such circumstances, the issue of landowner cooperation becomes paramount to whether the designation is appropriate.

The Federal Defendants argue to the Court that there is "no basis" for the Landowners' argument that Unit 1 is currently "unsuitable" as habitat for the frog due to the conditions of the upland areas. Fed. Brief at 32. But the Service could not have stated more clearly in the administrative record that Unit 1 must be "restored" because closed-canopy pine plantations are "unsuitable as habitat for dusky gopher frogs." Final Rule, 77 Fed. Reg. at 35,129 (ROA.640) (emphasis added). The Federal Defendants suggest, implausibly, that this was merely a "general statement about pine plantations" that somehow does not apply to the closed-canopy pine plantation on Unit 1. *See* Fed. Brief at 33. At the same time, the Federal Defendants acknowledge, as they must, that the Unit 1 uplands "currently lack[] certain beneficial characteristics" that would need to be restored "in order to better support functions other than breeding." Fed. Brief at 32–33. But the upland features that Unit 1 lacks are not merely "beneficial

characteristics" that would "better support" the frog's functions—the Service determined that these missing features are themselves "essential to the conservation of the species." Final Rule, 77 Fed. Reg. at 35,131 (ROA.642) (emphasis added).

The Federal Defendants argue that "Congress left it to [the Service] to determine whether the probability that particular unoccupied habitat would benefit recovery of a species is sufficient to warrant designation." Fed. Brief at 18. Although the Service does have some discretion in evaluating the probability that some particular land will contribute to the conservation of a species, this determination cannot be "arbitrary or capricious" any more than the Service's other determinations can. At some point, the likely benefit to the species from an area becomes so remote—as it is here—that it would be arbitrary and capricious to designate that land as critical habitat. Even if it had been considered, on this record there can be no finding of a probability that Unit 1 will be used to benefit the conservation of the dusky gopher frog.

As the Federal Defendants recognize, "[t]he sole legal consequence under the ESA of designating an area as critical habitat is that it becomes subject to consultation under ESA § 7." Fed. Brief at 6. Yet the Federal Defendants admit that "if Unit 1 continues to be used for timber harvesting"—a prospect they characterize as likely—"there would be no federal nexus," and thus no Section 7 consultation requirement. Fed. Brief at 15 & n.3. If the consultation requirement is not triggered, the Service has no power to effect the environmental

changes in Unit 1 that would be necessary for Unit 1 to benefit the dusky gopher frog. The Federal Defendants are therefore correct to describe the vague and uncertain prospect of restoring habitat in Unit 1 as nothing more than a "future possibility." Fed. Brief at 61.

Although the Defendants argue that the Service somehow found that the Landowners' cooperation was likely to be obtained in the future, this is absolutely false and without any support in this record. *See* Fed. Brief at 33–34 ("[The Service] found that [restoration] could be accomplished 'with reasonable effort' using existing statutory tools such as habitat conservation plans to obtain landowner cooperation."); CBD Brief at 19 ("[T]he agency could reasonably anticipate that the Landowners would work cooperatively in the future . . . ."). The Service found that the Unit 1 uplands are "restorable with reasonable effort"—*if* the Landowners' cooperation is obtained.[9] The Service explained, however, that its prospects of obtaining the Landowners' cooperation rest on nothing more than a "hope."[10] As for the alleged "statutory tools" for extracting the Land-

[9] *See* Final Rule, 77 Fed. Reg. at 35,123, 35,135 (ROA.634, ROA.646).

[10] "Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." 77 Fed. Reg. at 35,123 (ROA.634).

owners' consent, the Service noted that its "tools and programs are voluntary," not compulsory.[11]

Apparently recognizing that there is no realistic hope of a change in land use by the Landowners, the Intervenor Defendants resort to pure speculation, hypothesizing that "the ownership of Unit 1 could change in the future, and the frog might benefit from different owners that would embrace the opportunity to save this animal from the brink of extinction." CBD Brief at 20. But any regulation grounded in such pure and unsupported speculation is beyond "arbitrary and capricious."

The Defendants' actual, but unstated, "hope" is that once Unit 1 is saddled with a critical habitat designation, the Section 7 consultation requirement will effectively restrict the Landowners' use of their land so severely that they will have no choice but to cave in to the Service's demands.[12] This is quite simply an abuse of the ESA's critical habitat provisions and of the Service's power. The ESA allows the Service to designate land "which is *then* [*i.e.*, at the time of the designation] considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). But here, the Service has designated land that it hopes to

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[11] 77 Fed. Reg. at 35,123 (ROA.634). There is no basis in the record to predict that the Landowners will at some point decide to undertake restoration efforts; rather, their opposition is clear and unequivocal in the administrative record.

[12] *See* Final Economic Analysis at 4-4 (¶ 76) (AR.6664) ("Under the most conservative assumption . . . regarding the outcome of section 7 consultation, the Service would recommend complete avoidance of development within Unit [1] in order to avoid adverse modification of critical habitat.").

transform into habitat that could support the frog's conservation. Rather than using a critical habitat designation to protect and conserve lands that are *currently* suitable habitat into which an endangered species could foreseeably expand, as it did for the other unoccupied lands included in the designation, the Service is attempting to use it to coerce private landowners into giving up land that is now being used as a productive timber plantation so that a frog refuge can be created and artificially populated in its place.

As the Landowners pointed out in their opening brief, the Service's rationale for designating Unit 1 would just as easily allow it to designate much of the land in the United States as unoccupied critical habitat—even developed areas—if, in the Service's opinion, such areas are "restorable with reasonable effort." *See* Landowners' Brief at 30–32. There is, after all, probably very little land in the United States that does not fall within the historical range of *some* endangered species that is threatened due to loss of habitat. Ironically, the Defendants' only answer is that such "'slippery slope' arguments are easily disregarded" because only areas that are "essential to the conservation of the species" may be designated. CBD Brief at 15–16; Fed. Brief at 34–35. Yet the Defendants urge that the ESA "does not limit [the Service's] ability to designate unoccupied habitat simply because the degree to which that habitat may benefit the species' recovery is uncertain," Fed. Brief at 17, that "[n]othing in the ESA requires that unoccupied critical habitat be utilized for frog conservation 'now' or in the 'foreseeable future,'" CBD Brief at 9–10, and that unoccupied lands with

nothing more than a "potential to support recovery" may be designated. Fed. Brief at 17. In the Defendants' view, all that is needed is one biologist's opinion that the land would be an ideal stand-by location to expand the population of some endangered species, *if* it were restored at some uncertain time in the future.

Nor does the requirement that land be "restorable with reasonable effort" provide any meaningful check on the Service's power, when it is the Service who declares what is "reasonable." As will be discussed below, the Service contends that its weighing of the costs and benefits of a critical habitat designation is completely unreviewable. And in this very case, the Service determined that the "reasonable effort" required to restore and maintain Unit 1 as suitable habitat for the frog could cost the Landowners up to $33.9 million. The Federal Defendants argue that the Service's decision was "carefully limited" because it did not designate land in Alabama where "surrounding upland areas had been replaced by residential development." Fed. Brief at 35. But like the residential developments in Alabama, the Landowners' timber operations on Unit 1 are both economically valuable and entirely inconsistent with the Service's goal of creating a frog refuge. The fact that these timberlands lack buildings and concrete should not make them any more prone to a critical habitat designation, and to allow such an approach would create a perverse incentive for landowners to ensure that their lands are *not* restorable.

The Federal Defendants note, correctly, that "one of the 'central purposes' of the [ESA]" is "to preserve ecosystems upon which listed species de-

pend." Fed. Brief at 27 (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 699 (1995)). But the dusky gopher frog does not "depend" on Unit 1 in any legitimate sense of the word, and the Service is instead using a highly malleable definition of "essential" in an attempt to reclaim and restore land upon which the frog has not depended for decades. The Service's designation of Unit 1 is thus arbitrary and capricious, and should be overturned.

II. The Service's failure to exclude Unit 1 from its critical habitat designation based on a grossly disproportionate economic impact is reviewable by this Court and is plainly arbitrary and capricious.

Before designating land as critical habitat, the Service "*shall* . . . take[] into consideration the economic impact" of designating that area, and it "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). Notwithstanding this very clear statutory mandate to consider economic impacts, the Federal Defendants contend that "a decision by [the Service] not to exclude areas due to economic impact is entirely discretionary and hence unreviewable" by any court. Fed. Brief at 36. This is a troubling assertion of power that should not be ratified by this Court. By mandating that the Service consider economic impacts, Congress necessarily intended that the consideration given must be meaningful and the conclusions reached must not be arbitrary or capricious; otherwise, its command to consider economic impacts would amount to nothing more than a suggestion.

The Federal Defendants argue that "there is no judicially manageable standard by which to judge [the Service's] decision *not* to exclude areas from a designation." Fed. Brief at 40. Yet the Federal Defendants admit that the very same sentence in the same statute "provides a judicially manageable standard to judge the agency's decision *to exclude* areas from critical habitat designation"—specifically, "if the agency chooses to exclude, it must do so on the basis that the benefits of exclusion outweigh the benefits of designation." Fed. Brief at 40 (second emphasis added).[13] The two standards, of course, are the same: if a reviewing court can consider whether the benefits of exclusion outweigh the benefits of designation, it can just as easily determine whether the benefits of designation outweigh the benefits of exclusion. And whether the Service ultimately decides to include or exclude an area, it is always required to "take[] into consideration the economic impact." 16 U.S.C. § 1533(b)(2). Accordingly, the district court recognized that the Service's decision not to exclude Unit 1 must pass the basic test of rationality.[14]

The Federal Defendants cite district court opinions from outside the Fifth Circuit for the proposition that decisions "not to exclude" land from a critical habitat designation are unreviewable under the APA. Fed. Brief at 41–42; *see, e.g.*, *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 731 F.

[13] The statute also provides that areas may not be excluded if this exclusion would result in "the extinction of the species." 16 U.S.C. § 1533(b)(2).

[14] *See* Order and Reasons at 44 n.35 (ROA.2035) (quoting *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 850 (5th Cir. 2013)).

Supp. 2d 15, 29 (D.D.C. 2010). These cases are wrongly decided, however, based on a misreading of Supreme Court precedent and the APA. In *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985), the Supreme Court held that an agency's decision *not* to institute enforcement proceedings is presumptively unreviewable under the APA. The Court reasoned that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. On the other hand, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." *Id.* Here, the Service's decision first to designate and then "not to exclude" Unit 1 resulted in an affirmative act that plainly exerts the government's coercive power over the Landowners' property rights. This is exactly the kind of infringement of individual rights that courts can and should remedy.

The Service cannot sustain on any sound rational basis its decision "not to exclude" on this administrative record, which is why the Federal Defendants seek to declare the decision "unreviewable." *See* Fed. Brief at 40. The Service declared that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation" of Unit 1,[15] and the very word "disproportionate" presupposes that the costs and benefits have been weighed according to some standard. At the very least, a reviewing court could consider

[15] Final Rule, 77 Fed. Reg. at 35,141 (ROA.652).

whether the Service "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Yet the Service failed to provide even the most cursory analysis or discussion showing how the costs and benefits of the designation might have been weighed.

Contrary to the Federal Defendants' characterization, however, the Landowners' fundamental objection is not that the Service "failed to explain" why such a heavy burden—up to $33.9 million in losses, constituting over 99% of the total potential economic impact resulting from the critical habitat designation—fell upon Unit 1. *See* Fed. Brief at 45. The bigger problem is that such a heavy burden on Unit 1 land that will provide no benefit to the species now or in the foreseeable future is plainly disproportionate under any standard. Because the Service's consideration of the economic impacts on Unit 1 was arbitrary and capricious, the critical habitat designation must be overturned.

III. The Commerce Clause does not allow the Service to regulate activity having no meaningful connection to the survival or extinction of any species.

Although the Federal Defendants characterize the constitutional challenge in this case as "nearly identical" to the challenge in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), their discussion serves only to highlight critical distinctions in the two cases. Contrary to the Federal Defendants' argument, this Court did not hold in *GDF Realty* that "activity which destroys

the habitat of listed species" necessarily "has a substantial effect on interstate commerce." Fed. Brief at 49. *GDF Realty* analyzed the "take" provisions of the ESA, which prohibit, among other things, activities that "harm" listed species. *See GDF Realty*, 326 F.3d at 625; 16 U.S.C. §§ 1532(19), 1538(a)(B). Critically, "harm" is defined as "an act which *actually kills or injures wildlife*. Such act may include significant habitat modification or degradation *where it actually kills or injures wildlife* by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (emphasis added). *GDF Realty* says nothing whatsoever about habitat modification or degradation that does not rise to the level of a "take" by killing or injuring wildlife, and it certainly has no relevance to unoccupied lands such as Unit 1 that cannot even properly be called "habitat" because they are not actually habitable by the species or supporting the species in any way.

The Federal Defendants argue that "[i]t is not possible to draw a meaningful distinction for Commerce Clause purposes between the habitat protection provided by the ESA's prohibition on 'takes' . . . and the habitat protection provided by the designation of critical habitat." Fed. Brief at 53. To the contrary; the distinction is not only possible, but fundamental. This Court's reasoning in *GDF Realty* is straightforward: the ESA "take" provisions are a valid exercise of Congress's Commerce Clause powers because *species extinction* has a substantial, non-attenuated effect on interstate commerce. *See GDF Realty*, 326 F.3d at 640. The "take" provisions prohibit activity that "actually kills or injures" en-

dangered species, which has an obvious connection to species extinction and therefore to interstate commerce.

On the other hand, the Service here asserts the power to designate as "critical habitat" land that is not currently occupied by the frog and will not be utilized in any way for the conservation of the frog absent a series of speculative and highly unlikely events. Nothing that the Landowners could do on Unit 1 could possibly "kill or injure" any frogs because there are no frogs there. Nor will Unit 1 foreseeably be used in any way that would help to prevent the extinction of the species. The Defendants insist that unoccupied land can be designated as critical habitat even if it will not "be utilized for frog conservation 'now' or in the 'foreseeable future.'" CBD Brief at 9–10. But if the land will not be used for species conservation in the foreseeable future, it has no meaningful connection to species extinction—the only basis for regulation under the Commerce Clause.

The Federal Defendants cite four additional appellate opinions rejecting constitutional challenges to the ESA on different grounds, none of which shed any light on the issue here. *See* Fed. Brief at 52–53. Two of these cases involved the same "take" provisions addressed by this Court in *GDF Realty*. *See Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997). In the other two cases, the challengers argued that the Service has no power under the Commerce Clause to regulate intrastate species with no commercial value. *See San Luis & Delta-*

Mendoza Water Authority v. Salazar, 638 F.3d 1163, 1168 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1271 (11th Cir. 2007). But the Landowners do not argue that Congress and the Service lack power to protect the dusky gopher frog. Rather, the problem is that activity on Unit 1 and other similarly situated land[16] is so unrelated to the survival and conservation of any endangered species that it lacks the requisite substantial effect on interstate commerce—even in the aggregate.

The Intervenor Defendants argue that "[t]he Court has no power to 'excise individual applications of a concededly valid statutory scheme,'" CBD Brief at 25, but omit the qualifier: *if* these applications are an "*essential*" part of the statutory scheme, such that the purposes of the statute would otherwise be "*undercut*." *Gonzales v. Raich*, 545 U.S. 1, 24–25 (2005) (emphasis added). That's the crux of this case: that designation of unsuitable areas as "critical habitat" is not essential to the ESA. To the contrary, it is the designation of patently non-essential areas as "critical habitat" that undercuts the regulatory scheme. It is simply not enough to say that "designation of critical habitat," as a general matter, is "essential to [the ESA's] regulatory scheme." Fed. Brief at 55 (quotation omitted). If it is not essential to the overall regulatory scheme to regulate activity on private land that is not occupied by any endangered species and will not

[16] *I.e.*, privately-owned land that is not occupied by an endangered species, is not currently suitable for habitation by the species, and will not foreseeably be converted to suitable habitat.

support the conservation of any species in the foreseeable future, this class of activity cannot be regulated under the Commerce Clause.[17]

IV. The Service should have prepared an Environmental Impact Statement because its designation of Unit 1 as critical habitat assumes that major changes to the physical environment will be made.

Finally, the Service did not prepare an Environmental Impact Statement, which was required by NEPA.[18] The Federal Defendants argue that the Landowners have no right to seek redress under NEPA because their interests—which are allegedly "economic rather than environmental"—do not fall within the "zone of interests" protected by NEPA. Fed. Brief at 55–59. The Federal Defendants also suggest that an Environmental Impact Statement is not required because the designation of Unit 1 as critical habitat is not "proximately related to a change in the physical environment." *Id.* at 59 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

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[17] The Federal Defendants also argue that "any future regulation would occur in response to the landowners' commercial development plans, which further confirms that such regulation is authorized by the Commerce Clause." Fed. Brief at 50 n.14. But "future regulation," in the form of a required Section 7 consultation that could restrict the Landowners' use of their land, would be triggered by *any* activity on Unit 1 requiring any type of federal permit—not merely commercial development.

[18] The Federal Defendants point to *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), for the proposition that "critical habitat designations are not subject to NEPA." Fed. Brief at 60. The Tenth Circuit, however, after undertaking a thorough analysis of the legislative history, concluded that "the available material indicates that Congress intended that the Secretary comply with NEPA when designating critical habitat under ESA when such designations constitute major federal action significantly affecting the quality of the human environment." *Catron Cnty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996).

But the Service's rationale for designating Unit 1 in the first place rested squarely on the assumption that major environmental changes—such as conversion of the area to open-canopy forest, controlled burns, and importation of the dusky gopher frog—would be undertaken to establish a frog refuge.[19] These anticipated changes are plainly "environmental," rather than purely economic, and are "proximately related" to the critical habitat designation. The Service simply cannot have it both ways: If these anticipated environmental changes are too uncertain and speculative to trigger an Environmental Impact Statement, then the benefit to the species is too uncertain and speculative to support a critical habitat designation. If, on the other hand, these changes are deemed sufficiently likely to support the critical habitat designation, then an Environmental Impact Statement must be prepared.

CONCLUSION

For the foregoing reasons, the Landowners respectfully request that this Court reverse the district court and render judgment in their favor, excluding Unit 1 from the critical habitat designation.

[19] *See* Final Rule, 77 Fed. Reg. at 35,123 (ROA.634).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015, an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by either by the appellate CM/ECF system or by U.S. Mail to the following:

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,049 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2.

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I hereby certify that, in this Reply Brief filed using the Fifth Circuit CM/ECF document filing system: (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

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