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; KENNETH SALAZAR, Secretary of the Department of the Interior, in his official capacity; SALLY JEWELL, in her official capacity as Secretary Of The Department Of Interior,

Defendants-Appellees,

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenors 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, 2:13-CV-234, Section "F," Honorable Martin L.C. Feldman, Presiding

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APPELLEES' RESPONSE OPPOSING PETITION FOR REHEARING EN BANC

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INTRODUCTION

Under the Endangered Species Act ("ESA"), the United States Fish & Wildlife Service ("FWS" or "Service") is required, to the maximum extent prudent and determinable, to designate critical habitat for a species when it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A). The ESA defines "critical habitat" as including both occupied and unoccupied habitat. Thus, FWS may designate "the specific areas within the geographical area occupied by the species, at the time [it is listed as an endangered or a threatened species], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). It can also designate areas outside the geographical area occupied by the species at the time it is listed "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

This case concerns the dusky gopher frog ("the frog"), a highly endangered species that has lost most of its habitat to development and other factors, and whose surviving members are found only in a few ponds in Mississippi. FWS designated those ponds and surrounding uplands as critical habitat, but found that this species could not be conserved without additional habitat that was part of its former range but currently unoccupied. After a notice and comment process, FWS published a final rule designating 6,477 acres of critical habitat. 77 Fed. Reg. 35,118 (2012), ROA.629. At issue in this case is a parcel in Louisiana known as "Unit 1" containing

five ephemeral ponds where the frog was present as late as 1965, and which "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog," 77 Fed. Reg. 35,124, ROA.635. Landowners, who manage this parcel for timber production, challenged the Service's determination on a number of grounds, all of which were rejected by the district court and by the majority of the court of appeals panel. Judge Owen dissented from the majority's holding that the Service had properly interpreted the statute when it found that Unit 1 could be designated as unoccupied critical habitat because it is "essential for the conservation of the species."

Landowners do not claim that the decision conflicts with any decision of this Court or any other court. They argue that the issues surrounding whether FWS properly determined that Unit 1 was essential to the conservation of the frog are of such exceptional importance that *en banc* review is warranted. As we show, the panel majority's decision on this highly fact-bound issue was correct, and the issues raised by the Landowners and by the amici States do not warrant *en banc* consideration.

STATEMENT

The Landowners' claim of "exceptional importance" is based on factual premises that conflict with the record in this case. The Landowners claim that the Service "overreached" by designating Unit 1 as critical habitat when it "has no reason to believe that Unit 1 will ever contribute to the conservation of the dusky gopher frog in any way," and warn that property owners in "vast portions of the United

States" are threatened by future overreach unless the full Court reconsiders the case. Petition ("Pet.")at *iv-v*. The record does not support these assertions of agency overreach, but shows instead a careful, science-based determination that the features of a unique five-pond complex located on Unit 1 rendered the area "essential to the conservation" of the frog.

The Service's proposed designation of critical habitat for the frog included only 1,957 acres in Mississippi. Opinion ("Op.") at 3. In accordance with FWS policy, the agency sought the expert opinions of seven knowledgeable and independent specialists regarding the proposed rule. The peer reviewers concluded that FWS needed to go beyond the proposed critical habitat units in Mississippi and investigate sites in Louisiana and Alabama, because the low number of remaining populations and restricted range put the species at risk of extinction from catastrophic events. Op. 14-15.

Because of the rarity of ephemeral ponds within the historical range of the frog and their importance to the survival of the species, FWS focused on identifying more such ponds throughout the species' range. 77 Fed. Reg. 35,124, ROA.635. FWS considered sites in Alabama containing ponds, but eliminated them from consideration because of various physical or biological limitations. *Id.* (noting, *inter alia,* that "[t]he upland terrestrial habitat at this site has been destroyed and replaced by a residential development"). Unit 1, in contrast, which had been drawn to the Service's attention by one of the peer reviewers, had unique characteristics that made

it appropriate for designation. The peer reviewer pointed out that this parcel, which had supported a population of frogs as late as 1965, "contains the best remaining collections of breeding ponds for gopher frogs in Louisiana and some of the best ponds available anywhere in the historic range of the frog." AR.2315 at 2408. He also noted that although "the terrestrial habitat surrounding these ponds is currently in commercial pine plantations, it retains some stump holes and could be restored to suitable upland habitat for *R. sevosa* * * *." *Id.*

FWS inspected Unit 1 and found that the five ephemeral ponds were intact and of remarkable quality, 77 Fed. Reg. 35,133, ROA.644, and concluded that the ponds provide breeding habitat that in its totality is not known to be present elsewhere within the historical range of the frog, *id.* at 35,124. While the uplands associated with the ponds do not currently contain the features that would be most useful for the frog, they would be "restorable with reasonable effort." 77 Fed. Reg. 35,135, ROA.646; *see* AR.2315 at 2408 (comment from peer reviewer) ("It's much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds.") Importantly, Unit 1 includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the gopher frog. 77 Fed. Reg. 35,135, ROA.646.

Based on these facts, FWS determined that Unit 1 was essential for the recovery of the frog and included it in the final designation of critical habitat. 77 Fed. Reg. 35,133, ROA.644, Op.15-18. As the majority pointed out, the designation means

that federal agencies, in consultation with the Service, must insure that any action they authorize, fund or carry out is not likely to result in the destruction or adverse modification of the designated critical habitat, *see* 16 U.S.C. § 1536(a)(2), but does not compel the landowners to take any actions. Op. 7-8.[1]

ARGUMENT

A. The Service's determination was consistent with the ESA.

As the majority noted, "the Landowners do not challenge the consensus scientific data on which the Service relied." Op. 27. Instead, they charge that the Service evaluated that data under an erroneous interpretation of the statutory phrase "areas [that] are essential for the conservation of the species," 16 U.S.C. §1532(5)(A)(ii). Landowners (and the dissent) focus in particular on the Service's finding that the uplands surrounding the ponds were currently "unsuitable" because the commercial pine plantation does not have a sufficiently open canopy, but could be rendered suitable with "reasonable effort." 77 Fed. Reg. 35,135, ROA.646.

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[1] As required by 16 U.S.C. §1533(b)(2), the Service considered the economic impact of designating Unit 1 as critical habitat. The economic analysis commissioned by the Service considered a wide range of possible impacts, since it is unclear whether and to what extent any federal approvals or actions may affect Unit 1 in the future. On the one hand, costs to the Landowners may be non-existent if they continue the current use of the property for timber production or if they propose development that avoids wetlands under the jurisdiction of the Clean Water Act. Op. 10, AR.6625. The $33.9 million loss that Landowners frequently cite was not a prediction that such a loss was likely, but simply the other extreme of the continuum of possible effects, based on a worst-case scenario involving a complete inability to develop resulting from future denial of a Clean Water Act permit. 77 Fed. Reg. 35,140-35,141, ROA.651-652.

Landowners contend that a parcel cannot be found essential where "the land is currently unable to support the conservation of an endangered species in any way, and the Service has no rational basis to believe that it will ever do so in the future." Pet. 7 (subtitle). The dissent concluded that the Service could only find unoccupied habitat to be essential to the conservation of the species where it is "reasonably probable" that the land will in fact benefit the species.

There are numerous problems with this line of argument. First, the contention that the Service had "no rational basis to believe" that Unit 1 would ever support the conservation of the frog in the future is plainly inconsistent with the record. *See supra* at 3-4. Landowners have provided no grounds to contest the Service's finding that the ephemeral ponds could provide breeding habitat that in its totality is not known to be present elsewhere within the historical range of the frog, and that the uplands could be restored to preferable open-canopy woodlands with "reasonable effort." 77 Fed. Reg. 35,124, 35,135, ROA.635, 646.

Second, and more basically, there is nothing in the statute that supports a "reasonable probability" requirement, and no court has ever found such a requirement. The Landowners and the dissent try to derive support for such a requirement from the plain meaning of the word "essential." Pet. 9, Opp. 47 & 52. But the dictionary definitions they cite, *e.g.,* "'of the utmost importance: BASIC, INDISPENSABLE, NECESSARY,'" (Pet. 9, quoting from Merriam Webster's Collegiate Dictionary (11th ed. 2003)), do not suggest that *probability* has anything to

do with the meaning of "essential." A music teacher's statement that diligent daily practice is essential to becoming a good pianist may mean that it is of the utmost importance, but does not suggest anything about the probability that such practice will occur. The record here plainly supports that the habitat in Unit 1, with its rare complex of breeding ponds located far enough away from existing ponds in Mississippi to protect against disasters, is of the utmost importance to the frog, and hence "essential."

The plainness of the meaning of a statutory term is determined not only by the language itself, but also by "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, the phrase "upon a determination by the [Service] that such areas are essential for the conservation of the species" comes directly after and modifies the phrase "specific areas outside the geographical area occupied by the species at the time it is listed." 16 U.S.C. § 1532(5)(A)(ii). The fact that Congress authorized the designation of areas not occupied at the time of listing shows that it recognized that many imperiled species would have to expand their ranges if they were to recover. There is no reason to think that Congress failed to perceive that whether unoccupied habitat will actually aid in the conservation of a species will always be contingent on factors such as whether the species can overcome obstacles to its expansion and whether the area will be useable if and when such expansion occurs, either by natural migration or human-assisted translocation. Yet Congress placed no requirement on

the Service to determine the likelihood of successful expansion before designating unoccupied habitat as critical.[2]

If Congress had wanted to limit FWS to designating only unoccupied areas that had a strong likelihood of bringing about species conservation in a particular time frame it could easily have included appropriate limiting language, but it did not. Courts "ordinarily resist reading words or elements into a statute that do not appear on its face," *Dean v. United States*, 556 U.S. 568, 572 (2009), and there is nothing on the face of the ESA that imposes a limitation on the designation of unoccupied habitat based upon likelihood of eventual occupation. The fact that Congress did not provide a definition for "essential" indicates that Congress left it to the Service to determine the bounds of that concept on a case-by-case basis. *See, e.g., Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) (where ESA requires Secretary to designate critical habitat "to the maximum extent prudent or determinable," but does not define those terms, "[t]he ESA leaves to the Secretary the task of defining 'prudent' and 'determinable,'" so long as the Secretary makes

[2] Also relevant is the fact that the ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). This expansive language further confirms that the Service may use methods and procedures whose ultimate success may be uncertain.

designation decisions on the basis of the best scientific data available and after taking into consideration economic impacts).

No court has ever suggested that a determination of whether unoccupied critical habitat is essential to the conservation of a species requires a finding regarding the probability that the habitat will actually benefit the species. The dissent's reliance (Op. 48) in this regard on *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), is misplaced. *Bear Valley* upheld a critical habitat designation of unoccupied habitat that provided needed fresh water and gravel to downstream areas inhabited by a listed species of fish, but nowhere suggested that a likelihood of the unoccupied habitat benefitting the species was a prerequisite to the designation. The significance of *Bear Valley* is that it rejected the argument that the statute required the designated area be "habitable," because the text of the ESA only "requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" 790 F.3d at 994. The Landowners and the dissent here make the same mistake as the plaintiffs in *Bear Valley* by urging a requirement (probability of successful occupation) that is not supported by the language of the statute.

Ultimately, the Landowners and the dissent rest their case on a fear that, without a probability requirement, the Service may designate "empty field[s]" (Op. 56) and "vast portions of the United States" (Op. 42) as critical habitat. But as the majority pointed out (Op. 25, n.18), normal arbitrary and capricious review of critical habitat designations guards against determinations that are not rationally based on

specific data showing that particular areas are, in fact, important enough to conservation of the species to be determined "essential." In any event, while the Landowners and dissent claim that "agency overreach" is a serious problem justifying the full Court's intervention, neither point to a single other instance of a designation of unoccupied habitat as "essential" that they maintain was fundamentally improper.

B. The panel's Commerce Clause ruling provides no grounds for rehearing.

As the panel[3] noted, every Circuit that has considered the question, including this Court in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003), has found that the Commerce Clause authorizes Congress to enact measures to protect endangered and threatened species and their habitats in order to prevent the negative economic effects of species extinctions. Op. 36-37 (citing cases). The panel here found "no basis to distinguish the ESA's prohibition on 'takes' [as was upheld in *GDF Realty*] from the ESA's mandate to designate critical habitat," since the latter, like the former, is an essential component of the larger effort to protect the economic value of species. Op. 35-37.

The Landowners' "as applied" Commerce Clause argument simply recycles their argument that the designation of Unit 1 was not rational because the uplands are currently a closed-canopy forest. They contend that "[t]he ESA would not be

[3] The panel's rejection of the Landowners' Commerce Clause challenge was unanimous.

undercut if the Service were prohibited from designating land that cannot contribute to the conservation of an endangered species now or in the foreseeable future." Pet. 14. As set out *supra* at 3-4 & 6, the key factual premise of this argument is erroneous. The Service found, and supported, that Unit 1 *can* contribute to the conservation of the frog, because of the unique presence of five ephemeral ponds in a forested area that could be restored to a more natural open-canopied forest habitat "with reasonable effort." Landowners' argument that Unit 1 "cannot contribute" to the conservation of the frog is based on little more than the fact that they do not wish to cooperate in such efforts, but there is no evidence that Congress intended that a current landowner's unwillingness would preclude an area from being designated as critical habitat where the area possesses attributes that are essential to the conservation of the species. Contrary to the Landowners' evident assumption, the Commerce Clause does not limit Congress' authority to legislate to situations where there are no obstacles to a successful outcome.

As the panel here noted (Op. 35), this Court has already found that "the ESA is an economic regulatory scheme." *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature"). Relying on the reasoning of *GDF Realty,* the panel found that "allowing a particular critical habitat - one that the Service has already found to be essential for the conservation of the species - to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat." Op. 37. The panel concluded that the provision protecting

unoccupied habitat determined to be essential to the conservation of a species from federal agency actions is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Id.* Landowners' complaint (Pet. 15) that "[t]he panel majority was unable to identify any economic activity that is regulated through the critical habitat designation of Unit 1" misses the point, which is that the critical habitat designation itself does not have to directly regulate economic activity where it is an essential part of an economic regulatory scheme, without which the larger scheme would be undercut. *GDF Realty*, 326 F.3d at 639-40.

The Landowners' Commerce Clause argument presents no conflicts or exceptionally important question warranting *en banc* review.

C. The reviewability issue raised by amici States does not warrant rehearing.

The panel found that the Service, by commissioning and considering a thorough economic analysis, fulfilled the requirement of 16 U.S.C. §1533(b)(2) that it "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." Op. 31. The panel also concluded, consistent with the decision of every court that has reached the issue, that while Section 1533(b)(2) grants the Service discretion to exclude any area from critical habitat based on economic as well as other factors, it provides no meaningful standards for reviewing a decision not to exclude. Op. 29-30; *see Bldg. Ind. Ass'n of the Bay Area v. U.S. Dep't of Commerce,* 792 F.3d 1027, 1035 (9th Cir. 2015) (finding that a decision not to exclude areas from a critical habitat

designation is not reviewable), *cert. pending,* S. Ct. No. 15-1350; *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015) (same); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010) (same), *Home Builders Ass'n v. FWS*, No. S-05-cv-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal., Nov. 2, 2006) (same); *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) (same).

Landowners do not seek rehearing of the non-reviewability holding, though in a footnote they suggest that it increases the harm allegedly inflicted by the Service's designation of unoccupied habitat. Pet. 11, n.17. The amici States contend that rehearing on this issue is warranted, but their argument – that the non-reviewability holding allegedly conflicts with *Bennett v. Spear*, 520 U.S. 154 (1997) – is unconvincing. The question considered in *Bennett* was whether a determination to designate critical habitat pursuant to 16 U.S.C. § 1533(b)(2) is wholly discretionary, and the Court considered that question only for purposes of determining whether the ESA's citizen-suit provision applied, *see* 520 U.S. at 171-172. The Court held that such a determination is not wholly discretionary because the first sentence of Section 4(b)(2) provides that the "Secretary shall designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. §1533(b)(2)). The panel in this case faithfully applied that holding. Op. 16-17, 26-27, 31. The Court in

Bennett was not considering whether decisions about exclusions from critical habitat were reviewable, and accordingly there is no conflict.

CONCLUSION

The petition for rehearing *en banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing Response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I also certify that on this date a copy of the foregoing brief was served via the CM/ECF system or via U.S. mail to the following counsel:

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