IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al*.,

Defendants,

and

CENTER FOR BIOLOGICAL DIVERSITY, GULF RESTORATION NETWORK,

Intervenor-Defendants.

CIVIL ACTION

CASE NO. 13-cv-00234-MLCF-SS
CONSOLIDATED WITH:
13-cv-00362 & 13-cv-00413

PERTAINS TO 13-cv-00234

SECTION: F(1)

JUDGE: MARTIN L.C. FELDMAN

MAG. JUDGE: SALLY SHUSHAN

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendants Center for Biological Diversity and Gulf Restoration Network respectfully submit the following Reply in Support of their Cross-Motion for Summary Judgment on all claims set forth in Plaintiff Markle's Complaint.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Dusky gopher frog experts at the U.S. Fish and Wildlife Service ("FWS") and outside the agency came to the unanimous conclusion that Unit 1 must be designated as critical habitat for the frog to fulfill the requirements of the law. Other than its self-serving comments, Plaintiff cannot point to a single document – out of the hundreds in the record – that contradicts the findings of these experts. Instead, Plaintiff argues that Unit 1 cannot be lawfully designated because the frogs do not live there anymore and because Plaintiff, a current owner of Unit 1, refuses to restore the uplands to create the open canopy that the frogs require. But Plaintiff's refusal to cooperate in frog recovery provides no basis for setting aside the critical habitat designation.

As the Endangered Species Act requires, FWS designated "critical habitat" for the dusky gopher frog, including "specific areas outside of 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." 16 U.S.C. § 1533(a)(3)(A)(i); 16 U.S.C. § 1532(5)(A)(ii). Specifically, Unit 1 is "essential" for frog recovery because it contains the "best gopher frog habitat remaining in Louisiana," "important breeding sites for recovery" and "habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." 77 Fed. Reg. 35118, 35,135 (June 12, 2012); AR 1588. Nothing in the Act requires that FWS define "essential" or determine the total acres of frog habitat needed for recovery. Thus, the Court must reject Plaintiff's arguments that Unit 1 cannot satisfy the ESA's requirements for unoccupied critical habitat.

Plaintiff's complaints about FWS's economic analysis also miss the mark. Plaintiff relies solely on a decision from the Tenth Circuit, even though its reasoning hinged on a FWS regulation that both the Fifth and Ninth circuits have since found unlawful – and which FWS no longer applies. At bottom, Plaintiff believes that its economic interests in Unit 1 outweigh the benefits for the frog. Yet even if that were true (which it is not), nothing in the Act requires FWS to exclude lands from the critical habitat designation for economic considerations. To be sure,

every court that has examined the issue has found that the agency's decision not to exclude land is committed to agency discretion and unreviewable. Nor has any court ever found that an agency rule promulgated under the ESA exceeded authority under the Commerce Clause. Plaintiff's novel arguments to the contrary must be rejected.

For all these reasons, and as further explained below, Defendant-Intervenors ask that the Court grant the motions for summary judgment filed by Federal Defendants and Defendant-Intervenors.

ARGUMENT

I. FWS's Designation Of Unit 1 Satisfies The ESA's Substantive Requirements

A. No Definition Of "Essential" And No Threshold Viability Determination Are Required

Markle argues that FWS must define the term "essential" (as used in the ESA's definition of critical habitat) to provide an "express standard against which to measure, or even select, the factors" considered in the agency's critical habitat designations. Docket No. 105 (Markle Response) at 8. This argument is without merit. Congress delegated the broad power to FWS to administer the ESA, and the agency is given deference in its interpretation of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary.") (citing 16 U.S.C. § 1533). Nothing requires that the agency provide an "express standard" for every term it interprets. Consistent with the ESA and relevant case law, FWS provided a species-specific assessment of what is essential to conserve the gopher frog. No more is needed, and Markle fails to cite a single case standing for its contrary proposition.

Moreover, contrary to Markle's concerns, FWS does not have "unfettered authority" to designate critical habitat, even without such an "express standard." For unoccupied land, the agency must reasonably find that the area is "essential" for the conservation of the frog. 16 U.S.C. § 1532(5)(A)(ii). Here, based on the scientific expertise of its own agency biologists and

frog specialists outside of the agency, FWS concluded that Unit 1 is "essential for the conservation of the species" because it "provides important breeding sites for recovery" and "includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." 77 Fed. Reg. at 35,135; AR 1588 ("I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*."); *see also* Docket No. 93-1 (Intervenor-Defendants' Opening Brief) at 9-10 (summarizing FWS's findings on the importance of Unit 1). The Court must defer to this scientific determination made within the scope of the agency's expertise. *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 103 (1983).

Markle further argues that before designating critical habitat FWS must identify "the point" at which the protections of ESA will no longer be required by addressing "the threshold question of how much habitat is required for species conservation." Docket No. 105 (Markle's Response) at 10. As explained in Intervenor-Defendants' Opening Brief, the ESA provides that such analysis occurs at a later stage: when the agency develops a recovery plan. Docket No. 93-1 at 7-9. This approach does not ignore the important role of critical habitat designation in recovering listed species. FWS can reasonably determine that an area is essential for recovery without knowing exactly how much total habitat is needed for recovery. *See Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010) (rejecting a similar argument that attempted to import recovery planning into the process of designating critical habitat).

In short, the ESA requires a reasonable determination that Unit 1 is "essential for the conservation of the species," and FWS did that.

B. FWS Was Required To Designate Unit 1 Because It Is "Essential"

Markle argues that Unit 1 provides "no benefit" to the frog and that FWS therefore abused its discretion by designating Unit 1 as critical habitat. Docket No. 105 (Markle's Response) at 6. Specifically, Markle argues that Unit 1 cannot be essential because it is "inaccessible and unsuitable." *Id*. The Court must reject Markle's biased and non-expert opinion

on what is needed for frog recovery.

The record shows that Unit 1 is the most suitable frog habitat remaining in Louisiana. AR 1588 ("The critical habitat proposed in Unit 1 contains the best gopher frog habitat remaining in Louisiana, to my knowledge, and some of the best breeding ponds available anywhere in the historical range of *R. sevosa*."); *see also* 77 Fed. Reg. at 35,135 ("Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential . . . ."). The ESA requires that designated critical habitat be essential but does not require accessibility or suitability. Imposing those additional requirements urged by Plaintiff would be contrary to the ESA's purpose of conserving the ecosystems upon which rare species depend. 16 U.S.C. § 1531(b).

The fact that the Unit 1 owners will not currently allow the frogs access to this land is irrelevant. Absolutely nothing in the ESA or any case requires that land be "accessible" to support a finding that it is "essential." The current owners want to sell the land for development, and the future owners may embrace the opportunity to help save an endangered species. To be sure, developers of the land surrounding the gopher frog's best remaining breeding pond in Mississippi have worked cooperatively with FWS, Intervenor-Defendants, and others to ensure that the frog remains protected. *See* Docket No. 22-2 at 8 (Greenwald Dec. ¶ 11). Furthermore, the Final Rule never states that the frog could not presently survive in Unit 1.

Because FWS found that Unit 1 is "essential," the agency was required to designate it as critical habitat. The ESA provides that FWS "shall . . . designate any habitat of such [listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). And the definition of critical habitat includes "specific areas outside of 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." 16 U.S.C. § 1532(5)(A)(ii). Because the ESA mandates that FWS designate these essential lands as critical habitat, the Court must reject Markle's argument that FWS's designation of Unit 1 was an abuse of discretion.

In sum, the record supports FWS's determination that Unit 1 is essential, and the Court

must reject Markle's self-serving arguments to the contrary.

C. Unoccupied Critical Habitat Does Not Need Primary Constituent Elements

Markle erroneously asserts that FWS had to find PCEs in Unit 1 to designate it critical habitat, but that requirement is only for occupied land. 16 U.S.C. § 1532(5)(A). For unoccupied land, such as Unit 1, the regulations require FWS only to "focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species." 50 C.F.R. § 424.12(b) (emphasis added). Here, FWS's designation of Unit 1 easily complies with this regulation, which requires "focus" on the features when "considering" critical habitat but does not require the actual presence of PCEs in unoccupied habitat.

It cannot be disputed that FWS thoroughly analyzed the PCEs that the frog requires when designating critical habitat. 77 Fed. Reg. 35131. As a result of this analysis, even though all three PCEs are not currently found in Unit 1, FWS reasonably concluded that Unit 1 provides "habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts." 77 Fed. Reg. at 35,135. In short, the Final Rule complies with the regulation upon which Markle relies because it requires only consideration of the availability of the PCEs, and the Final Rule does that.

Citing *Fisher v. Salazar*, Markle concedes that "in a different case, it may make sense to designate such areas [lacking PCEs] as critical habitat." Docket No. 105 (Markle's Response) at 7. But Markle's attempt to limit *Fisher* to its facts is unpersuasive. In *Fisher*, the unoccupied habitat provided a transition corridor, and here, the unoccupied habitat provides "habitat for population expansion outside of the core population areas." *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1366-67 (N.D. Fla. 2009); 77 Fed. Reg. at 35,135. In both cases, the agency determined that an area lacking PCEs and unoccupied at the time of listing could nevertheless be essential to a listed species. Again, the Court must defer to the agency's scientific determination. *Balt. Gas & Elec. Co.*, 462 U.S. at 103.

II. FWS Properly Considered The Economic Impacts Of The Critical Habitat Designation

A. FWS Used An Appropriate Methodology To Analyze Economic Impacts

Markle fails to show that it was unreasonable for FWS to rely on the baseline approach to analyze the economic impacts of the gopher frog critical habitat designation. Markle relies solely upon an outdated Tenth Circuit case to argue that FWS should have used the co-extensive approach (rather than the baseline approach). *See N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001). While the Tenth Circuit in *New Mexico Cattle Growers* rejected the baseline approach, Markle fails to recognize the crucial context of that holding. As explained in Intervenor-Defendants' Opening Brief, the Tenth Circuit found the "baseline" approach to be "virtually meaningless" because under the now-rejected "functional equivalence theory," the critical habitat designation did not add any significant new protections or costs apart from those already triggered when the species was listed. Docket No. 93-1 at 13-17. Importantly, since the Tenth Circuit decided *New Mexico Cattle Growers*, courts outside of the Tenth Circuit have universally rejected the rationale of the co-extensive approach because it was based upon the functional equivalence theory that both the Fifth and Ninth circuits have since found unlawful – and which FWS no longer applies. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 445 (5th Cir. 2001); *Gifford Pinchot v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004).

Moreover, under Markle's preferred approach, FWS would need to analyze the cumulative economic impacts of the species listing and the critical habitat designation together. But that approach creates a deceptive result because economics are not lawfully considered in species listings. *See* 16 U.S.C. § 1533(a)(1). Given this context, Plaintiff cannot meet the high burden required for the Court to reject the agency's analysis.

Even if the Court is inclined to find that FWS used the wrong methodology, Markle has not experienced any harm from the agency's use of the baseline method. Unit 1 is unoccupied, and as such, the economic impacts would be identical under both the baseline and co-extensive methods. Thus, in addition to the jurisdictional problem arising from the lack of Markle's harm

here, there would be no practical relevance to remanding to the agency for further analysis. *See Whitehouse Hotel L.P. v. Comm'r*, 615 F.3d 321, 343 (5th Cir. 2010) ("Federal courts are only permitted to rule upon an actual 'case or controversy,' and lack jurisdiction to render merely advisory opinions beyond the rulings necessary to resolve a dispute.").

B. FWS's Decision Not To Exclude Unit 1 Is Unreviewable And Within Its Discretion

Markle argues that FWS's decision not to exclude Unit 1 is reviewable, even though every other court that examined the issue found that decisions not to exclude are "committed to agency discretion." *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, 731 F.Supp.2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *see Building Industry Ass'n of the Bay Area v. U.S. Dept. of Commerce*, No. 11-4118 PJH, 2012 U.S. Dist LEXIS 170688, at *19 (N.D. Cal. Nov. 30, 2012) ("In this case, section 4(b)(2) of the ESA does not provide any standard by which to judge an agency's decision not to exclude an area from critical habitat designation."); *Bear Valley Mut. Water Co. v. Salazar*, 2012 U.S. Dist. LEXIS 160048, at *41 (C.D. Cal. Oct. 17, 2012) ("The choice not to exclude habitat is not judicially reviewable because it is committed to agency discretion."); *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, No. S-05-0629 WBS-GGH, 2006 U.S. Dist. LEXIS 80255, at *66 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

With all relevant authority contrary to its position, Markle points to the Fifth Circuit's decision in *Suntex Dairy v. Block*, 666 F.2d 158 (5th Cir. 1982). But Markle's reliance on this case is misplaced. After acknowledging the narrowness of the exception to judicial review, the Fifth Circuit nevertheless found that the agency decision at issue in that case – the Secretary of Agriculture's decision to issue an order combining six milk marketing orders into a single new order – was committed to agency discretion. *Id*. at 163-65. In that case, the Fifth Circuit found

that the statute provided no law to apply because it "left to [the Secretary's] administrative decision whether or not to issue [the order] . . . ." *Id.* at 165.

Similarly, the ESA here allows FWS to decide whether or not to exclude critical habitat. The ESA provides: FWS "may exclude any area from critical habitat if [FWS] 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). No standard is given for the decision to not to exclude. Markle's arguments that weigh the benefits of exclusion against the benefits of inclusion are misplaced because the ESA requires such balancing only when the agency chooses to exclude an area (but not when it chooses to not exclude an area). *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 994 (D. Alaska 2013) ("The need to balance the benefits of exclusion versus inclusion arises only when the Service decides to exclude an area, not include one."). Moreover, even if FWS found that the benefits of exclusion outweigh the benefits of designating – which it did not, FWS would have the discretion – because of Congress's choice of the word "may" – to nevertheless designate the area as critical habitat.[1]

Finally, even if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion. *Bennett v. Spear*, 520 U.S. 154, 172 (1997); *see Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009) (applying the "highly deferential" "abuse of discretion" standard). As explained in Defendant-Intervenors' Opening Brief, the agency's decision easily survives this deferential standard. Docket No. 93-1 at 17-19.

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[1] Citing to *Ellison v. Conner*, 153 F.3d 247 (5th Cir. 1998), Markle argues that the ESA provides law that the Court can apply to evaluate the agency's exercise of discretion. *Ellison* applies the holding of *Suntex Dairy*, which explains that "action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed." *Suntex Dairy*, 666 F.2d at 163. Under the factors analyzed in *Ellison*, plaintiffs can, and indeed have, challenged agency decisions to include areas within critical habitat designations based on the requirements of the ESA. But here, as explained above and in Defendant-Intervenors' Opening Brief, the legislative scheme indicates that the decision not to exclude is committed to agency discretion because Congress gave no factors relevant for the decision not to exclude. Moreover, given the complicated scientific underpinnings of such a decision, it is good policy to leave that decision to the expert wildlife agency.

III. Markle's NEPA Claim Fails

A. NEPA Does Not Apply To The Critical Habitat Designation

Markle insists that NEPA applies by arguing that the Final Rule "literally calls for a physical change to the environment through management of the habitat . . . ." Docket No. 105 (Markle Response) at 14. Yet the record is clear that the designation of Unit 1 will not immediately result in any change to the physical environment. *See* Docket No. 93-1 at 20-21. FWS cannot force the landowners to take any action to modify Unit 1. 77 Fed. Reg. at 35,128 ("Such [critical habitat] designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners."). FWS has no existing agreements with the private landowners of Unit 1 to manage the site to improve habitat for the frog, nor can any actions (such as prescribed burning) be implemented without the cooperation and permission of the landowners, who have made clear that they will not manage the land for the frog. 77 Fed. Reg. at 35,128; Docket No. 69-3 at 2 (Rockwell Decl. ¶ 7) ("[Markle] has no intent to manage Unit 1 for gopher frog habitat.").

Markle emphasizes that NEPA applies to "proposed agency actions" and argues that the landowners' refusal to manage the land for the frog is somehow therefore irrelevant. Docket No. 105 (Markle's Response) at 14. This argument misses the mark, however, because the Final Rule is not an agency proposal to physically manage the land. The Final Rule designates critical habitat and no physical alteration of the environment results from that designation. If any future federal actions to restore critical habitat were proposed, those actions could then be subject to NEPA. But the critical habitat designation by itself does not lead to any changes in the physical environment and NEPA is therefore not triggered now. Thus, landowners' willingness to cooperate with FWS to make these changes now is not "irrelevant" as Markle argues. Instead, Plaintiff's NEPA claims turn on this question, which the record clearly answers.

B. Markle Lacks Prudential Standing For Its NEPA Claim

Because its asserted economic injuries do not fall within the zone of interests recognized by NEPA, Markle tries to assert an environmental injury from pond maintenance and controlled burns. Docket No. 105 (Markle Response) at 5. But again, any such physical changes to the environment will not occur as a result of the designation of critical habitat. If someday a federal agency (with the cooperation of the landowners) proposed to restore the critical habitat, Markle might then be able to assert an environmental harm that would fall within the zone of interests recognized by NEPA. But now, because Markle fails to prove that it will suffer any environmental harm from the designation of critical habitat, Markle lacks prudential standing to bring its NEPA claim, which must therefore be dismissed.

IV. Designation Of Unit 1 As Critical Habitat Is Proper Under The Commerce Clause

Markle makes much of the Supreme Court's decision in *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2571 (U.S. 2012), but that case does nothing to alter the Fifth Circuit and Supreme Court precedent analyzed in Intervenor-Defendants' Opening Brief. Docket No. 93-1 at 22-24.

In *NFIB*, the Supreme Court explains that Congress has the "power to regulate 'class[es] of activities' . . . ." *NFIB*, 132 S. Ct. at 2590 (citing *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)). Here, the relevant class of existing economic activity is nearly identical to that which the Fifth Circuit upheld under the Commerce Clause in *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 639 (5th Cir. 2003). Specifically, the Fifth Circuit found that the "ESA's protection of endangered species is economic in nature," and that the majority of species losses "would result from economic activity." *Id.*; *see San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011) (summarizing how cases have found "why the protection of threatened or endangered species implicates economic concerns"). To be sure, Plaintiff's motivation for bringing this lawsuit was partly to prevent the agency from regulating economic development of Unit 1. Given that the Final Rule regulates economic activity that may impact the frog's habitat, it makes little difference whether the designation will actually recover the

frog.[2] As the Supreme Court explained: "'[When] a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales*, 545 U.S. at 17 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995). *NFIB* did nothing to alter this holding, and in fact, *NFIB* cites *Gonzales* favorably. *NFIB*, 132 S. Ct. at 2590. Thus, Congress can regulate this class of economic activity – threats due to economic activity, as well as the economic benefits of protecting endangered species – even if an individual application of the statute lacks a substantial effect on intrastate commerce.

As such, under binding precedent from the Fifth Circuit and the U.S. Supreme Court, the Court must conclude that FWS's designation of Unit 1 is proper under the Commerce Clause.

CONCLUSION

For all the reasons explained above, Intervenor-Defendants respectfully request that the Court grant their Cross-Motion for Summary Judgment and deny Plaintiff Markle's Summary Judgment Motion. If the Court finds that the designation is unlawful, Intervenor-Defendants respectfully request an opportunity for additional briefing as to remedy.

Dated: June 30, 2014

/s/ Collette L. Adkins Giese

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[2] Arguments that the designation of Unit 1 would have "no bearing" on the frog also contradict the findings of the expert wildlife agency to which this Court must defer. 77 Fed. Reg. at 35,135 (finding that Unit 1 "is essential for the conservation of the species because it provides important breeding sites for recovery").

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CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such upon all attorneys of record.

Dated: June 30, 2014

/s/ Collette L. Adkins Giese

Collette L. Adkins Giese