UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

PLAINTIFF'S MARKLE'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7 and this Court's scheduling order dated September 5, 2013, Plaintiff Markle Interests, LLC, moves for summary judgment on all counts of the complaint challenging the U.S. Fish and Wildlife Service's final rule designating critical habitat for the dusky gopher frog. This motion is based on the 60-day notice, the complaint, the Memorandum of Points and Authorities, the Statement of Uncontested Material Facts, the Declaration of Robin M. Rockwell, and the pleadings filed by Plaintiffs P&F Lumber Co., et al., and Weyerhaueser Co., in this consolidated case. For the reasons set forth in these documents, this Court should set aside the rule designating critical habitat and remand it back to the agency to exclude Unit 1 from the designation of critical habitat.

DATED: December 9, 2013.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
DANIEL A. HIMEBAUGH *Pro Hac Vice*
dah@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ M. REED HOPPER
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing PLAINTIFF'S MARKLE'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

PLAINTIFF MARKLE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LEGAL FRAMEWORK 1

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 9

ARGUMENT 10

I. THE SECRETARY FAILED TO MAKE THE THRESHOLD DETERMINATION TO DESIGNATE CRITICAL HABITAT 10

II. UNIT 1 DOES NOT CONTAIN THE PHYSICAL OR BIOLOGICAL FEATURES ESSENTIAL TO THE CONSERVATION OF THE GOPHER FROG 12

III. THE ECONOMIC ANALYSIS IS INADEQUATE FOR FAILURE TO CONSIDER CUMULATIVE IMPACTS 15

IV. THE SECRETARY SHOULD HAVE EXCLUDED UNIT 1 FROM THE CRITICAL HABITAT DESIGNATION 18

V. NEPA APPLIES TO THE CRITICAL HABITAT DESIGNATION 20

VI. DESIGNATION OF UNIT 1 AS CRITICAL HABITAT EXCEEDS THE COMMERCE POWER 21

CONCLUSION 23

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013) 12-14, 20

Am. Petroleum Inst. v. Johnson, 541 F. Supp. 2d 165 (D.D.C. 2008) 7

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010) 14, 16

Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229 (9th Cir. 2001) 13

Bennett v. Spear, 520 U.S. 154 (1997) 17-18

Bldg. Indus. Legal Def. Fund v. Norton, 231 F. Supp. 2d 100 (D.D.C. 2002) 16

Camp v. Pitts, 411 U.S. 138 (1973) 8

Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior, 344 F. Supp. 2d 108 (D.D.C. 2004) 20

Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) 20

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 9

Douglas Cnty. v. Babbitt, 48 F.3d 1495 (9th Cir. 1995) 20

GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) 21

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 21

Home Builders Ass'ns of N. California v. Norton, 293 F. Supp. 2d 1 (D.D.C. 2002) 16

Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989) 9

Middle Rio Grande Conservancy Dist. v. Babbitt, 206 F. Supp. 2d 1156 (D.N.M. 2000) 15

Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010) 7

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) 9, 19

Page

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 21

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) 4, 22

New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service,
248 F.3d 1277 (10th Cir. 2001) 15-17

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) 21

Sierra Club v. E.P.A., 292 F.3d 895 (D.C. Cir. 2002) 6

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 6

United States v. Hill, 896 F. Supp. 1057 (D. Colo. 1995) 21

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 ..... 6, 22

United States v. Morrison, 529 U.S. 598 (2000) 22

Statutes

5 U.S.C. § 551, *et seq* 1, 8

5 U.S.C. § 704 8

5 U.S.C. § 706 ..... 8, 11

5 U.S.C. § 706(2)(A)-(D) 4

16 U.S.C. § 1531, *et seq.* 1, 22

16 U.S.C. § 1532(3) 2, 10

16 U.S.C. § 1532(5)(A) 14

16 U.S.C. § 1532(5)(A)(i) 10

16 U.S.C. § 1532(5)(A)-(C) 2

16 U.S.C. § 1532(5)(ii) 14

16 U.S.C. § 1532(6) 1

16 U.S.C. § 1532(19) 1

Page

16 U.S.C. § 1533(a)(1) 1

16 U.S.C. § 1533(a)(3)(A) 2

16 U.S.C. § 1533(b)(1)(A) 12

16 U.S.C. § 1533(b)(2) 2, 15, 18

16 U.S.C. § 1536(a) 6

16 U.S.C. § 1536(a)(2) 3

16 U.S.C. § 1536(a)(3) 3

16 U.S.C. § 1536(b)(3)(A) 3

16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv) 4

16 U.S.C. § 1538(a)(1)(B) 1

16 U.S.C. § 1540(c) and (g) 8

16 U.S.C. § 1540(g) 7

42 U.S.C. § 4321, *et seq.* 1

42 U.S.C. § 4332(2)(C) 4, 20

Rule

Fed. R. Civ. Proc. 56(a) 9

Regulations

50 C.F.R. § 17.3 ..... 1, 7

50 C.F.R. § 424.12 13

50 C.F.R. § 424.12(e) 11

Page

Constitution

U.S. Const. art. 1, § 8, cl. 3. ..... 1, 4

Miscellaneous

66 Fed. Reg. 62993, *et seq.* 5

77 Fed. Reg. 35118, *et seq.* 1, 5-8, 10-13, 15, 17, 19, 20-21

77 Fed. Reg. 51507 17

Legislative History of the Endangered Species Act of 1973,
as amended in 1976, 1977, 1978, 1979, and 1980: Together
with a Section-by-Section Index (Comm. Print) (1982) at 1221 18

Pursuant to this Court's scheduling order dated September 5, 2013, Markle Interests, LLC (Markle), submits these points and authorities in support of Markle's motion for summary judgment.

INTRODUCTION

In this action, Markle seeks declaratory judgment and injunctive relief against Federal Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife Service (Service), designated critical habitat for the dusky gopher frog in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., as well as the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* The designation of Unit 1 as critical habitat also exceeds the government's commerce power, U.S. Const. art. 1, § 8, cl. 3.

LEGAL FRAMEWORK

Listing of Species

Section 4 of the ESA requires the Secretary of the Interior (Secretary) to list a species as "endangered" based on its biological status. *See* 16 U.S.C. § 1533(a)(1). An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Section 9 prohibits any person from "taking" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19) and 50 C.F.R. § 17.3.

Critical Habitat Designation

When a species is listed as endangered, the Secretary must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). Critical habitat includes:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title [15 USCS § 1533], 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; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species. . . .
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

Economic Impacts Analysis

The Secretary must

> [d]esignate critical habitat . . . 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. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat*, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2) (emphasis added).

Consultation

Private property designated as critical habitat is subject to federal regulation. Under Section 7 of the ESA, in consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Section 7 also requires a federal agency to consult with the Secretary at the request of a permit applicant who believes "that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

The Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species' "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species' continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or

applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

"[T]o the fullest extent possible," all federal agencies must prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This includes:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

Administrative Procedure Act

Under the APA, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

U. S. Constitution

Commerce Clause enactments, like the ESA, are subject to the limits of that power. "The Constitution grants Congress the power to '*regulate* commerce.' Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

STATEMENT OF FACTS

Endangered Species Act

On December 4, 2001, the U.S. Fish and Wildlife Service (Service) listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq.* The designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118. Unit 1 is private land in which Plaintiff Markle owns an undivided interest. *See* Declaration of Robin M. Rockwell. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35123. Unit 1 is not suitable for gopher frog habitat as it does not contain the physical or biological features that would sustain the frog. *Id.* at 35135. And, it is undisputed that Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-32.

Unit 1 landowners, including Markle, submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123-24. The Service has acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35143.

Economic Impacts Analysis

In conjunction with the critical habitat designation, the Service completed an Economic Impacts Analysis. *See id.* at 35140-41. That analysis showed that designating Unit 1 as critical habitat could impose costs on the landowners as high as $33.9 million. *See id.* at 35141. The Secretary concluded that the "economic analysis did not identify any disproportionate costs that

are likely to result from the designation." *Id.* at 35141. Moreover, the Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-42.

National Environmental Policy Act

The Service did not conduct a NEPA review of the designation. *See id.* at 35144.

Administrative Procedure Act

The designation of critical habitat is final agency action.

U.S. Constitution

The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing economic activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

Standing

Article III standing is established by showing an "injury in fact" that is "fairly traceable" to defendants with "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). On motions for summary judgment, facts set forth by affidavit or other means "will be taken as true." *Sierra Club v. E.P.A.,* 292 F.3d 895, 899 (D.C. Cir. 2002).

Markle owns an undivided property interest in Unit 1 which the Secretary designated as critical habitat. *See* Declaration of Robin M. Rockwell at 1. That designation subjects the property owners, including Markle, to increased regulation and liability. Where use of Unit 1 requires federal approval, Section 7 consultation under the ESA is required. *See* 16 U.S.C. § 1536(a). These consultations can be both lengthy and costly to the landowner. The Service

itself concluded the economic impact on Unit 1, deriving solely from the critical habitat designation, could be as high as $33.9 million. *See* 77 Fed. Reg. 35141.

Moreover, under the ESA any person may enjoin any activity that violates the Act. *See* 16 U.S.C. § 1540(g). This may include "habitat modification or degradation." 50 C.F.R. § 17.3. Therefore, the designation of Unit 1 as critical habitat exposes Markle to increased citizen suit liability. Were it not for the designation of Unit 1 as critical habitat, Markle would not be subject to the ESA at all because the gopher frog is not found in Unit 1. Markle therefore suffers an injury in fact that is traceable to the designation of critical habitat which can be redressed by excising Unit 1 from the critical habitat designation. Thus, Markle has Article III standing to bring this suit. Moreover, "[a]s the Supreme Court has explained, plaintiffs are typically presumed to have constitutional standing when, as here, they are directly regulated by a rule." *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008).

Prudential standing for the ESA challenges is established by the Act's citizen suit provision authorizing "any person" to sue the government to enforce the Act. *See* 16 U.S.C. § 1540(g). Prudential standing for the NEPA challenge is established by virtue of the fact that Markle falls within the Act's "zone of interests." The Supreme Court stated recently that the "zone of interests" test of prudential standing is met under NEPA where the alleged injury "has an environmental as well as an economic component." *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) ("The mere fact that respondents also seek to avoid certain economic harms . . . does not strip them of prudential standing.").

The economic harm suffered by Markle was set forth above. The environmental harm Markle seeks to prevent lies in the final rule's call for special management of Unit 1 that requires a physical change to the environment. This includes pond management, regular controlled burns,

revegetation, and transplanting of frogs. *See* 77 Fed. Reg. 35129-32. Among other things, frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog's aquatic and terrestrial habitat. *Id.* In addition to the change in vegetation and the introduction of a new species to the local ecosystem, controlled burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources and loss of habitat for other species. The final rule does not discuss these effects. Therefore, Markle has standing to bring a NEPA challenge.

Ripeness

Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. It is undisputed that the final rule is final agency action. This case is brought in part under the ESA citizen suit provision which authorizes any person to enforce mandatory provisions of the Act. *See* 16 U.S.C. § 1540(c) and (g). As for the NEPA and constitutional challenges, there is no other adequate remedy in court. Therefore, this case is ripe for review.

Standard of Review

The Defendants' actions are reviewed under the APA, 5 U.S.C. § 551, *et seq.*, which requires a court to "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706. Review is based on the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). In exercising its duty under the APA, a court must consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on the facts in the record, and whether the agency considered other

relevant factors. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *See also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

An agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983). Generally, summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(a).

SUMMARY OF THE ARGUMENT

To rationally determine if Unit 1 is "essential to the conservation" of the gopher frog, the Secretary must apply some standard for determining "essential" habitat, such as identifying a viable population and habitat. The Secretary did not do so here. Also, Unit 1 does not contain the physical or biological features necessary to sustain the gopher frog. Therefore, Unit 1 is not critical habitat. It is speculative habitat. As a matter of law, speculative habitat can never be critical habitat. Additionally, the economic analysis is flawed because it does not quantify the cumulative impacts of the designation. Also, the Secretary's conclusion that $33.9 million in costs is not disproportionate, when Unit 1 provides no actual benefit to the species, is implausible and irrational. Moreover, the final rule calls for significant changes to the physical environment and is subject to NEPA review. Finally, the designation of Unit 1 as critical habitat is an invalid exercise of the commerce power because no economic activity on Unit 1 can affect

the listed species or biodiversity generally. Defendants' actions are therefore contrary to law and must be set aside.

ARGUMENT

I. THE SECRETARY FAILED TO MAKE THE THRESHOLD DETERMINATION TO DESIGNATE CRITICAL HABITAT

The ESA defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify the point when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

The Service responded to this argument in the final rule suggesting that "the Act does not require that recovery criteria be established as a precondition to designating critical habitat." 77 Fed. Reg. at 35121. But this response misses the point. Rational decision-making requires the agency to provide some standard for determining "essential" habitat. The most logical approach is to determine how much and what kind of habitat is required to maintain a viable population of gopher frogs. Instead, the Service argues it is enough to simply identify those areas that contain or could contain the physical or biological features (known as Primary Constituent Elements) that will sustain the species. The rule indentifies three Primary Constituent Elements (PCEs): "Ephemeral wetland habitat (PCE 1); [] upland forested nonbreeding habitat (PCE 2); and [] upland connectivity habitat (PCE 3)." *Id.* But simply

identifying areas that contain PCEs also misses the point because PCEs define suitable habitat, not essential habitat. Moreover, Unit 1 does not contain these PCEs, so it is neither suitable nor essential habitat.

As a fall back position, the Service maintains "the Secretary has discretion in determining what is essential for the conservation of the species" in unoccupied areas, like Unit 1. *Id*. This is true, but the Secretary is not entitled to unfettered discretion. The designation of critical habitat is subject to APA review. Under that review, agency "findings[] and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" are invalid. 5 U.S.C. § 706. To comply with the law, therefore, the Secretary must define the term "essential." Without some sort of limiting standard, the Secretary could designate any area as critical habitat by the mere expedient of asserting the area is "essential to the conservation of the species."

The practical effect of the Secretary's failure to determine a viable population and habitat size is that the Secretary is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. This flies in the face of the statute and the Service's own regulations. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This regulation in unambiguous and imposes a strict limitation on the Secretary's discretion which cannot be ignored. For these reasons, the critical habitat designation is invalid.

II. UNIT 1 DOES NOT CONTAIN THE PHYSICAL OR BIOLOGICAL FEATURES ESSENTIAL TO THE CONSERVATION OF THE GOPHER FROG

It is undisputed that the 1,544 acres of private property in St. Tammany Parish, LA, known as Unit 1, do not contain the PCEs that the Secretary has concluded are "essential to the conservation of the species." 77 Fed. Reg. 35123-24. It is undisputed that Unit 1 is not suitable habitat for the gopher frog in its current condition. *Id*. It is undisputed that Unit 1 cannot be made suitable habitat without human intervention, including change of land use, controlled burns, revegetation, transplanting of frogs, and more. *Id*. at 35129-32. It is undisputed that the government cannot compel such intervention on private property. *Id*. at 35143. It is undisputed that the landowners have expressed the intent to not manage Unit 1 for species conservation. *See* Declaration of Robin M. Rockwell. It is also undisputed that Unit 1 may never be suitable or available for gopher frog use or recovery. Based on "the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), it must be conceded therefore that Unit 1 is, at best, only speculative habitat. This is not enough. It is arbitrary and capricious to designate speculative habitat as critical habitat:

> Although a reviewing court must be deferential to agencies and presume valid their actions, agencies must still show substantial evidence in the record and clearly explain their actions. Specifically, in order for an area to be designated as critical habitat, an agency must determine that the area actually contains physical or biological features essential for the conservation of the species. An agency cannot simply speculate as to the existence of such features.

Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 999 (D. Alaska 2013) (footnotes omitted).

In *Alaska*, the court overturned the designation of critical habitat for the polar bear because the Secretary failed to show that certain designated units had the requisite PCEs that would make the units habitable.

> In short, the Service cannot designate a large swath of land . . . as "critical habitat" based entirely on one essential feature that is located in approximately one percent of the entire area set aside. The Service has not shown and the record does not contain evidence that Unit 2 contains all of the required physical or biological features of the terrestrial denning habitat PCE, and thus the Final Rule violates the APA's arbitrary and capricious standard.

Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d at 1001-02.

The present case is even more compelling because the Service *has* shown and the record *does* contain evidence that Unit 1 in St. Tammany Parish does not have the physical or biological features required by the Act. Therefore, the final rule violates the APA's arbitrary and capricious standard. The Ninth Circuit is in accord:

> Additionally, the ESA provides for the designation of critical habitat outside the geographic area currently occupied by the species when "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). . . . however, there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species.

Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229, 1244 (9th Cir. 2001).

This is especially true for any parcel of land, like Unit 1, that is *incapable* of supporting a protected species. In fact, federal regulation prohibits the designation of such parcels as imprudent where "[s]uch designation of critical habitat would not be beneficial to the species." 50 C.F.R. § 424.12. Nevertheless, the Service argues that unoccupied land may be designated as critical habitat, even without the PCEs, if the Secretary finds the land is essential to the conservation of the species. 77 Fed. Reg. 35123. But this argument is debunked by two provisions of the Act. The fist provision precludes designation of the entire occupied area:

> Plaintiffs argue that the Service acted contrary to congressional intent when the Service designated "virtually all of the U.S. range of the polar bear." "[W]hen the statutory language is plain, we must enforce it according to its terms" Under 16

> U.S.C. § 1532(5)(C), "critical habitat shall not include the *entire* geographical area which can be occupied by the" species. Congress's intent is clear.

Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d at 988 (footnotes omitted).

It would be anomalous under this provision if the Secretary could designate geographic areas that *cannot* be occupied by the species, like Unit 1, when the statute expressly prohibits the Secretary from designating all areas than *can* be occupied by the species. Similarly, the second provision requires a higher standard for designating unoccupied habitat than occupied habitat. The ESA defines a species' critical habitat as

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . , 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; and
>
> (ii) specific 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.

16 U.S.C. § 1532(5)(A). According to the Ninth Circuit,

> [t]he statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d, 1160, 1163 (9th Cir. 2010).

It would be anomalous under this provision if the Secretary could designate unoccupied geographic areas that not only do not contain the physical or biological features essential to the conservation of the species, but in all probability never will contain such features. Such a designation could hardly be said to impose "a more onerous procedure." As previously noted, the Secretary does not have unfettered discretion to designate unoccupied areas as critical habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and

biological features that are themselves "essential to the conservation of the species," i.e., the requisite PCEs: ephemeral wetland habitat; upland forested nonbreeding habitat; and, upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at 35135. Arguably, Unit 1 contains none of the PCEs essential to the conservation of the species. In any event, Unit 1 is currently not suitable habitat for the gopher frog at all, let alone critical habitat.

Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area *would* be essential for the conservation of the species, *if* it ever did contain the requisite PCEs. *See id.* But it doesn't now and likely never will. Therefore, by definition it cannot be considered critical habitat.

III. THE ECONOMIC ANALYSIS IS INADEQUATE FOR FAILURE TO CONSIDER CUMULATIVE IMPACTS

Under Section 4(b)(2) of the ESA, the Secretary must take "into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). This is accomplished by means of a formal Economic Analysis (or EA) that typically accompanies the final rule designating critical habitat.

The Service once took the position that the designation of critical habitat does not lead to any substantial economic impacts above those inherent in the listing. *See Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1181-82 (D.N.M. 2000). But that position was rejected by a federal district court in New Mexico, which stated that "[i]f this reading of the law is correct, it permits FWS . . . to circumvent an economic analysis altogether," which the court refused to allow. *Id.* at 1182. A year later, the Tenth Circuit rejected the Service's position

that it need only address incremental environmental impacts in critical habitat designations while ignoring the cumulative or coextensive impacts of the listing—a process known as the "incremental" or "baseline" approach. *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277, 1285 (10th Cir. 2001).

After these cases were decided, the Service recognized its position regarding critical habitat designation was indefensible, and, as a result, the Service took voluntary remand of some critical habitat designations so that it could analyze cumulative impacts. *See Bldg. Indus. Legal Def. Fund v. Norton*, 231 F. Supp. 2d 100, 102-03 (D.D.C. 2002) ("FWS has concluded that the Tenth Circuit's decision in *New Mexico Cattle Growers* is correct, and thus asks this Court to vacate the critical habitat designations."). *See also Home Builders Ass'ns of N. California v. Norton*, 293 F. Supp. 2d 1, 4 (D.D.C. 2002) ("Clearly, the Department of Interior, in its expertise, has decided to adopt the economic impact methodology of *New Mexico Cattle Growers*"). Thus, over a decade ago, the Service recognized that analysis of cumulative economic impacts was required under Section 4(b)(2) of the Act.

However, in 2010, the Ninth Circuit decided *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160. In that case, the Ninth Circuit held the Service could use either an incremental or cumulative analysis to address economic impacts, as the circumstances dictate. *Id.* at 1173. The Ninth Circuit went on to say, in dicta, that, in its view, the incremental approach was "more logical" because economic costs that would be incurred "regardless of the decision made" in connection with critical habitat designations were not required.

There is, therefore, a split among the circuits. The Tenth Circuit requires cumulative economic impact analyses in connection with critical habitat designations while the Ninth Circuit

allows the Service to determine on a case by case basis whether to use an incremental or cumulative approach.[1] In this case, the Secretary relied on the "baseline" approach:

> The incremental conservation efforts and associated economic impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat [for the dusky gopher frog].

77 Fed. Reg. at 35140.

This is a question of first impression in the Fifth Circuit, therefore Markle urges this Court to adopt the Tenth Circuit view. Fundamentally, the incremental approach makes little if any practical sense. Even if the incremental economic impacts are small, they may be significant when combined with the baseline costs, such as those from listing. There is a "tipping point" in cost-benefit analysis where the cumulative costs of regulation are outweighed by the cumulative benefits of regulation.

Moreover, the incremental approach is at odds with the ESA. *New Mexico Cattle Growers* held that the incremental approach is unlawful because that approach does not account for the full costs of the regulatory burdens by failing to measure the overall costs and benefits of critical habitat designation required by the ESA. *New Mexico Cattle Growers*, 248 F.3d at 1285. That Tenth Circuit analysis is not only consistent with but is required by the Supreme Court's decision in *Bennett v. Spear*: "[W]e think it readily apparent that another objective (if not indeed the primary one) [of the ESA] is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. 154, 176-77 (1997). Surely, with the potential for causing "needless economic dislocation," Congress

[1] However, the Service has recently issued a proposed rule that states the Service will be using "an incremental analysis in the weighing of benefits" for critical habitat designations. *See* 77 Fed. Reg. at 51507.

could not have intended the Secretary to ignore vital economic information for balancing the costs and benefits of critical habitat designation. Indeed, the provision requiring the consideration of all relevant economic impacts was characterized on the floor of the House of Representatives as the "most significant provision in the entire [ESA]."[2] Yet, ignoring vital economic information is precisely what the incremental approach does. The result of this approach is that neither the Secretary nor the public are ever provided a meaningful cumulative economic impacts analysis of the critical habitat designation. This is inconsistent with the language of the Act and the intent of Congress. Therefore, the Economic Analysis must focus on all of the impacts of critical habitat designation, including those impacts co-extensive with the listing.

IV. THE SECRETARY SHOULD HAVE EXCLUDED UNIT 1 FROM THE CRITICAL HABITAT DESIGNATION

Congress enacted the ESA to conserve species while avoiding "unnecessary economic dislocation," *See Bennett v. Spear*, 520 U.S. at 176-77, Section 4(b)(2) requires the Secretary to consider designating critical habitat in "any particular area" by balancing the conservation benefits of designation against the benefits of excluding "any particular area" from designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data and *after* taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat *if he determines* that the benefits of such exclusion *outweigh* the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2) (emphasis added).

[2] Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980: Together with a Section-by-Section Index (Comm. Print) (1982) at 1221.

In this case, the balance tips sharply in favor of the landowners, including Markle. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for development or oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes.

Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Secretary's bald conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and capricious. An agency rule is arbitrary and capricious "if the agency . . . 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., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43, 103 S. Ct. at 2867, 77 L. Ed. 2d at 443. Here, the agency rule is not only implausible; it is wholly irrational. No rational decision maker would conclude that imposing $33.9 million in lost revenue on the landowners is not a disproportionate cost when the benefit of designating Unit 1 as critical habitat provides zero benefit to the species. This implausible and irrational conclusion should result in invalidation of the rule:

> After reviewing the voluminous pages of case law pertaining to the legally required consequence of an agency action found to be arbitrary, capricious, and procedurally errant, and in light of the seriousness of the Service's errors, the Court hereby sets aside the Final Rule. The Court does not hand down this

> judgment lightly, but only after careful consideration of all the law and facts involved with this critical habitat designation. There is no question that the purpose behind the Service's designation is admirable, for it is important to protect the polar bear, but such protection must be done correctly. In its current form, the critical habitat designation presents a disconnect between the twin goals of protecting a cherished resource and allowing for growth and much needed economic development. The current designation went too far and was too extensive.

Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d at 1004. So it is here.

V. NEPA APPLIES TO THE CRITICAL HABITAT DESIGNATION

The National Environmental Policy Act (NEPA) requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency's decision making. 42 U.S.C. § 4332(2)(C). In its final rule designating critical habitat for the dusky gopher frog, the Service stated categorically that NEPA does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35144. But the better argument is to the contrary.

Neither the ESA nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this is such a case.

Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for a physical change to the environment through management of the habitat by improving the ponds, controlled burns, revegetation, and transplanting of frogs. *See* 77 Fed.

Reg. 35129-32. Among other things, frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog's aquatic and terrestrial habitat. *Id.* In addition to the change in vegetation and the introduction of a new species into the local environment, controlled burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and loss of habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done through the NEPA review process. Therefore, NEPA should have been applied here.

VI. DESIGNATION OF UNIT 1 AS CRITICAL HABITAT EXCEEDS THE COMMERCE POWER

In its Response to Comments, the Service argues the "courts have held that regulation under the Act to protect species that live only in one State is within Congress' Commerce Clause power and that loss of animal diversity has a substantial effect on interstate commerce." 77 Fed. Reg. 35120. In support of this proposition, the Service relies on a handfull of cases, including *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); and *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995).

But these cases are inapposite. The Service is not regulating to protect a species within the State of Louisiana. Nor does the designation of Unit 1 protect against the loss of animal diversity. The gopher frog does not inhabit Unit 1, or any part of the State for that matter. Nothing in Unit 1 can or does affect the gopher frog in or out of State, let alone have a substantial effect on biodiversity or interstate commerce. The cases on which the Service relies are not like this case. None of those cases involved a challenge to critical habitat designation of unusable land.

The ESA is a Commerce Clause enactment. 16 U.S.C. § 1531, *et seq.* As such, it is limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. at 558-59. In this case, only the last category applies. However, the Service has done nothing to demonstrate, and the record does not disclose, that the designation of Unit 1 as critical habitat has anything to do with economic activity affecting the gopher frog specifically or biodiversity generally.

In those cases in which the courts have considered the constitutionality of the ESA, the Service was purportedly regulating some economic activity and the protected species was actually or potentially affected by the regulated activity. But that is not true here. In short, the designation of Unit 1 as critical habitat is not the regulation of economic activity as the U.S. Supreme Court requires. *See United States v. Lopez*, 514 U.S. at 549; *United States v. Morrison*, 529 U.S. 598 (2000). Nor can the Service bring Unit 1 under the commerce power by means of the critical habitat designation itself. As the Supreme Court emphasized in the recent Affordable Care Act case, federal agencies can only regulate existing economic activity. They can't use the regulation to create it. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2573-74 ("This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity.' *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity"), and is therefore invalid under the Commerce Clause. Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat

is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

CONCLUSION

For the foregoing reasons, the critical habitat designation should be revised to exclude Unit 1. The final rule should be invalidated and remanded.

DATED: December 9, 2013.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
DANIEL A. HIMEBAUGH *Pro Hac Vice*
dah@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ M. REED HOPPER
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing PLAINTIFF MARKLE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

PLAINTIFF MARKLE'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, Markle Interests, LLC, submits the following Statement of Undisputed Material Facts in support of Plaintiff Markle's Motion for Summary Judgment.

1.

Markle owns an undivided interest in the land known as Unit 1 located in St. Tammany Parish, Louisiana. *See* Declaration of Robin M. Rockwell.

2.

Unit 1 was designated as critical habitat for the dusky gopher frog by final rule on June 12, 2012, 77 Fed. Reg. 35118, *et seq.*

3.

Designation of Unit 1 imposes increased regulatory burdens and liability on landowners, including Markle, with economic impacts estimated as high as $33.9 million. 77 Fed. Reg. at 35141.

4.

Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35123.

5.

Unit 1 does not contain the physical or biological features essential to the conservation of the gopher frog. *Id.* at 35123-24.

6.

Unit 1 does not contain the three Primary Constituent Elements (or PCEs) the Secretary determined are necessary to sustain the gopher frog. *Id.*

7.

Unit 1 is not suitable habitat for the gopher frog in its current condition. *Id.*

8.

Unit 1 cannot be made suitable habitat without human intervention, including transplanting of frogs into Unit 1, change of land use, controlled burns, revegetation, and more. *Id*. at 35129-32.

9.

The government cannot compel the landowners, including Markle, to manage Unit 1 for the conservation of the gopher frog. *Id*. at 35143.

10.

The landowners, including Markle, have expressed the intent to not manage Unit 1 for species conservation. *See* Declaration of Robin M. Rockwell.

11.

It is highly improbable that Unit 1 will ever be suitable or available for gopher frog use or recovery.

12.

Critical habitat is defined to include only those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)-(C).

13.

The Secretary has not defined the term "essential."

14.

The Secretary did determine a viable population or habitat size for the gopher frog.

15.

The Economic Analysis relies on the "incremental" or "baseline" approach under which "incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs . . . ." 77 Fed. Reg. at 35140.

16.

Although the Economic Analysis concluded that designation of Unit 1 could cost landowners as much as $33.9 million and Unit 1 is currently incapable of supporting the gopher frog, the Secretary concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," *Id.* at 35141.

17.

The Secretary concluded that the final rule was not subject to NEPA review. *Id.* at 35144.

18.

The Secretary did not identify a specific economic activity regulated by the designation of Unit 1 as critical habitat.

19.

The Secretary did not demonstrate an interstate commerce connection to Unit 1.

20.

No current economic activity on Unit 1 can or does affect gopher frogs.

DATED: December 9, 2013.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
DANIEL A. HIMEBAUGH *Pro Hac Vice*
dah@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ M. REED HOPPER
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing PLAINTIFF MARKLE'S STATEMENT OF UNDISPUTED MATERIAL FACTS with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

DECLARATION OF ROBIN M. ROCKWELL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Robin M. Rockwell, declare:

1. The facts set forth in this declaration are based on my personal knowledge and, if called as a witness, I could competently testify to their truthfulness under oath.

2. I am the manager of Markle Interests, LLC (a Louisiana limited liability company).

3. Markle Interests, LLC, owns an undivided interest in forested property identified in a U.S. Fish and Wildlife Service final rule as Unit 1 in St. Tammany Parish, Louisiana, and designated as "critical habitat" for the dusky gopher frog. *See* 77 Fed. Reg. 35188 (June 12, 2012).

4. This designation imposes significant regulatory burdens on the property such that federal approval may be required for any activity that may affect the species, including adverse habitat modification. Failure to obtain federal approval for such activity could subject Markle Interests, LLC, and its officers to civil and criminal liability.

5. The final rule estimates the economic impact to Unit 1 landowners from the designation could be as high as $33.9 million, of which Markle Interests, LLC, would bear a proportionate share. In addition to a drastic reduction in value, the designation also limits the usability and saleability of the property to the detriment of Markle Interests, LLC.

6. Unit 1 was designated as "critical habitat" although the area is not currently suitable for gopher frog habitat and cannot be made so without human intervention.

7. To protect its property interests, Markle Interests, LLC, has challenged the designation of Unit 1 as "critical habitat" and has no intent to manage Unit 1 for gopher frog habitat.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed the 3rd day of December, 2013, in West Palm Beach, Florida.

Robin M. Rockwell

Robin M. Rockwell
Manager, Markle Interests, LLC
701 South Olive Ave, #2101
West Palm Beach Florida 33401-6532
Telephone: (561) 833-7777
Facsimile: (561) 833-8881

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing DECLARATION OF ROBIN M. ROCKWELL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

PLAINTIFF MARKLE'S REQUEST FOR ORAL ARGUMENT

This case raises a number of important statutory and constitutional questions of first impression in this Court and this Circuit, including the standard for designating unoccupied areas as critical habitat under the Endangered Species Act, the scope of the associated Economic Analysis, the application of the National Environmental Policy Act to such designations and the constitutionality of the ESA as applied to Unit 1. There is a split among the circuits as to some of these questions. And, because of the broad application of the ESA in this case, the case has garnered national media attention and even congressional interest.

To resolve these important questions, Markle respectfully asks the Court for an opportunity to present this case in oral argument.

DATED: December 9, 2013.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
DANIEL A. HIMEBAUGH *Pro Hac Vice*
dah@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ M. REED HOPPER
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing PLAINTIFF'S MARKLE'S REQUEST FOR ORAL ARGUMENT with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*, Defendants.	)	Civil Action Case No. 2:13-cv-00234 (Consolidated with 2:13-cv-00362 and 2:13-cv-00413) Judge: Martin L. C. Feldman Magistrate Judge: Sally Shushan

NOTICE OF SUBMISSION

PLEASE TAKE NOTICE that Plaintiff Markle Interests, LLC, has filed a Motion for Summary Judgment. Unless otherwise ordered by the Court, pursuant to Local Rule 7.2 and this Court's Scheduling Order of September 5, 2013 [R. Doc. 66], the motion will be submitted to the Honorable Martin L. C. Feldman, United States District Judge, Eastern District of Louisiana, 500 Poydras Street, New Orleans, Louisiana, 70130, on May 14, 2014, at 10:00 a.m.

DATED: December 9, 2013.

Respectfully submitted,

M. REED HOPPER, *Pro Hac Vice* (TA)
mrh@pacificlegal.org
DANIEL A. HIMEBAUGH *Pro Hac Vice*
dah@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ANDREW J. HARRISON, JR.
(Louisiana Bar No. 20463)
ajh@ajharrisonlawllc.com
MADELINE AHLGREN
(Louisiana Bar No. 31009)
mahlgren@ajharrisonlawllc.com
Harrison Law, LLC
One American Plaza, Suite 820
Baton Rouge, Louisiana 70825
Telephone: (225) 388-0065
Facsimile: (225) 388-0501

/s/ M. REED HOPPER
M. REED HOPPER

Attorneys for Plaintiff, Markle Interests, LLC

DECLARATION OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing NOTICE OF SUBMISSION with the Clerk of the Court through the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ M. REED HOPPER
M. REED HOPPER