No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (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, 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:

> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available 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.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

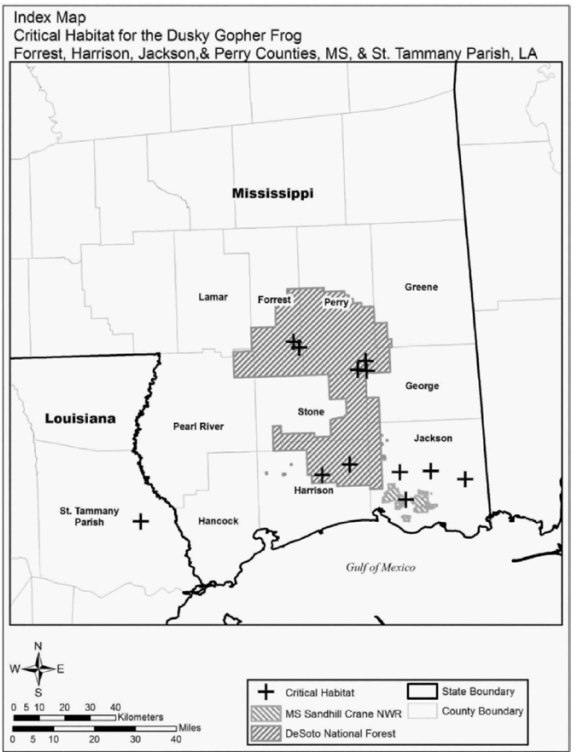
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

"A critical habitat designation provides protection for threatened and endangered species by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Under Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Accordingly, any actions undertaken on Unit 1 by the landowners having a "federal nexus," including actions requiring a federal permit, would trigger a Section 7 consultation.

Because of the uncertainty concerning what type of development might ultimately occur on Unit 1, whether a federal nexus would arise, and what types of conservation measures would be required in the event of a Section 7 consultation, the Economic Analysis considered three possible scenarios:

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

- In the second scenario, development requires a federal wetlands permit and therefore triggers a Section 7 consultation. The Service requires 60 percent of Unit 1 to be set aside and managed for the conservation of the dusky gopher frog, allowing the remaining 40% to be developed. This results in lost development value of $20.4 million over 20 years.

- In the third scenario, a Section 7 consultation is triggered and "the Service . . . recommend[s] complete avoidance of development with [Unit 1] in order to avoid adverse modification of critical habitat." This results in lost development value of $33.9 million over 20 years.

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id.* at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id.* at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id.* at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id.* at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id.* In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id.* Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id.*

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id.*, Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (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, 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id.* Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id.* (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (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, 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

> (1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;
>
> (2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and
>
> (3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id.* at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id.* Unit 1 does not contain the upland features necessary for the frog's survival. *Id.*

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id.* at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id.* at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The 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, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes '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.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available 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).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he 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." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id.* at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id.* at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id.* at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id.* at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id.* at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id.* at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id.* Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id.* In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id.*

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. 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).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id.* *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id.* at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI contains 8,756 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2017.

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United States of Appeals
Fifth Circuit
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Cons. w/ 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; 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

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had 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.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available 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." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

> arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] 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.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of 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."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (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.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("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."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded 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."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). 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. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen 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." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id.* at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (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, 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 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id*. at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. (emphasis added).

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL 13-413	c/w 13-362 and (Pertains to all cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
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> (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, 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
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> (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, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc*., 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See Summers *v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp*., 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "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 *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (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, 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II*, 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

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Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Cons. w/ 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; 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

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (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, 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; ["occupied critical habitat"] 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, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "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," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id*. In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the largerfact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> 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.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes '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.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("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 is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available 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).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

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." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against 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, designated critical habitat for the dusky gopher frog (previously Mississippi 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.*, in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. 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). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, 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)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (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 4 of this Act [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 4 of this Act [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).

19. "The 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." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. 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).

21. 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).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. 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).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe 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).

25. Under Section 7, 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.*

26. 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

27. The National Environmental Policy Act 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. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (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.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, 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).

31. Section 704 of the Administrative Procedure Act 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.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, 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." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat 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.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. 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 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. 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 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service"s decision making and constitutes final agency action.

Constitutional Compliance

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

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). 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.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service 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. *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."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. 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." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) 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. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. 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. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can‟t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. 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 35134-35135, 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 of 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 Service"s unsupported 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 irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made."" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department 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 County 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 case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and 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, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("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.”). 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.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

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Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.