UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC,	CIVIL ACTION
Plaintiff,	CASE NO. 13-CV-00234
v.	PERTAINS 13-234
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	SECTION: F
Defendants.	JUDGE: MARTIN L.C. FELDMAN
	MAG. JUDGE: SALLY SHUSHAN

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

Defendants, through undersigned counsel, respectfully submit the following reply in support of their Cross-Motion for Summary Judgment on all claims set forth in Plaintiff Markle Interests' Complaint.

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INTRODUCTION

With only about 100 frogs left in the wild, there is no dispute that the dusky gopher frog is on the verge of extinction. Nor is there any question that currently occupied habitat is inadequate to conserve the species. Beyond stating that it "disputes" the determination, Markle does not challenge the U.S. Fish & Wildlife Service's ("FWS") assessment of Unit 1 as the best breeding habitat in the species' historical range. *See* ECF 105-1 ¶63. Nor does it point to any evidence that there is alternative habitat that contains all 3 primary constituent elements ("PCEs") or other breeding habitat that FWS failed to consider. Yet Markle argues that FWS may not designate critical habitat beyond the meager habitat that the frog currently occupies. Even though one of the greatest threats to the frog is a stochastic event that would extirpate the remaining 100 frogs, Markle argues that FWS may designate habitat only within that same limited geographical area. Such an interpretation conflicts with the plain language, spirit, and purpose of the Endangered Species Act ("ESA"). Nor could Markle's reading even be a reasonable construction of the Act because it essentially guarantees the extinction of endangered species that have been reduced to areas far too small to ensure their survival, let alone conservation.

Markle still has not met its threshold burden of establishing Article III standing. The ESA and Rule make clear that activities occurring within unoccupied critical habitat are only regulated when such activities have a federal nexus. Markle does not dispute that the forestry activities in Unit 1, both currently occurring and planned through 2043, have no federal nexus. Moreover, Markle has failed to present evidence of any other activities likely to trigger ESA Section 7 consultation requirements within Unit 1. Thus, Markle has not established an injury-in-fact.

If the Court reaches the merits, it should enter summary judgment in favor of Defendants because Markle has not shown that FWS acted arbitrarily or capriciously when it designated Unit 1 as critical habitat. *Tex. Clinical Labs v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010). Markle makes no attempt to overcome FWS' showing that Unit 1 is essential for the conservation of the frog. Although Markle concedes that FWS has the statutory authority to designate unoccupied areas that contain no PCEs, it offers no legal support for its illogical assertion that FWS nevertheless was

required to meet the standard for designating occupied areas as critical habitat here. Pl. R. at 7-8. Markle's remaining claims rely on similarly strained interpretations of the ESA. Markle's arguments have been rejected by other courts and should likewise be rejected by this Court.

ARGUMENT

I. Plaintiff Lacks Article III Standing to Pursue Any of its ESA Claims[1]

Instead of providing the required evidence of standing, Markle asserts that its standing is "self-evident" because it is "directly regulated" by the Rule.[2] Pl. R. at 4. The designation of Unit 1 alone does not affect Markle's interests. Markle incorrectly asserts that it "must refrain from adversely affecting Unit 1 without federal approval." Pl. R. at 4. Absent a federal nexus or the occurrence of the frog within Unit 1, Markle's activities cannot be regulated under the ESA. *See* 16 U.S.C. § 1536; 77 Fed. Reg. 35118, 35121 (June 12, 2012) (response to cmts. 6 & 7); *see also Cape Hatteras Access Pres. Alliance* ("*CHAPA*") *v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). The record shows that Unit 1 lands will be used for timber operations that have no federal nexus under a lease agreement until June 30, 2043. ECF No. 67-2. Although Defendants highlighted the lack of evidence of concrete and imminent plans to use the land in a way that would trigger ESA Section 7 consultation requirements, Markle has done nothing to provide the necessary evidence.

Markle also asserts that standing is established because the Rule "may preclude any

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[1] Markle claims that, "no landowner has ever been denied standing while challenging the designation of his property as critical habitat." Pl. R. at 1. This is irrelevant because the Supreme Court still requires Markle to establish standing through evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Moreover, landowners often establish standing based on the ESA Section 9 prohibition on the take of listed species on their property. However, because Unit 1 is unoccupied, no such injury exists. Finally, Markle's counsel represented landowners in *Fisher v. Salazar* whose unoccupied property was designated critical habitat. 656 F. Supp. 2d 1357 (N.D. Fla. 2009). The *Fisher* court did not find the landowners' standing "self-evident" and in fact determined that they had not provided sufficient evidence to establish standing. *Id.* at 1365.

[2] Markle's reliance on *American Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008), is again misplaced. As the D.C. Circuit has clarified, a petitioner's standing to challenge an administrative action is often "self-evident" in that "no evidence outside the administrative record is necessary for the court to be sure of" the petitioner's standing. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). Markle had the opportunity during the comment process to establish economic harm from the regulation of activity with a federal nexus but failed to do so.

development of the site." Pl. R. at 4. Standing is not established when the "claimed anticipated injury has not been shown to be more than uncertain potentiality." *Prestage Farms v. Bd. of Supervisors of Noxubee Cnty., Miss.*, 205 F.3d 265, 268 (5th Cir. 2000). Markle does not state in a declaration that it is moving forward in the foreseeable future with development plans that could have a federal nexus. Because Markle's injury depends on the "occurrence of a number of uncertain events," the future injury is "too conjectural" to provide Article III standing. *Id.*

Finally, Markle has not presented any evidence, beyond the company's own bald assertions, that the Rule has caused a credible, concrete reduction in the value of its property. Markle had the opportunity to present such evidence during the administrative process and chose not to do so. Even now, when Markle carries the burden of proving the alleged injury, it again chose not to present any expert evidence of such a reduction in value. *See Int'l Paper Co. v. United States*, 227 F.2d 201, 208 (5th Cir. 1955) (It is "well established" that "the fair market value of real estate is proven by expert witnesses."); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Self-serving assertions are wholly insufficient at this stage to establish an injury-in-fact.

Defendants have not raised the bar for standing. They have simply held Markle to the time-honored legal standard, and Markle has failed to produce the necessary evidence to meet that standard. Because the frog does not occupy Unit 1 and Markle has presented no evidence that its activities now or in the foreseeable future have a federal nexus that would trigger Section 7 consultation, Markle cannot currently establish a concrete and imminent injury-in-fact.

II. Markle's Alleged Injuries Do Not Fall Within NEPA's Zone of Interests[3]

Plaintiff argues that it has alleged both economic and environmental injuries. Pl. R. at 5. The critical habitat designation, however, does not authorize any of the alleged environmental impacts to occur. Specifically, the Rule does not allow FWS to take any action on private land, *see* 77 Fed.

[3] The Supreme Court has recently clarified that whether Congress has authorized a particular type of claim to be brought under a statute is not properly termed "prudential standing" and goes to whether a cause of action exists, not the court's jurisdiction. *See Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1386-88 (2014). Accordingly, Plaintiff's National Environmental Policy Act ("NEPA") claim should be dismissed for failure to state a claim rather than for lack of prudential standing.

Reg. at 35122 ("The designation of critical habitat does not impose a legally binding duty on private parties."), a fact that Markle candidly admits, *see* Pl. R. at 6 (arguing that portions of Unit 1 require "restoration which the landowners will not allow and which (the Service admits) cannot be compelled"). Further, "[i]f there is no activity on private property involving a Federal agency, Federal action, Federal funding, or Federal permitting, participation in the recovery of endangered and threatened species is voluntary." 77 Fed. Reg. at 35123. "Critical habitat designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." *Id.* Because the Rule does not authorize the environmental impacts alleged by Markle, those alleged injuries are insufficient to show that it has suffered an actual injury that falls within the zone of interests of NEPA. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

This case is unlike *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). In *Monsanto*, the plaintiffs demonstrated both economic and environmental harm stemming from the potential gene transfer from genetically altered crops to conventional crops. *See id.* at 2754-55. In contrast, Plaintiff in this case cannot demonstrate any environmental harm resulting from the designation of critical habitat.

III. Unit 1 Meets All Critical Habitat Standards

A. The Designation of Critical Habitat for the Frog is Prudent

Markle argues that the designation of Unit 1 is an abuse of discretion because it provides no benefit to the species. Pl. R. at 6.[4] This argument has no merit. The ESA provides that FWS "to the maximum extent prudent and determinable…shall…designate any habitat of [the species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). Designation of critical habitat is not prudent if it increases the degree of takings threat to the species or is not beneficial to the species. 50 C.F.R. § 424.12(a)(1). Markle once again misapplies this regulation. The prudency

[4] In its opening brief, Markle argued that the designation was imprudent because (1) "designation of the entire occupied area" is precluded under the statute and (2) FWS cannot find an area "essential" if it does not contain all identified PCEs. ECF 69-1 ("Pl. MSJ") at 13-14. Defendants responded to both arguments in their cross-motion, demonstrating that Markle was ignoring key statutory language. CMSJ at 15-16. Markle appears to have abandoned its first argument and has conceded the second argument. *See* Pl. R. at 7-8.

determination "merely sets the outer bounds in determining areas to designate." ECF 89 ("CMSJ") at 14 (citation omitted); *see also* 49 Fed. Reg. 38900, 38903 (Oct. 1, 1984) (designation is imprudent "[i]n those cases in which the possible adverse consequences would outweigh the benefits of designation"). The presumption is that FWS must designate critical habitat and should make a "not prudent" finding only in rare circumstances. *See Fisher*, 656 F. Supp. 2d at 1359 n.1.

Further, FWS is not required to make separate prudency findings for each area proposed for designation, and Markle provides no support to suggest otherwise. As one court explained:

> The Court cannot find a requirement in the ESA or in its enforcing regulations that obliges the Service to expressly find, and to so state in the Final Rule, that the designation was prudent from the outset. Generally, the Service's decision concerning the prudency of a designation is implied with the continuation and completion of such designation.

Alaska Oil & Gas Ass'n ("*AOGA*") *v. Salazar*, 916 F. Supp. 2d 974, 996 (D. Alaska 2013). Nevertheless, here FWS included a prudency determination for the designation, which Markle does not challenge. *See* CMSJ at 15 (noting that deficiency). Thus, Markle has failed to meet its burden of establishing that the prudency determination is arbitrary or capricious. Moreover, the Court should reject Markle's attempt to craft a new requirement that FWS make an express prudency determination for each area designated. No such requirement is found in the ESA, and Markle's argument ignores FWS' interpretation of its own regulation,[5] the legislative intent behind the prudency finding, and relevant case law.

Even assuming *arguendo* that FWS was required to make an express prudency finding, the Rule easily establishes the biological benefits of Unit 1 to the frog. As discussed below, FWS reasonably determined that Unit 1 is "essential" to the species, a determination that Markle does not seriously challenge.[6] Markle does not dispute that the frog is in dire need of additional

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[5] Markle does not challenge 50 C.F.R. § 424.12(a)(1), which only requires FWS to explain its reasons for not designating critical habitat.

[6] Contrary to Markle's claim, there is no requirement that Unit 1 be currently adjacent to occupied habitat. It would appear that Markle has added this newfound requirement in its reply in an attempt to distinguish *Fisher* from the case at hand. Markle again attempts to impose a "suitability" requirement. The term "suitable" is found nowhere in the relevant statutory or regulatory provisions and, thus, it is unclear what Markle even means by the use of this term. Moreover, the law has long been clear that courts may not impose additional procedural requirements on agency

breeding habitat sufficiently far away from its current breeding habitat to reduce its risk of extirpation from stochastic events. Nor does Markle dispute that Unit 1 represents the best breeding habitat in the species' historical range and could support a much-needed metapopulation. Moreover, FWS did not find any adverse consequences to the frog that would outweigh the benefits of designation. Thus, FWS' implicit finding that Unit 1 is prudent is reasonable and consistent with Congressional intent and relevant case law. That Markle may continue to use the land in Unit 1 for forestry operations does not alter FWS' assessment that the designation is beneficial to the species. It certainly does not create one of those "rare circumstances" in which designation will bring harm to the species and, thus, is not prudent. *See Natural Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1125-26 (9th Cir. 1997). For all of these reasons, the Court should reject Markle's prudency argument.

B. FWS Explained Why Unit 1 is Essential

Markle appears to argue that, in the absence of a regulation issued by FWS defining the term "essential," a rule that makes a species-specific determination of what is "essential"—like the rule challenged here—is invalid. Pl. R. at 8-9. Markle provides no legal support for this new argument, which contradicts its original argument that, to determine what is essential, FWS must make certain species-specific determinations. Pl. MSJ at 10. Markle also incorrectly argues that Defendants take the position that FWS need not provide a species-specific assessment of what is "essential." In fact, the Rule did just that and, although that assessment was discussed at length in Defendants' cross-motion, *see* CMSJ at 9-11, it is nowhere mentioned in Markle's reply.

Congress delegated to the Secretary the authority to determine what is "essential" on a case-by-case basis, and that determination by FWS is entitled to deference.[7] *See Chevron, U.S.A. v. Natural*

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decisionmaking when such requirements are not enumerated in the statute. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524-25 (1978).

[7] Courts have approved of species-specific assessments in other ESA contexts, such as in determining the "foreseeable future" in the listing context. *See W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1184 (D. Idaho 2013); *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 962 (N.D. Cal. 2010) (noting that there is "no statutory definition of 'foreseeable future,' and the 'definition of foreseeable future may vary depending on the particular species").

Res. Def. Council, 467 U.S. 837, 843 (1984). The court must defer to agency interpretations that are not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). This is particularly true in ESA cases. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated *broad administrative and interpretive power* to the Secretary." (emphasis added)). Here, Markle does not even mention FWS' species-specific assessment, let alone meet its high burden of showing that the agency's assessment is arbitrary or capricious. *See Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998). FWS cogently explained its criteria for assessing whether an area is essential for the conservation of the frog and its determination that Unit 1 meets those criteria. Markle has not disturbed this assessment.

Markle also asserts that FWS was required to determine a "habitat threshold" for the frog. Pl. R. at 9. To support its argument, Markle states that Defendants "can point to no language in the ESA that precludes it from determining a minimum habitat size for the gopher frog." *Id.* Plaintiff's argument misses the point. Markle can point to no language in the ESA that there is any such requirement, and it has the burden to show that the Rule is not in accordance with the ESA. *See Tex. Clinical Labs*, 612 F.3d at 775; *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008). That Markle would prefer FWS to consider other criteria is of no import. *See Amoco Prod. Co. v. Lujan*, 877 F.2d 1243, 1248 (5th Cir. 1989) (a court "must honor the agency's interpretation of the law authorizing agency action so long as the interpretation is a reasonable one").

Markle also claims that the "habitat threshold" assessment is different from developing a recovery plan. Pl. R. at 9. In its opening brief, Markle argued that to define "essential," FWS "must first identify the point when the species will no longer be 'threatened' or 'endangered,'" which Markle opined required a determination of a viable population size and the minimum habitat necessary to sustain the population. Pl. MSJ at 10. However, Congress determined the identification of such criteria and the determination of the point at which the species is deemed conserved should be done in the recovery plan, *see* 16 U.S.C. § 1533(f). CMSJ at 11-12. The ESA does not require FWS to establish such criteria before designating critical habitat. Markle attempts

to make something of the fact that FWS designated Unit 1, in part, because of its recovery potential. Again, Markle ignores the plain language of the ESA. "Essential" is assessed in terms of the conservation of the species, which includes both the survival and recovery of the species. *See* 16 U.S.C. § 1532(3). The court must assume that Congress was aware that it was directing FWS to assess what would be "essential for the conservation" of a species at the critical habitat designation stage, yet it was not requiring FWS to identify at that time specific recovery criteria, such as viable population size or habitat required to recover the species. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). If Congress believed that identification of such criteria was necessary before designating critical habitat, it would have made the preparation of a recovery plan a prerequisite to designating critical habitat.

As a practical matter, FWS initially proposed to designate less habitat, but the expert peer reviewers overwhelmingly agreed that the habitat proposed for designation was inadequate to conserve the species. ECF 89-2 ("DSOF") ¶¶39-40; 43-47; 54-55. They concluded in their expert opinion that the habitat proposed in Mississippi did not meet the "minimum habitat size" needed for the frog's conservation. In determining that Unit 1 is "essential," FWS similarly concluded that, based on the best available science, Unit 1 was part of the minimum required habitat for the frog's conservation. Thus, no matter how it is approached, Markle's argument must be rejected.

C. Unoccupied Habitat Need Not Contain All PCEs to be Designated Critical Habitat

Markle argues without support that Unit 1 cannot be essential to the frog because it does not currently contain all three identified PCEs. Pl. R. at 6. As Defendants established in their detailed discussion of the relevant statutory language, which Markle does not address, the ESA does not require a showing of all PCEs to designate unoccupied areas; rather, FWS must make a different finding—that the area itself is essential to the conservation of the species. *See* CMSJ at 12-13. Markle all but concedes this point, stating that "[o]f course, in a different case, it may make sense to designate" areas with no PCEs as critical habitat. Pl. R. at 7-8. As Markle explains, in *Fisher*, the court determined that Units 2 and 4 were essential to the conservation of the beach mouse, and yet those areas did not contain any PCEs. Pl. R. at 7-8. Thus, Markle's assertion that designating

Unit 1 absent all three PCEs is "nonsensical" is based solely on its subjective opinion in this case, not on any statutory requirement that PCEs be found in unoccupied critical habitat.[8]

Far from being "nonsensical," this is a perfect example of when FWS must designate unoccupied areas that do not contain all PCEs. The frog population has been decimated by the destruction of its habitat and, to FWS' knowledge, there is no habitat outside of the general area occupied by the frog that contains all three PCEs. *See* DSOF ¶¶14-15; 21; 39; 50; 52-53. Recognizing that some species may be in this imperiled state due to habitat destruction, Congress allowed for the designation of areas that do not currently contain all PCEs upon the determination that the area *itself* is essential to the conservation of the species. *See* 16 U.S.C. § 1531(a)(1)-(2); § 1532(5)(A)(ii); *TVA v. Hill*, 437 U.S. 153, 179 (1978) (noting that in shaping legislation that would become the ESA, "Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat'"). FWS made that finding for Unit 1.

Despite conceding that an area may be essential to the conservation of the species without containing any PCEs, *see* Pl. R. at 7-8, Markle makes the contradictory assertion that it is the "combination" of the PCEs that are essential to the conservation of the frog, Pl. R. at 7. Markle's argument ignores the clear differences in the standards for designating occupied and unoccupied habitat and FWS' assessment of why Unit 1 is "essential" to the frog. Markle also argues that FWS' "regulations direct the Secretary to rely on the presence of the PCEs to designate unoccupied areas," seemingly implying that the regulation states that the PCEs must be present in all areas to be designated as critical habitat. Pl. R. at 7. Once again, Markle reads into this regulation requirements that do not exist. The cited regulation states that, when considering the designation of critical habitat, FWS must "focus on" the PCEs within a given area. 50 C.F.R. § 424.12(b). That language is markedly different from the language used to define occupied critical

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[8] Markle states that Defendants "doggedly assert[] Unit 1 is somehow suitable." Pl. R. at 7. Again, "suitable" is not found anywhere in the relevant statutory provisions. Thus, it is unclear what Markle is arguing. In any event, the Rule acknowledges that Unit 1 does not currently contain all of the features that would <u>conserve</u> the species as defined by 16 U.S.C. § 1532(3). Nowhere does the Rule state that the frog could not presently survive in Unit 1. *See* CMSJ at 15.

habitat: "areas within the geographical area occupied by the species…on which are found" those PCEs identified by the agency. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). There is no question that FWS "focused on" the PCEs when identifying critical habitat. FSOF ¶¶28; 31. After considering the comments of the scientific experts who reviewed the proposed rule and overwhelmingly stated that the proposed habitat was inadequate to conserve the species and determining that no other habitat containing all three PCEs could be identified, FWS decided to "focus on" PCE 1 (breeding habitat) due to the rarity of open-canopied, isolated ephemeral ponds within the historical range of the frog, and their importance to the frog's survival. *See* FSOF ¶¶44-53. Thus, the designation of the frog's critical habitat is fully consistent with the cited regulation.

Markle also attempts to distinguish *Fisher* by arguing that the unoccupied areas were essential only because they provided an "immediate benefit" to the beach mouse, a distinction that is found neither in the ESA nor in that court's analysis. In *Fisher*, FWS determined that the unoccupied units were essential because "they connect adjacent habitat units and because they provide habitat needed for storm refuge, expansion, natural movements, and re-colonization," most of which are "features that are essential to the long-term conservation of beach mice." 656 F. Supp. 2d at 1366-67. FWS also noted that the designation of those units "helps to assure that the beach mouse's future will not depend on the disconnected and isolated populations." *Id.* at 1367-68. In upholding FWS' finding that unoccupied units are essential for the conservation of the beach mouse, the *Fisher* court considered FWS' assessment, the fact that the expert peer reviewers generally concurred with FWS' methods and conclusions, and that Plaintiffs had "altogether failed to demonstrate" that FWS' determination was arbitrary or capricious. *Id.* at 1366-68. Here, FWS similarly undertook a robust assessment of the conservation needs of the frog and provided a cogent explanation for its finding that Unit 1 is essential to the frog, an explanation that Markle all but ignores. Further, FWS' finding is consistent with the recommendations of the experts that reviewed the proposed and revised proposed rules.

Grasping at straws, Markle also claims that, while unoccupied transition corridors may be essential to the beach mouse, the best breeding habitat in the frog's entire historical range is not

essential to the frog. Markle cites nothing in support of this theory. In short, based on the robust assessment of the best available science and at the advice of its peer reviewers, FWS found that additional breeding habitat (PCE 1) is essential to the frog's conservation and that Unit 1 contains that breeding habitat. FWS' designation of Unit 1 as unoccupied critical habitat complies with the plain language of the ESA, is rational based on the facts in the record, and should be upheld.

D. Markle's Economic Analysis Argument Fails from the Outset

Markle urges the Court to adopt the co-extensive approach to assessing economic impacts, even though it concedes that there are no "co-extensive listing impacts" in this case because Unit 1 is unoccupied. Pl. R. at 11. All potential impacts in Unit 1 were attributed to the designation, and thus FWS considered all potential economic impacts. Therefore, the baseline and co-extensive methods of analyzing potential economic impacts yield the same results and, thus, there is no injury. Markle, in essence, is requesting that the Court issue an advisory opinion, which the Court is not permitted to do. *See Whitehouse Hotel Ltd. P'ship v. C.I.R.*, 615 F.3d 321, 343 (5th Cir. 2010) ("Federal courts are only permitted to rule upon an actual 'case or controversy,' and lack jurisdiction to render merely advisory opinions beyond the rulings necessary to resolve a dispute.") (Garza, J., concurring); *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) ("federal courts do not have the power to render advisory opinions nor to decide questions that cannot affect the rights of the litigants" (citing *John Doe #1 v. Veneman*, 380 F.3d 807, 814 (5th Cir. 2004))). Accordingly, the Court should dismiss Markle's claim.

Even if the Court considers Markle's argument, Markle has failed to show that FWS' method is arbitrary or capricious. Markle does not dispute that "[n]either the [ESA] nor the regulations prescribe any particular method for determining the economic impact of a designation." *Fisher*, 656 F. Supp. 2d at 1368. Although Markle asserts that FWS "abruptly changed course" by adopting the baseline method for all economic analyses, Pl. R. at 2, Defendants have already established that this is far from true. CMSJ at 17-18 (noting FWS' formal adoption of the baseline approach is consistent with the approach approved by the U.S. Office of Management and Budget, underwent notice and comment, and has been approved by numerous courts).

Moreover, Markle's assessment of the Tenth Circuit's opinion is wrong. The Tenth Circuit invalidated the baseline approach (in the context of FWS' "functional equivalence theory") because, at that time, FWS took the position that the designation of critical habitat provided few additional benefits to the species above the benefits of listing and thus FWS assumed that potential economic impacts were generally insignificant. However, Markle incorrectly asserts that this "has not changed." Pl. R. at 10. As other courts have noted, in invalidating the adverse modification standard and rejecting the related "functional equivalence theory" applied at the time of *New Mexico Cattle Growers Association v. FWS*, 248 F.3d 1277 (10th Cir. 2001), "the problem that the Tenth Circuit confronted—the functional equivalence of the jeopardy standard and the adverse modification standard—was eliminated." *Ariz. Cattle Growers Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1034 (D. Ariz. 2008), *aff'd*, 606 F.3d 1160 (9th Cir. 2010). Thus, should the Court reach the issue, it should conclude, as numerous other courts have concluded, "that the baseline approach is a reasonable method, consistent with the language and purpose of the ESA, for assessing the actual costs of a particular critical habitat designation." *Fisher*, 656 F. Supp. 2d at 1369-71.

E. FWS' Decision not to Exclude Unit 1 is Unreviewable

Markle argues that FWS' decision not to exclude is reviewable because there is "no express language" establishing a legislative intent that the decision is "committed to agency discretion by law." Pl. R. at 11 (citing *Suntex Dairy v. Block*, 666 F.2d 158, 163 (5th Cir. 1982)).[9] Markle is mistaken. As we cited in our cross-motion and other courts have discussed:

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[9] Markle also incorrectly argues that "Section 4 of the ESA is designed to protect landowners." *Id.* Although Congress requires FWS "to take into consideration" economic and other impacts, the ESA is unambiguous: FWS "*may* [but is not required to] exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2) (emphasis added); *see, e.g., AOGA*, 916 F. Supp. 2d at 994; *Bear Valley Mut. Water Co. v. Salazar*, No. 11-1263, 2012 WL 5353353, at *14 (C.D. Cal. Oct. 17, 2012); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010). Even if FWS determines that the benefits of exclusion outweigh the benefits of designating an area as critical habitat, Congress has delegated FWS the authority to nevertheless designate such areas as critical habitat, demonstrating Congress' assessment that the importance of conserving a species and protecting its critical habitat may outweigh any impact of the designation, including economic impacts.

> [I]n the statute's legislative history, Congress explained that "[t]he Secretary is not required to give economics or any other relevant impact predominant consideration in his specification of critical habitat." Instead, "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion."

Fisher, 656 F. Supp. 2d at 1368 (emphasis added) (citing H.R. Rep. No 95-1625, at 16-17 (1978)). Congress' intent is unambiguous; this determination is "committed to agency discretion by law."

As the plain language of the ESA makes clear, after FWS "takes into consideration" economic and other potential impacts, the determination of whether to exclude is left to FWS' discretion. *Cf. Suntex Dairy*, 666 F.2d at 164-65 (although statute at issue imposed "rigorous obligations" to develop an evidentiary record, it left ultimate determination to Secretary's discretion). According to the Fifth Circuit, where, as here, the "scope of discretion accorded to the Secretary under the statutory scheme is such that [the provision] imposes no 'limits (on the) agency's discretion to act in the manner which is challenged,'" a determination made pursuant to that provision is "committed to agency discretion by law." *Id.* at 163-64. Moreover, the courts that have addressed this very issue likewise have concluded that the decision not to exclude an area as critical habitat is unreviewable. CMSJ at 20. Markle has neither distinguished those cases nor has it cited a single case that has adopted its novel interpretation of the ESA. Moreover, Markle does not dispute that FWS met its statutory duty to "take into consideration" the potential economic impacts of the designation of Unit 1 as critical habitat. Accordingly, Markle's claim must be rejected.

Ignoring the legislative history and statutory language, Markle argues that the Court should consider certain factors set forth in *Ellison v. Connor*, 153 F.3d 247 (5th Cir. 1998). Pl. R. at 12-13. As an initial matter, it is clear that the Fifth Circuit first considers the plain language of the statute, legislative history, and "the legislative scheme as well as the practical and policy implications." *See Suntex Dairy*, 666 F.2d at 163. In addition to the plain language and legislative history, the practical and policy implications of this assessment also weigh in favor of concluding that the decision not to exclude is properly committed to the agency's discretion by law. Courts are simply ill-equipped to weigh the benefits of including or excluding land in designating critical habitat.

Even if the Court considers the *Ellison* factors, this only reinforces the conclusion that the

decision is unreviewable. First, Markle incorrectly applies the factors.[10] Instead of applying the factors to the particular aspect of the critical habitat determination at issue here, as the Fifth Circuit requires, *see Ellison*, 153 F.3d at 253, Markle applies the factors to the entire designation process. *See* Pl. R. at 13 (listing factors that FWS must consider when designating critical habitat and noting requirement to apply "best available science" standard). However, Defendants do not argue that the designation of critical habitat is unreviewable. At issue here is whether the decision not to exclude an area from a critical habitat designation is reviewable. The ESA requires only that FWS "take into consideration" potential economic impacts. Otherwise, there are no specific factors, particular evidentiary standards, or procedures that FWS must apply when deciding not to exclude a particular area. *See Ellison*, 153 F.3d at 253 (contrasting the numerous requirements set out in § 320.4 of the RHA for considering whether to issue a permit). Markle points to the "best available science" standard, which does not govern this particular assessment. Pl. R. at 13; *see* 16 U.S.C. § 1533(b)(2). The provision simply states that FWS "may exclude" an area and does not provide any standard limiting the agency's discretion not to exclude an area. *See Ghanem v. Upchurch*, 481 F.3d 222, 224 (5th Cir. 2007) ("may" indicates discretion); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004) (same); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553, 557 (5th Cir. 1988) (same). Thus, whether the Court considers the legislative history, the plain language of the statute, the relevant case law, or the Fifth Circuit's framework described above, it is clear that FWS' determination not to exclude is unreviewable and Markle's claim has no merit.

In a related argument, Markle asserts that the Court should consider whether "the Secretary's balancing determination" is rational. Like the plaintiffs in *AOGA*, Markle misreads the statute. As the ESA's plain language makes clear, "[t]he need to balance the benefits of exclusion versus inclusion arises only when the Service decides to exclude an area, not include one." *AOGA*, 916 F.

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[10] "[W]hether the decision involves weighing alternative uses of property" does not appear to be one of the *Ellison* factors. *Contra* Pl. R. at 12-13. The Court merely used that factor, among many, to compare the level of deference provided to the relevant agency by two statutes authorizing the issuance of permits. *Ellison*, 153 F.3d at 253.

Supp. 2d at 994. Defendants raised this issue in their cross-motion and cited the relevant case law, CMSJ at 20, but Markle did not respond to our arguments, thereby waiving this claim. Even if FWS had to balance the benefits of exclusion versus inclusion—which it does not—FWS reasonably determined that the benefits of including Unit 1 outweigh the benefits of exclusion. The benefits include the possibility of providing protection to an area that (1) represents the best breeding habitat in the frog's historical range, (2) could support a metapopulation, and (3) could help address the frog's risk of extirpation due to stochastic events. In contrast, the benefits of exclusion are largely potential costs avoided by Markle---but those costs are either zero (if Markle continues to use the land for forestry activities, as the record shows it intends) or some speculative cost that is sure to be much less than the cited $33.9 million for all the landowners combined.[11]

IV. FWS Was Not Required to Prepare a NEPA Analysis

Contrary to Plaintiff's arguments, the designation of critical habitat for the frog does not authorize FWS to take management measures that affect the environment within Unit 1. In fact, the Rule explains that the designation does not affect private land and does not require that any management measures be taken on private land. *See* 77 Fed. Reg. at 35128 ("Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners."). The only way in which a landowner may have to undertake any management measures would be if the landowner decides to take an action requiring federal approval or funding that may affect critical habitat. *See id.* Under those circumstances, the applicable federal agency would have to consult with FWS under ESA Section 7. *Id.* If FWS concluded that the action would adversely modify critical habitat, then FWS could recommend to the action agency that it require the landowner to take reasonable and prudent measures to avoid harm to the species. *See id.* Thus, it is only in the context of some future as-yet-unknown action by the landowner that management

[11] Markle continues to overstate its case. None of the plaintiffs has ever provided to FWS any development plans for Unit 1 lands. Thus, even if FWS were required to balance the benefits of inclusion and exclusion, a determination to include Unit 1 lands would be reasonable given the frog's established need for such habitat and the speculative nature of Markle's plans for Unit 1 lands. Moreover, the costs represented by scenario 3 are highly unlikely because by statute FWS must propose reasonable and prudent alternatives. CMSJ at 5, 20.

alternatives affecting the environment could be required.[12] Because the critical habitat designation does not authorize any actions that would affect the environment, NEPA was not required. *See Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992).

The fact the critical habitat designation will not have any impacts on the environment is not the only reason that NEPA does not apply. As the Ninth Circuit persuasively found, the ESA procedures for the designation of critical habitat displace the requirements of NEPA because Congress has required "a specific process for the Secretary to follow when addressing the needs of endangered species." *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1503 (9th Cir. 1995). In designating critical habitat, the Secretary "*must* designate any area without which the species would become extinct," regardless of other factors. *Id.* (citing 16 U.S.C. § 1533(b)(2)). This requirement "conflicts with the requirements of NEPA because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions." *Id*. Thus, because the ESA provisions are more specific and require the consideration of only certain criteria when considering the designation of critical habitat, they displace the requirements of NEPA.

Finally, requiring a NEPA analysis would further the goals of neither NEPA nor the ESA and would only result in the delay in designating critical habitat to the detriment of the species. *See id.* at 1506. NEPA was intended to benefit the environment by informing government officials of the potential adverse impacts on the environment of governmental action. *See id.* (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983)). The intent of the ESA was to "halt and reverse the trend toward species extinction, whatever the cost." *TVA. v. Hill*, 437 U.S. at 184. The designation of critical habitat serves the purposes of both statutes by protecting the environment and preventing the extinction of the species. Requiring FWS to prepare a NEPA analysis "would only hinder its efforts at attaining the goal of improving the environment." *Douglas Cnty.*, 48 F.3d at 1506 (quoting *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir.

[12] Because FWS has not proposed taking any special management measures or made any decisions regarding such measures, 40 C.F.R. § 1502.2(g) does not require FWS to prepare a NEPA analysis at this time. *See* Pl. R. at 5. If such measures are proposed in the future, FWS may prepare a NEPA analysis as appropriate.

1981)).

V. FWS Has the Constitutional Authority to Designate Unit 1 as Critical Habitat

Markle has not met its burden of showing that Congress had no rational basis for protecting critical habitat, including unoccupied areas, such as Unit 1, that are essential for the conservation of a listed species. *See GDF Realty Invs. Ltd v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000). Markle again largely fails to discuss the relevant Commerce Clause jurisprudence and ignores Defendants' point that the cases cited by Markle—*United States v. Lopez*, *Morrison*, and *National Federation of Independent Business* ("*NFIB*") *v. Sebelius*— involved facial challenges to statutes or particular provisions. Here, in contrast, Markle seeks to isolate a single application of ESA Section 4, the Rule's designation of Unit 1 as critical habitat, which calls for a different analysis. CMSJ at 22 n.15.[13] Moreover, Markle's attempt to isolate "existing activity underway on Unit 1" from all other activity (current and future) regulated as a result of the Rule and from all other designations issued pursuant to Section 4 ignores the Supreme Court's admonition that isolating such an application of a concededly constitutional statute is inappropriate. *See Gonzales v. Raich*, 545 U.S. 1, 26 (2005); *see also* Pl. MSJ at 22 (conceding that the ESA is valid under the Commerce Clause).

Markle's primary argument—that the Rule is unconstitutional because it "is not the regulation of commercial activity, or any activity at all," Pl. R. at 14,—is meritless. Throughout Markle's pleadings, it claims the Rule regulates Markle's activities such that it "must refrain from adversely affecting Unit 1 without federal approval" and that the regulation of such activities "may preclude any development of the site at a cost to the landowners of up to $33.9 million." Pl. R. at 4; *see* ECF 69-3 ¶4 ("federal approval may be required for any activity that may affect the species, including adverse habitat modification."). In fact, all of the Plaintiffs state that one of the primary motivators behind this suit is to prevent FWS' regulation of future development activity.[14] Thus, Markle's

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[13] Applying the proper analysis, this application of ESA Section 4 easily passes constitutional muster. CMSJ at 22-24, *contra* Pl. R. at 15.

[14] The designation of critical habitat automatically triggers the application of Section 7, the provision that regulates activities that have a federal nexus and that may result in the destruction or

argument is, at best, inconsistent with the remaining arguments in its brief.

Markle incorrectly asserts that the facts of this case are similar to those before the Court in *NFIB*. There, the challenged provision required individuals who otherwise would choose not to purchase insurance to do so or face a tax penalty. 132 S. Ct. 2566, 2580, 2585 (2012). Thus, the challenged provision "regulate[d] individuals precisely *because* they are doing nothing." *Id.* at 2587. Contrary to Markle's assertions, the Supreme Court did not hold that Congress lacks the authority to regulate future activity; rather it held that Congress could not compel a class of individuals "whose commercial inactivity rather than activity is its defining feature" to act now under the assumption that those individuals would likely act in some particular way in the future. *Id.* at 2590; *see id.* at 2588 (using example of regulating consumers' decision not to purchase wheat). In contrast to the provision at issue in *NFIB*, the Rule does not create regulated activity, nor does it compel Markle to engage in commerce. Markle is free to decide whether or not to pursue development plans. If Markle decides to forever use its land for forestry activities, then those activities will not be regulated by Section 7. Although Plaintiffs have offered no evidence of such plans, if in the future they pursue development or other activities that have a federal nexus, Section 7 consultation requirements will be triggered and those activities may be regulated if it is determined they may adversely modify or destroy the frog's critical habitat.

Markle also argues that, if the Rule is not regulating Markle's current activities, it cannot be constitutional. For the reasons already stated, *NFIB* does not support this creative argument and Markle otherwise fails to cite any case law that suggests that Congress' authority to act under the Commerce Clause depends on the timing of the activity that it is regulating. Under Markle's assessment, the Rule could be constitutional at one moment and unconstitutional at the next depending on the whim of the actor whose activities are regulated by the provision at issue. Congress would have to wait until the actor engages in the soon-to-be regulated or prohibited

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adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). If Markle's argument is interpreted as arguing that the Rule must be divorced from ESA Section 7 and thus does not itself regulate any activity, then the Court would be required to find that Markle has no standing to challenge the Rule because all of its alleged harm stems from potential Section 7 regulation.

activity and would be out of luck if that activity is completed before the provision is enacted.

Relying on *GDF*, Markle also argues that "it would be improper to look beyond the activity the ESA purports to regulate to future development of Unit 1." Pl. R. at 16. Markle's interpretation of *GDF* is wrong for at least two reasons. First, the Fifth Circuit's concerns had nothing to do with "existing commercial activity" versus "future development," as Markle implies. Pl. R. at 15-16. Rather, the Fifth Circuit was concerned that, by focusing solely on the commercial activity planned by the plaintiffs (a Walmart, among other businesses), the constitutionality of the provision would turn on the commercial motivations of the plaintiff challenging the provision. *GDF*, 326 F.3d at 633. Contrary to Markle's assertions, *GDF* does not stand for the proposition that Congress cannot regulate future development. In fact, in deciding that the particular application at issue in *GDF* was constitutional under the Commerce Clause, the Fifth Circuit considered the fact that "it is obvious that the majority of [future] takes would result from economic activity." *See id.* at 639.[15]

Second, and more importantly, Markle ignores that the provision at issue in *GDF* was Section 9, which regulates the "take" of endangered species, which includes "to harass, harm, pursue [or] hunt" the species. 16 U.S.C. § 1532(19). The Fifth Circuit concluded that the application of Section 9 had a "*de minimis* effect on interstate commerce." *GDF*, 326 F.3d at 638. Nevertheless, the Court held that it was appropriate to consider the specific application in the context of the statutory scheme, considering the "take" of Cave Species when aggregated with those of all other endangered species. *Id.* at 639. In contrast, this case involves Section 7, which directly regulates activities that have a federal nexus, which include development, commercial, and other activities that adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Thus, the Fifth Circuit's

[15] The Court also noted that concern over the loss of species and habitat resulting from development was reflected in the ESA's findings and found persuasive the fact that loss of habitat due to development was one of the threats to the species at issue. *Id*. Here, Markle does not dispute that the destruction of the frog's habitat has been largely due to development and other commercial activities, *see* DSOF ¶¶14; 21, and the record shows that development remains among the greatest threats to the preservation of the frog's remaining habitat, *see* 76 Fed. Reg. 59775. Moreover, there can be no doubt that the regulation of activities that adversely modify the frog's critical habitat, when aggregated with the regulation of activities that affect other listed species' habitat, substantially affects interstate commerce. *GDF*, 326 F.3d at 640-41.

concern with looking beyond the regulated conduct in the Section 9 context is not relevant here.[16]

Markle has placed all of its eggs in the "no activity" basket and makes no attempt to analyze other factors that courts consider when assessing Commerce Clause challenges or to distinguish the long line of cases upholding the constitutionality of applications of the ESA. *See* CMSJ at 22. Moreover, Markle does not challenge Defendants' assertion that the ESA is a comprehensive regulatory scheme that has a substantial relation to interstate commerce. CMSJ at 23. Nor does Markle substantively challenge Defendants' argument that the protections provided by the designation of critical habitat, including the regulation under Section 7 of activities that may adversely modify that critical habitat, are an integral component of the ESA.[17] CMSJ at 23-24. It is clear that Congress enacted the ESA, in part, to conserve listed species and their habitat. *See, e.g.,* 16 U.S.C. § 1531(a)(1); *TVA v. Hill*, 437 U.S. at 178. Thus, even if the Court concludes that the regulated activities are not themselves commercial, the Rule should be upheld because the ESA would be undercut if FWS were unable to conserve highly endangered species by designating unoccupied areas essential to the conservation of those species. *Raich*, 545 U.S. at 24-25, 35.

CONCLUSION

For the reasons stated above, the Court should enter summary judgment in favor of Defendants on all claims. Although Defendants disagree that the designation is unlawful, any remedy, should the Court find that one is necessary, will depend on the scope and nature of any violation found. For this reason, Defendants respectfully request that the Court provide for additional briefing as to any remedy should the Court issue a decision on the merits for Plaintiffs in full or in part.

DATED this 16th day of June, 2014.

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[16] Markle incorrectly states that Defendants did not identify a regulated activity in our cross-motion. Pl. R. at 16; *see* CMSJ at 24 (noting that the regulated activities are those set out in Section 7 that may adversely modify the frog's designated critical habitat).

[17] Markle also argues that there is no existing or future activity on Unit 1 that could affect the frog. This statement is contradicted by its own assertion that, as a result of the Rule, "federal approval may be required for any activity that *may affect the species, including adverse habitat modification*." ECF 69-3 at ¶4 (emphasis added).

Respectfully Submitted,

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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 2:13-CV-00234 PERTAINS TO ALL CASES SECTION: F(1) JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN

CERTIFICATE OF SERVICE

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

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH