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Markle Interest, L.L.C. v. U. S. Fish & Wildlife Service

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Markle Interest, L.L.C. v. U. S. Fish & Wildlife Service, 827 F.3d 452 (5th Cir. 2016)

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This action is an appeal of a grant of summary judgment to the United States Fish and Wildlife Service on the designation of critical-habitat for the dusky gopher frog under the ESA. Landowner appellants originally sought declaratory and injunctive relief against the Service, the Department of Interior, and agency officials challenging the designation of their private property as critical-habitat for the dusky gopher frog. The court's holdings recognize loss of property value as a "particularized injury" for standing under the ESA in addition to addressing the landowners' three principal arguments: 1) the critical habitat designation violated the ESA and the APA; 2) USFWS lacked constitutional authority under the Commerce Clause to make the critical-habitat designation; and 3) the designation violated the NEPA. The United States Supreme Court granted certiorari, and the case will be heard as *Weyerhaeuser Co. v. United States Fish & Wildlife Service.*

I. INTRODUCTION

In 2010, the United States Fish and Wildlife Service ("Service") designated 1,544 acres in St. Tammy Parish, Louisiana ("Unit 1") as critical-habitat for the dusky gopher frog.[1] Unit 1 has not been occupied by the dusky gopher frog for decades and is privately owned by plaintiff/appellants Markle Interest L.L.C., P&F Monroe Properties, L.L.C., and Weyerhaeuser Company ("Landowners").[2] Additionally, Weyerhaeuser Company holds a timber lease on Unit 1 that expires in 2043.[3] Although the Court addressed article III standing concerns, the predominate questions in this case revolved around the merits of designating unoccupied lands as critical-habitat under the Endangered Species Act ("ESA"), the Commerce Clause of the United States Constitution, and the National Environmental Policy Act ("NEPA").

II. FACTUAL BACKGROUND

Rana Sevosa, the dusky gopher frog ("the Frog"), was listed as an endangered species under the ESA in 2001, with approximately 100 Frogs known to exist in the wild.[4] The Frog was historically located in parts of

1. Markle Interests L.L.C v. U.S. Fish and Wildlife Serv., 827 F.3d 452, 459 (5th Cir. 2016), *cert. granted sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Servs*., 138 S.Ct. 924 (2018).
2. *Id.*
3. *Id.*
4. *Id.* at 458 n. 4.

Louisiana, Mississippi, and Alabama, but only exists in Mississippi today.[5] When determining factors important to the Frogs' critical habitat designation, the Service noted that the Frogs spend the bulk of their lives underground in open-canopied pine forest, then migrate to ephemeral ponds to breed.[6] Ephemeral ponds are defined by a cycle of seasonal flooding followed by a period of drying up, which makes it impossible for predatory fish to survive.[7] Ephemeral ponds are not common in the Frogs' range and their locations were a primary consideration when the Service looked to expand the critical habitat designation beyond the original proposed rule, which only designated areas currently occupied by the Frog.[8]

In 2010 the Service published the original proposed rule designating 1,957 acres in Mississippi as critical habitat for the Frog.[9] Due to concerns raised during the peer-review process that the original proposed area was not sufficient, the Service's final designation was expanded to 6,477 acres, located in four counties in Mississippi and one parish in Louisiana.[10] The designated area in Louisiana, Unit 1, has a total area of 1,544 acres.[11] The Service's "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."[12]

III. PROCEEDINGS AND STANDARD OF REVIEW

This case arrived before the court on an appeal of a grant of summary judgment by the lower court.[13] The Landowners filed for declaratory and injunctive relief, challenging only the Service's designation of Unit 1 as critical habitat.[14] Ultimately, the district court granted summary judgement in favor of the Landowners on the issue of standing, and in favor of the Service on the critical habitat designation.[15]

Review of the Services' alleged maladministration of the ESA is governed by the Administrative Procedure Act ("APA"), not under the citizen-suit provision of the ESA. Under the APA a 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

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5. *Id.* at 458.
6. *Id.*
8. *Id.*
8. *Id.* at 466.
9. *Id.* at 459.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

excess of statutory jurisdiction, authority, or limitations."[16] Additionally, review under the arbitrary-and-capricious standard is "extremely limited and highly deferential."[17]

IV. ANALYSIS

A. Endangered Species Act

The primary objective of the ESA is to conserve the ecosystems upon which endangered species depend, allowing the species to survive and recover from their endangered or threatened status.[18] The Service has two primary functions under the ESA: first, to identify and list endangered and threatened species and second, to designate, "to the maximum extent prudent and determinable," the species' critical habitat.[19] Critical habitat designation benefits the listed species by requiring federal agencies to consult, under Section 7 of the ESA, with the Service prior to authorizing, funding, or carrying out any action that could result in habitat "destruction or adverse modification."[20]

1. Standing

To establish article III standing, the plaintiff in an action must show they have suffered an injury in fact that is fairly traceable to the defendant's action and likely redressed by a favorable decision.[21] Additionally, the injury must be both concrete and particularized and actual or imminent.[22] Under the APA the court typically applies the zone-of-interest test to establish standing, but neither the district court nor the Service in its appeal briefed this issue.[23] Therefore, the Court declined to consider the zone-of-interest test.[24]

The Landowners alleged two potential injuries to establish standing: 1) loss of future development, and 2) loss of property value.[25] The court disposed of the plaintiff's first alleged injury finding that the

16. *Id.* at 460 (citing 5 U.S.C. § 706(2)).

17. *Id*. (citing Gulf Restoration Network v. McCarthy, 783 F.3d 227, 243 (5th Cir. 2015)).

18. *Id*. at 460-461.

19. *Id.* at 461.

20. *Id.* (clarifying a common misconception, the court noted that private entities and private property owners are not subject to Section 7 consultation).

21. *Id*. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

22. *Id.* at 462.

23. *Id.* (to meet the zone of interest test "a plaintiff must show that 'the interest sought to be protected by the [plaintiff] is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question'")

24. *Id.* at 464.

25. *Id.* at 462.

injury was too speculative.[26] However, the court found the Landowners established standing on their second alleged injury, loss of property value.[27] The Service's Final Economic Analysis recognized that designating land as critical-habitat stigmatizes the property, "can cause real economic effects to property owners," and can lower the market value of the property "due to perceived limitations and restrictions."[28] The loss in value is presumed by the Service to occur at the moment of critical habitat designation; therefore, the injury is traceable to the designation, concrete, actual, and able to be redressed by a favorable judicial outcome.[29]

2. Critical Habitat Designation

Under the ESA, the Service can designate two types of critical habitat: 1) areas occupied by the endangered species at the time of listing, and 2) areas unoccupied by the species at the time of listing.[30] These two areas are designated under distinct criteria. To designate an occupied area, the Service must demonstrate that the area contains "those physical or biological features essential to the conservation of the species."[31] To designate an unoccupied area, the Service must determine that the area is "essential to the conservation of the species."[32] Under regulations that existed at the time of the Frog's listing, designation of unoccupied areas could only be made after a peer review process determined that a "designation limited to [a species'] present range would be *inadequate* to ensure conservation of the species."[33] After the peer review process of the initial critical habitat designation proposal was complete, the Service amended the designation to include Unit 1 because of a finding of habitat insufficiency in the original proposal.

The three "physical or biological features" that define the 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."[34] Following the peer-review processes' finding of habitat insufficiency, the Service examined areas that were "essential for conservation of the species."[35] Because of the rarity of ephemeral ponds and the extreme difficulty involved in their replication

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26. *Id.*
27. *Id.* at 463.
28. *Id.*
29. *Id.*
30. *Id.* at 464.
31. *Id.*; *see* footnote 12 containing the definition of "primary constituent elements."
32. *Markle*, 827 F.3d at 464.
33. *Id.* at 465 (citing 50 C.F.R. § 424.12(e) (2012)) (emphasis in original).
34. *Id.* at 464 (citing to footnote 12).
35. *Id.* at 466.

of ephemeral ponds, the Service used the existence of natural ephemeral ponds as the primary criteria for selecting unoccupied areas.[36] Unit 1 contains five ephemeral ponds that are "intact and of remarkable quality."[37] The Service therefore concluded "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 Frog."[38] However, as the dissent points out, despite the existence of ephemeral ponds in Unit 1, without additional modifications it will still be unable to sustain a population of frogs.[39]

The court first examined the congressional intent of the term "essential," as it is contained in the statute for defining unoccupied territory as critical habitat. The court noted that because Congress was silent or ambiguous as to the exact definition of "essential," the Service's interpretation is entitled to *Chevron* deference.[40] However, the Landowners' arguments were not based on whether the Service's interpretation deserves deference, but rather on whether the Service's interpretation was reasonable under the "plain meaning" of the term "essential" and within the limits of the ESA.[41]

The court summarized the Landowners' arguments against classifying Unit 1 as critical habitat into three parts, though they are all interconnected. First, the Landowner's proposed it was an unreasonable interpretation of the ESA to classify land that is not currently *habitable* by the Frog as "essential" for the conservation of the species ("habitability argument").[42] Second, the Landowners proposed it was unreasonable to classify Unit 1 as critical habitat because Unit 1 did not currently support "the conservation of the species in any way," and the Service had "no reasonable basis to believe it will do so at any point in the *foreseeable future*" ("temporal argument").[43] Finally, the Landowners argued that the designation of Unit 1 as critical habitat was inappropriate because the Service's interpretation of the term "essential" was unreasonable because it is beyond the limits of Service's power under the ESA.[44]

The Landowner's habitability and temporal arguments hinge on the fact that Unit 1 did not currently support the conservation of the Frog, and without significant inputs and modifications from the Landowners, which are not foreseeable, Unit 1 would never support the conservation of the Frog. The Court disposed of both arguments by a plain reading of the statute and regulations, finding the ESA requires the Service to designate "essential" unoccupied habitat and does not further define essential to

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 480 (Owen, J., dissenting).
40. *Id.* at 467.
41. *Id.* at 468.
42. *Id.*
43. *Id.* at 469 (emphasis in original).
44. *Id.* at 470.

mean habitable.[45] If the Service or the Court were to recognize the Landowner's definition of "essential" as "habitable," this would erase the distinction between occupied and unoccupied areas, and change the designation of unoccupied critical habitat under the ESA.[46] Likewise, the court found Landowners temporal arguments for foreseeable habitability were not supported in the text of the ESA.[47] The court noted that the ESA does not require the Service to have a specific plan for when the unoccupied critical habitat will be used, only that it identify areas that are "essential for the conservation of the species."[48]

The Landowner's next contended that the Service interpreted the ESA and the term "essential" in such a manner that placed no "meaningful limits" on the Service's ability to designate unoccupied areas as essential.[49] However, the court disagreed and noted several limitations on the Service's ability to designate unoccupied areas. First, unoccupied areas cannot be designated as critical habitat unless the Service has first established that occupied areas are inadequate for species protection.[50] Second, unoccupied areas can only be designated if they are "essential for the conservation of the species."[51] Finally, the ESA requires the Service to use "the best scientific data available," which further confines the Service's ability to stretch the designation of unoccupied areas.[52] Since the Landowners did not dispute the Service's scientific findings or their factual support that Unit 1 was essential, the court rejected the argument that the Service exceeded its statutory authority and accepted the Service's designation of Unit 1.[53]

3. Economic Decision Not to Exclude Unit 1

When designating critical habitat under the ESA, the Service is required to consider the economic impacts of designating any particular area.[54] The Landowners argued that the Service's decision not to exclude Unit 1 was arbitrary and capricious because the potential economic loss of future development was disproportionate to the biological benefit for the Frog.[55] Citing the potential loss of up to $33.9 million, the Landowners sought judicial review of the Service's final conclusion.[56] The court found:

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45. *Id.* at 468.
46. *Id.*
47. *Id.* at 469.
48. *Id*.
49. *Id*. at 470.
50. *Id.*
51. *Id.* at 471 (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").
52. *Id.* at 472.
53. *Id.* at 467.
54. *Id.* at 473 (citing 16 U.S.C. § 1533(b)(2)).
55. *Id.*
56. *Id.*

"Under the APA, decisions 'committed to agency discretion by law' are not reviewable in federal court."[57] Actions receive agency discretion when there is no "meaningful standard" to judge their discretion against.[58] Consequently, the Service's decision to not exclude Unit 1 for economic reasons was found to be unreviewable.

B. Commerce Clause

The court next examined the Landowners' alternative argument that Unit 1's critical habitat designation violated the Commerce Clause of the United States Constitution.[59] Since the Landowners conceded that the designation of critical habitat is a valid exercise of the Commerce Clause, their contention was that the designation of Unit 1 went beyond the scope of that power.[60] The Landowners argued that designation of Unit 1 is strictly *intrastate* commerce and "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce."[61] However, under the principle of aggregation, "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 is regulated.'"[62] The court followed precedent and determined that the ESA is an economic regulatory scheme and that critical habitat designations are an essential component of that scheme.[63] In support of this conclusion, the court noted every other circuit that has faced similar challenges has upheld provisions of the ESA under the aggregation principle as a valid exercise of the Congress's Commerce Clause power.[64]

C. National Environmental Policy Act

The court quickly disposed of the Landowners' claim that the designation of Unit 1 as critical habitat violated NEPA because the Service did not prepare an environmental impact statement ("EIS") prior to designation.[65] Under NEPA, an EIS is required if the federal action will "significantly affect [ ] the quality of the human environment" and "is not required for *non-major* action which does not have *significant* impact on the environment."[66] The court found that the critical habitat designation did not require physical changes to the environment and did not require the Landowners to take any action; therefore, NEPA's impact statement

57. *Id.* (citing 5 U.S.C. § 701(a)(2)).
58. *Id.* (citing Heckler v. Chaney, 470 U.S. 821, 830 (1985)).
59. *Id.* at 475.
60. *Id*.
61. *Id.*
62. *Id.* at 476 (citing Gonzales v. Raich, 545 U.S. 1, 36 (2005)).
63. *Id.* at 478.
64. *Id.* at 477.
65. *Id.* at 479.
66. *Id.* (emphasis in original).

requirement was not triggered and the Service was not required to complete an EIS.[67]

V. THE DISSENT

Judge Priscilla R. Owen's dissent states the "majority opinion's holding is unprecedented and sweeping."[68] Judge Owen's analysis focuses on the Service's interpretation of the word "essential," and that the Service's interpretation of the term is not reasonable and "rejects the logical limits of the word 'essential.'"[69] The thrust of her argument revolved around the fact that Unit 1 plays no part in the conservation of the Frog, Unit 1 does not contain all the biological and physical characteristics that will support the Frog, and there is no probability that the necessary physical alterations will be made to Unit 1 to make it "essential" to the Frogs recovery. [70]

VI. CONCLUSION

In conjunction with the holdings in *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016), the holdings in the present case have set the Service's designation of critical habitat up to be one of the most powerful and controversial provisions of the ESA. As species like the sage grouse, whose traditional habitat spanned much of the western United States, knock on the door of listing, the Supreme Court's ruling in this case will have far reaching ramifications for both wildlife managers and private property owners. The dissent makes valid arguments towards confining the Service's ability to define critical habitat, but precedent and statutory construction may lead the court in another direction.

67. *Id.* at 480.
68. *Id.* at 481.
69. *Id.* at 487.
70. *Id*. at 480-481.