Shawn Welch

Partner
801.799.5889
Salt Lake City
stwelch@hollandhart.com

Critical Habitat for Endangered Species: Does It Have To Be Habitat?

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On February 13, 2017, a sharply divided Fifth Circuit Court of Appeals declined en banc review of the decision in *Markle Interests, L.L.C. v. United States Fish and Wildlife Service*, 827 F.3d 452 (5th Cir. 2016), a split panel decision which upheld the Fish and Wildlife Service's ("Service") designation of unoccupied critical habitat for the dusky gopher frog. The court declined rehearing despite a strident dissent, stating that the *Markle* decision involved a judicial review strategy attributed to the dusky gopher frog itself: "play dead, cover their eyes, peek, and play dead again." The *Markle* decision and the dissent from denial of en banc review involve a recurring conflict between the extent of judicial review and the proper deference to be given to agency action.

The Markle Decision

The dusky gopher frog historically lived in Louisiana, Mississippi and Alabama. By 2001 approximately 100 adults were known to exist in the wild, and were only present in Mississippi. *Markle*, 827 F.3d at 459. After initially proposing 1,957 acres of critical habitat, the Service later designated 6,477 acres of critical habitat, including 1,544 acres of unoccupied private land located in Louisiana "Unit 1".

This additional designation of unoccupied habitat involved a two-step process under the Endangered Species Act ("ESA"). First, 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.'" *Id.* at 464 (quoting 16 U.S.C. § 1532(5)(A)(i)). The essential features of dusky gopher frog habitat are: 1) ephemeral ponds for breeding; 2) an open-canopy longleaf pine ecosystem; and 3) upland habitat between breeding and nonbreeding habitat that includes specific herbaceous plants under open-canopy longleaf pines. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,129 (June 12, 2012). The second step involved designation of unoccupied areas as critical habitat, if the Service determines that the occupied areas were insufficient for the conservation of the species. To designate unoccupied areas as critical habitat, the ESA requires the Service to "determine that the designated [unoccupied] areas are 'essential for the conservation of the species.'" 827 F.3d at 464 (quoting § 1532(5)(A)(ii)).

The Unit 1 dispute arose from the fact that, even though the area includes five ephemeral ponds, approximately "ninety percent of the property is currently covered with closed-canopy" pine plantations that were subject to timber operations. *Id.* at 482 (Owen, J., dissent). "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." *Id.* at 486. Additionally, the Unit 1 lands are privately owned, meaning the Service cannot require the land to be modified to create habitat for the frog without the landowner's consent and the private landowners confirmed their intent to continue timber harvesting operations on the land. *Id.* at 459.

In supporting its decision to designate the unoccupied private land as critical habitat, the Service acknowledged that although "the uplands associated with the [Unit 1] ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort." *Id.* at 482 (Owen, J., dissent) (internal quotation marks and citation omitted). Thus, Unit 1 was uninhabitable by the frog when it was designated as critical habitat essential for the conservation of the species. In her dissent from the panel decision Judge Owen wrote that 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." *Id.* at 486 (Owen, J., dissent).

The majority in *Markle* based its decision on a judicial doctrine known as *Chevron* deference, named for the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), under which a reviewing court will defer to agency expertise and interpretive regulations if a statute is silent on a specific aspect of implementing statutory intent. *See Markle*, 827 F.3d at 464-65.

Denial of En Banc Review and the Dissent

The Fifth Circuit denied en banc review by an eight to six vote. *See Denial of Rehearing En Banc, Markle Interests, L.L.C., et al. v. United States Fish and Wildlife Service, et al.*, App. No. 14-31008 (5th Cir. Feb. 13, 2017). In a rare move, the six dissenting judges filed a 31-page written explanation of why review should have been granted. Writing for the dissent, Judge Jones described the issues before the court as turning on statutory construction, not on deference to administrative discretion or scientific fact finding. Dissent at 4. Characterizing the *Markle* decision as "unprecedented," the dissent challenged: 1) whether the ESA included a "habitability requirement;" 2) whether the unoccupied Unit 1 land is "essential for the conservation of the frog;" and 3) whether the Service's decision not to exclude Unit 1 is unreviewable because it is committed to the discretion of the agency. Dissent at 3.

As to the question of whether the ESA contains a habitability requirement, the dissent confirmed that "Unit 1 is uninhabitable by the shy frog," but the critical habitat designation could result in economic impacts of $34 million in lost opportunities. Dissent at 6. Noting that the ESA's provision for designation of unoccupied areas requires that the Service determine such areas to be essential for the conservation of the species, the dissent wrote that "the ESA makes clear that a species' critical habitat must be a subset of that species' habitat." *Id.* at 8. "Critical habitat is not necessarily all

habitat, but its irreducible minimum is that it *be habitat*." *Id.* at 13 (emphasis in original). Following a lengthy review of the context of critical habitat in legislative history and the ESA's scheme, the dissent concluded:

> 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. *Id.* at 17.

The dissent would also have reversed *Markle* because, in the instance of an unoccupied area, the "specific *areas themselves* must be essential" for the species' conservation. Dissent at 19 (emphasis in original). Accordingly, the designation of unoccupied habitat "entails a broader and more complex investigation" into whether the entire area is essential to the species' conservation. *Id.* at 20. To the dissent, the *Markle* decision made it far easier to designate an unoccupied area as critical habitat than an occupied area. "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." Dissent at 24 (emphasis in original; citation omitted).

"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." Dissent at 23. In the absence of a more demanding and limiting structure for designating unoccupied habitat, the Service would have "free rein to regulate any land that contains any single feature essential to some species' conservation." *Id.* at 25. This would expand the Service's power in an unprecedented and sweeping manner. *Id.* at 29.

The dissent further criticized *Markle*'s holding that the Service's decision not to exclude Unit 1 was unreviewable. In designating critical habitat, the Service is required to take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying an area as critical habitat. Dissent at 30, citing 16 U.S.C. § 1533(b)(2). Following this analysis, the Service may exclude any area from critical habitat if it determines that the benefits of exclusion outweigh the benefits of specifying an area as part of the critical habitat. *Id.*

The Service's economic impact analysis found between $0 to $34 million in economic impacts to the private landowners of Unit 1. 77 Fed. Reg. at 35,140. "[T]here is virtually nothing on the other side of the economic ledger," and the economic analysis 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." Dissent at 30-31. Despite the lack of economic impact analysis, the majority held that the Service's decision "is unreviewable." *Markle*, 827 F.3d at 475.

Noting a strong presumption in favor of judicial review, the dissent wrote that the Supreme Court has held that "the Service's consideration of economic impact of critical habitat is mandatory, not discretionary." Dissent at 33 (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997)). Thus, "regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." Dissent at 33. To the dissent, the denial of review marked an abdication of the court's responsibility to oversee agency action. *Id.* at 34. In other words, it played dead. *Id.* at 3.

Fifteen states filed amicus curiae briefs in support of rehearing, and numerous other groups filed in support or opposition as well.