

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

MARKLE INTERESTS, LLC

CIVIL ACTION

VERSUS

**NO: 13-0234-c/w 13-0362
and 13-0413-MLCF-SS**

**UNITED STATES FISH AND
WILDLIFE SERVICE, et al**

ORDER

MOTION TO INTERVENE AS DEFENDANTS (Rec. doc. 22)

GRANTED

On February 7, 2013, the Markle Interests, LLC ("Markle") filed a complaint against the United States Fish and Wildlife Service ("Service") and others concerning the Service's issuance of a final rule designating habitat for the dusky gopher frog. Rec. doc. 1. P&F Lumber ("P&F") and Weyerhaeuser Company ("Weyerhaeuser") filed similar complaints. The actions were consolidated. The Center for Biological Diversity and Gulf Restoration Network (collectively "Center/Gulf Restoration") moved to intervene of right and in the alternative, by permissive intervention. The plaintiffs opposed the intervention. Rec. docs. 41-43. While the Service takes no position on the motion, it disagrees with some of the factual assertions made by the plaintiffs. Rec. doc. 46.

The parties agree that, pursuant Fed. R. Civ. 24(a), intervention of right is warranted when: (1) the application is timely; (2) the applicant has a legally protected interest in the action; (3) the action threatens to impair that interest; and (4) none of the existing parties adequately represent the would-be intervenor's interests. They agree that the motion by the Center/Gulf Restoration is timely.

A. Legally protected interest.

Center/Gulf Restoration must point to an interest that is direct, substantial, and legally protectable. Ross v. Marshall, 426 F.3d 745, 757 (5th Cir. 2005).

Markle requests that the final rule designating critical habitat for the dusky gopher frog be found invalid and the final rule void because the Service failed to comply with 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.* It requests a judgment enjoining enforcement of the final rule and remanding the rule for re-designation of critical habitat in accord with ESA, APA and U.S. Constitution. Rec. doc. 1 at 21-22.

Markle alleges that: (1) on June 12, 2012, the Service designated critical habitat for the dusky gopher frog; (2) the designation covers 6,477 acres in Mississippi and Louisiana, including 1,544 acres in St. Tammany Parish ("Unit 1"); (3) Unit 1 is private land in which Markle owns an undivided interest; (4) Unit 1 is not currently occupied by the dusky gopher frog; and (5) Unit 1 is unsuitable for dusky gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. Rec. doc. 1 at 9-10.

The plaintiffs argue that because Unit 1 does not contain either the frog or the physical and biological features essential to the conservation of the species, the Center/Gulf Restoration does not have a legally protected interest. Rec. docs. 41 at 3, 42 at 2 and 43 at 2. Center/Gulf Restoration concedes that there are no dusky gopher frogs on Unit 1. Rec. doc. 44 at 3. The Service and Center/Gulf restoration dispute the allegation that Unit 1 is not a suitable habitat. Rec. doc. 47. The undersigned agrees with Center/Gulf Restoration that if it denies the motion to intervene, it accepts as undisputed facts which remain to be adjudicated on the merits. For the reasons presented by

Center/Gulf Restoration, it possesses a legally protected interest.

B. Action threatens to impair that interest.

In response to Center/Gulf Restoration's argument that plaintiffs' actions threaten to impair its legally protected interest, Markle responds:

[I]f Plaintiffs succeed in excluding Unit 1 from critical habitat the dusky gopher frog would lose no essential protections under the ESA. As noted above, it is undisputed that Unit 1 is unoccupied and unusable as habitat for the species. The government concedes that Unit 1 is missing the features essential to make Unit 1 habitable and that it cannot compel the private landowners to manage Unit 1 for species conservation. *See* Markle Complaint at 10. Whether Unit 1 will ever become suitable habitat is pure speculation. Unit 1 does not provide any protections, let alone essential protections to the dusky gopher frog under the ESA.

Rec. doc. 41 at 4. If the undersigned accepts the arguments of Markle and the other plaintiffs, it would resolve a disputed issue of fact on the motion to intervene, which is improper. For the reasons presented by Center/Gulf Restoration, the plaintiffs' complaints threaten to impair its legally protected interest.

C. Adequate representation.

The parties agree that Center/Gulf Restoration's burden of demonstrating inadequate representation is minimal. Rec. docs. 22 at 13 and 41 at 6. Center/Gulf Restoration contends that it meets the burden because: (1) it had to sue the Service to get the challenged rules and protections in place; (2) the failure of the Service to advocate for protection in the past indicates that it may not adequately do so in the future; (3) the Service is required to represent the public interest and not the Center/Gulf Restoration's private interests; and (4) it will raise arguments that will not be raised by the Service. The plaintiffs respond that the Service and the Center/Gulf Restoration have the same ultimate objective, so there is no adversity of interest. Rec. doc. 41 at 6-7.

The fact that Center/Gulf Restoration was required to sue the Service demonstrates that there

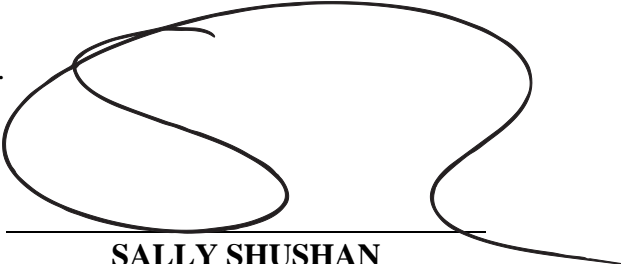
is a history of adversity. Its interests are not adequately represented by the Service.

* * *

The motion of Center/Gulf Restoration for intervention of right will be granted. It is not necessary to consider the issue of permissive intervention.

IT IS ORDERED that the motion of Center/Gulf Restoration for intervention of right (Rec. doc. 22) is GRANTED.

New Orleans, Louisiana, this 25th day of June, 2013.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal tail extending to the right.

SALLY SHUSHAN
United States Magistrate Judge