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In Win for WLF, High Court Agrees to Consider if Endangered Species Act Eviscerates Property Rights

(Weyerhaeuser v. U.S. Fish & Wildlife Service)

“The appeals court held that the judiciary cannot review a broad swath of federal government decisions imposing land-use restrictions under the Endangered Species Act. The Supreme Court appropriately decided to review that ruling, which contradicts the ‘strong presumption’ that federal administrative actions are judicially reviewable.”

—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—In a victory for the Washington Legal Foundation (WLF), the U.S. Supreme Court today agreed to review a decision by the U.S. Fish and Wildlife Service (FWS) to designate private property in Louisiana as “critical habitat” for an endangered species of frog, even though the frog does not live in Louisiana and could not do so without substantial land modifications. In a brief filed in support of the landowners’ petitions for review in *Weyerhaeuser v. U.S. Fish & Wildlife Service*, WLF argued that the appeals court erred in concluding that Congress barred cost-benefit challenges to such designations. WLF’s brief was joined by the Allied Educational Foundation.

The disputed Louisiana land consists of 1,500 acres of forest that the owners hope to develop, but its potential for development is substantially decreased by the “critical habitat” designation. FWS officials estimated that the designation decreases land values by as much as \$35 million. They also recognized that the designation would have little, if any, short-term value for the endangered frog because the landowners’ permission (unlikely to be granted) is required before (1) necessary land modifications could be undertaken; and (2) frogs could be transported to the land from their current Mississippi habitat. Despite this near-infinite cost-benefit ratio, FWS decided to exercise its discretion to proceed with the designation.

WLF’s brief argued that the Endangered Species Act (ESA) expressly authorizes courts to review whether FWS abuses its discretion when it designates land as “critical habitat” despite recognizing that the costs of designation greatly exceed benefits. WLF noted that Congress amended the ESA to require FWS to take account of costs and benefits of its actions—a strong indication that Congress intended to permit judicial review under an abuse-of-discretion standard. WLF also argued that the decision below—that courts may not second-guess FWS cost-benefit determinations—undermines the strong presumption that all federal administrative actions are subject to judicial review. WLF charged that FWS is extorting landowners in hopes that they will agree to permit species to be introduced onto their land in return for an FWS agreement to partially lift development restrictions. The Court is likely to hear oral arguments in October and issue a final decision in 2019.

Celebrating its 41st year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.