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WLF Asks Supreme Court to Review Taking of Uninhabited ‘Habitat’ Under Endangered Species Act

(*Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, et al.* and

Markle Interests, L.L.C., et al. v. U.S. Fish and Wildlife Service, et al.)

“The Fifth Circuit held that courts are not permitted to review a broad swath of federal government decisions imposing land-use restrictions under the Endangered Species Act. That ruling contradicts the ‘strong presumption’ that federal administrative actions are judicially reviewable.”

—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation filed an *amicus* brief with the U.S. Supreme Court yesterday supporting the petitioners, who are seeking *writs of certiorari* in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* and *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Service* (FWS). WLF’s brief was joined by the Allied Educational Foundation.

In 2012, FWS designated land owned by the petitioners in Louisiana as critical habitat for the dusky gopher frog, an endangered species formerly named the “Mississippi gopher frog.” The petitioners’ land consists of 1,544 acres of forest that is not currently occupied by the frog.

Petitioners challenged the “critical habitat” designation in district court in 2013. They claimed that FWS’s designation violated the Administrative Procedure Act because it was arbitrary, capricious, and an abuse of discretion, given that the costs of designating petitioners’ land far exceed any possible benefits. While the district court described this cost issue as troubling and compelling, the court ultimately decided that the Endangered Species Act required it to defer to FWS’s decision, and a divided Fifth Circuit panel affirmed.

WLF focuses its *amicus* brief on whether Congress intended to preclude all judicial review of FWS decisions not to exclude areas from a “critical habitat” designation. The misinterpretation of congressional intent below concerns WLF as “it will provide federal agencies with unilateral power to make a broad array of regulatory decisions, unchecked by any possibility of judicial review.”

As the brief argues, “critical habitat” designations are subject to judicial review under the ESA when FWS has failed to consider the economic impact of its designation. WLF contends the Supreme Court should take this opportunity to rectify the Fifth Circuit’s error in judgment as it is not consistent with the Court’s longstanding position favoring judicial review of administrative action. WLF also urges the Court to grant review because ESA does not permit regulation of land not currently inhabited by an endangered species when (as here) the land is not ‘essential’ to conservation of that species.

Celebrating its 40th 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.

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