Hogan Lovells

Supreme Court grants a shy frog the chance to shape critical habitat designations

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The Supreme Court (the Court) will soon address two recurring issues concerning administration of the Endangered Species Act, and more broadly, the deference given to agency action in the discretionary exercise of statutory authority. Last week, the Supreme Court granted certiorari for a Fifth Circuit case that pits property owners—including one of the nation's largest timber companies—against a small, elusive species of frog nicknamed the "shy frog." Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., No. 17-71 (U.S. 22 January 2018). Though the case specifically addresses the Fish and Wildlife Service's decision to include 1,544 acres of St. Tammary Parish, Louisiana, in the dusky gopher frog's "critical habitat," the legal questions raised could have broad implications for interpretations of the Endangered Species Act and administrative law generally. The petition for certiorari asks the Court to address:

1. whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation; and

2. whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

For each species listed as threatened or endangered under the Endangered Species Act, the Fish and Wildlife Service (the Service) must "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i)-(ii). The statute contemplates two types of critical habitat: (1) areas within the geographical area occupied by the species, which contain the physical or biological features essential to the conservation of the species; and (2) areas outside the geographical area occupied by the species, "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(i)–(ii) (emphases added). Once land is designated as critical habitat, "federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." Otay Mesa Prop., L.P. v. U.S. Dep't of Interior, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001 and proposed in 2010 to designate 1,957 acres in Mississippi as critical habitat. After public comment and peer review, the Service's final designation ultimately expanded the critical habitat designation to include 4,933 acres in Mississippi and 1,544 acres in St. Tammary Parish, Louisiana. See Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118 (12 June 2012). The dusky gopher frog does not currently occupy the land in St. Tammary Parish and has not been seen in Louisiana

since 1965. The Service also acknowledged that the St. Tammary Parish land does not currently contain all of the physical and biological features necessary to sustain dusky gopher frogs. But the land does contain ephemeral ponds, which are relatively rare and necessary for the frog to breed. The Service accordingly determined that "[m]ultiple breeding sites protect against catastrophic loss at any one site and provide opportunity for recolonization" and therefore "[t]he multiple ponds present at the St. Tammany Parish site . . . [are] essential for the conservation of the dusky gopher frog." Id. at 35,133. The Service thereby justified including this land as part of the dusky gopher frog's critical habitat as unoccupied but "essential" for its conservation.

Owners and lessees of the designated land in St. Tammary Parish who engage in timber operations and commercial development brought suit challenging the Service's decision. The landowners argued that unoccupied critical habitat must be "habitable"—i.e., capable of supporting a population of the species—in order to qualify as both habitat and essential under the Act. The court of appeals rejected this argument, holding that this "proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating unoccupied land with the standard for designating occupied land." Markle Interests, L.L.C. v. United States Fish & Wildlife Serv., 827 F.3d 452, 468 (5th Cir. 2016). The court found that the Service reasonably concluded that "occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog" and that the St. Tammary Parish land was essential for the conservation of the frog. Id. at 468, 473. As such, the court held that the Service was entitled to Chevron deference for its decision, meaning the court would not supplant its judgment for the Service's reasoned judgment and expertise. Id. at 473.

The court of appeals further rejected the contention that the Service acted arbitrarily in failing to adequately consider the economic cost of its decision. While the Service must take into account economic factors when designating critical habitat, the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . ." 16 U.S.C. § 1533(b)(2) (emphasis added). The commercial entities estimated US$33.9m of lost development opportunities. The court, however, never addressed this issue. Consistent with a recent Ninth Circuit opinion—and every prior district court decision to address the issue—the court instead held that because the statutory language allowing exclusion of land is permissive rather than mandatory, and no intelligible factor exists to evaluate the agency's decision, the Service's decision to not exclude the land was not subject to judicial review. See Markle Interests, L.L.C., 827 F.3d at 473–74 (citing Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 989–90 (9th Cir. 2015)).

The commercial entities asked the court to reconsider by petitioning for rehearing en banc, which the court denied, but with six judges dissenting. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 848 F.3d 635 (5th Cir. 2017). The dissent disagreed with three parts of the court's original ruling: (1) its failure to require that "critical habitat" be a subset of the species' "habitat"; (2) its interpretation of the "unoccupied" component of critical habitat as broader than the "occupied" component; and (3) its determination that the Service's decision not to exclude the land based on economic impacts was unreviewable by the courts. Id. at 640, 652–55. The dissent saw the panel decision as directly in conflict with the Supreme Court's decision in Bennett v. Spear, 520 U.S. 154 (1997), which held that the Service must "tak[e] into consideration the economic impact and any other relevant impact" in its critical habitat determination and that the ultimate determination is reviewable for abuse of discretion. Id. at 172. Whether Bennett is determinative will turn on whether the mandatory consideration of economic impact in the statute constrains the Service's discretionary authority to exclude areas from critical habitat designations, in the same manner it affects the Service's authority to designate areas of critical habitat.

A Supreme Court opinion in this case is likely to influence both the designation of critical habitat and administrative law generally. A reversal by the Supreme Court could prevent the Service from designating critical habitat in areas not currently inhabited or otherwise deemed inhabitable by the species. A particularly strict reading may even prevent the Service from designating unoccupied habitat that is needed to supplement the listed species' currently occupied habitat. The Court will also likely provide guidance on the weight given by the Service to its assessment of economic factors when making critical habitat designations. More broadly, this case is expected to determine the scope of judicial review of decisions which result from an exercise of agency discretion. In this regard, the Court's decision could have an expansive reach for federal agencies generally, well beyond the Service's protection of the shy frog from Mississippi.

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