

Froggie Goes A Courtin' in the Home of the Hapless Toad

John Roberts' first opinion as a judge on the D.C. Circuit was a dissent from denial of rehearing *en banc* in an Endangered Species Act case. His opinion famously referred to the endangered species at issue as "a hapless toad that, for reasons of its own, lives its entire life in California[.]" Two years later critics pointed to this flippant reference to species extinction as a reason to oppose his nomination to be Chief Justice.

On October 1st the Supreme Court will begin a new term. The first case scheduled for oral argument is another ESA case involving another amphibian, the dusky gopher frog. In this case, private landowners challenge the government's designation of 1,500 acres of pine forest not occupied by the frog as critical habitat essential for survival of the species.

The ESA clearly authorizes the designation of private land as critical habitat; and it expressly authorizes the designation of land not occupied by an endangered species if the Secretary finds the area to be essential for the species' survival. The fight over habitat for the dusky gopher frog in the Supreme Court involves two relatively straightforward issues of statutory construction:

1. Whether land not occupied by an endangered species may be designated as critical habitat if the land currently lacks one or more of the physical or biological features essential to conservation of the species; and
2. Whether the agency's decision not to exercise its discretionary authority to exclude petitioner's land from critical habitat on grounds of economic impact is committed to agency discretion.

A district judge appointed by President Reagan and generally regarded as staunchly conservative, upheld the critical habitat designation, but did so with clear distaste for the result:

“The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of government insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.”

The Fifth Circuit, widely regarded as one of the most conservative federal circuits, affirmed the district court, albeit with one judge on the panel dissenting and six judges dissenting from denial of rehearing *en banc*.

The Supreme Court’s decision to hear the case does not bode well for the dusky gopher frog. As the saying goes, “The Supreme Court does not grant *cert.* to affirm.” The broad picture of this case is familiar. A small, seemingly insignificant creature is allegedly blocking the common sense path of economic development and prosperity. The arguments challenging the habitat designation are long on drama regarding supposed economic impact, despite the fact the habitat designation only affects government actions, and in the absence of a federal nexus, does nothing to change the landowners’ private use of their property. And, the arguments against the habitat designation are very short on concern over the survival of what the landowners dub as the “phantom frog.”

So far, the sturdy structure of the ESA has generally withstood this type of full frontal assault, from the snail darter to the Delhi Sands flower-loving fly, to the hapless toad, and now to the dusky gopher frog. If the dusky gopher frog wins, it will not be the first time the Supreme Court took an ESA case that seemed at first blush to be an easy reversal only to find itself ultimately affirming a decision protecting the species. That was exactly what happened with the snail darter in *TVA v. Hill*. And, as was the case in *TVA v. Hill*, a victory for the dusky gopher frog in the Supreme Court will undoubtedly fuel arguments that Congress should amend the ESA.

Brett Kavanaugh's recent nomination to succeed Justice Kennedy has prompted speculation that he would vote against the dusky gopher frog based on his opinion in the D.C. Circuit vacating the critical habitat designation for the San Diego fairy brine shrimp and his critical view of *Chevron* deference. Such speculation may be overstated. It is not clear the Senate will vote on Judge Kavanaugh's confirmation in time for him to participate in the decision regarding the dusky gopher frog. And, in any event, the record supporting the habitat designation for the frog is far more robust than that involving the fairy brine shrimp. In this case, conservative principles supporting strict adherence to statutory language may carry the day for the dusky gopher frog.

Categories: Endangered Species Act, Supreme Court, Wildlife

Tags: Critical Habitat; Dusky Gopher Frog; Chief Justice John Roberts; Judge Brett Kavanaugh; Fairy Brine Shrimp; Weyerhaeuser Co.; Markle Interests, LLC; U.S. Fish & Wildlife Service