

Dusky Gopher Frog/Endangered Species Act: Allan Gates (Mitchell Williams) Addresses Upcoming United States Supreme Court Case



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My law firm colleague, Allan Gates, recently authored a post for the American College of Environmental Lawyers titled:

Froggie Goes A Courtin' in the Home of the Hapless Toad ("Post")

Allan's *Post* discusses the fact that the first case scheduled for oral argument when the United States Supreme Court ("Supreme Court") begins its new term (October 1st) is one involving the Endangered Species Act ("ESA").

As he notes, the dusky gopher frog is on the Endangered Species List and private landowners have challenged:

. . . 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 *Post* describes the issues that the Supreme Court will address as relatively straightforward issues in terms 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.

The *Post* next describes the United States Court of Appeals for the Fifth Circuit prior decision. It noted that a somewhat conservative court concluded the government was correct in its interpretation of the law (but had a dislike for the result).

As to the upcoming Supreme Court review, Allan notes in part:

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 that 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."

Nevertheless, the *Post* notes that the ESA has previously surprised observers with its ability to survive, citing the snail darter, etc.

A copy of the [Post](#) can be found here.