



Numerous Parties File Amicus Briefs in Dusky Gopher Frog Case

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As we reported here, the U.S. Supreme Court granted review of the petition for writ of certiorari in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, No. 17-71, on January 22, 2018. Petitioners challenge a 2-1 panel decision issued by the United States Court of Appeals for the Fifth Circuit, affirming a rule issued by the U.S. Fish and Wildlife Service (Service), 77 Fed. Reg. 35118 (June 12, 2012), that designated critical habitat for the dusky gopher frog (*Rana sevosus*) and included areas within the critical habitat that the frog does not and could not inhabit. Specifically, the currently uninhabitable areas are within the frog's historic range but today contain only one of the three habitat characteristics deemed essential for the frog's life cycle. The areas are part of a forest actively managed for timber production, and the owners (Petitioners) have no intention of restoring the characteristics that could support the frog.

The U.S. Supreme Court agreed to consider two questions presented by the Fifth Circuit's decision:

1. Whether the Endangered Species Act (ESA) prohibits designation of critical habitat within areas that are unoccupied and 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.

Petitioner Weyerhaeuser Company filed its opening brief on April 23, 2018. Respondent Markle Interests, LLC et al. filed their opening brief in support of petitioner on the same day.¹

Following the submission of the opening briefs, 18 amicus briefs were filed in support of Petitioners by a wide array of groups, including 20 states and national organizations representing business, farmers, home builders, and energy interests.

The parties to those briefs are as follows:

- Coalition for a Sustainable Delta, et al.
- Center for Constitutional Jurisprudence filed.
- St. Tammany Parish Government.
- Southeastern Legal Foundation.
- Wyoming Stock Growers Association, et al.
- Energy and Wildlife Action Coalition.
- American Exploration & Production Council, et al.
- Chamber of Commerce of the United States of America.
- Washington Legal Foundation, et al.
- National Conference of State Legislatures, et al.
- The Cato Institute.
- San Juan County, Utah.
- The National Association of Home Builders, et al.
- Building Industry Legal Defense Foundation, et al.
- Brief of Alabama and 19 Additional States.
- National Federation of Independent Business, et al.
- Cause of Action Institute.
- The American Farm Bureau Federation, et al.

Opposition briefs on the merits are due on June 29, 2018. Oral argument has not been scheduled at this time, but it is anticipated that it will be scheduled early in the fall term. Please check back with us to see how the U.S. Supreme Court decides these issues of critical importance to ESA jurisprudence, namely how to interpret the critical habitat provisions of the ESA and how much deference to give to the Service's interpretation of those provisions.

¹ Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, were plaintiffs-appellants below, but in the U.S. Supreme Court are respondents pursuant to Rule 12.6.