

17-71 WEYERHAUSER COMPANY V. FISH AND WILDLIFE SERVICE

DECISION BELOW: 827 F.3d 452

LOWER COURT CASE NUMBER: 14-31008

QUESTION PRESENTED:

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species***depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500- acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost \$34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

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

CERT. GRANTED 1/22/2018