Frog Or Foul: SCOTUS Weighs Historic ESA Case

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American landowners are about to discover how sacrosanct private property is—or isn't. Grinding against the edges of government power, a benchmark legal battle is ready for the Supreme Court. The potentially historic case features the expanding scope of the Endangered Species Act (ESA) and will either pile on tremendous muscle to federal agency jurisdiction or bolster individual property owner claims.

In the pantheon of controversial ESA cases, a phantom frog arguably has jumped clear of the pack. What began with an endangered amphibian in Mississippi has morphed into a surreal legal tale involving a Louisiana landowner, a host of government agencies or departments, a significant sidecar lawsuit, and a trail of federal judges. Despite a tangled outward appearance, the case begs a simple and jarring question for all U.S. property owners: Does the ESA have any true bounds or is it a federal silver bullet?

Species Deceasing

Can federal agencies point-and-click at any private land in the name of critical habitat for a species that does not live on a given piece of land, cannot live on the land with the current environmental conditions, and does not live in the bounds of the state in question? They presently can and they did; just ask Louisiana native Edward Poitevent.

On May 21, 2011, Poitevent (St. Tammany Parish) got a phone call from U.S. Fish and Wildlife (FWS) personnel, declaring roughly 1,500 acres of his timberland as a prime location for critical habitat for the Mississippi gopher frog. At the time, the last 100 gopher frogs in existence were hiding in Mississippi, the last remnant of a population that once spread across several southern states. However, as the FWS admits, the dusky gopher frog hasn't been "seen" in the entire state of Louisiana since 1967. Not on Poitevent's land; not in St. Tammany Parish; and not within state borders. Simply, the frog is extinct in Louisiana.

FWS had no power to introduce the frog species on Poitevent's Louisiana land, or convert the land to make it suitable for the frog, or force Poitevent and his co-owners to restore the land to accommodate the creature. At a bare minimum, Poitevent's land would need to be clear cut, replanted with longleaf pine, and consistently managed with controlled burns. (All of this would breach a timber contract that runs until 2043 with a third party covering most of the land.)

In addition, an FWS economic study estimated a $34 million long-term devaluation in Poitevent's property resulting from the loss of commercial development. Despite full knowledge that Poitevent wouldn't pay for restoration or allow reintroduction of the frog on his property, and aware of the results of its own economic study, FWS proceeded with the critical habitat designation.

In 2012, FWS officially marked 6,477 total acres as critical habitat for the gopher frog, including Poitevent's 1,500 acres of Louisiana ground. Significantly, FWS made an eleventh hour name change to "dusky gopher frog." By the stroke of the quill, the geographic inconvenience of "Mississippi" was removed from the frog's title.

Through bureaucratic fiat, FWS created a paper haven for a creature it knew would never live on the very land defined in the designation. "When average citizens first hear about my case, they're shocked because it makes no sense at all. When they find out more, the shock turns to outright disdain for government officials," Poitevent explains.

Poitevent is backed by briefs filed by St. Tammany Parish and the state of Louisiana, in addition to amicus support from 17 more states. (Poitevent also has "friends of the court" support from: California Cattlemen's Association, California Building Industry Association, Building Industry Legal Defense Foundation, Cato Institute, U.S. Chamber of Commerce, Center for Constitutional Jurisprudence, Energy and Wildlife Action Coalition, Mountain States Legal Foundation, National Association of Homebuilders and American Forest Resource Council, Southeastern Legal Foundation, Coalition for a Sustainable Delta, San Luis and Delta-Mendota Water Authority, Western Growers Association, Washington Legal Foundation, American Farm Bureau Federation, National Alliance of Forest Owners and National Mining Association.)

Representing Poitevent, Pacific Legal Foundation (PLF) attorney Mark Miller says the public is consistently "outraged by the details" of the gopher frog litigation. "People can't believe the government can lock down private land for a species that doesn't live there, hasn't been seen there in 50 years, and would die if it was put there without dramatic property change. Think about the implications and follow the logic: Any land in the entire country can be declared critical habitat. *Anywhere*."

Manacled to Chevron deference, Poitevent's case has bounced through the court system, but gained SCOTUS review (*Weyerhaeuser v. U.S. Fish and Wildlife*) in January 2018, and is roughly scheduled for an October 2018 hearing.

The ESA is often wielded as a "land use mechanism," according to Bonner Cohen, a senior fellow at the National Center for Public Policy Research. "ESA is an all-powerful statute that historically has been enforced by an entrenched bureaucracy. In the frog case, FWS targeted Poitevent's land already knowing it's unsuitable, and that clearly shows that FWS bureaucrats fully recognize the unbridled power of the ESA statute behind them."

"The bureaucrats that make these decisions, as in the Poitevent case, are unelected and unaccountable to anyone," Cohen continues. "The frogs, flies and mice are only a means to an

end, because the cases are really about control. The agency officials go after farming, ranching, timber or any activity they choose, entirely backed by an ESA battering ram."

Canary in the Coalmine

In 2016, five years after Poitevent received the first federal phone call regarding designation of his land, FWS and National Marine Fisheries Service (NMFS) added two new ESA rules expressly permitting the government to carve out critical habitat for any endangered species, regardless of whether the species lives on the land or whether the land is biologically hospitable for the species.

(For more on the two rules, see 1: "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" 2: "Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat")

Did FWS and NMFS write the two new rules with Poitevent's case as the proverbial canary in the coalmine? Regardless of intention, the two new rules further ensconce the targeting of private land for critical habitat designation. "At some point, maybe somebody got nervous about a reversal or decided to nail this down on me by amending the rule." Poitevent describes. "What is behind these new rules and why were they brought so late in the day after my case was already so far down the line?"

"The agencies will just claim the new rules are there to further protect species," contends Miller, "but some people will say the agencies are going after more private land. This is not what was intended when Congress passed the ESA."

Fish and Deserts

Spearheaded by Alabama, 18 states filed suit on Nov. 29, 2016 (*Alabama v. NMFS*) and came out swinging against the two new rules. As stated in the complaint: "If allowed to stand, the Final Rules would allow the Services to exercise virtually unlimited power to declare land and water critical habitat for endangered and threatened species, regardless of whether that land or water is occupied or unoccupied by the species, regardless of the presence or absence of the physical or biological features necessary to sustain the species, and regardless of whether the land or water is actually essential to the conservation of the species."

"For example, under the Final Rules, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species."

Settlement?

Approximately two years after the start of *Alabama v. NMFS* (and only two months after SCOTUS agreed to hear Poitevent's gopher frog case), Alabama Attorney General Steve Marshall announced a pending settlement on March 15, 2018.

However, the actual text of the settlement offered scant detail. The settlement required federal agencies to submit revised rules within 60 days, but as of June 2018, no updates are publicly available. When asked about the settlement's significance, Marshall's office offered a measured response: "The settlement signals that the Trump administration will reconsider the rule and, we anticipate, come up with a rule that is more consistent with the statute and better balances the interests of landowners and endangered species."

Marshall's office says although no formal relationship exists, the settlement raises similar issues to Poitevent's case: "…FWS' legal reasoning behind the designation in Markle (Poitevent's case) is similar to the legal reasoning the FWS used to justify the rule that we challenged."

Miller calls the settlement "nebulous" and says any significance for U.S. landowners is yet to be seen. "Some would say the deep state bureaucrats at FWS are biding their time, similar to deep state bureaucrats related to WOTUS rules. They delay with the belief that the clock is on their side, biding time until there is a new administration."

Locals Know Best

Miller is adamant that landowners consider the implications of a federal lockdown on private land with tenuous, or nonexistent, connections to an endangered species. "Congress needs to revisit the ESA and make clearer what is already clear. Anyone's land can be changed dramatically to become hospitable to an endangered species, and that means anyone's land can be declared critical habitat."

Is the settlement in the *Alabama v NMFS* lawsuit a harbinger for Poitevent's benchmark SCOTUS case scheduled for fall 2018? Poitevent's case deals in specifics, while the Alabama case tackles the broader picture, yet both deal with critical habitat designations and ask the central question pertinent to private land ownership: Does the ESA have any true bounds or is it a federal silver bullet?

Come October, U.S. landowners will be waiting for SCOTUS to deliver an answer. "It's possible this could be a historic case," Cohen notes. "Even a narrow decision supporting landowners would provide a ray of hope in what has been a rigged game for decades. A broad decision supporting landowners would be a giant step forward."

"Private property owners or farmers should never assume the ESA and critical habitat don't apply to their land. Right now it's me, but it can happen to anyone, anywhere and at any time—and for absolutely no good reason," Poitevent concludes. "Something tells me I've been the canary in the coalmine the whole time."