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The Gopher Frog and Justice Alito's Unanswered Question

By: [Brian Mannix](#) | December 12, 2018

Who should pay for the preservation of this public good?

Justice Alito posed this question during an [oral argument](#) on October 1, the first day of the Supreme Court's 2018 term. The public good at issue was the preservation of *Lithobates sevovus*, the endangered Dusky Gopher Frog, whose habitat needs were at issue in *Weyerhaeuser v. U.S. Fish and Wildlife Service*.

This particular frog lives today only in Mississippi, but the Fish and Wildlife Service (the Service) had designated 1,500 acres of private Louisiana forest land as critical habitat for the frog. The frog did not—indeed it could not—inhabit the designated acres. But with suitable modifications, the Service argued, this land could be made into much needed habitat for the frog. Besides, it estimated the cost to the Weyerhaeuser Company and the other private landowners to be a relatively modest \$34 million.

On Tuesday, November 27, the court released an 8-0 decision (Justice Kavanaugh did not participate) in favor of Weyerhaeuser and its co-petitioners, with a [unanimous opinion](#) written by Chief Justice Roberts. Surely, the Chief argued, when Congress wrote the words “critical habitat” into the Endangered Species Act, it was referring to a subset of “habitat”—meaning places where the frog does, or could, live, rather than places that might be converted into habitat. The case is not over; it is remanded to the U.S. Court of Appeals for the Fifth Circuit, with instructions to think again about what might qualify as critical habitat.

But the Court never reached Justice Alito's question of who should pay for the habitat if the Service persists and prevails on remand. Indeed, his question—really, whether the designation of critical habitat might amount to an unconstitutional taking of private property for public use—was not before the court, and will not be ripe for review unless and until an actual “taking” has been completed. At that point the landowners would seek compensation for the property that had been taken.

This question has been hanging over the Endangered Species Act for a long time. I was an economist at OMB's Office of Information and Regulatory Affairs (OIRA) when the Service sent

over one of the first critical habitat proposals, for a tiny creature called the [Hay's Spring Amphipod](#).

There were three striking things about the proposal. First, the critical habitat was in the District of Columbia, on the grounds of the National Zoo, within walking distance of my office. Second, it comprised only one square meter in total area (my first thought was that it might be a cage). Third, the exact location of the habitat was a secret.

I asked the Service staff for an explanation, and they said that they were being very cautious in implementing their fairly new critical habitat authority, because they believed that designating private property would trigger a credible claim for a regulatory taking. The modest habitat for the Hay's Spring Amphipod lay entirely on federal property, and thus could not trigger such a lawsuit. The location was not disclosed lest some drunken college students commit [xenocide](#) just for bragging rights. In the end, the Service decided it would be safer not to publish the critical habitat rule at all.

By 1992 the Service was feeling less inhibited, and proposed to designate most of the Cascade Range in Oregon and Washington as critical habitat for the Northern Spotted Owl. This would have ended logging in a region where logging was central to the local economies. Land ownership in that region is "checkerboarded"—divided by the 19th-century [Pacific Railroad Acts](#) into 1-mile square parcels with ownership alternating between the federal government and, originally, the Burlington Northern Railroad. Logging took place on both the federal and private parcels. Weyerhaeuser, although it owns extensive timberland in other parts of the country (including that frog non-habitat in Louisiana), operated primarily on federal lands in the Pacific Northwest. Its rival, the Plum Creek Timber Company, a spinoff from Burlington Northern, owned and logged the private parcels.

By this point I was working as a private consultant, and Plum Creek hired me and a colleague, Tom Lenard, to analyze the Service's Northern Spotted Owl proposal. Their law firm would be writing a comment on the rulemaking, and the Company wanted us to provide an appendix that documented the socioeconomic impact of the critical habitat designation. I pointed out that such an analysis would be provided by other commenters, but would be unpersuasive coming from Plum Creek because of their stake in the outcome. Instead, Plum Creek should do what no other commenter could do: tally the private cost of the proposal to them and threaten to sue for compensation under the takings clause.

Plum Creek's law firm, Perkins-Coie, was skeptical. They declined to incorporate the takings argument into their comment, to protect the firm's established reputation. But they acknowledged that it was not a crazy argument, and they would not object to us putting it into the appendix, which we did. We estimated the lost value of Plum Creek's private timber to be approximately \$6.4 billion. After seeing that appendix, the State of Washington threatened to sue the Service as well, for the value of any state lands that were included in the critical habitat.

In response, the Service withdrew its proposed rule, and replaced it with a critical habitat for the Northern Spotted Owl that only covered the federal parcels. Logging ceased on the federal lands, but continued on the interspersed private and state lands. Eventually Weyerhaeuser [bought out](#) Plum Creek, paying \$8.4 billion in 2016 for those private lands that had been saved from the critical habitat designation.

There is no case law directly establishing critical habitat designations as potential takings that merit compensation. But that may be because the Service has been carefully avoiding going to court, in instances where the facts seem to favor the landowners' claims.

The same will likely be true in the case of the Dusky Gopher Frog. The Fifth Circuit may now determine that the contested acreage is not habitat, and thus cannot be critical habitat. But if the Service somehow succeeds in designating this private land as critical habitat, the Supreme Court may finally reach, and answer, Justice Alito's question. And the answer likely will be that the government must pay for the property it has taken. Moreover, the price will not be the \$34 million determined by the Service's economic analysis. In a reverse condemnation suit, the compensation due will be the market value of the lost property rights, calculated by an independent authority.

If the answer to Justice Alito's question is that the federal government must pay for this public good, then the Service—and the President and the Congress—may want to weigh the value of this could-be critical habitat before they spend more money on it.

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