SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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WEYERHAEUSER COMPANY,   )

         Petitioner,   )

         v.   ) No. 17-71

UNITED STATES FISH AND WILDLIFE   )

SERVICE, ET AL.,   )

         Respondents.   )

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Pages: 1 through 66

Place: Washington, D.C.

Date: October 1, 2018

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 3    WEYERHAEUSER COMPANY,              )

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 8              Respondents.            )

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10                Washington, D.C.

11              Monday, October 1, 2018

12

13            The above-entitled matter came on for oral

14    argument before the Supreme Court of the United States

15    at 10:06 a.m.

16

17    APPEARANCES:

18    TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf

19        of the Petitioner.

20    EDWIN S. KNEEDLER, Deputy Solicitor General,

21        Department of Justice, Washington, D.C.; on behalf

22        of the Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 17-71,

5   Weyerhaeuser Company versus the United States

6   Fish and Wildlife Service.

7   Mr. Bishop.

8   ORAL ARGUMENT OF TIMOTHY S. BISHOP

9   ON BEHALF OF THE PETITIONER

10   MR. BISHOP: Mr. Chief Justice, and

11   may it please the Court:

12   Congress amended the Endangered

13   Species Act in 1978 to narrow the concept of

14   critical habitat, and it did that in response

15   to this Court's decision in Hill and an early

16   regulation that allowed critical habitat

17   designation for population expansion beyond a

18   species' present habitat. In the provision

19   that requires designation of critical habitat,

20   Section 4, Congress limited the Service's power

21   to designate to any habitat of such species

22   which is then considered to be critical

23   habitat.

24   In Section 3(5)(C), Congress commanded

25   that critical habitat shall not include the

1   entire area which can be occupied by a species.

2   And those limitations show that Congress

3   intended that areas that can be occupied by a

4   species -- that is, its habitat -- mark the

5   outer bounds, the outer bounds of critical

6   habitat, and it would be perverse --

7   JUSTICE KAGAN: Mr. Bishop, may -- may

8   I offer you a hypothetical just to understand

9   the scope of your argument, which is a bit

10   unclear to me? So, in my hypothetical, there

11   is a species which, like this one, is in only a

12   single habitat, and for whatever reason, that

13   habitat is no longer going to support the

14   species.

15   Disease has come, a predator has come,

16   it's gotten too hot, it's gotten too cold,

17   whatever it is. That single habitat no longer

18   will be able to support the species. And there

19   is no habitat that at the present moment --

20   there is no other habitat that at the present

21   moment is capable of conserving the species

22   over the long term.

23   But there is a habitat that, with only

24   slight improvements, what the government calls

25   reasonable efforts, can support the species.

1   Okay?

2   So habitat A where the species is, no

3   longer any good. Habitat B, it can't -- it

4   won't conserve the species if left just as it

5   is, but it only takes reasonable effort to

6   conserve the species.

7   Can the government designate that area

8   as unoccupied, critical habitat?

9   MR. BISHOP: No, it has to be habitat.

10   Now, just to be plain, part of the problem with

11   that is that the government -- when the

12   government talks about reasonable changes,

13   which is what -- is what it does here, what

14   would be involved in -- on this piece of land

15   for it to be inhabited --

16   JUSTICE KAGAN: I understand that you

17   think --

18   MR. BISHOP: There may --

19   JUSTICE KAGAN: -- that it's more than

20   reasonable changes that would be involved here.

21   But I'm -- in my hypothetical, that's why it's

22   a hypothetical, I'm --

23   MR. BISHOP: I understand.

24   JUSTICE KAGAN: I'm stipulating --

25   MR. BISHOP: I understand.

1   JUSTICE KAGAN: -- that it's -- it's

2   pretty minimal stuff. It's, you know, dig --

3   dig a few holes, plant a few trees, that sort

4   of thing.

5   MR. BISHOP: Right. I don't rule out

6   that the government might be able to justify a

7   critical habitat designation when there are de

8   minimis changes, where you're really only

9   talking about digging a few holes, where there

10   is a very minimal change required in the land.

11   That isn't this case. We haven't seen

12   the government's justification for doing that.

13   JUSTICE KAGAN: But I want to --

14   MR. BISHOP: What happens when you

15   have a reasonable --

16   JUSTICE KAGAN: I want to stick to my

17   hypothetical, which is, you know, maybe

18   something more than de minimis but -- but --

19   MR. BISHOP: No, I --

20   JUSTICE KAGAN: -- but what -- what

21   the government views as reasonable changes,

22   such to allow the land to support the species

23   over the long term.

24   MR. BISHOP: No, we don't think so,

25   Justice Kagan.

1   JUSTICE KAGAN: And why is that?

2   MR. BISHOP: And the reason is --

3   JUSTICE KAGAN: Where in the statute

4   do you find that?

5   MR. BISHOP: The statute says it in

6   three places. It says in Section 4 that only

7   habitat of such species can be designated as

8   critical habitat.

9   JUSTICE KAGAN: But we know that

10   habitat --

11   MR. BISHOP: It says it in Section

12   3(5)(C) --

13   JUSTICE KAGAN: -- doesn't mean --

14   excuse me, I'm sorry.

15   We know that habitat doesn't mean just

16   where a species lives. I mean, that's -- that

17   would be the common understanding of the word

18   "habitat," but this statute clearly goes beyond

19   that, and we know because it says -- it's also

20   where a statute -- where a species could live,

21   right? It's out -- there are also habitats

22   that are outside the geographical area occupied

23   by the species.

24   MR. BISHOP: But those are --

25   JUSTICE KAGAN: So we know that the

1   statute is not using the kind of garden-variety

2   definition of habitat.

3   MR. BISHOP: No, I -- I disagree with

4   that, Justice Kagan. 3(5)(C) says the critical

5   habitat cannot be designated beyond the entire

6   area which can be occupied. Congress was

7   thinking about habitat in the sense that it is

8   used in -- in common speech and in the

9   dictionaries, which is a "can be occupied"

10   sense. Let me give you an example: The 1979

11   convention of -- on migratory species, to which

12   we are a signatory, says it's an area which

13   contains suitable living conditions.

14   The Forest Service, contemporaneously

15   with these amendments in 1978, said that it's

16   the environment where all the essentials for a

17   species' development and existence are present.

18   JUSTICE GINSBURG: But if you use the

19   migratory bird example, then we have here the

20   ephemeral ponds, which are supposed -- supposed

21   to be ideal for breeding, so it's -- it's a

22   habitat that is suitable for breeding.

23   MR. BISHOP: I disagree with that,

24   Justice Ginsburg. It's -- it's -- it's

25   incorrect to label that as habitat because the

1   frog spends only less than a month in breeding

2   ponds. For this to be a habitat, it has to be

3   land which can be occupied.

4   The habitat here includes -- and this

5   is list --

6   JUSTICE GINSBURG: But is it -- is it

7   -- is it true with -- in -- in the case of

8   birds that they may stay at a place less than a

9   month?

10   MR. BISHOP: That's an entirely

11   different example, Justice Ginsburg. The

12   habitat for a migratory bird includes a summer

13   habitat, a winter habitat, and the places along

14   the way where it has to -- where it roosts. It

15   may -- it may prefer particular trees. You

16   have a contiguous habitat, and the roosting

17   trees clearly can be listed as critical habitat

18   if they meet the other conditions.

19   JUSTICE KAGAN: If I could go back to

20   the -- the statutory basis for your position,

21   because, to my mind, it is a counterintuitive

22   result that the statute would prefer extinction

23   of the species to the designation of an area

24   which requires only certain reasonable

25   improvements in order to support the species.

       1   That seems a counterintuitive result,

       2   and, as I say, it does not seem a result that's

       3   demanded at all by the statutory language,

       4   which contemplates that habitats will exist

       5   even beyond the areas where a species currently

       6   resides.

       7   MR. BISHOP: Justice Kagan, there is a

       8   difference between an area -- an unoccupied

       9   area that is habitat and an unoccupied area

      10   that is not habitat.

      11   JUSTICE ALITO: Mr. Bishop --

      12   MR. BISHOP: The statute reaches --

      13   JUSTICE ALITO: -- do you agree -- I'm

      14   sorry. Continue.

      15   MR. BISHOP: The statute reaches only

      16   in 3(5)(C) critical habitat shall not include

      17   the entire area which can be occupied. That is

      18   the limit that Congress set. It must be

      19   habitat that can be --

      20   JUSTICE KAGAN: But I think that that

      21   was dealing with a very different problem.

      22   That was dealing with a problem where a species

      23   can reside in many areas outside of the area

      24   where it resided, and the statute was making

      25   clear that just because that's true, you can't

1   go designate all of those areas habitat.

2   But this is a different problem from

3   the problem that we're talking about where

4   there's only a single area that might

5   conceivably prevent extinction of the species.

6   And you're saying that, notwithstanding that it

7   was -- it's only reasonable efforts that would

8   allow it to conserve the species, that's not

9   permitted.

10   MR. BISHOP: It is not. And there are

11   clear statutory indications that --

12   JUSTICE ALITO: Well, do you --

13   Mr. Bishop, do you agree with the proposition

14   that the choice in Justice Kagan's hypothetical

15   is between designation of the land as critical

16   habitat and extinction of the species? Are

17   there not --

18   MR. BISHOP: No.

19   JUSTICE ALITO: -- other options

20   available to the federal government?

21   MR. BISHOP: There are other options

22   and there are other clues in the statutory

23   language. Apart from section 4 and 3(5)(C),

24   what this Court said in Sweet Home was that the

25   Section (5) purchase authority was well suited

1   for buying land that is not yet but may in the

2   future become habitat. That was this Court's

3   decision in Sweet Home.

4   In addition, I would point out the

5   definition of conservation in Section 3.3,

6   which you would think if Congress had in mind

7   that restoration and creation of new habitat,

8   which is what would be required on this land,

9   let there be no doubt, if that was what it had

10   in mind, it would have used one of those terms

11   for the list in 3-3 talks about maintenance of

12   habitat and translocation. It does not talk

13   about the creation of new habitat or the

14   restoration of habitat back to the period

15   before human intervention.

16   JUSTICE KAGAN: But -- but I guess

17   what strikes me about the statute, Mr. Bishop,

18   is that really all over the place you get these

19   references to the fact that habitat isn't just

20   sort of there and perfect always, that habitat

21   requires things to be done to it.

22   You know, even in the definition of

23   occupied critical habitat, it talks about

24   special management that needs to be taken in

25   order to protect the habitat.

1   And, similarly, in the definition of

2   conservation, it talks about, you know, the

3   need for habitat improvement.

4   So -- so all through the statute

5   there's this idea of it's not just an on/off

6   switch, that there is habitat that needs to be

7   maintained, improved, and so forth in order to

8   fulfill the function of preserving a species.

9   MR. BISHOP: With all due respect,

10   Justice Kagan, I don't think that's right. I

11   think that all of those references to habitat

12   are references to maintaining habitat that

13   already exists. So --

14   JUSTICE GINSBURG: May I ask you a

15   preliminary question? And it concerns whether

16   the landowner's claim is currently ripe. That

17   is, you are not commanded to do anything. You

18   don't have to do anything at all to -- to

19   conserve the endangered species. And you can

20   continue the -- what is it, timber farming

21   that's going on.

22   Now it may be that down the road you

23   will want to do something else with the land,

24   but wouldn't that be the appropriate time to

25   seek exclusion?

         1   MR. BISHOP: No, Justice Ginsburg.

         2   The -- the immediate effect of this overlay of

         3   a critical habitat on this 1500 acres is a

         4   diminution in value of tens of millions of

         5   dollars. That is what it says in the agency's

         6   economic analysis, that there is an immediate

         7   loss in value.

         8   And the reason I think for that is

         9   fairly easy to -- easy to see. Any buyer

        10   coming in will recognize that down the road

        11   they have to deal with -- with the critical

        12   habitat designation.

        13   We have ourselves spent hundreds of

        14   thousands of dollars completely planning out

        15   and obtaining a rezoning of this land for

        16   development. We -- those are wasted

        17   expenditures at this point. That was done

        18   before the critical habitat designation.

        19   We would have to go back, we would

        20   have to revisit those, obtain changes in the

        21   zoning and change our plans. But the critical

        22   point here is that the agency itself found that

        23   there was an immediate loss of value to our

        24   land.

        25   This is our land that has been

1   designated. We are the object, to use Lujan's

2   -- Lujan's terms. We are the object of this

3   designation. And it has caused us immediate

4   financial losses, both sunk costs that we

5   already have and changes in order to be able to

6   -- to proceed.

7   JUSTICE SOTOMAYOR: This is a royal

8   we. As I understand it, the only appellant

9   before us is yours, who's the lessee of the

10   timberland, who owns a de minimis amount of

11   acres.

12   So it wasn't the lessee of the timber

13   cutting. It was the separate owner of the land

14   who's incurred these expenses, and that's not

15   an appellant before us, is it?

16   MR. BISHOP: No, we incurred all of

17   these expenses as the -- as the economic

18   analysis explains. The agreement between

19   Weyerhaeuser --

20   JUSTICE SOTOMAYOR: But who are you

21   representing? I thought the --

22   MR. BISHOP: The agreement between

23   Weyerhaeuser, the agreement between

24   Weyerhaeuser and the owners of the rest of the

25   property is that we would expend the money and

1   they will provide the land.

2   We also own 150 acres. We provided

3   all of the money for the development and we own

4   150 acres that have been designated that have

5   immediately lost value as a result of this.

6   JUSTICE SOTOMAYOR: Can I go back to a

7   question? As I was reading the evidence in

8   this case, it appeared that there was a dispute

9   as to whether this frog could, in fact,

10   survive, maybe not as healthily as it does now,

11   and maybe not for the very long term, but there

12   was evidence that the frog was there for, I

13   think, 10 or 15 years while timber cutting was

14   occurring.

15   There was some scientific evidence

16   that there were stumps that the frog might be

17   able to survive in, as opposed to the canopied

18   forest. I -- I -- I know that the Fifth

19   Circuit said that there was no dispute this

20   wasn't currently habitable, but I think that

21   depended on what definition you gave to

22   habitable.

23   If we give a different definition,

24   what would be the minimum, if it didn't include

25   the PCEs that you think are necessary, because

1   I don't know that unoccupied has to be an

2   optimal survival place, and if it doesn't have

3   to be optimal, what would otherwise be a

4   minimum?

5   MR. BISHOP: This property is not just

6   not optimal. It is not habitable. And this is

7   only the litigating position of the Department

8   of Justice.

9   The judges below who looked at -- the

10   Fifth Circuit judges, including the majority,

11   not just the dissenters, who looked at the

12   administrative record here, which is what this

13   Court is reviewing, not the litigating position

14   of the Department of Justice, concluded -- and

15   this is from the majority -- that the Service

16   had found that this was -- Unit 1 was currently

17   uninhabitable. That's page 24-A of the

18   petition appendix.

19   And just to --

20   JUSTICE SOTOMAYOR: But that -- but

21   that definition was never provided?

22   MR. BISHOP: The definition that we

23   provided was the definition that we have

24   provided to this Court, which is the dictionary

25   definition from Webster's 3rd, "the physical

1   features that naturally or normally are

2   preferred by the species," the 1979 convention,

3   "land which contains suitable living

4   conditions."

5   And, you know, a picture is worth a

6   thousand words. In the -- in the Joint

7   Appendix on page 57, there is a photo, albeit a

8   small one, of adult frogs uplands habitat. And

9   it's a picture of a few trees with a grassland

10 savanna. And the scientific experts that you

11 refer to, Justice Sotomayor, for example,

12 Lannoo, talk about the habitat that's needed on

13 the uplands as a savanna.

14   JUSTICE SOTOMAYOR: I think it's

15 begging -- it's begging the question, which is

16 I don't know that the circuit below actually

17 accepted your definition or whether your

18 definition, for the reasons I indicated just a

19 few minutes ago, covered all of the conditions

20 that could make for survival for this species.

21   As I read the record, there were

22 suggestions by some of the scientists that what

23 -- what you admitted to Justice Kagan a little

24 while ago, minimal work, this species could

25 survive, albeit not robustly, but it could

1   survive.

2   MR. BISHOP: No.

3   JUSTICE SOTOMAYOR: Wouldn't that be

4   enough?

5   MR. BISHOP: No, that's just not what

6   the administrative record shows. All right.

7   The --

8   JUSTICE SOTOMAYOR: Well, I don't want

9   to argue the record now. The question is, if I

10   come away having reviewed it with a question

11   about whether the Circuit actually addressed

12   that question and defined what it thought the

13   minimal requirements for habitat were, wouldn't

14   be -- wouldn't the answer be to remand this

15   case and let it make that determination?

16   MR. BISHOP: If you thought that

17   habitat meant something other than what the

18   convention says and what the dictionaries in

19   1978 said, and if you think that on the basis

20   of this record that this is habitat for these

21   species, then I think that would be --

22   JUSTICE SOTOMAYOR: Well, that's your

23   -- well, that's your adversary --

24   MR. BISHOP: But none of those things

25   are supported -- - none of those things are

1   supported by --

2   JUSTICE SOTOMAYOR: Assuming what I

3   said --

4   MR. BISHOP: Yes.

5   JUSTICE SOTOMAYOR: -- would a remand

6   be appropriate?

7   MR. BISHOP: Yes.

8   JUSTICE SOTOMAYOR: Okay.

9   JUSTICE BREYER: I'd like to ask you,

10   I've not -- one way of looking at the case, as

11   I started looking at it, is this isn't about

12   words, really, or definitions. Every time the

13   word habitat is used, or almost every time,

14   they talk about critical habitat, which is a

15   defined term. But the key words that follow it

16   are typically essential or necessary, so

17   something like that.

18   So, in thinking about it, I thought,

19   well, air is necessary. We're going to be in

20   real trouble without it. But it's not the only

21   thing that's necessary. Water is necessary

22   too.

23   So you could have for mammals

24   situations where they need air and they can't

25   be submerged in a swamp. So this land will

 1   have the air, but it's a big swamp. But maybe

 2   we'll drain it. So, if we drain it, it's going

 3   to be fine.

 4   And if that's what the statute

 5   basically means -- you get the idea where I'm

 6   driving -- then this is a typical agency case,

 7   because, after all, if you can't drain the

 8   swamp, then the air is irrelevant.

 9   But if you could drain the swamp

10   pretty easily, well, then the air is essential

11   and you better be sure you have it.

12   Now, on that, the agency has found,

13   well, it's not that hard to drain the swamp.

14   Good chance we'll do it. Good chance we'll do

15   it. You say: Ha, they don't know what they're

16   -- well, I mean, you're polite about it.

17   (Laughter.)

18   JUSTICE BREYER: And -- and so you

19   don't -- isn't what we have to do, we look at

20   the record, it's -- the discretion is given to

21   the Secretary. That's a lot. And we say: Did

22   they in this case, the Secretary, exceed the

23   discretion that the statute gives him in

24   thinking they could drain the swamp, i.e., they

25   could make a canopy? Good chance it'll happen.

1   Period. Typical agency case.

2   Now is that how I should look at it?

3   MR. BISHOP: No, not at all. The

4   administrative record here shows that this land

5   would have to be totally remade. It would have

6   to be made to look something like that picture

7   on JA 70 -- 77.

8   And that burden is not something that

9   is allowed by language, plain language, in the

10   statute that requires that the habitat -- the

11   habitat --

12   JUSTICE BREYER: No, we're looking at

13   it the same way. You just want me to come out

14   differently.

15   MR. BISHOP: I would like to spend a

16   couple of minutes, if I may, on judicial

17   review. The court below held that the

18   exclusion decision here is not subject to

19   judicial review. And the government argues

20   that that was correct.

21   The statutory language of the

22   exclusion decision here, Section 4(b)(2), is

23   that the agency may exclude any area from

24   designation if the Secretary determines that

25   the benefits of exclusion outweigh the benefits

 1   of inclusion.

 2   So it's not a "may" statement from

 3   Congress. It's a "may/if." May exclude if

 4   these other conditions are met. It weighs the

 5   benefits of exclusion against the benefits of

 6   inclusion.

 7   JUSTICE KAGAN: Well, it is a

 8   "may/if." But if the other conditions are met,

 9   it indicates, because of the use of the "may,"

10   rather than the use of a "shall," doesn't it,

11   that the Secretary still has discretion?

12   In other words, if the conditions

13   aren't met, then the Secretary can't exclude.

14   But if the conditions are met, the Secretary

15   may exclude if he wants.

16   MR. BISHOP: Yes, ultimately, there's

17   -- it's a discretionary decision. I think the

18   question is whether State Farm review of that

19   "if" clause is appropriate. And this Court has

20   already decided that question in Bennett, a

21   unanimous decision of this Court where it

22   considered both parts of that (b)(2) provision.

23   And the Court said it is rudimentary that

24   discretion as to the substance of the ultimate

25   decision does not confer discretion to ignore

1   the required procedures of decision-making.

2   JUSTICE GORSUCH: Mr. Bishop --

3   MR. BISHOP: And the government itself

4   has conceded this.

5   JUSTICE GORSUCH: If I --

6   MR. BISHOP: Sorry.

7   JUSTICE GORSUCH: No, not at all.

8   Maybe you can help me out with this. Let's

9   suppose for now that I would agree with you and

10   that we could review this.

11   What more would you expect the

12   Secretary to say, or could say, given the state

13   of scientific evidence before the Secretary?

14   That's not clear to me. The Secretary

15   says there's -- there's just not any evidence

16   of the benefits of exclusion that I -- that I

17   can put a number on.

18   And isn't -- isn't the way the statute

19   written put some burden of proof incumbent upon

20   the landowner or lessee to come forward with

21   something quantifying the benefits of

22   exclusion?

23   MR. BISHOP: Right. Well, certainly,

24   it's permissible for the agency to rely -- to

25   characterize the benefits of inclusion as being

1   biological, which is something that can be

2   described but not quantified.

3   But, on the other side of that ledger,

4   the agency has to meet State Farm standards in

5   identifying what the factors --

6   JUSTICE GORSUCH: And what -- what --

7   on that, my question is, what more would you

8   ask the Secretary to do? The Secretary did

9   quantify the economic benefits exclusion and

10   then said, compared to the benefits of

11   inclusion, they're indeterminate. And,

12   therefore, the burden of proving exclusion has

13   not been met.

14   And that burden, it seems to me, rests

15   with you. So suppose I -- there's some

16   judicial review possible here. Do we need to

17   get into how many angels dance on the head of

18   that pin if you -- if you've got no real

19   complaint at the end of the day with the

20   adequacy of the Secretary's --

21   MR. BISHOP: Well, we do --

22   JUSTICE GORSUCH: -- reasoning?

23   MR. BISHOP: -- we do have that

24   complaint. And, certainly, a remand would --

25   would allow us to explore that. But here,

1   under State Farm, the inputs --

2   JUSTICE GORSUCH: Well, could you

3   explain that to me?

4   MR. BISHOP: Yes, the inputs into the

5   decision have to be fair and reasonable and the

6   connection between those inputs and the

7   ultimate decision have to be.

8   Let -- let me give an example of a

9   very basic error that -- an example of an

10   internal inconsistency.

11   So the -- the Service refused to

12   factor in the loss of Unit 1 to housing and to

13   St. Tammany's tax base, and it did that because

14   it found that Unit 1 is only 0.5 percent of

15   developable land in the parish.

16   There's a big problem with that. It

17   included as developable land everything under

18   -- south of Interstate 12, which is not

19   developable because it flooded in Hurricane

20   Katrina, everyone from that area is moving up

21   to -- to us, to the higher ground.

22   It said, in addition, it acknowledged

23   that Unit 1 is particularly attractive for

24   development because Highway 36 runs through it.

25   It's an attractive area for development because

1   it's connected to centers of -- where jobs --

2   where the jobs are.

3   And yet -- so we have a Unit 1 that is

4   already zoned, it's outside the flood zone, and

5   it's well served by roads connecting it to

6   jobs, but the Service treated every undeveloped

7   area in the parish as fungible and said this

8   just isn't an important development area, even

9   though St. Tammany, as its brief explains in

10   this case, says no, it's a very important

11   development area.

12   The -- that is what you get when

13   there's no judicial review, when an agency

14   thinks that there are no controls over what it

15   concludes.

16   And the economic analysis is riven

17   through with very basic errors of that kind.

18   And I would submit that without the possibility

19   of judicial review in cases like this, that is

20   what you get, a very unsatisfactory balancing.

21   And that that is what State Farm is for.

22   State Farm is there to ensure that

23   when a balancing like this has to be done, when

24   there are multiple factors to be considered,

25   that the agency gets it fairly right as to what

1   those factors are and then connects up the dots

2   between what those factors are and what its

3   ultimate conclusion is. Not the one-line

4   conclusion -- unexplained conclusion that it

5   had here that it was not going to exclude.

6   If I can save the rest of my time for

7   rebuttal, please.

8   CHIEF JUSTICE ROBERTS: Thank you,

9   Mr. Bishop.

10   Mr. Kneedler.

11   ORAL ARGUMENT OF EDWIN S. KNEEDLER

12   ON BEHALF OF THE RESPONDENTS

13   MR. KNEEDLER: Mr. Chief Justice --

14   excuse me -- Mr. Chief Justice, and may it

15   please the Court:

16   The dusky gopher frog is a critically

17   endangered species. It is at serious risk of

18   extinction. As the Fish and Wildlife Service

19   found, if the frog is to be conserved and the

20   risk of its extinction reduced, the area

21   involved here is essential to accomplish those

22   explicit statutory purposes.

23   It, therefore, was properly designated

24   as unoccupied critical habitat. Petitioner

25   does not --

1   CHIEF JUSTICE ROBERTS: It has to be

2   -- your argument is that critical habitat

3   doesn't have to include all of the elements for

4   habitability because you could undertake some

5   restoration that would provide whatever's

6   missing?

7   MR. KNEEDLER: That -- that --

8   CHIEF JUSTICE ROBERTS: So the -- the

9   draining of the -- of -- of the swamp. But,

10   you know, if you have the ephemeral ponds in

11   Alaska, you could build a giant greenhouse and

12   plant the longleaf pines and the -- the frog

13   could live there. In other words, there has to

14   be presumably some limit on what restoration

15   you would say is required.

16   MR. KNEEDLER: Yes. And -- and what

17   the -- what the Service found here is that

18   restoration of the uplands could be

19   accomplished with reasonable efforts. The

20   central -- the central feature of the

21   habitat --

22   CHIEF JUSTICE ROBERTS: Well,

23   reasonable -- reasonable efforts that the

24   landowners would have to undertake voluntarily,

25   right?

1   MR. KNEEDLER: The landowners, or if

2   they entered into an agreement with a -- with a

3   conservation group. The Nature Conservancy has

4   purchased land at the other -- at the other

5   location where the frog is.

6   CHIEF JUSTICE ROBERTS: But they've --

7   they've told you they're not going to do it.

8   MR. KNEEDLER: That -- that's true.

9   But the -- the operation of the Act, it can't

10   be dispositive what the intention -- subjective

11   intentions at this moment in time by this

12   particular owner of the property are. The --

13   the Act turns on the -- on the status of the

14   land, not the intention of -- of the landowner.

15   Now that may be taken into account in

16   -- at some point in deciding whether the land

17   is essential. The -- the proposed regulation

18   that Interior has published says that.

19   CHIEF JUSTICE ROBERTS: I don't

20   understand. I mean, you -- you've said that it

21   can be designated as critical if some

22   restoration can take place. And as far --

23   where we are right now is the landowner is

24   saying: We're not going to do the restoration

25   you want.

1   MR. KNEEDLER: Right. But --

2   CHIEF JUSTICE ROBERTS: So you just

3   say, well, we're going to designate it anyway,

4   even though the restoration won't occur?

5   MR. KNEEDLER: Well, the -- the -- the

6   question of whether it -- it's -- whether it is

7   capable of supporting a population is basically

8   a scientific one. Section 4(b)(2) says that it

9   should be based on the best scientific evidence

10   available. It's about the status of the land

11   in terms of whether --

12   CHIEF JUSTICE ROBERTS: With the --

13   with -- with the change, right? Can this

14   support the population if they make this

15   change?

16   MR. KNEEDLER: Yes. There --

17   CHIEF JUSTICE ROBERTS: Well, but

18   what's the limit? I mean, you could require,

19   say, well, this -- this piece of property in --

20   in Canada could accommodate the species so long

21   as you invested $100 million to put in

22   ephemeral ponds, change the loblolly pines to

23   longleaf and do all this.

24   MR. KNEEDLER: Well, it has -- it has

25   to be, according to the Service here,

1   reasonable efforts. And --

2   JUSTICE ALITO: What's the definition

3   of reasonable?

4   MR. KNEEDLER: I -- something that --

5   I mean, for one thing, I think there's a big

6   distinction between whether the -- whether in

7   this case the upland habitat has been

8   transformed to such an extent that it's

9   destroyed, like if there was a shopping center

10   there or a housing development there.

11   As compared to the upland habitat here

12   --

13   JUSTICE GORSUCH: But why -- why --

14   MR. KNEEDLER: -- has trees that

15   different --

16   JUSTICE GORSUCH: -- why is that so,

17   Mr. Kneedler, though? I mean, it might be a

18   few more dollars to pull up the asphalt and

19   then put down the ephemeral ponds, but why

20   would a parking lot make the difference? Why

21   would that be an unreasonable effort

22   necessarily?

23   MR. KNEEDLER: It's conceivable if

24   there was a small --

25   JUSTICE GORSUCH: And where does all

1   this come from in the statute? Where do you

2   get reasonable efforts in the statute?

3   MR. KNEEDLER: Well, I -- I think it

4   runs throughout the statute, frankly.

5   JUSTICE GORSUCH: Well, runs

6   throughout. Can you show me where?

7   MR. KNEEDLER: Well, a number -- a

8   number of places I would -- I would -- I would

9   refer to. The definition of critical habitat,

10   both prongs, talk about --

11   JUSTICE GORSUCH: I don't see

12   reasonable efforts there.

13   MR. KNEEDLER: No, not reasonable

14   efforts, but --

15   JUSTICE GORSUCH: It's not there.

16   MR. KNEEDLER: No, but it -- it talks

17   about conservation, what's essential for

18   conservation of the species. Conservation is

19   defined as all measures necessary to bring the

20   species back to the point where it does not

21   need protection for that.

22   JUSTICE GORSUCH: Oh, I don't doubt

23   under Section 7 the government has enormous

24   powers to help species, whether in critical

25   habitat or elsewhere. All right? There's

        1   nothing preventing the government from

        2   purchasing land or taking other actions to

        3   protect an endangered species, whether on

        4   critical habitat or elsewhere, right?

        5   MR. KNEEDLER: But this Court said in

        6   Sweet Home, for example, that the fact that the

        7   government can purchase land or make grants

        8   does not undermine the -- the operation. The

        9   critical habitat and --

       10   JUSTICE GORSUCH: It's a supplementary

       11   power, though, you'd agree?

       12   MR. KNEEDLER: It -- it is. But for

       13   one thing, the designation of critical habitat

       14   serves -- serves a very important function in

       15   educating and identifying the areas where the

       16   species could be -- could be used.

       17   And it's also important to recognize

       18   this is a proposition not limited to private

       19   land. It also has to do with public land.

       20   So having the expertise of the Fish

       21   and Wildlife Service identify those areas that

       22   are necessary for recovery of the species, can,

       23   for example, identify the areas that would be

       24   -- that a conservation group might want to

       25   enter into an agreement with the landowner to

1 conserve, that -- that the -- that the state

2 might decide to purchase, so the identification

3 of the habitat is not just in terms of

4 triggering Section 7 of the -- of the Act.

5   JUSTICE GORSUCH: Do you --

6   JUSTICE SOTOMAYOR: Mister --

7   JUSTICE ALITO: I think your argument

8 requires you to provide some definition of

9 reasonable restoration. Now this case is going

10 to be spun, we've already heard questions along

11 this line, as a choice between whether the

12 dusky gopher frog is going to become extinct or

13 not. That's not the choice at all.

14   The question is, who is going to have

15 to pay and who should pay for the preservation

16 of this public good? Now it may be very

17 difficult for a lot of people to shed tears for

18 a big corporation like the one in this case,

19 but let's suppose this is a -- this is a family

20 farm and part of the -- the land is designated

21 or a good part of it is designated as critical

22 habitat.

23   Now to what -- is there some formula,

24 some percentage of the value of the family farm

25 that would have to be required for this

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1    reasonable restoration before -- before that

2    becomes unreasonable?  Can you provide any

3    guidance on that?

4              MR. KNEEDLER:  I -- I don't think

5    there would be a hard and fast rule.  I think

6    if you -- if you look at the -- if you look at

7    the nature of the land, I mean, for example

8    here, would -- would the restoration be -- be

9    within the framework that the -- that the land

10   is now being used for?

11             JUSTICE BREYER:  Well, that's --

12             MR. KNEEDLER:  It's being used to

13   raise trees.  All that would be necessary at

14   least at the beginning is to thin trees.

15             JUSTICE BREYER:  Well, yeah, but

16   that's -- that's -- now you're right at the

17   point.  I read this.  I thought it's an easy

18   case, not the result, but the concept's easy.

19   The statute books are filled with words like

20   reasonable.

21             And right here it says that the

22   Secretary, it says, a determination by the

23   Secretary that such areas are essential.  To

24   me, that calls up is it reasonable or isn't it

25   reasonable?
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1   It's not reasonable to say that this

2   area is essential if the frogs will die anyway

3   because there aren't enough trees. Okay?

4   So let's look at the picture on page

5   57. And the picture on page 57 shows an area

6   which has very few trees. And we also know

7   that this is a logging company. And so

8   probably they have lots of trees. They like

9   trees, not forever, but --

10   (Laughter.)

11   JUSTICE BREYER: -- but they want a

12   lot of trees planted there. And so what is it

13   in this case -- and I thought the case was no

14   more than that -- what is it -- what is it in

15   this case that makes discretion -- statute

16   books are filled with words like we give

17   discretion to the Secretary -- that makes this

18   within and not outside that delegated

19   discretion to the Secretary to determine

20   essentiality?

21   MR. KNEEDLER: Well, I -- the Act, as

22   you pointed out, it says the Secretary shall --

23   JUSTICE BREYER: But it's not the Act

24   that I'm thinking of. I agree with you that it

25   gives him lots of discretion. But the Chief

 1   Justice's first question was surely he can't

 2   require the building of hot air greenhouses in

 3   Nome, Alaska. That goes too far.

 4   And I'm not asking you to find it

 5   either. There are loads of places where it's

 6   not defined. I'm asking you to tell me what is

 7   in this record that suggests that this is

 8   within the Secretary's discretion and not

 9   outside of it.

10   MR. KNEEDLER: First of all, you

11   pointed to page 57 of the Joint Appendix, which

12   shows the uplands at Glen Pond. There are

13   pictures in the -- in the record at JA-17

14   through 20 of the -- of the area in -- at issue

15   here. There are trees in the background that

16   -- that don't show a dense canopy.

17   I don't want to say that there is not

18   forested land there, but I think one of -- one

19   of the -- one of the ways to look at it is

20   would the modifications be compatible with the

21   existing use of the land? If you're running --

22   if you're operating a tree operation, cutting

23   down and thinning trees is part of what you do.

24   And it's not as if this would have to

25   be done overnight.

1   CHIEF JUSTICE ROBERTS: Well, but the

2   problem with that is, once you have the

3   designation, you need probably federal permits

4   to do things like logging companies typically

5   do. And if you are asking for a federal

6   permit, the whole point of the designation is

7   you have to go through a fairly elaborate

8   process. And you might not get it at the end.

9   Well, you won't have to go through the

10   elaborate process, and you probably get one if

11   it weren't designated.

12   MR. KNEEDLER: Well, as far as logging

13   is concerned, the -- the ongoing logging

14   operations here have not required any -- any

15   federal permit. And it's -- it's only if the

16   landowner wanted to transform the land and use

17   it for development and if that interferes --

18   CHIEF JUSTICE ROBERTS: Which is

19   exactly what they want to do, right?

20   MR. KNEEDLER: Yes, but -- but if

21   that's true, then a Section 7 -- excuse me, a

22   404 permit would be required if they were going

23   to fill wetlands or -- or fill the ponds, but

24   if development happened without the need for a

25   federal permit, Section 7 does not impose any

1   limitation at all. It's only if there is

2   federal involvement.

3   But here we're talking about the basic

4   qualification of the land to be designated in

5   the first place. And --

6   JUSTICE SOTOMAYOR: Mr. Kneedler, in

7   your brief, you give a meaning to habitat

8   which, frankly, is very different than its

9   dictionary meaning. Pages 27 to 28, you argue

10   that "habitat can include some areas where a

11   species does not live and cannot ever live,

12   even with restoration." That's very different

13   than what you started your argument with today.

14   It's very different than what you've

15   done with the Santa Ana sucker, for example.

16   If we disagree with you, where does that leave

17   you in this case?

18   MR. KNEEDLER: Well, if you disagree

19   about the Santa Ana sucker, that's --

20   JUSTICE SOTOMAYOR: I'm not -- we're

21   not looking at that.

22   MR. KNEEDLER: Okay.

23   JUSTICE SOTOMAYOR: Let's assume I

24   take the dictionary definition of habitat,

25   which is the kind of place that is natural for

1   the life and growth of an animal or plant.

2   That's a fairly simple, natural place.

3   Could this -- is this a natural place for this

4   frog to live? And, if not, do -- is the

5   difference between you and your colleague

6   whether some reasonable restoration can be made

7   or not?

8   MR. KNEEDLER: That -- that may in the

9   end be the difference, but -- but I think it's

10   important when -- when you're talking about the

11   definition that you quoted, and we -- we quote

12   a number of them on page 33 of our brief, a

13   number of dictionary definitions, is it the

14   kind of place, is it the kind of site on which

15   the -- on which the species could thrive?

16   And -- and here the kind of site, I

17   think, is really most commonly understood or

18   defined as the central element, what makes it

19   rare, and that's the pond. Is it the kind of

20   place that this frog can live, is in an

21   ephemeral pond and the immediately surrounding

22   uplands?

23   JUSTICE SOTOMAYOR: And was I all that

24   --

25   JUSTICE KAGAN: Mr. Kneedler --

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1              JUSTICE GINSBURG:  We were just told

2    that they were in a pond for less than a month.

3              MR. KNEEDLER:  Well, the -- the adult

4    frogs are, but -- but the -- the larvae and

5    tadpoles remain in the -- in the pond for much

6    longer.  In fact, one of the -- one of the

7    reasons that this is rendered so rare is that

8    you have to have an ephemeral pond with

9    enough -- with water in it for a long enough

10   period of time, 195 days, so that --

11             JUSTICE GINSBURG:  How -- how do you

12   answer --

13             MR. KNEEDLER:  -- the tadpoles mature

14   and -- and metamorphose, but -- but not water

15   all the time so it has fish that will eat the

16   larvae.  That's what makes this group of ponds

17   critical --

18             JUSTICE GINSBURG:  But you need -- you

19   need a place for them to live outside the pond.

20   And Justice Sotomayor brought up the question

21   about whether the frogs could live in the area

22   outside.  You said yes, even though it's far

23   from an ideal place.

24             But Mr. Bishop said there is no

25   showing that frogs could live there.
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1   MR. KNEEDLER: Well, there -- there is

2   some evidence in the record that we point to

3   where the scientists evaluated the -- the land

4   and found some stumps. And -- and there was --

5   as was pointed out, there were frogs located on

6   this up until 1965, even though there was a

7   tree farm going on.

8   But one of the reasons that -- this

9   hasn't been further developed because this

10   really wasn't the -- the gravamen of the

11   administrative dispute, whether any frog could

12   survive there. And -- and that's why -- that's

13   why it's not -- you know, there isn't more

14   express findings about that. But --

15   JUSTICE ALITO: The frogs need the --

16   the frogs need the ephemeral ponds, and those

17   are there. And there's evidence in the record

18   that there are some stumps. But what about the

19   -- the ground cover and the trees? Is there

20   anything in the record that shows, that could

21   -- that could show that the frogs -- there

22   could be a sustaining population of frogs there

23   without changes in the tree cover and,

24   therefore, changes in the ground cover?

25   MR. KNEEDLER: For a long-term

1   sustaining population, there would have to be

2   changes. No, that -- we acknowledge that. And

3   that -- that is what is said here. But one --

4   one --

5   JUSTICE ALITO: So they -- they

6   couldn't survive where they are now? I mean,

7   the test can't be could you -- if you dumped a

8   couple of frogs there and then you came back

9   two weeks later or a month later, would any of

10   the frogs still be alive? That can't be the

11   test, right?

12   MR. KNEEDLER: No, but -- but --

13   JUSTICE ALITO: They would have to

14   sustain themselves.

15   MR. KNEEDLER: Well, they -- they

16   might live for several generations. I mean, I

17   -- I don't know. But I don't think that's the

18   -- the central point here.

19   I think the -- I think the fact that

20   frogs were identified there up until 1965 and

21   -- and there are stump holes and -- and the --

22   and the basics for this to be a sustained area

23   is -- is -- is really what's important because

24   it shows that it's capable of. And --

25   JUSTICE KAGAN: Mister --

1   JUSTICE SOTOMAYOR: So if we were --

2   JUSTICE KAGAN: -- Mr. Kneedler,

3   suppose -- if we could just go back to Justice

4   Alito's question, Justice Alito suggested that

5   there were other things that the government is

6   capable of doing to conserve these frogs.

7   So what, consistent with Mr. Bishop's

8   view of the statute, could the government do,

9   is the government enabled to do, that would

10   effectively conserve these frogs? Is there

11   anything?

12   MR. KNEEDLER: It does have the

13   authority -- there's a grant program under

14   Section 6 of the Act of grants to states. Now

15   that would -- the -- the grants to the state is

16   the state would have to decide to become

17   involved, and those can involve private

18   conservation groups.

19   The federal government could purchase

20   the land if -- for example, if the landowner

21   was willing to sell it. So far, there hasn't

22   been any indication that they would be. And

23   the Service understandably very rarely

24   exercises the power of eminent domain. It

25   probably would have the -- the -- the power to

1   do so.

2   But the -- none of that -- none of

3   that undercuts the need, the statutory

4   obligation to designate critical habitat.

5   JUSTICE KAGAN: And -- and this --

6   this statute presumes that the designation of

7   critical habitat is often, almost always, going

8   to be on private land, isn't that correct?

9   MR. KNEEDLER: Well, not -- not --

10   JUSTICE KAGAN: Maybe I'll take

11   down "almost always."

12   MR. KNEEDLER: -- almost always.

13   JUSTICE KAGAN: Often.

14   MR. KNEEDLER: No, I --

15   JUSTICE KAGAN. Is often going to be

16   on private land?

17   MR. KNEEDLER: It often will be on

18   private land. But it's also on public land.

19   And it's important -- it's -- it's important

20   that the Court understand that the limitations

21   the Petitioner would place on the designation

22   of critical habitat would also apply to the

23   government's own land in -- in terms of

24   limiting the Section 7 consultation process if

25   somebody wants a permit on -- on federal land.

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 1              CHIEF JUSTICE ROBERTS:  Can't you do

 2     what you want on federal land?

 3              MR. KNEEDLER:  Well, but triggering

 4     section -- yes, but -- to an extent, but

 5     Section 7 is a framework to bring in the Fish

 6     and Wildlife Service and its expertise.  And --

 7     and for --

 8              CHIEF JUSTICE ROBERTS:  Well, so the

 9     only benefit to the federal government is that

10     the Fish and Wildlife Service will sit down at

11     the table with whoever else, whatever other

12     government agency owns the land?

13              MR. KNEEDLER:  Well, I -- that is an

14     important benefit.  It's not the only benefit.

15     There's a benefit to the public in having -- in

16     having Section 7 scrutiny and consultation go

17     on before an action agency undertakes --

18              CHIEF JUSTICE ROBERTS:  At some point,

19     somebody in the federal government can say to

20     the federal wildlife service:  I want you to

21     sit down with whoever it is, the Army Corps of

22     Engineers.  Right?

23              MR. KNEEDLER:  That --

24              CHIEF JUSTICE ROBERTS:  You don't need

25     a statute to bring that about?
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1   MR. KNEEDLER: Well, it's true they

2   could, but Section 7 of the ESA organizes that

3   by setting up a consultation process such that

4   the action agency can't go -- can't go forward

5   in an area that might harm the species or its

6   habitat without consulting with the agency.

7   That is a very important concept at that time.

8   JUSTICE ALITO: Let's go back to my --

9   JUSTICE KAGAN: I guess what I was

10   suggesting was -- was -- you know, Congress

11   could have passed a statute which just said

12   every time that there's a problem of this kind,

13   the federal government has to purchase the land

14   that will support an endangered species. It

15   didn't pass that statute.

16   It passed a statute that said that the

17   Secretary could designate critical habitat

18   regardless whether that habitat was on private

19   or public land.

20   And then the question is, where does

21   this requirement of immediacy come from that

22   Mr. Bishop wants to impose?

23   MR. KNEEDLER: You mean immediate

24   restoration, do you mean?

25   JUSTICE KAGAN: You know, that it has

1   to be -- that it has to be available to support

2   the species exactly now without any further

3   effort?

4   MR. KNEEDLER: It is not in the Act at

5   all. And the -- and the whole concept of

6   conservation is a long-term prospect, not

7   something that has to happen immediately.

8   JUSTICE BREYER: So that's -- all

9   right, that's -- that's so. Land is around for

10   a long time. We hope the frogs will be too.

11   You're looking out into the future. Is there

12   anything you want to add in words that I would

13   write if I were writing this opinion that would

14   distinguish the case the Chief Justice first

15   brought up where the only way to save these

16   frogs, in addition to the ponds, is to build

17   special hothouses in Nome, Alaska?

18   A decision resting on that I -- would

19   strike me as far-fetched, from a situation

20   where all you have to do in addition is drain

21   six inches of swamp. If the decision rested on

22   that, even if the owner said I'll never do it,

23   I would say it was a reasonable decision.

24   Okay. That's highly subjective. Are there any

25   words that you could use that would distinguish

1   those two instances?

2   MR. KNEEDLER: Well, the greenhouse

3   example is not -- is not restoring habitat. I

4   don't -- I don't think a greenhouse would --

5   JUSTICE BREYER: Well, you see what

6   I'm trying to get at --

7   MR. KNEEDLER: No, no, no --

8   JUSTICE BREYER: -- is very unlikely.

9   MR. KNEEDLER: Yes. No, it's very

10   unlikely. But -- but here -- here the

11   restoration efforts are -- are entirely in sync

12   with the use of the land. I mean, there are

13   uplands with trees. As I say, they could be

14   thinned. It's not as if the -- not only does

15   the conservation not have to happen immediately

16   but the --

17   CHIEF JUSTICE ROBERTS: So would you

18   --

19   MR. KNEEDLER: -- but the restoration

20   doesn't have to happen immediately.

21   CHIEF JUSTICE ROBERTS: That's your --

22   that's your requirement, the restoration has to

23   -- has to be entirely in, what did you say, in

24   sync or in --

25   MR. KNEEDLER: In -- in sync with --

1   I'm not saying that that is a hard-and-fast

2   rule. I'm trying to explain why this one --

3   why it is reasonable in this case.

4   CHIEF JUSTICE ROBERTS: Okay. Well,

5   but I know. But the question and the reason

6   for the hypothetical is it seems to me that if

7   you permit the designation of something as

8   critical habitat that cannot be occupied by the

9   animal, because you think they can do something

10   down the road that will cure the problem,

11   whether it's cut the trees or do anything else,

12   that you ought to be able to articulate what

13   the limit is on what you require down the road.

14   MR. KNEEDLER: I -- I think it's

15   whether -- whether it is a further modification

16   of the habitat in it -- in its existing -- in

17   its existing state. And at least where the --

18   at least where the -- the habitat is being used

19   in a way that is similar to what would be

20   necessary for its restoration or would the

21   restoration undermine the fundamental nature of

22   it and in that --

23   CHIEF JUSTICE ROBERTS: So if you get

24   to Justice Gorsuch's or whoever it was -- the

25   asphalt thing, if what you have to do is just

1   dig up the asphalt, that's -- the use of the

2   area for a parking lot is not in tune with its

3   normal whatever, so you couldn't do that under

4   this statute?

5   MR. KNEEDLER: Well, I -- I think -- I

6   think there may be several factors, the -- the

7   effort involved. I mean, if it's one road,

8   that may not be an obstacle.

9   If I could just point out there is a

10   -- there is a statutory place to look for the

11   distinction that I'm drawing, and among others,

12   it's in 1533(a)(1)(A), which in designating or,

13   excuse me, listing a species, it directs the

14   Secretary to take -- to determine whether a

15   species may be endangered because of a number

16   of factors.

17   The first one is "the present or

18   threatened destruction, modification, or

19   curtailment of its habitat or range." The

20   reference to modification of habitat suggests

21   that even with modification, it's still

22   habitat, even though it's been modified.

23   And one of the reasons that land is

24   unoccupied by a species is often precisely

25   because of what has happened, people using the

 1   land in a way or transforming the land, but

 2   this -- this passage contrasts destruction of

 3   the habitat, which would be the case if -- if

 4   there was a parking lot or a building or some

 5   -- something that transformed it, and

 6   modification of the habitat, which suggests

 7   that it retains its essential nature.

 8   And here Unit 1 retains its essential

 9   nature, which is these very rare ponds, not

10   only that, a collection of five ponds, which

11   enables the development of a -- of a -- a meta

12   population.

13   JUSTICE SOTOMAYOR: So can we talk

14   about -- I see your point with talking about a

15   kind of place. And it does seem logical that

16   the frogs were there and they were there for a

17   very long time. They were there during the

18   timber cutting. But they left. They left or

19   they were destroyed.

20   So I -- what is it about the natural

21   -- the native environment that still exists

22   there and what is it that you think, with very

23   little reasonable effort, that you could change

24   to make it sustaining for a long period of time

25   again?

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 1              MR. KNEEDLER:  What the -- what the

 2     frog needs is -- is some --

 3              JUSTICE SOTOMAYOR:  The PCEs, I know.

 4              MR. KNEEDLER:  Well, yes, but it --

 5     but it -- that -- that transformation or that

 6     change, that restoration would not have to

 7     happen overnight.  It would not mean

 8     clear-cutting the loblolly pines and planting

 9     -- and -- and planting longleaf pines.

10              JUSTICE SOTOMAYOR:  That's my point.

11              MR. KNEEDLER:  And -- and there --

12     there is an example in the -- in the recovery

13     plan that is cited in the record when it's

14     describing what has happened at Glen Pond,

15     which is the place in Mississippi, the only

16     place where there is a -- a stable population

17     at all.

18              It describes that there has been some

19     habitat management which has included thinning

20     trees and planting longleaf pines, which

21     suggests this could be a gradual process.  As

22     the loblolly pines mature, they could be cut.

23     They could -- some could be cut now to create

24     some open space.  You could cut some trees and

25     leave stumps there for the frog.  It could be a
```

1   gradual process. It doesn't require that it be

2   instantly made -- made available.

3   CHIEF JUSTICE ROBERTS: But it's still

4   the case that that would require consent of the

5   owners, and they say they're not going to do

6   it.

7   MR. KNEEDLER: But -- but again --

8   CHIEF JUSTICE ROBERTS: You can't

9   require them to do it, right?

10   MR. KNEEDLER: But, again, what

11   constitutes habitat, looks at the nature of the

12   land. And what -- and whether something is

13   essential -- no, you can't require them to do

14   it, but -- but the Service looks at it and says

15   if this species is going to be conserved, in

16   fact, if this species is going to survive at

17   all and not be extinct, it is essential to use

18   these ponds.

19   It may be that if -- that the

20   landowner can ignore that, but it -- it does

21   serve to identify for the landowner and for

22   others that this is critical habitat to -- to

23   the survival of the species.

24   JUSTICE GINSBURG: But can you --

25   JUSTICE GORSUCH: Suppose the missing

```
 1      --

 2              JUSTICE GINSBURG:   -- can you explain,

 3      suppose the proposed regulation is in effect.

 4      What would the Fish and Wildlife Service have

 5      to do differently if the proposed regulation

 6      were in effect?

 7              MR. KNEEDLER:   If the what, the

 8      proposed regulation?

 9              JUSTICE GINSBURG:   Yes.

10              MR. KNEEDLER:   I think this would

11      qualify under the proposed regulation, as I --

12      as I read it.   In fact, it identifies -- it

13      says while the landowner's intentions can be

14      taken into account, it's sort of a sliding

15      scale, and the more critical the particular

16      area is for the -- for the species, the -- the

17      less likely it is that the intentions of the

18      landowner would be taken into account.

19              And I think that exactly describes

20      this case.   This is a rare case because of the

21      rare nature of these ponds.   It is critical to

22      preserve these ponds.   And they can be used for

23      the habitat of -- of the species.

24              JUSTICE GORSUCH:   Could -- could this

25      --
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1   MR. KNEEDLER: It is the kind of

2   place, because of the ponds, where the species

3   can thrive.

4   JUSTICE GORSUCH: Let's -- let's

5   assume for the moment that this isn't habitat

6   and, therefore, couldn't be designated as

7   critical habitat.

8   Could the Secretary take other actions

9   to identify this land as critical to the

10   survival of the species, even if it isn't

11   currently habitat? Is there anything in

12   Section 7 or elsewhere in the statute that

13   would prohibit that?

14   The way I read the statute, it says

15   that, you know, the Secretary has to take

16   actions to avoid jeopardizing the continued

17   existence of any endangered species, or result

18   in the destruction of habitat, critical

19   habitat.

20   So there's -- there's an "or" there.

21   And it seems to me, I -- I wonder, isn't the

22   Secretary fully endowed with authority to take

23   other actions, even if this isn't critical

24   habitat, to identify this land as important to

25   the future survival of the species?

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        1   MR. KNEEDLER: Well, Section --

        2   Section 7(a)(2) is talking about what the

        3   action agency does to avoid --

        4   JUSTICE GORSUCH: Right.

        5   MR. KNEEDLER: -- to avoid critical

        6   habitat. But --

        7   JUSTICE GORSUCH: That's the operative

        8   --

        9   MR. KNEEDLER: But -- but --

       10   JUSTICE GORSUCH: -- action part of

       11   the statute.

       12   MR. KNEEDLER: But -- but Congress

       13   enacted it -- the concept of habitat has never

       14   been a technical term or a technical feature in

       15   the way this --

       16   JUSTICE GORSUCH: I -- if you can just

       17   answer my question --

       18   MR. KNEEDLER: Yeah.

       19   JUSTICE GORSUCH: -- I would be

       20   grateful. Is there anything that prohibits the

       21   Secretary --

       22   MR. KNEEDLER: Maybe on an ad hoc

       23   basis --

       24   JUSTICE GORSUCH: Right.

       25   MR. KNEEDLER: -- but not -- it's not

1   under the statute. And the question is what

2   are the responsibilities --

3   JUSTICE GORSUCH: My question is: Why

4   isn't it under the statute, given that language

5   that says specifically that the agency -- the

6   agency can take cognizance of the continued

7   existence of any endangered or threatened

8   species, quite apart from preserving its

9   threatened habitat?

10   It seems to me there are two duties

11   that the Secretary has there.

12   And this would fit neatly under at

13   least one of them, if not the second.

14   MR. KNEEDLER: But the -- the

15   Secretary could, but the -- but the designation

16   of critical habitat, as I said, it's mandatory

17   under the Act. It has -- it has important

18   functions, including identifying the area where

19   actions should be taken because of the

20   likelihood here that the frog will need that

21   space to -- to survive.

22   Again, I suppose the Secretary could

23   do something on an ad hoc basis, but that's not

24   the framework that the statute set up. It's

25   set up with rule-making, with public

1   transparency, to be based on science, with

2   public input, and identification of -- of

3   costs, and weighing of costs. This is an

4   elaborate process.

5   And the -- and what the Secretary

6   should do to protect the land, and what other

7   agencies should do to protect the land --

8   JUSTICE GORSUCH: The agency --

9   MR. KNEEDLER: -- are part of that

10   process.

11   JUSTICE GORSUCH: The agency does lots

12   of things to protect species, endangered

13   species, beyond protecting their habitat,

14   doesn't it?

15   MR. KNEEDLER: Yes. If there's

16   federal land involved other federal agencies

17   could do it, but the Secretary would have no

18   independent authority with respect to private

19   land except the designation of critical

20   habitat.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   counsel.

23   Mr. Bishop, you have four minutes

24   remaining.

25

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 1                  REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP

 2                    ON BEHALF OF THE PETITIONER

 3                  MR. BISHOP:  Justice Gorsuch, your

 4       point 7(a)(1) imposes an obligation on all

 5       other federal agencies which shall, in

 6       consultation with the Secretary, utilize their

 7       authorities in furtherance of the purposes of

 8       this chapter.

 9                  Critical habitat is just one part.

10                  JUSTICE SOTOMAYOR:  But that's only if

11       it's designated critical habitat.

12                  MR. BISHOP:  No, no, that is a general

13       obligation.  I can tell you that whenever you

14       go for a Clean Water Act permit, you don't have

15       to be -- no critical habitat need be involved.

16       State wildlife agencies and FWS immediately

17       gets involved and has to sign off on those.

18                  Critical habitat does not have to be

19       involved.  And there's a perfect example in

20       this case.  If you read the final designation

21       here, the properties in Mississippi were

22       restored before there was any critical habitat

23       designation.

24                  And CBD in its brief says that in

25       doing so, the frog survived in Mississippi
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1   through "intense human effort and extensive

2   habitat restoration."

3   That was all done before the critical

4   habitat designation in this case. So the -- so

5   -- and -- and just to understand here, and to

6   respond to this changes in sync argument that

7   Mr. Kneedler made, there is nothing in sync

8   about creating a -- an open savanna on our

9   property.

10   This is an intensive 1500-acre tree

11   farm. The trees are planted 10 to 12 feet

12   apart. There is no groundcover because the

13   sunlight does not reach the forest floor, and

14   we don't want it to because that interferes

15   with tending to the trees. It interferes with

16   harvesting them.

17   This is not a property on which there

18   will be any groundcover to supply moisture or

19   food or cover for these frogs. We would have

20   to totally change the way that this land

21   operates in order to accommodate the frog.

22   And the idea that the frog scientists

23   here agree with the government is simply wrong.

24   And I would urge the Court to read Lannoo and

25   Pechmann and Blihovde, who say, for example,

 1   Pechmann, one of the scientists, that our plan

 2   is currently in commercial pine plantations,

 3   but -- but could be restored to suitable upland

 4   habitat.

 5   Blihovde says that aggressive and

 6   proactive management of the uplands will be

 7   critical to the survival of the frog. The most

 8   important management tool being fire to prevent

 9   this from being unsuitable habitat.

10   These scientists all have the same

11   point of view, that this land could be restored

12   through extensive effort to upland frog

13   habitat. Not one of them said that this is

14   currently habitat on what this frog -- on which

15   this frog can -- can't survive.

16   The immediacy here, Justice Kagan,

17   comes from the statutory language. It comes

18   from the word habitat in Section 4. It comes

19   from the limitation in 3(5)(C) that the maximum

20   extent of a critical habitat designation is

21   land that can be occupied. It comes from the

22   list in 3(3) where you would have certainly

23   have anticipated that if Congress thought that

24   land had to be restored or totally remade, in

25   order to be habitat for the frog, that it would

 1   have said that rather than using the word

 2   maintenance.

 3   Maintenance is a word that naturally

 4   refers to maintaining what you already have

 5   there and improving it, not to completely

 6   changing it.

 7   And, in addition -- in addition to the

 8   powers that I already talked about of the

 9   federal agencies having to protect these

10   creatures quite apart from critical habitat

11   designation, there are all sorts of powers

12   operated through the states and the purchase

13   power in Section 5 that allow protection.

14   This is not a choice between the frog

15   surviving and -- and not surviving if it

16   doesn't have this critical habitat. There are

17   plenty of ways for the government to ensure, as

18   it should, that the frog survives.

19   JUSTICE SOTOMAYOR: I'm sorry. I'm

20   sorry. I think I read that if these ponds are

21   not designated, that there are no other ponds

22   in the United States.

23   So to the extent that these ponds are

24   not designated critical habitat, and don't

25   survive, this frog won't, if there's a drought

1   or other conditions in Mississippi.

2   MR. BISHOP: Well, first of all, there

3   are other ways to acquire these ponds. Not one

4   person has talked, from the government, or from

5   any of the nature conservants or other groups

6   that buy easements on property have talked to

7   any of the owners here.

8   But the second thing is that --

9   JUSTICE SOTOMAYOR: But they don't

10   have to.

11   MR. BISHOP: No, they don't --

12   JUSTICE SOTOMAYOR: If it's critical,

13   they can designate it and then a deliberate

14   process goes on where they talk to the owners,

15   and you come to an accommodation. That's what

16   generally happens.

17   MR. BISHOP: Could I answer that

18   question?

19   CHIEF JUSTICE ROBERTS: Briefly.

20   MR. BISHOP: I mean, you know, the

21   government has made absolutely clear what it

22   thinks that means. Right? It -- it -- it

23   admits that it's the most likely outcome here,

24   if we need to apply for permits, is that we get

25   to use 40 percent of the land for development

1   and we have to turn 60 percent of it over for

2   frog habitat.

3   We don't think that that is an

4   appropriate use of our land, given that this is

5   not habitat to begin with.

6   Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel. The case is submitted.

9   (Whereupon at 11:08 a.m., the case was

10   submitted.)

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