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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-71, Weyerhaeuser Company versus the United States Fish and Wildlife Service.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP
ON BEHALF OF THE PETITIONER

MR. BISHOP: Mr. Chief Justice, and may it please the Court:

Congress amended the Endangered Species Act in 1978 to narrow the concept of critical habitat, and it did that in response to this Court's decision in Hill and an early regulation that allow critical habitat designation for population expansion beyond a species' present habitat. In the provision that requires designation of critical habitat, Section 4, Congress limited the Service's power to designate to any habitat of such species which is then considered to be critical habitat.

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

16
17 JUSTICE KAGAN: I understand that you
18 think it's much more --

19 MR. BISHOP: -- for it to be
20 inhabited. There may --

21 JUSTICE KAGAN: -- than reasonable
22 changes that would be involved here. But I'm
23 -- in my hypothetical, that's why it's a
24 hypothetical, I'm --

25 MR. BISHOP: I understand.

1 JUSTICE KAGAN: -- I'm stipulating --

2 MR. BISHOP: I understand.

3 JUSTICE KAGAN: -- that it's -- it's
4 pretty minimal stuff. It's, you know, dig --
5 dig a few holes, plant a few trees, that sort
6 of thing.

7 MR. BISHOP: Right. I don't rule out
8 that the government might be able to justify a
9 critical habitat designation when there are de
10 minimis changes, where you're really only
11 talking about digging a few holes, where there
12 is a very minimal change required in the land.

13 That isn't this case. We haven't seen
14 the government's justification for doing that.

15 JUSTICE KAGAN: But I want to --

16 MR. BISHOP: What happens when you
17 have a reasonable --

18 JUSTICE KAGAN: -- I want to stick to
19 my hypothetical, which is, you know, maybe
20 something more than de minimis but -- but --

21 MR. BISHOP: No, I --

22 JUSTICE KAGAN: -- but what -- what
23 the government views as reasonable changes,
24 such to allow the land to support the species
25 over the long term.

1 MR. BISHOP: No, we don't think so,
2 Justice Kagan.

3 JUSTICE KAGAN: And why is that?

4 MR. BISHOP: And the reason is --

5 JUSTICE KAGAN: Where in the statute
6 do you find that?

7 MR. BISHOP: The statute says it in
8 three places. It says in Section 4 that only
9 habitat of such species can be designated as
10 critical habitat.

11 JUSTICE KAGAN: But we know that
12 habitat --

13 MR. BISHOP: It says it in Section
14 3(5)(C) --

15 JUSTICE KAGAN: -- doesn't mean --
16 excuse me, I'm sorry.

17 We know that habitat doesn't mean just
18 where a species lives. I mean, that's -- that
19 would be the common understanding of the word
20 "habitat," but this statute clearly goes beyond
21 that, and we know because it says -- it's also
22 where a statute -- where a species could live,
23 right? It's out -- there are also habitats
24 that are outside the geographical area occupied
25 by the species.

1 MR. BISHOP: But those are --

2 JUSTICE KAGAN: So we know that the
3 statute is not using the kind of garden-variety
4 definition of habitat.

5 MR. BISHOP: No, I -- I disagree with
6 that, Justice Kagan. 3(5)(C) says the critical
7 habitat cannot be designated beyond the entire
8 area which can be occupied. Congress was
9 thinking about habitat in the sense that it is
10 used in -- in common speech and in the
11 dictionaries, which is a "can be occupied"
12 sense. Let me give you an example: The 1979
13 Convention of -- on Migratory Species, to which
14 we are a signatory, says it's an area which
15 contains suitable living conditions.

16 The Forest Service, contemporaneously
17 with these amendments in 1978, said that it's
18 the environment where all the essentials for a
19 species' development and existence are present.

20 JUSTICE GINSBURG: But if you use the
21 migratory bird example, then we have here the
22 ephemeral ponds, which are supposed -- supposed
23 to be ideal for breeding, so it's -- it's a
24 habitat that is suitable for breeding.

25 MR. BISHOP: I disagree with that,

1 Justice Ginsburg. It's -- it's -- it's
2 incorrect to label that as habitat because the
3 frog spends only less than a month in breeding
4 ponds. For this to be a habitat, it has to be
5 land which can be occupied.

6 The habitat here includes -- and this
7 is list --

8 JUSTICE GINSBURG: But is it -- is it
9 -- is it true with -- in -- in the case of
10 birds that they may stay at a place less than a
11 month?

12 MR. BISHOP: That's an entirely
13 different example, Justice Ginsburg. The
14 habitat for a migratory bird includes a summer
15 habitat, a winter habitat, and the places along
16 the way where it has to -- where it roosts. It
17 may -- it may prefer particular trees. You
18 have a contiguous habitat, and the roosting
19 trees clearly can be listed as critical habitat
20 if they meet the other conditions.

21 JUSTICE KAGAN: If -- if -- if I could
22 go back to the -- the statutory basis for your
23 position, because, to my mind, it is a
24 counterintuitive result that the statute would
25 prefer extinction of the species to the

1 designation of an area which requires only
2 certain reasonable improvements in order to
3 support the species.

4 That seems a counterintuitive result,
5 and, as I say, it does not seem a result that's
6 demanded at all by the statutory language,
7 which contemplates that habitats will exist
8 even beyond the areas where a species currently
9 resides.

10 MR. BISHOP: Justice Kagan, there is a
11 difference between an area -- an unoccupied
12 area that is habitat and an unoccupied area
13 that is not habitat.

14 JUSTICE ALITO: Mr. Bishop --

15 MR. BISHOP: The statute reaches --

16 JUSTICE ALITO: -- do you agree -- I'm
17 sorry. Continue.

18 MR. BISHOP: The statute reaches only
19 in 3(5)(C) critical habitat shall not include
20 the entire area which can be occupied. That is
21 the limit that Congress set.

22 JUSTICE KAGAN: But I think that was
23 --

24 MR. BISHOP: It must be habitat that
25 can be --

1 JUSTICE KAGAN: -- was dealing with a
2 very different problem. That was dealing with
3 a problem where a species can reside in many
4 areas outside of the area where it resided, and
5 the statute was making clear that just because
6 that's true, you can't go designate all of
7 those areas habitat.

8 But this is a different problem from
9 the problem that we're talking about where
10 there's only a single area that might
11 conceivably prevent extinction of the species.
12 And you're saying that, notwithstanding that it
13 was -- it's only reasonable efforts that would
14 allow it to conserve the species, that's not
15 permitted.

16 MR. BISHOP: It is not. And there are
17 clear statutory indications that --

18 JUSTICE ALITO: Well, do you --
19 Mr. Bishop, do you agree with the proposition
20 that the choice in Justice Kagan's hypothetical
21 is between designation of the land as critical
22 habitat and extinction of the species? Are
23 there not --

24 MR. BISHOP: No.

25 JUSTICE ALITO: -- other options

1 available to the federal government?

2 MR. BISHOP: There are other options
3 and there are other clues in the statutory
4 language. Apart from Section 4 and 3(5)(C),
5 what this Court said in Sweet Home was that the
6 Section (5) purchase authority was well suited
7 for buying land that is not yet but may in the
8 future become habitat. That was this Court's
9 decision in Sweet Home.

10 In addition, I would point out the
11 definition of conservation in Section 3.3,
12 which you would think if Congress had in mind
13 that restoration and creation of new habitat,
14 which is what would be required on this land,
15 let -- let -- let there be no doubt, if that
16 was what it had in mind, it would have used one
17 of those terms for the list in (3)(3) talks
18 about maintenance of habitat and translocation.
19 It does not talk about the creation of new
20 habitat or the restoration of habitat back to
21 the period before human intervention.

22 JUSTICE KAGAN: But -- but I guess
23 what strikes me about the statute, Mr. Bishop,
24 is that really all over the place you get these
25 references to the fact that habitat isn't just

1 sort of there and perfect always, that habitat
2 requires things to be done to it.

3 You know, even in the definition of
4 "occupied critical habitat," it talks about
5 special management that needs to be taken in
6 order to protect the habitat.

7 And, similarly, in the definition of
8 "conservation," it talks about, you know, the
9 need for habitat improvement.

10 So -- so the -- all through the
11 statute there's this idea of it's not just an
12 on/off switch, that there is habitat that needs
13 to be maintained, improved, and so forth in
14 order to fulfill the function of preserving a
15 species.

16 MR. BISHOP: With all due respect,
17 Justice Kagan, I don't think that's right. I
18 think that all of those references to habitat
19 are references to maintaining habitat that
20 already exists. So --

21 JUSTICE GINSBURG: May I ask you a
22 preliminary question? And it concerns whether
23 the landowner's claim is currently ripe. That
24 is, you are not commanded to do anything. You
25 don't have to do anything at all to -- to

1 conserve the endangered species. And you can
2 continue the -- what is it, timber farming
3 that's going on.

4 Now it may be that down the road you
5 will want to do something else with the land,
6 but wouldn't that be the appropriate time to
7 seek exclusion?

8 MR. BISHOP: No, Justice Ginsburg.
9 The -- the immediate effect of this overlay of
10 a critical habitat on this 1500 acres is a
11 diminution in value of tens of millions of
12 dollars. That is what it says in the agency's
13 economic analysis, that there is an immediate
14 loss in value.

15 And the reason I think for that is
16 fairly easy to -- easy to see. Any buyer
17 coming in will recognize that down the road
18 they have to deal with -- with the critical
19 habitat designation.

20 We have ourselves spent hundreds of
21 thousands of dollars completely planning out
22 and obtaining a rezoning of this land for
23 development. We -- those are wasted
24 expenditures at this point. That was done
25 before the critical habitat designation.

1 We would have to go back, we would
2 have to revisit those, obtain changes in the
3 zoning and change our plans. But the critical
4 point here is that the agency itself found that
5 there was an immediate loss of value to our
6 land.

7 This is our land that has been
8 designated. We are the object, to use Lujan's
9 -- Lujan's terms, we are the object of this
10 designation. And it has caused us immediate
11 financial losses, both sunk costs that we
12 already have and changes in order to be able to
13 -- to proceed.

14 JUSTICE SOTOMAYOR: This is a royal
15 we. As I understand it, the only appellant
16 before us is yours, who's the lessee of the
17 timberland, who owns a de minimis amount of
18 acres.

19 So it wasn't the lessee of the timber
20 cutting. It was the separate owner of the land
21 who's incurred these expenses, and that's not
22 an appellant before us, is it?

23 MR. BISHOP: No, we incurred all of
24 these expenses as the -- as the economic
25 analysis explains. The --

1 JUSTICE SOTOMAYOR: But who are you
2 representing? I thought the --

3 MR. BISHOP: The agreement between
4 Weyerhaeuser -- the agreement between
5 Weyerhaeuser and the owners of the rest of the
6 property is that we would expend the money and
7 they will provide the land.

8 We also own 150 acres. We provided
9 all of the money for the development and we own
10 150 acres that have been designated that have
11 immediately lost value as a result of this.

12 JUSTICE SOTOMAYOR: Can I go back to a
13 question? As I was reading the evidence in
14 this case, it appeared that there was a dispute
15 as to whether this frog could, in fact,
16 survive, maybe not as healthily as it does now,
17 and maybe not for the very long term, but there
18 was evidence that the frog was there for, I
19 think, 10 or 15 years while timber cutting was
20 occurring.

21 There was some scientific evidence
22 that there were stumps that the frog might be
23 able to survive in, as opposed to the canopied
24 forest. I -- I -- I know that the Fifth
25 Circuit said that there was no dispute this

1 wasn't currently habitable, but I think that
2 depended on what definition you gave to
3 habitable.

4 If we give a different definition,
5 what would be the minimum, if it didn't include
6 the PCEs that you think are necessary? Because
7 I don't know that unoccupied has to be an
8 optimal survival place, and if it doesn't have
9 to be optimal, what would otherwise be a
10 minimum?

11 MR. BISHOP: This -- this property is
12 not just not optimal. It is not habitable.
13 And this is only the litigating position of the
14 Department of Justice.

15 The judges below who looked at -- the
16 Fifth Circuit judges, including the majority,
17 not just the dissenters, who looked at the
18 administrative record here, which is what this
19 Court is reviewing, not the litigating position
20 of the Department of Justice, concluded -- and
21 this is from the majority -- that the Service
22 had found that this was -- Unit 1 was currently
23 uninhabitable. That's page 24-A of the
24 petition appendix.

25 And just to --

1 JUSTICE SOTOMAYOR: But that -- but
2 that definition was never provided?

3 MR. BISHOP: The definition that we
4 provided was the definition that we have
5 provided to this Court, which is the dictionary
6 definition from Webster's 3rd, "the physical
7 features that naturally or normally are
8 preferred by the species," the 1979 convention,
9 "land which contains suitable living
10 conditions."

11 And, you know, a picture is worth a
12 thousand words. In the -- in the Joint
13 Appendix on page 57, there is a photo, albeit a
14 small one, of adult frogs' uplands habitat.
15 And it's a picture of a few trees with a
16 grassland savanna. And the scientific experts
17 that you refer to, Justice Sotomayor, for
18 example, Lannoo, talk about the habitat that's
19 needed on the uplands as a savanna.

20 JUSTICE SOTOMAYOR: I think it's
21 begging -- it's begging the question, which is
22 I don't know that the circuit below actually
23 accepted your definition or whether your
24 definition, for the reasons I indicated just a
25 few minutes ago, covered all of the conditions

1 that could make for survival for the species.

2 As I read the record, there were
3 suggestions by some of the scientists that what
4 -- what you admitted to Justice Kagan a little
5 while ago, minimal work, this species could
6 survive, I'll bet not robustly, but it could
7 survive.

8 MR. BISHOP: No.

9 JUSTICE SOTOMAYOR: Wouldn't that be
10 enough?

11 MR. BISHOP: No, that's just not what
12 the administrative record shows. All right.
13 The --

14 JUSTICE SOTOMAYOR: Well, I don't want
15 to argue the record now. The question is, if I
16 come away having reviewed it with a question
17 about whether the Circuit actually addressed
18 that question and defined what it thought the
19 minimal requirements for habitat were, wouldn't
20 be -- wouldn't the answer be to remand this
21 case and let it make that determination?

22 MR. BISHOP: If you thought that
23 habitat meant something other than what the
24 convention says and what the dictionaries in
25 1978 said, and if you think that on the basis

1 of this record that this is habitat for these
2 species, then I think that would be --

3 JUSTICE SOTOMAYOR: Well, that's your
4 -- well, that's your adversary --

5 MR. BISHOP: But none of those things
6 are supported -- none of those things are
7 supported by --

8 JUSTICE SOTOMAYOR: Assuming what I
9 said --

10 MR. BISHOP: Yes.

11 JUSTICE SOTOMAYOR: -- would a remand
12 be appropriate?

13 MR. BISHOP: Yes.

14 JUSTICE SOTOMAYOR: Okay.

15 JUSTICE BREYER: I'd like to ask you,
16 I've not -- one way of looking at the case, as
17 I started looking at it, is this isn't about
18 words, really, or definitions. Every time the
19 word "habitat" is used, or almost every time,
20 they talk about critical habitat, which is a
21 defined term. But the key words that follow it
22 are typically "essential" or "necessary," so
23 something like that.

24 So, in thinking about it, I thought,
25 well, air is necessary. We're going to be in

1 real trouble without it. But it's not the only
2 thing that's necessary. Water is necessary
3 too.

4 So you could have for mammals
5 situations where they need air and they can't
6 be submerged in a swamp. So this land will
7 have the air, but it's a big swamp. But maybe
8 we'll drain it. So, if we drain it, it's going
9 to be fine.

10 And if that's what the statute
11 basically means -- you get the idea where I'm
12 driving -- then this is a typical agency case,
13 because, after all, if you can't drain the
14 swamp, then the air is irrelevant.

15 But if you could drain the swamp
16 pretty easily, well, then the air is essential
17 and you better be sure you have it.

18 Now, on that, the agency has found,
19 well, it's not that hard to drain the swamp.
20 Good chance we'll do it. Good chance we'll do
21 it. You say: Ha, they don't know what they're
22 -- well, I mean, you're polite about it.

23 (Laughter.)

24 JUSTICE BREYER: And -- and so you
25 don't -- isn't what we have to do, we look at

1 the record, it's -- the discretion is given to
2 the Secretary. That's a lot. And we say: Did
3 they in this case, the Secretary, exceed the
4 discretion that the statute gives him in
5 thinking they could drain the swamp, i.e., they
6 could make a canopy? Good chance it'll happen.
7 Period. Typical agency case.

8 Now is that how I should look at it?

9 MR. BISHOP: No, not at all. The
10 administrative record here shows that this land
11 would have to be totally remade. It would have
12 to be made to look something like that picture
13 on JA 70 -- 77.

14 And that burden is not something that
15 is allowed by language, plain language, in the
16 statute that requires that the habitat --

17 JUSTICE BREYER: No, we're looking at
18 it the same way --

19 MR. BISHOP: -- the habitat --

20 JUSTICE BREYER: You just want me to
21 come out differently.

22 MR. BISHOP: I would like to spend a
23 couple minutes, if I may, on judicial review.
24 The court below held that the exclusion
25 decision here is not subject to judicial

1 review. And the government argues that that
2 was correct.

3 The statutory language of the
4 exclusion decision here, Section 4(b)(2), is
5 that the agency may exclude any area from
6 designation if the Secretary determines that
7 the benefits of exclusion outweigh the benefits
8 of inclusion.

9 So it's not a "may" statement from
10 Congress. It's a "may/if." May exclude if
11 these other conditions are met. It weighs the
12 benefits of exclusion against the benefits of
13 inclusion.

14 JUSTICE KAGAN: Well, it is a
15 "may/if." But if the other conditions are met,
16 it indicates, because of the use of the "may,"
17 rather than the use of a "shall," doesn't it,
18 that the Secretary still has discretion?

19 In other words, if the conditions
20 aren't met, then the Secretary can't exclude.
21 But if the conditions are met, the Secretary
22 may exclude if he wants.

23 MR. BISHOP: Yes, ultimately, there's
24 -- it's a discretionary decision. I think the
25 question is whether State Farm review of that

1 "if" clause is appropriate. And this Court has
2 already decided that question in Bennett, a
3 unanimous decision of this Court where it
4 considered both parts of that (b)(2) provision.
5 And the Court said it is rudimentary that
6 discretion as to the substance of the ultimate
7 decision does not confer discretion to ignore
8 the required procedures of decision-making.

9 JUSTICE GORSUCH: Mr. Bishop --

10 MR. BISHOP: And the government itself
11 has conceded this.

12 JUSTICE GORSUCH: -- if I --

13 MR. BISHOP: Sorry.

14 JUSTICE GORSUCH: No, not at all.

15 Maybe you can help me out with this. Let's
16 suppose for now that I would agree with you and
17 that we could review this.

18 What more would you expect the
19 Secretary to say, or could say, given the state
20 of scientific evidence before the Secretary?

21 That's not clear to me. The Secretary
22 says there's -- there's just not any evidence
23 of the benefits of exclusion that I -- that I
24 can put a number on.

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

1 written put some burden of proof incumbent upon
2 the landowner or lessee to come forward with
3 something quantifying the benefits of
4 exclusion?

5 MR. BISHOP: Right. Well, certainly,
6 it's permissible for the agency to rely -- to
7 characterize the benefits of inclusion as being
8 biological, which is something that can be
9 described but not quantified.

10 But, on the other side of that ledger,
11 the agency has to meet State Farm standards in
12 identifying what the factors --

13 JUSTICE GORSUCH: And what -- what --
14 on that, my question is, what more would you
15 ask the Secretary to do? The Secretary did
16 quantify the economic benefits exclusion and
17 then said, compared to the benefits of
18 inclusion, they're indeterminate. And,
19 therefore, the burden of proving exclusion has
20 not been met.

21 And that burden, it seems to me, rests
22 with you. So suppose I -- there's some
23 judicial review possible here. Do we need to
24 get into how many angels dance on the head of
25 that pin if you -- if you've got no real

1 complaint at the end of the day with the
2 adequacy of the Secretary's --

3 MR. BISHOP: Well, we do --

4 JUSTICE GORSUCH: -- reasoning?

5 MR. BISHOP: -- we do have that
6 complaint. And, certainly, a remand would --
7 would allow us to explore that. But here,
8 under State Farm, the inputs --

9 JUSTICE GORSUCH: Well, could you
10 explain that to me?

11 MR. BISHOP: Yes, the inputs into the
12 decision have to be fair and reasonable and the
13 connection between those inputs and the
14 ultimate decision have to be.

15 Let -- let me give an -- an example of
16 a very basic error that -- an example of an
17 internal inconsistency.

18 So the -- the Service refused to
19 factor in the loss of Unit 1 to housing and to
20 St. Tammany's tax base, and it did that because
21 it found that Unit 1 is only 0.5 percent of
22 developable land in the parish.

23 There's a big problem with that. It
24 included as developable land everything under
25 -- south of Interstate 12, which is not

1 developable because it flooded in Hurricane
2 Katrina, everyone from that area is moving up
3 to -- to us, to the higher ground.

4 It said, in addition, it acknowledged
5 that Unit 1 is particularly attractive for
6 development because Highway 36 runs through it.
7 It's an attractive area for development because
8 it's connected to centers of -- where jobs --
9 where the jobs are.

10 And yet -- so we have a Unit 1 that is
11 already zoned, it's outside the flood zone, and
12 it's well served by roads connecting it to
13 jobs, but the Service treated every undeveloped
14 area in the parish as fungible and said this
15 just isn't an important development area, even
16 though St. Tammany, as its brief explains in
17 this case, says no, it's a very important
18 development area.

19 The -- that is what you get when
20 there's no judicial review, when an agency
21 thinks that there are no controls over what it
22 concludes.

23 And the economic analysis is riven
24 through with very basic errors of that kind.
25 And I would submit that without the possibility

1 of judicial review in cases like this, that is
2 what you get, a very unsatisfactory balancing.

3 And that is what State Farm is for.
4 State Farm is there to ensure that when a
5 balancing like this has to be done, when there
6 are multiple factors to be considered, that the
7 agency gets it fairly right as to what those
8 factors are and then connects up the dots
9 between what those factors are and what its
10 ultimate conclusion is. Not the one-line --
11 unexplained conclusion that it had here that it
12 was not going to exclude.

13 If I can save the rest of my time for
14 rebuttal, please.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Bishop.

17 Mr. Kneedler.

18 ORAL ARGUMENT OF EDWIN S. KNEEDLER

19 ON BEHALF OF THE RESPONDENTS

20 MR. KNEEDLER: Mr. Chief Justice --
21 excuse me -- Mr. Chief Justice, and may it
22 please the Court:

23 The dusky gopher frog is a critically
24 endangered species. It is at serious risk of
25 extinction. As the Fish and Wildlife Service

1 found, if the frog is to be conserved and the
2 risk of its extinction reduced, the area
3 involved here is essential to accomplish those
4 explicit statutory purposes.

5 It, therefore, was properly designated
6 as unoccupied critical habitat. Petitioner
7 does not --

8 CHIEF JUSTICE ROBERTS: It has to be
9 -- your argument is that critical habitat
10 doesn't have to include all of the elements for
11 habitability because you could undertake some
12 restoration that would provide whatever's
13 missing?

14 MR. KNEEDLER: That -- that --

15 CHIEF JUSTICE ROBERTS: The -- the
16 draining of the -- of -- of the swamp. But,
17 you know, if you have the ephemeral ponds in
18 Alaska, you could build a giant greenhouse and
19 plant the longleaf pines and the -- the frog
20 could live there. In other words, there has to
21 be presumably some limit on what restoration
22 you would say is required.

23 MR. KNEEDLER: Yes. And -- and what
24 the -- what the Service found here is that
25 restoration of the uplands could be

1 accomplished with reasonable efforts. The
2 central -- the central feature of the
3 habitat --

4 CHIEF JUSTICE ROBERTS: Well,
5 reasonable -- reasonable efforts that the
6 landowners would have to undertake voluntarily,
7 right?

8 MR. KNEEDLER: The landowners, or if
9 they entered into an agreement with a -- with a
10 conservation group. The Nature Conservancy has
11 purchased land at the other -- at the other
12 location where the frog is.

13 CHIEF JUSTICE ROBERTS: But they've --
14 they've told you they're not going to do it.

15 MR. KNEEDLER: That -- that's true.
16 But the -- the operation of the Act, it can't
17 be dispositive what the intention -- subjective
18 intentions at this moment in time by this
19 particular owner of the property are. The --
20 the Act turns on the -- on the status of the
21 land, not the intention of -- of the landowner.

22 Now that may be taken into account in
23 -- at some point in deciding whether the land
24 is essential. The -- the proposed regulation
25 that Interior has published --

1 CHIEF JUSTICE ROBERTS: I don't
2 understand --

3 MR. KNEEDLER: -- says that.

4 CHIEF JUSTICE ROBERTS: I mean, you --
5 you've said that it can be designated as
6 critical if some restoration can take place.
7 And as far -- where we are right now is the
8 landowner's saying: We're not going to do the
9 restoration you want.

10 MR. KNEEDLER: Right. But --

11 CHIEF JUSTICE ROBERTS: So you just
12 say, well, we're going to designate it anyway,
13 even though the restoration won't occur?

14 MR. KNEEDLER: Well, the -- the -- the
15 question of whether it -- it's -- whether it is
16 capable of supporting a population is basically
17 a scientific one. Section 4(b)(2) says that it
18 should be based on the best scientific evidence
19 available. It's about the status of the land
20 in terms of whether --

21 CHIEF JUSTICE ROBERTS: With the --
22 with -- with the change, right? Can this
23 support the population if they make this
24 change?

25 MR. KNEEDLER: Yes. There --

1 CHIEF JUSTICE ROBERTS: Well, but
2 what's the limit? I mean, you could require,
3 say, well, this -- this piece of property in --
4 in Canada could accommodate the species so long
5 as you invested \$100 million to put in
6 ephemeral ponds, change the loblolly pines to
7 longleaf and do all this.

8 MR. KNEEDLER: Well, it has -- it has
9 to be, according to the Service here,
10 reasonable efforts. And --

11 JUSTICE ALITO: What's the definition
12 of reasonable?

13 MR. KNEEDLER: I -- something that --
14 I mean, for one thing, I think there's a big
15 distinction between whether the -- whether, in
16 this case, the upland habitat has been
17 transformed to such an extent that it's
18 destroyed, like if there was a shopping center
19 there or a housing development there.

20 As compared to the upland habitat here
21 --

22 JUSTICE GORSUCH: But why -- why --

23 MR. KNEEDLER: -- has trees that
24 different --

25 JUSTICE GORSUCH: -- why is that so,

1 Mr. Kneedler, though? I mean, it might be a
2 few more dollars to pull up the asphalt and
3 then put down the ephemeral ponds. Why would a
4 parking lot make the difference? Why would
5 that be an unreasonable effort necessarily?

6 MR. KNEEDLER: It's conceivable if
7 there was a small --

8 JUSTICE GORSUCH: And where does all
9 this come from in the statute? Where do you
10 get reasonable efforts in the statute?

11 MR. KNEEDLER: Well, I -- I think it
12 runs throughout the statute, frankly.

13 JUSTICE GORSUCH: Well, runs
14 throughout. Can you show me where?

15 MR. KNEEDLER: Well, a number -- a
16 number of places I would -- I would -- I would
17 refer to. The definition of critical habitat,
18 both prongs, talk about --

19 JUSTICE GORSUCH: I don't see
20 reasonable efforts there.

21 MR. KNEEDLER: No, not reasonable
22 efforts, but --

23 JUSTICE GORSUCH: That's not there.

24 MR. KNEEDLER: No, but it -- it talks
25 about conservation, what's essential for

1 conservation of the species. Conservation is
2 defined as all measures necessary to bring the
3 species back to the point where it does not
4 need protection for that.

5 JUSTICE GORSUCH: Oh, I don't doubt
6 under Section 7 the government has enormous
7 powers to help species, whether in critical
8 habitat or elsewhere. All right? There's
9 nothing preventing the government from
10 purchasing land or taking other actions to
11 protect an endangered species, whether on
12 critical habitat or elsewhere, right?

13 MR. KNEEDLER: But this Court said in
14 Sweet Home, for example, that the fact that the
15 government can purchase land or make grants
16 does not undermine the -- the operation. The
17 critical habitat and --

18 JUSTICE GORSUCH: It's a supplementary
19 power, though, you'd agree?

20 MR. KNEEDLER: It -- it is. But for
21 one thing, the designation of critical habitat
22 serves -- serves a very important function in
23 educating and identifying the areas where the
24 species could be -- could be used.

25 And it's also important to recognize

1 this is a proposition not limited to private
2 land. It also has to do with public land.

3 So having the expertise of the Fish
4 and Wildlife Service identify those areas that
5 are necessary for recovery of the species, can,
6 for example, identify the areas that would be
7 -- that a conservation group might want to
8 enter into an agreement with the landowner to
9 conserve, that -- that the -- that the state
10 might decide to purchase, so the identification
11 of the habitat is not just in terms of
12 triggering Section 7 of the -- of the Act.

13 JUSTICE GORSUCH: Do you --

14 JUSTICE SOTOMAYOR: Mister --

15 JUSTICE ALITO: I think your argument
16 requires you to provide some definition of
17 reasonable restoration. Now this case is going
18 to be spun, we've already heard questions along
19 this line, as a choice between whether the
20 dusky gopher frog is going to become extinct or
21 not. That's not the choice at all.

22 The question is, who is going to have
23 to pay and who should pay for the preservation
24 of this public good? Now it may be very
25 difficult for a lot of people to shed tears for

1 a big corporation like the one in this case,
2 but let's suppose this is a -- this is a family
3 farm and part of the -- the land is designated
4 or a good part of it is designated as critical
5 habitat.

6 Now to what -- is there some formula,
7 some percentage of the value of the family farm
8 that would have to be required for this
9 reasonable restoration be -- before that
10 becomes unreasonable? Can you provide any
11 guidance on that?

12 MR. KNEEDLER: I -- I don't think
13 there would be a hard-and-fast rule. I think
14 if you -- if you look at the -- if you look at
15 the nature of the land, I mean, for example,
16 here, would -- would the restoration be -- be
17 within the -- the -- the framework that the --
18 that the land is now being used for?

19 JUSTICE BREYER: That's --

20 MR. KNEEDLER: It's being used to
21 raise trees. All that would be necessary at
22 least at the beginning is to thin trees.

23 JUSTICE BREYER: Well, yeah, but
24 that's -- that's -- now you're right at the
25 point. I read this. I thought it's an easy

1 case, not the result, but the concept's easy.
2 The statute books are filled with words like
3 reasonable.

4 And right here it says that the
5 Secretary, it says, a determination by the
6 Secretary that such areas are essential. To
7 me, that calls up is it reasonable or isn't it
8 reasonable?

9 It's not reasonable to say that this
10 area is essential if the frogs will die anyway
11 because there aren't enough trees. Okay?

12 So let's look at the picture on page
13 57. And the picture on page 57 shows an area
14 which has very few trees. And we also know
15 that this is a logging company, and so probably
16 they have lots of trees. They like trees, not
17 forever, but --

18 (Laughter.)

19 JUSTICE BREYER: -- but they want a
20 lot of trees planted there. And so what is it
21 in this case -- and I thought the case was no
22 more than that -- what is it -- what is it in
23 this case that makes discretion -- statute
24 books are filled with words like "we give
25 discretion to the Secretary" -- that makes this

1 within and not outside that delegated
2 discretion to the Secretary to determine
3 essentiality?

4 MR. KNEEDLER: Well, I -- the Act, as
5 you pointed out, that says the Secretary shall
6 --

7 JUSTICE BREYER: But it's not the Act
8 that I'm thinking of. I agree with you that it
9 gives him lots of discretion. But the Chief
10 Justice's first question was surely he can't
11 require the building of hot air greenhouses in
12 Nome, Alaska. That goes too far.

13 And I'm not asking you to find it
14 either. There are loads of places where it's
15 not defined. I'm asking you to tell me what is
16 in this record that suggests that this is
17 within the Secretary's discretion and not
18 outside of it.

19 MR. KNEEDLER: First of all, you were
20 pointed to page 57 of the Joint Appendix, which
21 shows the -- shows the uplands at Glen Pond.
22 There are pictures in the -- in the record at
23 JA-17 through 20 of the -- of the area in -- at
24 issue here. There are trees in the background
25 that -- that don't show a dense canopy.

1 I don't want to say that there is not
2 forested land there, but I think one of -- one
3 of the -- one of the ways to look at it is,
4 would the modifications be compatible with the
5 existing use of the land? If you're running --
6 if you're operating a tree operation, cutting
7 down and thinning trees is part of what you do.

8 And it's not as if this would have to
9 be done overnight.

10 CHIEF JUSTICE ROBERTS: Well, but the
11 problem with that is, once you have the
12 designation, you need -- probably federal
13 permits to do things like logging companies
14 typically do. And if you are asking for a
15 federal permit, the whole point of the
16 designation is you have to go through a fairly
17 elaborate process. And you might not get it at
18 the end.

19 Well, you won't have to go through the
20 elaborate process, and you probably get one if
21 it weren't designated.

22 MR. KNEEDLER: Well, as far as logging
23 is concerned, the -- the ongoing log -- logging
24 operations here have not required a -- any --
25 any federal permit. And it's -- it's only if

1 the landowner wanted to transform the land and
2 use it for development and if that interferes
3 --

4 CHIEF JUSTICE ROBERTS: Which is
5 exactly what they want to do, right?

6 MR. KNEEDLER: Yes, but -- but if
7 that's true, then a Section 7 -- excuse me, a
8 404 permit would be required if they were going
9 to fill wetlands or -- or fill the ponds. But,
10 if development happened without the need for a
11 federal permit, Section 7 does not impose any
12 limitation at all. It's only if there is
13 federal involvement.

14 But here we're talking about the basic
15 qualification of the land to be designated in
16 the first place. And it --

17 JUSTICE SOTOMAYOR: Mr. Kneedler, in
18 your brief, you give a meaning to "habitat"
19 which, frankly, is very different than its
20 dictionary meaning. Pages 27 to 28, you argue
21 that "habitat can include some areas where a
22 species does not live and cannot ever live,
23 even with restoration." That's very different
24 than what you started your argument with today.

25 It's very different than what you've

1 done with the Santa Ana sucker, for example.
2 If we disagree with you, where does that leave
3 you in this case?

4 MR. KNEEDLER: Well, if you disagree
5 about the Santa Ana sucker, that's --

6 JUSTICE SOTOMAYOR: I'm not -- we're
7 not looking at that.

8 MR. KNEEDLER: Okay.

9 JUSTICE SOTOMAYOR: Let's assume I
10 take the dictionary definition of "habitat,"
11 which is the kind of place that is natural for
12 the life and growth of an animal or plant.

13 That's fairly simple, natural place.
14 Could this -- is this a natural place for this
15 frog to live? And, if not, do -- is the
16 difference between you and your colleague
17 whether some reasonable restoration can be made
18 or not?

19 MR. KNEEDLER: That -- that may in the
20 end be the difference, but -- but I think it's
21 important when -- when you're talking about the
22 definition that you quoted, and we -- we quote
23 a number of them on page 33 of our brief, a
24 number of dictionary definitions, is it the
25 kind of place, is it the kind of site on which

1 the -- on which the species could thrive?

2 And -- and here, the kind of site, I
3 think, is really most commonly understood or
4 defined as the central element, what makes it
5 rare, and that's the pond. Is it the kind of
6 place that this frog can live, is in an
7 ephemeral pond and the immediately surrounding
8 uplands?

9 JUSTICE SOTOMAYOR: And was I all that
10 --

11 JUSTICE KAGAN: Mr. Kneedler --

12 JUSTICE GINSBURG: We were just told
13 that they were in a pond for less than a month.

14 MR. KNEEDLER: Well, the -- the adult
15 frogs are, but -- but the -- the larvae and
16 tadpoles remain in the -- in the pond for much
17 longer. In fact, one of the -- one of the
18 reasons that this is rendered so rare is that
19 you have to have an ephemeral pond with
20 enough -- with water in it for a long enough
21 period of time, 195 days, so that --

22 JUSTICE GINSBURG: How -- how do you
23 answer --

24 MR. KNEEDLER: -- the tadpoles mature
25 and -- and metamorphize, but -- but not water

1 all the time so it has fish that will eat the
2 larvae. That's what makes this group of ponds
3 critical --

4 JUSTICE GINSBURG: But you need -- you
5 need a place for them to live outside the pond.
6 And Justice Sotomayor brought up the question
7 about whether the frogs could live in the area
8 outside. You said yes, even though it's far
9 from an ideal place.

10 But Mr. Bishop said there is no
11 showing that frogs could live there.

12 MR. KNEEDLER: Well, there -- there is
13 some evidence in the record that we point to
14 where the scientists evaluated the -- the land
15 and found some stumps. And -- and there was --
16 as was pointed out, there were frogs located on
17 this up until 1965, even though there was a
18 tree farm going on.

19 But one of the reasons that -- this
20 hasn't been further developed because this
21 really wasn't the -- the gravamen of the
22 administrative dispute, whether any frog could
23 survive there. And -- and that's why -- that's
24 why it's not -- you know, there isn't more
25 express findings about that. But --

1 JUSTICE ALITO: The frogs need the --
2 the frogs need the ephemeral ponds, and those
3 are there. And there's evidence in the record
4 that there are some stumps. But what about the
5 -- the ground cover and the trees? Is there
6 anything in the record that shows, that could
7 -- that could show that the frogs -- there
8 could be a sustaining population of frogs there
9 without changes in the tree cover and,
10 therefore, changes in the ground cover?

11 MR. KNEEDLER: For a long-term
12 sustaining population, there would have to be
13 changes. No, that -- we acknowledge that. And
14 that -- that is what is said here. But one --
15 one --

16 JUSTICE ALITO: So they -- they
17 couldn't survive where they are now?

18 MR. KNEEDLER: They --

19 JUSTICE ALITO: I mean, the test can't
20 be could you -- if you dumped a couple of frogs
21 there and then you came back two weeks later or
22 a month later, would any of the frogs still be
23 alive? That can't be the test, right?

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

25 JUSTICE ALITO: They would have to

1 sustain themselves.

2 MR. KNEEDLER: Well, they -- they
3 might live for several generations. I mean, I
4 -- I don't know. But I don't think that's the
5 -- the central point here.

6 I think the -- I think the fact that
7 frogs were identified there up until 1965 and
8 -- and there are stump holes and -- and the --
9 and the basics for this to be a sustained area
10 is -- is -- is really what's important because
11 it shows that it's capable of. And --

12 JUSTICE KAGAN: Mister --

13 JUSTICE SOTOMAYOR: So if we were --

14 JUSTICE KAGAN: -- Mr. Kneedler,
15 suppose -- if we could just go back to Justice
16 Alito's question, Justice Alito suggested that
17 there were other things that the government is
18 capable of doing to conserve these frogs.

19 So what, consistent with Mr. Bishop's
20 view of the statute, could the government do,
21 is the government enabled to do, that would
22 effectively conserve these frogs? Is there
23 anything?

24 MR. KNEEDLER: It does have the
25 authority -- there's a grant program under

1 Section 6 of the Act of grants to states. Now
2 that would -- the -- the grants to the state is
3 the state would have to decide to become
4 involved, and those can involve private
5 conservation groups.

6 The federal government could purchase
7 the land if -- for example, if the landowner
8 was willing to sell it. So far, there hasn't
9 been any indication that they would be. And
10 the Service understandably very rarely
11 exercises the power of eminent domain. It
12 probably would have the -- the -- the power to
13 do so.

14 But the -- none of that -- none of
15 that undercuts the need, the statutory
16 obligation to designate critical habitat.

17 JUSTICE KAGAN: And -- and this --
18 this statute presumes that the designation of
19 critical habitat is often, almost always, going
20 to be on private land, isn't that correct?

21 Maybe I'll take --

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

23 JUSTICE KAGAN: -- down "almost
24 always."

25 MR. KNEEDLER: -- almost always.

1 JUSTICE KAGAN: Often.

2 MR. KNEEDLER: No, I --

3 JUSTICE KAGAN. Is often going to be
4 on private land?

5 MR. KNEEDLER: It often will be on
6 private land. But it's also on public land.
7 And it's important -- it's -- it's important
8 that the Court understand that the limitations
9 the Petitioner would place on the designation
10 of critical habitat would also apply to the
11 government's own land in -- in terms of
12 limiting the Section 7 consultation process if
13 somebody wants a permit on -- on federal land.

14 CHIEF JUSTICE ROBERTS: Can't you do
15 what you want on federal land?

16 MR. KNEEDLER: Well, but triggering
17 section -- yes, but -- to an extent, but
18 Section 7 is a framework to bring in the Fish
19 and Wildlife Service and its expertise. And --
20 and for --

21 CHIEF JUSTICE ROBERTS: Well, so the
22 only benefit to the federal government is that
23 the Fish and Wildlife Service will sit down at
24 the table with whoever else, whatever other
25 government agency owns the land?

1 MR. KNEEDLER: Well, I -- that is an
2 important benefit. It's not the only benefit.
3 There's a benefit to the public in having -- in
4 having Section 7 scrutiny and consultation go
5 on before an action agency undertakes --

6 CHIEF JUSTICE ROBERTS: At point,
7 somebody in the federal government can say to
8 the federal wildlife service: I want you to
9 sit down with whoever it is, the Army Corps of
10 Engineers. Right?

11 MR. KNEEDLER: That --

12 CHIEF JUSTICE ROBERTS: You don't need
13 a statute to bring that about.

14 MR. KNEEDLER: Well, it's true they
15 could, but Section 7 of the ESA organizes that
16 by setting up a consultation process such that
17 the action agency can't go -- can't go forward
18 in an area that might harm the species or its
19 habitat without consulting with the agency.
20 That is a very important concept at that time.

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

22 JUSTICE KAGAN: I guess what I was
23 suggesting was -- was -- you know, Congress
24 could have passed a statute which just said
25 every time that there's a problem of this kind,

1 the federal government has to purchase the land
2 that will support an endangered species. It
3 didn't pass that statute.

4 It passed a statute that said that the
5 Secretary could designate critical habitat
6 regardless whether that habitat was on private
7 or public land.

8 And then the question is, where does
9 this requirement of immediacy come from that
10 Mr. Bishop wants to impose?

11 MR. KNEEDLER: You mean immediate
12 restoration, do you mean?

13 JUSTICE KAGAN: You know, that it has
14 to be -- that it has to be available to support
15 the species exactly now without any further
16 effort?

17 MR. KNEEDLER: It is not in the Act at
18 all. And the -- and the whole concept of
19 conservation is a long-term prospect, not
20 something that has to happen immediately.

21 JUSTICE BREYER: So that's -- all
22 right, that's -- that's so. Land is around for
23 a long time. We hope the frogs will be too.
24 You're looking out into the future. Is there
25 anything you want to add in words that I would

1 write if I were writing this opinion that would
2 distinguish the case the Chief Justice first
3 brought up where the only way to save these
4 frogs, in addition to the ponds, is to build
5 special hothouses in Nome, Alaska?

6 A decision resting on that I -- would
7 strike me as far-fetched, from a situation
8 where all you have to do in addition is drain
9 six inches of swamp. If the decision rested on
10 that, even if the owner said I'll never do it,
11 I would say it was a reasonable decision.
12 Okay. That's highly subjective. Are there any
13 words that you could use that would distinguish
14 those two instances?

15 MR. KNEEDLER: Well, the greenhouse
16 example is not -- is not restoring habitat. I
17 don't -- I don't think a greenhouse would --

18 JUSTICE BREYER: Well, you see what
19 I'm trying to get at --

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

21 JUSTICE BREYER: -- is very unlikely.

22 MR. KNEEDLER: Yes. No, it's very
23 unlikely. But -- but here -- here the
24 restoration efforts are -- are entirely in sync
25 with the use of the land. I mean, there are

1 uplands with trees. They -- as I say, they
2 could be thinned. It's not as if the -- not
3 only does the conservation not have to happen
4 immediately but the --

5 CHIEF JUSTICE ROBERTS: So would you
6 --

7 MR. KNEEDLER: -- but the restoration
8 doesn't have to happen immediately.

9 CHIEF JUSTICE ROBERTS: That's your --
10 that's your requirement, the restoration has to
11 -- has to be entirely in, what did you say, in
12 sync or in --

13 MR. KNEEDLER: In -- in sync with --
14 I'm not saying that that is a hard-and-fast
15 rule. I'm trying to explain why this one --
16 why it is reasonable in this case.

17 CHIEF JUSTICE ROBERTS: Okay. Well,
18 but I know. But the question and the reason
19 for the hypothetical is it seems to me that if
20 you permit the designation of something as
21 critical habitat that cannot be occupied by the
22 animal, because you think they can do something
23 down the road that will cure the problem,
24 whether it's cut the trees or do anything else,
25 that you ought to be able to articulate what

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

2 MR. KNEEDLER: I -- I think it's
3 whether -- whether it is a further modification
4 of the habitat in it -- in its existing -- in
5 its existing state. And at least where the --
6 at least where the -- the habitat is being used
7 in a way that is similar to what would be
8 necessary for its restoration or would the
9 restoration undermine the fundamental nature of
10 it and in that --

11 CHIEF JUSTICE ROBERTS: So if you get
12 to Justice Gorsuch's or whoever it was -- the
13 asphalt thing, if what you have to do is just
14 dig up the asphalt, that's -- the use of the
15 area for a parking lot is not in tune with its
16 normal whatever, so you couldn't do that under
17 this statute?

18 MR. KNEEDLER: Well, I -- I think -- I
19 think there may be several factors, the size --
20 the -- the effort involved. I mean, if it's
21 one road, that may not be an obstacle.

22 If I could just point out there is a
23 -- there is a statutory place to look for the
24 distinction that I'm drawing, and among others,
25 it's in 1533(a)(1)(A), which in designating or,

1 excuse me, listing a species, it directs the
2 Secretary to take -- to determine whether a
3 species may be endangered because of a number
4 of factors.

5 The first one is "the present or
6 threatened destruction, modification, or
7 curtailment of its habitat or range." The
8 reference to modification of habitat suggests
9 that even with modification, it's still
10 habitat, even though it's been modified.

11 And one of the reasons that land is
12 unoccupied by a species is often precisely
13 because of what has happened, people using the
14 land in a way or transforming the land. But
15 this -- this passage contrasts destruction of
16 the habitat, which would be the case if -- if
17 there was a parking lot or a building or some
18 -- something that transformed it, and
19 modification of the habitat, which suggests
20 that it retains its essential nature.

21 And here, Unit 1 retains its essential
22 nature, which is these very rare ponds, not
23 only that, a collection of five ponds, which
24 enables the development of a -- of a -- a meta
25 population.

1 JUSTICE SOTOMAYOR: So can we talk
2 about -- I -- I see your point with talking
3 about a kind of place, and it does seem logical
4 that the frogs were there and they were there
5 for a very long time. They were there during
6 the timber cutting. But they left. They left
7 or they were destroyed.

8 So I -- what is it about the natural
9 -- the native environment that still exists
10 there and what is it that you think, with very
11 little reasonable effort, that you could change
12 to make it sustaining for a long period of time
13 again?

14 MR. KNEEDLER: What -- what the frog
15 needs is -- is some --

16 JUSTICE SOTOMAYOR: The PCEs, I know.

17 MR. KNEEDLER: Well, yes, but it --
18 but it -- that -- that transformation or that
19 change, that restoration would not have to
20 happen overnight. It would not mean
21 clear-cutting the loblolly pines and planting
22 -- and -- and planting longleaf pines.

23 JUSTICE SOTOMAYOR: That's my point.

24 MR. KNEEDLER: And -- and there --
25 there is an example in the -- in the recovery

1 plan that is cited in the record when it's
2 describing what has happened at Glen Pond,
3 which is the place in Mississippi, the only
4 place where there is a -- a stable population
5 at all.

6 It describes that there has been some
7 habitat management which has included thinning
8 trees and planting longleaf pines, which
9 suggests this could be a gradual process. As
10 the loblolly pines mature, they could be cut.
11 They could -- some could be cut now to create
12 some open space. You could cut some trees and
13 leave stumps there for the frog. It could be a
14 gradual process. It doesn't require that it be
15 instantly made -- made available.

16 CHIEF JUSTICE ROBERTS: Well it's
17 still the case that that would require consent
18 of the owners, and they say they're not going
19 to do it.

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

21 CHIEF JUSTICE ROBERTS: You can't
22 require them to do it, right?

23 MR. KNEEDLER: But, again, what
24 constitutes habitat, looks at the nature of the
25 land. And what -- and whether something is

1 essential -- no, you can't require them to do
2 it, but -- but the Service looks at it and says
3 if this species is going to be conserved, in
4 fact, if this species is going to survive at
5 all and not be extinct, it is essential to use
6 these ponds.

7 It may be that if -- that the
8 landowner can ignore that, but it -- it does
9 serve to identify for the landowner and for
10 others that this is critical habitat to -- to
11 the survival of the species.

12 JUSTICE GINSBURG: But can you --

13 JUSTICE GORSUCH: Suppose the missing
14 --

15 JUSTICE GINSBURG: -- can you explain,
16 suppose the proposed regulation is in effect.
17 What would the Fish and Wildlife Service have
18 to do differently if the proposed regulation
19 were in effect?

20 MR. KNEEDLER: If the what? The
21 proposed regulation?

22 JUSTICE GINSBURG: Yes.

23 MR. KNEEDLER: I think this would
24 qualify under the proposed regulation as I --
25 as I read it. In fact, it identifies -- it

1 says while the landowner's intentions can be
2 taken into account, it's sort of a sliding
3 scale, and the more critical the particular
4 area is for the -- for the species, the -- the
5 less likely it is that the intentions of the
6 landowner would be taken into account.

7 And I think that exactly describes
8 this case. This is a rare case because of the
9 rare nature of these ponds. It is critical to
10 preserve these ponds. And they can be used for
11 the habitat of -- of the species.

12 JUSTICE GORSUCH: Could -- could this
13 --

14 MR. KNEEDLER: It is the kind of
15 place, because of the ponds, where the species
16 can thrive.

17 JUSTICE GORSUCH: Let's -- let's
18 assume for the moment that this isn't habitat
19 and, therefore, couldn't be designated as
20 critical habitat.

21 Could the Secretary take other actions
22 to identify this land as critical to the
23 survival of the species, even if it isn't
24 currently habitat? Is there anything in
25 Section 7 or elsewhere in the statute that

1 would prohibit that?

2 The way I read the statute, it says
3 that, you know, the Secretary has to take
4 actions to avoid jeopardizing the continued
5 existence of any endangered species, or result
6 in the destruction of habitat, critical
7 habitat.

8 So there's -- there's an "or" there.
9 And it seems to me, I -- I wonder, isn't the
10 Secretary fully endowed with authority to take
11 other actions, even if this isn't critical
12 habitat, to identify this land as important to
13 the future survival of the species?

14 MR. KNEEDLER: Well, Section --
15 Section 7(a)(2) is talking about what the
16 action agency does to avoid --

17 JUSTICE GORSUCH: Right.

18 MR. KNEEDLER: -- to avoid critical
19 habitat. But --

20 JUSTICE GORSUCH: That's the operative
21 --

22 MR. KNEEDLER: -- but -- but --

23 JUSTICE GORSUCH: -- action part of
24 the statute.

25 MR. KNEEDLER: -- but -- but Congress

1 enacted it -- the concept of habitat has never
2 been a technical term or a technical feature in
3 the way that it's applied.

4 JUSTICE GORSUCH: I -- if you can just
5 answer my question --

6 MR. KNEEDLER: Yes.

7 JUSTICE GORSUCH: -- I'd be grateful.
8 Is there anything that prohibits the Secretary
9 --

10 MR. KNEEDLER: Maybe on an ad hoc
11 basis --

12 JUSTICE GORSUCH: Right.

13 MR. KNEEDLER: -- but not -- it's not
14 under the statute. And the question is what
15 are the responsibilities --

16 JUSTICE GORSUCH: My question is: Why
17 isn't it under the statute, given that language
18 that says specifically that the agency -- the
19 agency can take cognizance of the continued
20 existence of any endangered or threatened
21 species, quite apart from preserving its
22 threatened habitat?

23 It seems to me there are two duties
24 that the Secretary has there, and this would
25 fit neatly under at least one of them, if not

1 the second.

2 MR. KNEEDLER: But the -- the
3 Secretary could, but the -- but the designation
4 of critical habitat, as I said, it's mandatory
5 under the Act. It has -- it has important
6 functions, including identifying the area where
7 actions should be taken because of the
8 likelihood here that the frog will need that
9 space to -- to survive.

10 Again, I suppose the Secretary could
11 do something on an ad hoc basis, but that's not
12 the framework that the statute set up. It's
13 set up with rule-making, with public
14 transparency, to be based on science, with
15 public input, and identification of -- of
16 costs, and weighing of costs. This is an
17 elaborate process.

18 And the -- and what the Secretary
19 should do to protect the land and what other
20 agencies should do to protect the land --

21 JUSTICE GORSUCH: The agency --

22 MR. KNEEDLER: -- are part of that
23 process.

24 JUSTICE GORSUCH: The agency does lots
25 of things to protect species, endangered

1 species, beyond protecting their habitat,
2 doesn't it?

3 MR. KNEEDLER: Yes. If there's
4 federal land involved, other federal agencies
5 could do it, but the Secretary would have no
6 independent authority with respect to private
7 land, except the designation of critical
8 habitat.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Bishop, you have four minutes
12 remaining.

13 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP
14 ON BEHALF OF THE PETITIONER

15 MR. BISHOP: Justice Gorsuch, to your
16 point, 7(a)(1) imposes an obligation on all
17 other federal agencies which shall, in
18 consultation with the Secretary, utilize their
19 authorities in furtherance of the purposes of
20 this chapter.

21 Critical habitat is just one part.

22 JUSTICE SOTOMAYOR: But that's only if
23 it's designated critical habitat.

24 MR. BISHOP: No, no, no, that is a
25 general obligation. I can tell you that

1 whenever you go for a Clean Water Act permit,
2 you don't -- it doesn't have to be -- no
3 critical habitat need be involved. State
4 wildlife agencies and FWS immediately gets
5 involved and has to sign off on those.

6 Critical habitat does not have to be
7 involved. And there's a perfect example in
8 this case. If you read the final designation
9 here, the properties in Mississippi were
10 restored before there was any critical habitat
11 designation.

12 And CBD in its brief says that in
13 doing so, the frog survived in Mississippi
14 through "intense human effort and extensive
15 habitat restoration."

16 That was all done before the critical
17 habitat designation in this case. So the -- so
18 -- and -- and just to understand here, and to
19 respond to this changes in sync argument that
20 Mr. Kneedler made, there is nothing in sync
21 about creating a -- an open savanna on our
22 property.

23 This is an intensive 1500-acre tree
24 farm. The trees are planted 10 to 12 feet
25 apart. There is no groundcover because the

1 sunlight does not reach the forest floor, and
2 we don't want it to because that interferes
3 with tending to the trees. It interferes with
4 harvesting them.

5 This is not a property on which there
6 will be any groundcover to supply moisture or
7 food or cover for these frogs. We would have
8 to totally change the way that this land
9 operates in order to accommodate the frog.

10 And the idea that the frog scientists
11 here agree with the government is simply wrong.
12 And I would urge the Court to read Lannoo and
13 Pechmann and Blihovde, who say, for example,
14 Pechmann, one of the scientists, the upland is
15 currently in commercial pine plantations but --
16 but could be restored to suitable upland
17 habitat.

18 Blihovde says that aggressive and
19 proactive management of the uplands will be
20 critical to the survival of the frog, the most
21 important management tool being fire to prevent
22 this from being unsuitable habitat.

23 These scientists all have the same
24 point of view, that this land could be restored
25 through extensive effort to upland frog

1 habitat. Not one of them said that this is
2 currently habitat on what this frog -- on which
3 this frog can -- can't survive.

4 The immediacy here, Justice Kagan,
5 comes from the statutory language. It comes
6 from the word "habitat" in Section 4. It comes
7 from the limitation in 3(5)(C) that the maximum
8 extent of a critical habitat designation is
9 land that can be occupied. It comes from the
10 list in 3(3) where you would certainly have
11 anticipated that if Congress thought that land
12 had to be restored or totally remade in order
13 to be habitat for the frog, that it would have
14 said that rather than using the word
15 "maintenance."

16 Maintenance is a word that naturally
17 refers to maintaining what you already have
18 there and improving it, not to completely
19 changing it.

20 And, in addition -- in addition to the
21 powers that I already talked about of the
22 federal agencies having to protect these
23 creatures quite apart from critical habitat
24 designation, there are all sorts of powers
25 operated through the states and the purchase

1 power in Section 5 that allow protection.

2 This is not a choice between the frog
3 surviving and -- and not surviving if it
4 doesn't have this critical habitat. There are
5 plenty of ways for the government to ensure, as
6 it should, that the frog survives.

7 JUSTICE SOTOMAYOR: I'm sorry. I'm
8 sorry. I think I read that if these ponds are
9 not designated, that there are no other ponds
10 in the United States.

11 So, to the extent that these ponds are
12 not designated critical habitat, and don't
13 survive, this frog won't, if there's a drought
14 or other conditions in Mississippi.

15 MR. BISHOP: Well, first of all, there
16 are other ways to acquire these ponds. Not one
17 person has talked, from the government, or from
18 any of the nature conservancy or other groups
19 that buy easements on property have talked to
20 any of the owners here.

21 But the -- the second thing is that --

22 JUSTICE SOTOMAYOR: But they don't
23 have to.

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

25 JUSTICE SOTOMAYOR: If it's critical

1 --

2 MR. BISHOP: Well, they -- well --

3 JUSTICE SOTOMAYOR: -- they can
4 designate it and then a deliberate process goes
5 on where they talk to the owners, and you come
6 to an accommodation. That's what generally
7 happens.

8 MR. BISHOP: Could I answer that
9 question, Chief Justice?

10 CHIEF JUSTICE ROBERTS: Briefly.

11 MR. BISHOP: I mean, you know, the
12 government has made absolutely clear what it
13 thinks that means, right? It -- it -- it
14 admits that it's the most likely outcome here,
15 if we need to apply for permits, is that we get
16 to use 40 percent of the land for development
17 and we have to turn 60 percent of it over for
18 frog habitat.

19 We don't think that that is an
20 appropriate use of our land, given that this is
21 not habitat to begin with.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:08 a.m., the case
2 was submitted.)
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