



Property Rights Groups Eye ESA Fight In High Court

By Jesse Greenspan

Though they've been unsuccessful in the past, property rights advocates are expected to take advantage of a conservative U.S. Supreme Court, gearing up to once again challenge Congress' ability to protect endangered species found in only one state.

Their argument alleges that the U.S. Constitution's commerce clause does not give Congress the authority to protect rare animal and plant species that lack commercial value and don't cross state lines. Of the more than 1,300 species listed as threatened or endangered in the United States, roughly half fall into that category.

Over the past decade or so, federal circuit courts have rejected that commerce clause argument at least four times, and the Supreme Court has declined to take it up. But the high court has since moved to the right, and experts say the issue is ripe to come up again.

"One of these years it's going to get tied up in the right case, and it will be fascinating to see what the Roberts court does with it," said Russell Eggert, a partner with [Reed Smith LLP's](#) environmental practice group, referring to Chief Justice John G. Roberts.

"Everybody's now expecting to see some changes in the composition of the court, but the conservative bloc is relatively young and I think is going to be there for a while," Eggert added.

Julie Anna Potts, general counsel of the American Farm Bureau Federation, said she was very interested in the issue and that although she wasn't aware of any current cases out there, she would keep her eyes and ears open for "another good factual pattern."

Something to look for would be a case where property rights are being affected and where it would be hard to identify with the species in question, according to Potts.

A good example, she said, was a case previously litigated by the AFBF, along with certain states, that involved six species of endangered cave-dwelling insects that live in only two counties in Texas.

"The bugs were underground," she said. "It wasn't something that people were going to appreciate because they were cute and fuzzy or that were going to be hunted or anything."

In that case, GDF Realty Investments v. Norton, developers planned to build a [Wal-Mart](#) and other buildings in an area near Austin, Texas, but they were stymied by the presence of the endangered insects.

The developers lost their fight before both the district court and the U.S. Court of Appeals for the Fifth Circuit, but six of 15 appeals court judges did vote to rehear the case, falling just short of the required majority.

The Supreme Court then denied cert in June 2005, much as it did in earlier cases involving the Delhi Sands flower-loving fly, the arroyo southwestern toad and the red wolf.

"The Supreme Court has been repeatedly asked to review this issue and has always rejected it," said Glenn Sugameli, an attorney at environmental law firm Earthjustice who specializes in the commerce clause.

Sugameli said there were a number of good reasons why the Endangered Species Act should apply to all endangered species and not just those living in multiple states.

For one thing, a narrow reading of the commerce clause might prevent Congress from regulating numerous areas, including product safety and civil rights, as well as the environment, he said.

"The bottom line is that the Constitution's commerce clause is the basis for an enormous amount of what the government does," Sugameli said.

He also pointed out that people travel from out of state to view endangered species, that medicines can sometimes be obtained from endangered species and that endangered species protections can limit such interstate activities as road-building.

"Because biodiversity has a nationwide if not a global impact, all of the commerce clause law that I know of should allow the Supreme Court to uphold Congress' power to legislate in the area," said Fred M. Blum, a partner at Bassi Martini Edlin & Blum LLP.

"It would be a fairly far reaching decision for the court to do it, just because the science is too strong," he said.

Blum further said that although the Supreme Court usually won't take a case unless the circuits are split, the ESA's opponents would likely keep bringing up the issue.

Experts said however that the additions of Chief Justice Roberts and Justice Samuel Alito to the high court have improved the prospects for property rights advocates.

As a result, environmentalists should take those arguments seriously and not just shrug them off, according to Roger R. Martella, a partner in the environmental practice group at [Sidley Austin](#) LLP and former general counsel of the U.S. Environmental Protection Agency.

"It's hard to ignore that Justice Roberts dissented in an opinion that seemed to give some support to the argument, and then went on to become chief justice of the Supreme Court," Martella said in reference to the suit involving the arroyo southwestern toad.

In that case, litigated before the U.S. Court of Appeals for the District of Columbia Circuit, Chief Justice Roberts called the species "a hapless toad that, for reasons of its own, lives its entire life in California."

"That was a troubling opinion by him," Sugameli said. "He didn't actually say it was unconstitutional, but he said it raised a serious enough question that the entire court should review the issue."

Chief Justice Roberts acted "as if it's a vacation home and the toad could live somewhere else," Sugameli added.

Chief Justice Roberts and Justices Alito, Clarence Thomas and Antonin Scalia are all expected to be sympathetic to the property rights groups' argument, while Justice Anthony Kennedy is more of an unknown. The other four justices are likely to be opposed, experts said.

Even if endangered species found in only one state lose their federally listed status, most would still be protected by the states in which they reside. Nonetheless, all sides agree that the protections would be more limited.

"In many instances, I think there's a greater willingness to be pragmatic in state agencies than there is in federal ones, which is why people tend to try to get out of the federal regulatory loop if they possibly can," Eggert said.