



ENDANGERED SPECIES: Judge upholds FWS designation of private land as frog's critical habitat

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A federal judge recently upheld the Fish and Wildlife Service's decision to include private Louisiana lands in a frog's critical habitat, while also criticizing the designation as intrusive.

U.S. District Judge Martin Feldman issued a ruling Friday on a lawsuit over the critical habitat of the dusky gopher frog, an endangered species that numbers about 100 in the wild. In a 2012 rule, FWS designated 6,477 acres of land in Mississippi and Louisiana as critical habitat -- including almost 1,600 acres of private land in Louisiana where the frogs haven't been seen since the 1960s.

Landowners argued that their tree farm in St. Tammany Parish, La., is not suitable for the frog and accused FWS of forgoing adequate economic analysis and an environmental impact statement. But Feldman rejected those arguments, ruling that FWS followed the Endangered Species Act and other laws.

"The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property," Feldman wrote. "The troubling question is whether the law authorizes such action and whether

the government has acted within the law. Reluctantly, the Court answers yes to both questions."

Feldman also commented, in a footnote, on the "extraordinary scope of the ESA," suggesting that the questions outlined in the lawsuit are better suited for Congress. The judicial branch, he wrote, "is the wrong audience for addressing this matter of policy."

Indeed, Congress has long debated ESA's scope and its effect on private land, with Republicans holding numerous hearings on what they see as government overreach. Arkansas Sens. Mark Pryor (D) and John Boozman (R) also recently introduced a bill to reverse a 2013 rule that requires FWS to only consider how much critical habitat designations will cost federal agencies, not private landowners (Greenwire, Aug. 1).

In the case of the dusky gopher frog, FWS decided that 1,544 acres of private land was essential to the recovery of the species. Though the frog does not currently live on the land, the agency -- on the advice of peer reviewers -- found that it needed to add unoccupied territory to give the frog a chance of survival.

The Pacific Legal Foundation, which represents the landowners, wrote in its complaint that the private land "cannot be made suit-

able for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site" (Greenwire, Oct. 2, 2012).

But in his decision, Feldman noted that although ESA requires occupied territory to contain certain physical and biological features in order to be critical habitat, the same restrictions do not apply to "unoccupied territory."

"Wise or unwise, that is for Congress to decide," he wrote.

The Center for Biological Diversity, which was allowed to intervene in the lawsuit, called the ruling "good news" for a species on the "brink of extinction."

"The dusky gopher frog now regularly breeds in just one pond on Earth, so protection and restoration of the St. Tammany Parish lands are needed to prevent the frog's extinction," Collette Adkins Giese, a CBD attorney, said in a statement. "If the owners of the St. Tammany Parish lands were willing to work cooperatively with the Fish and Wildlife Service, they could take reasonable steps to help save the frog while still keeping their lands in business."

FWS listed the frog as endangered in 2001, in response to a CBD lawsuit. It similarly designated the frog's critical habitat in 2012 after CBD threatened to sue because the agency had not yet developed a required recovery plan.

The frogs spend most of their lives underground, often in the holes created by gopher turtles. They return to small ponds to breed, but today they only breed in one pond.