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Federal judge upholds St. Tammany Parish habitat designation for endangered frog

By Robert Rhoden,
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Two days after hearing oral arguments in the case, a federal judge has rejected claims that the U.S. Fish & Wildlife Service overstepped its authority by designating 1,544 acres of land in St. Tammany Parish as "critical habitat" for the endangered dusky gopher frog. Edward Poitevent II of New Orleans, whose family owns most of the property, said he was disappointed by Friday's (Aug. 22) ruling by U.S. District Judge Martin Feldman and would take the case to the 5th Circuit Court of Appeals.

Attorney Collette Adkins of the Center for Biological Diversity applauded the decision.

"The dusky gopher frog is on the brink of extinction and desperately needed today's good news," she said in a statement. "With maybe 100 of these frogs left in the



U.S. District Court House and Hale Boggs Federal Building in New Orleans (NOLA.com | The Times-Picayune archive)

world, they definitely need room to recover, including in Louisiana."

The court found that Fish & Wildlife properly considered the economic impacts of its action and rejected the landowners' argument that federal government regulation of the private lands was an unconstitutional abuse of power, she said.

The Poitevent family and Weyerhaeuser Co. filed a total of three lawsuits against

Fish & Wildlife after the agency in 2012 placed the critical habitat label on the forest land along Louisiana 36 west of Pearl River. Weyerhaeuser owns 140 acres of the land and has a timber lease on all 1,544 acres.

The plaintiffs argued that the government action amounts to a federal land grab that illegally takes the property out of commerce and could cost them tens of millions of dollars.

The landowners have said the property does not contain the temporary ponds, up-land habitat and connecting habitat required by the frog. Fish & Wildlife violated law on several points, the plaintiffs argued, maintaining it was the first time the agency had designated as critical habitat property that is potentially restorable as such.

But Department of Justice attorney Mary Hollingsworth, who could not be reached for comment Friday, said during oral arguments that the property is breeding habitat that could be used today if the frogs were present. She argued that Fish & Wildlife followed the law in its actions, including considering the economic impacts on the property owners.

Judge Feldman agreed.

In his 49-page ruling, he said, "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. 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."

Regarding the landowners' claims that the property cannot be essential for the conservation of the frog because no frogs live there, Feldman said they ignored the "clear mandate" of the Endangered Species Act, which tasks Fish & Wildlife with designating unoccupied areas as critical habitat.

Feldman rejected plaintiffs' claims that Fish & Wildlife failed to properly consider economic impacts of the critical habitat designation. He said the agency considered several potential impacts.

"The court finds that FWS fulfilled its statutory obligation," the judge ruled. "The outcome seems harsh, but it is not unlawful under the present administrative process and this court's confined standard of review."

Feldman also dismissed the argument that the federal government should have required an environmental impact statement prior to designating the land. The Center for Biological Diversity, which is dedicated to conserving amphibians and reptiles, and the Gulf Restoration Network were allowed to intervene in the case.

Plaintiff attorney M. Reed Hopper of the Pacific Legal Foundation said Friday that Fish & Wildlife has become a "defacto zoning board dictating local land and water use across the nation." He described as "irrational" the agency's determination that the benefit to the species outweighs the potential \$34 million negative impact the agency concedes the landowners could suffer due to restrictions on their land.

In addition to the land in St. Tammany, Fish & Wildlife put the critical habitat label on about 5,000 acres of public and private property in Mississippi as well. The frog species, placed on the endangered species list in 2001, has only about 100 adults still living in the wild in Harrison County, Miss., north of Gulfport.

The frog once lived throughout the area between the Mississippi River in Louisiana and the Mobile River in Alabama.