

Courthouse News Service

Help for Dusky Gopher Frog in Louisiana Upheld



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NEW ORLEANS (CN) — Despite protests from Louisiana landowners, the Fifth Circuit upheld protections for a rare species of frog by 2-1 vote, though a strongly worded dissent accuses the majority of rewriting the Endangered Species Act.

Writing for the majority, Judge Stephen Higginson upheld a ruling that the U.S. Fish and Wildlife Service properly applied the law when it declared 1,544 acres of Louisiana timberland critical habitat for the dusky gopher frog.

Only about 100 adult dusky gopher frogs were known to exist in the wild when the 2012

rule established habitat protections, including a total of 6,477 acres in Mississippi and Louisiana.

The frog is found only in Mississippi, but the Louisiana land contains historic breeding sites and habitat-friendly ponds.

In the June 30 ruling, Higginson found that Fish and Wildlife reasonably concluded that the Louisiana land is essential for the frog's recovery.

He rejected the landowners' argument that federal regulation of private land amounts to an abuse of power.

"In sum, the landowners have not established that the Service interpreted the ESA unreasonably," Higginson wrote.

But Judge Priscilla Owen wrote in dissent that the Endangered Species Act "does not permit such an expansive interpretation and consequent overreach by the government."

"If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as 'critical habitat' because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species," Owen wrote in a 27-page dissent to the majority's 41-page ruling.

"The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there," Owen wrote.

More than 98 percent of the endangered frog's natural habitat has been destroyed, according to the Center for Biological Diversity, an intervenor appellee. It says that fire suppression, drought, urban expansion, and the decline of gopher tortoises have made the frog so rare that it lives in only a few small Mississippi ponds.

"This important ruling is good news for these endangered frogs that desperately need room to recover," said Center for Biological Diversity Collette Adkins.

According to the Nature Conservancy, the dusky gopher frog is a stubby little fellow with ridges on its back and prominent warts that secrete a bitter white substance as a defense mechanism, and it has a loud, guttural call that sounds like snoring.

Judge Owen was appointed to the Fifth Circuit in 2005 by President George W. Bush, after spending 10 years on the Texas Supreme Court.

Higginson was appointed to the Fifth Circuit in 2011 by President Barack Obama, after spending 22 years as a criminal prosecutor in federal courts, and as chief of appeals in the Eastern District of Louisiana since 1995.

Judge Thomas Morrow Reavley, 95, who agreed with Higginson, is a senior judge for the Fifth Circuit. He was appointed to the Fifth Circuit in 1979 by President Jimmy Carter and retired from full-time service in 1990. He was a justice on the Texas Supreme Court from 1968 to 1977.