

Appeals court upholds critical habitat for endangered frog

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The 2-1 decision Thursday upheld a district court ruling that the U.S. Fish and Wildlife Service was within the law in declaring 1,544 acres in Louisiana as critical habitat for dusky gopher frogs, a species currently found only in Mississippi.

The ruling is "good news for these endangered frogs that desperately need room to recover," said Collette Adkins, senior attorney for the Center for Biological Diversity, which joined the defense against the landowner's lawsuit. An estimated 135 of the amphibians live in the wild and about 550 in zoos, according to the most recent recovery plan for the frogs.



File-This Sept. 27, 2011, file photo shows a gopher frog at the Audubon Zoo in New Orleans. A federal appeals court has rejected a Louisiana landowner's attempt to keep the federal government from listing some of his timberland as critical habitat for an endangered frog currently found only in Mississippi. The 2-1 decision upheld a district court ruling that the U.S. Fish and Wildlife Service was within the law in declaring 1,544 acres in Louisiana as essential for the frogs' future. The opinion says that doesn't require private landowners to do anything to protect the species. It also says the agency acted within two laws and the Constitution. Gerald Herbert, File AP Photo

The Pacific Legal Foundation, which represents landowner Markle Interests LLC, will either ask the full 5th U.S. Circuit Court of Appeals to rehear the case or appeal to the U.S. Supreme Court, attorney Damien Schiff said in a phone interview Thursday. The agency's action is "a particularly outrageous example of Endangered Species Act abuse," he wrote in a blog post.

The majority opinion by Judge Stephen Higginson said the agency acted within the Endangered Species Act, the National Environmental Protection Act and the Constitution.

“The court of appeals rejected every single argument that the private landowners made. It really showed that the Endangered Species Act is a powerful statute,” Adkins said in a phone interview.

The majority ruling could let the agency designate virtually any place in the country as critical habitat if the habitat could be changed to make it friendly to an endangered species, Judge Priscilla Owen wrote in a strongly worded dissent.

The 3½-inch-long frogs once lived in Louisiana, Mississippi and Alabama, but now live only in a few parts of Mississippi where there are temporary ponds that dry up in the summer, leaving them free of fish that might eat the frogs’ eggs. Adults come out of underground burrows in the winter and spring to lay and fertilize eggs in those ponds.

They need to be able to move into their former range to have a chance at survival, Adkins said.

The Fish and Wildlife service also designated nearly 5,000 acres in Mississippi as critical habitat, but the only challenge came from Markle and two companies that own smaller bits of the Louisiana land.

The landowners have said they will not replace the commercially popular loblolly pine trees with the slow-growing longleaf pine stands needed by the frogs, and land where the amphibians haven’t lived for decades and which is not currently suitable for them cannot be considered essential to their well-being.

Designating land as critical habitat doesn’t give the government any power to make the landowners do anything to protect the frog, Higginson noted at the start of the opinion joined by Judge Thomas Reavley.