



Fifth Circuit Upholds USFWS Designation of "Uninhabitable" Critical Habitat for Endangered Dusky Gopher Frog

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In a 2-1 decision, the United States Court of Appeals for the Fifth Circuit rejected challenges to the final rule designating critical habitat for the dusky gopher frog under the Endangered Species Act (ESA) and National Environmental Policy Act. *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Service*, No. 14-31008 (5th Cir. June 30, 2016). The decision is remarkable because it upholds the determination by the U.S. Fish and Wildlife Service (FWS) to designate areas as critical habitat that are not currently habitable by the frog and have not been shown likely to be habitable in the foreseeable future. Slip Op. at 20–24. While one might presume that Congress intended the term critical habitat to encompass only a subset of the habitat of a species—that is, those portions of a species' habitat that are critical to its conservation—the panel majority held that critical habitat can include areas that do not currently constitute habitat and may never be habitable.

To designate unoccupied areas, the ESA requires FWS to determine that such areas are essential for the conservation of the species. According to the majority, this language illustrates that Congress contemplated that critical habitat can include areas occupied by the species at the time of listing, as well as areas unoccupied by the species at the time of listing. The panel majority applied *Chevron* deference to FWS' interpretation of essential, which was considered in light of the ESA's broad definition of conservation to encompass the use of all methods necessary to recover a species.

The dusky gopher frog spends most of its life underground in open-canopy pine forest habitat, migrating to isolated, ephemeral ponds to breed. The final rule designating critical habitat for the species includes 4,933 acres in four counties in Mississippi and 1,544 acres in one parish in Louisiana. Slip Op. at 4. The designated area on private property in Louisiana (critical habitat Unit 1) has not been occupied by the species for decades, but is located in the species' historic range and includes ephemeral ponds, though it currently

lacks the upland habitat required by the frog. *Id.* at 4, 23. Plaintiff landowners challenged only the designation of Unit 1 as critical habitat, and the Fifth Circuit held that the landowners did not show that FWS employed an unreasonable interpretation of the ESA in finding Unit 1 essential for the conservation of the frog without first establishing that Unit 1 currently supports, or in the foreseeable future will support, the conservation of the frog. *Id.* at 24. Further, the majority rejected plaintiffs' claims that the broad interpretation of essential is unreasonable because it would place no meaningful limits on the FWS' power to designate critical habitat.

Designation of critical habitat for the dusky gopher frog was finalized under regulations for making such critical habitat determinations that have since been revised through a 2016 rulemaking. See 81 Fed. Reg. 7414 (Feb. 11, 2016) (codified at 50 C.F.R. part 424). The 2016 regulations may have altered the panel's analysis in certain respects, but likely would not have affected its decision to uphold the designation of areas as critical habitat that are not presently habitat for the species.

In a strongly-worded dissent accusing the majority of reject[ing] the logical limits of the word 'essential,' Judge Owen concluded that FWS' broad interpretation of essential for the conservation of the species unreasonably allowed FWS to impose restrictions on private land use even though: (1) the land has long been unoccupied by the species; (2) the land cannot sustain the species without substantial restoration and ongoing maintenance that FWS has no authority to effectuate on private lands; and (3) the land does not play any supporting role in sustaining current habitat of the species. Slip Op. at 42, 53, 55 (Owen, J. dissenting). Based upon a record indicating that there is no reasonable probability that Unit 1 will be altered in a way that will make it habitable—which would require removal of commercial timber operations, replanting with suitable trees, other modifications, and landowners' cooperation in reintroduction of the species—Judge Owen reasoned that whether there is a probability that the land will be so modified must be part of the equation of whether the area is 'essential.' *Id.* at 43, 52, 54. The dissent further cautioned that the ESA does not permit the Government to designate an area as 'critical habitat,' and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required. *Id.*

While the dissent sought to retain greater meaning in the word essential—which serves as the primary statutory limit on the FWS' discretion to designate unoccupied habitat—the Fifth Circuit upheld FWS' exercise of authority to designate as critical habitat unoccupied areas on private lands that may never contain the physical or biological features required by the species.