

# THE NEW ORLEANS ADVOCATE

## Frog habitat case pending at U.S. Supreme Court draws interest from St. Tammany to Utah

Faimon Roberts III and Sara Pagonas

September 10, 2017

San Juan County consists of five million acres of high desert in southeastern Utah, an arid, mountainous environment where the key crops are alfalfa, pinto beans and hard winter wheat.

The county is sparsely populated: just 15,000 residents, many of them Navajos, and not a single dusky gopher frog, a tiny, warty amphibian native to ephemeral ponds of southern Mississippi.

The absence of dusky gopher frogs is one of the few things that San Juan County has in common with Louisiana's St. Tammany Parish, where the U.S. Fish and Wildlife Service has designated 1,500 acres of privately owned land as critical habitat for the endangered species.

Officials in both places have a vested interest in the frog, which is at the heart of a pitched legal battle between landowners and the federal government.

That battle is now before the U.S. Supreme Court, and it has drawn a host of "amicus curiae," or "friend of the court," briefs from outside parties, including St. Tammany Parish, 18 states, private property rights groups and San Juan County.

The dusky gopher frog is an unimpressive-looking little creature: small, shy, covered with w...

The nation's top court hasn't agreed to hear the case, but many of those intervenors hope the broad interest from outside groups will spur the nine justices to accept the case and then sharply curtail the federal government's ability to designate private land as critical habitat.

The case was first filed in 2013 by the St. Tammany landowner, Edward Poitevent, who had been informed that the government had designated his land as critical habitat for the frog. "I thought surely there must be a mistake," Poitevent said earlier this year.

Poitevent, an attorney, was aided in his suit by the Pacific Legal Foundation, and a separate case was filed by Weyerhaeuser, a timber company that has a lease on the land until 2043. Both parties argued that the designation was an infringement of their property rights and was costing them millions of dollars in profit that they could earn from the land.

The dusky gopher frog is headed to the Supreme Court.

Both a U.S. District Court judge in New Orleans and the 5th Circuit Court of Appeals ruled against the landowners, agreeing with the government that the U.S. Fish and Wildlife Service was within its rights to issue the designation. That spurred the appeal to the Supreme Court, which was filed in July.

It's been roller-coaster week for Edward Poitevent, a local landowner and developer.

St. Tammany Parish officials jumped into the case years ago, adopting a resolution in 2011 that opposed the federal agency's designation of the land as critical habitat.

Now, the parish government is one of many that have filed briefs in support of a petition asking the Supreme Court to determine if the federal government has overstepped its bounds. Others include groups like the Cato Institute, the California Cattlemen's Association and the Chamber of Commerce of the United States, not to mention San Juan County.

St. Tammany's brief focuses on what the designation will do to the parish, arguing that it removes land from commerce that is needed for its tax base and for growth in an area that has seen a surge in population following Hurricane Katrina.

But the parish also claims that the federal government is usurping local officials' authority to make land-use decisions.

We might as well call the dusky gopher frog the dusky goner frog. It continues to spawn liti...

While the land is under a long-term timber lease with Weyerhaeuser, it is zoned for traditional neighborhood development.

The endangered frog species needs a longleaf pine forest, St. Tammany's brief points out, and that kind of forest requires periodic burning that would create traffic and health hazards for residents. What's more, the parish argues, no environmental impact statement was done as part of the Fish and Wildlife Service's decision-making process.

San Juan County's interest in the case derives from its experience with another threatened species, the Gunnison sage grouse. The grouse was designated as threatened in 2014, and more than 100,000 acres of San Juan County were designated as critical habitat, even though the bird doesn't now live on any of those acres.

That hit some landowners pretty hard, said Bruce Adams, a San Juan County commissioner.

"Only 8 percent of our county is private property," Adams said. Landowners are already resentful of the federal government's control of oil and gas leasing on federal lands, he said, and by designating the area as critical habitat, the government essentially took control over private property.

"They've designated a huge amount of critical habitat on federal and private land," Adams said.

The landowners, who own the mineral rights on their property, want the right to lease their land out, he said, and that led the county to get involved in the dusky gopher frog suit in far-off Louisiana.

The case has also drawn interest from the attorneys general of 18 states, led by Steve Marshall of Alabama and including Louisiana's Jeff Landry, who attacked the designation as federal overreach from the Obama administration.

"From our perspective, it's not about the dusky gopher frog. It's about this method of designating critical habitat," said Andrew Brasher, the Alabama solicitor general who wrote the amicus brief on behalf of the 18 states.

Allowing the federal government to designate property on which the frog doesn't even live as critical to its survival is "incredibly restrictive to private property," Brasher added.

The Advocate had a fascinating article on July 16 concerning a lawsuit that may end up in th...

That same coalition also filed a suit in federal court in Alabama, though that suit is on hold while the rules are reviewed by the Trump administration.

There's disagreement on whether the piling up of amicus briefs will have any effect on the Supreme Court.

What is Biometric Boarding? Find out in Delta's episode of The Flightdeck.

**BY DELTA** - Keep Climbing With Delta.

Collette Adkins, an attorney for the Center for Biological Diversity, said she expects the Supreme Court to refuse to hear the case. "If they grant the petitions, then I would be nervous," she said.

The case, she said, is not one that has drawn different conclusions from different appeals courts, a situation that often prompts the Supreme Court to get involved. In fact, in similar cases, other appeals courts have ruled similarly to the 5th Circuit's decision.

"This rule that the Fish and Wildlife Service did is one that has so much broad support from the scientific community," Adkins said. "Every expert on the frog said that the designation of the habitat only in Mississippi wouldn't be enough to save the frog."

But Paul Baier, the Judge Henry A. Politz professor of law at LSU, said the number of filings shows a national interest in the case. "It shows great interest, and it's a plus in whether (review) will be granted (by the high court). Justices take note if they pile up," he said.

He's not surprised to see so many states weighing in. "States don't care for federal muscle, and they have an interest in protecting their lands," he said, adding that he thinks the Supreme Court should hear the matter.

Tulane law professor Oliver Houck said there's no reason for the high court to take the case on its merits. But in the last 10 years, he said, it's become a standard strategy among conservative groups to use an onslaught of amicus briefs to get the Supreme Court to hear cases. He pointed to the Chamber of Commerce as the initiator of the strategy.

Industry and business groups are often joined by Republican governors and state attorneys general.

The strategy has seen some success, Houck admitted. "Every case (that) has been accepted, it has been to overrule an environmentally favorable decision," he said.

Cynthia Sarthou, of the Gulf Restoration Network, which intervened on behalf of the government, said the designation of the land as critical habitat doesn't preclude its development. "The designation doesn't do that much to him," she said of Poitevent. Even if he needs a wetlands permit from the U.S. Army Corps of Engineers, she said, the most that would be required is a conservation plan for the frog.

In most cases, Houck said, landowners work out a deal for habitat preservation and even end up feeling that they are guardians of the endangered species.

With only about 100 left in the wild, the gopher frog clearly needs a guardian. Sarthou described the tiny frog as a “grumpy” creature that won’t reproduce unless it’s in a perfect environment.

“There’s only one original pond that they really love, and it’s now protected,” she said of the frogs’ current Mississippi habitat.

Poitevent, the landowner, said he is “75-25” optimistic the case will be heard by the full court.

Experienced court watchers have told him that the case is “really interesting and really important and has a good chance,” he said. But he conceded there are no guarantees.

If the court refuses to hear it, “it will be a great and tremendous disappointment,” Poitevent said. “We’ll be stuck with designating 1,500 acres as critical habitat where there are no frogs and won’t be any frogs.”