

Endangered Species Act: The Frog That Jumped The Shark



By Hank Campbell — November 17, 2017



Mississippi gopher frog. Credit: Wikipedia

The definition of "endangered" is vague but in no dictionary does it mean an animal that does not even live in a state must be placed there, with private landowners footing the bill for \$20 million, in order to keep a creature from declining in population.

Yet that is exactly the bizarre case that [the Supreme Court will decide whether or not to hear in January](#) ^[1]. *Weyerhaeuser Company v. United States Fish and Wildlife Service, et. al.* (827 F.3d 452; 848 F.3d 635) is, on the surface, about the 2001 designation (66 Fed. Reg. 62993, Dec. 4, 2001) of the "Dusky Gopher Frog" as an endangered species in Louisiana. It's a little bizarre because the Dusky Gopher Frog is really just the rebranded Mississippi Gopher Frog, Fish and Wildlife Service changed the name of it in 2012, and it does not exist in Louisiana. It's slightly more bizarre that the U.S. Fish and Wildlife Service designated a tract of land in another state from where it now lives, outside New Orleans, as critical habitat for the frog. What is absolutely bizarre is that the land they said must now be used has never had the frog living there, and it never could.

That simply sounds ridiculous, like yet another "[Golden Fleece](#)" ^[2] government boondoggle, and if that were the extent of it, I would just write a short article about government waste when it comes to pretending to care about environmental issues, like I have in similar cases. **(1)** Yet this is not a joke. Below the surface is a more important issue, one similar to what courts recently decided by blocking President Obama's expanded definition of "Waters of the United States (40 CFR 230.3(s)) to gain control over almost any body of private water in America. If this case stands as the U.S. Court of Appeals for the Fifth Circuit ruled, the Fish and Wildlife Service will have demonstrated an ability to hijack any swath of public or private land in the country, exactly what

the 6th U.S. Circuit Court of Appeals denied the government over water. If it fails, the federal government will once again be guilty of incredible overreach, this time under the guise of pretending to save animals, and their longstanding policy of collaborating with environmental groups on prearranged settlements may be over.

Now, no one is against the Endangered Species Act when they hear its vaguely-positive name. It has been with us since 1966 and there is no Big Extinction movement so siding with endangered species is as much of a no-brainer as being for clean water. There are almost 1,400 species on the list. **(2)** Other than [when squirrels cause science to stop](#) [3], endangered species rulings don't get much attention so it has gotten a free pass from the public. Less well known is how easily it has been exploited by environmentalists. This frog designation smacks very much of environmental intervention rather than anything that will help our ecology.

There were only 100 of these Mississippi Gopher Frogs known by the time it became endangered, they existed solely in Harrison County, Mississippi. [There hadn't even been a known sighting in the entire state of Louisiana since 1965](#) [4]. So this was not government biologists pushing an alarm button in Louisiana because an animal was dying out in its native habitat, the government initially had no interest in Louisiana at all. If we're being ecologically honest, 100 frogs were not making any kind of difference by 2001, it was instead an 'all frog lives matter' publicity stunt that succeeded as part of a "sue and settle" agreement with the activist group Center for Biological Diversity. "Sue and settle" is just what it sounds like, a prearranged lawsuit with a predetermined settlement that can bypass Congress. Because there really aren't many truly endangered critical species now, these designations are obscure and more political than scientific, it takes about 11 years to get listed. The way to circumvent that delay is to get an environmental group to sue. Then lawyers inside government settle the lawsuit under the previously negotiated terms, government or whomever government is sticking with the bill pays the lawyers of the environmental team and they all go out to dinner.

The original settlement, the endangered species listing, was negotiated during the Clinton administration and other than signing off on it not much happened during the Bush years. Suddenly, a few short weeks after President Obama was elected, Center for Biological Diversity and Friends of Mississippi Public Land sued again, saying the Department of the Interior had failed to determine a "critical habitat" for this Mississippi frog. Under the new administration, Fish and Wildlife Service quickly complied, saying they would generate what a critical habitat should be. By 2010 they did, saying this frog needs:

- "Ephemeral ponds" embedded in an open canopy forest for breeding
- Open canopy forest upland from the ponds as non-breeding habitat
- "Abundant native herbaceous species" ground cover

And they had ideal land - where the frog actually lives. Plenty of land. They decreed 1,957 acres in Mississippi as "critical habitat" for the Mississippi Gopher Frog. That's 20 acres per frog, equivalent to giving a human 340 acres to raise a family.

Yet somehow by 2011 that was not enough. That is how we learn about the mysterious activists who are hired as "consultants" and secretly shape environmental law without any public oversight

or accountability. In this case the hand-picked team to justify the conclusion was the well-connected, 100-person strong group named Industrial Economics, Inc. of Massachusetts. Fish and Wildlife Service sent them a document that was obviously pre-written to honor a prearranged settlement and Industrial Economics, Inc. dutifully wrote up the kind of thing they are paid to write. You may have seen the famed exhibition basketball team the Harlem Globetrotters, they do tricks and stunts with basketballs that are a delight. Obviously since it is a basketball show they need a team to oppose, and since the 1950s that team has been the Washington Generals, now known as the World All-Stars. The Generals are there to lose and to make the Globetrotters look good doing so. In the 2012 document, the Washington Generals are five tracts of land in the actual state where the frog exists, Mississippi. Listed first, however, is D-1, and that tract of land is the Globetrotters in our example, even though it's in Louisiana. It was guaranteed to win, but why? Who bought a ticket to see that show?

Unless a Freedom of Information Act request is honored we may never know. Fish and Wildlife Service suddenly said that there needed to be 7,015 acres, *60 acres per frog*, in order for this creature not to die. And they needed land in Louisiana, the suburbs of New Orleans, even though the critical habitat guidelines that Fish and Wildlife Service just created a year prior was not possible there.(3)

I will recap. Fish and Wildlife Service had sent a document to their hand-picked consultant who created the ecological equivalent of a sole-source contract - where Louisiana would win even though the state had not even submitted a bid. And then Fish and Wildlife Service pretended their hands were tied by the science finding, even though the land they chose "is not occupied by the species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance."

"Substantial alterations" is where the \$20 million that the government refuses to pay comes in, and it could be as high as \$34 million.

You read that right. The only way any of this makes sense is if it is part of a prearranged settlement with environmental groups representing a Mississippi frog. Otherwise, landowners in Louisiana would not be told they must pay to tear down their forest and put up another one, suitable for endangered frogs who have never lived there. The Department of the Interior is supposed to exclude creating habitats that are economically punitive but did not do so.

Naturally, a lawsuit was filed opposing it. These may be cozy arrangements between environmental lawyers and Fish and Wildlife Service but they still carry the full-force of the federal government if the owners of the land didn't comply. And the government carries M4 assault rifles. The government wasted no time in letting the landowners know what was going to happen if they didn't do as demanded. Despite conceding they can't "compel" them they asserted that if the owners in Louisiana didn't agree to spend at least \$20 million to tear down one forest and put in another for this Mississippi frog, the government would make sure they could never develop any of the land. The broader impact is that all those people who want to move out of New Orleans before the next Katrina would be forced to pay higher costs because there won't be enough housing in the higher-elevation suburbs.

I don't need 340 acres to live much less 1020 and yet a frog can go from needing 20 to needing 60, in another state, with the touch of a consultant's keyboard. No science study, no validation, just a ruling no one understands, including the people who will be out \$20 million.

This isn't a one-off. Though it started with the best of intentions, the Endangered Species Act has been consistently manipulated and abused by lawyers for activist groups. If the Supreme Court hears the case, it could put an end to a lot of the abuse of this law. The Court might set limits on just how much bullying the federal government can do using current broad interpretation of endangered species designation criteria that have no scientific validity.

NOTES:

(1) I have written plenty about other "sue and settle" craziness, such as when the EPA declared water a pollutant as part of a settlement with a canoeing trade group that wanted nature to be nicer to its members on a river. And when that does not work, activist groups pit federal laws against each other so they can sue-and-settle over non-enforcement, such as [when the Paiute cutthroat trout had to be restored "to its historical range" by the Endangered Species Act but could not be, because there are no power lines there and they needed an auger to geo-engineer the land](#) [5]. Except the Wilderness Act prevented a gas generator from being used in a designated wilderness. Wilderness Watch and two other activist groups sued to block the trout's restoration, claiming the use of the auger should not be exempted from the Wilderness Act. They eventually settled.

(2) The figure our government lists. Analyses have shown it has not helped species much. Despite generous funding (over \$1.5 billion [in the last reported year](#) [6], 2015, and that's without land acquisition costs), numerous blockages of human development and awareness campaigns, [almost all species listed are either static or still in decline](#) [7]. On the few occasions rebounds have happened, media is sure to gush about it as a win for environmental fiat. Today, few things proposed as endangered actually are endangered. People are rushing to declare a new species of orangutan endangered [even though it has just been discovered](#) [8] and has obviously lived for 200 million years without any government recognition at all. Most of the species that have gone extinct - 99.9999 percent - we have never identified.

(3) I wrote Michael Donlan, the President of Industrial Economics, Inc., to ask in the interest of public transparency if they would share how their analysis was done and let me speak with the consultant who created the numerical model which determined the Louisiana land was not only essential, but passed government requires stipulating it be achievable without undo hardship, but no one from the company responded. Fish and Wildlife Service has not ruled on my Freedom of Information Act request.

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Links

[1] https://www.eenews.net/assets/2017/07/12/document_pm_01.pdf

[2] <http://www.the-scientist.com/?articles.view/articleNo/10030/title/What-Proxmire-s-Golden-fleece-Did-For-->

And-To--Science/

[3] http://www.science20.com/science_20/why_protest_clean_multicultural_whitecollar_astronomy_jobs-154738

[4] <https://www.acsh.org/news/2017/10/19/if-endangered-species-act-doesnt-adapt-it-will-go-extinct-11985>

[5]

http://www.science20.com/science_20/federal_wilderness_act_and_environmentalists_prevent_endangered_trout_rec-82548

[6] https://www.fws.gov/endangered/esa-library/pdf/2015_Expenditures_Report.pdf

[7] http://www.science20.com/anthrophysis/how_effective_endangered_species_act-90144

[8] http://www.science20.com/news_staff/tapanuli_a_third_orangutan_species_exists-227983