

February 16, 2000

COURT FINDS SCHOOL CONSTRUCTION POSES NO THREAT TO ENDANGERED SPECIES

(*Defenders of Wildlife v. Bernal*)

The United States Court of Appeals for the Ninth Circuit recently upheld a lower court ruling that dismissed a lawsuit that sought to stop the building of a new high school because it would disturb the habitat of the Arizona pygmy owl. In *Defenders of Wildlife v. Bernal*, the Washington Legal Foundation (WLF) had filed a brief with the court of appeals successfully urging it to uphold a district court ruling that found that there would be no unlawful disturbance of the owl or its habitat under the Endangered Species Act (ESA).

The Defenders of Wildlife and the Southwest Center for Biological Diversity had filed a suit against the Amphitheater School District in Tucson, Arizona, alleging that the school district's plan to build and operate a much needed high school would constitute an unlawful "take" under the ESA of the Arizona pygmy owl. The Arizona owl which is listed as an endangered subspecies is similar to the Texas pygmy owl which is not listed as endangered. The major difference between the two is geographical; there are relatively few Arizona pygmy owls, but many are found in Texas. Nevertheless, because of this listing of the Arizona owl, property owners are prohibited by federal law from developing their property if it would "take," that is, kill, harm, or harass the species. The school district had purchased the property in 1994 before the pygmy owl was even listed as endangered.

In 1995, the United States Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* upheld the Fish and Wildlife Service's broad definition of "harm" under the ESA to mean activity that "actually kills or injures wildlife," including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." In its appellate brief, WLF pointed out even under this broad definition, the so-called expert witnesses for the environmental groups were unable to prove that the school construction would actually harm the pygmy owl. Rather, the plaintiffs argued that, at best, the school construction "may" harm the owl's habitat, which is "likely" to impair the owl's behavior patterns. Under this speculative standard, any conduct that is "likely"

to disrupt the behavior pattern of the owl, however slight, would be a violation of the ESA. For example, trying to take a picture of the bird while it is eating could be violation of the ESA if the bird "may" become distracted and fly away, even if it does not actually do so.

The district court found that the plaintiffs lacked sound scientific evidence to support their contention that the school construction would in fact harm the pygmy owl, and thus, they failed to meet their burden of proof. Indeed, there was little proof showing that the pygmy owl actually lived on the property that was to be developed. On appeal, the court of appeals agreed, concluding that the district court's factual findings were not clearly erroneous.

The court of appeals noted that there had not been any actual sightings of the owl in the area under consideration for construction, although the plaintiffs claimed that several residents heard the owl in the area. A search of the 361 cavities of the saguaro cacti on the site where the owls prefer to nest produced no pygmy owls. Furthermore, the defendant's experts testified that pygmy owls can tolerate "and even benefit from human activity." A defense expert discovered one owl on the site, but it was the elf owl that is very similar to the pygmy owl; the elf owl is not on the endangered species list.

While the appeal was pending, the plaintiffs unsuccessfully tried to reopen the discovery process, and tried to preclude the court of appeals from ruling on the matter because the school board was considering a different site for the school that did not involve the presence of endangered species. These attempts failed, and the school district has resumed its construction of the school. WLF's brief was filed with the *pro bono* assistance of David T. Hardy, Esq. of Tucson, Arizona.

* * *

For further information, contact Paul D. Kamenar, WLF Senior Executive Counsel, at 202-588-0302.