

March 5, 2004

COURT DECLINES TO REVIEW MAJOR COMMERCE CLAUSE CASE (*Rancho Viejo, LLC v. Norton*)

The United States Supreme Court declined to review and reverse a court of appeals decision that would effectively remove any limits on Congress to regulate development under the Commerce Clause of the Constitution. In *Rancho Viejo, LLC v. Norton*, the U.S. Court of Appeals for the District of Columbia Circuit upheld the application of the Endangered Species Act to a small residential developer which had erected a fence on its property. The Department of Interior claimed that the fence would interfere with the southwestern arroyo toad, a federally listed endangered species which is located only in California and only ranges about one mile from the streams in which it breeds.

In its brief, filed on behalf of itself and the Allied Educational Foundation, the Washington Legal Foundation (WLF) had argued that the court of appeals decision would effectively undermine the Supreme Court's jurisprudence on the Commerce Clause. In recent landmark rulings, including *United States v. Lopez*, the Supreme Court has ruled that the power to regulate interstate commerce does not include the power to regulate local activity that does not substantially affect interstate commerce. Here, the arroyo toad is found only locally and has no commercial value. Consequently, WLF argued that there is no interstate commerce involved in this case, and hence, the federal government cannot regulate the activity, just because the owner of the fence happens to be a developer as opposed to a homeowner.

WLF argued that regulating local wildlife is a matter for state regulation, not federal regulation. California, which has an expansive endangered species law, did not find it necessary to list the arroyo toad as an endangered species. Circuit Judges David Sentelle and John Roberts dissented from the denial of rehearing the case *en banc*.

WLF's brief was filed with the *pro bono* assistance of Mark A. Perry and Amir Cameron Tayrani of the Washington, D.C. office of Gibson, Dunn & Crutcher LLP.

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