



**June 14, 2005**

## **SUPREME COURT DECLINES TO REVIEW IMPORTANT ENDANGERED SPECIES CASE** *(GDF Realty Investments v. Norton)*

The Supreme Court decided this week not to review an important court of appeals decision that gave the Department of Interior's Fish & Wildlife Service essentially unlimited authority to regulate local land development across the country in the name of protecting allegedly endangered species, including plants and bugs, that are local in nature and do not affect interstate commerce.

In *GDF Realty Investments v. Norton*, the Fish & Wildlife Service denied a permit to GDF Realty to develop a 200-acre piece of property in Travis County, Texas, and threatened criminal prosecution as well because any development might disturb certain beetles that live in nearby caves. The bugs spend their entire lives underground in that county and have absolutely no commercial value. In short, no interstate commerce was involved. The developer even offered to donate portions of the land where the cave bugs were located to a nonprofit conservation group, but was rebuffed by government bureaucrats, claiming development of other portions of the property might adversely affect the bugs' habitat. The denial of review was a disappointment to the Washington Legal Foundation (WLF) which had filed a brief in the case on behalf of itself and the Allied Educational Foundation urging the High Court to review and reverse the lower court decision.

The U.S. Court of Appeals for the Fifth Circuit rejected arguments that the Commerce Clause does not give the federal agency the authority to regulate local activities that do not affect interstate commerce. This ruling seemed contrary to a pair of landmark Supreme Court decisions in *United States v. Lopez* and *United States v. Morrison*, that the Commerce Clause does not give the federal government the authority to regulate activity that is not economic in nature and does not substantially affect interstate commerce. Accordingly, this principle should apply to local land use that may affect species found only in a single county or small area within a state. The states are free to regulate local land development that may impact local plant and animal species.

Despite the conflict between the Fifth Circuit's ruling and other circuit rulings and prior Supreme Court decisions, the Court denied review. Legal observers believe that this may have been due in part to the recent decision in *Ashcroft v. Raich*, where the Supreme Court ruled that the federal government can regulate the possession of marijuana, even though certain states permit possession for medical purposes, and even though the marijuana in question was grown by the patient on her property without any commercial activity, let alone interstate commercial activity.

Over the years, WLF has filed briefs in a number of endangered species cases raising the Commerce Clause issue. The courts of appeals are split on how to address these important questions, but apparently, the Supreme Court thought there was no clear split of authority at this point. Consequently, WLF will be monitoring other cases in other circuits in order to develop clear authority against federal jurisdiction.

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

\* \* \*

For information, contact WLF Senior Executive Counsel Paul Kamenar at 202-588-0302. A copy of WLF's brief can be obtained from its website at [www.wlf.org](http://www.wlf.org).