No. 01-51099
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, LP;
AND PARKE PROPERTIES II, LP

PLAINTIFFS - APPELLANTS,

V.

GALE A. NORTON, Secretary, United States Department of the Interior;
STEVEN A. WILLIAMS, Director, United States Fish and Wildlife Service

DEFENDANTS - APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

APPELLANTS' PETITION FOR PANEL REHEARING

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I. Introduction.

This Court's March 26, 2003, Opinion contains a material factual error that resulted in the rendition of an erroneous judgment. In upholding a summary judgment affirming the Federal Government's authority to regulate the take of intrastate, non-commercial endangered species, the Court incorrectly assumed that the species at issue in this case — which are found in only a handful of caves and sinkholes — and other endangered species are interdependent. The summary judgment record is affirmatively to the contrary. Because all facts and inferences in this appeal of a summary judgment must be reviewed in a light most favorable to the non-movant (the Appellants in this case) and the uncontroverted summary judgment evidence is directly contrary to the Court's factual assumption, the Court' s Judgment must be reversed.

II. Standard of Review in an Appeal of a Summary Judgment.

This is an appeal of a summary judgment granted in favor of the Appellees, Gale Norton, Secretary, U.S. Department of Interior and Steven Williams, Director, U.S. Fish and Wildlife Service. Although the standards for review of a summary judgment are familiar, they bear repeating here because of their importance to this Petition for Rehearing.

A grant of summary judgment is reviewed *de novo. See Dallas County Hosp.*

Dist. v. Associates' Health and Welfare Plan, 293 F.3d 282, 285 (5th Cir.2002). Summary judgment is appropriate only when there "is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Conoco, Inc. v. Medic Systems, Inc.,* 259 F.3d 369, 371 (5th Cir.2001).

As the Supreme Court has repeatedly stated, the court must view facts and inferences in the light most favorable to the party opposing the motion. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A factual dispute precludes a grant of summary judgment if the evidence would permit a reasonable jury to return a verdict for the non-moving party. *See Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505; *Merritt-Campbell, Inc. v. RxP Prods., Inc.,* 164 F.3d 957, 961 (5th Cir.1999). In reviewing the summary judgment evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe and should give credence to the evidence favoring the non-moving party. *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001).

Applied to this case, all facts and inferences must viewed in the light most favorable to GDF Realty. Conversely, all evidence proffered by the Government must be disregarded unless a jury would be required to believe such evidence. Any factual

disputes must be resolved in favor of GDF Realty.

GDF respectfully submits that the Court failed to adhere to these well-established standards in this case. The Court made a crucial factual assumption in favor of the movant (regarding the presumed interdependence of all endangered species) and, in so doing, disregarded specific summary judgment evidence to the contrary proffered by the non-movant.

III. The Court's factual assumption regarding the interdependence of the Cave Species with other species is contradicted by uncontroverted summary judgment evidence to the contrary.

The Court's opinion sustaining the Commerce Clause authority to regulate Cave Species takes hinges on aggregating the effect of all takes of *all endangered species*, rather than the effect of takes of the Cave Species. 2003 WL 1552198 at 17-20. Aggregation of all endangered species takes was necessary to sustain Commerce Clause authority because the Court correctly found that Cave Species takes do not exert a substantial effect on interstate commerce and, therefore, such takes alone cannot be the proper subject of federal regulation under the Commerce Clause. *Id.* at 15-16.

Several aspects of the Court's opinion in this regard are noteworthy. First, in framing the "substantial effects" inquiry for Category 3 cases, the Court properly rejected the District Court's misdirected focus on the proposed use of GDF's

property,[1] instead holding that the inquiry must focus on the regulated activity (Cave Species takes) rather than non-regulated conduct such as proposed commercial development. 2003 WL 1552198 at 12-14. Second, the Court rejected the Government's evidence of scientific travel and publication as showing only a negligible and attenuated effect on interstate commerce. *Id.* at 15-16. Third, the Court correctly rejected speculative future commercial benefits that might result from Cave Species as a means of showing substantial effect on interstate commerce. The mere possibility of such future benefits was held too hypothetical and attenuated from the regulation in question to pass constitutional muster. *Id.* at 16.

After establishing that Commerce Clause authority could not be established by Cave Species takes alone, the Court upheld such authority through aggregating the effect of takes of other endangered species. In other words, although Cave Species takes do not substantially affect interstate commerce, Cave Species takes can be regulated because the aggregate effect of all other endangered species takes substantially affects interstate commerce.

The Court premised its aggregation holding on the proposition that the "ESA

[1] Instead of addressing the effect of Cave Species takes on interstate commerce, the District Court looked to GDF's proposed use of the property to locate a nexus with interstate commerce. For example, the District Court stated: "[I]t is obvious that the effect of building Wal- Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." 169 F. Supp.2d 648, 660 (W.D. Tex. 2001).

is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes." *Id.* at 20. The Court's finding that Cave Species takes are an essential part of this scheme is premised on a factual presumption regarding the interdependence of endangered species. Several statements in the opinion illustrate this presumption:

- "*Gibbs* reaffirmed Congress' power to 'manage the interdependence of endangered animals and plants in large ecosystems.'" *Id*. at 19.
- "The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists." *Id*. *citing NAHB*, 130 F.3d at 1052 n. 11; *id.* at 1058 (Henderson, J., concurring)
- "[T]akes of any species threaten the 'interdependent web' of all species." *Id*.

Moreover, the Court underscored the importance of this presumed interdependence when it stated: "[O]ur analysis of the interdependence of species *compels the conclusion* that regulated takes under ESA do affect interstate commerce." *Id.* (emphasis added).

The Court's broad factual presumption, however, is directly contradicted by the summary judgment evidence in this case. The uncontroverted — and incontrovertible — facts in this case are that the Cave Species live their entire lives underground and

in complete isolation. These uncontroverted facts are not mere conclusory allegations, but are the statements of the world's leading expert on these species of karst invertebrates — James Reddell, the Curator of Invertebrate Zoology at the Texas Memorial Museum, The University of Texas at Austin.[2]

Reddell's primary areas of research is cave-dwelling species and their habitat. Reddell's affidavit makes clear that the Court's presumption that other endangered species are dependent on the Cave Species (or vice versa) is factually incorrect. The following are relevant excerpts from Reddell's affidavit [3] on this issue:

> I was the first, or at least one of the first, people to identify the karst invertebrates involved in this case. The scientific names of the Bee Creek Cave Harvestman (*Texella reddelli*) and the Kretschmarr Cave Mold Beetle (*Texamaurops reddelli*) are named after me. Because I have studied and observed these species for forty years and I have conducted or participated in the vast majority of the studies of these species, I am generally regarded as the leading expert on the species of karst invertebrates noted above.
>
> The species evolved as separate species because of their isolation. The karst invertebrates are troglobites, meaning they are specially adapted to subterranean existence and

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[2] Reddell is also the Chairman of the Cave Subcommittee of the Natural Science Committee, Texas System of Natural Laboratories. Texas System of Natural Laboratories is the non-profit foundation that was the recipient of the donation of several caves and sinkholes from the Purcells.

[3] A true and complete copy of James Reddell's summary judgment affidavit is attached hereto as Exhibit 1. R. 688-694.

> spend their entire lives underground. During the course of climatic changes since the last Ice Age, the ancestors of these species retreated into caves. Over time the fault along the Balcones Fault Zone has created small areas of caves that are isolated and unconnected with other caves. Over thousands of years these animals developed different characteristics from similar animals in other caves or cave clusters, even those a few miles away.
>
> Since the species never leave their caves, their interaction with other species is extremely limited. They interact with other species in the caves and feed on material left in the caves by cave crickets or other species that sometimes enter the part of the cave nearest the surface, as well as organic material that falls into the caves.

R. 690-691.

In sum, the Cave Species live their entire lives underground in caves and sinkholes and in complete isolation. In no way can it be shown — or even inferred — that Cave Species takes increase the likelihood of takes of other endangered species or vice versa. Nor can it be shown that Cave Species takes indirectly increase the likelihood of takes of other endangered species through the "interdependent web" of all species.

Put another way, it is both incorrect and contrary to the record to assume that Cave Species takes lead to an increased likelihood of takes of other endangered species — even those found locally (such as the golden-cheeked warbler or black-capped vireo), much less other endangered species found hundreds or thousands of

miles away — *e.g.*, endangered salmon found on the Pacific Coast, grizzly bears in the Rocky Mountains or red wolves in the Southeast.

Without some principle connecting the regulated activity to interstate commerce, aggregation is inappropriate. In *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000), the Supreme Court set out the basic limit for aggregation: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S.Ct. at 1750.[4]

The touchstone of aggregation is economic activity which, although trivial by itself, can through repetition elsewhere, substantially affect interstate commerce. Thus, in *Lopez*, aggregation could not be employed to uphold the Gun-Free School Zones Act because: "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. Similarly, in *Morrison*, the court rejected aggregation to uphold the Violence Against Women Act because "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."

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[4] "[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), the regulated activity was of an apparent commercial character. See, *e.g., Lopez,* 514 U.S., at 559-560, 580, 115 S.Ct. 1624." *Morrison,* 529 U.S. at 611.

529 U.S. at 613. "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

As a factual matter, the *repetition* of regulated activity which underlies aggregation — regardless of whether that activity is economic — is simply not present here.[5] It cannot be shown that repetition of Cave Species takes will cause or lead to the take of other endangered species — directly, or even indirectly. Nor can it be shown that repetition of takes of other endangered species will cause or lead to the take of the Cave Species — directly, or even indirectly. The plain and uncontroverted summary judgment evidence demonstrates that the "interdependence of species" the Court said "compell[ed] the conclusion that regulated takes under ESA do affect interstate commerce" is demonstrably false with regard to the Cave Species.

There may well be situations where species interdependence can tie non-commercial species with commercial species such that a substantial effect on interstate commerce can be found. But that is not this case. Because the record affirmatively contradicts the presumption that the Cave Species and other species are

[5] Although this Petition for Rehearing addresses the factual error in the Court's opinion regarding the interdependence of the Cave Species with other species, the Court's legal conclusion that the ESA take provision is "economic" is in error as well. Although that error is relevant here and would be an additional basis for reversal by the panel, that issue is the primary focus of the GDF's Petition for Rehearing En Banc.

interdependent, the take provision's application to the Cave Species cannot be sustained through aggregation of the effect of other endangered species takes.

IV. Conclusion and Prayer

In light of the foregoing, Appellants GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., respectfully request this Court to grant rehearing in this matter, reverse the District Court's Judgment and render judgment declaring the take provision of the Endangered Species Act unconstitutional as applied to the Cave Species because it exceeds Congress' Commerce Clause Authority. Appellants further seek a permanent injunction restraining the Fish and Wildlife Service from applying the take provision to the Cave Species. Finally, should the Appellants prevail on rehearing, Appellants pray for judgment awarding attorneys' fees to Appellants and remand to the District Court for a determination of the appropriate amount of attorneys fees to which Appellants are entitled.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

On the _____ day of May, 2003, a true and correct copy of the foregoing *Petition for Panel Rehearing* was served upon all counsel of record as indicated below:

Stephanie Tai, ***Via CM/RRR, #7108 1853 1570 0000*** ____
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