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 REHEARING EN BANC

HAZEN & TERRILL, P.C.

PAUL M. TERRILL III
SBN 00785094
VINCENT L. HAZEN
SBN 00787666
810 WEST 10TH STREET
AUSTIN, TEXAS 78701
TEL: (512) 474-9100
FAX: (512) 474-9888

ATTORNEYS FOR APPELLANTS
GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; PARKE PROPERTIES II, L.P.

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 REHEARING EN BANC

HAZEN & TERRILL, P.C.

PAUL M. TERRILL III
SBN 00785094
VINCENT L. HAZEN
SBN 00787666
810 WEST 10TH STREET
AUSTIN, TEXAS 78701
TEL: (512) 474-9100
FAX: (512) 474-9888

ATTORNEYS FOR APPELLANTS
GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; PARKE PROPERTIES II, L.P.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Honorable Judges of this Court may evaluate possible disqualifications or recusal:

1. *GDF Realty Investments, Ltd.*, Appellant
2. *Parke Properties I, LP*, Appellant
3. *Parke Properties II, LP,* Appellant
4. *Gale A. Norton*, Secretary United States Department of Interior, Appellee
5. *Marshall P. Jones*, Director, United States Fish & Wildlife Service, Appellee
6. *Paul M. Terrill III*, Hazen & Terrill, P.C.
   Attorney of Record for Appellants
7. *Vincent L. Hazen*, Hazen & Terrill, P.C.
   Attorney for Appellants
8. *R. James George, Jr.*, George & Donaldson, L.L.P.
   Attorney for the Appellants
9. *Mark A. Brown, David J. Lazerwitz and Stephanie Tai*, U.S. Department of Justice; Attorneys for Appellees Gale Norton and Steven Williams

_____

Paul M. Terrill III
Attorney of Record for Appellants

STATEMENT PURSUANT TO FED R. APP. P. 35(b)(1)

The panel decision conflicts with the decisions of the United States Supreme Court in *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

The panel decision also conflicts with the views of half this Court's members in evenly divided *en banc* decisions in *U.S. v. Hickman*, 179 F.3d 230 (5th Cir 1999)(en banc) and *U.S. v. McFarland*, 311 F.3d 376 (5th Cir. 2002)(en banc).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

Article I, §8, cl. 3, of the United States Constitution states: "The Congress shall have power ... [t]o regulate Commerce ... among the several States ..."

Section 9(a)(1) of the Endangered Species Act, 16 U.S.C. §1538(a)(1), states: "[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... (B) take any such species within the United States or the territorial sea of the United States; ..."

Section 3(19) of the Endangered Species Act, 16 U.S.C. §1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(a)(1) of the Endangered Species Act, 16 U.S.C. §1540(a)(1), states: "Any person who knowingly violates, ... any provision of this chapter, ... or of any regulation issued in order to implement subsection (a)(1) ... (B), ... may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. ... Each violation shall be a separate offense. ..."

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. §1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, ..., or of any regulation issued in order to implement subsection (a)(1) ... (B), ... of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

"Harm" in the definition of "take" in the Endangered Species Act has been administratively defined by the United States Fish & Wildlife Service to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3

STATEMENT OF ISSUES FOR EN BANC CONSIDERATION

1. Whether Congress has the authority under the Commerce Clause to regulate the "take" of intrastate, non-commercial species of cave-dwelling insects under §9(a)(1)(B) of the Endangered Species Act?

2. Whether aggregation of all takes of *all endangered species* can be used to sustain the regulation of species whose takes, considered alone, do not substantially affect interstate commerce?

STATEMENT OF THE CASE

I. Nature of the Case.

The issue in this case is whether Congress possesses the authority to regulate purely intrastate, non-commercial activity pursuant to the Commerce Clause. In the case below, Plaintiffs/Appellants GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., filed suit seeking a declaration that the "take" provision of the Endangered Species Act ("ESA"), 16 U.S.C. §1538(a)(1)(B), as-applied to six species of invertebrate, cave-dwelling insects (the "Cave Species") exceeds Congress' authority under the Commerce Clause.

II. Course of Proceedings and Disposition in the Court Below.

On June 15, 2000, Plaintiffs filed this suit against Defendants-Appellees Bruce Babbitt, Secretary of the U.S. Department of the Interior and Jamie Rappaport Clark, Director, United States Fish and Wildlife Service ("FWS") ("collectively referred to as the "Government"). (R. 1:1-16). The parties submitted the case to the court on cross motions for summary judgment. (R. 3:279-8:1787; R. 9:1810-1960). On

August 30, 2001, without hearing argument, Judge Sparks entered an Order and Judgment granting the Government's Motion for Summary Judgment and denying the Plaintiffs' Motion for Summary Judgment and rendered Judgment for the Government. *GDF Realty Invs., Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D. Tex. 2001). The District Court's Order held that the ESA take provision is a valid Congressional regulation under the "substantial effect on interstate commerce" category of Congressional authority (R. 10:2084-2093). 169 F.Supp.2d at 657-663.

On October 26, 2001, Plaintiffs timely filed a Notice of Appeal challenging the District Court's Judgment and the Order Granting Summary Judgment. (R. 2132-2133). On November 4, 2002, the case was argued before a panel consisting of Judges Davis, Barksdale and Dennis. On March 26, 2003, the Panel rendered its Opinion sustaining the constitutionality of the take provision, with Judge Barksdale writing the Panel's Opinion. ___ F. 3d ___, 2003 WL 1552198 (5th Cir. 2003).

STATEMENT OF FACTS

The Panel Opinion correctly states the material facts in this case — with one important exception addressed below. A brief summary of the material facts follows. The Petitioners in this case are the owners of approximately 216 acres of undeveloped land in Travis County, Texas, outside the City of Austin. The six "endangered" Cave

Species[1] at issue here are only found within a few caves and sinkholes on the Petitioners' property and a few other locations within Travis County and Williamson County, Texas. (R. 691). These small, eyeless creatures live their entire lives underground in caves and sinkholes, have no commercial value and have never been bought, sold or traded in commerce in any form or fashion. (R. 690-691; R. 320-321).

Despite the entirely non-commercial, intrastate nature of the Cave Species, FWS has consistently asserted federal regulatory jurisdiction over the Petitioners' property. (R. 321-329). FWS asserts that the Petitioners' proposed development plans will "take" the Cave Species in violation of §9(a)(1)(B) of the ESA. *Id.* In 1990, complying with FWS' requirements in effect at the time, the Petitioners permanently dedicated over 10 acres of prime commercial real estate to a non-profit foundation as preserves for the Cave Species. (R. 321-322).

Since Petitioners' dedication of the cave preserves over a decade ago, FWS has repeatedly changed the rules for protecting the Cave Species, made increasingly onerous demands for "dedication" of additional preserves, declared substantially all of the 216 acre property as "non-development area," blocked numerous development opportunities, and purposefully refused to act on Petitioners' §10(a) "incidental take" permit applications — a refusal to act that District Judge Sam Sparks characterized as

[1] The six Cave Species are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; and (6) Kretschmarr Cave Mold Beetle. The Cave Species have been listed as "endangered" pursuant to the Endangered Species Act.

"totally irresponsibl[e]" and "simply wrong". (R. 321-330).

As noted above, the Panel decision made one important factual error. After correctly holding that Cave Species takes alone do not substantially affect interstate commerce, the Panel upheld Commerce Clause authority by aggregating the effect of all takes of ***all endangered species***. 2003 WL 1552198 at 20. The Panel premised its aggregation decision on an incorrect factual assumption regarding species interdependence. The Panel held that because takes of all endangered species substantially affect interstate commerce, takes of the Cave Species must be regulated as well — even though they alone do not substantially affect interstate commerce. *Id.* at 18-20. The Panel stated that failure to regulate Cave Species takes would allow the ESA regulatory scheme to be undercut because of the interdependence of species. The Panel 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.* at 19 (emphasis added). The Panel's presumption of species interdependence is factually incorrect with regard to the Cave Species. The Cave Species exist in complete isolation. Cave Species takes do not make it more (or less) likely that other endangered species takes will occur (or vice versa). That factual error is the subject of a Petition for Panel Rehearing.

ARGUMENT AND AUTHORITIES

I. The Panel Opinion.

The broad issue in this case is whether Congress has the authority under the Commerce Clause to regulate the "take" of intrastate, non-commercial species of cave-dwelling insects under §9(a)(1)(B) of the Endangered Species Act. The narrower issue that is the focus of this Petition for Rehearing En Banc is whether aggregation of all takes of *all endangered species* can be used to sustain the regulation of species whose takes — considered alone — do not substantially affect interstate commerce.

Aggregation is critical to the Panel's decision because the Panel correctly found that Cave Species takes do not exert a substantial effect on interstate commerce and, thus, cannot alone justify federal regulation under the Commerce Clause. Several aspects of the Panel's opinion in this regard are noteworthy. First, in framing the "substantial effects" inquiry for Category 3 cases, the Panel properly rejected the District Court's misdirected focus on the proposed use of GDF's property,[2] 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 Panel rejected the Government's evidence of

[2] 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)

scientific travel and publication as showing only a negligible and attenuated effect on interstate commerce. *Id.* at 15-16. Third, the Panel correctly rejected speculative future commercial benefits that might result from the 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.

Having rejected Cave Species takes alone as a basis for federal jurisdiction, the Panel then held that the aggregate effect of *all endangered species takes* could be used to justify regulating Cave Species takes. The Panel reasoned that aggregation is appropriate because the "ESA's take provision is economic in nature" and, as a whole, the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it." *Id.* at 19-20.

In reaching this conclusion, the Panel Opinion conflicts with the Supreme Court's opinion in *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000). The Panel decision also conflicts with the views of one-half of the evenly divided en banc courts in *U.S. v. Hickman* , 179 F.3d 230 (5th Cir. 1999) and *U.S. v. McFarland*, 311 F.3d 376 (5th Cir. 2002) regarding the use of aggregation.

II. The Panel decision conflicts with the Supreme Court's decisions in *Lopez* and *Morrison*.

Lopez and *Morrison* are landmark decisions because they establish the outer

limits for allowing *Wickard*-style aggregation of otherwise trivial effects on interstate commerce. In *Lopez*, the Court canvassed its Commerce Clause jurisprudence and concluded that in those cases in which the Court had sustained the use of aggregation, its application was attributable to regulation of a commercial market. *Lopez* noted several such examples. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc*., 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels). See *Lopez*, 514 U.S. at 559-60. Even *Wickard v. Filburn,* which *Lopez* characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," involved economic activity in that Congress was regulating the wheat market. 514 U.S. at 560.

Morrison confirmed this view. "While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus 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. "[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.

The Panel's decision conflicts with *Lopez* and *Morrison* because it holds that the regulated activity — the ESA take provision — "is economic in nature" and, as a whole, the "ESA is an economic regulatory scheme" when neither the plain language of the take provision, nor the statutory scheme of the ESA justify that conclusion.

Under *Lopez* and *Morrison's* analysis, the Court should look to the *express terms* of the regulatory provision in question. *Morrison*, 529 U.S. at 610. The take provision — §9(a)(1)(B) of the ESA — states:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ...
>
> > (B) take any such species within the United States or the territorial sea of the United States; ..."

16 U.S.C. §1538(a)(1)(B).

Just as the harm to women addressed in §13981 of the Violence Against Women Act is "not, in any sense of the phrase, economic activity," *Morrison*, 529 U.S. at 610, neither is the harm to wildlife at issue in this case, in any sense of the phrase, economic activity. By its terms, the take provision makes no mention of "commerce" or "economic activity." The purpose or nature of the take (e.g., whether it occurred in connection with a commercial activity) is wholly irrelevant to §9(a)(1)(B)'s liability scheme. Simply put, the take provision prohibits harming listed species of wildlife, without regard to a nexus with interstate commerce.

To the extent that the Panel held that the take provision is, by its express terms, a regulation of commercial or economic activity, that conclusion cannot be squared with the plain language of the provision. Although the Panel opinion concludes by stating, "ESA's take provision is economic in nature," the Panel opinion also contains language suggesting the opposite conclusion:

> As noted earlier, whether an activity is economic or commercial is to be given a broad reading in this context. *Groome*, 234 F.3d at 208-09. Nevertheless, in a sense, *Cave Species takes are neither economic nor commercial.* There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be.

2003 WL 1552198 at 17(emphasis added).

The Panel Opinion then rejected the Government's argument that aggregation of Cave Species be classified as commercial because the aggregate effect of all endangered species takes will have a substantial effect on interstate commerce.

> To accept such a justification would render meaningless any "economic nature" prerequisite to aggregation. An activity cannot be aggregated based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce. This would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial. Noneconomic and noncommercial activity could be aggregated so long as, if aggregated, it would have a substantial effect. *Lopez* and *Morrison* stand against such a proposition.

Id.

Nevertheless, the Panel then upheld the use of aggregation based on its

conclusion that the ESA is "an economic regulatory scheme" of which "the regulation of intrastate takes of the Cave Species is an essential part." *Id.* at 20. The Panel's conclusion that the ESA is an economic regulatory scheme is based on three rationales, none of which survive scrutiny.

First, the Panel cites ESA legislative history regarding the "'incalculable' value of the genetic heritage that might be lost absent regulation" and imports legislative history from a precursor of the ESA[3] regarding the commercial value that might be derived in the future from controlled exploitation of species. *Id.* at 17-18. The flaw in relying on future commercial benefits from endangered species as a basis for showing that the ESA is an economic regulation is well stated elsewhere in the Panel Opinion: "This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.* at 16. If all that is required to show that a statute is "economic" — thereby allowing aggregation — is a belief that a statute may have some speculative future benefit to commerce, then there is no stopping point to the Commerce power.

Second, the Panel states that the "majority of takes would result from economic

---

[3] *Lopez* noted that the importation of legislative history from previous enactments is inappropriate. 514 U.S. at 563.

activity." *Id.* at 18. However, as the Panel correctly points out elsewhere in the Opinion, economic activity causing the takes is not the subject of the regulation:

> Unlike *Groome,* the district court in this case looked primarily beyond the regulated conduct--Cave Species takes--in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. ***But, Congress, through ESA, is not directly regulating commercial development.***

Id. at 12 (bold emphasis added).

Third, the Panel states that ESA is "truly national" in scope. *Id.* at 18. This rationale fails because simply identifying a problem and stating that it is national in scope does not convert a statute regulating that problem into a commercial regulation. If that were the case, then the "national problems" addressed by the Gun-Free School Zones Act and the Violence Against Women Act would have passed Commerce Clause muster.

A fair reading of the ESA indicates that it is not a scheme of commercial regulation — it is a statutory scheme designed to protect endangered wildlife. The ESA provides a process for listing endangered species and identifying their critical habitat,[4] provides authority to Federal agencies to protect listed species by purchasing

[4] 16 U.S.C. §1533.

land for preserves,[5] and directs all Federal agencies to consult with FWS to determine whether an agency action will "jeopardize the continued existence of any endangered species ... or result in the destruction or adverse modification of [critical] habitat."[6] The ESA also sets up a system of coordination with state[7] and foreign[8] governments to provide funding and collaboration to conserve listed species. Finally, the ESA prohibits certain acts,[9] including taking a listed species, while providing for permitting[10] and enforcement.[11]

What is absent here is an overall scheme to regulate a commercial market. The ESA stands in contrast to the regulation of congressionally-defined commercial markets for wheat (*Wickard*), surface coal mining (*Hodel*), credit transactions (*Perez*), restaurants (*Katzenbach*), and inns & hotels (*Heart of Atlanta*), to name just a few. Absent such a congressionally-defined commercial market, the Supreme Court has never sustained the use of aggregation. This Court should not depart from the Supreme Court's settled limitations on the aggregation principle.

---

[5] 16 U.S.C. §1534.

[6] 16 U.S.C. §1536. *See also Tennessee Valley Authority v. Hill*, 98 S.Ct. 2279 (1978).

[7] 16 U.S.C. §1535.

[8] 16 U.S.C. §§1537 and 1537a.

[9] 16 U.S.C. §1538.

[10] 16 U.S.C. §1539.

[11] 16 U.S.C. §1540.

III. The Panel decision conflicts with the views of half this Court's members in evenly divided en banc decisions.

In both *U. S. v. Hickman*, 179 F.3d 230 (5th Cir. 1999) and *U.S. v. McFarland*, 311 F.3d 376 (5th 2002), this Court, sitting *en banc,* affirmed the Hobbs Act convictions of local robberies by reason of an equally divided court. The Panel's analysis of aggregation conflicts with the aggregation analysis in Judge Higginbotham's dissent in *Hickman*, as well as Judge Garwood's dissent in *McFarland*. Although dissents, the analysis contained therein represents the view of one half of this Court sitting en banc.

Judge Higginbotham's thorough analysis in *Hickman*, which pre-dates the Supreme Court's opinion in *Morrison*, sets out the standard for aggregation: "We would hold that activities may be aggregated where the interactive play of their effects is such that regulation requires the ability to reach individual instances of the activity to be effective." 179 F.3d at 233. Explaining further, Judge Higginbotham stated that:

> [I]ndividual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection--in other words, an interactive effect--and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can

> be added. It is this principle that we believe is meant when the Supreme Court speaks of a "class of activities."

Id. at 233.

Under this standard, to aggregate the effect of takes of *all* endangered species, there must be an interactive effect. Yet no such interactive effect is present here. It is undisputed that the Cave Bugs live their entire lives underground in isolation. (R. 689-91). A Cave Bug take does not depend on whether an endangered fish, for instance, is taken in the Pacific Northwest or whether an endangered bird or bug is taken in Colorado or *vice versa*. In other words, the occurrence of a Cave Bug take does not make it "substantially more or less likely" that a take of some other listed species will occur. The aggregation analysis by the *Hickman* dissent both supports Petitioners' position in this case and foreshadowed the Supreme Court's aggregation analysis in *Morrison*.

After the Supreme Court decided *Morrison*, re-affirming *Lopez's* limit on aggregating non-commercial activity, this Court revisited the aggregation issue in *McFarland*. Judge Garwood's dissent, again representing the views of one half of the en banc court, expressed essential agreement with Judge Higginbotham's aggregation analysis in *Hickman*. 311 F.3d at 400.

Because the aggregation analysis in the Panel's Opinion incorrectly characterizes the regulated activity as "economic" and ignores the lack of "interactive effect" here, it cannot be squared with Judge Higginbotham's analysis in *Hickman* and

Judge Garwood's analysis in *McFarland*.

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 En Banc 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:_____

Paul M. Terrill III*
State Bar No. 00785094
Vincent L. Hazen
State Bar No. 00787666
HAZEN & TERRILL, P.C.
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)

Jim George
State Bar No. 07810000
GEORGE & DONALDSON, L.L.P.
1100 Norwood Tower
114 West 7th Street
Austin, Texas 78701
(512) 495-1400
(512) 499-0094 (fax)

* designated as lead counsel on appeal

CERTIFICATE OF SERVICE

On the 12th day of May, 2003, a true and correct copy of the foregoing *Petition for Rehearing En Banc* was served upon all counsel of record as indicated below:

Stephanie Tai, ***Via CM/RRR, #7108 1853 1570 0000*** ____
Department of Justice
P.O. Box 23795 (L'Enfant Station)
Washington, D.C. 20026

_____
Paul M. Terrill III