

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED

JUN 15 2000

U.S. DISTRICT COURT  
BY [Signature] DEPUTY

GDF REALTY INVESTMENTS, LTD.,  
PARKE PROPERTIES I, L.P.,  
PARKE PROPERTIES II, L.P., and

*Plaintiffs,*

vs.

BRUCE BABBITT, Secretary  
United States Department of Interior and  
JAMIE RAPPAPORT CLARK, Director,  
United States Fish and Wildlife Service.

*Defendants.*

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CIVIL ACTION NO. \_\_\_\_\_

**PLAINTIFFS' ORIGINAL COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs GDF Realty Investment, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., and file this Original Complaint against Bruce Babbitt, Secretary, United States Department of the Interior, and Jamie Rappaport Clark, Director, United States Fish and Wildlife Service. Plaintiffs allege that the application of §9(a)(1)(B) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B), to certain cave invertebrates only found in one small area entirely within the State of Texas exceeds Congress' power under the Commerce Clause. For their complaint, Plaintiffs state as follows:

**I  
PARTIES**

1. Plaintiff GDF Realty Investments, Ltd., is a Texas limited partnership doing business in Travis County, Texas.

2. Plaintiff Parke Properties I, L.P., is a Texas limited partnership doing business in Travis County, Texas.

3. Plaintiff Parke Properties II, L.P., is a Texas limited partnership doing business in Travis County, Texas.

4. Defendant Bruce Babbitt is sued in his official capacity as Secretary of the United States Department of the Interior, an agency of the Executive Branch of the United States Government. The Department of the Interior has statutory responsibility for the administration and implementation of the ESA.

5. Defendant Jamie Rappaport Clark is sued in her official capacity as the Director of the United States Fish and Wildlife Service ("FWS"), a Bureau of the Department of the Interior. The Department of the Interior has delegated to FWS certain responsibilities for administering the ESA. Specifically, FWS administers the regulatory process that resulted in the adoption of the final rules listing the endangered species that are the subject of this lawsuit.

6. Pursuant to Rule 4(i) of the Federal Rules of Civil Procedure, service upon the Federal Defendants may be effected by mailing a copy of the complaint and the summons by certified mail to the following:

- (a) James Blagg, U.S. Attorney for the Western District of Texas  
c/o Ms. Vernell Everett,  
Civil Process Clerk  
Office of the United States Attorney  
Western District of Texas  
601 Northwest Loop 410, Suite 600  
San Antonio, Texas 78216
  
- (b) Janet Reno  
Attorney General of the U.S.  
10<sup>th</sup> and Constitution Avenue, NW, Room B-324  
Washington, D.C. 20530

- (c) Bruce Babbitt  
Secretary of the Department of the Interior  
1849 C. Street, NW  
Washington, D.C. 20240
- (d) Nancy Kaufman  
Regional Director of the United States Fish and Wildlife Service  
P.O. Box 1306  
Albuquerque, New Mexico, 87103
- (e) Jamie Rappaport Clark  
Director of the United States Fish and Wildlife Service  
1849 C. Street, NW  
Washington, D.C. 20036

## II JURISDICTION

7. This action presents a federal question because it arises under Article I, §8 and Amendment X of the U.S. Constitution as well as 42 U.S.C. §1983. This Court has jurisdiction over this suit pursuant to 28 U.S.C. §1331 and the Declaratory Judgments Act, 28 U.S.C. §2201.

## III VENUE

8. Venue is proper in this Court pursuant to 28 U.S.C. §1391(e) because a substantial part of the events or omissions giving rise to the claims occurred, and the property that is the subject of this suit is situated, in this judicial district.

## IV NATURE OF ACTION

9. This suit challenges Congress' as-applied authority to regulate purely intrastate, non-commercial activity pursuant to the Commerce Clause of the United States Constitution. Plaintiffs seek a declaration that, as-applied to the six listed endangered cave invertebrates living on or in close

proximity to Plaintiffs' property, the "take" provision of the ESA, 16 U.S.C. §1538(a)(1)(B), is unconstitutional because it exceeds Congress' authority. Specifically, Plaintiffs contend that the regulated activity — takes of the endangered cave invertebrates — cannot be supported by the Commerce Clause (or any other provision) of the Constitution because the cave invertebrates are not articles of commerce, do not travel in commerce, do not traverse state lines and any such takes do not substantially affect interstate commerce. Because the Constitution does not give the federal government the authority to regulate activity that is neither interstate nor commercial, Plaintiffs seek a declaration that the Defendants lack constitutional authority to regulate takes of the cave invertebrates and an injunction prohibiting any such regulation.

## V

### BACKGROUND FACTS

#### The Property owned by the Plaintiffs

10. The Plaintiffs collectively own approximately 216 acres of undeveloped land near the intersection of RR 2222 and RR 620 ("the Property") in western Travis County, Texas. The Property is located outside of the incorporated limits of the City of Austin, but within the City of Austin's extraterritorial jurisdiction.

11. Located at the intersection of two highways in one of the most rapidly growing areas of Texas, the Property is an extremely valuable piece of real estate. Without the unconstitutional restrictions placed on the Property by the Defendants, the current fair market value of the Property is at least \$60,000,000. As detailed below, the Defendants' unconstitutional application of §9(a)(1)(B) of the ESA to the cave invertebrates located on the Property has rendered the Property undevelopable. Because the Plaintiffs have been prohibited from making economic use of the

Property, the Plaintiffs are in substantial and imminent danger of losing the Property through foreclosure.

12. The Property is located on the southern margin of a geological area known as the Lollyville Plateau, which is part of the larger Edwards Plateau region of central Texas. The area generally, and the Property in particular, is characterized by “karst” topography, in which water percolating through limestone rock creates such geologic features as caves, sinkholes, and steep canyons.

13. The Property contains numerous karst sinkholes and caves including: Tooth Cave, Kretschmarr Cave, Root Cave, Gallifer Cave, Amber Cave and an assortment of karst features referred to as the Cave Cluster.

#### **The Cave Invertebrates found on the Property**

14. Six invertebrate species inhabiting the numerous caves and sinkholes on the Property have been listed as “endangered” by the United States Fish and Wildlife Service, pursuant to §4 of the ESA, 16 U.S.C. § 1533(a)(1). Those listed endangered species are:

- (a) Bee Creek Cave Harvestman (*Texella reddelli*);
- (b) Bone Cave Harvestman (*Texella reyesi*);
- (c) Tooth Cave Pseudoscorpion (*Tartarocreagris texana*);
- (d) Tooth Cave Spider (*Neoleptoneta myopica*);
- (e) Tooth Cave Ground Beetle (*Rhadine persephone*);
- (f) Kretschmarr Cave Mold Beetle (*Texamaurops reddelli*).

These listed species are collectively referred to herein as the “Cave Invertebrates.”

15. The Bee Creek Cave Harvestman is a very small eyeless arachnid (body about 2 to 3 mm in length) that lives its entire life underground in a karst environment. The final rule listing the Bee Creek Cave Harvestman as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

16. The Bone Cave Harvestman is a very small eyeless arachnid (body about 1.4 to 2.7 mm in length) that lives its entire life underground in a karst environment. The final rule listing the Bone Cave Harvestman as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

17. The Tooth Cave Pseudoscorpion is a small eyeless arachnid (body about 4 mm in length) that lives its entire life underground in a karst environment. The final rule listing the Tooth Cave Pseudoscorpion as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

18. The Tooth Cave Spider is a very small arachnid (body about 1.6 mm in length) with rudimentary eyes that lives its entire life underground in a karst environment. The final rule listing the Tooth Cave Spider as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

19. The Tooth Cave Ground Beetle is a small insect (body about 7 to 8 mm in length) with rudimentary eyes that lives its entire life underground in a karst environment. The final rule listing the Tooth Cave Ground Beetle as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

20. The Kretschmarr Cave Mold Beetle is a very small eyeless insect (body less than 3 mm in length) that lives its entire life underground in a karst environment. The final rule listing the

Kretschmarr Cave Mold Beetle as “endangered” pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029.

21. The Cave Invertebrates are a wholly intrastate species, found only in caves and sinkholes in Travis County in the Edwards Plateau region of central Texas

22. The Cave Invertebrates are troglobites, meaning they are specially adapted to subterranean existence and spend their entire lives underground. No Cave Invertebrate has ever been known to leave the cave or sinkhole in which it is found. The Cave Invertebrates are completely isolated in caves and are rarely seen by anyone. Because of their subterranean existence, there are no more than a handful of people who have ever seen these creatures.

23. There is no commercial market for the Cave Invertebrates. The Cave Invertebrates have never been bought, sold, or traded by any person, and they have no known economic or commercial value.

24. Because the Cave Invertebrates live their entire lives underground in caves, they do not traverse state or international lines.

#### **The “Take” Provision of the Endangered Species Act**

25. Section 9(a)(1)(B) of the ESA makes it unlawful to “take” any species that has been listed as endangered. 16 U.S.C. § 1538(a)(1).

26. “Take” is defined in the ESA to mean: “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.” *Id.* § 1532(19).

27. FWS, the agency charged with implementing the duties of the Secretary of the Interior under the ESA, has administratively defined “harm” in the definition of “take” to include significant

habitat modification or degradation that impairs such activities as breeding, feeding, or sheltering the endangered species. 50 C.F.R. § 17.3.

28. Violation of the take provision or the harm regulation carries both criminal and civil penalties. Section 11(b) of the ESA provides criminal penalties of up to one year imprisonment and fines of up to \$50,000, or both, for knowing violation of the take provision and the harm regulation. 16 U.S.C. §1540(b)(1). Section 11(a) of the ESA provides for civil penalties of up to \$25,000 for each violation of the act. *Id.* §1540(a).

29. The only means by which a person can avoid civil and criminal penalties for “taking” endangered species is through an “incidental take permit.” Under Section 10(a) of the ESA, 16 U.S.C. § 1539(a), the Secretary of the Interior may grant a permit authorizing a non-federally funded project to “take” a species incidental to the project. In order to obtain such a permit, the applicant must provide a conservation plan specifying the impact of the project on the endangered species, the efforts taken to minimize the taking, and the reasons why alternatives to the taking are not feasible. 16 U.S.C. § 1539(a)(2)(A).

**The Defendants’ decade-long pattern of thwarting the use of the Property through application of the ESA take provision to the Cave Invertebrates.**

30. The Plaintiffs’ ownership of the Property traces to 1983, when brothers Fred and Gary Purcell first acquired an interest in the Property. Although various other persons and entities have had an interest in the Property since 1983, the Purcells are the only constant during that period. From 1983 through the present, the Purcells have owned (either individually or through limited partnerships) and sought to develop the Property. Fred and Gary Purcell are the sole limited partners of Plaintiffs Parke Properties I, L.P. and Parke Properties II, L.P., the owners of an undivided 70%



interest in the Property. The remaining 30% interest is owned by Plaintiff GDF Realty Investment, Ltd.

31. Years before the Cave Invertebrates were listed, the Purcells invested substantial time and money developing the Property, spending millions of dollars constructing water lines, wastewater gravity lines, force mains, lift stations and other utilities. The Purcells dedicated these utilities to the City of Austin as well as dedicating a right of way adjoining the highway to Travis County. The Property has been final platted and final approval for development was granted by the City of Austin in 1984.

32. Long after the Purcells began development of the Property, FWS listed the Cave Invertebrates and began using their criminal and civil enforcement authority under the take provision of the ESA to thwart the reasonable and responsible development of the Property as approved by the City of Austin.

33. After listing the Cave Invertebrates as endangered in 1988, FWS asked the Purcells to fund surveys to determine what steps would need to be taken in order to protect the endangered species. At substantial cost, the Purcells agreed to do so, and, in 1990, following all recommendations of FWS based on the surveys, placed gates over the entrances to the most ecologically sensitive caves and deeded Amber Cave, Tooth Cave, Root Cave, Gallifer Cave, Kretschmarr Cave, along with several other sink holes and buffer zones surrounding the caves to Texas Systems Natural Laboratories ("TSNL"), a non-profit organization dedicated to the research of environmental issues.

34. After studying the Cave Invertebrates and setting aside substantial portions of the Property to protect the Cave Invertebrates, the Purcells then attempted to proceed with development

and sale of various parcels of the Property. At every turn, the Purcells were thwarted in their efforts by FWS.

35. In 1991, the Purcells entered into a sales contract with Inland Laboratories, Inc. to develop and sell approximately ten acres of the Property. The contract required the Purcells to provide a letter from FWS indicating that the construction of the proposed project would not constitute a "take" under the ESA. Despite the fact that the Plaintiffs had complied with all recommendations in the surveys conducted at the behest of the FWS, the FWS refused to provide such a letter. As a direct result, the contract with Inland Laboratories fell through.

36. In 1993, Fred Purcell attempted to clear brush and trash off of the Property. FWS threatened Dr. Purcell that he was under federal criminal investigation for violating the take provision of the ESA for his clearing activities on the Property. FWS also told Dr. Purcell that any development activities on the Property were prohibited without obtaining a §10(a) incidental take permit.

37. From 1994 through the present, the Plaintiffs have proposed several progressively less intensive development plans for the Property. In each instance, FWS has changed its position, making demands that increasing portions of Plaintiffs' Property be set aside as undeveloped land left in its natural condition.

38. Because of FWS's refusal to allow development of the Property, Plaintiffs lost contracts to sell substantial portions of the Property, first to High End Systems, Inc. and, later, to Trilogy, Inc. In both instances, the contracts were terminated because of FWS restrictions on the Property because of alleged harm to the Cave Invertebrates.

39. On December 30, 1997, Plaintiffs filed seven applications for Section 10(a) incidental take permits – one for each of the seven tracts comprising the Property – in an effort to develop their property. The proposed development included a shopping center, a residential subdivision, and office buildings. FWS failed to act on any of the §10a incidental take permit applications in a timely manner.

40. Unable to use, sell or develop the Property because of FWS' claim that such use will cause "take" of the Cave Invertebrates prohibited by §9(a)(1)(B), and unable to get FWS to act on its §10(a) incidental take permit applications, Plaintiffs filed a lawsuit seeking a declaration that their permit applications had been *de facto* denied. *GDF Realty, Ltd., et al. v. United States, et al.*, Civ. Action No. A 98 CA 772 SS (W.D. Tex. 1998). The district court ordered the FWS to file a pleading describing the status of Plaintiffs' permit applications.

41. The FWS responded to the court's order by filing a sworn Declaration by the FWS's Regional Director that all of Plaintiffs' permit applications were deficient and that the proposed use of the Property would constitute a prohibited "take" of Cave Invertebrates. Although the Purcells complied with all FWS requirements in effect at the time by donating caves and buffer zones to TSNL as preserve areas, FWS apparently adopted some new unpublished and unknowable rules related to "take" of Cave Invertebrates. The application of those new and unknown rules in the FWS Declaration imposed much harsher requirements on the Plaintiffs by greatly increasing the amount of the Property that cannot be used.

42. Among numerous other conditions, the FWS Declaration stated that very substantial portions of the Property would have to be set aside in perpetuity as conservation areas left in their natural condition. FWS established benchmarks prohibiting any development of the Property above

certain elevation contour lines. The Plaintiffs were told by FWS that, because of the Cave Invertebrates, no development could occur above the 1030 contour line on one portion of the Property and no development above the 1010 contour line on another tract. The practical effect of FWS' dictates was to prohibit development on practically all of Plaintiffs' Property.

43. On June 7, 1999, the district court held that the Declaration by the FWS's Regional Director constituted a final agency action and declared that Plaintiff's Section 10(a) permit applications were *de facto* denied.

44. Because the FWS has denied Plaintiffs' applications for section 10(a) permits and indicated that development of Plaintiffs' property would constitute a take of the Cave Invertebrates under Section 9, Plaintiffs cannot develop their property without the threat of civil and/or criminal penalties for taking endangered species.

45. The unconstitutional restrictions on Plaintiffs' use and enjoyment of the Property have caused and continue to cause severe harm to the Plaintiffs. For over a decade, the Plaintiffs have been wholly prevented from making any economic use of the Property. As noted above, several contracts for sale and development of the Property have been terminated because of the Defendants' actions.

46. Moreover, because the Plaintiffs have been unable to make economic use of the Property, they have been unable to pay the substantial property taxes and debt service on the Property and, consequently, stand to lose some or perhaps all of the Property through foreclosure.

47. Plaintiffs currently owe approximately \$34,000.00 in delinquent property taxes on the Property. The Travis County Tax Assessor-Collector has posted the Property for foreclosure.

48. In addition, the majority of the Property is subject to indebtedness, including a balloon payment of \$4.8 million due on June 30, 2000. The entire debt has been accelerated and the indebted tract has been posted for July 4, 2000 foreclosure by the note holder.

## **VI REQUEST FOR RELIEF: DECLARATORY JUDGMENT**

49. Paragraphs 1 through 48 are incorporated herein by reference.

50. The Federal Government created by the Constitution is a government of limited, enumerated powers. Article I, §8 of the Constitution specifically enumerates those powers delegated to the Federal Government. As mandated by the Tenth Amendment to the Constitution, those powers not specifically granted by the Constitution to the Federal Government are reserved to the States or the people.

51. The authority to regulate wildlife and the authority to regulate the use of non-federal land is reserved to the States under the Tenth Amendment to the U.S. Constitution. Neither the Commerce Clause nor any other provision of the U.S. Constitution authorizes Congress to regulate purely local activities that affect species, such as Cave Invertebrates, which are found only in the State of Texas and the “takes” of which do not substantially affect interstate commerce.

52. Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), does not regulate the channels of interstate commerce.

53. Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), does not regulate persons or things in interstate commerce.

54. Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), does not regulate economic or commercial activity.

55. Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), does not contain a jurisdictional element.

56. The ESA contains no findings by Congress that “take” of the Cave Invertebrates (or any other species) has or would have a substantial effect on interstate commerce.

57. The final rules listing the Cave Invertebrates contain no findings that takes of the Cave Invertebrates will substantially affect interstate commerce.

58. Takes of the Cave Invertebrates prohibited by §9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), do not substantially affect interstate commerce.

59. Pursuant to 28 U.S.C. § 2201 and 42 U.S.C. §1983, Plaintiffs seek a declaration that, as applied to the Cave Invertebrates, Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), is an invalid exercise of congressional power under the U.S. Constitution.

## **VII**

### **REQUEST FOR RELIEF: PERMANENT INJUNCTION**

60. Paragraphs 1 through 59 are incorporated herein by reference.

61. Because of the Defendants’ unconstitutional application of Section 9(a)(1)(B) of the ESA to the Cave Invertebrates and the Plaintiffs’ inability to develop the Property without the threat of civil and criminal penalties for violation of Section 9, Plaintiffs have suffered and continue to suffer severe economic burdens and face the real danger of irreparable injury in the future. Plaintiffs therefore request that this Court permanently enjoin the Defendants from enforcing Section 9 of the ESA as it applied to the Cave Invertebrates.

## **VIII**

### **REQUEST FOR RELIEF: ATTORNEYS’ FEES AND COSTS**

62. Paragraphs 1 through 61 are incorporated herein by reference.

63. Pursuant to 28 U.S.C. § 2412 and 42 U.S.C. § 1988 and any other applicable provision of law, Plaintiffs request that this Court award to Plaintiffs their reasonable attorneys' fees, costs of court, and other expenses necessary for the preparation of their case.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that after a full and final hearing, the Court grant the following relief:

- (a) A judgment declaring that, as applied to the Cave Invertebrates, Section 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), is an unconstitutional exercise of congressional power under the U.S. Constitution;
- (b) A permanent injunction enjoining Defendants from enforcing Section 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), as applied to the Cave Invertebrates;
- (c) A judgment awarding to Plaintiffs their reasonable attorneys' fees, costs of court, and other expenses necessary for the preparation of their case; and
- (d) Such other relief as the Court may determine the Plaintiffs to be justly entitled.

Respectfully submitted,

HAZEN & TERRILL, P.C.

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