Team No. 9

Docket No. 16-0933

IN THE

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff–Appellee–Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant–Appellant–Cross Appellee,

And

BRITTAIN COUNTY, NEW UNION,

Defendant–Appellant.

Appeal from the United States District Court for the District of New Union in No. 112-CV-2015-RNR

BRIEF OF UNITED STATES FISH AND WILDLIFE SERVICE, Defendant–Appellant–Cross Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Lear filed this suit questioning the constitutionality of the Endangered Species Act, 16 U.S.C. § 1538 (2012). Alternative, Lear asserts a suit for inverse condemnation exists under the Fifth Amendment of the United States Constitution. The District Court of New Union found jurisdiction under 28 U.S.C. § 1331, or federal question jurisdiction. Additionally, other claims were asserted under federal supplemental jurisdiction, 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. § 1291, which creates appellate jurisdiction for final judgment. The district court entered a final judgment that dismissed all parties and all claims; therefore, jurisdiction is proper under § 1291.

STATEMENT OF THE ISSUES

1. The Supreme Court recognizes congressional authority to regulate economic activity that impacts interstate commerce under the United States Constitution's Commerce Clause. Most courts interpret the Commerce Clause as allowing the Endangered Species Act to regulate economic activity affecting the modification or degradation of America's natural resources. Does the Fish and Wildlife Service have the congressional authority under the Commerce Clause to regulate residential development that would eradicate an endangered butterfly?

2. A party's claim is not ripe until a federal regulatory agency reaches a final decision. If a landowner fails to take steps to allow Fish and Wildlife Service to make even an initial decision regarding the land, is the claim ripe?

3. A regulatory takings claim may arise when a regulation deprives land of all economic value. If an owner subdivides his land, but continues to live on all subdivisions after the regulation has become effective, is the relevant parcel for a takings analysis all the land prior to the subdivision?

4. Federal law recognizes a claim for regulatory taking by an owner when all land rights are lost. Here, the owner claims that an owner's rights are

analyzed at the time the regulation affects her ownership. If the regulation ceases in the future, does a take occur.

5. The equal footing doctrine establishes that, upon statehood, the federal government grants the States the right to handle water rights, subject only to the federal government's rights to interstate waterways navigation. The federal government can distribute water rights to individuals in a territory only in certain circumstances. If a State puts public trust rights in underwater land, can a territorial land grant by Congress give away those rights?

6. The Supreme Court has held that a government regulation must deprive land of all economic value before the government must grant a takings claimant compensation without any consideration of the public interest at stake. Is land deprived of all economic value when an organization offers to pay the takings claimant for the privilege to access the claimant's land?

7. When the federal government and any state government interact with one another, the Supreme Court recognizes them as distinct and separate sovereigns each with their own independent interests. Should either form of government be liable for a complete deprivation of the economic value of land when a federal regulation and county regulation coincidentally prevent a takings claimant from constructing a residence on the land?

STATEMENT OF THE CASE

This appeal involves an inverse condemnation suit. Cordelia Lear (Lear) alleges that the federal government, Fish and Wildlife Service (Fish and Wildlife), and the State of New Union, specifically Brittain County, deprived Lear of her land through regulations that prohibit the construction of a personal residence on her land. R. 1.

Fish and Wildlife previously designated the land as a critical habitat for the endangered Karner Blue. R. 5. Therefore, any construction of a residence would violate the Endangered Species Act ("ESA") as a "take" of an endangered species.

See ESA 9(a)(1)(B), 16 U.S.C. 1538(a)(1)(B). 50 C.F.R. § 17.3 (2015) defines a "take" as a "significant habitat modification and degradation where it kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering."

Additionally, Brittain County will not allow Lear to fill the cove surrounding her property under the Brittain County Wetland Preservation Law. R. 7. Brittain County will only grant Lear a fill permit if the fill is for a water-dependent use. *Id.* Lear alleges that these regulations establish a takings claim deserving government compensation. *Id.*

Despite never applying for an Incidental Take Permit ("ITP") set forth in ESA § 10, 16 U.S.C. § 1539(a)(1)(B), Lear filed suit against Fish and Wildlife and Brittain County in February 2014, in the Federal District Court of New Union. *Id.* Lear sought a declaratory judgment that the ESA, on which Fish and Wildlife relies to protect animals, was an unconstitutional exercise of congressional legislative power regarding her land. *Id.* Alternatively, Lear sought compensation from Fish and Wildlife and Brittain County for what she describes as a taking of her land under the Fifth and Fourteenth Amendments. R. 8. The district court held that, although the ESA is constitutional, Lear suffered a taking worthy of compensation. R. 12. Therefore, the district court ordered damages in the amount of 10,000 dollars against Fish and Wildlife and 90,000 dollars against Brittain County. *Id.*

Fish and Wildlife and Brittian County filed a timely appeal with this Court. R. 1. One day later, Lear filed a Notice of Appeal. *Id.* Fish and Wildlife and Brittain

County appeal the finding that Lear's claim is ripe because she never applied for an Incidental Take Permit. *Id.* Additionally, Fish and Wildlife and Brittain County appeal that the proper analysis for a takings claim is the entire Lear Island, and that the future natural destruction of the Karner Blue habitat does not preclude a takings claim. R. 1–2. They also appeal the finding that the surrounding underwater land has no public trust principles inherent in the land. R. 2. Finally, both Fish and Wildlife and Brittian County appeal the findings that the annual offer of 1,000 dollars does not preclude a takings claim for the loss of all economic value; and that the ESA and Brittain County Wetland Preservation Law together amount to a total deprivation of all the economic value of the Heath. *Id.*

Lear and Brittain County appeal the finding that the ESA is a constitutional act and does not violate the Commerce Clause of the constitution. R. 1.

STATEMENT OF FACTS

The United States Fish and Wildlife Service dates to 1871. For nearly 150 years the organization has worked to save wildlife and conserve nature. Fish and Wildlife Services, *Endangered Species*, http://www.fws.gov/endangered (last updated October 20, 2016). Bald eagles, grey wolves, American crocodiles, whooping cranes, blue whales, sea turtles, and seals rest among the many endangered animals Fish and Wildlife has saved through the ESA. *Id.* Since 1992, Fish and Wildlife has attempted to protect the endangered Karner Blue Butterfly. As one such means of protection, Fish and Wildlife designated a portion of Lear Island as a critical habitat for the Karner Blue in 1992. R. 6.

Lear Island is a 1,000-acre island located within Lake Union in the State of New Union. R. 4. In 1803 Congress granted Cornelius Lear fee simple absolute in all of Lear Island and in "all lands under water within a 300-foot radius of the shoreline of said island." *Id.* After the congressional grant, the Lear family occupied Lear Island as one parcel of land, and built a causeway connecting the island to the mainland. R. 5. However, in 1965, King Lear wanted to subdivide Lear Island into three lots in order to gift a lot to each of his daughters Goneril, Regan, and Cordelia. *Id.* The Brittain Town Planning Board approved King Lear's plan to create the following three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot (the acreage figures do not include deed lands underwater). *Id.*

Despite the subdivision, King Lear retained a legal life estate in all three lots when he deeded them in 1965. *Id.* King Lear's occupancy and enjoyment of the entire island did not change following the deeds. *Id.* He continued to occupy his homestead on the Goneril lot. *Id.* He built a home on the Regan lot. *Id.* He also continued mowing the Cordelia Lot each year. *Id.*

The Lear family began annually mowing the Cordelia Lot in 1965. *Id.* The Lear Family refers to the Cordelia Lot as the "Heath." *Id.* The Heath includes an access strip, nine acres of open field, and one acre of marsh. *Id.* Although the soft sands throughout the island would support the growth of blue lupine flowers, the annually cleared Heath enables the flowers to flourish. *Id.* Additionally, the Heath is adjacent to the Goneril Lot, which contains a successional forest that provides

shade for the lupine fields. *Id.* Because Karner Blue thrive in shaded lupine fields, the Heath is an ideal habitat for Karner Blue. R. 6.

The wild blue lupines are necessary for the survival of Karner Blue because the Karner Blue can only eat the leaves of the blue lupine. R. 5. Unfortunately, the Karner Blue struggle migrating to new habitats due to their short flight distance. R. 6. The Karner Blue on Lear Island are the last of the Karner Blue in the State of New Union. R. 5. Some populations exist in other States but not many as evidenced by the Karner Blue's placement on the endangered species list. *Id.* Pursuant to 57 Fed. Reg. 59, 236, (later codified in 50 C.F.R. § 17.11), the Karner Blue was added to the federal endangered species list on December 14, 1992. *Id.*

Despite the ESA designation of the Heath as a critical habitat for Karner Blue, King Lear never deeded additional land of Lear Island to Cordelia Lear (Lear). *Id.* King Lear died in 2005, and the daughters took their respective lots into possession. *Id.* Seven years later, Lear decided that she wanted to a construct a residence on the Heath. *Id.* Lear, aware of the ESA designation, contacted the New Union Fish and Wildlife Services office to determine whether she needed approval before constructing her residence. R.6.

A Fish and Wildlife agent advised Lear that any disturbance to the Heath, other than annual mowing, would constitute a "take" of the endangered Karner Blue. The agent also advised Lear of other options. *Id.* First, the agent told Lear that she could obtain an ITP under section 10 of the ESA. *Id.* In addition to filling out the ITP form, Lear would have to create a habitat conservation plan ("HCP")

and an environmental assessment document under the National Environmental Policy Act. *Id.* The agent indicated that the HCP would need to provide for additional contiguous lupine habitat on an acre-for-acre basis. *Id.* Unfortunately, however, Lear is estranged from her sister, Goneril, who owns the only contiguous land to the Heath; Goneril has also refused to cooperate with any HCP involving her land. *Id.* Additionally, the replacement habitat would have to continue the annual mowing as the Lear family had done since 1965. *Id.* Without the annual mowing, the lupine fields would grow into a successional forest and destroy the Karner Blue habitat within ten years. R. 7.

An environmental consultant suggested that an application for an ITP, including the HCP and environmental assessment document, would cost 150,000 dollars. R. 6.

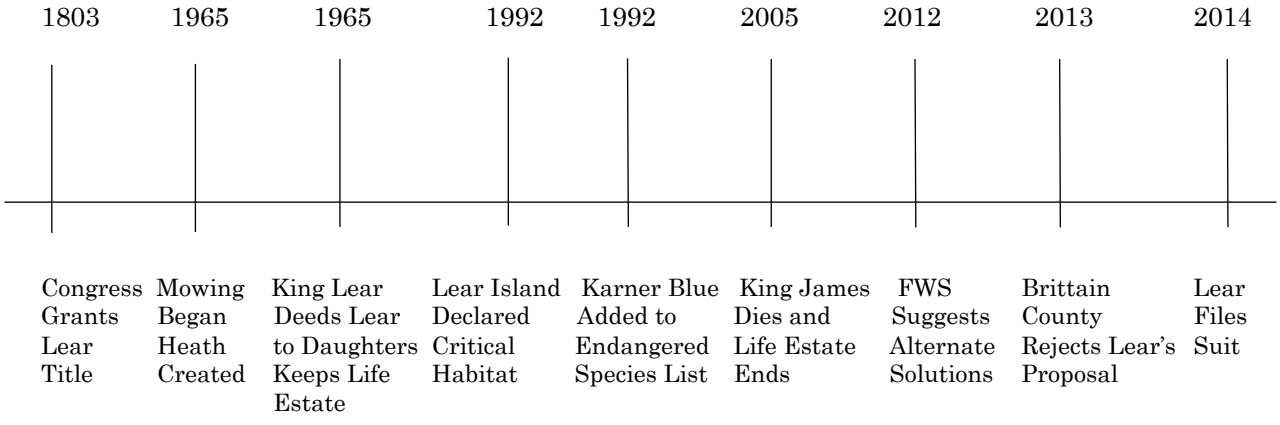
Following Lear's inquiry, Fish and Wildlife sent a letter confirming the options available to Lear. *Id.* However, Lear never applied for the permit, so Fish and Wildlife never officially reviewed her application. R.6–7.

Instead of following the recommended process, Lear pursued an alternative development proposal (ADP) that would allow her to construct a residence without disturbing the lupine field. R. 7. Lear proposed filling in a half-acre of the marsh and building the home on the newly filled area. *Id.* No federal permits would be needed for this ADP because the U.S. Army Corp of Engineers did not consider that water navigable. *Id.*

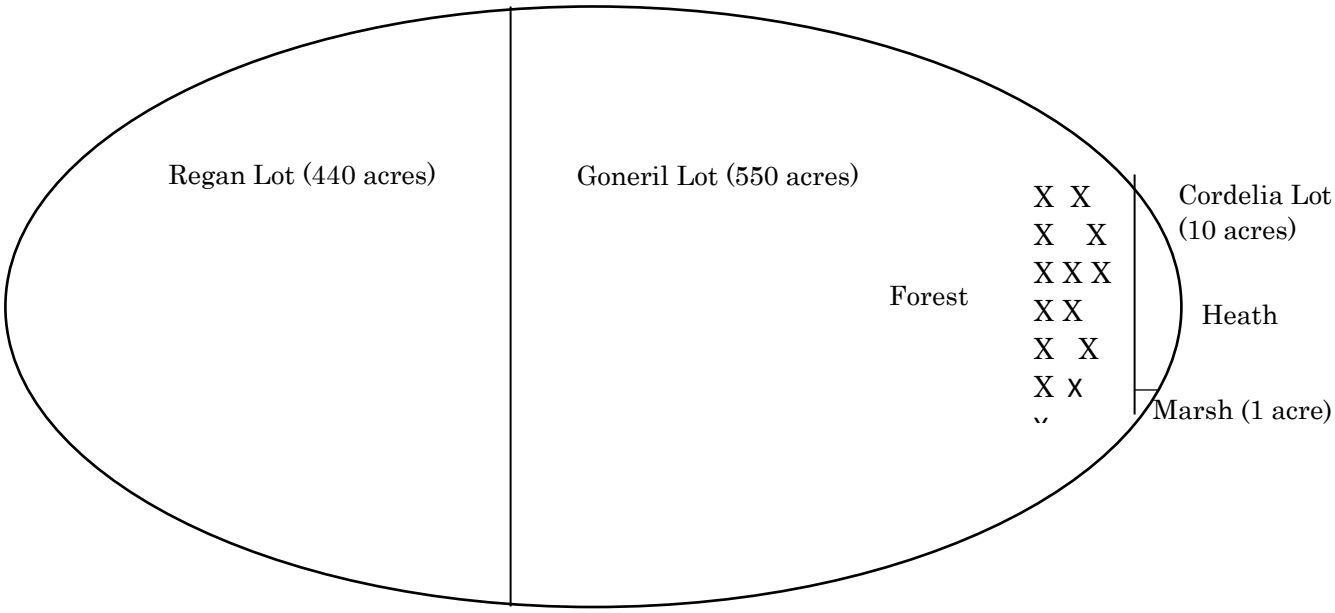
However, Brittain County, rather than the federal government, rejected Lear's ADP. *Id.* Under the Brittain County Wetland Preservation Law, filling in the marsh would require a county permit. *Id.* Unfortunately, however, Brittain County would only issue the permit if the fill was for a water-dependent use. *Id.* Accordingly, the Brittain County Wetlands Board rejected Lear's ADP in August 2013. *Id.*

After the rejection of Lear's ADP, Brittain County Butterfly Society offered to pay Lear 1000 dollars each year for the privilege to access her land and observe the Blue Karner habitat. *Id.* However, Lear rejected the society's offer. *Id.* Additionally, Lear has not had the land reassessed since Brittain County's rejection of her proposal. *Id.* The fair market value of the Heath without the ESA construction prohibition is 100,000 dollars. *Id.* Since filing suit, Lear has still not filed for an Incidental Take Permit application. *See id.*

Timeline



Lear Island Map



SUMMARY OF THE ARGUMENT

Fish and Wildlife, as a federal agency, cannot serve its purpose without the congressional authority to regulate. Fish and Wildlife utilizes the Endangered Species Act to accomplish its goals to protect and preserve the natural resources of the United States. The nation's natural resources benefit not just a single State, nor do they only benefit a single individual. Instead the resources impact every member and future members of this nation's sovereign governments. The commodities produced by natural habitats, the enjoyment derived from fields of butterflies, and the manufacturing of products used to protect or modify natural habitats affect the economy across state lines. The Commerce Clause broadly enables the regulation of economic activities affecting interstate commerce. The Endangered Species Act

serves as a valid exercise of congress' commercial power because the resources have a ripple effect not just on an interstate level but on every State in the nation.

Facing such high stakes, including the extinction of entire species, the federal government rightfully mandates procedures and protocols to balance the interests of the nation against an individual. Absent extraordinary exceptions, the federally mandated steps ensure that a balancing of interests occurs and prevent individuals from bypassing the assessment. At first glance, the procedures may seem unfair from an individual's perspective, but in reality the protocols provide the most impartial analysis of the interests at stake.

Lear determined that the procedures would not produce an outcome in her favor. However, a claim is not ripe until an agency makes a final decision. By choosing to not take even one step mandated by Fish and Wildlife, Lear denied the federal government the opportunity to consider the interests of the nation. The courts have required claims be ripe to avoid the very sidestepping Lear has attempted. Any guess at the outcome made by Lear or the courts is speculative at best, and does not make Lear's claim ripe.

In addition to being ripe, a takings claim needs to be valid. The government recognizes two types of takings claims: physical and regulatory. Lear's claim is a regulatory takings claim as there is no physical intrusion into the land; therefore, for Lear's claim to be valid, the relevant regulation must completely deprive Lear's land of all economic value.

The first step in analyzing a takings claim is to identify the relevant parcel of land in question. In the present case, the relevant parcel of land is the entirety of Lear Island, and not the Heath as a subdivided parcel. The only time that a subdivision of land is relevant for a takings claim is when the landowner has investment expectations in the land. Here, Lear inherited the land without any expectation of investment. Furthermore, recognizing the Heath as the relevant parcel creates unlimited liability for the federal government. All landowners would be able to subdivide their land to create an innumerable amount of takings claims.

In addition to disregarding subdivisions of land in a takings claim analysis, temporal total loss of economic value needs to occur as well. A snapshot of the land value cannot create a takings claim, and courts look towards a period of time when determining total loss of value. To do otherwise would disrupt any regulatory power of the state government as any regulation then causes litigation. A temporary devaluation is just a mere diminution of value and does not constitute a valid takings claim.

Further, Lear cannot fill the surrounding water around her land because a public trust exists under Brittain County. Although the original congressional grant to Lear's family purported to give title in the water surrounding Lear Island, this is a territorial grant. There is a strong presumption that states own the rights to underwater land. The only way to overcome the presumption is to show that the federal government expressly and specifically declared the reservation in water rights for a convincing reason. However, here, the federal government has given an

express reason; therefore, no underwater rights exist for Lear. Additionally, the equal footing doctrine gives States the rights to their navigable waters once achieving statehood, except for navigable tidal interstate rights reserved by the federal government. Although the doctrine originally only applied to tidal waters, the doctrine expanded to include all navigable waters. Thus, Brittain County's wetland preservation law validly prevents Lear from filling in the waterways.

The Brittain County Butterfly Society's offer to pay Lear 1,000 dollars per year for the privilege to access her land to observe the Karner Blue precludes Lear's takings claim based on a total deprivation of the economic value of the land. The society's offer precludes Lear's claim because Lear can obtain an annual 1,000 dollars' worth of economic benefit because of her land's unique Karner Blue habitat. The society's offer suggests that Lear may be able to access an untapped market of New Union. Lear may also negotiate with the society for additional economic benefits.

Fish and Wildlife and Brittain County are not liable for the deprivation of all the economic value of the Heath when either the relevant federal or the county regulation, by itself, does not prohibit the construction of a residence on the Heath. This Court should consider each regulation, the ESA and the Brittain County Wetland Preservation Law, separately in deference to each sovereign's independent interests. This separate consideration corresponds to prior Supreme Court treatment of other instances in which separate sovereign government interests have coincided. For example, the Supreme Court has held that an individual's Fifth

Amendment right against double jeopardy is not violated when two States prosecute the individual for the same crime.

Additionally, joint tort reasoning does not apply to the case at hand. Sovereign governments and tortfeasors affect society differently. For example, tortfeasors only create costs for society by causing individuals harm. On the other hand, sovereign government regulations may create minor costs for landowners but those regulations also create benefits for the common good.

These differences are discernable in the case at hand. Fish and Wildlife and Brittain County have restricted Lear's ability to construct a residence on her land. However, those restrictions have also resulted in the protection of the only Blue Karner in New Union. Accordingly, the federal and New Union governments have demonstrated that their respective regulations can actually produce benefits for society, rather than only causing society harm.

STANDARD OF REVIEW

The District Court of New Union held that the ESA is constitutional and, additionally, a takings claim exists. The issues on appeal present questions of law. This Court reviews questions of law under a *de novo* standard. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Therefore, this Court should review Lear's claims under a *de novo* standard and not defer to any legal findings of the lower court. *Id.*

ARGUMENT

Doing the right thing doesn't always align with what an individual's notion of fairness, but the right path must nevertheless be followed for the sake of a nation.

The United States government has ensured the availability of resources for the nation for over a century. Unavoidably, such protection sometimes interferes with individual's desire for unfettered control of the resources. The Lear island facilitates a habitat for an endangered butterfly species, a resource Fish and Wildlife needs to preserve for the enjoyment of all Americans. Cordelia Lear's intended actions destroy portions, if not all, of that habitat of the endangered Karner Blue for her personal residential development. Fortunately for the United States, Fish and Wildlife follows constitutional, valid procedures that balance an individual's interest against the country's interest before such destruction can occur. Recognition of Lear's claim creates severe burdens on the entire federal systems that are set up to regulate and preserve rights for all Americans to enjoy.

I. Fish and Wildlife Employs a Valid Exercise of Congress' Commercial Power to Protect the Butterflies

A federal government agency, such as Fish and Wildlife, needs congressional authority to regulate. The Commerce Clause of the constitution enables the government to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. Commerce power enables the Endangered Species Act (ESA). Courts have broadly interpreted the commerce clause to enable congress to regulate economic activity affecting more than one State.

The first relevant analysis for the constitutionality of the Endangered Species Act is whether monitoring habitat modification and degradation qualifies as substantially affecting interstate commerce. *United States v. Lopez,* 514 U.S. 549,

559 (1995). The Supreme Court, in declaring the Controlled Substances Act did not violate the Commerce Clause, defines economic activity as any activity involving the production, distribution, and consumption of a commodity. *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005). Modification and degradation of habitats can impact a multitude of resources, which may qualify as commodities. The habitats and the animals and resources within them may all merit the label of a commodities. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). Even if animal does not have present economic value, the act still protects the habitat for future commercial value. *Id.* Likewise, many other federal jurisdictions have upheld the Endangered Species Act as a valid exercise of the congressional authority within the Commerce Clause. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250, 1277 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton,* 326 F.3d 622, 640–41 (5th Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483, 505–06 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1057 (D.C. Cir. 1997).

Additionally, the specific activity on Lear Island that Fish and Wildlife uses the Endangered Species Act to regulate is economic. The proper analysis is the development of the land. The means by which an individual modifies or degrades a habitat may likely involve production, distribution, and consumption. For example, a company attempting to strip mine an area of land for coal affects interstate commerce and the federal government can enact legislation. Cordelia Lear intends

to alter the habitat of the Karner Blue for residential development. Such a process involves producing at least one home, using the home, and likely selling the home eventually. Cordelia's intended residential development of a portion of Lear Island meets all three subcategories of the Court's definition of economic activity.

The next relevant analysis for the constitutionality of the Endangered Species Act is whether the economic activity affects interstate commerce. (include court definition of interstate commerce). The construction of a home itself would involve commerce of multiple States. Acts by Congress can use economic regulation to achieve non-economic ends. *Norton*, 323 F.3d at 1074. Construction incorporates so many parts: dirt, lumber, appliances, labor, flooring, roof shingles, concrete, windows, décor, etc. Almost inevitably some of the materials will be manufactured and transported across State lines. The building process of a home, alone, implicates interstate commerce and gives Congress the authority to regulate.

The fact that the population of Karner Blue is entirely intrastate is not an issue for the court to decide because the statute specifically focuses on the modification and degradation of land. In fact, federal courts state that individual circumstances do no matter when challenging a regulatory statute. *Salazar*, 638 F.3d at 1163. Additionally, intrastate activity is subject to federal law when they have a connection to an identifiable economic activity. *Babbitt*, 130 F.3d at 1049. The Endangered Species Act controls the natural resource of animals, which federal courts state is a viable economic activity. Lear's contention that the butterfly

population is solely intrastate does not matter, as the entirety of the act is the relevant analysis.

Fish and Wildlife aims to protect resources for the benefit of each American in every State. The beneficial reach goes beyond even interstate effect because the preservation of American resources impacts every State. Such modification and degradation of the land will inherently affect interstate commerce to a substantial degree. The broad interpretation allows Fish and Wildlife to utilize the commerce power within the Endangered Species Act to safeguard America's resources. Therefore, Fish and Wildlife's authority extends to the prevention of the destruction of the natural environment of the Karner Blue.

II. Fish and Wildlife's Preservation Efforts Constitute Neither a Taking nor a Ripe Claim

This Court should recognize both that Lear has no claim and that Lear's claim is not ripe. For Lear to have a claim, this Court must recognize that the government has effectively taken Cordelia Lear's land. For Lear to have a ripe claim, this Court must validate Lear sidestepping the procedural process of Fish and Wildlife. The Court must decide whether Lear's has a ripe claim before it will decide the merits of Lear's inverse condemnation claim. If this Court finds that Lear's claim is ripe, it still fails as an inverse condemnation claim as there is no claim for taking. In order for a regulatory takings claim to exist, deprivation of the entire land needs to exist. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002). This includes both the physical limitations on the

land and the temporal limitations on the land. *Id.* In order for this Court to find merit that a taking occurred, Lear cannot have an economic use of her land at anytime or place. Only then can this Court find merit in her inverse condemnation claim.

A. Lear's Prediction of Fish and Wildlife's Prohibition Is Not Enough to Establish a Claim

Before Lear can bring a claim against Fish and Wildlife for a takings claim, Lear must have followed the mandatory procedures. The procedures provide an avenue through which Fish and Wildlife can balance an individual's land interests against the national resource interests. If these procedures are not followed, then animals are exposed to the actions and the discretion of an eager landowner.

The procedure involves three steps: apply for an Incidental Take Permit, develop a habitat conservation plan, and include an environmental assessment document. The three steps provide the opportunity for Fish and Wildlife to balance and assess the individual interests and the nation's interests. Until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the land at issue, no ripe claim exists. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). Lear denied that opportunity to Fish and Wildlife because she took none of the three steps, not even filling out the initial Incidental Take Permit form. Additionally, Fish and Wildlife reached no final decision because Lear never submitted even the initial application for an Incidental Take Permit.

An exception to the process does exist if Lear shows that following the procedures would have proved futile. The Court in *Palazzo v. Rhode Island* stated that "federal ripeness rules do not require the submission of further and futile applications with other agencies." *Palazzo v. Rhode Island*, 533 U.S. 606, 626 (2001). Lear's case distinguishes from Palazzo because Palazzo had in fact submitted some proposals whereas Lear has submitted none to Fish and Wildlife. *Id.* at 611. Further, Fish and Wildlife did not express that it would deny Lear's permit, so futility does not describe Lear's situation. The government did not declare a policy of denying the very sort of permit the claimant would need before the claimant even applied for the permit. Instead, Fish and Wildlife suggested avenues for Lear to take for approval.

Additionally, Fish and Wildlife provided alternatives for Lear to follow to enable her desired residential development. The alternatives provided were not impossible to accomplish. Fish and Wildlife would allow residential developments in other portions of the island. When Fish and Wildlife declared the Heath a critical habitat, King Lear had a life estate in the entire island. The critical habitat made up only ten acres of a 1000 acre island in the possession and control of King James. Using other portions of the island existed as a viable alternative. Any futility that existed resulted from Lear's own doing, not actions of Fish and Wildlife. The reason that Lear argues her application for an Incidental Take Permit is futile is due to her estranged relationship with her sister, not because of any government policy. The

estranged relationship prevents Lear from using a small portion of contingent Goneril Lot.

Further, relying on one environmental consultant's estimate of the cost of obtaining a permit does not allow Lear to sidestep the prescribed process. Applying for a permit is not futile even if the cost of applying for a permit exceeds the fair market value of the land in question. The Court should not put a price on ripeness. Obtaining a permit would allow Lear to construct a residence on her land without violating the Endangered Species Act. Presumably, her land would appreciate overtime becoming more valuable. Plus, nothing prevents Lear from selling her land in exchange for its fair market value to someone willing to abide by the permit process.

As another exception, government policy also allows relief outside of an Incidental Take Permit if the procedure creates an extraordinary delay. *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004). Lear did not suffer from an extraordinary delay. Fish and Wildlife offered no information that the process would take longer than normal for Lear. Additionally, Lear offered no evidence of emergency need for residential development. In fact, Lear provided no evidence that the tract of land ever constituted her primary residence or her only land. Any delay that exists results from Lear never filing an application with Fish and Wildlife and pursuing other options.

Neither the futility exception nor the burdensome delay exception apply to enable Lear to abandon the procedural process. Without providing Fish and Wildlife

the opportunity to balance the interests, Lear nor the courts should be able to predict that Fish and Wildlife would have denied her application. Recognizing a cost based exception will allow future individuals to buy ripeness. Allowing Lear to point to a bad relationship with a neighbor as the basis of the futility exception would indicate the Court's deference to an individual's discretion above a federal agency's final decision.

B. Fish and Wildlife Must Deprive the Heath of All Economic Benefit Before a Takings Claim Exists

Even if this Court determines that Lear's claim is ripe, Lear still needs to establish that a takings claim exists. Lear asserts that a take occurred, so compensation is required under an inverse condemnation claim. *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 340 (1987). Generally, the land rights of citizens are protected by the takings clause of the Fifth Amendment of the constitution. U.S. CONST. amend. V. However, there are generally two types of takings claims: physical and regulatory. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). A physical takings claim occurs when the government intrudes onto private land and proceeds to occupy the private land. *Id.* Federal courts state that even the smallest physical intrusion into private land demands a payment. *Lorelto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). (Where the federal government took part of an apartment rooftop to place cable TV lines for tenants). Additionally, a physical taking requires compensation even for a temporary use. *United States v. Gen. Motors Corp.*, 323 U.S. 373

(1945). However, the Fish and Wildlife Department never physically entered the land in question, so a physical taking never took place.

Federal courts recognize an additional type of takings claim when governmental regulation places burden on the land and restricts the landowner's ability to use his or her land in certain ways. *Block v. Hirsch*, 256 U.S. 135 (1921) (Restrictions on landowners from evicting tenants refusing to pay a higher wage). Courts are more unwilling to allow takings claim to proceed in a regulatory taking. Courts require that the total bundle of rights be taken, and hold that merely the destruction of one of the rights does not constitute a take. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1986). This standard set by the courts state that compensation is due for a regulatory taking only when the regulation deprives an owner of all economically beneficial uses of the land. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002). Therefore, for the Court to find a takings claim survives, Lear must prove that a total economic loss of her land exits.

i. The Takings Analysis Applies to the Entirety of Lear Island Due to the Combined Usage of the Land by One Owner and Strong Federal Policies for Not Allowing Partial Regulatory Takings Claim.

To qualify as a federal taking, the government must deprive or take a significant right of your entire land. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002). Unlike some State regulations, federal laws do not recognize claims for a partial regulatory taking. *Id* at 327. Therefore, the parameter of the land determines whether Lear may bring a claim for a take.

The proper parameters of the land that this Court needs to analyze is the entire deed given to the Lear family (the entire island featured in the map included above).

To establish the parameters of the Lear land, this Court should look to the historical treatment of the island by the landowners and by the government. The government established the Karner Blue's habitat in 1992. As part of the explanation for the thriving of the butterflies in the area, Fish and Wildlife recognized the tree shade provided by Goneril's tract combine with the open heath on Cordelia's tract to create the habitat. The declaration indicates that Fish and Wildlife did not view Cordelia's tract as separate and distinct.

Additionally, King Lear subdivided and deeded the land in 1965, but King Lear treated the entire island as though remained all his land. For forty more years after the assignment to his daughters, he retained a life estate in the entire island. He used of the entire island. He lived on the entire island. The Supreme Court rejected the argument that combined land rights are severable into separate units for a taking claim. *Id.* King Lear was still alive when the entire Cordelia subdivision became subject to regulation. To allow compensation for a partial regulatory take burdens federal regulation and administration schemes. That ruling would allow for any infringement on land rights to create potential litigation and compensation. A landowner could divide land into subdivisions and file a takings claim for that subdivision. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Therefore,

the King Lear's use of the land after Fish and Wildlife's critical habitat recognition, in 1992, of Cordelia's lot makes the proper unit of analysis the entire island.

Lear attempts to argue that a formal subdivision of land is allowable, so regulation the Heath constitutes a take. In some cases federal courts have used a single lot to determine that a regulatory take occurred. *Loveladies Harbor Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). The court in *Loveladies* stated that the appropriate land for a taking claim analysis was the smaller tract at dispute instead of the entire developable tract. *Id.* However, the court states that tract used for a takings analysis differs depending on factual circumstances. *Id.* First, the court in *Loveladies*, land came into possession by the owner through an investment and had investor backed expectations that the regulation did not permit. *Id.* at 1178. However, in the present case, Lear did not invest in the land. Instead, Lear received it as a gift from family, not as a commercial or personal investment. Secondly, the court looked at the timing of the transfers compared to the timing of the regulatory environment, and pointed out that Loveladies subdivided the land after regulation had begun. *Id.* at 1181. In contrast, Lear never attempted to develop the land until after Fish and Wildlife regulated the land. Additionally, she never even fully possessed the land until after the regulation took effect. Therefore, *Loveladies* does not apply to the present case.

Instead, by applying the commonly used flexible approach, the proper parcel for analysis is the entirety of Lear island. Federal courts state that it is a factual determination when deciding what parcel controls the taking analysis. *Deltona*

Corp. v United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981). The Supreme Court stated that a taking claim analysis does not involve dividing the parcel into discrete segments to see if there is total economic loss. *Penn Cent. Transp. Co. v. City of N.Y.C.*, 438 U.S. 104 (1978). Rather, the analysis looks at the nature of the action and its interference with rights of the whole parcel. *Id.* In *Deltona*, a landowner became aware of some lots of land they were acquiring possibly could be subject to future regulation. *Deltona Corp.*, 657 F.2d at 1192. when the anticipated regulation then occurred, the court then stated that the entire land owned served as the relevant parcel for the takings analysis. *Id.* As a result of the analysis, the court decided only mere diminution of value occurred, and no claim for taking existed. *Id.* Much like the plaintiff in *Deltona,* King Lear was likely aware of the relevant regulations during his ownership and possession. Similarly, Cordelia Lear knew of the regulation as evidenced by her inquiry with Fish and Wildlife. Therefore, this Court should not allow for Lear to say that their parcel the taking claim.

This Court should not ignore the consequences of recognizing Cordelia's tract as separate from the entire Lear island for the taking analysis. Such a recognition opens the door to allow land owners to subdivide land to have a small portion qualify as a governmental regulatory taking. The shift should not fall on Fish and Wildlife in its efforts to preserve resources, but rather on individuals to prevent seeming unfairness. The Fish and Wildlife declared the tract a critical habitat and the Karner Blue were placed on the endangered species list while King Lear held all the land. The Leers could have prevented Cordelia from ending up with only the

environmentally protected portion of the island, and ameliorated any perceived unfairness. Therefore, the proper analysis for taking is the entirety of Lear island. To decide otherwise would incentivize landowners to split their land to benefit from any potential federal regulation.

ii. In Order for a Regulatory Takings Claim to Exist, the Proper Analysis Is Over a Period of Time

Even if Lear prevails to convince the Court that only the Heath is the relevant parcel for a takings claim analysis, the Court still needs to look at the temporal nature of the claim. Regulatory taking implies permanency. With mowing, vegetation growth will naturally destroy the Karner Blue's habitat. Thus, within ten years or less the construction restriction on the Heath can cease. As an importantly held federal doctrine, a takings claim is not a snapshot of the economic value at the time the regulation first is in place, but in its entirety. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 330,332 (2002). By looking at the entirety of time, there is no takings claim. Lear by simply not mowing would remove the restriction and restore full economic value to the land. Therefore, no permanent regulatory take of the land occurred, and no claim exists.

If the Court deviates from the precedent favoring permanency, a potentially enormous financial burden shifts to Fish and Wildlife and the federal government. The burden would involve compensation for even temporary protection of our nation's resources. To avoid such a result, the Court should not recognize a regulatory take without total, permanent economic loss no matter a seemingly unfair result of a regulation. Therefore, the fact that the timeframe for the

regulation to disappear is ten years should matter. Allowing a takings claim for a ten-year regulation, will severely compromise the government's ability to regulate and administer laws. As one example of the Court leaning toward this view, the Court held that a zoning law prohibiting commercial development on certain parcels of land does not constitute a federal take. *Penn Cent. Transp. Co. v. City of N.Y.C.*, 438 U.S. 104 (1978). A contrary ruling by this Court that Lear's takings claim exists, could open liability for zoning laws and other temporary regulations to constitute a take as well. Such a court ruling would hamper not only the execution of the Endangered Species Act, but also hinder other forms of government regulation and administration. Therefore, the temporary nature of Lear's claim should not allow Lear to pursue a claim for a take. The Court should rightfully acknowledge it as a mere diminution of value and not total economic loss.

III. Congress Did Not Validly Grant Express Title in the Underwater Land, and the Equal Footing Doctrine Creates a Public Trust in the Land

Lear is also attempting to fill in the waterway she argues is granted to her from the 1803 initial conveyance to her family. This lease stated that title included "all lands under water within a 300-foot radius of the shoreline of said island" by an Act of Congress granting land in the Northwest Territory. That territory later became the State of New Union. Brittain County wetland law, however, states that the underwater land belongs to the public and cannot be filled. Brittain County argues no compensation claim exists as there is no title to the waterway. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). The initial conveyance to Lear was not valid because the equal footing doctrine applies, and an act of Congress

granting land in New Union did not have title in the water in 1803. Therefore, Lear's attempt to fill in the waterway fails under a public trust.

Lear argues an act of Congress purported to deliver title to underwater non-tidal land in the Northwest territory. Although the Supreme Court stated that Congress does possess the power to distribute land in the territories, the Court noted several limitations on Congressional power. *Shivley v. Bowlby*, 152 U.S. 1, 57 (1894). Additionally, there is a strong presumption for the State's water rights. *United States v. Alaska,* 521 U.S. 1, 34 (1997). To defeat the presumption, the federal government's transfer of title must be definitively declared or made very plain. *Id.* The reason for the presumption is that although Congress can convey rights to territorial land, Congress prefers to leave the decisions for water rights to the State once it reaches statehood. *Shivley,* 521 U.S. at 34. Congress only gives underwater territorial land to an individual for foreign commerce, exigent circumstances, or other public purposes. *Id.* Lear's transaction by an act of Congress makes no note of a foreign commerce deal or exigent circumstances. Additionally, there was no public purpose for the nation in the transaction, for example creating a national oil reserve. Instead, this is simply a transfer of rights to a private party and therefore fails to meet the presumption for State title in water.

Additionally, although the United States may not have recognized public water rights to non-tidal waters prior to 1810, the relevant time frame to determine water rights is at the time of statehood. *PPL Mont., LLC v. Mont.*, 565 U.S. 576, 589 (2012). The relevant time is when the State achieved statehood granting the State

absolute authority under the equal footing doctrine.

Although the original thirteen States differed in how the courts dealt with private ownership of water rights, States quickly shifted to the State holding ownership in the land under tidal, navigable waters. *Id.* at 590. The Supreme Court later upheld this doctrine and created the doctrine of equal footing, holding that the Constitution grants the States all water rights not given to the Federal Government. *Martin v. Lessee of Waddell*, 41 U.S. 367, 411 (1842). The rights reserved to the federal government include the right to navigable interstate waterways. *Id.*

The equal footing doctrine later extended to States beyond the original thirteen because all states are presumed equal in power. *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Additionally, the Supreme Court departed from English law and held that public trust principles apply to non-tidal navigable waterways. *Id.* Therefore, the doctrine provides States the discretion to grant water rights however they see fit, subject to the United States control of interstate navigable waters. *PLL Mont., LLC*, 565 U.S. at 591. The fact that Brittain County is unable to point to any New Union precedent for rights to underwater land should not matter. The equal footing doctrine allows for any State admitted to gain water rights to any lands in their state boundaries.

Finally, there is a long-standing policy of States having rights to navigable underwater waterway lands. This Court should recognize the lack of a federal transfer of underwater land, the application of the equal footing doctrine, and the

existence of a public trust. A court ruling otherwise creates great danger to our waterways and wetlands. It would allow for more individuals to harm the natural environment simply by having a deed purport to grant water rights. Therefore, this Court should make clear that Lear does not own the land right and, accordingly, that the land cannot be filled without a county permit.

IV. Brittain County Butterfly Society's Offer to Pay 1,000 Dollars Yearly Precludes Lear's Takings Claim for Complete Deprivation of Economic Value.

Brittain County Butterfly Society's offer to pay Lear 1000 dollars per year for permission to periodically view the Heath habitat precludes Lear's takings claim for total deprivation of economic value. The society's offer precludes Lear's takings claim for total deprivation of economic value because Lear could gain at least 1000 dollars worth of economic value per year by accepting the society's offer.

As previously mentioned, regulatory action that deprives land of all economic value categorically entitles a landowner to compensation without any further examination into the public interest at stake. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Although this standard may be simple to understand, it actually burdens landowners significantly because they must show that the regulatory action has forced them to sacrifice *all* economic uses of their land. *Id.* at 1019.

Lear failed to show that her compliance with the ESA has forced her to sacrifice all economic uses of the Heath. Instead, Lear actually showed that the ESA forged her an economic opportunity that may surpass any other ESA prohibited

economic use. Due to the ESA's designation of the Heath as a critical habitat for the Karner Blue, and the Lear family's preservation of the Heath by annual mowing, Lear possesses sole ownership of the only Karner Blue habitat in all of New Union. Lear may take advantage of her unique ownership by accepting the Brittain County Butterfly Society's offer and expanding upon that commercial relationship in the near future. Lear may also negotiate with the society and obtain other economic benefits that would better suit her taste. However, this Court should not deem the Heath void of all economic value due to Lear's failure to take advantage of an economic venture.

Lear's unique ownership not only opened the door to an untapped part of the New Union market, but her ownership also satisfies the needs of the common good by preserving an endangered species protected under the ESA. If this court were to rule in Lear's favor, New Union's only population of Karner Blue would be eliminated, therefore, robbing enjoyment by future generations. Additionally, landowners could choose to not exploit the economic opportunities surrounding their land merely because of the landowner's dislike of those economic opportunities. This court should avoid creating an incentive for landowners to rely on government compensation when their land can produce economic benefit in the midst government regulation.

V. The Court Should Consider the ESA and the Brittain County Wetlands Preservation Law Separately When Determining the Takings Liability of Fish and Wildlife and Brittain County.

When determining whether Fish and Wildlife and Brittain County are liable for a complete deprivation of the economic value of the Heath, the ESA and the Brittain County Wetlands Preservation Law must be considered separately. Each regulation, respectively, comes from a distinct and separate sovereign: the United States federal government and the New Union state government. Accordingly, each government's interests and the consequences of those interests must be considered independently in order to maintain sovereign integrity. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985).

The logic behind the dual sovereignty doctrine should be applied to the case at hand. The dual sovereignty doctrine holds that the Double Jeopardy Clause will not be violated if separate sovereign governments prosecute an individual for the same offense. *Id.* An individual's double jeopardy rights would not be violated because "[each sovereign government] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'" *Id.* at 89–90.

Likewise, Fish and Wildlife and Brittain County should be given similar deference regarding their land regulations. Just as separate sovereigns may subject an individual to multiple criminal prosecutions without violating the Double Jeopardy Clause, separate sovereigns should be able to subject an individual to

their own land regulations without having to provide compensation if those regulations, considered separately, do not deprive land of all economic value. *See id.* After all, the dual sovereignty doctrine requires that courts consider sovereign governments' prosecutorial interests separately when determining whether or not the Double Jeopardy Clause has been violated. *See id.* Accordingly, this Court should consider the federal and New Union governments' land regulatory interests separately.

Furthermore, because the ESA does not prevent Lear from filling the cove and constructing a residence on the filled area, Fish and Wildlife did not deprive the Heath of all economic value. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). Likewise, because the county regulation does not prevent Lear from constructing a residence on the Karner Blue habitat, Brittain County did not deprive the Heath of all economic value. *See id.* Therefore, neither Fish and Wildlife nor Brittain County is liable for a complete deprivation of the Heath's economic value due to their coinciding regulations.

Additionally, Lear's proposition that Fish and Wildlife and Brittain County should be jointly and severally liable for any taking of the Heath is unwarranted because such a proposition fails to recognize the differences between tortfeasors and sovereign governments.

Whether intentionally or not, tortfeasors bring harm to society and its people. In response, state tort law aims to compensate victims and deter tortfeasors. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). On the other hand, unlike

tortfeasors, sovereign governments strive to benefit society through their regulations. Such regulations may affect the economic value of an individual's land, but that cost is generally offset by some benefit. As in the case at hand, the protection of an endangered species of butterfly has offset the ESA's construction prohibition on Lear's land. In other words, the ESA has created a benefit for society to look to when reflecting on the restrictions posed against Lear's land. On the contrary, however, tortfeasors create only costs through their wrongful conduct.

By applying joint tort logic to the case at hand, this Court would be equating sovereign governments to tortfeasors. Despite the occasionally warranted hard feelings toward the federal and state governments, comparing these governments to tortfeasors wholly disregards the good that governments create. Accordingly, this Court should not apply reasoning that ignores the benefits sovereign governments create through their land regulations.

CONCLUSION

The Court should consider the consequences of expanding the burden placed on the federal agencies entrusted with protection of America's natural resources. As Teddy Roosevelt once said:

> Of all the questions which can come before this nation, short of the actual preservation of its existence in a great war, there is none which compares in importance with the great central task of leaving this land even a better land for our descendants than it is for us.

The Fish and Wildlife Service exists as one such agency of protection, which aims to carry out that mission for the people of the United States. For the aforementioned reasons this Court should affirm the constitutionality of the

Endangered Species Act. Additionally, this Court should reverse the United States District Court for the District of New Union's recognition of Lear's regulatory takings claim and subsequent money judgment against Fish and Wildlife