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TWENTY-NINTH ANNUAL
JEFFREY G. MILLER
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

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at Pace University

2017 Bench Memorandum*

I. REGULATORY AND FACTUAL FRAMEWORK.

A. PARTIES.

Cordelia Lear (Cordelia or **Lear**[1]**)** is an individual living on Lear Island, which is located in Brittain County in the State of New Union. She is the daughter of King James Lear and the sister of Goneril Lear and Regan Lear. She is also the descendent of Cornelius Lear, who received Lear Island via congressional grant in 1803. Upon her father's death in 2005, she came into possession of an undeveloped 10-acre lot on Lear Island called the "Cordelia Lot" or "the Heath." Cordelia proposes to construct a home on her lot, but the vast majority of the Heath has been designated a critical habitat for the Karner Blue Butterfly, an endangered species.

The United States Fish and Wildlife Service (FWS) is a federal agency within the U.S. Department of the Interior responsible for enforcing and administering federal wildlife laws, including the Endangered Species Act. Its mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.

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* Please note that the Table of Contents has been omitted.

1. All references to "Lear" are to Cordelia. Other members of the Lear family will be referred to by their first names or full names.

Brittain County, New Union is a local government in the State of New Union. The Brittain County Wetlands Board has permitting authority regarding wetlands in Brittain County, New Union. One of the Brittain County Wetlands Board's regulations limits permits to fill wetlands to situations where the wetland would be filled for a water-dependent use. Another rule conclusively establishes that a residential home site was not a water-dependent use.

B. OVERVIEW OF APPLICABLE LEGAL AUTHORITY.

Generally speaking, this case involves two claims: First, that the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, is not a valid exercise of congressional power under the Commerce Clause in article I, section 8, clause 3. Second, that the ESA and the Brittain County Wetlands Preservation Law[2] together deprive the Cordelia Lot of all economic value, resulting in a regulatory taking without just compensation. *See* U.S. CONST. amend. V; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The second claim contains a number of sub-issues, which will be explained in greater detail in part V below.

While the issues are constitutional challenges that do not turn on a direct application of the ESA, the ESA certainly impacts the outcome of those claims and so understanding how it underlies the litigation may be helpful. Enacted in 1973 and amended in 1978, 1982, and 1988,[3] the ESA "is a commitment by the American people to work together to protect and restore those species that are most at risk of extinction." EARTHJUSTICE, CITIZENS' GUIDE TO

2. Specific text of the Brittain County Wetlands Preservation Law has not been provided to the competitors. Three important components of the Wetlands Preservation Law can be divined from the facts, however: (1) that a permit is required to fill wetlands falling under its jurisdiction; (2) no permit can be issued where the wetland would be filled for a non-water-dependent use; and (3) constructing a residential home is not a water-dependent use.

As a final point, the district court mentioned in a footnote that the Constitution of the State of New Union does not have something comparable to a Just Compensation Clause and that New Union does not have statutes creating a just compensation schema.

3. An earlier version also existed: The Endangered Species Preservation Act was passed in 1966 and was amended in 1969 as the Endangered Species Conservation Act.

THE ENDANGERED SPECIES ACT 4 (2003).[4] The ESA begins with a congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." ESA § 2(a)(1), 16 U.S.C. § 1531(a)(1).

Under the ESA, the FWS is directed to "determine whether any species is an endangered species or threatened species." *Id.* § 4(a)(1), 16 U.S.C. § 1533(a)(1). This process is called "listing," and the listed species are compiled at 50 C.F.R. § 17.11 (2015). "The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature." ESA § 3(16), 16 U.S.C. § 1532(16). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 3(6), 16 U.S.C. § 1532(6).[5] Once the FWS has listed a species as endangered, it must designate a critical habitat for the species. *Id.* § 4(a)(3)(A), 16 U.S.C. § 1533(a)(3)(A).[6] The Karner Blue Butterfly was listed as endangered in 1992. 50 C.F.R. § 17.11 (2015); 57 Fed. Reg. 59,236 (Dec. 14, 1992).

Section 9 of the ESA prohibits the "take of any species within the United States" if the species has been listed pursuant to ESA § 4, 16 U.S.C. § 1533, *see* ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c)(1). "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." ESA § 2(19), 16 U.S.C. § 1532(19). "Harm in the definition of "take" in the [ESA] means 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. "Harass in the definition of 'take' in the [ESA] means

4. This document is available at: http://earthustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf.

5. A "threatened species" is one "which is likely to become an endangered species within the foreseeable future through all or a significant portion of its range." ESA § 3(20), 16 U.S.C. § 1532(20).

6. The FWS shall designate a critical habitat concurrently with the determination that the species is endangered or threatened. ESA § 4(b)(6)(B), 16 U.S.C. § 1533(b)(6)(B).

an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." *Id.*

ESA section 10 allows the Secretary of the Interior to "permit, under such terms and conditions as he shall prescribe . . . any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.22. This permit is called an "incidental take permit (ITP)." No ITP shall be issued, however, unless the applicant submits a habitat conservation plan (HCP). *See* ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A) (requiring ITP applicant to submit a "conservation plan"); *see also* 50 C.F.R. § 17.3 ("Conservation plans also are known as 'habitat conservation plans' or 'HCPs.'").[7]

Finally, ESA section 11 provides not only for civil penalties, but criminal prosecution as well. ESA § 11(a)–(b), 16 U.S.C. § 1540(a)–(b). "Any person who knowingly violates any provision of this chapter . . . shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both." *Id.* § 11(b), 16 U.S.C. § 1540(b).

The Commerce Clause[8] gives Congress the power "to regulate commerce . . . among the several states." U.S. CONST., art. I, § 8, cl. 3. Generally speaking, this grant of legislative power was fairly narrow in the 19th century, but was substantially expanded by a series of Supreme Court opinions in the 1930s. Following the Supreme Court's opinion in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), courts undeviatingly upheld congressional enactments until a pair of cases in the 1990s signaled a shift back in the opposite direction, *see United States v. Morrison*, 529 U.S. 598, 617 (2000); *United States v. Lopez*, 514 U.S. 549, (1995). Since those cases, courts remain generally deferential to Congress's exercise of the

7. For more information about HCPs and the ESA, see FWS, Habitat Conservation Plans under the Endangered Species Act (2011), https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf.

8. Both the Commerce Clause and the Fifth Amendment have generated substantial bodies of case law. This section is meant only to provide a brief introduction to and overview of those provisions. The case law, including case law for the relevant sub-issues, will be discussed in greater detail in parts IV and V below.

Commerce power, but have been more skeptical of its reach than in the last half-century.

The Fifth Amendment to the United States Constitution provides, inter alia, "nor shall private property be taken for public use, without just compensation."[9] It applies not only to physical takings and condemnations, but regulatory takings as well. *See First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304, 316 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922). Most takings claims involve a balancing of policy interests and ad hoc, fact-intensive inquiries. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). However, some categorical rules do exist: pertinent to the instant case, when a government regulation totally deprives a property owner of all economic value of their property, a taking has occurred and the government must pay the property owner just compensation. *Lucas*, 505 U.S. at 1015.

List of Applicable Rules of Law:

- U.S. CONST., Art. I, § 8, cl. 3
- U.S. CONST., Art. I, § 8, cl. 18
- U.S. CONST., Art. IV, § 3, cl. 2
- U.S. CONST., Amend. V
- U.S. CONST., Amend. X
- U.S. CONST., Amend. XIV
- Endangered Species Act § 2, 16 U.S.C. § 1531 (2012)
- Endangered Species Act § 3, 16 U.S.C. § 1532 (2012)
- Endangered Species Act § 4, 16 U.S.C. § 1533 (2012)
- Endangered Species Act § 9, 16 U.S.C. § 1538 (2012)
- Endangered Species Act § 10, 16 U.S.C. § 1539 (2012)
- Endangered Species Act § 11, 16 U.S.C. § 1540 (2012)
- 50 C.F.R. § 17.3 (2016)
- 50 C.F.R. § 17.11 (2016)
- 50 C.F.R. § 17.21 (2016)
- 50 C.F.R. § 17.22 (2016)

9. The Takings Clause of the Fifth Amendment has been incorporated against the states through the Fourteenth Amendment's Due Process Clause. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

Non-Binding Agency Guidelines:

- U.S. FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING HANDBOOK[10]

C. SUMMARY OF FACTS AND PROCEDURE.

The undisputed facts established by the district court are as follows:[11]

1. Lear Island is a 1,000-acre island in Lake Union, which is a large interstate lake that has been traditionally used for interstate navigation. Lear Island was granted to Cornelius Lear in 1803 by an Act of Congress, when present-day New Union was part of the Northwest Territory. The 1803 grant included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline," as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland.

2. Cornelius Lear and his descendants have occupied Lear Island since the 1803 grant, using the island as a homestead, farm, and hunting and fishing grounds. The original homestead is still located close to the north end of the island, near the strait that separates the island from the mainland. When Lear Island was a farm in the 19th century, produce was carried by boat from the island to the mainland. In the early 20th century, the Lears constructed a causeway connecting the island to the mainland by road.

3. In 1965, King James Lear owned the entirety of the 1803 Lear Island grant. As part of an estate plan, King James divided

10. Available at https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html.

11. Although this factual summary contains all pertinent facts and procedure as developed by the opinion of the district court in the course of a seven-day bench trial, it is condensed. Judges and brief graders should also review the Problem.

Additionally, the district court opinion in the Problem used numbered paragraphs to represent discrete factual findings following the bench trial. *See* Fed. R. Civ. P. 52. For the ease of judges and brief graders, this factual summary remains faithful paragraph numbering in the Problem. Citations to the Problem will generally be to the page

Lear Island into three parcels, one for each of his daughters Goneril, Regan, and Cordelia. The Brittain Town Planning Board approved the subdivision of the property into three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot.[12] At the time of the subdivision, the Town Planning Board determined that each lot could be developed with at least one single-family residence. King James then deeded each of the lots, respectively, to his three daughters, reserving a life estate in each lot for himself. He continued to live in the homestead, located on the Goneril Lot.

4. King James Lear died in 2005, and each of the three daughters came into possession of their deeded lots. In 2012, Plaintiff Cordelia Lear decided to build a residence on her lot.

5. The Cordelia Lot is situated at the northern tip of Lear Island. The lot consists of an access strip that is 40 feet wide by 1,000 feet long, and an open field that comprises the remaining nine acres of uplands. In addition, there is about one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing.

6. The 9-acre open field and access strip has been kept open by annual mowing in October by the Lear Family for several decades. The family has referred to the Cordelia Lot as "The Heath" because it was kept open, unlike the rest of the island, which naturally became wooded after agricultural use of the island ceased in 1965.

7. The Heath and the access strip are covered with wild blue lupine flowers, which thrive in the sandy soil of Lear Island. Fields of wild blue lupines are essential for the survival of Karner Blue larvae, which can only feed on the leaves of blue lupine plants. The ideal habitat for the Karner Blues consists of partially shaded lupine flowers near successional forests.

8. The Karner Blue is an endangered species. 50 C.F.R. § 17.11 (2015). It was added to the federal endangered species list on December 14, 1992. 57 Fed. Reg. 59,236 (Dec. 14, 1992).

9. Although populations of Karner Blues survive in other states, the only remaining population of the butterfly in New Union lives on the Heath on Lear Island. Karner Blues do not migrate. Instead, eggs are laid in the fall, overwinter, and hatch in

12. The acreage figures do not include deeded lands underwater.

the spring. A second brood hatches in the summer. Karner Blue larvae remain attached to lupine plant foliage until they emerge from chrysalis as butterflies, and any disturbance of the lupines during the larval and chrysalis stages would result in the death of the butterflies. Karner Blue populations have difficulty migrating to new habitats as their flight distance is short, and they must follow woodland edge corridors. The New Union subpopulation of Karner Blue is entirely intrastate and does not travel across any State boundaries.

10. The Heath was designated by the FWS as critical habitat for the New Union subpopulation of the Karner Blues in 1992.

11. In April 2012, Cordelia Lear contacted the New Union FWS field office to inquire whether development of her property would require any permits or approvals because of the existence of the endangered butterfly population. FWS agent L.E. Pidopter advised her that any disturbance of the lupine habitat in the Heath other than continued annual mowing would constitute a "take" of the endangered butterfly. Pidopter also advised Lear that it was possible to obtain an Incidental Take Permit ("ITP") under ESA § 10, but in order to file an application for such a permit, Lear would have to develop a habitat conservation plan ("HCP") for the Karner Blues and an environmental assessment document under the National Environmental Policy Act. Pidopter advised Ms. Lear that in order to be approvable, an HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip. Pidopter also advised that an approvable HCP would require a commitment to maintain the remaining lupine fields through annual fall mowing.

12. The only land that is contiguous to the Heath is the Goneril Lot. Cordelia is estranged from her sister, and Goneril has refused to cooperate in any HCP that involves restrictions on her property.

13. Lear investigated the cost of preparing the required HCP for the Karner Blues, and was advised by an environmental consultant that preparation of an application for an ITP, including the required HCP and environmental assessment documents, would cost $150,000.

14. Following Cordelia Lear's inquiry to the FWS, the FWS New Union field office sent Cordelia Lear a letter on May 15, 2012 confirming that her entire ten-acre property was a critical habitat

for the Karner Blues and that any disturbance to the lupine fields other than annual October mowing would constitute a "take" of the Karner Blues in violation of ESA § 9. The letter invited Lear to submit an ITP application and referred her to the FWS's Habitat Conservation Planning Handbook for information on how to develop an acceptable HCP to submit with an ITP application. The FWS letter reiterated that an acceptable HCP would require, at a minimum, that all acreage of lupine field disturbed by development would have to be replaced with contiguous acreage, and that Lear would have to commit to maintain the remaining and newly created lupine fields by annual mowing each October.

15. Without annual mowing, the lupine fields on the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees, eliminating the Karner Blues' habitat. This process would take about ten years. After ten years, this natural ecological process would result in the extinction of the New Union subpopulation of the Karner Blues, unless a replacement habitat was created within a one-thousand-foot radius of the existing fields.

16. Rather than pursue an ITP application with the FWS, Plaintiff developed an alternative development proposal ("ADP") that would not disturb the lupine fields. In the ADP, Lear proposed to fill one half-acre of the marsh in the cove to create a lupine-free building site, together with a causeway for access from the shared mainland causeway without disturbing the access strip. As the Army Corps of Engineers considers this portion of Lake Union to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899, and because construction of residential dwellings involving one half-acre or less of fill is authorized by Army Corps of Engineers Nationwide Permit 29, *see Issuance of Nationwide Permit for Single-Family Housing*, 60 Fed. Reg. 38,650 (July 27, 1995), no federal approvals would be needed for the ADP.

17. The ADP required a permit to fill the cove marsh, pursuant to the Brittain County Wetlands Preservation Law, which was enacted in 1982. In August 2013, Lear duly filed a permit application with the Brittain County Wetlands Board. The permit was denied in December 2013, on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site was not a water-dependent use.

18. The fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family house

on the lot is $100,000. Property taxes on the Cordelia Lot are $1,500 annually. There is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land. Lear has not sought reassessment of her property following the denial of the permit under the Brittain County Wetland Preservation Law. The Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season, but she rejected the Society's offer.

19. Plaintiff then commenced this action in February 2014, seeking a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively, seeking just compensation from FWS and Brittain County for a regulatory taking of her property.

On June 1, 2016, the District Court for the District of New Union entered judgment following a seven-day bench trial. The court determined that the ESA is a legitimate exercise of congressional power under the Commerce Clause, as applied to a wholly intrastate population of Karner Blue Butterfly. Next, the district court determined that the combined effect of the ESA and the Brittain County Wetlands Preservation Law totally deprived the Cordelia Lot of all economic value, resulting in a taking under *Lucas*. In making this second determination, the district court also determined that Lear's claim was ripe notwithstanding the fact that Lear did not apply for an ITP; that the relevant parcel of land for Lear's takings claim was the Cordelia Lot, not the entirety of Lear Island; that the fact that the Cordelia Lot could become developable in 10 years if the Karner Blue habitat was destroyed naturally through successional afforestation and non-mowing did not defeat Lear's takings claim; that the Brittain County Butterfly Society's offer to pay $1,000 annually in rent for wildlife viewing did not preclude Lear's takings claim based on a total deprivation of economic value; and that the public trust doctrine does not inhere in Lear's title and does not preclude Lear's takings claim. Accordingly, the district court awarded Lear $90,000 in damages against Brittain County and $10,000 in damages against FWS.

FWS, Lear, and Brittain County all filed timely notices of appeal filed to the United States Court of Appeals for the Twelfth

Circuit. FWS and Brittain County filed Notices of Appeal on June 9, 2016, and Lear filed a Notice of Appeal on June 10, 2016. The Twelfth Circuit has already decided that it has jurisdiction of this appeal.[13]

II. ISSUES.

- Whether the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?
    - On appeal, **Lear** and **Brittain County** will argue the ESA is not a valid exercise of the Commerce power.
    - On appeal, **FWS** will argue the ESA is a valid use of Congress's Commerce power because the relevant activity is constructing a house, which is plainly economic activity with the potential in aggregate of a substantial effect on interstate commerce.

13. Generally speaking, a statute governing claims against the United States—called the "Tucker Act"—places original jurisdiction of a claim for damages against the United States in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1). There is a corollary statute, however—the "Little Tucker Act"—that permits other district courts to have jurisdiction of claims against the United States if the claim is for less than $10,000. *See id.* § 1346(a)(2). One way a plaintiff may avoid the Court of Federal Claims, should they desire to do so, is to waive damages against the United States in excess of $10,000. *See Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987); *Shaw v. Gwatney*, 795 F.2d 1351, 1356 (8th Cir. 1986); *Goble v. Marsh*, 684 F.2d 12, 15 (D.C. Cir. 1982). In such a case, the Federal Circuit may have appellate jurisdiction under some circumstances, although courts of appeal have been reluctant to give up jurisdiction of a case. *See* 28 U.S.C. § 1295; *Chabal*, 822 F.2d at 353.

Here, Lear waived damages in excess of $10,000 against the FWS and United States, but did not waive damages in excess of that amount against Brittain County. Accordingly, district court jurisdiction was proper. Further, applying considerations in Chabal, the Twelfth Circuit likely has jurisdiction as well. **However, to avoid an issue of which court of appeals has jurisdiction to hear this case, competitors were directed to assume the Twelfth Circuit had already determined that it, and not the Court of Appeals for the Federal Circuit, has jurisdiction of this matter. It is therefore expected that neither district court jurisdiction nor appellate court jurisdiction should be an issue that is either briefed or argued.**

- Whether Lear's takings claim against FWS ripe without having applied for an ITP under ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B)?
    - On appeal, **FWS** and **Brittain County** argue Lear's claim is not ripe since she did not apply for an ITP.
    - On appeal, **Lear** will argue her claim is ripe even though she did not apply for an ITP.
- Whether, for Lear's takings claim, the relevant parcel is the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?
    - On appeal, **FWS** and **Brittain County** argue the entire island is the relevant parcel.
    - On appeal, **Lear** argues the Cordelia Lot is.
- Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?
    - On appeal, **FWS** and **Brittain County** argue the butterfly habitat's natural destruction in the future precludes Lear's takings claim.
    - On appeal, **Lear** argues it does not.
- Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?
    - On appeal, **FWS** and **Brittain County** argue public trust principles preclude Lear's takings claim.
    - On appeal, **Lear** argues they do not.
- Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?
    - On appeal, **Lear** argues that even though the regulations would not individually amount to a taking

under *Lucas*, the ESA and the Brittain County Wetlands Preservation Law together completely deprive the Cordelia Lot of all economic value.
    - On appeal, **FWS** and **Brittain County** argue that the ESA and the Brittain County Wetlands Preservation Law must be considered separately and thus do not completely deprive the Cordelia Lot of all economic value.

- Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?
    - On appeal, **FWS** and **Brittain County** argue it does.
    - On appeal, **Lear** argues it does not.

III. STANDARD OF REVIEW.

United States courts of appeal "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.[14] Generally speaking, where the district court has made factual findings following a bench trial, an appellate court will not set those findings aside unless they are "clearly erroneous." Fed. R. Civ. P. 52(a)(6); *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004). In contrast, a district court's conclusions of law are reviewed de novo. *Chandler v. City of Dallas*, 958 F.2d 85, 89 (5th Cir. 1992). A district court's application of law to fact is also reviewed de novo. *See Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998).

IV. COMMERCE CLAUSE:

Is the ESA a valid exercise of the Commerce power?

In the district court, **Lear** sought a declaration that the ESA is not a constitutional exercise of Congress's Commerce power when applied to a wholly intrastate population of an endangered species. **Brittain County** agreed with Lear in the district court.

14. See note 13, *supra*.

FWS resisted, arguing that the ESA substantially affects interstate commerce, particularly in situations like the present one, where commercial activity—constructing a residence; developing land; hiring contractors; and purchasing materials—threatens an endangered species. The district court agreed. The ESA is probably a constitutional exercise of the Commerce power, but Lear and Brittain County have several strong arguments.

Article I, section 8, clause 3 of the United States Constitution gives Congress the power "to regulate commerce . . . among the several states." Generally speaking, the Commerce power permits regulation of the instrumentalities and channels of interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1, 16–17 (2005). Additionally, and pertinent to this case, the Commerce power also extends to wholly intrastate activities that have a "close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Even intrastate activities that would have a trivial effect, let alone a substantial effect, on interstate commerce may be regulated if their effect on interstate commerce, in the aggregate, would be substantial. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

However, the Supreme Court clarified in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), that the activity must still be economic in nature. In *Lopez*, the Court struck down the Gun-Free School Zones Act (GFSZA), which made possession of a firearm within a certain distance of a school. *See* 514 U.S. at 561. In *Morrison*, the Court struck down the Violence Against Women Act, which made certain gender-motivated acts of violence a federal crime. *See* 529 U.S. at 617. *Morrison* synthesized four factors considered in *Lopez*:

- First, the GFSZA, which *Lopez* struck down, was "'a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.'" *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 561).
- Second, the GFSZA "contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.'" *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).

- Third, neither the GFSZA "'nor its legislative history contain express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" *Id.* at 612 (quoting *Lopez*, 514 U.S. at 562).
- Fourth, "*Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 612.

The *Lopez* and *Morrison* Courts both clarified that the second and third factors—a jurisdictional element in the statute and findings regarding the effects on interstate commerce of the regulated activity—are not absolute requirements, but instead are factors to be considered as part of the whole inquiry.

Initially, **FWS** will likely argue that nearly every court to consider whether the ESA is constitutional under the Commerce Clause has concluded ESA is constitutional. *See, e.g.*, *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 Investments, 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).[15] These cases uphold the ESA as applied to some strikingly local species: for example, the Fifth Circuit upheld the ESA in the context of "six species of subterranean invertebrates found only within two counties in Texas." *GDF Realty*, 326 F.3d at 624. The Eleventh Circuit rejected a challenge to the ESA's protection of the "Alabama sturgeon[, which] is a purely intrastate species with little, if any, commercial value, as evidenced by the fact that there have been no reported commercial harvests of the fish in more than a century." *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1271. *National Ass'n of Home Builders* affirmed the constitutionality of the ESA

15. **FWS** may also argue that the ESA has been before the Supreme Court several times, and the Court has never questioned its constitutionality. *See Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *TVA v. Hill*, 437 U.S. 153 (1978). Lear and Brittain County can respond that judicial minimalism is precisely a goal that the Court should strive for; so it would be inappropriate to rely on that consideration here. *But see Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1272 (considering the fact that the Supreme Court has not mentioned the constitutionality of the ESA in other cases).

with respect to a fly that lived in an 8-mile radius in California. *See* 130 F.3d at 1043. Moreover, most of these cases were decided after *Lopez* and *Morrison*. *Alabama-Tombigbee Rivers Coalition*, for example, included a thorough discussion of *Lopez* and *Morrison*. *See* 477 F.3d at 1271–72. *San Luis & Delta-Mendota Water Authority* explicitly recognized that *Lopez* and *Morrison* set forth the controlling test for whether a statute is a constitutional exercise of the Commerce power. *See* 638 F.3d at 1174.

In contrast, **Lear** and **Brittain County** will argue that none of those cases are binding on the Twelfth Circuit and that *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.* (*PETPO*), 57 F. Supp. 3d 1337, 1344–46 (D. Utah 2014), which held the ESA could not constitutionally be applied to takes of Utah prairie dogs, is more persuasive. The *PETPO* court reasoned an ESA rule regarding the take of Utah prairie dogs was unconstitutional because it did not regulate an economic activity. *Id.* at 1344. Like the Karner Blue, they will argue, the effect of the Utah Prairie dog on interstate commerce was attenuated; that the ESA affected commerce by frustrating agricultural or commercial development was not relevant to the Commerce Clause inquiry—whether a take of an intrastate endangered species like the Utah prairie dog was. *Id.* "In other words, the question in the present case is whether take of the Utah prairie dog has a substantial effect on interstate commerce, not whether the regulation preventing the take has such an effect." *Id.* **FWS** will reply that *PETPO* is a singular outlier, but **Brittain County** and **Lear** can also point to a dissent written by then-Circuit Judge John Roberts in a denial of a petition for rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (per curiam). Like the *PETPO* court, Judge Roberts argued that the central inquiry is not whether the <u>regulation</u> substantially impacts interstate commerce, but whether the <u>regulated activity</u> does. *Id.* at 1160 (Roberts, J., dissenting). Viewing the ESA in the proper light, they will argue, its constitutionality is in serious doubt.

FWS should counter that the Court's recent Commerce Clause jurisprudence has language suggesting that the dispositive issue is whether the regulation itself bears a significant relationship to interstate commerce. *See Lopez*, 514 U.S. at 558 ("'[W]here *a general regulatory statute bears a substantial relation to com-*

merce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (Quoting *Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968))). In addition, *Raich* stressed that Congress has the "power to regulate purely local activities that are part of an economic "*class of activities*" that have a substantial effect on interstate commerce." 545 U.S. at 17 (quoting *Perez v. United States*, 402 U.S. 146, 151 (1971)) (emphasis added). *Raich* elaborated on this formulation: "That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme." *Id.* at 22. Moreover, the Court emphasized that it need not determine whether regulated "activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* **Lear** and **Brittain County** can maintain that those are the very cases limiting the Commerce power, and, more importantly, *Raich* upheld the regulation at issue—a criminal prohibition on the possession of marijuana—precisely because a market, albeit an illegal one, existed.

FWS will stress that "economic activity must be understood in broad terms." *Gibbs*, 214 F.3d at 491. Consequently, FWS will likely argue that even if the relevant activity is not a plainly commercial activity like constructing a residence, biodiversity is itself an inherently valuable commercial resource worth protecting. *See id.* at 496–97. More to the point, biodiversity and the loss of biodiversity have serious economic impacts. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1053–54 ("In the aggregate . . . we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce."). Under this formulation, FWS can argue that the ESA can be justified vis-à-vis the regulated activity of taking an intrastate endangered species. **Lear** and **Brittain County** can respond that, as with frustrating commercial or agricultural development, the effect on commerce of taking an intrastate endangered species is attenuated. As the *PETPO* court and a dissent in *National Ass'n of Home Builders* reasoned, "'the Commerce Clause empowers Congress "to regulate commerce" not "ecosystems."'" *See PETPO*, 57 F. Supp. 3d at 1344 (quoting *Nat'l Ass'n of Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting). Further, as with the education system in *Lopez*, if regulations can be justified by the

impact of regulated activities on biodiversity, there may be no limit to the Commerce Clause's reach. *PETPO*, 57 F. Supp. 3d at 1344–45; *Lopez*, 514 U.S. at 565–66.

As a related argument, **FWS** may argue that the ESA as applied to Karner Blues can be justified because of possible future effects on interstate commerce by Karner Blues. *See Gibbs*, 214 F.3d at 496–97; *Nat'l Ass'n of Home Builders*, 130 F.3d at 1054; *Palila v. Hawaii Dep't of Land and Nat. Resources*, 471 F. Supp. 985 (D. Haw.1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). In fact, legislative history of the ESA recognizes that because extinction is a one-way street, extinction can have a serious future effect on commerce:

> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R. Rep. No. 93-412, at 4–5 (1973). Similarly, the Senate Report to a precursor the ESA stated: "Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years." S. Rep. No. 91-526, at 3 (1969). **Lear** and **Brittain County** can reply that since *Lopez* and *Morrison*, not only did *PETPO* reject this argument, but so did the Fifth Circuit in a case in which it otherwise affirmed the constitutionality of the ESA. *See GDF Realty*, 326 F.3d at 638 ("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."). They will stress that the attenuation of the link between the regulated activity and its impact on interstate commerce matters, perhaps more than the other factors, *see Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 562, and the connection between a wholly intrastate subpopulation of an insect species (with no commercial value other than a miniscule amount to be paid in rent for wildlife viewing) and imagined future impacts on interstate commerce is simply too tenuous.

Turning to other factors identified in *Morrison*, **FWS** should point out that section 2 of the ESA speaks in direct terms about the relationship between the ESA and commerce. *See* ESA § 2(a)(1), 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."). In addition, the ESA does not just prohibit takes in a general sense, but also specifically forbids the importation, shipment, delivery, sale, or offer for sale of endangered species in interstate or foreign commerce. *See id.* § 9(a)(1)(A),(D),(E),(F), 16 U.S.C. § 1538(a)(1)(A),(D),(E),(F). These are not only economic activities, they appear to be limited in some circumstances to interstate commerce. *See id.* Further, the FWS should point out that there is in fact some evidence in the record regarding the economic impact of these Karner Blues; the Brittain County Butterfly Society has offered to pay Lear $1,000 annually as rent for wildlife viewing. *See Gibbs*, 214 F.3d at 492–93 (discussing red wolf-related tourism). **Lear** and **Brittain County** will likely respond to the last point by pointing that isolated tourism is not tantamount to a substantial effect on interstate commerce. *See PETPO*, 57 F. Supp. 3d at 1344. They should also point out that section 11 of the ESA allows for criminal prosecution, ESA § 11(b), 16 U.S.C. § 1540(b), and that there are no express congressional findings regarding the impact of Karner Blues on interstate commerce, *see PETPO*, 57 F. Supp. 3d at 1344. **FWS** should reply, however, that the Supreme Court has certainly upheld criminal statutes from Commerce Clause challenges. *Raich*, 545 U.S. at 29.

Lear and **Brittain County** may analogize this case to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159, 172–74 (2001). Like this case, *SWANCC* dealt with the reach of an environmental regulation—the Army Corps of Engineers' Migratory Bird Rule regarding the jurisdictional reach of the Clean Water Act for dredge and fill permitting purposes—after *Lopez* and *Morrison*. The Supreme Court explained that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Here, **Brittain County** and **Lear** can argue that the case for the constitutionality of the Migratory Bird Rule is stronger than applying the ESA to the intrastate population of Karner Blues: the birds in *SWANCC* actually travelled across state lines, whereas the Karner Blues in this case do not; and "millions of people spend billions of dollars annually on recreational pursuits relating to migratory birds," whereas the Brittain County Butterfly Society has offered to pay only $1,000 per year as rent for viewing the Karner Blues. Furthermore, while the ESA take provision may mention interstate commerce in some cases, *see* ESA § 9(a)(1)(E)–(F), 16 U.S.C. § 1538(a)(1)(E)–(F), it does not in the general take provision, *see id.* § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B).

However, **FWS** can make arguments to distinguish *SWANCC*: First, since *SWANCC* was ultimately not decided on constitutional grounds but administrative procedure grounds—the court held that the Migratory Bird Rule exceeded statutory authority under the Clean Water Act—and since Lear did not bring her claim under the Administrative Procedure Act, *SWANCC* is inapposite. Second, the Supreme Court rejected an Administrative Procedure Act challenge to a broad interpretation of the definition of "harm" in ESA section 9 that includes "significant habitat modification or degradation that actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995). More importantly, however, FWS can point out that the Clean Water Act's findings do not mention commerce, *see* Clean Water Act § 101, 33 U.S.C. § 1251, but the ESA's findings do. *See* ESA § 2(a)(1), 16 U.S.C. § 1532(a)(1).

FWS may also argue that the ESA need not only be found constitutional because it substantially affects interstate commerce—the endangered species themselves can be viewed as "channels" of interstate commerce like goods. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1046–48. In this regard, Congress may regulate intrastate takes of endangered species to "aid the prohibitions in the ESA on transporting and selling endangered species in interstate commerce." *Id.* at 1047; *see also United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1996) (rejecting a post-*Lopez* challenge to statute

criminalizing the possession of machine guns "because [the statute] is 'an attempt to prohibit the interstate transportation of a commodity through the channels of commerce'" (quoting *Lopez*, 514 U.S. at 559)). Additionally, the ESA can be justified as a part of "'the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses.'" *Nat'l Ass'n of Home Builders*, 130 F.3d at 1048 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964)). **Lear** can reply that more recent cases have not adopted this position, apparently resisting the idea that the endangered species are goods to be transported or sold interstate commerce. *See Gibbs*, 214 F.3d at 491. Further, the *Heart of Atlanta* rationale may in fact be more appropriately considered as related to Congress's power to regulate activities that have a substantial effect on interstate commerce. *See Rancho Viejo*, 323 F.3d at 1076 n.19 ("[T]he Court has repeatedly referred to *Heart of Atlanta* . . . as also falling within the third category—the regulation of activities having a substantial relation to interstate commerce." (Citing *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 559)).

Finally, the parties may make two other constitutional arguments that are not reflected in the district court opinion. First, **FWS** may argue that even if the ESA exceeds congressional authority under the Commerce Clause, it is nevertheless constitutional under the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," including the Commerce Clause. U.S. CONST., art. I, § 8, cl. 18; *see Raich*, 545 U.S. at 22. FWS's argument will be that the ESA is constitutional with regard to the commercial activities it regulates, and that failing to regulate takes of endangered species that may not be for commercial purposes would substantially undermine the ESA's effectiveness elsewhere. *See Raich*, 545 U.S. at 28 ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity."). Indeed, *Raich* identified the prohibition of takes of bald eagles as an example of constitutional uses of the Commerce power when it said: "Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 26 &

n.36 (citing 16 U.S.C. § 668(a)). Notably, section 668(a) prohibits, inter alia, the "take" of any bald eagle. **Lear** and **Brittain County** will reply that *PETPO* is more persuasive: there is a national market for bald eagle feathers, but, as with Utah prairie dogs, there is no national market for Karner Blue Butterflies. *See PETPO*, 57 F. Supp. 3d at 1346. Lear and Brittain County can also argue that taking Karner Blues, even to the point of extinction, would not significantly affect the viability of any of predator of the Karner Blues that is regulated under the ESA. *See id.*

Second, **Brittain County** may argue that the ESA unduly intrudes upon the State authority protected by the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 156–57 (1992). **Lear** may also make a Tenth Amendment argument: under *Bond v. United States*, 564 U.S. 211, 225–26 (2011), a private person—and not just a State—may assert violations of the Tenth Amendment. Under this line of argument, management and conservation of a wholly intrastate subpopulation of a species for which there is no interstate market is a matter that should be regarded as within the sphere of state sovereignty. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 384–87 (1978). Alternatively, Brittain County can argue that if the ESA regulates land clearing and residential construction (as FWS asserts), it intrudes on state power. *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power."). By intruding on these spheres, the ESA violates the Tenth Amendment. **FWS** can reply that this is simply stating the inverse of Brittain County's and Lear's general Commerce Clause arguments: the Supreme Court has said that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941); *see also New York*, 505 U.S. at 156. Even recent opinions that have been more solicitous of the Tenth Amendment appear to suggest the Tenth Amendment is something of an equivalent check on congressional power. *See Bond*, 564 U.S. at 225 ("Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." (Citation omitted.)). In other words, FWS

would reply that while Brittain County may use the Tenth Amendment to mount a different rhetorical attack, it does not substantively alter the court's analysis. *See id.* at 226 ("Whether the Tenth Amendment is regarded as simply a 'truism,' or whether it has independent force of its own, the result here is the same." (Citation omitted.)).

V. TAKINGS CLAUSE:

Do the ESA and Brittain County Wetlands Preservation Law combine to deprive the Cordelia lot of all economic value?

In the district court, **Lear** argued that the ESA, together with the Brittain County Wetlands Preservation Law, totally deprived the Cordelia Lot of all economic value, resulting in a taking under the Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). **FWS** and **Brittain County** resisted, arguing that neither the ESA nor the Wetlands Preservation Law totally deprived the Cordelia Lot of all economic value. Additionally, they raised a number of arguments they believed precluded Lear's takings claim. The district court rejected their arguments.

The Fifth Amendment to the United States Constitution provides, inter alia, "nor shall private property be taken for public use, without just compensation."[16] In general, the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While this provision creates the power of condemnation, it

16. The Takings Clause of the Fifth Amendment has been incorporated against the states through the Fourteenth Amendment's Due Process Clause. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).
Additionally, the Fifth Amendment's prohibition on taking property for the public use without paying just compensation has been called both the "Just Compensation Clause," and the "Takings Clause." *Compare Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 175 (1985) ("Just Compensation Clause"), *with E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) ("Takings Clause"); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n. 1 (2002) (recognizing the connection between the two terms). This Bench Memo uses the term "Takings Clause" and refers to Lear's claim as a "takings claim." However, where a title or quoted text uses the term "Just Compensation Clause," this Bench Memo will not alter it.

has also been interpreted to prohibit "regulatory takings." *See First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304, 316 (1987); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–16 (1922). "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal*, 260 U.S. at 415. The Supreme Court has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'" *Lucas,* 505 U.S. at 1015 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Yet, some categorical rules do exist: pertinent to the instant case, when a government regulation totally deprives a property owner of all economic value of their property, a taking has occurred and the government must pay the property owner just compensation. *Id.*

At the outset, it bears noting that the Problem states that Lear "**does not advance a claim for a partial regulatory taking** based on the principles of *Penn Central*. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 317–18 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000), *aff'd* 535 U.S. 302." Problem at 8 n.3. In the *Tahoe-Sierra* cases, the Ninth Circuit noted the plaintiff not only did not advance a partial regulatory taking claim under *Penn Central*, they "stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." *Tahoe-Sierra*, 216 F.3d at 773. The Supreme Court commented that the "express[] disavow[al]" of *Penn Central* foreclosed the plaintiffs' recovery. *Tahoe-Sierra*, 535 U.S. at 334.

While the various arguments raised by FWS and Brittain County would each preclude a claim of a categorical taking under *Lucas*, it is possible that Lear *could* recover under *Penn Central* even if any of the FWS and Brittain County defenses prevail. *Cf. Tahoe-Sierra*, 535 U.S. at 334 ("[I]f petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."). Furthermore, the Problem arguably leaves ambiguous whether Lear waived a *Penn Central* claim since it only says that she "does not advance a claim for a partial regulatory taking," but does not say anything regarding an express disavowal of such a claim. To be sure, failure to make an argument

in the district court generally results in waiver of that argument, subject to exceptions not applicable here. *See Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1191 (9th Cir. 2009) ("Ordinarily, an appellate court will not hear an issue raised for the first time on appeal." (Internal quotation omitted)). Nonetheless, it is important to recognize that some competitors may choose to make arguments under *Penn Central*, but this Bench Memo will not address a partial takings analysis under *Penn Central*.

Returning to Lear's challenge as actually made in the district court: Lear's takings claim turns on six sub-issues: First, whether Lear's takings claim is ripe; second, whether the relevant parcel is the Cordelia Lot or all of Lear Island; third, whether possible future developability precludes Lear's takings claim; fourth, whether the public trust doctrine precludes Lear's takings claim; fifth, whether the ESA and Brittain County Wetlands Preservation Law can be combined to effect a *Lucas* taking of all economic value when neither regulation, acting alone, would completely deprive the Cordelia Lot of all economic value; and sixth, whether the option to receive some small residual value from the Brittain County Butterfly Society defeats Lear's claim that her property has been deprived of all economic value. From a big picture standpoint, if Lear loses any of these arguments, her takings claim based on a total and permanent deprivation of all economic value likely fails.

A. RIPENESS: Is Lear's takings claim ripe even though she didn't apply for an ITP?

Initially, **FWS** (and **Brittain County**) will argue that Lear's takings claim is not ripe since she did not apply for an ITP prior to filing suit. **Lear** will respond that while she didn't apply for an ITP, the process would have been futile and the cost associated with obtaining the permit exceeds the fair market value of the property in question.

"The general rule is that a claim for a regulatory taking 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985)); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349 (Fed. Cir. 2002) ("[A]bsent denial of the permit, only an

extraordinary delay in the permitting process can give rise to a compensable taking."); *cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) ("A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense . . . ."). "Evaluating whether the regulations effect a taking requires knowing to a reasonable degree of certainty what limitations the agency will, pursuant to regulations, place on the property." *Morris*, 392 F.3d at 1376.

It is undisputed that **Lear** did not complete the formal process for applying for an incidental take permit. However, **Lear** can argue that not only did make an inquiry to the FWS, the FWS sent her a letter reiterating FWS Agent L.E. Pidopter's position that she must submit an HCP that would, at a minimum, provide additional contiguous lupine habitat on an acre-for-acre basis. Yet, **FWS** and **Brittain County** will reply that the inquiry is not tantamount to a determination under the FWS's rules, since Chapter 3 of the Habitat Conservation Planning Handbook[17] contemplates "pre-application coordination and HCP development." Even actual applications that are not completed because of an inability to reach agreement with the agency do not ripen takings claims. *See Howard W. Heck & Assoc. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998). Further, the May 15, 2012 letter was not like a permit denial, but rather a cease and desist letter. A cease and desist letter, like an injunction, is not tantamount to a permit denial. *See Riverside Bayview Homes*, 474 U.S. at 126 (injunction); *Boise Cascade Corp.*, 296 F.3d at 1346 (injunction); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800–01 (Fed. Cir. 1993) (cease and desist order). In other words, the FWS letter was an "'assertion of regulatory jurisdiction,'" which has been held insufficient to ripen a claim for a taking. *See Boise Cascade Corp.*, 296 F.3d at 1346 (quoting *Riverside Bayview Homes*, 474 U.S. at 126). "The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

17. Available at https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html.

However, **Lear** will argue that either of two exceptions save her claim. First, if resort to the administrative process would be futile, a takings claim plaintiff need not pursue it. *See Freeman v. United States*, 124 Fed. Cl. 1, 6 (2015). Second, pursuit of a permit is also unnecessary if a plaintiff can establish that "the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996).[18] Whether Lear's takings claim is ripe thus turns on these exceptions.

First, **Lear** will argue that the application process would have been futile. FWS Agent L.E. Pidopter had informed Lear that her ITP application would have to be accompanied by an HCP, *see* ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A), and that any HCP would necessarily require additional contiguous lupine habitat on an acre-for-acre basis. The only contiguous land is the Goneril Lot, and Goneril, who is estranged from Cordelia, has refused to participate in any HCP that requires restrictions on her land. Moreover, whatever the technical requirements of the futility exception, Lear will argue that she meets the spirit of the rule: "The reason for this exception is that in such circumstances, no uncertainty remains regarding the impact of the regulation, certainty being the basis for the ripeness requirement." *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999) (citation omitted). Consequently, **Lear** will argue that denial was inevitable, *see Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991), and further administrative process could not "reasonably result in a more definite statement of the impact of the regulation." *See Morris*, 392 F.3d at 1376; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 625–26 (2001) (noting that when an agency "makes clear the extent of development permitted . . . federal ripeness rules do not require the submission of further and futile applications with other agencies").

18. Although no party addressed the issue before the district court, Lear's takings claim against Brittain County is also probably ripe. The Problem indicated that the Constitution of the State of New Union does not include a just compensation clause nor do the State of New Union's statutes provide a procedure for seeking just compensation. Problem at 9 n.5. The Supreme Court has suggested that an absence of state-level just compensation procedures would ripen a federal claim for an unconstitutional taking without just compensation against a state entity. *See Williamson Cnty.*, 473 U.S. at 194.

FWS and **Brittain County** will respond that "[t]he futility exception does not alter an owner's obligation to file one meaningful development proposal." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990). The Federal Circuit has explained "the futility exception simply serves 'to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Heck & Assoc.*, 134 F.3d at 1472 (quoting *S. Pac. Transp. Co.*, 922 F.2d at 504). "The failure to follow all applicable administrative procedures can only be excused in the limited circumstance in which the administrative entity has no discretion regarding the regulation's applicability and its only option is enforcement." *Greenbrier*, 193 F.3d at 1359. Even if Pidopter is correct about the FWS would likely require, they will argue, unless that result is compelled by law and the FWS lacks discretion, then Lear's claim is not made ripe by the futility exception. Indeed, *Morris* was a takings case involving ITPs and the ESA, and the Federal Circuit rejected a claim that the application process was futile, reasoning in part that cooperation and discretion were built in to the ITP process. 392 F.3d at 1377.

Second, **Lear** will argue that since the cost of the HCP exceeds the fair market value of the lot, the ITP application process is altogether confiscatory. In other words, if the cost of applying for an ITP is so high that it totally outweighs the economic value of the property, there is little difference between a regulation that completely prohibits economically valuable use of property and one that makes economically valuable use impossible because applying for the permit is too costly relative to the property. *See Gilbert*, 932 F.2d at 61 n.12; *Lakewood Assoc. v. United States*, 45 Fed. Cl. 320, 333 (1999); *Hage*, 35 Fed. Cl. at 164; *Stearns Co. v. United States*, 34 Fed. Cl. 264, 272 (1995). "Indeed, a regulatory program which puts a landowner to the Hobson's choice of spending good money after bad in the remote hope of obtaining final administrative action or losing the right to assert a claim guaranteed by the Fifth Amendment may well be a regulatory program gone far afield." *Moore v. United States*, 943 F. Supp. 603, 613 (E.D. Va. 1991). **FWS** and **Brittain County** will counter that this argument was rejected in *Morris*. *See* 392 F.3d at 1377–78. "The cost of an ITP application is unknowable until the agency has had some meaningful opportunity to exercise its discretion to assist in the

process." *Id.* at 1377. Moreover, in subsequent cases, the Court of Federal Claims has emphasized that the *Hage* requires not just economic futility, but that the procedure itself be unreasonable. *See Robbins v. United States*, 40 Fed. Cl. 381, 388 (1998). The ITP application process, including the submission of an HCP, is reasonable, they will contend, and the rule announced in *Hage* and *Stearns* does not apply.

B. RELEVANT PARCEL: Should the district court have considered all 1,000 acres of Lear Island as a whole or just the 10 acres of the Cordelia Lot?

If Lear's takings claim is ripe, then the court must determine what the relevant parcel of property is for the purposes of Lear's *Lucas* takings claim. **FWS** and **Brittain County** will argue that the relevant parcel is Lear Island as a whole since Cordelia Lear did not come into possession of the Cordelia Lot until 2005, following her father's passing. In contrast, **Lear** will argue that the relevant parcel is just the Cordelia Lot. The *Penn Central* Court explained that

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

438 U.S. at 130–31. In the context of a *Lucas* taking claim, "the question of whether there has been a partial or total loss of economic use . . . depends on what is the specific property that was affected by the permit denial." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (Fed. Cir. 1994), *abrogated on other grounds by Palazzolo*, 533 U.S. 606, *as recognized in Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1369–70 (Fed. Cir. 2004). This inquiry "is often expressed in the form of a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered." *Walcek v. United States*, 49 Fed. Cl. 248, 258 (2001). Therefore, "one of the critical questions is determining how to define the unit of property 'whose value is to

furnish the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)). The Court has "expressed discomfort with the logic of this rule," *Palazzolo*, 533 U.S. at 631, lamenting "the rhetorical force of [the] 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 505 U.S. at 1016 n.7.

To identify the relevant parcel for the purposes of a takings claim, courts have considered a variety of factors regarding "how both the property-owner and the government treat (and have treated) the property." *District Intown Props. Ltd. P'ship v. D.C.*, 198 F.3d 874, 880 (D.C. Cir. 1999). The factors include "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot." *Id.* To be sure, the factors are nonexclusive. *See Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991). Stated differently, courts apply "flexible approach, designed to account for factual nuances." *Loveladies Harbor*, 28 F.3d at 1181; *see also Deltona Corp. v. United States,* 657 F.2d 1184, 1192 (Ct. Cl. 1981). "These factual nuances include consideration of the timing of transfers in light of the developing regulatory environment." *Loveladies Harbor*, 28 F.3d at 1181.

Lear's strongest argument may be to point out that a district court's determination following a bench trial regarding the relevant parcel is reviewed for clear error as a finding of fact. *See id.* ("The trial court concluded that land developed or sold before the regulatory environment existed should not be included in the denominator. The Government has failed to convince us that the trial court clearly erred in this conclusion."). **FWS** and **Brittain County** should argue in response that while the district court's factual findings would only be reviewable for clear error, the relevant parcel determination should be treated as a legal conclusion or application of law to fact that is reviewable de novo on appeal. *See Cree*, 157 F.3d at 769. In the alternative, **FWS** and **Brittain County** may argue that the district court applied the wrong standard: the district court appeared to reject the prevailing "flexible approach" standard and apply something more rigid instead. *See*

Problem at 10. Applying the long legal standard is an abuse of discretion. *See Heimmerman v. First Union Mtg. Corp.*, 305 F.3d 1257, 1259 (11th Cir. 2002).

FWS and **Brittain County** will liken this case to *District Intown* (and cases like it) in that the Lears held these lands as a single lot for more than 150 years. *See District Intown Props.*, 198 F.3d at 880 (concluding nine lots should be treated as a single lot in part because "District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years"). FWS and Brittain County will also argue that, like *District Intown*, King James Lear essentially treated the three lots as a single lot *even after* subdivision in 1965. *See id.* Indeed, the Cordelia Lot didn't come into separate possession or ownership until King James's passing in 2005. Further, the Cordelia Lot is contiguous with at least one other lot, the Goneril Lot. **Lear**'s strongest response is to emphasize that there is no unity of ownership—unlike in *District Intown*, she doesn't own the contiguous lots. Further, she will reply that it is unfair to treat the parcels as a whole since she holds no rights in the contiguous Goneril Lot and is in fact estranged from her sister. She will also argue that the Cordelia Lot does not benefit the Goneril Lot. Additionally, the facts suggest that however it was treated by the government in the past, the Cordelia Lot is taxed separately now. In fact, the Brittain Town Planning Board approved the subdivision of lots in 1965 and approved the construction of one single-family residence on each lot.

FWS and **Brittain County** may make two other arguments in favor of treating Lear Island as a single parcel, but neither is likely to be particularly persuasive. First, **FWS** and **Brittain County** may argue that the mere fact that Lear acquired the property after the passage of the ESA and adoption of the Brittain County Wetlands Preservation Law defeats her claim. They might reason that the reasonable "investment-backed expectations" should be based on when the property existed as a whole. *See Penn Central*, 438 U.S. at 124. However, this argument is unsupportable: **Lear** will correctly argue *Palazzolo* forecloses any argument that post-regulation acquisition of the Cordelia Lot automatically defeats her takings claim. *See* 533 U.S. at 627. In fact, *Palazzolo* expressly contemplated that an heir or successor in interest could (at least under some circumstances) maintain a takings challenge

to a regulation that antedated the heir's acquisition; "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 627–28. Second, **FWS** and **Brittain County** may also argue that if the Cordelia Lot is the relevant parcel, then persons with portions (but not all) of their property subject to development restrictions will be encouraged to divide their property into developable and undevelopable tracts, and then seek just compensation for the deprivation of economic value in the undevelopable tract. **Lear** should argue in response that *Loveladies Harbor* forecloses this argument, when it acknowledged that the "flexible approach" accounts for the factual nuance of the timing of the transfer. 28 F.3d at 1181. She will be able to accurately point out there is no evidence of bad faith in the record and that the transfer occurred 8 years prior to the passage of the ESA and 17 years prior to the enactment of the Brittain County Wetlands Preservation Law.

C. NATURAL DESTRUCTION: Does the fact that the Cordelia Lot will become developable in approximately ten years if Lear stops mowing the heath each October, resulting the natural destruction of the Karner Blue habitat, preclude Lear's takings claim?

At trial, **FWS** argued that Lear's takings claim must necessarily fail because her ability to develop the land has not been totally deprived, but merely delayed. The Karner Blue requires fields of blue lupine flowers to survive, which in turn require partial shade from a successional forest to survive. If Lear ceases annual mowing of the Heath, it will convert to a successional forest in about 10 years. In that case, the lupine flowers will not be able to grow, and Karner Blue larvae will not be able to feed. With the habitat naturally destroyed, Lear will be able to develop a portion of the lot without taking Karner Blues. At trial, **Brittain County** joined **FWS**'s argument. **Lear** disagreed, arguing the time to determine the existence of economically viable use was now. The district court agreed with Lear, recognizing precedent that permits development or use of land to be delayed, but viewed 10 years as too long a period of time.

Lucas held that a permanent deprivation of all economically productive use constituted a taking for which just compensation was due. *See Lucas*, 505 U.S. at 1015; *see also Tahoe-Sierra*, 535

U.S. at 332. The Supreme Court has not determined when a temporary restriction becomes a permanent one. *See Tahoe-Sierra*, 535 U.S. at 335–36 ("We have no occasion to address . . . the distinction between a temporary restriction and one that is permanent."). One way of looking at the issue is one of timing: if 10 years is not too long to wait to develop her property, then Lear's takings claim must fail since she has not been deprived of *all* economically viable use; rather, she has merely been delayed in exercising *some* economically viable use. Another way of looking at the issue is whether indefiniteness is tantamount to permanence: if so, then future developability because of a hypothetical change in the facts is irrelevant—the ESA imposes an indefinite bar to Lear's developing the Cordelia Lot, and the Fifth and Fourteenth Amendments require the government to pay just compensation.

FWS and **Brittain County** can make a persuasive argument that the Supreme Court's opinion in *Tahoe-Sierra* totally precludes finding a categorical taking based on a delay in developability. In *Tahoe-Sierra*, an interstate development authority adopted a pair of ordinances resulting in a 32-month moratorium on development of land near Lake Tahoe. 535 U.S. at 306–07. When real estate developers, who owned fee simple estates, brought a takings claim under *Lucas* (but expressly disavowed a claim under *Penn Central*), the Court rejected a claim for a categorical, but temporary, taking. *See id.* at 332. "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* The *Tahoe-Sierra* Court emphasized that it did "not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay." *Id.* at 338 n.34. FWS and Brittain County can draw further support from *Boise Cascade Corp.*, which rejected a categorical challenge to a temporary taking in the context of the ESA. *See* 296 F.3d at 1350.

Lear can find sympathetic language in Chief Justice Rehnquist's dissent in *Tahoe-Sierra*, which would employ the *Lucas* categorical takings approach after a delay of 6 years. *See* 535 U.S. at 343, 346–51 (Rehnquist, C.J., dissenting). Of course, **FWS** and **Brittain** County can reply, as the *Tahoe-Sierra* majority did,

that 6 years is an arbitrary amount of time. Further, dissents are, by definition, not the law. And, in this regard, Chief Justice Rehnquist's dissent may bolster the argument that 10 years is not too long: Chief Justice Rehnquist lamented that "the Court would not view even a 10–year moratorium as a taking under Lucas because the moratorium is not 'permanent.'" *Id.* at 347 (Rehnquist, C.J., dissenting).

But **Lear** can also use Chief Justice Rehnquist's dissent as a bulwark for the argument that the delay here is indefinite, and that indefiniteness is tantamount to permanence. While 10 years is a good estimate of how long it may take the successional forest to overtake the Heath, there can be no certainty. Lear may point out that laws certainly can change and the government is allowed to abandon condemned land, but courts have found those situations to be takings all the same. *See id.* at 346 (Rehnquist, C.J., dissenting) (citing *Lucas*, 505 U.S. at 1011–12 (amendment of challenged ordinance), and *United States v. Dow*, 357 U.S. 17, 26 (1958) (abandonment of condemned land)). Hypothetical future changes in facts and law do not make indefinite restrictions temporary. **FWS** and **Brittain County** can point to cases like *Riverside Bayview Homes* and *Boise Cascade Corp.* as counterexamples: in those cases injunctions and permit requirements (which the property owners had not fully availed themselves of) indefinitely limited the property owners' use of their property, but those courts suggested that the restrictions were not actually permanent and that the property owners had not suffered a compensable taking.

As a final point, **Lear** may point out, as the district court recognized, the irony of the FWS relying on the natural destruction of an endangered species critical habitat as a way to avoid providing just compensation for protecting the Karner Blues. Moreover, the ESA expressly permits the FWS to acquire lands to protect and conserve endangered species. ESA § 5, 16 U.S.C. § 1534. Lear may accordingly argue that this is exactly the kind of situation in which FWS should use its acquisition power.

D. EQUAL FOOTING AND PUBLIC TRUST: Does the public trust doctrine, inherent in the title to the Cordelia Lot, preclude her takings claim?

At trial, **Brittain County** argued that the public trust doctrine inhered in Lear's title and precluded her takings claim with

respect to the Brittain County Wetlands Preservation Law. **FWS** joined in this argument. *Lucas* recognized that background principles of property law limited the Takings Clause: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only *if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with*." *Lucas*, 505 U.S. at 1027 (emphasis added). The Federal Circuit has prescribed a similar analytical framework for takings claims: first, a court should determine whether a takings plaintiff has a "stick in the bundle of property rights"; second, if so, the court must determine whether the governmental action at issue constituted a taking of that 'stick.'" *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). The Ninth Circuit has recognized that, where the public trust doctrine applies, it is indeed a background principle of law indicating that the proscribed interest was not part of the property owner's interest to begin with and thus can indeed defeat a *Lucas* takings claim. *See Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002).

Thus, the nub of **FWS** and **Brittain County**'s argument is that if either the equal footing doctrine vests title to the submerged lands in New Union or the public trust doctrine inhered in Lear's title, Lear never possessed a requisite stick in the submerged marshlands that the Brittain County Wetlands Preservation Law could "take." The district court disagreed, reasoning Brittain County had pointed to no statement of state law as to the existence or scope of the public trust doctrine in New Union. The district court also reasoned that waters not influenced by the tides were not navigable in 1803, and that, in any event, the equal footing doctrine did not vest title to submerged lands in the State where Congress granted title to submerged lands to a private person prior to statehood. This issue turns on two sub-inquiries: first, whether Lear or New Union owns the submerged lands; and second, if Lear owns the submerged lands, whether the public trust doctrine limits her ability to develop property there.

The public trust doctrine dates to Roman law, *PPL Montana LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012), and states that a State holds title to the beds of navigable waters "in trust for the people of the state that they may enjoy the navigation of the wa-

ter . . ." *Ill. Cent. R. Co. v Illinois* 146 U.S. 387, 452 (1892). "Because title to [lands underlying certain waters] was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). In this way, the public trust and equal footing doctrines are closely related. "The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence 'became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.'" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (quoting *Martin v. Waddell,* 41 U.S. 367, 410 (1842)). "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'" *Id.* (quoting *Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845)). "In consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself.'" *Id.* (quoting *Oregon v. Corvalis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)). Thus, upon statehood, "under the constitutional principle of equality among the several states the title [submerged lands] then passe[s] to the state, if the [water] was navigable, and if the [submerged lands] had not already been disposed of by the United States." *See United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *accord United States v. Utah*, 283 U.S. 64, 75 (1931).

Thereafter, a state is free to retain the submerged lands or dispose of them, but the public trust doctrine dictates that it may not abdicate its interest in navigable waters and its duty to protect the use of the water for navigation and fishing in trust to the public. *Ill. Cent.*, 146 U.S. at 453. The precise "contours of that public trust" are determined by state, not federal law. *PPL Montana*, 132 S. Ct. at 1235. The States' power to determine the contours of its public trust doctrine are "subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *Id.* at 1228 (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

First, **Lear** will argue that the public trust doctrine did not apply to non-tidal navigable waters like Lake Union in 1803. *See PPL Montana*, 132 S. Ct. at 1227 (collecting cases rejecting the tide-based distinction regarding navigable waters, the earliest of which was decided in 1810). **FWS** will point out that navigability turns on whether the water was navigable at the time of statehood "based on the 'natural and ordinary condition' of the water." *Id.* at 1228 (quoting *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922)). The Problem is not specific about when New Union obtained statehood. As an inland lake, Lake Union is presumably not influenced by the tides. Therefore, Lear will argue that since the tides did not influence Lake Union in 1803, it cannot be a public trust water.

FWS and **Brittain County** may reply directly to Lear's tide-based argument by pointing to case language regarding the English common law rule suggesting it would have applied more broadly had England shared America's larger waterways that are not otherwise influenced by the tide: "the *reason* of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience." *Barney v. City of Keokuk*, 94 U.S. 324, 337–38 (1876). Indeed, in *The Propeller Genesee Chief*, Chief Justice Taney wrote that the constitutional drafters and founding generation would not have intended to limit the benefit of admiralty courts to incidents taking place over tidally influenced waters. 53 U.S. 443, 454 (1851). **Lear** may point out the irony that in making that statement, the *Genesee Chief* Court had to overrule a pair of older cases that applied the tide-based distinction. **FWS** and **Brittain County** may also choose to argue that some early public trust cases, such as *Carson v. Blazer*, can be read to suggest that first, that tide-based distinction in navigability never applied in the United States. *See* 2 Binn. 475, 484–85 (Pa. 1810) ("[T]he uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident."). **Lear** can reply that the Supreme Court has characterized those cases as a rejection of the tide-based distinction. *See Coeur d'Alene Tribe*, 521 U.S. at 286. Finally, **FWS** and **Brittain County** may choose to point out that even some English common law cases recognized the flow of the tides is not truly what made a body of water

navigable and, therefore was not controlling. *See Phillips Petroleum Co. v Mississippi*, 484 U.S. 469, 487 (1988) (discussing *Mayor of Lynn v. Turner*, 98 Eng. Rep. 980, 981 (K.B. 1774)); *see also Executors of Cates v. Wadlington*, 12 S.C.L. 580, 582 (1822) (discussing English common law).

In any event, Lake Union is navigable-in-fact; it is a large interstate lake that has been used for interstate navigation, including the transport of agricultural products. *See United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *The Daniel Ball*, 77 U.S. 557, 563 (1871). Notably, navigability as it applies in the public trust and equal footing context does not require *interstate* navigation; rather, it simply requires that the water be used or susceptible to use in navigation, even intrastate navigation. *PPL Montana*, 132 S. Ct. at 1229; *Utah*, 283 U.S. at 76. Thus, **FWS** and **Brittain County**'s stronger reply is to **Lear**'s initial point out that the public trust cases Lear cites are state cases, and that the question of navigability is a federal question. *Utah*, 283 U.S. at 75. *PPL Montana* directs a court to look at the physical characteristics of the water body at the time of statehood, not the legal regime. *See PPL Montana*, 132 S. Ct. at 1228. Indeed, "[t]o treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended." *Holt State Bank*, 270 U.S. at 56. If the extent of state sovereignty over submerged lands turned on the state of a developing legal regime at the time of statehood, it could violate the equal footing doctrine. Finally, FWS and Brittain County may point to Illinois (which achieved statehood in 1818) and Minnesota (which achieved statehood in 1858) as examples of cases where statehood preceded the Supreme Court's apparent recognition that the appropriate test was navigability and not whether the water is tidally influenced. *See Holt State Bank*, 270 U.S. at 57 (concluding, in 1926, that a small intrastate lake was navigable and thus belonged to Minnesota under the equal footing doctrine); *Ill. Central*, 146 U.S. at 452 (holding, in 1892, that state sovereignty, and thus the public trust doctrine, extended to submerged lands in the Great Lakes).

Lear will argue that even if Lake Union was navigable at the time of New Union's statehood, Congress's grant to Cornelius Lear in 1803 (sometime prior to statehood) defeats Brittain County's argument. Congress granted fee simple absolute to all of Lear Island

and to "all lands under water within a 300-foot radius of the shoreline of said island," as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland to Cornelius Lear. Lear may argue, as the district court reasoned, that this defeats an argument that New Union can avail itself of the public trust doctrine. Certainly, "Congress has the power before statehood to convey land beneath navigable waters." *Idaho v. United States*, 533 U.S. 262, 272 (2001); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); *see* U.S. CONST., art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

Brittain County and **FWS** will reply that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States." *Montana v. United States*, 450 U.S. 544, 552 (1981); *see also United States v. Alaska*, 521 U.S. 1, 35 (1997). A prior congressional grant of submerged lands only defeats a future State's claim when clear language appears in the grant. *See Montana*, 450 U.S. at 552 (collecting cases). Ultimately, "[w]hether title to submerged lands rests with a State, of course, is ultimately a matter of federal intent." *Alaska*, 521 U.S. at 36. The Supreme Court has repeatedly found that pre-statehood congressional grants of submerged lands do not overcome the presumption. *See, e.g.*, *Holt State Bank*, 270 U.S. at 58 (holding lake entirely contained in lands given by pre-statehood congressional grant was property of the State, not congressional grantee). The *Holt State Bank* Court commented that there was nothing in the grant there "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." *Id.* at 58–59. In fact, in only one case did the prior grant defeat a State's equal footing claim, *see Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634–35 (1970), "and indispensable to the [*Choctaw Nation*] holding was a promise to the Indian Tribe that no part of the reservation would become part of a State." *Utah Div. of State Lands*, 482 U.S. at 198; *see Montana*, 450 U.S. at 555 n.5; *Choctaw Nation*, 397 U.S. at 635.

Lear will argue that the grant was rendered "in clear and especial words," *Martin*, 41 U.S. at 411, and "confirmed in terms embraces the land under the waters" of Lake Union. *See Packer v. Bird*, 137 U.S. 661, 672 (1891); *see also Montana*, 450 U.S. at 552. The 1803 grant specifically refers to "all lands under water within a 300-foot radius of the shoreline of [Lear Island]." **FWS** and **Brittain County** will argue that the indispensible element of *Choctaw Nation*—that the United States promised "that 'no part of the land granted to them shall ever be embraced in any Territory or State,'" 397 U.S. at 635—is absent here, and that that fact is controlling. In their view, it is the intention to defeat a future State's equal footing claim that must be "'definitely declared or otherwise made very plain.'" *Utah Div. of State Lands*, 482 U.S. at 202 (quoting *Holt State Bank*, 270 U.S. at 55). **Lear** can persuasively reply, however, that the *Utah Division of State Lands* opinion expressly equated the two intents in the context of a grant to a third party: "When Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land." *Id.*

If the equal footing doctrine does not vest title to New Union, then **Lear** will argue that *Illinois Central*'s holding regarding the public trust was "necessarily a statement of Illinois law," *Appleby v. City of New York,* 271 U.S. 364, 395 (1926). In fact, the Supreme Court has repeatedly stressed that state law defines the rights under the public trust doctrine. *See Packer*, 137 U.S. at 669 ("[W]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee."). "[T]he public trust doctrine remains a matter of state law . . . ." *PPL Montana*, 132 U.S. at 1235. The Problem makes clear that there is no decisional law from New Union exists regarding the scope of the public trust doctrine. Problem at 11. **FWS** and **Brittain County** will point to language in *Idaho v. Coeur d'Alene Tribe of Idaho* that while *Illinois Central* was a statement of state law, "it invoked the principle in American law recognizing the weighty public interests in submerged lands." 521 U.S. 261, 283 (1997). Therefore, since holding the waters in public trust is a such close incident of sovereignty, *see Utah Div. of State Lands*, 482 U.S. at

195, it is not at all unreasonable to infer that the public trust doctrine has "'always existed'" in New Union even if not explicitly recognized. *See Esplanade Props.*, 307 F.3d at 985 (quoting *Orion Corp. v State*, 747 P.2d 1062, 1072 (Wa. 1987)). In their view, since the doctrine has always existed, it would necessarily inhere in Lear's title. However, because public trust issues can be quite thorny, and the precise public trust issue is not only the existence of the public trust doctrine in New Union but whether and how it applies to the submerged lands near the shore of Lear Island, **Lear** can point to cases where federal courts have dismissed claims involving unsettled public trust issues. *See, e.g.*, *Brigham Oil & Gas, L.P. v. North Dakota Bd. of Univ. & Sch. Lands*, 866 F. Supp. 2d 1082, 1089–91 (D.N.D. 2012). Cases like *Brigham Oil* demonstrate that federal courts resist construing the scope of a State's public trust doctrine whenever possible.

E. DEPRIVATION OF ALL ECONOMIC VALUE: Can the ESA and the Brittain County Wetlands Preservation Law be joined for purposes of Lear's categorical takings claim based on a complete deprivation of economic value?

As an ultimate issue at trial, **Lear** argued that the ESA and Brittain County Wetlands Law have totally deprived the Cordelia Lot of economic value, amounting to a taking under *Lucas*. **FWS** and **Brittain County** each argued that their respective regulations did not individually amount to a *Lucas* taking. **FWS** argued that the ESA (nor any other federal regulation) prohibited Lear from constructing a residence in cove area. **Brittain County** made a similar argument: the Brittain County Wetlands Preservation Law did not prohibit construction in the Heath. In any event, **FWS** and **Brittain County** argued that no *Lucas* taking occurred because the property retains some residual economic value: the Brittain County Butterfly Society has offered to pay $1,000 a year in rent for wildlife viewing. The district court disagreed, concluding that the regulations could be considered together and that the butterfly society's offer did not preclude Lear's takings claim.

1. Whether the ESA and Brittain County Wetlands Law Can Be Combined to Consider Whether a

Taking Has Occurred.

Regarding the question of whether two regulations administered by two defendants can be jointly considered as effecting a total deprivation of all economic use of property under *Lucas*, there does not appear to be precedent on point. Because of the general lack of decisive precedent on the matter, the parties will likely make a number of policy arguments.

To be sure, **Lear** may argue that precedent supports the joint consideration of multiple regulations or administrative actions. She can cite *Tahoe-Sierra*, 535 U.S. at 337–38, and *Agins v. City of Tiburon*, 447 U.S. 255, 255 (1980),[19] as cases where two municipal ordinances were considered together in a takings claim. Additionally, **Lear** may cite *United States v. Clarke*, 445 U.S. 253 (1980) considered whether a federal statute—25 U.S.C. § 357, which authorizes a state or local government to condemn lands allotted to Native Americans in the same manner other lands held in fee may be condemned—permitted a municipal government to condemn land by physical taking. *Clarke* thus arguably demonstrates a blending of state and federal law in the context of takings claims.

FWS and **Brittain County** can reply that none of those cases involve takings that were joint takings by two different governments. For instance, *Clarke* did not did not feature a claim of a joint taking by the United States and local government, but rather an intergovernmental dispute in which an Alaska municipality attempted to physically occupy federal land held in trust by Native Americans. More importantly, they can argue that even if two provisions of a single regulatory schema could be combined in a takings claim in some cases, as in *Agins*, it would be inappropriate where two levels of government are concerned. It might make sense to consider one regulatory schema (administered by one government entity) as a whole, but considering two different government entities' regulations together is simply impractical. Federalism generally permits different governments to pass different laws, and, the federal government generally cannot control the applicability of a state or local law absent preemption. *Cf. Tahoe-Sierra*,

19. *Agins* was abrogated on other grounds by *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005). The Court in *Lingle* "conclude[d] that the "substantially advances" formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."

535 U.S. at 344 (Rehnquist, C.J., dissenting) (discussing causation under takings claims brought pursuant to section 1983); *Esplanade Props.*, 307 F.3d at 984 ("[A] plaintiff must make a showing of causation between the government action and the alleged deprivation.").

Lear can persuasively reply, however, that cooperative federalism is conducive to joint takings. For instance, she can point to the Clean Water Act, which requires a potential discharger to seek certification from States in which the discharge will occur that the discharge will not result in violation of the State's water quality standards. Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a)(1). The State may condition certification on compliance with State water quality standards. *Id.* § 401(d), 33 U.S.C. § 1341(d). EPA has a related rule that prohibits the issuance of a federal permit if it "cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d). Lear might point this or similar cooperative schema as an example where a taking could be foreseeable.

Lear can argue the nature of an inverse condemnation suit supports the conclusion that multiple provisions of law should be able to be considered together: "'[i]nverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *Clarke*, 445 U.S. at 257 (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)). Indeed, an inverse condemnation suit may be appropriate precisely because the government is unaware it has taken the plaintiff's property. Here, Lear can argue that the point of an inverse condemnation suit is to recover the value that has actually "been taken." The fact that is actually been taken by the combined operation of the regulatory regimes of two different governments should not preclude recovery.

In this vein, **Lear** will also argue that the two regulations in this case produced an "indivisible injury," so the FWS and Brittain County should be jointly and severally liable. *See, e.g.*, *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 343 (Tenn. 1976) ("[W]e . . . adopt . . . the rule for determining joint and several liability that when an indivisible injury has been caused by the concurrent, but

independent, wrongful acts or omissions of two or more wrongdoers . . . .").[20] **FWS** and **Brittain County** can reply that even if this rule were law, it wouldn't save Lear's claim. The *Velsicol Chemical* rule requires an injury to be "indivisible." *See id.* In fact, the Supreme Court of Tennessee relied on decisions from Texas, *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952), and the Sixth Circuit, *Michie v. Great Lakes Steel Division*, 495 F.2d 213, 216 (6th Cir. 1974), which reasoned in adopting the same rule that the rule was necessary to save a plaintiff in some cases from bearing an "impossible burden" of proving which defendant contributed which share to an indivisible injury. Here, they will argue, that is hardly the case: the ESA plainly affects one portion of Lear's property (the Heath), and the Brittain County Wetlands Preservation Law affects another (the Cove). In their view, there is nothing at all indivisible about the injury; Lear might have had two separate partial takings claims, but she has no categorical takings claim regarding the parcel as a whole.

FWS and **Brittain County** may also argue that the indirect effects of government regulation are not always clear to legislators, so combining multiple regulations is not necessarily fair to the government. This is particularly true of a regulation's intersections with other statutes and ordinances. **Lear** can respond, however, that Congress (and other legislators) are presumed to know the state of the law. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

2. Whether the Cordelia Lot Has Been Deprived of All Economic Value.

FWS and **Brittain County** will point out that the Cordelia Lot has not actually been deprived of all economic value. The Brittain County Butterfly Society offered to pay Lear $1,000 per year in rent for wildlife viewing.

They will point out the Supreme Court's precedent has "uniformly rejected" the proposition that a mere "diminution in value, standing alone, can establish a 'taking.'" *Penn Central*, 438 U.S. at 131. Indeed, in making that statement, the *Penn Central* Court identified diminutions in value of 87.5 and 75 percent as examples

20. Many states have such a common law rule. The Problem simply cited *Velsicol Chemical* as an example of the "prevailing rule." Problem at 12.

of takings claim it had rejected. *See id.* (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution)). Instead, these diminutions are merely the result of the government "adjusting the benefits and burdens of economic life for the common good." *See id.* at 124. Indeed, the Supreme Court did not find a taking in *Palazzolo*, which featured an overwhelming 93% loss of value in the plaintiff's property. *See* 533 U.S. at 616, 631. FWS and Brittain County can find similar support in *Lucas*: in a footnote, the majority of the Court suggested the proper recourse for a property owner deprived of 95% of economic value was a claim for partial regulatory taking under *Penn Central*, not a claim for a categorical taking under *Lucas*. 505 U.S. at 1019 n.8.

FWS and **Brittain County** will also argue that even if ESA and the Brittain County Wetlands Preservation Law eliminate the "most profitable use" or the "most beneficial use," it is not dispositive. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962). Supportive language is also found in later Supreme Court discussions on the topic: "In the *Lucas* context, of course, the *complete* elimination of a property's value is the determinative factor." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (emphasis added). In contrast, **Lear** will argue that she retains at most a "token interest." *See Palazzolo*, 533 U.S. at 631 ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

Further, **Lear** can point to *Loveladies Harbor* as an example where something less than a 100% diminution of value was recognized as a total taking. There, the Federal Circuit affirmed the district court's conclusion that where property value was diminished from $2,658,000 to $12,500—a more than 99% loss. *See* 28 F.3d at 1178, 1182. Here, the Cordelia Lot had a fair market value of $100,000 prior to the regulation. There is no market in which she can sell the Cordelia Lot, so the property's value appears value appears to be $0. Of course, the property has a rental value of $1,000 a year in light of the Brittain County Butterfly Society's offer. However, the property taxes on the Cordelia Lot are $1,500 annually—resulting in a $500 annual net loss. Lear will thus argue that the value of the Cordelia Lot is nil.

However, **Lear**'s strongest argument is that the district court found as a matter of fact that the Cordelia Lot had been deprived of all economic value. She will point out that *Loveladies Harbor* counsels that this factual determination reviewable for clear error. *See id.* at 1182 ("The trial court's conclusion that the permit denial was effectively a total taking of the property owner's interest in these acres is fully supported in the record; there is no clear error in that conclusion."). As with the relevant parcel determination, **FWS** and **Brittain County** should argue that this is a legal conclusion, not a finding of fact. Findings of fact like the value of the property may only be reviewable for clear error, but the determination that the Cordelia Lot has been deprived of economic value is a legal conclusion, they will argue, and it should accordingly be reviewed de novo.

FWS and **Brittain County** may find other, more speculative, arguments regarding the financial value of the Cordelia Lot; however, the record does not disclose any evidence regarding other economically productive uses, which should defeat any resort to them now. *See Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015) ("The government did not produce evidence indicating that Lost Tree could sell Plat 57 in such a condition. Speculative land uses are not considered as part of a takings inquiry."); *see also Olson v. United States*, 292 U.S. 246, 257 (1934).

VI. SAMPLE QUESTIONS FOR JUDGES

These questions are suggested as a starting point. Please feel free to develop your own.

Issue 1: Whether the ESA is a valid exercise of Congress's Commerce power

- Brittain County
    - What sovereign interests does the ESA infringe on?
    - Isn't the Tenth Amendment simply a "truism?" Or does the Tenth Amendment add something to your claim here beyond the limits imposed by Commerce Clause cases?
- Lear

- Why shouldn't we follow the long line of cases that hold the ESA is a constitutional exercise of the Commerce power?
- Doesn't the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing demonstrate that there is some link to commerce here?
- Doesn't *Raich* indicate that Congress can regulate local activity so long as it is part of a class of activities that have a substantial effect on interstate commerce?
- Can the ESA be considered a regulation of the channels of interstate commerce?

- FWS
  - Is justifying the ESA's application to the Karner Blue with biodiversity consistent with *Lopez* and *Morrison*?
  - What effect on commerce does biodiversity have?

Issue 2(a): Whether Lear's takings claim is ripe without having applied for an ITP permit

- Brittain County and FWS
  - What great certainty regarding the scope of the ESA's burden on the Cordelia Lot could be achieved by requiring Lear to apply for an ITP?
  - Why should Lear have to apply for an ITP when the cost of meaningfully applying for it would be more than the fair market value of the Cordelia Lot?
- Lear
  - Why should we treat Lear's inquiry to the FWS as the equivalent of a permit application?
  - Why the futility exception be extended to situations where no formal permit application has been completed?

Issue 2(b): Whether the relevant parcel is the Cordelia Lot or all of Lear Island

- FWS and Brittain County

  - Didn't the district court determine a matter of fact that the relevant parcel is the Cordelia Lot? If so, isn't it reviewable only for clear error?
  - Does the lack of unity of ownership here require a conclusion that the Cordelia Lot should be treated as the relevant parcel?

- Lear
  - Lear Island was a single parcel of property for 150 years, and was treated as a single parcel of property for another 40 years after that. Why should it be treated separately now?
  - Does the fact that Lear came into possession of the property after the enactment of the ESA and Brittain County Wetlands Preservation Law preclude her takings claim?

Issue 2(c): Whether future developability based on natural destruction of the butterfly habitat precludes Lear's takings claim

- FWS and Brittain County
  - Doesn't it seem incongruous to use the potential destruction of the Karner Blues' habitat as a defense to takings claim?
  - Isn't Lear's inability to develop the Cordelia Lot for ten years essentially a permanent deprivation?
  - When should the permanence of a deprivation be determined?
  - At what point does a temporary deprivation become a permanent one?
- Lear
  - What is the harm in waiting ten years to construct a residence on the Cordelia Lot?
  - Didn't the *Tahoe-Sierra* Court suggest that *Lucas* is never the appropriate vehicle for challenging a temporary deprivation of economic value?

Issue 2(d): Whether public trust doctrine principles

preclude Lear's takings claim

- FWS and Brittain County
  - Did navigability extend to Lake Union in 1803?
  - Why isn't the 1803 congressional grant specific enough about providing title to the submerged marshlands?
  - Without a rule of state law, can we know what the scope of the public trust doctrine is in New Union? If not, shouldn't we refrain from trying to predict it here?
- Lear
  - Is the navigability of Lake Union a question of federal law or state law?
  - Does the 1803 congressional grant satisfy clearly indicate a congressional intent to defeat a future state's title to the lakebed of Lake Union?
  - Isn't the public trust doctrine universal enough that we could consider its scope here?

Issue 2(e)(1): Whether the ESA and the county wetlands regulation can be considered together for takings purposes

- FWS and Brittain County
  - Don't cases like *Tahoe-Sierra* and *Agins v. City of Tiburon* demonstrate that the Supreme Court is willing to consider multiple laws together?
  - Environmental statutes frequently employ principles of cooperative federalism. Where the purpose of a regulatory regime is to have two levels of government cooperate, doesn't considering the regulations together seem appropriate?
- Lear
  - Has any court considered a joint taking before?
  - Why shouldn't we consider the diminution of the value of the Cordelia Lot to be a divisible injury?

Issue 2(e)(2): Whether the butterfly society's offer to pay $1,000 per year in rent for wildlife viewing defeats Lear's

takings claim

- FWS and Brittain County
    - Isn't the Brittain County Butterfly Society's offer, at most, just a "token interest?"
    - Does the fact that Lear's property taxes are higher than what the butterfly society would pay require a conclusion that the Cordelia Lot has been deprived of all economic value?
    - Is the district court's finding that the Cordelia Lot has been deprived of all economic value a finding of fact? In that case, can we only review it for clear error?
- Lear
    - Is the district court's finding that the Cordelia Lot been deprived of all economic value a finding of fact, or is it an application of law to fact that is reviewable de novo?
    - Isn't this just a diminution in value of the sort the Supreme Court has held to be non-compensable?

ISSUES TABLES

Summary of Parties' Positions by Issue			
Issue	Brittain County	Lear	FWS
Is the ESA constitutional under the Commerce Clause?	No	No	Yes
Is Lear's takings claim ripe even though she did not apply for an ITP?	No	Yes	No
For Lear's takings claim, is the relevant parcel the entirety of Lear Island ore merely the Cordelia Lot?	Lear Island	Cordelia Lot	Lear Island
Does the fact that the Cordelia Lot will become developable upon the natural destruction of the butterfly habitat in 10 years preclude Lear's takings claim?	Yes	No	Yes
Do public trust doctrine principles inherent in title preclude Lear's claim for a taking?	Yes	No	Yes
Are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when neither the ESA nor the county wetlands regulation would, by itself, completely prohibit Lear from building a single-family residence?	No	Yes	No
Does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?	Yes	No	Yes

Summary of Parties' Procedural Postures by Issue				
Issue	District Court Holding	Brittain County Posture on Appeal	Lear Posture on Appeal	FWS Posture on Appeal
ESA constitutional?	Yes.	Appeals and argues no.	Appeals and argues no.	(Agrees with District Court)
Takings claim ripe?	Yes.	Appeals and argues no.	(Agrees with District Court)	Appeals and argues no.
Relevant parcel?	The Cordelia Lot.	Appeals and argues Lear Island is the relevant parcel	(Agrees with District Court)	Appeals and argues Lear Island is the relevant parcel
Does developability upon natural destruction of the butterfly habitat in 10 years defeat Lear's takings claim?	No.	Appeals and argues no	(Agrees with District Court)	Appeals and argues no
Do public trust doctrine principles inherent in Lear's title preclude her takings claim?	No.	Appeals and argues no	(Agrees with District Court)	Appeals and argues no
Are FWS and Brittain County liable for a total deprivation of economic value even though neither the ESA nor the county wetlands regulation, acting alone, would totally deprive the Cordelia Lot of economic value?	Yes.	Appeals and argues no	(Agrees with District Court)	Appeals and argues no
Does the butterfly society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim based on total deprivation of economic value?	No.	Appeals and argues no	(Agrees with District Court)	Appeals and argues no