Team No. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 16-0933

CORDELIA LEAR,

Plaintiff—Appellee—Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant—Appellant—Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION

Defendant—Appellant.

On Appeal from the United States District Court
for the District of New Union

BRIEF OF DEFENDANT-APPELLANT,
United States Fish and Wildlife Service

Oral Argument Requested

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STATEMENT OF JURISDICTION

All parties have timely filed their Notices of Appeal to the Twelfth Circuit Court of Appeal from the final decisions made by the District Court in *Lear v. United States Fish and Wildlife Service*. R. 1; *see* Fed. R. App. P. 4. United States Courts of Appeals shall have jurisdiction over final decisions from federal district courts. 28 U.S.C. § 1291. The District Court for the District of New Union had jurisdiction over both of Cordelia Lear's federal questions, namely her challenge to the Endangered Species Act ("ESA") as a proper exercise of Congress's Commerce power, U.S. Const. art. I § 8 cl. 3, as well as her claim for an uncompensated taking proscribed by the Fifth Amendment's Takings Clause, U.S. Const. amend. V. *See* 28 U.S.C. § 1331. Having waived damages exceeding $10,000 against the United States, Cordelia Lear was not required to bring her takings claim before the Court of Federal Claims. *See* 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1). Therefore, the Twelfth Circuit has jurisdiction over this case.

STATEMENT OF THE ISSUES

I. Is the ESA a valid exercise of Congress's Commerce power as applied to a wholly intrastate population of endangered species?

II. Is Lear's takings claim ripe for litigation?

III. Is the relevant parcel for the takings analysis the entirety of Lear Island, or the Cordelia Lot as subdivided in 1965?

IV. Assuming the relevant parcel is the Cordelia lot, does the natural destruction of the butterfly habitat preclude a takings claim based on complete deprivation of economic value?

V. Assuming the relevant parcel is the Cordelia Lot, does Lear have an economically remunerative use of her property?

VI. Do public trust limits on uses of navigable waters inhere in Lear's title?

VII. Assuming the relevant parcel is the Cordelia Lot, do federal and state regulations need to be considered together or separately?

STATEMENT OF THE CASE

I. Statement of Facts

The Karner Blue Butterfly was added to the endangered species list in December of 1992. R. 5. Karner Blues thrive in partially shaded lupine fields near successional forests. R. 5-6. Any disturbance of the lupine plant during the Karner Blue's developmental stages will result in its death. R. 6. The butterflies can only migrate along woodland edge corridors, and do not travel across state boundaries. R. 6. While populations exist in other states, the only population in New Union is found on the Heath on Lear Island. R. 5-6.

Lear Island is in Brittain County, New Union ("Brittain County"). In 1803, Congress granted Cornelius Lear title in fee simple absolute of the entire 1,000 acres of Lear Island (approximately one mile wide by two miles long), surrounded by the interstate Lake Union. R. 4-5. The granted land extended to the shallow strait which separates the mainland from the island, and to the land underwater within a 300-foot radius of the shoreline of the island. R. 5.

Ever since, the Lear descendants have used the island for fishing, hunting, farmland, and homestead purposes. R. 5. They initially travelled across the lake by boat to deliver produce to the mainland, but in the early twentieth century built a highway connecting the island to the mainland. R. 5. By 1965, the entire island was owned by King James Lear who divided it into three parcels, deeding one parcel to each of his three daughters – Cordelia, Goneril, and Regan – upon his death in 2005. R. 5. The lots were divided as follows: the Goneril Lot is 550 acres, Regan Lot is 440 acres, and the Cordelia Lot is 10 acres. R. 5. The Brittain Town Planning Board determined that the lots complied with zoning requirements for a single-family residence. R. 5.

Cordelia Lear's ten-acre lot, known as "The Heath," is situated at the northern tip of Lear Island. R. 5. It consists of an open nine-acre field, an access strip that is forty feet wide by 1,000

feet long, and one acre of emergent cattail marsh, which was at one time open water. R. 5. The Heath has been kept open by the Lears' annual mowing, and its lupine fields adjacent to a successional forest makes an ideal habitat for the Karner Blue butterfly. R. 5-6.

Seven years after her father's death and coming into possession of her property, Ms. Lear contacted the New Union Fish and Wildlife Service ("FWS") field office to inquire about permits for constructing a residence on the Cordelia Lot. R. 5-6. At the time of her inquiry, Ms. Lear knew about the Karner Blue butterfly population, and that interference with its habitat would constitute a "take" of the endangered species in violation of Section 9 of the ESA. R. 6.

The FWS directed Ms. Lear to apply for an Incidental Take Permit ("ITP") before she began constructing her residence. R. 6. The process required her to conduct an environmental assessment under the National Environmental Policy Act, and establish a habitat conservation plan ("HCP"). R. 6. An approvable HCP provides for additional bordering lupine habitat on an acre-for-acre basis, as well as a commitment to maintain the lupine fields through annual mowing. R. 6. Goneril's lot is the only land bordering Cordelia's lot, but Cordelia's estranged sister refused to cooperate if it imposed restrictions on her lot. R. 6. Ms. Lear estimated that the cost of the ITP application, environmental assessment, and HCP would cost $150,000. R. 6.

Instead of pursuing an ITP, Ms. Lear developed an alternative development proposal ("ADP") to fill one-half acre of the marsh for her residence. R. 7. The ADP required no federal approval, but the Brittain County Wetland Preservation Law required Ms. Lear to get a permit before she could fill the cove marsh. R. 7. Brittain County's Wetland Board denied her permit because her proposed residence was not a water-dependent use. R. 7.

The fair market value of the Cordelia Lot is estimated at $100,000, but there is no current market in Brittain County for a lot that is strictly for agricultural or recreational use. R. 7. Ms.

Lear has not sought reassessment of her property, and she rejected the Brittain County Butterfly Society's offer to pay $1,000 annually to conduct tours in the summer for butterfly viewing. R. 7.

II. Procedural History

Cordelia Lear sued FWS and Brittain County in the District Court for the District of New Union challenging the constitutionality of the ESA as applied to her property, and alleging an unconstitutional taking of her property in violation of the Fifth Amendment's Takings Clause. R. 4. The District Court found that the ESA was a constitutional exercise of Congress's Commerce power, but that the FWS and Brittain County regulations together created an unconstitutional taking that required compensation. The FWS and Brittain County filed a Notice of Appeal on June 9, 2016 from an Order of the United States District Court for the District of New Union. R. 1. Cordelia Lear subsequently filed her Notice of Appeal on June 10, 2016. R. 1.

SUMMARY OF THE ARGUMENT

Cordelia Lear appeals the District Court's ruling that the ESA is a constitutional exercise of Congress's Commerce power as applied to the intrastate Karner Blue butterfly on her property. Her appeal is without merit. The Constitution gives Congress the power to regulate interstate commerce, which the Supreme Court expanded to include intrastate economic activities that have a substantial effect on interstate commerce. The ESA is a proper exercise of Congress's Commerce power because construction of a private residence is economic activity, and because the ESA is a regulatory scheme that has a substantial effect on interstate commerce.

The FWS appeals the District Court's finding that it, along with Brittain County, created a categorical taking of Ms. Lear's property. As a threshold matter, Ms. Lear's claim against FWS is not ripe for review because she did not complete the application for the necessary ITP. Ms. Lear self-determined that the application was futile, and did not pursue any agency decision.

As to the merits, there has not been a categorical taking because Supreme Court precedent directs courts to assess takings claims against the "parcel as a whole." Even so, Ms. Lear's claim is precluded because the habitat is only temporary. The Lears kept the Heath alive by their voluntary mowing each year, and much of the lupine habitat can be transferred to the neighboring 550-acre Goneril Lot. Her claim is equally precluded by the Brittain County Butterfly Society's offer to pay Ms. Lear $1000 annually for the right to view the Karner Blue butterfly. Thus, Ms. Lear's property has not been deprived of all economic value.

Ms. Lear's takings claim is also precluded by public trust principles inherent in Brittain County's title over the wetlands. The Brittain County Wetlands Preservation Law only enforces what has always been law, and does not take any property from Cordelia Lear.

Finally, the FWS and Brittain County cannot be liable because the regulations alone do not prevent Ms. Lear from constructing a residence. There is no precedent for considering the regulations together, and it was improper for the District Court to do so. However, if the District Court was correct to consider the them together, application of the ad hoc test in *Penn Central Transportation Co. v. New York* mandates a finding that aligns with "fairness and justice."

STANDARD OF REVIEW

There has been no final action or determination by an agency in this case; therefore, no deference is due. Both the Commerce Clause and Takings Clause issues involve mixed questions of law and fact. Therefore, this Court should review the appeals *de novo*.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO A WHOLLY INTRASTATE POPULATION OF THE KARNER BLUE BUTTERFLY

Congress has the power "to regulate commerce with foreign Nations, and among the several states . . . ." U.S. Const. Art. I § 8 cl. 3. The Supreme Court has defined 'commerce' as "activities that arise out of or are connected with a commercial transaction," *United States v. Lopez*, 514 U.S. 549, 561 (1995). The United States Supreme Court has identified three ways in which Congress can regulate commerce: (1) "channels of interstate commerce;" (2) "instrumentalities in interstate commerce;" and (3) intrastate activities "that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. at 558-59. The channels of commerce are the highways and means of transporting the instrumentalities between the states, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964), while instrumentalities are the persons or things in interstate commerce, *Perez v. United States*, 402 U.S. 146, 150 (1971). Intrastate activities, on the other hand, are not activities "among the states," but rather those economic activities that take place within one state. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (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."), *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."). Intrastate activities are considered in the aggregate when the underlying activity is economic. *United States v. Morrison*, 529 U.S. 597, 613 (2000).

The ESA is as a valid exercise of Congress's Commerce power because it prohibits parties from interfering with or "taking" an endangered species through economic activities like construction, which involves the channels (building materials moving intrastate and/or interstate) and instrumentalities (construction crews, architects and the like) of economic activity. Ms. Lear

argues that the Karner Blue butterfly is a wholly intrastate species that does not implicate Congress's Commerce power. This Court should uphold the District Court's ruling that the ESA is valid as applied to the intrastate butterfly because it regulates the economic activity that would result in the taking—construction of the proposed residence. R. 8. In the alternative, this Court should uphold the ESA as applied to the intrastate butterfly because it is a regulatory scheme that has a substantial effect on interstate commerce. *See Raich*, 545 U.S. at 17.

A. Section 9 of the ESA, which prohibits the taking of an endangered species, is a valid exercise of Congress's Commerce power.

The ESA is a valid exercise of Congress's Commerce power. The Constitution grants Congress broad authority to implement legislation it finds "necessary" and rationally related to its enumerated powers. U.S. Const. art. I § 8 cl. 18, *United States v. Comstock*, 560 U.S. 126, 134 (2010). Congress, under its constitutional authority, created the ESA after finding that "various species of fish, wildlife, and plants in the United States [had] been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1); *see* app. A at 2. The ESA is necessary to protect endangered species because the "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." §1531(a)(3).

Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), specifically prohibits any person from "tak[ing] any such species within the United States . . . ." *See* app. A at 3. To 'take' means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). However, a landowner might be permitted to take an endangered species if she successfully applies for an ITP that shows the potential taking is incidental to an otherwise lawful activity, and that she can comply with the FWS's judgment and order governing the taking. 16 U.S.C. § 1539(a)(1)(B) and (2)(B); *see* app. A at 3.

When the FWS designated the Heath on Ms. Lear's property as a critical habitat for the Karner Blue butterfly, it effectively prohibited Ms. Lear from interfering with that part of her property because doing so would likely injure, harm, and/or take the endangered species. Before starting construction on her property, Ms. Lear rightfully began the application process for the ITP hoping she could build in accordance with the FWS's restrictions. R. 8. Unfortunately, Ms. Lear did not complete the process with the FWS to determine whether the parties could agree to an incidental taking. R. 8. The ESA is not rendered invalid simply because Ms. Lear is unhappy with the ITP process. Her proposed construction is economic activity, which Congress has the constitutional authority to regulate. Ms. Lear's assertion that the Karner Blue butterfly is not a valid economic activity is incorrect because Congress had a rational basis for concluding that the regulation of this endangered species has a substantial effect on interstate commerce. *Raich*, 545 U.S. at 22 (citing *Lopez*, 514 U.S. at 557).

B. This Court should affirm the District Court's ruling that the ESA, as a valid exercise of Congress's Commerce power, regulated Ms. Lear's construction activity and resulting take of the Karner Blue butterfly.

The District Court did not err in finding that the ESA can regulate Ms. Lear's construction activity and her take of the endangered butterfly because the regulation governs activity that has a substantial effect on interstate commerce. In *Lopez*, the Supreme Court used a four factor test to measure whether activity substantially affects interstate commerce: (1) whether the regulated activity has anything "to do with commerce," or whether it is "an essential part of a larger regulation of economic activity" necessary for the regulatory scheme to be effective; (2) whether the regulation has an "express jurisdictional element" that will limit the statute's "reach" to an area that has a connection to interstate commerce; (3) whether legislative or congressional findings show an effect on interstate commerce; and (4) whether the connection between the

regulated activity and interstate commerce is substantial. *Lopez*, 514 U.S. at 561-65 (internal quotations omitted); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067-69 (D.C. Cir. 2003). This framework was reaffirmed by the Supreme Court in *Morrison*, 529 U.S. at 609-12. To be substantial, the link between the statute and the effect on commerce will not require the court to "pile inference upon inference" to determine the effect. *See Lopez*, 514 U.S. at 567. While courts have analyzed each of these factors, they tend to rely less on the jurisdictional element and the legislative history. A lack of evidence pertaining to these factors is not dispositive, but rather requires the Court to make its own determination on a case-by-case basis. *Lopez*, 514 U.S. at 561-63.

Reviewing the lower decision *de novo*, this Court should uphold the District Court's decision finding that Ms. Lear's proposed residential construction is 1) economic activity, and 2) activity that has a substantial effect on interstate commerce.

To reach this determination, the Court should first define the activity at issue, and then apply the *Lopez* factors to that activity as the D.C. Circuit did in *Rancho Viejo, LLC v. Norton*. 323 F.3d at 1064. There, a real estate development company sought to construct a housing development in San Diego County, but the FWS denied its proposal because construction would interfere with the existence of the endangered arroyo southwestern toad. *Rancho Viejo*, 323 F.3d at 1064. The plaintiffs specifically challenged Section 9 of the ESA as a valid exercise of Congress's Commerce power as applied to the intrastate toads, arguing that since they do not travel outside of California, the regulation of the toad cannot be considered interstate commerce. *Id.* at 1065-66. The *Rancho Viejo* court disagreed finding that the regulated activity was the proposed housing development, rather than "the arroyo toad that it threatens." *Id.* at 1072. The

Court stressed that "the ESA *regulates takings, not toads*," and Section 9 applies to the persons who do the taking. *Id.*

Applying the first *Lopez* factor, the *Rancho Viejo* court found that Section 9 validly regulated the construction of a 202-acre housing development because construction was "plainly an economic enterprise." *Rancho Viejo*, at 1068 (analogizing *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 104, 1056 (1997) (Section 9 "regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population.")).

Applying the second factor, the court failed to find a jurisdictional element that limits Section 9's application to commerce. However, the court noted that the jurisdictional hook has never been dispositive, as many courts have affirmed the ESA's constitutionality without it. *Rancho Viejo* at 1068 (citing *Gibbs v. Babbitt*, 214 F.3d 438, 487 (4th Cir. 2000)). The lack of a jurisdictional element allows the court to determine on its own whether the statute regulates activities that have a substantial effect on interstate commerce. *Id.* at 1068.

Applying the third factor, the court failed to identify any congressional findings with respect to Section 9's application to a commercial housing development's effect on interstate commerce. *Id.* However, the court again noted that these findings are neither mandatory nor dispositive, but only help courts assess Congress's "judgement" when "no substantial effect was visible to the naked eye." *Id.* (quoting *Lopez*, 514 U.S. at 563).

Applying the final factor, the Court determined there was a substantial relationship between the construction of the housing development and interstate commerce because the commercial development, "plainly an economic enterprise," was located near an interstate, and

would "presumably" be constructed with materials and by workers from outside of the state. *Rancho Viejo*, 323 F.3d at 1069 (quoting *NAHB*, 130 F.3d at 1048).

Ms. Lear's proposed activity is the construction of a residence. This activity is economic in nature, and substantially connected to interstate commerce. Like in *Rancho Viejo*, the District Court here found that the relevant activity was the construction of Ms. Lear's proposed residence ("clearly an economic activity"), not the existence of an endangered species. R. 8. While Ms. Lear's residence is not a commercial enterprise, like Rancho Viejo, her proposed activity is similarly economic in nature requiring construction materials and construction staff, generating the exchange of economic dollars, generation of jobs, taxes and business revenue. R. 8. While Section 9 of the ESA has neither a jurisdictional element nor express legislative findings specific to construction of a personal residence on a private lot, the court was able to independently determine that the project had an effect on interstate commerce. The District Court was not required to infer a connection to commerce, but could clearly identify the effect that the proposed residence would have on interstate commerce.

Thus, Ms. Lear's proposal to build a residence on her private lot is 1) economic activity; 2) the kind of activity that may be regulated by Section 9 of the ESA because it has impacts on the taking of the Karner Blue butterfly, much like the activity in Rancho Viejo impacted the arroyo toad; and 3) is a regulated activity with a substantial connection to interstate commerce.

C. If this Court finds that the relevant activity is the regulation of the Karner Blue butterfly, Section 9 of the ESA is still valid because it has a substantial effect on interstate commerce.

If this Court finds that the relevant activity is the protection of the Karner Blue butterfly, rather than construction of the proposed residence, Section 9 is still valid because Congress had a rational basis for concluding that protecting the endangered species has a substantial effect on

interstate commerce. *See Raich*, 545 U.S. at 22 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding."), *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

Circuit Courts of Appeal have applied different analyses for determining Congress's power to regulate takings under the ESA, but many have found that the relevant activity is the regulation of the endangered species because it was part of the larger regulatory scheme that had a substantial relationship to commerce. *See San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), *Alabama-Tombigee Rivers Coalition v. Kempthorne*, 638 F.3d 1163 (11th Cir. 2007), *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (finding the intrastate delta smelt, Alabama sturgeon, and Cave Species, respectively, were part of a regulatory scheme that has a substantial relationship to commerce). As the Fifth Circuit concisely articulated, courts must look to the "expressly regulated activity," (i.e. endangered species takes), and determine whether the takes have the substantial effect on commerce. *GDF Realty,* 326 F.3d at 634 (citing *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 204 (5th Cir. 2000)).

Applying the four *Lopez* factors, *supra* Part B, this Court should find that the ESA is a valid regulatory scheme having a substantial effect on interstate commerce.

1. Section 9 of the ESA is related to commerce because it is "an essential part of a larger regulation of economic activity" necessary for the regulatory scheme to be effective.

If the Court determines that the relevant activity is the endangered species takes, it follows that Section 9 has a "relation to commerce" because it is part of a regulatory scheme that has a substantial relationship to commerce. Where Congress has enacted a statute, the courts will

review it with a presumption of constitutionality. *Morrison*, 529 U.S. at 607. Further, when that statute regulates "economic activity that substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 610 (internal quotation marks omitted). The legislation may regulate "purely local activities" that are part of an "economic 'class of activities,'" and when a substantial relationship to commerce is established, "the *de minimis* character of individual instances arising out of that statute is of no consequence." *Raich*, 545 U.S. at 17. The Court will affirm regulation when the "failure to regulate" the intrastate activity will "leave a gaping hole" in the regulatory scheme. *Id.* at 22.

When Congress initially introduced the ESA, it had a rational basis for finding that protecting endangered species had a substantial effect on interstate commerce. It "declare[d] that

> (1) 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; . . .
>
> (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

16 U.S.C. § 1531(a)(1) and (3). Additionally, congressional committee reports reflect Congress's sense of urgency in passing the ESA, and the value that species of wildlife have to the environment: "[M]any of these animals perform vital biological services to maintain a balance of nature within their environments. . . . The two major causes of extinction are hunting and *destruction of natural habitat*." S. Rep. No. 93-307 (1973) (emphasis added); *see* app. B at 2. An earlier report reflects Congress's intent to specifically prohibit the take of an endangered species on private land: the ESA "would authorize the Secretary of the Interior to acquire privately owned lands, within the boundaries of any area administered by him, for the purpose of conserving, protecting, restoring, or propagating such species." S. Rep. No. 91-526 (1969); *see* app. B at 5. The Supreme Court reaffirmed Congress's rational basis for the ESA in *Tennessee*

Valley Authority v. Hill, 473 U.S. 153 (1978), which provided an in-depth analysis of the ESA's congressional reports, and Congress's intent to "*devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources."

The Fifth Circuit reviewed the constitutionality of the ESA as applied to an intrastate, noncommercial invertebrate Cave Species in *GDF Realty Investments Ltd. v. Norton*, 326 F.3d 622, 625 (5th Cir. 2005). The species was found in a series of caves on a 216-acre parcel in Texas near a rapidly growing area. *Id.* The species was listed as endangered because its habitat was being threatened by ongoing development and there were no laws in place to protect it. *Id.* The FWS notified the landowners that further development of their property could be a take of the endangered Cave Species. The landowners sought a declaratory judgment that development of their property would not constitute an endangered species take. *Id.* at 626. The Fifth Circuit found that the Cave Species had scientific and research value, and that the ESA as applied to the species was valid because the aggregate effect of species takes (ex: the effect on biodiversity and "interdependent web" of all species) would have a substantial effect on interstate commerce. *Id.* at 639-40. The court held that the ESA is a regulatory scheme, and "the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, the Cave Species takes may be aggregated with all other ESA takes." *Id.* at 640.

The taking of the Karner Blue butterfly can be similarly aggregated with all other endangered species takes. Even though the butterfly on Ms. Lear's property is purely local, just like the Cave Species, harm to the butterfly will affect biodiversity and the interdependence of all species. The ESA's taking provision is essential to the regulatory scheme because it keeps the endangered species from being removed from their habitats and prevent the habitats' destruction. Without Section 9, the ESA will be left with a "gaping hole," unable to regulate vital species on

private property. Further, the ESA is given a presumption of constitutionality; absent any contrary evidence of the statute going beyond the bounds of Congress's enumerated Commerce power, the ESA and its takings provision will be upheld.

The Supreme Court's most recent Commerce Clause decision limited Congress's power to regulate some commercial activities, but did not affect Congress's power to regulate takings of endangered species. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012). The Supreme Court held that Congress cannot regulate non-activity or future activity, but Congress may "anticipate the *effects* on commerce of an economic activity." *Sebelius*, 132 S.Ct. at 2589.

The Commerce Clause remains valid as applied to the intrastate Karner Blue butterfly on Ms. Lear's property even though *Sebelius* narrows that application. Congress, in the ESA, specifies that species have "esthetic, ecological historical, recreational, and scientific value" that must be preserved. § 1531(a)(3). It is not referring to future activity, but rather the current value of the species to the economy and the environment. Congress, after *Sebelius*, may anticipate the effect of prohibiting, or allowing, individuals from taking an endangered species, and the effect that it will have on interstate commerce. The species' use in medicines and scientific research, therefore, can be considered when assessing their commercial value and *effect* on interstate commerce.

If this Court finds the Karner Blue's effect on interstate commerce is less than clear, the ESA still regulates a class of activities where the *de minimis* character of an individual instance will not invalidate the regulation. *Raich*, 545 U.S. at 17. The takings prohibition is a necessary component of the ESA because it safeguards against individuals taking or harming a *de minimis* species, which has or could have a substantial effect on commerce.

In sum, Congress's protection of species like the Karner Blue butterfly through Section 9 is rationally related to commerce because it is part of a regulatory scheme that has a substantial relationship to commerce. Without the takings prohibition, the ESA would fail because persons could freely interfere with the species that the regulation aims to protect.

2. The lack of a jurisdictional element is not dispositive of Section 9's effect on commerce.

Courts have held that a jurisdictional hook that shows Congress's intent for the statute to affect commerce is not necessary to uphold the statute's constitutionality. A statute without a jurisdictional element will then allow the court to determine the scope of its applicability to commerce. *Rancho Viejo*, 323 F.3d at 1068.

3. Legislative history reflects Congress's intent to prohibit takes on private property.

While the government is not generally required to provide express findings of how a statute will affect commerce, *Lopez*, 514 U.S. at 562, the language of the ESA and the committee report, *see* app. B, suggests that Congress contemplated and intended to prohibit endangered species takes on private property because it would have an effect on interstate commerce. Endangered species "perform vital biological services to maintain a balance of nature within their environments," and the destruction of their habitats is one of the leading causes of their extinction. S. Rep. No. 93-307. Therefore, it is necessary for the FWS to have control over these species, even when they are located on private property. *See* S. Rep. No. 91-526.

4. Section 9 of the ESA has a substantial effect on interstate commerce.

The relationship between ESA § 9 and interstate commerce is not too attenuated, but rather it has a substantial effect on interstate commerce. When a statute is an "essential part of a larger regulation of economic activity," it will be sustained when the regulatory scheme will be "undercut unless the intrastate activity were regulated." *Lopez*, at 561. A species like the Karner

Blue butterfly is a natural resource whose existence is dwindling, thereby making regulation necessary for its continued use as a resource. The precise goal of the ESA is to protect and preserve these species, which will maintain their effect on interstate commerce. The ESA cannot be effective unless procedures are in place to prohibit individuals from 'taking' endangered species found on their property. Congress found that one of the leading causes of extinction was the destruction of critical habitats as a result of development. S. Rep. No. 93-307. If Section 9 were not in place, Ms. Lear could have freely destroyed the Heath and the last remaining Karner Blue butterfly population in New Union.

This Court should uphold the District Court's declaration that the ESA is a valid exercise of Congress's Commerce power. Ms. Lear's proposed residence, the activity that will essentially result in the taking of the Karner Blue butterfly, has a substantial relationship to interstate commerce because it will bring a team of developers and construction materials, some of which will certainly travel in interstate commerce. Ms. Lear's construction project will generate more commercial activity than there would have been without her project. In the alternative, the ESA has a substantial relationship to commerce because it, through Section 9, regulates endangered species takes. Endangered species are related to commerce because they maintain biodiversity, and have commercial value, such as scientific research and use in medicines. While there is no express jurisdictional limit in the statutes, legislative findings show that Congress has a rational basis for introducing the ESA with the takings prohibition to preserve and protect these species, even when they are located on private property. The relation to commerce is substantial because without Section 9, the ESA could hardly have any effect as so many endangered species are likely found on private property, and taken in the aggregate, endangered species takes would eliminate numbers of species and greatly affect biodiversity.

II. THE ESA TAKINGS PROHIBITION HAS NOT RESULTED IN A CATEGORICAL TAKING, AND THE FWS IS NOT LIABLE TO CORDELIA LEAR FOR AN UNCOMPENSATED TAKING IN VIOLATION OF THE FIFTH AMENDMENT

"[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. However, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The government may, on the basis of "justice and fairness," make adjustments to private property rights for the public good. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (citations omitted). One such adjustment is Congress's establishment of the ESA to protect and preserve species and the environment. *See supra* Part I. Though the ESA may interfere with certain private property rights to reach this goal, it is still a valid exercise of Congress's constitutional authority.

Ms. Lear argues that through the application of the ESA and wetlands restrictions, the FWS and Brittain County have effected a total taking without providing her compensation. However, Ms. Lear lost the opportunity to negotiate the best use for the property and establish a relationship with the agency when she failed to engage in the ITP process, making her claim not yet ripe for judicial review. *See Morris v. United States*, 392 F.3d 1372, 1377 (Fed. Cir. 2004).

Even if this Court finds that her claim is ripe, the application of the ESA to protect the Karner Blue butterfly's habitat is not a taking requiring just compensation because there is not a total diminution in value of Ms. Lear's property.

A. Ms. Lear's claim against the FWS is not ripe for review because she neither received a final decision nor completed the application process.

This Court does not have jurisdiction over Ms. Lear's takings claim because it is not ripe for review. A takings claim is ripe for adjudication when "the government entity charged with

implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

The ESA's takings prohibition forbids landowners and other individuals from "tak[ing] any [endangered] species within the United States . . . ." 16 U.S.C.A. § 1538(a)(1)(B). However, the ESA allows individuals to apply for an Incidental Take Permit (ITP) when the "taking is incidental to, and not the purpose of, the carrying out of an otherwise unlawful activity." 16 U.S.C.A. § 1539(a)(1)(B); *see* app. A at 3. When the landowner submits her plan, the agency will review it, and issue a decision that should provide the property owner with terms and conditions necessary to carry out the permit. § 1539 (a)(2)(B). This process is not only for the FWS, but is meant to benefit the property owner, as well. A takings claim cannot be effectively reviewed *de novo* unless the court knows the burdens that were placed on the property. *Morris*, 392 F.3d at 1374-76 ("Evaluating whether the regulations effect a taking requires knowing to a reasonable degree of certainty what limitations the agency will . . . put on the property."). When an agency has established these burdens, and they have been unambiguously communicated to the landowner(s), a taking is then ripe. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001).

Ripeness is consistent with administrative and constitutional requirements. The Administrative Procedures Act allows for judicial review only over "[a]n agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. Federal courts will only hear "actual cases or controversies." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). To have standing, "a plaintiff must have suffered an injury in fact, . . . there must be a causal connection between the injury and conduct complained of . . . and it must be likely, as opposed to merely speculative,

that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Only where the "regulations imposed were clear from the [agency's] denial of [plaintiff's] applications . . . ." or where a final decision has been given, a property owner may forgo "*further* and futile applications." *Palazzolo*, 533 U.S. at 625-26. (Emphasis added). Constitutional standing, the ESA, the Administrative Procedures Act, and case law each require, at minimum, a final decision that has caused some harm to the claimant.

In *Morris*, landowners wanted to remove redwood trees from their property, which had a takings effect under the ESA. 392 F.3d at 1374. The Morrises, however, asserted that harvesting the trees was the "property's only economically viable use." *Id.* They were advised to apply for an ITP with a Habitat Conservation Plan (HCP), but decided not to file the application because the cost would be higher than the property value. *Id.* The court held that the issue was not ripe because the landowners failed to engage the National Marine Fisheries Service, did not give the agency a "meaningful opportunity to exercise its discretion," and never received a final decision from the agency on the cost of the ITP. *Id.* at 1377. The Morrises' claim was based on "the burdens attending the administrative procedure" where the cost of the application was prohibitive, "rather than the burdens attending a decision on restriction of use" of their property. *Id.* at 1376. The court rejected the Morrises' futility argument for lack of an agency decision.

Ms. Lear's takings claim is not ripe for review because she never received a final agency decision. The FWS's letter to Ms. Lear informing her that the Heath was a protected habitat for the Karner Blue butterfly was not a final decision on the effect of the ESA takings prohibition. R. 6. Rather, it was an invitation for Ms. Lear to work with the FWS to submit a successful ITP. R. 6. She took it upon herself to determine that the application would cost $150,000, and then abandoned the process to develop an alternative development proposal (ADP). R. 6-7. The lower

court held that Ms. Lear's "application for a permit would be futile where it is undisputed that the cost of applying for a permit exceeds the fair market value of the property in question." R. 9. However, this is the very analysis that the *Morris* court rejected because a final decision had not been reached. Ms. Lear did not grow impatient with the FWS, but rather chose not to apply for agency review. No final agency decision exists when the applicant has self-determined that the cost of the procedure is too burdensome. Ms. Lear did not give the FWS the opportunity to determine "to a reasonable degree of certainty what limitations [it would] place on the property." *Morris*, at 1376. Therefore, a takings claim has not been established, and the futility exception cannot apply to the process on which Ms. Lear rests her claim.

B. The relevant parcel for Ms. Lear's takings claim is the entirety of Lear Island, rather than the Cordelia Lot.

If this Court determines that Ms. Lear's claim is ripe for review, it should consider all of Lear Island when determining whether Ms. Lear has experienced a compensable taking. The Supreme Court has consistently evaluated takings cases by viewing the property as a whole. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments . . ."), *Andrus*, 444 U.S. at 66 ("[T]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). A recent decision from a Wisconsin district court applied this very analysis. *Murr v. State*, 359 Wisc. 2d 675, para. 18 (2014) ("'The United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . .'" (quoting *Zealy v. City of Waukesha*, 201 Wisc. 2d 365, 375-76 (1996)). "Conceptual severance," as used in *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), is inconsistent with "fairness and justice" because it allows individuals to manipulate their property so that the government might never engage in land use planning

without having to provide each landowner compensation. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). To determine whether there has been a compensable taking, the Court should focus "both on the character of the action and extent of the interference with rights in the parcel as a whole . . . ." *Penn Central*, 438 U.S. at 130. This Court must consider the use and value of the property from the date of its acquisition by the owners.

Federal Circuit Courts of Appeal have followed this precedent applying a "flexible approach," or a fact-sensitive approach, when determining the relevant parcel for a constitutional takings analysis. *See Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (refusing to adopt a brightline rule that the relevant parcel is the one for which plaintiffs seek a permit, and giving great weight to the developers' expectations for each parcel) *abrogated by Bass Enter. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

In *Deltona Corp.*, a developer purchased 10,000 acres in 1964 with the intent to build a "water-oriented residential community, Marco Island." 657 F.2d at 1188. He divided the property into five sub parcels that same year. *Id*. Over time, the Army Corps of Engineers developed its policies and regulations, and by 1973 these regulations required Deltona to apply for permits for the three remaining undeveloped parcels. *Id.* Deltona was denied a permit for two of the remaining parcels due to the "overriding . . . public interest" in protecting the wetlands on the property. *Id.* at 1188-89. Deltona filed suit alleging that the regulations effected a compensable taking, and that it is "no longer able to capitalize upon a reasonable investment-backed expectation . . . ." *Id.* at 1191. After assessing the "fairness of the regulations" and any "'diminution in market value' of these parcels," the court found that the regulation did not

"prevent[] Deltona from deriving many other economically viable uses," and that "enormous" value remained in the property. *Id.* at 1992 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980)). The court noted that Deltona should have been aware the permit process could change; landowners cannot bring a claim for a compensable taking simply because they can no longer develop their property the way they planned. *Id.* at 1193.

Just like the *Deltona* court, this Court should find that Ms. Lear's inability to exploit her property as she prefers will not establish a taking, and that the "residual economic position" of Lear Island—comprised of the much larger Goneril and Regan lots—is great. *Deltona.*, at 1192. Even without her desired construction activity, as evidenced by its remaining property value and an offer by the society to compensate her for butterfly watching, both Ms. Lear's lot and Lear Island has viable economic value. R. 7.

A flexible, fact-intensive approach in the instant case shows that the District Court erred in finding that the Cordelia Lot is the relevant parcel. The ten-acre Cordelia Lot, as part of the whole of Lear Island, is similar to Deltona's properties. The Lear family has occupied Lear Island since 1803, and initially used the property for farming, fishing, commerce, etc. R. 5. When King James Lear owned the property in 1965, he divided the parcel among his daughters, yet he maintained a life estate for himself. R. 5. The record reflects Mr. Lear's active role in maintaining the entire property until his death in 2005. R. 5. Mr. Lear built a residence on the two larger parcels, the 550-acre Goneril Lot and 440-acre Regan Lot, but the only activity reflected in the record concerning the Cordelia Lot was the annual mowing. R. 5. Meanwhile, in 1992, the FWS listed the Karner Blue butterfly as an endangered species, and designated the Heath as the butterfly's critical habitat. R. 6. It can be inferred from this treatment that Mr. Lear never intended to develop the Cordelia Lot as a separate parcel. If Mr. Lear had intended to build

a residence on the Cordelia Lot, he could have re-deeded the properties after the Heath became a critical habitat. Instead, the regulations came into effect and no action resulted on his part. Twenty years had passed between the imposition of the regulation and Ms. Lear's possession. R. 5-6. This was plenty time for the family to either adjust the lot or adjust their expectations.

Had Ms. Lear taken part in the administrative ITP process, she and the FWS could have considered alternative plans for Lear Island. Therefore, designation of the Heath as a critical habitat had no effect on the Lear's investment-backed expectations. This Court should find that the relevant parcel is Lear Island. As Ms. Lear concedes, she does not have a compensable taking for the entirety of Lear Island.

C. Ms. Lear is precluded from bringing a claim for a categorical taking because the critical habitat is temporary.

Even if the relevant parcel is the Cordelia Lot, Ms. Lear is precluded from a takings claim for complete deprivation of all economic value because the critical habitat is only temporary. Just as the plaintiff cannot sever her lot from the entirety of Lear Island, she similarly cannot sever this potential ten-year waiting period to claim that it results in a total deprivation of "all economically beneficial uses." *Tahoe-Sierra,* 535 U.S. at 330-31(quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

In *Tahoe-Sierra*, the Supreme Court considered whether regulations that placed a 32-month moratorium on developing private properties around the Lake Tahoe Basin effected an unconstitutional taking. 535 U.S. at 311-13. The Court rejected petitioners' push for the extreme *Lucas per se* rule where any deprivation of all economic use, no matter how brief, constitutes a taking. *Id.* at 334-35. The Court reasoned that a temporary taking cannot render a property "valueless" because it will regain its value when the regulation is lifted. *Id.* at 332. The Court ultimately found that "fairness and justice" were best served by applying an ad hoc *Penn Central*

analysis instead of *Lucas*, and that a moratorium that lasted more than one year could be constitutionally acceptable if it comported with the landowner's investment-backed expectations. *Tahoe-Sierra*, 535 U.S. at 341-42 (quoting *Armstrong*, 364 U.S. at 49).

Accordingly, Ms. Lear cannot bring a claim for a total regulatory taking for the Cordelia Lot because the Heath and the access strip, which make up nine acres of Ms. Lear's ten-acre lot, is a temporary habitat only kept alive by the Lear family's annual mowing. R. 5. Without mowing, the Heath will "naturally convert to a successional forest" in ten years, "eliminating the Karner Blue's habitat." R. 7. Since the FWS seeks to preserve the Karner Blue butterfly, it suggested an acceptable HCP, which would allow for an "additional contiguous lupine habitat." R. 6. The Goneril Lot is contiguous to the Heath. R. 6. Mowing this portion of Lear Island could become an ideal habitat for the Karner Blue butterfly. Ms. Lear could maintain the butterfly habitat by transferring part of it from her lot to a small fraction of Goneril's 550 acres. R. 6. The temporary taking of the property only exists until Ms. Lear comes to the table to develop a HCP that will preserve the Karner Blue butterfly and allow her ample space to build her residence.

The record reflects a strained relationship between Cordelia and Goneril Lear, R. 6, but this conflict cannot be the FWS's concern. The FWS asks this Court to allow the agency the opportunity to make these negotiations before instituting a judgment for compensation. For now, Ms. Lear's property has not experienced a total deprivation of economic value, and her claim for regulatory categorical taking is precluded.

D. Brittain County's Wetlands Preservation Law aligns with background principles of law; therefore, Ms. Lear is precluded from bringing her claim for a categorical taking.

Ms. Lear is also precluded from bringing a claim against Brittain County, New Union for denying her proposal to fill the marsh cove because the State has an interest in protecting

navigable waters and wetlands inherent in its title. The Fifth Amendment Takings Clause is applicable to the States through the Fourteenth Amendment's Due Process Clause. *See* U.S. Const. amend. V and XXIV. A state regulatory taking based on public trust or state "background principles" inherent in the property's title is not unconstitutional or compensable because it is in the public's interest, and was a limitation "already placed upon ownership." *Lucas*, 505 U.S. at 1029. In other words, the deprivation of all economic value through state regulation will not require the government to compensate the landowner when it did "not proscribe a productive use that was previously permissible under relevant property and nuisance principles." *Id.* at 1029-30. A property owner should expect that his property will be occasionally limited by state regulations in a "legitimate exercise of [the State's] police powers." *Id.* at 1027.

Here, the District Court erred in finding that the 1803 congressional grant of Lear Island did not include public trust principles to protect New Union's navigable waters because Lake Union is navigable in fact as evidenced by the Lears' use of the waters for goods prior to the construction of a land bridge. R 5.

Additionally, the "equal footing doctrine" presumes that New Union received title for the navigable waters and wetlands when it entered the Union. Navigable waters are vested in the Sovereign or States when they enter the union "for the benefit of the whole people" because "they are of great value to the public for purposes of commerce, navigation, and fishery." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). Once determined, navigable waters are "not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. § 329.4. Although navigability of state waters are assessed at the time of statehood, *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1227-28 (2012), the Supreme Court long ago stated that navigability could be evaluated and applied retroactively, *United States v. Utah*, 283 U.S. 64, 82 (1931). Even

where waters have been used for private matters, evidence of the "ordinary conditions" of the waters and their "susceptibility to use as a highway of commerce" can be enough to satisfy navigability as of the date of the title. *Utah*, 283 U.S. at 82-83. Therefore, whether the waters in a title were deemed navigable before or after statehood, their value in commerce is substantial and benefits the whole public.

While the record in this case is silent on the activities of Lake Union at the time of statehood, it does indicate that the lake was used for interstate navigation and was once open water. R. 4. In fact, Cornelius Lear and his successors used the lake to ship produce between the island and the mainland. R. 5. It follows that the commercial uses have always been possible on Lake Union. Therefore, Cornelius Lear did not have to dredge the lake to make navigation possible. Lake Union has always been a navigable lake "susceptible for use to transport interstate . . . commerce," whose title was either retroactively applied to New Union's statehood, or became part of New Union's title, and by proxy Brittain County, when it became a state.

The District Court also erred in relying on *Shively v. Bowlby* to find that the private landowner who received the congressional grant would supersede an "equal footing doctrine" claim by a state. R. 10. A congressional grant to a private property owner does not preclude a state from gaining the public trust rights over the navigable waters in the property. It has long been established that congressional grants to private settlers "convey . . . no title or right below [the] high-water mark, and do not impair the title and dominion of the future state, when created . . . ." *Shively*, 152 U.S. at 57-58. To hold the opposite would give individual landowners and their successors power over navigable waters that the States might never achieve. Here, the District Court erred in finding that the congressional grant given to Cornelius Lear in 1803 barred Brittain County from gaining title over Lake Union.

In sum, public trust and background principles apply to Lake Union because it is a navigable body of water inherent in the state's title, and any law that reinforces this existing principle cannot be considered a constitutional taking. The Brittain County Wetlands Preservation Law complies with these background principles of state law by preserving a resource that was always protected in the title. Further, the Lears should have had some expectations that the wetlands on their property would be limited by state regulations seeking to preserve such an important public resource. Ms. Lear is precluded from bringing a takings claim against New Union and the FWS, because she has not experienced a categorical regulatory taking that goes beyond the ordinary background principles of property law.

E. Ms. Lear has not been deprived of all economic use of her property.

The District Court erred in finding that Ms. Lear has been deprived of all economic value in her property. If Ms. Lear's takings claim is ripe for review, and the Cordelia Lot is the relevant parcel, the FWS still cannot be held liable for a complete deprivation of economic use because the ESA only prohibits Ms. Lear from destroying the butterfly's critical habitat without depriving her of *all* economic use of her property.

The ESA and Brittain County's Wetland Preservation Law should be considered as separate regulations. However, if the Court determines that the regulations should be considered together, Ms. Lear has not experienced a categorical taking under *Lucas* because the Brittain County Butterfly Society's offer to pay $1000 annually gives the property economic value.

1. <u>The FWS and Brittain County restrictions should not be considered together to create a claim for a total compensable taking.</u>

An "apparently novel question" is before this Court: whether a federal regulation and a local restriction should be considered together to create a complete deprivation of economic

value of private property. This Court should reverse the District Court's decision to apply the ESA and Brittain County's land use regulations together.

An individual's right to private property is an essential right protected by the Constitution. U.S. Const. amend. V and XXIV. However, those rights must be balanced against legitimate state interests, for "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn. Coal,* 260 U.S. at 413; *see also Andrus*, 444 U.S. at 65 ("government regulation—by definition—involves the adjustment of rights for the public good."). The Framers gave Congress the power to develop laws to protect and preserve the environment for future generations. *See Gibbs v. Babbitt*, 214 F.3d at 492 ("Invalidating [the ESA] would call into question the historic power of the federal government to preserve scarce natural resources in one locality for the future benefit of all Americans.").

The Supreme Court recognized the importance of individual property interests in *Penn Central*, where it instituted a balancing test to ensure that an individual alone did not "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 438 U.S. 104 (quoting *Armstrong*, 364 U.S. at 46). To determine whether a regulation causes a compensable taking, the *Penn Central* ad hoc analysis considers 1) the character of the intrusion, 2) the reasonable investment-backed expectations, and 3) the economic impact that the regulation will have on the claimant by balancing individual and public interests. *Id.* at 124-25.

Using this ad hoc test, the Court should find that the regulations together only cover Ms. Lear's ten acres, which comprises a small part of a 1,000-acre parcel, and sufficiently protect a vital natural resource. Next, the court should note Ms. Lear's delay in both constructing a residence on her property, and in bringing claims against the FWS and Brittain County despite

these regulations having been in place for years. The court should avoid allowing an individual to position two government entities against each other to make a claim for compensation when she, for years, showed no intention or expectation of developing her property. *See* R. 5. Finally, the Court should consider the economic impact on the plaintiff. Ms. Lear did not rely on any plans to develop the property for a profit, and she was not already living on the property. There is nothing to suggest that she is losing any economic investment in the property since she has not started construction, and no facts suggest she has even invested in an architect yet. *See* R. 5. In sum, by applying this balancing test, the court will reach a fair decision that considers the regulations' purposes and the claimant's potential losses. The regulations in the instant case should stand on their own because the loss to Ms. Lear is meager compared to the destruction of the Karner Blue butterfly and Brittain County wetlands.

In the alternative, a brightline rule that requires two regulations to be considered together will put the Court in the awkward position of having to determine which entity must compensate the claimant, or which natural resource the claimant might destroy for her individual use. In the instant case, if both parties are found liable, as the District Court suggests by relying on joint and several tort law, Ms. Lear will be compensated by both entities. This creates a dangerous precedent where a claimant gets a windfall when her small parcel, part of a much larger and likely underdeveloped property, is governed by two regulations that aim to preserve vital natural resources. Also, either Ms. Lear or the Court will choose which regulation Ms. Lear may ignore. This positions two government entities with the same goal of protecting wildlife and natural resources against each other. Either way, the public loses because the result is the destruction of a natural resource, as well as government tax dollars spent on costly litigation.

In the very rare circumstance where two regulations are imposed to cover one whole property, the court should apply a balancing test to determine the effect both regulations will have on the protected resource and on the claimant. Here, it is in the interests of fairness and justice that the regulations are considered separately. However, this is a legislative and a policy determination that should be left to Congress. *Compare* U.S. Const. art. I § 1 *to* art. III § 2 cl. 1.

2. If the ESA and Brittain County Wetland Preservation Law are combined, it remains that Ms. Lear has not experienced a regulatory categorical taking because she has not been deprived of all economic use of her property.

If this Court finds that the relevant parcel is the Cordelia Lot, it remains that Ms. Lear has not been deprived of all economically viable use of her property. Ms. Lear relies on *Lucas* to claim that she has been deprived all economic use of her property, and is thus entitled to compensation under the Takings Clause. R. 8. In *Lucas*, the Supreme Court moved away from "factual [takings] inquiries," and established a brightline rule for determining whether there has been a regulatory categorical, or total, taking. 505 U.S. at 1015. There are two ways to establish a categorical taking: 1) a regulation causes the physical invasion of the landowner's property, and 2) a regulation denies a landowner of all economically beneficial use of the land. *Id.* Ms. Lear's, and the District Court's, reliance on *Lucas* to establish a regulatory taking was incorrect because there has not been a categorical taking that deprived Ms. Lear of all economically beneficial use of her property.

a. The District Court erred in finding that Ms. Lear has been deprived of all economically beneficial use of her property based on the *Lucas* factors.

It is "relatively rare" that the government deprives a landowner of all economic benefits of her land to require compensation. *Lucas*, 505 U.S. at 1018. This brightline rule, requiring total loss, has been criticized for its arbitrariness, as a landowner who has suffered only a 95% taking

cannot recover for that loss, while a landowner who has experienced a full taking will get full compensation. *Id.* at 1064 (Justice Stevens, dissenting).

To determine whether there has been a total taking depriving a claimant all economic value in the property, the *Lucas* Court considered three factors: 1) "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities," 2) "the social value of the claimant's activities and their suitability to the locality in question," and 3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant or the government . . . ." *Id.* at 1030-31 (citations omitted). The burden is on the claimant to show that the regulation has caused a taking. *See id.* at 1015 n.6, *Keystone*, 480 U.S. at 485. Following the *Lucas* analysis, this Court should find that Ms. Lear has not been deprived of all economic value.

b. Cordelia Lear has not lost all economically viable use of her property.

The District Court erred in finding that there has been a regulatory total taking of the Cordelia Lot because Ms. Lear has not lost all economically viable use of her land. Ms. Lear seeks to build a residence on the Cordelia Lot. She claims that the ESA's takings prohibition combined with Brittain County's wetlands preservation law has created a constitutional, compensable taking of her property. R. 7.

First, Ms. Lear still retains economic value in her property because the Brittain County Butterfly Society has offered her $1,000 annually to conduct viewings of the endangered species on the Heath. R. 7. While this amount alone does not result in a profit or additional economic value for Ms. Lear after property taxes, this does show that the habitat adds value to her property and alternatives are available to create economic value in her property that she has not explored. R. 7. Ms. Lear did not complete the ITP application process with the FWS so she cannot be fully

aware of other available alternatives. R. 7. Brittain County denied Ms. Lear a permit to build a residence on the marsh because it was not a water-dependent use even though the property was once used as a boat landing. R.5. Nothing in the record shows that Ms. Lear is precluded from building a boat landing, which would be a water-dependent use capable of providing her an economic benefit. Combined with the tourism generated by the Heath, Ms. Lear can derive economic value from her property, even if it is not a residence.

Next, the Court must determine whether Ms. Lear experienced a total taking of her property by applying the *Lucas* factors. First, the Court must analyze the degree of harm Ms. Lear's proposed activities will have on the critical habitat and the wetlands. The Heath is the last remaining habitat for the Karner Blue butterfly in all New Union. R. 5-6. Because the butterfly does not migrate, destroying its habitat will certainly destroy the species effectively barring any future research or economic uses for the species. R. 6. Therefore, Ms. Lear's proposed activity will do great harm to a public resource.

Second, while there is generally great social value in allowing landowners to build private residences on their property, *Penn. Coal*, 260 U.S. at 413, Ms. Lear's proposed activities are not suitable to her property. King James Lear divided Lear Island in 1965, but his daughters did not come into possession until 2005. R. 5. The record shows that Mr. Lear built residences on the Regan and Goneril lots during that period, but the family neglected to build a residence on the much smaller Cordelia Lot. R. 6. The only attention the family ever paid to the Cordelia lot was annual mowing, which created the critical habitat. R. 6. It can be inferred that the Lear family did not see much value in the Cordelia Lot long before it was ever named a critical habitat in 1992. Further, Ms. Lear did not show any interest in building on her lot for another seven years after her father's passing. R. 5. The social value of building residences is reflected in the entirety of

Lear Island, but the lack of activity on the Cordelia Lot shows that not much social significance was given to the property. While the property is generally suitable for a residence, the Lears created the problem that Ms. Lear now faces by limiting activity on the property for years to annual mowing thereby creating the Karner Blues' critical habitat.

Finally, Ms. Lear can avoid harming the butterfly and destroying the habitat, but she has chosen to forgo some of these options. Ms. Lear did not participate in the ITP process, which could have generated a plan that addressed the FWS's concerns and Ms. Lear's desire for a residence. R. 6-7. Ms. Lear abandoned that process, and instead decided to build her residence on her property's wetlands. R. 7. Although Brittain County denied her permit, it was only denied because she did not propose a water-dependent use of the wetlands. R. 7. The record shows that Ms. Lear has neither reevaluated her permit for the wetlands, nor has she tried to contact the FWS to follow through with the ITP process. R. 7. While obviously not her first choice, Ms. Lear still has the option to provide for "additional contiguous lupine habitat" on Goneril's lot. R. 6. A strained sibling relationship is not reason enough to destroy the last remaining Karner Blue butterfly species in New Union, or to require the government to compensate an avoidable taking.

Although building the residence was an idea communicated by King James Lear when he divided properties among his daughters, and although two of his daughters have built residences on their respective lots, "changed circumstances or new knowledge may make what was previously permissible no longer so." *Lucas*, at 1031. This does not change even if "other landowners similarly situated" may continue to exercise a right denied to the claimant. *Id.* Regan and Goneril's ability to build on their similarly situated lots does not automatically give Cordelia that same right. Essentially, all properties are not created equal, although Mr. Lear had every opportunity to divide these parcels equally before his death.

In sum, Ms. Lear has not lost all economically viable use of her property to qualify as a total, compensable taking because her use will do a great deal of harm to the endangered butterfly, there is a lack of social value in Ms. Lear building a residence on the ten-acre lot, and she has not considered alternatives for avoiding that harm. Instead, an ad hoc inquiry that allows for adjustments to "the benefits and burdens of economic life," as demonstrated in *Penn Central*, is necessary to show that Ms. Lear has experienced only a partial taking. 438 U.S. 104, 124 (1978); *see Palazzolo*, 533 U.S. at 616 (holding that the lower court erred in applying a Lucas analysis, and remanding for a *Penn Central* analysis). However, Ms. Lear does not advance a partial regulatory taking claim so it will not be addressed in this brief. *See* R. n.3.

III. CONCLUSION

In conclusion, the FWS respectfully requests that this Court affirm the District Court's decision finding the ESA to be a constitutionally permissible exercise of Congress's Commerce power. The ESA regulates endangered species takes, which result from construction projects that interfere with a critical habitat. In the alternative, the ESA is a regulatory scheme that has a substantial effect on interstate commerce because prohibiting endangered species takes protects biodiversity and the many effects that a balanced environment has on interstate commerce.

Finally, the FWS respectfully requests that this Court reverse the District Court's decision that the ESA and Brittain County's wetlands preservation law together form an unconstitutional taking. Ms. Lear's claim was not ripe for review, and the Court should consider all of Lear Island in its analysis. Even so, Ms. Lear has not lost all economic value in her property, and has failed to explore alternative uses.

APPENDIX A
STATUTES

APPENDIX A

ENDANGERED SPECIES ACT

§1; 16 U.S.C. § 1531 Congressional findings and declaration of purposes and policy
(a) Findings

The Congress finds and declares that--

(1) 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;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes
The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

> **(1)** It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.
>
> **(2)** It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

. . .

§9; 16 U.S.C. § 1538 Prohibited Acts
(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to--

> **(A)** import any such species into, or export any such species from the United States;
>
> **(B)** take any such species within the United States or the territorial sea of the United States;

§10; 16 U.S.C. § 1539 Exceptions
(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe--

> **(A)** any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or
>
> **(B)** 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.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies--

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that--

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

* * *

CODE OF FEDERAL REGULATIONS

33 C.F.R. § 329.4 Definition of Navigable Waters of the United States

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity

APPENDIX B
LEGISLATIVE HISTORY

APPENDIX B

SENATE COMMERCE COMMITTEE REPORTS

No. 93-307
Endangered Species Act of 1973

July 6, 1973

THE Committee on Commerce, to which was referred the bill (S. 1983) to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE

The purpose of this bill is to provide for conservation, protection and propagation of endangered species of fish and wildlife by Federal action and by encouraging the establishment of State endangered species conservation programs. The methods include authorization to the Secretaries of Interior and Commerce to list species which are either (1) endangered or (2) likely to become endangered within the forseeable future, and authority to establish an Advisory Committee for consultation regarding this list; authorization to the Secretary to use certain existing legislation for land acquisition; provision for criminal and civil penalties for violation of its prohibitions, provision for the administrative implementation of the international convention on endangered species; management of endangered and threatened species by the States under State plans that are approved by the Secretary; and provision for financial aid to State wildlife management agencies which enter into cooperative or management agreements with the Secretary.

Programs provided by this bill are to be administered jointly by the Secretary of the Interior and the Secretary of Commerce within their respective jurisdictions as regards fish or wildlife, as provided by Reorganization Plan No. 4 of 1970.

BACKGROUND

It has become increasingly apparent that some sort of protective measures must be taken to prevent the further extinction of many of the world's animal species. The number of animals on the Secretary of the Interior's list of domestic species that are currently threatened with extinction is now 109. On the foreign list, there are over 300 species. Further, the rate of extinction has increased to where on the average, one species disappears per year. Consideration of this need to protect endangered species goes beyond the aesthetic. In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a ‘balance of nature’ within their environments. Also revealed was the need for biological diversity for scientific purposes.

The two major causes of extinction are hunting and destruction of natural habitat.

The first comprehensive endangered species legislation was enacted by the 89th Congress and has become known as the Endangered Species Preservation Act of October 15, 1966 (Public

Law 89-669 (80 Stat. 926)). This Act achieved a dual objective: First, it authorized and directed the Secretary of the Interior to initiate and carry out a comprehensive program to conserve, restore, and where necessary to bolster wild populations to propagate selected species of native fish and wildlife, including game and non-game birds, that he found to be threatened with extinction. Secondly, it consolidated and in some cases expanded the authorities of the Secretary of the Interior relating to the management and administration of the National Wildlife Refuge System.

The 91st Congress enacted Public Law 91-135 (83 Stat. 275), known as the Endangered Species Conservation Act of 1969. This law expanded the endangered species program in at least three significant respects:

First, to help insure that the United States does not contribute to the expiration of other nations' wildlife, the Secretary of the Interior was authorized to develop a list of species of subspecies of animals that were threatened with worldwide extinction, and to prohibit the importation from a foreign country of any such animal or any part, any product, or egg thereof. Two limited exceptions to this prohibition were provided: the first authorizes the Secretary to issue permits for the importation of listed animals for scientific, educational zoological or propagational purposes; the second allows the Secretary to permit for one year the importation of such animals or products for commercial purposes if the importer was a party to a contract entered into prior to the date the animal was placed on the list if the importer would otherwise suffer ‘undue economic hardship‘.

Second, in order to assist the States in protecting domestically endangered species, the legislation amended existing laws to make unlawful throughout the United States their sale or purchase by any person who knows, or in the exercise of due care should know, that such animal was taken in any manner in violation of the laws or regulations of a State or foreign country. These provisions supplement an existing statute which currently prevents the interstate sale or purchase of fish, mammals, or birds in violation of State or foreign law.

Third, in order to further assist in the protection of domestically endangered species the law increased the amounts authorized to be appropriated to acquire lands for the purpose of conserving, protecting, restoring, or propagating any endangered species. This new authority for use of funds contained limits of $2.5 million per area and $5 million per year, and $15 million total ceiling.

NEED FOR THE LEGISLATION

While the Acts of 1966 and 1969 laid the framework for an increasingly effective endangered species conservation program, the Department of the Interior has indicated some difficulties in expanding the practical effect of the program to the spirit of the original legislation. As the President stated in his Environmental Message of February 8, 1972, the existing law ‘simply does not provide the kind of management tools needed to act early enough to save a vanishing species.’

From testimony offered at hearings on the bill, it is apparent that the following four requirements must be satisfied if the bill is to be effective:

(1) The bill must provide the Secretary with sufficient discretion in listing and delisting animals so that he may afford present protection to those species which are either in present danger of extinction or likely within the foreseeable future to become so endangered;

(2) the bill must provide protection throughout the nation for animals which are either endangered or threatened;

(3) the bill must lift the statutory restrictions that existing law places on authorization of monies for habitat acquisition from the Land and Water Conservation Fund Act, and extend to the Secretary land acquisition powers for such purposes from other existing legislation; and

(4) finally, it became apparent in hearings that many established State agencies could in the future, or do now provide efficient management programs for the benefit of endangered species.

While the Federal government should protect such species where States have failed to meet minimum Federal standards, it should not pre-empt efficient programs. Instead, it should encourage these, and aid in the extension or establishment of others, to facilitate management by granting regulatory authority and making available financial assistance to approved schemes. The reported bill is designed to meet these requirements.

The bill provides a broadened concept of 'endangered species' by affording the Secretary the additional power to list animals which he determines are likely within the foreseeable future to become threatened with extinction. This gives effect to the Secretary's ability to forecast population trends by permitting him to regulate these animals before the danger becomes imminent while long-range action is begun. By creating two levels of protection, regulatory mechanisms may more easily be tailored to the needs of the endangered animals. Flexibility in regulation is enhanced by a provision which allows for listing if the animal is endangered over a 'substantial portion of its range'. The Secretary makes his listing in full consideration of the forces which acted to bring about such endangerment. The Secretary is required to appoint an advisory committee for consultative purposes to aid in the review of these lists.

The bill makes violations of conduct prohibited under the bill subject either to civil penalties up to $10,000 or, to criminal penalties with fines levied up to $20,000 and/or imprisonment for up to one year. For the first time, the knowing taking of an endangered animal in violation of the law is a criminal offense where the Federal government has retained management power.

The Secretary may make certain exemptions from the prohibitions for scientific purposes or for the propagation of the species in controlled habitats, if he finds that such excepted conduct furthers the intent of the Act. The Committee wishes to clarify that such exemptions may be granted to individuals with legitimate claims who breed such animals domestically, whether or not they are associated with an institution. He may also receive applications for exemption where it is proven to him that failure to grant such an exemption will cause undue economic hardship to the applicant. The Secretary shall carefully scrutinize such applications to assure validity of the claim, and no such hardship exemption shall be longer than one year.

No. 91-526
Fish or Wildlife – Endangered Species – Protection

Nov. 6, 1969

THE Committee on Commerce, to which was referred the bill (H.R. 11363) to prevent the importation of endangered species of fish or wildlife into the United States; to prevent the interstate shipment of reptiles, amphibians, and other wildlife taken contrary to State law; and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of H.R. 11363 is threefold. First, in order to assist on an international level in the preservation of species threatened with extinction, this bill would authorize the Secretary of the Interior to develop a list of species of subspecies of wild mammals, fish, wild birds, amphibians, reptiles, mollusks, or crustaceans which are threatened with worldwide extinction, and it would prohibit the importation into the United States of any such species or subspecies or any part, product, or egg thereof. The bill would provide a limited exception to this prohibition, however, to permit the importation of endangered species or subspecies for zoological, educational, scientific, or propagation purposes under such terms and conditions as the Secretary of the Interior may prescribe. In addition, the bill would direct the Secretary of the Interior, through the Secretary of State, to seek the convening of an international ministerial meeting prior to June 30, 1971, for the purpose of signing a binding international convention of the conservation of endangered species.

Second, in order to assist the States in protecting domestically endangered species of reptiles, amphibians, mollusks and crustaceans, this bill would amend existing laws to make unlawful throughout the United States the sale or purchase of any reptile, amphibian, mollusk, or crustacean, or any part or egg thereof, by any person who knows, or in the exercise of due care should know, that such reptile, amphibian, mollusk or crustacean was taken in any manner in violation of the laws or regulations of a State or foreign country. These provisions will supplement existing statutes which currently prevent the interstate sale or purchase of State or foreign government protected fish, mammals, and birds.

Third, in order to further assist in the protection of domestically endangered species of fish, wildlife, reptiles, or amphibians, this bill would authorize the Secretary of the Interior to acquire privately owned lands, within the boundaries of any area administered by him, for the purpose of conserving, protecting, restoring, or propagating such species. The bill would authorize the appropriation of up to $1 million per year for fiscal years 1970, 1971, and 1972 for this purpose. In addition, it would raise the limitation on the total amount of money which may be spent on any area maintained for the conservation, protection, restoration or propagation of endangered species of native fish and wildlife, including migratory birds, from $750,000 to $2,500,000.

NEED

During recent years mankind has been exterminating species of fish and wildlife at a rapidly accelerating rate. From the time of Christ to about 1800 A.D., it has been estimated that

roughly one form of mammal was exterminated every 55 years. Since 1600, more than 125 species of birds and mammals have become extinct, as have nearly 100 additional subspecies (i.e., geographical races or varieties). Today it is estimated that one or two species of birds and mammals disappear each year. The International Union for the Conservation of Nature and Natural Resources presently lists approximately 275 species of mammals and 300 birds as rare and endangered; 89 different forms of fish and wildlife have been identified as endangered within the United States by the Secretary of the Interior.

There are three basic reasons for this accelerating rate of extermination of many of our planet's unique forms of life: the destruction of habitat in which the species can live and propagate by man's seemingly insatiable demand for land; the pollution of air and water which has proven particularly lethal to various species of fish; and the indiscriminate killing and capture of fish and wildlife for commercial or sporting purposes.

This bill, by restricting both international and domestic trade in endangered species of fish and wildlife, will obviously have its greatest impact in protecting those species which are threatened because of their commercial value. Nevertheless, since the bill also contains authority for the Secretary of the Interior to spend up to $1 million per year during the next 3 fiscal years for the acquisition of inholdings, in areas administered by him, for the conservation of species threatened with extinction, and since it raises the cumulative total which may be spent in acquiring lands for any area maintained for the conservation, protection, restoration, or propagation of endangered species from $750,000 to $2,500,000, it will help to preserve suitable habitat for many domestically endangered species which may have little commercial importance. In addition, the mere listing of a species as ‘endangered’ may provide considerable stimulus for governments of private groups to take more vigorous action to protect any species whose continued existence is in jeopardy.

Occasionally, a skeptic will question the importance of preserving a particular species of animal life when the world is still so rich in a variety of different life forms. This skepticism can be answered on two levels. From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the pool of germ-plasm available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants, is also irretrievably lost.

On a more philosophical plane, the gradual elimination of different forms of life reduces the richness and variety of our environment and may restrict our understanding and appreciation of natural processes. Moreover, in hastening the destruction of different forms of life merely because they cannot compete in our common environment upon man's terms, mankind, which has inadvertently arrogated to itself the determination of which species shall live and which shall

die, is assuming an immense ethical burden. Henry Beston has indirectly suggested the magnitude of this burden urging that man adopt a new and wiser concept of animals. He has stated:

We need another and a wiser and perhaps a more mystical concept of animals. Remote from universal nature and living by complicated artifice, man in civilization surveys creatures through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for their incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err, we greatly err. For the animal shall not be measured by man. In a world older and more complete than ours, they move, finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings, they are other nations caught with ours in the net of life and time, fellow prisoners of the splendour and travail of the earth.

The provisions of this bill reflect the urgency of increasing protection for those species of fish and wildlife whose continued existence is presently threatened. It will prohibit the importation into the United State of endangered species, and it directs the Secretary of State to seek similar action by foreign countries. Thus, by gradually drying up the international market for endangered species, it should help tremendously in reducing the poaching of any such species in the country where it is found. Similarly, by making illegal in every State, the sale or purchase of a reptile, amphibian, mollusk or crustacean, or any part or egg thereof, which was taken illegally in any State-- and continuing present restrictions relating to fish, birds, and mammals-- the incentive for poaching endangered species within the United States should be markedly reduced. Finally, by authorizing the acquisition of new lands for the conservation and propagation of endangered species, the legislation will assist in fostering the continued survival of many domestically threatened forms of fish and wildlife.

This legislation has been enthusiastically supported by conservation organizations, State fish and game departments, and the Department of the Interior. Many of the difficulties which business groups have had with earlier versions of the bill have now been resolved, and many amendments suggested by conservation groups, such as the National Audubon Society, have been included. Today there is a general and substantial agreement that this legislation offers a workable and effective method of ensuring continued survival of many of the world's endangered species of fish and wildlife.

* * *