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Natural Resources Law
Take-Home Exam
Exam No. 5263
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Question 1

An International Trade Organization has selected Miami-Dade County as its headquarters. This organization has been the target of large and sometimes violent protests by a variety of special interest groups including labor unions, environmentalists, and anarchists. To coincide with the opening of the trade organizations new headquarters massive demonstrations are planned six months from now.

One aspect of the protests is a planned 7-day encampment on undeveloped property adjacent to the new headquarters. Property in this area is owned in part by the State of Florida and the United States. The protest organizers' first choice for its encampment is on the federal land and have applied to the National Park Service (NPS) for a permit to hold the encampment on 5000 acres that NPS manages. The land involved is part of the Everglades that is covered with water for 2-4 months after heavy summer rains, but is generally dry between October and March of each year. The organizers estimate that 20,000 people will attend.

The NPS land is not eager to issue the permit because of concern about crowd control, pollution, and other environmental damage. The area was identified in the late 1990s as a critical area for Everglades restoration. No listed endangered species are known to exist in the area in question as no studies have been conducted but NPS biologists know that the area could be excellent habitat for the one-eyed greenback turtle, which is on the endangered species list. The 5000 acres of federal land in question was purchased from private parties in 1950. The NPS has issued use permits for the area in the past. The last permit issued in the 1980s was to a group trying to break the world speed record by jet-powered air boats.

The State of Florida is strongly in favor of the encampment and has stated that it believes the attendees will spend money in Florida traveling to and from the event. Adjacent to the federal land described above, the State owns a 640 acre school section. The State has issued the protest organizers a permit to occupy not only this 640 acres, but also the rest of the proposed site, claiming that the State has owned the entire area since Florida became a state and that any alleged purchase by the federal government is invalid. The use fee for the entire area is \$1.00. The state is willing to litigate the ownership issue.

The protesters' lawyers have let it be known that they will sue on all possible grounds if NPS denies the permit or attempts to control its activities on state or private land. Local environmental groups, although sympathetic to the protesters' goals, are concerned about the local environmental impact of the encampment and have indicated they want NPS to go slow here and will sue if NPS tries to take shortcuts in the decision-making process.

The NPS has decided it would like to deny the permit to use the Federal land. They also wish to prohibit the protester's use of the adjacent Florida land.

You are the lawyer advising the NPS. Discuss NPS's options for addressing this situation. Your

discussion should include the potential grounds for the three potential litigants (the protesters, local environmental groups, and State of Florida) to bring suit, the chances of success, and what steps the NPS can take to increase its chance of success in the potential lawsuits. The NPS would also like to know if there are any ways to delay its decision past the planned protest date.

QUESTION ONE

Arguments for State

1. State Ownership of Lands Under Navigable Waters

The State of Florida can argue, under Pollard v. Hagan, that “[the] right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions.” In this case, the federal lands are part of the Everglades, which are covered with water for two to four months after heavy summer rains, but that are generally dry between October and March of each year.

Since the federal lands in question are habitually covered by Everglades waters, this strengthens Florida’s claim to them. In Phillips Petroleum v. Mississippi, the Court held that when States entered into the Union, they “received ownership of all lands under waters subject to ebb and flow of the tide.” See also Illinois Central Railroad Co. v. Illinois. In Phillips, Mississippi received title to lands which were not navigable-in-fact but which were indirectly influenced by tide running in Gulf of Mexico, and which were adjacent and tributary to navigable rivers flowing into the Gulf.

The facts are very similar in this case, in that Everglades regions are influenced by tides and rivers flowing into the Gulf of Mexico. Florida could argue that when it joined the Union in 1845, it acquired title to the land in all Everglades regions, and that it continued to hold these lands in public trust even after the land was privately purchased. Additionally, Florida has the

power to create its own definition of water navigability, according to Coggins.

Florida would have a good chance of showing that the Everglades lands were under navigable water and that it always had ownership of these lands. It could then argue that the private sale to the United States was invalidated, since Florida had the right to always hold these lands for the public trust.

2. Florida Not Preempted from Regulating Land

In California Coastal Commission v. Granite Rock Co., the Court found that all state regulations of unpatented mining claims in national forests could not be preempted. In that case, the Court found that the state was “not seeking to *determine* basic uses of federal land: rather it is seeking to *regulate* a given mining use so that it is carried out in a more environmentally sensitive and resource protective fashion.” The Court stated that there is a difference between environmental regulation and land use planning. Environmental regulation was said to not prescribe any specific uses for the land but merely requires that damage to the land “is kept within prescribed limits.” Land use planning actually envisions particular uses for the land. In that case, the state had not engaged in impermissible land use planning simply because it had prescribed regulations over the mining activities.

Therefore, the federal Coastal Commission was unable to show that the state regulations pertaining to the mining were preempted by federal law. In the present case, Florida could use Granite to show that it would not be preempted from granting the protesters a permit to use the school lands. Under Granite, Florida could argue that it was not engaging in any impermissible land use planning by granting the permit. Rather, it could state that it could regulate the granting of the permit to make sure the encampment was conducted in an environmentally sound manner.

Arguments for the Protesters

1. Standing Requirements

The protesters could argue that they have standing to bring suit for NPS's denial of their permit to camp on the lands, under Lujan v. National Wildlife Federation. Under Lujan, the protesters would have to show that they have suffered legal wrong, have been adversely affected, or have been aggrieved by the challenged agency's action. Additionally, the agency action being challenged must be the final agency action.

In order to be adversely affected within the meaning of a statute under Lujan, the protesters would have to show that the injury of which they complain "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for their complaint." The protesters could argue that the granted permit could serve as the "statutory provision" that has been violated, and which violation caused them injury.

Lujan also provides that if a plaintiff is required to adjust his conduct immediately by agency action, that action is presently "ripe for review." Additionally, under Duke Power Co. v. Carolina Envtl. Study Group, the protesters would have to show that the relief they seek will redress the injury that they claim to suffer.

However, the plaintiffs would have to prove whether their claims are ripe for review. Under Ohio Forestry Association v. Sierra Club, in determining whether an agency's decision is ripe for review, "a court must consider: 1) whether delayed review would cause hardship to plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether courts would benefit from further factual development of issues presented." The protesters would have to prove each of these elements to prove that their

case is ripe for review.

2. NEPA Not Violated

The protesters can certainly use the findings of Robertson v. Methow Valley Citizens Council on their behalf. There, the Court found that the national Forest Service's granting of a permit for a downhill skiing development would not have violated NEPA. The protesters can emphasize that NEPA "does not mandate particular results, but simply prescribes the necessary process."

3. Policy of Protecting Recreational Rights

The protesters can also argue that under Illinois Central Railroad Co. v. Illinois that as the federal lands are in an Everglades region and part of a system of navigable waters, the title to these lands is "held in trust [by the State] for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."

Coggins also states that even though lands within the National Park System have always been protected by a preservation policy, but in recent years, the mission of the National Park Service has been broadened "by assignment of responsibility for recreation areas, urban parks, cultural areas, and the like." Recreation has increasingly become a part of public land policy. The protesters could point to this policy to bolster their case.

Arguments for NPS

1. Camfield

According to Camfield v. United States, "[a man's] right to erect what he pleases on his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that

is offensive to his neighbors.” Camfield also held that “[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.”

The protesters are planning on bringing 20,000 people out to their encampment over a seven day period. That means that tens of thousands of people will be trekking and foraging over the campgrounds, and will bring noise and physical pollution with them. They will likely destroy numerous animal habitats and intrude on the privacy of the wild animals as well. The noise and physical pollution may seriously disturb or prove harmful to the wildlife on the campgrounds, which may include endangered species.

Even if the protesters do not occupy the federal lands, they will cause a significant disturbance to the tranquility of the adjacent federal lands, and to the wildlife on those federal lands. Under Camfield, an encampment on the adjacent state lands may well create the kind of nuisance to neighbors on adjacent lands that is forbidden. Camfield would also grant NPS police power in protecting the federal lands if NPS can show that the situation is exigent enough. NPS has a good chance of showing that hoards of people tramping over the state land, and possibly federal land as well, creates an exigent situation since the natural resources and wildlife on both lands could be seriously threatened. Camfield grants NPS, as a federal agency, the power to regulate land use on private lands that affects the use or quality of the public lands.

2. Kleppe

In Kleppe v. New Mexico, the Supreme Court held that “[a]lthough the Property Clause does not authorize ‘an exercise of a general control over public policy in a State,’ it does permit

‘an exercise of the complete power which Congress has over particular public property entrusted to it.’” The Court defined that “complete power to necessarily include “the power to regulate and protect the wildlife living there.” Even though the states have “broad trustee and police powers over wild animals within their jurisdictions,” the Court emphasized that these powers “may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.”

In the present case, the State of Florida wants to grant the protesters the right to camp on the 640 acre school section adjacent to the federal lands. As previously mentioned, the protesters’ activities could seriously threaten the natural integrity of the lands, and the well-being of wildlife, both on the state and federal lands. NPS could then find authority under Kleppe that it has complete power including the power to regulate and protect the wildlife on the federal lands, and can enjoin the encampment by the protesters.

3. Minnesota v. Block

NPS can also point to Minnesota v. Block for support in its efforts to stop the protesters from occupying not only the federal lands, but also the adjacent state lands. In Block, users of motorized watercraft argued that “Congress unconstitutionally applied federal controls on the use of motorboats and snowmobiles to land and waters not owned by the United States.” Following Kleppe and Camfield, the Court upheld Congress’ authority to regulate conduct on or off public land “that would threaten the designated purpose of federal lands.” The Court stated that if Congress had enacted certain regulations to protect the fundamental purpose for which the portion of the Superior National Forest was preserved, Congress acted within its discretion.

Under Block, NPS could be successful in petitioning to prohibit the encampment of the

protesters on the neighboring Florida lands, citing to Block, Kleppe and Camfield for the proposition that the protesters' activities on the neighboring state school section would "threaten the designated purpose" of the Everglades preserve because the crowds, pollution, and other environmental damage that the protesters would cause on the state land, and possibly the federal lands as well. Protecting the designated purpose of the federal lands here is particularly important since the lands have for years been identified as a critical area for Everglades restoration.

4. Preemption

The United States Constitution, Article VI, clause two, provides that federal action authorized by the Constitution is protected from interference by state law. Congress may specify the extent to which states may make law on the same subject which federal law has already defined. When Congress specifically prohibits state law on the same subject as federal law, then the state law will be preempted.

The courts use either one of two methods of inquiry to determine whether a state law will be preempted in a certain case. The courts may consider whether Congress determined to "occupy the regulatory field," leaving no room for state law to operate. On the other hand, the courts could whether a Congressional act touches a "field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

It would be helpful for NPS if a court used the second method of inquiry, since the federal land sought to be protected is a critical area of Everglades restoration. There is a great deal of federal concern in restoring the Everglades. Arguably, federal enforcement of Everglades

cleanup is more strictly executed than state enforcement. Therefore, a court could hold that restoration of the Everglades is such a powerful federal interest that Florida is preempted here from making any regulation that interferes with federal regulations.

5. Federal Discretion over Granting of Permits

The Federal Land Policy and Management Act of 1976 (“FLPMA”) provides that anyone desiring to cross or use national forests or Bureau of Land Management (“BLM”) lands for noncausal purposes must obtain a right-of-way from the relevant agency. Rights of way are essentially permits for limited purposes and limited durations, for which the holder must pay fair market value. These permits are subject to potentially extensive regulation by the federal land manager to protect other uses and values of the land, such as protecting wildlife and the environment.

The protesters would then be required to obtain a permit from NPS to use the federal lands, under the FLPMA. Since NPS does not want to grant them the permit, the protesters would be deemed trespassers if they are found on the land, and NPS could bring criminal charges against them.

6. Power to Require an EIS

The NPS could also determine that an environmental impact statement (EIS) under § 102(2)(C) of the National Environmental Policy Act (“NEPA”) is required to evaluate the protesters’ request for a camping permit. Under NEPA, the responsible official of a federal agency may prepare a “detailed statement on any recommendation for legislation or other major federal action “significantly affecting the quality of the human environment,” which evaluates:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Reasons for a federal agency's preparation of an EIS, according to Robertson v. Methow Valley Citizens Council, are that an EIS

ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson also states that NEPA requires an agency to take a "hard look at environmental consequences. The case also holds that, if there is likely to be off-site effects on wildlife and the environment, a federal agency is not required to wait for state agencies to determine what mitigation measures would be appropriate.

Therefore, the NPS could determine which mitigation measures the State of Florida would be required to take, if the permit was granted. However, if NPS decides that an EIS is warranted, the EIS would take considerable time to prepare and the protester's encampment date could very well pass before NPS completes the EIS.

7. The Enclave and Property Clauses

NPS could also argue that the federal land is an enclave, pursuant to the "Enclave Clause" of the federal Constitution. The Enclave Clause, found at Article I, § 8, cl. 17 of the Constitution, provides (emphasis added):

Congress shall have power to exercise **exclusive Legislation...**over all Places **purchased** by the **Consent** of the Legislature of the State in which the Same shall be, for the **Erection** of Forts, Magazines, Arsenals, dock-Yards, and **other needful Buildings.**"

In this case, the facts do not state whether any buildings have been constructed on the federal land. Also, the facts do not state whether this land was purchased with the consent of the Florida legislature. Therefore, these federal lands may or may not be an enclave. If they are, federal laws, not state, would govern the use of this area.

However, the Enclave Clause is now largely overshadowed by the Property Clause of the federal Constitution, according to Coggins. Found in Article IV, § 3, cl. 2, the Property Clause states that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” In Utah Power & Light Co. v. United States, the Court held that a State’s powers over land within its boundaries which belong to the United States cannot conflict with the “full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.” See also United States v. Gardner.

Under Utah Power’s interpretation of the Property Clause, Florida cannot supersede the NPS’s authority to protect the Everglades restoration as it sees fit. NPS would have the power to control the use of the land by the protesters and have the discretion to grant or deny the protesters rights to these lands.

8. Endangered Species Act

a. TVA v. Hill

In TVA v. Hill, the Supreme Court held that the plain meaning of the Endangered Species Act (the “Act”) clearly directs that all federal agencies must “insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence” of an endangered species or “result in the destruction or habitat of such species.” Under TVA, NPS could not

grant a permit to the protesters without jeopardizing the possible existence of the greenback turtle or its habitat.

The Court acknowledged the stated purposes of the Act when it was passed in 1973: “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such species.” The Court found that the Act stood in full force even though Congress had spent more than 100 million dollars on constructing a federal dam, the construction and operation of which would jeopardize the survival of an endangered snail darter fish.

In this case, under TVA, NPS could still cite to the Act in its decision to protect the federal lands against the intrusion of the protesters. The Act requires NPS, as a federal agency, to not jeopardize either an endangered species or its habitat. Studies still need to be completed in order to determine whether this greenback turtle actually exists on the NPS lands. Until then, if NPS were to grant the protesters a permit, it would be endangering a species and its habitat.

b. *Northern Spotted Owl v. Hodel*

Particularly because of this case about the spotted owl, the NPS would certainly be ill-advised to issue a permit to allow the protesters to occupy these federal lands without first conducting a study to determine whether the greenback turtle actually inhabits the region. In the spotted owl case, the Court found that the Fish and Wildlife Service had not met the requirement of agencies to set forth clearly the ground on which it acted, when it did not list reasons for its decision not to list the spotted owl as endangered.

Under that case, NPS would need to cite reasons for granting the permit that would show that an endangered species would not be jeopardized by its decision. As previously stated, NPS

could not safely do so until it conducts a study to determine whether greenback turtles live in the region.

c. *Thomas v. Peterson*

Under Thomas and the Act, NPS would probably have to prepare a biological assessment of the federal lands to determine whether endangered species that may be in the area are likely to be affected by its possible decision to grant the protesters a permit to camp on the lands. If a biological assessment did determine that this species was likely to be affected, NPS would have to consult with the Fish and Wildlife Service (the “Service”), and the Service would have to issue a biological opinion. If the Service determined in its opinion that the proposed action would jeopardize the species or destroy or adversely modify crucial habitat, then the proposed action may not go forward.

Therefore, under Thomas, NPS must prepare a biological assessment of the lands before anything else can be done. This would be a good way of delaying NPS’s decision past the planned protest date, since NPS could determine the time frame for the biological assessment.

NPS’s Likelihood of Success

It appears that the bulk of the caselaw and statutes reside in NPS’s favor in the present case. However, Florida has a potentially strong argument that since the federal lands may be under navigable waters, that it still has the right to these lands and that the federal government never legally acquired title to these lands. NPS should look further into the details of the sale, and see whether any state officials or the legislature knew about the sale when it took place, but did not try to stop it.

NPS could also look to caselaw that supports a finding that Florida is preempted from

granting the permit, as it would conflict with NPS's broad grant of authority over the lands. NPS still has not conducted a biological assessment of the federal lands under the Endangered Species Act, as it would be required to do in considering whether to grant a permit or not.

NPS could also state to the protesters and Florida that they would need to conduct an EIS to determine what the impact of the encampment would be on the federal lands. The time needed for conducting the EIS would be extended by the time it takes NPS to get the required comments of any other federal agency "which has jurisdiction by law or special expertise with respect to any environmental impact involved."

NPS could say that it has not yet made any final agency actions, since it is required by the Endangered Species Act to conduct a biological assessment survey, and could also find an EIS helpful. This would help NPS defeat the standing of the adverse parties, since these parties might not have standing if they are appealing a non-final agency action. Also, between NPS's requiring an EIS and a biological assessment survey, and the other parties' appeals of the NPS's decisions, there is a good chance that NPS could delay its decision regarding the permit well past the protester's planned encampment period.

Question 2

In 1988, Develop-It, Inc. purchased 200 acres of undeveloped river front land for \$3,000,000.00 to develop a residential subdivision in 6 phases. Prior to closing, the company conducted studies to determine the feasibility of its plan. Development permits were obtained from the City of Nimby, Florida and construction commenced. Neighbors were not happy with the development but were unable to stop the issuance of the permits prior to the commencement of the project. The neighbors continued to protest the development and during construction of the 4th phase, the City changed its Code of Ordinances to include a limitation on the density of development along the river and to require that any riverfront development include public access to the river. Pursuant to the new Code, the City of Nimby required Develop-It to modify its building permit to establish a preservation area for public access and to reduce the number of houses along the river by half.

In addition, the State of Florida, through its Water Management District, has denied a permit to allow the withdrawal of groundwater stating that there is overuse in the area. Without this permit, the developer will have to install a surface water treatment system that will occupy two of the lots it had planned to develop and will increase construction costs by \$2,000,000.00.

Finally, the state of Florida Department of Environmental Resources (FDEP) enacted a new regulation (pursuant to a new Florida Law) limiting development around certain rivers of environmental concern. Develop-It's development is on one of these rivers. The DEP has determined that the law is retroactive and has indicated that no building within 100 feet of the river is allowed. Under this regulation Phases 4, 5, and 6 can not proceed at all.

You represent Develop-It. Prepare a letter to your client discussing its potential damage, takings, or other statutory claims against the City, the State's Water Management District, and the FDEP.

Question Two

Dear Client,

I have been researching possible claims you may have against the City, the Water Management District, and the FDEP. In this letter, I will explain to you what I have found, and a bit about what making each claim would involve.

1. Takings Claims
 - a. Two Categories of Compensable Regulatory Action

These government agencies have enacted regulatory actions against you which we will

claim has caused you damage. Supreme Court justices have construed past Court decisions as having created at least two categories of compensable regulatory action without case-specific inquiry into the public interest advanced in support of the action. The first category includes regulations that require a property owner to suffer a physical invasion of his property. The second category includes those regulations which deny “all economically beneficial or productive use of land.”

We can make claims against the City of Nimby, the State of Florida, and the FDEP for their regulatory decisions that have restricted your use of your property. Our claim against the City of Nimby is bolstered by the fact that the City is requiring you to give the public access to the river and a preservation area, which constitutes a physical invasion. We can argue that all three state agencies have deprived you of all economically beneficial or productive use of your land because your planned project is neither economically beneficial or productive with the regulatory restraints that have been placed upon it, such as the regulations that would require you to expend an additional two million dollars to install a water surface treatment system, and that deter you from being able to even complete the project.

b. Constitutional Claims

Your rights in your property are protected by both the federal and the state constitutions. The Florida Constitution has language which mirrors the federal constitution, which says that no private property can be taken for a public purpose without proper compensation to the property owner. When the government asks you for an easement, which grants the public a right-of-way across your property, the government can be required to give you money for that as well.

The City has required you to give the public access to the river, to reduce by half the

number of houses you can build along the river, and to establish a preservation area for public access. These restraints all include requiring you to give up some of your land for public use. Under the constitutions, we can certainly make a takings claim against the City.

2. “Bert Harris” Act

We can also file a “Bert Harris” claim under Fla. Stat. § 70.001 (The Bert J. Harris, Jr., Private Property Rights Protection Act) against these three government agencies. This Act gives private property owners claims against government actions which either “inordinately burden, limit, or restrict” property rights of the owners. This Act gives you a claim even if a court did not find that you have a claim under either the federal or state constitutions.

There are some challenges that we will face in making a claim under the Bert Harris Act for you. We will have to show the court that you did actually have the right to develop your property as you planned to, in light of the state’s property and nuisance laws. We will also have to prove to the court that these agency actions deprived you of all economically viable use of your land. Even if the court finds that the regulations, considered individually, did not amount to a complete deprivation, we could argue that all of the regulations combined did cause you that deprivation, especially combined with the FDEP regulation.

Finally, under the Bert Harris Act, we will have to show that the permit denials interfered with your “reasonable, distinct, investment-backed expectations,” and that you held these expectations when you bought the property. You did, in fact, have specific expectations for your use of the property when you bought it, and you did invest in these expectations when you conducted your feasibility study. Since this study and your financial expenditures related to the property are documented, we stand a good chance of proving your investment-backed

expectations to the court.

3. Land Use and Environmental Dispute Resolution

You may also have viable claims under the Florida Land Use and Environmental Dispute Resolution Act. This act protects property owners against development orders, either separately or combined, that they believe unreasonably or unfairly burden the use of their real property. A development order includes governmental agency actions which deny or grant with conditions a permit application. We can argue that this act applies to all the permit applications you made with the City, the District, and FDEP.

However, before we can sue in court under this act, we will have to file a request for relief with the heads of all three agencies. The heads will then forward the request for relief to a special master, which both you and the agencies will have to agree upon. The agencies will also make your request public to your adjacent neighbors and any people who submitted public testimony on the agency actions. This would include many of your neighbors who opposed your project. Since they would be made privy to any request for relief you would make under this act, that could be one possible difficulty with seeking relief under this act.

Question 3

The following is the text of an actual letter that appeared in the Miami Herald:

The argument that preserving and even restoring the Everglades is for the benefit of everyone makes me laugh.

Why not just develop the Everglades into residential, commercial, industrial, agricultural or any other productive form of land management?

Grow up, Miami. The so-called environmentalists feel that we the people need to suffer to make a few birds happy. It's just another way of preventing this great city from reaching its true potential.

I say: Just pave the Everglades, and let's start building. I'm all for cheaper housing costs, less traffic and more people.

Due to pressure by the development interests, the State of Florida has decided to sell some of its holdings to private developers. Some of this property became state land at the time of statehood and some of the land was subsequently purchased with bond money earmarked for conservation. You are an attorney with a large New York firm making “big” money as a first year associate. Driving down the turnpike in your new hard top Mercedes convertible (feeling quite fit and tan) you have a pang of guilt and start thinking of pro-bono work that you might enjoy. You decide to bring suit to stop the state’s sale.

3a Discuss the Florida Constitutional Provisions that you might be able to use in such a suit.

3b What if the land was Federal and it is an agency of the Federal government making the sale to private individuals? Discuss the Federal Government’s powers under the federal constitution to sell its property.

3c Assume there are valid grounds for a challenge pursuant to NEPA and the Endangered Species Act (ESA). Explain why a “win” pursuant to one of these laws is more likely to result in a permanent prohibition to the sale than a “win” under the other law.

QUESTION 3

3(a)

First, you could cite to Art. II, § 7, Natural Resources and Scenic Beauty. This provision states that “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of

natural resources.” Therefore, the policy of the State should not be to cave in to development interests, but to maintain the natural resources and scenic beauty of the Everglades.

You could also point to Art. X, § 17, Everglades Trust Fund. This provision establishes a trust fund for the purpose of conserving and protecting the natural resources and abatement of water pollution in the Everglades. You could make the argument that the State should not be selling lands if a trust fund has been designated to protect these lands. Otherwise, the individuals giving funds to the trust could have claims against the State.

Additionally, Art. X, § 18, Disposition of Conservation Lands, is applicable. This new section states that “real property held by an entity of the state and designated for natural resources conservation purposes as provided by general law shall be managed for the benefit of the citizens of this state.” This section also provides that the state cannot dispose of these lands unless the governing body of the holding entity decides the property is no longer needed for conservation purposes, and this determination must be reached by a two-thirds vote of that governing body.

You could make an investigation to see whether the decision to sell the Everglades land to private developers was even discussed by the Florida legislature (if that is the governing body referred to in the section) or voted upon.

3(b)

As stated earlier, the Federal Constitution includes the Property Clause, found in Article IV, § 3, cl. 2, which states that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” This clause allows the federal government to sell the land to the private developers.

The federal government might also have power to conduct the sale under the Commerce

Clause, Art. I § 8, cl. 3, which states that “Congress has the power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Relying on this clause, the government’s authority for the sale would depend on whether the private developers were intended to be included in the definition of the “several States.”

3(c)

According to Robertson v. Methow Valley Citizens Council, NEPA does not mandate any particular results, but simply prescribes the necessary process. It has been said that NEPA is purely procedural, and “merely prohibits uninformed—rather than unwise—agency action.” The ESA, on the other hand, is much more substantive, and prescribes very specific results. Coggins states that “the Act arguably has become the most important national land use law.” The Act requires all agencies to “conserve” listed species, and “conservation” is defined very broadly.

Therefore, it is much better to sue under the ESA rather than NEPA. ESA is more likely to prescribe an environmentally favorable result.