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In sum, given that the factors of the Penn Central test weigh in favor of the United States, the trial court properly concluded that Mr. Brace has not proven a compensable, non-categorical regulatory taking.

CONCLUSION

The judgment of the Court of Federal Claims should be affirmed.³

Respectfully submitted,

MATTHEW J. MCKEOWN
Acting Assistant Attorney General
Environment & Natural Resources Div.

SUSAN COOK
KATHRYN KOVACS
TAMARA N. ROUNTREE *Tamara N. Rountree*
Attorneys, Department of Justice
Environment & Natural Resources Div.
Washington, DC 20530
(202) 514-1174

OF COUNSEL:

DANA OTT
Office of General Counsel
U.S. Environmental Protection
Agency
Washington, DC

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³ To the extent there is any debate about compensation, this Court should not consider Mr. Brace's arguments. Br. 42. The trial court here, having rejected Mr. Brace's identification of the parcel as a whole, never ruled on a compensation amount. Accordingly, any consideration of the fact-based question of compensation should first be presented to, and ruled on, by the trial court. See Sage Products, 126 F.3d at 1426 ("In short, this court does not 'review' that which was not presented to the district court.").

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for the United States as Appellee have been served by United States mail, this 10th day of May 2007, upon the following counsel of record:


For Appellant:

Richard A. Lanzillo, Esq.
Knox, McLaughlin, Gornall & Sennett
120 West Tenth Street
Erie, PA 16501

Norman A. Stark, Esq.
The Stark Firm
100 State Street, Suite 210
Erie, PA 16507

For Amicus Curiae:

Richard P. Rector, Esq.
DLA Piper US LLP
1200 19th Street, NW
Washington, DC 20036


TAMARA N. ROUNTREE
Attorney, Appellate Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026
(202) 514-1174
(202) 353-1873 (fax)