Team No. 1

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 in
No. 112-CV-2015-RNR, Judge Romulus N. Remus

BRIEF OF BRITTAIN COUNTY, NEW UNION
Defendant-Appellant

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of New Union. The District Court had proper subject matter jurisdiction over the case because the issues arise under Constitution's Fifth and Fourteenth Amendments, the Commerce Clause of the Constitution (Article I, Section 8, Clause 3), and the Endangered Species Act 28 U.S.C. §§ 1531-1544 (2012), and the district courts have original jurisdiction over all civil actions arising under the Constitution and laws of the United States. 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction. 28 U.S.C. § 1291 (2012). Additionally, jurisdiction is proper because Lear waived all damages in excess of $10,000 against the United States. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2012).

STATEMENT OF THE ISSUES

I. Whether Lear's takings claim against FWS has failed to ripen when the agency could not make a final decision because she did not apply for an ITP under ESA § 10.

II. Whether public trust principles preclude Lear's claim for a taking based on the denial of a county wetlands permit because New Union has title to the submerged lands of Lake Union under the equal footing doctrine.

III. Whether the fact that The Heath will become developable upon the natural regrowth of the forest over the lupine fields precludes Lear's complete taking claim because the Cordelia Lot will fully regain its value in ten years.

IV. Whether the Brittain County Butterfly Society's offer to pay $1,000 annually for wildlife viewing precludes Lear's taking claim because there has not been a complete loss of economic value on the Cordelia Lot.

V. Whether the relevant parcel is the entirety of Lear Island as granted in 1803 because the Lear Family has exploited the whole island for more than two centuries.

VI. Whether Lear's complete taking claim is precluded for a complete deprivation of the economic value of the Cordelia Lot because neither the federal or county regulation, by itself, would prevent development of a single-family residence.

VII. Whether the ESA is an invalid exercise of Congress's Commerce power, as applied to a wholly intrastate population of butterfly, because take of the Karner Blue does not substantially affect interstate commerce.

STATEMENT OF THE CASE

I. Factual Background

Lear Island, New Union, is an island located in the large, interstate, navigable water of Lake Union. R. at 4. The entire island, composed of approximately 1,000 acres, was granted to Cornelius Lear by Congress in 1803, along with underwater lands within 300 feet of the island's shoreline and under a shallow strait separating the island from the mainland. R. at 4–5. The surrounding lake was traditionally used for interstate navigation, R. at 4, and the Lear family had a boat landing on Lear Island used for transporting produce to the mainland from Lear Island's "productive farm." R. at 5. In 1803, present-day New Union was part of the Northwest Territory. R. at 4.

In 1965, King James Lear, a descendant of Cornelius Lear, owned the entirety of Lear Island. R. at 5. He created an estate plan which divided Lear Island into three parcels, and at the time of this subdivision, the Brittain Town Planning Board indicated each lot could be developed with one single-family residence. R. at 5. Cordelia Lear ("Lear") inherited approximately ten acres of the island ("Cordelia Lot") from her father, King James Lear, upon his death in 2005. R. at 5. Property taxes on her property are $1,500 per year. R. at 7. Her two sisters, Goneril and Regan, inherited the other 990 acres (550 and 440 acres, respectively). R. at 5.

Of Cordelia Lear's ten acres, approximately nine are composed of lupine fields lined with forests that provide ideal habitat for the Karner Blue, a species of butterfly that was added to the Endangered Species list in 1992. R. at 5. Also in 1992, those nine acres were designated critical habitat for the New Union subpopulation of Karner Blues, which lives exclusively on Lear Island on the upland portion of the Cordelia Lot, known by the Lears as "The Heath." R. at 5. The Heath requires annual mowing to maintain its use as a habitat for the butterflies and otherwise would revert to successional forestland, eliminating the butterflies' habitat, after ten years. R. at

5, 7. Lear's remaining one acre of property is an area of emergent cattail marsh, referred to by the Lears as "The Cove," which historically was open water and was where the family's boat landing was located. R. at 5.

Lear initially planned to build her residence on The Heath, so—aware of the presence of endangered butterflies on her property—she contacted the New Union Field Office of the U.S. Fish and Wildlife Service ("FWS") in April of 2012. R. at 5. FWS agent L.E. Pidopter advised Lear that, in order to use part of The Heath to build a residence, she would have to apply for an Incidental Take Permit ("ITP") under section 10 of the ESA. R. at 6. Pidopter informed Lear that, in order to file an application for an ITP, she would have to develop a Habitat Conservation Plan ("HCP"), including either acre-for-acre contiguous habitat for the Karner Blues or continued annual mowing on The Heath, as well as an Environmental Assessment ("EA") under the National Environmental Policy Act. R. at 6. On May 15, 2012, FWS sent a letter to Lear "confirming that her *entire ten-acre property* was a critical habitat for the Karner Blues" and reiterating that Lear would have to either continue annual mowing or replace any disturbed lupine land with contiguous acreage. R. at 6 (emphasis added). The letter also referred Lear to the FWS Habitat Conservation Planning Handbook for more information on applying for an ITP. R. at 6. Lear's sister Goneril, who owns the only land adjacent to the Cordelia Lot, has refused to cooperate in any HCP process that would impose restrictions on her property. R. at 6.

Based on this information, Lear received a single consultation on the cost of developing an HCP and EA, estimated at approximately $150,000. R. at 6. Following receipt of this estimate, Cordelia Lear never pursued development of an HCP and never submitted an ITP to FWS. R. at 7. Instead, in August 2013, Lear applied to the Brittain County Wetlands Board for a permit, pursuant to the Brittain County Wetland Preservation Law of 1982, to fill one-half acre

of marsh in The Cove. R. at 7. No federal approvals were required for the project based on U.S. Army Corps of Engineers Nationwide Permit 29 and the Corps' finding that this portion of Lake Union was "non-navigable" at the time. R. at 7. Lear's wetlands permit was denied by Brittain County in December 2013 because filling wetlands would only be allowed for a water-dependent use, not a residential home. R. at 7.

Although the Cordelia Lot was previously estimated to be worth approximately $100,000 without restrictions preventing the construction of a house on the site, there is not a market for the property for recreational use without the ability to build a residence, nor is there a market for the property as agricultural or timber land. R. at 7. Lear was offered $1,000 annually from the Brittain County Butterfly Society ("Society") for the privilege of offering Karner Blue observation outings each summer. R. at 7. Lear rejected the Society's offer. R. at 7. Since Brittain County's denial of Lear's permit, she has not sought reassessment of her property value. R. at 7.

II. Procedural History

Lear commenced this action in February 2014 seeking a declaration that the ESA was an unconstitutional exercise of the Commerce power, or alternatively seeking just compensation from FWS and Brittain County for a regulatory taking. R. at 7. The United States District Court for the District of New Union issued an order as to all claims on June 1, 2016. R. at 1. Brittain County and FWS each filed a notice of appeal on June 9, 2016. R. at 1. Lear filed a notice of appeal on June 10, 2016. R. at 1.

Brittain County and Lear appeal the District Court's determination that the ESA is a valid exercise of Congress' Commerce Power as applied to the New Union subpopulation of Karner Blues. R. at 1. Brittain County and FWS appeal the District Court's holdings that (1) Lear's taking claim is ripe without her having applied for an ITP; (2) the relevant parcel is merely the

Cordelia Lot and not the entirety of Lear Island; (3) the natural destruction of the butterfly habitat over ten years does not preclude Lear's taking claim; (4) the Society's offer to pay $1,000 annually for butterfly viewing does not preclude Lear's taking claim for complete deprivation of economic value; (5) public trust principles inherent in Lear's title do not preclude her takings claim; and (6) the ESA and Brittain County's wetlands regulation can be combined to deprive Lear of all economic value. R. at 1–2.

STANDARD OF REVIEW

Constitutional determinations are subject to *de novo* review. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 480 (1991); *United States v. Brown*, 72 F.3d 96, 96 (8th Cir. 1995) (reviewing a Commerce Clause constitutional challenge *de novo*); *Iowa Assur. Corp. v. City of Indianola, Iowa*, 650 F.3d 1094, 1097 (8th Cir. 2011) (reviewing legal conclusions in cases of regulatory takings *de novo*).

SUMMARY OF ARGUMENT

As a threshold matter, Lear's joint taking claim against Brittain County and FWS should be dismissed because Lear failed to demonstrate that her claim against FWS was ripe. She never applied for an ITP, as required under the ESA, so FWS never had the opportunity to make a final agency determination as to the scope of the ESA's reach on her property. Moreover, because she did not attempt to cooperate with FWS on the development of an HCP or EA, it is not reasonable for her to claim either process would have been futile or prohibitively expensive.

Even assuming Lear's taking claim is ripe, Lear's claim against Brittain County is precluded because public trust principles inherent in her title under the equal footing doctrine place rightful title of the submerged lands of Lake Union—an interstate lake traditionally used for navigation—with New Union. A denial of a wetland permit was a reasonable exercise of

New Union's police power to prevent an obstruction of navigable waters. To the extent Congress' 1803 grant included submerged lands of Lake Union, it was void against background principles of state law.

Furthermore, because Lear only asserted a claim of a *complete* deprivation of economic value, her taking claim fails given the remaining economic uses of the property. First, the restriction on her property is temporary because, in ten years, the ESA will no longer restrict The Heath, and the Cordelia Lot will regain its full market value. Second, Lear has failed to establish she suffered a 100 percent loss of value to her property, as the Society has offered $1,000 annually for wildlife viewings, which provides Lear's property with some economic value for the interim ten years. Finally, given the Lear family's use of the entire island for more than 200 years, not only as a home but also as a productive farm, the relevant parcel should be evaluated under a flexible standard that recognizes the entire island as the parcel. Accordingly, since the other two subdivisions of Lear Island still have substantial remaining economic value, Lear's claim is further precluded.

Moreover, the lower court's unprecedented holding that two separate regulations—neither of which would independently deprive Lear of the opportunity to build her residence—is inappropriate and inconsistent with public policy. It was inappropriate to apply a liability concept from torts to a taking claim, and the result is overly punitive to Brittain County. In addition, joint and several liability is inapplicable to a taking claim when there is a reasonable basis for dividing the harm among the actors at the water's edge.

Finally, the application of the ESA to the Lear Island subpopulation of Karner Blues is unconstitutional. The activity specifically regulated by the ESA is take of the butterflies, a non-economic activity, rather than the underlying development of Lear's residence. Additionally,

because the Karner Blue itself has no known value in interstate commerce, the connection between take of the intrastate subpopulation of the species and commerce is too attenuated to support regulation under the Commerce Clause. Therefore, the ESA is unconstitutional as applied to the Lear Island Karner Blues.

ARGUMENT

I. LEAR'S TAKINGS CLAIM AGAINST FWS IS NOT RIPE BECAUSE SHE FAILED TO APPLY FOR AN ITP, PREVENTING FWS FROM MAKING A FINAL AGENCY DECISION AND INVALIDATING HER FUTILITY ARGUMENT.

Lear has asserted a taking claim under the Fifth and Fourteenth Amendments to the U.S. Constitution. U.S. Const. amend. V; U.S. Const. amend. XIV ("nor shall private property be taken for public use, without just compensation"). The U.S. Supreme Court has firmly established the general rule that, before bringing a taking claim, the property owner must demonstrate that she has received a final administrative decision on the issue. *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This requirement exists because, without a final, definitive decision from the regulating agency, a reviewing court cannot conclusively evaluate certain factors required in a regulatory taking analysis. *Williamson Cty.*, 473 U.S. at 191; *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes" (quoting *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922)).

The initial threshold for establishing a taking claim is to merely apply for a permit or submit a development plan for approval in the first place. *Williamson Cty.*, 473 U.S. at 187 (discussing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (abrogated on other grounds), in which "a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property"). Ordinarily, a property owner must not only submit this initial permit application or plan and receive a denial from the

regulating entity, but also, in order to show that a final agency action truly meets the "finality" standard, the property owner must prove she has exhausted any available administrative process for resolution. *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297 (1981) (footnote omitted).

In this case, Lear's claim is not ripe because she never met the initial requirement of applying for a permit, and therefore, she cannot definitively establish that the process of applying for an ITP would have been futile or prohibitively expensive.

A. Lear's claim fails to satisfy the futility exception because even that limited exception still requires an initial filing and denial of a permit application.

In certain limited circumstances where property owners have worked with a regulating government entity extensively enough to determine with *certainty* that a development is impossible given the limits of the government's discretion or flexibility, courts may find that the permit application is futile and therefore unnecessary. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613–15 (2001) (holding a claim ripe where a property owner had applied for five development proposals on the property over a period of decades, all of which were rejected, because it was clear "the agency lack[ed] the discretion to permit any development, or the permissible uses of the property [were] known to a reasonable degree of certainty. . . ."). In making this determination, however, the Court reemphasized that such claims would only be valid in cases where "the landowner[] first [has] followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property . . . ." *Id.* at 620–21.

Cases following the *Palazzolo* decision have termed this exception to the typical ripeness requirements the "futility exception," which multiple circuits have agreed "simply serves 'to protect property owners from being required to submit *multiple* applications when the manner in

which the first application *was rejected* makes it clear that no project will be approved.'" *Howard W. Heck and Assoc., Inc. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (quoting *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990)) (determining that the futility argument was inappropriate where the plaintiff failed to complete an initial application for a permit, despite negative comments from the agency regarding the proposed application) (emphasis in original *Heck* opinion). Along these lines, in cases where the initial permit application was never submitted, a taking claim cannot be ripe. *See, e.g.*, *Schooner Harbor Ventures, Inc. v. United States*, 92 Fed. Cl. 373, 374 (2010), *aff'd*, 418 Fed. App'x 920 (Fed. Cir. 2011) (unpublished) (holding a taking claim was not ripe where the plaintiff relied on a Biological Opinion developed by FWS for the Navy under Section 7 of the ESA, and claimed a permit application regarding the same property would be futile, but never submitted an ITP for its own specific development proposal).

In finding that Lear's permit application would have been futile, the lower court erroneously relied on *Hage v. United States*, which states that a permit application may be unnecessary for establishing ripeness where "the procedure itself is not a reasonable variance procedure . . . and is so burdensome that it effectively deprives the property of value." 35 Fed. Cl. 147, 164 (1996) (citing *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386–87 (1988); *Stearns Co. v. United States*, 34 Fed. Cl. 264 (1995)). This reliance was misplaced because both of the cases cited by the *Hage* court involved situations where the plaintiffs alleging takings *had* submitted at least one permit application and merely had not applied for unnecessary variances or pursued alternate procedures for relief following their initial permit denials. *Id.* In fact, the *Loveladies* court went on to again reinforce that "[i]t is well-settled that a takings claim is premature where the private litigant never submitted a plan or application for

development to the governing body whose approval was required." 15 Cl. Ct. at 385. Moreover, even in a later proceeding in the *Hage* litigation itself, the Federal Circuit ultimately overturned the Court of Federal Claims' finding that a taking had occurred, determining that the Hages' claims regarding their ditch rights-of-way were not ripe because they had not applied for a permit from the U.S. Forest Service. *Est. of Hage v. United States*, 687 F.3d 1281, 1287 (Fed. Cir. 2012) ("the Claims Court erred in holding that the Hages' regulatory takings claim was ripe").

In this case, Lear has merely received informal guidance from FWS—rather than anything resembling a final agency decision—on her proposed residence development on The Heath. Like the property owners in *Agins, Heck, Schooner,* and *Hage,* Lear has failed to even meet the initial threshold of submitting an HCP for FWS' consideration. She merely received an informal advisement from Agent Pidopter and a letter reiterating the same advice as a follow-up. The content of the letter itself actually belies the informality of the advisement; it erroneously indicates that all *ten* acres of Lear's property consist of Karner Blue habitat, when really only *nine* acres provide such habitat in The Heath. Surely, if Lear were seeking a true final determination, she would have clarified this fact to attempt to find out the true scope of the agency's jurisdiction.

In addition, Lear's situation creates a stark contrast to situations such as *Palazzolo*, *Loveladies*, and *Stearns*, where the permit seekers had all submitted at least one, if not several, permit applications that were denied by the respective reviewing agencies. The plaintiffs in those cases had all made good-faith attempts to comply with the regulating agencies' requirements, and only after one or more permit denials and reasonably certain indications of how future applications would proceed were their claims found ripe due to futility. Here, Lear denied FWS

the opportunity to apply its reasonable, established procedures for evaluating an HCP, and therefore, FWS' advice and letter cannot be viewed as a final agency determination.

Moreover, even if Lear did view the letter from FWS as a final determination as to the available uses of her property (which would be erroneous since, as already noted, she did not even apply for a permit), she also did not make any attempt to work with FWS after receiving its letter to find a mutually agreeable solution. Similar to the property owners in *Williamson County* and *Hodel*, Lear could have consulted with FWS to explore other options that might be available to resolve the situation before proceeding to litigation.[1] Instead, she chose to not even apply for the permit. As a result, the lower court erred in determining her claim was ripe because, like the Court in *MacDonald*, it had no way of establishing how far the FWS regulation would go with respect to Lear's property, and therefore no way of knowing whether the regulation had gone "too far."

B. Lear cannot establish that the cost of applying for the ITP would exceed the property value without actually engaging in the process of applying.

The lower court also erred in concluding that a claim is futile where the cost of applying for a permit exceeds the fair market value of the property in question. In *Morris v. United States*, the Federal Circuit addressed this precise issue and determined that, without engaging in the process of developing an HCP, an ITP application estimated to cost more than the value of the property would not be futile because the permitting agency (in *Morris*, National Marine Fisheries Service ("NMFS")) had discretion to assist with the HCP's development, which could reduce the cost to the property owner. 392 F.3d 1372, 1374–75 (Fed. Cir. 2004). Based on several

[1] Because the record is silent on the matter, it does not appear that Lear pursued options such as offering to purchase credits from a conservation bank or to restore Karner Blue habitat on an acre-by-acre basis in another state.

statements from NMFS's handbook that indicated the agency should provide technical assistance with HCPs, plus the fact that the agency had discretion as to what must be included in an HCP, the court stated, "The assumption that the cost of applying for the ITP is fixed and knowable is simply incorrect." *Id.* at 1377. In addition, NMFS had offered to prepare the Environmental Assessment required under NEPA, *id.*, as is common when agencies work with private landowners. Therefore, the agency's advisement that an ITP was necessary, combined with the property owner's evaluation of the costs required to develop the application, were not enough to constitute a final agency decision. *Id.*

In spite of the lower court's unprecedented holding on the topic, Lear cannot know the ultimate cost of developing an HCP without attempting to work with FWS, and therefore her ripeness claim must fail. Agent Pidopter advised her to refer to FWS' handbook, which—like the NMFS handbook relied on by the court in *Morris*—provides that the agency is expected to assist throughout the HCP process with technical expertise. U.S. Fish and Wildlife Service, *Habitat Conservation Planning Handbook* 3-1 (1996), *available at* https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html. Similarly, FWS may have agreed to conduct the EA itself, as NMFS did in *Morris*, and this would presumably have reduced the overall cost of Lear's application even further. Lear deprived FWS of the opportunity to exercise this role, and her claim cannot ripen until she attempts the HCP process, complete with FWS' helpful resources and technical assistance.

Furthermore, Lear only requested one single estimate on the cost of preparing an HCP. While that particular consultant may have provided a cost-prohibitive estimate, Lear has provided no evidence that more affordable options were not available to her or that she even researched such availability, making her claim overly hypothetical. Rather than allow FWS to

make a cooperative, reasoned determination as to the options available to Lear, she has attempted to sidestep the administrative process, denying the agency the opportunity to even consider an application, and has prematurely brought this lawsuit that does not meet the well-established requirement of ripeness.

II. LEAR'S TAKING CLAIM FAILS BECAUSE BRITTAIN COUNTY'S DENIAL OF HER WETLANDS PERMIT IS A REASONABLE EXERCISE OF THE POLICE POWER ON PUBLIC TRUST RESOURCES NEW UNION ACQUIRED UNDER THE EQUAL FOOTING DOCTRINE.

The U.S. Supreme Court has established that compensation is not required for development limits that "inhere in the title itself," such as "background principles" of state law. *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1029 (1992). The public trust doctrine, as a background principle of state law, has been found to preclude a taking by placing a preexisting restriction on the title of privately owned lands. *Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978, 987 (9th Cir. 2002).

A. The Congressional grant of Lear Island's submerged lands was void because it attempted to convey lands that Congress only held in trust for New Union.

Under the equal footing doctrine, states acquire title to navigable waterways and their soils from the federal government upon admission into the United States. *Pollard v. Hagan,* 44 U.S. (3 How.) 212, 223 (1845) (explaining that equal footing can be traced to Article IV of the U.S. Constitution). The equal footing doctrine is an "inseparable attribute" of the equal sovereignty granted to a State upon its admission into the United States. *United States v. Louisiana., Texas, Mississippi, Alabama and Florida,* 363 U.S. 1, 16 (1960); *supplemented by* 382 U.S. 288 (1965). The federal government only owns right of soil in the territory of a future state for temporary purposes until it transfers those rights to the state upon admission. *Shively v. Bowlby,* 152 U.S. 1, 27 (1894) (citing *Pollard,* 44 U.S. (3 How.) at 223).

The U.S. Supreme Court traditionally held

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

Pollard, 44 U.S. (3 How.) at 230 (limited by S*hively*, 152 U.S. at 58). The Court in *Shively* recognized the principle that it is generally the right of the State, and not the federal government, to control lands abutting navigable waters. 152 U.S. at 58. Without this choice, a new state would not be admitted on equal footing with that of the other thirteen colonies—which gained "ownership and control" over all navigable waters and shores within their respective territories when America won independence from England. *Commonwealth v. Alger*, 61 Mass. 53, 83 (1851). Accordingly, the Supreme Court has recognized that congressional policy is to only grant title of submerged lands within territorial lands owned for future states in "exceptional circumstances" when (1) an international duty requires it, or (2) there is a public exigency behind the grant. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196–97 (1987). Only one federal grant has ever been construed for such a purpose, and this involved Indian Territory. *Id.* at 197–98 (reinforcing that courts will not lightly confer an intent for the federal government to make such a grant).

For evaluating navigability, the test under the equal footing doctrine is whether the waters were used or could be used "as highways for commerce" at the time of admission into statehood. *PPL Mont., LLC v. Montana*, 132 S.Ct. 1215, 1228 (2012) (citing *The Daniel Ball*, 77 U.S. 557, 564 (1870)); see also *The Genessee Chief*, 53 U.S. 443, 457 (1851) (noting that navigability depends on the "character of the water, and not upon the ebb and flow of the tide"). It is "'the settled law of this country' that lands under navigable freshwater lakes . . . were within the public

trust given the new States upon entry into the Union." *Phillips Petroleum, Co. v. Miss.*, 484 U.S. 469, 479 (1988) (quoting *Barney v. City of Keokuk,* 94 U.S. 324, 338 (1877)).

Applying the equal footing doctrine, when New Union was admitted to the United States it was entitled to all beds of navigable waters within its territory. The federal government never had right of soil in the submerged lands of Lake Union except for temporary purposes. Therefore, to the extent it included submerged lands of Lake Union, Congress's 1803 grant to King Lear, a private citizen, violated the equal footing doctrine by attempting to permanently convey lands held in trust for New Union. New Union holds title to "all lands under water within a 300-foot radius of the shoreline" of Lear Island because Lake Union is a navigable waterway traditionally used for interstate navigation. R. at 4–5. The Lears were aware of Lake Union's navigability since the nineteenth century when the boat landing shipped produce from Lear Island's "productive farm." R. at 5.

Although the 1803 grant did include the submerged lands within a 300-foot radius of the shoreline, the record presents no evidence an international duty, such as a treaty, obligated Congress to grant submerged lands of Lear Island. Likewise, there was no stated public exigency that would require granting soils of Lake Union to a private party. This Court should not presume Congress intended to usurp New Union's rightful possession to Lake Union's submerged lands because neither of these exceptional circumstances are present. As a result, this Court should find New Union had title of the submerged lands of Lake Union so that New Union may rightfully enjoy the same rights conferred to all states upon admission.

B. Brittain County's denial of a permit to fill The Cove was a reasonable exercise of the police power under the public trust doctrine to ensure Lake Union remains "forever free."

Similar to the equal footing doctrine, a State's public trust duties cannot be alienated without the "express assent of the State," and title generally cannot be transferred to a private

person, even for non-private purposes. *Ill. Cent.*, 146 U.S. at 435. "[B]y the virtue of state sovereignty," a state is not barred from raising a "much belated claim" that they have public trust rights in a navigable water. *PPL Mont.*, 132 S.Ct. at 1233–34. In *Illinois Central*, one square mile of Chicago harbor within Lake Michigan, including submerged lands, was granted to a private company by the Illinois legislature in exchange for a percentage of the company's profits. 145 U.S. at 438. The court found this grant invalid because placing title of public trust lands of a non-tidal navigable waterway into private hands ran afoul of the public's interest in the waters. *Id.* at 452–53.

In 1787, Congress recognized public trust principles in Article Four of the Northwest Ordinance, which established governance for the Northwest Territory. Article Four provides, "The navigable waters leading into the Mississippi and Saint Lawrence, *and the carrying places between the same, shall be common highways, and forever free . . . .*" An Ordinance for the Government of the Territory of the United States North-West of the River Ohio (July 13, 1787) [hereinafter Northwest Ordinance] (emphasis added).

The value of public trust waters is presumed to be substantial or immeasurable. *Ill. Cent. R.R. Co. v. Illinois.*, 146 U.S. 387, 453 (1892); *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 149–151 (Mich. 1960). States' public trust duties traditionally include protecting navigable waters, as well as their beds and shores, to promote public uses or prevent substantial impairment, *Ill. Cent.*, 146 U.S. at 453, and can include preventing impairment of environmental quality. *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203, 206 (Wash. App. Ct. 2004). Management of public trust resources, such as submerged lands of navigable waters, in the interest of the public welfare is within a state's police power. *Ill. Cent.*, 146 U.S. at 387; *see also Just v. Marinette Cty.*, 201 N.W.2d 761, 768 (Wis. 1972) (including wetland protection as a

valid use of the police powers under the public trust doctrine). Traditional public trust duties require the prevention of obstructions to navigable waters that harm their navigability. *Ill. Cent.*, 146 U.S. at 458.

Because New Union was admitted as a State within the Northwest Territory, public trust principles precede Lear's grant of title to any submerged lands of Lake Union. As a navigable waterway, Lake Union is a "carrying place[]" that was part of the Northwest Territory and was afforded protection under public trust principles. Thus, it was intended to remain "forever free" as a "common highway" for all citizens. There is no indication in the record that New Union gave its express assent for the submerged lands to be granted to Cornelius Lear. As noted in *PPL Montana*, New Union is not now barred from raising a claim of title to the public trust lands granted to it under the Northwest Ordinance. In addition, Lear's proposed development of a house can be classified as an obstruction to a navigable water as it was undisputedly a non-water-dependent use. R. at 7. By denying Lear's wetland permit, Brittain County was fulfilling its role of protecting public trust lands and ensuring Lake Union is maintained in the public interest.

Even if this Court were to find that the grant to Lear was valid at the time it was made, this Court should void the grant to the extent it included submerged lands. The lower court erred as a matter of law because it did not examine the Northwest Ordinance and misapplied the equal footing doctrine in violation of New Union's sovereignty. Together these establish the public trust doctrine as a background principle of state law, under which New Union had a duty to protect its navigable waterways from obstruction. Lear never acquired title to such lands because Congress did not have the authority to grant title to property it did not own.

III. LEAR'S CLAIM FOR A COMPLETE DEPRIVATION FAILS BECAUSE HER PROPERTY IS NOT PERMANENTLY RESTRICTED AND WILL FULLY REGAIN VALUE ONCE THE RESTRICTIONS ARE LIFTED.

Nearly a century ago the U.S. Supreme Court recognized there are situations where government regulations can amount to a taking in the context of the Fifth Amendment. *Mahon,* 260 U.S. 393 (cited in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002) (discussing the concept of regulatory takings, noting the Court has preferred to not create a set formula for determining when a regulation has gone too far)). While it has attempted to avoid adopting *per se* rules in the context of regulatory takings, the Court has carved out a categorical rule for situations where a regulatory action permanently prohibits "all economically beneficial or productive uses" of a property. *Tahoe-Sierra*¸ 535 U.S. at 330 (quoting *Lucas,* 505 U.S. at 1019). The Court explicitly limited the *per* se rule announced in *Lucas* to the context where a regulatory action "wholly eliminate[s] the value" of an owner's fee simple title because "no productive or economically beneficial use of land is permitted" by the regulatory scheme. *Tahoe-Sierra,* 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017).

The categorical rule carved out in *Lucas* only applies to the extraordinary situations where a regulation "permanently deprives the whole property of all value . . . ." *Tahoe-Sierra,* 535 U.S. at 332. Courts must begin by asking "whether there was a total taking of the entire parcel," which has both geographic and temporal dimensions. *Id*. at 331–32.

> Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id at 332. Applying this rule, the Court determined a developmental ban imposed for a period of thirty-two months did not warrant creation of a categorical rule and was not sufficient to amount

to a complete taking. *Id*. at 342–43 (reasoning that "fairness and justice" require use of a partial takings analysis in deciding cases involving temporary restrictions); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350 (Fed. Cir. 2002) (reiterating that no case precedent supports a finding of a complete taking where a regulation prohibits economic use of a property for a finite period of time).

The *Tahoe-Sierra* Court reemphasized that "with respect to [the duration of a restriction] . . . the temptation to adopt what amount to *per se* rules in either direction must be resisted." *Tahoe-Sierra*, 535 U.S. at 342. It also noted that the formulation of this kind of general rule is a "suitable task for state legislatures [rather than the judiciary]." *Id*.

The lower court's holding conflicts with Supreme Court precedent and has opened the door to a novel categorical rule that circumvents the well-established principles of regulatory takings. The court relied on the fact that the development ban in *Tahoe-Sierra* did not extend for "an entire decade." This is improper because, first, it implies that FWS' ten-year restriction on The Heath is categorically enough to constitute a permanent deprivation of all economic value. Allowing such a rule would violate the inherent principles of separation of powers as the judicial branch is essentially legislating hard-cut rules. Second, like the restriction in *Tahoe-Sierra,* FWS' restriction will last for a defined, finite period, after which the value of the property will recover fully.

As such, the applicable regulatory restriction on The Heath will merely cause a diminution in the value of the property, which is distinct from cases where the regulatory restrictions permanently deprive the property of all value. Finding a taking here would render routine government processes prohibitively expensive as a result of the increased taking claims that could be filed under such a loose standard. Thus, the lower court's holding that Lear can

recover for a complete taking should be reversed because Lear cannot be permanently deprived of the use of her entire property when the alleged ESA restrictions are only imposed for a finite, ten-year period.

IV. THE SOCIETY'S OFFER TO PAY LEAR FOR WILDLIFE OBSERVATIONS PRECLUDES LEAR'S COMPLETE TAKING CLAIM BECAUSE A $1,000 ANNUAL PAYMENT PROVIDES LEAR WITH ECONOMIC VALUE.

Just compensation for complete regulatory takings is limited to instances when a regulatory action "wholly eliminate[s] the value" of an owner's fee simple title. *Lucas*, 505 U.S. at 1017. The late Justice Scalia reiterated that a complete deprivation can only be found in "the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted" and not in situations where the land owner's diminution in value is "95% instead of 100%." *Id.* at 1019, n. 8 (discussing that "[t]akings law is full of these all-or-nothing situations" where an owner who is "one step short of [a] complete" deprivation is unable to recover); *see also Tahoe-Sierra*, 535 U.S. at 330 (reaffirming that anything less than a total loss would require undertaking the *partial* regulatory taking analysis applied in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

For purposes of this appeal, it is undisputed that Lear has failed to advance a claim for a partial regulatory taking based on the principles of *Penn Central*, R. at 8, n3; therefore, Lear has the burden of establishing a *100 percent* loss of her property value to recover under the *Lucas* rule. Because of this, Lear's claim is precluded by the Society's offer to pay Lear annually for the privilege of conducting observations on The Heath since Lear has not been deprived of 100 percent of the economically viable use of her property.

Specifically, the lower court erred by solely relying on comparing the Society's annual $1,000 offer to Lear's $1,500 annual property taxes in concluding that Lear was completely deprived of all economic use of her property. The lower court cited no precedent to support its

conclusion that a complete taking occurs when annual property taxes exceed one available source of income. Moreover, combining the Society's offer with the fact that FWS' restriction will only last ten years, it will only cost Lear a total of $5,000 in property taxes during the ten-year period that its takes the Heath to naturally convert back to a successional forest. After those ten years, Lear's property will recover full value as it will no longer be encumbered by any ESA prohibitions. With a fair market value of $100,000, less the $5,000, Lear will have retained ninety-five percent of her property value, precluding her complete taking claim. Therefore, Lear falls one step short of showing a complete deprivation for her taking claim as the offer made by the Society to pay annually for the right to conduct butterfly observations excludes her from suffering a total economic loss.

V. THE RELEVANT PARCEL FOR LEAR'S TAKING CLAIM IS ALL OF LEAR ISLAND BECAUSE THE LEAR FAMILY HAS EXPLOITED THE ENTIRETY OF LEAR ISLAND FOR MORE THAN TWO CENTURIES.

For complete regulatory takings claims, the Court repeatedly instructed that the law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Tahoe-Sierra* at 1481 (quoting *Penn Central*, 438 U.S. at 130); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979); *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 643–33 (1993) (rejecting efforts to divide property into individual "sticks" in the "bundle" of rights based on the separately identifiable legal interests that make up property). In either a complete or partial regulatory taking claim, the economic impact of the regulation must be applied to the "whole parcel of land" in its entirety. *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004).

Most recently, the Court has reaffirmed the relevant-parcel doctrine in *Tahoe-Sierra*, elaborating that the relevant parcel includes spatial, functional, and temporal aspects in assessing a property interest. 535 U.S. at 332. The Court held that treating temporary deprivations as total

takings would violate the parcel-as-a-whole doctrine by disaggregating the property into temporal segments. *Id*. at 331. The Court reiterated that the temporal relationship between the regulation and the acquired title is not given exclusive significance but is one of the factors to consider in assessing the interference with investment-backed expectations of a regulation on a property owner. *Id.* at 335–36. The parcel-as-a-whole rule is necessary to prevent the takings doctrine from being manipulated so as to destroy the government's capacity to function. If a taking claim could be established in relation to the affected interest or portion of the property, then most regulations would "always" result in a taking. *Concrete Pipe*, 508 U.S. at 643.

Courts have utilized a flexible approach in determining what constitutes the parcel as a whole. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (emphasizing that case precedent utilizes a flexible approach to account for factual nuances in assessing takings claims); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (holding that an owner did not suffer complete deprivation when one out of three of the other lots in the same subdivision retained value); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (finding no basis for treating a regulation that restricted two percent of the total property left to be exploited as an unconstitutional taking).

This court must find that the relevant parcel is the entirety of Lear Island because the Lear family has enjoyed and exploited the entirety of Lear Island as a homestead, farm, and hunting and fishing grounds for over two hundred years. Additionally, the restrictions of the ESA only apply to ten acres out of the 1,000 acres that make up the entirety of Lear Island. This equates to only one percent of the total property being restricted, and as such there is no basis to treat one percent of the parcel as a separate property for Lear's taking claim. To permit Lear to recover for a complete taking under these facts circumvents the parcel-as-whole doctrine by

disaggregating the Cordelia Lot from the rest of Lear Island and disregards that there is still economic value in the remaining lots on the island. Therefore, this Court should reverse the lower court's application of the parcel-as-a-whole doctrine and should consider all of Lear Island the relevant parcel for analysis of Lear's taking claim.

VI. FWS AND BRITTAIN COUNTY CANNOT BE LIABLE FOR A COMPLETE TAKING BECAUSE NEITHER REGULATION ALONE PREVENTS LEAR FROM BUILDING A RESIDENCE.

A. The lower court erred in applying a liability concept from tort law to a non-tortious taking claim.

Although takings law and tort law both derive from property rights, the two areas of law have evolved separately and address different societal needs. Over time, these areas of law have diverged further apart and now cannot even be brought in the same claim against the federal government. 28 U.S.C. § 1500 (2011). Tort law is meant "to deter [private] conduct which has been identified as contrary to public policy and harmful to society." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring). In contrast, takings law is intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *United States v. Armstrong*, 364 U.S. 40, 49 (1960). As a result, application of joint and several liability to a non-tortious taking claim is inappropriate given the divergent purposes of the two bodies of law. Jan G. Laitos, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill Rts. J. 1181, 1198 (2012) ("Many torts causation concepts . . . such as . . . joint and several liability . . . arguably do not have a place in takings jurisprudence.") Although some taking claims can fall within the scope of tort law, these are limited to only physical takings that arise from trespass or nuisance. Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing*

the Authority Requirement of the Just Compensation Clause, 19 UCLA J. Envtl. L. & Pol'y 359, 389 (2002).

The lower court erred by citing *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976), for the principle that joint and several liability can apply to Lear's taking claim. First, tort law from another state is not applicable in New Union, and second, *Velsicol* did not concern a taking claim. *Id.* at 338 (analyzing tortious, illegal conduct by private businesses). In reality, the application of joint and several liability to Lear's taking claim was inappropriate because Brittain County has not caused a harm in the tortious sense. Rather, the county's wetlands law is meant to prevent harm to the environment. It would be manifestly unfair to hold Brittain County responsible for FWS' harms when no tortious conduct has occurred, especially when the county is bearing the burden for ninety percent of the loss in value despite only regulating ten percent of the property.

Despite the fact that certain courts have recognized the inherent unfairness of treating two regulations separately when they appear to cause a single harm, *Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989); *Good v. United States*, 39 Fed. Cl. 81, 105 (1997), in this case, Lear's harm was actually caused by her failure to bring her suit properly. Lear chose to bring a claim for complete taking and waive damages over $10,000 against the United States to bring her case in the District Court. Lear could have filed her claim in the Court of Federal Claims and would not have to have had to waive damages over $10,000 against the United States in order to gain standing. Moreover, if Lear would have brought a partial takings claim in the Court of Federal Claims, she would have been able to recover proportionately for the takings against Brittain County and FWS.

Furthermore, Lear's taking claim does not present issues of nuisance or trespass, so the concept of a tortious taking is not implicated in her situation. As a result, the lower court was erroneous in attempting to apply a liability concept from tort law to a taking claim, and therefore, the two regulatory schemes must be considered separately. Viewing Brittain County's regulation alone, Lear still may develop the upland portion of her property and thus cannot sustain a complete taking claim.

B. Joint and several liability is further inapplicable because the concept only applies to indivisible harms, and Brittain County's regulation can be reasonably severed from FWS' regulation.

Joint and several liability is only appropriate where the resulting harm is "of an indivisible nature and is not subject to rational apportionment." *Wm. G. Roe & Co. v. Armour & Co.*, 414 F.2d 862 (5th Cir. 1969); Restatement (Second) of Torts § 433A cmt. i (1965). In contrast, when two or more independent actors tortiously cause either distinct harm or a single harm for which there is a reasonable basis for division, each is subject to liability only for the portion of harm he has himself caused. Restatement (Second) of Torts §§ 881, 433A (1965).

The application of joint and several liability was further inappropriate because the two regulatory schemes affected distinct, divisible segments of Lear's land, and FWS and Brittain County did not act in concert. Brittain County independently exercised its police powers by denying Lear's permit to fill wetlands and had no involvement in the ESA process. Additionally, there is no evidence in the record that Brittain County and FWS acted concurrently, making joint and several liability inappropriate for the case at hand. Likewise, Lear's alleged harm is subject to rational apportionment at the water's edge. Brittain County's actions affected water, and the ESA restrictions affected land. Therefore, if anything, several liability would be appropriate, under which Brittain County would only be liable for the portion of Lear Island it regulated—only ten percent of the Cordelia Lot.

Thus, this Court should reverse the lower court's decision to apply joint and several liability to a non-tortious taking claim. Joint and several liability should not be applied because Brittain County and FWS did not cooperate in any way, and even if an injury to Lear were to be found, it is subject to rational apportionment at the water's edge.

VII. THE ESA IS AN INVALID EXERCISE OF CONGRESS' COMMERCE POWER AS APPLIED TO THE LEAR ISLAND POPULATION OF KARNER BLUES BECAUSE FWS IS ATTEMPTING TO REGULATE A NON-ECONOMIC ACTIVITY THAT DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Section Nine of the ESA prohibits "take" of listed species. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (2012). "Take" is defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015). This prohibition on take ostensibly falls within Congress' power to regulate under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which the Supreme Court has defined to include "activities having a substantial relation to interstate commerce."[2] *United States v. Lopez*, 514 U.S. 549, 559 (1995) (holding that the Gun-Free School Zones Act of 1990, which prohibited knowing possession of a firearm near a school district, was an unconstitutional exercise of Congress' Commerce Power because possession of a weapon was a non-economic activity); *United States v. Morrison*, 529 U.S. 598 (2000) (finding that Congress could not regulate gender-motivated violent crimes via the Violence Against Women Act of 1994 because such crimes are non-economic in nature, and the link between them and any substantial effect on interstate commerce is too attenuated).

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[2] The other two categories of activity that the Court has affirmed Congress may regulate are the channels of interstate commerce and persons or things in interstate commerce, *id.*, neither of which is at issue in this case.

In *Lopez*, the Court established a four-factor framework, later reiterated and clarified in *Morrison*, for evaluating the constitutionality of laws that purportedly bear a "substantial relation" to commerce. Two of those factors are (1) whether the activity regulated by the statute is economic in nature and (2) whether the link between the regulated activity and its effects on interstate commerce is too "attenuated."[3] *Lopez*, 514 U.S. at 563–67. While it is true that all circuit courts that have considered the issue have upheld the constitutionality of the ESA under Congress' Commerce Power post-*Lopez* and *Morrison*, at least one district court has held that the take prohibition was unconstitutional as applied to a fully intrastate species of prairie dog. *People for Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*, 57 F. Supp. 3d 1337, 1339 (D. Utah 2014). Similarly, the ESA's prohibition on take of New Union Karner Blues cannot meet the threshold required under the *Lopez* analysis because the regulated activity, take of the butterflies, is non-economic, and because the link between take and any effect on interstate commerce is too attenuated and purely hypothetical.

A. The regulated activity is the take of the Karner Blue, a purely non-economic activity, not the underlying construction of Lear's residence.

As established in *Lopez*, the first factor to consider in determining whether an activity may be regulated under the Commerce Clause's "substantial effects" test is whether the activity is economic in nature. 514 U.S. at 563. The Court has noted that the appropriate inquiry requires looking at "*the precise object or activity* that, in the aggregate, substantially affects interstate

[3] The remaining two factors are (1) "whether the statute contains an 'express jurisdictional element,'" and (2) "whether the 'legislative history contain[s] express congressional findings regarding the effects upon interstate commerce.'" *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011) (quoting *Lopez*, 514 U.S. at 561–67). The ESA does not include an express jurisdictional element nor congressional findings regarding the Karner Blue's value in commerce.

commerce." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (emphasis added).

In evaluating cases involving take under the ESA, the regulated activity must be considered the take of the species itself, rather than any underlying activity that results in take. In *GDF Realty Investments, Ltd. v. Norton*, explaining its reasoning for focusing on expressly regulated activity (take of cave species) as opposed to the underlying economic activity (construction of a Wal-Mart), the Fifth Circuit stated, "Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce." 326 F.3d 622, 634 (5th Cir. 2003). The court further expanded that, were the statute applicable to underlying activities, "[t]here would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* Similarly, the court in *PETPO* found that the conduct to be considered for the "substantial effects" test was the actual take of a species, as opposed to any underlying economic activities. *PETPO*, 57 F. Supp. 3d at 1344 (citing *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)).

Although other circuits have found that the ESA regulates underlying economic activity, they did not make that determination in the context of a "substantial effects" analysis regarding a species that had never been traded in commerce. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (a pre-*Morrison* case that, in evaluating takes of a California species of flies, considered underlying activities only in the context of a "channels of interstate commerce" analysis but not in its "substantial effects" analysis); *Gibbs v. Babbitt*, 214 F.3d 483

(4th Cir. 2000) (finding that takes of red wolves were economic in nature because farmers were killing them for directly economic reasons—to protect livestock on their farms—and because the wolves had demonstrated value in tourism, science, and pelt trading).

In this case, the lower court erred in finding that the relevant activity regulated under the ESA was Lear's proposed underlying construction activity, rather than the take of Karner Blues itself. Clearing part of The Heath and removing vegetation to provide for construction of a residence—the actual activities that would presumably cause take of the Karner Blues—are not economic activities. As noted by the *GDF Realty* court, it would be improper to allow the ESA to regulate later construction activities that are enabled by the land-clearing since "take" is what is expressly regulated. Additionally, there would be no logical stopping point for regulating intrastate activities if the only requirement for federal jurisdiction is that some preceding action in a chain of events involved take of a listed species. Therefore, the focus should remain where Congress intended it: the expressly regulated take of Karner Blue butterflies, which is non-economic and does not substantially affect interstate commerce.

B. The connection between the take of Karner Blues and economic activity is too attenuated to support application of the Commerce Clause.

In certain circumstances, the U.S. Supreme Court allows related, intrastate activities to be aggregated for the purpose of determining whether they have an effect on interstate commerce. For example, in *Raich*, the Court ruled that a law prohibiting home growing and consumption of marijuana was constitutional because, by aggregating all individual home growers together, the regulated activities would have a substantial effect on the national market for marijuana. 545 U.S. at 23 (citing *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (holding that an individual farmer growing wheat could have a substantial effect on supply and demand for the commodity of wheat, if aggregated with all other individual growers). In rationalizing the aggregation

principle in *Raich*, the Court explained, "[T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 19.

While the Court has not adopted a categorical rule against aggregating non-economic activities, it has only allowed the principle to apply in cases where the regulated activity was economic in nature. *Morrison*, 529 U.S. at 613. Once aggregation has been found appropriate, the Court allows regulation of individual, intrastate instances of an activity so long as each one amounts to "an *essential part of a larger regulation of economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez,* 514 U.S. at 561 (emphasis added). In contrast, for example, in evaluating the constitutionality of regulating take of a noncommercial, intrastate species under the ESA, the court in *GDF Realty* found "[t]he possibility of future substantial effects of the [species] on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." 326 F.3d at 638 (citing *Morrison,* 529 U.S. at 612).

The regulation of take of Karner Blues can be distinguished from both *Raich* and *Wickard* because, in those cases, there were actual markets for the commodities in question (marijuana and wheat, respectively), and therefore the regulation of small-scale contributors was essential to the overall regulatory scheme. The New Union subpopulation of Karner Blues cannot be said to have a "substantial effect on supply and demand in the national market for" Karner Blues because there *is no* national market for Karner Blues. Since there is no commodity market for the Karner Blue, prohibition of its take is not essential to the overall success of the ESA.

This situation is also different from *Gibbs v. Babbitt* because, in that case, the red wolf was listed as endangered, at least in part, precisely because it had been over-hunted to the verge of extinction because there was a market for its pelts. The Karner Blue has no value in interstate commerce and never has—there is no known market for the butterfly or any part of it in pharmaceuticals, agriculture, fishing nor hunting. Similarly, the record has shown no evidence that any out-of-state travelers ever have visited or ever would visit Lear Island to view the Karner Blue. As in *GDF Realty*, the connection between taking Karner Blues and interstate commerce is too speculative and attenuated to allow this application of the Commerce Clause to stand, since there are no known uses in any commercial or industrial process.

Thus, since the Karner Blues do not have economic value in interstate commerce, take of the butterflies does not substantially affect interstate commerce. Accordingly, this Court should reverse the lower court and hold that the ESA is an unconstitutional exercise of Congress' commerce power as applied to the New Union subpopulation of Karner Blues.

CONCLUSION

For the above reasons, Brittain County asks this Court to reverse the District Court on all six takings issues: Lear's taking claim was not ripe for adjudication; the claim was precluded by the equal footing and public trust doctrines; the taking was not a complete deprivation of economic value since the property will regain its value in ten years; the property still maintains economic value through the $1,000 annual payment from the Brittain County Butterfly Society; the relevant parcel is the entirety of Lear Island; and the application of joint and several liability was patently erroneous and unprecedented. Additionally, Brittain County asks this Court to reverse the District Court on the Commerce Clause issue and hold the ESA unconstitutional as applied to the Lear Island intrastate Karner Blue subpopulation.

Respectfully Submitted,

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Counsel for Brittain County, New Union