UNITED STATES COURT OF APPEALS

for the

TWELFTH CIRCUIT

September Term, 2016
Docket No. 16-0933

CORDELIA LEAR,

Plaintiff—Appellee—Cross Appellant,

- v. -

UNITED STATES FISH ABD WILDLIFE SERVICE,

Defendant--Appellant—Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant—Appellant.

Appeal from the United States District Court
For the District of New Union

PLAINTIFF--APPELLEE'S BRIEF

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Jurisdiction

The Federal Courts of Appeals have jurisdiction from final decisions from United States District Courts. See 18 U.S.C. § 1291. This appeal is from the final order of the United States District Court for the District of New Union dated June 1, 2016 in 112-CV-2015-RNR.

Statement of the Issues

1. Is the Endangered Species Act (ESA) a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?

2. Is Ms. Lear's takings claim against the Fish and Wildlife Service (FWS) ripe without having applied for an Incidental Take Permit (ITP) under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?
3. For takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?
4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County (BC) from a takings claim based upon a complete deprivation of economic value of the property?
5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?
6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Ms. Lear's claim for a taking based on the denial of a county wetlands permit?
7. Assuming the relevant parcel is the Cordelia Lot, are FWS and BC liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

Standard of Review

Each issue before this court is a question of law and is afforded de novo review. A trial court's legal conclusion is reviewed de novo. See Husain v. Olympic Airways, 316 F.3d 829, 835. (9th Cir. 2002). Additionally, mixed issues of law and fact are also afforded de novo review. See Lim v. City of Long Beach, 217 F.3d 1050, 1054 (9th Cir. 2000). Commerce clause

and Fifth Amendment Takings issues are legal questions. But, even if one of the seven issues before the Court includes a question of fact, a de novo review is still the appropriate measure.

Statement of the Case

This case commenced in the District Court for the District of New Union in February 2014. R. at 7. The lower court awarded plaintiff Ms. Lear $10,000 from the FWS for an unconstitutional taking under the Fifth Amendment and $90,000 from BC for the same reason. R. at 4. The lower court dismissed Ms. Lear's challenge to the ESA's constitutionality under the Commerce Clause (Clause) as applied to her property. The findings of fact are included below.

Ownership and Division of Lear Island

Ms. Lear's 10-acre lot (Cordelia Lot) of the 1,000-acre Lear Island is wholly within New Union. R. at 4, 5. The total lot acreage does not include the underwater lands, but underwater lands are included with the deed. R. at 5. Lear Island sits upon Lake Union, an interstate lake "traditionally used for interstate navigation." R. at 4. Ms. Lear received her lot from a conveyance by her father, King James Lear, who retained a life estate for himself. R. at 5. Ms. Lear's sister Regan also received a lot, and Ms. Lear's estranged sister Goneril received the lot between Regan and Ms. Lear. Id. Only Goneril's lot is contiguous with Ms. Lear's lot. See R. at 5-6. King James Lear is a descendant of the original grantee, Cornelius Lear. See R. at 5. Cornelius Lear was granted Lear Island in 1803 by an Act of Congress when it was part of the Northwest Territory. Id. The grant stated that Cornelius Lear had a title in fee simple absolute to the entire island and to "all lands under water within a 300-foot radius of the shoreline of said island," and lands beneath the straight separating Lear Island and the mainland. R. at 4-5.

Uses of Lear Island

Cordelia Lot is at the northern tip of Lear Island, containing an access strip, nine acres of an open field, and an emerging land in a cove. R. at 5. This emerging land was evaluated by the U.S. Army Corps of Engineers (Corps), who determined is can no longer be considered a

navigable water; within the meaning of the Rivers and Harbors Act of 1899, it is "non-navigable." R. at 7. When King James Lear divided the lots in 1965, Brittain Town Planning Board "determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence." R. at 5. On Regan's lot, King James Lear built a residence for Regan's use, in conformance with zoning requirements imposed by the Brittain Town Planning Board. Id. The original homestead is located on the Goneril lot. Id. Prior to the 1965 division, the island was used for farming. Id. When farming ceased in 1965, the Cordelia lot continued to be mowed while the rest of the land transformed into forest. Id. The land on Goneril's lot and Regan's lot began naturally transforming into a forest in 1965 and was completed before the Karner Blue butterflies were listed as an endangered species. See id. Mowing every October is the only reason the forest has not spread to the Cordelia Lot; otherwise, Cordelia Lot will become forest within ten years. R. at 7. When King James Lear died in 2005, Ms. Lear's right to enjoyment of Cordelia Lot vested. R. at 5.

Karner Blue Butterflies Change the Makeup of Lear Island

The Karner Blue butterfly was listed as an endangered species under the Endangered Species Act on December 14, 1992. Id. Karner Blue butterflies have populations in multiple states, including New Union. Id. There is a Karner Blue population on Lear Island in the Cordelia Lot. Id. Cordelia Lot was determined to be a critical habitat of the Karner Blues in 1992. Id. The Karner Blue critical habitat is partially-shaded lupine flowers near successional forests, which exists on the border between the Cordelia Lot and her estranged sister, Goneril, and on the access strip. R. at 6. Karner Blue lay eggs in the fall and hatch from chrysalis in the spring and summer. Id. The lupines must be undisturbed prior to hatching for them to emerge. Id. The Karner Blue population on Cordelia Lot remain on the island and are wholly intrastate. Id.

The Taking

Ms. Lear started the process of building her zoning-conforming single-family residence by determining whether she needed any permits or approvals in April 2012 because of the Karner Blue butterflies' habitat. Id. FWS agent L.E. Pidopter "advised" Ms. Lear that "any disturbance," other than the annual mowing, violates the ESA's taking prohibition. Id. Pidopter then told Ms. Lear that she could explore obtaining an ITP under section 10 of the ESA. Id. To file for and receive an ITP, Ms. Lear would also need a habitat conservation plan (HCP) and an environmental assessment document under the National Environmental Policy Act (NEPA). Id.

Agent Pidopter told Ms. Lear that the HCP must include "acre-by-acre" replacement of lupine habitat contiguous to the current fields and "require a commitment to maintain the remaining lupine fields through annual [October] mowing." Id. FWS New Union field office confirmed Agent Pidopter's statements in a letter to Ms. Lear dated May 15, 2012. Id. Ms. Lear has only one option to satisfy the HCP: working with her estranged sister Goneril, the owner of the only contiguous swaths of land. Id. Goneril refused to cooperate in any HCP that involves restricting use of her property; this is out of Ms. Cordelia' control. Id. The cost of preparing the now-impossible HCP, combined with the cost of preparing the ITP and NEPA compliance, is $150,000, thirty-three percent more than the pre-taking value of Cordelia Lot. R. at 6-7.

Realizing that she simply could not afford to spend more money than her property was worth, Ms. Lear diligently developed an alternative development proposal (ADP). R. at 7. The ADP proposed "to fill one half-acre" of the emerging acre of land for a "lupine-free building site" together with the causeway constructed in the early twentieth century. R. at 5, 7. Since the Corps determined that the Rivers and Harbors Act of 1899 no longer applied to the emerging land, federal approvals were not required for the ADP. See R. at 7. Ms. Lear sought the required permit under the 1982 BC Wetland Preservation law to finish filling the emerging land to make it

safe for development. Id. The permit was denied by the BC Wetlands Board in 2013 because the permit could only be granted "for a water-dependent use," and a "residential home site was not a water-dependent use." Id. Since the permit was denied, Ms. Lear has not sought a re-valuation of her property; but, the value when development appeared to be an available right was less than the cost of the ITP, so it is clear that Ms. Lear still cannot afford it with no guarantee of return on her investment. See R. at 6-7. Ms. Lear pays $1,500 in taxes annually, more than the amount BC Butterfly Society offered to pay Ms. Lear for butterfly viewing privilege during the summer. R. at 7. Without the right to develop a residence, there is no market for the Cordelia Lot. Id. Ms. Lear brought suit in the District Court in February 2014 and filed a notice of appeal in June 2016. R. at 1, 7.

Summary of the Argument

The lower court misapplied the United States v. Lopez test to these facts when it found the ESA was valid here under the Clause. 519 U.S. 549, 558-59 (1995). The specific species at issue determines whether the Lopez analysis proceeds under the first or third "substantially affects" category. First category eligibility requires Karner Blue regulation to be essential to the ESA; the FWS has not proven this. So, this attempted application of the ESA is subject to independent review in the third category. It fails here because the FWS attempted to regulate both activity and inactivity, which an improper use of the Clause.

Alternatively, if this Court finds the Commerce Clause to be a valid basis for the ESA on these facts, then it is clear that Ms. Lear's takings claim is ripe for review because actions beyond which she has already taken are futile. From there, an essential component of a takings claim analysis is defining the relevant parcel. The Supreme Court has made its spatial rule clear: the relevant land is the parcel as a whole. Landowners seeking to manufacture a taking by dividing land into segments, also referred to as "creating a denominator," are not entitled to

compensation. Here, the Cordelia Lot's vertical boundaries are not at issue and the horizontal boundaries are the limits established by her Father in 1965. She has not divided this parcel and is not claiming only a segment of the parcel has been taken.

Further, the ten-year anticipated duration of the critical habitat still constitutes a taking. The Supreme Court announced in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency that temporary regulations may constitute a taking and that any regulation lasting more than a year should be viewed with skepticism. 525 U.S. 302 (2002). For the Cordelia Lot, the critical habitat designation—at the very least—will last ten years. If ten year regulations that diminish all value to a relevant parcel are excluded from just compensation, then takings jurisprudence is emulsified; government entities should prepare for windfalls. Moreover, at best, experts can only speculate as to when the Karner Blue butterfly population on the Cordelia Lot will no longer exist. No amount of party and expert stipulation will affect the butterflies—whose population may continue for ten, fifteen, or twenty years.

The Brittain County Butterfly Society's ("Butterfly Society") offer to pay $1,000 a year in rent does not preclude a takings claim. When a regulation's impact on property does not amount to categorical taking, a balancing test of the Penn Central factors is performed. The economic impact of the regulation is not mitigated enough by the offer from the Butterfly Society to facially preclude a taking. Second, the regulation's interferes enough with Ms. Lear's reasonable investment-backed interests to an extent of which the offered rental payment would not mollify. Finally, the character of the regulation's impact acts as a total diminution of economically viable use and as a permanent physical occupation. Taken together, these factors would provide the basis for finding a complete diminution of economic value.

The 1803 congressional grant is clear in its intent to convey fee simple absolute in lands submerged to Cornelius Lear. Because the intent of the conveyance was clear, any public trust claims by the state are defeated. Furthermore, even if the court deems the intent of the conveyance to be unclear, the state has lost possession of the previously submerged one-acre parcel through the principle of accretion.

Under the current takings jurisprudence, the parcel as a whole rule is illustrative how deprivation of economic value should be analyzed when neither the county or federal regulation alone would completely bar viable economic use. Furthermore, takings analyses focus on what an owner has lost, not what the taker has gained. Separating the parcels into discrete segments so that each regulation is analyzed in isolation would shift the focus to what takers have gained.

Argument

1. ON SUCH NARROW FACTS, THE ESA IS AN INVALID EXERCISE OF THE CLAUSE

The ESA is invalid under the Commerce Clause where, as here, the subject subpopulation of the entire endangered species is a wholly intrastate.

Clause jurisprudence unpredictably greatly expanded in 1937 after over 140 years of adhering to the intended narrow definition of "commerce." Compare NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (expanded view of the Clause), with Gibbons v. Ogden, 22 U.S. 1 (1824) (stating the original and intended narrow view of the Clause). The Clause has since been used to justify Congress' over-reaching. The Supreme Court recognized this in Lopez, where it outlined the test to determine if the identified connection of the regulated activity to interstate commerce is too tenuous. 519 U.S. at 558-59. The Clause can regulate channels of commerce, instrumentalities of commerce, and activities that substantially affect interstate commerce. Id. Three types of categories are recognized by the Supreme Court to substantially affect interstate commerce: activities that are economic by their terms, or other activities, even intrastate, which

are essential to the larger regulatory scheme of an economic activity if the aggregate of such activities has a substantial effect on interstate commerce; any activity with a jurisdictional element; and the "catch-all" third category subject to independent review. Id. at 562; Gonzales v. Raich, 545 U.S. 1 (2005) (fleshing out examples of intrastate activities that, when aggregated, have a substantial effect on interstate commerce).

This independent review is a logic test, not strictly de novo review, which tests the implications of upholding the regulation; to be upheld, there must be a type of activity that the regulation structure cannot reach. See Lopez, 519 U.S. at 562. This is a high standard that was affirmed in United States v. Morrison. 529 U.S. 598, 612-13 (2000).

The first category is subject to rational basis review, and is thus easier to satisfy than independent review. Compare Gonzales, 545 U.S. at 24 (finding that Congress can "regulate purely local activities [if they are an essential] part of an economic 'class of activities' that have a substantial effect on interstate commerce" and satisfy rational basis review), and Perez v. United States, 402 U.S. 146, 151 (1971) (holding that there was a directly link between purely intrastate "loan sharks" and interstate crime, so regulating this intrastate activity is essential to the regulation of interstate commerce and easily satisfied rational basis review), with Lopez, 514 U.S. at 638-41 (finding that "if [Gun-Free School Zones Act of 1990 (Act)] is to be sustained, it must be under the third category['s independent review] as a regulation of an activity that substantially affects interstate commerce" because it did not have a jurisdictional component, was not a commercial or economic statute, and was not essential to a larger regulatory scheme for an economic activity. The Act was subject to and failed independent review because the Government's argument led to the regulation of both violent criminal acts and acts which "might lead to" violate criminal acts – there was nothing shown to not be regulated).

This exception for intrastate non-economic and non-commercial activities is a qualified. The exception requires that activities, which would in any other situation fall outside the scope of the Clause, be essential to the greater regulatory scheme. Gonzales, 525 U.S. at 24. "Essential," as applied to endangered species preservation, includes showing that an entire species is within a single state, GDF Realty, 169 F.Supp.2d 648, 655 n.9 (W.D.Tx. 2001), as well as if almost half of the entire endangered species is located in a single state. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d. 1041, 1052 (D.C. Cir. 1997).

Clearly, these decisions prove that the Supreme Court is skeptical about using the Clause to uphold regulation of primarily non-economic activity. The ESA was created to "protect and recover imperiled species and preserve the ecosystem upon which these species depend," a primarily non-economic activity. See 16 U.S.C. § 1531(b). For a taking prohibition to be evaluated under the first category of the "substantially affects" test, it must be essential to the ESA. See 16 U.S.C. § 1538; 50 C.F.R. § 17.3 (2015); Nat'l Ass'n of Home Builders, 130 F.3d at 1059.

The lower court had to give greater deference than this Court must to other circuit courts who have misapplied the Lopez test in situations involving the ESA. The lower court followed the D.C. Circuit's approach in Rancho Viejo when it claimed to be following the "weight of the authority," by treating the development as the regulated activity, instead of the ESA taking, like the Fifth and Fourth circuits did in GDF Realty, 169 F.Supp.2d at 655, and Gibbs v. Babbitt, 214 F.3d 483, 493-94 (4th Cir. 2000). R. at 8; 323 F.3d 1062, 1068 (D.C. Cir. 2003). More accurately, only five circuit courts (4th Cir., 5th Cir., 9th Cir., 11th Cir., and the D.C. Cir.) have ruled on this issue and they disagree on the basis for validity. The circuits are split – disagreement about what is being regulated by the ESA is not a sound foundation make for ESA constitutionality.

This Court, bound by no such deference to other circuits, is able to follow the Lopez correctly and use the endangered species at issue to decide whether the federal action falls under the first "substantially affects" category, and is therefore subject to a rational basis review, or whether the action falls under the third "substantially affects" category, and is therefore subject to independent review. This case-by-case approach allows Congress' purposes for passing the ESA to be achieved while not imposing a public burden solely onto Ms. Lear – a private citizen.

Here, if this Court uses the first "substantially affects" category, then it is clear that FWS has not met its burden to prove regulation is "essential." There are Karner Blue populations in several other states and FWS has not asserted that the New Union population is a significant portion of the entire species. See R. at 5. The second category does not apply because the ESA does not impose a jurisdiction on the taking prohibition. Thus, the ESA is subject to the third category and independent review.

To survive independent review, there has to be something in the class of activities that cannot be regulated under the ESA. Here, the class of activities is regulation of a wholly intrastate species in a critical habitat that requires maintenance for its survival. This case's facts are as narrow as imaginable for an endangered species. Ms. Lear does not dispute the cases which have upheld preventing private development under the ESA. But, if this Court follows the lower court, then the ESA would be used to require private citizens to preserve the habitat themselves. The FWS is thus arguing that the ESA taking prohibition should be used to prevent activity and require activity that was not required before.

This is the same situation that was struck down in National Federation of Independent Business v. Sebelius. 132 S.Ct. 2566 (2012). In Sebelius, Justice Roberts stated "[t]he Framers gave Congress the power to regulate commerce, not to *compel* it . . . [Congress is trying to] reach

beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." Id. at 2589, 2592 (finding the examined provision of the Affordable Care Act invalid under the Commerce Clause, but valid under the Taxing Clause for reasons irrelevant here). Regulating inactivity is not a permissible under the Clause; yet, FWS attempts it anyway.

It would be frivolous to argue that, generally, preventing species extinction does not have a substantial effect on interstate commerce. Species that clearly substantially affect interstate commerce are those whose populations cross state borders, or attract tourists, trade, or scientific research. Gibbs, 214 F.3d at 494. That reasoning does not logically extend here, to the Karner Blues on Lear Island. Here, a wholly intrastate population of the species, not the entire species itself, is at issue. Defendants BC and FWS will likely argue that the BC Butterfly Society's offer to pay Ms. Lear $1,000 to conduct summer butterfly viewings shows that there is a tourist value to the Karner Blues. This is a red herring; as shown in Gibbs, tourism is more than one small group's offer to buy use of private property.

A sixth circuit court, the Tenth Circuit, will be soon considering the question, since in People v. United States Fish & Wildlife Serv. a Utah District Court found that a rule prohibiting taking of an intrastate species on private land, not just federal land, failed independent review. 57 F.Supp.3d 1337, 1344. The court said "the question . . . is whether take of the Utah prairie dog [an intrastate species, not even just a population] has a substantial effect on interstate commerce." Id. Defendants in People attempted to argue it was the species' biological value that tied its regulation to interstate commerce, but the district court held that using the Clause "to regulate anything that might affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under" the Clause. Id. The court in People applied the

Lopez test correctly by using the individual species to determine the category for evaluation; a fortiori, the Clause is an invalid basis of authority here.

2. ALTERNATIVELY, IF THE ESA IS CONSTITUTIONAL UNDER THE CLAUSE, THEN THE LOWER COURT CORRECTLY RULED THAT THE APPLICATION OF THE ESA ITP AND BC WETLANDS PRESERVATION LAW TO LEAR'S PROPERTY CONSTITUTE AN UNCOMPENSATED TAKING OF HER PROPERTY

   a. LEAR'S TAKINGS CLAIM AGAINST FWS AND BC ARE RIPE

The seminal case for ripeness is Abbott Labs. v. Gardner. 387 U.S. 136 (1967) *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977). Abbott was the first case to explicitly allow pre-enforcement challenges to agency action. This ruling is provides relief for situations where it is clear that enforcement would cause harm to the plaintiff, so completing steps for purely reasons of formality is nonsensical and unjust; a plaintiff need not perform a futile act as a prerequisite of judicial review; in other words, the issue is purely legal. Id. at 155-56. The Supreme Court has since clarified that ripeness is a three-factor test. The court should evaluate "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Nat'l Ass'n of Home Builders v. Norton, 298 F.Supp.2d 68, 79-80 (citing Ohio Forestry Ass'n. v. Sierra Club, 523 U.S. 726, 733 (1998)).

In takings claims, the ripeness analysis is conflated with two other justiciability requirements: exhaustion (agency and state procedures) and finality, but exhaustion can be excused, and finality satisfied, if such actions are futile. See Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 n.8 (1997) (finding exhaustion unnecessary where state has no procedure to obtain just compensation); Palazzolo v. Rhode Island, 533 U.S. 606, 625-626 (2001) (finding finality met because a denial already occurred, so additional permit applications, otherwise required, are futile). A permit application can be futile if "the procedure to acquire a

permit is so burdensome as to effectively deprive plaintiff[] of [her] property rights." Hage v. United States, 35 Fed. Cl. 147, 164 (1996). Therefore, in those situations, submitting an initial permit application and having it formally denied is the only way to satisfy finality. Morris v. United States, 392 F.3d 1372, 1374 (finding that a claim was not ripe when the agency had not sufficiently exercised its discretion, since there was no cost-prohibition or clear reason to show that continuing the process would definitely harm the plaintiffs).

Here, the lower court correctly applied straight-forward and established ripeness rules because the issue is purely legal – whether Ms. Lear requires an ITP and what Ms. Lear must provide to obtain the ITP. This Court can defensibly uphold the lower court's reasoning.

In a letter from the FWS New Union Field Office and from conversations with FWS Agent Pidopter, Ms. Lear was informed of two truths: her land was a critical habitat for the Karner Blue butterfly and she would need an ITP, 16 U.S.C. § 1539(a)(1)(B), to build a single-family residence on her property. R. at 6. FWS authorities listed the minimum requirements (acre-for-acre replacement habitat on contiguous land, annual fall mowing, an HCP, and NEPA environmental assessments) and Ms. Lear learned the total cost of such compliance was $150,000 – thirty-three percent more than the pre-permit denial value of her property. Clearly, Ms. Lear cannot afford an ITP. Even if it was affordable, Ms. Lear has no hope of recuperating her investment, because successful procurement of an HCP depends completely on Goneril's cooperation. Goneril refuses to cooperate.

For thoroughness, although it is so clearly futile to apply for the permit, the Ohio Forestry factors are explored. First, delayed review certainly poses hardship to Ms. Lear, because she is denied all use of her property. Second, the FWS is not required to take further action, so judicial

review will not interrupt any processes. Lastly, there are no facts missing from this situation that this Court would need to evaluate the FWS' actions up to this point.

Opposing counsel would likely argue that Goneril is Ms. Lear's sister, so in the interests of maintaining familial harmony, cooperation could likely come at a later date, and an HCP would then be possible. However, this argument is meritless because it misconstrues the purpose of the FWS and of this Court. It is not the role of the government or the court to require familial harmony. Ms. Lear cannot afford to get an ITP. Goneril refuses to cooperate with Ms. Lear to fulfill the terms of the HCP. The HCP is required for the ITP. Under Palazzolo, finality is satisfied by the inability to get the HCP combined with the FWS letter stating the HCP is required. Compare Boise Cascade v. State, 164 Or. App. 114, 132 n.8 (1999) (finding not applying for an ITP made the claim unripe since there were undeveloped facts which could lead to granting the ITP). Exhaustion is not necessary because, as discussed below, the state has no just compensation procedure. Thus, Ms. Lear's takings claim against FWS is ripe.

Ms. Lear's takings claim against Brittain County is also ripe. None of the parties raised this issue, but since the lower court made this finding in a footnote, it is addressed her with equal brevity. When a "state agency charged with enforcing a challenged land use regulation entertains an application from an owner and [denies it, making] clear the extent of the development permitted [and there are no allegations of failure to comply with exhaustion or pre-permit processes], federal ripeness rules do not require" additional acts that are thus futile. Palazzolo, 533 U.S. at 625-626. Additionally, if a state does not have a procedure for obtaining just compensation for a takings claim, then the claim becomes ripe upon the taking and is not conditioned upon any other action; lack of a just compensation procedure constitutes denial of

just compensation. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985).

Here, New Union does not have any just compensation procedure. Additionally, the BC Wetlands Board denied her ADP permit application. Both of these, under the above-referenced cases, clearly apply. Ms. Lear's claim against BC is ripe.

b. THE PARCEL SHOULD BE VIEWED AS A WHOLE

Before measuring a diminution of value, the court must conduct a parcel-as-a-whole inquiry: *what is in* and *what is out*. See generally Penn. Cent. Trans. Co. v. City of New York City, 438 U.S. 104, 130-131 (1978) ("[T]his court focuses rather on . . . the nature of the interference with the rights in the parcel as a whole."); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 382, 391-92 (Cl. Ct. 1988) ("[T]he critical issue is how to define what the whole parcel includes."); Raymond Coletta, The Measuring Stick of Regulatory Takings: a Biological and Cultural Analysis, 1 U. Pa. J. Const. L. 20. There is no bright-line rule for this inquiry. See Steven J. Eagle, The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole, 36 Vt. L. Rev. 549, 566 (Spring 2012). The *what is in* and *what is out* analysis does not change the nature of the inquiry, but may serve to focus the Court's analysis.

As to *what is in*, the whole parcel inquiry "does not divide a single parcel into discrete segments," but considers the limits of both the horizontal and vertical limits of the parcel. See Penn Central at 30; see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (rejecting an approach that artificially creates a denominator upon which the regulation acts as the numerator). As such, no landowner may segment his parcel, thereby narrowing a parcel to fit a regulation with the effect of manufacturing a taking. See generally Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. at 332 (2002). Consistent with courts attempts to find the true parcel as a whole, when a landowner owns contiguous

parcels, a court may find, for purposes of a Takings claim, the parcel as a whole is, in fact, more a single parcel. When a landowner owns only one parcel—whose limits are clearly defined by state law—the inquiry then proceeds to *what is out*.

For determining *what is out*, the court examines the parcel under state property laws and preexisting regulations. See Loveladies, 15 Cl. Ct. at 392. A landowner may only have one remaining stick from her bundle of interests, due to preexisting laws and regulations, when a government action tears away that last interest. Such a circumstance is distinct from cases like *Penn Central* and *Deltona* where courts found the landowners had rights to develop other segments of their parcels. See generally Penn Central, (finding the landowner still had other air rights available for development). See Deltona Corp. v. United States, 657 F.2d 1184, 1188 (Ct. Cl. 1981) (finding a landowner who purchased a 10,000 acre parcel could develop large areas of the original parcel). See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496 (1987) (finding a landowner retained other investment-backed interests in mining areas of parcel not effected by new government action). For example, zoning might remove all but a few property rights. The unusable rights, removed by valid zoning regulations, are not included in the *what is in*, but constitute *what is out.* Accordingly, a segment of a parcel is unusable when a regulation precludes use of that land and the permit that could circumvent such regulation has been or is nearly certain to be denied. See Loveladies, 15 Cl. Ct. at 393.

For Ms. Lear, *what is in* are the vertical and horizontal limits of the property her father conveyed to her, and her *what is* out is the zoning regulation imposed by the Town Planning Board. Like the vertical limits, which are not at issue here, the horizontal limits are largely defined by state law. The trial court correctly found the Lear Island Parcel was "formal[ly]" divided into separate lots by Ms. Lear's Father prior to the conveyance. See R. at 10. The

Brittain Town Planning Board approved this subdivision—leaving Ms. Lear with the same ten-acre parcel she owns today. See R. at 5. Ms. Lear never divided her own parcel and she owns no contiguous parcels. See Order at 5-6 ("[T]he only land . . . contiguous to the [Cordelia Lot] is [Ms. Lear's estranged Sister's] Lot."). Consequently, the ten-acre parcel conveyed to her by her father marks the horizontal limits of the parcel as a whole. Ms. Lear's *what is out* are all interests in constructions other than a single family home as the Town Planning Board zoned Ms. Lear's lot for a single one-family residence. See R. at 5.

Significantly, Ms. Lear's sisters' Lots are not relevant for this parcel as a whole analysis. Those parcels would only be relevant if the conveyance to Ms. Lear is found invalid. Neither the FWS nor BC has raised such challenge; therefore, the challenge is waived. The other two parcels would have been relevant only for a takings claim brought by Ms. Lear's Father. As such, if King James Lear claimed the two regulations acting in concert constituted a taking of the Cordelia Lot while he enjoyed a life estate in all three parcels, then he would have been viewed as creating a denominator parcel for the purpose of manufacturing a taking. Such a takings claim gave rise to courts' strong stance against claimants manufacturing takings by finding a denominator diminished by a regulation. See generally Penn. Central, 438 U.S. at 130-33.

C. TEMPORARY TAKINGS STILL CONSTITUTE A COMPENSABLE TAKE

The regulations act as a taking despite the possibility that the critical habitat on the Cordelia Lot could naturally change such that the Karner Blue population on the Lot is eliminated. Land-use regulations are revocable. See Tahoe-Seirra, 525 U.S. at 347 (dissent). Courts, however, can still find temporary regulations constitute a taking. See generally Tahoe-Sierra, 525 U.S. 302 (2002); First English Evangelical Lutheran Church v. Cty. of L.A., 482 U.S. 304, 319 (1987) (holding that a temporary taking that denies all use of a property is not different from a permanent taking). In an analysis under the Penn Central factors, the Supreme Court

requires "'careful examination and weighing of all the relevant circumstances'" to determine if a temporary regulation will constitute a taking. See id. at 335 (quoting Palazzolo, 533 U.S. at 636); cf. Tahoe-Sierra, 525 U.S. at 335, 337 (rejecting "a rule that require[s] compensation for every delay in the use of property" because such rule "would render routine government processes prohibitively expensive or encourage hasty decision making"). While recognizing that some short-term prohibitions do not require compensation, the Supreme Court provides that "any moratorium that lasts for more than one year should be viewed with special skepticism." See Tahoe-Sierra, 525 U.S. at 341.

The FWS and BC regulations are not affected by the potential temporary nature of those regulations. These regulations will prohibit development as long as the critical habitat designation remains. The critical habitat will remain for more than one year; so, these regulations should be analyzed with skepticism. See R. at 7. The District Court noted that the critical habitat will be eliminated by the natural changes in the Cordelia Lot once Ms. Lear stops mowing the parcel and such elimination is anticipated in ten years. R. at 7.

This ten year prediction, however, is mere speculation. The regulations will continue for ten years if every variable comports with the predictive models for ten straight years. No amount of party stipulation will affect the succession of vegetation nor will it ever predict the elimination of a population of butterflies. As such, the critical habitat will likely remain far longer than ten years. This Court should not create a precedent that limits takings claims based on speculations as to when an agency might remove a designation—particularly when the purported date of removal is no earlier than ten years. Such a holding would necessarily undermine takings jurisprudence and create a windfall for government agencies.

D. THE FWS CRITICAL HABITAT DESIGNATION AND THE BC REGULATION CREATE A TAKING OF THE CORDELIA LOT.

The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. See Palazzolo, 533 U.S. at 606. A fully compensable categorical taking, or a taking *per se*, occurs under two conditions; when a permanent physical occupation has occurred and when a regulation denies all economically beneficial or productive use of land. See Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical taking); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, at 1016 (1992) (regulatory taking). If the taking does not deprive the property of all economically beneficial use or is a permanent physical occupation, a partial taking may still have occurred. Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 274-277 (1955). A "non-categorical regulatory taking" is a regulatory imposition that prohibits or restricts uses that would otherwise be available to the property owner, but leaves the owner with some use. See John R. Sand & Gravel Co. v. U.S., 60 Fed.Cl. 230 (Fed. Cl. 2004).

A regulation constitutes a partial taking when it goes "too far" in interfering with private property rights. See Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). Courts determine if a regulation has gone "too far" by a balancing of three factors. See generally Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104. Courts consider (1) the economic impact on a claimant, (2) the extent to which the regulation has interfered with reasonable investment backed expectations, and (3) the character of the government action. Id., at 124. "[T]he Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005). Additional relevant factors to be considered

include the benefits that a landowner would share with other landowners as result of the regulations and economic considerations. Deltona Corp., 657 F.2d at 1192 (Ct. Cl. 1981).

1. Economic Impact,

The economic impact of a regulation is often the most significant of the Penn Central factors, however, courts have gone with little elucidation of what the factor entails, generally including reasonable rate of return on investment, available economic uses, and the character of the impact of the government regulation. Courts first look to the rate of return on the property. In Penn Central, the court found that even without the development proposed by the landowner, a "reasonable return" could be earned from the existing facility. Id., at 136-37. Thus, if some reasonable rate of return on the owner's investment is available, the court is unlikely to find a taking.

Next, courts examine the regulation's impact on the economic uses of the property. Under this analysis, courts are discorded in what amounts to adequate diminution of economically beneficial use constituting a taking. A growing number of cases in lower courts have held that certain partial diminutions in economic use can constitute a taking. See Loveladies Harbor, Inc. v. U.S., 21 Cl. Ct. 153 (1990) (99% reduction in land value plus additional factors a taking); Yancey v. United States, 915 F.2d 1534 (Fed.Cir.1990) (personal property's value reduced by 54% constituted a taking). These cases were considered consistent with a Supreme Court holding that only the elimination of all beneficial use of a property amounts to a taking. See Andrus v. Allard, 444 U.S. 51 (1979) (Court found federal ban on sale of bird artifacts did not eliminate all beneficial use of owner's property as some economic use was preserved in his ability to exhibit the artifacts in a museum and charge admission, resulting in no take).

Finally, as part of weighing the economic impact of a regulation, courts look at the regulation's impact the property's fair market value. To determine the fair market value, the court can

compare the difference between the market value of the property with and without the restrictions on the date that the restriction began. Alternatively, the court can compare the lost net income due to the restriction with the total net income without the restriction over the entire useful life of the property. Cienega Gardens v. U.S., 503 F.3d 1266, 1282 (Fed. Cir. 2007).

2. Regulatory Interference with reasonable investment-backed interests,

The second factor in the Penn Central balancing test is how much the regulation interferes with "reasonable investment-backed interests." This concept asks whether the regulation interferes impermissibly with the expectations on which the owner has invested resources. Where the governmental regulation adversely affects a reasonable investment-backed expectation where the regulation adversely affects a number of strands in the bundle, a taking may be found. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 479-81 (1987). The reasonableness of a property owner's expectancy interest is determined by the regulations in place at the time the owner purchased or invested in the land and the interference with that expectation interest must be substantial and unforeseeable. Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 14 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-07 (1984) (finding a taking where plaintiff relied on provision previously enacted regulation). However, if the new regulations are imposed, thus altering the existing rules upon which a property owner has already reasonably relied, the owner's property rights should be protected. Lucas v. South Carolina Coastal Council, at 112 (finding a taking where the state passed legislation regulating the plaintiff's property).

3. Character of government regulation's impact on the property.

The third factor in the Penn Central balancing test is the character of the government regulation's effect on the property. "A taking may more readily be found when the interference with the property had to be characterized as a physical invasion by the government, and when

interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central, at 124-25. Accordingly, the focus of the regulatory takings analysis is on fundamental fairness – whether it is fair for the government to impose the cost of a regulation on private parties rather than on the public as a whole. Cienega Gardens v. U.S., at 1278. Therefore, the closer the regulation comes to complete diminution of economic value or a permanent physical occupation of the property, the two categorical takings, the more likely a taking will be found.

E. THE BC BUTTERFLY SOCIETY'S OFFER TO PAY $1,000 PER YEAR IN RENT FOR WILDLIFE VIEWING DOES NOT PRECLUDE A TAKING.

The BC Butterfly Society's (hereinafter, "Butterfly Society") offer to pay $1,000 a year in rent does not preclude a takings claim. When a regulation's impact on property does not amount to categorical taking, a balancing test of the Penn Central factors is performed. The offered rental to be paid to Ms. Lear would only represent one "strand" in the "bundle" of property rights, and therefore would only influence the calculation of, and is not dispositive for the preclusion of, the claim of whether a taking has occurred. The economic impact of the regulation is not mitigated enough by the offer from the Butterfly Society to facially preclude a taking. Second, the regulation's interferes enough with Ms. Lear's reasonable investment-backed interests to an extent of which the offered rental payment would not mollify. Finally, the character of the regulation's impact acts as a total diminution of economically viable use and as a permanent physical occupation. Taken together, these factors would provide the basis for finding a complete diminution of economic value.

For this analysis, King James Lear's deeding of the property to Ms. Lear in 1965 is when her property interest vested, and provides the temporal basis for her reasonable investment-backed interest. R. at 5. Although King James Lear retained a life estate, it was his duty to

preserve the value of the property and prevent waste to the property, exclusively for Ms. Lear as remainderman. These duties include paying property taxes, which amount to $1,500 annually. R. at 7. Furthermore, the relative moment for when the taking occurred is the 1992 designation of the critical habitat for the Karner Blues. R. at 6. Finally, there is no market available for Ms. Lear's parcel as it is. R. at 7.

Economic use of the parcel has been diminished too far to be considered economically productive. The Butterfly Society's yearly $1,000 rental would not provide a reasonable rate of return on investment, as she would have to operate the property at a loss. Under the current regulations, the uses currently permissible on the property provide no market for the property to be sold. These restrictions on use eviscerate all beneficial economic use of the property, to the point where the value of the property is rendered $0.

Ms. Lear's reasonable investment-backed expectancy interest is severely frustrated by the application of the government's regulations. Ms. Lear has had possession of property rights associated with the Cordelia parcel since she was deeded the property in 1965. At the time, the only regulations applicable to the parcel was the town's single-family house zoning designation. Coupled with the fact that the two other lots on Lear island have single family homes, it is reasonable that Ms. Lear expected to be able to build a single family home. The application of the Critical Habitat designation in 1992 was unforeseeable for the Lear family's routine mowing of the Heath had been an ongoing activity since Ms. Lear took title to her property in 1965. Ms. Lear could not have anticipated that a sudden growth of flowers on a substantial portion of her lot would one day provide a habitat for an endangered species.

The character of the imposed regulations is both a total diminution of economic value. From Ms. Lear's full bundle of property rights, the regulations on her parcel have been nearly

extinguished completely. The ability to collect a penance of a rent payment is of nominal economic value. If existence of an offer for rental payment which would result in an operating loss can preclude a taking, Ms. Lear would be forced to abdicate her right to exclude individuals from her property to make any economically beneficial use of her property. Furthermore, the right to exclude "is traditionally considered one of the most treasured strands in an owner's bundle of property rights." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-36 (1982). It would be against the principles of fairness to require Ms. Lear to give up the last strand of her remaining bundle to make a non-economically beneficial use. This would essentially ask Ms. Lear to bear the entire public burden of regulation on her own.

The Butterfly Society's offer of a $1,000 does not preclude a claim for complete loss of economic value. Although not a taking *per se,* the Penn Central inquiry turns in large part of the economic impact and degree of interference of a regulation. Under this analysis, Ms. Lear is left with a property that offers no market for resale, no ability to recoup operating costs, has entirely frustrated her long held expectation to build a home, and is of the character that imposes a public burden entirely upon a private individual. Thus, the lower court's decision should be upheld.

F. THERE ARE NO PUBLIC TRUST PRINCIPLES INHERENT IN MS. LEAR'S TITLE TO PREVIOUSLY SUBMERED LANDS.

The 1803 congressional grant is clear in its intent to convey fee simple absolute in lands submerged to Cornelius Lear. Because the intent of the conveyance was clear, any public trust claims by the state are defeated. Furthermore, even if the court deems the intent of the conveyance to be unclear, the state has lost possession of the previously submerged one-acre parcel through the principle of accretion.

1. Navigability

To determine if public trust principles apply, the navigability in fact test is used. P.P.L. Montana L.L.C. v. Montanta, 132 S. Ct. 1215, 1227-28 (2012). "Under the 'navigability in fact rule', those rivers must be regarded as public navigable rivers in law which are navigable in fact; they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Id. In our case, Lake Union is the relevant body of water and is found to be navigable, for its history as a navigable body and its current ability support travel by water. Therefore, Ms. Lear makes no dispute as to navigability of Lake Union generally, and at the time of conveyance to Cornelius.

Intent of 1803 grant

Although Congress has power before statehood to convey land beneath navigable waters, and to reserve such land for United States, analysis of the title to bed of navigable water must begin with strong presumption against defeat of state's title. However, a state's claim of title may be defeated by proof that the property was privately held before the state entered into statehood. Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 14 (1935). For purpose of interpreting the Government's intent in a federal grant, federal, not state law controls and because statutes are silent as to construction of federal patents, such interpretation involves analysis of federal common law. Where the federal Government patents shoreland along navigable waters with express intent to pass title to water beds, the submerged lands belong to the grantee. Idaho v. U.S., 533 U.S. 262, 272-73 (2001) (presumption of state retaining title to submerged lands rebutted by the clear intent in executive grant to Native American tribe). Bourgeois v. United States., 212 Ct. Cl. 32, 36-38 (Ct. Cl. 1976) (state ownership of submerged lands found where grant specified only the acreage of the patent based upon the shoreland only).

If the Federal Government, in conveying riparian lands to Cornelius Lear, was clear in its intent to convey submerged lands, New Union's claim that Ms. Lear's title is inhered with public trust principles fail. The 1803 grant, occurring before New Union was admitted as a state, included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island." R. at 4-5. This is a highly specific express grant of lands submerged. This case differs from Bourgeois v. U.S. as the acreage in the patent to Cornelius Lear expressly conveys specific submerged lands. Therefore, the presumption that New Union has reserved these lands for public use should be defeated.

2. Accretion

Even if the submerged lands of Lake Union at time of conveyance to Cornelius are found to have been reserved for public use, through the principle of accretion the previously submerged lands have lost navigability and no longer retain public trust principles that were inhered in title.

"Accretion is the process whereby the action of water causes an increase in riparian land through the gradual and imperceptible deposit of solid material… so as to create new dry land in an area that was previously covered by water." 73 Am. Jur. 3d Proof of Facts §167 (2016). Title vests in riparian owners whose property abuts emergent lands. Swaim v. Stephens Production Co., 359 Ark. 190, 198-99 (Ark. 2004). "In order to effect a change of boundary, formations resulting from accretion must not only be made to the contiguous land, but must also operate to produce an expansion of the river bank or shoreline outward from the tract to which they adhere." 73 Am. Jur. 3d Proof of Facts §167 (2016). "The party who asserts that land was formed by accretion to a river shoreline will seek to prove that (1) the land elevation is comparatively low, (2) the vegetation on the land is comparatively young or "pioneer" in nature (such as grasses or willows), (3) soil borings indicate the presence of recent alluvial deposits to a greater depth than in the surrounding land, and (4) early records and reports indicate that the land

was once located on the downstream side of preexisting upland, and on the upstream side of the main flow of water." Id.

The one-acre area that previously was a cove, has over time, become an emergent cattail marsh. The one-acre area of lowlands had been previously open water and was used for a boat landing. R. at 6. There is an emergent cattail marsh in that area. The army corps of engineers has designated the property as non-navigable. R. at 7.

The emergent cattail marsh is accreted, non-navigable land whose title has fully vested in Ms. Lear and no longer has public trust navigability servitude attached to it, as the four factors in proving accreted lands are nearly met in full by the presented record. The land elevation is comparatively low, as it is described as lowlands in comparison to the remaining nine acres of the rest of the Cordelia lot. The vegetation on the land is comparatively young and pioneering in nature, as cattails are grasses. Finally, records indicate that the land was previously underwater and used for navigation purposes, evincing the downstream nature in relation to preexisting upland.

Navigability is the underlying criteria for determining the existence of the government's reservation of public use. While Ms. Lear does not dispute the navigability of Lake Union generally, the navigability in the one-acre emergent cattail marsh no longer exists. Because lands in the cove have emerged that conforms with the principles of accretion, it has rendered the cove non-navigable, which comports with the Army Corps' designation. When no-navigability exists, the government can no longer assert that the land is subject to public trust servitude. Furthermore, if Ms. Lear did not have the right to exclude the public when lands were submerged, now that they have accreted, all property rights have vested in her and should not bar her from developing the cove area as she pleases.

G. FWS AND BC ARE BOTH LIABLE FOR COMPLETE TAKING

The FWS and BC are both liable for complete deprivation of economic value of the Cordelia lot. Under the current takings jurisprudence, the parcel as a whole rule is illustrative how deprivation of economic value should be analyzed when neither the county or federal regulation alone would completely bar viable economic use. Furthermore, takings analyses focus on what an owner has lost, not what the taker has gained. Separating the parcels into discrete segments so that each regulation is analyzed in isolation would shift the focus to what takers have gained. Moreover, under the principles of joint and several liabilities, both the county and federal government can be found liable. Finally, returning to the concept of fairness, and ensuring that some individuals alone do not bear public burdens that should be borne by the public as a whole, it goes against this concept to preclude Ms. Lear from recovering because the burdens imposed on her have been applied separately.

When the government physically takes possession of an interest in property for some public purpose, the Just Compensation clause ensures that the government compensates the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Brown v. Legal Foundation of Washington, 538 U.S. 216, 230 (2003). "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." Penn Cent. Transp. Co. v. City of New, at 130-31. The focus in takings litigation must be on what an owner has lost, not on what the taker has gained. Brown v. Legal Foundation of Washington, at 230. See also, Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910).

To preclude a taking claim of deprivation of economic value when neither the county or federal regulation alone would completely bar viable economic use would shift the takings analysis to what takers have gained. Isolating the regulations to the relevant area of the parcel seeks to analyze how much the taker is removing from the lot, instead of the regulation's cumulative impact on the entire parcel. In the context of the whole parcel, Ms. Lear's bundle of rights have taken hits from all sides. She has lost all economic use of her property from the county and federal regulations, in concert with the municipal single family home designation. R. at 5.

A taking is more readily found when the interference with property is characterized as a complete diminution of economic value. "The law of regulatory takings is commonly understood as a defense for individuals against government actions that are extreme and unreasonable as applied to the individual, rather than as a guarantee of equal treatment among members of a community." John E. Fee, The Takings Clause as a Comparative Right, 76 S. Cal. L. Rev. 1003, 1004 (2003). In our case, Ms. Lear is being forced to deal with the total public burden, as no one else is subject to the Karner Blue Critical Habitat in New Union. Furthermore, the regulations work together to create a regulatory environment of which Ms. Lear must work within. Considering them separately ignores the real world application and impact of these regulations. Thus, without redressability through the Just Compensation clause, these regulations would clearly violate the commonplace notion of justice and fairness.

Conclusion

This Court should reverse the District Court's ruling as to the legitimacy of Congress's Commerce power in the ESA as applied to the intrastate population of Karner Blue butterflies on the Cordelia Lot. Alternatively, if this Court finds that the ESA was properly applied, affirm the

District Court's finding that a Ms. Lear should be compensated by FWS for a regulatory taking. This Court should also affirm the District Court's finding, regardless of its decision on the ESA's invalidity in this situation, that Ms. Lear should be compensated by Brittain County for a regulatory taking.