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.

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 CORDELIA LEAR, Plaintiff-Appellee-Cross Appellant

Oral Argument Requested

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STATEMENT OF JURISDICTION

Jurisdiction over non-tort monetary claims against the United States is defined by the Tucker Act, as codified at 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2012). Under the Tucker Act, both the United States Court of Federal Claims and district courts share original jurisdiction over non-tort monetary claims against the United States not exceeding $10,000. Because Ms. Lear waived any damages in excess of $10,000 in her takings claim against the United States of America, her claims against the United States Fish and Wildlife Service (FWS) and Brittain County were properly heard in the district court. *See Chabal v. Reagan*, 822 F.2d 349, 357 (3d. 1987). Therefore, this Court has proper appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

II. Is Ms. Lear's takings claim against the FWS ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?

III. For purposes of the takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?

IV. 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 from a takings claim based upon a complete deprivation of economic value of the property?

V. 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?

VI. Assuming the relevant parcel is the Cordelia Lot, are the FWS and Brittain County 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?

VII. 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?

STATEMENT OF THE CASE

I. Facts

Lear Island is a 1,000-acre island located in the interstate lake of Lake Union. *See Lear v. U. S. Fish and Wildlife Serv.*, No. 112-CV-2015-RNR, slip op. at 4 (D. New Union June 1, 2016). In 1803 Congress granted Lear Island and "all lands under water within a 300-foot radius of the shoreline on said island" to Cornelius Lear in fee simple. *Id.* at 4–5. In 1965, King James Lear inherited Lear Island. *Id.* at 5. As part of his estate plan, King James Lear divided Lear Island into three parcels, one for each of his daughters—Goneril, Regan, and Cordelia. *Id.* The Brittain Town Planning Board approved the division of the property, determining that each lot could be developed in conformance with zoning requirements with at least one single-family residence. *Id.*

King James Lear died in 2005 and Ms. Cordelia Lear came into possession of her 10-acre lot, known as the Cordelia Lot. *Id.* The Cordelia Lot consist of an access strip that is 40 feet wide by 1,000 feet long and an open field that is about nine acres. *Id.* Also, there is one-acre of emergent cattail marsh in a cove that historically was open water. *Id.* The Lear Family has referred to the Cordelia Lot as "The Heath" because it was kept open by annual mowing each October, unlike the rest of the island which is wooded. *Id.* Due to the annual mowing, The Heath and the access strip have become covered with wild blue lupine flowers. *Id.*

In 1992 the Karner Blue Butterfly was listed as an endangered species. *Id. See also* 50 C.F.R. § 17.11 (2016). The only population of the Karner Blue located in New Union lives on The Heath. *Lear*, slip op. at 5. This subpopulation of the Karner Blues is entirely intrastate and does not travel across state boundaries. *Id.* at 6. Because The Heath consists of lupine fields and is adjacent to the forest of the Goneril Lot it provides the ideal habitat for Karner Blues, which thrives

in partially shaded lupine fields. *Id.* In 1978 the FWS designated The Heath as critical habitat for the New Union subpopulation of the Karner Blues. *Id.*

In 2012 Ms. Lear decided to build a residence on the Cordelia Lot. *Id.* at 5. Ms. Lear contacted the FWS to inquire whether development of her property would require any permits or approvals. *Id.* at 6. The FWS informed Ms. Lear that any disturbance of the lupine habitat, other than the annual mowing, would constitute a "take" of the endangered butterfly under the Endangered Species Act (ESA). *Id.* Ms. Lear was advised by an environmental consultant that the preparation for an ITP would cost $150,000. *Id.*

Additionally, as part of the application for an ITP, Ms. Lear would have to develop a habitat conversation plan (HCP) for the Karner Blues, which requires supplementing contiguous lupine habitat on an acre-for-acre basis and maintaining the remaining and newly created lupine fields with annual mowing. *Id.* The only land that is contiguous to The Heath is the Goneril Lot, and Goneril Lear has refused to consider cooperating in any HCP that involves placing restrictions on her lot. *Id.* Without annual mowing, the lupine fields on the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees in about ten years, eliminating the Karner Blues' habitat. *Id.* at 7.

Due to the lack of cooperation by Goneril Lear and the cost associated with the ITP application, Ms. Lear developed an alternative development proposal (ADP) that would not disturb the lupine fields. *Id.* In the ADP, Ms. Lear proposed to fill one half-acre of the marsh in the cove to create a lupine-free building site for her residence. *Id.* Because the U.S. Army Corps of Engineers considers this portion of Lake Union to be "non-navigable" for purposes of the Rivers and Harbors Act of 1889, no federal approvals would be required for the filling of the marsh. *Id.* However, pursuant to the Brittain County Wetland Preservation Law, Ms. Lear was required to

apply to Brittain County for a permit to fill the marsh. *Id.* Brittain County denied the permit on the grounds that a permit to fill wetlands would only be granted for a water-dependent use, and that the residential home site did not qualify as such a use. *Id.*

The fair market value of the Cordelia Lot, without any restriction that would prevent development of a single-family residence on the lot, is $100,000. *Id.* Property taxes on the Cordelia Lot are $1,500 annually. *Id.* The Brittain County Butterfly Society has offered to pay Ms. Lear $1,000 annually for the privilege of conducting butterfly viewings on the Cordelia Lot, but she has rejected the offer. *Id.*

II. Procedural History

Because Ms. Lear was unable to build on The Heath due to the FWS's ITP requirements and Brittain County's denial of the permit to fill the cove marsh, she commenced this action in February 2014 in the United States District Court for the District of New Union. *Id.* Ms. Lear sought a declaration that the ESA was an unconstitutional exercise of congressional power. *Id.* Alternatively, Ms. Lear sought just compensation from the FWS and Brittain County for a regulatory taking of her property. *Id.* The district court determined that the ESA is legitimate exercise of congressional power as applied to Ms. Lear's property. *Id.* at 8. However, the district court awarded Ms. Lear $10,000 damages against the FWS and $90,000 against Brittain County for the uncompensated regulatory taking of her property *Id.* at 12. Following the issuance of the district court's order, the FWS and Brittain County each filed a Notice of Appeal on June 9, 2016 and Ms. Lear filed a Notice of Appeal on June 10, 2016. *Id.* at 1.

SUMMARY OF THE ARGUMENT

As a threshold matter, the ESA is not a valid exercise of Congress's Commerce power, as applied to a "take" of intrastate species, because it does not substantially affect interstate

commerce. A "take" of the Karner Blues is not a commercial or economic activity. Additionally, the ESA itself does not purport to regulate a commercial activity, rather its' purpose is to preserve endangered and threatened species. Furthermore, the actual regulation of the Karner Blues is not linked in any way to interstate commerce. Therefore, the "take" provision of the ESA is unconstitutional and should not be relied upon as authority to deny Ms. Lear the ability to build a residence on her land.

Even if this Court finds the ESA to be a valid exercise of Congress's Commerce power, an uncompensated taking of Ms. Lear's property in violation of the Fifth Amendment has occurred. A regulatory takings claims is normally not considered ripe until the government agency charged with implementing the regulation has made a final decision on the matter. Nevertheless, the Supreme Court has long recognized that the doctrines of ripeness and exhaustion contain exceptions, particularly for when exhaustion would prove futile. This futility exception allows a plaintiff to file a lawsuit before exhausting all administrative requirements as long as the plaintiff can show sufficient evidence of the futility of further action through the administrative process. Ms. Lear sufficiently followed all procedures necessary for obtaining a permit, making any further action futile. Therefore, this Court should consider her claim ripe for review.

The first step in the takings analysis is identifying the relevant parcel. Courts consider the economic expectations of the claimant, namely, if she treats contiguously owned land as a single economic unit. Courts also consider if the land in question was developed or sold before a regulation existed. The district court correctly excluded Lear Island as a whole from the relevant parcel, as it had clearly been severed into three distinct parcels before the regulatory scheme was enacted. Therefore, the Cordelia Lot is the relevant parcel to analyze.

Next, courts must determine the relevant time period of the taking. Generally, any permanent deprivation of the landowner's use of the entire area is considered a taking, whereas a temporary restriction causing a slight reduction in value is not. The critical question is determining whether the taking has a start and end time. Here, the regulations creating the moratorium of the Karner Blues' habitat did not specify an expiration date, and were not expressly temporary when enacted. Because the restrictions are indefinite, they are permanent, thus the relevant time period for the takings analysis is Ms. Lear's current and future ability to develop her land.

It has been well established that when a regulation denies all economically beneficial or productive uses of land, a taking has occurred. This concept extends to when a regulation requires land to be left in its natural state, allowing for no productive uses of the land. The FWS and Brittain County's regulations have completely restricted all uses of her land. Since Ms. Lear is restricted from building a single-family residence, she has been stripped of all economically beneficial use of the Cordelia Lot resulting in a taking that requires just compensation.

The FWS and Brittain County incorrectly assert that since neither of their individual regulations completely deprive Ms. Lear of all of her property value, neither of them should be liable. Although this is a novel issue for the Court, both tort law and public policy require a holding that two joint actors cannot weasel out of a taking solely by leaving a small portion of the land available that is governed by a separate government regulation. A holding against Ms. Lear could open a large loophole for government actors to avoid compensating victims of regulatory takings.

Finally, land restrictions must rest on the background principles of the state's property and nuisance laws. If the restrictions are not inherent in the property's title or background principles, compensation must be paid to sustain such restrictions. Therefore, defendants cannot claim any inherent public trust limits on the development of the land that would preclude her takings claim.

ARGUMENT

I. THE ESA IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER, AS APPLIED TO A "TAKE" OF THE KARNER BLUE BUTTERFLY, BECAUSE IT DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Section 9 of the ESA makes it unlawful for any person to "take" an endangered species of fish or wildlife. *See* ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (2012). The term "take" is defined by regulation 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 (2016). Thus, any disturbance of the lupine fields by Ms. Lear, other than annual mowing, would constitute a "take" of the Karner Blues.

By prohibiting a "take" of the Karner Blues, Congress has exceeded its' authority under the Commerce Clause of the United States Constitution. The Commerce Clause allows Congress to regulate three broad categories of activity: (1) channels of interstate commerce; (2) persons or things in interstate commerce; and (3) activities that have a "substantial effect" on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Because Section 9 does not address the first two categories, it can only be sustained as a valid exercise of Congress's Commerce power under the third category—whether the activity "substantially affects interstate commerce."

The first step in determining whether the regulated activity "substantially affects interstate commerce," and therefore is within Congress's power to regulate, is to define the "regulated activity" at issue. *See United States v. Morrison*, 529 U.S. 598, 610 (2000). After determining the regulated activity at issue, courts then are directed to use the four-factor test established in *Morrison* to analyze whether the given activity "substantially affects interstate commerce." Accordingly, this Court must consider the following as part of its analysis: (1) does the regulated

activity purport to regulate an economic activity or further an economic enterprise? *Id.*; (2) is the regulated activity supported by an express "jurisdictional element" that explicitly connects the activity to interstate commerce? *Id.* at 611–12; (3) is the regulated activity supported by express legislative findings regarding its effects upon interstate commerce? *Id.* at 612; (4) is the connection between the regulated activity and its effect on interstate commerce attenuated? *Id.* If the Court determines that the activity is not commercial in nature, then the last three factors play a greater role in the Court's analysis because Congress may regulate a noncommercial activity only where there are "substantial" and "not attenuated" effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce. *Id.* at 614–16.

Although several circuit courts have declined to invalidate the ESA as-applied to intrastate species, those decisions are incorrect and inconsistent. The circuits have all "applied different and, sometimes, clearly contradictory rationales to justify regulation of endangered species." Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 378 (2007). Therefore, this Court should not feel bound by the decisions of the other circuits in deciding whether or not the ESA, as applied to a wholly intrastate species, exceeds Congress's Commerce power.

A. <u>The Regulated Activity at Issue is the "Take" of the Karner Blues.</u>

The ESA's text is decisive in determining the regulated activity at issue here. Section 9 of the ESA regulates "*takes*." However, rather than examining what is expressly regulated by the text of the ESA, the district court incorrectly looked at the *effects* of regulating a "take" of the Karner Blues by holding that the regulated activity "is the underlying land development through construction of the proposed residence." *Lear*, slip op. at 8. As the Fifth Circuit correctly explained in *GDF Realty Inv.'s, Ltd. v. Norton*, "the effect of regulation of ESA takes may be to prohibit

such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development." 326 F.3d 622, 634 (5th Cir. 2003). The Fifth Circuit further held that "[n]either the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity . . . solely because non-regulated conduct . . . by the actor engaged in the regulated activity will have some connection to interstate commerce." *Id.* Therefore, the regulated activity at issue here is the "take" of the Karner Blues, not the underlying effects of the "take."

B. A "Take" of the Karner Blues is Not a Commercial or Economic Activity.

The Constitution gives Congress the power "[t]o regulate **commerce** . . . among the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). The distinction between what is and is not commercial therefore lies at the heart of the Commerce Clause, but the meaning of "commerce" is not obvious from the Constitutional language.

Historical scholarship indicates that in addition to the normal notion of "commerce" as the "buying, selling, and transporting of goods," the term was understood at the founding of the county to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace, such as the production of goods for sale. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 9–42, 107–110 (1999) (citing DANIEL DEFOE, A PLAN OF THE ENGLISH COMMERCE (2d ed. 1730); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); ALEXANDER HAMILTON, THE FEDERALIST NO. 11 (Jacob E. Cooke ed., 1961)).

In *United States v. Lopez*, the Supreme Court applied these historical principles by finding that the possession of firearms was not commercial or economic and that the prohibition on the

possession of a firearm near a school "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 560. The Court's holding in *Lopez* was logical because the mere possession of a firearm does not constitute the "buying, selling, and transporting of goods" as the common notion of the term "commerce" would require.

Similarly, a "take" of the Karner Blues is not the "buying, selling, and transporting of goods," nor does it constitute the compensated provision of services as well as activities in preparation for selling property or services in the marketplace. Section 9 prohibits "takes" of threatened and endangered species without regard to its' effect on interstate commerce and without any connection to a sale or transportation. *See* 16 U.S.C. § 1538(a)(1)(B). Furthermore, Section 9's "take" prohibition "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Therefore, a "take" of the Karner Blues is not a commercial or economic activity that falls within the common understanding or judicial determinations of the meaning of "commerce."

C. The ESA Contains No Jurisdictional Element That Explicitly Connects the Prohibition on "Takes" to Interstate Commerce.

If a regulated activity is not "commercial," Supreme Court precedent requires courts to consider whether the authorizing statute for federal regulation contains an "**express** jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562 (emphasis added).

The ESA's "take" provision states that "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any species" without regard to the effect a "take" may have on interstate commerce. 16 U.S.C. § 1538(a)(1)(B). Therefore, the regulation of a "take" of the Karner Blues does not include any sort of jurisdictional limit that would ensure that the regulation prohibits a "take" that substantially affects interstate commerce and that the government

was acting "in pursuance of Congress' power to regulate interstate commerce." *See Morrison*, 529 U.S. at 613.

While it is true that other circuits have held that the ESA's statutory prohibition on "takes" implicates a relationship to interstate commerce, none of their conclusions rest on the finding of an express jurisdictional element in the ESA establishes such a connection. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011) (holding the ESA directly relates to interstate commerce because a species might become threatened or endangered due to overutilization for commercial purposes); *Alabama–Tombigbee Rivers Coal v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007) (holding that the ESA protects endangered or threatened species, in part, by prohibiting all interstate and foreign commerce in those species); *Gibbs v. Babbit*, 214 F.3d 483, 495 (4th Cir. 2000) (arguing that regeneration of a threatened or endangered species might allow future commercial utilization of the species).

These circuits have incorrectly found a jurisdictional element in the ESA by looking at the underlying purposes and effects of the statute rather than identifying an express jurisdictional element in the ESA. In fact, the circuits' reasoning could be applied to find a jurisdictional element of interstate commerce in almost every federal statutory scheme, an interpretation that puts no limits on the Congress's Commerce power. Therefore, this Court should be cautious in readily agreeing with the other circuits and instead focus on the ESA's statutory language, which does not contain an express jurisdictional element linking it to interstate commerce.

D. <u>There are No Legislative Findings Regarding the Effects of a "Take" of the Karner Blues on Interstate Commerce.</u>

When a regulated activity is not "commercial" a court must consider whether the statute itself or the statute's legislative history contains "express congressional findings" regarding the regulated activity's effects upon interstate commerce. *Lopez*, 514 U.S. at 562. Under the ESA,

neither the "take" prohibition nor any other provision of the ESA contain findings regarding the effects of "takes" of an intrastate, noncommercial endangered species on interstate commerce. *See* 16 U.S.C. §§ 1531–1544.

Congress's silence is confirmed by the FWS's final rule listing the Karner Blues as an endangered species, which contains no recitation that demonstrates a relationship between Karner Blue "takes" and any commercial activity. *See* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Karner Blue Butterfly, 57 Fed. Reg. 59,236 (Dec. 14, 1992) (codified at 50 C.F.R. pt. 17). Thus, Congress has provided no explanation for how a "take" of a noncommercial species like the Karner Blues would substantially affect interstate commerce.

E. The Connection Between the ESA's Prohibition of a "Take" of the Karner Blues and Interstate Commerce is Attenuated.

Finally, attenuation between a regulated activity and its effect on interstate commerce is fatal to the federal government's authority to regulate that activity regardless of it' commercial nature. Where the regulated activity is not commercial, as is the prohibition on "takes" of the Karner Blues, Congress may regulate such activity *only* where there are "substantial" and "not attenuated" effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce. *See Morrison*, 529 U.S. at 614–16. This showing is demonstrated if the regulation of the noncommercial activity is an essential part of "comprehensive legislation to regulate the interstate market in a fungible commodity." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). In order for a statute to constitute an economic regulatory scheme under *Raich*, the law at issue must clearly establish that Congress was concerned with an interstate commercial market. *See id.* at 12–13 n.20.

While the ESA includes "Congressional findings" and a "declaration of purposes and policy," one would be hard pressed to find that the ESA was enacted to address "a substantial and direct effect upon interstate commerce." *Id*. at 13 n.20.

The ESA looks nothing like the Controlled Substance Act (CSA) at issue in *Raich*, which was designed to regulate an entire market of commodities. Although some provisions of the ESA (that are not challenged here) do regulate economic activity, see 16 U.S.C. § 1538(a)(1)(A), (C)-(F), the regulation of economic activity is not the broader purpose of the statutory scheme.

Instead, Congress, through the ESA, purported to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions" for endangered species. 16 U.S.C. § 1531(b).

Congress's concerns clearly distinguish the ESA from statutes, like the CSA, that directly regulate "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. More precisely, "the Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'" *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting).

Here, *Raich* may not serve as a basis for validating the prohibition of a "take" of an intrastate species such as the Karner Blues, because of the significant differences between the statutory schemes of the ESA and that of the CSA. Far from serving to control an established and lucrative interstate market in endangered species, the ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress's concern was not in regulating a substantial market

in endangered species, but in protecting various species from extinction. *See* § 1531(a). *See also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) ("[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."). Cf. *United States v. Maxwell*, 446 F.3d 1210, 1217 n.7 (11th Cir. 2006) ("[T]he CSA was constitutionally 'comprehensive' in that it regulated an entire market for a commodity.").

Indeed, the purely intrastate and noncommercial nature of the Karner Blues coupled with the fact that the ESA is not a comprehensive regulatory scheme aimed at regulating economic activities precludes any federal regulation of this species. Therefore, this Court should hold that the prohibition on "taking" an intrastate species such as the Karner Blues does not substantially affect interstate commerce and thus is not a valid exercise of Congress's Commerce power.

II. APPLICATION OF THE ESA ITP AND THE BRITTAIN COUNTY WETLANDS PERSERVATION LAW TO MS. LEAR'S PROPERTY HAS RESULTED IN AN UNCOMPENSATED TAKING OF HER PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

A. The District Court Correctly Found that an ITP is Not Necessary to make a Claim Ripe for the Court if Applying for the ITP Would Be Futile.

The FWS as well as Brittain County contend that the district court incorrectly found Ms. Lear's claim to be ripe. Defendants base this objection on the single element that Ms. Lear did not apply for an ITP with the FWS before filing this suit. Defendants are correct in stating that a takings claim against the government is "not ripe until the government entity charged with implementing the regulation[] has reached a final decision regarding the application of the regulation[] to the property at issue." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). However, not only is there an exception to the final decision requirement

when applying for the application would be futile, but also the *Williamson* case is distinguishable from Ms. Lear's.

The Supreme Court has long recognized that the "doctrines of 'ripeness' and 'exhaustion' contain exceptions [which] permit early review when, for example, the legal question is 'fit' for resolution and delay means hardship, or when exhaustion would prove **futile**." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (emphasis added). Put another way, "a claimant can show its claim was ripe with sufficient evidence of the **futility** of further pursuit of a permit through the administrative process." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1315 (Fed. Cir. 2006) (emphasis added) (citing *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986)). This futility exception is logical since a plaintiff should not be required to spend time and money on applications that have no chance of being accepted. Without the upholding of this much used exception, certain plaintiffs could be effectively denied relief from regulatory takings by having to apply for costly and time consuming permits that are futile due to certain circumstances.

The Supreme Court again in *Palazzolo v. Rhode Island*, held that federal ripeness rules do not require the submission of futile applications. 533 U.S. 606, 626 (2001). The Court went on to say that "once it becomes clear that the agency [will not] permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. *Id.* at 620. Any action from the agency can also be deemed final if the proposed course of action is practically and affirmatively rejected. *See Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003). This goes to show that the final agency action test from *Williamson* is not a strict rule, but can come from a variety of different actions or even discussions with the agency.

The *Palazzolo* Court cites *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), in its futility exception discussion. Although *Suitum* does not specifically discuss futility, the *Palazzolo* Court held in that case that not every agency application must be exhausted before the final decision prong is met. In *Suitum*, the question of ripeness was raised after the plaintiff found out that she could not do anything with her land after a certain regulation was passed. The plaintiff filed a takings claims; however, the government agency contended that her claim was not ripe for failure to exhaust all available remedies. The agency believed she could still sell her property, making her claim unripe. The Ninth Circuit agreed with the agency's argument that the plaintiff in *Suitum* had failed to obtain a final and authoritative decision from the agency. However, the Supreme Court held that although she had not exhausted all available remedies, any further applications would be futile, and therefore the plaintiff had satisfied the final decision prong from *Williamson*. *See Suitum*, 520 U.S. at 744.

Ms. Lear in this case owns a ten-acre parcel of land on Lear Island. She was given this land by her father, and would like to build a house on her land so she can live on the island. She was given the land with no restrictions attached. However, when she went to get a permit to build a house on her father's land, she was told she could not do so without first applying for a special ITP. Part of the ITP requires an HCP to be completed on the property. After talking with an environmental consultant, the cost of an HCP for her land would be roughly $150,000. The valuation of her land with no restrictions and the ability to build a house is only $100,000. Therefore, just applying for the permit will greatly exceed the value of her land even if the permit is accepted.

Another part of the ITP requires that any contiguous land also be part of the HCP. Unfortunately, Ms. Lear's sister lives on this contiguous land and has refused to cooperate with

any HCP on her land. The refused cooperation itself makes the ITP futile since an HCP of the contiguous land is a requirement for the permit. Even without that, the fact that the permit requirements will cost Ms. Lear one and a half times what her property is worth with no restrictions on it also makes the application futile.

Defendants will likely turn to *Morris v. United States* for the idea that cost of the ITP alone is not enough to make the application futile and the claim ripe. 392 F.3d 1372 (Fed. Cir. 2004). However, Ms. Lear's case can be distinguished from *Morris*. In *Morris*, the plaintiff wanted to cut down trees, but the National Fish and Wildlife Service (NFWS) said he needed to apply for an ITP due to an endangered species. Before consulting the NFWS further, Morris filed a lawsuit claiming the task of applying for the ITP was too expensive for the trees he wanted to cut, and therefore a regulatory taking had occurred. The court found the claim to be unripe and stated that a big issue was that the cost was indeterminable since Morris had not consulted with the NFWS before filing the suit alleging a taking. *Id.* at 1377.

In Ms. Lear's case, she has consulted with the FWS and was told precisely what she would need to complete a valid and full ITP. *See Lear*, slip op. at 6. Her known cost will be at least $150,000—which is much higher than the value of the land with no restrictions—plus time and effort on her part. Unlike the plaintiff in Morris, who was comparing the unknown cost of his ITP to the value of trees, not the land itself, Ms. Lear is comparing her known costs to the value of her land as she received it, with no restrictions. Even if that is not enough of a distinction, one of the aspects of the ITP that must be completed is for the contiguous lot to cooperate. It is known here that this element will be impossible to achieve. Futility "applies [] where the agency's conduct operates as a constructive denial of a permit." *Morris*, 392 F.3d at 1375. Here, since the elements

set forth by the FWS for Ms. Lear's ITP cannot be met, and will cost more than the land is worth with no restrictions on it, the filing of an ITP will be futile, so the claim is ripe.

A holding against the particular use of this exception could in effect remove the ability of certain plaintiffs, including Ms. Lear, to bring a regulatory taking suit at all. If, as is the case here, there is no way for the requirements of the permit to be met, then there is no reason the plaintiff should be required to spend the time and money on a futile application. Most average civilians cannot afford to apply for a permit knowing there is no way all the criteria can be met. The safety net for these situations is that the plaintiff can go to court to challenge the regulatory taking itself without incurring futile cost. Without this avenue, plaintiffs could be trapped for years going through the agencies permitting process, and spending large amounts of money, knowing the whole time the permit cannot be granted. Or worse, plaintiff will be unable to even apply for a permit knowing that the cost incurred will be more than the land is worth even if the permit is accepted. Without an option to go directly to court in the case of futility, many plaintiffs could end up with no form of relief.

Even without applying the futility exception, which has been widely accepted and fits for this case, the case at hand is readily distinguishable from *Williamson*. *Williamson* involved a developer who was applying for a permit to create a subdivision. After his first rejection, he filed suit. One of the main holdings from *Williamson* regarding ripeness is that the denial of one particular use does not constitute a final decision when there are other options available for the property. 473 U.S. at 193–94. In Ms. Lear's case, there are no available alternatives. The constructive denial by the FWS leaves Ms. Lear with no options on her property, completely diminishing its value, and leaving her with a piece of useless land. Since this is very far from the

Williamson holding where the plaintiff had other design options for his development, Ms. Lear's claim is distinguishable and ripe.

Due to the futility of Ms. Lear's claim, and the lack of alternative options available, the district court should be affirmed and her claim found to be ripe for trial.

B. The District Court Correctly Found that an Uncompensated Taking of Ms. Lear's Property Has Occurred.

This is not the "usual" takings case, where the government has physically seized private property for its own use. Rather, it is a conflict arising from the administration of "some public program [regulating] the benefits and burdens of economic life to promote a common good." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 101, 124. Regulations are often aimed at eliminating socially undesirable conduct, and can permissibly control *some* actions on private property. *Id.* However, if that regulation goes "too far" it will be regarded as a taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In other words, if the government's regulatory interference has gone "too far," the regulation becomes actionable under the Fifth Amendment. *See Lost Tree Vill., Corp. v. United States*, 787 F.3d 1111, 1115 (Fed. Cir. 2015) (requiring just compensation when a regulation deprives a landowner of economically beneficial uses in the name of the common good, leaving the landowner with "economically idle" property).

A taking of private property can be found by using the ad hoc factors outlined in *Penn Central* or under the *per se*, "categorical" rules set forth in *Lucas v. S.C. Coastal Council*. A *per se* categorical taking occurs when a regulation completely strips the property owner of all economically beneficial use of their property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1112 (1992). The Supreme Court in *Lucas* reasoned that where a regulation completely deprives an owner of beneficial use of their property, it is essentially the equivalent of a physical taking. *Id.* However, anything less than a *complete* elimination of value, or a *total* loss, requires analysis under

the factors in *Penn Cent*.[1]

i. The relevant parcel of land for the takings analysis is only the Cordelia Lot, not all of Lear Island.

When determining whether a taking has occurred, courts compare the value that has been removed from the property, with whatever property-value remains. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987). To achieve this goal, courts must first define the property being assessed, commonly referred to as the "relevant parcel." *Id.* at 472. Without determining the extent of the property, accurately calculating the lost value is nearly impossible. *See Penn Cent.*, 438 U.S. at 108 (focusing on the character of the government's action and on the nature and extent of the interference with rights in the parcel as a whole). *See also Concrete Pipe and Prod.'s of Cal., Inc. v. Constr. Laborers Pension Tr. for Southern Cal.*, 508 U.S. 602, 638 (1993) (holding to the extent that any portion of property is taken, it is always taken in its entirety).

Determining the relevant parcel is not an exact science. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). In fact, courts generally consider an array of factual nuances surrounding the property in reaching its determination. *See Keystone*, 480 U.S. at 497. When identifying the "relevant parcel," courts consider the economic expectations of the claimant as they relate to the given property. *Id.* Court's also consider how a landowner treats contiguous parcels, i.e. if he treats the separate pieces as a single economic unit. *See Tahoe-Sierra*, 535 U.S. at 327. For example, evidence indicating that a developer has treated contiguous, but legally distinct, parcels as a single economic unit may be enough constitute it as the "relevant parcel." *Forest Props. v. United States*, 39 Fed. Cl. 56, 68 (1997) (holding that the relevant parcel

[1] Under the *Penn Central* test, courts analyze the following three-factors to assess claimed regulatory takings: (1) whether there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) whether the property owner had distinct investment-backed expectations; and (3) whether it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine. *See Penn Central*, 438 U.S. at 125–27.

included 53 upland acres and 9 acres of lake bottom even though tracts were acquired at different times since the "economic reality" was that owner treated the property as continuous project).

However, even when contiguous land is purchased in a single deal, the relevant parcel may still be severed from the original purchase to become its own distinct unit. *Palm Beach Isles Assoc.'s. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (holding relevant parcel consisted of a 50-acre wetland portion of the original 311-acre purchase, where the landowner never intended to develop the land as a single unit, and sold 26-acres of oceanfront property prior to enactment of relevant regulatory scheme). The Court may also consider the timing of any transfer of title in light of the regulatory environment. *Loveladies Harbor, Inc. v United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (holding relevant parcel consisted of 12.5 acres from the original 250-acre purchase, affirming the conclusion that land developed or sold before the regulatory environment existed should not be included). *See also Deltona Corp. v. United States*, 657 F.2d 1184, 1192–93 (Ct. Cl. 1981) (recognizing that the timing of the implementation of the applicable regulatory scheme when calculating the relevant parcel has a great effect on the result of that calculation).

The relevant parcel for the takings analysis is *only* the Cordelia Lot. The district court correctly excluded the other 990-acres from consideration, since Lear Island had clearly been severed into three distinct parcels. The FWS and Brittain County incorrectly suggest that the relevant parcel should be the entire Lear Island (1000 acres). Other circuits have expressly rejected the argument that land developed or sold before a regulation existed, should be included in determining the relevant parcel. *See Loveladies*, 28 F.3d at 1173. This case clearly fits the mold. However, assuming the FWS and Brittain County's *arguendo*, when assessing if there was a complete loss of beneficial economic use of the land, their analysis demands that the entire island be considered. This means that if the Cordelia Lot is compared with the entire island—whose

residuary value is substantially independent of regulation—it is unlikely that a taking has occurred. *See Fla. Rock Indus. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (reasoning that if the tract of land is defined by some larger piece, independent of regulation, then it is more likely a partial or no taking occurred).

Fortunately, courts have also rejected the idea that if the parcels were purchased together, they must be treated as a single parcel for purposes of the takings suit. *See Palm Beach*, 208 F.3d at 1381 ("combining the two tracts for purposes of the regulatory takings analysis, simply because at one time they were under common ownership . . . . [simply] cannot be justified"). Lear Island, like the acreage in *Loveladies*, had been split before the passage of the ESA in 1973. It had also been divided well before the Karner Blues were listed as endangered. *See Lear*, slip op. at 5. Because each lot was severed well before the regulatory scheme was enacted, there is no doubt that Ms. Lear's lot should constitute the relevant parcel in the analysis. The law is clear that when land is severed from a larger piece, the larger piece has no bearing in the takings analysis. It is also clear that when King James Lear divided the properties, he intended for them to be individual residences for each of his daughters. This suggests that because each lot was intentionally divided and separately deeded, he never planned to develop it as a single unit. In fact, by requesting Brittain County's approval to divide the property, King James Lear followed the correct procedures ensuring that the lots were legally separate.

Thus, the relevant parcel for the takings analysis is *only* the Cordelia Lot. It does not matter that the two other residential lots constituting Lear Island were enjoyed or exploited by the Lear Family for 200 years. Because each lot was divided before the regulatory scheme was enacted, there is no further inquiry in the relevant parcel analysis, because the land has been severed. Moreover, because Ms. Lear was denied the ability to build a home, the very reason that her father

deeded her the land, this surely constitutes a *per se* takings analysis under *Lucas*. Thus, this Court should affirm the district court's determination that the relevant parcel for the takings analysis is the Cordelia Lot.

ii. The relevant time period for a takings analysis is Ms. Lear's current and future development of the Cordelia Lot.

The Court in *Lucas* held that compensation is required when a regulation deprives an owner of "**all** economically beneficial use," of his land. *Lucas*, 505 U.S. at 105 (emphasis added). So, a statute "wholly eliminating the value" of a fee simple title would clearly qualify as a taking. *Id*. Generally, any permanent deprivation of the owner's use of the entire area is considered a taking, whereas a temporary restriction causing a diminution in value is not. *See Tahoe-Sierra*, 535 U.S. at 326. This suggests that a regulation that merely causes impermanent delay, would not constitute a per se taking of the landowner's property. *Id*. In deciding whether a taking occurred, courts may consider several factors including: the landowner's investment-backed expectations; the impact of the regulation on the landowner; the importance of the public interest involved; and the underlying reasons for imposing the temporary restriction. *Id.* at 330 (reasoning that a bright-line rule establishing that any deprivation of all economic use, no matter how short-lived, would constitute a compensable taking that would have an undesirable impact on governments).

In *Tahoe-Sierra* the owners of land near an unsettled lake, sued a regional planning agency. The agency had imposed a temporary building moratoria to maintain the environmental status quo while designing an environmentally sound growth strategy. The landowners contended that the moratoria against all viable economic use of their property imposed a constitutional obligation on the agency to compensate them for the value of their use during the moratoria. Although the regulations creating the moratorium did not specify the date of their expiration, they were expressly temporary when enacted. And even though the affected landowners could not use their land for a

fixed period of time, their future interests remained intact. Ultimately, the Supreme Court affirmed the appellate court's judgment, reversing the finding of an unconstitutional taking. *Id.* at. 341–42.

Conversely, in the context of a physical invasion, to which the Supreme Court analogized the taking in *Lucas*, "permanent does not [always] mean forever, or anything like it." *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (depending on the circumstances, a taking can be "permanent" even for a limited term—according to the principles of property law). The *Hendler* court also recognized that, "[a]ll takings are 'temporary' in the sense that the government is free to change its mind at a later time." *Id.* at 1376. This is especially true when the property interest taken is a possessory estate for years or a fee simple acquired through condemnation by virtue of a regulation. *See Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004) (observing that the precise nature of the takings claim, namely whether it is permanent or temporary, may be unknown until it accrues). Thus, the essential element in defining the relevant time period for the taking analysis is the duration of the taking, i.e. whether it has a determined start and end. *Id*.

In this case, when the restriction was enforced, it prohibited all residential development on Ms. Lear's property, and extinguished both her present and future interests. Unlike the moratorium in *Tahoe-Sierra*, Ms. Lear's inability to construct a residence was not qualified by a date or condition on which it would terminate. Moreover, FWS nor Brittain County made any effort to repeal the restriction. This means that from the point the restriction took effect, it was unconditional and permanent, causing a taking of the parcel as a "temporal whole."

Here, like the plaintiff in *Lucas*, Ms. Lear would never be able to use her property as a residence. And contrary to defendants' claim that the parcel's future use interests could conceivably spring back into existence, the protective restriction was never intended to be

temporary. FWS and Brittain County incorrectly suggest that all Ms. Lear has to do, is stop mowing her fields for ten years, and the natural processes of succession will result in the elimination of the Karner Blues' habitat. However, even if this was a valid argument, the possibility that Ms. Lear could regain economically viable use of her property, is not *per se* fatal to her categorical takings claim. *See Hendler*, 952 F.2d at 1366. Because the restriction is indefinite, except in the unlikely natural destruction of the habitat, it is a permanent restriction. Thus, since the restriction permanently eliminates the entire value of the land, the relevant time period for the takings analysis is Ms. Lear's current and future ability to develop.

iii. The district court was correct in holding that Ms. Lear was deprived of all economic use of her property and therefore is entitled to just compensation.

The first part of this issue is the correct standard of review this Court should apply. In *City of Monterey v. Del Monte*, the Supreme Court discussed the relevant standard of review for regulatory takings cases. 526 U.S. 687 (1999). The Court held that "whether a landowner has been deprived of all economically viable use of his property is a predominantly **factual** question." *Id.* at 720 (emphasis added) (discussing this in context with *Williamson* case). "A federal appellate court may set aside a trial court's factfindings only if they are 'clearly erroneous,' and must give due regard to the trial court's opportunity to judge the credibility of the witnesses." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Fed. R. Civ. P. 52(a)). Since the issue of whether the landowner has been deprived of all economically viable uses is a question of fact decided by the district court, this Court may only overturn that determination if the facts are clearly erroneous. This is a high burden that the defendants cannot possibly meet, since at the most general level, Ms. Lear is unable to build a house on her land. However, even with a less deferential standard of review, the district court's findings of complete deprivation of economic use of Ms. Lear's land still should be upheld.

The most well-known and cited case for economic use is *Lucas*. In *Lucas*, the plaintiff purchased land on the beach front with plans to build a house on it, however before he could begin building, a regulation was passed which made it unavailable for him to build a house on the property. The plaintiff claimed the regulation took all his economically viable uses away, and therefore he deserved just compensation. The South Carolina Supreme Court held that this was not a regulatory taking. *Lucas*, 505 U.S. at 1009. The U.S. Supreme Court, however, reversed that decision, holding that the plaintiff had been deprived of economic use of his land, and therefore was entitled to just compensation. *Id*. at. 1032.

When a "regulation denies all economically beneficial or productive use of land," a taking has occurred requiring compensation. *Id.* at 1015. The Court stated that there has never been specific justification for this holding, but that "deprivation of beneficial use is . . . the equivalent of a physical appropriation." *Id.* at 1017. More specifically, when a regulation leaves "the owner of land without economically beneficial or productive options for its use—typically, as here [and in Ms. Lear's case], by requiring land to be left substantially in its natural state— [there is] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018.

This holding from *Lucas* is analogous to Ms. Lear's situation. The regulations placed on her land have in effect required her land to be left in its natural state. The Court in *Lucas* specifically held that this type of regulation, that deprives the landowner of economically beneficial or productive use, is a taking. The Court even expands on this to say that if a landowner is required by regulation to keep his property economically idle, "he has suffered a taking." *Id.* at 1019. Conversely, property is not deemed to be economically idle if the owner is allowed to build—or have beneficial use—on part of his land, and is just denied use of one section. *See*

Palazzolo, 533 U.S. at 609 (*infra* pp. 14–15). Unlike the plaintiff in *Palazzolo* who could still develop on part of his land, Ms. Lear cannot do anything with her land, leaving it economically idle. As shown in *Lucas*, the deprivation of all economic uses of her property amounts to a regulatory taking that entitles Ms. Lear to just compensation.

Defendants will likely point to the Brittain County Butterfly Society's offer to pay $1,000 per year to Mr. Lear to allow strangers to come on her property to look at the Karner Blues. To begin with, the $1,000 payment will still constitute an economic loss for Ms. Lear, since the property taxes alone for her property are $1,500 per year. With that, defendants expect Ms. Lear to pay over $500 a year to allow strangers onto her land where she is not allowed to build a residence. This is a preposterous "solution" to the issue.

Even without the common-sense solution that Ms. Lear should not be required to pay money to allow strangers onto her land, as a property owner, she has a right to exclude others from her land. Again in *Lucas*, the Court stated that regulatory impairment of certain noneconomic interests in land, such as the interest in excluding strangers from one's land, "will invite exceedingly close scrutiny under the Takings Clause." 505 U.S. at 1019 n.8. Allowing strangers to enter Ms. Lear's property is more akin to a physical taking, caused by a regulation. With the combination of Ms. Lear having to pay to allow strangers on her land, as well as her property right to exclude strangers from her land, the defendants' argument that $1,000 per year is sufficient to rebut complete economic loss, clearly fails.

Defendants will also likely look to *Tahoe-Sierra* for their economic use argument. In *Tahoe-Sierra*, a moratorium was placed on landowners around Lake Tahoe. They were not allowed to build or develop their land for a total of 32 months. The landowners filed suit for a regulatory taking. The Supreme Court found no taking since there was not a deprivation of all economic

value. *See Tahoe-Sierra*, 535 U.S. at 341–42. The holding was premised on the fact that the hold on development was only for 32 months, and after that, landowners would again be allowed to build. Therefore, there was no complete loss of economic value. Ms. Lear's case is very different from *Tahoe-Sierra*. There is no moratorium that will be up in less than three years, allowing Ms. Lear to build on her land. The regulations in place have no end date, and could last forever, giving Ms. Lear no economic use of her land whatsoever, and leaving the land economically idle. "A regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land" is clearly a taking. *Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). Consequently, the regulations on Ms. Lear's land, unlike in *Tahoe-Sierra*, are permanent and therefore a complete deprivation of her economic use of the land.

Finally, there are two relevant Federal Circuit cases regarding economic use for land with regulatory takings. First, in the recent case *Lost Tree Vill., Corp. v. United States*, a regulation devalued land from $4.8 million to around $30,000. 787 F.3d at 1115. The government claimed that the ability to still sell the land (even for a small amount), precluded the argument that the land had been completely deprived of economic use. The Federal Circuit disagreed holding that "economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel," holding further that "land sale [does not qualify] as an economic use." *Id.* at 1117. Therefore, a taking had occurred.

Similarly, in *Loveladies*, the plaintiff's property was also greatly diminished of its value by a regulation (from $2.8 million to $12,000). 28 F.3d at 1171. The Federal Circuit again held that this great decrease in value was enough to deprive the plaintiff of all economically feasible uses of his land, and a taking had occurred. *Id.* at 1182. These Federal Circuit cases show that the doctrine of economic use first described in *Lucas* is somewhat flexible. As first mentioned in this

section, the issue of deprivation of economic use is a factual question that the trial court must decide. Weighing all the evidence presented at the trial, the judge must make a decision whether the plaintiff's property was completely deprived of all economic value and beneficial use.

In this case, the district court determined Ms. Lear was deprived of all economic use of her property, and therefore a taking had occurred. This Court should defer to the district court's findings of fact, and affirm the holding of a taking. Even with less deference given to the trial judge, it is clear from the case law above that a taking occurred, depriving Ms. Lear of all economic use. Therefore, the district court's determination that a taking occurred should be affirmed.

C. The District Court was Correct in Concluding that the Federal and County Regulations Combined, Resulted in a Complete Deprivation of the Economic Value of Ms. Lear's Land.

As noted above, Ms. Lear's land is being subjected to federal regulations by the FWS and local regulations by Brittain County. Although the two regulations affect different sections of her land, they have the combined effect of completely depriving Ms. Lear of all viable economic uses of her property. The FWS and Brittain County each argue that their specific regulation leaves part of the land open for development. In essence they are searching for a loophole that could get each of them off the hook for taking Ms. Lear's property. Although this issue of combined regulations is a novel one, using similar case law and simple canons of construction, it is clear that takings claims are meant to cover any and all government actions/regulations.

To begin with, the district court compared this novel situation to the well-known tort law theory of joint and several liability. The most cited case discussing this theory is from the Supreme Court of Tennessee in *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976). This case was filed by a homeowner in Tennessee who filed suit against a chemical company for polluting his air and water. The defendant filed five third-party complaints against other companies in the

area, claiming they were the ones liable for the pollution. The court found that "where tortious acts of two or more wrongdoers join to produce indivisible injury[—meaning injury which cannot be apportioned with reasonable certainty to individual wrongdoers—each] of the wrongdoers will be held jointly and severally liable" for all harm to the plaintiff. *Id.* at 342–43. The injured party may then collect the judgement against one or all parties in the suit.

This principle of joint and several liability was adopted by the U.S. Supreme Court as far back as 1876 in *The Atlas*, 93 U.S. 302 (1876). Although this was an admiralty case, the Court held that when a party sustains an injury to himself or his property, from the consequences of two or more causes, the injured party is entitled to compensation for his loss from either one or both of them. *Id.* at 315. Further, "acts wrongfully done by the co-operation [of several parties] constitute all the parties wrong-do[ings], and they may be sued jointly or severally; and any one of them . . . is liable for the injury done by all." *Id.*

Similarly, in *Summers v. Tice*, the Supreme Court of California discussed the implications of having multiple defendants to a case, where it is difficult to pinpoint the cause of the injury on one or the other. 199 P.2d 1 (Cal. 1948). In *Summers*, the plaintiff and two defendants were hunting when the two defendants shot at a bird located above the plaintiff. The plaintiff was struck in the eye and lost vision in that eye. Unfortunately, both defendants were using the same gun with the same ammunition. Therefore, there was no way to prove by a preponderance that one of the defendants was liable. However, the Supreme Court of California held that even though neither defendant could be shown to be liable individually, "each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently." *Id.* These combined cases show that under the theory of joint and several liability, when multiple parties jointly injure a plaintiff,

even if the cause cannot be placed entirely on a single defendant, the joint parties are both jointly liable.

This theory fits precisely into Ms. Lear's dilemma. Both the FWS and Brittain County's claim that Ms. Lear cannot show that either one of them completely deprived her of all economic uses of her land. However, as shown in *Summers* and *The Atlas*, even if it is difficult to place the blame on a single defendant, when both defendants have caused harm, they both are jointly and severally liable. Therefore, this well-known and commonly used theory should be adopted as a test for this novel takings situation where multiple government regulations/actions completely deprive the plaintiff of all economic uses of her land. With this conclusion, the district court's holding should be affirmed and the regulations looked at together.

Even without applying the widely accepted theory of joint and several liability, the plain meaning of the takings clause of the Fifth Amendment precludes any taking by the government. There is no clause stating a single government action, just that the government cannot take property without just compensation. The Supreme Court has noted that the "doctrine of regulatory takings 'aims to identify **regulatory actions** that are functionally equivalent to the classic taking' [and] deprives [the plaintiff] of all economically beneficial use of his property." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (emphasis added) (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005)). Regulatory actions here are plural, meaning it could be a combination of a number of actions, and is a taking if these actions deprive the plaintiff of all economically beneficial uses of her property. Every case that discusses regulatory takings never limits the "regulation" to a single one, but rather discusses it more generally as government regulations that go so far as to require compensation. *See Lingle*, 544

U.S. at 531; *Lucas*, 505 U.S. at 1015; *Keystone*, 480 U.S. at 494; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Penn Cent.*, 438 U.S. at 131.

Although none of the above cases contain facts where more than one regulation was at issue and resulted in a taking, none of the cases limit their discussion of the regulatory takings doctrine to be restricted to a single regulation. Rather, the more important question is whether government actions, or regulations, have the effect of completely depriving plaintiff of all economic uses of her land. In this case, that is exactly what happened to Ms. Lear. Regulations imposed by the government have deprived her land of all economically beneficial uses. Regardless of whether it is one, two, or even ten different regulations, the combined effect is that her land is now economically useless. Because of this deprivation, the FWS and Brittain County should not be able to create a loophole allowing the government as a whole to take private parties property without just compensation. Any holding aside from affirming the district court's opinion would open up the door for regulatory takings without the requirement of just compensation. This blatantly goes against the Fifth Amendment, therefore the district court should be affirmed, and the regulations be looked at together to determine that Ms. Lear has been deprived of all economic value of her property.

D. Defendants Cannot Claim any Inherent Public Trust Limits on the Development of the Cordelia Lot that Would Preclude Ms. Lear's Takings Claim.

Where a regulation prohibits all economically beneficial use of land, the regulation "must inhere [to limitations] in the title itself." *Lucas*, 505 U.S. at 1029. This means that restrictions placed on the land must rest on the background principles of the given state's property and nuisance laws. *Id.* In other words, the use of property that is now expressly prohibited, must **have always been** unlawful. *Id.* Courts reason that its' unlawfulness leaves states with the ability to make the

implied background principles of nuisance and property law, into explicit prohibitions. *See Scranton v. Wheeler*, 179 U.S. 141, 186–88 (1900).

However, if the restrictions are **not** inherent in the property's title or background principles, compensation **must** be paid to sustain it. *See First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 324 (1987) (holding "where [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation"). Naturally, this requires an evaluation of the property's title regarding its uses—in this case, the limits on filling and developing of lands underwater.

A state is presumed to have title to the beds of waters then navigable or tidally influenced, within its borders. *See PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226–27 (2012). States may also allocate and govern those lands according to local law, and are only circumscribed by the federal power of the United States to regulate such waters for purposes of navigation in interstate and foreign commerce. *Id* at 1228. Conversely, the United States retains title to any land vested in it before statehood, that is non-navigable (and not tidally influenced), to be transferred or licensed as it chooses. *See United States v. Utah*, 283 U.S. 64, 91 (1931) (establishing the principle that if a body of water is designated to be "non-navigable," the United States retains the title to regulate the lands' uses, including the power to devise and distribute.).

Although states are presumed to have title to navigable waters and their beds in trust for the public, it remains undisputed that federal law determines riverbed title under the equal-footing doctrine. *See Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (establishing the principle that the federal government retains title to non-navigable waters). Moreover, this presumption becomes irrelevant if title has already been granted to another party. *See Knight v. United Land Assoc.*, 142 U.S. 161, 169–71 (1891) (explaining that this doctrine does not apply in situations where the land had been

previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way).

Under the equal footing doctrine, if an intrastate body of water was navigable at the time of statehood then the title to the lands beneath that water would be vested to the state. However, if the body of water is non-navigable, the title to such riverbeds would remain vested in the United States. *See Shively*, 152 U.S. at 26–27. *See also Donnelly v. United States*, 228 U.S. 243, 257 (1913). Thus, the question of Lake Union's navigability is critical in this controversy. Here, the U.S. Army Corps of Engineers determined that this portion of Lake Union was "non-navigable," even authorizing the construction of residential dwellings involving one-half acres or less of "fill." Brittain County has failed to present evidence demonstrating the lakes navigability at the time New Union became a state. It is also well settled that state laws do not affect titles that have been vested in the United States. *See Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 84–85 (1922) (recognizing that state law has no bearing on Congress's power to grant anyone title to land below the water mark of navigable waters in any Territory of the United States). In other words, if Congress is vested with title to the property, it is free to devise the land as it pleases. *Id.*

The United States clearly has the ability to grant title in the soil below in non-navigable waters as it deems appropriate, and this situation is no different. Lake Union was designated as "non-navigable," so the United States would normally retain the title. However, per its authority, Congress had already devised the title of Lear Island to Cornelius Lear, which included the all land within 300 feet of the shoreline. *See Lear*, slip. op. at 5. Because Congress intentionally included Lear Island's 300-foot radius, it cannot be presumed that New Union took title to these lands under the equal the footing doctrine. In fact, where title is devised via a congressional grant, its status is inherently superior against any state claim asserting equal footing. *See Shively*, 152 U.S. at 18.

Because the title was devised via a congressional grant, New Union's equal footing claim is presupposed by Congress's grant in 1803. Therefore, because Brittain County failed to introduce evidence showing that public trust or equal footing principles were inherent in the Lear Family's 1803 title, these claims cannot preclude Ms. Lear's takings claim.

CONCLUSION

The "take" provision of the ESA is not a valid exercise of Congress's Commerce power because it does substantially affect interstate commerce, instead it regulates the preservation of endangered species. Congress's concern was not in regulating a substantial market of endangered species, but rather preventing species from becoming extinct. Therefore, the "take" provision of the ESA is not a valid exercise of Congress's Commerce power as applied to the wholly intrastate species of the Karner Blues.

Even if this Court finds the ESA to be a valid exercise of Congress's Commerce power, Ms. Lear is entitled to just compensation under the Fifth Amendment's Taking's Clause. While Ms. Lear did not apply for an ITP with the FWS before filing this suit, her claim is still ripe due to futility and the lack of alternative options available.

For a takings analysis, this Court should find that the relevant parcel is the Cordelia Lot because the Lear Family had already severed the land into three distinct parcels before the enactment of the regulations. Additionally, the Lear Family did not treat the severed parcels as a single economic unit. Moreover, because the restrictions on Ms. Lear's land are indefinite, the relevant time period for analysis is the current and future ability to develop her land. Combined, the FWS and Brittain County regulations completely restrict all uses of Ms. Lear's land, resulting in a taking that requires just compensation.

Finally, there are no public trust or inherent limits in the Lear Family title that would preclude Ms. Lear from brining her takings claims against the FWS and Brittain County.