Team No. 13

C.A. No. 16-0933

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff–Appellee–Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant–Appellant–Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant–Appellant.

On Appeal from the United States District Court
for the District of New Union
Case No. 112-CV-2015-RNR

Brief of Defendant–Appellant–Cross Appellee, the United States Fish and Wildlife Service

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STATEMENT OF JURISDICTION

This case concerns the application of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531-1544 (2012), as well as questions of constitutional law. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331 (2012). This Court has jurisdiction over this appeal from the final order of the district court. 28 U.S.C. § 1291 (2012); *see also* R. at 12.[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the ESA is a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly.

II. Whether Ms. Lear's takings claim against the FWS is ripe despite having failed to apply for an Incidental Take Permit (ITP) under the ESA § 10, 16 U.S.C. § 1539(a)(1)(B).

III. Whether the proper parcel for the takings analysis is the entirety of Lear Island.

IV. Assuming the relevant parcel is the Cordelia Lot, whether the natural destruction of the butterfly habitat over ten years due to inaction by the landowner precludes a takings claim based on complete economic deprivation of value of the property.

V. Assuming the relevant parcel is the Cordelia Lot, whether the ability to lease the property at a rate of $1,000 per annum until the Karner Blue's habitat is naturally destroyed precludes Ms. Lear's takings claim.

VI. Assuming the relevant parcel is the Cordelia Lot, whether the public trust doctrine and equal footing doctrine preclude a takings claim based on the denial of a wetland fill permit by the county.

VII. Assuming the relevant parcel is the Cordelia Lot, whether either FWS or Brittain County are liable for a taking when neither the federal or county regulation individually preclude the development of a single-family residence.

STATEMENT OF THE CASE

The mission of United States Fish and Wildlife Service ("FWS") in administering the ESA is to promote the conservation and recovery of the planet's rarest plants and animals. Pursuant to

[1] The citations "R. at __" refer to pages of the Final Problem, Revised on November 7, 2016.

that mission, the FWS has restricted the use of a small plot of vacant land in New Union, which is the state's last remaining isle of habitat for a rare species of butterfly, the Karner Blue. The listing of the species and designation of the habitat in question went unchallenged for nearly twenty years.

The FWS does not contend that Cordelia Lear ("Ms. Lear"), cannot build a home on the property at issue. FWS merely insists that Ms. Lear follow the well-established and flexible permitting process outlined in the ESA and accompanying regulations. The FWS is being forced to defend its decision not because it foreclosed development, but because the landowner seeks to circumscribe the longstanding permitting process designed to accommodate development.

A. Statement of Facts

The Karner Blue was listed as endangered on December 14, 1992, and the property in question was designated as critical habitat on the same date. R. at 5; *Determination of Endangered Status of the Karner Blue Butterfly*, 57 Fed. Reg. 59,236 (Dec. 14, 1992) (to be codified at 50 C.F.R. pt. 17). Ms. Lear owns a single ten-acre parcel on the northern tip of Lear Island, in the state of New Union; this parcel is referred to herein as the "Cordelia Lot." R. at 2, 4. The Cordelia Lot is the last Karner Blue habitat in New Union. *Id.* at 5-6. The lot consists primarily of an access strip and a nine-acre open field. *Id.* at 2. Contiguous to the lot is a cove containing one-acre of emergent cattail marsh that was historically open water and used as a boat landing. *Id.*

Lear Island has a surface area of about 1,000 acres and is located on a large interstate lake, which was traditionally used for interstate navigation. *Id.* at 1. In 1803, Congress granted the entirety of the island to Cornelius Lear, Ms. Lear's ancestor.[2] *Id.* Since then, the Lears have used the island as a homestead, farm, and hunting and fishing grounds. *Id.* at 2. In 1965, King James

[2] "The 1803 grant 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," as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland." R. at 1-2.

Lear ("James Lear"), Ms. Lear's father, subdivided the island into three separate lots: "the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot." *Id.* James Lear deeded each lot to one of his daughters, including Ms. Lear, and reserved a life estate for himself. *Id.* While James Lear constructed a residence on the Regan, the Lears intentionally kept the Cordelia Lot open and mowed from 1965 onward; the family even refers to the lot as "The Heath."[3] *Id.* Following her father's death in 2005, Ms. Lear took possession of the Cordelia Lot in 2005. *Id.*

1. The Cordelia Lot is Essential Habitat for the Karner Blue.

Decades of annual mowing, coupled with the Cordelia Lot's placement near the edge of a successional forest, created the perfect habitat for Karner Blue butterflies. *Id.* at 5-6. This is due largely to the bountiful population of blue lupine flowers, which thrive in the sandy soil and are the Karner Blue's primary food source. *Id.* at 5. Importantly, Karner Blues do not migrate, and due to their relatively short flight distance, the butterfly's entire lifecycle occurs within a single flower patch. *Id.* at 6. The species' eggs overwinter onsite and hatch in the spring; once hatched, the larva can only survive by feeding on the leaves of blue lupine flowers. *Id.* at 6. Eventually, while still attached to a lupine flower, the larva undergoes metamorphosis[4] and resets the life-cycle. *Id.*

Because the Cordelia Lot is on an Island, this population is isolated. *Id.* at 5-6. The endangered status of the Karner Blue means that any development of the Cordelia Lot that disturbs the lupine fields will require permission from the FWS in the form of an Incidental Take Permit ("ITP"). *Id.* An ITP would be required for the proposed development, even if the Cordelia Lot was

[3] "Heath" means "a tract of wasteland" or "an extensive area of rather level open uncultivated land . . . ." Merriam-Webster, *Heath*, Merriam-Webster.com (Nov. 27, 2016), http://www.merriam-webster.com/dictionary/heath.

[4] Metamorphosis is defined as "a typically marked and more or less abrupt developmental change in the form or structure of an animal (as a butterfly or a frog) occurring subsequent to birth or hatching." Merriam-Webster, *Metamorphosis*, Merriam-Webster.com (Nov. 27, 2016), http://www.merriam-webster.com/dictionary/metamorphosis.

not critical habitat. 16 U.S.C. § 1538(a)(1). However, without annual mowing, the Karner Blue habitat will naturally disappear within ten years. *Id.* at 7.

2. The Failure to Seek an ITP Manufactured this Controversy.

For the first time since being deeded the Cordelia Lot in 1965 Ms. Lear decided to build a home in 2012, *id.* at 5-6, making her decision with full knowledge of the restrictions imposed by the ESA twenty years earlier. *Id.* In a letter dated May 15, 2012, the FWS advised Ms. Lear that any disturbance of the lupine fields, other than continued mowing, would constitute a "take" of an endangered species. *Id.* at 6. Additionally, Ms. Lear was invited to apply for an ITP under § 10 of the ESA. *Id.* The development of a Habitat Conservation Plan ("HCP") and Environmental Assessment is a part of that application process. *Id.* An acceptable HCP requires offsetting any disturbance to the lupine fields by creating contiguous habitat at a one-to-one ratio and maintaining the status quo on the remainder of the lot. *Id.*

Ms. Lear elected not to seek an ITP or create an HCP. *Id.* at 6-7. Presumably, she based this decision on the advice of a private consultant, who estimated the net-costs of the ITP application as $150,000.[5] *Id.* Instead, Ms. Lear pursued an Alternative Development Proposal ("ADP"), which if approved, would facilitate development through filling of one-half acre of marshland to create a building site without disturbing any of the protected habitat. *Id.* The FWS took no position on the proposed filling and no federal approval is required.[6] *Id.* at 7.

[5] "The fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family house on the lot is $100,000. Property taxes on the Cordelia Lot are $1,500 annually." *Id.* at 7. Ms. Lear has not reassessed the property with restrictions. *Id.*

[6] The U.S. Army Corps of Engineers considers the cove to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899. R. at 7. Therefore, "because construction of residential dwellings involving one half-acre or less of fill is authorized by U.S. Army Corps of Engineers Nationwide Permit 29, *see Issuance of Nationwide Permit for Single-Family Housing*, 60 Fed. Reg. 38,650 (July 27, 1995), no federal approvals would be required for this project." *Id.*

In order to proceed with the ADP, Ms. Lear is required to obtain approval from Brittain County, pursuant to the county's 1982 Wetland Preservation Law. *Id.* Ms. Lear filed her application with the County in August 2013. *Id.* The County denied the application on the basis "that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site was not a water-dependent use." *Id.*

B. Procedural History

Ms. Lear commenced this action with the United States District Court for the District of New Union against the FWS and Brittain County in February 2014, alleging that application of the ESA in this case is unconstitutional and seeking compensation for a regulatory taking under the theory of complete economic deprivation. *Id.* at 8. Following a seven-day bench trial, the Honorable Judge Romulus N. Remus entered a judgment for the court. *Id.* at 12. The court held that the ESA was constitutional as applied, but it found that the combination of state and federal regulations constituted a regulatory taking requiring compensation. *Id.* at 11. Both the FWS and Brittain County timely filed a Notice of Appeal on June 9, 2016, and Ms. Lear filed a Notice to Cross Appeal on June 10, 2016. *Id.* at 1; Fed. R. App. P. 3(a), 4(a). This Court entered an order granting all parties' Notice of Appeal on September 1, 2016. R. at 1.

SUMMARY OF THE ARGUMENTS

First, application of the ESA to an intrastate population of an endangered butterflies is constitutional. The "take" prohibition in § 9 of the ESA is one facet of a general regulatory scheme that targets interstate trade and transport of endangered species. Moreover, the effects of intrastate land development and the potential extinction of a species both have the potential to substantially affect interstate commerce in the aggregate. As such, this Court should follow sister circuits and hold that applying the ESA in this case is a constitutional under the Commerce Clause.

Second, because Ms. Lear did not apply for an ITP and the FWS has taking no final action on her proposed development her claim against the FWS is not ripe. While there are recognized exceptions to the finality requirement, none apply to Ms. Lear because the FWS did not indicate that her application would be denied and the cost of applying does not, itself, establish futility. As such, the district court's erroneous ripeness holding should be reversed.

Third, assuming the claim is ripe, when determining whether a taking has occurred, this Court should focus on the entire 1,000-acre Lear Island, not Ms. Lear's 10-acre lot. From 1803 to 2005, Lear Island was managed as one contiguous unit, without regard to who held title. Also, because the Lears intentionally kept the Cordelia Lot vacant and mowed from 1965 to the present day, and because Ms. Lear had no development plans until twenty years after the Karner Blue was listed and six years after taking possession of the lot, application of the ESA did not adversely affect her reasonable investment backed interests.

Fourth, a categorical taking also is precluded because the restrictions imposed by the ESA are temporary in nature. The ESA will cease to apply if Ms. Lear discontinues landscaping of her property, thereby causing the natural cessation of the Karner Blue's habitat within ten years. Furthermore, the lot retain present economic value as recreational land that as it can be leased for $1,000 annually for butterfly viewing and used in the same manner that it has been since 1965.

Fifth, Brittain County's denial of a wetland fill permit does not give rise to a takings claim. Under the public trust doctrine, the State of New Union retains a navigable servitude over the underwater lands surrounding Lear Island. Also, because all waters surrounding Lear Island were navigable in fact when New Union became a state, pursuant to the equal-footing doctrine New Union hold superior title to those lands. These background principles of property law allow the county to regulate the submerged lands without giving rise to a taking.

Lastly, the district court erred in applying joint liability. Joint liability is applied in tort context to punish bad actors who cause a foreseeable, indivisible harm. Conversely, a sovereign exercising its presumed legal right to appropriate or regulate land is not a bad actor. Joint liability is also inappropriate when the alleged injuries caused by the ESA and County regulations can be apportioned to two distinct government entities.

ARGUMENTS

STANDARD OF REVIEW

The extent of Congress's powers under the Commerce Clause, takings claims under the Fifth Amendment, as well as questions of ripeness, are questions of law subject to *de novo* review. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992); *United States v. Ambert*, 561 F.3d 1202, 1205 (11th Cir. 2009). The district court's factual conclusions are reviewed for clear error. *United States v. El-Mezain*, 664 F.3d 467, 577 (5th Cir. 2011).

I. THE ENDANGERED SPECIES ACT IS PROPERLY APPLIED TO A PURELY INTRASTATE POPULATION OF BUTTERFIES WHEN SUCH APPLICATION IS PART OF A GENERAL REGULATORY SCHEME AND THE ACTIVITIES REGULATED HAVE A SUBSTANTIAL AGGREGATE EFFECT ON INTERSTATE COMMERCE.

Congress has the power to regulate intrastate activities that "have a substantial effect on interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). This power is derived from Article I of the Constitution; "Congress shall have power . . . [t]o regulate commerce . . . among the several states," and to make "laws which shall be necessary and proper" to carry out that power. U.S. Const. art. I, § 8. The commerce power allows Congress "to prescribe the rule[s] by which commerce is to be governed[, and] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). Accordingly, Congress may enact general regulatory statutes that

burden purely intrastate activities bearing a substantial relation to commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

Lower courts have derived four factors from *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), which must be considered in determining whether a law has a substantial effect on interstate commerce:

1. Whether the statute has anything to do with "commerce or any sort of economic enterprise, however broadly one might define those terms;"

2. Whether the statute contains an "express jurisdictional element;"

3. Whether the "legislative history contains express congressional findings regarding the effects upon interstate commerce;" and

4. Whether the link between the regulated activity and the effect on interstate commerce is too "attenuated."

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174 (9th Cir. 2011) (internal citations omitted). It follows that "when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute [are] of no consequence." *Raich*, 545 U.S. at 17.

Under the well-established principle of *Lopez* and *Morrison*, the ESA is a valid exercise of Congress's authority pursuant to the Commerce Clause, even when applied to purely intrastate populations, for two reasons. First, the text and legislative history of the ESA demonstrate that it is a comprehensive regulatory scheme and preserving of biodiversity directly impacts interstate commerce. Second, the ESA regulates activities that have substantial aggregate effects on interstate commerce, even when the specific conduct is intrastate in nature.

A. The Text and Legislative History of the ESA Show That Congress Intended to Create a Comprehensive Regulatory Scheme and That Preserving Biodiversity is Directly Related to Interstate Commerce.

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved." 16 U.S.C. § 1531(b). Once a species is listed pursuant to § 4 of the ESA, 16 U.S.C. § 1533, the unauthorized "take" of that species is prohibited by § 9. 16 U.S.C. § 1538(a)(1)(B). "Take" is further defined by statute, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," 16 U.S.C. § 1532(19), and by regulation, "harm" includes "an act which actually kills or injures wildlife. . . . includ[ing] 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 (2012). The "take" provision of § (9)(a)(B) must be considered in light of the ESA's entire regulatory scheme.

As the Court stated when upholding the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq*., as applied to purely intrastate marijuana cultivation, Congress may burden intrastate activities when "a general regulatory statute bears a substantial relation to commerce." *Raich*, 545 U.S. at 17. The Court specifically noted that the CSA is a nationwide "comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." *Id.* at 27. While application of the CSA burdened only intrastate cultivation of marijuana in *Raich*, its application could not be severed from the interstate nature of the overall statutory scheme. *Id.*

Similar to the CSA, the "take" prohibition in § 9(a)(1)(B) is a small part of a regulatory scheme that directly regulates commerce among the states. This Court must read § 9(a)(1)(B) in *pari materia* with all activities that are regulated under § 9, such as the import, export, or sale of listed species in interstate or foreign commerce. *See* 16 U.S.C. §§ 1538(a)(1)(A)-(G). In every

subsection of (9)(a), except subsection (a)(1)(B), the "take" provision, expressly prohibits or regulates activities directly tied to interstate commerce. The subsection at issue is but a single cog in a comprehensive regulatory machine. Under this Court's reasoning in *Raich*, a general regulatory statute targeting interstate activities is not unconstitutional merely because its application burdens some intrastate activities. 545 U.S. at 17.

The legislative history accompanying the ESA shows that Congress intended to regulate ecosystems and markets, not just individual species. The House Report accompanying the ESA explained that as human development pushes species toward extinction, "we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable." H.R. Rep. No. 93–412, at 143 (1973) (to accompany H.R. 37). Congress recognized an inherent value in preserving biodiversity for the simple reason that such lifeforms "are potential resources." *Id.* at 144. The report further stated:

> Honesty compels us to admit that *steps taken by H.R. 37 to close the U.S. market to trade in endangered and threatened species* may not be sufficient . . . Passage of this legislation is, however, of importance—*both because the United States is an important market*, and because of the precedent it will create.
>
> . . . .
>
> The basic purpose of the Act is . . . to provide a means whereby *ecosystems upon which endangered species . . . depend may be conserved, protected or restored*. . . .

Id. at 144-45 (emphasis added). Congress recognized endangered species, themselves, as instruments of commerce, and endorsed the protection of entire ecosystems. States are even encouraged to be stricter than the ESA requires, if necessary. *Id.* at 146. It simply cannot be said that Congress intended federal agencies to be powerless when one species is so threatened that its entire population is bound within the borders of a single state.

B. This Court Should Follow Other Circuits that Have Unanimously Upheld the Application of the ESA to Activities that Impact Purely Intrastate Species.

This Court should hold, as other circuits have, that the ESA is substantially related to interstate commerce and is constitutional as applied to intrastate species. Following *Gonzales v. Raich*, when "a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute, rather than an isolated application, in determining whether the statute relates to 'commerce or any sort of economic enterprise.'" *Salazar*, 638 F.3d at 1175 (upholding the application of § 9 to a purely intrastate smelt population). The purpose and aggregate effect of the ESA make clear that the statute is related to numerous economic enterprises.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court held that purely intrastate activities may be regulated by Congress due to the potential aggregate impact of the conduct on interstate commerce. *Id.* at 133. In *Wickard*, federal law imposed a penalty on the harvest of excess quantities of wheat, even if the excess was solely for intrastate, on-the-farm use. *Id.* at 116-17. The Court upheld the law under the Commerce Clause, because if one considered the potential of the aggregated impact of the personal usage of every farmer in the country, those activities could impact interstate commerce. *Id.* at 130-31. The Court followed the same principle in *Raich*, where it noted that intrastate cultivation of marijuana has the potential for substantial aggregate interstate movement of narcotics. 545 U.S. at 29. The same logic is applicable to the ESA.

Numerous recent court decisions uphold the application of the ESA to intrastate species as constitutional. The D.C. Circuit, for example, upheld regulations that halted a commercial development project due to the potential taking of an intrastate population of the Delhi Sands flower-loving fly. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1059-60 (D.C. Cir. 1997) (hereinafter "*NAHB*"). The court reasoned, "Congress contemplated protecting endangered species through regulation of land and its development. . . . Such regulation, apart from the

characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce." *NAHB*, 130 F.3d at 1059. Noting that Congress intended to protect ecosystems, the court held that application of the ESA was proper because the burdened activity, land development, "asserts a substantial economic effect on interstate commerce." *Id.*

The ESA primarily regulates activities of a economic nature, and its application to intrastate activities are justified by reference to interstate commerce. Unlike the Violence Against Women Act, in *Morrison*, or the Gun Control Regulation, in *Lopez*, the ESA directly impacts interstate commerce. As the district court correctly noted, the actual activity burdened in this case—land development and construction of a residential home—"is clearly an economic activity, involving as it does the purchase of building materials and the hiring of carpenters and contractors." R. at 8. Even assuming Ms. Lear could build her home using purely intrastate resources, the aggregate effects of such activities impact interstate commerce. This case is substantively no different from *Wickard* and *NAHB*. The regulation of grain grown solely for on-the-farm use in *Wickard* was permissible because of the potential aggregate effect on national agricultural trade. *Wickard*, 317 U.S. at 131-32. Halting commercial development because of an intrastate insect was permissible because of the potential aggregate impact of habitat destruction from land development on interstate commerce. *NAHB*, 130 F.3d at 1059**.** Similarly, restricting Ms. Lear's residential development to prevent the destruction of an intrastate insect is permissible because of the aggregate impacts of habitat destruction and land development on a national scale.

Numerous aspects of biodiversity, and the potential recovery of endangered species, are also related to interstate commerce. For example, a species might become endangered because of "overutilization for commercial . . . purposes." 16 U.S.C. § 1533(a)(1)(B); *see also Trout Unlimited v. Lohn*, 559 F.3d 946 (9th Cir. 2009). Moreover, "even where the species . . . has no

current commercial value, Congress may regulate under its Commerce Clause authority to 'prevent the destruction of biodiversity and thereby protect the current and future interstate commerce that relies on it.'" *Conservation Force v. Manning*, 301 F.3d 985, 994 n. 8 (9th Cir. 2002) (quoting *NAHB*, 130 F.3d at 1052) (internal quotation marks omitted). The Eleventh Circuit recognized that "[b]ecause Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered." *Alabama-Tombigbee Rivers Coal*, 477 F.3d 1250, 1274-75 (11th Cir. 2007) (citing *GDF Realty Invs, Ltd. v. Norton*, 326 F.3d 622, 632 (5th Cir. 2003)). In fact, species diversity, itself, is often directly related to commerce, as "half of the most commonly prescribed medicines are derived from plant and animal species." *Alabama-Tombigbee*, 477 F.3d at 1273.

While a particular species may not yet be an essential instrument of commerce, it can become one as populations recover and scientific knowledge develops. It may very well be that further scientific advancement will reveal economic values of the Karner Blue that mankind is as of yet unaware of. The aggregate effects discussed above and the potential of scientific advancement are additional factors bringing the ESA within Congress's Commerce Clause authority.

II. MS. LEAR'S TAKINGS CLAIM AGAINST THE FWS IS NOT RIPE BECAUSE SHE HAS NOT APPLIED FOR AN INCIDENTAL TAKE PERMIT AND THE FWS HAS NOT TAKEN A FINAL ACTION IN THIS MATTER.

The Fifth Amendment assumes the power of government to appropriate lands for public purposes. U.S. Const. amend V. However, before a Fifth Amendment takings claim ripens, the government action at issue must be final, unless the petitioner proves that awaiting finality is futile. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19, 626 (2001); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). The finality requirement allows a court to determine the precise scope of development and use permitted on the land. *Morris v. United States*, 392 F.3d 1372, 1377 (Fed.

Cir. 2004). Each circuit addressing alleged takings claims arising from application of the ESA has held that the plaintiff must apply for, and be denied, an ITP before the claim ripens. *See, e.g.*, *Morris*, 392 F.3d at 1376-77 (holding that the failure to seek an ITP for a proposed logging operation precluded ripeness, despite the cost and complexity of the process); *Acorn Land, L.L.C. v. Balt Co.*, 402 F App'x 809, 814 (4th Cir. 2010). The "finality" requirement is compelled because determining whether a taking has occurred "requires knowing to a reasonable degree of certainty what limitations the agency will, pursuant to regulations, place on the property." *Morris*, 392 F.3d at 1376. Thus, "when an agency provides procedures for obtaining a final decision, a takings claim is unlikely to be ripe until the property owner complies with those procedures." *Id.* (citing *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999)).

A. The Takings Claim is Not Ripe Because Ms. Lear Did Not Apply For an ITP.

The case of *Morris v. United States* is analogous to the matter currently before the Court and is illustrative for the ripeness analysis. In *Morris*, the plaintiff sought to log timber on a parcel, but it became clear that both a HCP and ITP would be necessary. *Id.* at 1374. The plaintiffs argued that their takings claim was ripe for review because the cost of the ITP application process "is greater than the value of their property, and the government has no meaningful discretion to change those facts." *Id.* Using their own expert, the plaintiffs estimated the costs of the application, but their figure was not persuasive to the court. *Id.* The court rejected their argument, reasoning that "the agency has discretion to assist the plaintiffs with the application." *Id.* at 1377. Absent an application, the court had no way of knowing what impact on costs the agency's discretionary assistance would have, thus the claim was not ripe. *Id.*

As in *Morris*, "the assumption that the cost of applying for the ITP is fixed and knowable is simply incorrect." *See id.* The ESA requires Ms. Lear to create an HCP as a part of her ITP application, just like the *Morris* plaintiffs, which she argues will cost more than the Cordelia Lot

is worth. R. at 6. Nevertheless, the FWS is required to provide technical assistance to an ITP applicant and federal guidance documents strongly encourage applicants to seek this assistance. U.S. Dep't of the Interior and Fish and Wildlife Serv., *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*, Ch. 2 (Nov. 4, 1996) ("Handbook"); *see also Morris*, 392 F.3d at 1377. As in *Morris*, the actual "cost of an ITP application is unknowable until the agency has had some meaningful opportunity to exercise its discretion to assist in the process." 392 F.3d at 1377. Ms. Lear made no attempt to apply for an ITP, there has been no enforcement action, and the FWS has not issued a final decision. R. at 6. Despite Ms. Lear's private estimates, the actual cost of the application process cannot be known until the agency has the opportunity to assist and make a final determination. Therefore, Ms. Lear's claim is not ripe.

B. The Recognized Exceptions to the Finality Requirement of the Ripeness Doctrine Do Not Excuse Ms. Lear's Failure to Apply For an ITP.

Despite the district court's conclusion to the contrary, none of the exceptions to the finality requirement save Ms. Lear's claim. Generally, the finality requirement is only excused where the government has made clear that no application of any kind will be granted. *See Palazzolo,* 533 U.S. at 621. A few cases have indicated, in dicta, that "where the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights," a takings claim may ripen. *Lakewood Assocs. v. United States,* 45 Fed. Cl. 320, 333 (1999) (*citing Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386-387 (1988) (hereinafter "*Loveladies I*"), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994)).[7] However, neither circumstance is presented by the instant facts.

[7] In the hypothetical situation where Ms. Lear actually applied for an ITP and the agency failed to respond in a timely manner, then her claim may have ripened. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349-50 (Fed. Cir. 2002) ("Absent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking.").

The first basis for an exception is not supported by the record. The Federal Circuit Court of Appeals has held that the "futility exception simply serves to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (internal quotation marks and citation omitted). The FWS gave no indication that it would deny Ms. Lear's ITP application; rather it has merely stated the kinds of conditions that are likely necessary. R. at 6. The letter received by Ms. Lear on May 15, 2012, suggests that if she complied with the requirements and followed the procedures of the Handbook, the FWS would likely grant her permit. *Id.; see also* Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 Yale J. on Reg. 329, 370 (1998) (noting that completed HCP applications are usually approved). Accordingly, Ms. Lear's ripeness argument hinges and falters on the contention that the ITP application process is overly burdensome. *See* R. at 9.

The application process is not unduly burdensome merely because it carries substantial costs or that the conditions will inconvenience Ms. Lear. While the Court of Federal Claims has recognized the unduly burdensome exception as a means of proving futility, it has never addressed what degree of hardship is sufficient. *See Hage v. United States*, 35 Fed. Cl. 147, 164 (1996) (holding that plaintiffs had the right to present proof at trial to establish that requirements were unduly burdensome). This Court should follow *Morris*, which rejected the contention that costs alone make the procedural requirements unduly burdensome. *See* 392 F.3d at 1377-78.

The costs associated with the ITP and the requirement of creating contiguous lupine fields are not unreasonable. As the *Lakewood* court recognized, while actions required to receive a permit may be burdensome, those that are necessary for the permitting process to function are not unduly

so. *See* 45 Fed. Cl. at 333. The requirement for the creation of contiguous habitat is a necessary burden, which is necessary to fulfill the ESA's purpose—the preservation and recovery of populations of endangered species. *See* 16 U.S.C. § 1531(b). Further, even if Ms. Lear's sister, the owner of the contiguous land, may not assist compensation free, *see* R. at 6, there is nothing to stop Ms. Lear from paying her sister for the right to utilize adjacent land. Furthermore, the fact that Ms. Lear proposed an ADP that has no impact on the protected Karner habitat, demonstrates the availability of creative and feasible alternatives under federal law.

This case is also distinguishable from *Loveladies I*, 15 Cl. Ct. at 381, where the court found an application process to be unduly burdensome. In *Loveladies I*, the only means by which the proposed riverfront construction could move forward was by proving one narrow exception to the Rivers and Harbors Act, whereby the rule could be overridden. 15 Cl. Ct. at 387. The Court of Claims noted that where the regulation sought to prevent pollution and mitigate interference with navigation in the harbor, and where the proposed activity was terrestrial construction, it was unduly burdensome to force the plaintiff to seek a non-existent variance from the regulation. *Id.* Significant to the court's conclusion was that the proposed terrestrial construction would not interfere with navigation. *See id.* at 387-88.

Unlike *Loveladies I*, the proposed residential development in this case directly affects the very thing that the ESA seeks to prevent—the destruction of habitat for an endangered species. The creation of a HCP and acquisition of an ITP are provisions designed specifically for situations where development cannot move forward because of the ESA. Such procedures are essential to administration of the ESA. While these procedures present a financial burden, the procedures are not an unreasonable obstacle given the nature of the regulation and the proposed development.

Accordingly, this Court should decline to reach the merits of Ms. Lear's takings claim because it is not ripe for review.

III. ASSUMING THE TAKINGS CLAIM IS RIPE, THE DENOMINATOR IN THE TAKINGS FRACTION IS ALL OF LEAR ISLAND BECAUSE THE ISLAND HAS BEEN TREATED AS ONE CONTIGUOUS UNIT SINCE ITS CONVEYANCE.

This case presents a classic denominator problem in takings law; as such, this Court should not automatically assume that the proper denominator in the takings fraction is the burdened parcel. *Lucas,* 505 U.S. at 1018. The general rule is that properties are evaluated as a whole, and temporal or interest based divisions are not permitted. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002). Moving forward, this Court should adopt the flexible approach endorsed by several other courts, which allows for consideration of the factual nuances of each case. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (hereinafter "*Loveladies II*"); *Machipongo Land & Coal Co. v. Dep't of Envtl. Prot.*, 799 A.2d 751, 768 (Pa. 2002).

The justification for a flexible approach is that if the court merely focuses on change of title, it will underestimate the creativeness and ingenuity of developers seeking a windfall. Julian C. Juergensmeyer and Thomas R. Roberts, *Land Use Planning and Development Regulation Law* 438 (2nd Ed. 2007). Several factors that are relevant under such an analysis include the following: (1) "the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, . . . the timing of transfers . . . in light of the developing regulatory environment; [(2)] the owner's investment backed-expectations; and [(3)] the landowner's plans for development." *Machipongo*, 799 A.2d. at 768. *See also Loveladies II*, 28 F.3d at 1179. Applying these factors and despite the change of ownership, Lear Island as a whole is the proper parcel for a takings analysis.

A similar application of this analysis is relevant here. In *Deltona Corp. v. United States,* 657 F.2d 1184, 1193 (1981); *cert. denied*, 455 U.S. 1017 (1982), plaintiffs took title to a large

swath of land in 1964 with plans to develop the property. While some development had already occurred, certain segments of the original acquisition became subject to additional regulations in 1970. *Id.* at 1192-93. Because the plaintiffs were on notice that all proposed development was subject to permit approval, the court forbade severing the affected parcels for purposes of the takings analysis. *Id.* The application of additional regulation was not a taking because only a small fraction of the total acquisition was deprived of value. *Id.*

The Federal Circuit Court of Appeals reached a different conclusion in *Loveladies II*, where it rejected a bright line rule. 28 F.3d at 1180-82. The court applied the proffered flexible approach and concluded that a portion of the property owned by petitioners should be excluded from the takings fraction. *Id.* Of the original 250 acres purchased, all land developed prior to enacting the 1982 regulations was excluded from the denominator because the state made no attempt to regulate this property during the prior twenty-four years of development. *Id.* Of the remaining fifty-one acres, the court excluded thirty-eight and one-half acres from the denominator, because that land had been promised to the state in exchange for the permit sought. *Id.* at 1181. Therefore, the court was left with only the land for which a permit was sought as the taking fraction's denominator. *Id.* While the *Loveladies I* and *II* analysis is sound, the facts of this case do not dictate the same result.

Despite the recent transfer of title, Lear Island, which consists of 1,000 acres of above water land, was treated as one continuous unit from the date of conveyance until as late as 2012. Since 1803, the Lear family has always held legal title to the entire island, and the entire island has been used for homesteading, farming, and hunting. *Id.* at 4. While the island was subdivided into three lots in 1965, the entire island remained in the possession, and under the management, of

James Lear until his death in 2005.[8] *Id.* at 4. In fact, the Lear sisters did not take possession of their deeded property until 2005. *Id.* From 2005 to 2012, the property was still managed as one unit, including the annual mowing of the ten-acre Cordelia Lot, which began in 1965. R. at 4-5. As this historic recollection demonstrates, the Lear family managed the entirety of Lear Island as one unit of land for over 200 years, without regard to which individual actually held title.

History is significant in light of developing regulations. Notably, it was the annual mowing of the Cordelia Lot since 1965 that created the Karner Blue habitat. *Id.* at 4-5. While the butterfly was listed, and its habitat designated, in 1992, the Lears continued to maintain the annual mowing schedule until James Lear died in 2005. The mowing has been continued to this day. *Id.* at 4-6. Similar to the developers in *Deltona*, Ms. Lear should be presumed to have awareness that any potential residential development will require normal building permits. More importantly, she was aware, from at least 1992 onward, that development of the Cordelia Lot would be subject to the restrictions of the ESA. *Id.* at 5-6. Despite Ms. Lear's awareness, she never changed her plans or sought differential treatment until 2012, twenty years after regulations burdened the lot. *Id.* at 7.

Ms. Lear's investment backed interests or hypothetical development plans do not favor treating the Cordelia Lot as the denominator for the takings claim. It is relevant to note that Ms. Lear did not purchase the Cordelia Lot with the intent of development; rather, she inherited the property at no cost. In addition, unlike the plaintiffs in *Deltona* or *Loveladies I* and *II*, Ms. Lear did not have plans to develop the Cordelia Lot, or any other part of Lear Island, when she took title in 1965, or possession in 2005. While the 1965 Brittain County Planning Board speculated that residential development would be permitted under the then existing zoning designation, no

[8] James Lear retained a life estate in each subdivided parcel, thus giving him the legal right to retain possession until his death. R. at 4.

further actions were taken. Unlike the plaintiffs in the *Loveladies* cases, there is no historic pattern of development, which later became subject to regulation. Rather, the uses of Lear Island as a homestead and hunting and recreational land continued, uninterrupted, from the 1965 subdivision until 2012. It was not until twenty years after the ESA first burdened the Cordelia Lot that any development plans were proposed. R. at 4-5.

Despite the District Court's conclusion to the contrary, R. at 9-8, mere transfer of title does not conclusively determine what property should constitute the denominator of the takings analysis in this case. The historic use of Lear Island as one contiguous unit, the retention of title within one family, and the lack of any development-oriented investment backed interests until 2012 all weigh in favor of treating the entire island as the relevant parcel. Looking to the entirety of Lear Island a categorical taking is precluded because only 1% of the total acreage, ten acres, is burdened by the ESA. *See* R. at 4.

IV. IF CORDELIA LOT IS THE PROPER PARCEL, MS. LEAR'S TAKING CLAIM IS STILL PRECLUDED BECAUSE THE ESA' BURDENS ARE TEMPORARY LAND USE RESTRICTION AND INACTION BY THE LANDOWNER WILL CAUSE THE NATURAL DESTRUCTION OF THE KARNER BLUE'S HABITAT.

Just as takings jurisprudence frowns upon the physical division of the whole parcel, temporal divisions of permitted uses and rights associated with a parcel must be avoided. *Tahoe-Sierra,* 535 U.S. at 327. This rule of thumb follows from the principle that, while a regulation may go too far, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.* An interest in real property is not merely its physical and geographical scope, but also the "term of years that describes the temporal aspect of the owner's interest." *Id.* at 331-32 (citing Restatement of Property §§ 7-9 (1936)). Both the physical and temporal dimensions of property ownership must be considered in a takings analysis. *Id.* at 332. Accordingly, "a permanent deprivation of the owner's use of the entire area is a taking of 'the

parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not." *Id.* Because the ESA burdens land only so long as a species is alive or habitat is suitable, it is a temporary restriction and not a categorical taking of all economically productive use. [9]

The rule prohibiting temporal division of an estate in real property for the purpose of a takings analysis stems from the Supreme Court's 2002 decision in *Tahoe-Sierra*, which declared that a thirty-two-month moratorium on any form of construction or development was not a taking. *Tahoe-Sierra, 535 U.S. 302.* The moratorium in *Tahoe-Sierra* effectively prohibited any economic use or development of the affected properties for nearly two years. *Id.* at 310-12. The owners remained free to alienate their property interest and to exclude others from their property. *Id.* at 341-42. Once the moratorium was lifted, the value of the property returned to its prior level. *Id.* The holding of the Court in *Tahoe-Sierra* demonstrated that temporary burdens on some sticks, but not all, within the bundle of property rights is not a categorical taking under *Lucas*. *Id.* at 335. Quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), the Court noted that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 335.

Under a plain reading of the ESA, as viewed through *Tahoe-Sierra*, the statute restricts land use only as long as a species remains listed. Once a species is listed as endangered, uses of the land that could constitute a "take" are restricted. 16 U.S.C. § 1538(a)(1)(B). This includes the

[9] The temporary diversion of water, pursuant to the ESA, to which a landowner claims a legal right can give rise to a compensable taking, however, in such cases courts have ruled that the diverse constituted a physical appropriation, not a regulatory taking. *See, e.g.*, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) (holding that diversion of water from a canal to facilitate fish spawning is physical taking); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001) (holding that diversions of water away from irrigation supplies to protect fish species is a physical taking). As such, these cases are distinguishable from the issue before the Court, which involves an alleged regulatory taking.

destruction of the species' habitat. However, when (1) a species recovers and is delisted, (2) a species becomes extinct, or (3) a piece of property can no longer naturally support the listed species, the ESA's burdens disappear. *See* 16 U.S.C. §§ 1533(a), (d); 1538. Stated differently, the ESA only burdens property while the species is alive and on the property, or so long as the property remains a viable habitat. The ESA also does not restrict Ms. Lear's ability to alienate her property or to continue using it for recreational or hunting purposes, as has been done historically.

Should Ms. Lear choose so, the ESA will burden her property for no more than ten years. R. at 7. Immediate discontinuance of mowing will lead to the natural cessation of the Karner Blue habitat, and thus, an automatic lifting of the restrictions without violating the ESA. *Id.* Accordingly, the § 9 restrictions, as applied to the Cordelia Lot, are analogous to a ten-year moratorium on development. Such restrictions may still constitute a partial taking, under framework of *Pennsylvania Central Transport Co. v. New York City*, 438 U.S. 104 (1978). However, these restrictions are not a categorical taking under *Lucas*. *Cf. Tahoe-Sierra*, 122 S. Ct. at 1478. As Ms. Lear did not argue for application of *Pennsylvania Central* below, *see* R. at 8, n. 3, this Court should not engage in such an analysis *sua sponte*.

V. THE CORDELIA LOT RETAINS ECONOMIC VALUE AS RECREATIONAL LAND THAT CAN FETCH $1,000 PER YEAR IN RENT.

Where a regulation deprives property of less than all economically beneficial use, a categorical taking cannot be sustained. *Lucas*, 505 U.S. at 1015-16. Moreover, mere diminution in value, even if significant, is not deprivation of all economically beneficial use. *Palazzolo*, 533 U.S. at 630-31. A categorical taking under *Lucas* only materializes in "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1016-17).

The retention of some economic value, even if it is less than 10% of what would be possible in the absence of regulation, precludes a categorical taking under *Lucas*. In *Palazzolo*, the plaintiff's property was decreased in value by nearly 94%, as a direct result of the development restrictions imposed by regulation. *Id.* However, the Supreme Court held that because some portion of the parcel was still developable and the property retained some value, application of *Lucas* was precluded. *Id.* at 631-32.

In the cases since *Palazzolo*, circuit courts have generally interpreted *Lucas* as requiring complete and total loss of value to constitute a taking. *See, e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (holding that *Lucas* requires loss of "100% of a property interest's value"); *but see Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994) (holding that a 92% diminution in value was a per se taking under *Lucas* in the absence of other possible uses). Also, as discussed, the temporary suspension of an economic use also precludes application of *Lucas*. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 330; *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). And, while purely speculative land uses and hypothetical sales do not constitute the retention of reasonably economically beneficial use, *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015), just as in *Palazzolo*, Ms. Lear retains a concrete interest in the property.

The Cordelia Lot indisputably can produce at least $1,000 a year in annual rents until the ESA regulations become moot following ten years of discontinued mowing. R. at 7. This case is more similar to *Lucas* and *Tahoe-Sierra* than it is to *Cienega Gardens*. In *Lucas*, the plaintiff retained the ability to build at least one residence on his lot, and the overall property retained about 7% of its potential developable value. In *Tahoe-Sierra*, while no economic use was possible during the moratorium, the property in question recovered 100% of its value when the moratorium lifted. *Tahoe-Sierra*, 535 U.S at 331-32. Conversely, in *Cienega Gardens*, not only did the property lose

over 90% of its market value, but no other uses were permitted on the property; thus, a categorical taking occurred. 331 F.3d at 1342-43. In addition to the right to sell the Cordelia Lot, Ms. Lear remains free to lease access to her property for $1,000 a year. R. at 7. Under the *Lucas* doctrine, the ability to lease access to the property for cash, coupled with the temporary nature of the restrictions, precludes a taking under *Lucas.* As the Supreme Court has stated, the *Lucas* per se taking standard is reserved for "extraordinary circumstances." *Tahoe-Sierra,* 535 U.S. at 331-32.

Finally, this Court should not succumb to Ms. Lear's attempt to analogize the magnitude of the deprivation in this case to that of *Loveladies I.* In that case, the Federal Claims Court concluded that the property decreased in value by 99% and that a compensable taking had occurred. *Loveladies I,* 21 Cl. Ct. at 161. Arguably, if one ignores the ten-year limitation on development restrictions in this case, one calculation would result in a 99% diminution in value. However, the temporal limit cannot be ignored under *Tahoe-Sierra,* 535 U.S. at 330. Further, *Loveladies I* and *II* are distinguishable because the court applied the *Pennsylvania Central* framework. *Id.* at 160-61. Ms. Lear waive a *Pennsylvania Central* challenge by failing to raise it below. *See Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 51 (1st Cir. 2006).

This Court should also refrain from the erroneous consideration of property taxes engaged in by the district court. R. at 7. All property owners pay taxes, and such taxes have never been noted as a relevant factor in a *Lucas* analysis by any court. Property taxes have been paid on this property in the absence of any productive economic use, since 1965, when agricultural production ceased. Further, if the value of the Cordelia Lot has decreased, a reassessment will lower the annual taxable value of the lot. Because the property can be put to economic use through a lease until habitat cessation lifts the regulations and property taxes are not a relevant consideration, the lot retains economic value.

VI. BACKGROUND PRINCIPLES OF PROPERTY LAW, INCLUDING THE PUBLIC TRUST DOCTRINE AND THE EQUAL FOOTING DOCTRINE, PRECLUDE A TAKINGS CLAIM BASED THE DENIAL OF A WETLAND FILL PERMIT.

The government is not required to compensate landowners for restrictive regulations that "inhere in the title itself;" meaning that such restrictions arise from preexisting "background principles of the [s]tate's law of property and nuisance." *Lucas*, 505 U.S. at 1029; *see also Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005). These background principles are not limited to common law nuisance. *Cf. Lucas*, 505 U.S. at 1035 (Kennedy, J. concurring). The government's navigational servitude over the submerged lands beneath and adjacent to navigable waters also precludes a takings claim, *id.* at 1029 (citing *Scranton v. Wheeler*, 179 U.S. 141 (1900)), because the landowner does not, in law, hold absolute title to the submerged lands. *See PPL Mont., L.L.C v. Montana*, 565 U.S. 576, 589-90 (2012); *see also Carson v. Blazer*, 2 Binn. 475, 483 (Pa. 1810) ("The common law principle is . . . that the owners of the [river] banks have no right to the water of navigable rivers."). Furthermore, pursuant to the equal-footing doctrine, "[u]pon statehood, the [s]tate gains title within its borders to the beds of waters then navigable." *PPL Mont.*, 565 US at 591. Under either the public trust or equal-footing doctrine, any takings claim arising from the denial of the marshland fill permit is precluded.

A. Ms. Lear Does Not Have Absolute Title to the Lands Beneath the Marsh, Which Are Held in Trust by the State of New Union For the Public.

The public trust doctrine is an ancient body of law, under which "states retain residual power to determine the scope of the public trust over waters within their borders." *Id.* at 604. The roots of this doctrine can be traced from Roman civilization, through English common law, and to the laws of the original thirteen states. *Id.* at 603; *see also Shively v. Bowlby*, 152 U.S. 1, 18-26 (1894) (summarizing the English common law and the incorporation of the public trust doctrine into the original colonies and states). While the doctrine is ultimately a matter of state law, it is

generally understood that the state owns "all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983) (internal quotation marks omitted). Pursuant to this longstanding body of law, New Union and Brittain County, holds the submerged lands under Lear Island's cove as a trustee for the public.

Colonies and States have applied the public trust doctrine to non-tidal rivers and lakes since this country's founding. The district court incorrectly cites the discussion in *PPL Montana, L.L.C. v. Montana*, 565 U.S. at 590, for the proposition that lands under non-tidal waterways were considered private property until 1810. R. at 10. While European common law did not recognize non-tidal waterways as navigable, most colonies and states rejected such a restrictive definition. *See Carson*, 2 Binn. at 483 ("The common-law principle is in fact, that the owners of the banks have no right to the water of navigable rivers."). The *Carson* court expressly recognized that the English definition of navigable waterway was inapposite in America. *Id.* Moreover, early colonies and later the states "dealt with the lands under the tide waters within [their] borders according to [their] own views of justice and policy," and they reserved control over or granted rights to use of such lands according to the public's interest. *Shively*, 152 U.S. at 26.

Predicting the exact scope of New Union's public trust protections is outside this Court's abilities on the current record, however, the Court should assume that such protections exist and are applicable. New Union was not a state at the time of the original grant, R. at 4, but the Supreme Court has recognized that the United States holds territorial lands in trust for future states. *Shively*, 152 U.S. at 30. Furthermore, the state of California, has led many others in applying public trust protections beyond mere navigation, commerce, and fishing, to include a wider scope of public interests and to the tributaries of navigable waters. *Nat'l Audubon Soc'y*, 658 P.2d at 719. For

example, in *National Audubon Society*, the California Supreme Court held that traditional navigable waters could be protected by restricting diversions of water in non-navigable tributaries. *Id.* at 436-37. On the current record, this Court cannot know with absolute certainty that New Union's protections are as extensive as California's, but *National Audubon Society* and the history of the public trust doctrine demonstrate that New Union has the power to exercise such authority. Therefore, without evidence to the contrary, this Court should assume that Brittain County's wetland regulation is a permissible exercise of its sovereign public trust power.

B. Brittain County's Wetland Regulations are a Lawful Exercise of Governmental Title to Underwater Lands Pursuant to the Equal-Footing Doctrine.

Under the equal-footing doctrine, when a state enters the Union it "gains title within its borders to the beds of waters then navigable . . ." as a matter of constitutional law. *PPL Mont.*, 565 U.S. at 591. Once title is obtained, the state may regulate and allocate those lands, subject only to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *Id.* When the United States acquires territorial lands by concession or treaty, it holds the navigable waterways of those lands in trust for future states. *Shively*, 152 U.S. at 49-50. For a conveyance of territorial lands otherwise subject to the equal footing doctrine to be valid, this Court must find both that Congress intended to convey such lands and that it intended that conveyance to defeat the state's later claim to title. *United States v. Alaska*, 521 U.S. 1, 41 (1997) (hereinafter "*U.S. v. A.K.*").

For the purpose of the equal-footing doctrine, navigability is determined at the time of statehood on the basis of whether the waterway is "navigable in fact." *PPL Mont.*, 565 U.S. at 592. The Supreme Court's four-part test originally held that waterways are navigable in fact if they are:

> used, or are susceptible of being used, [1] in their ordinary condition, [2] as highways for commerce, over which trade and travel are or may be conducted [3] in the customary modes of trade and travel on water . . . [4] when they form . . . by

> themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on.

Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). The Supreme Court later eliminated the "ordinary condition" requirement, recognizing that "[t]o appraise the evidence of navigability on the natural condition only of the waterway is erroneous." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940). In *Daniel Ball*, Grand River was navigable in fact because a steam ship could travel forty miles inland from Lake Michigan. *Id.* at 564. The possibility of use, not actual use, for navigation is determinative. Because the Lear Island cove is navigable in fact, and the 1803 grant did not supersede New Union's claim to title, denying the fill permit is not a taking.

Lear Island's cove is navigable in fact, despite the Army Corps of Engineers' interpretation of the Rivers and Harbors Act. R. at 1-2. Lake Union is an interstate lake that was, and still can be, used for interstate navigation. R. at 7. The portion of the cove that is now marshland was historically open waters and was used as a boat launch, and the cove remains contiguous with the lake. *Id.* Historically, ingress and egress to Lear Island was exclusively made by boat. *Id.* at 5. When New Union became a state the waters surrounding Lear Island, including the cove, were used or susceptible to use "as highways for commerce, over which trade and travel are or may be conducted." *Daniel Ball*, 77 U.S. (10 Wall.) at 563. Therefore, the cove was navigable in fact when New Union became a state making it subject to the equal footing doctrine.

An analogous case is *Shively v. Bowlby*, where Congress granted petitioners land through the Oregon Donation Act, which was bound on the north by the Columbia River. *Shively*, 152 U.S. at 8. At issue was whether the grant rightfully included lands under the surface of the Columbia's waters. The Court held that Congress has the power to grant titled to lands below the high-water mark of navigable waters in territories:

> [W]henever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or *to carry out other public purposes* appropriate to the objects for which the United States hold the Territory.

Id. at 48 (emphasis added). However, it was also recognized that Congress does not typically do so by general laws, and that in the absence of "international duty or public necessity," Congress has left the administration of such lands to the states. *Id.* at 58. The following justification was proffered by the Court:

> Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and . . . "in trust for the future States."

Id. at 49. Thus, congressional grants of public lands bordered by navigable waters convey to private individuals "no title or right below the high water mark, and do not impair the title and dominion of the future State."[10] *Id.* at 58. Accordingly, the Court held that the general grant under the Oregon Donation Act did not include title to subsurface lands. *Id.* at 58.

While Congress has the power to expressly grant title to submerged lands to private parties, the Lear grant is invalid as to similar lands because no proper purpose was offered. *See U.S. v. A.K.*, 521 U.S. at 38-39 ("the purpose of a conveyance or reservation is a critical factor in determining federal intent"). In *U.S. v. A.K.*, the Court specifically stated that "the only constitutional limitation on a conveyance or reservation of submerged lands is that it serve[s] an appropriate public purpose." *Id.* at 40. The express reservation of submerged lands

[10] This principle was affirmed in *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926), where the Court held that the setting aside of the Red Lake Reservation prior to Minnesota becoming a state did not convey title to the subsurface lands absent express intent to do so.

containing oil deposits furthered the public purpose of "securing an oil supply for national defense." *Id.* at 41. Thus, reserving the lands satisfied the first prong, and the second prong was met because the public purpose at issue required the federal government to have superior title. *Id.*

Because the United States holds territorial subsurface lands in trust for later states, any conveyance of title to such lands should not be valid unless the transfer is for a public purpose. In the present case, the first prong is not contested, as the plain language of the grant expresses an intent to convey the submerged lands surrounding Lear Island. R. at 4-5. However, because there is no indication of any public purpose served by the conveyance to a private party, this transfer should not be presumed to defeat the state's traditional right to superior title under the second prong. *See U.S. v. A.K.*, 521 U.S. at 34. Congressional intent to defeat the state's claim to title is required for conveyances of title to private parties, just as it is for federal reservation.

While the public purpose requirement has not been specifically applied to private conveyances, the same policy concerns that arise in federal reservation compel its application here. *Id.* at 5 ("[O]wnership of submerged lands--which carries with it the power to control navigation, fishing, and other public uses of water--is an essential attribute of sovereignty."). Lake Union is a navigable interstate body of water. New Union has a strong interest in maintaining ownership over all lands laying beneath the lake in order to control navigation and other uses. Moreover, no interest of the Lears in 1803, nor today, would be harmed by finding that the conveyance bestowed something less than fee simple absolute title to the lands under the lake. At the time of conveyance, the waters surrounding Lear Island were merely needed for ingress and egress from the island. The Lears have never raised any concern regarding mineral rights or any other need for strict ownership of the subsurface land. Conversely, the state retains a high interest in the need to control navigation, protect sensitive ecological habitats, and regulate construction of structures extending over the

lake. Simply put, there would have been no public purpose served, nor was one stated, in the 1803 grant that challenged New Union's presumed claim to title. In the absence of a public purpose, it should not be inferred that Congress intended to defeat the future states claim to title of all lands under Lake Union upon achieving statehood. *See Id.* at 34.

VII. THE DISTRICT COURT ERRED BY APPLYING TORT PRINCIPLES OF JOINT AND SEVERAL LIABILITY TO MULTIPLE LAYERS OF REGULATION THAT AFFECT DIFFERENT RIGHTS AND PORTIONS OF THE PROPERTY.

The district court erred when it applied Ms. Lear's novel theory of joint and several liability to this takings claim involving multiple government actors. Similar to a claim for tortious liability, to establish a taking a plaintiff must prove that the government's action or regulation was the actual and proximate cause of the injury. *See Cary v. United States*, 79 Fed. Cl. 145, 147 (2007) (discussing plaintiff's burden of proof for an inverse condemnation claim). However, unlike a tortious actor, the government is not a trespasser or wrongful actor. *See Halverson v. Skagit Cty.*, 983 P.2d 643, 649 (Wash. 1999). While joint and several liability arises from the interest of ensuring that wrongfully injured parties can recover from those who contributed to a foreseeable indivisible harm, *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976), compensation for takings is a one-for-one exchange of money for a property interest acquired through lawful authority. *Lingle.*, 544 U.S. at 536; *see also* Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill of Rts. J. 1181, 1198 (2012).

It would be a mistake for this Court to apply the tort theory of joint and several liability to the present case for three reasons. First, the policy concerns justifying compensation in tort law and takings law are fundamentally different. Second, the only court to previously consider this novel theory rejected it in the takings context. Third, even if joint and several liability applies, the alleged injury is not indivisible, and thus not fit for joint liability.

A. Joint Liability Punishes Bad Actors and Should Not be Applied to the Lawful Actions of Government.

Joint liability is only proper in contexts where compensation is due for an indivisible injury caused by an unlawful act. Joint liability in tort law arises from the circumstances where multiple wrongful actors, acting either in concert or independently, produce an injury that cannot be factually or legally apportioned amongst the actors. *See Velsicol,* 543 S.W.2d at 342-43. This rule has been expanded to include concurrent wrongful acts that produce a similarly indivisible injury, such as multiple nuisances. *Id.* at 343. However, the justification for joint liability is to avoid "putting on the [wrongfully] injured party the impossible burden of proving the specific shares of harm done by each defendant." *Id.*

Conversely, compensation in the Fifth Amendment context is a recognition that the government has the lawful authority to seize private property for public use, but when that authority is exercised the owner must be compensated. *Lingle*, 544 U.S. at 536-37. The purpose of requiring compensation is to prevent the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 537. In the tort context, joint liability serves as a punishment to ensure that bad actors do not escape liability. No such punishment is necessary in takings law, as the government is a lawful actor. While individuals should not have to privately fund public improvements, courts should not dissuade governments from furthering public interests through their police powers.

B. This Court Should Follow the Washington Supreme Court and Reject the Novel Application of Joint and Several Liability to Takings Claims.

Nearly twenty years ago, the Supreme Court of Washington declined to apply the "acting in concert" theory of joint liability in a reverse condemnation proceeding, *Halverson,* 983 P.2d at 650, and this Court should do the same with the variety of joint liability proposed by Ms. Lear. In *Halverson,* the plaintiff alleged that the county was jointly and severally liable for levee-induced

flooding because it acted in concert with the diking districts to divert floodwater over plaintiff's property. *Id.* at 647. However, the diking districts were statutorily and legally separate entities from the county; the levee system was created independently of the county and was not owned by the county. *Id.* at 647-48. Plaintiff sought to recover based on the difference in value between damage that actually occurred, as compared with what would have occurred without the system; essentially, damages arising from the existence of the levee system. *Id.* at 650. The court held that even if the county repaired the system, this concert action was insufficient to satisfy the causal element of a reverse condemnation claim, and it refused to extend the proposed tort theory to such a claim. *Id.* This Court should similarly hold that application of the tort concept of joint and several liability is inappropriate in the context of a takings claim involving multiple layers of regulation associated with legally and factually independent government entities.

C. Any Alleged Injury Caused by the Combination of State and Federal Regulation Is Severable Making Joint Liability Inappropriate.

No federal regulations prevent Ms. Lear from filling or developing the marshland of Lear Island cove, and therefore, the FWS has not deprived her property of all economic value. A key justification for joint and several liability is that the injury is indivisible. The *Velsicol* court framed the concept as follows:

> Where the tortious acts of two or more wrongdoers join to *produce an indivisible injury, that is, an injury which cannot be apportioned with reasonable certainty to the individual wrongdoers*, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.

543 S.W.2d at 342-43 (emphasis added). When the alleged injury can be easily apportioned among actors, joint and severable liability is inappropriate.

The impacts of the regulations on Ms. Lear's property can be apportioned to the respective governing entities and to the property rights they affect. The restrictions imposed by the ESA do

not apply to the cove because the marshlands are not critical habitat for the Karner Blue and because no federal approval is required. R. at 1-3. No federal laws prevent the proposed filling or development of the cove. *Id.* Similarly, the Brittain County wetland regulation does not burden any use of the above water portions of the property on which the Karner Blue resides. *Id.* The regulations burden different property rights and parts of the property in a distinctive manner.

The FWS, nor any other federal agency, can control the local regulatory policies of Brittain County that exceed minimum federal requirements. As in *Halverson*, no action of the FWS is a direct or proximate cause of any taking associated with the County's denial of a fill permit. Any alleged burden caused by the ESA is associated only with the above water portions of the Cordelia Lot. Likewise, any burden imposed by the county regulation affect only the submerged portions of the parcel. Thus, even assuming that joint and several liability applies to Fifth Amendment takings claims, joint liability is inappropriate because the alleged harm is severable.

CONCLUSION

For the foregoing reasons, Defendant–Appellant–Cross Appellee, the United States Fish and Wildlife Service, respectfully requests that this Court affirm the district court's holding regarding the constitutionality of the ESA and reverse the district court's holdings that Ms. Lear's Fifth Amendment takings claim is ripe and that a compensable taking has occurred.

Respectfully Submitted,

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Attorneys for Defendant–Appellant–Cross Appellee

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The United States Fish and Wildlife Service