Team No. 15

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

September Term, 2016
Docket No. 16-0933

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH 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

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BRIEF OF UNITED STATES FISH AND WILDLIFE SERVICE
Defendant-Appellant-Cross Appellee

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Cordelia Lear ("Plaintiff") filed suit in the United States District Court for the District of New Union to challenge the constitutionality of the Endangered Species Act (ESA) as applied to her property, and alleged the Fish and Wildlife Service (FWS) and Brittain County ("the County") took her property without just compensation in violation of the Takings Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. The District Court dismissed Plaintiff's claim that the ESA was unconstitutionally applied to her property, and awarded Lear $10,000 in damages against the FWS and $90,000 in damages against the County for the alleged unconstitutional taking of Plaintiff's property in violation of the Fifth Amendment. The District Court's order is final, and as this Court has previously addressed[1] jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

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

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

4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?

5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?

[1] As stated in the September 1, 2016 Order this Court previously determined it has jurisdiction, and the Federal Circuit does not. (R. 2).

6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?

7. Assuming the relevant parcel is the Cordelia Lot, are FWS and 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?

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of New Union's order dismissing Plaintiff's constitutional challenge of the ESA, and award of $100,000 in damages to Plaintiff against the County and FWS for the alleged unconstitutional taking of Plaintiff's property in violation of her Fifth Amendment rights. (R. 4).

Plaintiff brought suit after the FWS informed her that construction of a single family home on her property would constitute a "take" of the Karner Blue Butterfly, an endangered species with critical habitat on Plaintiff's lot, in violation of section 9 of the ESA unless she first received an Incidental Take Permit (ITP). (R. 6). Plaintiff claimed the ESA's application to New Union's intrastate subpopulation of the Karner Blue Butterfly was an invalid exercise of Congress' Commerce power, and thus unconstitutional. (R. 6-7). The District Court dismissed Plaintiff's allegation and found the ESA's prohibition against an unpermitted take of an intrastate species is a constitutionally valid exercise of the Commerce power. (R. 8).

Plaintiff also alleged the ESA in conjunction with the Brittain County Wetlands Preservation Law ("County Wetlands Law") deprived her of any economic use of her property, and therefore constituted a regulatory "take" of her property requiring just compensation under the Fifth Amendment. *Id.* FWS sought dismissal of the claim for lack of ripeness because she never applied for an ITP. (R. 9). FWS informed Plaintiff that in order to receive an ITP she would need to complete an Environmental Assessment (EA) and develop a Habitat Conservation

Plan (HCP). *Id.* FWS advised Plaintiff the HCP must include continued annual mowing of her lot's lupine fields, the Karner Blue Butterfly's critical habitat. *Id.* The District Court found Plaintiff's claims were ripe because, in its opinion, pursuit of a HCP would be unnecessary because of its requirement to preserve and mow the lupine fields, which rendered construction of a home on the Cordelia Lot allegedly impossible. *Id.* FWS and the County argued Lear Island is the relevant parcel for determining whether the ESA and the County Wetlands Law allow some residual economic use of the lot. *Id.* The District Court rejected this contention and held the relevant parcel is the Cordelia Lot, not the entire Island. (R. 10). The District Court concluded the ESA and County Wetlands Law deprived Plaintiff of all economic value of her property and analogized the situation to that of joint tortfeasors and held both FWS and the County jointly and severally liable for the taking of Plaintiff's property. *Id.*

In addition, the County claimed it was not liable for a taking of Plaintiff's lot because development of submerged land beneath a navigable water is prevented by the public trust doctrine. *Id.* The District Court disagreed and found the United States had not yet recognized public trust rights in nontidal navigable waters, such as Lake Union, when the land was granted to Cornelius Lear in 1803, thus the Court held no public trust navigational reservation could be presumed. *Id.* The District Court further found a prior congressional grant gave superior title to Plaintiff against New Union's claim for title pursuant to the equal-footing doctrine. *Id.*

Plaintiff, FWS, and the County filed Notices of Appeal challenging the District Court's decision. Plaintiff maintains, and the County agrees, ESA's application to the intrastate population of the Karner Blue Butterfly is not a legitimate exercise of Congress' Commerce power, and is thus unconstitutional. In contrast, FWS alleges the ESA may constitutionally be

applied to the Karner Blue Butterfly. FWS and the County both dispute all other conclusions of the District Court.

STATEMENT OF FACTS

Plaintiff seeks to construct a single family home on her ten-acre lot on Lear Island in Lake Union. (R. 4). Lear Island contains the only remaining habitat for the New Union subpopulation of the Karner Blue Butterfly, a federally listed endangered species. *Id.* Plaintiff inherited her lot, known as the "Cordelia Lot," upon her father's death in 2005. (R. 5). The Lot consists of an access strip that is 40 feet wide by 1,000 feet long, a nine-acre open field, and about one acre of emergent cattail marsh that historically was open water and used as a boat landing. *Id.* The open field and access strip on the lot (known as "the Heath") has been kept open by annual mowing for several decades, and has become covered with wild blue lupine flowers. *Id.*

Blue lupines are essential for Karner Blue larvae, which feed solely on blue lupine leaves. *Id.* Further, Karner Blue larvae rely on lupine plants for metamorphosis, and any disturbance of the lupines during the larval and chrysalis stages will kill the butterflies. (R. 6). The Heath provides the ideal habitat for the Karner Blue Butterflies: partially shaded lupine flowers near a successional forest. (R. 5). The Heath was designated by the FWS as critical habitat for the New Union subpopulation of the Karner Blues in 1992. *Id.* Without annual mowing, however, the lupine fields on the Cordelia Lot would naturally convert to a successional forest, and thus eliminate the Karner Blues' habitat. (R. 7). If this occurred, New Union's subpopulation of the Karner Blues would become extinct within about ten years, unless a replacement habitat was created within a one-thousand-foot radius of the existing fields. *Id.*

In 2012, Plaintiff contacted FWS to inquire whether development of her property required any permits or approvals because of the Karner Blue population and critical habitat located on her lot. (R. 6). FWS advised Plaintiff that any disturbance of the lupine habitat in the Heath, other than continued annual mowing, would constitute a take of the Karner Blue Butterfly. *Id.* FWS informed Plaintiff, however, that she could apply for an ITP to construct her home if she developed a HCP and completed an EA. *Id.* FWS stipulated the HCP must provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbances of the access strip, and must maintain the remaining lupine fields through continued annual mowing. *Id.* The adjacent lot owned by Plaintiff's sister, known as the "Goneril Lot," could be used to conform with the HCP's contiguous land conditions. *Id.* Cordelia is estranged from her sister, however, and her sister has stated she refuses to comply with any property restrictions contained in a HCP. *Id.*

Rather than pursue an ITP, Plaintiff instead developed an alternative development proposal (ADP) that did not impact the lupine fields. (R. 7). The ADP proposed to fill one half-acre of the marsh with an access causeway to provide access from the mainland causeway, without disturbing the access strip. *Id.* The ADP, however, requires a permit to fill the cove marsh pursuant to the County Wetlands Law. *Id.* The County denied Plaintiff's permit application because permits under the County Wetlands Law are restricted to water-dependent uses, and the County determined a residential home site is not a water-dependent use. *Id.*

The Cordelia Lot's fair market value without any development restrictions is $100,000. *Id.* Currently, there is no market for the Cordelia Lot to be used solely as timber land, or for recreation or agriculture, without the ability to develop a residence. *Id.* The Brittain County Butterfly Society ("the Butterfly Society"), however, offered to pay Plaintiff $1,000 per year to

conduct butterfly viewing outings in the summer, but she rejected the Society's offer. *Id.* There has been no reassessment of the Cordelia Lot's value following the denial of the permit under the County Wetlands Law. *Id.*

STANDARD OF REVIEW

The claims involved are all questions of law, which this Court reviews *de novo*. *Contender Farms, L.L.P. v. U.S. Dept. of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (holding ripeness is a question of law reviewed *de novo*); *Miller v. Raytheon Co.*, 716 F.3d 138, 148 (5th Cir. 2013) (holding constitutionality of a statute is a question of law reviewed *de novo*); *Flores v. Ashcroft*, 354 F.3d 727, 729 (8th Cir. 2003) (holding constitutional claims are questions of law reviewed *de novo*). This Court gives no deference to the district court's ruling in a *de novo* review. *Cambridge Integrated Servs. Group, Inc. v. Concentra Integrated Servs., Inc.*, 697 F.3d 248, 253-54 (5th Cir. 2012).

SUMMARY OF THE ARGUMENT

The prohibition of the unpermitted "take" of any endangered species, as found in § 9 of the Endangered Species Act, is an activity that substantially affects interstate commerce and is thus a valid assertion of legislative authority under the Commerce Clause. The prohibition against an unpermitted "take" of the Karner Blue Butterfly is an activity that substantially affects interstate commerce in that it can be aggregated into a class of economic activities that substantially affects interstate commerce.

Lear's claim that an uncompensated taking has occurred is not ripe for review. First, the claim does not raise an issue fit for judicial decision, in that the claim does not arise out of a final agency action. Further, Lear has not demonstrated that she would suffer hardship as a result of being denied court consideration.

The lower court incorrectly determined the relevant parcel for the taking claim was the Cordelia Lot, when it should have used all of Lear Island for its analysis. Plaintiff has not overcome the presumption in favor of using the larger lot for taking analysis, and all the relevant factors weigh in favor of using Lear Island as the relevant parcel. Further, because the regulations deprive the Cordelia Lot's economic value only temporarily, Plaintiff has not suffered a complete taking. In addition, to successfully establish a *per se* taking, Plaintiff must show a complete deprivation in her property's economic value. The Cordelia Lot, however, retains value because the Butterfly Society offered to pay Plaintiff annually to conduct tours on her property.

Public trust principles inherent in the 1803 grant, due to the Northwest Ordinance of 1787, preclude Plaintiff's taking claim based upon the County Wetlands Law. Furthermore, FWS is not liable for a categorical taking of the Cordelia Lot because the ESA and County Wetlands Law must be considered separately for the takings analysis. Even if this Court, however, disagrees and concludes the ESA and County Wetlands Law must be considered concurrently to determine whether a categorical taking has occurred, "background principles" in title, including the public trust doctrine and the ESA, preclude Plaintiff's categorical taking claim.

ARGUMENT

I. THE ESA PROHIBITION AGAINST AN UNPERMITTED "TAKE" OF A WHOLLY INTRASTATE SPECIES IS A VALID EXERCISE OF THE COMMERCE POWER.

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, allows Congress to regulate three broad categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549,

558-59 (1995). A valid exercise of the Commerce power would thus involve a regulation of any one of these categories.

The first two categories are not applicable to the prohibition of the unpermitted "take" of any endangered species, as found in § 9 of the Endangered Species Act (ESA). *See* ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (2015). Section 9 does not regulate the use of channels on interstate commerce, such as roads, nor does it "prohibit the interstate transportation of a commodity through the channels of commerce." *Lopez*, 514 U.S. at 559. Further, the regulation does not involve an instrumentality of interstate commerce, nor a person or thing in interstate commerce. The regulation properly fits into the third category: the prohibition of the unpermitted "take" of any endangered species, as found in § 9 of the Endangered Species Act, is an activity that substantially affects interstate commerce and is thus a valid assertion of legislative authority under the Commerce Clause.

Plaintiff argues the ESA, by prohibiting the "take" of an intrastate species, seeks to regulate non-economic activity, such as land-clearing and vegetation removal, and is thus not a valid exercise of the Commerce Clause power. The prohibition against an unpermitted "take" of the Karner Blue Butterfly is in fact an activity that substantially affects interstate commerce in that it can be aggregated into a class of economic activities that substantially affects interstate commerce, and the ESA prohibition against an unpermitted "take" of a wholly intrastate species is thus a valid exercise of the Commerce power. First, contrary to Plaintiff's mischaracterization, the prohibition of taking of endangered intrastate species, such as the Karner Blue Butterfly, is an economic activity. Further, even if this intrastate activity on its own were characterized as non-economic, it is part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.

A. An unpermitted take of an endangered species would substantially affect interstate commerce.

In determining whether an activity has a substantial effect on interstate commerce, there are four factors courts consider: (1) whether the regulated activity has anything to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms; (2) whether the statute in question contains an "express jurisdictional element" which would ensure, through case-by-case inquiry, that the activity in question affects interstate commerce; (3) whether there are "express congressional findings" or legislative history "regarding the effects upon interstate commerce" of the regulated activity; and (4) whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066-67 (D.C. Cir. 2003), quoting *Lopez*, 514 U.S. at 560-62, 564.

In order to have a substantial effect on interstate commerce, the Court in *Lopez*, 514 U.S. at 560, and *United States v. Morrison*, 529 U.S. 598, 610 (2000), emphasized the importance of the activity being economic in nature. The economic activity could, on its own, have a substantial effect on interstate commerce, or have such an effect when aggregated with other similar activities. *Morrison*, 529 U.S. at 610-11; *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003). Activities having a substantial effect on interstate commerce could also include activities that are an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. *Lopez*, 514 U.S. at 561. The Court did not limit their finding of a substantial effect on interstate commerce to interstate activities. “Even if an activity is local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ” *Lopez*, 514 U.S. at 556.

There is no question that regulation of the Karner Blue Butterfly's habitat is an intrastate activity. The only remaining population of the species in the state exists on the Heath on Lear Island, with no migration between this population and others in other states. (R. 5-6.) It is unlikely that a take of one entirely intrastate species would exert a substantial impact on interstate commerce. Thus, in order to substantially affect interstate commerce, the activity at issue here must be aggregated into a class of activities that has such an effect.

> 1. The prohibition against "taking" an intrastate species is part of a class of activities that has a substantial impact on interstate commerce.

Under the authority of the Commerce Clause, Congress has the power to regulate entirely intrastate activities that are part of a class of economic activities that has a significant effect on interstate commerce. *Lopez*, 514 U.S. at 600; *Morrison*, 529 U.S. at 617.

> '[E]ven if a person's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce' . . . When Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class.

Gonzales v. Raich, 545 U.S. 1, 17 (2005). Further, the class of activities does not have to substantially affect interstate commerce in fact; Congress simply needs a "rational basis" for concluding that the class will have such an effect. *Lopez*, 514 U.S. at 557; *Gonzales*, 545 U.S. at 22. Activities can thus be aggregated into a class in order to determine the substantiality of the impact of such activities on interstate commerce.

In order to be aggregated, the activity must be (1) economic in nature or (2) an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated. *Lopez*, 514 U.S. at 560-61. Because the activity at issue here – the protection of endangered species – is both economic in nature and an

essential part of a larger regulation of economic activity, it can properly be aggregated into a class, which has a substantial effect on interstate commerce.

> a) The prohibition against "taking" an intrastate species is an economic activity.

The prohibition of the unpermitted "take" of any endangered species, as found in § 9 of the ESA, is an economic activity, and thus properly aggregated as a class. In her claim that the prohibition against "taking" and intrastate species is not an economic activity, Plaintiff relies on the Court's decisions in *Lopez* and *Morrison,* in which the Court held that neither the presence of handguns on school property nor gender-motivated violent crimes, respectively, constituted activity that had a substantial effect on interstate commerce, and thus Congress' attempts to regulate these activities was an invalid assertion of the Commerce power. The facts of our case, however, are distinguishable from those of Lopez and Morrison. In both of those cases, the regulation at issue targeted a wholly intrastate *non-economic* activity. The lack of economic character of the activities, either as stand-alone targets of regulation or as a part of class, was the key to the Court's decision in both cases.

Here, the activity to be regulated is clearly economic in character. The economic value of the continued existence of intrastate endangered species derives from the economic value of biodiversity.

> The elimination of all or even some of these [intrastate] endangered species would have a staggering effect on biodiversity – defined as the presence of a large number of species of animals and plants – in the United States and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species.

Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997). Plant and animal species are used in a huge array of commercial products, including as the source of valuable medicines and genetic material. *Id*. at 1052. Many of the potential economic benefits of such

species are yet undiscovered. Thus, with each species lost to extinction, so too are lost the current and potential valuable information and natural resources they provide. The exact value of each individual species lost is difficult to quantify. "In the aggregate, however, the court can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *Nat'l Ass'n of Home Builders*, 130 F.3d at 1053-54. Thus, because the prohibition on takings of endangered species prevents the destruction of biodiversity, and subsequently protects the current and potential future economic value of that biodiversity, the ESA has a significant effect on interstate commerce.

Although the evidence clearly indicates that the protection of endangered species and the biodiversity they provide is an economic activity, even if it were not considered so, the regulation is still a valid exercise of Commerce power because the ESA also involves the regulation of the development of land through construction of the proposed residence. Land development activities are clearly economic in nature, as noted by the district court. This activity involves the hiring of employees, such as contractors and construction workers, and the purchase of building materials. (R. at 8.) The court in *Rancho Viejo* agreed: "Insofar as application of § 9(a)(1) of the Endangered Species Act acts to regulate commercial development of the land inhabited by the endangered species, it may be reached by Congress because it asserts a substantial economic effect on interstate commerce." 323 F.3d at 1070.

> b) The prohibition against "taking" an intrastate species is an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity is regulated.

As discussed above, the key question for purposes of the aggregation principle is "whether the nature of the regulated activity is economic." *GDF Realty Invs., Ltd.*, 326 F.3d at 630. In addition to being economic in nature itself, another way in which a regulated activity

might be economic is when the intrastate activity is part of an economic regulatory scheme that would be undermined if the particular intrastate regulation were removed. *Id*. "[T]he Supreme Court has reiterated that when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

While *Lopez*, 514 U.S. 549, and *Morrison*, 529 U.S. at 617, required that a given activity be economic if it is to be aggregated with other activities in a class for purposes of determining its interstate commerce impact. Building on this principle, *Gonzales* allowed for the valid regulation of a wholly intrastate, non-economic activity if that activity is an essential part of a larger regulation of economic activity in which the regulatory scheme would be undercut unless the intrastate activity were regulated. 545 U.S. at 17. Thus, even a non-economic, entirely intrastate activities may be validly regulated under the authority of the Commerce Clause if it is within the reach of a comprehensive statute.

Our sister circuits have upheld as a valid exercise of the Commerce power the enforcement of § 9 of the ESA in protecting individual species and their habitats on numerous occasions. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007); *Rancho Viejo*, 323 F.3d at 1069; *GDF Realty Invs., Ltd.*, 326 F.3d at 640–41; *Gibbs v. Babbitt*, 214 F.3d 483, 505–06 (4th Cir. 2000); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1057. In all of these cases, the courts found that, while the existence and protection of a particular endangered species was not necessarily economic in nature, the given activity was an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.

Thus, the prohibition against an unpermitted "take" of a wholly intrastate endangered species, such as the Karner Blue Butterfly, is an activity that substantially affects interstate commerce, and the ESA prohibition against an unpermitted "take" of a wholly intrastate species is therefore a valid exercise of the Commerce power.

II. LEAR'S TAKINGS CLAIM IS NOT RIPE.

In order to be ripe, a claim against an agency must (1) raise an issue fit for judicial decision, and (2) demonstrate that the party bringing the claim would suffer hardship as a result of withholding a court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The facts of the instant case do not meet either of these requirements. The issue of whether a taking has occurred is not an issue fit for judicial decision. Further, Plaintiff has failed to demonstrate that she would suffer hardship as a result of being denied court consideration. Thus, Plaintiff's takings claim against FWS, without having applied for an ITP under ESA, is not ripe.

A. The taking claim is not an issue that is fit for judicial decision.

An issue that is fit for judicial decision is (1) one that involves a purely legal question and (2) one arising from a final agency action (in which neither the court nor the agency would benefit from the postponement of review). *Abbott Labs.*, 387 U.S. at 149. Here, while the determination of whether the application of the ESA incidental take provision has resulted in an uncompensated taking does involve a legal question, the claim does not arise out of a final agency action, and is thus not an issue that is fit for judicial decision.

1. The taking claim does not arise from a final agency action.

The key question in determining ripeness is whether a final agency action has occurred. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). "The general rule is that a claim for a regulatory taking is not ripe until the government entity charged with implementing the

regulations has reached a final decision regarding the application of the regulations to the property at issue." *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004). In *Palazzolo*, as relied on by the Plaintiff, the Supreme Court found the state court erred in finding the claims were unripe because the landowner obtained a final decision from the council determining the permitted use for the land. 533 U.S. at 618. No such final decision has been issued or challenged here. A final agency action would be the issuance or denial of a permit – that is, "a final agency decision pertaining to the actual use of [the] property." *Morris*, 392 F.3d at 1375-76.

One key consideration in evaluating whether an agency action is final for purposes of determining the fitness of the issue for judicial decision is whether "further factual development would 'significantly advance [the Court's] ability to deal with the legal issues presented.'" *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011), quoting *Nat'l Hospitality Ass'n*, 538 U.S. at 812. Here, both the court and the agency would benefit from the postponement of review until the agency action in question has assumed a final or more concrete form. Specifically, more information is needed to determine the feasibility and cost of completing the ITP application.

The District Court reasoned that "a takings claimant need not perform a futile act, when the government has already declared a policy of denying the very sort of permit the claimant would need." *See Palazzolo*, 533 U.S. at 626. In *Palazzolo*, the Court found that the previous decisions of the involved agency made "plain that the agency interpreted its regulations to bar petitioner from engaging in" the regulated activity for which petitioner was seeking a permit, and that "[f]urther permit applications were not necessary to establish this point." *Id*. at 621. The facts of *Palazzolo* are plainly distinguishable from our case. The FWS has not made a definite practice of denying ITPs, nor foreclosed the possibility of granting the permit to Plaintiff, were

she to apply for it. A completed permit application would thus not be a futile act, but an essential step in determining the feasibility of Plaintiff's proposed development under the regulations of the ESA.

Further, the District Court's conclusion that any ITP would necessarily "include conditions that it would be impossible for Plaintiff to satisfy" is incorrect. (R. 9). It simply cannot be determined with certainty what precise conditions the ITP would impose upon the plaintiff. *See Morris*, 392 F.3d at 1377-78.

> Evaluating whether the regulations effect a taking requires knowing to a reasonable degree of certainty what limitations the agency will, pursuant to regulations, place on the property. This means that 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. at 1376. Because a completed ITP application is necessary to establish the precise extent of the restrictions the ESA will impose on the property development, there can be no final agency action for purposes of ripeness without Plaintiff first applying for an ITP.

B. Plaintiff would not suffer hardship as a result of withholding court consideration.

The second prong of the *Abbott Labs*. test for ripeness is a determination of whether Plaintiff would suffer hardship as a result of withholding court consideration. Hardship is typically found "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Abbott Labs.*, 387 U.S. at 153. Further, "mere financial expense is not a justification for pre-enforcement judicial review." *Id*.

In the instant case, no such showing of hardship has been made. The regulation does not require any immediate or significant change in Plaintiff's conduct of her affairs, nor deprive her of any right. Rather, it is only because she is actively *seeking* to change the normal state of

affairs through developing her property that she is finding herself within the scope of the regulation. While the district court cites the excessive cost of applying for a permit as a reason that such an application would futile, (R. 9), this cost is neither so fixed and undisputed as the court claims, nor a valid basis for establishing hardship.

Thus, Lear's taking claim does not raise an issue fit for judicial decision because it does not arise from a final agency action, nor has Lear established that she would suffer hardship as a result of withholding court consideration, Lear's takings claim against FWS is not ripe.

III. THE RELEVANT PARCEL FOR THE TAKING ANALYSIS IS THE ENTIRETY OF LEAR ISLAND, NOT JUST THE CORDELIA LOT.

For the purposes of a taking inquiry, the size of the relevant parcel is key in determining whether a plaintiff has suffered a reduction or deprivation of value. When a court considers a large piece of land of which only a small section has lost value due to regulation, it is less likely to conclude that a taking has occurred. If the court considers only a small subdivision of that parcel, the economic impact is more likely to appear large enough to constitute a taking. Courts have referred to this as "the denominator problem." *Giovanella v. Conservation Comm'n of Ashland*, 447 Mass. 720, 725-26 (2006). In the case at bar, the lower court incorrectly determined that the relevant parcel was only the Cordelia Lot, when it should have made its analysis based on the entirety of Lear Island.

A. The relevant parcel for the taking analysis is determined by a flexible, fact-based inquiry.

It is well established that when determining whether a compensable taking has occurred, courts must look at the entire parcel, not just a segment.

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978). The entire bundle of rights, not just a single stick, must be considered.

In determining the appropriate parcel for the taking analysis, courts should take a flexible approach. The lower court incorrectly rejected this approach, and found that the division of a parcel is determinative. Existing case law has explicitly argued against such a bright-line rule. In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), the court explained this flexible approach is designed to account for factual nuances, including the timing of the transfers in light of the regulation.

B. There is a presumption in favor of using the larger parcel in a takings analysis.

Not only is the determination made on a case-by-case, factual basis, but there is a presumption against severance, and towards using the larger parcel. *Ciampitti v. United States*, 22 Cl.Ct. 310, 319 (1991). Other courts, considering the denominator problem, laid out other factors to consider. "Determining the size of the denominator parcel is inherently a factual inquiry." *Giovanella*, 447 Mass. at 726-27. Courts look to factors that "identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment," to determine the appropriate parcel for a taking analysis. *Id.* The court laid out several factors which lead to a conclusion that the analysis should be based on the larger parcel, including common ownership, not being separated by a road, both parcels being intended for the same use, and parcels "inextricably linked in terms of purchase and financing." *Id.* at 729. The biggest factor, however, is that the properties are contiguous. *Id.* The courts look at these factors, in addition to "many other factors" which tend to show the extent to which the property has been historically treated as a single unit. *Ciampitti*, 22 Cl.Ct. at 319.

In the instant case, it is clear that all the factors weigh in favor of using the entirety of Lear Island as the relevant parcel for the takings analysis. There is no doubt the parcels are contiguous, and are not divided by roads or any form of barrier, natural or artificial. When considered alongside the neighboring Goneril Lot, which contains a single family home, the two contiguous lots are used for the same purpose. Because it was given to the Lear family by congressional grant as a whole over two centuries ago, the entirety of Lear Island is "inextricably linked in terms of purchase and financing." Although the Island was formally subdivided in 1965, all three subdivisions remained in the possession of King James Lear until his death in 2005.

The fact that Plaintiff inherited the lot from her father also weighs heavily in favor of using the entirety of Lear Island as the relevant parcel. After exploiting and enjoying the Island for centuries, the Lear family's investment-backed expectations have clearly been met. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court looked at a case where the plaintiff had received title from a company after enactment of the regulation at issue. The Court held that while having a regulation in place prior to taking ownership does not bar a taking claim, "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." *Id.* at 633 (O'Connor, J., concurring). The Court further elaborated that, inheritance specifically is not a bar to a taking claim, but a factor weighing against it. *Id.* at 635 (O'Connor, J., concurring). These factors weigh heavily against finding that Plaintiff in the instant case has been subject to a taking.

C. Plaintiff inherited the Cordelia Lot after the Heath was designated as the Karner Blue Butterfly's critical habitat, and thus knew of the limitations the ESA imposed on potential property development at the time of her inheritance.

The regulatory timing also weighs heavily in favor of finding that a taking has not occurred. In *Loveladies,* plaintiffs purchased a 250-acre lot in 1958, and over the course of several decades developed all but 12.5 acres into single family homes. *Loveladies Harbor*, 28 F.3d at 1181. In 1982, the *Loveladies* plaintiffs sought a fill permit on the remaining 12.5-acre parcel, which was denied under the Clean Water Act. *Id.* The court held that in light of all the relevant factors, the relevant parcel was the 12.5 acre parcel, not the larger lot. The determinative factor was the fact that the regulation was not imposed upon plaintiff until after the project was well underway. *Id.*

Loveladies is readily distinguishable from the case at bar. In *Loveladies*, the plaintiffs owned the property for merely fourteen years prior to the enactment of the relevant statute, while Lear Island has been in the Lear family for generations. The regulation in *Loveladies* was passed mid-project, while the Cordelia Lot did not come into Plaintiff's possession until 2005, after the property was designated as Karner Blue Butterfly critical habitat. Even after Plaintiff took possession, she let the land idle for nearly an additional decade.

In light of all of these factors, the relevant parcel is the entirety of Lear Island, not solely the Cordelia Lot. The Island was granted to the family as a whole, and was enjoyed in that form for centuries until it was subdivided. Even after that subdivision, it continued to be used and owned by King James Lear as a single parcel, despite its formal legal separation. Furthermore, Plaintiff's investment-backed expectations have clearly been met because Plaintiff inherited her parcel after the ESA's development limitations had already been imposed on the Cordelia Lot.

IV. UNDER A PROPER BALANCING TEST, PLAINTIFF IS NOT DUE COMPENSATION FOR THIS TEMPORARY TAKING.

In the case at bar, the lower court held Plaintiff was completely deprived of all economic value of her land, and is therefore entitled to compensation. (R. 11-12). Citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the lower court held because Plaintiff would be unable to build on the Cordelia Lot for ten years she suffered a complete deprivation of the economic value of her property. (R. 10). This is a misstatement of the law, and a misunderstanding of the *Tahoe-Sierra* case. Under a proper analysis, a temporary complete deprivation of a property's value is subject to a *Penn Central* balancing test. The lower court failed to perform this test after incorrectly finding that a complete taking had occurred. Plaintiff has not shown that a complete taking has occurred, and has not articulated a partial taking claim. On these grounds, the court should find that Plaintiff's taking claim is prohibited.

A. The ESA's restrictions on Plaintiff's development constitutes a temporary taking, not a permanent *per se* taking.

In analyzing a temporary taking claim, courts view the relevant parcel based on the property as a whole, both temporally and spatially. *Tahoe-Sierra*, 535 U.S. at 331. In *Tahoe-Sierra,* the Supreme Court determined that even when a regulation completely deprives a property of all economic value, the court should apply a *Penn Central* balancing test, not a *per se Lucas* rule. *Id.* at 303. *Lucas* only applies when the regulation results in a permanent and complete deprivation of value. *Id.*

The *Tahoe-Sierra* plaintiffs were a group of developers who sought to construct a single family home development near Lake Tahoe. *Id.* Due to overlapping local regulations, plaintiffs were subject to a 32-month building moratorium, and alleged for that period they had been

completely deprived of any economic value of the property. *Id.* The Court rejected this argument, and found that although plaintiffs had been completely deprived of all economic value of their property, a *Lucas* claim is not tenable if that deprivation is only temporary. *Id.* The Court explicitly rejected the idea that temporary takings can be a complete deprivation of value, stating "a permanent deprivation of all use is a taking of the parcel as a whole, but a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted." *Id.* A categorical taking occurs when a regulation results in complete and permanent deprivation of a property's economic value, not in cases where such deprivation is only temporary. *Id.*

The *Tahoe-Sierra* Court explicitly and repeatedly rejected the idea that a temporary restriction, no matter how restrictive, cannot be considered a *per se* taking. Depriving an owner of all use of their property for only a portion of time is equivalent to only depriving the owner of only a small subdivision of their property. *Id.* at 319. A temporary regulation only deprives the owner of economic value of their land for a "temporal slice." *Id.* A *per se* taking only occurs when the deprivation is complete and permanent. The Court stated that

> [an] interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id. at 331-32 (internal citation omitted).

It is undisputed the Cordelia Lot will return to its natural state after ten years if Plaintiff stopped annually mowing the blue lupine fields. Although most temporary deprivations are a result of temporary regulations, in the instant case the regulation is permanent but will become

irrelevant once nature takes its course. Although the lower court does not explicitly engage in the discussion, it appears as though it distinguished this case from *Tahoe-Sierra* based on that fact. This should not factor into the court's conclusion on finding a temporary taking. Whether a deprivation is temporary as a result of natural processes or the expiration of the relevant statute, the effect on the property owner is the same. After a brief window of being barred, Plaintiff will again be able to build her home, and make full use of her property.

The ESA's restrictions will no longer apply to the Cordelia Lot after natural processes will destroy the Karner Blue Butterfly's habitat, and thus impacts the property in the same manner as a temporary restriction. Whether the regulation expires in ten years, or Plaintiff's position changes as to no longer be subject to it in ten years makes no practical difference. Therefore, Plaintiff is subject to only a temporary taking, which is by definition not a permanent, categorical taking.

The temporary nature of the Cordelia Lot's deprivation in economic value prohibits Plaintiff's claim. The lower court distinguished the facts at bar from *Tahoe-Sierra* because the deprivation in the matter at hand will persist for ten years, while the *Tahoe-Sierra* plaintiffs suffered under the building moratorium for less than three years. *Id.* at 302. This is an incorrect application of the law. Regardless of the length of time, unless a deprivation is permanent, it does not constitute a *per se* taking. Plaintiff failed to make a claim for a partial taking, and thus cannot seek relief based upon such claim, nor is Plaintiff able to recover damages for a categorical taking.

V. THE BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY PLAINTIFF $1,000 ANNUALLY MEANS THAT THE CORDELIA LOT HAS NOT BEEN DEPRIVED OF ALL ECONOMIC VALUE.

The Supreme Court established in *Lucas* that a government regulation which results in a complete and total loss of all economic value to a landowner's property results in a categorical taking which requires compensation. A plaintiff must establish a property's value has been completely deprived as a result of a regulation to successfully allege a categorical taking. Courts continually stress the fact that a categorical taking requires *all* value be lost due to the regulation in question.

A. In order to successfully establish a *per se* taking, Plaintiff must establish a regulation deprived the Cordelia Lot of *all* economic value.

Prior to recognition of categorical takings, courts engaged in a balancing test to determine whether a regulation required compensation as a taking. The court held in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." The reasoning behind this is that, for the landowner, a denial of all beneficial use is the same as a physical occupation. The court subsequently determined what "too far" meant in *Penn Central Transp. Co,* 438 U.S. at 123. Pursuant to *Penn Central*, courts apply a balancing test to determine whether a taking has occurred by weighing: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations and; (3) the character of the government action. *Id.*

The lower court did not delve deeply into its reasoning on its succinct finding on this matter, but it appears the court incorrectly applied the balancing test to the facts at bar, weighing the property's economic value against the cost of its property taxes. Under *Lucas*, "no balancing of factors is required. If a regulation categorically prohibits all economically beneficial use of

land - destroying its economic value for private ownership - the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking." *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564–65 (Fed. Cir. 1994). If a regulation removes anything less than all economically beneficial use of the land, it is not a taking. *Id. Lucas* and *Florida Rock* repeatedly stressed the fact that a categorical taking occurs if, and only if, the owner has been completely and permanently deprived of all economic value.

B. The Cordelia Lot has not been deprived of all economic value because the Butterfly Society offered to pay Plaintiff $1,000 per year to conduct tours on her property.

In the case at bar, the lower court incorrectly held that the Cordelia Lot has been completely stripped of any and all economic value, and is therefore a categorical taking under *Lucas,* despite the fact that the Butterfly Society offered to pay $1,000 per year to conduct butterfly tours of the property. The lower court stated because this offer fell short of the $1,500 in annual property taxes, the lot had completely lost all economic value. As the court put it, "a piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value." (R. 12).

Courts have occasionally found that a taking occurs when a property's retained value is outweighed by cost, but the instant case is distinguishable. In *Bowles v. United States*, 31 Fed. Cl. 37 (1994), plaintiff brought a successful categorical taking claim after a local ordinance resulted in a substantial negative value of the property. Bowles bought the property at issue with the specific intention of building a single family residence, which was the property's only possible use. Shortly after purchasing the property, plaintiff was denied a permit to backfill his property to install a septic field. His only option was to put in an above ground septic tank. This would come with a substantial installation cost and a prohibitively expensive $27,000 per year in maintenance on a lot valued at approximately $70,000. *Id.* at 49

The instant case is distinguishable from the *Bowles* case on several grounds. The *Bowles* court repeatedly stressed the fact that a taking occurred because the cost of the regulation was not just negative, but *substantially* negative. Due to the regulation at issue, Bowles would incur nearly forty percent of the value of the property each year in maintenance costs due to the regulation. In the instant case, Plaintiff's costs amount to $1,500 in property taxes, which will be almost entirely offset by the $1,000 rent from the Butterfly Society. This is a mere $500 annual loss, far from the $27,000 in annual costs incurred under the regulation by Bowles. Further, Bowles had shown that the only economic value of his property was for a residential property, which could not be done without a way to dispose of waste. In the instant case, the most valuable use of the land may be as a residential lot, but the fact that the Butterfly Society is willing to pay to conduct butterfly tours in and of itself shows that the Cordelia Lot retains economic value.

On alternate grounds, this court could find that Plaintiff has not suffered a deprivation in value, and is therefore not entitled to compensation for a taking. Under both *Penn Central* and *Lucas,* a taking occurs when a government regulation partially or completely reduces the economic value of a property, respectively. *Penn Central Transp. Co*, 438 U.S at 123; *Lucas,* 505 U.S. 17 1017. In order to determine the economic impact of the regulation in question, the court must compare the fair market value of the property before the alleged taking with the fair market value of the property after the alleged taking. *Bowles*, 31 Fed. Cl. at 46.

In the instant case, the lower court found FWS liable for $10,000 in damages, meaning the ESA reduced the value of the property by $10,000. In determining that the value was reduced by $10,000, the court failed to consider the annual rent from the Butterfly Society. Until the Cordelia Lot returns to its natural state in ten years, Plaintiff stands to make $10,000 in rent. When taken into consideration, this completely offsets the $10,000 loss in value as determined

by the lower court. Thus, the Cordelia Lot's value has not been reduced by the ESA's application to Plaintiff's property, and therefore a compensable taking has not occurred.

VI. PUBLIC TRUST PRINCIPLES INHERENT IN THE 1803 CONGRESSIONAL GRANT PRECLUDE PLAINTIFF'S TAKING CLAIM BASED ON THE COUNTY'S DENIAL OF A WETLANDS PERMIT.

A regulation that prevents any economically beneficial use of a property, and would otherwise constitute a categorical taking, is permissible if the regulation's restrictive effect is inherent in the property's title due to, "background principles of the State's law of property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). The public trust doctrine provides that navigable waters are held, "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). The Northwest Ordinance of 1787 established public trust principles in the beds of Lake Union, a navigable water formerly part of the Northwest Territory, prior to the 1803 congressional grant to Cornelius Lear. Thus, public trust limitations constitute "background principles" that inhered in Plaintiff's title at the time of the grant. *See Espalande Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (finding the public trust doctrine constituted a "background principle" inherent in title). Pursuant to these inherent limitations, the grant never permitted a grantee to fill and develop any portion of the Lake in direct contradiction of the public trust doctrine. The County's denial of Plaintiff's permit application to fill a half-acre marsh within Lake Union does not constitute a taking because public trust principles inherent in title prevented any such development regardless of application of the County Wetlands Law to Lear Island.

A. The Northwest Ordinance imposed public trust principles inherent in the 1803 congressional grant of Lake Union's beds.

The Northwest Ordinance of 1787, enacted by the Congress of the Confederation of the United States, established the Northwest Territory. The United States Congress adopted the Ordinance in 1789 when Congress came into existence. 1 Stat. 50 (1789). The Northwest Territory consisted of the modern states of Ohio, Michigan, Indiana, Illinois, Wisconsin, New Union, and the northeastern portion of Minnesota. Article IV of the Northwest Ordinance provides:

> [t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor. *Id.* at Art. IV.

The Northwest Ordinance is a legal origin of the public trust doctrine in the modern states previously part of the Northwest Territory. *See Glass v. Goeckel*, 473 Mich. 667, 678 (2005) (holding the public trust doctrine "passed from English courts to the American colonies, to the Northwest Territory"); *Illinois Steel Co. v. Bilot*, 84 N.W. 855, 856-57 (Wis. 1901) (holding the beds of navigable waters were held in trust for the public when Wisconsin was part of the Northwest Territory). The District Court incorrectly concluded no public trust limits inhered in the 1803 grant because courts did not widely recognize public trust rights in nontidal navigable waters at the time of the conveyance. The distinction between tidal and nontidal waters is irrelevant, however, because the Northwest Ordinance applied public trust principles to all *navigable* waters regardless of whether the body of water was tidally influenced.

Federal law dictates whether a water is "navigable" for purposes of state riverbed title. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012). Federal law provides waters are "navigable" for purposes of determining title to a water's beds if they are "navigable in fact."

The Daniel Ball, 77 U.S. 557, 563 (1870). Waters are "navigable in fact" if, "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* Lake Union is clearly "navigable in fact" because it traditionally has been used for interstate navigation. Further, the cove Plaintiff proposes to fill was historically used as a boat landing. Thus, Lake Union was a "navigable water" within the Northwest Territory, and the Northwest Ordinance imposed public trust limitations implicitly included in the 1803 grant to Cornelius Lear.

B. Plaintiff may not base a takings claim on the County's denial of her permit application because public trust principles inherent in the 1803 grant prevent the development of the marsh land regardless of application of the County Wetlands Law to the Cordelia Lot.

The District Court concluded the Lear's have superior title to Lake Union's beds than the State of New Union because Cornelius Lear received title prior to New Union's statehood, which defeats any claim for title by New Union under the equal-footing doctrine. (R. 10-11). The equal-footing doctrine provides:

> [w]hen the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown...Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Utah Div. of State Lands v. United States, 482 U.S. 193, 196 (1987). Although it may be true the pre-statehood grant expressly conveyed title to Lake Union's beds to Cornelius Lear in fee simple superior to New Union's equal-footing doctrine claim, the fact remains that public trust principles inherent in Lear's title prevent Plaintiff from alleging a Fifth Amendment taking claim based upon the County's denial of her permit application under the County Wetlands Law. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

The Fifth Amendment of the U.S. Constitution prevents private property from being taken for a public use without just compensation. U.S. Const. amend. V. However, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use... it may resist compensation...if...the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Plaintiff may not fill and develop the half-acre of marsh land because the public has a right to, "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties," within Lake Union. *Illinois Cent. R. Co.,* 146 U.S. at 452. As the Supreme Court has explained:

> [T]he title to the submerged lands of navigable waters...was acquired subject to the rights which the public have in the navigation of such waters...It is a qualified title, a bare technical title, not at his absolute disposal...but to be held at all times...consistent with or demanded by the public right of navigation.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900). Although New Union has not established the scope of its public trust doctrine, "one can consider...a federal prohibition on any state efforts to abrogate the doctrine entirely, but allowing states a wide berth to expand the doctrine's protection beyond a federal minimum," established by *Illinois Cent. R. Co*. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699, 704 (2006). Thus, at a minimum regardless of the scope of New Union's public trust doctrine, Plaintiff cannot obstruct or interfere with the public's right to access Lake Union for navigation and recreation pursuant to *Illinois Cent. R. Co.* If Plaintiff filled and developed the marsh land to construct a private residence, she unquestionably would prevent access to Lake Union's waters held by New Union in trust for the people of the state. Plaintiff's title to Lake Union's beds is a "qualified title" and does not entitle her to fill the marsh land, and she may not base a Fifth Amendment takings claim upon her inability to do so because public trust principles inherent in title prevent such action regardless of the County's permit denial.

VII. FWS IS NOT LIABLE FOR A CATEGORICAL TAKING OF THE CORDELIA LOT BECAUSE THE IMPACT OF THE ESA AND COUNTY WETLANDS LAW MUST BE CONSIDERED SEPARATELY, AND REGARDLESS BACKGROUND PRINCIPLES IN TITLE PRECLUDE PLAINTIFF'S CATEGORICAL TAKING CLAIM.

Categorical or *per se* takings occur when a regulation prevents all economically beneficial or productive uses of property. *Lucas*, 505 U.S. at 1015. A claimant must demonstrate the property at issue is rendered valueless by a regulation to establish a *per se* takings claim. *Dist. Intown Properties Ltd. P'ship v. D.C.*, 198 F.3d 874, 882 (D.C. Cir. 1999). The County Wetlands Law and ESA should be considered separately to determine whether a categorical taking of the Cordelia Lot occurred. When the impacts of the ESA and County Wetlands Law are considered independently, economic value of the Cordelia Lot remains and thus Plaintiff's categorical taking claim is precluded. Even if this Court, however, disagrees with FWS' contention that the regulations should be considered separately for categorical takings analysis purposes, it remains that "background principles" in title preclude Plaintiff's categorical taking claim.

A. Regulations that impact a property's potential development must be considered separately to determine whether a categorical taking has occurred.

The District Court declared the impacts of the County Wetlands Law and ESA on the potential development of the Cordelia Lot should be considered in conjunction to determine whether a categorical taking occurred. (R. 11-12). There is no precedent, however, to support the District Court's interpretation that all restrictions that may impact a property's potential development should be considered concurrently in a categorical takings analysis. If the impacts of the County Wetlands Law and the ESA on the development of the Cordelia Lot are considered independently, it is impossible to establish a claim that the Lot was completely deprived of its economic value.

The ESA solely prevents destruction of lupine fields without an ITP. Lear could have received an ITP if she replaced the destroyed lupine fields with additional contiguous lupine fields. All of the land within the Cordelia Lot, however, was covered with lupine fields, thus the only way to construct a home on the lot to comply with ESA requirements would be to fill and develop the marsh land. Therefore, application of the ESA to the Cordelia Lot does not prevent all economic value of the land because under the ESA Plaintiff could still feasibly develop a residence on her Lot.

In order to develop the marsh land Plaintiff needed to acquire a permit pursuant to the County Wetlands Law, a separate and distinct restriction on property development from the ESA. The County denied Plaintiff's permit application, however, because permits are restricted to water-dependent uses, which does not encompass construction of a residence. Application of solely the County Wetlands Law still permitted Plaintiff to develop the nine acres of land on the Cordelia Lot.

Although FWS acknowledges the ESA and County Wetlands Law effectively prevent any possibility of construction of a residence on the Cordelia Lot due to each regulation's concurrent development limitations, it remains that it is inappropriate to base a categorical takings claim upon multiple regulations. Nowhere in the *Lucas* decision did the Supreme Court state or imply that a categorical taking claim based upon the cumulative impact of all levels of governmental regulations would be tenable. Furthermore, it would violate public policy to hold governmental actors jointly and severally liable for a categorical taking based on the existence and impact of other restrictions that the government agency does not actually implement, and may not even be aware of its existence.

In sum, the County Wetlands Law and ESA must be considered separately to determine whether a categorical taking occurred. Neither restriction completely deprives the Cordelia Lot of its entire economic value independently, thus no categorical taking of the Cordelia Lot can be alleged.

B. Even if the regulations are considered concurrently, it remains that "background principles" in title preclude Cordelia Lear's categorical taking claim.

As was previously discussed a categorical taking claim is precluded if a regulation's restrictive effect is inherent in a property's title due to, "background principles of the State's[2] law of property." *Lucas,* 505 U.S. at 1029. Again, public trust limitations inherent in the 1803 grant to Cornelius Lear never permitted Plaintiff to develop and fill any portion of Lake Union encompassed by Plaintiff's title, regardless of application of the County Wetlands Law. Thus, even if both restrictions are considered concurrently only the ESA has any impact on Plaintiff's proposed development. The question remains then whether the prior designation of the Heath as critical habitat is also a "background principle" inherent in title.

It appears the question of whether the ESA constitutes a "background principle" is an issue of first impression. Scholars, however, have considered this possibility post-*Lucas* and have generally concluded because, "public ownership of wildlife has a long legal history, and courts have relied on this doctrine to support a variety of restrictions on private property interests...takings claims based on modern laws protecting threatened and endangered species,"

[2] "*Lucas* spoke only of 'background principles of the *State's* law of property and nuisance' in ascertaining what property interests are constitutionally protected. *Lucas,* 112 S. Ct. at 2886 (emphasis added). However, its approach has been held applicable to federal statutory law as well. *See Preseault,* 27 Cl. Ct. at 88-89; *M&J Coal Co. v. United States,* 30 Fed. Cl. 360, 367-70 (1994) (citing *Preseault*). The extension of *Lucas* to federal statutes appears sound. There is no principled reason why federal law should be any less cognizable as a 'background principle,' since a purchaser's expectations at the time of acquisition may be shaped as much by then-existing federal law as by state law." Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property,* 24 Envtl. L. 369 (1994).

are precluded. John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause,* 16 Tul. Envtl. L.J. 331 (2003); *see also* Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?,* 80 Iowa L. Rev. 297 (1995); *see also* Patrick A. Parenteau, *Who's Taking What? Property Rights, Endangered Species, and the Constitution*, 6 Fordham Envtl. L.J. 619 (1995) (finding, "[h]istory, logic, and the public interest all suggest" that "wildlife and ecosystem preservation are included within the 'background principles' of state and federal law.") Wildlife "[f]or literally thousands of years" has been considered a public resource. *Id.* Furthermore, "[c]ourts also have invoked the public ownership doctrine to uphold state authority to regulate uses of private property without compensation in order to protect or restore wildlife." *Id. See Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993).

Plaintiff may not allege a categorical taking against FWS because the ESA's critical habitat restrictions constitute a "background principle" that had already imposed limitations on the uses of the Cordelia Lot prior to her inheritance of the property. Prior to Plaintiff's inheritance of the property in 2005, the Heath had already been designated as Karner Blue Butterfly critical habitat under the ESA in 1992. Although the Lot's market value would be $100,000 if a residence could be constructed on the Cordelia Lot, when Plaintiff inherited the property, however, she never feasibly could have constructed a residence on the lot due to the ESA's restrictions upon her property's use. Furthermore, the property has not been appraised since the County's denial of her permit application under the County Wetlands Law, thus it is unknown precisely how much loss in property value Plaintiff indeed has suffered, if any, since her inheritance of the Cordelia Lot.

Therefore, Plaintiff cannot base a categorical takings claim upon the ESA's application to her property because the Heath's designation as Karner Blue Butterfly critical habitat pursuant to the ESA arguably is a "background principle" in the title she inherited.

CONCLUSION

The ESA's prohibition of unpermitted takes of any endangered species substantially affects interstate commerce and is thus a valid exercise of legislative power under the Commerce Clause. Plaintiff's claim that an uncompensated taking occurred is not ripe for review because it does not arise out of a final agency action, and Plaintiff will not suffer hardship as a result of being denied court consideration. The entirety of Lear Island should be considered to determine whether application of the ESA to the Cordelia Lot resulted in a categorical taking. Plaintiff, however, has not suffered a *per se* taking because the Cordelia Lot's economic value has only been temporarily deprived of its value, and regardless the Butterfly Society's offer of annual payment negates any possible claim of a categorical taking.

Furthermore, public trust principles preclude Plaintiff's taking claim based upon the County Wetlands Law. In addition, FWS is not liable for a categorical taking of the Cordelia Lot because the ESA and County Wetlands Law must be considered separately for the takings analysis. Even if this Court, however, disagrees and concludes the ESA and County Wetlands Law must be considered concurrently to determine whether a categorical taking has occurred, "background principles" in title, including the public trust doctrine and the ESA, preclude Plaintiff's categorical takings claim.

For the foregoing reasons, this court should: (1) affirm the district court's conclusion that the ESA may constitutionally be applied to the Cordelia Lot, and (2) dismiss Plaintiff's categorical taking claim.