Team No. 17

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 16–0933

CORDELIA LEAR,

Plaintiff–Appellee–Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant–Appellant–Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant–Appellant.

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

BRIEF OF CORDELIA LEAR, Plaintiff–Appellee–Cross Appellant

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STATEMENT OF JURISDICTION

Cordelia Lear ("Lear") brought a claim seeking a declaration that the Endangered Species Act ("ESA") unconstitutionally exceeded the scope of congressional authority under the Commerce Clause. In the alternative, Lear alleged that the ESA's Karner Blue regulation constituted a regulatory taking of her property and she therefore sought just compensation. Lear sought judicial resolution of these federal questions pursuant to 28 U.S.C. § 1331. On June 1, 2016, the district court issued its ruling upholding the ESA as a valid exercise of congressional authority while at the same time awarding Lear $100,000 as just compensation for the ESA's regulatory take of her property. The order of the district court is final and therefore jurisdiction in this Court is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. The Commerce Clause grants Congress limited authority to regulate interstate commerce. The ESA's prohibition on takings of the Karner Blue is a regulation non-economic activity that, at best, has an attenuated connection to interstate commerce. Does the Commerce Clause grant Congress the authority to implement such a regulation?

II. The ripeness doctrine stems from Article III's case or controversy requirement and prohibits a court from hearing a claim if it is not appropriate, or "ripe," for judicial resolution. However, ripeness does not require a claimant to complete unreasonable or futile tasks before being allowed to bring a claim. If the only remaining steps available to Cordelia Lear are impossible for her to complete or so unduly burdensome as to be patently unreasonable, is her takings claim ripe for adjudication?

III. The relevant parcel for takings claim analysis must be evaluated with a focus on the parcel as a whole. Since 1965, Lear Island has been split into three distinct lots and, at the time of her takings claim, Cordelia Lear only holds title to the Cordelia Lot. Is the Cordelia Lot then the relevant parcel for Cordelia Lear's regulatory takings claim?

IV. A landowner suffers a *per se* taking under *Lucas* when prospectively permanent regulations deprive land of all current and expected future economic use and value. The restrictions on the Cordelia Lot, imposed pursuant to the ESA, prohibit any land development and interference with an endangered butterfly species. Does the fact that the lot could become developable upon the natural destruction of the butterfly habitat preclude Lear's total takings claim?

V. A landowner suffers a *per se* taking under *Lucas* when a regulation strips the land of all economically viable use, resulting in a loss of all economic value. The Butterfly Society offered to pay Lear $1,000 per year to enter upon the Lot for wildlife viewing. Has the Cordelia Lot retained economically viable use and economic value based upon the Butterfly Society's offer?

VI. A government may not limit private land-uses under the authority of the public trust doctrine unless the government holds the land in the public's trust and the land-use at issue violates the public's trust. Lear sought to fill the marsh cove on her submerged lands to build a sing-family home. Do public trust principles inherent in title to the Cordelia Lot preclude Lear's claim for a taking based on the denial of a county permit to fill the cove?

VII. Constitutional takings jurisprudence necessitates priority in compensating landowners for loss of all economic use and value of land at the hands of government regulations. The ESA's restrictions and the county's wetlands restrictions together restrict development of a home on the Cordelia Lot, but separately do not. May the government evade its duty to compensate a landowner when a federal or county regulation, by itself, would still allow development, but together do not?

STATEMENT OF THE CASE

In 1803, when present-day New Union was still part of the Northwest Territory, the United States granted Cornelius Lear title in fee simple absolute to all of Lear Island and all lands under water within a 300-foot radius of the shoreline of Lear Island. (R. 4–5.) Lear Island is a 1,000-acre island located on Lake Union, a lake that has traditionally been used for interstate navigation. (R. 4.) Cornelius Lear and his descendants have lived on Lear Island since the 1803 grant. (R. 5.) In 1965, King James Lear, who owned the entirety of the 1803 grant, devised an estate plan that divided Lear Island into three separate parcels to be separately owned by his three daughters Cordelia, Regan, and Goneril. (R. 5.) At the time of the subdivision, the Brittain County Planning Board assured Mr. Lear that a single-family residence could be built on each lot in conformance with zoning requirements. (R. 5.) The original homestead on the island was on the Goneril Lot, and King James Lear built another residence on the Regan Lot after deeding the

properties to his daughters. (R. 5.) The three daughters came into possession of their deeded properties upon King James Lear's death in 2005. (R. 5.)

In 2012, Cordelia Lear sought to build a residence on her lot. (R. 5.) The Cordelia Lot is a ten-acre parcel, consisting of nine acres of open field with an access strip ("the Heath") and one acre of emergent cattail marsh in a cove. (R. 5.) The marsh cove historically had been open water and used as a boat landing. (R. 5.) However, the U.S. Army Corps of Engineers now considers this portion of the lake to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899. (R. 7.) Unlike the other parcels on Lear Island, the Heath has been kept open by annual mowing each October for decades. (R. 5.) Consequently, the Heath has become covered with wild blue lupine flowers. (R. 5.)

The Karner Blue butterfly species has been listed as an endangered species under the ESA since 1992, and the Fish and Wildlife Service ("FWS") designated the Heath as critical habitat for the New Union subpopulation of the Karner Blues in 1992. (R. 5–6.) While Karner Blue populations exist in other states, New Union's last remaining population of the Karner Blues live on the Heath. (R. 5.) The wild blue lupine flowers on the Health are essential for the survival of Karner Blue larvae, which attach to the lupine plant and feed on the leaves. (R. 5–6.) The Heath's lupine fields are adjacent to the successional forest on the Goneril Lot, which provides ideal habitat for the Karner Blues. (R. 6.) Karner Blues do not migrate, and New Union's Karner Blues subpopulation is entirely intrastate. (R. 5–6.) If the Heath were not mowed annually, the lupine fields would naturally convert to a successional forest of oak and hickory trees, which would eliminate the Karner Blues' habitat and result in extinction of the New Union subpopulation after ten years. (R. 7.)

In April 2012, Cordelia Lear contacted the New Union FWS field office to inquire whether she needed any approval or permits to develop her land. (R. 6.) FWS agent L.E. Pidopter told Lear that any disturbance to the Heath other than annual mowing would constitute a "take" of the Karner Blues, but Pidopter informed Lear that it might be possible for her to obtain an Incidental Take Permit ("ITP") under section 10 of the ESA. (R. 6.) Pidopter told Lear that she needed to develop a Habitat Conservation Plan ("HCP") and environmental assessment document under the National Environmental Protection Act ("NEPA") to file an application for an ITP. (R. 6.) Pidopter advised Lear that an HCP would only be approvable if it provided for additional contiguous lupine habitat on an acre-for-acre basis and a commitment to maintain the lupine fields through annual mowing. (R. 6.)

In May 2012, the FWS New Union field office sent Lear a letter confirming that her "entire ten-acre property was a critical habitat for the Karner Blues and that any disturbance to the lupine fields other than annual mowing during the month of October would constitute a "take" of the Karner Blues in violation of section 9 of the ESA." (R. 6.) The letter reiterated what FWS agent Pidopter had told Lear, and that an HCP would require, at a minimum, that all acreage of lupine field disturbed by development would have to be replaced with contiguous acreage, and that the property owner would have to commit to maintain the remaining and newly created lupine fields by annual mowing each October. (R. 6.)

However, the only land that is contiguous to the Heath is the Goneril Lot. Cordelia Lear is estranged from her sister, and Goneril Lear has refused to consider cooperating in any HCP that involves restrictions on her property. (R. 6.) Furthermore, an environmental consultant advised Lear that preparation of an application for an ITP, including the required HCP and environmental assessment documents, would cost $150,000. (R. 6.)

Accordingly, Lear decided to not pursue and ITP, but instead developed an alternative development proposal ("ADP") that would not disturb the lupine fields. The ADP would fill in a half-acre of the marsh cove to create a lupine-free building site for a single-family home and create a causeway for access to the shared mainland causeway without disturbing the access strip. (R. 7.) Because the U.S. Army Corps of Engineers does not consider this portion of the lake to be navigable, the project would not require any federal approvals. (R. 7.) However, the project required a permit pursuant to the Brittain County Wetland Preservation Law of 1982, and the Brittain County Wetlands Board denied Lear's permit application. (R. 7.)

The fair market value of the Cordelia Lot without any restrictions preventing the development of a single-family home is $100,000. (R. at 7). However, there is no market in Brittain County for a parcel such as the Cordelia Lot with such restrictions for recreational use. Also, there is no market for the property in its current state as agricultural or timberland. (R. 7.) Although the Brittain County Butterfly Society ("Butterfly Society") has offered to pay Lear $1,000 annually to enter upon the land for wildlife viewing, the property taxes on the Cordelia Lot are $1,500 annually. (R. 7.)

The United States District Court for the District of New Union in Case No. 112–CV–2015–RNR held: (1) the ESA restrictions pertaining to the Karner Blues is a legitimate exercise of Congress's Commerce Clause power, (2) Lear's takings claim is ripe for review, (3) the Cordelia Lot is the only relevant parcel in the takings analysis, (4) the ESA restrictions are not considered temporary, (5) the Lot was deprived of all economic value despite the Butterfly Society's offer to pay Lear $1,000 annually, (6) principles of public trust do not preclude Lear's takings claim, and (7) the restrictions imposed by the FWS and Brittain County must be considered together.

SUMMARY OF ARGUMENT

As a threshold matter, the Court should hold that the ESA prohibition on takings of the Karner Blue exceeds the scope of congressional Commerce Clause authority. While the Commerce Clause grants Congress the power to regulate interstate commerce, that power must be limited by effective bounds to maintain the distinction between what is truly national and what is truly local. The ESA's Karner Blue regulation exceeds those bounds because it regulates non-economic activity with only a tenuous connection to interstate commerce. Also, it is not justifiable as necessary and proper to the Commerce Clause because it is not rationally related to the implementation of Congress's Commerce Clause power.

If the ESA's Karner Blue regulations are a valid exercise of Congress's Commerce Power, the Court should find that Lear's regulatory takings claim is ripe for judicial resolution. Prior to bringing her takings claim, Lear exhausted all of the necessary and reasonable steps that the government entities needed to fully determine the extent of the regulatory restrictions on her property. She should not then be required to complete additional steps that are both impossible for her to complete, patently unreasonable, and ultimately futile.

In evaluating Lear's regulatory takings claim, the Court should find that the Cordelia Lot as the only relevant parcel and that the restrictions affect the parcel as a whole. Not only is the Cordelia Lot the only piece of land owned by Lear, but it has also been treated as a distinct parcel and economic unit since 1965. Also, the Court should consider the ESA's restrictions on the Lot to be prospectively permanent, rather than temporary, because the restrictions, which would last a minimum of ten years, deprive the Lot of all current and expected future economic use and value. Furthermore, the Court should find that the regulatory restrictions imposed by the FWS under the ESA and Brittain County under the Brittain County Wetlands Preservation Law

together deprive the whole parcel of all economic use and value, and that both government entities are liable because the regulations jointly cause an indivisible harm.

Lastly, the Court should find that principles of public trust do not preclude Lear's takings claim based on Brittain County's denial of a wetlands permit, because principles of public trust did not inhere in Cordelia Lear's title to the Lot, and the public trust doctrine would not prohibit filling the marsh cove.

STANDARD OF REVIEW

"Whether a government action constitutes a taking is a question of law based on underlying facts." *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115 (Fed. Cir. 2015). The Court reviews "the trial court's conclusions of law de novo and underlying facts for clear error." *Id.*

ARGUMENT

I. The ESA's provision prohibiting takings of the entirely intrastate Karner Blue population on Lear Island is an unconstitutional overreach of congressional authority under the Commerce Clause.

A. The ESA's prohibition on takings of the Karner Blue is a broad prohibition of non-economic activity that has, at best, an attenuated connection to interstate commerce and therefore exceeds the scope of congressional authority under the Commerce Clause.

The ESA's prohibition on any kind of taking of the Karner Blue broadly prohibits activity that is facially non-economic and, additionally, is too tenuously connected to interstate commerce to be valid under the Commerce Clause. The Commerce Clause provides that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. This clause appears to grant Congress a broad swath of authority to regulate almost anything. However, the Supreme Court has emphasized "that even under [its] modern, expansive interpretation of the Commerce

Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000). As such, the Court has delineated three broad categories of activity that the Commerce power gives Congress the authority to regulate: the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *Id.* at 608–09. Regulation of the Karner Blue involves neither the channels nor the instrumentalities of interstate commerce and therefore, like in *Morrison*, only the third category, involving activities that substantially affect interstate commerce, is applicable in this case.

As a result, this Court must determine whether the ESA's regulation prohibiting takings of the Karner Blue is a valid exercise of congressional authority to regulate activities that substantially affect interstate commerce. In making this determination, the Supreme Court identified four factors to be considered: (1) whether the regulation was economic or non-economic in nature; (2) whether the regulation has a jurisdictional element limiting its reach; (3) whether the legislative history includes express congressional findings regarding the regulated activity's effect on interstate commerce; and (4) whether the link between the regulated activity and interstate commerce is overly attenuated. *See id.* at 610–12 (citing *United States v. Lopez*, 514 U.S. 549, 561–67 (1995)). In this case it is clear that the second and third factors are not present. Applying the remaining factors, it is highly unlikely that the Commerce Clause grants Congress the authority to regulate takings of the Karner Blue on Lear Island. As a result, the Court should overturn the decision of the New Union District Court and find that the ESA's prohibition on takings of the Karner Blue exceeds the scope of congressional power under the Commerce Clause.

1. *The Karner Blue regulation broadly prohibits activity without regard for the activity's nature and is therefore a facially non-economic regulation.*

The ESA's regulation prohibiting takings of the Karner Blue is a facially non-economic regulation and therefore outside the purview of congressional authority under the Commerce Clause. The first factor identified by *Lopez* requires the Court to determine "whether the regulated activity has anything 'to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.'" *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (quoting *Lopez*, 514 U.S. at 561). Largely based on this consideration, both the Gun Free School-Zones Act and the Violence Against Women Act were struck down by the Supreme Court because neither statute dealt with economic activity and therefore both exceeded the scope of Congress' authority under the Commerce Clause. *See Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 627. In fact, a review of the Commerce Clause jurisprudence reveals that a regulation of an intrastate activity has only been upheld based on that activity's substantial effect on interstate commerce when the activity is some kind of economic endeavor. 529 U.S. at 611.

In this case the ESA's regulation prohibiting takings of the Karner Blue is clearly a regulation of non-economic activity. Under the ESA, a take includes any type of harassing, hunting, pursuing, harming, killing, wounding, shooting, trapping, capturing, or collecting of any endangered species including the Karner Blue. *See* 16 U.S.C. § 1538. None of these activities are expressly economic or commercial in nature. Instead, the ESA's Karner Blue regulation is a broad prohibition on any activity, regardless of its nature, that might harm the Karner Blue or its habitat. It is therefore, facially, a non-economic regulation. Despite this, it could be argued that by preventing Lear from developing her land, the Karner Blue regulation does prohibit economic activity. However, this argument mischaracterizes the ESA's takings provision by positing that the Act's effect on preventing economic activity makes it a commercial development regulation.

In reality, the ESA's takings provision is aimed exclusively at preserving species, with no regard for commercial possibilities and no reference to commercial ends. *See GDF Realty Invs. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). To hold otherwise would impose "no limit [on] Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* That conclusion flies in the face of the Supreme Court's Commerce Clause jurisprudence and, as a result, this Court should find the ESA's prohibition on takings of the Karner Blue is a regulation of non-economic activity.

2. *The Karner Blue regulation's connection to interstate commerce based on its environmental impact or potential future influence on industries are far too attenuated to be regarded as substantial.*

Any connections that the ESA's prohibition on takings of the Karner Blue has to interstate commerce are tenuous at best and therefore not nearly enough to be a valid exercise of congressional authority under the Commerce Clause. The final *Lopez* factor requires the Court to determine "whether the relationship between the regulated activity and the interstate commerce is too attenuated to be regarded as substantial." *Rancho Viejo*, 323 F.3d at 1069. Based on this consideration the *Lopez* Court rejected the "costs-of-crime" and "national productivity" arguments for the Gun Free School-Zones Act because each would have allowed Congress to regulate all activities that might lead to violent crime, "regardless of how tenuously they relat[ed] to interstate commerce." *Lopez*, 514 U.S. at 564. Similarly, the *Morrison* Court rejected the "aggregate effect" argument for the Violence Against Women Act because it too would have allowed federal regulation of virtually anything based on a weak and attenuated connection to interstate commerce. *Morrison*, 529 U.S. at 617. In reaching that conclusion, the *Morrison* Court

reaffirmed the *Lopez* Court's underlying principle, that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.*

Here the ESA's prohibition on takings of the Karner Blue cannot be validated based on its potential connection to interstate commerce because each of the purported connections, if any exist at all, are too attenuated to be substantial. The first of these potential connections argues that the ESA's regulation can prohibit all activities that could harm the Karner Blue because the species as a whole affects the environment and the environment, in turn, affects interstate commerce. However, accepting this argument places no logical limit on congressional power. Instead, it enables Congress to regulate anything that might affect the environment, which essentially grants it the power to regulate everything. And while the Karner Blue may indeed affect the environment, that is not enough to justify the regulation because "the Commerce Clause empowers Congress 'to regulate commerce' not [the environment]." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting). As a result, the potential affect on interstate commerce resulting from the environmental impact of the ESA's Karner Blue regulation is far too attenuated to stand and, therefore, should be rejected by the Court.

A second potential connection to interstate commerce stems from the idea that allowing takings of the Karner Blue can have a direct impact on interstate commerce because, even though the Karner Blue is not currently used in any commercial activity, it may be in the future. The ESA's legislative history appears to lend support to this contention by hypothesizing that cures for cancer or other medical and scientific breakthroughs could lie hidden and undiscovered in the genetic or biological structures of the endangered species. *See* H.R. REP. NO. 93-412, at 4 (1973). However, the mere "*possibility* of future substantial effects of the [Karner Blue] on interstate

commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *GDF Realty*, 326 F.3d at 638. In addition, as with the purported environmental impact connection, this supposed future use connection also imposes no logical limit on congressional power as virtually everything has the potential for future commercial use. Therefore, the Court should reject this future use connection and, ultimately, strike down the ESA's prohibition on takings of the Karner Blue as a violation of the Commerce Clause.

B. The Endangered Species Act's prohibition on takings of the Karner Blue is a part of a larger regulatory scheme, however, that regulatory scheme is not rationally related to economic activity and therefore the prohibition is neither necessary nor proper to the implementation of the Commerce Clause and ultimately constitutes an unconstitutional overreach of congressional authority.

The ESA's Karner Blue regulation is equally unjustifiable under the Necessary and Proper Clause because it is not rationally related to an economic regulatory scheme that is otherwise valid under the Commerce Clause. The Necessary and Proper Clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. This Clause is not meant to confer additional authority onto Congress, but is instead meant to clarify that Congress may utilize the necessary means to exercise its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). In line with that purpose, the Supreme Court has limited the scope of the Necessary and Proper Clause by requiring all statutes enacted under its authority to be "rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

As noted above, the Commerce Clause—granting Congress the authority to regulate interstate commerce—is one of Congress' constitutionally enumerated powers. *See* U.S. CONST. art. 1, § 8, cl. 3. As such, the Necessary and Proper Clause grants Congress the authority to enact statutes that are rationally related to implementation of the Commerce Clause, even if those statutes, by themselves, fall outside the scope of that enumerated power. *See Comstock*, 130 S. Ct. at 1956. The Supreme Court expressly acknowledged this concept in *Gonzales v. Raich* in which the Court upheld a comprehensive statute regulating the interstate marijuana market despite the fact that it also encompassed purely intrastate possession and consumption of marijuana. *See* 545 U.S. 1, 22 (2005). In doing so, the Court noted that the regulation of the intrastate activity was both necessary and proper because "it was an essential part of a larger regulation of economic activity" and the otherwise valid regulatory scheme would be severely "undercut unless the intrastate activity were regulated." *Id.* at 24–25. However, this holding was largely based on the existence of an established, though illicit, interstate market for marijuana as well as the purpose of the regulation being "to control the supply and demand of controlled substances in both lawful and unlawful drug markets." *Id.* at 18–19.

Contrary to the case in *Raich*, here, the ESA's prohibition on takings of the Karner Blue is not part of a larger regulatory scheme of economic activity. There is no established market for the Karner Blue that the prohibition seeks to regulate nor is the purpose of the prohibition to control any economic activities pertaining to the Karner Blue. Instead, the ESA's prohibition on takings of the Karner Blue simply seeks to preserve the species with no regard for any economic or commercial concerns. Therefore, though the ESA's prohibition clearly relates to a larger regulatory scheme, it cannot be said that that regulatory scheme is rationally related to interstate commerce nor can it be said that limiting the ESA's ability to restrict takings of the Karner Blue

in any way implicates its ability to regulate commerce. And while it is true that preventing the ESA from regulating takings of the Karner Blue may undermine the Act's non-economic, conservation goals, those goals are simply not enough to justify the prohibition under the Necessary and Proper Clause. If they were, then there would be no limit to congressional authority under the Necessary and Proper Clause and Congress would be permitted to regulate anything so long as its regulations were rationally related to a policy objective. Not only does this fly in the face of the concept that federal authority should be subject to reasonable limits but it also eliminates any distinction between federal power and the states' police power. As a result, the Court should overturn the New Union District Court and strike down the ESA's prohibition on takings of the Karner Blue because it constitutes an unconstitutional overreach of congressional authority.

II. Despite failing to apply for an ITP under § 10 of the ESA, Lear's regulatory takings claim is ripe for judicial resolution.

Cordelia Lear's ("Lear") takings claim is ripe for judicial resolution because she has exhausted all of the necessary and reasonable administrative steps and requiring her to undertake additional procedures would be a futile endeavor that would likely render her takings claim worthless. Stemming from Article III's case or controversy requirement, the ripeness doctrine prohibits a federal court from hearing a claim unless it is appropriate, or "ripe," for judicial resolution. *See Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). Applying this doctrine to Fifth Amendment takings claims, the Supreme Court has made clear that a claim alleging "that the application of government regulations effects a taking of a property interest 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." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). A final decision is made when

the regulatory agency determines whether a taking has occurred by clearly defining the extent of permitted development on the land in question for both the landowner and the court. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (1985). Therefore, when the permitted uses for a piece of land are reasonably well known, a final decision has been reached and the claimant's takings claim is likely ripened. *Id.* at 620.

This general rule typically requires a claimant to follow whatever reasonable and necessary steps are needed for a regulatory agency to fully determine the extent of the regulatory restrictions on the claimant's property. *See id.* at 620–21. What it does not require, however, is for a claimant "to submit applications for their own sake." *Id.* at 622. In other words, if there are no further reasonable and necessary steps that a claimant can take to allow the regulatory agency to exercise its full discretion, then the permissible uses of a property are reasonably certain and a final decision has been reached. *See id.* at 620. The claimant will not then be required to complete additional procedures or submit "further and futile applications with other agencies." *Id.* at 626. Here, the FWS advised Lear to obtain an ITP, which would require her to develop an approvable HCP for the Karner Blue. However, fulfilling this additional step would be a futile endeavor because: (1) the conditions required for an approvable HCP are impossible for Lear to fulfill; and (2) the cost of preparing the required HCP is overly burdensome and therefore patently unreasonable. As a result, Lear has clearly received a final decision from the FWS regarding the permissible uses for her land and her takings claim is thereby ripe for adjudication.

A. <u>It is impossible for Lear to create any Habitat Conservation Plan that would make her Incidental Take Permit application successful. Therefore, requiring her to undertake additional steps anyway would prove to be an unnecessary and futile endeavor and, as a result, her regulatory takings claim is ripe for adjudication.</u>

Lear's regulatory takings claim is ripe for judicial resolution because it is impossible for her to complete a successful ITP application; thus requiring her to do so would be neither

necessary nor reasonable and would ultimately prove futile. Applying the futility standard, courts look to the facts of each case to determine if there were any reasonable and necessary steps that a claimant failed to take that would have given the regulatory agency a better opportunity to exercise its full discretion. If the claimant still has options available, or makes a unilateral decision that an available option or step is unrealistic, then courts are unlikely to characterize those available steps as futile and will instead require the those steps to be undertaken before the claim can be considered ripe for adjudication. *See Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004). By contrast, if a claimant has adhered to the necessary and reasonable steps as much as possible and any deficiency in the completeness of that undertaking is not attributable to the claimant then it is likely that a court will make a finding of futility and thereby judge the underlying claim to be ripe for judicial resolution. *See Washoe Cnty v. United States*, 319 F.3d 1320, 1324–25 (Fed. Cir. 2003). Courts have made similar findings of futility "when unchanging facts and applicable law" make the undertaking of additional procedures or filing of additional permits largely pointless. *Cooley v. United States*, 325 F.3d 1297, 1303 (Fed. Cir. 2003).

In this case, Lear's takings claim is clearly ripe for adjudication because neither the facts nor the law have changed to make her potential ITP application any more successful than it would have been when she was first advised by the FWS in April of 2012. At that April meeting, Lear was told that to develop her property she would need to obtain an ITP and to obtain an ITP she would have to submit an approvable HCP for the Karner Blue. To be approvable, the HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis. However, the only contiguous land next to the Heath on the Cordelia Lot belongs to Lear's sister. The two are estranged from and the sister patently refuses to cooperate in any HCP that places restrictions on her property. It is therefore impossible for Lear to submit an approvable HCP,

which, in turn, makes it equally impossible for Lear to obtain an ITP to develop her land. Those facts have not changed and neither has the requirement that Lear obtain an ITP before doing anything that would constitute a taking of the Karner Blue. And while it is true that Lear never formally applied for an ITP, requiring her to go through those expensive and time-consuming processes would be the quintessential example of an unnecessary and futile endeavor that the *Palazzolo* Court sought to prevent. *See Palazzolo*, 533 U.S. at 626. As a result, by advising Lear that the only way she could obtain an ITP was by submitting an impossible HCP, the FWS effectively gave her a final decision regarding the permissible uses for her land and her takings claim is therefore ripe for judicial resolution.

B. The cost of completing the ITP is so unduly burdensome that it is patently unreasonable and therefore cannot be a required antecedent to Lear's clearly ripe regulatory takings claim.

In addition to finding futility when procedures require claimants to satisfy impossible conditions, courts have also found procedures to be futile, and therefore unnecessary, if they are unreasonably burdensome or costly. *See Hage v. United States*, 35 Fed. Cl. 147, 164 (1996). These findings stem largely from Supreme Court precedent that only requires a claimant to follow the steps that are reasonable and necessary for a regulatory agency to exercise its full discretion regarding the use of the claimant's land. *See Palazzolo*, 533 U.S. at 620–21. Therefore, a claimant need not adhere to steps or administrative procedures if they can establish that the procedure "is so burdensome as to effectively deprive [them] of their property rights." 35 Fed. Cl. at 164. In other words, if the costs of a procedure are so prohibitively high as to be unduly burdensome, then the procedure is both patently unreasonable and futile and ultimately need not be followed. *Id.*

In this case, the cost of preparing an ITP application that includes an approvable HCP is so high and unduly burdensome that requiring Lear to adhere to the procedure would effectively divest her of her property rights. The fair market value of Lear's land without any land use restrictions is $100,000. However, with the land use restrictions regarding the Karner Blue in place, there is no market for Lear's land, effectively dropping its fair market value to zero. This entitles Lear to, at most, $100,000 as just compensation for the regulatory taking of her land. By contrast, the cost of an ITP application including an approvable HCP is $150,000 or, in other words, $50,000 more than the highest possible award that Lear can hope to receive from her takings claim. Therefore, not only is requiring Lear to formally apply for an ITP patently unreasonable, but it is also so unduly burdensome and futile that it would effectively deprive her takings claim of any real value and thereby divest her of any kind of property right in her land. Such an outcome goes against both the purpose and jurisprudence surrounding regulatory takings claims and cannot be permitted by this Court. As a result, the Court should affirm the decision of the New Union District Court and hold Lear's takings claim to be ripe for judicial resolution because to hold otherwise would force Lear to perform futile and unnecessary acts that would ultimately render her takings claim worthless.

III. The relevant parcel for analysis of Lear's regulatory takings claim is limited to the Cordelia Lot, which was subdivided from the entirety of Lear Island in 1965.

The Court should limit the relevant parcel for Lear's regulatory takings claim to the Cordelia Lot because, regardless of which standard the Court adopts, the Lot clearly satisfies the Supreme Court's "parcel as a whole" approach. The "test for [a] regulatory taking requires [the court] to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). Therefore, to determine what value remains in the property, the court must first define how much

of the claimant's property is relevant and should be included in the analysis. Typically, landowners, such as Cordelia Lear, advocate for the relevant parcel to be defined narrowly so as to increase the economic impact of the government action. By contrast, government actors, such as the FWS or Brittain County, advocate for the relevant parcel to be defined broadly so as to lessen the overall impact of the government action. The distinction between these two viewpoints can be critical, particularly as the relative parcel consideration is often determinative of the whole claim. *See Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013). However, despite the critical nature of this issue, the Supreme Court has yet to settle the question. *Id.* Instead, the Court has simply directed courts to focus on the "parcel as a whole" but has provided little to no guidance as to what that means or what such a focus should look like. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978). As a result the lower courts have developed their own approaches to address this issue, the most significant being the "traditional property standard" as well as the more recent "flexible approach." Regardless of the approach taken by the Court, however, in this case it is clear that the relevant parcel for takings analysis is the Cordelia Lot.

A. The traditional property standard looks to the claimant's fee simple to determine the bounds of the relevant parcel for takings analysis, and, therefore, limits the relevant parcel for Lear's regulatory takings claim to the Cordelia Lot itself.

Under the traditional property standard, the relevant parcel for Lear's regulatory takings claim is limited to the land that she actually owns and therefore only includes the Cordelia Lot. The traditional property standard determines the bounds of the relevant parcel analysis by looking at the landowner's fee simple. *See*, *e.g.*, *Bevan v. Brandon Twp.*, 475 N.W.2d 37, 42–43 (Mich. 1991). Often, this is as easy as defining the relevant parcel to be inline with the deed of the property involved in the regulatory takings claim. And for a number of reasons, this approach

has proven to be an advantageous one. To begin, it is an easy and objective standard that courts can apply consistently because they are not required to undertake complicated balancing tests involving subjective considerations. In addition, the traditional property standard adheres to the plain language of the Supreme Court's "parcel as a whole" approach and is therefore more in line with Supreme Court precedent. In this case, then, the traditional property approach would look to the deed held by Lear to determine the relevant parcel for her regulatory takings claims. Given that her father only deeded her the Cordelia Lot, it is clear that under the traditional property approach, the relevant parcel should be limited to the Cordelia Lot and not include the whole of Lear Island. And while it is true that people seeking to "create" a fraudulent takings claim can abuse such a rigid standard, there is no evidence of that type of subterfuge in this case. As a result, under the traditional property standard, the relevant parcel is almost certainly limited to the Cordelia Lot.

B. The flexible approach turns on the claimant's economic expectations regarding the property and, as a result, limits the relevant parcel from Cordelia Lear's regulatory takings claim to the Cordelia Lot.

Even under the flexible approach, Lear's economic expectations regarding her property are clearly limited to the Cordelia Lot and therefore the relevant parcel should be as well. Contrary to the traditional property standard, the flexible approach is "designed to account for factual nuances, 'in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity.'" *Lost Tree*, 707 F.3d at 1293. The critical inquiry under this approach therefore turns on the claimant's economic expectations with regards to the property. *Id.* If a claimant holds a number of legally distinct properties but treats them as one economic unit (such as a housing development) then they may all be considered as part of the relevant parcel. *Id.* "Conversely, even when contiguous land is purchased in a single transaction,

the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units." *Id.* In addition, this approach also allows courts to consider other relevant factors such as a claimant's timing or motivation for subdividing a parcel of land. And while this takes away from some of the efficiency and consistency that comes with the traditional property standard, it adds depth and discretion to the courts' analysis which not only helps judges to eliminate any risk of fraudulent takings claims, but also allows them the discretion to come to the right determination in each case.

Here, though Lear Island was granted to the Lear family in a single transaction and as a contiguous unit, Lear's father clearly began developing the island into three distinct parcels as early as 1965. It is uncertain when those parcels became distinct economic units but it was unquestionably no later than 2005 when each lot was separately deeded upon the father's death. And given the timing and circumstances of those deedings (i.e. upon the death of a family member and a minimum of seven years before Lear brought her takings claim), there is absolutely no evidence that the subdivision was undertaken as a subterfuge to create a fraudulent takings claim. As a result, even under the flexible approach, the Cordelia Lot is almost certainly a distinct subset of the original Lear Island and should be considered the lone relevant parcel for the regulatory takings analysis.

IV. The ESA's provisions prohibiting the "take" of the Karner Blue endangered species, and the accompanying land-use restrictions on the Cordelia Lot, are prospectively permanent and deprive the Lot of all current and expected future economic use and value.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In emphasizing the importance of constitutional limits on governmental power, the Supreme Court cautioned that if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

In response to this concern, the Supreme Court magnified priority in protecting landowners' fundamental rights when declaring, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Consequently, our High Court set forth the *per se* rule that a regulation goes too far, and a government cannot evade its categorical duty to compensate a landowner, when a landowner "has been called upon to sacrifice all economically beneficial uses [of land] in the name of the common good, that is, to leave [his or her] property economically idle . . ." 505 U.S. at 1019. In *Lucas*, the Court found the landowner had suffered a total regulatory taking from a prospectively permanent restriction on all economically viable use of land. *Id.* at 1012.

The Supreme Court seemingly limited the scope of the *per se* rule articulated under *Lucas* by its narrow holding in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). With particular focus on the temporal dimension of the "parcel as a whole" rule, the *Tahoe-Sierra* Court held that a temporary moratorium on land development did not amount to a per se taking. *Id.* at 331–32. However, the Federal Circuit has stated that the *Tahoe–Sierra* Court "may have only 'rejected [the] application of the *per se* rule articulated in *Lucas* to temporary development moratoria.'" *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004).

Nevertheless, the Supreme Court's narrow holding in *Tahoe-Sierra* does not preclude Lear's takings claim under *Lucas*. First, the temporary nature of the moratoria in *Tahoe-Sierra* is fundamentally different than the potential temporariness of the ESA restrictions on the Cordelia Lot. Second, despite the possibility that the land could become developable after ten years upon the natural destruction of the butterfly habitat, ESA's restrictions' practical effect deprives the Lot of all current and expected future economic value.

A. The temporary nature of the moratoria in *Tahoe-Sierra* is fundamentally different than the potential temporariness of the prospectively permanent ESA restrictions on the Cordelia Lot.

The *Tahoe-Sierra* Court held that a typical temporary moratorium on development, which by its very nature is temporary, does not go so far as to deprive a landowner of all economic value of land. 535 U.S. at 332. The Court held that "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.* at 332. In other words, the parcel as a whole includes "temporal future interests as well as present possessory interests (such as tenancies or easements) recognized at common law." *Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 477 (2009). Consequently, restrictions are "temporary" if they are intended to be temporary from the outset, and, thus, cannot constitute a taking of the parcel as a whole because such restrictions do not diminish interests in prospects of future use. *See id*. at 476 ("Whereas the regulation at question in *Lucas* stated that the ban on development 'was unconditional and permanent,' the Court found it dispositive that the regulations at issue in *Tahoe–Sierra* were merely temporary measures, which specifically stated that they would terminate").

In *Tahoe-Sierra*, it was known from the outset that the regulatory restrictions were temporary and would be lifted upon the completion of the goal for which they were set in place

to achieve. In *Tahoe-Sierra*, an upsurge in development in the Lake Tahoe Basin caused increases of runoff water flowing into the lake, which threatened the lake's exceptional clarity and beauty. 535 U.S. at 307–08. In response to this trend, the Tahoe Regional Planning Agency ordered the moratoria, which prohibited development on all at-risk lands in the Lake Tahoe Basin for less than three years, for the purpose of "maintain[ing] the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth." *Id.* at 306. The moratoria were lifted upon completion of the regional development plan. *Id.* The Court concluded that, unlike the rare prospectively permanent regulatory restrictions that deprive land of value and constitute a taking under *Lucas*, the moratoria at issue in *Tahoe-Sierra* "are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy . . ." and "are an essential tool of successful development." *Id.* at 337–38.

Unlike the regulatory land-use restrictions at issue in *Tahoe-Sierra*, the ESA's provisions prohibiting the "take" of the Karner Blue endangered species, and the accompanying land-use restrictions on the Cordelia Lot, are prospectively permanent by their very nature. The restrictions were intended to remain in effect indefinitely to protect the endangered Karner Blues since 1992, when the Karner Blue was declared an endangered species and the Cordelia Lot was designated as critical habitat for the New Union subpopulation. The restrictions on the Cordelia Lot were imposed pursuant to section 9 of the ESA under the "take" prohibition. Lear was instructed by the FWS New Union field office that "her entire ten-acre property [is] a critical habitat for the Karner Blues and any disturbance to the lupine fields other than annual mowing during the month of October would constitute a 'take' of the Karner Blues in violation of section 9 of the ESA." Congress made it clear that the purpose of the ESA is to protect endangered

species, because wildlife, such as the butterfly species, is of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Congress declared that the purposes of the ESA's restrictions "are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Congress also provided, "It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). To that end, Section 5 of the ESA gives the FWS authority and funds to compensate landowners for the purpose of advancing the ESA's purpose to protect species. 16 U.S.C. § 1534.

Accordingly, the "take" prohibition reflects Congress' significant priority given to preventing interference with the endangered Karner Blue species and securing its continued existence. To that end, contrary to the circumstances in *Tahoe-Sierra*, lifting the ESA's restrictions only upon the condition that Lear refrain from mowing the lot for ten years and foster the habitat's natural destruction is paradoxical to achieving the goal for which the ESA and its restrictions were set in place to achieve.

B. The practical effect of the ESA restrictions deprives the Lot of all current and expected future economic value.

1. *A restriction on all land-use for a minimum of ten years precludes reasonable expectations for future economic use and value.*

A restriction on all land-use for a minimum of ten years clouds any reasonable expectations for future land-use. *See David Hill Dev., LLC v. City of Forest Grove*, 688 F. Supp. 2d 1193, 1208 (D. Or. 2010) (recognizing that a taking may occur when temporary regulatory

restrictions that deprive economic use are "'so long lived as to make any present economic plans for the property impractical'") (quoting *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or. 185, 199, 935 P.2d 411, 421 (1997)). In *Tahoe-Sierra*, while the Supreme Court flatly rejected the landowners' proposed rule that a *Lucas* taking occurs whenever any "regulation imposes a temporary deprivation—no matter how brief—of all economically viable use," 535 U.S. at 320, the Court acknowledge that regulations lasting longer than even one year "should be viewed with special skepticism." *Id.* at 341. Here, the ten-year restriction clouds foresight for whether any present economic plans for the property in ten years will be practical, and it takes away property rights for a period that likely "goes too far". Therefore, the duration of the restrictions precludes reasonable expectations for future use.

2. *The mere possibility that the ESA's restrictions on the Cordelia Lot could be cut short after ten years does not reduce the permanent nature of the regulation to a "temporary" regulation.*

A regulatory restriction can never be truly "permanent." The Court of Federal Claims provided: "[I]n the context of a physical invasion, to which the Supreme Court compared the totality of the taking in *Lucas*, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is . . . an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." *Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 481–82 (2009) (quoting *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed.Cir.1991)). Moreover, the Federal Circuit has stated that "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." 85 Fed. Cl. at 481–82 (quoting *Hendler*, 952 F.2d at 1376). To that end, allowing the government to label a

ten-year deprivation of all economic value of land as "temporary" could induce a slippery slope effect, in which every regulation, even the regulation at issue in *Lucas*, could be considered temporary because a regulation is always subject to potential change. Therefore, allowing the government to label the ten-year restrictions on the Cordelia Lot as "temporary" is contrary to our regulatory takings jurisprudence.

Therefore, for the foregoing reasons, the Court should give no weight to any perceived "temporariness" of the restrictions on the Cordelia Lot caused by the potential natural destruction on the Karner Blue's critical habitat after ten years or leaving the land idle.

V. The ESA's restrictions on the Cordelia Lot have deprived the lot of all economically viable use and economic value, despite the Buttery Society's offer to pay Lear $1,000 annually to enter upon the Lot to observe the butterflies.

In holding that a categorical taking occurs "where regulation denies all economically beneficial or productive use of land," Justice Scalia suggested that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. The Federal Circuit recently reiterated that while the *Lucas* Court's majority opinion emphasized deprivation of all economically beneficial or productive *use* of land, the Court "used the term 'use' synonymously with the term 'value.'" *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115 (Fed. Cir. 2015). "Subsequent Supreme Court cases emphasize that a *Lucas* taking requires a total loss in economic value." *Id.* Recently, the Federal Circuit affirmed that land must have economically viable use to have economic value. *Id.* at 1119. However, the Ninth Circuit suggests that "[a]lthough the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999).

Nevertheless, the ESA's restrictions on the Cordelia Lot have deprived the Lot of all economically viable use and economic value, despite the Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing. First, the Cordelia Lot has no economically viable use, because there is no competitive market for a conceivable economic use of the land. Second, there is no economic value in the land, because any residual value is merely environmental value. Third, the ESA's restrictions resulted in total economic loss for the Cordelia Lot. Lastly, the resulting available use of the lot is not a reasonably expected use.

A. The Cordelia Lot has no economically viable use, because there is no competitive market for a conceivable economic use of the land.

The Ninth Circuit held that there is no economically viable use where "government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space), and no competitive market exists for the property without the possibility of development . . ." *Del Monte*, 95 F.3d at 1433. A competitive market does not exist if there is only one buyer. *See Id.* ("[T]he mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim").

In Brittain County, there is no market for a parcel such as the Cordelia Lot left in its natural state with the type of restrictions on land-use imposed pursuant to the ESA. There is no market for recreational use without the right to develop a residence on the property, and there is no market for the property as agricultural or timberland. Rather, the only conceivable remaining use of the land is the Butterfly Society's offer to pay Lear $1000 annually to allow the society's members to enter upon her land to view the butterflies. Accordingly, the only potential "buyer" for such environmental use of the land is the Butterfly Society. Therefore, there is no viable economic use because there is no competitive market for use of the land.

B. There is no economic value in the land, because any residual value is only environmental value.

The Supreme Court emphasized that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo*, 533 U.S. at 631 (finding a landowner was not left with a mere token interest because a "regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle'"). The Federal Circuit interpreted the *Palazzolo* Court's "token interest" rule as implying that a parcel's "residual value does not defeat a categorical takings claim at least when residual value is not attributable to economic uses." *Lost Tree*, 787 F.3d at 1116. Accordingly, while a regulation may leave land with residual environmental value, if the land is deprived of all other economic uses, the land has no economic value. *Id.* at 1119 (finding a *Lucas* taking because the parcel's residual value stemming from environmental value as a wetland did not reflect any economic use, and, therefore, the residual value was not economic). The ability to sell the land based on environmental value alone is not an economic use. *Id.* at 1117 ("Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel").

The ESA's restrictions have stripped all economic value from the Cordelia Lot and left Lear with a token interest in her land. Any residual value of the Cordeila Lot is merely environmental value in the Karner Blue Butterfly species and its critical habitat. The Butterfly Society's offer of $1,000 per year simply reflects the residual environmental value of the land. Accordingly, such environmental value does not reflect any economic use, and, therefore, the residual value is not economic.

C. The ESA's restrictions resulted in an total economic loss for the Cordelia Lot, despite the Butterfly Society's offer to pay Lear $1,000 annually.

To "determine the economic impact of the regulation and whether any economically viable use remains 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 v. United States*, 31 Fed. Cl. 37, 46 (1994); *See Lost Tree*, 787 F.3d at 1118 (stating that the trial court correctly determined the parcel's loss by calculating the difference between the parcel's value with a permit and without a permit). A court must make its calculation of the fair market value based on the "highest and best use" of the parcel, which is "'the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.'" 787 F.3d at 1118.

Here, the highest and best use of the Cordelia Lot is the development of a single-family house on the Lot, and the fair market value of the Lot without any restrictions that would prevent such development is $100,000. The value of the lot with the ESA's restrictions is reduced to zero despite the Butterfly Society's offer to pay Lear $1,000 annually, because, as discussed above, residual value of the $1,000 per year from the Butterfly Society merely reflects environmental value rather than economic value. Furthermore, the property taxes on the Cordelia Lot are $1,500 annually, which means that the property becomes a liability due to the tax liability. *See Bowles,* 31 Fed. Cl. at 48. Therefore, the ESA's restrictions have resulted in a total economic loss.

D. The Butterfly Society's offer to pay $1,000 in annually to enter upon the land does not satisfy Lear's reasonable expectations for use of the Cordelia Lot.

While the *Lucas* Court's majority opinion did not consider whether the landowner had investment-backed expectations for use of land in its analysis, some courts have held that a lack of such expectations may bar a *Lucas* takings claim. *See Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) ("Reasonable, investment-backed expectations are an element of every regulatory takings case"); Cf. *Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1357

(Fed. Cir. 2000) ("Questions of whether the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis"). Nevertheless, the Supreme Court has emphasized that a successive, post-enactment landowner with notice of regulations on property is not always be precluded from bringing a takings claim. *Palazzolo*, 533 U.S. at 626-28. The Supreme Court emphasized, "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. *Id.* at 627.

Accordingly, Lear had reasonable expectations to construct a single-family home on the Cordelia Lot, despite the fact that title of the Lot passed to her through succession by will in 2005, and the FWS designated Cordelia Lot as the critical habitat of the Karner Blue in 1992. Because Lear was the first landowner to seek an application for development on the Lot, she could not have known the extent of the limitations on the Lot. Furthermore, Lear reasonably expected to be able to build a single-family house on the Lot. *See Lucas*, 505 U.S. at 1031 (suggesting that constructing a home on land is a type of "essential use" of land that is usually not restricted); *See also Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1364 (Fed. Cir. 2009) (stating that an owner of a title in fee simple absolute has a recognized property interest in developing his or her land). Moreover, at the time Lear Island was subdivided in 1965, the Brittain Town Planning Board determined that the Cordelia Lot could be developed in conformance with zoning requirements with at least one single-family residence. Additionally, single-family houses were constructed on the other two lots on Lear Island. Therefore, Lear had reasonable expectations to construct a home on the Lot, and the Butterfly Society's offer to pay to enter the land is not a sufficient use.

VI. Public trust principles could not preclude Lear's total takings claim based on the denial of a county wetlands permit to fill the marsh cove.

The Supreme Court in *Lucas* declared, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Thus, "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. However, neither state nor federal law can wield the public trust doctrine to diminish Lear's property interest in the lands granted to Cornelius Lear in 1803 by an Act of Congress.

A. Principles of public trust in navigable waters did not inhere in the title to Lear Island in 1803.

In 1803, when an Act of Congress granted Cornelius Lear title in fee simple absolute to all of Lear Island, including the lands under water within a 300-foot radius of the shoreline, the states did not have sovereign title over navigable non-tidal waters. *See PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (citing cases suggesting the earliest that states considered non-tidal navigable waters to not be private property was in 1810). Accordingly, at the time Cornelius Lear acquired title, navigable non-tidal waters, such as those surround Lear Island, were not held in trust for the public. Therefore, public rights in the waters and submerged lands did not inhere in Lear's title.

B. Because the State of New Union never acquired sovereign title of the submerged lands surrounding Lear Island where the marsh cove sits, the state does not hold the land in trust for the public.

The Supreme Court has stated, "Generally speaking, state law defines property interests, . . . including property rights in navigable waters and the lands underneath them." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot*., 560 U.S. 702, 707 (2010) (citing *Phillips v.*

Washington Legal Foundation, 524 U.S. 156, 164 (1998)). However, a state cannot shape property interest without sovereign authority to do so. The Supreme Court has stated that while new states admitted to the Union have the same rights as the original states in waters and submerged lands, "[t]he title and rights of riparian or littoral proprietors in the soil below high-water mark . . . are governed by the laws of the several states, subject to the rights granted to the United States by the constitution." *Shively v. Bowlby*, 152 U.S. 1, 57–58 (1894). Accordingly, the United States' authority to grant such title in submerged lands to private parties limits the states' rights over title of navigable waters. At the time of the 1803 Act of Congress granting Lear Island to Cornelius Lear, present New Union was not a state yet, but instead was a part of the Northwestern Territory. Thus, upon entering the Union and acquiring title to navigable waters in the public's trust, the lands granted to Cornelius Lear were excluded from the state's sovereignty over title.

C. Principles of public trust, if inherent in title, would not prohibit filling in the marsh cove and building a single-family home therein, because the waters are no longer navigable.

In *Lucas*, the Supreme Court held that a state "must identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found." 505 U.S. at 1031. The Court emphasized that "[o]nly on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [regulation] is taking nothing." *Id.* at 1031–32. Regarding the background public trust principle of property law, the California Supreme Court emphasized that "the public trust is not limited by the reach of the tides, but encompasses all *navigable* lakes and streams." *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 435, 658 P.2d 709, 719 (1983) (citing *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892)).

Here, because the waters in the marsh cove, as presently found, are not navigable, any background principles in public trust could not prohibit filling the cove. *See Orion Corp. v. State*, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987) (finding that, because waters over submerged lands were navigable, the landowner had "no right to make any use of its property that would substantially impair the public rights of navigation and fishing"). Although the cove historically was open water and was historically used as a boat landing, and the lake had traditionally been used for interstate navigation, the U.S. Army Corps of Engineers now considers this portion of Lake Union to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899. Therefore, given the change in circumstances, principles of public trust would not prohibit filling the cove and constructing a house therein.

VII. The FWS and Brittain County are liable for the complete deprivation of the economic value of the Cordelia Lot, because Constitutional protections afforded to landowners necessitate consideration of the federal and county regulations together.

"Assuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no Fifth Amendment remedy merely because two government entities acting jointly or severally caused a taking." *Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989). Consequently, "the federal and state governments should not be allowed to use each other's environmental regulations as a total takings defense, leaving a property owner whipsawed without a forum in which to seek relief guaranteed by the Constitution." *City Nat. Bank of Miami v. United States*, 33 Fed. Cl. 224, 232 (1995) (Finding it necessary to consider the economic devaluation of property caused by state regulations when measuring the devaluation cause by federal regulations). This protection for landowners is similar to the concept of joint and several liability for indivisible harm under tort law. In the area of tort law, "if the tortious conduct of each of two or more persons is a legal cause of harm that

cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive." Restatement (Second) of Torts § 879 (1979). To put it another way, "[d]amages are indivisible, and thus the injury is indivisible, when . . . every tortious act of the defendants and other relevant persons caused all the damages." Restatement (Third) of Torts: Apportionment Liab. § 26, cmt. g (2000).

The entire, indivisible harm in the instant case is the total deprivation of all economically beneficial or productive use of land, which was jointly caused by the FWS's imposition of land-use restrictions and Brittain County's denial of Lear's alternative development proposal to fill in the marsh cove. While either the federal or county regulations, in isolation from on another, would still allow the development of a sign-family house somewhere on the Lot, concepts of fairness and justice underlying our takings jurisprudence require that the two regulatory impacts must be considered together. Although the FWS and Brittain County have not committed torts, the protections afforded to landowner under the Constitution ensure that government entities acting separately but causing indivisible harm are held jointly and severally liable. Therefore, the FWS and Brittain County are jointly and severally liable for complete deprivation of the economic value of the Cordelia Lot, despite the fact that the federal and county regulations, by themself, might not constitute a taking.

CONCLUSION

For the foregoing reasons, Cordelia Lear asks this Court to affirm the United States District Court for the District of New Union's judgment pertaining to issues two through seven, and reverse the District Court's judgment concerning issue one.