Team 18

NO. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

September Term, 2016

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

V.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross Appellee.

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION IN NO. 112-CV-2015-RNR, JUDGE ROMULUS N. REMUS

Brief for Defendant-Appellant-Cross Appellee, United States Fish and Wildlife Service

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The district court entered an order and judgment 1) dismissing Lear's claim seeking the declaration of the Endangered Species Act (ESA) as unconstitutional as applied to her property; 2) awarding damages of $10,000 in favor of Lear against the U.S. Fish and Wildlife Service (FWS) for a taking in violation of the Fifth Amendment to the Constitution; and 3) awarding damages of $90,000 against Brittain County for a taking in violation of the Fifth Amendment to the Constitution. R. 4. A timely notice of appeal was filed by the FWS on June 9, 2016. R. 1. This court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Endangered Species Act section 9(a)(1)(B) prohibition against the "taking" of endangered species, as applied to Appellee's single-family residence project, is a constitutional exercise of congressional power under the Commerce Clause.

2. Whether Appellee's takings claim against FWS is ripe without having applied for an Incidental Take Permit under ESA section 10.

3. Whether the whole of Lear Island constitutes the "relevant parcel" for a takings analysis.

4. If the Cordelia Lot constitutes the "relevant parcel", whether the natural destruction of the Karner Blue's habitat on the Cordelia Lot in 10 years precludes Appellee from a categorical takings claim.

5. If the Cordelia Lot constitutes the "relevant parcel", whether the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing precludes Appellee from a categorical takings claim.

6. Whether public trust principles inherent in title preclude Appellee's claim for a taking based on the denial of a county wetlands permit.

7. Whether FWS and Brittain County should be held liable for a complete deprivation of the economic value of Cordelia Lot when either the federal and county regulation, if taken separately, would allow development of a single-family residence.

STATEMENT OF THE CASE

This action is on appeal from an order of the United States District Court for the District of New Union. Appellee seeks a declaration that the ESA was an unconstitutional exercise of legislative power. In the alternative, Appellee seeks just compensation from the FWS and Brittain County for a regulatory taking of her property. R. 7.

FWS challenges the ripeness of Appellee's claim for an uncompensated taking under the Fifth Amendment because the FWS has not made a final decision regarding Appellee's development project. FWS challenges the district court's "relevant parcel" determination, which concluded the Cordelia Lot was the relevant parcel. FWS challenges the district court's relevant time period for the takings analysis, which included the current permissible development of the property. FWS challenges the district court's finding that the Cordelia Lot was deprived of all economic value because the Brittain County Butterfly Society offered to pay Appellee $1,000 per year in rent to use the property for wildlife viewing. FWS challenges the district court's holding that the Cordelia Lot was not subject to public trust limitations and argues that New Union has an interest in the adjacent submerged lands as a result of the Equal Footing Doctrine. FWS also challenges whether the state and federal regulations should be considered together on the basis that it undermines principles of federalism and that joint tort law is not a proper analog to a takings analysis.

STATEMENT OF THE FACTS

A. STATUTORY BACKGROUND

The Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, was enacted in response to increasing concerns regarding the extinction of many animal species. *See* S. REP. NO. 93-307, at 2982 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2982. In its findings, Congress

acknowledged these species are of "esthetic, ecological, educational, historical, recreational and scientific value to our Nation," and thus enacted the ESA "to provide for the conservation, protection, restoration and propagation of species of fish, wildlife, and plants facing extinction." *Id*.; 16 U.S.C. § 1531(a)(3). When enacting the ESA, Congress recognized species were disappearing at an increasingly accelerated rate due to "pollution, destruction of habitat and the pressures of trade." H.R. REP. NO. 93-412, at 4 (1982), *as reprinted in* Senate Committee on Environment and Public Works, *A Legislative History of the Endangered Species Act of 1973, As Amended,* 141, 143. The ESA itself states species "have been rendered extinct as a consequence of economic growth and development, untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Given the alarming findings and unanimous passage of the Act, the ESA is regarded as "the most comprehensive legislation for the preservation of endangered species ever enacted." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 180 (1978).

The ESA authorizes the Secretary of the Interior to list domestic or foreign species as endangered or threatened. 16 U.S.C. § 1533(a). Once a species is listed, it is afforded certain protections. Section 9(a)(1)(B) of the ESA prohibits the takings of endangered species. *Id.* at § 1538(a)(1)(B). Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such activity." *Id.* at § 1532(19). Federal regulations further define "harm" as an act that "actually kills or injures wildlife," which may include "significant habitat modification or degradation" that impairs[s] essential behavioral patterns." 50 C.F.R. § 17.3; *see also Babbitt v. Sweet Home Chapter of Communities,* 515 U.S. 687 (1995) (upholding the regulatory definition of "harm"). Pursuant to section 10 of the ESA, persons may obtain an Incidental Take Permit ("ITP") to lawfully take a species when the taking is incidental to otherwise lawful activities. 16 U.S.C. § 1539(a)(3)(B)(i)-(v).

B. FACTUAL BACKGROUND

1. *The Karner Blue Butterfly.*

The Karner Blue Butterfly is an endangered species. 50 C.F.R. § 17.11 (2015); R. 5. The Karner Blue was added to the federal endangered species list on December 14, 1992. 57 Fed. Reg. 59,236 (Dec. 14, 1992); R. 5. The only remaining population of the Karner Blue Butterfly in New Union lives on a section of Appellee's property called the Cordelia Lot. R. 6. This unique subpopulation does not travel across state boundaries. R. 6. Karner Blue larvae rely on lupine foliage for development and any disturbance of the habitat during development would "result in the death of the butterflies." R. 6. The Cordelia Lot lupine fields are maintained through annual mowing, without which, the habitat would be naturally destroyed in 10 years. R. 5, 7.

2. *Appellee development actions.*

Cordelia Lear ("Appellee") is a private landowner who owns a 10-acre parcel of land, the "Cordelia Lot, on Lear Island. R. 5. Lear Island is a 1,000-acre island located in Lake Union in the State of New Union. R. 4. Lear Island is physically connected to the mainland by a raised road, or causeway. R. 5. The Lear family originally acquired title to the island in fee simple absolute through an 1803 congressional grant to Cornelius Lear. R. 4. Throughout the nineteenth century the island maintained agricultural production with products being transported to the mainland by boat. R. 4. Agricultural production ceased in 1965 at which point the sole owner, King James Lear, subdivided his fee title into three parcels named after his daughters: a 550-acre tract (the "Goneril Lot"), a 440-acre tract (the "Regan Lot"), and a 10-acre tract (the "Cordelia Lot"). R. 5. The Cordelia Lot consists of an access strip approximately one acre in size and a nine-acre open field, both of which have been kept open by the annual mowing. R. 5. The Cordelia Lot has been designated by FWS as critical habitat of the New Union Karner Blue

subpopulation since 1992 because it is the ideal habitat for Karner Blue larvae to develop. R. 5-6. The Cordelia Lot is worth $100,00 without building restrictions preventing the development of a single-family home. R. 7. Annual property taxes are $1,500. R. 7. Although there is no market for recreational use for the Cordelia Lot, the Brittain County Butterfly Society has offered to pay Appellee $1,000 annually to conduct butterfly viewing tours during the summer. R. 7. Appellee rejected the Society's offer. R. 7.

C. FWS AND BRITTAIN COUNTY REGULATORY ACTIONS.

a. The ITP Permit.

Prior to undertaking any development of the Cordelia lot, Appellee contacted the New Union FWS field office in April 2012 to inquire whether she would need to obtain any permits or approvals for a project that would disturb the endangered butterfly habitat on her property. R. 6. On May 15, 2012, the New Union FWS field office sent Appellee a letter confirming that the entire Cordelia lot was critical habitat for the endangered Karner Blue butterfly species. R. 6. After FWS agent L.E. Pidopter advised Cordelia that she would need to obtain an ITP for any disturbance to the lupine habitat other than the annual mowing to avoid taking any Karner Blue butterflies, Appellee decided not to pursue an ITP application with the FWS. R. 6-7.

b. The ADP Permit.

Appellee, instead, developed an alternative development proposal (ADP) to fill one half-acre of marsh land in a cove to avoid disturbing the Karner Blue's critical habitat. R. 7. The ADP did not require federal approval because the project area is "non-navigable" for purposes of the Rivers and Harbors Act of 1899 and the construction of residential dwellings less than one-half acre is authorized by Nationwide Permit 29 from the Army Corps of Engineers. R. 7. However, the ADP did require a permit from the Brittain County Wetlands Board. R. 7. The Board denied

Lear's permit in December 2013 because it was not for the only allowed purpose: water-dependent uses. R. 7.

SUMMARY OF THE ARGUMENT

First, following the weight of jurisprudence including the Ninth, Eleventh, Fifth, Fourth, and D.C. Circuits, the district court correctly held the ESA "take" prohibition, as applied against Appellee's construction of a residential housing structure and its effects on the endangered Karner Blue Butterfly, was a constitutional exercise of congressional power under the Commerce Clause.

Second, the district court lacked jurisdiction to review Appellee's takings claim because it is not ripe. Judicial review is not available under the Administrative Procedure Act ("APA") because the agency action challenged by Appellee—a letter stating that Lear's proposed development project would violate the ESA—is not a "final agency action" and therefore not ripe for review.

Third, based on the factual nuances of this case, Lear Island in its entirety—not the Cordelia Lot—is the relevant parcel under the federal circuit courts' flexible approach.

Fourth, even if this Court finds the Cordelia Lot is the relevant parcel, Appellee is precluded from bringing a categorical takings claim because the Cordelia Lot will be developable in 10 years upon the natural destruction of the Karner Blue's habitat. Also, the 10-year period cannot constitute a categorical taking unless this Court finds it to be an "extraordinary delay" –which it is not.

Fifth, Appellee is further precluded from bringing a categorical takings claim because the Cordelia Lot still has economic value after the alleged taking. The Brittain County Butterfly Society's offer to pay $1,000 per year to use the Cordelia Lot for recreational site visits to view

Karner Blues is evidence of the significant economic value the Lot retains. R. 7.

Sixth, assuming that the relevant parcel is the Cordelia Lot, public trust principles are inherent in title and preclude a takings claim based on the denial of the county wetlands permit.

Finally, the State and Federal regulations were inappropriately considered together by the district court. Combining the regulations is inappropriate because it violates basic principles of Federalism and allows appellee to circumvent the well-established administrative procedures.

ARGUMENT

Standard of Review

In reviewing the judgments by the district court, this Court examines legal determinations *de novo* and findings of fact for clear error. *Bass Enter. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). Whether a taking has occurred is a question of law based on factual underpinnings. *Wyatt v. United States,* 271 F.3d 1090, 1096 (Fed. Cir. 2001). This Court should review the following questions of law *de novo* and the following questions of fact for clear error. *Id*.

I. THE TAKE PROHIBITION OF THE ENDANGERED SPECIES ACT, AS APPLIED TO APPELLEE'S DEVELOPMENT ACTIVITIES AS THEY AFFECT THE KARNER BLUE BUTTERFLY, IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE.

This Court should affirm the New Union District Court's decision that section 9 of the Endangered Species Act ("ESA"), which makes it unlawful for any person to take any endangered species, is a legitimate exercise of congressional power under Article I, Section 8, Clause 3 of the U.S. Constitution, as applied to a wholly intrastate population of Karner Blue Butterflies. R. 8; 16 U.S.C. § 1538(a)(1); U.S. CONST. Art. I, § 8, cl. 3. The U.S. Constitution provides Congress the authority to "regulate Commerce . . . among the several States." U.S.

CONST. Art. 1, § 8, cl. 3. This broad grant of authority allows Congress to regulate interstate activities in three categories: (1) the "use of the channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "intrastate activity . . . that substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557-59 (1995). The FWS has authority to regulate takings of Blue Karner Butterflies under the third *Lopez* category because the destruction of their habitat by residential development substantially affects interstate commerce.

A. The majority of courts have determined that federal regulation prohibiting the taking of an endangered species is valid under the Commerce Clause.

The District Court aptly noted, "[E]very court of appeals that has considered a Commerce Clause challenge to the ESA 'take' prohibition has upheld this Act . . . [And] the weight of precedent . . . holds that the ESA prohibition against an unpermitted 'take' of a wholly intrastate species is a valid exercise of the Commerce power." R. 8; *see e.g.*, *San Luis & Delta Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011) (Delta smelt endemic to California); *Alabama-Tombigbee Rivers Coal. v. Kepthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007) (Alabama sturgeon endemic to Alabama); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 640-41 (5th Cir. 2003) (cave bugs endemic to Texas); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (arroyo toad endemic to California); *Gibbs v. Babbitt*, 214 F.3d 483, 505-06 (4th Cir. 2000) (red wolf endemic to North Carolina); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (Delhi Sands flower-loving fly endemic to California). Most relevant here is the D.C. Circuit's holding in *Rancho Viejo* where a developer seeking to construct a housing project brought a Commerce Clause challenge against the FWS when FWS prohibited the taking of protected arroyo toads according to the ESA. *Rancho Viejo, LLC v. Norton*, 323 F.3d at 1069. The D.C. Circuit upheld the FWS order that required the developer to

remove a fence in order to accommodate the movement of nonmigratory toads that did not have a commercial use. *Rancho Viejo, LLC v. Norton*, 323 F.3d at 1069 (following *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*)). The D.C. Circuit upheld the ESA take prohibition because taking the endemic, nonmigratory toad had a substantial impact on interstate commerce.

Without the support of any binding precedent, Appellee argues the ESA, by prohibiting the take of an intrastate endangered species, seeks to regulate noneconomic activities including land clearing and vegetation removal. R. 8. The district court, however, correctly defined the relevant activity to be the underlying land development through construction of the proposed residence, which the Court noted is economic activity because it involves the "purchas[ing] of building materials and the hiring of carpenters and contractors." R. 8. This court should follow the weight of precedent, which allows the FWS to protect the endangered Karner Blue from extinction caused by Appellee's building project on the butterfly's critical habitat.

B. The New Union District Court correctly held the take prohibition is economic in nature within the broad meaning of the Commerce Clause.

Appellee's residential development project qualifies as interstate commerce because it involves purchasing building materials, hiring contractors and traveling across an interstate lake, the effect of which when aggregated substantially affected interstate commerce. R. 8. According to the Supreme Court, the proper inquiry to determine whether the federal regulation of an activity violates the Commerce Clause is whether the challenge is to "a regulation of activity that substantially affects interstate commerce." *Morrison*, 529 U.S. at 609. A court must evaluate "the precise object or activity, that in the aggregate, substantially affects interstate commerce." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

Here, the regulated activity is Appellee's planned residential development, not the Karner Blue that she threatens. As in *Rancho Viejo*, Appellee's project has a "plainly commercial character." R. 8. The D.C. Circuit concluded, "The regulated activity at issue in *NAHB*—the construction of a hospital, power plant, and supporting infrastructure—was plainly an economic enterprise . . . The same is true here, where the regulated activity is the construction of a 202 acre commercial housing development." *Rancho Viejo*, 323 F.3d at 1068. Similarly, Appellee is subject to ESA regulation despite the Karner Blue's intrastate character because Appellee's development involves the purchase of building materials and the hiring of carpenters and contractors. R. 8. Given the ESA take prohibition "regulates and substantially affects commercial development activity," the regulation of Appellee's development is constitutional. *Rancho Viejo*, 323 F.3d at 1068 (quoting *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring)). This finding is consistent with the ESA text, which emphasized that species "have been rendered extinct as a consequence of economic growth and development, untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Such conclusion is also reaffirmed by the ESA's legislative history which cited habitat destruction as a significant cause of species extinction. H.R. REP. NO. 93-412, at 4 (1973).

Appellee's attack on the constitutionality of the application of the ESA to her residential development is indistinguishable from the attack the D.C. Circuit denied in both *NAHB* and *Rancho Viejo* and nothing in subsequent Supreme Court jurisprudence undermined the precedential authority of those decisions. Even if Appellee were to attempt to distinguish *Rancho Viejo* or *NAHB* because those cases address commercial housing developments whereas Appellee plans to undertake the project as a private landowner, the distinction has no bearing on the applicability of the ESA to her activities because "where a general regulatory statute bears a

substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." *NAHB*, 130 F.3d at 1046 (quoting *Lopez*, 514 U.S. at 558). In other words, the ESA applies to individual housing projects just as it applies to professional housing developments because they entail the same relations to commerce, namely buying building materials and hiring carpenters and contractors. *But see Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, J., concurring) (arguing that a "homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce."). Simply, the activity causing the taking is the same regardless of whether the actor is an individual or corporation and regardless of the scope of the project because *any* taking is prohibited by the ESA. 16 U.S.C. § 1531(a)(1)(B).

Although Appellee contends the taking prohibition of an intrastate species, like gun possession (*Lopez*) and rape (*Morrison*), are non-economic activities that cannot support congressional legislative authority under the Commerce Clause, the D.C. Circuit specifically rejected Appellee's argument in *Rancho Viejo*: "neither [*Lopez* nor *Morrison* preclude] the conclusion that it is unconstitutional to apply the ESA to a commercial construction project . . . . [A] court must hesitate before extending those two cases, neither of which involved economic regulation of any kind, to require the unraveling of a vast fabric of Supreme Court precedent and congressional legislation." *Rancho Viejo*, 323 F.3d at 317 (citing C*hampion v. Ames*, 188 U.S. 321, 355-57 (1903); *Hoke v. United States*, 227 U.S. 308, 317 (1913); *United States v. Darby*, 312 U.S. 100, 116-17 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 as evidence the Supreme Court has long upheld Congress's ability to act under the Commerce Clause to achieve noneconomic ends through regulation of commercial activity). Therefore, this

Court should reject Lear's Commerce Clause claim because her project, which will take Karner Blues has a substantial effect on interstate commerce.

II. THIS COURT LACKS JURISDICTION TO REVIEW APPELLEE'S TAKINGS CLAIM AGAINST FWS BECAUSE THE ISSUE IS NOT RIPE.

Courts only have jurisdiction over claims that are ripe. *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004). Ripeness issues must be resolved before considering the merits of the claim. *McGuire v. United States*, 707 F.3d 1351, 1357 (Fed. Cir. 2013). In *Palazzolo v. Rhode Island*, the Supreme Court emphasized that a party's regulatory takings claim is not ripe for review until the claimant obtains a final decision from a government agency charged with administering the challenged regulations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–21, (2001); *see also* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Appellee's takings claim fails to challenge a final agency action. To the extent that the facts of Appellee's complaint could be construed as a regulatory taking for an alleged refusal to grant permission to build a residential structure on critical habitat of a federally listed endangered species, such a claim is not ripe. Critically, Appellee never submitted an application for an Incidental Take Permit. As a result, Appellee has not received a final decision from FWS on the ITP on which the Court could base a regulatory takings claim. Appellee bases her suit on a taking prohibition allegedly made in a letter from the FWS to Appellee. R. 8-9. This letter, however, merely notified Appellee that the Cordelia Lot was critical Blue Karner habitat and that any disturbance to the lupine fields beyond annual mowing would cause a prohibited take. R. 6. The letter does not satisfy the test for finality established in *Bennett v. Spear* because the letter (1) does not mark the consummation of an agency decision making process and (2) does not have any legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Thus, the letter does not

constitute final agency action and is therefore not reviewable by this Court.

A. The FWS advisory letter does not satisfy the Supreme Court's "final agency action" test

The Supreme Court established the test for "final agency action" in a case regarding the Endangered Species Act. *Bennett v. Spear,* 520 U.S. at 177-78. For agency action to be final, two conditions must be met. First, "the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature." *Id.* (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71 (1970). The APA's judicial review provision also requires, "the person seeking APA review of final agency action have 'no other adequate remedy in court.'" *Sackett v. EPA,* 132 U.S. 1367, 1369 (2012) (quoting 5 U.S.C. § 704).

Communication in the form of a letter dated May 15, 2012 is the only FWS action that Appellee has described. That letter provided Appellee with information regarding the ITP application process, including how to develop an acceptable Habitat Conservation Plan. R. 6. Based on these facts, Appellee concludes that the FWS precluded her ability to develop her property. But such a conclusion does not follow. Appellee has not even completed an application for an ITP, much less completed the process that would result in a final decision regarding the residential construction project.

1. <u>The advisory letter is not the consummation of FWS decision-making process.</u>

To satisfy the first *Bennett* prong, the letter must "must mark the consummation of the agency's decision-making process." *Bennett,* 520 U.S. at 177–78. The Supreme Court specified that an agency decision is final when it is "not subject to further agency review." *Sackett v. EPA,*

132 S. Ct. 1367, 1374 (2012). Unlike the post-construction compliance order in *Sackett* that precluded landowners from a hearing and required them to restore the filled wetlands, the FWS pre-construction letter invited Appellee to engage with the agency by submitting an ITP application, which would be reviewed by the FWS. Where an agency "provides [permitting] procedures for obtaining such a final decision, a takings claim is unlikely to be ripe until the property Owner complies with those procedures." *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999) (citations omitted)). Simply, the letter was an assertion of regulatory jurisdiction. It is not final agency action because it expressly invites Appellee to submit an ITP application to enable the FWS to begin the permitting process.

2. The letter did not result in any legal consequences.

To meet the second *Bennett* prong, the letter must affect Appellee's rights or obligations or create new legal consequences. *Bennett*, 520 U.S. at 177. An agency's actions is not reviewable when they merely reiterate what has already been established. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011) (holding EPA guidance letters that "merely restate [a statute's] prohibition . . . have no effect on a party's rights or obligations."). Because both the Karner Blue Butterfly has been listed as endangered and the Cordelia Lot has been designated as its critical habitat since 1992, the letter merely restated what was already known—that disturbing the butterfly habitat would constitute a take in violation of ESA section 9. Although Appellee may argue that the letter obliged her to include specific development proposals in her ITP application, the letter neither creates new legal consequences nor affects Appellee's rights or obligations. Agency actions that have no effect on a party's rights or obligations are not reviewable final actions. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593–94 (9th Cir. 2008); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d

8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). The FWS letter does not change any rights or obligations and only reiterates what has been well-established since the enactment of the ESA—individuals are prohibited from taking endangered species without a permit. Thus, the letter does not meet the two-part *Bennett* test and are not final, reviewable agency decisions.

B. Appellee is not excused from her burden to show FWS made a final decision because applying for an ITP is not futile.

There are two exceptions that excuse a plaintiff's burden to show an agency made a final decision: futility and undue delay. Here, appellee does not satisfy the futility exception and therefore her claim is not ripe.

The lower court erred when it determined, an "application for a permit would be futile where it is undisputed that the cost of applying for a permit exceeds the fair market value of the property in question." R. 9. The futility exception has been narrowly interpreted by courts to excuse a plaintiff from showing an agency made a final decision "only where the agency's conduct operates as a constructive denial of a permit, not where the permitting process is merely complex, arduous, or expensive." *Morris*, 392 F.3d at 1375. In *Morris*, the Federal Circuit held a property owner's regulatory takings claim against the United States was not ripe where the property owner refused to file an ITP application because the cost of applying for the ITP was greater than the value of the federally protected tree species they wanted to cut down. *Id.* at 1374-75. The Court reasoned, "Because the agency has discretion over the cost to the [property owner] of complying with the regulations, this claim is unripe." *Id.* The Court continued, "The assumption that the cost of applying for the ITP is fixed and knowable is simply incorrect. The cost of an ITP application is unknowable until the agency has had some meaningful opportunity

to exercise its discretion to assist in the process." *Id.* at 1377. Here, whether a taking would occur if the cost to Appellee to apply for an ITP is greater than the alleged economic value of her property is a "hypothetical exercise." *Id.* The FWS, for example, may reduce costs to Appellee by providing technical assistance in preparing the HCP. *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*, (Nov. 4, 1996). Thus, the requirement to apply for an ITP is not futile and serves a legitimate purpose to enable to FWS to take a final agency action. Simply, Appellee's claim is not ripe.

III. THIS COURT SHOULD FIND THE RELEVANT PARCEL FOR A PROPER TAKINGS ANALYSIS IS THE ENTIRETY OF LEAR ISLAND, NOT THE CORDELIA LOT.

The district court's relevant parcel determination was a finding of fact, which this Court should review for clear error. *Walcek v. United States*, 303 F.3d 1349, 1354 (Fed. Cir. 2002).

In *Penn Central*, the Court articulated the foundational rule for analyzing takings claims: the relevant property is the "parcel as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). The Supreme Court further articulated in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* that "parcel as a whole" requires courts to consider the "aggregate . . . in its entirety." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328 (2002). The Supreme Court has not defined a bright-line rule as to how to apply the "parcel as a whole test." *Tahoe*, 535 U.S. at 326. However, courts have required a "flexible approach" which is designed to "account for factual nuances." *Forest Properties*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *see also Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 419 (2011), *rev'd on other grounds*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (the court endorsed *Loveladies* and the "flexible approach"); *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1380-81 (Fed. Cir. 2000).

The New Union District Court erroneously rejected this "flexible approach" in stating that while it has its merits, it is not applicable where ownership has been transferred or formal subdivision has taken place. R. 10. In fact, jurisprudence using the "flexible approach" addresses the District Court's concerns by showing that transfers of property are not determinative and that formal subdivision is not determinative. Therefore, this Court should reverse the District Court's decision because a "flexible approach" to the "parcel as a whole" test shows that the whole of Lear Island is the relevant parcel.

A. The entirety of Lear Island is the relevant parcel because Lear Island was treated as a single income-producing unit.

There are six key factors that to consider when assessing whether a property has been treated as a single economic unit: (1) the degree of contiguity between property interests; (2) the dates of acquisition of property interests; (3) the extent to which a parcel has been treated as a single income-producing unit; (4) the extent to which the regulated lands enhance the value of the remaining lands; (5) the extent to which a common development scheme applied to the parcel; and (6) the extent any earlier development had reached completion and closure. *Loveladies Harbor,* 28 F.3d at 1180; *Cane Tenn., Inc. v. United States,* 62 Fed. Cl. 703, 709 (2004); *Forest Properties,* 39 Fed. Cl. at 74; *Ciampitti v. United States,* 22 Cl. Ct. 310, 318 (1991)*; Palm Beach,* 231 F.3d at 1381 (adding factors 5 and 6, which are chiefly for commercial property).

Here, the record indicates Lear Island is the relevant parcel. The Cordelia Lot is contiguous with the rest of the 1,000 acres which constituted the original grant of Lear Island, it was part of a single conveyance in 1803, the whole island has been used as "a homestead, farm, and hunting and fishing grounds," and the island's single causeway enhances the value of the

Cordelia Lot. R. 4, 6. The fact that there is a superficial demarcation between the Cordelia Lot and the contiguous Goneril Lot due to annual mowing on the Cordelia Lot, this is not dispositive of a single parcel finding. In *Brace v. United States*, the Court of Federal Claims found an unpaved road which ran between two properties did not disturb the two properties from constituting a "parcel as a whole." *Brace v. United States*, 72 Fed. Cl. 337, 349 (2006). Here, the distinction between the two properties is equally arbitrary. Even if the Cordelia Lot could be said to be used for different purposes by way of its having been mowed continuously, the court in *Brace* would say that "amounts to little more than wishful thinking" and doesn't disturb the "parcel as a whole" finding. *Id.*

This Court should be cautious in applying factor (5) at all because it has been mostly applied to property purchased for large-scale development. *See Palm Beach*, 231 F.3d 1354 (the subject property was planned for development of 125 residential lots). Although Lear Island may be commercially developable, Appellee is not herself a commercial developer and has no plans for large-scale development. Therefore, this Court should not rigorously apply factor (5). If, however, this Court chooses to assess whether there was a common development scheme in this case, it should find that the Cordelia Lot, along with the rest of Lear Island, has always been both practically and theoretically planned for development as a whole.

In *Loveladies*, the lands outside the area for which claimants were seeking a permit were already developed. R. 5-6. Here, except for a traditional homestead located on the Goneril Lot and single home built on the Regan Lot, there is no development on the rest of Lear Island. R. 5. Furthermore, the court in *Loveladies* justified its decision by reasoning that a partial grant of private lands to the state offset the claimant's responsibility as to other lands. *Loveladies*, 28 F.3d at 1182. This justification does not apply to the facts at hand since no measure of Lear Island has

been commercially developed or gifted to the state so as to justify any offset in the "parcel as a whole" test. Therefore, this Court should find Lear Island is the relevant parcel because factor (6) shows there is no earlier development which would sever the Cordelia Lot from rest of Lear Island.

B. Given the Lear family only transferred title to the Cordelia Lot within the family, this Court should apply the "flexible approach" to determine the relevant parcel.

In the decision below, the District Court wrongly rejected the flexible approach, citing that the Cordelia Lot had been transferred from King Lear to Appellee. R. 10. Where property has been transferred, lower courts have assessed whether the transfer occurred before or after the development of the regulatory scheme giving rise to the takings claim. *Loveladies*, 28 F.3d at 1181; *Palm Beach*, 231 F.3d at 1371; *Norman v. United States*, 63 Fed. Cl. 231, 236 (2004); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 727 (2002).

In *Loveladies*, the claimant partially developed the parcel prior to the enactment of the regulatory framework. *Loveladies*, 28 F.3d at 1174. Similarly, in *Palm Beach*, the relevant parcel had been transferred to the claimant prior to the enactment of the Clean Water Act. *Palm Beach*, 231 F.3d at 1381. Here, the Cordelia Lot was designated a critical habitat for the Karner Blue and the Karner Blue was added to the endangered species list in 1992, twenty years *before* Cordelia came into possession of the Cordelia Lot. R. 5-7.

In both *Appolo* and *Norman*, the court specifically noted that the parcels had been acquired following the passage of the relevant regulations in those cases. *Appolo*, 54 Fed. Cl. at 727; *Norman*, 63 Fed. Cl. at 256. While it is true that the Cordelia Lot was subdivided before the ESA affected the property, the actual transfer of the Cordelia Lot to Appellee from her father King Lear occurred *after* the ESA affected the Cordelia Lot. R. 5-6. Using the same reasoning

found in *Appolo* and *Norman*, this Court should overturn the District Court's decision and instead find the transfer of the Cordelia Lot is not determinative of the relevant parcel.

C. Limiting analysis to the subdivided Cordelia Lot would enable private landowners to artificially subdivide their property to avoid ESA enforcement.

The District Court erred when it reasoned that formal subdivision is determinative. R. 10. Here, the relevant parcel must be determined as the parcel against which the impact of the government action will be measured. *See Forest Properties*, 177 F.3d at 135 (the "relevant parcel inquiry is critical because 'our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property.'") (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987)).

The lower court relied on *Loveladies* to justify its holding that formal subdivision is determinative. R. 10. In *Loveladies*, the question for the court was whether to include lands "developed or sold before the regulatory environment existed." *Loveladies*, 28 F.3d at 1181. Here, there are two distinctions from *Loveladies*. First, transfer of property occurred *after* the regulatory scheme was in place. R. 5. Second, the subdivision was just a formality as the Cordelia Lot remained in the singular possession of King Lear through his life estate from 1965 to 2005. R. 5.

In *Palm Beach*, the dissent warned against adopting a rule which would allow claimants to purchase lands subject to regulation, develop some of these lands and sell them for a profit, then apply for a permit on the remaining lands, and claim a categorical taking on the denial of such a permit. *Palm Beach*, 231 F.3d at 1371. Although the facts in *Palm Beach* are different from those before this Court, a finding that the Cordelia Lot is the relevant parcel would expose the federal government to "enormous demands for windfall compensation awards" for property

acquired with contiguous land in a single transaction. *Palm Beach*, 231 F.3d at 1371. Based on the foregoing, limiting the relevant parcel analysis to the Cordelia Lot contravenes federal court jurisprudence and creates perverse incentives for landowners. Therefore, this Court should analyze Lear Island as the relevant parcel.

IV. APPELLEE'S TAKINGS CLAIM FAILS BECAUSE THERE IS NO "COMPLETE DEPRIVATION OF ECONOMIC VALUE" AS THE HABITAT OF THE KARNER BLUE BUTTERFLY WILL BE NATURALLY DESTROYED IN 10 YEARS.

Should this court find that the Cordelia Lot is the relevant parcel for this takings analysis, that parcel is not subject to a total economic loss as it will have its full economic potential in 10 years, following the natural destruction of the Karner Blue's habitat. Although this 10-year period only constitutes the time before final agency action, temporary moratoria are commonplace mechanisms designed to prevent development in the short term, which may exacerbate the behavior meant to be regulated. *Williams v. City of Central*, 907 P.2d 701, 706 (Colo. Ct. App. 1995). In *Lucas*, the Supreme Court indicated that a permanent ban on development might render the parcel at question "valueless." *Lucas*, 505 U.S at 1020. It would be folly to expand the *per se* takings analysis of *Lucas* to include temporary periods before final action by an agency because the Court in *Lucas* so clearly stated a *per se* taking should only apply in "extraordinary circumstances." *Lucas*, 505 U.S. at 1017. In this case, the 10-year period before the natural destruction of the Karner Blue's habitat on the Cordelia Lot could constitute a temporary moratorium only insofar as Appellee is precluded from building on the Cordelia Lot before there is final action by the FWS, although there has been no agency action to institute such a temporary moratorium. And in any case, because there is an offer for rent on the Cordelia Lot, there is still beneficial use to the property. Further, until Appellee applies for an ITP, there is no temporary moratorium

A. To separate the parcel based on when it will have economic value under the present regulatory scheme amounts to temporal severance, which has been roundly rejected.

Severing property rights based on when they have economic value is a form of conceptual severance. In the same way that courts have rejected horizontally severing property so that a parcel may be subject to a regulatory taking, courts have rejected temporally severing property based on when it has economic value. *Tahoe*, 535 U.S. at 336. A temporary regulatory restriction on a piece of property which causes a temporary diminution in value is not a taking because the property will ultimately recover its value when that temporary regulation is lifted. *Id*. To assess whether a property will recover its value before and after a temporary regulation, we should compare the economic activity which occurred prior to the regulation and that activity which will occur after the expiration of the regulation. *Id*. To do otherwise would amount to conceptual severance.

B. The 10-year period amounts only to a temporary taking, not a permanent and complete deprivation of all economic value.

A categorical taking is only compensable if it completely deprives the landowner of all economic value of the property. *Tahoe*, 535 U.S. 302. Given Appellee has not applied for an ITP, there is no *per se* development moratorium; however, because the Karner Blue's natural habitat on the Appellee will no longer exist in 10 years, that period constitutes an effective development moratorium should no permit be granted. If a temporary moratorium should constitute a temporary taking, the Supreme Court has required a "careful examination and weighing of all the relevant circumstances." *Tahoe*, 535 U.S. at 326 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (O'Connor, J., concurring)).

In *Tahoe*, the Supreme Court held a widely-used development moratorium regulation did not constitute a categorical taking *per se*. *Tahoe,* 535 U.S. at 337. There, while the development moratorium lasted for 32 months, the Court rejected all categorical takings claims for temporary moratoria, requiring instead a factual inquiry under *Penn Central*. *Id*. at 342; *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350 (Fed. Cir. 2002). The Court reasoned property "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe*, 535 U.S. at 332. Although the alleged development moratorium placed on the Cordelia Lot would be a 10-year period, which is longer than that specified in *Tahoe*, the language in *Tahoe* was clear. The Supreme Court rejected a categorical determination not because of the length of the moratorium but because there was a temporary moratorium at all: "the *Penn Central* framework adequately directs the inquiry to the proper considerations – only one of which is length of delay." *Id*. at 304.

C. There can be no claim that the 10-year period amounts to an "extraordinary delay" in the permitting process.

The only way to construe the 10-year moratorium on development as a categorical taking without final agency action on the Cordelia Lot would be to construe it as a permitting delay. The distinction between a permitting delay and denial of a permit may rest on facts which can only be determined after-the-fact. *Id*. at 338, n.31. In *Boise,* the Federal Circuit affirmed where an agency hasn't denied a permit, the absence of such denial can be fatal to a takings claim. *Boise*, 296 F.3d at 1355. However, in such cases where there is no guarantee that a permit will be granted, it may be appropriate to review a temporary moratorium as a permitting delay. *Id.* at 1352; *see also Tahoe*, 535 U.S. at 338. Absent a permit denial, "only extraordinary delays in the

permitting process ripen into a compensable taking. *Boise*, 296 F.3d at 1352. What constitutes "extraordinary delay" has been interpreted widely.

We should consider the wait (as it's not a denial of the ITP permit) as a permitting delay. In *Wyatt*, it was found that a 10-year permitting process did not constitute an "extraordinary delay." *See Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir.2001) (permitting began on February 4, 1980 and continued through the expiration of the subject lease on February 28, 1990). Furthermore, in *Sartori v. United States*, even a 9.5-year delay did not rise to the level of a categorical taking. *Sartori v. United States*, 67 Fed. Cl. 263, 277 (2005). Therefore, this Court should find that this 10-year period does not constitute an "extraordinary delay."

V. THE BRITAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY $1000 PER YEAR IN RENT FOR WILDLIFE VIEWING PRECLUDES LEAR'S TAKINGS CLAIM FOR A COMPLETE LOSS OF ECONOMIC VALUE.

The blackletter of the law is abundantly clear that where there is *any* economically beneficial use of land, there is not a categorical taking. *Norman*, 63 Fed. Cl. at 252. This rule applies regardless of the property taxes imposed on the property. *Palm Beach*, 208 F.3d at 1380. In addition, this Court should resist factoring property tax into a 100% diminution in value analysis for jurisprudential reasons. Such a rule whereby landowners are permitted to obtain a categorical taking if their property taxes are higher than an economically viable use of their property would create perverse incentives for landowners. Specifically, landowners would be incentivized to develop their property so as to inflate their property taxes; or, alternately, property owners may not participate in administrative remedies related to their property tax values where doing so may alter the status of a takings claim.

A. A categorical takings claim is not proper unless there is a complete loss of economic value.

In *Lucas*, the Supreme Court articulated the general rule that where there is a complete loss of economic value, there is a categorical taking. *Lucas*, 505 U.S. at 1019-20 (n. 8). However, the Court cautioned that anything less than a "total loss" of economic value would not constitute a categorical taking, requiring instead the *Penn Central* analysis. *Id*. at 1019-20. Not even a 98.8% decrease in economic value constitutes a categorical taking. *Norman*, 63 Fed. Cl. at 258 (citing *Cooley v. United States*, 342 F.3d 1297, 1305 (Fed. Cir. 2003). In fact, claimants must be deprived of 100% of the beneficial use of their property for a categorical taking founded on total loss of economic value. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1354 (Fed. Cir. 2003).

Notably, the offer to pay Appellee for wildlife viewing constitutes economic activity and has economic value. In *Gibbs v. Babbit*, the court affirmed that red wolves, a protected species, were "things of interstate commerce" because they were followed by "tourists, academics, and scientists." *Gibbs*, 214 F.3d at 490. In this case, the Karner Blue also constitute subjects of commerce as they are clearly valued by wildlife viewers. Nevertheless, if this court should seek to apply the more fundamental *Lucas* rule, it is still clear there is not a categorical taking under the black letter law as the Cordelia Lot still has economic value.

B. Accounting for property tax liability in a complete loss of economic value analysis would create perverse incentives and frustrate the purpose of the ESA.

The general rule from *Lucas* that requires a complete loss of economic value has been consistently interpreted to bar a *per se* taking where there is *any* potential economic use. *Tahoe*, 535 U.S. at 302; *Palm Beach*, 231 F.3d 1365; *Maritrans*, 342 F.3d at 1354. Here, the District Court interpreted this rule in an unprecedented and dangerous way. The Brittain County

Butterfly Society offered to pay Appellee $1,000 per year in rent for Karner Blue viewings on the Cordelia Lot. R. 7. This offer to pay clearly illustrates that there is no categorical taking under *Lucas* as there is still a "productive or economically beneficial use of land…permitted." *Lucas*, 505 U.S. at 1017.

VI. LEAR'S TAKINGS CLAIM BASED ON THE DENIAL OF THE COUNT WETLANDS PERMIT IS PRECLUDED BECAUSE PUBLIC TRUST LIMITATIONS INHERE ON THE LEAR'S 1803 CONGRESSIONAL GRANT OF TITLE.

Within the scope of the public trust, when an owner receives title to land, their title is subject to any restrictions that arise from the State's background principles of its law of property and nuisance. *Id.* at 1029. Landowners take title to land with the understanding that the use of their property is limited by the State's legitimate exercise of its police power. *Id.* at 1028. Consequently, a landowner is not entitled to compensation for an alleged taking because the interest claimed is reserved to the state and was never part of their title. *Id.* at 1027. Appellee's ADP proposes to fill a one half-acre parcel of a marsh and construct an access-causeway to the shared mainland causeway. R. 7. No federal approvals are required for this project because public trust limitations remain the purview of the States. R. 7; *see PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) (holding that "under the accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders."). Appellee is not entitled to compensation because the State of New Union has an interest in preserving the navigable waters adjacent to the Cordelia Lot. This interest is supported by the "Equal Footing Doctrine" and the 1803 Congressional grant does not abrogate those interests. *PPL Mont., LLC*, 565 U.S. at 589.

A. Public Trust Limitations inhere on a parcel when they are supported by a state's background principles of property and nuisance law.

Origins of the public trust doctrine can be traced back to ancient Roman civil law and English Common Law. *PPL Mont., LLC*, 565 U.S. at 603. The rationale for this doctrine has remained unchanged in its various permutations: in designated lands it is preferable that the sovereign hold title as a means of preventing private individuals from harming the interest of the public. *Id*. at 594. This concept is relevant to regulatory takings because it precludes private landowners, like Appellee, from receiving compensation for land use activities that were impermissible at the time of acquisition. According to the Supreme Court, even in cases where the regulation has the effect of eliminating the land's only economically productive use, compensation is not appropriate because the regulation "does not proscribe a productive use that was previously permissible." *Lucas*, 505 U.S. at 1029. The interest in keeping the marsh cove navigable belongs to New Union. This interest was never ceded to Appellee or her predecessors in title. In short, Appellee cannot be compensated for an injury to a right that she never possessed.

Admittedly, the public trust doctrine is not without limitations, but the present case is well within the outer limits set by the Supreme Court in *Lucas* because New Union's interest is rooted in background principles of property and nuisance. The Supreme Court stated that a public trust limitation that precludes compensation "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 placed upon land ownership." *Id.* at 1029. The district court acknowledged that it was unable to find any New Union precedent to support Brittain County's contention that the State's interest in navigable waters is founded in its

background principles of property and nuisance. R. 10. However, the lack of New Union precedent is not determinative that the State did not have an interest in navigable waters; rather the court failed to recognize that the background principles of New Union can be determined by analyzing the public trust interests of other states presuming that New Union took title under the same terms under the "Equal Footing Doctrine."

B. The background principles of New Union's law of property and nuisance recognize a public trust interest in the non-tidal navigable waters of Lake Union.

New Union's public interest in navigable waters adjacent to the Cordelia precludes Appellee from compensation. The District Court erred in finding an interest in navigable waters did not exist at the time of the Lear grant in 1803 because the finding ignores the "Equal Footing Doctrine" and its impact on public trust jurisprudence. R. 10. The court relied improperly read *PPL Montana* to suggest that the beds of non-tidal rivers were considered private property prior to 1810. R. 10. Critically, the Court did not give proper weight to the *PPL Montana* analysis that reject the district court's conclusion.

The Court continued its analysis in *P.P.L. Montana* by rejecting the distinction in English common law between royal rivers and public highways. In appreciating the geographical differences between England and the U.S., the Supreme Court held, "The tidal rule of 'navigability' for sovereign ownership of riverbeds while perhaps appropriate for England's dominant coastal geography was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained." *PPL Mont., LLC*, 565 U.S. at 589. The distinction made at English common law between royal rivers and public highways was replaced by the rule of "navigability in fact." *Id*. The navigability in fact rule applies to the states through the "Equal Footing Doctrine" which states that the 13 original States and those later admitted to

the Union, as a result of the principles of co-equal sovereignty, "hold the absolute right to all their navigable waters and the soils under them subject only to the rights surrendered and powers granted by the Constitution to the Federal Government." *Id*. Consequently, just as the original thirteen states have an absolute right to soils under navigable waters, New Union as a later admitted state, receives title to soils under navigable waters on equal footing as the thirteen original states.

C. New Union has an interest in the submerged soils of the Cordelia Lot because it is beneath waters that are navigable in fact.

The inquiry to determine whether waters are navigable in fact, and thus subject to public trust limitations, is whether the waters 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 the water." *Id.* at 591. This determination is made "as of the time of statehood, and it concerns the river's usefulness for 'trade and travel,' rather than for other purposes." *Id.* at 600.

The waters surrounding Lear Island satisfy the navigability in fact test because they have been used for navigation purposes. R. 4. Beginning in 1803 and continuing into the late nineteenth century, Lear Island and the Cordelia Lot specifically have been used for commercial purposes. R. 5. The record states, "produce was carried by boat from the island to the mainland" and on the Cordelia Lot, in particular, "there is about one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing." R. 5.

It is inconsequential that agricultural production ceased on Lear Island in 1965. R. 5. The Supreme Court held that present-day use should be used only "to the extent it informs the *historical* determination whether the river segment was susceptible to use for the commercial

navigation at the time of statehood." *PPL Mont., LLC*, 565 U.S. at 600. Thus, any present day use that may be posited by Appellee does not alter the historical analysis that deems the emergent cattail marsh as navigable in fact and therefore subject to public trust limitations.

D. The "Equal Footing Doctrine" is Not Abrogated by the 1803 Congressional Grant of Title.

The 1803 Congressional grant of title to Cornelius Lear is analogous to other grants of title conveyed to settlors in the Northwest territory and therefore should be granted the interpretation that is in accordance with the interests New Union and its population. The Supreme Court in *Shively v. Bowlby* noted that although it was possible for the United States to grant title or rights in soil below high water mark, it "[has] never done so by general laws" and absent an "international duty or public exigency," the grant should be construed "in accordance with the interest of the people and with the object for which the Territories were acquired." *Shively v. Bowlby*, 152 U.S. 1, 58 (1894). The Supreme Court reaffirmed the importance of interpreting grants in light of the public interest in *Idaho v. Coeur D'Alene Tribe. Idaho v. Coeur D'Alene Tribe,* 521 U.S. 261 (1997). In *Coeur D'Alene*, the Supreme Court held, "disposal by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *Id.* at 283.

Appellee cannot overcome the strong presumption that soils under navigable waters are held in trust by the state because there is no evidence that the 1803 grant was made in contemplation of any international duty or public exigency. In order to overcome the presumption that submerged soils beneath navigable waters are held in trust by the state, a landowner must be successful on both prongs of the rule adopted in *Shively*: 1) the disposal must

be made for an exceptional instance of international duty or public exigency and 2) the intention must be definitely declared. *Shively*, 152 U.S. at 50. Although the 1803 grant states title is given to "all lands under water within a 300-foot radius of the shoreline of said island" there is nothing on the record to suppose that this grant was made for public exigency or international duty. R. 4-5. Absent evidence of public exigency or international duty, the 1803 grant cannot abrogate the strong presumption in favor of New Union's public interest in the navigable waters adjacent to the Cordelia Lot. Therefore, this court should reverse the holding of the District Court and find that public trust limitations preclude Appellee's takings claim based on the denial of Brittain County's wetlands permit.

VII. FWS IS NOT LIABLE FOR A COMPLETE DEPRIVATION OF ECONOMIC VALUE OF THE CORDELIA LOT BECAUSE THE FEDERAL AND COUNTY REGULATIONS SHOULD BE CONSIDERED SEPARATELY.

A. The District Court erred in jointly considering the federal and county regulations because FWS and Brittain County are not analogous to joint tortfeasors.

The District Court cited *Velsicol Chemical Corp. v. Rowe* for the proposition that a takings analysis is analogous to a joint tort; however, this logic is faulty because it assumes that the harm has already been established. *Velsicol Chemical Corp. v. Rowe*, 543 S.W. 2d 337, 343 (1976). The court in *Rowe* stated a joint tort relationship arises in circumstances "where the tortious acts of two or more wrongdoers join to produce an indivisible injury...all wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit." *Id*. The issue in the present case is not whether the injury is divisible, but whether it exists at all.

Tort law is an inappropriate analogy because unlike joint tortfeasors, concepts of federalism draw a clear distinction between federal and state action. By considering the

regulations together, the district court put the proverbial cart before the horse. Joint and several liability, as the name suggests focuses on liability of a harm, not whether an alleged harm exists at all. By considering the distinct regulations concurrently in order to constitute a taking, the district court impermissibly merges the apportionment of liability and the existence of liability. Furthermore, the district court's joint application is effectively allowing Appellee to simultaneously bring federal and state takings claims in direct contravention to the exhaustion requirement. *See Swiish v. Nixon*, 4:14CV2089 CAS, 2015 WL 86750 at *5 (E.D. Mo. Feb. 27, 2015) ("The exhaustion requirement cannot be satisfied by simultaneously bringing federal and state takings claims.").

B. The district court erred in jointly considering the regulations because even if the takings analysis were analogous to tort law, the alleged harm is divisible making joint and several liability inappropriate.

Assuming that a takings analysis is analogous to joint tort, the FWS and Brittain County should not be held jointly and severally liable because the alleged harm is divisible. In *Rowe*, the court recognized two instances where the indivisibility requirement applies: 1) when "the harm is not even theoretically divisible, as death or total destruction of a building" or 2) when "the harm while theoretically divisible, is single in a practical sense in that the plaintiff is not able to apportion it among the wrongdoers with reasonable certainty, as where a stream is polluted as the result of refuse from several factories." *Rowe,* 543 S.W. 2d at 342. Appellee fails under both of these scenarios.

First, the alleged harms are not only theoretically divisible, they are actually divisible. The alleged harm is divisible because it arises from two different statutes, the statutes are executed by separate levels of government, and the agencies charged with enforcing the statutes do not have jurisdiction over one another. The federal ESA governs the IPT whereas the Brittain

County Wetland Preservation Law governs the ADP. R. 7. Also, the regulations cover two distinct parts of the Cordelia Lot—no federal approval is required for the filling project in the emergent marsh, it is subject to the jurisdiction of Brittain County. R. 7.

The District Court erred in holding the Appellee could not apportion the alleged harm with reasonable certainty. The policy rationale in *Rowe* determined the injured plaintiff should not bear "the impossible burden of proving the specific shares of harm done by each defendant." *Rowe*, 543 S.W.2d at 343. However the burden, if any, that Appellee has to bear in determining the difference between a federal agency and a state agency is far from impossible. Appellee communicated with each of the agencies, understands that they are separate entities and that they regulate different portions of her land. R. 7-8. If this Court were to uphold the district court's decision, Appellee would effectively be allowed to dismiss the difference between federal and state government action in order to place it under the single heading of "government action" and manufacture an injury for takings purposes. Furthermore, the district court's holding sets a disruptive precedent that landowners are allowed to circumvent well-established administrative procedures by convoluting the distinction between state and federal action; to hold FWS and Brittain county joint and several liable runs counter to the basic concepts of federalism.

CONCLUSION

This Court should affirm the district court and follow the weight of authority including the Ninth, Eleventh, Fifth, Fourth, and D.C. Circuits, and hold the ESA "take" prohibition, as applied against Appellee's construction of a residential housing structure, is a constitutional exercise of congressional power under the Commerce Clause.

This Court should dismiss Appellee's regulatory takings claim for lack of jurisdiction

because the agency action challenged by Appellee—a letter stating that Lear's proposed development project would violate the ESA—is not "final agency action" and is therefore not ripe for review. This Court should find the relevant parcel is the whole of Lear Island, not the Cordelia Lot, because the Lot is contiguous with the Island, it was conveyed with the Island, and the Lot is part of the Island's single income-producing unit. This Court should deny Appellee's categorical takings claim because any potential loss of economic value is temporary and a potential 10-year moratorium does not rise to the level of a categorical taking for "extraordinary delay." This Court should affirm its endorsement of the *Lucas* rule for a categorical taking which requires a 100% diminution in economic value of a property – regardless of property tax values. This Court should dismiss Appellee's taking claim based on the denial of the county wetland permit because, in light of public trust limitations, she did not have a right in the submerged lands when she acquired title. Finally, this Court should deny Appellee's takings claim because combining disparate state and federal regulations undermines basic principles of federalism and joint and tort law is not analogous to a takings claim.

Respectfully submitted,

Team 18
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