Team No. 19

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

Brief for Plaintiff-Appellee-Cross Appellant — Cordelia Lear

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

JURISDICTIONAL STATEMENT

This case is on appeal from a decision of the United States District Court for the District of New Union. Cordelia Lear seeks review of the District Court's final decision and judgment. This Court has jurisdiction to review the District Court's decision because the Courts of Appeals have jurisdiction over the final decisions of the District Courts. 42 U.S.C. § 1291. Moreover, Ms. Lear's claim was properly before the District Court because she waived any damages in excess of $10,000 in her takings claim against the United States of America. 28 U.S.C. § 1346(a)(2).

STATEMENT OF ISSUES PRESENTED

1. Whether Ms. Lear's takings claim against the Fish and Wildlife Service is ripe when applying for an incidental takings permit would have been futile.

2. Whether the inability to build a home for ten years is an extreme circumstance that amounts to a total deprivation of economic value.

3. Whether the District Court appropriately found that the relevant portion for the takings analysis is the Cordelia lot, the only portion of Island owned by Ms. Lear.

4. Whether earning $1,000 per year in rent, for wildlife viewing, is a de minimis value when property taxes are $1,500 annually.

5. Whether the Fish and Wildlife Service and Brittain County are liable for the combined effect of their regulations when the takings claim is not precluded by public trust principles inherent in the title, and each government is independently responsible for the indivisible harm.

6. Whether the District Court correctly held that the Endangered Species Act is a valid exercise of Congressional power under the Commerce Clause when applied to a solely intrastate species of butterfly.

STATEMENT OF THE CASE

This case is about a landowner, Ms. Cordelia Lear (hereinafter "Ms. Lear"), who wishes to build a single-family residence on the land she inherited. R. 4. Ms. Lear's land, however, is also home to the Karner Blue, an endangered species of butterflies. *Id.* To help preserve this species of butterflies, the government imposed several regulations upon the land that prohibit Ms. Lear from developing and receiving the full use and enjoyment of her land. R. 5. Of consequence, the butterflies, which the government is attempting to protect, are doomed to extinction regardless of the recently imposed regulations. R. 10.

The subject property is a lot located on Lear Island, in Brittain County, New Union. R. 1. Lear Island is approximately two-miles long and one-mile wide, and spans 1,000 acres. R. 4. Ms. Lear owns only an isolated ten-acre piece of the island, which was specifically deeded to her. *Id.* It is upon this ten-acre lot that Ms. Lear wishes to construct a single-family home. *Id.*

The Early Days of Lear Island. Lear Island was granted to Cornelius Lear ("Mr. Lear") in 1803. R. 5. The grant provided Mr. Lear title in fee simple absolute encompassing all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline" of Lear Island. R. 4-5. In addition to building a homestead, Mr. Lear used the property for hunting, fishing, and farming. *Id.*

Development was specifically contemplated when the lot was subdivided. Lear Island existed as one unit until 1965, when owner King James Lear divided the island into three separate parcels for each of his daughters: "the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot." R. 5. The Brittain Town Planning Board approved the subdivision with full knowledge that future development was specifically contemplated. *Id.* Specifically, the Brittain Town Planning Board, "[d]etermined that each lot could be developed

in conformance with zoning requirements with at least one single-family residence." *Id.* Additionally, there were no governmental restrictions upon the property that indicated there would be obstacles to future development at this time. *Id.*

Ms. Lear comes into possession of her lot. Upon King Lear's passing in 2005, each of his daughters came into possession of their respective lots. R. 5. Ms. Lear's lot is located on the northern tip of Lear Island. *Id.* Nine acres of the lot consists of open fields. *Id.* An access strip is kept open via the annual mowing performed by the Lear family for the past several decades. *Id.* Ms. Lear's enjoyment and future plans for the property is limited to her respective lot, as she is estranged from her sister who owns the adjacent lots. R. 6.

The Karner Blue Butterfly -- A solely intrastate species resides on the Lot. Due exclusively to the Lear's annual mowing over several decades, a species of butterfly, the Karner Blue, is able to reside in a small area on the Cordelia Lot. R. 5. Without the Lear's efforts, the island would become overgrown by woods. *Id.* Eventually, lupine flowers began to grow on the lot, attracting the Karner Blue butterflies to take permanent residence. *Id.* Due to its limited migratory patterns, the Karner Blue butterfly is entirely intrastate. R. 5-6. Although the Karner Blue butterfly is listed on the Endangered Species list, it has several habitats outside of Lear Island. R. 5.

Ms. Lear seeks to develop her lot. Ms. Lear initiated plans to develop her property in April of 2012. R. 6. While seeking government approvals, Ms. Lear was told by a New Union Fish Service and Wildlife ("FSW") agent that, "[a]ny disturbance of the lupine habitat in the Heath other than continued annual mowing would constitute a "take" endangered butterfly." R. 6. In order to develop her land, Ms. Lear was advised that she needed to: obtain an Incidental Takings Permit ("ITP"), develop a habitat conservation plan ("HCP"), and obtain an

environmental assessment document under the National Environmental Policy Act ("NEPA"). *Id.* Ms. Lear would also have to "[p]rovide an additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip." R. 6. Ms. Lear's property, however, does not extend into the adjacent lot. *Id.*

The FSW creates hurdles barring the development. Ms. Lear encountered an additional hurdle after learning that obtaining an HCP and the corresponding environmental assessment documents would cost $150,000. R. 6. Adding to Ms. Lear's troubles, she received a letter from the FSW, "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 only option presented to Ms. Lear by the FSW was to submit a costly ITP application, which would require, "[a]t a minimum, that all acreage of lupine fields 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. Ironically, the Karner Blue butterflies could not survive without the care and maintenance provided by the Lears, as "[w]ithout annual mowing, the lupine fields on the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees, eliminating the Karner Blues' habitat, a process which would take about ten years. R. 7.

Ms. Lear takes further measures to comply with the FSW Requirements. Due to the expense of obtaining an ITP, Lear developed an alternative development proposal ("ADP"). R. 7. However, this plan never came to fruition as the Brittain County Wetlands Board denied Ms. Lear's ADP permit. *Id.* Despite Ms. Lear's best efforts, none of her attempts to develop her land

while simultaneously providing for the Karner Blue's were satisfactory to the FSW or New Brittain. *Id.* Indeed, to comply with the requirements set out by the government, Ms. Lear would have to spend $150,000.00 despite the fair market value of her property, assuming there are no restrictions barring development, is only $100,000.00. *Id.*

Procedural History. After numerous attempts to develop the property in compliance with FSW and New Brittain requirements, in February of 2014, Ms. Lear commenced this action in pursuit of a declaration finding the Endangered Species Act to be an unconstitutional exercise of Congress' power, or in the alternative, that FSW and Brittain County must pay just compensation for the regulatory taking of her parcel. R. 7.

The District Court determined that Ms. Lear's takings claim is ripe, and recognized that applying for an Incidental Takings Permit would be futile in the present case. R. 9. The District Court also found that the relevant parcel for the takings analysis is the Cordelia lot in isolation, rather than Lear Island in its entirety. *Id.* Moreover, the District Court determined that the relevant time period for this lot is limited to the current permissible development of the property for purposes of the takings analysis. R. 10. Additionally, the District Court determined that the there are no public trust limits inherent in the title to this property which would bar the development of a single family residence. *Id.* Finally, the District Court found the Endangered Species Act to be a valid exercise of Congress' Commerce Clause power. R. 7-8.

SUMMARY OF THE ARGUMENT

Ms. Lear's takings claim is ripe because it was clear that she could not meet the requirements of the Incidental Takings Permit. A landowner must take reasonable steps to determine the extent of the restriction on her property before she sues the government for a regulatory taking. In this case, Ms. Lear was able to determine the extent of the restrictions on

her property without applying for a permit. The substantive requirements of the FWS regulations require that Ms. Lear include plans for relocating the lupine habitat to a contiguous piece of property. Ms. Lear would have to relocate the habitat to her sister's neighboring piece of property. However, her sister is not willing to agree to the plan. Consequently, Ms. Lear's application would be futile because it will fail based on the substantive requirement of the FWS regulations. This claim is ripe because Ms. Lear knows the extent of the restrictions on the property. Therefore, this court should affirm the District Court's decision and hold that Ms. Lear's claim is ripe because she does not need to submit a permit when she cannot meet the substantive requirements of the regulation.

Ms. Lear lost all economic use of her property because the FWS and Brittain County regulations force her to leave the property economically idle for ten years. The Fifth Amendment requires the government to pay just compensation to a landowner when government regulations infringe upon property owner's rights. Here, both FWS and Brittain County regulations prevent Ms. Lear from enjoying the full economic benefit of her property for an indefinite period, in excess of 10 years. As a direct result of the government regulations, Ms. Lear must stop her current schedule of annual mowing, and subsequently wait for a forest to naturally form, overtaking and destroying the property's lupine environment. This Court should affirm the District Court's decision because no court, in the interests of justice and fairness, has ever found that a 10-year taking falls within the meaning of a "temporary restriction".

In addition, the taking of the Cordelia lot should be analyzed in isolation from the rest of Lear Island because the lot is a distinct unit that is solely owned by Ms. Lear. Subdivided lots are analyzed in light of the economic expectations of the landowner and the regulations in place at the time when development was contemplated. Lear Island has not been treated as a single unit

ever since it was subdivided in 1965. At which point, the Brittain Town Planning Board determined that each lot could be developed with at least one single-family residence. Therefore, Ms. Lear and her father had economic expectations that the Cordelia lot would be a separate and distinct unit. In addition, the current regulatory structure was not in place when the Goneril and Regan lots were developed in or around 1965. Consequently, it is inappropriate to include the development of the Goneril and Regan lots in Ms. Lear's takings analysis. Therefore, this court should affirm the District Court's decision and find that the Cordelia lot is the only relevant lot for this takings analysis.

Next, this Court should affirm the District Court's finding that the Butterfly Society's offer of $1,000 per annum to have *de minimus* value. The Defendants misconstrue the value of the Cordelia lot by arguing that the potential earnings of $1,000 per year illustrates the remaining value Ms. Lear's property has retained. While common law maintains that there can be no taking where a property retains value to the owner, it has never gone so far as to distinguish between a 100% loss of economic value and a 99% loss of economic value. Here, earnings of a mere $1,000 per year is even less than 99% of the property's total value. As such, accounting for property taxes, the property creates a net loss for Ms. Lear. Reversing the District Court's decision would not only be unjust, but it would also be utterly inconsistent with takings *jurisprudence*. To reverse would open the floodgates for the government to take private citizen's property in exchange for only an insubstantial amount of consideration.

Moreover, this court should also find that the combination of the local and federal regulations caused an indivisible injury by depriving the Cordelia lot of all economic value. The joint effect of the regulations factually caused the total loss in economic value because Ms. Lear would be able to build a home on the property if the regulations did not exist. The District Court

correctly found that there were no "background principles of state law" which would hinder Ms. Lear's right to develop her property. At the time both Ms. Lear and her father acquired the land, not only were there no laws in place that would hinder development, but also as noted above, the Brittain County Planning Board expressly recognized that the development of a single-family residence was appropriate on the lots. In addition, each government had independent control over their regulations and cannot justifiably use a *point-the-finger* defense. Lastly, their independent and concurrent acts combined to destroy the economic value of the land, making it impossible to apportion individual liability.

Finally, this Court should reverse the decision of the District Court finding that the Endangered Species Act is a valid exercise of power under the Commerce Clause. The District Court erred in applying Supreme Court precedent establishing limitations upon Congress' Commerce Clause power. Additionally, while the Twelfth Circuit has not decided on this issue, the case law cited to by the Court is inapplicable to the present case in which Ms. Lear wishes to construct a mere single-family residence. Therefore, this Court should reverse the decision of the District Court and find that the Endangered Species Act is an invalid exercise of Congress' power under the Commerce Clause.

STANDARD OF REVIEW

This Court reviews conclusions of law based upon a *de novo* standard, and questions of fact under a "clearly erroneous" standard. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) *citing Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379 (Fed. Cir. 2001). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed." *Id. citing United States v. United States Gypsum Co.*, 68 S. Ct. 525, 542 (1848).

"Whether a compensable taking has occurred is a question of law based on factual findings." *Maritrans Inc.* 342 F.3d at 1350 *citing Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). As such, "determining whether a particular regulatory action constitutes a taking involves an ad hoc, fact-sensitive inquiry." *Walek v. United States*, 303 F.3d 1349, 1354 (Fed. Cir. 2002). Further, the District Court's finding of the relevant parcel in the context of regulatory takings is a question of fact reviewed for clear error. *Id.* at 1354 *citing Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1366 (Fed. Cit. 1999).

ARGUMENT

1. Ms. Lear's takings claim is ripe because it would have been futile to apply for the incidental take permit when Ms. Lear could not meet the substantive requirements of the permit.

A regulatory takings claim, against the federal government, is ripe when the government has made a final decision about the types of restrictions it will impose on the property. 5 U.S.C. § 704 (1988); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-94 (1985). Therefore, a landowner must comply with agency procedures that provide a means for obtaining a final decision. *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980). For example, landowners are generally required to apply for permits and variances when they want to develop property restricted by government regulations. *Id.* Permit applicants should allow the agency to use its discretion to help with the application process. *Morris v. U.S.*, 392 F.3d 1372, 1376-77 (Fed. Cir. 2004). Ultimately, a takings claim is ripe when the government has reached a final decision based on the substantive aspects of the application—procedural deficiencies will not suffice. *Heck v. U.S.*, 37 Fed. Cl. 245, 251, 256 (1997).

The purpose of the finality requirement is to determine the extent of the restriction on the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001). However, ripeness requirements cannot become more exhaustive than the substantive takings claim itself. *Loveladies Harbor v. U.S.*, 15 Cl. Ct. 381, 386 (1988). Therefore, a landowner only needs to take reasonable steps to determine the extent of the restriction on the property. *See Hage v. U.S.*, 35 Fed. Cl. 147, 164 (1996) *citing Loveladies Harbor*, 15 Cl. Ct. at 386-87.

A plaintiff does not need to take futile steps to determine the extent of the restrictions on their property. *Loveladies Harbor*, 15 Cl. Ct. at 387. The plaintiff in *Loveladies Harbor* sued the federal government when it denied his permit application to fill federally protected wetlands. *Id.* at 383. The government argued that the takings claim was not ripe because the plaintiff could have applied for a variance after his permit was denied. *Id.* at 386. Based on the government's regulations, a variance was allowed when the denial of the permit has a detrimental effect on navigation and anchorage. *Id.* at 387. However, the variance was not designed to protect landowners such as the plaintiff. *Id.* Instead, the court recognized that the government's variance was meant to protect the navigation and anchorage of the wetland. *Id.* Consequently, plaintiff's attempts at requesting a variance would have been futile. *Id.* The court rejected the government's argument and held that the plaintiff's claim was ripe. *Id.*

In contrast, the plaintiff's claim in *Morris* was not ripe because the plaintiff did not prove the futility of applying for a permit. *See Morris*, 392 F.3d at 1377. The plaintiff wanted to harvest six large redwoods trees. *Id.* at 1374. However, he was restricted by the ESA because harvesting the trees would interfere with the fish in a nearby river. *Id.* The plaintiff could have applied for an Incidental Take Permit, however he declined to do so because the cost of the permit would have been greater than the value of the trees. *Id.* Instead, he filed a regulatory

takings claim against the United States. *Id.* at 1375. The court held that the claim was not ripe because the agency had discretion to assist with the application process—thereby reducing the cost. *Id.* at 1377. Applicants for an Incidental Take Permit are strongly encouraged to request technical assistance from the agency. *Id.* Consequently, the court was unable to determine the cost of the incidental take permit. *Id.*

Ms. Lear's claim is ripe because applying for an incidental take permit would have been futile. This case is like *Loveladies* because the plaintiffs in both cases were able to determine the extent of the restriction on their property, without taking futile steps. Applying for a variance was futile in *Loveladies* because the plaintiff's variance would have clearly been denied. Variances were only granted for the purpose of protecting the wetland and the plaintiff's development plans were focused on building residential housing, not protecting the wetland. Similarly, it would have been futile for Ms. Lear to apply for an Incidental Take Permit because her permit would have clearly been denied. The permit would only be granted if Ms. Lear's application provided for the protection of the lupine habitat. Specifically, the application needed to include plans for moving the lupine habitat to her sister's lot. However, Ms. Lear is estranged from her sister Goneril, and Goneril has refused to help her sister.

Consequently, this court should follow the *Loveladies* reasoning and hold that the Ms. Lear's claim is ripe because applying for the Incidental Take Permit would have been futile. In addition, this court should find that Ms. Lear's case is distinguishable from *Morris*. The plaintiff in *Morris* did not apply for the permit due to of the cost of the application. However, unlike the *Morris* plaintiff, Ms. Lear did not apply for the permit because she could not satisfy a substantive requirement of the application. It is true that the cost of the permit clearly denied Ms. Lear of all economic use of her property. She would have to spend $150,000 to apply for the permit. The

property is only worth $100,000 if there are no restrictions on development, and there is no market for the property without a residence. However, Ms. Lear did not request technical assistance because her sister refused to cooperate with moving the lupine habitat.

2. The government regulations deprive Ms. Lear of all economic use of her property because the inability to develop the property for ten years cannot, in the interests of fairness and justice, be considered a temporary restriction.

The Court should affirm the District Court's finding that Plaintiff's property was taken. "The Fifth Amendment forbids the taking of private property for public use without just compensation." *Penn Central Transportation Co*. v. *New York City*, 438 U.S. 104, 123-125 (1978). The Supreme Court recognized that this constitutional guarantee is "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." *Penn Central,* 438 U.S. at 123-124. Moreover, essential to the understanding of the Takings Clause are the concepts of "fairness and justice." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002).

To determine whether a taking has occurred, the court must determine that the plaintiff has "been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). While the Court has "eschewed any set formula" for determining whether the government has deprived an individual of his property interest,[1] it instead undertakes a "careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 535 U.S. at 335 (citing *Palazzolo v. Rhode Island*, 533 U.S. at 636 (2001) (O'Connor, J., concurring)). That said,

[1] "An interest in property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describe the temporal aspect of the owner's interest." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).

the Court has identified three factors to consider in analyzing regulatory takings claims: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the extent to which the regulation interferes with reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124 (1978). Relevant here, the Court has recognized that a plaintiff's interest in real property can be defined both by its geographic dimensions and the term of years. *Tahoe-Sierra*, 535 U.S. at 331. Therefore, a permanent deprivation of the owner's use of the entire parcel is a taking—while a temporary restriction of the entire parcel is not. *Id*.

As noted above, in *Tahoe-Sierra*, the Court held that the plaintiff's loss of the land for 32-months was only a temporary taking and therefore not compensable. *Id.* at 341-343. By doing so, the court rejected a Plaintiff's proposed *per se* rule that would impose liability whenever there is a temporal obstruction to an individual's land. The Court cited the potential slippery slope that could lead courts astray in cases of "normal delays." *Tahoe-Sierra*, 535 U.S. at 334-35 (citing *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 321 (1987) (normal delays include "obtaining building permits, changes in zoning ordinances, and the like").

Nevertheless, the Court did hold that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Id*. at 342 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). The court even expressly acknowledged that a reasonable court could potentially find that a taking occurred even after only one year, provided that it interfered with reasonable investment-backed expectations. *Id.* The case at bar presents such an example.

The District Court correctly distinguished *Tahoe-Sierra* from the case at hand because the *Tahoe-Sierra* moratorium did not extend for an entire decade. Even assuming *arguendo* that Plaintiff's land is only temporarily taken, *Tahoe-Sierra* still would not have precluded Plaintiff's

takings claim. The Court merely rejected Plaintiff's proposed *per se* rule, it did not strictly prohibit compensation for all temporary takings. As such, even a temporary taking is entitled to traditional *ad hoc* review. Despite *Tahoe-Sierra*'s generous application of the term "temporary" to a 32-month taking, it would be unreasonable to find that a 10 year—120 month—taking falls within the meaning of the word temporary. While courts should not view any one factor as dispositive, depriving Plaintiff use of her land for over 10-years, in the interests of justice and fairness, should be highly persuasive.

Furthermore, there are no "normal delays" that a court could cite that would justify a 10-year taking. In *Tahoe-Sierra*, the court allowed the 32-month taking so that governmental entities would not be vulnerable to numerous takings claims and "hasty decision making." *Id.* at 335. However, after 10 years, hasty decision making is unlikely to be a concern. The exorbitant term that Defendants are depriving Plaintiff of her land demonstrates that the case at bar is far closer to the "extraordinary circumstance" found in *Lucas* rather than the "temporary circumstance" found in *Tahoe-Sierra*.

Unlike *Tahoe-Sierra*, *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles* is far more analogous to the facts at hand. There, the Court was asked to consider "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." *First English Evangelical Lutheran Church of Glendale v. Cty. Of L.A.*, 482 U.S. 304, 313 (1987). In *First English*, the city passed an ordinance temporarily prohibiting the construction of any structure within an interim flood protection area as a matter of public health and safety. *Id.* at 307. The Court held that the Just Compensation clause was not designed to limit governmental interference, but rather "to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 316; *see also Pennsylvania Coal Co. v. Mahon*,

260 U.S. 393 (1922) ("the general rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

Of consequence, the Court cited a string of cases that awarded compensation "though the takings were in fact temporary." *Id.* at 318; *see Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motor Corps.*, 323 U.S. 373 (1945). The Court then summarily rejected any distinction between temporary and permanent takings. *Id.* at 319. As such, here, the Court should not dismiss Plaintiff's cause of action because it would be inconsistent with numerous Supreme Court decisions that did not distinguish between temporary and permanent takings. *Id.* at 318.

In short, the Court should affirm the District Court's holding because it correctly distinguished the case at bar from *Tahoe-Sierra*. *Tahoe-Sierra* was a case petitioning the court to adopt a hardline *per se* rule that would impose mandatory liability upon any governmental taking—no matter how temporary. By rejecting this rule, the Court cited the potential ramifications such a rule could have on short-term regulations or delays. Here, the Defendants are misconstruing the *Tahoe-Sierra* decision to argue that temporary holdings are not compensable. However, the Court has never deviated from the *First English* holding that rejected any distinction between temporary and permanent takings. Consequently, regardless of whether the regulation was temporary or permanent, the Defendants' have denied Plaintiff all economic value of her property, and therefore must compensate Plaintiff for her losses.

3. For purposes of the takings claim, the relevant parcel of land is limited to the Cordelia Lot as explicitly subdivided, rather than the land in its entirety because Ms. Lear received only the Cordelia lot, and treated the lot as a distinct unit.

The District Court correctly found that the relevant parcel of land for the takings claim is the Cordelia lot in isolation, rather that Lear Island in its entirety. R. 1. Determining what portions of land constitute the relevant parcel requires a fact sensitive inquiry. *Loveladies Harbor*

v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994). While there is no set formula for assessing the relevant parcel, in making this inquiry, courts have looked to "[t]he timing of the property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition…" *Palm Beach Isles Assocs. v. United States*, 208 F. 3d 1374, 1381 (Fed. Cir. 2000). Consistent with this focus, "[t]he crucial issue is 'the economic expectations of the claimant with regard to the property.'" *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013) *citing Norman v. United States*, 429 F.2d 1081, 1091 (Fed. Cir. 2005). Notably, in assessing how environmental regulations impact development rights, courts consider the regulations imposed on the property at the time development was contemplated. *See Palm Beach Isles Assocs*., 208 F.3d at 1381 (noting that it was "inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory structure that was not in place at the relevant times.").

As noted by the District Court, when a lot has been subdivided with distinctly separate ownership, the relevant parcel is limited to that which the landowner possesses. R. 10. For example, the Plaintiff in *Loveladies Harbor*, originally owned a 250-acre parcel, which was later subdivided, sold, and individually developed. *Id*. Plaintiff then filed an application for a fill permit to develop a remaining 12.5-acre parcel, which was denied. *Id.* at 1174. As a result, the plaintiff filed a takings claim against the government. *Id.* While plaintiff claimed that the relevant parcel for takings purposes was limited to the 12.5 acres for which the permit was denied, the government contended that the relevant parcel expanded to include the original 250-acre purchase. *Id*. In determining the relevant parcel, the Court looked to "factual nuances," including the "timing of transfers in light of the developing regulatory environment." *Id.* at 1181. Moreover, looking to the timing of the conflicting regulation, the Court noted that New Jersey

did not move to enforce the development on this wetland until after Plaintiff's initial project had already been approved for development. *Id.* As such, the Court rejected defendant's argument, finding that the relevant portion of the property was limited to the 12.5-acre lot, and not the property in its entirety. *Id.*

Not limited to the holding in *Loveladies Harbor*, the Court in *Palm Beach Isles Assocs. v. United States* also addressed the issue of defining the relevant parcel. In *Palm Beach Isles Assocs.*, the plaintiffs purchased a 311.7-acre property in 1956. 208 F. 3d at 1136. This property was subdivided and developed over a period of several years, and was split into two parcels by a road that ran across the property. *Id.* After their initial permit to develop the property expired, plaintiff later filed for another permit, which the government denied citing environmental restrictions stemming from the Clean Water Act. *Id.* As a result, plaintiff filed a takings action against the federal government. *Id*. In defining the relevant parcel for the subdivided property, the Court specifically noted that, where land was once jointly owned, as is the case here, "[c]ombning the two tracts for purposes of a regulatory takings analysis...simply because at one time they were under common ownership, or because one of the tracts was sold for a substantial price, cannot be justified." *Id.* at 1381.

Furthermore, consistent with *Loveladies Harbor*, the Court looked to the intent of the landowner at the relevant time and noted that the plaintiff, "[n]ever planned to develop the parcels as a single unit" and that the "it is inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory structure that was not in place at the relevant times." *Palm Beach Isles Assocs., 208 F. 3d* at 1381. As such, the relevant parcel was limited to the individual parcel for which Plaintiff filed a development permit, and not the parcel in its entirety. *Id.*

Only when the parcel is subjected to a temporary taking have courts found that the relevant parcel is not limited to the specific lot which is the subject of a permit application. *Tahoe-Sierra*, 535 U.S. at 306. For instance, in *Tahoe- Sierra*, the issue before the court involved a 32-month moratoria limiting development of the property. *Id.* In considering the nuanced facts of this case, the Court determined that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use…" *Tahoe-Sierra*, 535 U.S. at 335 *citing Palazzolo*, 533 U.S. at 636 (2001) (O'Connor, J., concurring). As such, the Court determined that the relevant parcel in this case must be considered in light of "the nature and extent of the interference" with the rights to the parcel. *Id.* at 327. In this situation, because the restriction was merely temporary and did not permanently divide the property of its value, the Court rejected the categorical per se takings rule advanced in *Lucas. Id.* at 332.

The present case is analogous to *Loveladies Harbor* and *Palm Beach Isles Assocs*. Similar to the present case, in *Loveladies Harbor*, the government took the position that the relevant parcel was the 250 acre lot, while the Plaintiff argued that the relevant parcel was limited to the 12.5 acres for which the Plaintiff sought its permit. In *Loveladies Harbor*, the Court determined that the relevant parcel was the 12.5 acres for which the Plaintiff had filed a permit because it was deprived of all economically feasible use. Likewise, in the present case, this Court should find the relevant parcel to be limited to the Cordelia lot, for that is the only lot a permit for development has been filed for. Furthermore, analogous to *Palm Beach Isles Assocs*., where the Court found no justification for combining lots for the purposes of a takings analysis, the Cordelia lot should not be combined with the neighboring Goneril lot.

Moreover, even adopting the government's argument that the relevant parcel should be based upon the parties "investment backed expectations," at the time of subdivision, the original

owner, Cornelius Lear's, own investment backed expectations for the property were for it to be subdivided and developed when he deeded the property individually to his daughters. The town of New Brittain codified this possibility for the property when it specifically noted that the land could be developed in the future. R. 5. As such, while the government contends that the Lear family's previous use of this land should be a factor in determining the relevant parcel, the reasoning adopted by the Supreme Court in *Loveladies Harbor* voids this argument. Indeed, in *Loveladies Harbor*, the Court held that portions of the 199-acre parcel, which were previously developed or sold prior to the regulation, should not be counted as part of the relevant parcel or denominator. Similarly, in the present case, any development or regulation which took place over the course of many years that the Lear family owned the property cannot be said to factor into determining the relevant parcel.

Finally, the facts in this case are distinguishable from that in *Tahoe-Sierra*. Whereas in *Tahoe-Sierra*, as noted above, the Court determined that the loss of land for a 32-month period did not constitute a permanent taking, and therefore did not necessitate compensation under takings law. However, the present case entails a more long-term permanent taking necessitating compensation under the takings clause. Indeed, unlike *Tahoe-Sierra*, Ms. Lear stands to lose her property, which will be rendered valueless, for a period of at least ten years. Moreover, in the present case, the only portion of the land under examination is the Coredelia lot. Indeed, this is the only portion of Lear Island that Ms. Lear has access to. Therefore, because the taking in the present case far surpasses a temporary bar on the use of the relevant parcel, the Court should find that the relevant parcel is limited to the Cordelia lot.

4. Ms. Lear's property has been completely deprived of all economic use because it only retained de minimis value.

The Court should affirm the District Court's finding that Plaintiff's property was without economic value because the Butterfly Society's offer of $1,000 annually, at best, represents a de minimis portion of the property's total value. Plaintiffs must generally be deprived of the entire economic benefit of their land, however, recent case law has established an exception. Plaintiffs, such as Ms. Lear, whose investment-backed expectations have been substantially hindered by governmental regulations. *Compare Mugler v. Kansas*, 123 U.S. 623 (1887) (the prohibition on the sale of alcohol which rendered a brewery worthless is not a taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (resolving a regulatory takings claim solely using the plaintiff's reasonable investment-backed expectations). Casting aside any doubt, the Court in *Palazzolo* affirmatively adopted a two-tiered inquiry. *See Palazzolo*, 533 U.S. at 606.

Under the first tier approach, a complainant may prevail by demonstrating that the regulation caused plaintiff's property to suffer a complete loss of economic value. The second tier is essentially an ad hoc factual inquiry into whether the government regulation has gone so far as to essentially render plaintiff's property valueless. Consequently, plaintiffs are entitled to compensation even when their property is not strictly valueless. *See Keystone Bituminuous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1981) (analyzing "the value that has been taken from the property with the value that remains in the property").

In *Palazzolo*, the petitioner brought a takings claim after the state designated his land as a protected coastal wetland. The state supreme court rejected plaintiff's claim on the grounds that his property retained a value of $200,000 (compared to the $3.1 million total estimate provided by plaintiff) and was therefore not valueless. The United States Supreme Court reversed this decision. The Court noted:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Palazzolo, 533 U.S. at 617. While the Court did not specifically comment on what level of interference a government regulation must have caused to constitute a taking, an examination of *Palazzolo* and the Court's prior precedent demonstrates that redress is constitutionally required when the taking is slightly greater than de minimis. Moreover, the Court has never found there to be a taking where the plaintiff has suffered greater than a 93% reduction in property value. See *Agins*, 447 U.S. at 255 (no taking with an eighty-five percent reduction in value); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking with a 75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking with a 92.5% diminution in value).

Here, Plaintiff has suffered a 99% reduction in value. The facts are undisputed that the fair market value of the Cordelia lot, sans governmental interference, is $100,000. Consequently, the $1,000 annual offer from the Brittain County Butterfly Society does not rise beyond the level of de minimis value. Factoring in the $1,500 Plaintiff would owe for property taxes, Plaintiff would actually lose money just by retaining the property. For this reason, Plaintiff's property is now essentially valueless. Because the property is valueless—or at best retains de minimis value, Plaintiff is entitled to compensation under the Constitution. For all of the reasons mentioned above, Plaintiff respectfully requests that the Court affirm the lower court's decision.

5. The FWS and Brittain County are liable for the total loss of economic value in Ms. Lear's property because the combination of the local and federal regulations caused an indivisible taking.

There is a long history of applying tort concepts to takings claims. It has been well established in takings law that a person has a series of property rights associated with their

ownership. *Hansen v. U.S.*, 65 Fed. Cl. 76, 99 (2005) (*citing Gardner v. Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (the right to use water on one's property)). Tort law has helped to define the property rights that, if taken, will give rise to a takings claim. *Hansen*, at 100. For example, the tort of trespass provides owners with the right to exclude others from their property. *See id.* at 99-100 (*citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). The tort of nuisance has also helped to shape takings law. *Lucas*, 505 U.S. at 1031 (holding that the government is not liable for a taking when its regulation merely restricts conduct that is already prohibited by nuisance or property law).

Courts continued to use other tort concepts, such as factual and proximate cause, to limit takings liability. *Hansen*, at 96. Consequently, claims arising in tort and takings share similar causation requirements. *Hansen*, at 98, 102-107. Both tort and just compensation claims use factual and proximate causation concepts to determine liability. *See Sanguinetti v. U.S.*, 264 U.S. 146, 149-50 (1924); *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 146-49 (Tenn. 2007); *Ventures Northwest Ltd. Partnership*, 914 P.2d 1180, 1187 (Wash Ct. App. 1996). In the case of two or more defendants, as in this case, factual causation determines whether a party's actions were a substantial factor in causing a particular harm. *Id.* The concept of proximate causation is used to place a limit on the factual causes in which a defendant can be liable. *Taggart v. State*, 822 P.2d 243, 258 (Wash. 1992). The purpose of the limitation is to rule out liability for harms that may be factually linked to a defendant, but too remote to justify imposing liability. *Hansen*, 65 Fed. Cl. at 102. A plaintiff with a torts claim proves proximate cause by showing that the harm was a foreseeable consequence of the defendant's conduct. *Id.* Just compensation claims follow a similar concept and limit liability to harms that are the direct, natural, or probable result

of the defendant's conduct. *Id.* at 116-19 (*citing Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

In addition to causation principles, this court should also look to the tort concepts of joint and several liability in the context of a taking caused by the joint effect of federal and local regulations. Joint and several liability is when all defendants are liable for the entirety of the plaintiff's damages if the defendants are the proximate cause of the plaintiff's harm. *See Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 340-42 (Tenn. 1976). In which case, the plaintiff can collect their damages award from one defendant or all of the defendants. *Id.* It is up to the defendants to file claims for contribution against each other if they can prove that their conduct had a lesser contribution to the plaintiff's harm. *Id.* While the issue before this court does not necessarily pertain to the apportionment of damages, the concepts involved in joint and several liability helps to prove Ms. Lear's argument that considering the federal and local restrictions separately would run contrary to the spirit of the Fifth Amendment.

5.1. The joint effect of the FWS and Brittain County regulations are the factual and proximate cause of the total loss in economic use of Ms. Lear's property.

There is little discussion of causation in regulatory takings cases because there is typically no doubt that the government's action caused the alleged taking. *Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 984 (9th Cir. 2002)*. However, causation principles can be extrapolated from the cases. First, the government's actions are considered a substantial factor in depriving the plaintiff of all economic use when the plaintiff's proposed use would be permitted if the government's regulation did not exist. *See Lucas*, 505 U.S. at 1027. Second, government liability is limited to instances where the government retains independent control over its own regulations. *See Ciampetti v. U.S.*, 18 Cl. Ct. 548, 555 (1989). Third, governments are liable for

the joint effect of their regulations when a defense that blames another party would run contrary to the spirit of the Fifth Amendment. *Id.*

5.1.1. The regulations are the factual cause of the taking because there are no public trust limits on the property—therefore Ms. Lear's proposed use would be permitted if the regulations did not exist.

The District Court correctly found that public trust principles inherent in title do not preclude Ms. Lear's claim for a taking based on the denial of a county wetlands permit. In instances where a state regulation will deprive a landowner of all economically viable use of the land, the state may avoid compensation only when the purpose for which the owner seeks to use his land was "not part of his title to begin with." *Lucas*, 505 U.S. at 1019. The scope and enforcement of the public trust doctrine is typically derived from "background principles of state law." *Lucas*, 505 U.S. at 1029. For example, government may regulate the development of private property centered on public access to waters used for "navigation, fishing, and other recreational uses." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603. In limited circumstances, public trust principles inherent in the title of land may curb the permitted use of land. *Id.* As such, unless the government can show that the restriction was inherent in the title, landowners will be permitted to develop their property. *Lucas* 505 U.S. at 1028-1029.

Brittan County's reliance on dicta in *Lucas* suggesting that compensation is not required when development limits are inherent in the title to the property is misguided in the present case. As noted above, in *Lucas*, a landowner was denied a fill permit for two lots that were hindered by restrictions stemming from the Beachfront Management Act. *Id.* at 1006. The Court in *Lucas* explicitly recognized that a regulation barring economically beneficial use of the land may only be implemented without compensation when the restrictions are "background principles of state law" which "inhere in the title itself. *Id.* at 1029. However, absent background principles of state law, the Court noted that typically in takings claims, no "matter how minute the intrusion, and no

matter how weighty the public purpose behind it, we have required compensation." *Id.* at 1015. Therefore, because the regulation declared "off limits" all economically productive or beneficial uses the land, the Court determined that this regulation went beyond what relevant background principles would dictate, and compensation must be paid to sustain it. *Lucas* 505 U.S. at 1030.

Moreover, only where a landowner wishes to develop in a manner that is clearly inconsistent with public trust, will the actions be barred by the public trust doctrine. *In Esplanade Properties, LLC v. City of Seattle*, Plaintiff, landowner, purchased a tract of tidelands upon which it wished to develop shoreline property. 307 F.3d 978, 987 (9th Cir. 2002). However, the city denied its request for permits to construct waterfront homes. *Id.* Plaintiff then filed a inverse condemnation claim against the government. *Id.* at 979-980. In addressing the public trust doctrine challenge, the Court was able to easily determine that just compensation was not required for the taking, because background principles of state law would have nonetheless precluded development of this property. *Id*. at 986-987. Furthermore here, the area in which the landowner wished to develop was "an area regularly used by the public for various recreational and other activities" and was therefore "inconsistent with the public trust that the State of Washington is obligation to protect." *Id.* at 987.

In the present case, the District Court correctly concluded that there are no public trust limitations inherent in the title to Ms. Lear's property. Similar to *Lucas*, and in contrast with *Esplanade Properties,* the regulation in the present case would "declare off limits" any viable and productive use of Ms. Lear's property. Further, unlike *Esplanade Properties,* there are no background principles of state law which were present at the time either Ms. Lear, or any of her ancestors, acquired the property which would hinder development upon the property. Not only are there no background principles of state law hindering the development of Ms. Lear's

property, but also, Brittain County Planning Board expressly confirmed that a single-family residence would be developed upon the property. R. 5. Finally, as noted by the District Court, "Brittan County points to no New Union precedent establishing the scope of New Union's protections for public trust waters." R. 10.

5.1.2. The joint effect of the FWS and Brittain County regulations are the proximate cause of the taking because each government is independently responsible for its own regulation and the governments' defense would run contrary to the spirit of the Fifth Amendment.

Proximate cause is a policy consideration that limits a party's responsibility for the consequences of its actions. *Ventures Northwest Ltd. Partnership v. State*, 81 Wash App. 353, 365 (1996). Limits are imposed based on 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Id.* (citing cases). In the context of a regulatory takings claim, government liability is limited to takings that are the direct, natural, or probable result of the government's regulation. *Ridge Line*, 346 F3d at 1355-56. In contrast, the government is not the proximate cause of injuries that are the incidental or consequential result of the government's regulation. *Id.* A complete deprivation of economic use is the direct, natural, and probable result of government regulation when two separate government entities, having independent control over their own regulations, jointly or severally create the impediment to development. *Ciampetti*, 18 Cl. Ct. at 555-56.

5.1.2.1. The FWS and Brittain County independently control their own regulations because they citied their own regulations when they denied Ms. Lear's lot of economic use and each government has its own process for obtaining a permit.

A government is responsible for the joint effect of its regulation when it prohibits development based on its own regulations, and the process for obtaining a permit starts and ends with the government. The federal government in *Ciampetti* denied the plaintiff's permit because the project would violate federal regulations regarding dredging, filling, and discharging

materials. 18 Cl. Ct. at 552. The government also cited the plaintiff's noncompliance with state regulations. *Id.* However, the court held that the plaintiff's claim would survive summary judgment. *Id.* at 555. The court reasoned that the government could not use the state's regulations as a defense when the government's denial was, in part, based on its own regulations. *Id.* at 554. In addition, the process for obtaining a federal permit starts and ends with the federal government. *Id.* at 555. Therefore, a government is the proximate cause of a taking when it has independent control over the regulations that are limiting development.

The joint effect of the FWS and Brittain County regulations created a taking that is the direct, natural or probable result of the regulations. Ms. Lear's case is like *Ciampetti* because there are multiple governments impeding her ability to build a home on her land. The federal government in *Ciampetti* was independently responsible for the regulation because it denied the permit based on its own regulation and the process for obtaining a permit started and ended with the federal government. Here, both the FWS and Brittain County are independently responsible for their own regulations. Each government denied Ms. Lear economic use of her property based on its own regulations—the FWS citing regulations designed to protect the lupine habitat and Brittain County citing regulations that prohibited filling in a wetland. In addition, Ms. Lear had to apply for Incidental Take Permit with the FWS and wait for an answer from the FWS. Similarly, she had to apply for a wetland fill permit through Brittain County and wait for an answer from Brittain County. Therefore, process for obtaining a permit started and ended with each government respectively. Consequently, this court should find that both governments are responsible for the joint effect of their regulations because they have independent control over the regulations that caused a taking.

5.1.2.2. The government's defense would run contrary to the spirit of the Fifth Amendment because it would leave Ms. Lear with no economic use of her property and no just compensation.

The plaintiff's property in *Ciampetti* was restricted by both federal and state regulations. *Ciampetti*, 18 Cl. Ct. 552, 554. The court, prior to turning to the case before it, notes some of the history of the litigation: In an earlier case, the plaintiff first sued the state of New Jersey for just compensation. *Id.* at 551. He argued that the state took his property when it denied his permits for dredging and filling in protected wetlands. *Id.* The district court held that a taking did not occur because federal restrictions were an independent limitation on development and they were not attributable to the state. *Id.*

The *Ciampetti* court then turned to the case at hand, involving plaintiff's claim against the federal government. *Id.* at 552. It did not determine whether the district court was correct in dismissing the state claim, but it nonetheless reasoned that it would not be an appropriate limit on takings liability to allow governments to escape liability by blaming each other for the harm. *Id.* at 556. The court further reasoned that it would be contrary to spirit of the Fifth Amendment if the state and federal governments could avoid paying just compensation by "acting jointly or severally to cause a taking." *Id.* at 556. Therefore, a regulatory takings is the direct, natural, and probable result of government regulation when multiple government entities create an impediment to development and allowing a *point-the-finger* defense would run contrary to the spirit of the Fifth Amendment.

Like the defendants in *Ciampetti*, the FWS and Brittain County are essentially using a point-the-finger defense. The FWS attempts to shield itself from liability because it leaves some developable portion of land. In addition, Brittain County tries to shield itself from liability because it leaves some other developable portion of land. Consequently, this court should follow the *Ciampetti* court's reasoning and hold that both governments are the proximate cause of the

taking. Both governments are acting as an impediment to development regardless whether they are acting jointly or severally. In addition, the government's point-the-finger defense would run contrary to the spirit of the Fifth Amendment because it would leave Ms. Lear with no economic use of her property and no just compensation. Therefore, the taking of Ms. Lear's property is the direct, natural and probable result of the regulations.

5.2. The FWS and Brittain County are liable for the joint effect of their regulations because the taking is an indivisible harm.

In addition to the proximate cause concepts discussed above, the concepts involved in joint and several liability can also be instructive. The purpose of joint and several liability is to allow the plaintiff to recover the entire amount of judgment from any one of several defendants. *See Erny v. Estate of Merola*, 171 N.J. 86, 98 (2002). In which case, the plaintiff must prove that each of the defendants are liable for the plaintiff's entire injury. *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 340 (Tenn. 1976). The issue in this case does not relate to how damages are apportioned, rather, the issue is about whether the federal and local government can be liable for the joint effect of their regulations. Ms. Lear argues that the governments are liable for the joint effect of their regulations under the joint and several liability concepts surrounding divisibility of the harm.

Defendants can be liable for the joint effect of their independent and concurrent acts that proximately cause the plaintiff's injury. *Velsicol*, 543 S.W.2d at 342. Defendants are jointly liable for conduct that creates a single indivisible injury to the plaintiff. *Id.* In contrast, there will not be joint liability when each defendant is responsible for a separate and distinct harm. *Id.* In which case, the defendants are only liable for the damage caused by his acts. *Id.* A harm is indivisible the harm cannot be apportioned to the individual wrongdoers. *Id.* (*citing Landers v. East Teas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952)). The defendant's in *Landers*

both operated pipes that ran near the plaintiff's property. *Landers* 248 S.W.2d at 732. Each company pumped salt water through the pipes. *Id.* However, the pipe lines broke and the saltwater ran into a lake on plaintiff's property and killed the fish in his lake. *Id.* The court held that both companies could be jointly and severally liable because holding otherwise would make it impossible for the plaintiff to secure relief when independent tortious acts joined in producing an injury. *Id.* at 734. The court reasoned that it would have been impossible for the plaintiff to prove each defendant's individual contribution to the harm. *Id.*

The FWS and Brittain County are liable for the joint effect of their independent and concurrent acts because Ms. Lear's total loss in the economic use of her property cannot be apportioned to each government. The joint effect of the regulations is like the joint effect of the pipes bursting in *Landers*. It would have been impossible to assign individual liability to each of the companies in *Landers* because the salt combined in the lake and killed the fish. Similarly, it is impossible to assign individual liability to each government because the regulations combined to destroy any economic use of Ms. Lear's land. Consequently, this court should affirm the district court's ruling that the FWS and Brittain County are liable for the joint effect of their regulations.

6. The ESA is not a valid exercise of Congress's Commerce power as applied to a wholly intrastate population of an endangered butterfly species because the construction of a single-family residence does not "substantially affect" interstate commerce.

The Endangered Species Act is not a valid exercise of Commerce Power in the present case. Section 9 of the Endangered Species Act prohibits individuals from a take of a species within the United States. See ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). However, the Commerce Clause power is not unlimited, and only applies to those regulations that are economic in nature. *United States v. Morrison*, 529 U.S. 598 (2000). The Commerce Clause provides Congress with the power to "regulate commerce among the several States, and with the

Indian Tribes." U.S. Const. Art. I § 8, Cl 3. The Supreme Court has limited this power to three distinct categories in which Congress may properly regulate intrastate commerce, including: (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce; or (3) activities which have a substantial relation to interstate commerce. *United States. v. Lopez*, 514 U.S. 549, 558 (1995).

As set forth more fully below, Congress does not have power to regulate under the Commerce Clause in the present case because this case concerns a purely intrastate species of butterfly, the regulation of which fails to rise to the lofty threshold of substantially affecting interstate commerce.

6.1. The District Court erred in applying the Supreme Court's precedent in United States v. Lopez and United States v. Morrison to the present case in finding that an isolated intrastate species "substantially affects" interstate commerce.

As noted in *Lopez*, regulation of interstate commerce is only appropriate when, the activities in question "[s]o affect the interstate commerce or the exercise of the power of Congress to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Lopez*, 514 U.S. at 549 (*citing United States v. Darby*, 312 U.S. 100 (1941)). In *Lopez*, the Court found that the Gun Free School Zone Act was not a valid exercise of commerce power because the respondent was "a local student at a local school," and as such, there was no indication that this act would substantially affect interstate commerce. *Id*. at 567. The Court determined that to find a substantially affect, it would "[h]ave to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* Notably, in analyzing the Commerce Clause, the Court recognized that, "[i]t is not intended to say that these words comprehend that commerce, which

is completely internal, which is carried out between man and man in State, or between different parts of the same state, and does not extend to or affect other states." *Id*. at 533 (*citing Gibbons v. Ogden*, 22 U.S. 1, 189-190, (1824)).

Additionally, in *Morrison*, the limits of the Commerce Clause were further illustrated when the Supreme Court found that a statute providing for a gender-motivated violence was outside the realm of the commerce power. *United States v. Morrison*, 529 U.S. 598, 601-602 (2000). Indeed, in *Morrison*, Court rejected a "cost of crime" argument finding that the Commerce Clause does not allow Congress to regulate violent crime, no matter "how tenuously they relate to interstate commerce." *Id.* at 615 (*citing Lopez*, 514 U.S. at 564). As such, the Court solidified that the proper inquiry is whether the challenge to a regulation substantially affects interstate commerce. *Id.*at 601.

Here, analogous to *Lopez*, to accept the government's argument that the construction of Ms. Lear's home would substantially affect interstate commerce is to pile inference upon inference in an attempt to link the construction to interstate commerce. Indeed, in order to find that Ms. Lear's construction of a single-family home would rise to the high threshold of substantially affecting interstate commerce, this Court would have to make numerous inferences to assume that Ms. Lear is hiring outside contractors, who will ship materials in from out of state, in a manner that would meet this lofty threshold. This is an unrealistic assumption given the isolation of Lear Island. Furthermore, the construction of a small, single-family residence, fails to reach the substantial affects standard articulated in *Morrison*. Similar to *Morrison*, where the Supreme Court determined that even a tenuous connection to interstate commerce was insufficient to bring laws regarding gender motivated crime within the confines of Commerce Clause power, the tenuous relationship to interstate commerce noted by the District Court fails to

substantially affect interstate commerce. Analogous to *Lopez* and *Morrison*, Ms. Lear is not engaging in activity that in any way extends outside the bounds of New Union. Therefore, the butterfly population alone, which is isolated within Lear Island, falls short of having "substantial affect" on interstate commerce.

6.2. The District Court erred in finding that the construction of the proposed residence is "clearly economic" activity that substantially affects interstate commerce.

Even focusing on the proposed development, as suggested by the District Court, the present case differs from the precedent cited by the District Court. For instance, in *National Association of Home Builders v. Babbit*, the County of San Bernardino sought to build a $470 million hospital. *Nat'l Ass'n of Home Builders v. Babbit*, 130 F. 3d 1041, 1057 (D.C. Cir. 1997). However, the site for the hospital was located within the habitat of an endangered species of fly, therefore hindering this development project. *Id. at 1043-1044.* After revising the development plan to no avail, the County filed suit challenging the Commerce Clause application to this endangered species of fly. *Id.* at 1045. In finding that the regulation constitutional under the Commerce Clause, the court noted that "[t]he provision prevents the destruction of biodiversity," and "[c]ontrols adverse effects of interstate competition." *Id.* at 1052. *See also*, *Ranhco Veijo, LLC v. Norton*, 355 U.S. App. D.C. 303, 305 (2003) (*affirming Babbit*, 130 F.3d at 1041 (noting that the development of a 202-acre housing complex had a substantial effect on interstate commerce because it was "[p]resumably being constructed using materials from outside the state which will attract construction workers and purchasers "from both inside and outside the state." *Id.* at 1069)).

Moreover, Courts have looked to the aggregate effects of a regulation in assessing their effect on interstate commerce. *See GDF Realty Invs., Ltd. v. Norton,* 326 F. 3d 622, 624 (5th Cir. 2003). In *GDF Realty Invs.*, the landowners sought to commercially develop a 216 acre property.

Id. at 625. However, their permit was denied due to an endangered species of beetle located upon the property. *Id.* While the landowners argued that this endangered species was insufficient to substantially affect interstate commerce, the Court aggregated its effect and found that the in the aggregate, the species was sufficient to substantially affect interstate commerce. *Id.* at 640. *See also San Luis v. Delta-Mendota Water Auth. V. Salazar,* 638 F. 3d 1163, 1167 (9th Cir. 2011) (finding a substantial bearing to interstate commerce by looking to the aggregate effects of the statute in order to establish a substantial relationship to interstate commerce).

In the present case, the District Court erred in finding that this regulation has a substantial effect on interstate commerce because the development of a single family home, even considered in the aggregate, does not substantially affect interstate commerce. Even adopting the District Court's reasoning that the focus should be on the construction of the proposed residence, this case fundamentally differs from the precedent the Court cited to support its argument. In the present case, unlike in *GDF Realty* or *San Luis*, the challenged portion of the regulation, even aggregated, does not focus on interstate commerce or substantially relate to interstate commerce in any way due to their lack of economic value. Furthermore, while *GDF Realty* involved the development of a 216-acre property, the development of a single-family residence upon a 12.5-acre lot fails to rise to the level of substantially affecting interstate commerce.

Furthermore, as noted above in *Lopez*, transactions between man and man are not sufficient to reach the threshold of substantially affecting interstate commerce. Therefore, it is unrealistic and inconsistent with the underlying purpose of Congress' Commerce Clause power to assume that the Construction of Ms. Lear's single-family residence, within the confines of Lear Island, will rise to the lofty threshold of substantially affecting interstate commerce. Finally, unlike *National Ass'n of Home Builders v. Babbit*, the District Court did not find biodiversity

concerns to be a link to interstate commerce, and instead, unlike the precedent it relied upon, focused on the construction as the economic activity. Therefore, because this transaction fails to substantially affect interstate commerce, this Court should reverse the decision of the District Court.

CONCLUSION

This court should affirm the District Court's decision on the following grounds: (1) Ms. Lear's claim is ripe because she was not required to apply for an Incidental Takings Permit when she was able to determine the extent of the restriction on her property without taking futile steps to do so; (2) Ms. Lear has suffered a taking because the inability to build a home for ten years, while waiting for the natural destruction of the habitat, is an extreme circumstance that cannot be considered a temporary taking; (3) the Cordelia lot is the only relevant property to analyze this takings claim because it is the only portion of the island owned by Ms. Lear; (4) Ms. Lear's property has suffered a total deprivation of economic value because the offer to pay $1,000 in annual rent is a de minimis value; and (5) the FWS and Brittain County are liable for the combined effect of their regulations because the joint effect of their regulations caused the taking when there were no public trust principles prohibiting the development of the property and each government was independently responsible for the indivisible harm. In addition, this court should reverse the lower court's decision and find that the ESA is not a valid exercise of Congressional power under the Commerce Clause.