Team No. 2

C.A. No. 16-0933

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
***Plaintiff-Appellee-Cross Appellant*,**
v.

UNITED STATES FISH AND WILDLIFE SERVICE,
***Defendant-Appellant-Cross Appellee*,**
v.

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 OF U.S. FISH & WILDLIFE SERVICE

Defendant-Appellant-Cross Appellee

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the United States District Court for the District of New Union. Cordelia Lear brought a claim against the U.S. government, specifically, Fish and Wildlife Service ("FWS"), challenging the constitutionality of a federal statute, so the district court had jurisdiction under 5 U.S.C. § 8912 (1992) and 28 U.S.C. § 1331 (1980). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982) because the district court entered a final judgment against FWS and Brittain County on June 1, 2016, in 112-CV-2015-RNR. The Notice of Appeal was timely filed on June 10, 2016, pursuant to Fed. R. App. P. 4(a)(1)(A), and this order was signed on September 1, 2016.

ISSUES PRESENTED FOR REVIEW

I. Whether ESA protection of an intrastate population of an imperiled butterfly is a valid exercise of Congress's power to regulate under the Commerce Clause.

II. Whether Lear's takings claim against FWS is ripe for judicial review even though Lear did not even apply for an incidental take permit as required by the ESA.

III. Whether the relevant parcel for takings analysis is the entirety of Lear Island or merely Lear's 10-acre subdivided lot.

IV. Whether natural cessation of the Karner Blue habitat in 10 years bars Lear's takings claim.

V. Whether the Brittain County Butterfly Society's offer to pay rents for wildlife viewing precludes Lear's takings claim.

VI. Whether public trust principles preclude Lear's takings claim based on Brittain County's denial of a wetlands permit.

VII. Whether FWS is liable for a complete deprivation of economic value on Lear's lot even though the ESA does not completely deprive the property of economic value on its own.

STATEMENT OF THE CASE

This appeal arises out of the final decision of the U.S. District Court for the District of New Union, awarding Appellee, Cordelia Lear, $10,000 in damages against Appellant, U.S. Fish

and Wildlife Service ("FWS"), $90,000 in damages against Appellant, Brittain County ("the County"), and dismissing Lear's claim seeking a declaration that the Endangered Species Act ("ESA") is unconstitutional as applied to her property. [R. 12]. Petitions seeking judicial review were timely filed by FWS and the County and were consolidated for purposes of this appeal.

Lear's father deeded three parcels of land on Lear Island to Lear and her two sisters in 1965, reserving a life estate in the land; Lear's father passed in 2005 at which time ownership transferred from the father to the Lear sisters. Seven years later, Lear decided to build a residence on her lot, known as the Heath. The Heath is covered with wild blue lupine flowers, designated as a critical habitat for the endangered Karner Blue butterfly since 1992. The Karner Blue depends on the blue lupine flower for survival. Consequentially, Lear's proposed placement of her residence poses a risk to the Karner Blues because development would disturb and potentially fragment the critical habitat. [R. 5]. If Lear discontinues annual mowing, the fields would naturally convert to forest and the butterflies could no longer survive on the Heath.

Lear contacted FWS and was instructed to apply for an incidental take permit ("ITP"), accompanied by a habitat conservation plan ("HCP"). [R. 6]. Instead, Lear drafted an alternative development proposal ("ADP"), under the County's Wetlands Preservation Law, on which she offered to fill the non-navigable cove marsh to build her residence there rather than on the Heath portion of her lot. The ADP application was denied by the County in 2013 because Lear's proposed residential development did not have water-dependent use. Even though Lear has not sought reassessment of her property's value since the ADP denial in 2013, she claims that the fair market value of her property with a single-family residence totals $100,000. The Brittain County Butterfly Society offered to pay rents for use of the Heath for wildlife viewing, but Lear rejected the offer. [R. 7]. Lear filed suit, alleging that FWS and the County took her property for

public use without compensation as required by the Fifth Amendment to the U.S. Constitution. [R. 4].

The district court determined that the ESA is a valid exercise of Congress' Commerce Power because the land regulation is economic activity that involves controlling materials, workers, and visitors traveling within interstate commerce. [R. 8]. While the court held that Lear's takings claim was ripe for review, the court neither considered the fact that Lear does not know the final cost of the ITP, nor the possibility that FWS would work with her to mitigate damage to the lupine fields and find a solution. Even though the Lear family has enjoyed unlimited use of the entire Lear Island for 200 years, the district court analyzed Lear's claim based solely on the 10-acre Heath rather than the relevant 1,000-acre island. Next, the court found that the natural destruction of the land in 10 years does not preclude Lear's takings claim, even though the proposed moratorium on her residential development is temporary in nature. [R. 9]. The court held that public trust principles do not preclude Lear's takings claim. [R. 10]. The court also reasoned that the federal and county regulations, taken together, deprived Lear's lot of all of its economic value and applied Tennessee tort law to hold the governments jointly and severally liable for taking Lear's property. [R. 11].

STANDARD OF REVIEW

This appeal turns on legal issues concerning the constitutionality of federal and local government regulations, which are questions law. This Court should review this case *de novo*. *California First American Local v. Calderon*, 150 F.3d 976, 980 (9th Cir. 1998). To the extent the issues presented involve mixed questions of law and fact, such questions are also normally reviewed de novo, particularly where, as here, the case involves purported constitutional rights. *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992). This Court

should uphold the Endangered Species Act as a valid exercise of Commerce Clause power if the Court determines that "a rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995).

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the U.S. District Court for the District of New Union on all grounds, except this Court should uphold the district court's conclusion that the Endangered Species Act ("ESA") is a valid exercise of the Congress's power under the Commerce Clause. Developing property on Lear Island and protection of the endangered Karner Blue involve channels of interstate commerce, and the negative aggregate effect of many people across the Nation violating the ESA, hurting the chances protected wildlife have to survive, would substantially impact interstate commerce.

Lear's takings claim against FWS is not ripe for judicial review because she has neither applied for an incidental take permit to allow the agency the opportunity to make a final decision regarding use of her property nor has she fully negotiated with FWS to know what the agency's decision would be. In evaluating Lear's takings claim, the relevant parcel is the entirety of Lear Island because the island has been viewed as a single property for over 200 years and focusing on boundaries between subdivided plots of land would severely diminish the value of the Takings Clause. Lear's takings claim is precluded because her land will be developable without restriction within 10 years. Similarly, her claim is precluded by the Brittain County Butterfly Society's offer to pay rents for wildlife viewing because an opportunity to earn money off of her land defeats the proposition that her land was deprived of all economically beneficial use.

The public trust doctrine further bars Lear's claim because she does not even own part of the property she claims was taken by government regulation. To determine whether FWS or the

County are liable to Lear for compensation, the regulations enforced by each government should be evaluated separately. Combining the laws and treating the governments like joint-tortfeasors is unfair and unreasonable because governments cannot be expected to account for every single federal, state, and local regulation affecting land use before enacting new laws.

ARGUMENT

This Court should reverse the decision of the U.S. District Court for the District of New Union, except as to its correct conclusion that the Endangered Species Act ("ESA") is a valid exercise of the congressional lawmaking power under the Commerce Clause.

I. THE ESA IS A VALID EXERCISE OF CONGRESSIONAL REGULATORY POWER UNDER THE COMMERCE CLAUSE.

The district court correctly upheld the ESA as a valid exercise of Congress's power to regulate interstate commerce. [R. 7]. Congress has the Constitutional authority to regulate activities involving channels of interstate commerce, activities using instrumentalities of interstate commerce, or activities that substantially affect interstate commerce. U.S. Const. art. I § 8; *see also Lopez*, 514 U.S. at 551. In *Lopez*, the Court disapproved a federal law regulating gun use at schools because, in effect, prohibiting one student from bringing a gun to a local school did not constitute economic activity related to interstate commerce. *Id.* The student had no plans to place the gun in the channels of interstate commerce by selling it. *Id.* Therefore, the regulation did not fall within the scope of Congress's Commerce power because the underlying regulation was disconnected from the channels of interstate commerce. *Id.* The facts in the present case are highly distinguishable from the facts in *Lopez* because effects of the ESA on Lear's property involve considerably more economic activity than in *Lopez*, such as transport of construction workers, purchasing of building materials, research related to the butterfly, tourism, and preventing transportation of the species.

A. Land development for the purpose of building a residence and protecting the Karner Blue are economic activities that involve channels of interstate commerce.

Congress's Commerce power extends control over transport of endangered species and efforts to prevent activity that would threaten critical habitat from using channels of interstate commerce. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d. 1041 (D.C. Cir. 1997). In *NAHB*, the only habitat of an endangered fly species was situated in San Bernardino County, and a significant portion of it was threatened by urban development. *Id.* at 1043. The ESA restricted construction of a hospital, which would have encroached on the fly's protected habitat. *Id.* at 1048. In upholding the ESA under the Commerce Clause, the court concentrated on the fact that workers and construction materials would travel within the channels of interstate commerce to construct the hospital. *Id.* Further, the fly contributed to the biodiversity of the environment and had a potential use in the development of medicines and promotion of crop diversity. *Id.* at 1053.

Lear Island remains situated on an interstate lake and requires a causeway for commuters to access it. [R. 4]. For purposes of this analysis, channels of interstate commerce include, but are not limited to, rivers, city streets, highways, and bridges. 29 C.F.R. § 776.29 (1956). Thus, traveling to the island necessitates using at least one channel of interstate commerce. [R. 4]. Similar to the circumstances in *NAHB*, the causeway's activity will sizably increase when workers and materials travel to build the residence, or, conversely, when visitors take tours of the Karner Blue habitat. [R. 12]. Consequently, protecting the Karner Blue and developing the property are both activities that inherently involve channels of interstate commerce.

B. If residential development on Karner Blue habitat occurred in every state containing the species, the aggregate effect of the ESA regulations would impact the population of the butterfly and substantially affect interstate commerce.

Congress has the authority to regulate activities substantially affecting interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 114 (1942). When an activity is wholly intrastate,

it nevertheless can be regulated by Congress if the activity, in the aggregate, substantially affects interstate commerce. *Id.* In *Wickard*, when a lone farmer produced an amount of wheat on his farm that exceeded the volume permitted under the Agricultural Adjustment Act, the Court examined how the farmer's independent labor of harvesting, marketing, and selling wheat affected the national market. *Id.* at 115. The farmer challenged the constitutionality of the Act and emphasized the fact that he harvested and sold his wheat entirely within a small county in Ohio. *Id.* at 114. He further averred that the intrastate nature of these activities excluded his wheat production from congressional regulation under the Commerce Clause. *Id.* While the single farmer's production had a relatively negligible effect on the nation's wheat market, the Court recognized that his "contribution, taken together with that of many others, similarly situated, is far from trivial." *Id.* Even isolated actions of separate producers collectively influence an industry and impact interstate commerce. *Id*. Looking beyond the seemingly inconsequential actions of one farmer, the Court determined that the farmer's actions, combined with other farmers in similar positions, would substantially affect interstate commerce. *Id*.

Because the present case involves regulating an entire species rather than the grain output of a sole wheat farmer, the aggregate effects of the ESA are even more apparent in the present case than in *Wickard*. [R. 8]. In applying the reasoning in *Wickard* to ESA-related issues, the taking of a single endangered animal may have a minor effect, but threatening endangered animals on a national scale has a major impact on interstate commerce. *Gibbs v. Babbitt*, 214 F.3d. 483, 493 (4th Cir. 2000). In *Gibbs*, when FWS, through enforcement of the ESA, struck down a local ordinance permitting the trapping and killing of endangered red wolves, property owners asserted their right to shoot the wolves on private property. *Id.* at 489. The court upheld the ESA as valid under the Commerce Clause. *Id*. at 506. The purpose of the ESA is to defend an

entire species, not just a single animal; preservation of a threatened species, therefore, required FWS to take protective measures on a national scale. *Id.* at 489. Also, annihilation of the red wolf population eliminated an appreciable amount of scientific research and job opportunities, and hunting red wolves across the country would impact the fur trading industry as a whole. *Id.* Thus, preventing take of red wolves substantially affected interstate commerce in the aggregate. *Id*. at 506.

Lear argues that the intrastate nature of the Karner Blue prohibits an extension of congressional authority to the present case; however, if the ESA did not restrict construction of residential buildings on all habitats of the Karner Blue, the entire species would eventually meet its end. Because the ESA substantially affects interstate commerce by protecting the species indiscriminately across the Nation, it is a valid exercise of Congress's Commerce power.

II. LEAR'S TAKINGS CLAIM AGAINST FWS IS NOT RIPE FOR JUDICIAL REVIEW.

The district court incorrectly concluded that Lear's takings claim against FWS is ripe for judicial review. [R. 9]. Lear has not received a final decision from FWS as to the nature and extent of the restrictions on her property and has not even applied for such decision. [R. 6]. Once she receives a final agency determination regarding her Habitat Conservation Plan ("HCP"), this Court can determine the extent of the agency's decision on her right to use the property.

A holistic analysis to determine whether a regulatory taking occurred involves measuring not only the degree to which the government has affected property owners' rights in their property but also examining the character of the action and extent of the interference with their property rights. *Penn Cent. Transp. v. City of New York*, 438 U.S. 104, 130 (1978). In *Penn Central*, the New York City Landmarks Preservation Commission designated Grand Central Terminal as a historic landmark, which limited the railroad's air rights to build an office building

above the terminal. *Id*. at 111. When the commission denied a proposal to construct the office building submitted by the railroad, the railroad brought a takings claim against the City. *Id.* at 118. The Court was able to adequately review the railroad's takings claim because the denial of the proposal defined the extent to which the development restrictions affected the landowner's air rights. *Id.* at 135. To determine whether the railroad company suffered a taking, the Court considered and balanced the following factors: (1) the economic impact on the claimant, (2) the extent to which it interferes with distinct investment-backed expectations, (3) and the character of the government action. *Id.* at 124. The regulation did not have a negative economic impact on the railroad because it did not affect the regular operations of the company. *Id.* at 137. Moreover, the regulation did not prohibit all construction on top of the terminal but, instead, mandated that any proposed addition "harmonize in scale, material, and character" with the terminal. *Id.* Because the commission had made a final decision defining the extent of the regulatory limits on the railroad's property, the Court was able to fully examine the merits of the takings claim. *Id.*

Because Lear has not applied for an ITP, and FWS has yet to issue a final determination indicating how FWS restricts her use of the property, this Court cannot determine the regulation's full economic impact or the character of the government action. The ITP application is Lear's opportunity to propose an alternative solution that could preserve the habitat and allow her to increase the economic value of her property; however, FWS cannot determine the degree to which the regulation affects Lear's property until an ITP application is submitted. Necessary components for a complete and thorough takings analysis by a court are, therefore, missing.

A. Lear failed to apply for an ITP, leaving FWS without an opportunity to render a final agency decision.

A claim for a regulatory taking is not ripe until the government agency implementing the regulation has reached a final decision as to the extent the regulation applies to the property at

issue. *Morris v. United States*, 392 F.3d. 1372 (Fed. Cir. 2004). In *Morris*, when property owners sought to harvest redwood trees adjacent to a river holding endangered fish, the court concluded that the Morrises' claim was unripe for judicial review because they did not apply for an ITP and, consequently, received no final verdict. *Id.* at 1375. The Morrises argued that a taking already occurred due to the cost-prohibitive nature of the permit process. *Id.* at 1375. The court rejected the Morrises' assertion because FWS had not yet informed the Morrises of the extent the regulation limited harvesting on their land. *Id.* at 1376. The takings claim was not ripe and would not be ripe until the agency exercised its discretion in a manner "that makes reasonably clear or final the effect the regulation will have on the Morrises' application." *Id.* at 1378.

Similar to the property owners in *Morris*, Lear wants to increase the economic value of her property by developing her land. [R. 5]. Like the property owners in *Morris*, Lear has refused to apply for an ITP due to a probability that the permit process will cost more than the value of her property. A consultant advised Lear about the cost of the ITP application process, but Lear never received a final verdict from FWS declaring the final fee of the ITP. [R. 6]. Additionally, FWS has not specified how she may or may not develop her land. [R. 7]. Therefore, under the *Morris* analysis, it's impossible for this Court to determine the specific nature to which the regulation affects her property rights.

The district court mistakenly concluded that a taking occurred because the cost of the application exceeded the current market value of Lear's property [R. 9], relying on *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996). The circumstances in *Hage*, however, are distinguishable from the present case because property owners were denied their ditch rights-of-way and the water rights to maintain their crops and livestock. *Id.* at 150. In *Hage,* because these rights determined the economic value of the property, the harms felt by the property owners were

concrete and substantial enough to be considered a regulatory taking over which the government exercised its full discretion. *Id.* The owners' only avenue of relief fell within the grasp of the judiciary. *Id.* at 163. Lear's claim cannot effectively be addressed until FWS evaluates an HCP and ITP application to define the appropriate building plan, taking into account both Lear's property interest and the protection of the Karner Blue.

B. Further negotiations between FWS and Lear are crucial for FWS to determine the degree of development potentially allowed on her property.

Determining whether a takings claim is ripe for judicial review requires that the agency issue a final denial or, equivalently, that the regulation clearly indicates the property owner's permissible uses of their land. *Seiber v. United States*, 364 F.3d. 1356, 1364 (Fed. Cir. 2004). A denial is also considered final when the applicant has no appeal mechanism available. *Id.* at 1364. In *Seiber*, the Oregon Department of Forestry ("ODF") forbade loggers from logging merchantable timber because their property was designated as a habitat for the endangered spotted owl. *Id.* at 1363. The loggers submitted a plan to ODF requesting to log timber, which was rejected. *Id*. at 1364. Subsequently, the loggers submitted an ITP application to the Oregon Board of Forestry and appealed its denial in state court. *Id.* The loggers later submitted an ITP application to FWS. *Id.* at 1361. After the Seibers filed suit, FWS visited the loggers' property to assist in developing an alternative plan to preserve the habitat. *Id.* at 1362.

The appeal process taken by the loggers in *Seiber* presents a fundamental example of the extent of negotiations necessary before a takings claim becomes ripe for judicial review, illustrating the need for courts to evaluate the degree to which government interference either limits or expands property owners' use of their property in a takings case. The loggers in *Seiber* actually applied for an ITP and appealed negative verdicts to obtain a conclusive decision from FWS. *Id.* Lear, however, has yet to take the first step in determining the degree of development

FWS will allow on her property. Thus, it is unclear how FWS's action will affect her rights of use. Only when negotiations between an agency and a landowner are so significant that it would be futile to submit an application to determine the extent to which a regulation affects land use is a case ripe without a final agency decision. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 623 (2001). Lear's situation clearly does not fall within this exception because all that Lear knows is that a critical habitat of the Karner Blue exists on her property and that FWS recommends that she file ITP application. [R. 6].

III. THE RELEVANT PARCEL TO CONSIDER IN A TAKINGS ANALYSIS IS THE ENTIRETY OF LEAR ISLAND RATHER THAN ONLY THE SMALL PORTION OF THE PROPERTY KNOWN AS THE CORDELIA LOT.

The district court incorrectly evaluated Lear's takings claim based on 10 acres of the relevant 1,000-acre parcel of land. [R. 9-10].

A. Lear's purported expectation that her lot was separate from the rest of Lear Island for takings analysis is unreasonable.

Property interests are not created by a landowner's unilateral, subjective hopes for how she would prefer to use her land; instead, the interests "are created and [] dimensions are defined by existing rules or understandings that stem from an independent source." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). For example, in *Penn Central*, the Court refused to treat the air rights above the railroad's terminal as a separate property from the actual terminal structure when evaluating the New York City regulation's economic impact on the property even though New York law regarded air rights as distinctive, alienable interests. 438 U.S. at 130-31. The focus in determining whether a taking occurred is not on discrete segments of a single parcel but rather is on "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id*. Although the railroad subjectively expected the relevant parcel to be solely the air rights, the Court evaluated the takings claim considering

the property as a whole to determine that the New York law did not effect a taking. *Id*. at 138.

Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court concluded that underground coal was not a separate parcel of property from the support estate for takings law purposes. 480 U.S. 470, 498 (1987). For over 100 years, landowners involved in the dispute had been severing title to underground coal and the right of surface support while conveying away ownership of the surface estate. *Id*. at 478. In holding that a state subsidence act affecting the support estates did not effect a taking, the Court recognized that the rights in the underground coal and the support estate were part of a bundle of rights possessed by the owner, which were never separated by owners despite the state's law allowing a separation of title. *Id*. at 500.

Comparable to terminal and air rights in *Penn Central* and surface and support estates in *Keystone*, the Cordelia Lot and the rest of Lear Island constitute one parcel even though three different people, albeit sisters, own the lots. Lear apparently expected her lot to be separate and distinct from the rest of the island, but the history of ownership and use of Lear Island suggest different objective expectations.

1. The entirety of Lear Island has been treated as one parcel for more than 200 years, and Lear's father devised the property to Lear and her sisters upon his death in 2005, keeping title of the island in the family.

Several factors should be considered to determine the relevant parcel for takings analysis, including the property owner's economic expectations, the degree to which the property has been treated as a single unit, the level of contiguity of the parcels, and the time the property was acquired. *See Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991). For instance, in *Forest Properties, Inc. v. United States*, the court combined two tracts together to form the parcel as a whole necessary for evaluating a takings claim based on a denial of a permit to fill wetlands. F.3d 1360, 1365 (Fed. Cir. 1999). The property owner purchased 53 upland acres and an option

to buy separate, but contiguous, submerged land. *Id*. The two parcels had different kinds of title, were acquired in different transactions, were capable of separate development, and were regulated by different local government authority. *Id*. at 1366. The court focused on the economic expectations of the property owner, honing in on the fact that, from the outset, the owner planned to buy both lots to build the same housing development and, nonetheless, viewed both tracts together as the relevant parcel. *Id*. at 1365.

In *Lost Tree Village Corp. v. United States*, the court focused on the landowner's planned usage of the property to determine the relevant parcel for takings analysis. 707 F.3d 1286, 1293-94 (Fed. Cir. 2013). In doing so, the court rejected giving significant weight to the facts that the parcels were commonly owned and located in the same vicinity. *Id*. at 1294. In *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, a developer who divided his property into several separate lots was denied permits to build townhomes after the town rezoned the land as an historic site. 198 F.3d 874, 878 (D.C. Cir. 1999). The court concluded that the relevant parcel for takings analysis was the entire plot of land as originally purchased by the developer because the property had been treated by the owner as a single unit for more than 25 years before subdivision. *Id*. at 880. The intentional act of subdivision is the only instance whereby the landowner treated the lots as distinct units. *Id*.

In conjunction, the aforementioned decisions exploit the fact-intensive nature of the inquiry required to determine the relevant parcel for takings claims. For more than 200 years, Lear Island has been occupied by the original owner, Cornelius Lear, and his descendants. The island has been used by the Lear family as a homestead, farm, and hunting and fishing grounds, and like in *District Intown*, the only evidence whereby any owner of Lear Island treated the lots as separate units was when Lear's father subdivided the land in 1965. Even after the subdivision,

the island remained with Lear's father and continued to be treated as one property for 50 years because he reserved a life estate in the land. Thus, any indication of treatment of the island as distinct lots did not surmise until 2005 when Lear's father passed, leaving title in the island to Lear and her sisters. [R. 5].

Furthermore, Lear did not even show interest in using her land until 2012 when she decided to build a residence on her lot. Her economic expectations and planned usage were nearly, if not completely, nonexistent at the time she acquired title to her 10-acre tract. The organization of the island itself shows that no one in the family, including Lear, could have expected any of the lots to be treated as separate parcels because the entire island shares one causeway connecting it to the mainland and has been viewed by the Lear family as one property since the day the land was granted to their ancestor in 1803. [R. 4-5].

2. Ownership of the lot was transferred to Lear more than 10 years after FWS designated the lupine fields on her lot as critical habitat of the Karner Blue.

Takings law is "guided by the understandings of our citizens regarding the content of…the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). FWS designated the Heath on Lear's then future property in 1992, more than 10 years before Lear obtained title. [R. 6]. Lear's understanding of the content of her "bundle of rights" therefore could not include development of the property without complying with the safeguards prescribed by the ESA. Looking at Lear's situation objectively, she did not have clear economic expectations, any concrete plans for use of the lot, and must have viewed the island as one property until the time this litigation ensued.

B. Solely basing the relevant parcel determination on boundary lines between lots subdivided by the owner of the property would not advance the policy behind the Fifth Amendment.

Property rights protected by the Fifth Amendment are not demarcated by "legalistic

distinctions" by property owners and local governments subdividing property. *See Penn Central*, 438 U.S. at 131; *see also Keystone*, 480 U.S. at 499. For example, in *Palazzolo*, petitioner owned 74 contiguous lots after dividing three parcels into 80 lots and selling 6 lots. 533 U.S. 606, 613 (2001). Using the entire area of land owned by the petitioner as the denominator, the Court opined that the property value had not been totally diminished and, therefore, a taking did not occur. *Id*. at 631.

Had the petitioner in *Palazzolo* argued and Court accepted that each individual subdivided lot should be evaluated separately to determine whether a taking occurred, like Lear requests this Court do in her case, the long-standing parcel-as-a-whole rule would no longer prevent plaintiffs from "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002). In other words, the Fifth Amendment was not meant to allow property owners to morph the parcels on their land and then, later, claim that use of certain subdivided parcels is regulated to a point that entitles the owner to compensation under the Takings Clause.

1. Considerations made by local governments in approving subdivision of land are substantially different than inquiries made by courts deciding substantive questions of constitutional law.

Regularly, municipalities approve subdivision of land without any consideration of the potential regulatory effects on some of the subdivided lots. Also, like in *Palazzolo*, determination of boundary lines between lots does not necessarily involve informed, formulaic government decision-making at all; instead, property owners themselves are frequently the only persons actively involved in any sort of practical decision-making. This simplistic, often arbitrary, subdivision process varies appreciably from the analysis courts are instructed to make when evaluating takings claims.

In fact, even the most fundamental purpose of the Takings Clause – "to prevent the government from 'forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole'" – has no bearing on a local government's approval of land subdivision. Boundary lines give no reasonable insight into the scope of a landowner's rights in a property, and complete reliance on them would lead to absurd results in many cases. For example, if this Court were to accept Lear's argument, theoretically, two property owners with the same size plots of land burdened by land-use restrictions on one-third of each property could receive vastly different retribution if one plot is subdivided; the owner of the subdivided property would have a much higher likelihood of proving a takings claim because each subdivided lot would carry its own takings challenge. This inequitable result does not comport with the fairness and justice principles underlying the Fifth Amendment.

2. Focusing on land divisions made by the property owner to determine whether a Fifth Amendment taking occurred would undermine the Takings Clause.

Most alarming is the potential for abuse if this Court and others begin to focus on boundary lines instead of the parcel as a whole. Leaving behind the parcel-as-a-whole standard would welcome and even encourage investors and landowners to alter plat lines on their property to have a greater chance of success in a takings claim if the government ever enacts a regulation affecting land use. Because "the functional basis for permitting government, by regulation, to affect property values without compensation…does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses," focusing on boundary lines would severely alter the long-standing balance between property rights and public interest. *Lucas*, 505 U.S. at 1018. The relevant parcel to use for the evaluation of Lear's takings claim is the entirety of Lear Island.

IV. LEAR'S TAKINGS CLAIM IS PRECLUDED BECAUSE REGULATION WILL CEASE TO RESTRICT DEVELOPMENT ON LEAR'S LAND WITHIN 10 YEARS.

The district court mistakenly relied only on the temporary nature of the regulation's effect on Lear's property in determining that the duration did not preclude her takings claim. [R. 10]. Discontinuing annual mowing to allow the habitat to leave on its own is not the course of action FWS prefers; however, Lear's claim is precluded by the short, natural development moratorium on her lot.

Resolving whether a temporary regulation is a compensable taking of private property requires a fact-based inquiry that varies with the circumstances of the case. *Tahoe-Sierra*, 535 U.S. at 331. In *Tahoe-Sierra*, a regional planning agency responded to pollution in the Lake Tahoe River Basin and placed a 32-month moratoria on development in the basin. *Id.* at 302. This action was taken predominantly to preserve both the water quality and the aesthetic of the lake. *Id* at 308. Basin real estate owners asserted a takings claim alleging that the restriction deprived their property of all economic value because it prevented them from erecting a single-family home during that time period. *Id.* at 309. The Court used the framework from *Penn* Central, making "*ad hoc* factual inquiries designed to allow careful examination and weighing of all the relevant circumstances." *Penn Central*, 438 U.S. at 124. The temporary nature of the taking alone does not elicit a *per se* treatment as to whether the regulation amounted to a compensable taking. *Tahoe-Sierra*, 535 U.S. at 343. The Court, instead, reasoned that the claim should be evaluated under the same *Penn Central* balancing test long used by courts, factoring in the temporary nature when considering the economic impact of the moratoria on the property owners, extent to which the moratoria affect the property owner's investment-backed expectations, and the character of the government action. *Id.*

Because Lear's claim involves not only a specific duration, a threat to an endangered

species, and the rights of a property owner, relying on the temporary nature of the regulation is not sufficient to fully discuss the extent to which the restriction can be categorized as a taking. Although the temporary nature of a regulation is not dispositive to preclude a taking, it is an important, overlying factor necessary to consider when evaluating a takings claim. *Tahoe-Sierra*, 535 U.S. at 331. The *Penn Central* decision, though not evaluating a regulation that was temporary, provides insight into how temporariness weighs into a taking determination. *See generally* 438 U.S. 104. The temporariness of a regulation weighs most heavily when considering the economic impacts on the property owner and the nature and character of the government action. *Id*. at 128. A temporary moratorium, as opposed to permanent, therefore, substantially lessens negative economic impact on landowners in most situations and maintains reasonableness in character of the government action. Considering its duration, the nature of the ESA in the present case is, effectively, a temporary moratorium on development of Lear's property to prevent substantial harm to the endangered Karner Blues. Furthermore, the economic impact on Lear is significantly reduced by the temporariness of the restrictions because any economic constraints will disappear in 10 years.

While the underlying goal of the ESA is to protect imperiled species by preventing destruction of critical habitat, letting the lupine fields on Lear's lot naturally cease would better comport with the policies of the ESA than letting Lear destroy the Karner Blue habitat at once. Congress enacted the ESA in response to the extinction of fish, wildlife, and plant species caused by human activity. 16 U.S.C. § 1531 (1988). Allowing Lear to destroy the Karner Blues' habitat in such a manner would directly contradict the primary concern embodied in the ESA. Natural cessation of the habitat, although not FWS's preferred coursed of action, better comports with the ESA, so the temporary nature of the regulation precludes Lear's takings claim.

V. THE ESA DID NOT CAUSE A REGULATORY TAKING OF LEAR'S PROPERTY BECAUSE THE COUNTY BUTTERFLY SOCIETY OFFERED TO PAY HER RENT FOR WILDLIFE VIEWING.

The district court incorrectly determined that Lear's property was completely deprived of economically beneficial use even though she was given a concrete offer by the Brittain County Butterfly Society ("the Society") to rent her property for butterfly viewing. If Lear is facing property taxes in excess of the value of her land, she needs to request that the local tax assessor reassess her property.

A. The property is not completely deprived of economic value because there is a potential for Lear to earn profit off the land.

Only when a regulation "denies *all* economically beneficial or productive use of land" is compensation automatically required under the Fifth Amendment. *Lucas*, 505 U.S. at 1015. In *Lucas*, petitioner purchased beachfront property zoned for residential use. *Id*. at 1009. Two years later, after he had already begun the planning process for developing his property, the Beachfront Management Act decreed a permanent ban on construction on his land, leaving him with no economic use of his property. *Id*. Because the regulation amounted to the equivalent of a physical appropriation of his property, the Court determined that he was entitled to just compensation. *Id*. at 1031.

In juxtaposition to case at bar, petitioner's property in *Lucas* was left "economically idle." *Id*. at 1019. Lear's property, contrarily, has not been left economically idle. The Society offered to pay Lear rent for the privilege of conducting butterfly viewing outings each summer; however, Lear rejected the offer outright. [R. 7]. The Society's offer to pay Lear for use of her property unmistakably displays that her land is economically prosperous rather than idle. Also, the County did not grant Lear a permit to fill the wetlands because she did not intend to use the land in a way that is water-dependent, which suggests that the County is willing to grant a permit

to Lear if she adapts her proposal to fit into a water-dependent use category. [R. 7]. Thus, Lear can further increase the economic viability of her property by developing as such.

When a regulation does not eliminate all economically beneficial use, just compensation is required only if, after weighing the previously mentioned *Penn Central* factors, justice and fairness command that economic injuries caused by public action be compensated by the government. 438 U.S. at 124. Claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Id*. at 130. In *Penn Central*, the Court determined that the landmark preservation regulation did not significantly affect the railroad because it did not burden its current operation, that the railroad did not have any reasonable investment-backed expectations in the air rights above the terminal, and that the landmarks protection laws served a substantial public purpose. *Id*. at 135-37. Therefore, a taking did not occur. *Id*. at 138.

In regard to Lear, the ESA inconveniences her by requiring that she construct a HCP and obtain an ITP from FWS before developing on the uplands part of the Heath. [R. 6]. Lear discussed the application process with only one private environmental consultant who gave her an estimate of $150,000 for his services to draft the ITP and develop the HCP. [R. 6].

Lear did not have many, if any, reasonable investment-backed expectations. First and foremost, Lear did not make an investment to acquire her property and neither did her father. *See Hodel v. Irving*, 481 U.S. 704, 715 (1987) (suggesting that property acquired through gift, devise, or intestacy may not qualify for Fifth Amendment protection). The land was granted to Lear's ancestor by Congress in 1803 and has been passed down to her by gift. [R. 5]. Second, even though the Brittain Town Planning Board assured Lear's father in 1965 that the lot could be developed in conformance with at least one single-family residence [R. 5], relying on this

expectation over fifty-two years later is unreasonable. Zoning restrictions and land use regulations change frequently. *See Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (based decision that landowner did not suffer taking on the ground that he should have known that growing environmental concerns could lead to stricter development restrictions). Lear's expectations were neither investment-backed nor reasonable. Finally, there is no dispute that the ESA is serves an important public purpose—that is, to protect endangered wildlife for the benefit of all citizens. 16 U.S.C. § 1531(b) (1988).

Under similar facts to the current case, the U.S. Supreme Court denied relief to a landowner who could not develop his land like he originally expected because of regulations preserving wetlands but, nonetheless, retained some economic value. In *Palazzolo*, petitioner purchased three adjoining parcels of land in 1959 with an intention to develop. 533 U.S. at 613. In 1985, petitioner sought a permit to build a residential subdivision, but the permit was denied. *Id*. at 615. Between the time petitioner acquired the property and applied for a permit, State legislation resulted in local regulations protecting coastal wetlands. *Id*. at 614.

At the time regulations were promulgated, petitioner did not have title to the land; a corporation of which petitioner was sole shareholder held the title. *Id*. at 626. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. *Id*. The petitioner filed suit against the State, claiming deprivation of all economically beneficial use because his lot prior to regulation was appraised for $3,150,000, and after regulation, at only $200,000. *Id*. at 616. A portion of petitioner's property was not affected by the regulation; however, a separate permitting process was required to develop there. *Id*. at 615.

On these facts, the petitioner in *Palazzolo* was unable to prove a total regulatory taking. *Id*. at 632. Similarly, Lear has not suffered a taking because her property has not been deprived

of all economic value, and part of the parcel is potentially developable. At the time Lear's father deeded the Heath to her in 1965, he was under the impression that the lot was suited for development of one single-family residence. Lear's father reserved a life estate in the property, and full ownership did not transfer to Lear until his death in 2005. [R. 5]. In the meantime, the Karner Blue was added to the federal endangered species list in 1992, and FWS designated the Heath as critical habitat for the New Union subpopulation of the species that same year. [R. 6].

In 2012, when Lear decided that she wanted to build a house, her property had been designated as critical habitat for 20 years; Lear cannot reasonably expect that regulations on the land remained unchanged since 1965 when her father was told by the County that the lot was zoned for building a residence. Moreover, despite the County's denial of a permit to fill wetlands on her property to build a house [R. 6], her claim is precluded because, like the petitioner in *Palazzolo*, her property retains economic value. The Society's offer to pay Lear $1,000 per year, Lear's potential for development for water-dependent use, and her failure to submit an ITP application to FWS to develop the uplands part of the Heath, coupled together, overwhelmingly indicate a remaining economic value.

B. Lear should have her property reassessed by the County to avoid losing money by paying unreasonably high property taxes.

The district court incorrectly classified Lear's property as one without economic value. [R. 12]. While it is true that when a person pays property taxes in excess of the value of the land, the property is depleted of value, the court failed to acknowledge the fact that Lear, who has at least some knowledge of the actual value of her property and that she is losing money by paying an excessive amount of property taxes, has failed to seek reassessment of her property. [R. 7].

Although the value of Lear's land is likely higher than $1,000 per year, if the Society's offer is the only economic value Lear has in her property, then she should not have to pay the

municipality $1,500 in property taxes. A lawsuit, however, is not the appropriate remedy. Lear should seek reassessment of her property to incur less property tax liability. Once her property is reassessed and tax liability is reduced, the property will no longer seem like economic value is nonexistent. Thus, the Society's offer precludes Lear's takings claim.

VI. LEAR CANNOT CLAIM A FIFTH AMENDMENT TAKING BASED ON THE DENIAL OF THE COUNTY WETLANDS PERMIT BECAUSE LAND ONCE BELOW NAVIGABLE WATER IS HELD IN TRUST BY THE STATE OF NEW UNION FOR THE BENEFIT OF THE PUBLIC.

The district court incorrectly dismissed the County's argument that Lear's takings claim based on the denial of a wetlands permit is precluded by public trust principles inherent in title because no New Union precedent applicable to public trust protection of once-navigable waterways could be located. [R. 10]. The court also refrained from appreciating the "equal footing doctrine" that presumes New Union entered statehood on the same terms as the thirteen original states, taking title to lands below water. [R. 10]. Public trust doctrine has been implanted in the law of New Union since as early as 1787; also, title to land beneath navigable waters cannot be transferred to private parties because the Constitution reserves this land to the states in the interest of the people. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845).

A takings claim is preempted when an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1029 (1992). In other words, if title is restricted by background principles of State property law in a way that would prevent the landowner from using her property as she desires, she is not entitled to compensation under the Fifth Amendment. *Id*.

The public trust doctrine is a background principle of State property law burdening title to land held in trust by the State. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 986 (9th Cir. 2002). In *Esplanade Properties*, the court concluded that regulations restricting

development of shoreline property near a public park did not effect a total taking because the petitioner's development plans "never constituted a legally permissible use" of the property. *Id*. at 987. Similarly, the County's denial of a wetlands permit was not a taking because filling the wetlands that are held in public trust by New Union to build a residence has never been a legally permissible use of the property.

A. Public trust has been rooted in New Union law since the Northwest Ordinance of 1787.

As part of the Northwest Territory, New Union's public trust doctrine stems from the Northwest Ordinance of 1787. Ordinance of 1787, Art. IV (1787). Article IV of the Ordinance states:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and *forever free*, as well to the inhabitants of the state as to the citizens of the United States, without any tax imposed or duties therefor.

Id. "Navigable waters" consists of all waters that are navigable in-fact. *See generally Barney v. Keokuk*, 94 U.S. 324 (1876). This language has been interpreted by the, now, states of which the Northwest Territory comprised as paralleling the widely recognized common law public trust doctrine. *Illinois Steel Co. v. Bilot*, 84 N.W. 855, 859 (1901). In *Illinois Steel*, the court stated,

> The United States never had title, in the northwest territory out of which this state was carved to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever.

Id. at 856-57. In sum, states within the area originally known as the Northwest Territory have been indoctrinated with the rights and duties of public trust over the shoreline and navigable waters within its borders since 1787, and the doctrine was further reinforced at the time statehood was granted.

In 1803, Congress purportedly granted title of "all lands under water within a 300-foot

radius of the shoreline" of the island to Lear's ancestors. [R. 4-5]. The lake on which the island sits, Lake Union, is a large interstate lake, which has been traditionally used for interstate navigation. [R. 4]. Because it is actually used for commerce, the lake is necessarily navigable.

B. New Union was granted sovereignty over shoreline and land under navigable waters within its border upon entry to the Union.

The Northwest Ordinance further ensured that once a state achieved a population of 60,000, it would be admitted to the Union on an "equal footing" with the original thirteen states. Northwest Ordinance, Art. V. The thirteen original states, based on principles of sovereignty, "hold the absolute right to all their navigable waters and the soils under them." *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). The same principle applies to subsequent states admitted to the Union because the Constitution recognizes all states in the Union to be coequal sovereigns. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 228 (1845). According to the equal footing doctrine, a state's title to lands beneath navigable water within its borders was "conferred not by Congress but by the Constitution itself." *Oregon ex. rel State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The U.S. Supreme Court has repeatedly reiterated the vigor of the equal footing doctrine and, accordingly, the public trust doctrine; however, the district court, nevertheless, repudiated the notion that New Union did not receive title to the land under all of its navigable waterways and shorelines as did the other states in the Union. The court understands the congressional grant to Lear's ancestor as giving superior title to the State's title, which under the equal footing doctrine was conferred by the Constitution. [R. 10]. A congressional grant does not hold strength over the Constitution itself.

The district court read *Shively v. Bowlby* to require it to hold that Lear's title is superior because the congressional grant of title was made before New Union became a state. 152 U.S. 1

(1894); [R. 10]. *Shively*, however, stands for the exact opposition proposition. In *Shively*, Congress granted a private citizen title to land submerged by a navigable river in Oregon while Oregon was still a territory. *Id*. at 9. Although the Court recognized Congress's power to make grants of land below high-water mark of navigable waters in U.S. territories when it becomes necessary to do so in order to perform international commerce or for the promotion and convenience of commerce with foreign nations and states, it concluded that "Congress [has] never undertaken, by general laws, to dispose of such lands, and the reasons are not far to seek." *Id*. at 58. The "reasons" alluded to by the Court refer to the important principles contained in the equal footing and public trust doctrines. *Id*. at 48-52. The district court misapplied *Shively* and should not have stripped the State of New Union from its place as a coequal sovereign of the U.S. under the equal footing doctrine.

C. The public trust bars ownership transfer of land below navigable water to private parties.

Title to state public trust property cannot be relinquished when "the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 433 (1892). In *Illinois Central*, the Illinois legislature enacted the Lake Front Act, which granted a portion of the shore of Lake Michigan and over 1,000 acres of submerged land to Illinois Central Railroad for the development of a harbor. *Id*. Four years later, the grant was repealed. *Id*.

The Court was posed with the responsibility of determining ownership of the disputed land. *Id*. The Court held that the State, not the federal government or private riparian owners of the land adjacent to Lake Michigan, was given title to the bed of the lake at the time statehood was granted. *Id*. at 434-37. Any abdication of title of the public trust of a state is revocable. *Id*.

Similar to *Illinois Central*, the Lear Island was granted to a private party by the

government. [R. 4]. Because the wetlands located on the part of the island known as the Cove were covered by navigable waters both at the time the Northwest Ordinance instilled the public trust and at the time the trust was reaffirmed upon New Union's grant of statehood [R. 4-5], any purported transfer of the wetlands during that time violated the public trust and is revocable by the State.

The public trust doctrine is flexible and has increasingly been expanding to cover more than only navigable waterways and the land beneath them; most notably, the doctrine has even been extended to wildlife protection. *See, e.g., Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The doctrine reinforces deeply-rooted principles grounded in state property law to preserve public lands for the use and enjoyment by citizens. Lear does not have a valid takings claim based on the denial of a wetlands permit to fill land held in public trust by the State of New Union.

VII. THE ESA SHOULD BE ANALYZED DISTINCTLY FROM THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW TO DETERMINE LIABILITY UNDER THE TAKINGS CLAUSE.

The district court incorrectly superimposed Tennessee tort law onto Lear's federal constitutional takings claim, determining that FWS and the County caused Lear indivisible harm as joint-tortfeasors by enforcing the ESA and the County's Wetlands Law. The effects of the ESA on Lear's property are unquestionably separate from those of the Wetlands Law; the isolated laws each regulate a distinctive portion of the Cordelia Lot. Moreover, principles allowing remedy to property owners affected by indirect land use regulation by the government and compensation to victims of tortious conduct by private parties stem from fundamentally different policy concerns, so treating liability similarly would be unreasonable, especially in this case as Lear's recovery from one party is limited.

A. The claims advanced by Lear do not comport with the practical reasons some courts impose joint and several liability on certain tortfeasors.

> Two or more tortfeasors can be held jointly and severally liable only when either:
>
> 1) the actors knowingly join in the performance of a tortious act or acts;
> 2) the actors fail to perform a common duty owed to the plaintiff;
> 3) there is a special relationship between the actors causing one to be vicariously liable for the actions of the other; or
> 4) the independent acts of several actors combine to produce indivisible harm.

Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342 (Tenn. 1976). In *Velsicol*, homeowners sued a chemical company for damages sustained from a nearby plant's contaminating emissions into the air and water in the area, alleging that the company was guilty of nuisance, trespass in depositing chemicals onto homeowners' properties, and an intentional disregard of the law and prior court orders. *Id*. at 338. The chemical company brought five third-party defendants into the suit, alleging that each of the third-party defendants also operated chemical plants in the area and contributed to the chemical emissions. *Id*. Because it was impossible to uncover specific evidence showing the extent of harm to the homeowners' and their properties caused by each individual plants' pollutant emissions, the Tennessee Supreme Court concluded that the chemical companies could be held jointly and severally liable for damages. *Id*. at 343-44.

Unlike the situation in *Velsicol*, the effects of the regulations by FWS and the County are clearly defined and impact discrete parts of Lear's land. The regulators should be evaluated individually and not treated as one because neither the regulations nor the effects thereof fall into the gambit of harm from which the joint-tort theory is designed to protect. Among the four situations where a joint-tort might occur, two are not at issue here—there is neither an indication that FWS and the County colluded together to knowingly enact regulations affecting Lear's property nor is the relationship between FWS and the County one in which either party would be vicariously liable for the actions of the other. The regulations do not fall within the zones of the

remaining joint-tort contexts either.

1. FWS and the County did not fail to perform a common duty owed to Lear.

Common duty exists when defendants owe the same duty to a plaintiff at approximately the same time and have the opportunity to guard against the other's actions. *Pratt v. Stein*, 444 A.2d 674, 704 (Pa. 1982). For example, in *Lasprogata v. Qualls*, a car crash victim sustained injuries due to the negligent driving of another. 397 A.2d 803, 805 (1979). Subsequently, a negligent physician aggravated the injuries. *Id*. The negligent actors were not joint-tortfeasors because neither could guard against the actions of the other. *Id*.

Similar to the defendants in *Lasprogata*, FWS and the County could not prevent the other's action. Congress cannot reasonably be expected to account for all of the municipal laws enacted in the multitudes of counties in the U.S. and make a judgment call on whether proposed legislation would negatively affect individuals when combined with local law. Takings claims against two governments should not be scrutinized as if both, in combination, caused harm as joint-tortfeasors. Pressing this harsh standard would deter both federal and local governments from continuing to regulate to further the purpose behind laws like the ESA and Wetlands Law—to protect the nation's natural resources for the benefit of the public.

2. The effects of regulation by FWS through the ESA and by the County through its wetlands law are separate and distinct, not indivisible.

If adequate information is available, each party's action should be evaluated individually; if actions of two or more parties cause harm, liability should be apportioned according to each parties' fault, not jointly. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 617 (2009). In *Burlington*, the U.S. Environmental Protection Agency and the California Department of Toxic Substances Control filed actions under the Comprehensive Environmental Response, Compensation, and Liability Act for reimbursement of land cleanup costs against Shell Oil &

Gas and two railroad companies who owned the property where significant contamination of soil and ground water was discovered. *Id*. at 605. The railroads subsequently filed suit against an agricultural chemical distribution business who transported and spilled pesticides over several years on the property for reimbursement of land remediation costs. *Id*. The cases were eventually consolidated. *Id*.

The Supreme Court determined that Shell was not liable under CERCLA, leaving the Court to determine whether the two railroad companies should be held jointly and severally liable or whether liability should be apportioned according to each company's actual fault. *Id*. at 617. The district court's findings made it "abundantly clear" where the contamination occurred on the property and the percentage of spills of hazardous chemicals that occurred on the railroad land. *Id*. The Court specified that to avoid application of a joint tort theory, "divisibility may be established by 'volumetric, chronological, or other types of evidence,' including appropriate geographic considerations (citations omitted)." *Id*. at 617-18. The Court held that when liability can be apportioned based on findings of fact, like that of the railroads' liability, joint and several liability is inappropriate. *Id*. at 619.

In the current case, the claims against FWS are not unlike those against the railroads in *Burlington*. The railroads were found to have contributed to contamination of land, a single injury caused by separate acts by distinctive parties. Similarly, Lear claims that the enforcement of the ESA by FWS on her land contributed to a Fifth Amendment taking. [R. 7]. FWS's actions and the effects thereof can be apportioned based on the district court's findings of fact. Since 1992, the partially shaded lupine fields located on the Heath have been designated as critical habitat for the Karner Blue. [R. 5]. Part of Lear's property is protected by the ESA, so before building on the land and disturbing the Karner Blue's habitat, Lear must abide by section 10 of

the Act by submitting an ITP application to and receiving approval to build from FWS. [R. 6].

Lear is not required to seek approval from the federal government to fill and build her desired residence on the 1-acre marsh cove adjacent to the Heath. [R. 5, 7]. Additionally, information outlining the harm to Lear caused by the County is available, so there is no reason not to evaluate FWS and the County separately and apportion any liability, if found, accordingly. The County denied Lear a permit to build a residence in the cove area of the property, effectively preventing Lear from constructing a residence on the cove. [R. 7]. Lear asserts the denial of the aforementioned permit as the County's contribution to the harm. [R. 4]. Although it is difficult to see any actual harm from the ESA due to Lear's failure to apply for an ITP and, thus, no official bar by FWS to Lear building a house on the Heath [R. 6], under the Court's standard in *Burlington*, the harm Lear claims that FWS caused is clearly defined and should be evaluated separately from the County Wetlands Law to apportion potential liability accurately and fairly.

Even if a deeper inquiry into whether FWS and the County should be treated as joint-tortfeasors was warranted, the district court did not fully appreciate the requirements set forth by the authority cited as the basis for its decision. The *Velsicol* court explained—

> The requirement of indivisibility can mean either that the harm is not even theoretically divisible, as death or total destruction of a building, or that 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.

543 S.W.2d at 342. Lear's situation plainly demonstrates that any claimed harm caused by FWS and the County is both theoretically divisible and can be apportioned between the parties.

B. A government whose regulation incidentally burdens private property in an attempt to protect natural resources for the benefit of the public should not face the same level of liability as a tortfeasor who necessarily acted contrary to public policy.

The underlying purposes for allowing recovery for injuries under tort law and just

compensation for government taking of property, especially in the realm of regulatory takings, are profoundly different, and holding governments as joint-tortfeasors does not advance the prerogative of the Fifth Amendment. In other words, the nature of the conduct causing tortious harm and actions effecting regulatory takings is so fundamentally dissimilar that extension of a joint-tort theory of liability to regulatory takings would be inequitable. *See generally Hansen v. U.S.*, 65 Fed.Cl. 76 (2005); *see also Ridge Line, Inc. v. U.S.*, 346 F.3d 1346 (Fed. Cir. 2003).

Tort law is meant "to deter [private] conduct which has been identified as contrary to public policy and harmful to society" and to make whole victims of such conduct. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, concurring). For example, in *Moore v. Strong*, a car crash victim sued to recover damages for injuries to herself and two minor children and for the wrongful death of her husband and one minor child. 360 F.2d 71, 73 (10th Cir. 1966). The crash was caused by several negligent drivers, all of which were named defendants in the suit. *Id*. Evidence did not portray a clear picture of the crash, but the court could realize that all defendants were concurrently negligent. *Id*. at 78. Because the concurrent negligence was the proximate cause of the tort victim's injuries, the drivers were jointly and severally liable for damages arising out of the accident. *Id*.

Tort victims like Mrs. Strong should be provided stealthy safeguards to ensure recovery for injuries sustained due to the negligence of others. The joint-tort theory provides those safeguards because it forces wrongdoers to compensate injured parties and protects tort victims from the potential insolvency of one joint-tortfeasor. Tortfeasors should face the possibility of being held jointly and severally liable because tortfeasors, by definition, act in a manner that is harmful to society. Tortfeasors, while responsible for making their victims whole, also face legal liability, in part, as a consequence of their conduct, which serves to deter future wrongdoing.

In contrast, takings doctrine is meant 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." *United States v. Armstrong*, 364 U.S. 40, 49 (1960). This highlights the unfairness and injustice, notably principles that takings doctrine seeks to advance, applying a joint-tort theory generates. Unlike ordinary tortfeasors, FWS and the County acted to enhance the welfare of the public when enforcing the ESA and Wetlands Law, the actions Lear claims caused her harm.

For instance, "the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend" because wildlife is of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." U.S. FISH & WILDLIFE SERVICE, FACT SHEET: ESA BASICS 1 (2013). The ESA, admittedly, inconvenienced Lear by requiring her to apply for an ITP before building a house on her property [R. 6] but only in an effort to preserve natural resources for the public good. Liability for this type of "harm" should not devise such a grave consequence. Governments are working for its citizens, not acting in a way harmful to society like tortfeasors, and therefore should not face liability for damages caused by others.

C. Treating FWS and the County as joint-tortfeasors, in this case, is unenforceable and meaningless because Lear's recovery from FWS is limited to $10,000.

Even if this Court believes that applying a joint-tort theory is appropriate when separate governments' regulations, while neither alone constitute a Fifth Amendment taking, deprive a property owner of economic value, it neither makes sense nor creates an equitable result in the current case. U.S. District Courts have subject matter jurisdiction over claims against the federal government arising under the Constitution and not exceeding $10,000, leaving jurisdiction over claims exceeding $10,000 solely to the Court of Federal Claims. 28 U.S.C. § 1346(a)(2) (2013). If a plaintiff wishes to remain in district court instead of the Court of Federal Claims, the plaintiff may waive all damages over $10,000. *See Roedler v. Department of Energy*, 255 F.3d 1347,

1351 (Fed. Cir. 2001). Lear chose to waive damages in excess of $10,000 against FWS and litigate in federal district court in New Union, so joint-tort liability in this case is unenforceable.

The district court outcome illustrates the very problem the joint-tort theory generates. Instead of evaluating the ESA and Wetlands Law separately to decide whether FWS, the County, or both violated Lear's Fifth Amendment rights, the court grouped the distinct laws together [R. 11], leading to an inequitable result for both parties. Jurisdiction of the district court under the Tucker Act restricts any application of a joint-tort theory because it necessarily leaves the non-federal defendant liable for a disproportionate fraction of damages and renders the joint and several liability rule pointless; if the joint-tort theory were to actually be enforced here, the district court would lose subject-matter jurisdiction over this case, requiring dismissal *sua sponte*. *See generally John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130 (2008).

The district court's analysis of Lear's claims under a joint-tort theory leads to unjust results and, if applied correctly, mandatory dismissal by this Court. The two regulations affecting Lear's property should be analyzed separately to determine whether a Fifth Amendment taking occurred. FWS is not liable for compensation to Lear because the ESA does not prevent economically beneficial use of her property.

CONCLUSION

For the foregoing reasons, FWS respectfully requests that this Court reverse the judgment of the U.S. District Court for the District of New Union except as to its decision to uphold the ESA as a valid exercise of congressional power under the Commerce Clause.

Respectfully submitted,

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Counsel for U.S. FISH & WILDLIFE