Team No. 20

C.A. No. 16-0933

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, and

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant.

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

BRIEF OF DEFENDANT-APPELLANT-CROSS APPELLEE, UNITED STATES FISH AND WILDLIFE SERVICE

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Plaintiff below, Cordelia Lear ("Lear"), claims that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–44 (2012), is an invalid exercise of congressional power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, as applied to a wholly intrastate population of the endangered Karner Blue Butterfly. Lear also claims that the United States Fish and Wildlife Service (the "FWS") and Brittain County ("Brittain") have completely deprived her property of economic value, effecting an uncompensated taking under the Fifth Amendment. U.S. CONST. amend. V. The United States District Court for the District of New Union had federal question jurisdiction over Lear's claims. 28 U.S.C. § 1331. Lear, the FWS, and Brittain each appeal the district court's June 1, 2016 Order and have filed timely notices of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction over all claims at issue. 28 U.S.C. § 1291. The Court of Federal Claims has exclusive jurisdiction over federal takings claims in excess of $10,000. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). However, Lear waived any takings damages against the FWS in excess of $10,000, allowing this appeal to proceed properly before this Court.

ISSUES PRESENTED

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

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

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

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

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

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

VII. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when with the federal or county regulation, by itself, would still allow development of a single-family residence?

STATEMENT OF THE FACTS

Lear Island is situated in Lake Union, an interstate non-tidal navigable lake. R. at 4. Lake Union is two miles long and one mile wide, consists of approximately 1,000 acres, and is traditionally used for interstate navigation. R. at 4. Congress granted Lear Island to Cornelius Lear in 1803. R. at 4. At the time of the grant, New Union was part of the Northwest Territory. R. at 4. The grant included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island." R. at 4–5.

Cornelius Lear and his descendants have occupied Lear Island continuously from 1803, using the island as a homestead, farm, and hunting and fishing grounds. R. at 5. In the late 1800s, the Lears operated Lear Island as a producing farm. R. at 5. Although agricultural use of the Island ceased in 1965, the original homestead remains standing on the north end of Lear Island near the strait that separates the Island from the mainland. R. at 5.

While the farm was in operation, the Lears transported produce to the mainland by boat. R. at 5. In the 20th century, the Lears constructed a causeway connecting Lear Island to the mainland by road. R. at 5. King James Lear owned the entirety of Lear Island until 1965, at which point he subdivided the property into three tracts, deeded the parcels to each of his daughters, Goneril, Regan, and Cordelia, and reserved a life estate in each lot for himself. R. at 5.

The Brittain Town Planning Board approved the subdivision of the island into three lots as follows: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. R. at 5.

At the time of the subdivision, the Brittain Town Planning Board approved the development of a single-family residence in conformance with zoning regulations on each of the three lots. R. at 5. King James Lear constructed a residence on the Regan Lot and continued to live in the homestead on the Goneril Lot until his death in 2005. R. at 5. Upon his death, King James Lears' three daughters came into possession of their deeded properties. R. at 5. Seven years later, Lear decided to build a residence on the Cordelia Lot. R. at 5.

The Cordelia Lot, commonly referred to as "the Heath," is situated at the northern tip of Lear Island and includes a 40-foot wide 1,000 feet long access strip. R. at 5. The access strip leads to an open field that consists of nine acres of uplands. R. at 5. For several decades, the Lears have voluntarily kept the nine-acre field and access strip open with annual mowing. R. at 5. Over time, the Heath and the access strip have become covered with wild blue lupine flowers, which thrive in the soil of Lear Island. R. at 5. One acre of emergent cattail marsh abuts the Heath in a cove that was historically open water and used as a boat landing. R. at 5. The U.S. Army Corps of Engineers currently considers the cove to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899. R. at 7. The federal government does not preclude filling the cove for residential development as the U.S. Army Corps of Engineers Nationwide Permit 29 authorizes filling one half-acre or less. R. at 7. However, the 1982 Brittain County Wetland Preservation Law precludes filling this area without a proper permit. R. at 7.

Fields of wild blue lupine flowers are essential to the survival of Karner Blue Butterfly. R. at 5. The Karner Blues are an endangered species that were added to the federal endangered species list on December 14, 1992 under 57 Fed. Reg. 59,236. R. at 5. Karner Blue larvae can

only feed on the leaves of blue lupine plants. R. at 5. The Heath provides an ideal habitat for the Karner Blues with its lupine flowers that are partially shaded by the successional forests located on the contiguous Goneril Lot. R. at 6. In 1992, the FWS designated the Heath as critical habitat for the New Union subpopulation of the Karner Blues. R. at 6.

Populations of the Karner Blues survive in other states, but the only population of the butterfly in New Union exists on Lear Island. R. at 6. The Karner Blues lay their eggs in the fall and then overwinter. R. at 6. The butterflies' larvae remain attached to lupine plant foliage until they emerge from their chrysalis. R. at 6. Any disturbance of the lupines during the larval and chrysalis stage results in the death of the butterflies. R. at 6. The Karner Blues have difficulty migrating to new habitats as their flight distance is short, and they must follow woodland corridors. R. at 6. Because the Karner Blues do not migrate, the New Union subpopulation of the species is entirely intrastate. R. at 5–6.

In April 2012, Lear contacted the New Union FWS field office to inquire as to whether the development of her property would require permits or approvals due to the presence of the endangered butterfly population on her lot. R. at 6. An FWS agent advised Lear that any disturbance of the lupine habitat in the Heath other than the continued annual mowing would constitute a "take" of the endangered butterfly. R. at 6. The agent also advised that it was possible to obtain an incidental take permit ("ITP") under Section 10 of the ESA, but in order to file an approvable application for such an ITP, Lear would have to develop and include a habitat conservation plan ("HCP") with the application. R. at 6. The FWS informed Lear that an approvable HCP would provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip, and a commitment to maintain the remaining lupine fields through annual fall mowing. R. at 6. On May 15, 2012, the FWS sent Lear a letter

confirming the Cordelia Lot was a designated critical habitat for the Karner Blues, and inviting Lear to submit an application for an ITP. R. at 6. In the letter, the FWS referred Lear to FWS's Habitat Conservation Planning Handbook (the "HCP Handbook") for information on how to develop an acceptable HCP to submit with the ITP application. R. at 6. The HCP Handbook provides landowners with the opportunity to obtain certainty as to permitting costs and provides assistance in developing an approvable application.

An independent environmental consultant advised Lear that the cost of preparing an ITP, including the required HCP, would amount to $150,000. R. at 6. Lear did not consult with the FWS or the HCP Handbook on matters relating to ITP permitting costs. Rather than pursuing an ITP application, Lear developed an alternative development proposal ("ADP") seeking approval from Britain County to fill the marsh cove. R. at 7.

The fair market value of the Cordelia Lot, without any development restrictions, is $100,000. R. at 7. Property taxes on the Cordelia Lot are $1,500 annually. R. at 7. There is no market in Brittain to use the Cordelia Lot for recreation, without the right to develop a residence on the property, nor does the property have any market value in its current state for agricultural use or timber land. R. at 7. Lear has not sought reassessment of the value of the Cordelia Lot following Brittain's denial of her application for a permit to fill the marsh cove. R. at 7. The Brittain County Butterfly Society offered to pay Lear $1,000 annually to conduct butterfly viewing outings during the summers. R. at 7. Lear rejected the Society's offer. R. at 7.

Lear filed her claims against the FWS and Brittain in February 2014. R. at 7. Lear sought a declaration that the ESA was an invalid exercise of congressional power under the Commerce Clause. R. at 7. Lear additionally sought compensation from the FWS and Brittain for an uncompensated regulatory taking under the Fifth Amendment. R. at 7. On June 1, 2016, the

district court dismissed Lear's as applied constitutional claim. R. at 4. However, the court awarded Lear damages of $10,000 against the FWS and $100,000 against Brittain for her Fifth Amendment takings claim. R. at 4. All parties appealed the district court's order. R. at 4.

STANDARD OF REVIEW

In reviewing whether the ESA is a valid exercise of Congressional power under the Commerce Clause, this Court should apply a rational basis test to determine if there is "a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison,* 529 U.S. 598, 607 (2000); *see Gonzales v. Raich,* 545 U.S. 1, 22 (2005); *United States v. Lopez,* 514 U.S. 549, 566 (1995). The rational basis review entitles congressional enactments, like the ESA, to a "presumption of constitutionality," *Morrison*, 529 U.S. at 607, and this Court "need not determine whether respondents' activities, when taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding." *Gonzales,* 545 U.S. at 22. In other words, this Court only needs to ask whether a rational basis exists for concluding that the ESA, as applied to the wholly intrastate population of the Karner Blue Butterfly,[1] sufficiently affects interstate commerce. *Lopez,* 514 U.S. at 557.

In reviewing whether the application of the ESA and Brittain's Wetlands Preservation Law resulted in an uncompensated taking of Lear's property under the Fifth Amendment, this Court should apply a heightened scrutiny standard to determine whether the government has used its regulatory power to force Lear to bear burdens that properly should be borne by the public. *See Dolan v. City of Tigard,* 512 U.S. 374, 383–84 (1994); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1071 (1992); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 861 (1987). This heightened scrutiny is proper for cases that involve an uncompensated regulatory

[1] The Fourth Circuit Court of Appeals has referred to this standard of review as a "rational basis review with teeth." *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000).

taking; such cases balance the authority of governments to engage in land use planning against the constitutional property rights of individuals. *Dolan*, 512 U.S. at 383–86.

Finally, FWS's appeal of the district court's determination that Lear's takings claim was ripe is reviewed *de novo*. *See Life Partners v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011); *Johnson v. United States,* 317 F.3d 1331, 1333 (Fed Cir. 2003); *Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468, 1471 (Fed. Cir. 1998).

SUMMARY OF ARGUMENT

This Court should uphold the district court's holding that the ESA is a valid exercise of congressional authority under the Commerce Clause. Congress' power to regulate commerce is expansive and includes the ability to regulate conduct that is wholly intrastate if it substantially affects interstate commerce. Every court of appeals that has considered a Commerce Clause challenge to the ESA take prohibition has upheld its validity.

This Court should also reverse the district court's holding that the FWS and Brittain effected an uncompensated regulatory taking on Lear's property under the Fifth Amendment. Lear's takings claims are premature and precluded. First, Lear's takings claim against the FWS is not ripe because she failed to apply for an ITP. Thus, the FWS has not issued a denial or any other final decision pertaining to the use of Lear's property. Further, Lear has not shown that the FWS has rejected one permit application, let alone *multiple* permit applications, to sufficiently support a claim for futility.

Second, the district court erred when it found the Cordelia Lot to be the relevant parcel for a takings analysis rather than the entirety of Lear Island. In order to determine the relevant parcel for a takings analysis, courts take into account the specific facts and circumstances of the property at issue rather than applying any categorical takings rule. As part of that analysis, courts

consider a variety of factors to determine the relevant parcel. Although Lear Island is formally subdivided, formal subdivision is not determinative. Because the owners' actual and projected use of Lear Island has remained constant and the regulation at issue is sufficiently related to the entire island, this Court should find that Lear Island is a single parcel and is the relevent parcel to for the takings analysis.

Third, the district court erred when it held that the ESA take prohibition on the Karner Blues deprived Lear of all economic use of the Cordelia Lot. Because the take prohibition under the ESA is a temporary regulation and the property will recover any lost its value once the restrictions no longer apply, the regulation has not completely deprived her property of all economic value. Further, the Cordelia Lot retains other economically viable uses that Lear has failed to acknowledge and pursue, and the district court failes to follow established precedent to consider other economically viable uses. Finally, the district court erred when it applied tort liability theory to Lear's takings claim and improperly combined the federal and county restrictions for the takings analysis. This Court should apply proper takings jurisprudence and find that the FWS's actions cannot be attributed to or combined with Brittain's actions because the two government entities have not promulgated independent regulatory actions and the actions are disproportionate.

Lastly, the district court failed to follow precedent when it held that the public trust doctrine did not preclude Lear's takings claim based on Brittan's denial of a wetlands permit. The public trust doctrine is a background principle of state law that protects the submerged soil and foreshore of navigable waters for public use. Because the public trust is an inherent restraint upon the state's sovereign power, it is incapable of elimination by transfer or sale. Since Lear

Island is located in Lake Union, a body of water with a history of interstate navigation, the public trust attaches to the submerged lands at issue and precludes Lear's takings claim.

ARGUMENT

I. THE ESA TAKE PROHIBITION IS A VALID EXERCISE OF FEDERAL AUTHORITY UNDER THE COMMERCE CLAUSE.

The United States Constitution authorizes the Federal Government to regulate interstate commerce. U.S. Constitution art I, § 8, cl. 3. Commerce Clause jurisprudence has expanded this authority to permit federal regulation of wholly intrastate activities that "exert[] a substantial effect interstate commerce," *Wickard v. Filburn*, 317 U.S. 111, 124 (1942), and are "economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 560 (1995). When addressing challenges to ESA regulations under the Commerce Clause, federal courts "must first identify the activity that is being regulated." David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. REV. 789, 803 (2005).

As the district court noted, every court of appeals that has considered a Commerce Clause challenge to the ESA take prohibition has upheld the validity of the ESA. R. at 8. However, the federal courts have identified different activities to which to apply the Commerce Clause economic analysis. Generally, the courts have taken three approaches: the "conduct approach;" the "individual target approach;" and the "comprehensive approach." Scopp, *supra* at 803–04. Although the Twelfth Circuit Court of Appeals has not yet addressed the question, under any of the three approaches the ESA take prohibition on the New Union subpopulation of the Karner Blues, an intrastate species, is a valid exercise of federal authority under the Commerce Clause.

Under the conduct approach, a Commerce Clause challenge considers "the economic nature of the regulated activity." *Morrison*, 529 U.S. at 610–11. Federal courts of appeal have

upheld the constitutionality of the ESA take prohibition when the regulated activity was "economically motivated," *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000), or the activity had "a plainly commercial character," *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003). The take prohibition on the Cordelia Lot restricts Lear's proposed development of her property. R. at 6. Because the fair market value of the Cordelia Lot for residential use exceeds the value of the property for recreational, agricultural, or timber land use, Lear's development of a single-family house on the property, the regulated activity, is economically motivated. Further, the construction of a residence on the Cordelia Lot has "a plainly commercial character." The ESA regulation prohibiting the take of the Karner Blues on the Cordelia Lot, thus, is a valid exercise of the federal commerce power under the conduct approach.

Under the individual target approach, a Commerce Clause challenge "considers the economic impact of the individual species at issue." Matthew D. Bockey, *To Keep Every Cog and Wheel: Preserving Biodiversity Through the Endangered Species Act's Protection of Ecosystems,* 41 CAP. U. L. REV. 133, 142–43 (2013). The Fourth Circuit Court of Appeals has upheld the constitutionality of the ESA take prohibition when protection of the species involved "regulable economic and commercial activity" and "substantially affect[ed] interstate commerce through tourism, trade, scientific research, and other potential economic activities." *Gibbs*, 214 F.3d at 497. The Karner Blues on the Cordelia Lot are the only remaining population of the butterfly in New Union, R. at 5, and the Brittain County Butterfly Society has offered to pay Lear annually for the privilege of conducting seasonal viewings of the Karner Blues. R. at 7. The Karner Blues on the Cordelia Lot directly involve economic activity that affect interstate commerce through tourism, scientific research, and potentially many other economic activities as the butterflies are the only remaining population of the Karner Blues in New Union. Because the

ESA take prohibition regulates a species that affects interstate commerce, the regulation is a valid exercise of the commerce power under the individual target approach.

Under the comprehensive approach, a Commerce Clause challenge considers whether the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Essentially, the comprehensive approach evaluates "the effect that losing the species has on the [ESA's] comprehensive goal of preserving biodiversity." Scopp*, supra*, at 804. The Fifth Circuit Court of Appeals upheld the constitutionality of the ESA take prohibition when it found the "provision [to be] economic in nature and supported by Congressional findings to that effect." *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003); *see also* the Endangered Species Act, 16 U.S.C. § 1531(a)(1) (finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of *economic* growth and development") (emphasis added). The court held that, because the "ESA is an economic regulatory scheme[,] the regulation of intrastate takes . . . is an essential part of it." *Id*. Further, the Supreme Court has held that the ESA promotes a substantial government interest. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (describing the legitimacy and importance of the public interest embodied in the ESA). Under the comprehensive approach, regulation of intrastate takes of the Karner Blues on the Cordelia Lot is an essential part of the regulatory scheme of the ESA, and, therefore, the ESA take prohibition on the butterflies is a valid exercise of the commerce power.

Every federal circuit court of appeal that has addressed a Commerce Clause challenge to the ESA take prohibition has unanimously upheld the constitutionality of the regulation. Although the federal courts of appeal have taken different approaches in their analyses of the

question, each court has found that an intrastate prohibition on the take of an endangered or threatened species substantially affects interstate commerce either because the regulated activity is economic in nature, the regulated species affects economic activities, or the take prohibition itself furthers the economic regulatory scheme of the ESA. Applying any of the three approaches, the take prohibition on the Karner Blues on the Cordelia Lot is a valid exercise of federal regulatory authority under the Commerce Clause.

II. APPLICATION OF THE ESA TAKE PROHIBITION TO LEAR'S PROPERTY HAS NOT RESULTED IN AN UNCOMPENSATED TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

The Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S CONST. amend. V. A categorical regulatory taking occurs when the a regulation deprives a landowner of "*all* economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (emphasis added). This categorical rule, however, only applies to the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id.* at 1017. In the absence of such an "extraordinary circumstance," the inquiry as to whether a regulation effects a taking is "more fact specific." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Before conducting a takings analysis, this Court must determine whether the takings claims is ripe, which parcel is the relevant parcel to which to apply the analysis, and whether the proper inquiry is a categorical rule for complete deprivation of economic valueor a fact-specific analysis. Lear's takings claim fails for three reasons. First, Lear's takings claim is not ripe.

Second, the relevant parcel for a takings analysis is the entirety of Lear Island. And, third, Lear has not been deprived of all economically viable use of the Cordelia Lot.

A. Lear's Taking Claim Against FWS Is Not Ripe.

1. Because Lear Failed to Apply For an Incidental Take Permit Under Section 10 of the ESA, FWS Has Not Yet Made a Final Decision.

The Supreme Court has held that takings claims against regulatory agencies are "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Thus, a takings claim is not ripe if an agency has retained some discretion regarding the permissible uses of land. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738–39 (1997). Accordingly, a takings claim based on ESA requirements is not ripe until the administering agency has made a final decision, such as denying an application for an ITP. *See Morris v. United States*, 392 F.3d 1372, 1376–37 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1351 (Fed. Cir. 2002). Because Lear has not applied for an ITP permit, and the FWS has not yet made a final agency decision regarding the use of the Cordelia Lot, Lear's takings claim against the FWS is not ripe.

In *Morris*, property owners brought a takings claim against a federal agency under the ESA claiming that the statute's regulatory requirements to apply for an ITP, including submitting a HCP effected a taking. *Morris*, 392 F.3d at 1374. The property owners did not apply for an ITP arguing that the financial cost of complying with the ESA's regulatory process exceeded the value of the property. *Id*. The Federal Circuit found that, because the property owners did not apply for an ITP, the claim was not ripe. *Id*. at 1376. The court stated that, "when an agency provides procedures for obtaining a final decision, a takings claim is unlikely to be

ripe until the property owner complies with those procedures." *Id*. Ripeness, the court further opined, is dependent upon a final agency decision because, without a final decision, the court cannot sufficiently fix the cost of a regulatory requirement, such as the cost of an ITP application. *Id*. at 1376–77. The court acknowledged that, because the administering agency has discretion regarding an ITP application and can potentially reduce associated costs, "[t]he cost of an ITP application is unknowable until the agency has had some meaningful opportunity to exercise its discretion to assist in the process." *Id*. at 1377.

Like the property owners in *Morris*, Lear made no attempt to apply for an ITP. R. at 7. Lear similarly determined, through an independent consultation, that that the cost of the ITP would exceed the cost of her property. R. at 6–7. Because Lear has not applied for an ITP, the FWS has not made a definitive final decision for Lear's property, and the associated costs of Lear's ITP and HCP, similar to *Morris*, are unknowable because the FWS has not had a meaningful opportunity to exercise its discretion to assist with the application. Further, the FWS has attempted to assist Lear with the ITP application process. When the FWS invited Lear to submit an ITP application in its May 15, 2012 letter, the agency referred her to the FWS's Habitat Conservation Planning Handbook ("HCP Handbook") for information on how to develop an acceptable HCP to submit with the ITP application. R. at 6. The HCP Handbook allows property owners "to obtain maximum regulatory certainty, with practical considerations such as manageability, availability of biological information, and cost." U.S. FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING HANDBOOK, 3-8 (1996). While Lear's environmental consultant advised Lear that an ITP application would cost $150,000, that cost does not consider the potential cost-saving measures that are made possible by following the procedures outlined in

HCP Handbook.[2] Because the FWS has provided procedures for Lear to obtain an final agency decision and Lear opted not to follow the ITP permitting processes, Lear's takings claim against the FWS is not ripe.

2. Lear's Taking Claim Against FWS Does Not Qualify for the Futility Exception.

The futility exception for taking claims serves "to protect property owners from being required to submit *multiple* applications when the manner in which the first application was *rejected* makes it clear that no project will be approved." *Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (emphasis added); *Morris*, 392 F.3d at 1376. In other words, the futility exception only applies when there is an actual application for a permit, the application is denied, and the denial "makes clear the extent of development permitted such that federal ripeness rules do not require the submission of further and futile applications." *Palazzolo*, 553 U.S. at 626; *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990). In addition, "the burden of establishing futility must lie with the party seeking to bypass the permit procedure and any reasonable doubt ought to be resolved against that party." *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991). Here, Lear has not shown that the FWS has rejected a permit application, let alone *multiple* permit applications, to sufficiently support a claim for futility. Therefore, the district court erred when it found that Lear's takings claim was ripe under the futility exception.

[2] The HCP Handbook provides 41 pages of assistance for applicants for pre-application development and HCP development, including measures that will reduce costs. The HCP Handbook describes how the FWS can provide technical assistance for the design of mitigation or conservation measures and determine if an application belongs in a low-effect category, which could incur less costs for applicant. *See* HCP HANDBOOK, *supra* at 1-8, 2-6. Furthermore, a HCP must describe the likely impact of the requested "take," the applicant's plan to "minimize and mitigate such impacts," the alternative options pursued by the applicant, and the reasons those options were not ultimately chosen. 16 U.S.C. § 1539(a)(2)(A)(i).

In finding the FWS's established procedural process futile as applied to Lear, the district court relied on *Palazzolo* to find that the FWS had already declared a policy of denying the sort of permit the Lear would need. The district court further relied on *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996), to find that permitting was unnecessary if the procedure is so burdensome as to effectively deprive the plaintiff of their property rights. However, the district court's reliance on both *Palazzolo* and *Hage* are misplaced. In *Palazzolo*, the agency had previously denied multiple permit applications to fill wetlands on a subject property, which effectively made clear the extent of the authorized land development. 553 U.S. at 625–26. In *Hage*, the burdensome permitting process at issue, which effectively deprived plaintiffs of their property rights, involved permits that had been previously granted and subsequently suspended or cancelled. 35 Fed. Cl. at 156. Because *Palazzolo* and *Hage* involved multiple permit applications and neither involved permitting under the ESA, they are factually distinguishable from Lear's case, and the district court improperly applied their holdings to find a futility exception. This Court should overrule the district court and apply *Morris* to find that Lear's claim is not ripe because there has been no final agency decision and the futility exception does not apply.

In misapplying the futility exception, the district court created a new "economic futility" exception when it found that the FWS's permitting process was futile based only on Lear's independent estimation of the ESA's permitting costs. No binding authorities have recognized this newly created "economic futility" exception; indeed, the Court of Federal Claims has rejected the concept. *See Beekwilder v. United States*, 55 Fed. Cl. 54, 61–63 (2002); *Lakewood Assocs. v. United States*, 45 Fed. Cl. 320, 333–34 (1999); *Robbins v. United States*, 40 Fed. Cl. 381, 387–88 (1998). This Court should decline to implement such an exception, as doing so would excuse a landowner's failure to engage in available permitting procedures based solely on

the landowner's claim that permitting is too costly. Holding otherwise would incentivize landowners to overestimate or exaggerate permitting costs to avoid regulatory compliance.

Even if the economic futility exception were viable, as discussed above, Lear has not sufficiently proven that applying for an ITP would cost more than her property is worth. Lear's independent assessment of the costs of the ITP application is not dispositive. At this juncture, the associated costs of an ITP are unfixed and conclusory because Lear has not submitted an ITP application, and the FWS has not had the opportunity to exercise its discretions to assist Lear in the permitting process.

B. The Relevant Parcel for a Taking Analysis Is the Entirety of Lear Island.

In order to determine the relevant parcel for a takings analysis, the Supreme Court has rejected the adoption of any categorical rule. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002); *Palazzolo*, 553 U.S. at 636 (O'Connor, J., concurring) ("The temptation to adopt a *per se* rule in either direction must be resisted."). Instead, courts have favored the application of a "flexible approach" that considers numerous factors specific to the property at issue. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), *abrogated on other grounds by Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). The district court erred when it refused to apply a "flexible approach" to the relevant parcel analysis. The court found King Lear's 1965 formal subdivision of Lear Island determinative for the relevant parcel analysis. In finding this one factor determinative, the district court's finding amounted to a categorical rule in contravention of takings jurisprudence that have rejected the adoption of categorical rules. *See Tahoe-Sierra*, 535 U.S. at 342. Further, depending on the specific facts of the case, one factor may be more compelling than another. *See Palm Beach Isles v. United States*, 208 F.3d 1374, 1381 (Fed. Cir.

2000), *abrogated on other grounds by Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). Analyzing the relevant factors and weighing the most compelling factors concludes that Lear Island is a single parcel. Therefore, the district court erred when it subdivided Lear Island for its takings analysis.

The formal subdivision of Lear Island in 1965 is not determinative for the relevant parcel analysis. Because an owner's treatment of "legally separate parcels as a single economic unit" can outweigh a formal subdivision when determining the relevant parcel for a takings analysis, *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999), a formal subdivision is not alone determinative. *See Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (stating that an owner's treatment of multiple parcels as a single unit outweighed a formal subdivision for the relevant parcel analysis). Rather, a formal subdivision is merely one of multiple factors in a relevant parcel analysis. *See Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 457–58 (Mass. 2006) (describing the multiple factors that courts have applied for the relevant parcel analysis). Other factors include the "owner's actual and projected use of the property," *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 73 (1997), *aff'd* 177 F.3d 1360 (Fed. Cir. 1999), and the "timing of the property acquisition and development." *Palm Beach Isles Ass'n*, 208 F.3d at 1381. When considering the relevant factors, the entirety of Lear Island is the relevant parcel for a takings analysis because of the actual and projected use of Lear Island and the timing of the property acquisition and development.

The owner's actual and projected use of Lear Island indicates that the land is a single parcel. The Federal Claims Court has held that "[a] property owner, who treats a series of parcels as one property for the purposes of development, financing, planning, and *utilization*, cannot then segregate the properties for the purpose of establishing a takings claim." *Forest Props.*, 39

Fed. Cl. at 73 (emphasis added). The original owner, Cornelius Lear, and all subsequent owners, his descendants, have occupied Lear Island from the time of its 1803 grant. R. at 5. The Lear family has since continuously used the property as a homestead, farm, and hunting and fishing grounds. R. at 5. Although King James Lear formally subdivided Lear Island in 1965, he did so in order to deed the subdivisions to each of his daughters, and neither the Lear's use of the property or the Lear family's sole occupancy of the property has changed since the original grant. R. at 5. The Lear family, and only the Lear family, has occupied and operated Lear Island for centuries. Currently, the Lear family continues to be the sole occupants and operators of the land, and, because this has long been the practice, there is a strong presumption that this use will continue for the foreseeable future. Because the owners past, present, and projected use of Lear Island is for one purpose, the Lear family's occupancy and operation, the owners' actual and projected use of the property is as a single parcel.

Similar to the other factors, the Federal Circuit has held that "[t]he timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the imposition, is a factor, but only one factor, to be considered in determining the proper [relevant parcel] for [a taking] analysis." *Palm Beach Isles Ass'n*, 208 F.3d at 1381. The court further held that common ownership of a parcel was not sufficient to combine multiple tracts of land for a regulatory takings analysis if the regulatory imposition on one tract was unrelated to the use of the other tracts. *Id.* In Lear's case, the government implemented the regulation causing the alleged taking, the ESA Section 9 prohibition on takes of the Karner Blues, in 1992 when it designated the Heath on the Cordelia Lot as the critical habitat for butterflies. R. at 6. Although the Karner Blues' critical habitat is located on the Cordelia Lot, the FWS's agent has stated that an appropriate HCP for an ITP approval would provide for

additional contiguous lupine habitat for the Karner Blues, which applies to the Goneril Lot. R. at 6. In addition, the HCP Handbook states that "[s]ome HCPs encompass areas that have been or have the *potential* to be designated at critical habitat." U.S. FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING HANDBOOK, 3-18 (1996) (emphasis added). Because the Karner Blues have short flight distances and the New Union subpopulation of Karner Blues are located entirely on Lear Island, R. at 5–6, all of Lear Island has the potential to be designated as critical habitat for the butterflies. Therefore, the application of the take prohibition through the HCP development effects the entirety of Lear Island, making the governmental regulation causing the alleged taking sufficiently related to both the Goneril and Regan Lots in order to combine the lots with the Cordelia Lot for a takings analysis.

The district court erred when it considered the Cordelia Lot as the relevant parcel for the takings analysis because all of Lear Island is a single parcel due both the owner's actual and project use of the property and the encompassing effect of the ESA regulations. The Supreme Court has held that a regulatory takings analysis must consider the effect of a land use regulation on the "parcel as a whole." *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330–31 (2002). Because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), a takings analysis should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular parcel have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130–31. Instead, the analysis should focus "on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130–31; The Supreme Court has consistently opposed subdividing a single parcel for a takings analysis. *See*

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 642–44 (1993) ("To the extent that any portion for of property is taken, that portion is always taken in its entirety . . . ."). Therefore, the Court should not subdivide Lear Island for the takings analysis and, instead, should apply the taking analysis to the entirety of Lear Island.

C. The ESA Take Prohibition Has Not Resulted In a Categorical Regulatory Taking of Lear's Property Because The Property is Not Permanently Deprived of All Economic Use.

1. Due to the Forthcoming Natural Destruction of the Karner Blues' Critical Habitat, the Take Prohibition on the Cordelia Lot is a Temporary Regulation and Does Not Deprive Lear of All Economic Use of Her Property.

A regulation that temporarily deprives a property owner of the economic use of his or her property does not cause a categorical regulatory taking "because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332. Whether such regulation constitutes a compensable temporary, or partial, regulatory taking, however, "requires careful examination and weighing of the relevant circumstances." *Palazzolo v. Rhode Island*, 553 U.S. 606, 635 (2001) (O'Connor, J., concurring); *see also Tahoe-Sierra*, 535 U.S. at 342 (holding that a temporary taking analysis is subject to the test established in *Penn Central*). Because any ESA regulations promulgated on the Cordelia Lot will only be applicable for ten years, the prohibition on takes of the Karner Blues on the Cordelia Lot does not result in a categorical regulatory taking as a permanent deprivation of economic use under *Lucas* or a temporary regulatory taking under *Penn Central*.

An interest in property is not only measured by the physical dimensions of the property but also by "the temporal aspect of the owner's interest." *Tahoe-Sierra*, 535 U.S. at 331–32; *see also* RESTATEMENT (FIRST) OF PROPERTY § 9 (AM. LAW INST. 1936) (stating that, in addition to a possessory interest, an interest in land is "ownership measured in terms of duration"). Just as

takings jurisprudence does not permit division of the physical land to determine whether a repudiation of an ownership interest has occurred, it does not permit the segmentation of a temporal interest in land. *See Penn Central*, 438 U.S. at 130–31 (noting that a takings analysis must focus on the "extent of the interference with rights in the *parcel as a whole*" (emphasis added)). A regulation must deprive a landowner of a property interest *permanently* in order to cause a taking of the "parcel as a whole." *See Tahoe-Sierra*, 535 U.S. at 332. Correspondingly, a regulation that "merely causes a diminution of value" or causes a "temporary prohibition on economic use" does not effect a taking of the "parcel as a whole." *Id.* Further, under *Lucas*, there is a categorical taking only when a regulation bars "*all* economically productive or beneficial uses of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (emphasis added). Because the ESA will only be applicable to the property for ten years, it will not permanently affect the "parcel as a whole," and any prohibition on the economic use will not cause a categorical regulatory taking of Lear's property interest.

The ESA functions to "encourag[e] the States and other interested parties . . . to develop and maintain conservation programs" in order to conserve the Nation's fish, wildlife, and plants that "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1), (a)(5), (b). The statute gives authority to the administrator of the ESA to list, alter the listing status of, or delist species as endangered or threatened. *Id.* at § 1533(a). In order to fulfill its purpose, the ESA, in addition to other conservation measures, prohibits the take[3] of any listed endangered or threatened species. *Id.* at §§ 1533(d), 1538(a)(1). Because the ESA take prohibition is *only*

[3] Federal regulation expand the statutory definition of "harm" as applied to a "take" to mean acts that "may include significant habitat modification or degradation where it actually kills or injure wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2016).

applicable to species listed as endangered or threatened, the applicability of the ESA and the duration of any land use restriction promulgated under the ESA is entirely dependent upon the survival status of the relevant species.[4]

Multiple factors affect the survival of any particular species. In addition to untempered economic growth and development, and inadequate regulatory mechanisms, the ESA notes that a species may become endangered or threatened on account of disease, predation, or other natural factors. *Id.* at § 1533(a)(1). Such natural factors affect the survival of the Karner Blues on the Cordelia Lot. In approximately ten years, natural ecological processes will convert the lupine fields on the Cordelia Lot into a successional forest of oak and hickory trees, eliminating the Karner Blues' habitat and resulting in the extinction of the New Union subpopulation of the Karner Blues. R. 7. Upon the extinction of the Karner Blues, the ESA regulations will no longer be applicable to the Cordelia Lot. Due to these natural ecological processes, any ESA restrictions on the Cordelia Lot will have a duration of approximately ten years.

Although continuing to mow the lupine fields annually will abate the Karner Blues' natural habitat destruction, R. at 7, Lear is under no obligation to continue to do so. The ESA places an affirmative duty on federal agencies "to conserve endangered and threatened species," 16 U.S.C. § 1531(c), yet the statute does not place the same duty on private parties or even the States. *Cf. Good v. United States*, 39 Fed. Cl. 81, 100 (1997) (holding, correspondingly, that "the ESA does not legally require that the property be maintained in its natural state"). Rather, the ESA encourages and supports the States and private parties to engage in conservation efforts

[4] The ESA's statutory framework described here has historically created perverse incentives for landowners to engage in activities, such as preemptive habitat destruction, that diminish the applicability of the statute on their land. *See* J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVTL. L. REV. 343, 344 (2015).

with the aid of federal financial assistance. 16 U.S.C. at §1531(a)(5). The FWS would support Lear's voluntary conservation of the Karner Blues New Union subpopulation through the mowing of the lupine fields on the Cordelia Lot.[5] However, because Lear is under no affirmative duty to protect the Karner Blues population from extinction, the natural ecological processes that threaten the Karner Blues' habitat currently control the species survival. As a result, the species survival, and, consequently, the ESA's applicability to the Cordelia Lot, will last approximately ten years.

The Supreme Court has found that a protracted prohibition on economic use is not categorically unconstitutional. *Tahoe-Sierra*, 535 U.S. at 341–42. In *Tahoe-Sierra*, the Supreme Court upheld a district court finding that a 32-month moratorium on the economic use of a property was "not unreasonable." *Id.* at 341. Further, Justice Stevens, in writing the opinion for *Tahoe-Sierra*, suggested that a six-year, or even ten-year, prohibition on economic use would not necessarily constitute a regulatory taking. *Id.* at 338–39 n. 34. Chief Justice Rehnquist, although dissenting to the opinion, interpreted *Tahoe-Sierra* as suggesting that a ten-year moratorium on development is not a taking because it is not "permanent." *Id.* at 347 (Rehnquist, C.J., dissenting). Because any land use restrictions on the Cordelia Lot promulgated under the ESA will last approximately ten years, the restrictions will be temporary.

Any ESA regulations promulgated on the Cordelia Lot under the ESA will not permanently deprive Lear of the economic use of the "parcel as a whole," in temporal terms, because the natural ecological process that threatens the Karner Blues' habitat will cause the extinction of the New Union subpopulation in ten years. Upon the species extinction, the ESA

[5] The FWS's Endangered Species Program supports the efforts of private landowners to conserve and recover endangered and threatened species. See Appendix A for a detailed description of the program elements, policies protecting participating landowners, and available grant programs.

will no longer be applicable to the Cordelia Lot, and Lear will recover the full economic use of the property. Therefore, any potential ESA restrictions on the Cordelia Lot will be temporary and will not cause a categorical taking of the property.

Under *Lucas v. S. Carolina Coastal Council*, a regulation that permanently deprives a property owner of "*all* economically beneficial use" of the property constitutes a categorical taking. 505 U.S. 1003, 1019 (1992) (emphasis in original). However, when a regulation does not permanently deprive the property owner of *all* economically beneficial use of the property, the categorical rule does not apply. *Tahoe-Sierra*, 535 U.S. at 332. Rather, the inquiry as to whether a regulation effects a temporary, or partial, regulatory taking is fact specific. *Id.* Under *Penn Central*, a partial regulatory takings analysis considers the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Under the first test of *Penn Central*, Lear cannot demonstrate the economic impacts of the ESA regulations because Lear has not applied for an ITP permit and the costs are not yet sufficiently fixed. *See supra* Section II.A.1. Under the second test of *Penn Central*, Lear similarly cannot show that the FWS interfered with Lear's distinct investment-backed expectations because Lear inherited the property. Furthermore, courts consider the owner's expectations and the foreseeable impacts of the regulation at the time of owner's acquisition of the land. *See Brace v. United States*, 72 Fed. Cl. 337, 354 (2006). Here, the Heath had already been designated the Karner Blues' critical habitat at the time that Lear acquired her property interest, thus the impacts of the regulations were readily foreseeable. Finally, under the third test of *Penn Central*, "a taking may more readily be found when the interference with property can

be characterized as a physical invasion by government." *Penn Cent.*, 438 U.S. at 124. Here, the application of the ESA involves no physical invasion of Lear's property. Therefore, the ESA regulations do not result in a partial taking on the Cordelia Lot under *Penn Central* because Lear cannot show that the regulations cause a negative economic impact, interfere with Lear's investment-backed expectations, and physically invade her property.

2. Lear Failed to Acknowledge or Pursue Other Economically Viable Uses For the Cordelia Lot.

Under *Lucas*, a categorical taking exists when "a regulation denies *all* economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015 (emphasis added). The district court applied *Lucas* to hold that Lear has been deprived of *all* economic value of her land because the amount of property taxes she pays annually exceeds the $1,000 per annum offer made by the Brittan County Butterfly Society. However, this application is errant because Lear has failed to investigate, and the district court has failed to consider other economically viable uses of Lear's property, such as selling the land to an environmental or conservation group or pursuing the sale of transferable development rights ("TDR").[6]

While courts have not developed a bright line definition of "reasonable or viable economic uses," selling land to a conservation group or selling TDR are methods that have been established as economically viable uses of land that cannot be developed due to ESA regulations. *Good v. United States*, 39 Fed. Cl. 81, 107 (1997). Both the Federal Claims Court and the Supreme Court have held that the value of TDR's must be considered to answer the threshold question of whether an unconstitutional taking has occurred. *Id.* at 108; *Penn Cent.,* 438 U.S. at 137. The Brittan County Butterfly Society's $1,000 per annum offer indicates that Lear's property retains economic value because of the Karner Blues, even without residential

[6] See Appendix B for a description of TDR programs commonly used to buy critical habitat.

development. Indeed, a small local society's willingness to pay money to tour the property is indicative that other conservation groups may attach value to the property as well, perhaps even to buy the property to guarantee the protection of the Karner Blues. Further, Lear failed to acknowledge or pursue the possibility that a land developer may be interested in purchasing TDR, which, under the holding of *Penn Central*, property owners must consider if the option is available. *Penn Cent.*, 438 U.S. at 137. Because the district court similarly failed to acknowledge the existence of these established economically viable precedents, the court's determination that all economic value had been deprived is unfounded and errant.[7] At most, the FWS's application of the ESA has caused Lear to suffer merely non-compensable diminutions in property value.

Once a determination is made that Lear's property has not been deprived of all economic value, then this Court can balance the extent of any actual deprivation and the interference with Lear's reasonable expectations against the public interest being served. *See Penn Cent.*, 438 U.S. at 123–24. As discussed above, the processes involved with protecting endangered species under the ESA, when properly balanced under the *Penn Central* test, outweighs any mere diminutions in value Lear has experienced.

3. The Federal and County Restrictions Do Not Combine to Deprive Lear of All Economic Use of Her Property.

In order to combine a federal regulatory action and a local regulatory action to hold a federal and local government entity jointly and severally liable for a taking, courts have held that the government entities must have taken independent regulatory action, and the regulatory

[7] The district court's decision also disregards the fact that the FWS already analyzed the economic impacts on Lear's property when it first designated a critical habitat. The ESA requires the administrator to designate critical habitat only "to the maximum extent prudent and determinable" and only "after taking into consideration the economic impact, and any other relevant impact" of such designation. 16 U.S.C. § 1533(a)(3).

actions cannot be disproportionate in magnitude. *See Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989); *Mesa Ranch P'ship v. United States*, 2 Cl. Ct. 700 (1983); *De–Tom Enters. v. United States*, 552 F.2d 337, 339 (1977). In Lear's case, the federal and local government actions should not be combined to hold the FWS and Brittain jointly and severally liable for a taking of the Cordelia Lot because the alleged government actions are disproportionate. In addition, the district court improperly applied a tort theory of liability to Lear's takings claim. Under a takings theory of liability, FWS and Brittain are not jointly and severally liable for a taking of Lear's property because the regulatory actions are not the direct cause of Lear's injury.

In *Ciampetti*, the Claims Court found that, although "two government entities acting jointly or severally [can] cause[] a taking," the entities must both have independently promulgated regulatory actions that constitute a taking. 18 Cl. Ct. at 556. The Claims Court acknowledged that "the [federal g]overnment can only be held responsible for a Fifth Amendment taking when its own regulatory function is so extensive or intrusive as to amount to a taking." *Id*. at 556 (quoting *De–Tom Enters.*, 552 F.2d at 339 (internal quotations omitted)). Further, the Claims Court found that where "[t]here had been no application for a federal permit . . . there was no independent federal regulatory action." *Id.* (discussing *Mesa Ranch P'ship*, 2 Cl. Ct. at 711). The FWS has not taken an independent federal regulatory action that constitutes a taking. Although the FWS prohibited takes of the Karner Blues under Section 9 of the ESA, no court has yet recognized a takings claim as a result of an ESA regulation. *See* Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329, 332 (1998). Further, the ESA has built-in provisions that minimize the effects of ESA regulations on property owners, such as ITPs and habitat conservation plans. *Id.* at 368. Further, because Lear has not applied for an ITP permit, and the

FWS has not issued a denial of the permit application, the FWS also has not taken independent federal regulatory action in regards to the ITP permitting process.

In addition, the actions of one government entity cannot be attributed to another government entity in order to constitute a taking when the different entities' actions are of unequal weight, or unbalanced. *See Ciampetti*, 18 Cl. Ct. at 556; *Mesa Ranch*, 2 Cl. Ct. at 711. In *Ciampetti*, the Claims Court found that when there is a "substantial state and local regulatory action" and "no independent federal regulatory action," the state and local action cannot be attributed to the federal government in order to support a takings claim. *Ciampetti*, 18 Cl. Ct. at 556. The Claims Court has found that, when there is no independent federal action, "to the extent that [the landowner's] development plans may have been inhibited by state and county action, such action is clearly not imputable to the [federal government]." *See Mesa Ranch,* 2 Cl. Ct. at 711. Because two government entities are only liable for a taking to the extent that their independent actions caused the injury, the courts have not held different entities jointly and severally liable for a taking if one entity's action were substantial and the other entity did not act. *See Mesa Ranch*, 2 Cl. Ct. at 711; *Ciampetti*, 18 Cl. Ct. at 556; *see also Griggs v. Allegheny Cty.,* 369 U.S. 84, 89–90 (1962) (holding that federal involvement in a local regulatory process is not a sufficient basis for relieving a local regulatory authority of liability for a taking). Under this framework, Lear's taking claim does not permit combining the federal and local regulatory actions in order to constitute a taking because the actions are unbalanced. Brittain's regulatory action is substantial because it is a final agency action, while the FWS's regulatory action is nonexistent because, as discussed, the FWS has not taken an independent regulatory action that constitutes a taking. Therefore, Lear's claim has not met the balance element in order to combine the federal and local actions for a takings analysis.

Furthermore, the district court erred when it applied a tort theory of liability to Lear's takings claim against FWS and Brittain. Takings claims are distinguishable from tort claims for two main reasons: first, unlike a tort, a taking is the result of an authorized government action, and, second, takings claims consider not only the potential illegality of the action, but also the nature and magnitude of the government action. *See Ridge Line v. United States*, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003). Under this second factor, the government action must "appropriate a benefit to the government at the expense of the property owner . . . rather than merely inflict an injury that reduces its value." *Id.* at 1356. Further, the injury to the property owner must be a "direct, natural, or probable result" of the government action that "could not have been foreseen or foretold." *Id.* Conversely, an "incidental or consequential injury inflicted by the [government] action" may give rise to a federal tort claim but not a takings claim. *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955).

Because the tort theory of liability is distinguishable from the takings theory of liability,[8] the district court erroneously applied joint tortfeasor theory to Lear's claim of complete deprivation of economic value of the Cordelia Lot when the federal regulations restrict one use of the property and the county regulations restrict another. Lear has brought a takings claim, not a tort claim. Therefore, the correct analysis of the issue is not whether the harm is indivisible and jointly and severally attributable to the FWS and Brittain under tort theory, but whether the harm was "the predictable result of the government action." *Ridge Line*, 346 F.3d at 1356. Lear alleges the harm that the federal and county regulations together cause the complete deprivation of

[8] Legal scholars have noted that torts and takings must be clearly distinguished, as "[t]he ultimate result [of confusing torts and takings] . . . is a flabbergasting, confusing, and inefficient system whereby a litigant may be forced to adjudicate a takings case in two different courts, under two different theories, and subject to two different statutes of limitation." John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts,"* 61 ME. L. REV. 467, 479 (2009).

economic value of the Cordelia Lot. Because the regulatory actions of the FWS and Brittan are unbalanced, the actions do not cause "direct, natural, or probable" harm to Lear giving rise to a takings claim under the takings theory of liability.

III. PUBLIC TRUST PRINCIPLES PRECLUDE LEAR'S TAKING CLAIM.

When "background principles" of state law, such as the public trust doctrine, deprive a property owner of a use, the claim of deprivation against the state under that principle precludes a Fifth Amendment takings claim. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992); *see also* U.S. CONST. amend. V. The district court misapplied the public trust doctrine to Lear's claim and errantly held that no public trust navigational reservation can be presumed to have existed at the time of the 1803 grant.

In *Lucas*, the Supreme Court held that a state statute rendered a property "valueless" when it had the "direct effect of barring the petitioner from erecting any permanent structures on his two parcels." *Lucas*, 505 U.S. at 1007. The *Lucas* court found that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The public trust doctrine is such a background principle which grants state ownership of the beds and banks of navigable waterways. The Constitution impliedly granted all states ownership in submerged lands via the "equal footing" doctrine. *See Pollard v. Hagan*, 44 U.S. 212, 216 (1845). Thus, the waters navigable at the time of statehood are "held in trust for the people of the state, that they may enjoy navigation of the water." *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Further, the doctrine of public trust guaranteeing navigable rights prevents a state from eliminating or transferring those rights to another. *Id*. at 453 ("The state can no more

abdicate [this] trust . . . than it can abdicate its police powers . . . ."); *see also Lawrence v. Clark Cty.*, 254 P.3d 606, 613 (Nev. 2011) ("The public trust doctrine is thus not simply common law easily abrogated by legislation; instead, the doctrine constitutes an *inseverable restraint* on the state's sovereign power." (emphasis added)).

First, the district court erred when it found that the public trust limits do not inhere in Lear's 1803 grant. The court mischaracterized the *Lucas* court's holding as dicta. *Lucas*, 505 U.S. at 1029. Several courts have applied *Lucas'* "background principles" of the public trust as an absolute defense to takings claims. *See, e.g., McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (rejecting a takings claim because the landowner's property rights did not include the right to backfill tidelands subject to the public trust). Although there is no New Union precedent regarding the scope of the public trust protections for public trust waters, *Illinois Central* establishes the general federal rule that a state may not "abdicate" its responsibilities to protect public trust waters. *Ill. Cent.*, 146 U.S. at 453; *see Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 448, 452 (Cal. 1983) (using *Illinois Central* as a federal floor for its public trust jurisprudence). Therefore, the lack of New Union precedent does not control.

Second, the district court erred when it found dispositive that the United States did not recognize public trust rights in lands within the 300 feet of the shore of Lear Island as they are non-tidal navigable waters of Lake Union mentioned in the 1803 grant. The Supreme Court has held that the public trust doctrine *does* encompass non-tidal, navigable waters as well as the submerged lands beneath such waters. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476–77 (1988) ("Petitioners do not deny that broad statements of public trust dominion over tidelands have been included in this Court's opinions since the early 19th century."); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) (finding that submerged lands are protected by the public trust);

Barney v. City of Keokuk, 94 U.S. 324, 339 (1876). Lake Union has been traditionally used for interstate navigation. R. at 5. In addition, the Lears have long navigated over the submerged lands at issue to reach the Cordelia Lot, and have historically used the property as a boat landing for personal and economic transport. R. at 5. Therefore, the submerged lands around Lear Island are subject to the public trust doctrine, and rights to those lands were never granted to Lear because public trusts interests are "inherently nonvested property interests." Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 709–10 (1995); *see also Nat'l Audubon*, 658 P.2d at 732 (holding that vested rights do not bar reconsideration of water resources).

Although *Shively* held that a Congressional grant prior to statehood may preclude the assertion of a state's subsequent "equal footing" claim, that is not the end of the inquiry. *Shively*, 152 U.S. at 58. A landowner must still show that the intended use of the public trust lands either promotes the public trust or does not cause a substantial impairment of the public trust. *See Ill. Cent.*, 146 U.S. at 453 ("The control of the state for the purposes of the public trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any impairment of the public interest in the lands and waters remaining."). While Lear can cite the original grant's express language conveying 300 feet of submerged lands surrounding Lear Island, R. at 4–5, filling the lands would substantially harm the public trust by destroying the natural resources in the submerged lands and impairing navigability. Therefore, *Shively* does not protect Lear's takings claim.

CONCLUSION

The district court properly held that the ESA is a valid exercise of congressional authority under the Commerce Clause because Congress' expansive regulatory authority includes the

ability to regulate conduct that is wholly intrastate if the conduct substantially affects interstate commerce. The ESA Section 9 take prohibition as applied to Lear substantially affects interstate commerce for three reasons. First, the take prohibition regulates activity that is economic in nature: the development of a single-home residence. Second, the regulated species has an economic impact: the Karner Blue Butterfly has value for tourism and, potentially, scientific research. And, third, the Section 9 take prohibition is essential to the comprehensive scheme of the ESA: the take prohibition allows the federal government to mitigate against the premature extinction of endangered and threatened species.

The district court, nevertheless, erroneously held that the FWS and Brittain effected an uncompensated regulatory taking on Lear's property under the Fifth Amendment. Lear's takings claim against the FWS is not ripe nor futile because she has not yet applied for an ITP, which would provide Lear with avenues to develop her property while mitigating damage to the Karner Blue population inhabiting her property. The district court erred further when it found that the relevant parcel for a takings analysis is the Cordelia Lot and not the entirety of Lear Island, in contravention of takings jurisprudence eschewing subdividing property for takings analyses. Lastly, the district court improperly found that the government regulations deprived Lear of all economically beneficial use of the Cordelia Lot. The FWS's regulations are temporary, the Cordelia Lot retains economically viable uses outside of residential development, and, because the federal and local regulations cannot be combined for Lear's takings claim, the FWS's regulations do not prevent Lear from developing another area of her property, the marsh cove.

Finally, Brittan's denial of a wetlands permit does not preclude Lear's takings claim under the public trust doctrine. The district court erroneously applied the public trust doctrine jurisprudence when it held that the doctrine is not inherent upon the state's sovereign power.

Because states cannot autonomously abrogate the public trust doctrine, the doctrine attaches to the submerged lands at issue and precludes Lear's takings claim.

For the above reasons, the FWS urges this Court to uphold the district court's holding that the ESA, as applied to the Cordelia Lot, is valid under the Commerce Clause. In addition, the FWS urges this Court to overrule and reverse the district court's finding of an uncompensated Fifth Amendment taking and vacate the awarded damages.

APPENDIX A

U.S. Fish & Wildlife Service

Our Endangered Species Program and How It Works with Landowners

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Dr. Michael Forstner, Texas State University

The Endangered Species Act (ESA) defines endangered species as species in danger of extinction throughout all or a significant portion of their range. Threatened species are likely to become endangered in the foreseeable future.

In cooperation with public and private partners, the Endangered Species Program conserves endangered and threatened species and the ecosystems upon which they depend. Conservation helps ensure functioning ecosystems, preserve our natural heritage for future generations, and maintain long-term economic prosperity. For more information, visit the Program's Web site at http://www.fws.gov/endangered/

Our Program's priorities are:

- Conserving imperiled species
- Recovering listed species
- Providing quality customer service to Federal, State, and local governments, Tribes, and private citizens to assist in conserving listed species while meeting their social and economic objectives.

Endangered Species Program Elements

- Through the Candidate Conservation program, the U.S. Fish and Wildlife Service (Service), in partnership with State and Federal agencies, Tribes, private organizations, and landowners, works to reduce the threats to declining species and thus prevent the need for listing. By acting early before a species requires ESA protection, the Service can maintain management flexibility for landowners and reduce the costs of recovery.

- Through the Listing program, the Service follows Federal rulemaking procedures and specific Endangered Species Act requirements to determine whether to list species. A formal peer-review process and an opportunity for public comment ensure that the Service obtains the best available scientific information in making its decisions.

When it is prudent to do so, the Service protects essential habitat through designating critical habitat at the time a species is listed or soon afterwards. Once a species is listed, it is afforded the full range of protection under the Act, including prohibitions on unauthorized killing, harming, or otherwise taking and restrictions on importing and exporting to prevent trade-related declines.

- Through the Consultation program, the Service works with Federal agencies as they ensure that the activities they authorize are compatible with species conservation. The Service also encourages Federal agencies to involve their applicants, such as private landowners, in the consultation process through opportunities to provide information and review documents.

- Through the Recovery program, the Service develops partnerships with Federal, State, and local agencies, Tribes, researchers, conservation organizations, businesses, landowners, and private citizens to conserve listed species. Recovery efforts include a range of management activities, such as breeding species in captivity and protecting habitat or restoring it. Beneficial activities may include addressing threats such as removing introduced predators to stabilize listed species so they will increase. A species is considered for delisting once it recovers to the point where it is secure in the wild and no longer needs the protection of the ESA.

The Endangered Species Act defines an endangered species as in danger of extinction throughout all or a significant portion of its range. A threatened species is likely to become endangered in the foreseeable future.

Assistance to Landowners

Approximately half of listed species have at least 80 percent of their habitat on private lands. Thus, the participation of private landowners is critical to successful species recovery. Several programs provide incentives for private landowners, Tribes, State and local governments, industry, and agricultural interests.

- The Safe Harbor Policy encourages voluntary management for listed species to promote recovery on non-Federal lands by providing assurances to property owners that no additional management activities will be required for the species.

- The Candidate Conservation Agreements with Assurances Policy provides incentives for non-Federal property owners to conserve candidate species, with the goal of making listing

unnecessary. This includes assurances that no additional management activities will be required even if the species becomes listed.

■ Habitat Conservation Planning allows private landowners to develop land supporting listed species provided they undertake conservation measures. The No Surprises Policy assures participating landowners that they will incur no additional mitigation requirements beyond those agreed to in their Habitat Conservation Plans, even if circumstances change.

■ Conservation Banks are permanently protected privately or publicly owned lands that are managed for endangered, threatened, and other at-risk species. A conservation bank is like a biological bank account. Instead of money, the bank owner has habitat or species credits to sell.

Grants Program

■ The Cooperative Endangered Species Conservation Fund (section 6 of the ESA) provides funding to States and Territories to participate in a range of conservation projects on non-Federal lands for candidate, proposed, and listed species. Because more than half of all listed species spend at least part of their life-cycle on privately owned lands, the Service recognizes that conservation success depends on working cooperatively with landowners, communities, and Tribes to foster voluntary stewardship. States and Territories play a key role in this work. Although eligibility in the grant program is limited to States and Territories, individual citizens or groups—for example, land conservancies, community organizations, and conservation organizations—may work as subgrantees with a State or Territorial agency on conservation efforts that are mutually beneficial.

Funding is available:
• to implement conservation projects for listed and species at-risk (Conservation Grants);

• to integrate habitat conservation into local land use planning through the development of Habitat Conservation Plans (Habitat Conservation Planning Assistance Grants);

• to further species conservation through land acquisition and easements associated with approved Habitat Conservation Plans (HCP Land Acquisition Grants); and

• to acquire lands essential to the recovery of listed species (Recovery Land Acquisition Grants).

Looking Ahead

By building strong partnerships and initiating early and collaborative conservation efforts, the Service can best conserve endangered and threatened species and the ecosystems upon which they depend.

Contact Us

Want more information? Please contact the appropriate office below:

Washington D.C. Office
Endangered Species
4401 North Fairfax Drive, Room 420
Arlington, VA 22203
http://www.fws.gov/endangered/
Acting Chief, Division of Conservation and Classification: Nicole Alt, 703-358-1985
Chief, Division of Consultation, HCPs, Recovery, and State Grants: Rick Sayers, 703-358-2171
Chief, Division of Partnerships and Outreach: Claire Cassel, 703-358-2390

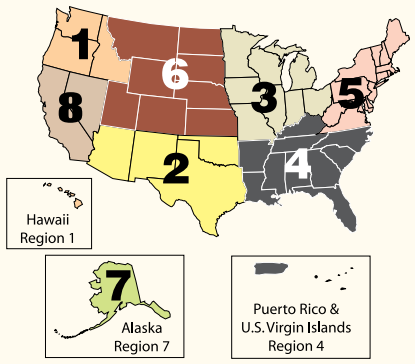
Region One — Pacific
Eastside Federal Complex
911 N.E. 11th Avenue
Portland OR 97232-4181
http://www.fws.gov/pacific/
Chief, Division of Endangered Species: Patrick Sousa, 503-231-6158

Region Two — Southwest
P.O. Box 1306, Rm 4012
Albuquerque, NM 87102
http://www.fws.gov/southwest/
Chief, Division of Endangered Species: Susan Jacobsen, 505-248-6641

Region Three — Great Lakes, Big Rivers
Bishop Henry Federal Building
One Federal Drive
Ft. Snelling, MN 55111-4056
http://www.fws.gov/midwest
Chief, Ecological Services Operations: T. J. Miller, 612-713-5334

Region Four — Southeast
1875 Century Boulevard
Atlanta, GA 30345
http://www.fws.gov/southeast/es/
Acting Assistant Regional Director for Ecological Services:
Jack Arnold, 404-679-7311

Office Boundaries



Region Five — Northeast
300 Westgate Center Drive
Hadley, MA 01035-9589
http://www.fws.gov/northeast
Chief, Division of Endangered Species: Martin Miller, 413-253-8615

Region Six — Mountain Prairie
134 Union Boulevard
Lakewood CO 80228
http://mountain-prairie.fws.gov
Chief, Division of Endangered Species: Bridget Fahey, 303-236-4258

Region Seven — Alaska
1011 East Tudor Road
Anchorage, AK 99503-6199
http://alaska.fws.gov
Regional Endangered Species Coordinator: Sonja Jahrsdoerfer, 907-786-3323

Region Eight — California and Nevada
2800 Cottage Way, Suite W2606
Sacramento, CA 95825
http://www.fws.gov/cno/
Assistant Regional Director for Ecological Services:
Mike Fris, 916-414-6464

U. S. Fish and Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
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APPENDIX B

Planning Implementation Tools
Transfer of Development Rights (TDR)

TOOL DESCRIPTION

Transfer of Development Rights (TDR) is a voluntary, incentive-based program that allows landowners to sell development rights from their land to a developer or other interested party who then can use these rights to increase the density of development at another designated location.

While the seller of development rights still owns the land and can continue using it, an easement is placed on the property that prevents further development. (See Conservation Easement fact sheet) A TDR program protects land resources at the same time providing additional income to both the landowner and the holder of the development rights.

Possible Uses

Preservation of:

- Farmland
- Grazing land
- Timber land
- Open space
- Critical habitat
- Historic buildings and districts

COMMON USES

Farmland protection

TDR programs are a way to permanently protect blocks of productive farmlands. Developers give farmers cash for their development rights. Farmers can use the money in any way they please (e.g. pay down debt, start a retirement account, pay operational expenses). The farmer still owns the land and retains the right to farm it.

Natural Resource Protection

A TDR program can provide a source of private money to purchase development rights on unique natural areas, critical habitat, and areas important for resource protection such as groundwater recharge areas.

Guide New Urban Development

A TDR is useful in rapidly urbanizing communities to guide housing to desirable locations. Receiving districts can be located in places where urban growth or higher densities are desired or where urban services are available.

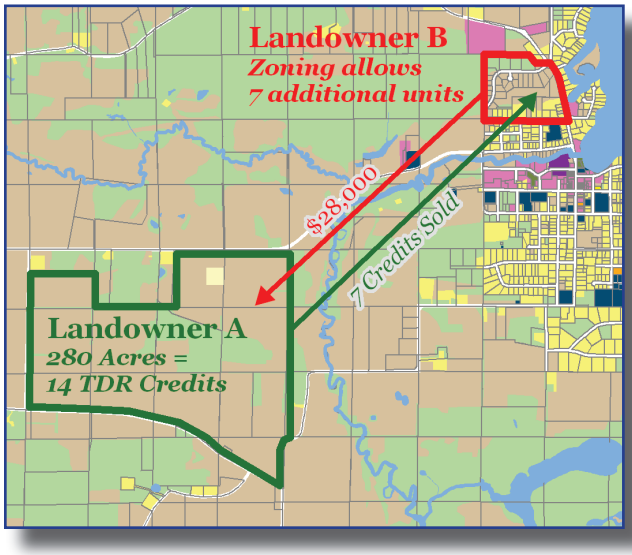

Figure 1. Landowner A, a farmer, would like to get additional economic return from his property. In exchange for restrictions on his land, Landowner A sells the development rights that are part of his property. This permanent prevention of development helps the community reach its farmland preservation goals. Landowner B would like to develop her property in the receiving area which already has public services. Landowner B finds that she would earn a larger profit by purchasing TDR credits from Landowner A, thereby allowing her to build more housing units.

IMPLEMENTATION

CREATION

There are four elements in successful TDR programs:

1. **Designate a preservation zone (Sending Area).**
   Identify target areas that the community desires to protect (i.e. contiguous blocks of productive farmland or sensitive natural resources).

2. **Designate an urban growth zone (Receiving Area)**
   Identify target areas in the community where development is desirable (i.e. near businesses, existing urban services, along a transportation corridor).

3. **Determine a market for development rights**
   TDRs only work when a demand exists for development rights. It is important that long-term growth expectations exist for receiving areas to assure landowners in the sending areas that their development rights have value. Adequate incentives must be provided to landowners before they will sell development rights.

4. **Define TDR Procedures and Transfer Ratio**
   TDR procedures include establishing what will be used to determine the number of development credits received (i.e. acres protected, amount of prime agricultural soil, dollar value of the land) and determining how many additional units a developer will receive per credit. Guidelines should also be set up to aid staff in their role as liaison between landowners and developers.

ADMINISTRATION

Establishing a TDR bank, run by a local government, can help the program run smoothly. Instead of developers purchasing development rights directly from landowners, the local government acts as a middleman to buy and then sell available development rights. A TDR bank makes the program more predictable and manageable for landowners and developers.

A well trained staff person is needed to manage development right transfers either by running the TDR bank, or by negotiating the transactions between landowners and developers. Staff will need to monitor the market for development rights and recommend adjustments to their value as needed. Staff also plays a large role in educating local officials, landowners, and developers about the program. Staff must ensure that the municipality's capital improvement program and ordinances continue to support the program as development transfers occur.

Creating Development Credits

A formula is used to convert development rights into specific development credits based on such factors as the area put under protection, e.g. one credit for every 20 acres protected, or on the cash value of the land, or for every $1,000 paid to the landowner. The formula also identifies how much you receive for each credit in the receiving area, e.g. one credit allows you to build an additional family unit or increase the floor area ratio of a building by a given percent.

Successful TDR programs have:

- Credits to buy,
- Increasing growth pressure in the area,
- Incentives that target growth to the receiving area.