Team No. 21

Docket 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,

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
Honorable Romulus N. Remus, District Judge

BRIEF OF CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Lear's case challenges the constitutionality of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44 (2012), under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and argues that the combination of U.S. Fish and Wildlife Service's (FWS) incidental take permit (ITP) regulations, 16 U.S.C. § 1539(a)(1)(B), and the Brittain County Wetland Preservation Law amounted to an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments of the Constitution. This Court has federal question jurisdiction over these constitutional claims, and counterclaims of the same case, pursuant to 28 U.S.C. §§ 1331 and 1367(a), respectively. Lear satisfied Article III standing by demonstrating injury by her inability to construct a house on her property, traceable to the regulatory takings imposed by FWS and Brittain County, and redress is available. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). Lear filed a timely appeal following the district court's order. Fed. R. App. P. 4(a)(1)(A). Finally, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the ESA's Karner Blue take regulation is within the Commerce and Necessary and Proper Clause power, where the Karner Blue subpopulation on Lear's property is wholly intrastate, non-economic in nature, and inhabits lupine fields existent only due to annual mowing.

2. Whether Lear's takings claim against FWS is ripe despite not applying for an ITP, where the ITP contains conditions impossible to satisfy and the application expense exceeds fair market value of the property in question.

3. Whether the Heath is the relevant parcel for Lear's takings claim where it was properly conveyed and is a distinct parcel to which conceptual severance should not be applied.

4. Whether the natural destruction of the butterfly habitat in ten years precludes Lear's takings claim based on complete deprivation of economic value, where value will be restored to the property only after the future extinction of the endangered subpopulation.

5. Whether a regulatory takings claim for complete loss of economic value is prohibited where a landowner rejects an offer for a property income less than the annual property taxes.

6. Whether it is appropriate for analysis under *Lucas* to examine the combined impact of both the FWS and Brittain County regulations when together they result in a complete deprivation of all economic value of the Heath.

7. Whether public trust doctrine precludes Lear's takings claim where an Act of Congress granted the Lear's absolute title in fee simple to the marsh before 1910, the year the public trust doctrine was applied to non-tidally affected lakes, and where the marsh was most likely non-navigable at the time New Union achieved statehood.

STATEMENT OF THE CASE

After ESA regulations and a municipal wetlands law precluded Lear from building a single-family home, Lear filed a regulatory taking claim, alleging violations of the Fifth and Fourteenth Amendments against defendants, the FWS and Brittain County in the U.S. District Court for the District of New Union. (R. at 4). The lower court upheld the constitutionality of the ESA, but awarded Lear $10,000 in damages from FWS and $90,000 in damages from Brittain County. (R. at 4). On June 9, 2016, FWS and Brittain County each filed a timely Notice of Appeal. (R. at 1). Lear followed suit, and filed a Notice of Appeal on June 10, 2016.

In 2012, Cordelia Lear sought to build a single-family residence for her own use on her 10-acre island property. (R. at 5). Her property is on the northern tip of Lear Island, which sits on Lake Union in Brittain County, New Union. (R. at 4, 5). Lear's lot consists of a cattail marsh in a cove, a one-acre access strip, and open lupine fields called the Heath, which have been annually mowed since agricultural use on Lear Island ceased in 1965. (R. at 5). The Heath and access strip are the only areas of the island that are covered with wild blue lupines that have not revegetated into successional forest. (R. at 5). The lupines provide critical habitat and the only food source for a Lear Island subpopulation of Karner Blue butterflies listed as endangered under the ESA in 1992. (R. at 5). Karner Blues have short flight distances and can only migrate along woodland edge corridors. (R. at 6) The Lear Island subpopulation of Karner Blues lives entirely within New Union, does not travel beyond New Union, and is biologically incapable of leaving the

island. (R. at 6). The Brittain County Butterfly Society offered Lear $1,000 for access rights for butterfly watching, but Lear declined the offer. (R. at 7).

Lear inherited her property from her father. (R. at 5). An Act of Congress originally granted Lear Island to Cornelius Lear in 1803, when New Union was not yet a state. (R. at 4). The grant included title in fee simple absolute to the entire island, the soils beneath the waters within a 300-foot radius of the shoreline, and the soils beneath the shallow strait connecting the island to the mainland. (R. at 4-5). The Lear family originally farmed, and sold produce by boating, and later transporting it on the causeway they constructed across the strait to the mainland. (R. at 5). In 1965, King Lear owned the entire Lear Island grant. (R. at 5). Before he died in 2005, he created an estate plan that divided Lear Island into three parcels: the Goneril Lot (550 acres), Regan Lot (440 acres), and Cordelia Lot (10 acres). (R. at 5). The Brittain Town Planning Board approved the plan, where construction of a single-family residence on each parcel was allowed by zoning. (R. at 5). King Lear then deeded the properties to his daughters, reserving a life estate in each. After he died, the three sisters inherited the deeds to their respective properties. (R. at 5). The Goneril and Regan Lots currently have single-family residences. (R. at 5).

Desiring to build a single-family residence for private use on her property, Lear contacted FWS in April of 2012 inquiring whether her development plans required special permitting for the subpopulation of endangered Karner Blues. (R. at 6). On May 15, 2012, FWS confirmed by letter that her entire property was designated critical habitat in 1992, when the butterfly subpopulation was listed as endangered. (R. at 6). FWS then instructed Lear to apply for an ITP, which required completion of a Habitat Conservation Plan (HCP) pursuant to the ESA and an environmental assessment under the National Environmental Policy Act. 42 U.S.C. § 4321 *et*

seq. (R. at 6). At a minimum, an acceptable HCP required Lear to provide contiguous acre-for-acre Karner Blue Habitat. (R. at 6). Surrounded primarily by Lake Union, Lear only has one adjacent landowner, her estranged sister Goneril, to the south. (R. at 6). Goneril refused to consider land restrictions that may provide contiguous habitat. (R. at 6). Overall, preparing the ITP application would cost Lear an estimated $150,000. (R. at 6). Furthermore, the HCP required Lear's commitment to mow and maintain the lupine fields each fall. (R. at 6). Without Lear's annual mowing, the lupine habitat would naturally convert back to a successional oak and hickory forest, unsuitable to Karner Blues. (R. at 7). If no replacement habitat was created within a 1,000 ft. radius of the lupine fields, the Karner Blues would naturally become extinct within ten years. (R. at 7).

Realizing the impossibility and exorbitant expense of the ITP process, Lear developed an alternative development proposal to fill and build on one-half acre of the marsh cove. (R. at 7). No federal approvals were required for Lear's proposed fill, because the U.S. Army Corps of Engineers designated the marsh portion of Lear Island non-navigable pursuant to the Rivers and Harbors Act of 1899, and authorizes fill for construction of residential dwellings involving one-half acre or less. (R. at 7). However, Lear's alternative development proposal did require a permit to fill the cove marsh, pursuant to the 1982 Brittain County Wetland Preservation Law. (R. at 7). Lear applied for a permit with the County Wetlands Board in August 2013, and was denied in December 2013, because her purpose for fill was not a water-dependent use. (R. at 7).

There is no market value in Brittain County for a parcel with restrictions against single-family residence construction. (R. at 7). The fair market value of the Cordelia Lot without restrictions preventing construction of the single-family residence is $100,000. (R. at 7). Lear's property has no additional recreational, agricultural or timber value. (R. at 7). As a result, Lear

filed the complaint that is the basis of this appeal, claiming a *per se* regulatory takings and complete deprivation of any economically beneficial use on the Cordelia Lot. (R. at 4).

SUMMARY OF THE ARGUMENT

1. ESA regulation of a wholly intrastate, non-commercial butterfly population, dependent on human maintenance of habitat on private land, falls outside of congressional power under the Commerce and Necessary and Proper Clauses of the Constitution, and the purpose and intent of the ESA. The intrastate Karner Blue subpopulation is non-economic in nature, and the Supreme Court made clear in *Lopez*, *Morrison*, and *Raich*, that an activity must be economic in nature for the Commerce Clause to authorize its regulation. While the Necessary and Proper Clause may still authorize regulation of a non-economic activity, the regulation must be necessary and proper to implementing the applicable statute. Here, take regulation of Karner Blues, which inhabit maintained lupine fields on Lear's private property, is neither necessary, nor proper. The ESA function is not undercut when Karner Blue take is not regulated on Lear Island. Rather, Congress reaches beyond its enumerated authority, where it attempts to regulate private land use through the auspices of an intrastate non-commercial butterfly.

2. Lear's regulatory takings claim against FWS is ripe because the agency has reached a final determination regarding disturbance of the endangered Karner Blue habitat. A complete ITP application is futile because the agency has determined any application must include conditions Lear is incapable of meeting. Further, preparation of the ITP application would cost Lear fifty percent more than the value of the property without any restrictions that would prevent development of a single-family house.

3. Lear has been deprived of any "economically viable use of [her] land" under *Lucas*, where FWS regulation of the endangered Karner Blue butterfly and the Brittain County

Wetlands Preservation Law regulations have made it impossible to build a single-family home on her property. Lear obtained fee simple interest in the land in 2005, and her distinct interest in the property makes it the correct parcel of land for a takings claim instead of the entire Lear Island. The potential for elimination of the Karner Blue subpopulation in the future does not prohibit takings claim because it contradicts the intent of the ESA by suggesting that Lear could voluntarily destroy the Karner Blues if she ceased to maintain their lupine habitat, therefore removing restrictions on her property. Lastly, an offer to use the Heath for Karner Blue viewing by the Brittain County Butterfly Society, too minimal to cover the annual taxes on the property, does not constitute as an economically viable use as to bar the claim.

4. In 1803, Congress granted the Lear's absolute title in fee simple to the marsh waters and soils underneath them. This title is superior against New Union's equal-footing and public trust doctrine claim, because the congressional title was clear and Congress granted it before 1910, the year public trust doctrine included navigable waters, like lakes and rivers, beyond those just affected by the tides.

ARGUMENT

I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE ESA TAKE REGULATION OF AN INTRASTATE, NON-COMMERCIAL KARNER BLUE BUTTERFLY POPULATION INHABITING MAINTAINED HABITAT ON PRIVATE PROPERTY, BECAUSE THESE TAKINGS DO NOT SUBSTANTIALLY EFFECT INTERSTATE COMMERCE AND ARE NOT NECESSARY AND PROPER TO THE FUNCTION OF THE ESA.

The district court's judgment is an unconstitutional overstep of congressional power as enumerated by the Commerce Clause. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). Federalism protects individual liberty from

arbitrary federal power by ensuring that local governments have power over people in the ordinary course of their lives. *Id*. at 2578.

Article I, section 8, clause 3 of the U.S. Constitution vests the power to "regulate Commerce … among the several States" in Congress. Modern Commerce Clause jurisprudence provides that Congress may regulate 1) the use of channels of interstate commerce, 2) the instrumentalities of commerce, and 3) "activities having a substantial relation to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). Only the third category is at issue in the present case. Congress's power is also encompassing as the Necessary and Proper Clause provides the additional authority to "make all Laws which shall be necessary and proper for carrying into Execution for foregoing Powers." U.S. Const. art. I, § 8, cl. 18. While the modern interpretation of Commerce Clause authority is expansive, it is not without effective limits. *Sebelius*, 132 S. Ct. at 2578-9. Interstate commerce must consider the U.S.'s "dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . effectually obliterate[s] the distinction between what is national and what is local." *United States* v. *Lopez*, 514 U.S. 549, 557 (1995) (*quoting NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Section 9 of the ESA criminalizes "take" of listed species without a permit. *Id*. at § 1538(a)(1)(B). Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. *Id*. at § 1532(19).Harm includes "significant

habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding" in its definition. 50 C.F.R. § 17.3.

While circuit courts have readily applied the seminal ESA case, *Tenn. Valley Auth. v. Hill*, the Supreme Court has not directly spoken on the constitutionality of the ESA, choosing instead to repeatedly express limits to the Commerce and Necessary and Proper Clause power. 437 U.S. 153 (1978). *Sebelius* represents the Supreme Court's most limited expression on Commerce Clause power yet. 132 S. Ct. 2566. Lear's suit represents the Twelfth Circuit's first ESA constitutionality impression since the Supreme Court reinforced the limits on congressional power in *Sebelius*.

Lear does not ask the Court to find the entire ESA unconstitutional. Instead, Lear asks that ESA regulation of an intrastate non-commercial species on private property be found outside of congressional authority under the Commerce and Necessary and Proper Clauses. Therefore, Lear respectfully asks the Court to overturn the lower court's finding that Karner Blue take on Lear's property substantially affects interstate commerce. When the correct scope of analysis is applied, it is clear that intrastate Karner Blue take, alone or in the aggregate, does not substantially affect interstate commerce, because Karner Blues are non-economic in nature. If the regulated activity is non-economic in nature, the Commerce Clause alone cannot authorize regulation of the non-economic activity. Finally, the Necessary and Proper Clause authorizes regulation of non-economic activity under the Commerce Clause if the regulation is necessary and proper. Here, intrastate regulation of Karner Blue take is neither necessary to the function of the ESA as a whole, nor proper in terms of the principles of federalism enshrined in the Constitution.

A. The scope of inquiry for determining whether the activity substantially affects interstate commerce is the regulated activity Karner Blue butterfly take, not the effect of the regulated activity, Lear's inability to build on private property.

The Commerce Clause's scope of inquiry determines whether the expressly regulated activity substantially affects interstate commerce, not whether the effects stemming from the activity substantially affect interstate commerce. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). Looking beyond the regulated activity to the regulation's attenuated effects obliterates any constitutional limit on Congress's authority to regulate intrastate activities. *Id*. In *Lopez,* the Court held that regulation of gun possession near schools did not substantially affect interstate commerce. 514 U.S. at 558-59. Similarly, the *Morrison* Court held that regulation concerning violence against women did not substantially affect interstate commerce. 529 U.S. at 610. In both *Lopez* and *Morrison*, the scope of inquiry used to analyze substantial relation to interstate commerce was based on the regulated activity, and both regulations were beyond the limits of congressional authority enumerated in the Commerce Clause. *Lopez*, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 617.

Additionally, *GDF Realty*, assessed a challenge to ESA's constitutionality under the Commerce Clause but did not analyze the effects stemming from ESA regulations to satisfy the substantial relation test. 326 F.3d at 634. Instead, the court applied the scope of inquiry to the regulated activity, take of intrastate, non-commercial subterranean invertebrates under the ESA, consistent with *Lopez* and *Morrison*. *Id*. at 635. *GDF Realty* overturned the lower court's finding because Congress's link to prove substantial effect on interstate commerce was invertebrate take, not attenuated effects stemming from the regulation, like those on interstate construction jobs or materials. *Id*. at 634. The court held that no matter how many invertebrate takes occurred, the

regulated activity would never substantially affect interstate commerce, because the subterranean invertebrates were non-commercial and wholly intrastate. *Id*. at 640.

Here, the Court must determine whether take of an intrastate, non-commercial butterfly population substantially affects interstate commerce, alone or in the aggregate. The lower court misapplied the scope of inquiry articulated in *Lopez*, *Morrison*, and *GDF Realty*, because it found that Lear's inability to build a single-family residence had effects on the sale of building materials and employment of contractors, which substantially affected interstate commerce. The lower court's scope of inquiry is attenuated and effectively eliminates the limiting purpose of the Commerce Clause. Akin to *GDF Realty,* where the regulated activity, the take of intrastate, non-commercial invertebrates, was the proper scope of inquiry, here, the regulated activity, the take of intrastate, non-commercial butterflies, is the proper scope of inquiry. Following *GDF Realty*, where the lower court's finding was overturned, because it focused on construction materials to satisfy the substantial relation test, rather than subterranean invertebrate take, here, the lower court's finding should be overturned, because it focuses on building materials and construction jobs to satisfy the substantial relation test, rather than Karner Blue take.

B. Karner Blue butterfly takings do not substantially affect interstate commerce, alone or in the aggregate, because the population lives wholly intrastate and has no commercial value.

The Commerce Clause only authorizes regulation of activities economic in nature. *Lopez*, 514 U.S. at 560. Regulated activity can be aggregated to satisfy the substantial relation to interstate commerce test, but it must be commercially related. *Gonzales v. Raich*, 545 U.S. 1, 37 (2005). In *Raich,* the Court held that the Commerce Clause authorized regulations restricting intrastate home production of medical marijuana, because, unregulated medical marijuana aggregately produced a substantial effect on interstate supply and demand. *Id*. at 19. While *Raich*

viewed the regulated activity in the aggregate, the Court found marijuana production economic in nature. The key factor is whether the nature of the regulated activity is economic. *Morrison*, 529 U.S. at 610-611.

The Supreme Court has never found a regulation within the Commerce Clause power that does not concern an activity economic in nature. In *Lopez*, the Court held that the "noneconomic, criminal nature of the conduct at issue was central to [its] decision" and commercial activity was not regulated. *Morrison*, 529 U.S. at 610; *see Lopez*, 514 U.S. at 551. The Court spoke very clearly, stating that "possession of a gun in a local school zone [was] in no sense an economic activity that might, through repetition elsewhere, substantially effect interstate commerce." *Lopez*, 514 U.S. at 567. In *Morrison*, the Court added that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority" if it found that violence against women, even in the aggregate, was an economic activity. 529 U.S. at 615.

Therefore, the Commerce Clause authorized Congress to enact the ESA only where species take substantially affects interstate commerce, when it is economic or commercial in nature. For example, a 4th Circuit panel found red wolf take economic in nature because the economic value of interstate wolf-related tourism was an estimated $ 29.2 billion and wolf pelts were historically traded on interstate markets. *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000). However, the court in *GDF Realty* held that intrastate invertebrates were not economic in nature, because tourists did not travel to Texas to see them, there was no historic trade, and no current market existed. 326 F.3d at 634. Furthermore, "future substantial effects on interstate commerce, through industries such as medicine, [are] simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.* at 638.

While the circuit courts have unanimously upheld the constitutionality of the ESA under the Commerce Clause, the Supreme Court has not explicitly spoken on ESA constitutionality. However, after the Supreme Court's ruling in *Sebelius*, it is clear that the constitutional authority for ESA regulation of intrastate, non-commercial species stems from the Necessary and Proper Clause, and not the Commerce Clause alone. Here, this Court must find that Karner Blue butterfly take, alone or in the aggregate, is economic in nature to conclude that Karner Blue take regulation is within the Commerce Clause power alone. This is not possible, as the intrastate Karner Blue population on Lear's property has no commercial value, and therefore cannot substantially effect interstate commerce, even in the aggregate. Unlike in *Raich*, where home-grown medical marijuana had a substantial effect on interstate commerce because it affected national supply and demand, here, there is no market or commercial value for Karner Blues. While the local Brittain County Butterfly Society offered to pay Ms. Lear $1,000 annually for butterfly outings, the organization is intrastate, no current outings exist, and consistent future outings are simply conjecture that will not involve substantial interstate tourism.

Instead, the facts here closely align with *Lopez* and *Morrison*. Karner Blue take, even in the aggregate, is not economic in nature. Like in *Lopez*, where gun possession in a local school zone was not "an economic activity that might, through repetition elsewhere, substantially effect interstate commerce," here, intrastate take of a butterfly population that cannot migrate beyond its island habitat is similarly not an economic activity that might substantially affect interstate commerce.

In terms of the ESA, the Karner Blue population on Lear's property does not share the commercial characteristics of the red wolves in *Gibbs*, which linked it to interstate commerce. Unlike red wolf take, which involved substantial wolf-related tourism and commercial trade in

pelts, here, Karner Blues do not attract substantial, out-of-state tourism, and have no current commercial or historic trade value. Instead, the facts here parallel the facts in *GDF Realty*, where Karner Blues are not economic in nature, because tourists do not travel to New Union to see them and there is no historic or current market. Furthermore, future scientific Karner Blue benefits are too hypothetical to prove the economic nature of Karner Blues. Thus, the Commerce Clause alone does not authorize Congress to regulate Karner Blue take.

C. The Necessary and Proper Clause does not give Congress Commerce Clause power to regulate non-commercial Karner Blue take, because the regulation of intrastate butterfly is not necessary to the function of the ESA, nor is it proper where man-made butterfly habitat restricts building of a single-family house on private land.

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *Sebelius*, 132 S. Ct. at 2579; *citing* U.S. Const. Art. I, § 8, cl. 18. However, the Necessary and Proper Clause only authorizes Congress to "enact provisions incidental to the [enumerated] power, and conducive to its beneficial exercise." *Sebelius*, 132 S. Ct. at 2591; *citing McCulloch v. Maryland*, 17 U.S. 316, 418 (1819). Thus, it is not necessary, nor proper, for Congress to exercise "any 'great substantive and independent power[s]' beyond those specifically enumerated in the Constitution." *Sebelius*, 132 S. Ct. at 2591. Rather, the purpose of the Necessary and Proper Clause is to remove uncertainty and provide the "means of carrying into execution those [powers] otherwise granted" in the Constitution. *Id.* In *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, the district court held that Congress was not afforded "authority though the Necessary and Proper Clause because the regulation of takes of [intrastate] Utah prairie dogs is

not essential or necessary to the ESA's economic scheme." 57 F.Supp.3d. 1337, 1347 (D. Utah 2014).

1. ESA regulation of an intrastate, non-commercial butterfly population on man-made habitat is not necessary to the function of the ESA, where it is not within the ESA's intended purpose and the ESA is not undercut where Karner Blue take is not regulated.

The Commerce Clause necessarily authorizes regulation of intrastate activity when it is an essential part of a larger economic regulatory scheme. Where the larger regulatory economic scheme is undercut by failing to regulate intrastate activity, it is necessary to regulate intrastate activity. *Raich*, 545 U.S. at 24-25. In *Raich*, failure to regulate intrastate cultivation of medical marijuana would have undercut federal marijuana regulation as a whole. *Id*. Thus, it was necessary to regulate the intrastate activity. *Id*.; *see Sebelius*, 132 S. Ct. at 2593.

Lear is not asking this Court to find the entirety of the ESA outside of the Commerce Clause and Necessary and Proper Clause power. Lear only asserts that ESA take regulation of an intrastate, non-commercial species inhabiting man-made habitat on private property, is outside congressional power. In addition, the critical habitat on Lear's property only exists because Lear annually mows in the fall. Without annual mowing, the fields will develop into a successional forest. The lupine fields could not have been designated as critical Karner Blue habitat in 1992 without annual maintenance. While Congress enacted the ESA to conserve habitats that support endangered species, the lupine habitat here is man-made, and thus, outside of the purpose of the ESA. Thus, ESA regulation of Karner Blue take is not an essential part of the ESA regulatory scheme. Following *Raich*, ESA take regulation of the Karner Blues on Lear's private property would not undercut ESA authority. Therefore, it is not necessary to regulate Karner Blue take under Commerce Clause authority.

2. ESA take regulation of an intrastate, non-commercial butterfly population on man-made habitat is not proper, because it restricts private land use, which is not incidental to the enumerated Commerce power, and is thus, reserved to the states.

Although federal regulations may be necessary, they may still be improper. *Sebelius*, 132 S. Ct. at 2592. Federal regulation that is inconsistent with the letter and spirit of the Constitution is not a proper means for carrying into execution Congress's enumerated powers. *Id*. Regulations that prop up un-enumerated independent powers are an usurpation of power from the states. *Id.* Where essential attributes of state sovereignty are usurped, the regulation is not incidental to the enumerated power, and thus, not proper. *Id.* In *Sebelius,* the Court held that the Obamacare individual mandate could not be upheld under the Commerce Clause and Necessary and Proper Clause, because requiring individuals to purchase healthcare was not incidental to the exercise of the Commerce power. *Id.* at 2593. "Such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority," and would allow Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *Id.* at 2592. Although the individual mandate may have been necessary, the *Sebelius* Court held that, "such an expansion of federal power was not a 'proper' means for making those reforms effective." *Id.*

Even if this Court finds that Karner Blue take regulation is necessary to ESA operation, it is not proper. While the Necessary and Proper Clause authorizes Congress to enact provisions incidental to the Commerce Clause power, it does not authorize the creation of independent, not enumerated powers, such as to regulate ecosystems or private property. Here, holding that ESA take regulation is necessary and proper, when the intrastate Karner Blue is non-commercial and inhabits maintained lupine fields on private property, not only creates a federal power not enumerated in the Constitution, but deprives the states of their traditionally reserved powers.

New Union and Brittain County's authority to plan land use on Lear's private property is an essential attribute of New Union's state sovereignty. Lear desires to build a single-family residence on her private property. She cannot do so, because a butterfly population inhabits lupine meadows maintained by the Lear family. The Constitution limits federal power to ensure that state governments have power in local situations. This directly applies to Lear's situation, since man-made habitat preservation appears to be outside of the ESA's intent and purpose. If Lear refrained from mowing, the Karner Blue population would die off naturally within ten years. Like in *Sebelius*, where the single payer mandate was not proper because it would allow Congress to reach beyond the scope of its enumerated authority, here, intrastate, non-commercial Karner Blue take regulation is not proper because it allows Congress to usurp private land use management power, reserved for the states. 132 S. Ct. at 2592. Expansion of ESA regulation into the realm of man-made habitat on private property, as well as intrastate, non-commercial butterfly management, is not a proper means for making the ESA effective. Therefore, ESA take regulation of the Karner Blue butterfly is not a necessary and proper exercise of the Commerce Clause power.

II. TAKINGS CLAIMS ARE RIPE WHEN REQUIRED CONDITIONS OF A PERMIT ARE IMPOSSIBLE TO FULFILL AND THE COST TO COMPLETE THE APPLICATION PROCESS EXCEEDS THE VALUE OF THE PROPERTY.

The U.S. Constitution restricts federal judicial power to cases or controversies. Art. III. § 2, cl. 1. Determining whether an administrative action is ripe for review requires evaluation of the issues' fitness for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Ripeness issues are judicially reviewed *de novo*. *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004).

Where a claim is brought too early, it is not ripe for judicial review. Ripeness is a threshold question that must be resolved before addressing the merits of a claim. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs*, 387 U.S. at 148-49. Ripeness doctrine requires finality in decision-making, because it is "concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

Here, the FWS appeals the district court's discharge of the *Morris* requirement that ESA takings claims ripen only after the rejection of an ITP application. 392 F.3d at 1378. This Court must decide whether Lear's takings claim against FWS is ripe for review without the completion of the prohibitively expensive ITP process. Under ripeness doctrine, the Court must determine whether FWS reached the end of its discretion when it told Lear that she could not build without providing contiguous acre-for-acre Karner Blue habitat, and whether Lear will suffer real consequences should the Court decline to consider her claims. *Hage v. United States*, 35 Fed. Cl. 147, 162 (1996).

In terms of land-use, regulatory takings claims ripen only after the regulating agency identifies the permissible uses of the property within a reasonable degree of certainty. *Palazzolo*, 533 U.S. at 620. An agency has no further discretion to exercise when every development proposal results in the same final decision. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997). After permissible uses are known to a reasonable degree of certainty, they are

final for purposes of ripeness and do not require the submission of additional futile applications. *Palazzolo*, 533 U.S. at 626.

Takings claims ripen after an agency informs landowners of a definitive position on how regulations apply. *Stearns Co. v. United States*, 34 Fed. Cl. 264, 270 (Fed. Cl. 1995). In *Palazzolo*, the Rhode Island Coastal Resources Management Council (Council) responded to a landowner's development proposal and informed him that state law did not permit wetland fill for any ordinary land use, including property development. 533 U.S. at 614-16. The Court did not require the landowner to submit a finalized proposal for his claim to ripen, because submission of the "proposal would not have clarified the extent of development permitted by the wetlands regulations." *Id*. at 624. The Council exercised its full discretion over the property when it denied the landowner's application to fill and develop the wetland property. *Id*. at 621. Thus, the decision was final because the extent of permitted development on wetlands was defined, and "ripeness rules do not require the submission of further and futile applications" after an agency exercises its full discretion. *Id.* at 625.

Furthermore, the ripeness doctrine does not require a landowner's ITP application if the process is so burdensome that it effectively deprives the property of value. *Hage*, 35 Fed. Cl. at 164. The pursuit of a land-use variance or alternative should not be imposed where no such alternative is available. *Loveladies Harb. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). Similarly, a compensable taking has occurred where a regulatory scheme is so futile or unduly burdensome as to essentially divest property of all value. *Stearns*, 34 Fed. Cl. at 272. This Court must now decide if Lear is required to continue pursuing an ITP despite knowing she cannot possibly meet the required FWS criteria. Even assuming a one-to-one acre exchange was

possible, the cost of completing an ITP application imposes an administrative and procedural burden on Lear that is greater than the overall value of the property.

Here, Lear's claim is ripe, because the FWS exercised the full extent of its ESA discretion over Lear's property and the permissible property uses are known to a reasonable degree of certainty. Lear actively engaged FWS regarding development in critical habitat on her property, which informed her by letter that an ITP application required and HCP. The HCP, at a minimum, required contiguous acre-for-acre Karner Blue habitat replacement, a condition Lear was powerless to satisfy. In the same way a finalized development proposal in *Palazzolo* would not alter the Council's discretion nor clarify the permitted development on the property, Lear's completion of the ITP application process would not alter FWS discretion over Lear's property, nor clarify whether she could build a single-family residence. Thus, like in *Palazzolo,* where the Court held that the landowner's claim was ripe, and did not require the submission of further and futile applications, here, Lear's claim is similarly ripe, and does not require completion of the futile ITP application process.

Where the FWS determined that adjacent acre-for-acre critical habitat replacement was a minimum requirement of the HCP, pursuant to *Palazzolo*, FWS reached both a final decision and the end of its discretion over Lear's property under the ESA. Lear lives on an irregularly shaped parcel on the tip of an island with only one possibility for the contiguous lupine habitat required by the HCP. The sole adjacent landowner, Lear's estranged sibling, is wholly unwilling to consider any land-use restrictions on her property. Furthermore, the adjacent property is forested and unsuitable for Karner Blues. The unique circumstances of the island property leave Lear with no options for meeting the HCP requirements. Therefore, because Lear could not possibly provide adjacent acre-for-acre Karner Blue critical habitat, it was futile to complete the

burdensome ITP process and her takings claim against FWS is ripe for review.

Furthermore, Lear's ITP application preparation is not only futile, but also unduly burdensome in its expense. An environmental consultant advised Lear that preparation of an ITP application for the Heath, including the required HCP and environmental assessment, would cost $150,000. The fair market value of the property without any restriction preventing development of a single-family house is only $100,000. Therefore, the application process would unduly burden Lear and compliance with the permitting process results in a regulatory taking.

III. LEAR SUFFERED A *PER SE* REGULATORY TAKING BECAUSE THE COMBINED EFFECTS OF FEDERAL AND LOCAL REGULATIONS DEPRIVED HER OF ALL ECONOMICALLY BENEFICIAL USE OF HER PROPERTY WHEN THEY PROHIBITED HER FROM BUILDING A RESIDENCE.

The Just Compensation Clause ensures private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The Fifth Amendment limits federal takings to those "for a public use," and the Fourteenth Amendment binds local governments to the same standard. U.S. Const. Amend. V, XIV; *see Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). There are two types of takings, physical occupations and regulatory. Physical takings occur through direct physical occupation, regardless of the public interests that are served. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Regulatory takings occur when a "regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A regulatory taking arises when a regulation "*denies an owner economically viable use of his land*" to the point where "from the landowner's point of view" the equivalent of a physical appropriation." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992); *citing Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980) (emphasis in original). Physical and regulatory takings are legally distinct from each other such that precedents cannot be used to further arguments for the

other. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002).

There are three methods to challenge a regulatory takings claim: 1) a "total regulatory taking" under *Lucas*; 2) by considering "ad hoc, factual inquiries" under the three factor *Penn Central* analysis, or 3) land use exactions. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005). While there are several types of regulatory takings claims, at issue here is a total, *per se*, regulatory taking under *Lucas*. *Lucas* represents the "relatively rare" case where the regulation has gone too far and the landowner is deprived of "all economic value," establishing a *per se* taking. *Tahoe-Sierra*, 535 U.S. at 319.

The purpose of the Fifth Amendment in requiring compensation for regulatory takings, is "to bar Government from forcing some people to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 148 (1978) (Rehnquist, W. dissenting). The government regulates issues of public interest. It could not effectively do so without diminishing some values incident to property, but, where it completely deprives a property owner of all economically beneficially use, it must compensate them. *Pennsylvania Coal*, 260 U.S. at 413.

Here, Lear suffered a regulatory taking *per se*. Where ESA take regulations blocked construction of a single-family residence on the Heath and a local Wetland Preservation Law blocked wetland fill and construction on the marsh, the FWS and Brittain County completely deprived Lear of all economically beneficial use of her property, because no market existed in Brittain County for a property without a single-family residence or the right to build one. FWS and Brittain County did nothing to physically appropriate the Cordelia Lot, making a physical taking analysis inappropriate. Therefore, the Court's analysis should proceed under *Lucas,* where

a *per se* regulatory taking was at issue, rather than *Penn Central*, where the regulatory taking was not *per se*, and the Court employed an ad hoc factor-based analysis. The facts here closely mirror those in *Lucas*, in that both property owners suffered *per se* regulatory takings. Here, the Cordelia Lot is the relevant parcel for the takings analysis, because it was properly conveyed and is distinct. While ESA regulation of Karner Blues would no longer apply to the Cordelia Lot if Karner Blues became extinct, that possibility should not preclude Lear's claim of complete deprivation of value. Similarly, the Brittain County Butterfly Society's offer to rent the property for $1,000 per year does nothing to redress the Cordelia Lot's deprivation of value, especially when Lear pays $1,500 per year in property taxes. Therefore, the combined effect from federal and local regulations on the Cordelia Lot deprived Lear of all economic value, because there was no market value for a parcel without the right to build a residence, and Lear's property had no additional agricultural, recreational, or timber production value.

A. The Cordelia Lot is the proper parcel for a *per se* regulatory takings claim where Lear's land was properly conveyed and is distinct so conceptual severance is inapplicable.

Takings law has not established bright line rules to determine the appropriate way to distinguish a parcel within regulatory takings doctrine. *Penn Central*, 438 U.S. at 130-31. There are three different ownership dimensions for the division of property: physical, functional, and temporal ("duration of property interest"). *Tahoe-Sierra*, 535 U.S. at 318. Early jurisprudence established that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). Therefore, takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Tahoe-Sierra*, 535 U.S. at 327. Since the

analysis here proceeds under *Lucas*, it is inappropriate to consider Lear's investment backed expectations, the second prong of *Penn Central*'s balancing test, despite FWS and Brittain County's urging. *Lingle*, 544 U.S. at 538-39. The regulatory takings in *Lucas* deprived the landowner of all economic use, creating a narrow exception to the *Penn Central* "ad hoc" analysis. *Id*. at 538. Therefore, the *Penn Central* "investment backed expectations" are inapplicable to *Lucas*-type cases. *Id*. at 538-39.

This Court must first establish the relevant parcel for the regulatory takings claim. The FWS and Brittain County contend that the entirety of Lear Island should be considered for a takings analysis. While *Tahoe-Sierra* did not overrule the potential use of conceptual severance theories in the future, their applicability in this case is misguided. Lear is not severing her property; she was the grantee of a proper conveyance, and has owned and maintained the Heath in her sole possession since 2005. Equating the temporal dimension distinction with actual severance of inherited property is impermissible here. The Cordelia Lot, as owned and maintained solely by Lear, should be regarded as an independent, stand-alone parcel for a takings claim. Additionally, it is inconsequential that Lear received her property through grant rather than purchase. To bundle Lear's rights with the adjacent property is an unacceptable application of conceptual severance.

The FWS and Brittain County inappropriately rely on *Tahoe-Sierra, Keystone*, and *Penn Central* to claim the Cordelia Lot should be conceptually severed from Lear Island for a takings analysis. In *Tahoe-Sierra*, 400 landowners purchased parcels primarily for constructing single-family homes at the time of their choosing before regulations restricted development opportunities. *Tahoe-Sierra*, 535 U.S. at 312. While different landowners possessed the lots, the Court treated the parcels as a single entity for the relevant takings claim. *Tahoe-Sierra* argued

that temporal conceptual severance was appropriate because a 32-month moratorium on property development was a distinct period for the purposes of a takings claim. *Id*. at 303. *Tahoe-Sierra* acknowledged a "categorical taking" under the *Lucas* test, yet the Court was unwilling to uphold that this was an acceptable conceptual severance. *Lucas*, 505 U.S. at 316. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, subsurface coal pillars that needed to be left in place to preserve the integrity of a single-family home above were not a conceptual severance. 480 U.S. 470, 500-01 (1987). Similarly, *Penn Central* contained a failed argument to separate air rights above a train station from the rest of the property. *Penn Central*, 438 U.S. at 130-31.

Alternatively, in *Loveladies*, developers conveyed public rights to a 38.5-acre parcel in exchange for development rights to a 12.5-acre parcel. 28 F.3d at 1181. Subsequently, a permit to fill the 12.5-acre parcel for development was denied. *Id*. The court in *Loveladies* held that a regulatory taking under *Lucas* was valid, where the 12.5-acres to be considered a distinctive parcel for a takings analysis as the government acted "ungrateful in the extreme." *Id*. *Loveladies* relies on "precedent [that] displays a flexible approach, designed to account for factual nuances, [including] consideration of the timing of transfers in light of the developing regulatory environment." *Id*.

Another valid regulatory taking under *Lucas*, *Lost Tree Village Corp. v. United States* held that "Plat 57" of a development on the peninsula of an island deserved different treatment than the other parcels and was distinct for a takings analysis. 787 F.3d 1111, 1113 (Fed. Cir. 2015) *petition for cert. filed*, 84 U.S.LW. 3564 (U.S. Mar. 23, 2016) (No. 15-1192). During the island's development, Plat 57 was "ignored entirely," from 1984 to 1994, "where the property . . . had not been platted, utilities had not been extended to it, nor had it been dedicated to any use." *Lost Tree Vill. Corp. v. United States*, 100 Fed Cl. 412, 433 (2011), *rev'd* 707 F.3d 1286 (Fed.

Cir. 2013), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015) *petition for cert. filed*, 84 U.S.LW. 3564 (U.S. Mar. 23, 2016) (No. 15-1192). Only when the Lost Tree Corporation discovered excess Wetland Mitigation credits did they explore the development of Plat 57. *Id*.

Lear's takings claim is limited to the Cordelia Lot, as she has possessed valid fee simple rights to the property since her father's life estate terminated in 2005 and each daughter came into full possession and ownership of their properties. There is no indication that any form of deception was used in the conveyance of Lear's property. Similar to the government's ungrateful behavior in *Loveladies*, it would be patently unfair to assess Lear's land with the adjacent Goneril Lot. Even Lear's attempt to coordinate for potential Karner Blue habitat mitigation on the Goneril Lot to obtain an ITP permit was fruitless.

Lear's property is distinct and the *Loveladies* approach accounts for factual differences. The Cordelia Lot is not only 40 times smaller than other lots, but like Plat 57 in *Lost Tree*, the Cordelia Lot has been managed differently ever since agricultural uses ceased in 1965. The Goneril and Regan Lots have been left wild and are now naturally wooded with early successional forests, whereas the Heath and access strip are annually mowed, supporting the critical blue lupine fields. Similar to Plat 57, the Heath is distinct from the other two parcels that comprise Lear Island in dimension, management, and use.

In addition, both the Goneril and Regan Lots have already been developed for single-family homes. There is no indication that the construction of a single-family residence was previously pursued on the Cordelia Lot, even though the Brittain Town Planning Board determined zoning requirements allowed for at least one single-family home. Similarly to *Lost Tree*, Lear did not consider pursuing the construction of a single-family home until 2012, six years after her full possession, a patently different time than the other residences. Lear's

development expectations, like those of *Lost Tree*'s Plat 57, were distinct. For the foregoing reasons, the Court should hold the Cordelia Lot as the appropriate parcel to address Lear's takings claim.

B. Lear suffered a regulatory taking based on complete deprivation of economic value where the land-use restrictions may be lifted in ten years and annual property taxes exceeded any economically beneficial use of the property.

The Court in *Lucas* supplemented the general *Penn Central* test, by establishing a new categorical rule for government regulations that cause the loss of all economically beneficial or productive use of land, unless justified by property or nuisance law. 505 U.S. at 1022. The new categorical rule established regulations depriving land of all "economically beneficial use" as *per se* takings, no matter the importance of the public interests involved. *Id*. at 1019. In *Lucas*, an anti-erosion law prohibited permanent construction on beachfront property, though the property owner purchased the lots before enactment of the law. *Id*. at 1008. The trial court found his lots had been "rendered valueless." *Id*. at 1020. The Supreme Court found a *per se* taking, because regulations denied Lucas of "all economically productive or beneficial uses of [his] land." *Id*. at 1030.

Here, Lear suffered a *per se* regulatory taking after the FWS determined that any development of the Heath constituted a prohibited ESA taking and Brittain County denied the marsh's fill pursuant to the Wetlands Preservation Law. By imposing regulations on Lear, the federal ESA and county wetland regulations usurp the Fifth and Fourteenth Amendment's guarantees "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123-24.

The FWS and Brittain County challenge Lear's regulatory takings claims based on

complete deprivation of economic value from numerous angles. The government first challenges Lear's taking claim because of the potential that land-use restrictions could be lifted after the population of endangered Karner Blues naturally expires. The government then suggests that a monetary offer for access to the property, less than annual property taxes, bars a claim of complete deprivation of all economic value. For the reasons described below, the district court's finding that Lear suffered a *per se* regulatory taking should be affirmed.

1. The potential return of property value in ten years, following the natural destruction of the Karner Blue habitat and subsequent elimination of the Lear Island subpopulation, does not bar Lear's takings claim.

Lucas represents the common interpretation that when a landowner sacrifices all economically beneficial uses of their property "in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U.S. at 1019. Similarly, *First English* held government actions that deny landowners all use of their land, whether temporarily or permanently, are compensable takings. 482 U.S. at 318. While there is no distinction between temporary and permanent takings when a landowner is deprived of all economically viable use of his land, *id.*, the duration of the land-use restriction is an important factor that a court must consider in appraising a regulatory takings claim. *Palazzolo*, 533 U.S. at 636. The *Lucas* Court noted the *First English* rule, that temporary deprivations of use are compensable under the Takings Clause, while also recognizing nothing problematic when later developments potentially make the land-use restrictions temporary. 505 U.S. at 1011-12.

The Supreme Court addressed a temporary takings claim in *Tahoe-Sierra*, but refused to adopt a categorical rule for temporary takings. 535 U.S. at 342. *First English* did not hold that a moratorium on development was a temporary taking; instead, it held that a regulation might lead to a temporary taking when a court invalidates the regulation after the taking. 482 U.S. at 321-22.

The *Tahoe-Sierra* Court contrasted that with a temporary moratorium, which from the outset was designed to last for only a period of time. In *Tahoe-Sierra*, the Court explained that a 32-month suspension on development during the process of devising a comprehensive land-use plan did not deprive landowners of all economically beneficial use, because economic use could resume at the end of the temporary delay. *Id*. at 332. Further, temporary bans on development allow for the normal delays involved in processing land-use applications and discourage hasty decision-making by regulatory agencies. *Id*. at 335. The 32-month moratorium did not constitute a *per se* taking because allowing a temporary delay was in the interest of facilitating informed decision-making. *Id*. at 339. However, the Court stressed that the duration of the restriction was an important factor to consider and held that any moratorium lasting for more than one year should be viewed with special skepticism. *Id*. at 341-42. The Supreme Court held that compensatory damages are an appropriate remedy for regulatory takings because the Takings Clause was designed "not to limit the government interference with property rights *per se*, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315.

The land use restrictions imposed on Lear are distinguishable from *Tahoe-Sierra* in both duration and purpose. Where a 32-month moratorium was recognized as an important delay for regional planning efforts in *Tahoe-Sierra*, the temporary nature of the restrictions to the Heath would last for a minimum of ten years. Additionally, the restrictions would only be lifted following habitat loss causing the extinction of the endangered Karner Blue subpopulation, a result far from ideal for anyone. Regulations go too far and should be recognized as a regulatory taking when only the prospective extirpation of a protected species lifts land-use restrictions and returns property value.

Though no specific formula exists, in establishing when regulatory land-use restrictions go too far, any regulation implementing the ESA should encourage the conservation of endangered species and the habitat they depend on. Here, the land-use restrictions encourage the landowner to allow the natural succession of critical habitat to eliminate a subpopulation of endangered butterflies as the quickest route to reclaiming development rights for a single-family home. Any disturbance to the Heath, other than continued annual mowing, constitutes a prohibited take under the ESA. If Lear ceases to mow the Heath, the natural destruction of butterfly habitat by an encroaching forest will eventually return property rights to Lear. The FWS argues that this natural process, naturally eliminating Karner Blue habitat on the Heath within ten years, means that Lear is not deprived of economic value on the Heath. This argument turns the purpose behind compensating regulatory takings, to adjust the benefits and burdens of economic life to promote the common good, on its head. Lear does not dispute that conserving endangered butterfly habitat is an important issue of public concern. However, current FWS application of ESA regulations encourages Lear to allow the Heath to naturally convert into a successional forest of oak and hickory trees, eliminating the Karner Blues habitat, to gain the ability to develop a single-family home.

Regulatory schemes that incite extinction as a landowners' only means of recovering control from restrictive land-use regulations fail to promote the common good. In order to avoid extinction of an endangered subpopulation of Karner Blues, this Court should recognize the occurrence of a compensable regulatory taking and uphold the New Union District Courts' decision. In an effort to avoid a *per se* regulatory takings claim, the FWS has subverted the very intent of the ESA. This circular and counterintuitive argument should not be sustained.

2. The Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing excursions does not disqualify Lear's *per se* regulatory takings claim because Lear pays $1,500 annually in property taxes.

A piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value. *Loveladies*, 28 F.3d at 1175. Land-use regulations depriving an owner of all economically viable uses of land, violate the Fifth Amendment because the total deprivation of use is, from the landowner's perspective, the equivalent of a physical appropriation. *Lucas*, 505 U.S. at 1016-17.

The Supreme Court reassessed the *Lucas* test in *Palazzolo*, where land-use restrictions barred a landowner from developing a 74-lot subdivision on 18 acres of coastal wetlands. 533 U.S. 606. In *Palazzolo*, the Supreme Court indicated that it would adhere to a strict definition of complete deprivation of economic value, and refused to recognize a complete deprivation of value where property value was merely reduced after development on an 18-acre parcel was restricted to a single residence. *Id*. at 631. The Court concluded that because the landowner could build a substantial residence on the 18-acre parcel, the property was not economically idle, and, therefore, no regulatory taking occurred. *Id*. However, the court in Loveladies found that a 99% diminution of value was sufficient to find a *per se* regulatory taking.

The facts surrounding *Palazzolo* are in stark contrast to the situation facing Lear. Unlike in *Palazzolo*, where the takings claim was barred because land-use restrictions still allowed him to develop a single-family home, here, the regulations explicitly prohibited Lear from building a single-family residence on her property. Now, the only economic use of her property, a $1,000 annual payment from the Brittain County Butterfly Society, is insufficient to cover the annual property taxes. Lear was barred from developing a single-family home on the Heath because any disturbance of the Karner Blue butterfly habitat would violate the ESA. The only productive use

of the Cordelia Lot comes from Brittain County Butterfly Society's offer to pay Lear $1,000 annually for the privilege of conducting butterfly viewing tours on the property. Therefore, the only economic value of the Cordelia Lot is less than the $1,500 annual property taxes. Like in *Loveladies*, where a 99% diminution in property value resulted in a *per se* regulatory taking, here, where Lear experienced more than a 99% diminution in her property value, a *per se* regulatory taking has also occurred. Consequently, Lear was deprived of all economic use of her land and is entitled to compensation from the FWS and Brittain County as a matter of law.

C. By combined regulation, the FWS and Brittain County have taken all value of the Heath and should be held joint and severally liable for Lear's damages.

In *Tahoe-Sierra*, the Court focuses on the value of the land, whereas *Lucas* focuses on the landowner's perception to establish when the "total deprivation of beneficial use . . . is equivalent of a physical appropriation." 535 U.S. at 350. At the time the landowner in *Lucas* sued, the Beachfront Management Act, which resulted in a *per se* regulatory taking, did not contain a variance provision allowing exceptions for extreme hardship or difficulty. *Id*. at 332. If such a provision had existed there might have been a release valve to exempt Lucas from the harsh limitations placed on his property. *Id*. Overregulation of private property that goes "too far" establishes a taking. *Pennsylvania Coal*, 260 U.S. at 415.

Joint and several liability generally allows for recovery when more than one party is responsible for inflicting damage. *See* Restatement (Third) of Torts: Apportionment Liabilities § 17 (2000). Combining regulatory impacts in takings analyses is squarely in line with previous changes in policy to allow for *per se* regulatory takings. For example, *Lucas* took a novel step within the law to hold a narrow exception for a *per se* regulatory taking. *Lingle*, 544 U.S. at 538. Combing regulatory impacts does not overly broaden the scope of the result. *Id*. Furthermore,

compensation for a regulatory taking "requires careful examination and weighing of all the relevant circumstances" including public interests and those of the individual landowner. *Palazzolo*, 533 U.S. at 636 (O'Connor, J. concurring); *see also Tahoe-Sierra,* 535 U.S. at 321. Again, the underlying justification of the "Fifth Amendment . . . was . . . to bar Government from forcing some people to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 148 (Rehnquist, W. dissenting); *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Lear's perception is that her property is devoid of all use. Lear does not argue that if only one of these regulations was applicable to the Cordelia Lot, the property would maintain some value. It is the combination of FWS's protection of the Karner Blue and Brittain County's application of the Wetlands Preservation Law that leaves Lear with no economically viable use of her land. ESA regulations prohibit Lear from disturbing the Heath to develop a single-family residence. Lear is unable to find relief from the Brittain County Wetlands Preservation Law, because the Brittain County Wetlands Board does not grant fill permits for development not for a water dependent use. The combined application of FWS and Brittain County regulations on the Cordelia Lot went too far, thereby establishing a *per se* regulatory taking. It does not matter that a single regulation by itself causes only a portion of the damage. The FWS and Brittain County's combined regulations have made it impossible for Lear to build a single-family residence on her property. Lear is thus deprived of all use of her property, because there is no market in Brittain County for parcels without residences or the ability to construct them. Lear's property has no additional agricultural, recreational, or timber production value, and, as previously stated, the Brittain County Butterfly Society's offer to pay $1,000 annually does not even cover Lear's $1,500 annual property taxes. Here, the FWS and Brittain's regulations have gone too far, and

should not be allowed to circumvent Lear's recovery. Lear's taking claim is consistent with the landowner's claim in *Lucas*. Like in *Lucas*, where the plaintiff was able to exercise his constitutional rights and recover what the government had taken from him, here too, Lear asks the Court to find a *per se* regulatory taking.

IV. THE PUBLIC TRUST DOCTRINE DOES NOT PRECLUDE LEAR'S TAKINGS CLAIM, BECAUSE AN ACT OF CONGRESS GRANTED THE LEAR FAMILY ABSOLUTE TITLE IN FEE SIMPLE OVER THE MARSH IN 1803 AND THE PUBLIC TRUST DOCTRINE WAS NOT APPLIED TO NAVIGABLE LAKES AND RIVERS UNTIL 1910.

Under English common law, the Crown has title over lands under tidewaters, held in trust for the public, so "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). However, English "title to the riverbed and soil […] was held in private ownership." *P.P.L. Montana L.L.C. v. Montana*, 565 U.S. 576, 590 (2012). Following the American Revolution, the original colonies adopted England's public trust doctrine, holding title over lands under navigable tidewaters in trust for the public. *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842). In 1842, the Court declared that the people of each state "hold the absolute right to all their navigable waters and the soils under them." *Martin*, 41 U.S. at 410. However, it was not until 1910 that the public trust doctrine was applied to navigable waters beyond those subject to the ebb and flow of the tides. *P.P.L. Montana*, 565 U.S. at 590.

While states currently hold title to navigable waterways and the soils under them, grantees that received titles prior to 1919 from congressional acts expressly granting title over navigable waterways and the soils under them hold the superior title. *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894). In *Shively*, a couple claimed title to lands below the high water mark on the

Columbia River, obtained through a donation land claim by an act of Congress in 1850, before Oregon became a state. *Id.* at 10. Ultimately, the Court held that Oregon maintained title to the navigable waters and soils below them through the doctrines of public trust and equal footing, because the donation land claim did not include a title or right in the land below high water mark. *Id.* at 57-58.

Equal footing doctrine mandates that all states in the Union are co-equal sovereigns under the Constitution. *P.P.L. Montana*, 565 U.S. at 590. Thus, as the Union admitted new states, the equal footing doctrine conferred title over navigable waterways and the soils under them to the new states, however, navigability had to exist at the time the state entered the Union for a public trust doctrine claim to survive. *Id*. at 591. "The United States retains any title vested in it before statehood to any lands beneath the waters not then navigable, … to be transferred or licensed as it chooses." *Id*. Waters are navigable in fact when they can be used, "in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. 557, 563 (1871).

Here, Lear asks the Court to affirm the lower court's finding that public trust doctrine does not preclude Lear's takings claim. An 1803 Act of Congress granted the Lear family title in fee simple absolute to all of Lear Island and to all lands under water within a 300-foot radius of the shoreline. Lear Island sits in Lake Union and the title includes the marsh where Lear intends to build her single-family residence. In 1803, the public trust doctrine only applied to lands affected by the ocean's tides. Lear Island, and more specifically, the marsh, are not affected by the oceans tides. Unlike in *Shively*, where a donation land claim granted by an 1850 Act of Congress was not a superior title against an equal footing doctrine claim by the state of Oregon, here, Lear's absolute title in fee simple, specifying lands under water and granted by an 1803 Act of Congress, is a superior title against the New Union equal footing doctrine claim. Therefore,

consistent with the lower court's finding, "public trust limits on the uses of state navigable waters do not inhere in the Lear's 1803 congressional grant of title." (R. at 10-11).

Finally, even if this Court is persuaded that the equal footing doctrine is superior to Lear's 1803 congressional grant of title, pursuant to *P.P.L. Montana*, New Union only holds title in trust over the waters that were navigable at the time of admission into the Union. The marsh waters and the soils under them, most likely, were not navigable at any time. While Lake Union has traditionally been used for interstate navigation, the Army Corps of Engineers determined that this portion of Lake Union was non-navigable for purposes of the River and Harbors Act of 1899, which, like the *Daniel Ball* test, focuses on commerce and trade. The shallow strait separating Lear Island from the mainland, which now supports a causeway, further evidences that the marsh section of Lear Island would have obstructed commerce and was non-navigable at the time New Union obtained statehood. Here, the equal footing doctrine does not apply because the federal government transferred title to the marsh waters and the soils beneath them prior to New Union becoming a state.

CONCLUSION

Lear wants to build a single-family residence for private use on her own private property. Therefore, Lear asks the Court to find intrastate, non-commercial take of the Karner Blues inhabiting Lear's lupine fields to be beyond the scope of congressional authority under the Constitution. Alternatively, Lear asks the Court to affirm the district court's judgment and award of damages, finding that the ESA and Brittain County's Wetlands Preservation Law precluded Lear from building amounted to a regulatory taking in violation of the Fifth and Fourteenth Amendments to the Constitution.