Team 23

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

NO. 16-0933

CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant

V.

UNITED STATES FISH & WILDLIFE SERVICE,
Defendant-Appellant-Cross Appellee

and

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant

BRIEF FOR THE DEFENDANT-APPELLANT BRITTAIN COUNTY, NEW UNION

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STATEMENT OF JURISDICTION

Plaintiff-Appellee-Cross Appellant Cordelia Lear ("Appellee") filed suit in the United States District Court for the District of New Union, seeking (1) a declaratory judgment that the Endangered Species Act ("ESA") exceeds Congress's authority under the Commerce Clause of Article I of the United States Constitution, or alternatively (2) just compensation from the United States Fish and Wildlife Service ("FWS") and Brittain County pursuant to the Takings Clause of the Fifth Amendment to the Constitution. The district court had federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2012).

The district court entered judgment against Appellee with regard to the ESA claim, but found that FWS and Brittain County had taken Appellee's property without just compensation. The district court judgment was a final decision under 28 U.S.C. § 1291 (2012). The parties timely appealed. Fed. R. App. P. 4(a).

STATEMENT OF THE ISSUES

I. Is the ESA a valid exercise of Congress's commerce power as applied to a wholly intrastate population of an endangered butterfly whose critical habitat would be modified by clearing the land in preparation for the construction of a residence for personal use?

II. Is Appellee's takings claim against FWS ripe despite her failure to take reasonable and necessary steps to apply for an Incidental Take Permit?

III. Is the relevant parcel for Appelle's takings claim the island that Appellee's family has treated as a single economic unit for over two centuries or the ten-acre parcel which came into Appellee's possession seven years ago?

IV. Is Appellee's categorical takings claim foreclosed by the fact that any butterfly-related restrictions on her property will end when the species naturally dies out in ten years?

V. Do long-recognized public trust principles inherent in the title of Lear Island preclude Appellee's takings claim against Brittain County?

VI. Was the district court correct to apply the principles of joint and several tort liability to hold that distinct land-use restrictions combine to effectuate a single categorical taking?

VII. Notwithstanding the above questions, has Appellee shown a total deprivation of economic value on her ten-acre lot?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Lear family has resided on Lear Island, New Union, for more than two centuries. *Lear v. U.S. Fish & Wildlife Service*, No. 112-CV-2015-RR, *slip op*. at 4 (D.N.U. June 1, 2016). Congress granted the island, consisting of 1,000 acres of land and underwater lands within a 300-foot radius of the shoreline, to Cornelius Lear in 1803, and he and his descendents have used the island as their homestead and family farm ever since. *Id*. at 4-5.

In 1965, the Lears stopped actively farming the land, but King Lear continued to exercise dominion over the entire island. *Id*. at 5. Although he decided to subdivide the land into three parcels—one for each of his daughters Goneril, Regan, and Cordelia, Appellee—he reserved a life estate in each parcel, and remained active in the management of the entire island. *Id*. Over the next forty years, he supervised construction on the Regan Lot, lived on the historical family homestead on the Goneril Lot, and continued maintenance and landscaping duties on the Cordelia Lot. *Id*.

The lot devised to Appellee consists of an access strip, one acre of cove marsh, and a nine-acre open field that the family refers to as "the Heath." *Id*. The Heath is distinct from other areas on the island; whereas the rest of the island reverted to forest after the Lears stopped

farming in 1965, the Heath has been kept open through annual mowing. *Id*. The wild blue lupine flowers that cover the Heath support a population of Karner Blue butterflies. *Id*. The Karner Blue is an endangered species, and both the butterflies and the Heath, as critical habitat, came under federal protection in 1992. *Id*. If the family were to choose to stop maintaining the Heath, the area would follow the ecological patterns that occurred on the rest of the island, and would naturally convert into a successional forest of oak and hickory trees. *Id*. at 7. These natural processes would result in the loss of the Karner Blue habitat and their subsequent extinction on Lear Island in approximately ten years. *Id*.

The three daughters came into possession of their respective lots upon King Lear's death in 2005. *Id*. at 5. Seven years later, Appellee decided to build a residence on her lot. *Id*. Inquiring after her obligations under the ESA, Appellee contacted the local field office of the FWS. *Id*. at 6. A FWS agent informed Appellee that any disturbance of the butterfly habitat would constitute a violation of federal restrictions, but that Appellee could apply for an Incidental Take Permit ("ITP") that would allow her to construct a residence. *Id*. According to the agent, the ITP application would require some documentation on her part, including an environmental assessment and a proposed habitat conservation plan ("HCP"). *Id*. The HCP would need to provide for acre-for-acre replacement of any disturbed habitat, and would require a commitment to continue mowing the Heath. *Id*. A month later, FWS sent Appellee a letter inviting her to apply for an ITP, and confirming the proposed HCP requirements. Appellee did not dialogue further with FWS. *Id*. at 7. Instead, she sought advice from an unidentified environmental consultant, who told Appellee that the preparation of an ITP would cost $150,000. *Id*. at 6.

Rather than seek a second opinion, reach out to the agency, or further investigate an ITP application, Appellee explored the possibility of filling one half-acre of the wetlands on her

property for the purposes of building a residence. *Id*. at 7. Although this alternative development proposal ("ADP") required no federal approvals, the Brittain County Wetland Preservation Law required that Appellee file an application prior to filling the cove marsh. *Id*. Appellee's application was denied in December 2013 on the grounds that fill permits are exclusively granted for water-dependent projects. *Id*.

Without the restrictions imposed by the ESA and the Brittain County Wetland Preservation Law, Appellee's lot would have a fair market value of $100,000. *Id*. The lot has not been assessed subsequent to the permit denial by Brittain County. *Id*. Although there is no market for her lot for recreational, agricultural, or timber uses, the Brittain County Butterfly Society made an unsolicited offer of $1,000 annual rent to conduct summertime butterfly viewing trips. Appellee rejected the offer. *Id*.

II. PROCEDURAL HISTORY

Appellee filed suit in the United States District Court for the District of New Union, seeking (1) a declaratory judgment that the ESA was an unconstitutional exercise of federal power under the Commerce Clause of Article I of the United States Constitution, or (2) just compensation from FWS and Brittain County pursuant to the Takings Clause of the Fifth Amendment to the Constitution.

On June 1, 2016, Judge Remus entered judgment against the Appellee with regard to the ESA claim, but found that FWS and Brittain County had unlawfully taken Appellee's property without just compensation. The court found that the two regulations combined to deprive Appellee of all economically viable use of her land, and thus held FWS and Brittain County jointly and severally liable. Judge Remus entered damages of $10,000 against FWS and $90,000 against Brittain County. The parties now appeal to this Court.

SUMMARY OF THE ARGUMENT

Each of the district court's conclusions of law is incorrect, and should be reversed by this Court. The district court erroneously concluded that the application of the ESA to the New Union subpopulation of Karner Blues was a valid exercise of the Congress's interstate commerce power, despite the fact that the proposed takes of the Karner Blues on the Heath are not economic in nature. Even if they were, such takes do not produce a substantial effect on interstate commerce. Moreover, there is no jurisdictional hook either in the ESA or FWS regulations, and neither Congress nor the FWS have made any findings regarding the effects of Karner Blue takes on interstate commerce.

The district court similarly erred in holding that appellee had stated a valid categorical takings claim, making critical mistakes at each step of its inquiry. First, Appellee's claim is not ripe. By declining to apply for an ITP, Appellee failed to follow reasonable and necessary steps that would allow FWS to exercise its full discretion and render a final decision. Further, Appellee's inaction is not excused for futility.

Second, the relevant parcel for the takings analysis is not the Cordelia Lot, as the district court found, but rather Lear Island in its entirety. The Lear family has treated the island as a single economic unit for nearly two centuries, and so any economic expectations with regard to development on the Heath should be viewed in the context of the entire island. In holding otherwise, the district fashioned a per se rule that violates the flexible, fact-specific approach mandated by the Supreme Court.

Third, the imminent extinction of the Karner Blues on the Cordelia Lot precludes a categorical takings claim. Because Appellee will be free to develop her land after any ESA-

related restrictions are lifted, Appellee cannot claim that her property has been permanently deprived of all economic value.

Fourth, the title to the Cordelia Lot is inherently burdened by two distinct public trust doctrines: a public right of passage when Congress first granted the land, and the equal-footing doctrine when New Union achieved statehood. As background principles, these public trust doctrines fall into a long-recognized exception to categorical regulatory takings.

Finally, the district court erroneously applied tort law to conclude that FWS and Brittain County were jointly and severally liable for the alleged harm to Appellee's property. To the extent that tort law should guide the court's analysis, the doctrines employed by the district court actually cut against Appellee's position. Even assuming that the district court's legal invention was legitimate, however, Appellee's property has not suffered a total deprivation of economic value. The rental offer by the Brittain County Butterfly Society demonstrates that the property continues to retain more than a token value, and Appellee has failed to take the most basic steps to meet her burden of showing a total deprivation of economic value.

Accordingly, this Court should reverse.

STANDARD OF REVIEW

Courts of appeals review a district court's conclusions of law de novo. A district court's factual findings are reviewed for clear error. *Pullman-Standard v. Swint*, 456 U.S. 273, 286 (1982).

ARGUMENT

I. APPLYING THE ESA TO THE KARNER BLUES ON THE HEATH IS AN IMPERMISSIBLE EXERCISE OF CONGRESS'S INTERSTATE COMMERCE POWER.

The Endangered Species Act ("ESA", "the Act") prohibits the "take" of any species that FWS has designated as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B) (2012). The statute

defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." 16 U.S.C. § 1532(19) (2012). The FWS administrator has further clarified that "harm" includes "significant habitat modification or degradation where it actually kills or injures [endangered or threatened] wildlife." 50 C.F.R. § 17.3 (2016).

The ESA's take prohibition is authorized under the Interstate Commerce Clause, only if, by it, Congress regulates (1) the use of channels of interstate commerce, (2) the instrumentalities of interstate commerce, or (3) those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). When courts review legislation that purports to regulate an activity under the third category, they consider four questions: (1) whether the regulated activity is economic in nature, (2) whether the challenged statute or regulation contains a jurisdictional hook that limits the scope of the regulation to interstate commerce, (3) whether Congress has made findings regarding the effects the regulated activity has on interstate commerce, and (4) whether the link between the regulated economic activity and interstate commerce is so attenuated that its effects cannot be considered substantial. *United States v. Morrison*, 529 U.S. 598, 610–13 (2000); *see also GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 628–29 (5th Cir. 2003). Each of these questions weighs against the application of the ESA here.

First, Karner Blues takes on the Heath do not substantially affect interstate commerce because such takes are not economic in nature, and even if they were, they would not produce a substantial effect on interstate commerce. Second, there is no jurisdictional hook either in the ESA or the FWS Karner Blue endangerment determination. Third, neither Congress nor the FWS have made any findings regarding the effects of Karner Blue takes on interstate commerce.

Therefore, this Court should hold that extending the ESA's protections to the Karner Blues on the Cordelia Lot is an invalid exercise of Congress's interstate commerce power.

A. Karner Blue Takes on the Cordelia Lot Are Not Economic in Nature, But Even If They Were, The Link Between Such Takes and Interstate Commerce Is Too Attenuated To Produce a Substantial Effect.

There is no consensus in the courts as to when a regulated activity is economic in nature. Since *Lopez*, the Supreme Court has failed to further refine its view of what constitutes economic activity. *See Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (holding that Congress could regulate non-economic activity because of the risk that high market demand would pull intrastate goods into the interstate market); *Morrison*, 529 U.S. at 598 (striking down a statute for regulating non-economic activity). Without direction from the High Court, lower courts have developed two approaches to defining "economic in nature" in ESA challenges. Some circuits, the D.C. Circuit in particular, have looked to the nature of the actor and the conduct of the take. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). Other courts, like the Fifth Circuit, have focused on the value of the individual members of the protected species, at times analyzing the aggregate value of all of the species protected by the Act. *See, e.g.*, *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty*, 326 F.3d 622; *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Here, the district court relied on the reasoning in *GDF Realty* and *Alabama-Tombigbee Rivers* to uphold the application of the ESA to the Karner Blues, but these cases cannot support such a burden. Because the Fifth Circuit's approach conflicts with Supreme Court precedent and is contrary to the maintenance of as-applied challenges to the ESA, this Court should instead adopt the D.C. Circuit's approach. Accordingly, this Court should find that because the take of

the Karner Blues on the Heath is not economic in nature, it is beyond Congress' power to regulate under the Interstate Commerce Clause.

The Fifth Circuit's approach is inconsistent with Supreme Court precedent. The *GDF Realty* court upheld the ESA's application to six cave-dwelling, wholly intrastate species under the interstate commerce power because "cave Species takes may be aggregated with all other ESA takes." 326 F.3d at 640. Thus, the court focused on the aggregated purpose of the ESA (to protect endangered and threatened species) and not on the regulated activity (takes). But the Court in *Lopez* explicitly rejected this kind of aggregated, purpose-oriented argument. 514 U.S. at 563–64. In that case, the government argued that the Gun-Free School Zones Act was justified by the productivity gains of a safe educational environment and the overall cost of violent crime. The Court concluded instead that the proper inquiry should focus solely on the regulated activity—here, firearm possession. *Id.*; *see also Morrison*, 529 U.S. at 613, (invalidating the Violence Against Women Act because "[g]ender-motivated crimes of violence" are not economic in nature, despite the economic value of protecting women).

Further, the Fifth Circuit's approach is contrary to the maintenance of as-applied challenges to the ESA because it considers economic effects beyond the scope of the particular case before the court. A facial challenge to a statute fails unless the challengers can prove that "there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause." *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) *denying rehearing en banc* (Roberts, J., dissenting) (citing *United States v. Salerno*, 481 U.S. 739 (1987)). In *GDF Realty*, the Fifth Circuit rejected an industry challenge to ESA regulation of a non-commercial, wholly intrastate species. 326 F.3d at 625. But the court, by aggregating not just the takes of all of the cave-dwelling species at issue but *all* ESA takes, turns an as-applied

challenge into a facial challenge. *See Rancho Viejo*, 334 F.3d at 1160 *denying rehearing en banc* (Roberts, J., dissenting). That is, the existence of any interstate species which Congress would be authorized to protect under the Interstate Commerce Clause would provide the necessary nexus for regulation of *all* species, no matter how attenuated from interstate commerce. Given that such an interstate, commercial species almost surely exists, the adoption of the Fifth Circuit approach would make the ESA effectively unchallengeable. Because the Fifth Circuit approach is contrary to Supreme Court precedent and inconsistent with the maintenance of as-applied challenges to the ESA, this Court should adopt the D.C. Circuit approach.

In contrast, the D.C. Circuit's approach makes clear that the ESA does not extend to non-economic activity like takes of the Karner Blues on the Heath. In *Rancho Viejo*, the D.C. Circuit memorably characterized the regulated activity under the ESA as "takings, not toads." Although that court found the takings at issue to be economic in nature because both the "actor" and the "conduct" had a "plainly commercial character." 323 F.3d at 107, here the actor is a private citizen and the conduct—the construction of a single residence for private use—is non-commercial in nature. In fact, the *Rancho Viejo* concurrence by then-Chief Judge Ginsburg appears to have contemplated these very facts. He explained that "a take can be regulated if—but only if—the take itself substantially affects interstate commerce" and that when a homeowner "moves dirt [on] his property . . . tak[ing a protected species], [he] does not affect interstate commerce. 323 F.3d at 1080 (Ginsburg, C.J., concurring). Appellee's conduct, moving dirt and preparing the land for her home, does not affect interstate commerce because such conduct is not economic in nature. *See Rancho Viejo*, 334 F.3d at 1158 *denying rehearing en banc* (Sentelle, J. dissenting). The fact that Karner Blues are taken in the process does not alter the fundamental nature of her conduct.

Even if Karner Blue takes were economic in nature, they do not substantially affect interstate commerce. A regulated activity does not come within the interstate commerce power simply because it is economic in nature; the link between the economic activity and interstate commerce must not be so attenuated that its effects are insubstantial. *See Morrison*, 529 U.S. at 612–13. In *Raich*, the Court found that growing marijuana in a private yard for private use substantially affected interstate commerce because of "the likelihood that the high demand in the interstate market will draw [the homegrown intrastate] marijuana into [the] market," and the aggregated effect of these growing operations. *Raich*, 545 U.S. at 19. The instant case is distinct. The Karner Blue is a non-commercial species without an interstate market to affect. *Cf. Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (upholding the ESA under the Interstate Commerce Clause as applied to red wolf takes in part because there was a market in red wolf pelts).

Further, despite the attempts by some circuit courts to index the scope of Congress's interstate commerce power on the interstate tourism associated with an animal species, the Supreme Court has rejected the notion that such tourism markets are sufficient to authorize regulation under the Interstate Commerce Clause. In *Alabama-Tombigbee*, the Eleventh Circuit found that the take of a non-commercial species substantially affected interstate commerce because a "species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism." 477 F.3d at 1274. The Supreme Court foreclosed this kind of Interstate Commerce Clause analysis in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers* ("*SWANCC*"). 531 U.S. 159 (2001). The majority held that defining the Clean Water Act's jurisdiction under the Interstate Commerce Clause by indexing it on the presence of interstate migratory birds raised a serious constitutional question. *See id.* In so holding, the Court implicitly rejected Justice Stevens' analysis in dissent, which insisted that

such interstate fowl could be the basis for authorizing congressional regulation because "birdwatching and hunting and [similar] activities generate a host of commercial activities of great value," in the case of the migratory birds, at least $618 million a year. *Id.* at 195, n. 17 (Stevens, J., dissenting). Yet even if the Court's jurisprudence allowed for an interstate tourism nexus, the facts here distinguish this case from *SWANCC*. Unlike migratory birds, the Karner Blue population on the Heath is wholly intrastate. Moreover, the Karner Blues on the Cordelia Lot have a tourism value of $1,000 a year, substantially less than the $618 million the Court rejected in *SWANCC*.

The take of a Karner Blue on wholly intrastate, private property by a private citizen is not economic in nature. Further, such a taking, even were it to be considered economic in nature, it is too attenuated from interstate commerce to substantially affect it.

B. Neither the ESA Nor FWS's Karner Blue Endangerment Determination Contain a Jurisdictional Hook.

The statutes in *Lopez* and *Morrison* were both struck down in part for failing to include a jurisdictional hook that would ensure that the regulated activity would have some nexus with interstate commerce. *Lopez*, 514 U.S. at 561–62; *Morrison*, 529 U.S. at 613. Some courts have understood the absence of a jurisdictional hook to indicate "that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce." *Rancho Viejo,* 323 F.3d at 1068 (quoting *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999)). As explained above, Appellee's takes of Karner Blues on the Cordelia Lot do not "arise out of or in connection with a commercial transaction," and even if they did, they do not substantially affect interstate commerce. Therefore, even if the absence of a

jurisdictional hook is not fatal to the FWS's case, *see id.* at 1068, it undermines the constitutionality of the ESA's application to Karner Blues on the Heath.

C. Neither Congress Nor the FWS Have Made Any Findings Regarding the Effects of Karner Blue Takes on Interstate Commerce.

Courts look to congressional findings to determine "whether the rationale offered to support the constitutionality of the statute . . . has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors." *See Rancho Viejo*, 334 F.3d at 1158 *denying rehearing en banc* (Sentelle, J. dissenting). When courts review a facial challenge to a statute, they consider congressional findings made concurrent with the statute's passage regarding the effect of the regulated activity on interstate commerce. *See Morrison*, 529 U.S. at 612. But when the challenge is as-applied, the courts should look to congressional findings regarding the specific regulated activity at issue, or to findings in the relevant regulation. *See People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2014). It is true that the ESA contains a statement of purpose that some courts have read as a general finding on the effects of endangered species takes on interstate commerce, *see GDF Realty*, 326 F.3d at 639 (citing 16 U.S.C. § 1531(a)(1) (2012): "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); *Rancho Viejo*, 323 F.3d at 1064 (citing the same), but taken as a whole, "there are no formal congressional findings that the ESA affects interstate commerce." *Gibbs v. Babbitt*, 214 F.3d at, 494, n. 3. Additionally, neither the ESA nor the FWS' endangerment determination contains any findings regarding the particular effect of Karner Blue takes on interstate commerce. *See* 57 Fed. Reg. 59,236 (Dec. 14, 1992). While the lack of findings is not

dispositive, such a failure leaves the scope of the Act open, cutting against the constitutionality of the ESA's application to the Karner Blues on the Heath. *See Lopez*, 514 U.S. at 557.

The Karner Blues takes on the Cordelia Lot are not economic in nature. Even if they were, such takes do not produce a substantial effect on interstate commerce. Additionally, there is no jurisdictional hook either in the ESA or the FWS regulations and neither Congress nor the FWS have made any findings regarding the effects of Karner Blue takes on interstate commerce. Therefore, this Court should reverse the district court and hold that extending the ESA to the Karner Blues on the Heath is an invalid exercise of Congress's interstate commerce power.

II. APPELLEE FAILS TO STATE A VALID CATEGORICAL TAKINGS CLAIM.

The Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. Const., amend. V. The constitutional requirement of just compensation applies both when a government action physically invades private property and when a government regulation imposes a restriction on private property that "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Physical takings trigger a per se duty to compensate the property owner, regardless of the extent of the intrusion. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In evaluating regulatory takings, however, the Court has "generally eschewed any set formula for determining how far is too far." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002). Instead, the Court engages in "essentially ad hoc, factual inquiries." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *Lucas v. South Carolina Coastal Council* established the sole bright line in regulatory takings jurisprudence: in the "extraordinary circumstance when no productive or economically beneficial use of land is permitted," the government actions represents a "categorical" taking. 505 U.S. 1003, 1017 (1992).

To establish a categorical taking, a claimant must show that their entire property has suffered a total deprivation of economic value as a result of a government action. *Tahoe-Sierra,* 535 U.S. at 331. Anything less than a "complete elimination of value" triggers the fact-based analysis established in *Penn Central*. *Lucas*, 505 U.S. at 1019-1020 n.8. Because this test "requires us to compare the value that has been taken from the property with the value that remains," an antecedent question is how to define the "parcel as a whole." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (*citing Penn Central*, 438 U.S. at 130-131). Further, because a property interest has both spatial and temporal dimensions, a court should only find a categorical taking when there has been a *permanent* deprivation of all value. *See Tahoe-Sierra*, 535 U.S. at 332.

Whether a government regulation constitutes a taking is a question of law based on underlying facts. *Bass Enters. Prod. Co. v. U.S.*, 133 F.3d 893, 895 (Fed. Cir. 1998). Courts of appeals review the district court's conclusions of law de novo and findings of fact for clear error. *Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111, 1115 (Fed. Cir. 2015). Here, the district court erred in several aspects. First, the court erroneously concluded that Appellee's takings claim against FWS was ripe, despite her failure to obtain a final decision from FWS. Second, the court incorrectly identified the Cordelia Lot as the relevant parcel, rather than Lear Island as a whole. Third, the court failed to recognize that any ESA-related land use restrictions on Appellee's property are temporary in nature, and so should be challenged the *Penn Central* test for partial regulatory takings. Fourth, the district court erred in finding that background public trust principles did not preclude Appellee's claim against Brittain County. And finally, notwithstanding the above errors of law, the district court wrongly concluded that Appellee had adequately demonstrated that her property has suffered a total deprivation of economic value.

Accordingly, this Court should reverse the district court and dismiss Appellee's claim.

A. Appellee's Claim Against FWS is Unripe.

When determining the ripeness of a takings claim, the central question is "whether [the] petitioner obtained a final decision from the [government entity] determining the permitted use for the land." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). Landowners must follow the "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Id.* at 620–21. When the application process would be futile, however, courts may waive this requirement. "[T]he law does not require [claimants] to apply for a permit if . . . the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996). Ripeness is a question of law, which courts of appeals review de novo. *Severance v. Patterson*, 566 F.3d 490, 496 (5th Cir. 2009).

1. Appellee Did Not Make Reasonable Efforts To Obtain a Final Decision.

The ESA empowers the Secretary to permit otherwise unlawful takes of listed species "if such taking is incidental to . . . an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (2012). To receive an Incidental Take Permit ("ITP"), one must file an application that includes a Habitat Conservation Plan ("HCP"). *See* 16 U.S.C. § 1539(a)(2)(A)(i)-(iv)(2012). The denial of an ITP constitutes a final decision that may give rise to a takings claims, See *Morris v. United States*, 392 F.3d 1372, 1377 (Fed. Cir. 2004), because it gives FWS "the opportunity [to use] its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo*, 535 U.S. at 620-21.

Here, Appellee has put her cart several steps before the horse. Not only that FWS has failed to render a final decision; Appellee has failed even to file an application for an ITP. Until Appellee receives the FWS's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question," her claim is unripe. *Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 191 (1985).

2. Appellee's Failure to Pursue an ITP Application Is Not Excused For Futility.

The district court determined that Appellee was excused from applying for an ITP because the cost of the permitting process was greater than value of the land and because complying with the suggested HCP would be impossible. But the district court erred as a matter of law because neither the cost nor the precise requirements of "an ITP application [are] knowable until the agency has had some meaningful opportunity to exercise its discretion," which it can only do once an application has been submitted. *Morris*, 392 F.3d at 1377.

The cost of the ITP permitting process for Appellee is unclear, and therefore could not render the ITP application futile. The amount relied upon by the district court was a cost estimate from a private environmental consultant. There is no indication that the estimate factored in any mitigating agency involvement, which may have been significant. The FWS Habitat Conservation Planning Handbook, to which FWS directed Appellee during her initial inquiry, describes how the agency is "responsible for assisting the applicant in preparing the HCP and . . . the National Environmental Policy Act Assessment . . . and [for] providing technical assistance . . . throughout the process." *Id.* (citing U.S. Fish & Wildlife Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (1996)). As in *Morris*, because the FWS has discretion as to the level of its involvement in the application process, the cost of obtaining an ITP can not be determined until Appellee began the ITP process. *See id.* Without

more evidence supporting the computation of Appellee's cost estimate, the district court was wrong to find that the ITP application process was futile.

FWS's letter to Appellee does not change this conclusion. When considering her ITP application, the FWS "has discretion concerning what [Appellee] must do to complete a satisfactory HCP." *Id.* The letter's reiteration that Appellee would need to prepare an HCP with an acre-for-acre substitution of contagious land was nonbinding, because the FWS retains its discretion over the requirement of the permitting process. The letter constitutes a mere informal adjudication, *see U.S. v. Mead Corp.*, 533 U.S. 218, 224-25 (2001), and the agency's determination can be reversed as easily and by the same procedures with which it was made. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015). As the letter has no binding legal effect on the agency or Appellee, it does not qualify as a final decision for the ripeness inquiry. *See Bennett v. Spear*, 520 U.S. 154, 177–78, (1997). Yet even if the letter were binding on the parties, it would not make compliance an impossibility. The record indicates that the only land contiguous to the Heath is on the Goneril Lot, which is owned by Appellee's estranged sister. Although Goneril Lear has declined to voluntarily cooperate, the record does not establish that contiguous land could not be purchased from Goneril at a viable price. Until such facts are established, the question before this court becomes a pure question of law. Appellee's taking claim is not fit for judicial review and therefore is unripe. *Abbott Laboratories v. Gardner* 387 U.S. 136, 148-49 (1967).

Appellee, by not applying for an ITP, failed to follow reasonable and necessary steps to allow FWS to exercise its full discretion, and has therefore not received a final decision. Additionally, her failure is not excepted for futility because the cost of the permitting process is

unknown and FWS has discretion when setting the requirements for an HCP. For these reasons, Appellee's taking claim is unripe and the decision by the district court should be reversed.

B. Lear Island Is the Relevant Parcel for Appellee's Categorical Takings Claim.

Even assuming that Appellee's claim against FWS is ripe, the district court erred in identifying the Cordelia Lot, rather than Lear Island as a whole, as the relevant parcel. The first step of a categorical takings analysis is determining the scope of the plaintiff's property interest. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002). This is the "denominator problem." *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1180 (Fed. Cir. 1994). The court should identify the relevant property interest "as realistically and fairly as possible, given the factual and regulatory environment." *Ciampitti v. U.S.*, 22 Cl. Ct. 310, 319 (Cl. Ct. 1991). The purpose of this analysis is to prevent a devious property owner from artificially dividing their property into fragments and subsequently claiming that the government has taken one of the fragments. *See Concrete Pipe and Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Here, a "realistic" and "fair" assessment of the Lear family's economic expectations of their property, juxtaposed with the interests of fundamental fairness that underlie takings jurisprudence, demand that the court evaluate Appellee's takings claim with Lear Island as the denominator.

1. The Family's Economic Expectations Apply to the Island in Its Entirety.

Courts avoid making bright-line rules in takings claims. They instead employ a "flexible approach, designed to account for factual nuances," *Loveladies*, 28 F.3d at 1181, to facilitate "careful examination and weighing of all relevant circumstances," *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). Relevant factors to consider include "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the

extent to which the protected lands enhance the value of remaining lands." *Ciampitti*, 22 Cl. Ct. at 318. The crucial issue, however, is the "economic expectations of the claimant with regard to the property." *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005). When a "developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

In *Forest Props.*, the Federal Circuit held that the relevant parcel for a developer's takings claim included both the coastal lots subject to regulation and legally distinct upland lots. 177 F.3d at 1365. The court noted that "from the outset, the development was treated as a single integrated project," and that the parcels were "used in conjunction with each other as one income-producing unit." *Id*. The history of Lear Island tells a similar story. The Lear family acquired the spatially contiguous lots in a single transaction, and prior to 2005, the island had been treated as a single economic unit for over two centuries. For generations, the Lears developed and maintained the island with an eye toward shared, family use. Even after King Lear delineated the island into three lots in 1965, he continued to treat Lear Island as a single parcel: he lived in the family homestead on the Goneril Lot, managed construction on the Regan lot, and maintained landscaping operations on the Cordelia Lot.

Further, King Lear's expectations must take into account the presence of the regulatory framework. The Heath has been federally protected critical habitat since 1992; King Lear had been on notice that his development rights on the Heath had been burdened by the Endangered Species Act for over a decade prior to the conveyance of the land to Appellee. Although notice of the regulatory framework does not foreclose a subsequent taking claim, it should inform the court's view "of what fairness requires in a given case." *Palazzolo*, 533 U.S., at 635 (O'Connor,

J., concurring). If the knowledge of "existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost." *Id*. Here, the "factual and regulatory environment" of Lear Island overwhelmingly supports the view that this Court should reject Appellee's position. *Ciampitti*, 22 Cl. Ct. at 319. Indeed, the formal division of the Lear Island into three lots is the only "evidence produced by [appellee] that it has treated the lots as distinct units." *District Intown Properties L.P. v. District of Columbia*, 193 F.3d 874, 876 (D.C. Cir. 1999).

2. The Subdivision of the Island by King Lear Is Not Dispositive.

Appellee argues that by taking title to her lot, her expectations were necessarily constrained to the metes and bounds of those ten acres. In her view, her father's conveyance of the land should be dispositive. It is a long-accepted tenet of regulatory takings jurisprudence, however, that courts should reject "the temptation to adopt what amount to per se rules in either direction." *Palazzolo*, 535 U.S. at 636 (O'Connor, J., concurring). Moreover, the Supreme Court has made clear that the relevant parcel inquiry requires courts to ignore the legal boundaries established under state property law. *Keystone*, 480 U.S. 499-500. Takings analyses should not "turn on whether state law allowed the separate sale of the segment of property." *Id*. King Lear's division of the Island is thus but one factor for this Court to consider.

This Court should abstain from inventing a per rule here. The rule created by the district court would allow a family that has continuously owned a single, contiguous parcel of land for centuries, "with a wink-and-a-nod," to divide it such that one of the parcels is taken by a pre-existing government regulation. *City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 319 (Idaho 2006). As the Supreme Court of Idaho stated: "a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely

dividing up ownership of their property so as to definitively influence the denominator analysis." *Id.* at 319. The risk of land-division gamesmanship is particularly acute here, where Appellee can point to no personal investment-backed expectations of developing her parcel, and the government regulations at issue were in place prior to the conveyance. Although Justice O'Connor has noted that the lack of personal financial investment in property does not necessarily defeats a takings claim, see *Palazzolo* 533 U.S. at 634-35 (O'Connor, J., concurring), Appellee's lack of investment-backed expectations further underscores that she never had any reasonable expectation of constructing a residence on the Heath. In short, "[t]his is not a case where a bona fide purchaser for value invested reasonably in land fit for development, only to see a novel regulation destroy the value of her investment." *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 766 (Mass. 2005). In finding that the Cordelia Lot was the relevant parcel for Appellee's claim, the district court violated the maxim that "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." *Penn Central*, 438 U.S. at 130-31. Recognizing the district court's error, this Court should reverse.

C. The Temporary Nature of Any Hypothetical Development Restrictions Imposed by FWS Forecloses Appellee's Categorical Takings Claim.

Even if Appellee had been denied an ITP, any development restrictions would apply only so long as the Karner Blues persist on Lear Island. Temporary restrictions on land use cannot amount to a categorical taking, because the land necessarily recovers some value when the restriction ends. *See Tahoe-Sierra*, 535 U.S. at 332. Accordingly, courts evaluate claims for temporary takings under the *Penn Central* test. *See Tahoe-Sierra*, 535 U.S. at 342. Appellee did not state a *Penn Central* claim in the court below, and so the Court should not entertain one here. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Alternatively, to the extent that the district court

based its holding on a misplaced belief that FWS's argument was made in bad faith, its conclusion should be reversed.

1. A Temporary Restriction on Appellee's Property Cannot Form The Basis for a Categorical Takings Claim.

Appellee alleges that FWS and Brittan County have jointly taken her property under the categorical test of *Lucas v. South Carolina Coastal Commission.* 505 U.S. 1003, 1031 (1992). This claim cannot succeed, however, because the Supreme Court has made clear that temporary deprivations are not governed by *Lucas*. *See Tahoe-Sierra*, 535 U.S. at 332. A *Lucas* categorical taking applies only when a property owner has been deprived of "all economically beneficial uses" of the property. *Id*. at 330 (quoting *Lucas*, 505 U.S. at 1012). Because a piece of property subject to a temporary government restriction recovers some value when the restriction is lifted, courts treat temporary takings as partial regulatory takings under the *Penn Central* test. *Id*.

Lear Island's subpopulation of Karner Blues, without continuing human intervention, will naturally die out in roughly ten years. At this point, with no endangered animals at risk of a "take," the FWS would likely re-evaluate the Heath's status as critical habitat. *See* 50 C.F.R. § 424.12 (2016). Assuming no other development restrictions applied to the Heath, Appellee would be free to construct her residence. As in *Tahoe-Sierra*, the economic value of the property will be restored, belying Appellee's claim that her property has permanently lost all value.

The district court distinguished this case from *Tahoe-Sierra*, noting that the 32-month moratorium at issue in *Tahoe-Sierra* was shorter than the 10-year period at issue here. *Lear*, *slip op*. at 10. The case law makes clear, however, that in the context of a categorical takings analysis, the length of the moratorium is irrelevant. *See Tahoe-Sierra*, 535 U.S. at 338 n.34. In similar contexts, courts have held that multi-year restrictions on development do not trigger a taking. *See*, *e.g., First English*, 210 Cal. App.3 (Cal. 1989) (upholding temporary restriction lasting

longer than six years); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1233 (9th Cir. 1994) (condoning an eight-year restriction); *Sartori v. U.S.*, 67 Fed. Cl. 263 (Ct. Cl. 2005) (declining to find a categorical taking of a 9.5-year restriction on land development). Moreover, the district court's theory—that there is a line after which temporary restrictions become categorical takings—was expressly rejected by the Supreme Court in *Tahoe-Sierra*, 535 U.S. at 338 n.34. Brittain County does not dispute that ten years may feel like a long time, and concedes that Appellee may be able to assert a claim for a partial taking under *Penn Central*. We argue only that she has not done so here, and that this Court should dismiss her baseless categorical claim.

2. There Is No "Irony" in FWS's Argument.

Alternatively, this Court should hold that the district court erred in relying on the "irony" of the FWS using the imminent extinction of the Karner Blues in its defense. By basing its legal conclusion on the "irony" of the FWS's position, the district court conflated the FWS's legal obligations under the ESA with unwarranted assumptions about the environmental policy views of its employees. Its legal conclusion is thus erroneous, and should be reversed.

First, there is no irony in FWS's position; its argument is wholly consistent with the agency's statutory mandate. The ESA requires that the FWS make decisions according to "the best scientific and commercial data available." *See* 16 U.S.C. § 1533(b)(1)(A)(2) (2012). This standard pervades the FWS's decisionmaking; it applies when the agency makes species listing decisions, designates critical habitat, and completes its consultation process. *See* 16 U.S.C. §§ 1533(b)(I)(A); 1533(b)(2); 1536(a)(2); 1536(c) (2012). In short, the law expressly requires that FWS make data-driven determinations with regard to endangered species. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1024–25 (9th Cir. 2011) (vacating FWS decision to delist the Yellowstone grizzly bear because the agency irrationally ignored scientific

data). Accordingly, the position that the Lear Island's Karner Blue subpopulation will naturally die off in ten years is properly understood a reasonable assertion of data-backed ecological trends. Their litigating position here is simply another example of FWS employing "the best scientific and commercial data available," and thus aligns with their mandate under the ESA.

Second, to the extent that the district court relied on this invented contradiction in upholding Appellee's claim, it should be reversed. By basing its conclusion on an unproven allegation of bad faith, the district court based its legal conclusion on facts unsupported in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009). This Court should thus reverse.

D. Public Trust Principles Preclude Appellee's Takings Claim Against Brittain County.

In *Lucas*, the Court created an exception to categorical regulatory takings where "background principles of nuisance and property law . . . prohibit the uses [the regulated party] now intends." 505 U.S. 1003, 1031 (1992). Where such limitations are inherent in the property's title, the state's invocation of such limitations does not deprive the owner of any property interest that they lawfully possessed, and therefore has not suffered a taking. *See Palazzolo*, 533 U.S. at 629. *Lucas* did not list what was specific constituent doctrines constitute "background principles," but jurisdictions across the country are increasingly recognizing public trust doctrines among them. *See* David L. Callies, *Through A Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 76 (2014). Here, the limitation imposed by Brittain County on Appellee's right to fill public trust wetlands on her private property actually inhered in the title to Lear Island. Because the cove wetlands were non-tidal navigable waters at the time the island was granted to Cornelius Lear, he received ownership of the lake bed but no right to obstruct public passage on the water. Additionally, when New Union achieved statehood,

the ownership over beds of navigable waters transferred to the state under the "equal-footing doctrine," further attenuating any claim by Cornelius or Appellee, as an owner in succession, that she possesses a private right to fill the wetlands. As such, the Brittain County Wetlands Preservation Law does not constitute a taking of Appellee's property.

The limitation on filling wetlands on Appellee's lot inheres in the lot's title because recognized public trust doctrines at the time of the grant prohibited private obstructions of public rights of passage on navigable waters. When Lear Island was granted to Cornelius Lear in 1803, nontidal, navigable waters were considered "public highways." *P.P.L. Montana, L.L.C. v. Montana*, 132 S. Ct. 1215, 1226–27 (2012). The property rights to these public highways were divided: the lake or streambeds were owned by the private owners whose property abutted the water, but the public retained a right of passage upon the water. *Id.* at 1227. As such, a private owner's title to the beds under such navigable waters was burdened, because they could not impair the public's right of passage. *Id.* at 1226-28. The district court mistook private ownership of underlying riverbeds for unburdened title. At the time of the congressional grant Cornelius Lear's private property extended 300 feet from the shoreline, but he would have been unable to obstruct public passage on the waters above. This burden transferred to Appellee upon her father's death via the property principle of *nemo dat quod non habet*: "no one can convey . . . any better title than [s]he owns." *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Appellee has no greater right to fill the cove than Cornelius Lear did centuries ago. Because the title to the Cordelia Lot was inherently limited, the denial of a permit to fill the cove wetlands cannot constitute a taking of Appellee's property.

Even if the title to Lear Island were not inherently burdened, it became burdened when New Union became a state. Under the equal-footing doctrine, "[u]pon statehood, the State gains

title within its borders to the beds of waters then navigable" and the State "may allocate and govern those lands according to state law subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *P.P.L. Montana*, 132 S. Ct. at 1227–28 (internal quotation marks omitted). If the cove had not yet become wetlands, but was navigable at the time that New Union became a state, the underlying land is held in public trust by New Union and it may regulate such land according to state law. There is nothing the in the factual record to indicate that the cove wetlands were not navigable at the time of New Union's statehood; indeed, that the district court did not reject this claim at the threshold question of the wetlands' historic navigability suggests that the cove was navigable. The district court rejected the equal-footing argument below, asserting that an act of Congress, instantiated in the grant to Cornelius Lear, trumped the equal-footing doctrine. Yet the district court's cited authority establishes the opposite proposition:

> "Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right *below high-water mark*, and do not impair the title and dominion of *the future state*, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States."

Shively v. Bowlby, 152 U.S. 1, 58 (1894) (emphasis added). A congressional grant of public lands does not limit the title that future states obtain upon entering the Union; New Union's title to the cove wetlands is no different.

The title to the Cordelia Lot, and to the cove wetlands in particular, is inherently burdened by public trust principles: first, due to a public right of passage when Congress first

granted the land, and second, via the equal-footing doctrine when New Union achieved statehood. As background principles, these public trust doctrines fall into the exception to a categorical regulatory taking established in *Lucas*. Therefore, Appellee's takings claim against Brittain County is foreclosed. The district court should be reversed.

E. The Separate Restrictions Imposed by FWS and Brittain County Cannot Be Consolidated to Allege a Single Categorical Taking, But Even If They Could, the Cordelia Lot Has Not Been Deprived of All Economic Value.

The district court erred in finding that the application of the ESA's take prohibition and the Brittan County Wetlands Preservation Law together deprive Lear's property of all economic value. First, the district court invented a wholly new rule in takings jurisprudence by wrongly injecting theories of tort liability into regulatory takings law. Second, the rental offer by the Brittain County Butterfly Society demonstrates that the Cordelia Lot retains some economic value, and so it has not suffered a total economic deprivation. Finally, even if the rental offer does not itself sink Appellee's claim, Appellee has nonetheless failed to provide sufficient evidence for the district court to determine the diminution of value imposed on the Cordelia Lot. The claimant bears the burden of demonstrating economic loss by comparing the value of the land before and after the alleged taking. *U.S. ex rel. and for Use of Tennessee Valley Authority v. Powelson*, 319 U.S. 266 (1943). By failing to do so, Appellee has failed to make out a valid claim for a categorical taking. This Court should reverse the district court and dismiss her claim.

1. The FWS and Brittain County Regulations Cannot Be Merged to Invent a Categorical Taking.

The district court erroneously applied common law tort doctrines to hold that FWS and Brittain County jointly caused a categorical taking and thus should be held jointly and severally liable. Courts of appeals review de novo whether the district court applied the correct legal test.

Stanger v. China Electric Motor, Inc., 812 F.3d 734 (9th Cir. 2016). By misusing tort principles to find a categorical taking instead of dismissing the case for failure to state a *Penn Central* claim, the district court "based its ruling on an erroneous view of the law," and this Court should accordingly reverse. *Id*. at 405.

Although there are doctrinal connections between tort and takings law, the district court's invention is both incorrect and unwarranted. Of course, tort and takings jurisprudence share an evolutionary root; takings law originated in the common law of property, and particularly in the law of nuisance. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1234-76. In some ways, these areas of law parallel each other still today. Where a physical government intrusion on private property is alleged, the claimant may often sue under either takings or tort law. *Clark v. United States*, 19 Cl. Ct. 220, 222–23 (1990) ("There is no analytical inconsistency between tort and takings theories. Both a tort and a taking can be made out on the same set of operative facts."). Under the circumstances of this case, however, an appeal to joint and several liability is both legally erroneous and unnecessary.

First, the tort doctrines relied upon by the district court, properly applied, actually undermine the court's legal conclusions. Joint and several liability is premised on the idea that each tortfeasor that proximately contributed to an indivisible injury is liable in full for the resulting harm. *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* s. 488 (2d edition). This rule protects plaintiffs by allowing for full recovery, even if one of the tortfeasors is insolvent. *Id.* When separate actors produce distinct injuries, however, their conduct does not result in a single tort. *See* Restatement (Second) of Torts s. 433(A) (2016). As here, the "harm" alleged is not indivisible. Even assuming that FWS regulations took one portion of Lear's property, and Brittain County's regulation took another portion, it is incorrect to assert

that the plaintiff has suffered one indivisible harm. There are two distinct "harms": one restriction on the Heath and a separate, causally unrelated restriction on the cove. Accordingly, regardless of the total amount of property taken, joint and several liability is inappropriate. *See Russell v. Tomlinson*, 2 Conn. 206 (Conn. 1817) (when multiple tortfeasors independently damage plaintiff's property, the plaintiff has suffered discrete harms, and joint liability is rejected).

Second, the district court was incorrect in asserting that "a property owner deprived of all economic use of their property would be denied recourse, as the federal government and local government each claim that their own regulation, by itself, leaves some developable portion." *Lear*, *slip op*. at 11. *Penn Central* provides for just such a recourse. 438 U.S. at 123-25. Where a single regulation places limitations on land that "fall short of eliminating all economically beneficial use," courts apply the *Penn Central* factors to determine if a taking requiring just compensation has occurred. *Palazzolo*, 533 U.S. at 617. Here, Appellee points to two discrete land use restrictions, imposed by vastly different regulatory bodies, that restrict separate portions of her property. The Constitution allows Appellee to recover for the "economic injuries caused by government action." *Penn Central*, 438 U.S. at 124. But because neither of Appellee's injuries amount to the "extraordinary circumstances" of a categorical taking, they should instead be assessed under the balancing test defined in *Penn Central*. *Lucas*, 505 U.S. at 1017. Because Appellee's claim rests on an allegation of a complete economic deprivation—a single, indivisible harm—it is unsupported in the record, and should be dismissed.

2. The Butterfly Society's Rental Offer Demonstrates that the Cordelia Lot Retains Some Economic Value.

Even if the two regulatory programs could be consolidated for the purposes of Appellee's takings claim—though they cannot—the district court erred in finding that the Cordelia Lot had

suffered a complete economic wipeout. The value of a taken property is an issue of fact which is reviewed for clear error. *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land in District of Columbia*, 670 F.2d 289, 293 (D.C. Cir. 1981). But because the district court grounded its findings in an erroneous legal standard that measured the regulation's economic impact based on the property's remaining "use" instead of its remaining "value," this Court should review the district court's decision and apply the correct legal standard as established in *Tahoe-Sierra*. 535 U.S. at 330. *Sea Coast Foods, Inc. v. Lu–Mar Lobster & Shrimp, Inc.*, 260 F.3d 1054, 1058 (9th Cir. 2001) ("We review whether the district court applied the correct legal standard de novo."). See *Protective Comm. for Indpt. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 445 (1968) ("Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations."). The record shows that Appellee's claim for a categorical taking must fail, because the rental offer from the Brittain County Butterfly Society demonstrates that the Cordelia Lot has not suffered a "permanent obliteration of . . . value." *Tahoe-Sierra*, 535 U.S. at 330. Even if this Court were to find that the rental offer does not preclude Appellee's claim, Appellee has nonetheless failed to meet the evidentiary bar for showing a complete deprivation of economic value. *See Forest Props., Inc. v. United States,* 177 F.3d 1360, 1367 (Fed. Cir. 1999).

To determine the economic impact of a regulation, a court compares the fair market value of the property before the alleged taking with the fair market value after the alleged taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The district court relies on *Lucas* in holding that Lear suffered a categorical taking because the regulations combine to deny her "economically remunerative use" of the property. *Lear*, *slip op*. at 11. In so doing, the court erred by applying the incorrect standard. *Lucas* inspired much confusion about

whether categorical takings should be measured by the value remaining in a property or the "economically viable uses" remaining in the property. *See* Douglas T. Kendall, "*Defining the* Lucas *Box:* Palazzolo*,* Tahoe, *and the Use/Value Debate," in Taking Sides on Takings Issues: Public and Private Perspectives* 427 (ed. Thomas Roberts 2002). In *Tahoe-Sierra*, however, the Court settled the debate, definitively interpreting *Lucas* to govern only "the extraordinary case in which a regulation permanently deprives property of all *value*." *Tahoe-Sierra*, 535 U.S. at 332 (emphasis added). Justice Rehnquist, writing in dissent, acknowledges as much: "The Court's position [is] that value is the sine qua non of the *Lucas* rule." *Tahoe-Sierra*, 535 U.S. at 350 (Rehnquist, C.J., dissenting). Lower federal courts agree. *See Robinson v. City of Baton Rouge*, 2016 WL 6211276, *41 (M.D. La. 2016) ("Regardless of any ambiguity in *Lucas*, later Supreme Court cases make clear that, to prevail on a categorical taking claim, the property must lose *all value*") (emphasis original). Accordingly, the Court's takings inquiry hinges on whether the Cordelia lot has permanently been deprived of all value.

Although a precise assessment of the post-regulation value of the property is not in the record (as Appellee failed to conduct such an assessment), the estimated market value of the property can be extrapolated from the rental offer. Since 1960, the average rent-to-price ratio in the United States has fluctuated between 3% and 6%. Morris Davis et al., *Review of Income and Wealth* 279-84 (2008), https://perma.cc/TL8T-P5KF. Even if we assume that Appellee's property commands a high rent-to-price ratio (lowering the property value relative to the rent), a $1,000 annual rent correlates with a property value of $30,000. Thus, based on the Butterfly Society's rental offer, it would be reasonable to estimate the market value of the Cordelia Lot at $30,000.

Even rejecting this estimate, however, the existence of *any* remaining value pushes Appellee's claim beyond the rubric of *Lucas*. *See Cooley v. U.S.*, 324 F.3d 1297 (Fed. Cir. 2003)

(reversing district court finding that 98.8% diminution of value resulted in categorical taking). Since the inception of the categorical taking in *Lucas*, the Supreme Court has reiterated that a categorical taking only applies when the property has suffered a total loss. *Tahoe-Sierra*, 535 U.S. at 330 ("The categorical rule would not apply if the diminution in value were 95% instead of 100%)," citing *Lucas*, 505 U.S. at 1019, n.8. The rental offer from the Brittain County Butterfly Society therefore undermines Appellee's claim that her property has been deprived of all value. The offer of rent might be lower than Appellee would like, but it nevertheless indicates that the property has *some* post-regulation value. And considering that the offer was both unsolicited and rejected without negotiation, it would not be unreasonable to assume that Appellee could secure a higher rent if she tried.

3. Appellee Fails to Meet the Evidentiary Burden Of Asserting a Total Economic Loss.

Even assuming that the district court was correct in finding that the offer of rental income does not preclude Appellee's categorical takings claim, the district court's finding of a total economic deprivation was clearly erroneous. A finding is clearly erroneous if its (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Because Appellee failed to provide sufficient evidence that her property has sustained a total economic loss, the district court's factual findings are erroneous under the third *Hinkson* factor. Although there is sufficient evidence in the record for this Court to reverse the district court, the Court could alternatively vacate the district court's ruling and remand for additional fact-finding.

Here, Appellee asserts a total deprivation of economic value, but fails to provide sufficient evidence to evaluate the claim. The plaintiff bears the burden of proving the economic loss by comparing the value of the land before and after the alleged taking. *U.S. ex rel. and for*

Use of Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943); *Keystone*, 480 U.S. at 497. If the plaintiff fails to make a sufficient factual showing, the claim should be dismissed. *See Garneau v. City of Seattle* (9th Cir. 1998) (finding the lack of evidence of the economic impact of the regulation "dispositive"). *See also Laurel Park Community, LLC v. City of Tumwate*r, 790 F.Supp.2d 1290 (W.D. Wash. 2011). Conspicuously, Appellee declined to conduct an assessment of her property value after the county permit was denied, preventing the district court from determining the regulation's effect. *See Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 873-74 (Mass. 2005). Moreover, though the district court noted that there is no market for the land for agricultural, timber, or recreational use, they failed to acknowledge other potential uses for the property. For example, because the county permit only denies filling the cove for non-water-dependent uses, it leaves open the possibility of development of a boat landing, marina, or other water-dependent project. Of course, the viability of such a use is subject to its own legal evaluation, and the district court may be justified in discounting it. *See Olson v. United States*, 292 U.S. 246, 255 (1934). Brittain County argues only that the fact-finder base its decision on a full consideration of the facts.

Because the district court was incorrect to insert joint and several liability into regulatory takings law, and because the trial record indicates that Appellee's property has not suffered a complete deprivation of value, this Court should reverse the district court and dismiss Appellee's categorical takings claim.

CONCLUSION

For these reasons, Brittain County respectfully requests that this Court reverse the district court's ruling. Failing that, this matter should be remanded for additional fact-finding regarding the value remaining in Appellee's property.

Dated this 28th day of November, 2016.

Respectfully submitted,

Attorneys for Defendants-Appellants