Team #24

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

September Term, 2016

Docket No. 16-0933

CORDELIA LEAR,

Plaintiff–Appellee–Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant–Appellant–Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant–Appellant.

Appeal from the United States District Court for the District of New Union in

No. 112-CV-2015-RNR, Judge Romulus N. Remus

Brief for Brittain County, New Union

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JURISDICTIONAL STATEMENT

Cordelia Lear filed a complaint in the United States Court of Appeals for the Twelfth Circuit alleging Fifth and Fourteenth Amendment violations against the United States Fish and Wildlife Service. Brittain County in the State of New Union, intervened. Following the issuance of an Order of the United States District Court for the District of New Union dated June 1, 2016, both Brittain County, New Union and the United States Fish and Wildlife Service (FWS) filed Notice of Appeal June 9, 2016. Cordelia Lear filed Notice of Appeal June 10, 2016. The district court's order is final, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the application of the ESA to a wholly intrastate population of butterflies is a constitutional use of Congressional Commerce power.

2. Whether Lear's claim against the FWS is ripe for adjudication, despite her failure to apply for an incidental take permit.

3. Whether, in analyzing Lear's taking's claims, the relevant parcel is the subdivided Cordelia lot or the entirety of Lear Island.

4. Whether the FWS and Brittain County are shielded from a takings claim when the property in question will become eligible for development upon the natural destruction of the habitat in ten years' time.

5. Whether the Brittain County Butterfly Societies offer to pay $1,00 per year for wildlife viewing access precludes the complete loss of economic value necessary for a takings claim.

6. Whether public trust principles inherent in title to the Cordelia Lot preclude a takings claim by Lear based on the denial of her county wetlands permit.

7. Whether the FWS and Brittain County are liable for a complete deprivation of economic value of the Cordelia Lot when their respective regulations by themselves would still allow for development of a single-family residence

STATEMENT OF THE FACTS

Lear Island is approximately 1,000-acres and sits in Lake Union in the state of New Union, was granted to Cornelius Lear in 1803, and has since been possessed by the Lear family for over two centuries. R 4-5. In 1965, King James Lear divided Lear Island into three parcels, one for each of his daughters. These parcels include the Goneril lot at 550-acres, the Regan lot with 440-acres, and the Cordelia lot with 10-acres. After King Lear's death in 2005, each of the daughters came into possession of their respective lots. It was not until 2012 that Cordelia Lear decided to build a single family home on her small lot.

Plaintiff Lear's lot is primarily nine acres of upland property, that is mowed annually. This has created an ideal environment for the Karner Blue larvae and butterflies, which need partially shaded flowers near successional forests to thrive, Precisely the habitat Cordelia's primary 9 acres provide. R. 5-6. The Karner Blue butterfly was added to the federal endangered species list on December 14, 1992, and is the only surviving population left in the state of New Union is found on Lear Island. R at 5. In April of 2012, Cordelia contacted the New Union FWS to inquire about whether or not she could build her desired single family home on her plot. She was advised by FWS that she would need to obtain an Incidental Take Permit (ITP) due to the presence of the endangered butterfly population. R at 6. It is also known to the FWS and Cordelia Lear that without specific mowing and upkeep of the lot, it will naturally revert back to forest within 10 years. R at 6. Rather than obtaining an ITP, plaintiff instead took matters into her own hands, developing an alternative development proposal (ADP) to attempt to avoid disturbing the butterfly habitat. The ADP required application approval from the county, as it would fill and dredge a portion of the lake which Lear would then build her house upon. This application was denied by Brittain County under the Brittain County Wetland Preservation law,

as the law only allows the filling of wetlands for water dependent use. R. at 7. This action was subsequently brought by plaintiff in February of 2014. R. at 7.

STANDARD OF REVIEW

The district court dismissed Lear's complaint alleging that the ESA is unconstitutional, and found in favor of Lear regarding her taking's claim, awarding her damages from both the FWS and Brittain County. This Court reviews a district court's verdict's regarding constitutional questions de novo, and "no deference is given to the district court." *See Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

Due to the wholly intrastate nature of the population of Karner Blue butterflies, the Endangered Species Act (ESA) is NOT a valid exercise of congress's commerce power. The FWS does not have the jurisdiction to prevent Lear's desired construction of a single family residence on her 10-acre plot, under the *Lopez* test. Additionally, Plaintiff Lear's takings claim against the United States Fish and Wildlife Services (FWS) is not Ripe for adjudication, because she has not exhausted all avenues by which to challenge the ESA. Her failure to seek an incidental take permit means her claim cannot be ripe, regardless.

The parcel in question in this case is the entirety of Lear Island. The Supreme Court has never heard a case considering such a question, and the federal circuit court, interpreting statements the Supreme Court has made has applied those statements to a "flexible" analysis that shows the entire island is at question, not just the Cordelia lot. Finding that the entire parcel is at issue is dispositive of issues four through seven.

In the alternative, if the Court disagrees about the relevant parcel, Lear's claim fails for

several other reasons. First, because the "taking" of Lear's parcel is temporally not significant. A complete economic taking cannot occur because the taking would not last more than 10 years. Furthermore, there have been monetary offers to Lear to offset the cost of keeping the lot as it is, for a public purpose. Finally, the actions of the FWS and Brittain County cannot be considered as one action, as it is unrealistic for the government and would never allow any state to create its own laws and regulations.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER, AS APPLIED TO A WHOLLY INTRASTATE POPULATION OF BUTTERLIES THAT WOULD BE ELIMINATED BY CONSTRUCTION OF A SINGLE-FAMILY RESIDENCE ON PRIVATE PROPERTY

Article 1, Section 8, Clause 3 of the U.S. Constitution, Congress is granted the power, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Endangered Species Act (ESA) is not a valid exercise of Congress's Commerce power, as applied to wholly intrastate population of endangered butterflies, as it fails the Lopez reformulated rational basis test. *United States v. Lopez*, 514 U.S. 549, (1995).

A. The Endangered Species Act Is Not Valid Because It Fails the Lopez Reformulated-Rational Basis Test

The Endangered Species Act prohibits generally the "taking" of, "any such species within the United States or the territorial sea of the United States." *16 U.S.C.S. § 1538 (a)(1)(B) (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).* Taking is further defined as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." *16 U.S.C.S. § 1532 (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).* The word "harm" found in the definition of take, is furthered expanded upon as:

> … An act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (Lexis Advance through the November 9, 2016 issue of the Federal Register).

The contemplated taking of a wholly intrastate population of butterflies does not fall within the Commerce powers of Congress.

The trial court ruled on this matter based on decisions from several different Circuit Courts of Appeal. These decisions are merely persuasive upon this court however. Alternatively, the court should turn to binding precedent of the modern test for Congressional Commerce Powers enumerated by the Supreme Court of the United States. This test is found in the case of *United States v. Lopez.* 514 U.S. 549 (1995). In *Lopez,* the Defendant was charged with violating the Gun-Free School Zones Act of 1990. This act prohibited the knowing possession of a firearm within a school "zone," which was defined as on the grounds of, or within 1000 feet from the grounds of, a school. Reviewing a reversal by the Court of Appeals for the Fifth Circuit, the Supreme Court held that there are three possible situations in which Congress may validly exercise its power to regulate Commerce based on Article 1, Section 8, Clause 3 of the U.S. Constitution.

> First, Congress may regulate the channels of interstate commerce…Second, Congress has the power to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce…finally Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. *United States v. Lopez.* 514 U.S. 549 (1995).

Applied to the case at hand, the wholly intrastate population of the Karner Blue butterflies does not fall into any of the three possible appropriate exercises of Commerce power by Congress. First, the Karner Blue butterfly is in no way a channel of interstate commerce.

Second, it cannot be said that the Karner Blue is an instrumentality or thing in commerce; it is not used to effectuate commerce or bought and sold in interstate commerce. Third, an evaluation of whether the case at hand has a substantial effect upon interstate commerce requires an additional three-prong analysis utilized by the court in *Lopez*.

Lopez holds that Congress may regulate an activity that "substantially effects" interstate commerce when, Congress seeks to control a commercial activity or an activity necessary to the regulation of some commercial activity, if the Congressional action contains a jurisdictional nexus requirement to ensure the activity they seek to regulate affects interstate commerce, and when the rational that upholds the regulation has a logical stopping point. *Id.* In the case at hand, Congressional regulation through the ESA as applied to the Karner Blue Butterfly population fails prongs two and three of the "substantial effects" test. There is no jurisdictional nexus requirement being observed that ensures the regulated activity pertains to interstate commerce in the case at hand. The population of Karner Blue's is wholly intrastate, with no ties in any way to interstate activity generally, let alone commerce. The only method by which a jurisdictional nexus could be appropriated in this situation would require a far reaching speculation regarding the potential future usage of the land, i.e. future construction. R. at 7. This is impermissible as it violates the third prong of the substantial effects test. If the court were to extend the reach of the ESA to include the regulation of a piece of property based on the future potential for a taking by habitat modification, there would be no property right beyond the reach of Congressional grasp.

Much like the regulation of firearms contemplated by the Gun-Free School Zones Act, the ESA as applied to the population of Karner Blue's is an invalid exercise of Congressional Commerce Power. Similar to *Lopez,* the Supreme Court invalidated the over extension of

Congressional power in the case of *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000).

In the case of *Morrison*, the court reviewed the application of a statute created by Congress which sought to provide a federal civil remedy for victims harmed by gender-based violence. *42 U.S.C.S. §13981.* The court found that in enacting *§13981,* Congress specifically enumerated that their source of authority for enacting the bill. *Id.* In subsection (a) of the legislation it stated that a "federal civil rights cause of action" is established "pursuant" to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." This is the same justification provided by Congress in creating the Endangered Species Act. 16 U.S.C.S. § 1531 (a)(3) (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).

In *Morrison,* the question of whether or not §13981 was constitutional hinged on an application of the "substantial effects" analysis, following the court's dismissal of the first two prongs of the *Lopez* test. *United States v. Morrison*, 529 U.S. 598 (2000).

In addressing whether a federal statute addressing civil remedies for gender-based violence has a "substantial effect" on interstate commerce, the court first turned back to *Lopez* to reiterate the necessity of the activity in question, "being some sort of economic endeavor." Id. The court held that the civil remedies proposed had no such relation as an economic endeavor. This is analogous to the case at hand, as the regulation of private decisions regarding land use as habitat modification has no relation as an economic endeavor.

The second issue with the "substantial effects" test as applied in *Morrison,* was a failure to include a judicial nexus that demonstrated that the federal civil remedies legislation was related to interstate commerce. In the case at hand, there is a lack of jurisdictional nexus similar

to *Morrison.* In seeking to indiscriminately exert influence over private property rights based on the implementation of construction, the lower court failed to show any guaranteed jurisdictional nexus with interstate commerce. As a result, the expansion of Congressional power into the situation in the case at hand is unconstitutional.

Finally, the *Morrison* court found that there was no foreseeable or logical limit on the applicability of the federal civil remedies penalty, and therefore it was unconstitutional. The court held in quoting *Lopez* that, “if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." This is applicable to the case at hand. Affording Congress the power to prohibit certain land use’s based on a wholly intrastate population of butterflies using the authority of the commerce clause eliminates all requirements linking Congressional action to their enumerated powers under the constitution.

II. CORDELIA LEAR’S TAKING CLAIM AGAINST THE FISH AND WILDIFE SERVICES IS NOT RIPE FOR ADJUDICATION DUE TO HER FAILURE TO SEEK AN INCIDENTIAL TAKE PERMIT UNDER THE ENDANGERED SPECIES ACT

Cordelia Lear’s taking claim is not ripe for adjudication as she has failed to receive a final agency decision regarding her proposed land use. The Endangered Species Act allows for the incidental taking of an Endangered or Threatened species in the course of habitat modification through *16 U.S.C.S §1539 (a)(1)(B).* This permission is granted in the form of a permit where, “such a taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* In the case at hand, Lear contacted the Fish and Wildlife Service’s New Union office to inquire whether she would be required to take additional procedural step’s in developing her property, due to the population of Karner Blue’s existing thereon. *R. at 8.* The Fish and Wildlife Service responded to her request informing her that she would need to apply

for an incidental take permit which would require the completion of both a habitat conservation plan, as well as an environmental assessment under the National Environmental Protection Act. Additionally, the Fish and Wildlife Service informed Ms. Lear that any successful HCP would include the procurement and continued maintenance of contiguous lupine habitat on an acre to acre basis.

A. Ripeness Requirements for Taking Claims Enumerated in *Williamson County*

The foundational case enumerating the ripeness requirements for any governmental taking's claim under the Just Compensation clause of the Constitution's fifth amendment is *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172. In *Williamson,* the Respondent on appeal sued their local zoning commission and its staff under a claim that application local zoning laws to a proposed subdivision constituted a taking under the Fifth Amendment's Just Compensation Clause. In analyzing whether the Respondent's taking's claim was ripe for adjudication, the Court observed a two-step threshold test.

The first of these two steps requires the court to analyze whether, "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172. The court explains that one of the potential benefits of this requirement was demonstrated in *Hodel* where the process of arriving at a final solution in that case could have yielded a mutually beneficial result without the necessity of judicial intervention. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264 (1981). This situation and the benefit it could present are analogous to the case at hand. Ms. Lear has failed to receive a final decision regarding a potential incidental take permit, which includes a failure to complete a habitat conservation plan as well as environmental assessment. This is

critical to demonstrating the lack of ripeness to her claim, as the process she would engage in to receive a final decision could potentially generate solutions that would be dispositive of this issue entirely. Although the petitioner is not required to exhaust all administrative options available, the adjudication scheme of administrative action does necessitate the generation of a decision from which the agencies actions could be evaluated as unlawful or inappropriate. *See FTC v. Standard Oil Co.,* 449 U.S. 232 at 243 (1980*).* Without exploring the potential solutions that would be generated in the process of completing a final decision for the property at issue, Lear's taking's claim is not ripe for adjudication.

The second step of the test utilized by the court in *Williamson* relates to the textual language of the Fifth Amendment's Just Taking's Clause itself. The court observes that, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." To summarize, the court holds that a Fifth Amendment taking's claim is not appropriate is not ripe for adjudication until the claimant assert's that a method of compensation is unavailable for the property regulation in question. Conversely, if the opponent of the claim can demonstrate that an adequate process for obtaining compensation exists which yield's just compensation when necessary, there can be no taking's clause based on the Fifth Amendment. The court recognized the ossification of this principle by citing the case of *Ruckelshaus v. Monsanto Co.,* in which a taking's claim was found not to be ripe due to the availability of a remedy in the statutory form of the Tucker Act. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984). In the present case, there has been no demonstration of an unavailability or inadequacy of either process or remedies to address a taking. As a result, until and unless the petitioner is able to demonstrate the unavailability and inadequacy of state taking's compensation mechanisms, the fifth amendment takings claim they assert is not ripe for adjudication.

B. The Inapplicability Of The Futility Doctrine, Lucas, and Palazollo

The first exception to the final decision requirement explained by the court in *Williamson* is the rule against "late created permit procedures", found in *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992). In the case of *Lucas,* the applicant sought to build homes upon two lots that he had purchased, only to be precluded by the passage of the Beachfront Management Act. S. C. Code Ann. § 48-39-250 et seq. The Beachfront Management Act presented an opportunity to seek a "special permit" allowing for an exception to the ban on construction, and although the applicant failed to pursue such a permit, the court found his claim was still ripe for adjudication. They arrived at this conclusion by holding that the "special permit" that the applicant could apply for would only to allow him to regain the property rights that he initially purchased with the land, and therefore it was required for adjudication of the taking's claim. This case is inapplicable to the present case however. Unlike *Lucas,* the application of the Endangered Species Act to Ms. Lear's property is not a development that occurred following her acquisition of the property. Rather, the record indicates that Ms. Lear approached the Fish and Wildlife surface to inquire about permit's that would be needed for the effect that construction would have upon the population of Karner Blue's. This demonstrates that not only was the Endangered Species Act not a "late created permit procedure," but that the applicant was well aware of a potential requirement to comply with permitting upon her acquisition of the property.

The futility doctrine has been established as an exception to the requirement's established in *Williamson,* which allows petitioners to bring to the court taking claims that would normally be dismissed as not ripe for adjudication. The United States Court of Claims had occasion to address the futility doctrine in the case of *Hage v. United States, 35 Fed. Cl. 17 (Fed. Cir. 2012).* Although *Hage is* persuasive and not binding upon this court, it is a clear and robust example of

the futility doctrine. In *Hage* the applicants sought a finding that they had suffered a taking at such a time that the state suspended water and ditch right-of-ways from their ranching operation, stripping it of all economic value. The state countered that the applicants had never applied for a permit for the use of the ditches and water under the Federal Land Policy Management Act. The court held however, that in reference to the lack of water on the ranch, "the law does not require plaintiffs to apply for a permit if the procedure itself…is so burdensome that it effectively deprives the property of value." This is again, not analogous to the case that is before this court. The record reflects that even without solicitation, Lear has already received an offer from the Brittain County Butterfly Society to receive compensation of $1,000 dollars a month for access to observe the Karner Blues. There is also a ready opportunity for potential development on the land if one were to engage in a water dependent use, which would allow for a fill permit under the Brittain County Wetland Preservation Law. These are merely two examples that are readily available from the record which demonstrate that the futility doctrine does not apply to the situation at hand, and therefore the takings claim filed by petitioner is not ripe for adjudication.

A third exception of sorts to the requirement of a final agency decision was created by the Supreme Court in the case of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In this case, the local resource management council created a regulation designating the property at issue as protected coastal wetlands. Following this designation, the petitioner in the case became the owner of the properties in question and consequently filed for and was denied a permit to fill in the property. The petitioner landowner filed an action in the state court and was denied relief in part due to a holding that his claim was not ripe. On appeal, the court observed that agency arrival at a final decision was critical to adjudication of an administration matter, because it provided a measuring standard by which the court could analyze whether the claimant had been

deprived of, "all economically beneficial use" of their property. In *Palazzolo*, the local resource management council was unable to permit any development of the property, and consequently the court held that, "once it becomes clear that the agency lacks discretion to permit any development, or it is clear the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." The situation before the court regarding Lear island is different than the situation in *Palazzolo.* In the case at hand, the extent of Lear's options to use the land in cooperation with the preservation of the Karner Blue's has not been explored, and as a result it is not clear that the FWS is unable to permit a valuable use of the land. Likewise, as no alternative development options, or any development options at all, have been explored, a statement that the permissible uses of the property are reasonably known would be pure speculation at this point in time.

III. THE RELEVANT PARCEL IS THE ENTIRETY OF LEAR ISLAND

The idea of conceptual severance was first coined by Margaret Jane Radin in *The Liberal Conception of Property: Cross Currents in Jurisprudence of Takings*, and refers to plaintiffs' attempts to conceptually sever their property physically, functionally, or temporally to show that a regulation diminishes a significant portion or 100% of the parcel's value. 80 Harv. L. Rev. 1165, 1192-93 (1967). Various factors have been considered to determine the relevant parcel by courts, like the deed, adjacency, single transaction, and nature of the regulation, with varying results. Angie Chang, *Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights*, 98 Cornell L. Rev. 965, 966 (2013). Conceptual Severance is not well understood or widely used in courts, and should not be considered in this case. Rather, because there are no leading decisions in the Supreme Court on the matter, the flexible approach suggested by FWS and Brittain County should be used in the

case at hand.

In the *Lost Tree* case, the Army Corps of Engineers denied the Lost Tree Village Corporation a commercial and real estate permit to fill wetlands on a 4.99-acre plat, along with a second plat, while the corporation owned various plots totaling approximately 1,300 acres that Lost Tree had purchased beginning in 1969 through the mid-1990's. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013). After the case had been appealed, the Federal Circuit Court stated that "the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation… the Supreme Court has not settled the question of how to determine the relevant parcel in regulatory takings cases." *Id.* at 1292. The majority, holding that the plots need to be considered together when deciding whether or not there is a taking, continues that although the Supreme Court has not settled this type of question, they have offered some guidelines, instructing that any takings analysis must focus on the parcel as a whole. *Id.* at 1292-93. The Federal Circuit court also stated that this requires "a 'flexible approach designed to account for factual nuances', in determining the relevant parcel where the landowner holds (*or has previously held*) *other property in the vicinity*" *Id.* at 1293, citing to *Loveladies Harbor v. United States* 28 F.3d 1171 (Fed. Cir. 1994) (emphasis added).

Not only is the 'flexible' approach preferred by the courts, but the Supreme Court's standards require it for its decisions to be followed. Additionally, the *Lost Tree* decision held that although the Army Corps was preventing action on approximately 58% of the lots, it was not enough to constitute a taking. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 at 1291 (2013). The small sections of the 10-acre that FWS and Brittain County are preventing Lear from building upon make up 10% of the entire Lear island plot, and do not constitute a taking.

Applying the facts of this case, which consider what the Supreme Court of the United States would do, is important in interpreting that the entire Lear Island is the relevant plot. This outcome makes issues four through seven irrelevant.

IV. LEAR'S TAKINGS CLAIM IS SHIELDED BECAUSE OF THE TEMPORARY NATURE OF THE ENDANGERED SPECIES ACT RESTRICTION DOES NOT RISE TO THE LEVEL OF COMPLETE DEPRIVATION OF ECONOMIC VALUE

Takings claims are grounded in the Fifth and 14th Amendments of the U.S. Constitution. The Fifth Amendment states that private property shall not be taken for public use, without just compensation. U.S. Const. amend. V. The 14th amendment applies this prohibition to the states, and pronounces that no state shall deprive any person of property, without due process of law. U.S. Const. amend. XIV. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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." *Armstrong v. United States*, 364 U.S. 40 at 49 (1960). However, the Supreme Court has been clear that the government would fail to exist if it were required to pay property owners for every change in the law. *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S. 393, 413 (1922). Consequently, the Supreme Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

In the present case, the alleged taking involves the application of the Endangered Species Act in conjunction with a municipal wetlands law. R at 4. Lear owns an irregularly shaped 10-acre parcel, known as the Cordelia Lot, on Lear Island in Brittain County, New Union. *Id*. at 5. The property in question has the last remaining habitat for the subpopulation of the Karner Blue Butterfly. *Id*. Lear seeks to build a single-family house for her own use on the island but is

restricted by both of the regulations on her property. *Id*. at 6. The FWS requires that a Habitat Conservation Plan be developed and an application for incidental take be submitted. *Id.* The County's Wetland Preservation Law prohibits Lear from filling in a wetland to build a house to circumvent the requirements of the ESA. *Id*. at 4.

"There is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). However, the Supreme Court has adopted two "per se" methods for proving that a take has occurred. The first "per se" take requires the physical occupation of private property by the government. *v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second "per se" requires a total deprivation of all economically viable use of the property by government regulation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). A taking for the purpose of the Fifth Amendment is considered on a case-by-case basis. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124. The Supreme Court has more readily found a taking when the governmental action can be characterized as a physical invasion by the government compared to an interference that arises from some public program adjusting the benefits and burdens of economic life to promote the common good. *Id*.

The Cordelia Lot is being regulated, instead of occupied by government, and therefore would need to show a total deprivation of all economically viable use of the property to be a per se takings. R. at 4. Although the Supreme Court has not developed any bright line rules, they have highlighted factors that may be relevant in discerning whether a taking has occurred. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124. Whether "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and the "character of the governmental action." *Id.*

To analyze the economic impact, the Supreme Court compares "the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction."' *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The Supreme Court has consistently held that the proper consideration for the "denominator" is the property as a whole. "'Taking' 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 Cent. Transp. Co. v. New York City*, 438 U.S. at 130. Thus the Cordelia Lot in question must be examined as a whole.

The whole parcel would include Lear's entire property interest in the estate. An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. *See* Restatement of Property §§ 7-9 (1936). So while the geographic characteristics of the property must be considered unsegmented, so does the duration of the property interest. This Court should analyze the Lear's entire property interest when considering what value has been taken from it. Lear's property interest in question to develop on her land is only a temporary. Without annual mowing for about ten years, the lupine fields on the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees. R. at 7. The forest would eliminate the Karner Blues' habitat and would result in the extinction of the New Union subpopulation of Karner Blues. *Id.* This would restore Lear's entire property interest in a matter of 10 years.

There have been cases where the Supreme Court has mandated compensation when a leasehold is taken and the government only temporarily occupies the property. *See United States v. General Motors Corp.*, 323 U.S. 373 (1945), *United States v. Petty Motor Co.*, 327 U.S. 372

(1946). However, these cases are distinguishable from the present case because they involved a government occupation instead of a regulatory taking. The Supreme Court has held that these two distinct forms of taking should be regarded as creating different precedents. “This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323, 122 S. Ct. 1465, 1479 (2002). Therefore, this Court should not use the temporary takings rulings for government occupation as binding or persuasive authority for a regulatory matter.

Contrary to cases involving government occupation, numerous courts have held that temporary land use restrictions were not takings. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 at 337 (2002) (Finding that a temporary regulatory taking is not a complete deprivation of economic use of a property); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004) (Holding that no regulatory taking existed where the government action did not deprive the relevant parcel of all economic value where plaintiffs made no showing of economic injury caused by a temporary taking.) *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) (Finding the plaintiff failed to allege a temporary taking of the four acres because the logging restriction was not permanent on its face or so long lived as to make any present economic plans for the property impractical.). Even with seemingly adequate precedent, the Supreme Court leery of developing clear rules has stated, “we simply recognize that it should not be given exclusive significance one way or the other. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 337.

Thus the temporal factor requires a return to the factors presented in the *Penn Central* holding. The first factor to examine is the economic loss from the regulation. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 at 124. Without conceding that Lear has exhausted her remedies, the possible value that has been taken from Lear is the ability to build a single-family house on the 10-acre property. If we assume that Lear, by nature of the ESA and the Wetland Preservation Law, is unable to build a home she has suffered economic harm. The fair market value without any restrictions is $100,000. R. at 7. There is no market in Brittain County for a parcel for recreational use that does not have the right to develop a residence. *Id.* The parcel also does not have any market in its current state as agricultural or timberland. *Id*. Unfortunately, Lear has not assessed the property following the denial of the permit under the Brittain County Wetland Preservation Law so it is unclear what the value of the property is now. *Id.*

The economic impact must be considered in light of Lear's investment backed expectations. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 at 124. Lear does not have investment-backed expectations outside of the property being used as an open field because of its historical use and because of the facts of the deed. R at 4-7. Since Lear Island was granted to Cornelius Lear in 1803, there has been no single-family dwelling built on the Cornelius Lot. *Id.* at 4-5. The island, including the Cordelia Lot, was used in a farming operation in the latter half of the nineteenth century. *Id.* at 5. The Cordelia Lot's nine acres of open field is the remnant of the historic farming operation. *Id.* The Lear's have continued to mow this area every year since the family quit using the parcel for agricultural uses in 1965. *Id.* This parcel has been open and undeveloped for over 100 years and has been nicknamed "The Heath" because it was kept open, unlike the rest of the island. *Id*. Neither the Endangered Species Act, nor the Wetland Preservation Law disturb the use of the property as it has been used for over a century. "So the

law does not interfere with what must be regarded as [Plaintiff's] primary expectation concerning the use of the parcel. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 at 136.

The nature of the deed also illustrates that there was never an expectation to build on the Cordelia lot. *See* R. at 5. In 1965, Lear Island was subdivided into three individual lots. *Id*. The Goneril Lot contained 550 acres and the Regan Lot contained 440, compared to the Cordelia lot containing 10 acres. *Id*. The lot sizes may not alone be determinative of the intended use of the lots, but the actions of King James Lear shows that the Cordelia Lot was not intended to be a residence. Before King James Lear passed away, he built a residence on the Regan Lot for use by his daughter. *Id*. This meant that single-family homes occupied both the Regan Lot and the Goneril Lot, where the homestead was located. *Id*. Instead of building a residence on the Cordelia Lot, King James Lear annually mowed nine acres to keep it an open field. *Id*. There should not be a compensable taking if Lear did not have the expectation of building a house on the lot. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (Holding the plaintiff did not show his reasonable investment-backed expectations were frustrated because the plaintiff could not have had reasonable expectations when he bought the property in 1973 that he would obtain approval to fill the wetland).

Even if this Court found that there existed an investment-backed expectation, Lear's loss is only temporary. Both dimensions of geography and time must be considered if the interest is to be viewed in its entirety. A permanent deprivation of Lear's use of the entire area is a taking of the parcel as a whole, whereas the temporary restriction from the current existence of the butterfly is not. The Cordelia Lot at a maximum is only suffering a regulation that will affect her property for ten years. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition

is lifted. *Agins* v. *City of Tiburon*, 447 U.S. at 263, n. 9 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'") (quoting *Danforth* v. *United States*, 308 U.S. 271, 285 (1939)). Once the government decides that the butterfly no longer exists on the Cordelia Lot, Lear will be free to develop the property. A ten-year delay in developing the land in the way that the land owner desires should not be considered "extraordinary" but rather an incident of ownership. There is no bright line determination that triggers regulations duration to equal a takings. "In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the 'temptation to adopt what amount to per se rules in either direction must be resisted.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 342 (*quoting Palazzolo v. Rhode Island*, 533 U.S. 606 at 636, (2001)).

Furthermore, the Cordelia Lot has not suffered a complete deprivation of economic value because the parcel is still valuable in other ways besides building a residence. In the spirited[1] dissent in *Lucas* by Justice Blackmun, he states that the Court's conclusion that there is a total deprivation of Lucas's property to be "almost certainly erroneous." Although his dissent is not binding on this Court it is persuasive. The petitioner can still enjoy other attributes of property ownership, including "the right to exclude others… picnic, swim, camp in a tent, or live on the property in a movable trailer." *Lucas v. S.C. Coastal Council*, 505 U.S. at 1044. Furthermore,

[1] Blackmun begins his dissent by stating, "[t]oday the Court launches a missile to kill a mouse."

State courts have frequently held that economic values exist, even if those uses are recreation or camping. See, *e.g., Turnpike Realty Co. v. Dedham*, 284 N.E.2d 891 (1972); *Turner v. County of Del Norte*, 24 Cal. App. 3d. 311 (1972), cert. denied, 409 U.S. 1108 (1973); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). This residual economic use if given even more value when you consider its scarcity. All the other portions of the island are covered in trees and do not provide the same ability to access the beach, camp, or picnic. There is an exceptional value in the Cordelia Lot based upon the existence of a subspecies of endangered butterfly. The Brittain County Butterfly Society has already offered Lear a rental fee to observe the butterflies on her property. R. at 7.

When looking to the standard of complete deprivation of economic value, it is clear that Lear's Cordelia Lot does not meet this threshold and therefore a takings claim should be barred. The temporal nature of the taking is just a single factor in the taking analysis, and when applied with the other factors it is clear that the Cordelia Lot does not suffer a complete deprivation of economic value for the parcel. In ten years or less, Lear will be able to build on the property. The temporary restriction of her ability to build is an assumed risk in property ownership.

V. LEAR'S TAKING CLAIM IS PREVLUDED FROM BEING A COMPLETE LOSS OF ECONOMIC VALUE BECAUSE BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER DEMONSTRATES A VALUABLE USE OF THE LAND WITH CURRENT REGULATIONS

With the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing there is evidence that there is not a complete loss of economic value on the Cordelia Lot. R. at 7. The Butterfly Society is just one illustration of land, which no structure can be built upon, can still be used for recreational purpose and valuable for preservation of views.

In the *Tahoe-Sierra Preservation Council* case, the Supreme Court held that their ruling in *Lucas* for a complete deprivation of all economically beneficial uses was limited to "the

extraordinary circumstance when no productive or economically beneficial use of land is permitted." In this case, there remains a productive or economical beneficial use of the land. Lear has already had at least one offer to rent the land for butterfly watching. R. at 7. Since this offer stands, there can be no argument that a complete deprivation has occurred.

The Supreme Court has indicated that it adheres to a strict definition of complete deprivation of economic value. *Palazzolo v. Rhode Island*, 533 U.S. 606, 632. In the *Palazzolo* case, the landowner owned around 18 acres and asserted that value was worth over $3 million prior to being made useless by development by stringent environmental regulations. *Id.* at 615-616. However, the Supreme Court found that the parcel retained some value even under the regulations. The Court ruled that where a regulation did not completely eliminate the economical beneficial use of a property, the Court would have to evaluate whether a taking occurred "depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Id.* at 632, citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124.

This returns this Court's analysis to the factor test outlined in Penn Central. Returning to the argument above, when viewing all the factors together, Lear was not deprived of all beneficial use. The permitted use is consistent with the current and historic use of the parcel. Lear did not have investment backed expectations to build a single family residence on the property. The regulatory taking is only a temporary inconvenience if Lear decides she does not want to mow the Cordelia Lot. In a manner of years, it will return to its natural wooded state and the butterflies will have vacated. Finally, the County Butterfly Society's offer to rent the parcel for wildlife viewing precludes a takings claim for complete loss of economic value, because

there exists a recreation value for the property. This recreational value is a scarce resource and has the potential to generate economic returns.

VI. PUBLIC TRUST PRINCIPLES PRECLUDE LEAR'S CLAIM FOR TAKING BASED ON DENIAL OF THE COUNTY WETLANDS PERMIT

As it stands, the public trust doctrines apply to the established Brittain County Wetland Preservation Law of 1982 on Lear's desire to fill and develop the under-water portion of her property. Thus why Lear was appropriately denied her permit in December of 2013 R. at 7. The "background principle" from *Lucas* and equal footing doctrine both apply in this case.

A. The District Court for the District of New Union incorrectly interpreted the Equal Footing Doctrine, which leans in favor of the State and County

When making its decision, the United States District Court for the District of New Union quoted *Shively v. Bowlby* in stating that the equal footing doctrine does not avail Brittain County, as a prior clear congressional grant gives superior title to the congressional grantee against an equal footing claim. *Shively v. Bowlby*, 152 U.S. 1 (1894); R. at 10. This interpretation is incorrect. The *Shively* court stated that

> Grants by congress of portions of the public lands within a Territory to settlers thereon, though bordering or 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. *Id.* at 58

Although owners of any particular land before statehood may have rights to that land after statehood, the court is clear when explaining that grants of that land that are with navigable waters does not change the right the State has to those shores and waters. The equal footing claim that New Union and through it, Brittain County holds, can succeed. Lear was appropriately banned from drudging the waters of the Cordelia plot. Because

New Union has equal standing over the interstate navigable waters within its borders, the background principle also has the ability to take hold.

B. The Background Principle from *Lucas* is applicable to the Brittain County Wetland Preservation Law

Although the Supreme Court in *Lucas* established that states could not take property without just compensation, an exception was also established in such cases. Such background principles must "do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the state's law of private nuisance, or by the state under its commentary power to abate nuisances that affect the public generally, or otherwise." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 at 1029 (1992). In the facts of that case, the Supreme Court held that South Carolina could overcome the claim if it could prove on remand that such background principles already placed restrictions on the landowner's title.

In 2009, another court decision clarified the concept of background principle. In *Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Environmental Protection* the United States Supreme Court considered a 1961 Florida law called the Beach and Shore Preservation (BSPA). *Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Environmental Protection*, 560 U.S. 702 (2009). Petitioner, an association of homeowners, challenged the constitutionality of the state in coordination with similar coastal permits to save sections of shoreline, claiming it deprived owners of their rights to accretion and water and a water boundary as a taking of the owner's property. *Id*. at 702-703. The Supreme Court agreed with the Florida Supreme Court, that the 1961 BSPA was considered a background principle of state property law, even if it affected the property owners' littoral rights, and was not considered a taking. *Id*. at 731. This should be

applied to New Union and the Brittain County regulations applying to Lear's dredge application being denied. Although the law did not exist at the time the property was granted to Cornelius Lear in 1803 (R. at 5), the Brittain County Wetland Preservation Law of 1982 within the state should be considered background principle, thus meeting the exception to the *Lucas* precedent.

These two findings preclude Lear's takings claim based on the denial of her County Wetlands Permit. Because the State and the County have domain over the wetland area, that allows the County the power to accept or deny her permit application. The denial of Lear's permit in this case does not constitute a complete taking, because it meets the *Lucas* background principle exception. As the majority in *Penn Central* aptly put it "[T]he submission that [plaintiff] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simple untenable." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 at 130 (1978).

VII. FWS ACTIONS THROUGH THE ENDANGERED SPECIES ACT AND BRITTAIN COUNTY WETLANDS PRESERVATION LAWS ARE CONSIDERED SEPARATE AND DO NOT COMPLETELY DEPRIVE THE CORDIELIA LOT OF ECONMIC VALUE

Lear's taking claim is not warranted, as discussed *supra* in arguments four and five. Additionally, the actions of the United States Forrest Service and Brittain County must be considered separate and distinct actions. Several arguments support this standing, including the possibility for Lear to still build and the retention of economic value.

A. Policy Analysis Dictates Why Federal and State Laws Should Be Considered Separate

As a general policy, setting a president that state and federal laws and regulations be considered one rather than separate simply should not be done. Any state law land use restriction with other federal laws may likely look like a taking, and that would mean that the state and/or federal government would be responsible for paying every single claim that came about from the

combination. The Tenth Amendment of the United States Constitution gives the powers not delegated to the federal government to the States. Those powers are meant to be complimentary, rather than in opposition. States would be left with no power to delegate laws if any federal act precluded any action by the state on that same topic.

Furthermore, Brittain County contends that it cannot be responsible for rules outside of its control. The only restriction it has created is the filling and dredging of the half acre cove area of the Cordelia Lot. The fact that the federal government has restricted access anywhere else has nothing to do with Brittain County's actions. The County would have restricted Lear's desire to fill the cove regardless of the actions of the federal government. Brittain County should not be held responsible for an entire economic taking when it has the power to deny such applications as Lear's. The area Brittain County is preventing from being developed is under water, while developable land is not being restricted for use by the County. This has been upheld by courts previously. *See, e.g.*, *Palazollo v. Rhode Island*, 533 U.S. 606 (2001) (finding that the existence of developable uplands can defeat a takings claim based on wetlands regulations affecting most but not all, of property). Brittain County has left both the area upland and the causeway available for Ms. Lear to build, and cannot be held responsible for anything but that decision.

B. The Cordelia Lot Retains Some Economic Value Regardless of the Action of Brittain County or the Federal Government

Second, Lear's property has not been voided of all economic value. The Brittain County Butterfly Society has offered to pay Lear $1,000 annual for the opportunity of conducting tours on her property. R. at 2, 7. The lower court stated that, because this amount is not enough to cover the property tax of the property, it is still considered a full economic taking. R. at 12. But, the lower court ignores several factors.

The first is that Ms. Lear has been in possession of this 10-acre plot since 2005, when it passed from her father to her. Until her interest in building and the beginning of these proceedings, the lot was vacant, not being used by anyone, while Lear payed full property tax without any type of compensation. Because she now wants to build on the previously undeveloped land, this may be considered land speculation, where a person comes to own a piece of land that they hope becomes of value at a later time, and is generally considered undesirable. *See, e.g. Penn Cent. Transp. Co. v. New York* City, 438 U.S. 104 (1978). Now, Plaintiff has been offered an amount a specific amount of money that she can use the land as is, but she has chosen to decline it.

Next, it is well established law that property can be taken for "public use". In *Lucas,* three requirements were discussed: 1. Degree of harm to public lands or adjacent property posed by the related activities, 2. The social value of such activities, 3. The relative ease with which the alleged harms can be avoided through measures taken by either the claimant or government. *Lucas v. S.C. Coastal Counsel,* 505 U.S. 1003 (1992). Further discussion of what constitutes a public use can be found in *Kelo v. City of New London*. This case outlines that property may not be taken for the sole purpose of transferring it to another private party, but that public use is retaining property for public interest and public use. *Kelo v. City of New London,* 545 U.S. 469 (2005). The public interest and use already exists for the Cordelia lot, through the protection of the endangered butterflies and the group of people willing to pay an annual fee to give tours of the island for the purpose of viewing the butterfly population. As Justice Brennan stated in *Penn Central*, a taking will not be readily found when a "public program adjusting the benefits and burdens of economic life to promote common good" is being done. *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 at 124 (1978).

CONCLUSION

The Fish and Wildlife Service have overstepped its bounds by applying the endangered species act to the butterfly population of Lear Island of an intrastate species, therefore Lear's claim against it cannot be ripe. Plaintiff has not been denied of all economic value of her property by Brittain County, through both the money offered to her for access to view the butterflies, as well as alternatives for locations to build. The County's laws regarding filling permits are considered a background principle, and thus an exception to Lear's takings claims. Therefore, this Court should DENY that the ESA is a valid exercise of congress commerce power, that there has been an uncompensated takings of Plaintiffs property, and finally that the Cordelia Lot has been completely deprived of all economic value.

Respectfully Submitted,

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