Docket No. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
***Plaintiff–Appellee–Cross Appellant*,**

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

and

BRITTAIN COUNTY, NEW UNION,
***Defendant–Appellant*.**

Appeal from the United States District Court for the District of New Union in No. 112-CV-2015-RNR, Judge Romulus N. Remus

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

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STATEMENT OF JURISDICTION

Appellant Cordelia Lear commenced this action in February of 2014, seeking a declaratory judgment that Endangered Species Act 16 U.S.C. §§ 1531-1544 (2012) is an unconstitutional exercise of congressional legislative authority or seeking just compensation from the United States Fish and Wildlife Service and Brittain County, New Union for a regulatory taking of her property. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (2012) and issued a final judgment on June 1, 2016. The U.S Fish and Wildlife Service and Brittan County, New Union filed a timely appeal on June 9, 2016. Cordelia Lear filed an appeal thereafter on June 10, 2016. This court has jurisdiction to review this case pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Is the Endangered Species Act, when used to prevent the take of an intrastate subpopulation of a federally listed endangered species, a valid exercise of Congress' power to regulate interstate commerce pursuant to Article I section 8 of the United States Constitution?

II. Is this action ripe for review if Cordelia Lear has not filed for an Incidental Take Permit, as is required under 16 U.S.C §1539(a)(1)(B), and therefore failed to exhaust all available administrative remedies?

III. When reviewing the takings claim, should the court consider the relevant parcel of land to be the entirety of Lear Island, as granted by an Act of Congress in 1803, as opposed to the Cordelia Lot, as subdivided by King James Lear in 1965?

IV. If the Cordelia Lot is the relevant parcel, is the takings claim precluded by the fact that failure to maintain the area will result in the natural destruction of the butterfly habitat and therefore render the land available for development?

V. If the Cordelia Lot is the relevant parcel, is the takings claim precluded by the fact that the Brittain County Butterfly Society offered to pay $1,000 annually in rent for wildlife viewing, thus preserving the economic value of the parcel?

VI. If the Cordelia Lot is the relevant parcel, is the takings claim based on the denial of Lear's county wetland permit, precluded by the principles of the Public Trust Doctrine inherent in the title of the land?

VII. If the Cordelia Lot is the relevant parcel, should the U.S. Fish and Wildlife Service and Brittain County, New Union be held liable for the complete deprivation of the economic value of the property if neither the federal nor county prohibitions, when standing alone, fully preclude development?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Lear Island is currently home to the only remaining population of the Karner Blue Butterfly in the state of New Union. R. at 5. The Karner Blue larvae can only survive on the leaves of blue lupine plants which cover a portion of Lear Island known as the "Heath." *Id*. As Karner Blues do not migrate, any disturbance of this habitat would result in the death of the Karner blues which were federally listed as an Endangered Species on December 14, 1992. *Id*.

Lear Island was granted by an Act of Congress to Cornelius Lear in 1803 and included a title in fee simple absolute to Lear Island and "all lands under water within a 300 foot radius of the shoreline of said island." *Id*. at 4-5. An additional grant was given which included the lands

under water in the shallow strait that separates the island from the mainland. *Id*. at 5. Cornelius Lear and his descendants have occupied the island since 1803 and have utilized the land as a homestead as well as for farming, hunting and fishing. *Id*. In the early twentieth century the family also constructed a causeway in order to connect the island and the mainland. *Id*.

In 1965, King James Lear possessed of the entirety of the original 1803 grant and divided the island into three separate plots, creating one lot for each of his daughters. *Id*. With the approval of the Brittain Town Planning Board, King James split the property into the 550-acre "Goneril Lot", the 440-acre "Regan Lot" and the 10-acre "Cordelia Lot." *Id*. The Brittain Town Planning Board approved the division of land, and determined that each lot could be developed with at least one single-family residence. *Id*. King James then deeded each of the lots to his daughters, and reserved a life estate in each lot for himself. *Id*. Before his death in 2005, King James constructed a residence on the Regan Lot for use by his daughter Regan, while continuing to live in the homestead located on the Goneril Lot. *Id*.

The remaining Cordelia Lot consists of a 40-foot wide, 1,000 foot long access strip, one acre of emergent cattail marsh and the nine acres of uplands. *Id*. The access strip and the uplands are currently covered with the Karner Blue's essential blue lupine habitat. *Id*. The land is referred to as the "Heath" because unlike the rest of the land which naturally became wooded, the Heath was kept open with annual mowing each October. *Id*. In 2012, Plaintiff Cordelia Lear sought to build a house on the Cordelia lot and contacted the U.S. Fish and Wildlife Service (FWS) to inquire about whether the presence of the Blue Karner population would require any permits. *Id*. Lear was then informed that any disturbance of the blue lupine habitat would constitute a "take" but she did have the option of obtaining and Incidental Take Permit (ITP) in accordance with Section 10 of the Endangered Species Act (ESA) (16 U.S.C. § 1539 (2012)). *Id*. at 6.The

formulation of an ITP would require Lear to develop a Habitat Conservation Plan (HCP) for the Karner Blues, and an environmental assessment pursuant to the National Environmental Policy Act. *Id*. An acceptable HCP would require the provision of additional lupine habitat on an acre for acre basis which includes any disturbance of the access strip. R. at 6. Lear would also be required to maintain the lupine habitat through mowing. *Id*. If Lear did not continue to mow the Heath, the land would naturally convert to a successional forest of oak and hickory trees, destroying the Blue Karner's habitat. *Id*. at 7.

Following Lear's inquiry the U.S. FWS sent Lear a letter confirming that her entire property was critical Karner Blue habitat and that any disturbance outside of the annual mowing would constitute a "take." *Id*. at 6. The letter also invited Lear to submit an application for an ITP and provided her with information in the FWS's Conservation Planning Handbook that detailed how to develop a HCP. *Id*. Instead of pursuing an ITP, Lear chose to develop and alternative development plan (ADP) which would not disturb the Blue Karner habitat. *Id*. at 7. The ADP proposed filling in the cove marsh located on the lot in order to create a building site that was free of blue lupines as well a separate access road to the mainland so as not to disturb the existing access strip. *Id*. Because of the non-navigable status granted to this wetland by the Army Corps of Engineers, no federal approvals would be required for this project. *Id*.

The Brittan County Wetlands Board denied Lear's application based on a provision of the Brittain County Wetland Preservation Law of 1982 which states that permits to fill wetlands would only be granted for a water dependent use. *Id*.

Lear estimates that without the restrictions that are in place, the value of the Lot property is approximately $100,000 with $1,500 in annual property taxes. *Id*. However, the property has not been reassessed since the denial of the wetlands permit. *Id*. The Brittain County Butterfly

Society offered to pay Lear $1,000 annually for the privilege of viewing the butterflies on her property. *Id*. Lear rejected the offer and commenced this action in February 2014. *Id*. Lear seeks a declaration that the ESA was an unconstitutional exercise of congressional legislative power or that FWS and Brittain County compensate her for performing a regulatory taking of the Cordelia Lot. *Id*.

II. PROCEDURAL HISTORY

On June 1, 2016 the United States District Court for the District of New Union ruled that the ESA is a valid exercise of Congress' commerce power when applied to an intrastate subpopulation. *Id*. at 1. However, the court found that the application of the incidental take prohibition and the Brittain County Wetlands Preservation Law constituted a taking of Lear's property without just compensation. *Id*. at 1-2. The court awarded Lear $10,000 in damages against the U.S. Fish and Wildlife Service and $90,000 in damages against Brittain County. *Id*. at 12. The U.S. Fish and Wildlife Service and Brittain County appealed this judgment on June 9, 2016; thereafter, Lear duly filed notice of appeal on June 10, 2016. *Id*. at 1.

STANDARD OF REVIEW

A question of mixed law and fact exists where "primary facts are undisputed and ultimate inferences and legal consequences are in dispute." *Suzy's Zoo v. Commissioner*, 273 F.3d 875, 878 (9th Cir. 2001). When reviewing "mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles" the reviewing court must apply a de novo standard. *Smith v. C.I.R.*, 300 F.3d 1023, 1028 (9th Cir. 2002). Further, "[s]tanding, ripeness and mootness are questions of law that [are reviewed] de novo." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) (Citing *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (standing); *California ex rel.*

Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1010 (9th Cir. 2009) (ripeness); *Siskiyou Regional Educ. Project v. U.S. Forest Serv*., 565 F.3d 545, 559 (9th Cir. 2009) (mootness)). The constitutionality of a statute is also reviewed *de novo*. *United States v. Pereleman,* 658 F.3d 1134, 1135 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

The fact that the Karner Blue butterfly population at issue is wholly intrastate and that the regulations protecting their habitat are not economic in nature is irrelevant. *Gonzalez v Raich* established that Congress has the authority to regulate "purely local" activities belonging to a class of activities that have a substantial effect on interstate commerce. Congress can also regulate intrastate activities where failure to do so would weaken its regulation of the interstate market of that commodity. The take prohibition in the ESA is a constitutional exercise of Congress' power because the protection of a species habitat restricts its entrance into the "channels of interstate commerce" and therefore has a "substantial effect on interstate commerce" as it relates to the trafficking of endangered species. Further, by restricting Lear's ability to build on certain parts of her property, the take prohibition "substantially" affects the interstate market for building materials. However, as Lear has yet to file for an ITP, which is expressly required by the ESA, the U.S. Fish and Wildlife Service has not had the opportunity to "reach a final decision" regarding the "extent of permitted development on [her] land.' Thus, she has not exhausted all available administrative remedies and her case is not ripe for review.

For purposes of the takings analysis, the relevant parcel of land is the entire 1,000 acres of Lear Island as it was granted to Cornelius Lear in 1803. *Penn Central* dictates that "takings jurisprudence, does not divide a single parcel into "discrete segments," but rather, examines the interference of rights with "the parcel as a whole," considering how governmental regulation

burdens "investment-backed expectations" of the property. Given that the Cordelia Lot was gifted to Lear, she has no investment-backed expectations of the property, and the Court must consider the expectations at the time of the 1803 grant, which may still be actualized today.

Lear's takings claim cannot advance if the Blue Karner habitat would naturally be destroyed in ten years. This natural destruction of the Blue Karner's habitat would remove ESA regulations from the Lot, which makes the regulatory effect temporary. *Per se* takings have not been found when the regulatory effect has a definite end. Additionally, when temporary takings have been recognized there must exist an extraordinary delay in the agency decisionmaking process. The only decision making process under the ESA applicable to this situation was the ITP process, which was not utilized. Therefore, there could not have been an extraordinary delay in a process that was not utilized and no temporary taking can occur. It was also not inappropriate for the FWS to rely on this natural reclamation of critical habitat to show the temporary nature of the regulatory effect on the Lot. Such a natural process is not prohibited under the ESA and does not contradict the goal of the act.

The claim that Lear suffered a *per se* taking for a complete loss of the economic value of her land is uncompelling. The facts of the case show that the Brittain County Butterfly Society offered Lear $1,000 dollars annually to use the Lot in its current condition. This alone shows that the Lot is not deprived of *all* economically beneficial or productive use, which would bar the takings claim. Additionally, the Court must consider all possible sources of economically beneficial or productive use of the Lot. When the Court considers all possible sources in conjunction with the fact that Lear can still develop her property with permits issued under both the ESA and Wetlands Preservation Law, it becomes clear that there is at least some

economically beneficial or productive use of the Lot that would cause the *per se* takings analysis to fail.

Further, Lear's claim of a taking by the denial of a county wetlands permit to fill the cattail marsh in the cove of property is precluded by principles of the public trust doctrine. The equal footing doctrine confers authority upon New Union to hold in trust all waters that are navigable in fact for public benefit. This right may not be superseded by a pre-statehood conveyance of land.

The ESA and Wetlands Preservation Law allows development on the Lot which would not result in a complete loss of economic value. Each law individually allows unrestricted development on the part of the Lot that they do not regulate. These laws cannot be considered jointly to determine whether they allow development because doing so would too greatly increase the scope of the *per se* takings doctrine. Even if the laws were considered jointly, the availability of permitted development under both regulatory schemes shows that each regulation permits development and would cause the *per se* takings analysis to fail.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF THE COMMERCE CLAUSE WHEN APPLIED TO THE INTRASTATE SUBPOPULATION OF THE KARNER BLUE BUTTERFLY BECAUSE CONGRESS HAS THE AUTHORITY TO REGULATE 'PURELY LOCAL ACTIVITIES'

Although the Karner Blue butterfly population in this case is entirely intrastate, "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce is firmly established". *Gonzales v. Raich*, 545 U.S. 1, 2 (2005). Further, "Congress can regulate purely intrastate activity that is not itself 'commercial,' *i.e.,* not produced for sale, if it concludes that failure to regulate that

class of activity would undercut the regulation of the interstate market in that commodity." *Id.* Section 9(a)(1) of the ESA prohibits "significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering" of endangered species. 16 U.S.C. §1538 (2012). This prohibition is an integral part of Congress' ability to regulate interstate trafficking in endangered species. Thus, if the integrity of the ESA is to be upheld, the government must be able to regulate not just those endangered species that migrate over state lines but all species classified as endangered.

The relevance of the take prohibition in the ESA is rooted in Congress' ability to regulate interstate commerce. The Supreme Court in *United States v. Lopez* explained that Congress has the authority to regulate "the use of the channels of interstate commerce … and … those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1045 (D.C. Cir. 1997). If Congress is to efficiently regulate the channels of interstate commerce where the transport of endangered species over state lines is involved, they must be able to "secure the habitat of the species from predatory invasion and destruction" *Id* at. 1047. In addressing the relevance of activities of "purely local character" the Court explained that "if it is interstate commerce that feels the pinch, it does not matter how local the operation with applies the squeeze." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The failure to protect the Karner Blue population on Lear Island would result in the decrease in the overall population of Karner Blues and therefore would defeat the purpose of the species being listed and undermine the ESA.

Congress may also regulate interstate commerce where the activity they seek to regulate has a substantial effect on interstate commerce. Such activities may "be reached by Congress if it

exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Nat'l Ass'n of Home Builders,* 130 F.3d at 1049 (quoting, *Lopez*, 514 U.S. at 556). In tailoring this standard to legislation that is not facially commercial in nature, the D.C. Circuit court explained that "[w]hen ruling on a Commerce Clause challenge, we must determine, as always, 'whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.' " *Id*. at 1051–52. In the case at hand the lower court rightfully noted that the prohibition against a "take" of the Blue Karner habitat substantially affected plaintiff's ability to build a house whose materials would no doubt be a product of interstate commerce. This reasoning is directly in line with the purpose of section 9(a)(1), specifically "to ensure that 'growth and development,'… would not be at the expense of the conservation and protection of a variety of species, injury to which would have equally deleterious consequences for interstate commerce." *Id*. at 1056. In light of this, the "take" prohibition substantially not only affects interstate commerce but Congress had a rational basis for ensuring that it would.

II. LEAR'S CASE IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE SHE FAILED TO FILE AN INCIDENTAL TAKE PERMIT AND THEREFORE DID NOT EXHAUST ALL ADMINISTRATIVE REMEDIES.

Because Lear has yet to file for an ITP, an administrative procedure required by Section 10 of the ESA, she has not exhausted all administrative remedies and there is no judicially reviewable final action.16 U.S.C §1539 (2012). The Federal Circuit, stated that "[t]he general rule is that a claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004). Further, "[a] final decision does not occur until the responsible agency determines the

extent of permitted development on the land." *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). Lear did not file an ITP as instructed by the U.S. Fish and Wildlife Service (FWS) upon her inquiry, and as such the FWS had no opportunity to make a "final decision regarding her application" or determine "the extent of permitted development on the land." In fact, the only action Lear did take was to create an Alternative Development Plan (ADP) which she sent to the Brittain County Planning Board. Essentially, Lear is either asking for the review of a decision FWS was not given an opportunity to make or of one in which FWS did not participate.

The lower court relied on *Palazzolo v. Rhode Island* for its proposition that where the government has a policy of denying the type of permit sought by the claimant, the claimant may be excused from performing an act they believe to be futile. However, the U.S. Fish and Wildlife Service showed no indication of an intention to deny Lear's permit. In fact, upon receiving an inquiry from Lear, Agent L. E Pidopter provided the exact criteria Lear needed to meet in order to have the required ITP approved. The FWS further showed its willingness to help Lear develop a successful ITP by referring her to the FWS's Habitat Conservation Planning Handbook in an unsolicited follow up letter. While it is true that "[w]hether an action is barred by failure to exhaust administrative remedies is within the discretion of the trial court" *Silver v. Babbitt*, 924 F. Supp. 976, 987 (D. Ariz. 1995), this discretion is typically exercised where an agency has a history of denying the claimants application or where there are no formal administrative remedies available. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *See also McGuire v. U.S.*, 707 F. 3d 1351 (Fed. Cir. 2013). The trial court should not use its discretion to act in contravention to the purposes of the exhaustion doctrine which include: "the avoidance of premature interruption of the administrative process", the development of "the necessary factual background on which decisions should be based" and ensuring the agency has "the first chance

to exercise [its] discretion or to apply [its] expertise". *McKart v. United States*, 395 U.S. 185, 194 (1969). It is also "generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages". *Id.* Thus, in concluding that Lear's case was ripe for judicial review, the lower court deprived the agency of its chance to perform one of its core functions and impermissibly interfered in the administrative process.

III. THE RELEVANT PARCEL OF LAND IS THE ENTIRETY OF LEAR ISLAND, NOT A "DISCRETE SEGMENT" OF THE PROPERTY.

To determine whether the U.S. Fish and Wildlife Service, or Brittain County have violated the Fifth Amendment of the Constitution by issuing a taking of the Lear property, the Court should concentrate its focus away from the discrete segment of the Cordelia Lot, and instead examine the entirety of Lear Island, as it was granted to the family by Congress in 1803.

The Fifth Amendment of the Constitution states that no private property shall "be taken for public use, without just compensation." U.S. Const. amend. V. This provision of the Constitution was implemented 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, 49 (1960). In *Penn Central Transportation Co. v. City of New York,* the Court explained that there are both physical, and regulatory takings, and that "a 'taking' may more readily be found when the interference with a property can be characterized as a physical invasion by government." 483 U.S. 104 at 124. However, when it cannot, a regulatory taking may exist when the government executes laws or programs that "adversely affect recognized economic values" of property. *Id.*

A. The Court has long rejected notions of 'conceptual severance,' and instead, applies a 'flexible approach' to assess the value of the 'parcel as a whole.'

The Court should examine the entirety of Lear Island, as it was granted by an act of Congress in 1803, as the relevant parcel of land for determining whether the ESA and Brittain County Wetlands Preservation Law restrictions allow for some residual economic use of the property. In *Penn Central* the Court explained that, "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." 438 U.S. at 130. Rather, when deciding whether a governmental action constitutes a taking, the Court looks, "both on the character of the [government] action, and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* See also *Palazzolo v. Rhode Island,* 533 U.S. 606, 626 (2001); *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Regulatory Planning* Agency, 535 U.S. 302, 330 (2002).

The Court applies the "ad hoc, factual inquiries" set forth in *Penn Central* on a case-by-case basis, to set up a flexible approach. *Penn Central* 438 U.S. at 130. See also *Tahoe-Sierra* 535 U.S. at 326 . The United States Court of Federal Claims has rejected the notion of a "conceptual severance, under which the takings analysis could be applied only to the portion of a larger property most directly burdened by the regulation." *Brace v. United States* 72 Fed. Cl. 337, 348 (2006). If implemented in the present case, the theory of "conceptual severance" would sequester the Cordelia Lot as a discrete segment of Lear Island, and require the court to analyze the alleged taking in isolation from the greater value of the property. However, the proposition of applying the theory of "conceptual severance" is "unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases [the Court] must focus on 'the parcel as a whole.'" *Tahoe-Sierra* 535 U.S. at 331. This "parcel as a whole" test "requires [the court] to compare the value that has been taken from the property with the value that remains of the property," and "where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the

bundle' is not a taking because the aggregate must be viewed in its entirety." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987) (quoting *Andrus v. Allard,* 444 U.S. 51 (1979)).

Rather than isolate the Cordelia Lot from the aggregated property, the Court must take into account the value of the the Regan and the Goneril Lots that comprise the remainder, and majority, of the island. This Court should then consider (1) the nature of the government action that restricts the use of the relevant parcel, and (2), the economic impact of the regulation, "particularly the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. If the action burdens some economic expectations, but promotes public good, the Court will find that a taking did not occur. *Id.* at 127. Additionally, The United States Court of Claims has applied a "flexible approach," designed for "factual nuances" and reasoned that, despite restrictions on one portion of the land, "remaining land uses are plentiful and [their] residual economic position very great." *Deltona Corp. v. United States,* 228 Ct. Cl. 476, 490. See also *Loveladies Harbor, Inc. v. United States* 28 F.3d 1171, 1181.

While the take prohibition of the ESA and the Brittain County Wetlands Conservation Law does restrict the use of the Cordelia Lot, the preservation of the endangered subpopulation of the Karner Blue butterfly, and the Brittain County wetlands are undoubtedly some public good. Further, when considered with the Goneril and Regan lots, 90% of Lear Island is not affected whatsoever by the ESA or wetlands restrictions, and the relevant parcel, considered in the aggregate, retains the potential for "plentiful" use.

B. <u>The court's analysis should be based on Lear's ancestors' "investment-backed expectations" of the entirety of Lear Island at the time of acquisition in 1803, not the gifted Cordelia Lot.</u>

When a property owner wants to keep possession of a title in fee simple for himself for the time being, but convey it to another at a later time, the property owner may give a present gift of a future interest, and retain a life-estate for himself. Restatements (Third) of Prop.: Wills and Other Donative Transfers §6.3 (Am. Law Inst. 2003). When King James Lear divided Lear Island into three parcels for each of his three daughters, he retained a life-estate in each deed, therefore conveying only a future interest in the property, redeemable only upon his death. R. at 5. Such conveyance is considered a gift. *Id*. Cordelia, receiving her 10-acre parcel as a gift, made no investments into the property, thus, she has no investment-backed expectations to the property. While it is possible that she may consider the annual mowing of The Heath an investment, because this mowing has kept The Heath open for several decades, it would be a stretch to say that this was done so with the expectation that one day, a single-family residence might be built.

Because Cordelia has no investment-backed expectations in the property, the court must look at the investment-backed expectations of the island as a whole, as it was conveyed in the 1803 congressional grant. Since the 1803 congressional grant, Cornelius Lear and his descendants used the island "as a homestead, farm, and hunting and fishing grounds." R. at 5. Until 1965, even, the island was used as a productive farm, and produce was carried first by boat to the mainland, then by road, after the construction of a causeway. *Id.* Today, though the land is no longer used for agricultural purposes (by choice of the family, not by regulations upon the property), the Homestead still stands on the Goneril Lot, and another residence stands on the Regan lot. *Id.* The Lear family is still able to use the island as a homestead, farm, hunting, or fishing ground. Thus, the investment-backed expectations of the property have not been burdened under the *Penn Central* test.

C. The Lear family has exploited the entirety of Lear Island since 1803, and cannot claim that it has been deprived of all economic value only after subdividing the property.

To consider any discrete segment of Lear Island without considering it as compared to the economic history and potential of the property as a whole would be indefensible. In *Penn Central*, the Court stated that, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130. The court explained that it would be a grave error to find a taking "whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Id*, n. 27. Further, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id*. at 127. The *Penn Central* Court noted that, "in instances in which a state tribunal reasonably concluded that the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of the land, this court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Id* at 125.

The Lear Family exploited the resources inherent in the entirety of the island, to such an extent that they have destroyed any other option that would provide for a contiguous habitat for the Karner Blue butterfly. R. at 6. Though the use of the Cordelia Lot has been restricted, the nature of the governmental action that restricts it (i.e., preventing the take of the Karner Blue butterfly) is absolutely an effectuation of a substantial public purpose. It would be untenable, counter to all takings case law and policy, and to the purpose of the ESA, for this Court to consider this government action a taking only after the family has destroyed any other feasible habitat for the Karner Blue subpopulation.

IV. LEAR'S TAKINGS CLAIM IS PERCLUDED BY THE FACT THAT THE KARNER BLUE WOULD NATURALLY BE DESTROYED IN TEN YEARS BECAUSE *PER SE* TAKINGS CANNOT EXIST WHEN A REGULATION'S EFFECT ON A PROPERTY IS TEMPORARY.

Lear relies on the *per se* regulatory takings claim for complete loss of economic value set out in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). *Per se* regulatory takings may not exist when the effect of the regulation is temporary. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

A. The regulations only place a temporary loss of value which cannot result in a *per se* taking because there has been no extraordinary delay by FWS.

There has been a genuine dispute over whether or not a *per se* taking can be temporary. The Supreme Court has held that a temporary, thirty-two month moratorium on development was not enough to constitute a *per se* taking. *Id*. In its decision, the Supreme Court expressed that it is inappropriate to create a judicial rule for temporary *per se* takings stating that "[a] rule that required compensation for every delay in the use of property…should be the product of legislative rulemaking rather than adjudication." *Id*. at 335. The Supreme Court's decision to not create a temporary *per se* takings rule while they had the chance shows that the Court was not fond of the prospect of allowing temporary takings under the *Lucas* test. While the exact implications of *Tahoe-Sierra*'s effect on temporary *per se* takings has been a point of contention among lower courts, the general pattern among the courts is that the temporary nature of a regulation is a factor to be considered when the multi-factor *Penn Central* analysis is implicated. See *Sansotta v. Town of Nags Head*, 97 F. Supp. 3d 713 (E.D.N.C. 2014) (temporary taking only discussed in the context of a *Penn Central* analysis); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004) (same); *Sartori v. United States*, 67 Fed. Cl. 263 (2005) (same). Lear has only relied on a *per se* taking claim under *Lucas* in her complaint which does not allow the Court to consider

the *Penn Central* multi-factor takings analysis. See R. at 8 n.3. Therefore, the Court is limited in its consideration of the length of time of the imposed restrictions resulting from the ESA in its analysis.

If the theory of temporary takings were applied to the type of *per se* taking in this case then the length of the regulatory effect alone would not automatically allow for a takings analysis. See *Sartori v. United States*, 67 Fed. Cl. 263 (2005) (nine year regulatory effect was not alone sufficient to prove a temporary taking). "[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a [temporary] regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 342. In addition to a significant duration of the restriction, there must also be an "extraordinary delay." See *Tahoe-Sierra*, 535 U.S. at 332; *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001); *Seiber v. United States*, 364 F.3d 1356, 1364 (Fed. Cir. 2004). "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay…cannot be considered as a 'taking'". *Tahoe-Sierra*, 535 U.S. at 332 (citing *Agins v. City of Tiburon*, 447 U.S. 255 at 263, n. 9 (1980)). This extraordinary delay must occur during "the process of governmental decisionmaking." *Id*.; See also *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993).

The type of governmental decision making process that is generally analyzed for determining whether there is an extraordinary delay is a permitting process. See *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). This decision-making process is appropriate in the current case since the only governmental decision making process available is the ITP process under the ESA. However, in order for there to be an unreasonable delay in the ITP process, Lear must have actually began the process, which she has failed to do. There can be

no extraordinary delay when the only decision-making process that can result in a delay has not been sought. Therefore, even if the Court were able to apply the theory of a temporary taking to a *per se* takings claim, it would fail because there is no extraordinary delay in the decision-making process.

B. It was not inappropriate for the FWS to rely on natural reclamation of critical habitat to show that the ESA's effect was temporary because the ESA does not prohibit such effects.

The District Court noted "the irony of the FWS relying on the prospective extinction of the very subpopulation of Karner Blues it is fighting to protect as an argument against finding a taking of Plaintiff's property," in its analysis of the temporary nature of the regulatory restrictions. R. at 10. This statement shows that the District Court had a fundamental misunderstanding of the laws in their opinion.

Under ESA § 4(a)(3)(A) (16 U.S.C. § 1533) the FWS may designate critical habitat for endangered species. This critical habitat designation has no effect on any non-federally related project or individual. There is no prohibition in the ESA against a private citizen destroying critical habitat. Although ESA §9(a)(1) (16 U.S.C. § 1538) prohibits the "take" of any endangered species, which under ESA §3(19) (16 U.S.C. § 1532) means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," this would require an action by Lear. Destroying the critical habitat by inaction does not violate any provision of the ESA. Lear would not actively "take" the Karner Blue by not mowing the Heath, but instead leave its critical habitat to develop as it would without human interference. This type of natural progression is not violative of the ESA and is in fact more in-line with the goal of the act to reduce human interference on nature. While the FWS would prefer to keep the critical habitat intact, this set of

events would provide Lear an avenue to legally remove her land from the ESA's jurisdiction, which makes the effect temporary.

V. BRITTAIN COUNTY BUTTERFLY SOCIETY"S OFFER TO PAY LEAR $1,000 ANNUALLY PERCLUDES THE TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE BECAUSE IT IS EVIDENCE THAT THE LOT HAS SOME ECONOMIC VALUE.

The Supreme Court has outlined the requirements for a *per se* taking in *Lucas*. 505 U.S. 1003 (1992). The Court held that a *per se* taking can only exist when "regulation denies *all* economically beneficial or productive use of land." *Id.* at 1019 (original emphasis).

A. The Brittain County Butterfly Society's offer to pay Cordelia Lear $1,000 dollars annually shows that there is some economic value to the lot.

The Lot cannot be deprived of all value if the Brittain County Butterfly Society offered Lear $1,000 annually to use it. The Supreme Court in *Lucas* stated that a *per se* regulatory taking can only exist when "regulation denies *all* economically beneficial or productive use of land." *Id.* There can be no taking if the Lot retains *any* economically beneficial *or* productive use of land. *Id.* at n. 8. This simple and broad requirement to prevent the *per se* takings claim is the main reason that *Lucas* has been rarely, if ever, successfully applied to show a *per se* taking exists. See *Tahoe-Sierra*, 535 U.S. at 330 (holding from *Lucas* is limited and can only be applied in an "extraordinary circumstance"). As long as one lone, solitary stick remains in Lear's bundle of rights then the test under *Lucas* fails. The Brittain County Butterfly Society's offer to pay $1,000 annually to use the land for viewing the butterflies is an economically viable and productive use of the Lot. Lear would receive $1,000 dollars annually to continue doing what she is doing now and it would provide an educational and aesthetic benefit to the Brittain County Butterfly Society, which shows both economic benefit and productive use of the Lot.

The benefit of the Brittain County Butterfly Society's offer would obviously satisfy the requirement under *Lucas* for showing that the Lot was not deprived of *all* economically beneficial or productive use. Lear does not contest that the $1,000 does not present a value, however she contends that it must be balanced against the $1,500 in property taxes that she must pay on the lot. No court has ruled that any economic benefit must be balanced against possible taxes on the property. Indeed any court that would hold that such a balance was necessary would be misreading the exact language of *Lucas.* The Supreme Court specifically stated and has reiterated over and over again that a regulation is a *per se* taking only when it "denies *all* economically beneficial or productive use of land." *Id*. at 1019. The Supreme Court did not state that a *per se* taking occurs when regulation denies economically beneficial or productive use of land that sufficiently make up for the property taxes assessed on the property. By the Supreme Court's exact language, the mere existence of an economically beneficial or productive use bars a *per se* takings claim. Therefore, the mere existence of the Brittain County Butterfly Society's offer to pay for the use of the Lot bars any *per se* taking claim under *Lucas*.

B. <u>The Lot can still have value besides the Brittain County Butterfly Society's offer that can be used to preclude the claim for complete economic loss.</u>

Even if the offer of $1,000 from Brittain County Butterfly Society alone does not prove that there is an economic value to the lot, that offer is not the only source of economic value. The District Court for the District of New Union failed to consider all sources of revenue when it went through its per se takings analysis. The District Court only considered the annual payment of $1,000 offered by the Brittain County Butterfly Society in reaching its conclusion that the lot was deprived of all economic value. However, the Court was required to consider all possible sources of economic value, not just the single possibility offered by Lear. See *Lucas*, 505 U.S. at 1026, n. 13 (in order to determine that a property is devoid of any and all economic value then all

possible sources of value must be considered). While this analysis may look at factors such as the Brittain County Butterfly Society's offer, it must also consider any other factors that may contribute to the economic value of the land such as the price it could be sold for, any possible sources of income provided by the land, and possible courses of development allowed by the regulations. See *Id*.

When considering all possible sources of value of the Lot, it becomes impossible for the Court to find that there has been a complete deprivation of *all* economically beneficial or productive use of the Lot. Lear has not proven that the Lot has no value that it can be sold for because the lot has not been reappraised in its current condition. R. at 7. Additionally, while the District Court found that the land has no value for agricultural or timber uses, the Brittain County Butterfly Society's offer shows that there are other resources on the lot that can provide value to the property. These factors alone show that there can be some economically beneficial or productive use of the Lot without development. This distinguishes the current case from *Lucas* where the development of the lot was factually found to be the only possible source of value from the lot and without the ability to develop, the lot had no value of any sort to anyone. 505 U.S. at 1009.

The current case is further distinguished from *Lucas* because Lear still has the ability to develop her property if she seeks permits under either of the regulations affecting the Lot. This Court cannot find that there has been a complete deprivation of *all* economically beneficial or productive use of a property when there are still available permits which would allow for development. Lear can apply for an ITP under the ESA to develop the portions of the Lot that are currently occupied by the Blue Karner's critical habitat. ESA § 10 sets out the ITP process specifically so that people are able to develop their property even when regulated by the ESA.

The fact that Lear has failed to avail herself of this avenue to pursue development of her property does not mean that her property is not available for development. The Wetlands Preservation Law also allows for development under a permit. Lear was denied such a permit for construction of a residential dwelling. R. at 7. However, Brittain County Wetlands Board stated that a permit could be obtained for a water dependent structure. *Id.* The ability to construct a water dependent structure shows that there is still a permissible use under the Wetlands Preservation Law as well. Both of these permitting processes help distinguish this case from *Lucas*, where there was no option to obtain any permits.[1] 505 U.S. at 1003. The availability of economical use and the possibility of development under the permitting structures of both regulations show that the Court cannot find a complete deprivation of *all* economically beneficial or productive use. Therefore, there can be no taking.

VI. THE PRINCIPLES SET FORTH IN THE PUBLIC TRUST DOCTRINE, INHERENT IN THE TITLE OF THE LAND, PRECLUDE LEAR'S TAKINGS CLAIM FOR THE DENIAL OF A WETLANDS FILL PERMIT.

The public trust doctrine holds that state governments may act as trustees over navigable waters and certain lands in order to protect the public's right to use such areas for activities such as commerce, navigation, recreation, and fishing. *Illinois C. R. Co. v. Chicago*, 176 U.S. 646, 659 (1900). Principles of the public trust are conferred to the states by the equal footing doctrine, which ensures that once any territory becomes a state, that state retains the same sovereignty as the original 13 states claimed upon entering the Union. *Pollard v. Hagan* 44 U.S. 212, 223 (1845). Lear's takings claim based on the denial of a county wetlands permit, that would permit

[1]There was an issue of the state making a permit available after the State Supreme Court decision, but the decision rested on the lack of a permitting process at the onset of the litigation, which makes *Lucas* only applicable when no permit is available. 505 U.S. at 1013.

her to fill a cove that was historically used as a boat landing, is precluded by these principles of the public trust.

A. The wetlands that comprise the cove of Cordelia Lot are "navigable in fact," and therefore, protected by the Public Trust Doctrine.

The wetlands in the cove of the Cordelia Lot are navigable waters for purpose of the public trust doctrine. The public trust doctrine, and the idea that private lands can be preserved for public benefit, pre-dates contemporary understandings of property rights. J. Sax, *Liberating the Public trust Doctrine from its Historical Shackles*, 14 U.C. Davis L. Rev. 185, 186 (1980). It was developed by the Romans to explain the ownership status of natural resources such as water and air, which can only be owned in common by everyone, or by no one. J. Sax, *Liberating the Public trust Doctrine from its Historical Shackles,* 14 U.C. Davis L. Rev. 185, 186 (1980). As in a private trust, in the public trust, the State acts as the trustee of these natural resources, and has a legal obligation to protect and preserve them for the common use by the beneficiary. A. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife,* 23 B.C. Envtl. Aff. L. Rev. 357, 361 (1996). The public is the beneficiary of the trust, and collectively holds title to the "assets" of the trust (e.g., rights to air and water). *Id.*

These principles of the public trust were incorporated into English common law to include rights to navigable waters as public highways for commerce, because, "the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisance." *Shively v. Bowlby,* 152 U.S. 1, 12 (1892). Indeed, it is in the interest of the sovereign for its people to engage in commerce. See generally *Id.* Protection of navigable waters were later adopted through English common law by the American system. *Id* at 12. The public trust under the American system notably protects are waters that are "navigable in fact," meaning that "they are used, or are susceptible to being used, in their ordinary condition, as

highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871).

The wetlands in the cove of the Cordelia Lot were historically open water, and used as a boat landing, in the public highway that is the interstate lake of Lake Union. R. at 5. This historical use, or at the very least, potential use for travel and trade, makes these waters navigable in fact. *Daniel Ball* 77 U.S. at 563. As such, they are protected by the public trust doctrine, which requires States, as the sovereign, to hold these wetlands and navigable waters in trust such that they be used for the benefit of the public at large. *Pollard* 44 U.S. at 229.

B. The court need not consider whether the United States recognized public trust rights in non-tidal navigable waters such as Lake Union in 1803.

Though Lake Union is a non-tidal late, and the federal government did not formally recognize public trust rights in non-tidal waters at the time of the 1803 grant, public trust navigational reservation is still essential to the analysis before the court here, because the waters are navigable in fact, and it is the State, not the federal government, that holds lands in public trust.

Under English Common Law, from which the American system was adopted, the public trust protected "all lands under waters subject to the ebb and flow of the tide," because in England, "practically all navigable rivers are influenced by the tide." *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 478 (1988). In England, it was the navigability in fact of the land beneath the tidewaters that allowed the Crown to hold such land in public trust. *Id.* Upon the American Revolution, the United States formed a federal government under the Constitution that conferred certain police powers to the respective states, including title to navigable waters and the soils beneath them. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 378 (1977). Under this Constitution, states developed their own understanding of navigability for

purposes of the public trust doctrine. The "*American* public trust doctrine make[s] it clear that navigability-- and not tidal influence-- has become the *sine qua non* of the public trust interest in tidelands in this country." *Id* (original emphasis). This is so because the geography of America, "in particular, [the] thousands of miles of public navigable water[s]...in which there is no tide -- required that jurisdiction [be] made to depend upon the navigable character of the water, and not the ebb and flow of the tide." *Id.* at 479 (internal quotations omitted). Indeed, given the different topography, American states came to hold that freshwater, non-tidal lakes, such as Lake Union, are navigable in fact. *PPL v. Montana,* 565 U.S. 576, 590 (2012).

While the change in emphasis from tidal influence to navigability in fact for purposes of creating public highways was first established in *Carson v. Blazer* in 1810, it was cited through acts and charters of the original colonies as from as early as 1700. 2 Binn. 475, 492 (1810). Moreover, in those acts and charters, in *Carson*, and all cases since, the court defined navigability within the context of commerce, and access to trade. *See Carson* 2 Binn. at 492. *See also PPL Mont. LLC* 565 U.S. at 590.

Lear argues that because this new understanding that waters may be non-tidal, but nevertheless navigable, wasn't established in the courts until *Carson* in 1810, that it cannot be applied, because the understanding was after the 1803 congressional grant. R at. 10. However, it is clear that sovereignty over non-tidal waters was established long before *Carson*. 2 Binn. 475 at 492. Rather than using a standard dependent on the time of first judicial interpretation of navigability, it is imperative that the Court examine the context in which that interpretation was made, and from where that court derived its authority. Lake Union is an interstate lake, and a public highway for use of commerce. The wetlands that make up the cove were navigable in fact,

and therefore, protected in public trust by the State of New Union, and by extension, the Brittain County Wetland Preservation Law.

C. Principles of American Federalism and the Equal Footing Doctrine Demand that New Union maintain sovereignty over its navigable waters.

As with all other states that entered the Union after the formal creation of the United States, New Union entered the nation under the equal footing doctrine, which ensures that all new states shall have the same "rights of sovereignty, jurisdiction, and eminent domain" as the original 13 states. *Pollard* 44 U.S. at 229.

When the federal system of government was created, "the people of each state became themselves sovereign; and in that character hold absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." *Martin v. Lessee of Waddell,* 41 U.S. 367, 410 (1842). This does not mean that individual citizens have individual rights to all navigable waters, but that the Constitution confers control of navigable waters to the States, as an essential police power. *Pollard,* 44 U.S. at 229. The State's absolute title in beds of navigable waters for purposes of public trust is not defeasible by grant from Congress to a third party. *Oregon ex rel.*, 429 U.S. at 374.

Lear argues that, because the 1803 congressional grant includes clear language that the title in fee simple absolute to all lands on the island and "all lands under water within a 300-foot radius of the shoreline of said island" were conveyed to Cornelius Lear, that any claims to public trust under the equal footing doctrine are superseded by the congressional grant. R. at 10. She also argues that because the grant was given by Congress prior to statehood, that the equal footing does not apply. *Id.* However, to construe the equal footing doctrine to provide for an exception for private use of land would be untenable, and ultimately result in an unequal establishment of statehood.

While it is true that, in "exceptional" circumstances, "the Federal Government could defeat a prospective State's title to land under navigable waters by a pre-statehood conveyance to a private party," such conveyance may only occur, "in case of some international duty or public exigency." *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). In *Pollard* the court explained that, "to give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." 44 U.S. at 230. As noted above, in the American federal system, state sovereignty is required to regulate property, and the "Federal Government has no power to convey lands which are rightfully the states under the equal-footing doctrine" because "the shores of navigable waters and the soils under them [are] not granted by the Constitution to the United states, but [are] reserved to the states respectively." *Oregon ex rel. State Bd. v. Corvallis Stand & Gravel Co.*, 429 U.S. 363, 373-78 Even in instances such as the conveyance to Cornelius Lear, where title was conveyed to a third party prior to statehood, "Congress 'early adopted and constantly has adhered' to a policy of holding land under navigable waters 'for the ultimate benefit of future states.'" *Utah Div. of State Lands* 482 U.S. at 201. While Congress may convey the land itself, when "deciding a question of title to the bed of a navigable water [the court] must...begin with a strong presumption against conveyance by the United States." *Utah Div. Of State Lands* 482 U.S. 193 at 197.

If the court were to rule that congressional title is superior to State control of navigable waters, it would undermine the nature of the federal government system, because any exception to the equal footing doctrine would, in fact, make the longstanding doctrine unequal in practice. The lands in the Northwest Territory were ceded to the United States by the state of Virginia, one

of the original 13 states, with the expectation that the territory would form a state and be admitted to the Union with the same rights held by Virginia. *Pollard* 44 U.S. at 222. The lands conveyed by Virginia were to be held by the United States federal government only until the territories became independent states themselves, when they would hold the navigable waters and shores in public trust. *Id*. Accordingly, it was never the position of the United States, or the State of New Union to grant the land under navigable waters in the first place. *Oregon ex rel. State land Bd.* 429 U.S. at 374. Virginia had to hold its navigable waters in trust for public benefit, and ceded the Northwest Territory with the expectation that the states formed from it, including New Union, would enter the Union on equal footing, and would do the same.

Furthermore, if the Congressional grant is to supersede New Union's right of sovereignty and jurisdiction over its navigable waters, it would in effect deny New Union control over its borders, since Lake Union is an interstate lake. See generally *Mass. v. New York*, 271 U.S. 65 (1926) (discussing rights to the shores of Lake Ontario and the imperative for the states of Massachusetts and New York to control their state boundaries). As such, though the congressional grant gave Cornelius Lear rights to lands under water within a 300 ft radius, such a grant was not warranted, and only the grant of the 1,000 acres of land of the island should be recognized.

VII. FWS AND BRITTAIN COUNTY ARE NOT LIABLE FOR THE DEPRIVATION OF ECONOMIC VALUE OF THE LOT BECAUSE THE ESA AND WETLANDS PRESERVATION LAW MUST BE CONSIDERED SEPERATELY.

A. Regulations which are passed by separate agencies at different levels of government cannot be considered together in a takings claim analysis because doing so would too greatly expand the *per se* takings doctrine.

No court has ruled on whether or not two separate regulations from two different state and federal agencies should be considered together in a takings claim. In the absence of any case

law to the contrary, the Court cannot and should not consider the two regulations at issue together in their *per se* takings analysis. The Supreme Court in the past has been hesitant to create categorical rules that expand a plaintiff's ability to make a *per se* takings claim. See *Tahoe-Sierra*, 535 U.S. 302. This hesitation by the Supreme Court in expanding the scope of *per se* takings claims should be well considered by the Court before they create a rule of law that would allow for joint consideration of both statutes because of the significant effects it could have on the *per se* takings doctrine.

Allowing separate laws from separate levels of government to be considered jointly in a *per se* takings would open the flood gates to claimants filing suits while listing every single minor regulation that affects their property in any way. Any given property is regulated under zoning regulations, tax regulations, environmental regulations, public health regulations, and a variety of other regulations at the local, state, and federal levels. If courts had a requirement to consider the joint impact of the regulations affecting a given property, then most property owners could file joint complaints against all of the regulatory agencies that have regulations mildly affecting their property. While none of the regulations alone would be considered a taking, it would not be unreasonable that a large number of property owners could piece enough of these regulations together to make a convincing takings claim where none actually exists. Where would the courts draw a line in this scenario to prevent a slew of successful takings claims against the agencies across the country that in reality have committed no taking? It is clear that, while no court has directly ruled on this issue, considering both regulations together would create a strenuous and difficult categorical rule of law similar to those the courts have avoided associating with takings before. See *Tahoe-Sierra*, 535 U.S. 302. Therefore, the Court cannot consider these regulations together in its takings analysis.

B. The combined effect of the regulations is irrelevant because neither law completely prevents development.

Even if the ESA and Wetlands Preservation Law were considered together, it would not matter since both laws allow permitted development. The District Court correctly cites to *Palazzolo v. Rhode Island* as the most compelling case when considering the effect of the two regulations on each other. 533 U.S. 606 (2001). Under *Palazzolo*, "the existence of developable uplands can defeat a takings claim based on wetlands regulations affecting most, but not all, of property." R. at 9 (citing 533 U.S. at 631). The only concern the District Court expressed in taking this position was that where one regulation ends another begins and both prevent development. However, the Court failed to realize that Lear has two routes to develop her land through the regulations. The first is the ESA's ITP process and the second is the Wetlands Preservation Law permitting process. These avenues of development show that when looking at each regulation, the other lands are still available for development which allows *Palazzolo* to be applied to the case without having the concern of preventing all development. This allows the Court to consider the regulations separately.

Additionally, as discussed above, both of these permitting processes allow for development of the property and provide economic benefits that would prevent the finding of a *per se* taking. Even if the Court were to decide that the regulations must be considered together, it would not make a difference in the outcome of the current case because both allow for economic value.

CONCLUSION

The Endangered Species Act is a valid exercise of the commerce clause, even when applied to the wholly intrastate subpopulation of the Karner Blue butterfly. The effect of intrastate species on interstate commerce has been repeatedly considered and the outcome is

always that applying the ESA to intrastate species is within the scope of Congress' authority under the Commerce Clause.

There has been no taking, either by the restrictions placed on the Cordelia Lot by the ESA, or by the Brittain County Wetlands Preservation Law. The takings claim is not ripe for Lear to bring at this time, as she failed to file for an Incidental Take Permit, and thus has not exhausted all administrative remedies to her. In determining whether there has been a taking of her land, the claim fails under both the "parcel as a whole" test set forth by *Penn Central*, and the "complete deprivation of economic value" analysis set forth by *Lucas*. This Court should affirm the holding that the ESA is constitutional under the commerce clause, but reverse the holdings that there has been a taking.