Team 26

Docket No. 16-0933

In the United States
Court of Appeals for the Twelfth Circuit

CORDELIA LEAR,
Plaintiff – Appellee – Cross Appellant,

v.

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

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 CORDELIA LEAR,
Plaintiff – Appellee – Cross Appellant

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because this case involves two federal questions. On June 1, 2016, the district court awarded Cordelia Lear damages against the Fish and Wildlife Service and Brittain County for an unconstitutional taking of her property in violation of her Fifth Amendment rights. R. 1, 4. The district court dismissed Cordelia Lear's request for declaratory judgment and failed to declare the Endangered Species Act unconstitutional as applied to her property. R. 12. The judgment from the district court is final, therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Cordelia Lear filed a timely notice of appeal on June 10, 2016. R. 1.

STATEMENT OF THE ISSUES

1. Whether the Endangered Species Act is unconstitutional as applied to Cordelia Lear's land when the Act regulates a noneconomic activity that fails to substantially impact interstate commerce.
2. Whether Cordelia Lear's takings claim is ripe for review when the Fish and Wildlife Service cannot permit any development on her lot and has stripped all economic value from her property.
3. Whether Cordelia Lear's ten-acre lot is the relevant land parcel for the takings analysis when Goneril and Regan Lear fully own and control all remaining parcels on Lear Island.
4. Whether Cordelia Lear has a viable takings claim when waiting ten years to develop her property would not only constitute a taking but would also completely destroy the Karner Blue population in New Union.

5. Whether the Brittain County Butterfly Society's offer to pay $1000 in annual rent usurped Cordelia Lear's standing to claim that she has lost complete economic value of her property when the fair market value for the lot is $100,000.
6. Whether public trust principles preclude Cordelia Lear's takings claim even though the United States did not recognize any public trust rights to nontidal navigable waters when Congress granted Lear Island.
7. Whether the Fish and Wildlife Service and Brittain County can ignore the impact of each other's regulation to escape liability for the complete deprivation of economic value of Cordelia Lear's lot when she must comply with both regulations without exception.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Cordelia Lear's case requires this Court to apply well-established principles of fairness and justice to preserve Cordelia Lear's ability to reasonably use and develop her property. First, this action asks the Court to rule that Congress lacks authority under the Constitution's Commerce Clause to regulate noneconomic activity on Cordelia Lear's property. The Supreme Court has maintained that courts cannot interpret the Commerce Clause to allow unlimited federal power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000); *United States v. Lopez*, 514 U.S. 549, 584-85 (1995); *Gibbons v. Ogden*, 22 U.S. 1, 46 (1824). Indeed, the federal government cannot use the commerce power to regulate an activity unless that activity substantially affects interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Recently, a number of federal appellate courts have issued erroneous and conflicting opinions regarding Congress's authority to regulate takings of wholly intrastate, noneconomic species. *See generally San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-*

Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). These inconsistent rulings promote an overly expansive federal legislative power, which threatens to grant Congress "an indefinite supremacy over all persons and things." The Federalist No. 39, at 256 (James Madison) (Clinton Rossiter ed., 1961). Here, this Court must maintain limits on federal power while also protecting endangered species.

Second, this action asks the Court to rule that the ESA and the Brittain County Wetlands Preservation Law together create an unconstitutional taking. The Supreme Court refuses "to adopt per se rules" to govern cases involving partial regulatory takings. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002). Instead, courts must examine "a number of factors" and considers unique circumstances to evaluate what outcome will be fair and just. *Id.* at 333-36. Due to the amorphous nature of takings jurisprudence, courts across the nation, including the Supreme Court, have issued seemingly inharmonious decisions. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). This Court must conduct a fact-specific analysis to determine whether precluding Cordelia Lear's takings claim unjustly deprives her of her Fifth Amendment rights.

II. FACTUAL BACKGROUND

In 1965, King Lear owned the entirety of the island that Congress granted the Lear family in 1803. R. 5. Until 1965, the island was a single parcel of land owned by one family member. R. 5. However, King Lear decided to divide the land into three parcels and deed one parcel to each of his daughters upon his death. R. 5. With confirmation from the Brittain Town Planning Board that, if divided, he and his daughters could build at least one single-family residence on

each of the lots, King Lear divided the island. R. 5. Since 1965, there have been three distinct lots on Lear Island: Goneril's, Regan's, and Cordelia's. R. 5. King Lear owned all three lots until his death in 2005, at which time each daughter gained ownership of her respective property. R. 5.

Cordelia Lear has owned her ten-acre lot for eleven years. R. 5. An open field known as "The Heath" and an access strip make up nine acres, and the tenth acre consists of a cattail marsh. R. 5. Since 1965, the Lears have mowed The Heath every October to prevent woods from invading the clearing. R. 5. Over the past fifty-one years, wild blue lupine flowers have grown to cover The Heath. R. 5. With the flowers came a population of Karner Blue Butterflies. R. 5. The Heath, with its blue lupines and nearby forest, provides an ideal habitat for the Karner Blues. R. 5. In 1992, the Fish and Wildlife Service (FWS) listed the Karner Blues as endangered and designated The Heath as a critical habitat for the New Union Karner Blue population. R. 5.

In 2012, Cordelia Lear decided to build a single-family residence on her lot. R. 6. She recognized, however, that to build a house she would need to remove some of the blue lupine flowers. R. 6. Since the lupines are critical habitat for the endangered butterflies, the FWS informed Cordelia Lear that she must obtain an Incidental Take Permit (ITP) to build a home on her property. R. 6. The FWS emphasized that building without a permit would violate the ESA. R. 6. To apply for an ITP, Cordelia Lear needed to develop a habitat conservation plan (HCP). R. 6. To create an acceptable HCP, Cordelia Lear had to show that she could offset her take by replacing the flowers she would remove for construction on land contiguous to the remaining lupines. R. 6.

The HCP requirements proved impossible for two reasons. First, Cordelia Lear does not own any other land on which she could plant replacement lupines. She is unable to plant lupines in the one-acre marsh because there is no soil. Nor can she plant flowers on the lakebed she owns

because the lupines cannot survive in an underwater habitat. Second, Goneril Lear, the adjacent property owner, has refused to plant lupines on her property. R. 6. Goneril Lear's property is the only land bordering the Cordelia Lot. R. 6. Thus, Cordelia Lear cannot create a successful HCP or acquire an ITP without Goneril Lear's approval to relocate some of the lupine flowers.

After learning that she could not satisfy the ITP requirements, Cordelia Lear tried to pursue a different plan. R. 7. Cordelia Lear created an alternative development proposal (ADP) to construct a single-family residence that would not destroy any of the Karner Blue's critical habitat. R. 7. Under her ADP, Cordelia Lear sought to fill one-half acre of the cattail marsh to create a "lupine-free building site" with a new access causeway connecting her residence to the shared mainland causeway. R. 7. Neither the new building site nor the new access causeway would disturb The Heath. R. 7. To fill the marsh and pursue her ADP, the 1982 Brittain County Wetlands Preservation Law required Cordelia Lear to acquire a permit. R. 7. In 2013, Cordelia Lear applied for the necessary permit. R. 7. Brittain County denied Cordelia Lear's permit request. R. 7. The county explained it would only grant a permit for a water-dependent use of the land and building a house failed to qualify as an acceptable water-dependent use. R. 7.

Together the federal and state laws obstruct Cordelia Lear's ability to build a home, and thus, obliterate all beneficial economic value of the Cordelia Lot. In 2014, after unsuccessful attempts to remedy the situation, Cordelia Lear's only option was to file this lawsuit. R. 7.

III. PROCEDURAL BACKGROUND

This is an appeal from a final order of the District Court for the District of New Union dismissing Cordelia Lear's claim for declaratory judgment. R. 12. In February 2014, Cordelia Lear commenced this action against the FWS and Brittain County. R. 1. Cordelia Lear sought a declaration that the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2012), as applied

to her property violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it seeks to regulate noneconomic activities. R. 1. Cordelia Lear also sought compensation from the FWS and Brittain County for their unconstitutional taking of her property. R. 1.

On June 1, 2016, the district court awarded Cordelia Lear $10,000 in damages against the FWS and $90,000 in damages against Brittain County for the unconstitutional taking of her land. R. 12. The district court, however, looked to the underlying land development to find economic activity and dismissed Cordelia Lear's request for declaratory judgment. R. 7-8. On June 10, 2016, Cordelia Lear filed a Notice of Appeal challenging the district court's holding "that the ESA prohibition against an unpermitted 'take' of a wholly intrastate species is a valid exercise of the Commerce power." R. 8. In its June 9, 2016 appeal, Brittain County agreed with Cordelia Lear that the ESA is unconstitutional as applied in this case. R. 2. Yet, the FWS and Brittain County each filed an appeal challenging the district court's decision that Cordelia Lear's takings claim was ripe, not precluded, and that she has lost all economic value of her land. R. 1.

STANDARD OF REVIEW

This Court reviews the district court's decision that the ESA is constitutional as applied to an intrastate population *de novo*. *United States v. Patton*, 451 F.3d 615, 620 (10th Cir. 2006). Similarly, this Court reviews the district court's determination that Cordelia Lear's takings claim is ripe *de novo*. *Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468, 1471 (Fed. Cir. 1998). As to the remaining takings issues, determining "[w]hether a compensable taking has occurred is a question of law based on factual underpinnings." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350-51 (Fed. Cir. 2003). When reviewing the final decision of the district court, this Court reviews legal conclusions *de novo* and factual findings for clear error. *Id.* at 1351.

SUMMARY OF THE ARGUMENT

This case is about protecting a landowner's property rights. Cordelia Lear asks this Court to ensure that she can fully use and enjoy her property without unlawful interference from the government. The FWS and Brittain County want this Court to ignore the impact their joint taking has on Cordelia Lear's property rights and, instead, to look at each law's impact in a vacuum to find that no taking has occurred. To follow and uphold the government's position would devastate the constitutional protections that allow landowners to own and control private property. This country has long respected "the ancient adage that a man's house is his castle." *Miller v. United States*, 357 U.S. 301, 307 (1958) (Kennedy, J., concurring). This Court must protect Cordelia Lear's right to build a home on her land.

First, this Court must find the ESA unconstitutional as applied to Cordelia Lear's property because her take of the Karner Blues is not economic activity. The FWS has tried to justify the ESA by relying on the federal commerce power to impose the Act on Cordelia Lear's lot and prohibit her from building a home. R. 6. However, Supreme Court precedent explicitly states that the federal government cannot use the Commerce Clause to regulate an activity, such as the take of a wholly intrastate population, when the activity fails to substantially impact interstate commerce. *Raich*, 545 U.S. at 16-17; *Lopez*, 514 U.S. at 584-85.

Second, this Court must find that all of the government's issues and conditions fail to preclude Cordelia Lear's takings claim. Her takings claim is ripe for review because courts do not require futile permit applications to ripen a claim. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S 725, 740 (1997); *Hage v. United States*, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996). Cordelia Lear cannot satisfy the ITP minimum requirements, therefore, it is useless for her to spend thousands of dollars on the application process only to elicit a final denial that would then ripen

her claim. R. 6-7. Thus, Cordelia Lear can bring her challenge now. The combined effect of the FWS regulation and the Brittain County law is currently and will continue to deprive Cordelia Lear of the beneficial economic value of her property. When the government takes property, temporarily or permanently, without compensating the landowner, the courts are open to the aggrieved party to seek a remedy. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 (1987). Cordelia Lear does not have to wait to bring this claim because she has already lost economic value of her land and the FWS and Brittain County have not compensated her for the taking.

Further, the Brittain County Butterfly Society's meager offer to pay Cordelia Lear $1000 in annual rent does not preclude her takings claim. The Fifth Amendment requires the FWS and Brittain County to provide just compensation for their taking. U.S. Const. amend. V. The government must provide the fair market value of the property to justly compensate the taking. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 78 (1913). The Cordelia Lot without restrictions is worth $100,000. R. 7. The Brittain County Butterfly Society's offer is not just compensation because the offer fails to provide Cordelia Lear with the fair market value of her land.

Similarly, public trust principles fail to preclude Cordelia Lear's request for just compensation. The United States did not recognize public trust rights for Lake Union at the time Congress granted Lear Island. *See PPL Mont., LLC. v. Montana*, 132 S. Ct. 1215, 1227 (2012) (explaining that lands underneath nontidal rivers were considered private property prior to 1810). Therefore, the government cannot use any public trust reasoning to bar the takings claim. Moreover, the presumption against pre-statehood grants under the equal footing doctrine fails to preclude Cordelia Lear's takings claim because the 1803 grants contains clear congressional

intent. *See Montana v. United States*, 450 U.S. 544, 552. As such, the Court can evaluate Cordelia Lear's takings claim now.

When assessing the extent of Cordelia Lear's loss of economic value of her land, this Court can only evaluate the takings claim based on the land Cordelia Lear actually owns. *See Tahoe-Sierra*, 535 U.S. at 326; *Lucas*, 505 U.S. at 1015. Cordelia Lear does not own any part of Goneril's or Regan's lot, therefore, the relevant parcel as a whole is the Cordelia Lot. R.5. Cordelia Lear expected to build a residence on her land and to maintain the fair market value of her property. R. 5, 7. The FWS regulation and the Brittain County law together cause more than a "mere diminution" in her property value. *Mahon*, 260 U.S. at 415-16. Given Cordelia Lear's expectations and impossible situation, the laws go "too far" and completely deprive her of all beneficial economic value of her land.

For these reasons, this Court should hold that the ESA is unconstitutional as applied to the take of the New Union Karner Blues and that the FWS and Brittain County must justly compensate Cordelia Lear for her loss of the economic value of her land due to their taking.

ARGUMENT

I. REGULATING THE TAKE OF A WHOLLY INTRASTATE, NONCOMMERCIAL POPULATION OF THE KARNER BLUE BUTTERFLY UNCONSTITUTIONALLY EXPANDS FEDERAL POWER.

A. Taking Karner Blues is not an activity that substantially affects interstate commerce.

The Commerce Clause provides broad power. *Lopez*, 514 U.S. at 556-57. Yet, the Supreme Court has repeatedly emphasized that this clause does not authorize unlimited federal power. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012); *see also, e.g.*, *Morrison*, 529 U.S. at 618-19. Congress may only use the Commerce Clause to regulate: (1) channels of interstate commerce; (2) instrumentalities, persons, or things engaged in interstate

commerce; and (3) activities that substantially affect interstate commerce. *Raich*, 545 U.S. at 16-17; *Lopez*, 514 U.S. at 567. The first two categories do not apply in this case. Rather, the issue in this case is whether the regulated activity, i.e., the "taking" of Karner Blues, substantially affects interstate commerce. It does not.

In *Lopez* and *Morrison*, the Supreme Court articulated four factors courts should consider to determine whether a statute substantially affects interstate commerce. Under this four-factor test, a court first considers whether the regulated activity is economic in nature. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. Second, courts must consider whether the challenged statute contains an express "jurisdictional element which might limit its reach to [activities] that . . . have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12 (quoting *Lopez*, 514 U.S. at 562). Third, courts should examine whether the act's legislative history contained any "express congressional findings regarding the effects upon interstate commerce of [the regulated activity]." *Id.* at 611-12; *accord Lopez*, 514 U.S. at 562-63. Fourth, courts must decide whether the regulated activity is directly and substantially connected to interstate commerce. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 563-67.

i. Taking Karner Blues is not economic activity.

Under the first *Lopez* factor, courts must determine whether the regulated activity is economic. *Lopez*, 514 U.S. at 561. An activity is economic if it involves the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25. Supreme Court precedent has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Here, the regulated activity is the take of Karner Blue Butterflies. Just as the lower court noted, "[s]ection 9 of the ESA prohibits the 'take' of any endangered species." R. 7 (citing ESA

§ 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B)). In this context, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered or threatened animal. 16 U.S.C. § 1532(19). Moreover, the definition of "harm" includes "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 (2016). Here, the land clearing and vegetation removal on the Cordelia Lot would modify the Karner Blues habitat, which would effectively harm the species and result in a take.

To be economic, an activity must involve the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25. Cordelia Lear's activities resulting in the take of Karner Blues, namely land clearing and vegetation removal, do not involve the production, distribution, or consumption of commodities. Rather, taking Karner Blues is analogous to the noneconomic activity in *Lopez*. In that case, the Supreme Court held that Congress lacked constitutional authority to regulate firearm possession in a school zone. *Lopez*, 514 U.S. at 561. Restricting a person's ability to possess a gun prohibits violent activity but has "nothing to do with 'commerce' or any sort of economic enterprise." *Id.* Likewise, prohibiting Cordelia Lear from taking Karner Blues prohibits violence to butterflies, however, this limit has nothing to do with commerce or an economic enterprise.

Furthermore, the activity of taking Karner Blues is clearly distinguishable from the regulated activity of mining in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *Hodel v. Indiana*, 452 U.S. 314 (1981). In those cases, the Surface Mining Act required mine operators to mitigate the environmental impacts of mining. *Hodel v. Indiana*, 452 U.S. at 318-21. Thus, the rule restricted the activity of mining. *Id.* Unlike taking Karner Blues, mining is clearly an economic activity because it involves the production of

commodities. *Raich*, 545 U.S. at 25. The activity of taking Karner Blues is also distinguishable from the regulated activity in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). In that case, Title II of the Civil Rights Act prohibited service providers, such as motels, from denying their services based on a customer's race. *Id.* Thus, the rule restricted how businesses could operate. *Id.* Unlike taking Karner Blues, restricting a motel's ability to decline service is an economic activity because renting and paying for hotel rooms is economic in nature.

The lower court's finding that "the relevant activity is the underlying land development" improperly focuses the "substantial effect" test on the challenged regulation rather than the "regulated activity." *See Rancho Viejo, LLC*, 334 F.3d at 338 (Roberts, J., dissenting); R. 8. Based on its analysis, the lower court appears to have examined whether section 9 of the ESA (the "take provision") substantially affects interstate commerce. Instead, the court should have limited its analysis to whether taking Karner Blues affects interstate commerce. Here, this Court must find that the take of Karner Blues, the regulated activity, is noneconomic. Neither the act of injuring or killing a Karner Blue is economic, nor are acts of habitat modification or degradation, such as land clearing or vegetation removal.

ii. The take provision contains no express jurisdictional hook limiting its application to activities affecting interstate commerce.

Under the second *Lopez* factor, courts examine whether the challenged statute contains an express "jurisdictional element which might limit its reach to [activities] that . . . have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. A jurisdictional element is a phrase such as "this regulation only applies if the regulated activity affects interstate commerce." According to *Lopez*, a regulation that expressly restricts its jurisdiction to economic effects is likely constitutional. *Id.* at 612. However, if a regulation broadly applies to any activity, regardless of whether the activity's effects are economic, the Court must look to the other *Lopez*

factors to determine the statute's constitutionality. *Id.* The requirement of a jurisdictional element is especially relevant in cases involving "non-economic and intrastate activities." *Groome Res. Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000).

Here, "[s]ection 9 of the ESA has no express jurisdictional hook that limits its application, for example, to takes 'in or affecting commerce.'" *Accord. GDF Realty Invs.*, 326 F.3d at 632-33; *Rancho Viejo*, *LLC*, 323 F.3d at 309; *see* 16 U.S.C. § 1538 (2012) (noting lack of jurisidctional hook). Thus, this Court must look to the other *Lopez* factors to determine if the take provision substantially affects interstate commerce. Because Congress did not restrict the take provision, it is less likely that the commerce power authorizes this provision in all circumstances.

iii. The ESA's legislative history lacks congressional findings discussing how taking Karner Blues will affect interstate commerce.

Under the third *Lopez* factor, courts examine whether an act's legislative history contained any "express congressional findings regarding the effects upon interstate commerce of [the regulated activity]." *Morrison*, 529 U.S. at 611-12; *accord Lopez*, 514 U.S. at 562-563. If there is no evidence that Congress considered the impact of the regulation on interstate commerce, then it is less likely that the commerce power authorizes the regulation. *See Lopez*, 514 U.S. at 562-63. If congressional findings are present, it is more likely that the Commerce Clause upholds the challenged regulation. *Id.* When congressional findings exist, these records alone are insufficient "to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614. Thus, this factor alone is not determinative. Other *Lopez* factors must also clearly indicate that the regulation substantially affects interstate commerce.

Here, Congress's legislative findings on the ESA fail to mention potential effects that the take provision, let alone taking Karner Blues, will have on interstate commerce. *See* 16 U.S.C. § 1531 (containing no findings discussing interstate commerce); *See People for the Ethical*

Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1344 (D. Utah 2014) (limiting analysis of third *Lopez* factor to the specific species regulated by the take provision). Rather, the Senate Report explains that "[t]he two major causes of extinction are hunting and destruction of natural habitat," excluding any mention of a potential relationship between commerce and extinction. S. Rep. No. 93-307, at 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. Thus, similar to the second *Lopez* factor, the third factor does not support a finding that the take provision is constitutional as applied to the Karner Blues.

iv. Cordelia Lear's take does not directly or substantially affect interstate commerce.

Under the final *Lopez* factor, courts must decide whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. 563-67. Under this rule, courts may not find a substantial effect on interstate commerce by piling inference upon inference. *Lopez*, 514 U.S. at 567. The Supreme Court has explicitly rejected the argument that Congress may "regulate any [activity] as long as the nationwide, aggregated impact of that [activity] has substantial effects on employment, production, transit, or consumption." *Morrison*, 529 U.S. at 615. Rather, courts may only examine an economic activity's aggregate impact on interstate commerce. *Id.* Regulations that control intrastate, noneconomic activity through the Commerce Clause often rely on economic impacts that occur too far down the line to qualify as direct and substantial. *See Morrison*, 529 U.S. at 617-18; *see also United States v. Riccardi*, 405 F.3d 852, 866 (10th Cir. 2005).

Here, this Court cannot consider the aggregate effect of regulating the take of Karner Blues on interstate commerce. While it is conceivable that taking Karner Blues could cause some economic effects, courts cannot aggregate these tangential effects because the regulated activity is not economic. *Morrison*, 529 U.S. at 611. In *Morrison* and *Lopez*, the Supreme Court refused

to aggregate economic effects stemming from the restrictions that limited gun possession and criminalized violent behavior. 529 U.S. at 618; 519 U.S. at 561. Similarly, this Court must refuse to aggregate any potential effects resulting from taking Karner Blues.

Since the Court cannot aggregate economic effects of all Karner Blue takings, the Court must determine whether the economic effects of Cordelia Lear's take substantially affect interstate commerce. Admittedly, Cordelia Lear's take may have some economic effects. For example, she could pay someone to help her remove the wild lupine flowers on The Heath. If Cordelia Lear does this, then the take economically benefits the person who helped her clear the land. This potential economic effect, however, is minute and distant from interstate commerce. Cordelia Lear's take would occur on a small piece of property. Therefore, if she hires people to help her take the Karner Blues, she will not need much help. It is unlikely Cordelia Lear will pay a significant amount of money for help removing the lupine flowers from The Heath. Thus, the economic effect will be insubstantial. Next, any link between this potential economic activity and interstate commerce will be attenuated. For example, Cordelia Lear might hire people who are not from New Union to help her remove the flowers, thereby involving interstate commerce. However, this causal chain would fail to support the take provision because it is too attenuated to withstand scrutiny. Cordelia Lear's act of hiring people from another state implicates interstate commerce, not the act of taking Karner Blues. Thus, at most, Cordelia Lear's take can only insubstantially and indirectly affect interstate commerce.

After analyzing the four *Lopez* factors, this Court must conclude that the take provision as applied to the New Union population of Karner Blues does not substantially affect interstate commerce and thus, is not authorized under Congress's commerce power.

B. Congressional protection of the Karner Blue is not an essential part of a larger economic scheme.

Under the Necessary and Proper Clause, a noneconomic intrastate activity may be regulated as incidentally necessary for Congress's commerce power. *Raich*, 545 U.S. at 24-25 (quoting *Lopez*, 514 U.S. at 561). To be "incidentally necessary" the regulation must be an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* To demonstrate that an intrastate, noneconomic activity is subject to Congress's commerce power through the Necessary and Proper Clause two conditions must be met. *Id.* First, the regulated activity must be necessary to the larger regulatory scheme. *Id.* Second, the larger regulatory scheme must be economic in nature. Here, neither condition is met.

First, the ESA is not an economic regulatory scheme. Rather, it is an environmental conservationist statute. The statute's inherent environmental goals are visible from its text and its legislative history. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178-79 (1978); *see, e.g.*, S. Rep. No. 93-307, at 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. Indeed, the Act's purpose promotes conservation ethics, not interstate commerce. *See* 16 U.S.C. § 1531(b). Specifically, the ESA's purposes "are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and . . . to achieve the purposes of [treaties and conventions]." 16 U.S.C. § 1531(b). These statutory purposes fail to discuss the need for regulation of interstate markets of endangered species, or express concern for the regulation of interstate commerce. *See id.* Because the ESA's goals are distinct from interstate commerce and economic activity, any relationship that is found between the statute and interstate commerce or economic activity is tangential. *See* Justin Gregory Reden, Comment, *The*

Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to Intrastate Species, 25 T. Jefferson L. Rev. 649, 667 (2003) (noting that "[n]either the purpose nor the design of the ESA has a commercial nexus.")). Therefore, the ESA is not an economic regulatory scheme, and the take provision is not an essential part of a larger regulation of economic activity.

Second, even if this Court finds that ESA is an economic regulatory scheme, the take provision as applied is not incidentally necessary to Congress's commerce power. Taking Karner Blues fails to substantially affect the national market for any commodity regulated by the ESA. No evidence has been presented that the Karner Blue is necessary to an economic activity.

Importantly, taking Karner Blues is distinguishable from the regulated noneconomic activity that the Supreme Court upheld under the Necessary and Proper Clause in *Raich*. 545 U.S. at 1. There, the Court determined whether Congress was authorized to regulate the local growth, consumption, and possession of marijuana. *Raich*, 545 U.S. at 7-8. The Supreme Court determined that because a national market for marijuana already existed, Congress had authority to regulate activities that substantially affected that market. *Id.* at 17-22. The Supreme Court reasoned that if Congress was not able to regulate the local marijuana activities, this would frustrate its ability to regulate the national market for marijuana would be frustrated. *Id.* at 19. Likewise, in *Andrus v. Allard*, 444 U.S. 51, 54-56 (1979), the Court allowed Congress to regulate takes of intrastate bald eagles because a national market existed for bald eagles and bald eagle products. If Congress lacked authority to regulate the purely intrastate takes of bald eagles, Congress's efforts to regulate the national market for bald eagles would be frustrated. *Id.* Here, unlike bald eagles and marijuana, the Karner Blue is not a commodity. Thus, its take will not

frustrate the federal government's regulation of interstate commerce. *See Raich*, 545 U.S. at 22; *see also Andrus*, 444 U.S. at 54-56.

Finally, this Court must not aggregate taking Karner Blues with takings of other intrastate, noneconomic species to determine whether the challenged restriction is incidentally necessary. Cordelia Lear is not asking this Court to invalidate the take provision for all intrastate noneconomic species. R. 1. Her action is limited to the taking of New Union Karner Blues. *Id.* Moreover, there is no evidence that the extinction of the Karner Blues would affect any other species. Although Congress might be authorized to regulate takes of intrastate noneconomic species whose take would subsequently harm other, species that is not the case before the court. Thus, this Court must not find that taking Karner Blues substantially affects interstate commerce by grouping them with other intrastate species whose take alone might have such an effect. This broad analysis fails to show that prohibiting taking Karner Blues is a necessary part of the ESA's regulatory scheme.

In conclusion, protecting endangered species is important. However, this cannot be achieved by permitting Congress to expand its powers beyond what the Constitution authorizes. Traditionally, states possess the authority to regulate wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979). Congress must respect the limits of federal power, and allow the states to develop their own conservation laws. For these reasons, Congress lacks authority to regulate the take of Karner Blues on Cordelia Lear's property.

II. THE FWS AND BRITTAIN COUNTY JOINTLY VIOLATED CORDELIA LEAR'S FIFTH AMENDMENT RIGHTS WHEN THEY DEPRIVED HER OF ALL BENEFICIAL ECONOMIC VALUE OF HER LAND WITHOUT COMPENSATION.

A. Since the FWS lacks discretion to grant Cordelia Lear an ITP, her permit application is futile and her takings claim is ripe.

Generally, a takings claim is only ripe after "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This rule ensures that courts have all the information needed to determine "whether a regulation has deprived a landowner of 'all economically beneficial use' of the property or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (citations omitted) (quoting *Lucas*, 505 U.S. at 1015). A court must know "the extent of permitted development" on the land in question before a takings claim can be adjudicated. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).

While a final permitting decision can provide this information, courts do not require plaintiffs to submit "futile" applications simply to ripen their claims. *See Suitum*, 520 U.S. at 739. Rather, a takings claim is ripe "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 621. While the Court has not expressly defined a "futile" permit application, it has found futility where there was "little or no uncertainty" concerning how a challenged regulation applied to the land in question. *Suitum*, 520 U.S. at 740. Courts have also found permit applications "futile" when the permit procedure "is so burdensome that it effectively deprives the property of value" or the "plaintiffs of their property

rights." *Hage*, 35 Fed. Cl. at 164; *accord Stearns Co., Ltd. v. United States*, 34 Fed. Cl. 264, 272 (Fed. Cl. 1995).

Here, pursuing an ITP from the FWS would be futile for two reasons. First, the FWS has already expressed the extent of permitted development on The Heath. No uncertainty remains. The FWS informed Cordelia Lear in writing that she cannot develop on The Heath without an ITP. R. 6. A successful ITP must contain an HCP that "would require*, at a minimum,* that all acreage of lupine field disturbed by development would have to be replaced with contiguous acreage." R. 6. (emphasis added). Cordelia Lear cannot satisfy the HCP requirements and thus, cannot satisfy the ITP requirements. R. 6. Because Cordelia Lear cannot satisfy the minimum ITP requirements, the FWS cannot authorize development on The Heath. R. 6.

Cordelia Lear's situation is analogous to the situation in *Palazzolo*. There, the Court found that "permit applications were not necessary" after the Council effectively barred petitioner from "engaging in any filling or development activity on the wetlands." *Palazzolo*, 533 U.S. at 621. Here, an ITP application is unnecessary because the FWS has clearly expressed that Cordelia Lear must offset her Karner Blue take under the HCP, which she cannot do. R. 6. Thus, applying for an ITP would be a futile permit application. Furthermore, requiring Cordelia Lear to pursue the ITP promotes wastefulness by forcing her to pursue an expensive and time-consuming process that will ultimately lead to nothing.

Second, the ITP would be a futile permit application because the associated costs effectively deprive Cordelia Lear of her property rights. Here, Cordelia Lear's situation is similar to the plaintiffs' in *Hage v. United States*. In that case, the Forest Service argued that the plaintiffs' claim was not ripe because the plaintiffs never acquired a permit to use ditch rights-of-ways. *Hage*, 35 Fed. Cl. at 163-64. The plaintiffs countered that the permit procedure was futile.

See id. The plaintiffs contended that the process was so burdensome that it "put their ranch out of business and stripped [their property] of all economic value." *Id.* at 162. The court agreed with the plaintiffs and found that the takings claim was ripe because the permitting process effectively deprived the plaintiffs of their property rights in the ranch. *Id.* at 164.

Similarly, in Cordelia Lear's case, the ITP process forces her to forfeit her property rights. Preparing the HCP and other required environmental assessment documents will cost her $150,000. *Id.* Cordelia's Lot, without any development restrictions, has a fair market value of $100,000. *Id.* Thus, the ITP permitting process alone costs more than what the property is worth. Ultimately, the prohibitive permitting cost prevents Cordelia Lear from pursuing the ITP. This effectively deprives her land of its entire economic value. Indeed, she cannot even begin the development process without paying more than the property's value. *Id.* at 6-7. Thus, the permitting process transforms her property from an asset into a liability.

B. The Court should limit its economic deprivation analysis to the Cordelia Lot because Cordelia Lear does not own or use any other areas of the island.

To determine whether a taking has occurred, the court must first isolate the relevant land. *Lucas*, 505 U.S. at 1016-17 n.7. Generally, courts must measure the effect of a given regulation on an entire parcel of land. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). If a party owns a whole parcel of property but tries to divide that land into several distinct units to assert a categorical taking on only some of the units, the party has conceptually severed its land. *See Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 497 (1987). Courts do not allow parties to conceptually sever land to intensify the impact of a taking. *Tahoe-Sierra*, 535 U.S. at 330.

Conceptual severance allows a party to skew the court's economic harm calculation. However, courts refuse to allow parties to manipulate takings analysis in this way. *Keystone*

Bituminous Coal Ass'n, 480 U.S. at 497. Instead, the Supreme Court has held that courts must broadly define the relevant land and look at the "parcel as a whole." *Lucas*, 533 U.S. at 63; *Tahoe-Sierra*, 535 U.S. at 326. While the Court has not articulated a method for defining the parcel as a whole, it only evaluates takings claims based on the land a party actually owns. *See, e.g., Tahoe-Sierra*, 535 U.S. at 330; *Penn Cent. Transp. Co.*, 438 U.S. at 120-31. The Court has never expanded its analysis of relevant property to include economic benefits of land a party does not own. Here, expanding the relevant land to encompass all of Lear Island precludes any takings claim by the Lear's and sets problematic precedent. Almost all property borders land owned by someone else. Thus, if courts assess the economic value of all contiguous land, regardless of ownership, courts would deny compensation to all property owners based on the value of neighboring land.

The flexible approach, which takes into account surrounding property values, is not applicable after ownership transfers to different parties. *See Loveladies Harbor*, *Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). Cordelia Lear only owns a ten-acre segment of Lear Island. R. 5. The current takings analysis must only consider the Cordelia Lot because she does not have the right to possess, exclude, enjoy, or dispose of any of the land owned by her sisters.

In *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1348 (Cl. Ct. 1992), *aff'd,* 10 F.3d 796, 798 (Fed. Cir. 1993), the court rejected the plaintiff's attempt to split his property into five distinct units in order to assert a categorical taking of three units. The court stated the plaintiff could not subdivide property he owned into fractions of the whole to strengthen his takings claim. *Id.* Unlike the situation in *Tabb Lakes, Inc.*, Cordelia Lear is not slicing and dicing her property to aggrandize her loss. She does not have any other property.

C. The Constitution requires the FWS and Brittan County to provide just compensation for a ten-year taking that prohibits Cordelia Lear from exercising her ownership rights.

This Court must determine that the FWS has deprived Cordelia Lear of all economic value of her property since the agency is taking her land for at least ten years. The Supreme Court has held that when the government takes possession of an interest in property, it has a categorical duty to compensate the former owner." *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). Both temporary and permanent takings require just compensation. *First English*, 482 U.S. at 312.

Here, the Court must conduct a factual inquiry to determine how the taking affects Cordelia Lear's property rights now and for the foreseeable future. *See Penn Cent. Transp. Co.*, 438 U.S. at 116. Temporary takings that "deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 304. Since Cordelia Lear cannot fully exercise her ownership rights for an extended period of time, the government must compensate her.

The FWS and Brittain County contend that the present taking is temporary and does not warrant compensation because Cordelia Lear can build a home in ten years if she stops mowing The Heath. R. 10. If Cordelia Lear stops mowing The Heath, the Karner Blues' habitat will disappear and the butterflies will die. R. 6. The FWS and Brittain County maintain that with the Karner Blues dead, The Heath will no longer be critical habitat and Cordelia Lear will be free to build her home. This argument fails for two reasons.

First, restricting development on the property for ten years constitutes a compensable taking. This Court must look at the impact created at "at the time of the taking." *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 193. Thus, the Court must assess what development is

currently permissible on Cordelia Lear's property to determine whether the FWS and Brittain County must compensate her. *See Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002). If the taking denies Cordelia Lear use of her property, the Constitution requires the FWS and Brittain County to provide compensation. *First English*, 482 U.S. at 304.

The only way Cordelia Lear can abide by the laws and build her house is to stop mowing and wait ten years for the Karner Blues to go extinct in New Union. The fact that the taking could be cut short if Cordelia Lear stops mowing does not cancel out the current loss of her property interests. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 484 (Fed. Cl. 2009). Even if she can build after ten years, the government unconstitutionally took her property. The Supreme Court has held that such takings require compensation. *Lucas*, 505 U.S. at 1033; *First English*, 482 U.S. at 304.

The potential ten-year end date in this case is substantially different from other cases involving temporary takings that did not merit compensation. In *Tahoe-Sierra*, a building moratorium lasted only thirty-two months, after which the owners were free to build again. 535 U.S. at 302. In *Bass Enterprises Production Co. v. United States*, 54 Fed. Cl. 400, 402 (Fed. Cl. 2002), *aff'd* 381 F.3d 1360 (Fed. Cir. 2004), a drilling delay lasted only forty-five months and was necessary to assess the health and safety of oil drilling in the area. Unlike the present situation, these takings were set to end in a relatively short timeframe. *See id.*; *See also Tahoe-Sierra*, 535 U.S. at 318. Once the temporary takings ended, the owners regained full value and use of their land. *Bass Enters. Prod. Co.*, 54 Fed. Cl. at 402; *Tahoe-Sierra*, 535 U.S. at 302.

Further in *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004), the government did not have to compensate a landowner for a temporary taking. However, unlike Cordelia Lear, the landowner did not lose complete economic value of his land. *Id.* There, the government

refused to permit logging on part of a property that was a critical habitat for spotted owls. *Id.* Two years later, the government lifted the restriction because the spotted owls naturally moved away. *Id.* at 1362. Thus, the area no longer needed protection. *Id.* The government did not compensate the landowners because they could still log other portions of their parcel the entire time the restriction was in place. *Id.* at 1371. Here, Cordelia Lear has no such alternatives.

Second, The Heath, as a mowed open field, is critical habitat. R. 6. If Cordelia Lear stops mowing The Heath, she "harms" the New Union Karner Blues, violating the ESA. *See* 50 C.F.R. § 17.3 (defining harm to include "significant habitat modification or degradation where it actually kills or injures wildlife…."). The FWS stated that disturbing the habitat to build a house constitutes a take under the ESA. R. 6. It logically follows that allowing vegetation to overgrow and destroy the critical habitat also constitutes an illegal take of the Karner Blues. Thus, Cordelia Lear violates the ESA whether she waits ten years or builds now. The FWS claims that Cordelia Lear needs a permit because the ESA seeks to protect an imperiled species. Despite this, the FWS is prepared to let the species die off to avoid compensating Cordelia Lear for her property. R. 10. The FWS cannot justify requiring an ITP to protect animals in one breath, and in the next promote behavior that will harm the same animals as a defense against another claim. Allowing the FWS to rely on contradictory excuses to limit Cordelia Lear's Fifth Amendment rights insulates the agency from public accountability. For these reasons, this Court must conclude that the return of development rights in ten years does not preclude Cordelia Lear's takings claim.

D. The government's take of the Cordelia Lot has deprived her of her all beneficial economic value of her property.

When a regulation causes more than a "mere diminution in a property's value and goes 'too far' courts will recognize the regulation as a taking." *Mahon*, 260 U.S. at 413-15. To determine how far is "too far," courts engage in factual inquiries to establish whether a taking

completely deprives a landowner of all beneficial economic value. *Lucas*, 505 U.S. at 105. Here, this Court must evaluate Cordelia Lear's reasonable, investment-backed expectations to determine whether she lost all economic value of her property. This analysis must be an "objective, but fact-specific inquiry into what, under all the circumstances, plaintiffs should have anticipated." *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).

Cordelia Lear expected to maintain the fair market value of her property. In 1965, the Brittain Town Planning Board stated that the Lears could build a single-family residence on each of the three subdivided lots. R. 5. Cordelia Lear, like the plaintiff in *Lucas*, expected to build a home on unrestricted land. R. 6. When she learned she could not, she was "unduly surprised by the government's regulation." *Lucas*, 505 U.S. at 1027. Cordelia Lear cannot develop her property and "there is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land." R. 7. Cordelia Lear is currently left with an economically useless piece a land.

Similarly, in *Lucas*, the South Carolina Coastal Council enacted the Beachfront Management Act about ten years after the plaintiff began extensive residential development on his property. 505 U.S. at 1008. There, an unanticipated regulation frustrated a landowner's plans and drastically decreased the owner's property value. *Id.* The Court found that governments may be required to compensate landowners for after-the-fact regulations that frustrate property owner's plans. *Id.* at 1018-19. Furthermore, in *Loveladies Harbor, Inc.*, an unexpected regulation decreased a landowner's property value by more than 99 percent. 28 F.3d at 1175. There, the court recognized the regulation virtually eradicated the economic value of the land. *Id.* Here, Cordelia Lear's situation mirrors that of the plaintiffs in *Loveladies Harbor, Inc.*, and *Lucas*. In

all three situations, the landowners reasonably expected to maintain the value and use of their land without restriction. However, a government restriction significantly reduced the owner's property values and ability to maintain or regain expected economic value. Thus, in this case, the Court should find that Cordelia Lear has been deprived of all beneficial economic value.

i. The Brittain County Butterfly Society's rental offer fails to preclude Cordelia Lear's takings claim because it does provide her fair market value of her property.

The only conceivable economic value left to Cordelia Lear is the Brittain County Butterfly Society's offer of $1000 annually for wildlife viewing. R.7. This offer fails to preserve the economic value of Cordelia Lear's land. The FWS and Brittain County maintain that this offer demonstrates a lack of complete economic deprivation. They suggest that the offer indicates that the "property retains some economic value even if it cannot be developed." R. 11. However, it is inequitable and unjust for courts to require landowners to demonstrate a one hundred percent deprivation of their land to receive compensation from a regulatory taking. The Supreme Court has held, "a state may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo*, 533 U.S. at 631.

Here, the rental offer fails to provide Cordelia Lear with anything more than a token interest. The fair market value of her property is $100,000. R. 7. Providing Cordelia Lear $500 less than her yearly taxes does not justly compensate her. R. 7. Precedent mandates the government must compensate Cordelia Lear for the fair market value of her land. *Olson v. United States*, 292 U.S. 246, 255 (1934).

ii. The FWS and Brittain County are jointly liable for taking Cordelia Lear's property.

Initially, Cordelia Lear tried to comply with the ESA in order to build a home. R. 6. When she discovered that the permitting process was futile, she decided to pursue another

option. R. 6. Cordelia Lear created an ADP that would not disturb the lupine fields. R. 6. However, this ADP required a fill permit from Brittain County. R. 6. She dutifully filed for the permit only to find out she, again, did not qualify. R. 7. Cordelia Lear was left with no legal way to build her home. She could not build a house on The Heath without violating the ESA, and she could not build a house on the marsh without violating the Brittain County Wetlands Preservation Law. R. 7.

Cordelia Lear cannot selectively decide to follow one law and not the other. She is bound to comply with both regardless of the burden they place on her. Yet, the FWS wants this Court to rule that Cordelia Lear has not lost all economic value because the ESA restriction alone does not prevent her from filling the marsh. R. 11. Likewise, Brittain County seeks to evade providing compensation because the local wetlands law does not prevent Cordelia Lear from building on The Heath. R. 11.

Accepting the FWS and Brittain County's arguments would leave property owners subject to overlapping restrictions deprived of all economic use of their property without recourse. As the lower court reasoned, the present situation is similar to joint tort cases. R. 11. When the harm is indivisible, the courts hold each tortfeasor jointly and severally liable. *Id.* (citing *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976)). Carrying this principle over to Cordelia Lear's takings claim, this Court should recognize the combined effect of the FWS and Brittain County's restrictions. Allowing either to escape liability directly contradicts established principles of fairness and justice. Accordingly, both the FWS and Brittain County are jointly and severally liable for taking Cordelia Lear's property.

III. NO PUBLIC TRUST PRINCIPLES INHERE IN THE TITLE THAT WOULD PRECLUDE CORDELIA LEAR'S TAKINGS CLAIM.

When Brittain County denied Cordelia Lear's request for a wetlands permit and did not compensate her, the county participated in an unconstitutional taking of the Cordelia Lot. *See* U.S. Const. amend. V; *see also* U.S. Const. amend. XIV. As presented in the previous sections, the FWS and Brittan County deprived Cordelia Lear of all beneficial economic value of her property. *Supra* Section II.D. Now, Brittain County seeks to use public trust principles to preclude the present takings claim. This final attempt by the county to skirt its constitutional duty must fail.

Public trust principles establish that a state holds power over the land under navigable water acquired at statehood. *Shively v. Bowlby*, 152 U.S. 1, 58 (1894); *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452-59 (1892); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). Under these principles, all lands under navigable water are the state's property and are held in trust for the public. *Shively*, 152 U.S. at 50 (1894). All States have the power to broaden their own limits to the public trust doctrine. *Martin*, 41 U.S. at 383. However, federal law establishes minimum standards, which hold in trust and protect activities related to navigation, commerce, and fishing. *Id.* Generally, lands governed by public trust principles are retained under state ownership and may not be granted to private landowners. *Ill. Cent. R. Co.*, 146 U.S. at 453. As such, the public trust doctrine operates as a narrow exception to the takings clause. However, the exception only applies in limited circumstances, none of which are present in this case.

In *Lucas*, the Supreme Court relied on the public trust doctrine to carve out several narrow exceptions to the taking clause. 505 U.S. at 1027. The Court decided that property owners are not entitled to just compensation, even when the state has effected a complete taking, if established "background principles" of state law "inhere in the title itself." *Id.* at 1029. If such

background principles are present, the land in question belongs to the state and was never owned by the private individual. *Id.* at 1030. Thus, the Court reasoned that private property owners are not entitled to just compensation for an interest that they did not already possess. *Id.* at 1029. Here, New Union has no established background principles.

A. New Union's interest in preserving navigation rights and protecting important public trust interests does not constitute a "background principle" of state law.

In *Lucas*, the central question was whether the land use restrictions were "part of [the landowner's] title to begin with." 505 U.S. at 1027. Though the Supreme Court determined that states are not required to compensate private property owners where a background principle of state law inhered itself in the landowner's title, the Court left open the question of what constitutes such a background principle. *See Palazzolo*, 533 U.S. at 629 (stating "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."). However, the Court has provided criteria for identifying these background principles, including: (1) the rule must be rooted in state law rather than federal law, *Id.*; (2) the rule cannot be newly decreed, *Lucas*, 505 U.S. at 1029; (3) the restrictions do no more than "duplicate the result that could have been achieved in the courts," *Id.*; (4) the restrictions must apply equally to all property owners, *Id.*; and (5) the restrictions must not be subject to ambiguous application. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia J., dissenting) (condemning ambiguous application of such background principles so as to avoid "a sense that the court is creating the doctrine rather than describing it.").

Importantly, while the Court remanded *Lucas* to allow South Carolina to determine whether state common law prohibited the landowner's use of the land, it observed that "it seems unlikely that common-law principles would have prevented the erection of any habitable or

productive improvements on petitioner's land." *Lucas*, 505 U.S. at 1031. Additionally, while states may expand the limits of their public trust doctrines, federal law establishes that at a minimum states hold in trust and protect activities related to navigation, commerce, and fishing. *Martin*, 41 U.S. at 383. Here, New Union has no precedent establishing that the scope of its public trust doctrine expands beyond the federal minimal protections. R. 10. Thus, New Union cannot claim any public trust principles beyond the federal minimums.

Moreover, courts should narrowly limit the scope of background principles of state law in order to preserve the integrity of the Takings Clause. Admittedly, most courts acknowledge that public trust principles are, indeed, background principles of state law. *Lucas*, 505 U.S. at 1029; *see Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 984-85 (9th Cir. 2002) (concluding that the public trust doctrine was a background principle of Washington's property law, and stating that it is "beyond cavil that a public trust doctrine has always existed in Washington."); *see also Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 113-14 (Fed. Cl. 1999) (holding that denial of a mining permit was permissible as a background principle because "Tennessee's Water Quality Control Act of 1977 . . . recognizes that the water of the state, including its groundwaters, are property of the state, held in public trust"). The courts cannot agree, however, on the proper scope of these public trust principles. *Compare Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (recognizing that the public trust doctrine includes lands under tidal waters which are not navigable), *with In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980) (concluding that the public trust doctrine includes the state's interest in protecting wildlife), *and State ex rel. Brown v. Newport Concrete Co.*, 336 N.E.2d 453, 457 (Ohio Ct. App. 1975) (expanding the public trust doctrine to include navigation for pleasure and

recreation), *and Mayor of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (expanding public trust principles to drinking and groundwater).

Nonetheless, courts should avoid expansive readings of public trust principles as background principles to state law. Such a reading threatens to broaden the public trust doctrine as a narrow exception to the Takings Clause so far as to eliminate the rule completely. This broadening risks undermining the interests of private property owners in favor of states' regulatory objectives. If the public trust doctrine is included as a background principle of state law, courts should limit its application to how the doctrine was interpreted at the time a landowner originally took title.

To this end, the court in *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995), limited its scope to the law as it stood when the landowner took title, stating, that "in analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property." In that case, the threshold question was whether "the use interest proscribed by the governmental action was part of the owner's title to begin with, i.e., whether the land use was a 'stick in the bundle of rights' acquired by the owner." *Id.* at 1154. Here, Cordelia Lear's land use interest involves building a home on her property. This interest was recognized and permitted at the time Cornelius Lear took title to the property. R. 5.

B. At the time of the 1803 land grant to Cornelius Lear, the United States did not recognize public trust rights to nontidal navigable waters.

In 1803, Congress granted Lear Island to Cornelius Lear. R. 5. While modern public trust principles indicate that states hold title to lands under navigable water, in 1803 the United States did not recognize such title extending to navigable nontidal waters, like those of Lake Union. *See PPL Mont., LLC.*, 132 S. Ct. at 1227 (collecting cases proposing that lands underneath nontidal

rivers were considered private property prior to 1810). In *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 452 (1851), the Supreme Court held that federal admiralty jurisdiction extended to the navigable, nontidal waters of Lake Ontario. Prior to this decision, however, the standard test used to determine the reach of federal jurisdiction for both public trust and admiralty law was the "ebb and flow" test. *Palmer v. Mulligan*, 3 Cai. R. 307, 318 (N.Y. Sup. Ct. 1805). Under the "ebb and flow" test, federal jurisdiction extended to waters influenced by the ebb and flow of the tide. *Phillips Petroleum Co.*, 484 U.S. at 470. This tidality standard originated from English common law and was the traditional standard used to establish public trust title at the time of the 1803 grant. *Steamboat Thomas Jefferson*, 23 U.S. 428 (1825).

Courts in the United States used tidality as a way to prove the legal existence of navigability. *Martin*, 41 U.S. at 391-92 (1842). Initially, federal admiralty jurisdiction and public trust principles were limited to coastal waters. *Propeller Genesee Chief*, 53 U.S. at 455. It was not until the end of the nineteenth century that the Supreme Court formally recognized the modern navigability-in-fact test for public trust title to nontidal navigable lands. *Packer v. Bird*, 137 U.S. 661, 667 (1891); *Barney v. Keokuk*, 94 U.S. 324, 325 (1876). Not until 1810, did state courts begin to recognize a state's presumptive title of navigable waters regardless of tidality. *Carson v. Blazer*, 2 Binn. 475, 483-84 (Pa. 1810). Thus, when Congress granted Lear Island, the United States did not recognize public trust rights to lands underneath navigable, nontidal waters.

C. Congress's 1803 grant of Lear Island overcomes the presumption against pre-statehood grants of navigable waters.

Britain County presumes that under the "equal footing doctrine," New Union took title to all submerged lands on the same terms as the original thirteen colonies. R. 10. The equal footing doctrine establishes the United States' power to convey land under navigable water prior to statehood. Montana, 450 U.S. at 551; *Pollard v. Hagan*, 44 U.S. 212, 216 (1844). Under this

doctrine, newly admitted states are entitled to the same rights and obligations as the original thirteen. *Utah Div. of State Lands v. United States*, 482 U. S. 193, 196 (1987); *Pollard*, 44 U.S. at 223 (1844). Important to the present case, the equal footing doctrine describes which lands under navigable waters a state acquires at statehood. *Pollard*, 44 U.S. at 229.

In *Pollard v. Hagan*, the Supreme Court ruled that the United States held lands under navigable waters in trust for future states and that the equal footing doctrine prohibited the state government from transferring title to these lands. *Id.* at 230. In less than fifty years, however, the Court qualified this sentiment. In *Shively v. Bowlby*, the Court held that under the Property Clause, the federal government has the authority to convey lands under navigable waters to third parties. 152 U.S. at 48. The Court has since clarified that the United States may confer such lands to third parties where Congress has clearly shown its intent to do so. *Montana*, 450 U.S. at 552; *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

In *Idaho v. United States*, 533 U.S. 262 (2001), the Supreme Court recognized this Congressional authority. There, the Coeur d'Alene Tribe (the "Tribe") agreed to relinquish all claims to its ancestral lands excluding those within a reservation set aside by the United States. *Id.* at 266. Congress ratified agreements with the Tribe, stating that the United States would forever hold the ceded the land as tribal. *Id.* at 267-68. Later, the United States brought action against the State of Idaho to quiet title in the United States, in trust for the Tribe, to the reservation's submerged land. *Id.* at 271. The Court held that the federal government, not the State of Idaho, held title in trust for the Tribe to submerged lands within the reservation. *Id.* at 272. The Court recognized Congress's intent "to bar passage to Idaho of title to the submerged lands at issue [t]here." *Id.* at 281.

Similarly, in the present case, Congress intended to bar New Union from acquiring title to the submerged lands on Lear Island. Congress made its intent clear in its 1803 grant to Cornelius Lear. In this grant, Congress included in fee simple absolute all of Lear Island and "all lands under water within a 300-foot radius of the shoreline of said island: as well as lands under water in the shallow strait separating Lear Island from the mainland." R. 4-5. By including specific language addressing the underwater lands within its grant, Congress made its intentions explicit. This case presents a clear and plain Congressional grant of land to Cornelius Lear prior to New Union's statehood. While the equal footing doctrine usually prohibits such land transfers, the presence of such clear Congressional intent preserves this particular grant.

CONCLUSION

This Court should hold that the ESA is unconstitutional as applied to a wholly intrastate, noneconomic population of Karner Blues because it fails to regulate an economic activity that substantially affects interstate commerce. The FWS and Brittain County jointly violated Cordelia Lear's Fifth Amendment rights by depriving her land of all beneficial economic value without compensation. Additionally, no relevant background principles of state law inhere in Cordelia Lear's title to preclude her takings claim. Accordingly, we ask this Court to uphold the lower court's decision that the FWS and Brittain County have unlawfully taken Cordelia Lear's property.