No. 16-0933

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiffs-Appellee-Cross-Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross-Appellee,

v.

BRITTAIN COUNTY, NEW UNION

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR DEFENDANT-APPELLANT, BRITTAIN COUNTY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The judgment of the District Court for the District of New Union was entered on June 1, 2016. R. at 1. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 (2012). Appellant Brittain County, New Union, gave timely notice of appeal on June 9, 2016. R. at 1. The jurisdiction of this court is invoked under 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Is the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?

2. Is Lear's takings claim against the United States Fish and Wildlife Service ripe without having applied for an Incidental Take Permit under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?

3. For takings analysis, is the relevant parcel is the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?

4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shields the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?

5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?

6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?

7. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

STATEMENT OF THE CASE

A. Factual Background

Lear Island. Lear Island ("the Island") is a 1,000-acre island in Lake Union currently a part of the State of New Union. R. at 4. In 1803, Congress granted title of the Island and all submerged lands within 300 feet of its shoreline in fee simple absolute to Cornelius Lear. R. at 4-5. At the time of the grant, Lear Island was part of the Northwest Territory. R. at 4. The Lear Family traditionally used the Island as "a homestead, farm, and hunting and fishing ground." R. at 5. During the later half of the nineteenth century, the Lears constructed a causeway and access strip on the north end of the Island connect the entire island to the mainland. *Id*.

In 1965, in accordance with the laws of New Union, the Brittain Town Planning Board approved King James Lear's ("King Lear")—sole owner of Lear Island at the time—proposal to subdivide the island into three parcels with the understanding that each lot was zoned for at least one single-family residence. *Id*. As part of his estate plan for Lear Island, King Lear reserved a life estate in each of the three parcels for himself, and then subsequently deeded one parcel each to three daughters, creating the Goneril, Regan, and Cordelia Lots. *Id*.

After building a home for Regan on the Regan Lot, King Lear continued to live in the historic homestead on the Goneril Lot, which is directly contiguous to the Cordelia Lot. *Id*. Upon King Lear's death in 2005, each daughter took possession of her respective lot, not previously having the exclusive right to such due to King Lear's aforementioned life estate. *Id*. Seven years later, in 2005, Cordelia Lear began the construction process on her lot. *Id*.

The Cordelia Lot and the Karner Blue. The Cordelia Lot is a ten-acre lot located at the north end of Lear Island, in addition to a one-acre marsh. *Id*. The ten-acre field has been kept open by the Lear Family through annual mowing since 1965, and includes the access strip connecting the mainland and causeway to the Goneril and Regan lots. *Id*.

The field and access strip (collectively "the Heath") are covered in blue lupine flowers that are essential to the survival of a species of endangered butterfly larvae, the Karner Blue. *Id*. In 1978, the United States Fish and Wildlife Service ("FWS") designated the Heath as a critical habitat for the only subpopulation of Karner Blue butterflies in New Union—a wholly intrastate population. R. at 6. In 1992, the Karner Blue was added to the federal endangered species list in accordance with the Endangered Species Act ("ESA"). R. at 5.

In April 2012, Plaintiff-Appellee, Cordelia Lear ("Lear"), asked the New Union FWS field office whether, due to the presence of Karner Blues, she would need any permits to develop her property. R. at 6. FWS agent L.E. Pidopter told Lear that, other than annual mowing, any disruption to the Cordelia Lot would be a "take" of the Karner Blue, and would only be permissible if Lear first obtained an Incidental Take Permit ("ITP"). *Id*. Pidopter also told Lear that a successful ITP application would include an environmental assessment document and a habitat conservation plan ("HCP"). *Id*. A successful HCP, according to Pidopter, would require Lear to provide additional habitat contiguous to the current Lupine fields for any land Lear disturbed, as well as a commitment to continue annual mowing of the remaining fields. *Id*. Later, on May 15, 2012, the FWS field office sent Cordelia Lear a letter that (1) confirmed the information previously provided by Pidopter in person and (2) referred her to FWS's Habitat Conservation Planning Handbook for information on forming an HCP. *Id*.

The ITP application had an estimated cost of $150,000. *Id.* Moreover, Lear's estranged sister, Goneril, who owns the only land contiguous to Lear's, refused to participate in any HCP that would restrict use of her land. *Id*. However, if the Lear Family were to cease annual mowing of the Heath, the land would naturally convert into a forest and eliminate the Karner Blue's habitat within a period of roughly ten years. R. at 7.

Rather than apply for an ITP or allow the Heath to naturally convert into a forest, Lear developed an alternative development plan ("ADP"), which involved filling one half-acre of the one-acre marsh. *Id*. Although the ADP did not require any federal approval, it did require a local fill permit pursuant to the 1982 Brittain County Wetland Preservation Law ("Wetlands Law"). *Id*. Lear applied for the fill permit, but the Brittain County Wetlands Board denied it because such permits are only granted for water-dependent uses. *Id.*

The Cordelia Lot has a market value of $100,000 and is subject to annual property taxes of $1,500. *Id*. However, the lot has not been re-assessed with these new, known, restrictions. *Id*. Although Lear has faced a setback in residential development, she has received alternative proposals for economic use of her land. For example, the Brittain County Butterfly Society offered Lear $1,000 yearly to allow seasonal viewings of the species. *Id*.

B. Procedural Background

This is an appeal from the District Court of New Union. At the District Court, Lear alleged that the ESA was unconstitutional as it violated Congress's power under the Commerce Clause. R. at 1. Lear also brought a claim against the FWS and Brittain County, claiming federal and local laws worked in conjunction to eliminate all economic value in her land, thus depriving her of property without just compensation in violation of the Constitution. *Id*.

On June 1, 2016, following a seven-day bench trial, the district court ruled partly in favor of the FWS and partly in favor of Lear. The court determined that the ESA was a valid exercise of Congress's commerce power, even applied to a wholly intrastate population of the endangered Karner Blue, thus dismissing Lear's as-applied challenge to the ESA. R. at 4. The court, however, found an uncompensated taking had occurred and promptly awarded plaintiff damages of $10,000 against the FWS and $90,000 against Brittain County. *Id*.

SUMMARY OF ARGUMENT

The Federal government has inserted itself into affairs directly reserved for local and state government. Through the ESA's take provision and under the guise of its Commerce Clause power, Congress is attempting to regulate a subpopulation of the Karner Blue Butterfly that resides entirely within the boundaries of the State of New Union. Because there is no rational basis between the regulation of non-economic takes and interstate commerce, and because the takes of a purely intrastate subpopulation of Karner Blues cannot be aggregated to meet this requisite requirement, the ESA is invalid as applied to these facts.

Lear's regulatory takings claim should be dismissed, assuming the ESA is found to be valid by this court, for five reasons. First, and as a threshold issue, Lear's claim is not ripe because she never received a final agency decision. Only with a final agency decision can a reviewing court conduct a proper inquiry into a regulatory takings claim. Second, a proper takings claim analysis requires a court to legally identify a claimant's property and attached rights. Because Lear's property is the entirety of Lear Island, Lear has the ability to construct a single-family residence without permission from the FWS and, thus, has no takings claim.

Assuming this court determines Lear's property is restricted solely to the Cordelia Lot, Lear's takings claim is still precluded, because third, public trust principles inherent in Lear's title inhibit Lear from filling in wetlands on her property. Thus, the Brittain County Wetlands Law cannot be the cause of a regulatory taking because Lear's title does not give her the right to fill in the wetlands. Fourth, and finally, Lear has not suffered a complete deprivation of all economic value. But for the ESA, Lear would have no takings claim against Brittain County and conversely, but for the Wetlands Law, Lear would have no takings claim against ESA. Taken alone, neither regulatory action acts to completely deprive Lear of her ability to construct a

residence on her property. Additionally, a regulation that only temporarily restricts the use of a parcel of land does not constitute a regulatory taking. The restriction on Lear's property is only temporary as, within ten years, the critical habitat of the Karner Blue will naturally deteriorate. A local organization offered $1,000 yearly to Lear for access to view her land, evidencing the retainer of some economically beneficial value and use in Lear's property. Therefore, this court should overturn the lower court's ruling, find that the ESA as applied to the intrastate Karner Blue is invalid, and dismiss Lear's takings claim.

STANDARD OF REVIEW

Each question before the court in this case is one of law. Questions of law are reviewed *de novo* by an appellate court. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 2546, 101 L. Ed. 2d 490 (1988). The lower court's fact-finding is not in dispute here. Rather, Brittain County—recognizing many of the briefed issues are novel—asserts that the lower court answered legal questions incorrectly.

ARGUMENT

I. The district court's decision should be overturned because the Endangered Species Act is invalid as applied to a wholly intrastate population of an endangered butterfly because it is an unconstitutional exercise of Congress's Commerce Clause power.

Congress has the power to "regulate Commerce . . . among the several States," U.S. Const. art. 1, § 8. This power, however, is not unlimited. The Supreme Court, in *United States v. Lopez*, clarified that Congress may regulate three broad categories inherent in its commerce power: (i) the use of channels of interstate commerce; (ii) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (iii) those activities that substantially affect interstate commerce. 514 U.S. 549, 558-59 (1995).

The Court further clarified Congressional commerce power in *United States v. Morrison* with regard to the third *Lopez* category. 529 U.S. 598, 609-12 (2000). The Court identified four factors to analyze in determining when a "regulated activity" falls within Congress's power under the Commerce Clause: (i) whether the activity is non-economic in nature, (ii) whether there is an "express jurisdictional element which might limit [Congress's] reach," (iii) whether the act seeking to regulate a certain activity contained any "express congressional findings regarding the effects upon interstate commerce," and (iv) whether there is a strong link between the regulated activity and its effects on interstate commerce. *Morrison*, 529 U.S. at 610-14.

The parties to this appeal agree that it is the third *Lopez* category at issue here: activities that substantially affect interstate commerce. R. at 7-8. The second and third *Morrison* factors both support the finding that the ESA is unconstitutional as applied to the Karner Blue as there is neither an express jurisdictional element that would limit the ESA's reach to takes that have an explicit connection to interstate commerce nor congressional findings regarding the effects on interstate commerce of taking an intrastate Karner Blue. *See* 16 U.S.C. § 1531 (2012).

The two remaining *Morrison* factors are typically analyzed together as courts determine whether a regulated activity has a substantial effect on interstate commerce. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 629 (5th Cir. 2003). There are two ways in which a regulated activity can have a substantial effect on interstate commerce. The activity can be "of a nature and scope that it, alone, has such an effect" or the activity "can be aggregated with similar activities so that the sum of the activities has the requisite substantial effect." *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *Morrison*, 529 U.S. at 613).

The federal government must establish that a "rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce" to survive Constitutional review.

Lopez, 514 U.S. at 556. The commerce clause power mustn't be "extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local.'" *Id*. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

The focus of whether a regulated activity has a substantial effect on interstate commerce must be on the "regulated activity." *Gonzalez v. Raich*, 545 U.S. 1, 23 (2005). Courts must look at the "regulated activity" and not at the frustrated intentions of regulated plaintiffs. *GDF Realty Investments, Ltd.*, 326 F.3d at 634.

Where the Supreme Court has reached the constitutional question of Congressional commerce power, it has found that when a particular activity does not have a substantial effect on interstate commerce, it should at least be economic in nature. *Lopez*, 514 U.S. 549. Section 9 of the Endangered Species Act prohibits the "take" of any listed species. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as "any harm," which is "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015). The definition of "take" allows Congress to regulate any activity that causes "harm" to a listed species, regardless of the nature of the activity. Therefore, when Congress is "not directly regulating commercial development" through the ESA and, although "the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances," courts must look at the actual take occurring to the species. *GDF Realty Investments, Ltd.*, 326 F.3d at 634.

The take of an endangered species is non-economic in nature and because no rational basis exists showing the take of an intrastate butterfly substantially affects interstate commerce, it cannot be aggregated.

A. The ESA regulates "takes," which are non-economic in nature.

In *United States v. Lopez*, the Supreme Court held the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q), unconstitutional as it exceeded Congress' Commerce Clause authority. 514 U.S. 549. The Act made possession of a gun within a school zone a federal offense. The Court determined that "possession of a gun" could not be regulated under the third *Lopez* category because the activity was not "commercial in nature and was not an essential part of a larger regulation of economic activity." *Id.* Additionally, the Court looked closely at Congressional findings to determine whether there was a rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, but found none.

Some courts have found the "take" provision" of the ESA as noneconomic. In *GDF Realty Investments, Ltd. v. Norton*, for example, the Fifth Circuit determined that the take of intrastate cave species in Texas was "neither economic nor commercial." 326 F.3d at 638. In reaching this conclusion, the court found that there was no market for the cave species, that any future market was conjecture, that no historic trade of the cave species existed, that tourists did not come to Texas to view the species, and that if "the speculative future medicinal benefits from the Cave Species [made] their regulation commercial, then almost anything would be." *Id.* The court dispelled each and every attempt by the FWS to argue that the "take" was economic in nature. Moreover, the court found the take of the cave species to be non-economic in nature despite its presence in published scientific research and museum displays across the country. *Id.* at 637; *compare to Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (finding the take of red

wolves is a regulation of economic activity because the take of red wolves directly implicated economic activities in the areas of tourism, scientific research, and possible future commercial trade in pelts, and protection of commercial and economic assets).

In this case, the take of an intrastate butterfly on private land is neither economic nor commercial. Similar to *Lopez*, the record below is void of Congressional findings asserting a substantial effect of the intrastate Karner Blue on interstate commerce or any relation between the two at all. In *Lopez*, the Court noted there was a direct connection between guns and interstate commerce, but had to focus exclusively on the activity actually being regulated and determined that possession of a gun in a school zone did not substantially affect interstate commerce. This case is even stronger than *Lopez* as there is no known connection between the intrastate Karner Blue and interstate commerce in the record.

Similar to *Norton*, none of the economic impacts discussed by the Fifth Circuit exists for the Karner Blue butterfly. There is no speculative medicinal benefit; there is no market for the insect; there is no ongoing scientific research related to the butterfly or its habitat. The cave species at issue in *Norton* had been the subject of published scientific research and had even travelled in interstate commerce to be displayed at museums. This is not true for the Karner Blue. At best, there is an argument that the Karner Blue is a tourist attraction because of the Brittain County Butterfly Society's mere *wish* to view the Karner Blue on the Cordelia Lot; however, the facts show only that this *potentially* attracts individuals, and even only from *within* Brittain County—let alone outside of New Union. In comparison, the Fifth Circuit noted the importance of tourism coming from *outside* of Texas with regard to the cave species case, and again, this does not exist for the Karner Blue.

B. There is no rational basis for concluding that the regulated take of a purely intrastate butterfly has a substantial relationship to interstate commerce and it, therefore, cannot be aggregated.

In previous cases upholding Congress's power to regulate under the Commerce Clause, the link between regulated activities and interstate commerce has been direct. In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the Supreme Court held the activity of growing wheat to be directly connected to federal commerce because the wheat being regulated could directly enter the national wheat market. Thus, the Court did not have to pile inference upon inference to connect the regulation of a state's wheat farming to the national wheat market. Applying the laws of supply and demand, the Court concluded that, although a single individual farmer's effect on the market could be trivial, the activity taken in the aggregate had a substantial direct effect on commerce. *Id.*

In cases where an activity has been found to be non-economic, the Supreme Court has typically refused to apply the principle of aggregation. *See also Jones v. United States*, 529 U.S. 848, 857-58 (2000) (refusing to construe a federal arson statute as applying to arson of non-commercial buildings because it would, at least in part, "raise grave and doubtful constitutional questions" regarding Congress's commerce clause power). At issue in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs* was the "Migratory Bird Rule." 531 U.S. 159 (2001). There, the Court refused to recognize the Rule as permitting federal regulation of an intrastate gravel pit as it would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 173-74.

The proper question before the court in this case is whether takes of the Karner Blue (the activity regulated by the ESA) have a substantial effect on commerce. According to the findings of fact made by the district court, there is no direct connection between Karner Blue takes and

interstate commerce. R. at 5-6. In contrast to *Wickard*, there is no national market for the Karner Blue butterfly. Instead, this court would have to "pile inference upon inference"—as the lower court did—to connect mowing of a few lupine flowers to the destruction of Karner Blue habitat and to the construction of a single family residence on a privately owned island in the middle of a lake. R. at 5-6. The "take" here wouldn't be for the entire subpopulation of the Karner Blue, but rather the removal of a small portion of its habitat.

Moreover, aggregation here would still not provide the result reached by the lower court. Unlike the wheat-growing individual in *Wickard*, there are no other Karner Blue populations in New Union. R. at 4-5. In fact, it is unclear from the record where other populations exist outside of New Union and whether ITPs have been issued in those areas. An analysis of the Karner Blue takes would require additional fact-finding. Thus, the ESA merely attempts to use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *Maryland v. Writz*, 392 U.S. 183, 196 n. 27 (1968), and is an invalid use of Congressional Commerce Clause power.

Therefore, the lower court's order upholding the ESA as applied to the wholly intrastate population of Karner Blue should be overturned as the regulated activity is non-economic and no rational basis exists connecting the butterfly's "take' to interstate commerce.

II. Assuming the ESA is valid, the district court's decision should be overturned because Lear has failed to assert a valid takings claim under *Lucas*.

The Takings Clause prohibits the federal government from taking private property for public use without just compensation. U.S. Const. amend. V; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). This prohibition extends to the States through the Fourteenth Amendment. U.S. Const. amend. XIV; *see also Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). Although the government has the ability to regulate private property, a taking can

occur when the government inhibits a landowner's dominion through physical occupation or regulations that go "too far." *Palazzolo*, 533 U.S. at 617.

Regulatory takings occur when a law "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (abrogated on other grounds). However, there is a "heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987). A *Lucas* taking requires the deprivation of *all* economically valuable uses of an individual's property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Lear has not, and cannot, adequately prove a taking of her property. The following analysis begins with the threshold issue of ripeness and showing that Lear's takings claim is not ripe for this court's review. The analysis continues looking at the merits, or lack thereof, of Lear's claim.

A. Lear's takings claim against FWS is precluded as unripe because Lear failed to apply for an Incidental Take Permit pursuant to ESA § 10, 16 U.S.C. § 1539(a)(1)(B).

A takings claim "challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached *a final decision* regarding the application of the regulations to the property at issue.'" *Palazzolo*, 533 U.S. 606, 618 (citing *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)) (emphasis added). The agency does not make a final decision until the "responsible agency determines the extent of permitted development on the land." *Id.* at 607.

A final decision is necessary to ensure that the court has an adequate factual basis on which 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 a taking has occurred." *Id.* at 618 (internal citations omitted). Without fully knowing "'the extent of permitted development' on the land in question," a court cannot resolve a takings claim in definitive terms. *Id.* (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). As a result, "when an agency provides procedures for obtaining a final decision, a takings claim is unlikely to be ripe until the property owner complies with those procedures." *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) (citing *Greenbrier v. United States,* 193 F.3d 1348, 1359 (Fed. Cir. 1999)). In *Morris,* the court found that when an agency has the discretion to assist in an ITP application in a manner that could significantly affect the cost of the application process, the final cost of the application is "unknowable until the agency has had some meaningful opportunity to exercise its discretion to assist in the process." 392 F.3d at 1377. This uncertainty over the final cost of the application process exists even when the takings claimant can furnish a cost estimate provided by a professional consultant. *Id.*

Under limited circumstances, a court may allow a takings claim to proceed without compliance with these requirements. For example, the Supreme Court implied in *Palazzolo* that following these requirements may not be necessary when an application for a permit would be futile. *See* 533 U.S. at 626. The Court limited the applicability of this futility exception by stating that "[w]here the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and *its denial of the application* makes clear the extent of development permitted . . . federal ripeness rules do not require the submission of further futile applications with other agencies." *Id.* at 625-26 (emphasis added). The central question, then, in resolving a ripeness issue is whether petitioner obtained a final decision from the regulatory agency determining the permitted use for the land. *Id.* at 618.

For example, in *Palazzolo*, before filing suit, the petitioner had, on five separate occasions spanning the course of nearly two decades, applied for permission to fill wetlands on his property and denied by a government entity each time. *Id.* 614-17. It was only within the context of these five separate applications and subsequent denials that the *Palazzolo* court determined that yet another application for a permit would not be needed in order to secure the ripeness of the takings challenge. *Id.* 625-26. Notably, each denial of a permit application conformed to the general conception of a *final* agency action. *See Bennet v. Spear*, 520 U.S. 154, 177-78 (1997) ("As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision making process, — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'") (internal citations omitted).

Lear's takings claim is not ripe because she has not applied for an ITP and thus has failed to comply with any part of the procedures FWS has provided for obtaining a final agency decision. R. at 7. Pursuant to its authority under ESA § 10, 16 U.S.C. § 1539(a)(1)(B) (2012), the FWS allows landowners to apply for an ITP that allows them to develop land despite any incidental effects on an endangered species. Although Lear was given the opportunity to take part in this process, she chose not to do so. R. at 7. As a result of her refusal to apply for any ITP, there is essentially no factual basis on which to conduct a reasoned takings analysis and thus, as required by *Morris*, no "reasonable degree of certainty what limitations the agency will . . . place on [Lear's] property" exist to evaluate. 392 F.3D at 1376.

In this case, there was no communication that could have been interpreted as final agency action. Unlike *Palazzolo,* in which the court determined that an additional permit application

was futile in light of five previous *final* agency actions denying similar applications, *Palazzolo*, 533 U.S. 625-26, there were two agency actions that were not final here. R. at 6; *Bennet v. Spear,* 520 U.S. 154, 177-78 (1997). There is no evidence in the record to suggest that either the advice provided by FWS agent L.E. Pidopter in April 2012 or the letter sent to Lear by the FWS New Union field office were the consummation of FWS's decision making process regarding an ITP application. R. at 4-7. To the contrary, both Pidopter and the FWS field office letter advised Lear to apply for an ITP, evidencing that both were preliminary or tentative. R. at 6. The lack of any final agency action here distinguishes this case from *Palazzolo* and suggests that it was inappropriate for the lower court to apply the *Palazzolo* futility exception to the facts of this case.

Although the FWS New Union field office and Pidopter issued preliminary opinions regarding Lear's potential ITP application, R. at 6, these actions represent only the beginning of a complex decision making process that, if undertaken, would include participation from the FWS Regional Office, Solicitor's Office, and General Counsel's Office. *Habitat Conservation and Planning Handbook,* 6-11 (1996). In light of the significant process and expertise yet to be utilized, it would be premature for any court to speak in absolute terms regarding the potential standards by which Lear's ITP application will be judged. In addition to having no reasonably definite understanding of the extent of the limitations FWS may place on Lear's property, the court cannot know, with any certainty, how costly the ITP application process will be until Lear meaningfully engages in the process.

Here, FWS is instructed by the Habitat Conservation Planning Handbook to provide a wide array of support to a party applying for an ITP and developing an HCP. *Habitat Conservation and Planning Handbook,* 3-6 – 3-7 (1996). Although Lear is able to furnish an estimate of the cost of applying for an ITP, R. at 6, the final cost of the application is—just as it

was in *Morris*—unknowable until FWS "has had some meaningful opportunity to exercise its discretion to assist in the process." 392 F.3d at 1377. Thus, it is impossible for Lear to have a ripe takings claim without first applying for an ITP. Her failure to do so violates the rule requiring a takings claimant to comply with agency procedures for obtaining a final decision.

B. Lear's takings claim is precluded because, for this takings analysis, the relevant parcel is the entirety of Lear Island, not merely the Cordelia Lot as subdivided in 1965, and thus is not subject to FWS regulation.

When determining whether a taking has occurred, the court must focus first "both on the character of the action and on the nature of the interference with the rights *in the parcel as a whole*." *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 130-31 (1978). A single parcel cannot be divided "into discrete segments" in an attempt to facilitate a particular outcome favorable to a plaintiff. *Id.* Therefore, when there is a dispute over the relevant parcel involved in a takings claim, courts consider the following factors:

> 1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which a common development scheme applied to the parcel, (4) the extent to which the parcel has been treated as a single economic unit, (5) the extent to which the regulated lands enhance the value of the remaining lands, and (6) the extent any earlier development had reached completion and closure.

Lost Tree Vill. Corp. v. United States, 92 Fed. Cl. 711, 717–18 (2010). A court's analysis in identifying the relevant parcel must be carried out "as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991) (finding relevant parcel to include non-contiguous lots). Additionally, courts should approach this analysis with "a flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *see also Deltona Corp v. United States,* 657 F.2d 1184, 1192 (Ct. Cl. 1981). Thus, a court will usually include in the relevant parcel all contiguous, same-ownership land unless there is good reason to exclude.

However, the transfer of a small piece of property to different ownership, although relevant to the parcel analysis, is not dispositive. *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (reasons as to plaintiff's purchase of parcels from larger tract are relevant to whether larger tract might be relevant parcel). Courts also look to the "extent to which property was to be developed as a whole." *Id.* at 320; *see also, Walcek v. United States,* 49 Fed.Cl. 248 (Fed.Cl.2001) (finding relevant parcel to be larger, total land tract because the "uplands and the wetlands were [not] zoned differently or intended to be developed separately").

For example, in *Deltona Corp v. United States*, the relevant parcel was found to be the entire 10,000-acre, island parcel, not just the regulated wetland acres, or the two of five "construction parcels" containing the wetlands. 657 F.2d at 1188. The court reasoned that the developer's master plan envisioned an entire community, including the wetlands, as they were a "thoroughly integrated, unified whole." *Id.* Thus, the court gave weight to the developer's envisioned plans, as well as the fact that the island was, in and of itself, a larger community as a whole. Moreover, because three of the five parcels were already being developed, no taking was found as the developer's investment-backed expectations were in the entire island, as a whole.

Additionally, in *District Intown Properties Ltd. Partnership v. District of Columbia,* no taking was found where only one apartment building was subject to regulation rather than the entire complex. 198 F.3d 874, 880 (D.C. Cir. 1999). The court held that as a contiguous parcel, purchased and long treated for 25 years as a single unit by an owner, was the relevant parcel, not the individual building lots, into which it was eventually subdivided. The court reasoned that the apartment complex, long-treated as a whole, was "spatially and functionally contiguous," and thus one parcel, due to lots being treated equally, even for accounting purposes for that time. *Id*.

In this case, Lear's Lot, being part of a larger, family-owned, functionally and spatially contiguous island, long treated as a single economic unit, is only part of the relevant parcel. Therefore, her investment-backed expectations are in the entirety of Lear Island. Further, based on the analysis articulated by the court in *Lost Tree*, all six factors support a finding that the parcel in this case is the entirety of Lear Island—an island that has been in, and still remains in, the authority of the entire Lear family.

Beginning with the first *Lost Tree* factors, Lear's lot, like that in *District Intown,* is contiguous, and to a high degree—it is one of only three parts of the entire family island. R. at 7. Although Lear's lot only physically touches the Goneril lot—which is contiguous to both the Cordelia and Regan Lots—an access strip physically connects all three lots. R. at 5. This access strip connects each lot of land to a causeway, which leads to the mainland, and to move between the mainland and any of the three lots on Lear Island, an individual *must* cross the causeway and subsequent access strip. *Id*. Thus, just as the property in *District Intown,* Cordelia's parcel is "spatially and functionally contiguous" to the larger property as a whole, Lear Island. Therefore, despite a subdivision in ownership among the Lear sisters, the lots are contiguous, share common uses, and remain under the common ownership of the Lear family.

Moreover, Lear was only given a future interest in the Cordelia Lot in 1965, forty years before taking possession. *Id*. Further, as evidenced by King Lear's acceptance of the Brittain County Zoning Board's findings that three single-family residences could be built on Lear Island in 1965, the subsequent deed transfers to each of King Lear's daughters evidences King Lear's larger, developmental scheme for Lear Island—a family owned and maintained plot of land to provide security for his current and future offspring. The second and third factors—dates of

acquisition and the extent to which a common development scheme applied to the parcel—then, must be looked at in light of these facts.

This developmental scheme of keeping the *total* island *in the family* is further evidenced by King Lear's remainder life estate in himself on each of his daughters' deeds. *Id.* If, for example, Lear or a sister passed before him, King Lear could revert the property back to himself, enabling him to ensure that the island was kept within the Lear family. Thus, Lear's lot is part of a larger developmental scheme to keep the island within the Lear family with each family having its own residence—just like the island in *Deltona Corp*. Again like *Deltona Corp.,* over half the island has already been able to adhere to this developmental scheme, as two of three of the lots already have residential homes, as envisioned by King Lear, and therefore meet another *Lost Tree* factor. Also similar to the *Walcek* case, Lear's parcel is not "zoned differently" or "intended to be developed separately," rather, Lear and her two sisters each received the deed and title to the land at the exact same time, for the exact same purpose of building a home.

Regarding the final factors in the *Lost Tree* analysis, the parcel has continuously been treated as a single economic unit and, applying the regulations to the Lear Island as a whole, enhances the value of all three lots. Since 1803, Lear Island has been kept, lived upon, and economically developed collectively by the Lear family and its descendants.[1] R. at 5. The Lear Family originally used the island as a productive farm, homestead, and hunting and fishing grounds. *Id.* Today, although agricultural use has ceased, the Lear homestead remains. *Id*. Additionally, the Lear homestead, a seemingly shared property, remains in the northern part of the island, in close proximity to the Cordelia Lot and seemingly used by all three sisters, as it has been throughout the past. *Id.*

[1] Note the record is void of who actually upkeeps the homestead or Cordelia Lot through annual mowing.

Most importantly, Lear Island has been treated as a contiguous, single-unit parcel for the past *forty years,* despite Lear having title to only a portion of the Island and sharing the subdivided land with her sisters, since she did not have possession during that time—just as the entire complex in *District Intown Properties* which was also subdivided. Thus, this case is even more compelling than *District Intown,* where the court found "long treated" as a single economic unit to be met by a mere seventeen years. Additionally, although Lear doesn't own the entirety of Lear Island, this fact is not dispositive as the *Coer* court articulated.

Therefore, Lear's ownership of her parcel stems from hundreds of years of shared land ownership between Lear family descendants, and her ownership was given in congruence with a single developmental scheme by her father to her and her sisters. Additionally, because she was deeded the property in 1965, from the forty years that Cordelia first took title to her parcel until 2005, her parcel was being treated as part of Lear Island in its entirety, with each subdivision under the exclusive possessory rights of her father, who lived in the shared family homestead in the *middle* of the island. For Cordelia to claim that an island in her family for hundreds of years, even named after herself and her siblings, having the necessity of sharing an on/off access to the mainland, complete with a family homestead still on the property to be a severance from her parcel, would be, in the words of the late Justice Scalia, "jiggery-pokery" and "pure applesauce." Therefore, the relevant parcel for this takings analysis should be Lear Island in its entirety.

C. Lear's takings claim is precluded because of public trust principles inherent in Lear's title preventing the filling of wetlands.

Another threshold inquiry in a *Lucas* takings case is to define first, what rights a plaintiff possesses in the allegedly "taken" property in accordance with the "background principle" analysis. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1054 (1992). The Supreme Court explained, "regulations that prohibit all economically beneficial use of land . . . [can]

inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029.

The identification of background principles must be based on an "*objectively reasonable application* of relevant precedents." *Id*. at 1032 n.18 (emphasis in original). This inquiry allows "some leeway in a court's interpretation of what existing state law permits." *Id*. Additionally, "changed circumstances may make what was previously permissible [for a landowner] no longer so" under *Lucas's* threshold inquiry of background principles. 505 U.S. at 1031. Thus, what once may have been considered a compensable taking for a property owner, may evolve into a non-compensable, "background principle" of state law limiting or restricting that property owner's once-recognized property right to no right at all. *See e.g., Coates v. City of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827); *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826); Kincaid's Appeal, 66 Pa. 411, 423 (1870) ("Though at the time [property] may be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise, by the residence of many people in its vicinity, and that it must yield to laws for the suppression of [what we recognize today as background principles]."). Therefore, a state may, through statutes and other legislation, create new background principles that evolve overtime.

One explicitly recognized background principle is the public trust doctrine. *See, e.g., McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (finding no taking because the landowner's property rights did not include the right to backfill tidelands subject to the public trust); *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 624 (Fla. Dist. Ct. App. 1997) (rejecting a takings challenge to prohibitions on offshore drilling because the public trust doctrine permitted the legislature to exercise without compensation its "authority to protect the lands held in trust for all people"). The Supreme Court has stated that "[s]tates have the authority

to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 475 (1988).[2] Therefore, a state may extend its public trust doctrine to include once-privately owned, navigable waters, or even non-navigable waters, whenever it "see[s] fit," which includes environmental regulations. Thus, the district court's reliance on *P.P.L. Montana L.L.C. v. Montana*, 132 S. Ct. 1215, 1227 (2012), is dispositive as no Montana state law determined the public trust limits on the property in question in that case.

For example, in *Esplanade Properties, LLC. V. City of Seattle*, a landowner sued when he was denied a shore development permit from the state of Washington. 307 F.3d 978 (9th Cir. 2002). The court found that he was subject to public trust principles of his resident-state, which were defined by a state shore management act that the court cited as precedent for Washington's background principles. Moreover, the land subject to regulation in the case was in fact a non-navigable, sandy area, determined by the state of Washington to be navigable per its connection to regularly used public, navigable recreational activities. Thus, since the landowner wanted to construct a structure, his purpose was "inconsistent with the public trust that [Washington] [was] obligated to protect." *Id.* at 987.

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[2] *See e.g., Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine applies to nonnavigable tributaries affecting navigable waters, and therefore upholding the protection of fish habitat in Mono Lake and its tributaries to the potential detriment of vested water rights), *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (determining that the public trust doctrine extends to dry sand beach areas for both access to and limited use of the ocean and foreshore); *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) (upholding a state environmental law restricting development in a natural area and not finding a taking of private property when concluding that early common law in England and America spoke to the subject of environmental regulation); *Avenal v. State*, 886 So. 2d 1085, 1101-02, 1109-10 (La. 2004) (finding no taking of private oyster beds per the environmental project in question because the project "fit[] precisely within the public trust doctrine" since the public resource at issue "is our very coastline, the loss of which is occurring at an alarming rate"), *Department of Environmental Quality v. Morley*, 314 Mich. App. 306 (2015) (no taking per trial court order requiring property owner to cease all actions on his wetland property that violated wetland protection act; act applied throughout state for the benefit of everyone per the public's interest of wetlands).

Additionally, in *W.J.F. Realty Corp. v. State,* a court upheld a state statute preventing development on the basis that early English and American common law, and even as far back as Roman law, stood for the proposition that "conservation of resources is intrinsically good and necessary for the continuation of society." 672 N.Y.S.2d 1007, 1012 (1998). Therefore, the court concluded that in enacting environmental laws, the government was preserving, by obligation and in public trust, resources for future generations. *Id.*

Moreover, a property interest, such as the acquisition of title, does not, by itself, confer property status required for a takings claim. *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932). Thus, to determine whether a property interest is potentially subject to background principles at all, courts look at factors including the ability to sell, assign, transfer, or exclude that is inherent in the property. *Mc*G*uire v. United States*, 707 F.3d 1351 (Fed. Cir. 2013). Consequently, if background principles that restrict the use of a plaintiff's property are identified at the time the property status is determined, a regulatory prohibition of that use cannot constitute a regulatory taking as the restriction "inheres in title." *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 and n.6 (Fed. Cir. 2014) (stating broadly "[i]f a challenged restriction was enacted before the property interest was acquired, the restriction may be said to inhere in the title . . . .").[3] For example, in *City of Virginia Beach v. Bell*, the court found that because claimants did not acquire title to the land at issue until *after* passage of a law requiring a permit to alter sand dune areas, they never possessed the right to develop their land. 498 S.E.2d 414, 417–18 (Va. 1998).

[3] *Kim v. City of New York*, 681 N.E.2d 312, 315–16 (N.Y. 1997) (finding no taking and stressing that "in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property"); *Hunziker v. Iowa*, 519 N.W.2d 367, 370–71 (Iowa 1994) (holding that a preexisting state statute authorizing protection of important archaeological burial sites was a *Lucas* background principle.).

Here, the Wetlands Law was enacted in 1982 to prevent the filling of state wetlands absent a "water-dependent use." R. at 7. Therefore, through the passage of this legislation, Brittain County, and by extension the state of New Union, exercised its "authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S at 475.

The Wetlands Law's enactment defined the scope of New Union's protections for public trust waters; the law extended protection to *all* wetlands from being filled—whether privately owned or not, tidal or non-tidal, navigable or non navigable—unless being filled for a water dependent use. Moreover, the fact that the regulation permits filling only for "water-dependent" uses only, in turn, evidences that the law seeks to protect, in the public trust, a navigational reservation for the people of New Union, through the protection of wetlands, albeit the marsh not considered navigable per federal regulations. R. at 7.

The Wetlands Law establishes that non-water-dependent uses of wetlands, private or not, are inconsistent with the public trust that New Union must protect. Thus, like the property in *Esplanade*, the wetland at issue here is (1) undisputedly a wetland, (2) has been traditionally used for navigational purposes, (3) was historically in open water and (4) was historically used as a boat landing, and (5) is close to a causeway allowing for main landers to access for recreation. R. at 5. In addition, the protection of wetlands themselves, i.e. through the permit requirement, serves the public trust interest of conservation of natural resources, as defined by the Wetlands Law itself. R. at 7. Moreover, New Union, in enacting the Wetlands Law, similar to New York in *W.J.F. Realty Corp,* is simply, by obligation, preserving in public trust the natural resource of wetlands for future New Union generations, and the Law therefore stands as precedent defining the scope of New Union's public trust doctrine.

Additionally, Lear did not take possession of the Cordelia Lot until 2005, when her father, upon his death, relinquished the reserved life estate he had in her deeded lot. R. at 5. Although she retained a future interest in the property beginning in 1965 with the original deed, the reserved life estate of her father, King Lear, left him, and not Lear, the exclusive right to possession of the property until his 2005 death. Thus, in comparison to *Mcguire,* Cordelia did not have the exclusive ability to sell, assign, transfer, or exclude anyone on the property without her father's consent until 2005. Importantly, King Lear had the right of exclusive possession while Lear had no right to possess, or step foot on the property at all during the 1965 to 2005 period. Moreover, she possessed only a *future* interest in the property at that time, if that at all, as the record is void of any evidence of whether the 1965 deed was even ever properly recorded or not. Thus, even assuming the deed was properly recorded, as *Reichelderfer* iterates, an interest of value in property does not of itself, equate to property status required for a takings analysis. Moreover, the record is void of any evidence that Lear exercised any right at all attached to her interest between 1965 and 2005, most rights of which would have, again, been subject to King Lear's approval. Thus, her future interest between 1965 and 2005 are not considered "property;" her property interest did not begin until she took possession to Cordelia Lot in 2005.

Therefore, because the Wetlands Law was enacted in 1982, a total of twenty-six years before Lear took possession of the property, such inhered in her title. Thus, similar to plaintiffs in *City of Virginia Beach*, since she did not acquire title to the land at issue until *twenty-six* years after the passage of the Wetlands Law instating a background principle that required a permit to build, she never possessed a right in the first place to develop on the land. Moreover, the statute

at issue in *City of Viriginia Beach*, was issued a mere two years before the plaintiff's took title, giving Lear an extra twenty-four years of notice in comparison.

Even assuming Lear had property rights necessary for a takings claim at the moment of the 1965 deed, Lear would still be subject to the *Lucas* Court's notion that, "changed circumstances may make what was previously permissible [for a landowner] no longer so." 505 U.S. at 1031. Although Lear took title in 1965, the changed circumstance of wetlands preservation law in 1985 necessary for navigation and conservation prohibits Lear from compensation. *See e.g., Coates*, 7 Cow. 585; *Brick Presbyterian Church*, 5 Cow. 538. Thus, although Lear's restricted property use is a result of changed circumstanced and not a regulatory taking. Therefore, Lear's takings claim is precluded is public trust principles inherent in her deed.

D. Lear's takings claim is precluded because Lear has not suffered a *complete* loss of economic value on her property.

1. FWS and Brittain County are not jointly and severally liable for a complete deprivation of the economic value of the Cordelia Lot because neither regulation, by itself, disallows for development of a single-family residence.

A precondition for a plaintiff to bring a successful takings claim is that the government-defendant must have caused the alleged harm, or taking, to the plaintiff. *See, e.g., Abdullah v. Comm'r of Ins*., 84 F.3d 18, 22 (1st Cir. 1996) (where no taking was found where no "causal connection between the statute facially attacked and the [insurance] rates claimed to be confiscatory [by the plaintiff]"). As taught in property law:

> When state and federal law work in concert to deprive individuals of property, the owner must decide whether it is the operation of state or federal law that is the cause of the harm. In cases where an owner experiences the denial of a federal permit (e.g., a Section 404 permit under the Federal Clean Water Act), and this is based in large part on decisions made under state law, courts often use a "but

> for" test to ascertain the relative causative culpability of federal and state actors.

JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS 10-48.17 (Supp. 2012). Additionally, plaintiffs have the burden of proving through evidence that the damage alleged to constitute a taking would not have occurred "but for" the conduct of the government entity who is the defendant. *See, e.g., Halvorson v. Skagit County,* 983 P.2d 643 (Wash. 1999) (when levees flooded, county not liable for resulting taking when it simply made repairs or improvements, while the levees were built owned, and managed by a separate diking district)*; Bowles v. United States,* 31 Fed. Cl. 37, 49 (1994)*; Ventures Northwest Ltd. V. State,* 941 P.2d 1180, 1187 (Wash. App. 1996) (Plaintiff could not show evidence that but for the county denial of a fill permit, the federal Army Corp would also not have denied plaintiff's federal wetland permit; therefore, the county did not engage in an unconstitutional taking by denying plaintiff a county fill permit.). *Bowles,* as well as *Halvorson*, and *Ventures Northwest* all stand for the proposition that causation of harm in a takings case cannot be caused by more than one government actor; rather, one government actor/regulation must be determined as the "but for" cause of the taking, even when regulations between differing levels of government act in concert to perform a complete deprivation. Thus, the plaintiff must choose which single government entity to sue, based on which government entity was the "but for" cause of the taking.

For example, in *Bowles v. United States*, the plaintiff bought a small piece of property in the Treasure Island subdivision for the intention of building a single-family residence. 31 Fed. Cl. at 49. In order to conform with local regulations in building his residence, the plaintiff needed to fill a wetland located on his property. *Id.* The plaintiff was subsequently denied a federal fill permit. *Id*. In its analysis, the court stated that "[t]he burden of plaintiff is to show that

"but for" the federal government's action they would have been able to realize their plans for the property allegedly taken. The evidence here satisfies any reasonable "but for" causation test. But for the denial of a fill permit no state or local authority would have prohibited Bowles from building on Lot 29." *Id.*

Thus, if one government's issuance of regulations leads to another government's regulations being implemented, even on another area of the same parcel, the first government 'taker,' alone, is liable. Therefore, joint and several liability does not apply to takings cases, especially when one government actor, and not both, have caused the taking, making the District Court's reliance on *Velsicol Chem. Corp. v. Rowe,* 543 S.W.2d 337 (Tenn. 1976), improper.

The present case is very similar to *Bowles*, in that both plaintiffs are trying to build a single-family residence on their small island lot, both of which are subject to wetlands restrictions, as well as others. R. at 5. However, the two cases differ in that in *Bowles,* the wetlands law applied to the totality of his property and the local law [would have] applied only to a subsequently built house on the property. In contrast, here, the ESA applies only to the ten-acre dry land parcel while the Wetlands Law applies only to a connected one-acre, underwater marsh. R. at 6. These differences are reconciled, however, because both cases' federal regulations at issue, the federal wetlands law and ESA respectively, *initially* caused an actual take or harm, which in and of itself lead to a taking of all available property for residential build.

Just like the *Bowles* plaintiff, Lear is wanting to build a single-family residence on her 10-acre plot. R. at 5. Per the Brittain County Zoning Board's decision in 1965, Lear was previously approved to do so. *Id*. The record reflects how up *until* Lear was *first* prevented from building on her 10-acre plot by the ESA, she never once consider building on the marsh. R. at 7. Thus, from the outset, "but for" the ESA regulations, Lear would have been able to build her

residential home where she wanted, without her wetland ever being implicated. However, because the ESA restrictions forbid her from building on the entire dry land parcel, the ESA restrictions therefore themselves, restrict her possibility of residential land-use to the 1-acre wetland. Thus, in all, "but for" having to comply with ESA regulations, Lear would have been free to develop her land and the county permitting process for the one-acre wetland would have been superfluous.

Using the same "but for" principal, and because there is no precedent supporting joint and several liability between government actors in takings claims, Lear cannot show that "but for" the Brittain County regulation, she is completely deprived of all economic use of her property, as an entire ten-acre parcel remains for her use. Conversely, Lear cannot show that "but for" the ESA, she is completely deprived of all economic use of her property. However, if this court finds the local and federal regulations must be looked at conjunctively, FWS is singlehandedly liable for any uncompensated takings of Lear's property due to causation, regardless of the fact that defendants to takings cases cannot be held jointly and severally liable.

2. The Cordelia Lot will become developable upon the natural destruction of the Karner Blue habitat in ten years, thus not resulting in a complete deprivation of economic value of the property.

In deciding whether a regulatory takings has occurred, a court must focus "both on the character of the action and on the nature of the interference with the rights in the parcel as a whole." *Penn Cent. Transp. Co.*, 438 U.S. 104, 130-31. It is critical to take into account not only the geographical dimensions of the property but also "the term of years that describes the temporal aspect of the owner's [property] interest." *Tahoe–Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331 (2002) (citing Restatement of Property §§ 7-9 (1936)). A regulation that permanently deprives a landowner of his or her property may be

considered a taking of the "parcel as a whole." *Id.* at 332. Critically, however, a regulation that only temporarily affects a landowner's use of her property cannot be considered a taking of the "parcel as a whole" and thus cannot be the basis of a takings claim based upon the complete deprivation of the economic value of the property. *Id.* Simply put, "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.*

"Temporary" is construed to mean "not permanent." *See Tahoe–Sierra Preservation Council*, 535 U.S. at 331 (relying on the *Lucas* notion that "anything less than a 'complete elimination of value' or a 'total loss'" cannot be the motivation for a takings claim based upon a complete deprivation of economic value). The Court in *Tahoe-Sierra* illustrates this temporal taking analysis in detail. In *Tahoe-Sierra* a group of landowners claimed that a thirty-two month moratorium on development constituted a regulatory taking. *Id.* at 302. The Court found that because the moratorium was not permanent, it did not constitute a regulatory taking. *Id.* at 339.

Here, after taking into account the "term of years that describes the temporal aspect of [Lear's] interest" in her property, it is clear that Lear is subject to only a temporary restriction on the use of her property and cannot claim a complete deprivation of economic value. Lear was deeded her land in 1965. R. at 6. Upon her father's death in 2005, Lear took full possession of the land in fee simple absolute. *Id*. The record unambiguously states that once annual mowing of the Cordelia Lot is terminated, the Karner Blue habitat on the lot will be naturally eliminated in roughly ten years—a fraction of the total temporal aspect of Lear's interest in the property. R. at 7. Once the Karner Blue habitat is eliminated, Lear will be relieved of any obligations under the ESA and will be free to use her land as she sees fit without any need for an ITP. In other

words, her property "will recover value as soon as the prohibition [against taking an endangered species] is lifted." *Tahoe–Sierra Preservation Council*, 535 U.S. at 332.

Applying the rule set forth in *Tahoe-Sierra* to this case supports the conclusion that a taking has not occurred. Although the moratorium in *Tahoe-Sierra* was not as long as the approximately ten-year restriction in this case, these cases are analogous. A thirty-two month moratorium and ten-year restriction are both temporary and not permanent. A non-permanent restriction on land-use cannot, by definition, deprive an individual of *all* economic value.

As such, this court should find that Lear has no basis for a takings claim based on a complete deprivation of economic value of her property.

3. The Cordelia Lot has retained economic value because of Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewings.

Under *Lucas*, a taking is "limited to the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302, 330 (emphasis in original); *see also Lost Tree Vill. Corp.,* 787 F.3d 1111, 1116; *Palazzolo*, 533 U.S. 606, 616. While there is no set formula for determining when a taking has occurred based on loss of "economically viable use," courts are to conduct ad hoc, factual inquiries "with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981). Diminution in property value, standing alone, cannot establish a taking. *Penn Central Transp. Co.*, 438 U.S. 104 (1978).

A court must find that a challenged regulation deprives the landowner of all economically beneficial uses of his land in order to find a regulatory takings has occurred. *Lucas*, 505 U.S. at 1014. In its review, a court takes into consideration neither "case-specific inquiry into the public

interest advanced in support of the restraint" nor the "landowner's investment-backed expectations." *Id.* If a court determines that a regulation "declares 'off-limits' *all* economically productive or beneficial uses of land goes beyond what the relevant background principles [of property value] would dictate," it must be sustained by compensation to an affected landowner. *Id.* at 1030, n.8 (emphasis added) (emphasizing that "all" is meant in an "all-or-nothing" approach).

The proper measure of economic impact "is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action." *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003), *on reconsideration in part*, 62 Fed. Cl. 481 (2003); *see also Keystone*, 480 U.S. at 497. Although relevant to a court's analysis, a comparison of the property value "before and after a regulatory action . . . it is by no means conclusive." *Keystone*, 480 U.S. at 490.

In many cases, courts have disallowed plaintiffs' claims for compensation where partial economic benefit remained in the property. For example, in *Tabb Lakes, Inc. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), substantial economic activity occurred on the complainant-landowner's property despite the denial of a fill permit. There, the losses suffered by the landowner were a "mere diminution in value," and not a complete economic loss of use of property. *Id.* Similarly, in *Jentgen v. United States*, 228 Cl. Ct. 527 (1981), and *Dufau v. United States*, 22 Cl. Ct. 156 (1990), the court concluded no compensable taking had occurred as the landowner could still undertake development on part of the land.

In the seminal case on this issue, *Lucas*, a property owner alleged a taking where a state law prohibited the construction of any permanent habitable structures on his land. 505 U.S. at 1009. The Supreme Court determined that the prohibition left the landowner's property without

any economically beneficial uses of his land. 505 U.S. at 1019. The Court concluded that the landowner's property was left "economically idle," and thus suffered a taking. 505 U.S. at 1019. After finding the land had been deprived of all economically beneficial use, the Court noted that the state government could "resist compensation only if the logically antecedent inquiry into the nature of the owner's estate show[ed] that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.[4]

In *Lost Tree v. United States*, the city sued the federal government claiming a *Lucas* taking based on the government's denial of a wetlands fill permit. 787 F.3d 1111, 1114. On remand for additional findings of fact, the trial court determined that the permit denial resulted in a diminution of property value by approximately 99.4%. *Id.* The United States argued that residual value arising from noneconomic uses precluded application of *Lucas*, instead requiring the application of *Penn Central*. The court agreed with the United States, and remanded the case for additional fact-finding consistent with the legal questions presented by *Penn Central*. *Id.*

In this case, the Cordelia Lot has retained an economically beneficial use despite the regulatory actions taken here. In contrast to the parcel of land at issue in *Lucas*, where the parcel retained no value of any kind—it could neither be sold nor serve another economic purpose—the Cordelia Lot currently has at least one opportunity for economically beneficial use. The Brittain County Butterfly Preservation Society has offered to pay $1,000 annually for the "privilege of conducting butterfly viewing outings during the summer Karner Blue season." R. at 7. The fair market value of the Cordelia Lot without restrictions preventing development is $1,000. R. at 7. Property taxes based on this value are $1,500 annually. R. at 7. Because property taxes are assessed in accordance with property value, the actual property tax on the Cordelia Lot is

[4] Discussed, *supra*, in Section II.C.

unknown until the lot's property value is reassessed. Because of this, the Cordelia Lot could potentially make a profit solely off of the $1,000 butterfly viewing fee.

In contrast to the issue in *Lost Tree*, the facts on the record do not provide the market value for the Cordelia Lot with the contested regulations in effect. However, even if the property's was reduced to 1% of its former value, as the lower court's findings of fact imply, the offer by the Brittain County Butterfly Society evidences that Cordelia Lot's residual value will still be attributable to an economic use.

Regarding equitable principles, the Court in *Lucas* noted that takings law is often full of "all-or-nothing" situations such as the one presented by the facts of this case. While a *Penn Central* analysis can occasionally make up for this disparity, here, Lear has only alleged a *Lucas* regulatory taking and, thus, the facts must be analyzed as such. *Lucas*, 505 U.S. at, 1020, n. 8.

However, because whether a "government action constitutes a taking is a question of law based on underlying facts," *Lost Tree Vill. Corp.*, 787 F.3d 1111, 1115, remand may be more appropriate for this particular issue to make additional findings of fact. (i.e., the newly assessed property value, other potential uses of land, etc.).

Therefore, because Lear has not proven a complete deprivation of economic use of her property, this court should find that no regulatory taking has occurred.

CONCLUSION

For the foregoing reasons, the appellate court should overturn the district court's ruling.

Respectfully submitted,
Team 30

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