Team 31

Docket No., 16-0933

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant

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

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BRIEF FOR DEFENDANT-APPELLANT FISH AND WILDLIFE SERVICE

ORAL ARGUMENT REQUESTED

Team 31,
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Table of Contents

TABLE OF AUTHORITIES

Cases

United States Code

Other Sources of Authority

STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction in this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (citizen suit actions under the Endangered Species Act); 28 U.S.C. § 1346(a)(2) (claims not exceeding $10,000 "for any other civil action against the United States").

STATEMENT OF THE ISSUES

1. Whether the ESA is 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. Whether Lear's takings claim against FWS is ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B).

3. For takings analysis, whether 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, whether the fact that the lot will become developable upon 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 in property.

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

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

7. Assuming the relevant parcel is the Cordelia Lot, whether FWS and Brittain County are liable for 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

I. Facts

In 2005, Plaintiff was devised a ten-acre tract of land, "the Cordelia lot," on the northern tip of Lear Island, located in Lake Union. R. at 5. The Cordelia lot contains a nine-acre open field, "the Heath," and one acre of emergent cattail growth in a cove that was historically open water. *Id.* The Heath has been kept open for several decades by annual mowing each October, allowing fields of wild blue lupine flowers to grow. *Id.* The leaves of the wild blue lupine flowers support Karner Blue butterfly larvae which feed on the leaves and attach to the foliage before they emerge from chrysalis as butterflies. *Id.* at 6. The Karner Blue butterfly was listed as an endangered species in 1992, and the only remaining population of the butterfly in New Union exists in the Heath on Lear Island. *Id.* at 5. The Heath was designated as critical habitat for the Karner Blue in 1992. *Id.* at 6.

In 2012, Plaintiff inquired with the New Union FWS field office to determine whether any permitting or approval was needed in order for Plaintiff to develop her property because of the existence of the Karner Blue population. *Id.* The FWS field office informed Plaintiff that any disturbance of the Karner Blue habitat, other than annual mowing of the Heath, would constitute a "take" under the Endangered Species Act ("ESA") and that Plaintiff must apply for an Incidental Take Permit ("ITP"). *Id.* As part of the ITP, a Habitat Conservation Plan ("HCP") and an environmental assessment must be done. *Id.* Plaintiff spoke with an independent environmental consultant who informed her that preparation for an ITP application would cost around $150,000, including the development of an HCP and paperwork associated with an environmental assessment. *Id.*

After Plaintiff's inquiry to the FWS field office, the office sent Plaintiff a letter detailing the requirements for an ITP application and what an acceptable HCP must include. *Id.* The letter emphasized that an acceptable HCP would require that "all acreage of lupine field disturbed by development would have to be replaced with contiguous acreage, and that the property owner would have to commit to maintain the remaining and newly created lupine fields by annual mowing each October." *Id.* Instead of applying for an ITP or developing an HCP, Plaintiff developed an Alternative Development Proposal ("ADP") that would not disturb the Heath, but which included one-half acre of the marsh in order to create a building site for a residence, for which no federal approval would be necessary. *Id.* at 7.

In order to fill the one-half acre of the marsh, Plaintiff was required to file a permit application pursuant to the Brittain County Wetland Preservation Law which was enacted in 1982. *Id.* Plaintiff filed the application in August 2013, and the board denied the application in December 2013, "on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site was not a water-dependent use." *Id.*

Property taxes on the Cordelia lot are $1,500 annually, and the fair market value of the property without any restrictions that would prevent the development of a single-family residence is $100,000. *Id.* The Brittain County Butterfly Society offered to pay Plaintiff $1,000 annually "for the privilege of conducting butterfly viewing outings during the summer Karner Blue season," but the Plaintiff rejected the Butterfly Society's offer. *Id.* Plaintiff never filed an application for an ITP or developed an HCP. *Id.*

II. Procedural History

After denial of the permit pursuant to the Brittain County Wetland Preservation Law, Plaintiff commenced this action in 2014. *Id.* Plaintiff sought a declaration that the ESA

was an improper, unconstitutional exercise of congressional legislative power or alternatively, just compensation from Brittain County and the FWS for a regulatory taking of her property. *Id.* The District Court held:

1. That the ESA was a valid use of congressional power;
2. There was a take of Plaintiff's property under the Fifth Amendment;
3. Plaintiff's takings claim against the FWS was ripe for litigation;
4. The relevant parcel for analysis is the Cordelia lot, not Lear Island;
5. The relevant time period for takings analysis is the current permissible development of the property;
6. Public trust limits on uses of state navigable waters do not inhere in the Lear's 1803 congressional grant of title;
7. The Cordelia lot has been completely deprived of all economic value;
8. The federal and local restrictions must be combined to consider whether a take has occurred; and
9. Plaintiff has been deprived of all economic use of her property.

R. at 7-12.

The lower court awarded $10,000 damages against FWS and $90,000 damages against Brittain County, as well as dismissing Plaintiff's claim for a declaratory judgment declaring the ESA as unconstitutional as applied to her property. R. at 12. The FWS and Brittain County filed a notice of appeal from the judgment on June 9, 2016 and Plaintiff subsequently filed a notice of appeal on June 10, 2016. R. at 1.

SUMMARY OF THE ARGUMENT

This court should reverse the award of damages to Plaintiff and should hold the ESA is not unconstitutional as applied to Plaintiff's property for the following reasons: (1) the ESA is a valid exercise of Congress's Commerce power; (2) Lear's takings claim is unripe because she never applied for an ITP; (3) the entirety of Lear Island is the relevant parcel; (4) the natural destruction of the butterfly's habitat in the future precludes Lear's takings claim; (5) the Brittain County Butterfly Society's offer to pay $1000 per year in rent for wildlife viewing precludes a

takings claim for complete loss of economic value; (6) public trust principles preclude Lear's takings claim; and (7) the ESA and Brittan County Wetlands Preservation Law must be considered separately and do not completely deprive the Cordelia Lot of all economic value.

The ESA prohibition against an unpermitted "take" of a wholly intrastate species is a valid exercise of Congress's Commerce power. The Commerce Clause allows Congress to regulate three broad categories of economic activity, and the protection of a wholly intrastate species falls into these categories because it has a "substantial effect" on interstate commerce. The protection of endangered species implicates economic concerns for several reasons, such as that the species may be threatened because of commercial activity or interstate travelers to the threatened species stimulate interstate commerce. Additionally, every circuit has considered this issue and has upheld the Act as applied to intrastate species.

Plaintiff's takings claim is not ripe without application for an ITP under ESA § 10. For a regulatory takings claim to be ripe, the agency must make a final decision in applying the law. Here, the FWS was unable to make a final decision because Plaintiff never completed an ITP coupled with the HCP. The ADP Plaintiff applied for does not replace an ITP and any decision on the ADP is not a final agency decision. The futility exception relied on by Lear and the lower court does not excuse Lear from applying for an ITP.

The entirety of Lear Island is the relevant parcel for this analysis. The court must consider the economic expectations of Plaintiff Lear. Plaintiff received the lot as a gift from her father rather than purchasing the land. At the time of the subdivision, the Cordelia Lot was treated the same as the other lots on the island. There is no indication that the development on Lear Island was complete.

Plaintiff's takings claim is precluded because of the eventual natural destruction of the habitat. The ESA does not impose a duty to improve a species' habitat. When Plaintiff stops mowing the Heath, the lupine fields will be taken over by oak and hickory trees in approximately ten years. The ESA merely seeks to prevent human action that may harm a threatened or endangered species and cannot regulate inaction. Therefore, Plaintiff has no duty to maintain the Heath. Once maintenance of the Heath has stopped and Karner Blue are no longer present, Plaintiff may do as she wishes with the property.

The Brittain County Butterfly Society's payment precludes Plaintiff's claim for taking based on complete loss of economic value. The Society's payment precludes a *Lucas* analysis and requires a *Penn Central* analysis. Plaintiff holds a profitable bundle of rights associated with collecting rent for wildlife viewing, and such viewing is not limited to the Society alone. Furthermore, Plaintiff has no relevant investment-backed expectations in this case, because Plaintiff's lot was not an investment at all. Plaintiff did not purchase the property in reliance on the non-existence of a regulation.

Public trust principles preclude Plaintiff's takings claim. New Union controls lands beneath non-tidal navigable waters under the public trust and equal footing doctrine, and Plaintiff's claim fails to account for this. The public trust rights of land beneath Lake Union transferred to the State of New Union upon admission into the United States; therefore, both the public trust and equal footing doctrine are validly asserted to produce a background principle in state law to preclude a regulatory takings claim. Compliance with two separate property regulations does not deprive plaintiff of all economic value of her property. Plaintiff has failed to demonstrate that her property has lost all its economic value and any valid demonstration as to how either regulation constitutes a harm requiring joint and several liability.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO THE KARNER BLUE BUTTERFLY

a. The Commerce Clause Allows the Regulation of Activities that have a Substantial Effect on Interstate Commerce.

The Commerce Clause, U.S. Cont. art. 1, § 8, cl. 3, allows Congress to regulate three broad categories of activity: 1) channels of interstate commerce, 2) instrumentalities of interstate commerce, and 3) activities that have a substantial effect on interstate commerce. *San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011).

The Endangered Species Act was enacted in 1973 with the purpose "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Section 9 of the ESA prohibits the "take" of any endangered species. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Unauthorized takes may result in civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment for one year. *See* 16 U.S.C. § 1540(a) and (b).

b. This Court Should Follow Precedent and Find that the ESA Implicates Economic Concerns.

A Commerce Clause challenge to the ESA "take" prohibition is an issue of first impression in the Twelfth Circuit. However, every Court of Appeals has considered this issue and has upheld the Act as applied to the take of intrastate species. R. at 8. This court need not reinvent the wheel, and therefore, should follow the weight of precedent. This court should hold that the ESA prohibition against an unpermitted "take" of a wholly intrastate species is a valid

exercise of Congress's Commerce power. See *San Luis & Delta-Mendota Water Auth. V. Salazar*, 678 F.3d 1163, 1177 (9th Cir. 2011); *Alabama-Tombigee Rivers Coal v. Kempthorne*, 477 F.3d 1250,1277 (11th Cir. 2007); *Rancho Vejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003); *GDF Realty Investments Ltd. v. Norton*, 326 F.3d 622, 640-41 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 505-06 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997). The District Court pointed out that the underlying activity is economic in nature through the construction of the proposed residence, purchase of building materials and the hiring of carpenters and contractors. R. at 8. These activities meet prong three in *San Luis* and substantially affects interstate commerce.

Even if this court is not persuaded by the lower court's argument on this point, the ESA is a valid exercise of the Commerce Clause because the ESA is part of economic regulation. Courts have discussed at length why the protections of threatened or endangered species implicates economic concerns: 1) a species might be threatened or endangered because of commercial purposes; 2) the ESA protects the future and unanticipated interstate-commerce value of species; 3) regeneration of a threatened or endangered species might allow future commercial utilization of the species; 4) interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered species; 5) the genetic diversity provided by endangered or threatened species improves agriculture and aquaculture, which clearly affect interstate commerce. *San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011).

Courts have determined that if the challenged sections of the ESA are "an essential part of a larger regulation of economic activity, then whether than section ensnares some purely intrastate activity is of no moment." because the ESA is an essential part of a larger regulation

of economic activity. *San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d at 1175. Not only does building on the property create economic activity, the individuals that come to the Heath to visit the Karner Blue create economic activity. Additionally, individuals that visit the Karner Blue must travel on Lake Union, an interstate lake that has historically been used for interstate navigation. R. at 4.

Thus, this court should hold that the Commerce Clause can regulate a wholly intrastate species such as the Karner Blue.

II. PLAINTIFF'S TAKINGS CLAIM IS NOT RIPE WITHOUT APPLICATION FOR AN INCIDENTAL TAKE PERMIT UNDER ESA § 10.

The Fifth Amendment prohibits the government from taking private property for public use without just compensation. *Palazzolo v. Rhode Island*, 533, U.S. 606 (2001). An individual may apply for an "incidental take permit" pursuant to Section 10 of the ESA. 16. U.S.C. § 1539. An incidental take permit allows a take of a species protected under the ESA so long as the take is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(b). FWS may issue the incidental take permit if it finds that the taking will be incidental and will "not appreciably reduce the likelihood of the survival and recovery of the species in the wild," that the applicant will minimize and mitigate the impacts "to the maximum extent practicable," and that the applicant will implement any other terms and conditions the FWS deems appropriate. 16 U.S.C. § 1539(a)(2)(B). The take of any listed species with an incidental take permit does not violate Section 9 of the ESA. 16 U.S.C. § 1538(a)(1).

a. The Agency must have Reached a Final Decision in Applying the Law to have a Ripe Regulatory Takings Claim.

Plaintiff's challenge is not ripe. A challenge to an alleged regulatory taking is not ripe unless two conditions are satisfied. First, the action alleged to constitute the taking must be a

final decisions regarding how the property owner will be allowed to develop its property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001). A takings claim is not ripe until the government entity charged with making the regulations has reached a final decision regarding the application for the regulations to the land at issue. *Id* at 186, 611. Second, a plaintiff must have sought compensation for the alleged taking through available state procedures. *Id*. Absent denial of a permit, only an extraordinary delay in the permitting process can give rise to a compensable taking. *Boise Cascade Corp v. United States*, 296 F.3d 1339, 1349 (Fed. Cir. 2002). 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. *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999).

b. The Takings Claim is Not Ripe Because Lear Never Applied for an Incidental Take Permit.

Plaintiff's Takings claim is not ripe because Plaintiff never applied for an Incidental Take Permit. Incidental Take Permits are required when non-Federal activities will result in take of threatened or endangered species. *Endangered Species Permits*, Fish and Wildlife Service (July 15, 2016), https://www.fws.gov/ENDANGERED/permits/index.html. A Habitat Conservation Plan must accompany an application for an ITP. *Id.* The HCP associated with the ITP application ensures that the effects of the incidental take are adequately minimized and mitigated. *Id.* Language in the ESA contemplates the necessity of the ITP, "The Secretary may permit, under such terms and conditions as he shall prescribe any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C.S. § 1539(a)(1)(B).

The court rejected an ESA-based takings claim as ripe in *Morris v. United* States, 392 F.3d 1372 (Fed. Cir. 2004). In *Morris v. United States*, the property owners sought to harvest six large redwood trees after asserting that it was the property's only economically viable use. *Morris v. United* States, 392 F.3d 1372. The property owners never applied for an ITP, claiming the cost was excessive and instead filed suit. *Id*. The Government contended that since the government never took a final action restricting the use of the property, the claim was unripe. *Id*. The court agreed that the claim was unripe because the agency had discretion over the cost of complying with the regulations and was unable to do so without an ITP. *Id*. Likewise, in *Boise Cascade*, the court rejected a temporary taking claim based on an injunction that prohibited logging on plaintiff's property until plaintiff applied for and obtained an incidental take permit. *Boise Cascade Corp. v. United States*, 296 F.3d 1339.

Here, the record indicates that Plaintiff never applied for an ITP and therefore Plaintiff's ITP was never denied. Instead, Plaintiff created an Alternative Development Proposal (ADP). An ADP is not an option for Plaintiff and is not a permit issued by the Fish and Wildlife Service. The only available permits suitable for this situation are Incidental Take Permits, Enhancement of Survival Permits, and Recovery and Interstate Commerce Permits. *Permits for Native Species Under the Endangered Species Act*, U.S. Fish and Wildlife Service, https://www.fws.gov/endangered/esa-library/pdf/permits.pdf (last visited Nov. 19, 2016).

Even if an Alternative Development Proposal was an acceptable permit, case law clearly states that an ITP must be denied before a takings claim to be considered ripe. There is nothing in the record which indicates that the FWS was prepared to deny Plaintiff's ITP. Here, just as in *Boise Cascade* and *Morris*, "the denial of a permit is still a necessary trigger for a ripe takings claim." *Boise Cascade* 296 F.3d at 1347; *Morris* 392 F.3d at 1376. Thus, Plaintiff's claim is not

ripe and the court need not consider the second requirement under *Williamson County*. 473 U.S. at 194. Even if the court believes that the ADP was sufficient, the failure of Plaintiff to seek just compensation means that a ripe federal takings claim was never created. *Id*.

c. The Futility Exception Does Not Excuse Lear from Applying for an Incidental Take Permit.

The court below incorrectly finds that applying for an incidental take permit would be futile where it is undisputed that the cost of applying for a permit exceeds the fair market value of the property in question. R. at 9. The lower court also states that applying for a permit is unnecessary if the Plaintiff can establish that it is so burdensome that it effectively deprives plaintiffs of their property rights. R. at 9.

No official agency communication actually disclosed to the Plaintiff how much the ITP and HCP would cost, so an argument that the permit process is too expensive or burdensome has no foundation. Plaintiff contends that an environmental consultant informed her that an application for an ITP including the environmental assessment documents would cost $150,000. R. at 6. According to this U.S. Fish and Wildlife Service, an ITP application fee is $100. *Federal Fish and Wildlife Permit Application Form*, Department of Interior U.S. Fish and Wildlife Service (Rev. Oct. 2013), https://www.fws.gov/forms/3-200-56.pdf.

The record does not indicate that the environmental consultant who advised Plaintiff was an agency consultant. Only the FWS has the ability to tell Plaintiff how much these processes will cost, and Plaintiff did not give the agency the opportunity to make such a determination because Plaintiff never actually applied for an ITP. *Morris* at 1377. Moreover, it appears on the record that the lower court blindly adhered to Plaintiff's claim that the ITP preparation would be excessively costly, relying on one statement from Plaintiff's chosen, unnamed environmental consultant. The application for an ITP cannot be futile, as there has been no evidence in the

record of excessive economic burden except for Plaintiff's unfounded claim that preparation of an ITP would cost $150,000.

Additionally, it should be noted that the case in which the lower court relies involves facts that are dissimilar to this situation. The issue in that case involved not a regulatory taking, but rather, a physical taking. *Hage v. United States*, 35 Fed. Cl. 147 (1996). In *Hage*, plaintiffs claim that defendant has taken their property rights in water, ditch rights-of-way, and forage which date back to the 1800s. *Id*. at 150. Defendant's in Hage actually impounded plaintiff's cattle. *Id.* 176. There is no physical occupation of Lear's property that is proposed by the FWS or Brittain County. This is a purely regulatory taking, not a physical taking which would be automatically compensable as described in *Hage*.

In conclusion, Lear's claim is not ripe because she never applied for a Section 10 ITP with an HCP. Applying for an ITP would not be futile because the FWS never addressed the scope of permissible development. The District Court improperly determined that Plaintiff's claim was ripe.

III. THE ENTIRE ISLAND IS THE RELEVANT PARCEL FOR THIS ANALYSIS.

The relevant parcel is Lear Island, not solely the Cordelia lot. The Supreme Court has not settled the question of how to determine the relevant parcel is regulatory takings cases. The Court of Appeals for the Federal Circuit has taken a "flexible approach, designed to account for factual nuances," in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013). (quoting *Loveladies*, 28 F.3d 1171 at 1181). Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into the economic impact of the regulation the

claimant and on investment-backed exceptions. *Id.* The relevant parcel determination is a question of law based on underlying facts. *Palm Beach Isles Assocs. V. United States*, 208 F.3d 1374 (Fed Cir. 2000).

a. Application of Factors in *Lost Tree* Results in the Entire Island as the Relevant Parcel.

The most recent court decisions considering the relevant parcel issue were *Lost Tree I* and *Lost Tree II*. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412 (2011); *Lost Tree Vill. Corp. v. United* States, 707 F.3d 1286 (Fed. Cir. 2013). In *Lost Tree*, the area at issue was a five-acre parcel of land known as Plat 57. 100 Fed. Cl. 412; 707 F.3d 1286. Plat 57 existed within John's Island which comprised about 1,300 acres and contained hundreds of other parcels. *Id*. All other parcels had been previously sold for development. *Id*.

In *Lost Tree I*, the Court of Federal Claims rejected both the government's position that the relevant parcel was the entire island and Lost Tree's position that only Plat 57 was relevant. 100 Fed. Cl. 412. The court found instead that the relevant property consisted of Plat 57 along with Plat 55 and various scattered wetlands in John's Island. *Id*. at 431-32. Because the permit denial at Plat 57 only reduced the value of that collection of relevant properties by 58 percent, the court found no taking under either *Lucas or Penn Central*. *Id.* at 437-38. *In Lost Tree II*, The Federal Circuit reversed agreeing with Lost Tree that the relevant parcel was Plat 57 alone and focused on the elimination of productive use of property. 707 F.3d 1286. The Federal Circuit believed that Lost Tree did not treat Plat 57 as part of the same economic unit as the other land it had developed into the John's Island community. *Id* at 1293. The facts indicated that the John's Island community had actually been developed long before it decided to fill Plat 57. *Id*. at 1294. The court believed that Lost tree had a "long hiatus from development efforts," so Plat 57 was the only land it actually owned. *Id*.

While *Lost Tree* provides a starting framework for this issue, the facts must be distinguished from the issue at hand regarding Lear Island. First, the Cordelia Lot was treated the same as the other subdivided areas on the island, unlike John's Island in *Lost Tree*. At the time of the subdivisions on Lear Island, the Brittain Town Planning Board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence. R. at 5. Lot 57 on John's island was left intentionally undeveloped while the rest of John's island developed. *Lost Tree* at 1293. Unlike John's Island, there is no indication that the development of Lear Island as a whole was ever complete. Second, the intent behind the subdivision of each property is different. There is no indication that King James Lear had any intent for the island to sold to anyone outside the Lear family. In fact, when King Lear originally deeded the lots to his three daughters, he kept a life estate for himself. R. at 5. The division of Lear Island resulted solely from the fact that King James Lear had three daughters, thus the three parcels now on Lear Island. However, John's Island was divided with the intent to sell each parcel separately to build homes. *Lost Tree* at 1294. Additionally, Cordelia's economic expectations could not be the same as a purchaser of land for the purpose of development. Because our facts are distinguishable from *Lost Tree*, Lear Island is the relevant parcel.

b. A Flexible Approach Should be Used to Determine the Relevant Parcel.

The lower court cites *Loveladies Harbor* explaining that a flexible approach cannot be used when the relevant lots have been transferred to different parties and that formal subdivision of a property into separate lots should be determinative. R. at 9. However, the circumstances in *Loveladies Harbor* are distinguishable here. In *Loveladies Harbor*, the court found: 1) the builders purchased the land with the reasonable expectation and intention of developing it for resale; 2) the denial of the development permit constituted an interference with their investment-

backed expectations; 3) evidence supported the trial court's ruling that the denial of the permit deprived the builder's of all economically feasible use; and 4) evidence supported the trial court's ruling that the government failed to carry its burden of proving that the common law doctrine of nuisance could have been invoked to prevent the development. *Loveladies Harbor*, 28 F.3d 1171. Plaintiff Lear surely cannot have the same expectations in this matter as the developers in *Loveladies* because there is no interference with Plaintiff's investment-backed expectations. Plaintiff did not purchase the land. When the land was given to Plaintiff in 2005, the butterfly had already been designated an endangered species. R. at 5.

Moreover, if this court is not persuaded by the distinction from *Lost Tree* and *Loveladies*, this court cannot ignore that the survival of the Karner Blues depends on partially shaded lupine fields. R. at 6. The shade to the lupine fields is provided, in part, by the successional forest on the Goneril lot. R. at 6. Thus, the court must consider more than just the Cordelia lot in this inquiry because the butterfly could not survive without the shade from the other parcel on the island. Even if the court does not agree that the entirety of Lear Island is relevant, the court should consider more than solely the Cordelia lot. The fact that Cordelia is estranged from her sister should have no impact on the parcel consideration.

IV. THE ESA DOES NOT IMPOSE A DUTY TO IMPROVE A SPECIES' HABITAT BECAUSE INACTION IS NOT "HARM" UNDER THE STATUTE.

The Heath has been kept open by annual mowing each October, and that yearly human intervention has allowed fields of wild blue lupine flowers to grow which are essential for the survival of the Karner Blue larvae. R. at 5. If Plaintiff stops mowing the Heath each October, the Heath would gradually be taken over by oak and hickory trees, completely destroying the Karner Blue's habitat over a period of about ten years. R. at 7. The District Court notes "the irony of the FWS relying on the prospective extinction of the very subpopulation of Karner Blues it is

fighting to protect as an argument against finding a taking of Plaintiff's property." R. at 10. Ironic though this argument may seem, it is solid in its foundation. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* solidified the Supreme Court's understanding of "harm"; the court specifically chose to exclude inaction. 515 U.S. 687 (1995).

> In *Sweet Home*, the Solicitor General's opening brief stated that "harm" usually excludes inaction except where a law other than ESA section 9 creates a duty to act, such as a Federal Power Act "duty to maintain a licensed dam structure." Outside such narrow circumstances, *"harm" does "not encompass passive acts of nonfeasance or create a duty (where none otherwise would exist) to maintain a listed species' habitat.*" Thus, the litigation position of the United States is that the harm rule itself creates no duty to act to improve a species' habitat.

Donald C. Baur & William Robert Irvin, *Endangered Species Act: Law, Policy, and Perspectives* (2d ed. 2010)(emphasis added).

The ESA does not seek to bend God's will – it seeks only to prevent human actions, agency or individual, from adversely modifying or destroying the "critical habitat" of any endangered or threatened species. The Plaintiff has no affirmative duty to maintain the Heath, the Karner Blue's only habitat in New Union, but has been doing so by mowing each October and preventing the growth of oak and hickory trees that will naturally take over the area without human intervention. R. at 7. Should Plaintiff decide to stop mowing, the failure to maintain the Karner Blue larvaes' habitat, the Heath, does not fall into the category of "harm" that the ESA protects against.

The District Court also unsuccessfully attempts to distinguish the nearly three-year moratorium in *Tahoe-Sierra* from the ten-year delay in this case before natural processes will render the Cordelia Lot developable. R. at 10. Although the court is correct that ten years is indeed a longer delay than 32 months, the court in *Tahoe-Sierra* states that it "could not possibly conclude that every delay of over one year is constitutionally unacceptable." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002). More specifically, the

court in *Tahoe-Sierra* concludes that "'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Id*. Although the Plaintiff and District Court aspire to move away from the ad hoc, fact based determination mandated by *Penn Central*, the very holding of *Tahoe-Sierra* makes that aspiration impossible. Any "'temptation to adopt what amount to per se rules in either direction must be resisted."

V. THE DISTRICT COURT MUST USE *PENN CENTRAL* IN THIS CASE, NOT LUCAS, AS THE LAND RETAINS ECONOMIC VALUE.

Lucas provides that there are only two scenarios when the "ad hoc, factual inquiries" identified in *Penn Central* are irrelevant: 1) when a regulatory action denies all economically beneficial or productive use of the land or 2) when a physical occupation or taking of the land occurs. *Lucas*, 505 U.S. at 1015. Courts have determined that temporary physical takings that deny landowners *all* use of their property require compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987). However, not all temporary takings or restrictions require compensation. Currently, the rule is that there *is no rule* associated with temporary, purely regulatory restrictions on the use of land – there is no automatic exemption for temporary regulatory restrictions from the Takings Clause, and conversely there is no *per se* taking associated with temporary physical invasion or even a temporary denial of all economic use of the land. See *Lucas*; *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 513 (2012); *First English*, 482 U.S. at 314.

The District Court attempts to use *Lucas* to pave the way to victory for the Plaintiff in this case, but the facts are incontestably different. In *Lucas*, David Lucas paid $975,000 for two beachfront lots in Charleston County, South Carolina, where he intended to build luxurious residential homes and subsequently offer them for sale, undeniably an investment decision.

Lucas, 505 U.S. at 1006. Shortly after Lucas purchased the lots, the South Carolina legislature enacted the Beachfront Management Act which would permanently prevent Lucas from erecting any homes or permanent structures of any kind on the lots he purchased specifically to build on. *Id.* at 1007. Conversely, in this case, the Plaintiff was devised the land by a family member and will unfortunately experience a ten-year delay in her ability to build a residence on the Cordelia lot. The gravely impactful permanent sacrifice of "*all* economically beneficial uses in the name of the common good" discussed in *Lucas* is not present here. *Lucas*, 505 U.S. at 1019. "Few if any regulations have such a drastic effect on property value, meaning that Lucas has been converted to a precedent of largely symbolic significance." John D. Echeverria, *Making Sense of Penn Central*, 39 Envtil. L. Rep. News & Analysis 10471, 10472 (2009).

After *Lingle v. Chevron U.S.A., Inc.,* an aggrieved party must assert either a physical taking, a taking by total economic deprivation like in *Lucas*, a partial taking like in *Penn Central*, or a land-use restriction that acts as a taking. 544 U.S. 528, 528 (2005). Partial regulatory takings where at least some sliver of economic value remains are still subject to the *Penn Central* factors. *Id.* Although the District Court notes that Plaintiff is not relying on the partial takings analysis in *Penn Central*, after examining the facts, that scenario is the only viable option of the *Lingle* categories for the Plaintiff to pursue. This court must apply the test developed in *Penn Central* because the Cordelia Lot is not deprived of all economically beneficial or productive use.

In *Penn Central*, Justice Brennan identified three factors that are controlling in takings jurisprudence: 1) the economic impact of the regulation on the landowner; 2) the extent to which the regulation interferes with investment-backed expectations and 3) the nature of the governmental action. *Penn Cent. Transp. Co. v. City of N.Y.,* 438 U.S. 104, 124, 98 (1978). After

Loretto v. Teleprompter Manhattan CATV Corp., the Supreme Court further narrowed takings jurisprudence into three distinct types: 1) outright physical takings, which are always compensable, 2) physical takings by regulation and 3) pure regulatory takings. Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. Envtl. L. and Pol'y 119, 125 (1993). "The first two categories are clearly compensable, while the third continues to be mired in ad hoc analysis." *Id.* Even if this court decides that there was a taking in this case, the taking of the Cordelia lot would be purely regulatory, and therefore mired in the ad hoc analysis of *Penn Central* and not automatically compensable under the largely symbolic *Lucas*.

a. Economic Impact of the Regulation on the Landowner.

Even severe economic loss alone is not enough to constitute a regulatory taking. *Miller v. Schoene*, 276 U.S. 272 (1928); *Andrus v. Allard*, 444 U.S. 51 (1979). The temporary delay in development potential of the Cordelia Lot will certainly have a minimal economic impact on the Plaintiff. The property taxes on the lot are currently $1,500 per year, and the Plaintiff will be forced to postpone building until the Heath rids itself of wild lupine flowers, if the Plaintiff wishes to stop mowing and allow nature to take its course. R. at 7. The Brittain County Butterfly Society offered to pay the Plaintiff $1,000 per year in rent for wildlife viewing of the Karner Blue Butterfly, but the Plaintiff has so far rejected the Society's offer. *Id.* In *Andrus v. Allard,* the Eagle Protection Act prohibited the sale of any object containing eagle feathers. *Andrus*, 444 U.S. at 57. The court held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id*. at 66. Moreover, even when the "most profitable use" of an owner's property is prevented by regulation, that factor alone is not dispositive. *Id*. at 67. "If some 'bundle' remains

– for example, the right to charge admission to see the feathers, or the right to donate or devise the feathers – then there is no taking." Murray, *supra* at 126. Comparably, even though there is temporarily no viable residential building site on the Cordelia Lot, the Plaintiff still possesses the secondary, profitable bundle of rights associated with collecting rent for wildlife viewing. Admittedly, "prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Andrus*, 444 U.S. at 66. The court need not engage in a prediction of profitability here – the Brittain County Butterfly Society has provided a number, $1,000 per year, that shows unequivocally that the economic impact on the Plaintiff is minimal.

b. Investment-Back Expectations.

There are no relevant investment-backed expectations in this case, as this was not an investment at all. The Plaintiff received her property as a devise from her father in 2005. R. at 5. The investment-backed expectations requirement from *Penn Central* "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." *Good v. United States,* 189 F.3d 1355, 1360 (Fed. Cir. 1999) (quoting Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)). Even if the Plaintiff had bought the property, "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." *Id.* at 1361. The Plaintiff was aware that there was an endangered species of butterfly present on her lot, and that development may require permits or approvals from the FWS. (DCT Decision, paragraph 11). Notably, the FWS declared the Heath critical habitat for the Karner Blue butterfly in 1992, and the Brittain County Wetland Preservation Law was established in 1982. R. at 5, 7. If the Plaintiff had bought the property with that same knowledge, the Plaintiff's knowledge would act to prevent her "ability to fairly claim

surprise" when permission was denied to develop the land, and she would simply be out the money. *Id*. at 1363.

c. Nature of the Governmental Action.

"[T]he 'character of the government action' – for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'" is a relevant factor in determining whether a regulatory restriction is compensable. *Lingle*, 544 U.S. at 540-41. Many decisions have indicated that the "character" factor of the *Penn Central* test is only relevant in cases involving the physical occupation or taking of property. *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 134 (Cal. Ct. App. 2006); *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 201 P.3d 8, 28 (Mont. 2008); *RAR Dev. Assocs. v. N.J. Sch. Constr. Corp.*, No. L-9424-05, 2008 WL 2663403, at *11 (N.J. Super. Ct. App. Div. July 9, 2008). However, "what considerations might reasonably be included in the 'character' calculus remain as great a mystery today as the day *Penn Central* was drafted." R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 Urb. Law. 437, 447 (2006). There are three other plausible definition of the character prong: 1) the importance of the regulation to the public interest, 2) whether the government is acting in bad faith, and 3) whether the regulation fails to substantially advance a legitimate state interest. Joshua P. Borden, *Derailing* Penn Central*: A Post*-Lingle*, Cost-Basis Approach to Regulatory Takings*, 78 Geo. Wash L. Rev 870, 872 (2010). The last, the "substantially advances" test, has been repudiatd by *Lingle,* so that leaves three remaining interpretations of the character prong, all used by circuits around the country. *Id.* at 873. The government action in this case passes all of these tests; there is no physical occupation of the Plaintiff's property, there is no obvious public interest in the

butterfly's survival, and there is nothing in the record to suggest bad faith (nor has the other party suggested it.) After analyzing all of the *Penn Central* factors, there is no taking and there must be no compensation to Plaintiff.

VI. NEW UNION CONTROLS LANDS BENEATH NON-TIDAL NAVIGABLE WATERS UNDER PUBLIC TRUST AND EQUAL FOOTS DOCTRINE.

Plaintiff's takings claim fails to account for the State of New Union having an inherent title to lands beneath non-tidal navigable waters, held in public trust, and regulated as a matter of state law on grounds of equal footing. Regulatory takings do not require just compensation if the regulation, "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." *Lucas,* 505 U.S. at 1029. It must not "be newly legislated or decreed." *Id.* Public trust doctrine sufficiently qualifies as a background principle owned by the state.

a. **Public Trust Doctrine.**

Traditionally, public trust doctrine declared a state or sovereign held the rights to public lands, including tidal lands under the water, in trust for use in commerce or enjoyment by the public. *P.P.L. Montana L.L.C. v. Montana*, 565 U.S. 576, 603 (2012); *see Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 458 (1892). However, courts have long established that states reserve the right to extend public trust principles to lands beneath non-tidal waters that are navigable if they so choose. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876). This principle of non-tidal navigable waters falling under public trust extends not just to rivers and streams but to lakes as well. *See Alaska v. United States*, 563 F. Supp. 1223, 1226 (D. Alaska 1983) (declaring Slopbucket Lake a non-tidal body of water, but deemed navigable under public trust doctrine); *cf. Utah v. United States*, 403 U.S. 9, 11 (1971) (applying public trust doctrine "to all water courses").

Plaintiff's action establishes that Lake Union is an interstate lake that has been used for both navigation and commerce; the lake was used in the past to transport produce from the Lear family farm when it was in full operation, as well as for hunting and fishing. R. at 4–5. These facts alone demonstrate that the state of New Union may assert the public trust doctrine "for the public advantage and convenience" over Lake Union. *Barney*, 94 U.S. at 338. The public trust doctrine applies to the cove on Plaintiff's property despite New Union setting no specific guidelines as to public trust of its waters. R. at 10. The assertion of New Union's public trust of Lake Union extends from Brittain County's Wetlands Preservation Law. R. at 7. This law, passed in 1982, requires a permit to fill marsh in the cove on the lake. *Id.* Similarly, the city of Keokuk, Iowa, granted itself authority to fill property along the Mississippi River and to regulate how the property along the river was used. *Barney*, 94 U.S. at 339. The Court explicitly stated, "we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the river side, by filling in below high water, and building wharves and levees for the public accommodation." *Id.* Brittain County, therefore, with its county authorities, also has the right to protect non-tidal navigable waters like Lake Union by requiring permitting to fill in marsh area. R. at 10. The authority of the state is being exercised through a local government unit in both cases. *See Barney*, 94 U.S. 324. These set of facts show the public trust doctrine applies to the cove area of Lake Union.

b. Equal Footing Doctrine.

Equal footing doctrine applies to all public lands and waters in every state, including New Union, inhibiting Plaintiff's argument that public trust does not apply to non-tidal navigable waters prior to 1810. *See* R. at 10. Equal footing doctrine is where "the people of each State, based on principles of sovereignty, 'hold the absolute right to all their navigable waters and the

soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *P.P.L. Montana L.L.C.,* 565 U.S. at 591 (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842)). With New Union admitted to the United States after being acquired via the Northwest Territory, its lands and waters are also held "upon an equal footing with the original States in all respects" including the right to hold its lands and waters and the lands underneath the waters "in a trust for the future states." *Shively v. Bowlby*, 152 U.S. 1, 49 (1894). More narrowly, Congressional grants of property to private settlers do not allow for title beneath the high water mark on the property, and do not preclude the state from asserting its right over lands beneath the waters, once created. *Id.* at 58.

Lear Island was originally granted to Cornelius Lear in 1803 in the Northwest Territory. R. at 4. The land grant included "all lands under water within a 300-foot radius of the shoreline of said island" in addition to the land under the strait. *Id.* at 4–5. While the Lear family may have originally had title to the lands beneath the waters of Lake Union, once New Union joined the United States, any grant of land beneath navigable waters is reserved to that individual state in public trust, and the landowner is left with the property above the high water mark. *Shively*, 152 U.S. at 58. Accordingly, it does not matter when the land grant was made, the public trust rights of land beneath Lake Union transferred to the state of New Union upon admission into the United States; therefore, both the equal footing and public trust doctrines are validly asserted to produce a background principle in state law to preclude a regulatory takings claim. *Lucas,* 505 U.S. at 1029.

VII. COMPLIANCE WITH TWO SEPARATE PROPERTY REGULATIONS DOES NOT DEPRIVE PLAINTIFF OF ALL ECONOMIC VALUE OF HER PROPERTY.

The final aspect of Plaintiff's takings claim is insufficient on two grounds, first, the federal and local regulations do not deprive Plaintiff's property of its entire economic value, and

second, both harms, occurring independent of one another, must be viewed separately. The test for evaluating a regulatory takings claim alleging a total economic loss is, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019.

a. Federal and Local Regulation Do Not Deprive All Economic Value.

Because economic value applies to submerged property, courts have found that if property upland from the submerged property may still be developed, that property has not lost its entire economic value. *Palazzolo*, 533 U.S. at 631. While Brittain County does not grant Plaintiff a permit to build on the marsh in the cove, Plaintiff is still allowed to develop upland on the property partially regulated by the ESA. R. at 7. While Plaintiff conducted an assessment of her property without restrictions, she has not conducted a second assessment of her property value, meaning Plaintiff's original assessment of $100,000 is irrelevant. *Id.* Without knowing the specific value of Plaintiff's property, it is at least the $1,500 in property taxes plus the value of a completed house complying with ESA restrictions. *Id.* at 6–7. Plaintiff has not demonstrated an additional assessment of what the property value would be once a house was completed, other than the $150,000 it would cost to comply with regulations; there is the possibility the property value could increase upon completion of a house compliant with federal restrictions. *Id.* at 6. Similarly, in *Palazzolo*, the Court concluded there was $200,000 remaining in property value to construct a homestead on the property. 533 U.S. 606 at 631. Plaintiff's property value is not able to be fully determined, but it is higher than zero. R. at 10. A number higher than zero is not leaving the property "economically idle" depriving it of all economic value. *Lucas*, 505 U.S. at 1019.

Another key aspect from *Palazzolo* in defeating the regulatory takings claim is the disputed property was developable at the time of the action. 533 U.S. 606 at 631. The Court noted that deprivation of all economic value was defeated given the property was transferred after the land regulation was put in place, giving the owner notice that a restriction is in place. *Id.* at 626; *see Palazzolo v. State*, 746 A.2d 707, 716 (R.I. 2000). This holding does not provide an answer to whether this rule extends to regulatory takings in the context of undevelopable submerged land subject to regulation held by a property owner. Some state courts have adopted the principle that the authority of the state or its agent may acquire submerged, unimproved lands for public purpose. *State ex rel. Bower v. Tampa*, 316 So. 2d 570 (Fla. Dist. Ct. App. 1975). The court upheld an act of the Florida legislature acquiring submerged, undeveloped lands from property owners as not constituting an unconstitutional regulatory taking. *Id.* at 573. This particular case affirmed and cited the following rule, "the reasonableness or justice of a deliberate act of the Legislature...so long as the act does not contravene some portion of the organic law, are all matters for legislative consideration and are not subject to judicial control." *State ex rel. Davis v. Clearwater*, 106 Fla. 761, 771 (1931).

Having established Brittain County has authority to act in a similar manner as a state, and that the State of New Union, on equal footing and through public trust, established title to submerged lands in Lake Union upon admission into the United States, New Union may adopt the law of Florida on this matter, and apply principles found in *Palazzolo*. *Barney,* 94 U.S. at 338; *Shively,* 152 U.S. at 58; *Utah v. United States*, 403 U.S. 9, 11 (1971). Brittain County first adopted its Wetland Preservation Law requiring a fill permit in 1982. R. at 7. Plaintiff did not receive title to her property until her father passed away in 2005. R. at 5. Plaintiff has presented no evidence declaring that this regulation was passed in a manner that is unconstitutional. *See*

State ex rel. Davis, 106 Fla. at 771. Therefore, Plaintiff had notice of the particular wetlands regulation affecting the marsh in the cove on Union Lake. *Palazzolo,* 533 U.S. at 626. This particular notice, granting of a parcel of property post-promulgation of a regulation, precludes the possibility of there being a complete deprivation of economic value. *Id.* If there is not a complete deprivation of economic value, then the claim for just compensation under *Lucas* must fail. 505 U.S. at 1019. Neither federal nor county regulations deprive Plaintiff of all of her property's economic value.

b. Joint and Several Liability are Inapplicable.

Secondly, even if either property restriction may be viewed as harm, neither regulation should be combined together to establish potential joint and several liability. Some states have adopted the concept of treating two tortfeasors with joint and several liability although there is "no concert of action," but "the independent acts of several actors concur to produce indivisible harmful consequences." *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976). So, there must be two independent acts that produce a single harm that cannot be differentiated between the two Defendants. *Id.*

While there may be two independent acts by Brittain County and FWS, the establishing of critical habitat for the Karner blue butterfly, and the Wetlands Preservation Law, neither act produces a single, indivisible harm. *Velsicol*, 543 S.W.2d at 342; R. at 5, 7. First, both actions by FWS and Brittain County took place in separate years and in separate locations. The Karner blue butterfly was listed as an endangered species in 1992 and the wetlands law was passed by Brittain County in 1982. R. at 5, 7. In addition, the endangered species designation applies only to the Heath on one particular portion of the property, whereas the wetlands law applies to submerged wetlands off the shore of the island. *Id.* Neither independent action combines

because there has been no harm to Plaintiff. With the wetlands law, Plaintiff applied for a permit to fill the marsh area, for which Brittain County has established a standard of water-dependent activity in granting. *Id.* at 7. Plaintiff's permit was denied under a validly enacted law concerning lands Brittain County is entrusted to protect. *See Barney,* 944 U.S. at 338; *State ex rel. Davis,* 106 Fla. at 771.

There is no harm committed in FWS protecting the butterfly because Plaintiff first attempted to comply by obtaining an incidental take permit, but abandoned the proposition to obtain a fill permit from the county. R. at 7. Plaintiff merely has cost estimates of property restriction compliance, but has not spent any money to comply with those restrictions. *Id.* Further, Plaintiff could wait another ten years without disturbing the butterfly habitat, and the land would naturally convert back to forest and destroy the habitat of the butterfly. *Id.* Since Plaintiff has not spent any money or resources and can wait ten years for the property restrictions to expire; there is no concurring harm resulting in joint and several liability. *Velsicol*, 543 S.W.2d at 341. Concluding, Plaintiff has failed to demonstrate her property has lost all its economic value and any valid demonstration as to how either regulation constitutes a harm requiring joint and several liability.

CONCLUSION

For the above reasons, Defendant-Appellant-Cross Appellee Fish and Wildlife Service (FWS) believes that Plaintiff's takings claim is not ripe due to her failure to apply for an Incidental Take Permit, that the relevant parcel of property is Lear Island in its entirety, that the natural destruction of the Karner Blue Butterfly's habitat precludes Plaintiff's takings claim, that the offer of $1,000 by the Brittain County Butterfly Society also precludes Plaintiff's takings claim, that public trust principles preclude Plaintiff's takings claim, and that the Endangered

Species Act and Brittain County's Wetlands Preservation Law must be viewed separately, and when viewed separately, do not deprive Plaintiff of all her property's economic value. FWS requests the court vacate the award of $10,000 in damages awarded to Plaintiff, and affirm the dismissal of declaratory judgment stating the Endangered Species Act is unconstitutional.