Team 33

Docket No. 16 - 0933

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff-Appellant-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 THE UNITED STATES FISH AND WILDLIFE SERVICE

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Appellant Cordelia Lear ("Lear") filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331. On June 1, 2016, the district court entered its judgment on all counts, determining that the Endangered Species Act is a valid exercise of congressional power and that the conjunctive application of federal and local regulations resulted in an uncompensated taking of Lear's property. The district court's judgment is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is the Endangered Species Act ("ESA"), as applied to the Cordelia Lot, an invalid exercise of congressional power?

II. Is Lear's takings claim against the United States Fish and Wildlife Service ("FWS") ripe, when she failed to apply for an Incidental Take Permit under Section 10 of the ESA?

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

IV. Assuming the relevant parcel is the Cordelia Lot, can Lear assert a takings claim based on complete deprivation of economic value of the property against FWS, when her land will become developable within ten years?

V. 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?

VI. 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?

VII. Assuming the relevant parcel is the Cordelia lot, are the 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-home residence?

STATEMENT OF THE CASE

This is an appeal from a final judgment of the District Court for the District of New Union. (R. at 12.) On May 15, 2012, the New Union FWS field office sent a letter to Lear informing her that, in order to build a home on the Cordelia Lot, she was required to develop a Habitat Conservation Plan ("HCP") and apply for an Incidental Take Permit ("ITP"). (R. at 6.) Instead, Lear developed an alternative development proposal ("ADP") and, in August 2013, filed a fill permit application with the Brittain County Wetlands Board, which was denied in December 2013. (R. at. 7.) In February 2014, without pursuing the ITP application, Lear brought an action against the FWS under the ESA, and against Brittain County under the state's Wetlands Preservation Law, seeking monetary damages and declaratory judgment. (R. at 4.)

After a seven-day bench trial, the district court entered its judgment: (1) dismissing Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of legislative power as applied to her property; (2) awarding damages of $10,000 in Lear's favor against the FWS for an unconstitutional taking of her property in violation of the Fifth Amendment to the Constitution; and (3) awarding damages in the amount of $100,000 against Brittain County for an unconstitutional taking of Lear's property in violation of the Fifth Amendment to the Constitution. (R. at 4.)

The FWS and Brittain County each filed a Notice of Appeal on June 9, 2016. Thereafter, Lear filed a Notice of Appeal on June 10, 2016. (R. at 1.) FWS takes issue with the district court's following holdings: that Lear's claim for an uncompensated taking was ripe even though Lear did not apply for an ITP; that the relevant parcel for the purpose of Lear's takings claim based upon complete deprivation of economic value is the Cordelia Lot as subdivided in 1965, and not the entirety of Lear Island; that the potential future natural destruction of the

Cordelia Lot's lupine fields, which are the butterflies' habitat, does not preclude Lear's takings claim; that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Lear's takings claim based upon complete deprivation of economic value; that the public trust principles inherent in Lear's title do not preclude her takings claim; and that the ESA as administered by FWS and Brittain County's application of the state's Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value. (R. at 1-2.) Lear takes issue with the district court's determination that the ESA is a legitimate exercise of congressional power under art. I, § 8 of the U.S. Constitution, as applied to a wholly intrastate population of Karner Blue Butterfly. (R. at 1.)

STATEMENT OF THE FACTS

In 2005, Cordelia Lear inherited a piece of property from her father, King James Lear. (R. at 5.) The property, known as the Cordelia Lot, is located on Lear Island, in Lake Union. (R. at 5.) Lake Union is an interstate lake, which has been traditionally used for interstate navigation. (R. at 4.) Lear Island was granted to Cornelius Lear in 1803 by an Act of Congress (R. at 4.) The congressional grant included the entire Lear Island and all the submerged lands within a 300-foot radius of its shoreline, as well as the submerged lands within a shallow strait that separated Lear Island from the mainland portion of the state of New Union. (R. at 4-5.) At the time of the grant, the present-day New Union was part of the Northwest Territory. (R. at 4.)

Since the 1803 grant, the Lear family has used the island as a homestead, farm, and hunting and fishing grounds. (R. at 5.) In the nineteenth century, produce grown on the island was carried by boat to the mainland. (R. at 5.) In the twentieth century, the Lear family constructed a causeway connecting the island and the mainland by road. (R. at 5.) The family ceased agricultural activities on the island in 1965. (R. at 5.)

In 1965, King James Lear ("James") owned the entirety of the 1803 grant. (R. at 5.) James developed an estate plan dividing Lear Island into three parcels, one for each of his daughters Goneril, Regan, and Cordelia. (R. at 5.) Lear Island consists of 1,000 acres, and was divided into the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. (R. at 5.) James deeded the lots to his daughters, reserving a life estate in each lot for himself. (R. at 5.) At the time of the subdivision, the Brittain Town Planning Board determined that at least one single-family residence could be developed on each lot. (R. at 5.)

Soon after deeding the island to his daughters, James constructed a residence on the Regan Lot for use by his daughter Regan. (R. at 5.) James continued to live in the original home located on the Goneril Lot, close to the north end of the island, near the strait that separates the island from the mainland. (R. at 5.) The Cordelia Lot is situated at the northern tip of Lear Island. (R. at 5.) The Cordelia Lot consists of a forty-foot wide by 1000-foot long access strip and nine acres of open field. (R. at 5.) After ceasing agricultural activities on Lear Island in 1965, the Lear family kept the Cordelia Lot open by mowing it every October. (R. at 5.) The rest of the island naturally became wooded. (R. at 6.) The family referred to the Cordelia Lot as "The Heath" due to its openness. (R. at 5.)

The Heath has become covered with wild blue lupine flowers. (R. at 5.) These plants are essential to the survival of the Karner Blue butterfly, an endangered species listed on December 14, 1992. (R. at 5.) The Karner Blue larvae remain attached to the blue lupine plant foliage, and feed exclusively on these leaves, until they emerge from chrysalides as butterflies. (R. at 5-6.) Any disturbance of the lupines during the larval and chrysalis stages would result in the death of the butterflies. (R. at 6.) Partially shaded lupine fields near successional forests constitute the ideal habitat for the Karner Blue butterfly. (R. at 6.) These butterflies cannot naturally migrate

or relocate to new habitats because they have a short flight distance which must follow woodland edge corridors. (R. at 6.)

The only remaining population of the Karner Blue butterfly in the state of New Union lives in the Heath. (R. at 5.) The Heath provides ideal habitat for the Karner Blue butterfly because it consists of lupine fields which are adjacent to the successional forest on the Goneril Lot. (R. at 6.) The access strip provides particularly good habitat for the Karner Blues because it is partially shaded. (R. at 6.) The FWS designated the Heath as critical habitat for the New Union population of Karner Blue butterflies in 1992. (R.at 6.) Discontinuing the annual mowing operations would naturally convert the lupine fields on the Cordelia Lot into a forest within ten years. (R. at 7.) This process would eliminate the Karner Blues' habitat, and the New Union population of the butterfly would go extinct without a replacement habitat located within a one-thousand-foot radius of the existing fields. (R. at 7.)

James died in 2005, and each of his daughters came into possession of their deeded properties. (R. at 5.) In 2012, Lear decided to build a residence on the Cordelia Lot. (R. at 5.) Lear was aware of the existence of the endangered butterfly on her property and contacted the New Union FWS field office to inquire whether she needed any permits or approvals in order to develop her property. (R. at 6.) FWS agent L.E. Pidopter informed Lear that any disturbance of the lupine habitat other than continued annual mowing would constitute a "take" of the endangered Karner Blue butterfly in violation of section 9 of the ESA. (R. at 6.) Pidopter advised Lear that she could avoid a "take" by obtaining an Incidental Take Permit ("ITP") under section 10 of the ESA. (R. at 6.) Pidopter further advised Lear that, in order to obtain an ITP, she would need to develop a habitat conservation plan ("HCP") and an environmental assessment document under the National Environmental Policy Act. (R. at 6.)

Pidopter also informed Lear that her HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip, and the permit would require her to commit to maintain the remaining lupine fields through annual fall mowing. (R. at 6.) The Heath is adjacent to the Goneril Lot, and Goneril Lear has refused to consider cooperating in a HCP that involves restrictions on her property. (R. at 6.) On May 15, 2012, the FWS New Union field office sent Lear a letter which confirmed that the entire ten-acre lot was a critical habitat for the Karner Blue butterflies and reiterated the information provided by Pidopter. (R. at 6.) The letter further invited Lear to apply for an ITP and referred her to the FWS's Habitat Conservation Planning Handbook for information on how to develop an acceptable HCP. (R. at 6.)

Lear discussed the ITP process with an environmental consultant, who advised her that the entire application process, including the HCP and the environmental assessment, would cost $150,000. (R. at 6.) Lear decided against pursuing an ITP application. (R. at 7.) Instead, she developed an alternative development proposal ("ADP") that would not disturb the lupine fields. (R. at 7.) Lear's ADP proposed to fill one-half-acre of cattail marsh, which has formed in a cove that was historically open water and was used as a boat landing. (R. at 5, 7.) The proposed project would create a lupine-free building site and an access causeway connecting the site to the mainland through the shared causeway without disturbing the access strip. (R. at 7.) This project did not require any federal approvals. (R. at 7.)

The ADP required a fill permit from the Brittain County Wetlands Board ("Board") pursuant to the Brittain County Wetland Preservation Law, which was enacted in 1982. (R. at 7.) Lear applied for a permit in August 2013. (R. at 7.) Her application was denied 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. (R. at 7.)

The fair market value of the Cordelia Lot, without restrictions on the development of a house, is $100,000. (R. at 7.) The Cordelia Lot is not currently marketable in Brittain County as agricultural or timber land, nor is it marketable for recreational use alone without the right to build a residence. (R. at 7.) The Brittain County Butterfly Society has offered to pay Lear $1,000 annually for the privilege of conducting viewings of the Karner Blue during the butterfly's summer season. (R. at 7.) Lear rejected this offer. (R. at 7.) Property taxes on the Cordelia Lot are $1,500 annually. (R. at 7.) Lear has not sought reassessment of her property since December 2013 when the Board denied her fill permit. (R. at 7.) Instead, Lear commenced this action in February 2014, seeking a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively, seeking just compensation from FWS and Britain County for a regulatory taking of her property. (R. at 7.)

STANDARD OF REVIEW

The district court entered judgment on all counts. This Court reviews a district court's judgment on questions of law *de novo*. *See Mathews v. Chevron Corp*, 362 F.3d 1172, 1178 (9th Cir. 2006). This Court further reviews a district court's judgment on mixed questions of law and fact *de novo*. *Id.* at 1180.

SUMMARY OF THE ARGUMENT

I. The ESA, as applied to the development of the Cordelia Lot, is a valid exercise of congressional power because the regulated activities have a substantial effect on interstate commerce. First, the construction proposed on the Cordelia Lot has a direct effect on interstate commerce because it is an economic enterprise that involves the purchase of building materials

and the hiring of carpenters and contractors, and because the construction will become the potential object of interstate commerce through the sale, rent, or use as a place for overnight accommodations. Second, under the aggregation principle, the takes of Karner Blues on the Cordelia Lot, in aggregation with other takes of endangered species, affect tourism, agriculture, and other uses of those species, thus substantially affecting interstate commerce.

II. Lear's takings claim is unripe because she failed to apply for an Incidental Take Permit, show that the agency had made it clear that her application would be denied if she did apply, or adequately estimate the cost of the permit. Absent such a showing, she can demonstrate neither the requisite factual basis for adjudication nor sufficient hardship to outweigh the deference due to the agency's decisionmaking process.

III. The relevant parcel for the takings analysis must be the entire island, not just the Cordelia Lot. The entire island was granted to the Lear family, and for generations it has remained one single unit of land. A property cannot be divided up when doing a takings analysis; it must be judged as a whole. Therefore, when doing a takings analysis, the entire island must be the relevant property.

IV. Assuming the relevant parcel is the Cordelia Lot, Lear's takings claim is precluded because her land will become developable within ten years, which is a reasonable temporary prohibition on land development. First, Lear did not have a reasonable economic expectation to develop the Cordelia Lot. The Lear family has traditionally kept the Cordelia Lot open through annual mowing activities that continued after the critical habitat designation and after Lear took possession of the parcel. Second, the prohibition against takes of the Karner Blues from the Cordelia Lot did not interfere with the present use of the property, which at all relevant times has consisted of annual mowing for the purpose of maintaining the parcel as open space. Third,

the prohibition was a proportional response to a serious risk of harm to the Karner Blues, which is a legitimate state interest. Lastly, the regulation affected the Cordelia Lot long before Lear took possession of the parcel.

V. Assuming the relevant parcel is the Cordelia Lot, the Brittain County Butterfly Society's offer to pay $1,000 a year in rent for wildlife viewing purposes precludes a claim for complete loss of economic value. In order for a regulation to be considered a taking, the regulation must eliminate all economic benefits from the property. The Brittain County Butterfly Society has offered Cordelia Lear an annual rent in order to have the ability to view the Karner Blue butterflies that would be protected on the island. Because this is a source of income, and the property has not been completely deprived of all of its economic value, the offer precludes a claim for a complete loss of economic value.

VI. Lear's property is subject to public trust principles inherent in title, despite language suggesting that part of the lake was included in the original grant, because the public trust has been widely applied to navigable freshwater in the United States by state legislatures since before Congress granted title to Lear's ancestor, and that trust was an interest implicit in the title. Moreover, Brittain County has superior title, through the State, because Congress lacked authority to grant the lakebed absent a public interest in doing so. Because the public trust inures in Lear's title, the state's interest is superior to Lear's.

VII. Assuming the relevant parcel is the Cordelia Lot, neither the agency's nor the county's regulation completely deprives the property of all of its economic value, so FWS and Brittain County cannot be held liable for a complete loss of economic value to the property. No federal regulation would block the ability of Cordelia Lear to fill one half-acre of the marsh. No local regulation restricts development in the causeway or the Heath. Both regulations leave some area

available to develop. Since neither regulation completely deprives the entire property of its economic value, FWS and Brittain County cannot be held liable for a complete loss of economic value.

ARGUMENT

I. THE ESA, AS APPLIED TO THE DEVELOPMENT OF THE CORDELIA LOT, IS A VALID EXERCISE OF CONGRESSIONAL POWER.

The ESA is a valid exercise of congressional power under the Commerce Clause of the United States Constitution. Section 9 of the ESA makes it unlawful for any person to "take any [endangered or threatened] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538 (2012). The definition of "take" under section 9 of the ESA encompasses the "significant habitat modification or degradation that actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995). "In reviewing an act of Congress passed under its Commerce Clause authority [courts] apply the rational basis test as interpreted by the *Lopez* court." *GDF Realty Invs., Ltd v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003).

Congress has authority to regulate three broad categories of activities under the Commerce Clause: (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) (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), and *United States v. Morrison*, 529 U.S. 598, 610 (2000)). "[S]ection 9(a)(1) of the ESA regulates a class of activities – takings of endangered species – that is within Congress' Commerce Clause power under both the first and third *Lopez* categories." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997).

When determining whether a statute has a "substantial effect" on interstate commerce, a court must consider four factors: (1) whether the statute bears any relationship to "commerce or any sort of economic enterprise, however broadly one might define those terms"; (2) whether the statute contains an "express jurisdictional element"; (3) whether the legislative history contains "express congressional findings regarding the effects upon interstate commerce"; and (4) whether the link between the regulated activity and the effect on interstate commerce is too "attenuated." *San-Luis & Delta Mendota*, 638 F.3d at 1174 (interpreting *Lopez*, 514 U.S. at 561-67, and *Morrison*, 529 U.S. 598, 610-12).

Additionally, it is "firmly establishe[d]" that Congress has the power to regulate purely local activities that are part of an economic class of activities which have a substantial effect on interstate commerce. *Id*. Intrastate activity can substantially affect interstate commerce in two ways: (1) the activity alone may have such effect; or (2) the effects of that activity may be aggregated with the effects of other similar activities. *GDF Realty*, 326 F.3d at 629.

A. The proposed construction on the Cordelia Lot is an economic enterprise because it has a "substantial effect" on interstate commerce.

The regulated activity in the present case is the "underlying land development" on the Cordelia Lot through construction. An intrastate activity can substantially affect interstate commerce due to its economic nature. *See GDF Realty*, 326 F.3d at 636. Furthermore, when deciding whether to uphold a regulation under the Commerce Clause, a court must consider the economic activity in broad terms. *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000).

The circumstances in the present case are similar to those in *National Association of Home Builders*, where the D.C. Circuit determined that the regulated activity – the construction of a hospital, power plant, and supporting infrastructure – was a clear economic enterprise. *Nat'l Ass'n*, 130 F.3d at 1056. That court reiterated this view six years later in a case involving the

construction of a housing development. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003). Likewise, Lear's proposed construction is an economic enterprise because construction involves the purchase of building materials and the hiring of carpenters and contractors. (R. at 8.)

In *Gibbs*, the court determined that the taking of the endangered red wolf from private property by farmers directly affected to interstate commerce because without red wolves there will be no red wolf-related tourism and no scientific research. *Gibbs*, 214 F.3d at 492. Likewise, a direct relationship between Karner Blue butterfly takings and interstate commerce exists because the taking of the butterfly on Lear Island leads to reduced numbers of butterflies, and potentially the extinction of the species, thus curtailing tourism and scientific research activities. The *Gibbs* court further noted that the farmers' takes of red wolves to protect the economic assets and investments in the land was an interstate commerce-related activity. *Id.* Similarly, Lear's purported construction relates to interstate commerce because she seeks to develop her property and protect her investments at the peril of the Karner Blues. Although the Cordelia Lot is not currently marketable in Brittain County, (R. at 7), the property would become marketable due to the construction. Thus, the construction will become the potential object of interstate commerce because it could be sold, rented, or used as a place for overnight accommodations.

B. Under the aggregation principle, the proposed construction on the Cordelia Lot substantially affects interstate commerce.

Even if the take resulting from the construction on the Cordelia Lot is not, by itself, an economic enterprise, the aggregate effects of similar economic activities affect interstate commerce. When an intrastate activity alone does not substantially affect interstate commerce, "the activity's effects may be aggregated with those of other similar activities, the sum of which might be substantial in relation to interstate commerce." *GDF Realty*, 326 F.3d at 629. "[W]hen

a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *San-Luis & Delta Mendota*, 638 F.3d at 1175. Aggregation is appropriate when a non-commercial, intrastate activity is essential to an economic regulatory scheme. *GDF Realty*, 326 F.3d at 639. The ESA is an economic regulatory scheme for two reasons: first, because it regulates the economic effects of species loss; and second, because it regulates takes, a majority of which result from economic activity. *Id*.

The take of the Karner Blue butterfly, aggregated with other takes, is essential to the economic regulatory scheme of the ESA. When determining whether the regulated intrastate activity under section 9 of the ESA is economic or commercial in nature, a court must analyze the regulation of the endangered species, and not the commercial motivations of the plaintiff. *Markle Interests, LLC v. United States Fish and Wildlife Serv.*, 827 F.3d 452, 476 (5th Cir. 2016). The legislative history of the ESA reveals that Congress sought to protect endangered species from takes in order maintain their availability to interstate commerce. *Nat'l Ass'n*, 130 F.3d at 1050. Specifically, the drafters of the Act were concerned with the incalculable value of the genetic heritage that might be lost absent regulation. *GDF Realty*, 326 F.3d at 639.

The protection against loss of the Karner Blue implicates economic concerns for several reasons. First, Congress is authorized to prevent the destruction of biodiversity in order to protect the future and unanticipated interstate commerce value of the species. *San-Luis & Delta Mendota*, 638 F.3d at 1176. Second, regeneration of the species may allow future commercial utilization of this species, either through interstate tourism for recreational observations and scientific study of the species, or by improving agriculture through the species' genetic diversity. *Id.* As the *National Association of Home Builders* court explained, the variety of

plants and animals in our country are a natural resource that can be utilized by commercial actors to produce marketable products, such as medicine. *Nat'l Ass'n*, 130 F.3d at 1052. Hence, whenever a species becomes extinct, interstate commerce is substantially affected because that natural resource, the full value of which is uncertain or unknown, is diminished. *Id.* at 1053.

Moreover, individual instances of takes of endangered species resulting from economic activity can also be aggregated because those takes result in destructive interstate competition which creates incentives for individual states to adopt lower standards in order to gain an advantage over other states and, thus, substantially affecting interstate commerce. *See Id.* at 1054-55. The legislative history of the ESA shows that the Act was adopted to ensure that growth and development would not occur at the expense of the conservation and protection of species, the injury of which would have consequences for interstate commerce. *Id.* at 1056.

Consequently, regulating the take of Karner Blues is essential to the take provision of the ESA, which substantially relates to interstate commerce. The fact that Lear's proposed construction would have a *de minimis* character is of no consequence, because aggregating Lear's proposed construction with similar activities is proper and not too attenuated. Therefore, the ESA, as applied to the land development on the Cordelia Lot, is a proper exercise of congressional power.

II. LEAR'S TAKINGS CLAIM AGAINST FISH AND WILDLIFE SERVICE IS NOT RIPE BECAUSE APPLYING FOR AN INCIDENTAL TAKE PERMIT IS NOT A FUTILE ACT.

Lear's failure to apply for an ITP prior to litigation deprived the Service of an opportunity to analyze her application and formalize an administrative decision that was by no means certain to deny her a permit.

Ripeness doctrine promotes both agency autonomy and judicial efficiency. A ripeness analysis serves to "prevent the courts, through avoidance of premature adjudication, from

entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-149 (1967). To determine whether a controversy is ripe for adjudication, a court must evaluate (1) whether there has been an agency action that provides sufficient factual basis for analysis and (2) whether a party will experience hardship as a result of inaction by the court. *Nat'l Park Hosp. Ass'n v. Dep't. of the Interior*, 538 U.S. 803, 808 (2003).

The Supreme Court has repeatedly held that a facial regulatory takings claim is not ripe unless the party alleging taking has received a full and final determination of the type of development permitted on the property and has been denied just compensation for the use restriction. "[A] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *Macdonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *see generally Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295 (1981) ("the constitutionality of statutes ought not to be decided except in a factual setting that makes such a decision necessary"); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (Mere enactment of zoning restriction did not constitute taking when applicants had not yet submitted development plan). While a party may experience hardship in the event of delayed review, an agency experiences hardship when judicial intervention inappropriately interferes with further administrative action, and this hardship is accorded deference. *See Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

While a taking claimant need not apply for a permit if denial is certain, the agency must make clear that it believes it has limited discretion in its determination, or that permissible uses of the property are known to a reasonable degree of certainty, such that the claimant knows the

application will be denied before filing. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (Additional application was not necessary when agency clearly communicated, via two permit denials, that it interpreted its regulations to bar petitioner from filing wetlands for any reason, thus rendering denial of future permits a foregone conclusion). Thus, some agency action is still required to form a factual basis for analysis.

A. The FWS's communications to Lear are insufficient for a proper analysis because they are not a sufficiently final agency action.

The FWS routinely issues ITPs of the type sought by Lear. Under the ESA, people may apply for an ITP when their otherwise-lawful activities may incidentally result in the taking of an endangered animal. 16 U.S.C.S. § 1539 (a)(1)(B) (1988). ITPs must be associated with a Habitat Conservation Plan, or HCP, which is prepared prior to the application process and included as part of the application. 16 U.S.C.S. § 1539 (a)(2) (1988).

HCPs have several straightforward requirements: The applicant must identify (1) the likely impact of the activity for which the applicant seeks authorization; (2) the steps the applicant will take to monitor, minimize, and mitigate that impact; (3) alternatives the applicant considered and their reasons for not choosing those alternatives; and (4) "[s]uch other measures that the Director [of the Service] may require as being necessary or appropriate for purposes of the plan." 50 C.F.R. § 17.22(b)(1)(iii) (2004). Any permit issued on the strength of a compliant HCP may include additional terms and conditions as necessary, including, but not limited to, monitoring and reporting requirements. 50 C.F.R. § 17.22(b)(3) (2004). The Director shall grant a permit if the application criteria are met – that, if the applicant makes a sufficient showing that their take of the species will be incidental and as fully mitigated as practicable, their HCP will be adequately funded, and the species' continued survival in the wild will not be appreciably reduced. 50 C.F.R. § 17.22(b) (2004).

Even when the Service denies an ITP based on an inadequate HCP, it has broad latitude to work with landowners to develop acceptable alternatives that will result in issuance of a permit. *See Seiber v. United States*, 53 Fed. Cl. 570, 573 (2002) (FWS denied permit based on inadequate HCP, but offered extensive assistance in developing acceptable HCP that could result in issuance of permit); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 202 F. Supp. 2d 594, 621 (D.W. Tex. 2002) (FWS rejected developer's initial proposed mitigation plans, but ultimately issued ITP when satisfactory plan was proposed). While there is a futility exception to the application requirement for ripeness, it is limited to protecting landowners from filing multiple applications when it is clear from the first rejection that no application will be sufficient; it does not absolve them of making that initial application. *George E. Warren Corp. v. United States*, 341 F.3d 1348, 1351 (Fed. Cir. 2003); *Howard W. Heck, and Assocs., Inc. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990); *Freeman v. United States*, 124 Fed. Cl. 1, 8 (2015).

The FWS repeatedly communicated with Lear and informed her of the requirements for an adequate HCP, as well as resources available to applicants. (R. at 11, 14.) The requirements are pragmatic, not prohibitive; in fact, Lear substantially complied with one requirement – consideration of alternative actions – of her own accord, and chose that alternative over applying for a permit. (R. at 16.) The Service did not, however, tell her that her permit application would be denied; their communications all tended to suggest that Lear would likely receive a permit if she drafted an adequate application under readily available guidelines. (R. at 14.) Moreover, the FWS had discretion to consider other alternatives never proposed, such as creation of new Karner Blue territory in adjacent areas; while the FWS said that the creation of

contiguous habitat would meet the requirements for a HCP, it did not explicitly rule out other common strategies for mitigating impact, such as establishing non-contiguous habitat and relocating larva or the purchase of an adequate amount of replacement habitat from the adjacent landowner, and has discretion to consider such proposals when they are made. While these options are speculative, they are speculative because Lear chose not to apply for a permit, so there is no agency decision for a court to review. Because Lear did not apply, there are insufficient factual grounds for a finding that she was reasonably certain to have been denied a permit, and her suit is unripe.

B. Because Lear merely estimated the cost of the permit, she made no showing of hardship.

While a permit application costing more than the value of the property may constitute a barrier to application, courts have found that government assistance in preparing a permit application may mitigate the cost of such an application. In a factually similar case, plaintiffs argued that because the cost of applying for a permit, as estimated by their chosen expert, would exceed the value of the property, application would render their property valueless and the application requirement for ripeness ought to be waived. The court there disagreed:

> Plaintiffs could accept the assistance offered by NMFS, which may mitigate the expense, and prepare an application to the best of their ability. Notwithstanding the cost estimate they have received from an expert consultant, it is for the agency and not this court to determine whether the application and HCP plaintiffs may submit to NMFS merits the granting of an ITP.
>
> *Morris v. United States*, 58 Fed. Cl. 95, 98 (2003).

Lear relied on a third party's advice that the total cost of an ITP application would be $150,000. However, the Service provides substantial assistance to property owners applying for an ITP; absent such an application, with resulting assistance, it is not clear that the cost of the permit would actually exceed the fair market value of the unimproved property. Because Lear

made no effort to explore these cost mitigations, there is no factual basis for a determination that an application would actually be prohibitively expensive and the issue is not ripe for judicial review.

C. The procedure to obtain a permit is not unduly burdensome.

The incidental take permit application process is "unduly burdensome" when habitat loss mitigation effectively deprives the property of value. *Robbins v. United States,* 40 Fed. Cl. 381, 388 (1998). Courts have rejected speculative economic losses, particularly when no permit has been applied for. *Id.* at 388. Because Lear did not apply for a permit or seek an estimate of the cost of mitigating her project's impact on the butterflies, she did not raise an argument that the procedure to obtain a permit is unduly burdensome. As such, her takings claim is not ripe for judicial review under an undue-burden analysis.

Because Lear did not apply for a permit, she did not receive a formal administrative decision that would constitute a taking, and such a decision was required because the agency has discretion to issue permits and clearly does not interpret its statute as defining limited permissible uses of the property. Because Lear denied the FWS the opportunity to analyze her application on its merits and did not show that the actual cost of the permit application or of mitigation measures would exceed the value of her property, her takings claim is not yet ripe for adjudication.

III. THE RELEVANT PARCEL FOR THE TAKINGS ANALYSIS IS THE ENTIRE ISLAND, NOT JUST THE CORDELIA LOT AS SUBDIVIDED IN 1965.

The relevant parcel for the takings analysis must be the entire island because a property cannot be divided up into smaller segments when doing a regulatory takings analysis. The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation for public use. U.S. Const. amend. V. Regulations on private property have been held to also be considered takings if they deny "all economically

beneficial or productive use of the land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Supreme Court recognized that investment-backed expectations can be a factor in determining whether or not all economical or productive use of the land has been eliminated. *Palazzolo v. Rhode Island*, 533 U.S. at 617 (citing *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. at 124).

Furthermore, the Supreme Court has determined that a "conceptual severance" argument, effectively dividing up property, fails because "the parcel must be taken as a whole." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) (citing *Penn. Central*, 438 U.S. at 130-131). The Supreme Court plainly stated, "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central* at 130-131. Thus, one cannot simply divide property up in order to find one area that has been affected by the regulation instead of the area as a whole.

Cornelius Lear was granted Lear Island by an Act of Congress in 1803. (R. at 1.) Cornelius Lear and his descendants have lived on the island since 1803, using it for farming, hunting, fishing, and living. (R. at 2.) The island was quite productive agriculturally, and the produce from the island was shipped to the mainland. (R. at 2.) When King James Lear passed away in 2005, and due to his life estates in each of the properties, his daughters came into their possessions of these properties. (R. at 4.)

Because the Supreme Court has stated that investment-backed expectations play a factor in determining whether or not all of the economical uses of a property have been deprived, the takings analysis must include all of Lear Island, not just the Cordelia Lot. The entire island was granted to Cornelius Lear in 1803. (R. at 1.) From 1803 to 1965, the island was never split up

and was used for agriculture. This agriculture was shipped for profit to the mainland. (R. at 2.) The intent of the investment in the island in 1803 was for living and agriculture. The investment has been paying off. Clearly, because the investment has been paying off, and the entire island was the investment, not all of the economic uses of the island were deprived.

In addition, because the Supreme Court has already decided that a property must be taken as a whole and not divided up, the entire island must be the relevant parcel. The island was granted as a whole by Congress to King James Lear. (R. at 1.) It was used as an investment as a whole for over a century. Because "the parcel must be taken as a whole," *see Penn Central* at 130-131, and the "conceptual severance" arguments of applying a takings analysis to just one portion of a property has been struck down, the relevant parcel for this takings analysis must be the entire island. *See Tahoe-Sierra*, 535 U.S. at 330. Because the entire island was the original property given to the Lear family, and a property cannot be divided up for the takings analysis, the entire island must be the relevant portion.

IV. ASSUMING THE RELEVANT PARCEL IS THE CORDELIA LOT, CORDELIA LEAR'S TAKINGS CLAIM IS PRECLUDED BY THE FACT THAT THE LAND WILL BECOME DEVELOPABLE WITHIN TEN YEARS.

Assuming the relevant parcel is the Cordelia Lot, Lear's takings claim is precluded because her land will become developable within ten years. An interest in property is defined by the metes and bounds that describe its geographic dimensions and the "temporal aspect of the owner's interest." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. at 331-32. A categorical taking occurs in the extraordinary circumstance when no productive or economically beneficial use of land is permitted. *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). "Anything less than a complete elimination of value, or a total loss, is a non-categorical taking." *Id.* Additionally, courts analyze temporary non-categorical regulatory takings claims under the *Penn Central* framework. *Tahoe-Sierra*, 535 U.S. at 321.

A. Lear does not have a valid takings claim because the restriction on the economic use of her property is temporary.

The impact of the regulation on the Cordelia Lot did not amount to a taking of property that warrants compensation because Lear will be able to develop her property within ten years after discontinuing the annual mowing operations. (R. at 15.) "[A] fee simple estate cannot be rendered valueless by a temporary restriction on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332.

In *Tahoe-Sierra*, the Supreme Court held that the imposition of a multiyear moratorium on construction was not a complete deprivation of the economic value of the underlying property. *See Id.* Although the district court found that the length of time in the present case distinguishes it from the circumstances in *Tahoe-Sierra*, the answer to the question of whether a regulation effects a temporary taking "depends upon the particular circumstances of the case," which circumstances are "best analyzed within the *Penn Central* framework." *Id.* at 321. However, as explained below, Lear's temporary non-categorical regulatory takings claim does not pass the *Penn Central* test.

B. Lear's takings claim does not satisfy the *Penn Central* factors required for a valid temporary non-categorical regulatory takings claim.

Lear's takings claim does not satisfy the *Penn Central* factors. The *Penn Central* analysis of a non-categorical taking requires an intensive ad hoc inquiry into the circumstances of each particular case. *Sherman*, 752 F.3d at 565. A court must weigh three factors to determine whether the interference with property amounts to a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* Lear's takings claim does not pass this test.

1. *The prohibition against Karner Blue takes does not have a sufficient economic impact on Lear's interests on the Cordelia Lot.*

The prohibition against the Karner Blue butterfly takes does not have a sufficient economic impact on Lear's interests in the Cordelia Lot. "Government may execute laws or programs that adversely affect recognized economic values." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). That is so because the "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* The Supreme Court has dismissed takings claims in cases in which the governmental action resulted in economic harm, but did not interfere with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment Purposes." *Id.* at 124-25.

Although the Brittain Planning Board determined that at least one single-family residence could be developed on each of the three parcels created by the 1965 estate plan (R. at 3), the Lear family has kept the Cordelia Lot open through annual mowing. (R. at 6.) Further, after the FWS designated The Heath as critical habitat for the Karner Blues in 1992, the Lear family continued the mowing operations. (R. at 6). Moreover, after Lear came into possession of the Cordelia Lot in 2005, she continued the annual mowing. (R. at 5.) Lear did not attempt to build a home on her parcel until 2012, seven years after taking possession of her lot, and several decades after the critical habitat designation.

Additionally, the Lear family built two homes on the island. (R. at 3.) The original homestead was built sometimes after the 1803 grant on what is now the Goneril Lot, (R. at 3), and a second home was built by James on the Regan Lot after the 1965 deed. (R. at 3.) The record is devoid of any evidence that James or any other members of the Lear family ever attempted to construct a home on the Cordelia Lot. Lastly, although Lear could have ceased the mowing

operations as soon as she came into possession of The Heath, her continued mowing shows that she did not have an expectation of using the parcel for the construction of a home. Had she expected to build a home on the parcel, she would have ceased mowing operations in 2005, which would have rendered her property developable by 2015. Thus, the circumstances of this case show that Lear did not have a reasonable expectation of building a home on her parcel because the Cordelia Lot has always been used as an open area, even before the critical habitat designation.

Further, the Supreme Court has previously recognized that regulation temporarily denying an owner all use of her property might not constitute a taking when the state can establish that the regulation at issue is part of the State's authority to enact safety regulations. *Tahoe-Sierra*, 535 U.S. at 329. In the context of regulatory takings, safety regulations are those that prohibit the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community. *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 593 (1962). As the legislative history of the ESA reveals, the prohibition against takes and the creation of critical habitats is premised on Congress' concern that, with the increased human pressure on plant and animal species, we threaten our own genetic heritage, the value of which is incalculable. *Nat'l Ass'n*, 130 F.3d at 1050-51. The legislative history further provides that some species may provide "potential cures for cancer and other scourges," *Id.* at 1051, which qualifies the ESA as a "safety regulation" within the meaning of *Goldblatt*.

2. *The prohibition against takes of the Karner Blues did not interfere with Lear's distinct investment-backed expectations.*

The prohibition against takes of the Karner Blues from the Cordelia Lot did not interfere with Lear's distinct investment-backed expectations. Investment-backed expectations are measured by the diminution in value of the property resulting from the regulation. *Penn.*

Central, 438 U.S. 104 at 131. In *Tahoe-Sierra*, the Supreme Court found that multiple-year moratoria generally do not interfere with investment-backed expectations. *Tahoe-Sierra*, 535 U.S. at 342. Further, in *Penn Central* itself, the Court found that landmark legislation which applies only to select buildings does not establish a taking. *Penn. Central*, 438 U.S. 104 at 132.

Similarly, the ESA's critical habitat designation provision impacts private property in a selective way, depending on whether a particular parcel is suitable for providing threatened or endangered species with appropriate habitat. The Heath is home to the only remaining population of the Karner Blue butterfly in the state of New Union, (R. at 9), and provides ideal habitat for the Karner Blue butterfly. (R. at 10.) Additionally, a court must consider whether the regulation interferes with the present use of the property. *Penn Central*, 438 U.S. 104 at 136. As in *Penn Central*, not only does the regulation not interfere with the current use of The Heath as an open space, (R. at 6), but it allows and encourages the perpetuation of that use. *See id.* Even if the "present use" of the property should be determined in relation to the timeframe of the critical habitat designation, the Cordelia Lot has been used as an open space since 1965, long before the critical habitat designation in 1992. (R. at 6.) Thus, the prohibition against Karner Blue takes does not interfere with Lear's distinct investment-backed expectations.

3. *The character of the prohibition against takes of the Karner Blues does not support a takings claim.*

The character of the prohibition against takes of the Karner Blues further supports the assertion that a taking of property did not occur in this case. "A taking can more readily be found where the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn. Central*, 438 U.S. at 124. Here, prohibition against takes of the butterfly on the Cordelia Lot did not involve a physical invasion by the

government, but a mere restriction on certain uses of that parcel. Moreover, this restriction arises from a public program meant to promote the common good. The purpose of the ESA is to protect the ecosystems upon which humans and other species depend, and the preservation of threatened and endangered species is essential to that purpose. *See Nat'l Ass'n*, 130 F.3d at 1059. Moreover, the restriction on the takes of butterflies was a proportional response to a serious risk of harm to the Karner Blues, which advanced a legitimate state interest. *See Tahoe-Sierra*, 535 U.S. at 334. Therefore, a taking of property did not occur in this case.

C. Even if Lear's temporary non-categorical regulatory takings claim would pass the *Penn Central* test, additional considerations nevertheless do not support the finding that a taking occurred.

Assuming Lear's takings claim could pass the *Penn Central* test, additional considerations do not warrant the finding that a taking occurred. When deciding whether a taking occurred, courts must carefully examine and weigh all the relevant circumstances. *See Tahoe-Sierra*, 535 U.S. at 335. Relevant to the present case is the consideration of the role that the "temporal relationship between regulatory enactment and title acquisition" bears on the outcome of the case. *Id.; Palazzolo v. Rhode Island*, 533 U.S. at 636 (O'Connor J., concurring). Much like in our case, the regulation at issue in *Palazzolo* predated the plaintiff's acquisition of the land. *Id.* at 634.

This Court should also consider the fact that the parcel was deeded to Lear by her father, (R. at 5), and that she did not make an investment for which she would reasonably expect a return. Although the fair market value of the Cordelia Lot without the restriction on development of a house is $100,000, (R. at 7), the restriction existed when Lear came into possession in 2005. Moreover, Lear was aware of the restriction, which is why she consulted the New Union FWS field office regarding any potential permits before developing the property.

(R. at 6). Her father could have adjusted the property division after the 1992 restriction in a way that would allow Lear to build a home in the future, but he chose not to do so. Therefore, a careful examination and weighing of the relevant circumstances shows that a temporary taking did not occur on the Cordelia Lot.

V. ASSUMING THE RELEVANT PARCEL IS THE CORDELIA LOT, THE OFFER BY THE BRITTAIN COUNTY BUTTERFLY SOCIETY FOR VIEWING THE BUTTERFLY PRECLUDES A TAKINGS CLAIM.

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. The Fifth Amendment to the Constitution prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V. Cases have explained that a minimal "permanent physical occupation of real property" would require compensation under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). Justice Holmes also explained that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Holmes still left unclear, then, where the line was that made a regulation go too far.

Later on, this question of when a regulation went too far was discussed. The Supreme Court determined a balancing test for whether or not the regulation went too far. Justice Scalia provided that there are two situations in which regulatory action required compensation "without case-specific inquiry into the public interest in support of the restraint:" one being that the regulations included a physical "invasion" upon property; the other being that the "regulation denies all economically beneficial or productive use of the land." *Lucas*, 505 U.S. at 1015.

For the issue of whether or not the offer by the Brittain County Butterfly Society precludes a takings claim for complete loss of economic value, the test from *Lucas* will be

applied. In this case at hand, the Karner Blue butterfly is an endangered species. 50 C.F.R. § 17.11 (2015); (R. at 5.) The last remaining population of the butterfly in the state of New Union lives on the Heath of the Cordelia Lot on Lear Island. (R. at 5.) The Heath provides the ideal habitat for these Karner Blue butterflies because it is covered in shaded lupine fields. (R. at 6.) The Cordelia Lot has no market for agriculture or timber in its current state, nor is there a recreational market for it as it currently is. (R. at 7.) However, "the Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season, but she rejected it." (R. at 7.)

The *Lucas* test states that a physical invasion onto the property or the complete loss of economic value of the property constitutes a regulatory taking. Here, there is no physical invasion onto the property; the government merely laid out what would constitute a "take" under the Endangered Species Act. (R. at 6.) The Brittain County Butterfly Society also has offered to pay Cordelia Lear in order to view the butterflies. (R. at 7.) This $1,000 annual payment clearly shows that the regulation does not deprive Cordelia Lear of all of the economic value of the property. In fact, it even generates a new source of revenue from her property.

While the regulation does impose upon Cordelia Lear the inability to completely maximize the profit off her property, she still has a way to make money off the property. The *Lucas* test clearly states that all economic benefits from the land must be denied for there to be a regulatory taking. *Lucas*, 505 U.S. at 1015. Because Cordelia Lear can make $1,000 annually by accepting the offer from the Brittain County Butterfly Society, not all economic benefits from the land have been deprived. Thus, this offer precludes a regulatory takings claim.

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

The district court relied on two lines of reasoning in finding that Lear's title is superior to Brittain County's. First, it held that non-navigable waters were not considered part of the public trust at the time of the 1803 grant to Cornelius Lear; second, it held that the State's title interest under equal footing doctrine is inferior to Lear's interest because the language in the Congressional grant to Cornelius Lear includes the lakebed 300 feet from the shore of Lear Island. (R. at 4-5). There is, however, substantial historical evidence that the public trust has encompassed non-tidal navigable waters since the Revolutionary War. Moreover, the clear-language exception to equal footing doctrine applies only when Congress had a diplomatic purpose or other public interest in the grant.

A. Public trust doctrine has been applied to non-tidal rivers in statutory law since the 1700s.

Public trust doctrine has been extended to non-tidal navigable rivers and lakes in the United States since before 1803; as such, it was inherent in Lear's title at the time of the grant. Public trust doctrine is the principle that an inalienable interest exists in sovereign control of rivers, tidal areas below high water, and other navigable waterways for the benefit of the public as represented by the government. *See* Arden H. Rathkopf et. al., *The Law of Zoning and Planning* § 7:50 (4th ed.) (2016). Public trust is inherent in the title granted to the states from the federal government; because it is a common law principle inherent in state title, it is state law, and its extent is determined by states. *See Pollard v. Hagan*, 44 U.S. 212, 229 (1849). In England, the trust infixed in tidal riverways, since non-tidal waterways were not navigable. *Ill. Cent. R. Co. v. Ill.*, 146 U.S. 387, 435-436 (1892). In the United States, however, navigable rivers and lakes are freshwater and therefore non-tidal. *Id.* at 436. Where there are conflicting interpretations of law stemming from the adoption of principles of British law, deference is

given to the United States' interpretation of its laws. "[State] rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." *Pollard*, 44 U.S. at 229.

The extension of the public trust to non-tidal waters was recognized explicitly in *Illinois Central Railroad Co.*, which describes the English "tidal" test as "convenient" and states that "if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it […] The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Ill. Cent. R. Co.*, 146 U.S. at 436-437. This decision coincides with the explicit adoption of the practicable navigability test, which is in wide effect today, but as a practical matter the test had been in use for more than a century.

While early lawmakers use "tidal" and "navigable" interchangeably, there are numerous indications that Pre-Colonial and Colonial lawmakers and judges intended for such critical routes of commerce to be held in common. Pre-Revolutionary provincial governments clearly acknowledged a public interest in non-tidal navigable rivers by legislating control over those rivers. *See generally Carson v. Blazer*, 2 Binn. 475, 492 (Pa. 1810) (Summarizing pre-Revolutionary Pennsylvanian laws prohibiting dams and weirs); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn. St. Envtl. L. Rev. 1, 11 (2007) (Summarizing approaches of various state legislatures to ownership of submerged lands); *id.* at 26-110 (survey of Eastern states' implementations of public trust doctrine, which range from mandating public ownership

of navigable waters to protecting public use of nominally private property). These recognized public interests in navigable waters are inalienable, even by legislative act.

> "[T]he State's title in navigable waters] is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. […] that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."
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> *Ill. Cent. R. Co.*, 146 U.S. at 452-453.

Lake Union is a navigable interstate lake. (R. at 4.) As such, it is subject to public trust limitations because the tidewater distinction had already been largely abandoned at the time of the 1803 grant. The public trust is an inalienable principle inherent in title. Because Lear's title was subject to public trust considerations at the time of the grant, those limitations on use form a background principle of state law that was improperly set aside at trial.

B. Equal footing doctrine is applicable to Brittain County because Congress cannot grant title to navigable waters unless doing so furthers a public interest.

Under the Constitution, Brittain County has a sovereign interest in navigable waterways that is inferior only to an explicit Congressional grant furthering a public interest. The equal footing doctrine is a principle of federal law rooted in Article IV, § 3 of the Constitution, granting sovereign rights to navigable waterways to the states in which they lie. *See Ill. Cent. R. Co.*, 146 U.S. at 435. The people of the thirteen original colonies became sovereign and established absolute rights to navigable waters and the land beneath them at the time of the Revolution. *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842). By claiming sovereignty over newly purchased territories and transferring those rights in their entirety to each state as it was chartered, the United States placed each new state on the same footing as those thirteen original colonies with their original grants. *See Pollard*, 44 U.S. at 221.

The doctrine created a new problem, however. Parts of the newly purchased U.S. territories had already been granted or sold to individuals under British law, and while many of these grants were recognized by the United States, the earlier conflation of "tidal" and "navigable" rendered title descriptions confusing. Accordingly, in the landmark case *Shively v. Bowlby*, the Supreme Court held that only explicit inclusion of navigable waters in a Congressional grant of title predating a state interest was sufficient to overcome the presumption that navigable waters belong to the public, not an individual. *Shively*, 152 U.S. 1, 57-58 (1894). Such a Congressional grant must be not only explicit, but must be done "in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Id.* at 48. The "Shively presumption" is that absent such an explicit grant, sovereign title to navigable waters rests in the state. This is consistent with the public interests lauded in *Pollard v. Hagan* and *Ill. Cent. R. Co.*

The grant to Cornelius Lear did not and does not further a public purpose or promote international relations; the land has been privately held for several generations and has been used as a private farm, homestead, and hunting and fishing grounds for the duration of ownership. (R. at 5.) *Shively* does not support the grant to individuals of title superior to the State's absent promotion of international relations or some other furtherance of public purpose by that grant of title; as such, the court erred in finding that equal footing doctrine was not applicable to the present case.

The district court erred in finding that Lear's title to the lakebed is superior to Brittain County's. First, it held that non-tidal navigable waters were not considered part of the public

trust at the time of the 1803 grant to Cornelius Lear, but the public trust existed in non-tidal navigable waters in practice even before the Supreme Court formally found the distinction between tidal and non-tidal meaningless in the United States; second, the Court erred in finding that equal footing doctrine is inapplicable when there is a clear Congressional grant of lakebed land, since even explicit grants must serve a public interest and the grant to Cornelius Lear served no such interest. Absent a public interest, Congress lacked authority to alienate lakebed territory and the land is still subject to state interests under equal footing doctrine.

VII. FWS AND BRITTAIN COUNTY CANNOT BE HELD LIABLE FOR A COMPLETE LOSS OF DEPRIVATION BECAUSE NEITHER REGULATION COMPLETELY DEPRIVES ALL ECONOMIC VALUE TO THE PROPERTY.

These two regulations must be regarded separately for the takings analysis. The District Court analogized this situation to a joint tort. A joint tort and a regulation are quite different; a better analogy would be between regulations at multiple levels of government, such as taxation permitted at multiple levels of government. Once the regulations are viewed separately for the takings analysis, it is revealed that neither regulation completely deprives Lear of all the economic value to the property. Because some economic value is left by either regulation, FWS and Brittain County cannot be held liable for a complete loss of all economic value to the property.

A. A regulation is not the same as a tort.

The District Court recognized that the issue of a local regulation restricting one part of a property and a federal regulation restricting another part of the same property is a novel question. The Court suggested that this situation is similar to that of a joint tort. It noted that the applicable rule is that where the harm is indivisible, each tortfeasor is jointly and severally liable to the plaintiff. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976).

Equating a tortfeasor to regulations on a property is unreasonable. Regulations seek to protect people and the environment; tortfeasors cause harm to people and the environment. A

more proper analogy would be to taxation. "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or a corporation." 28 U.S.C. § 960(a)(1948). Court officers, as well as businesses and individuals, can be taxed by all three levels of government separately. The taxes do not need to be joined together; each level of government can assess taxes on the same sources; and court officers, businesses, and individuals must pay taxes to all levels of government. Just as the different levels of government can tax the same sources separately, the different levels of government can regulate the same property separately.

B. Neither regulation has completely deprived the property of all of its economic value.

The two separate laws must be considered separately for the takings analysis. The Supreme Court has held that in order for a regulatory takings claim to succeed, all of the property's economic benefits must be unavailable. *Lucas* at 1015. Thus, a regulation must deprive a landowner of all economic benefits to a property in order for a regulatory taking occurring that would require compensation. If a regulation does not deprive all economic benefits to a property, compensation is therefore unnecessary.

The Cordelia Lot has not been completely deprived of all economic value by either regulation. Neither the Endangered Species Act nor any other federal regulations restrict filling of the cove area in order to develop a residential lot. (R. at 7.) The Brittain County Wetlands Preservation Law, an applicable local restriction, does not put any restrictions on the Heath nor the causeway. (R. at 7.) Both regulations restrict the property in certain ways, but neither regulation completely deprives the property of all possible economic benefits. Thus, the *Lucas*

rule that all the property's economic benefits must be deprived for a regulation to require compensation remains in effect. *Lucas* at 1015.

CONCLUSION

For the reasons stated above, Appellant-Cross Appellee-Defendant United States Fish and Wildlife Service respectfully requests that this Court uphold the lower court's decision regarding Issue I and reverse the district court on Issues II - VII.

Respectfully submitted,

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Counsel for United States Fish and Wildlife Service