Team No. 35

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 16-0933

CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
Defendant-Appellant-Cross Appellee, and

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Union
No. 112-CV-2015 (RNR)

BRIEF FOR PLAINTIFF-APPELLEE-CROSS APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Cordelia Lear ("Ms. Lear" or "Appellee") filed a complaint in the United States District Court for the District of New Union challenging the constitutionality of the Endangered Species Act ("ESA"), as applied to her situation, and asserted a claim against the United States Fish and Wildlife Service ("FWS") and Brittain County, New Union ("Brittain County" or collectively "Appellants") for an uncompensated taking of her property under the Fifth and Fourteenth Amendments. On June 1, 2016, pursuant to federal question jurisdiction under 28 U.S.C. § 1331, the district court denied Ms. Lear's claim on the constitutionality of the ESA, but held that the application of the ESA's incidental take provision and the Brittain County Wetlands Preservation Law to the Ms. Lear's property had resulted in an uncompensated taking in violation of the Fifth Amendment. The district court's holding is final, and jurisdiction is in this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. 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.

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

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

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

V. 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 viewings preclude a takings claim for complete loss of economic value.

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

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

STATEMENT OF THE CASE

This is an appeal of the United States District Court for the District of New Union decision regarding the constitutionality of the ESA, 16 U.S.C. §§ 1531-1544 (2012), as applied to the wholly intrastate, non-commercial Karner Blue Butterfly. The appellants in this matter, FWS and Brittain County, have also filed an appeal to the district court's decision regarding Ms. Lear's takings claim under the Fifth and Fourteenth Amendments. Ms. Lear's response to their appeal is also included herein. R. at 1.

Cordelia Lear initially brought this action in February 2014. *Id*. In her complaint, she asserted issues with the constitutionality of the ESA as applied to a wholly intrastate, non-commercial subpopulation of Karner Blue Butterflies located on her property. In the alternative, Ms. Lear asserts a takings claim under the Fifth and Fourteenth Amendments if the ESA is held to be constitutional. R. at 7-8. The plaintiff waived any damages in excess of $10,000 in her takings claim against the United States so she could proceed with her claim in the district court. R. at 1. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). The plaintiff argued that the "take" provision of the ESA, 16 U.S.C. § 1532(19), cannot regulate noneconomic activities such as land clearing and vegetation removal. R. at 8. Ms. Lear argued that the proper "take" was the actual taking of the Karner Blue Butterfly, which is a noneconomic activity. R. at 8. Ms. Lear also argued that the combination of the ESA and Brittain County Wetlands Preservation Law created a taking of her

property by depriving her of any economic use of her property. *Id*.

The district court disagreed and stated that the proper activity to look at was the underlying land development, which the district court stated was clearly an economic activity. R. at 8. Therefore, the district court held that the ESA was constitutional as applied to the Karner Blue Butterflies located in New Union. R. at 8. The district court agreed with the plaintiff on her claim of a Fifth and Fourteenth Amendment taking, and awarded the plaintiff $10,000 damages against the FWS, and $90,000 damages against Brittain County. R. at 8-9, 12. The district court held that the plaintiff's claim was ripe even though she had not applied for an incidental take permit ("ITP"), and also that the relevant lot was the Cordelia Lot, not all of Lear Island. R. at 9.

The district court also held that the relevant time period for the takings analysis is the current permissible development of the property, and that public trust principles on uses of state navigable waters do not inhere in the Lear's 1803 congressional grant of title. R. at 10-11. The district court continued its opinion by holding that the Cordelia Lot had been deprived of all economic value and that the federal and local restrictions must be combined to consider whether a categorical taking had occurred. R. at 11.

FWS and Brittain County subsequently filed a Notice of Appeal on June 9, 2016. R. at 1. FWS took issue with the district court's holding that: (1) Ms. Lear's takings claim was ripe; (2) the relevant parcel of land for the purpose of Lear's takings claim based upon complete deprivation of economic value is the Cordelia Lot; (3) the potential natural destruction of the Cordelia Lot's lupine fields, which are the butterflies' habitat, does not preclude Lear's takings claim; (4) the Brittain County Butterfly Society's offer to pay $1,000 annually; (5) the public trust principles inherent in Ms. Lear's title did not preclude her takings claim; and (6) the ESA

and local laws could combine to deprive the Cordelia Lot of all economic value. R. at 1-2.

Brittain County agreed with all of the above appeals by FWS, but also took issue with the holding that the ESA was constitutional as applied to the wholly intrastate subpopulation of the Karner Blue Butterfly. R. at 2. Ms. Lear filed a Notice of Appeal on June 10, 2016 and took issue with the district court's dismissal of her claim for declaratory judgment that the ESA is constitutional under the Commerce Clause, Article 1, Section 8, Clause 3 of the U.S, Constitution, as applied to the wholly intrastate, non-commercial New Union subpopulation of the Karner Blue Butterfly. R. at 1, 12.

STATEMENT OF THE FACTS

Lear Island is an island located in Lake Union. R. at 4. It is approximately two miles long by one-mile-wide and consists of one thousand (1,000) acres. *Id.* An 1803 Act of Congress granted all of Lear Island itself, including "all lands under water within a 300-foot radius of the shoreline of said island", and all lands under water in the shallow straight separating Lear Island from the mainland to Cornelius Lear in fee simple absolute. *Id*. Since the 1803 grant, Cornelius Lear and his descendants have continuously occupied Lear Island. R. at 5.

In 1965, Cornelius Lear's descendant, King James Lear, owned the entirety of the 1803 Lear Island grant. *Id*. King James Lear's estate plan divided Lear Island into three parcels, one for each of his three daughters: Goneril, Regan, and Cordelia. *Id*. Goneril was deeded 550 acres ("Goneril Lot"), Regan was deeded 440 acres ("Regan Lot"), and Cordelia was deeded 10 acres ("Cordelia Lot") with King James Lear reserving a life estate in each lot for himself. *Id*. The Brittain Town Planning Board approved this subdivision of property and determined that each lot could be developed in conformance with zoning requirements with at least one single-family

residence per lot. *Id*. King James Lear died in 2005 and Goneril, Regan, and Cordelia came into possession of their respective properties. *Id*.

The Cordelia Lot is located at the northern tip of Lear Island. *Id*. It consists of an access strip that is 40 feet wide by 1,000 feet long and an open field that comprises the remaining 9 acres of the Lot. *Id*. The Cordelia Lot also contains approximately 1 acre of emergent cattail marsh in a cove that was historically open water. *Id*.

The 9-acre open field, referred to as "The Heath", is kept open by annual mowing each October. *Id*. Both the Heath and the access strip are home to wild blue lupine flowers. *Id*. Without annual mowing, the Cordelia Lot would naturally convert to a successional forest in approximately 10 years, killing the population of wild blue lupine flowers. R. at 7.

Wild blue lupine flowers are the source of food for the Karner Blue species of butterfly. R. at 5. The Karner Blue species of butterfly was listed on the federal endangered species list on December 14, 1992. R. at 5-6; 57 Fed. Reg. 59,236 (Dec. 14, 1992). The Cordelia Lot is the only home to the Karner Blue butterfly in New Union, though there are populations in other states. R. at 5-6.

In April 2012, Cordelia Lear contacted the New Union FWS field office to inquire as to whether or not she could construct a single-family residence on the Cordelia Lot. R. at 6. FWS informed her that any disturbance of the wild blue lupine habitat on The Heath, other than continued mowing, would constitute a "take" of the endangered butterfly. *Id*. FWS advised Ms. Lear that it was possible to obtain an ITP under section 10 of the ESA, but in order to file an application, she would first need to develop a habitat conservation plan ("HCP") for the Karner Blue Butterfly and an environmental assessment document under the National Environmental Policy Act. *Id*.

FWS further informed Ms. Lear that an acceptable HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis as well as a commitment to maintain the remaining lupine fields through annual fall mowing. R. at 5. The estimated cost for Ms. Lear to prepare and application for an ITP was $150,000. R. at 6.

Because of the exorbitant cost of applying for an ITP, Ms. Lear developed an alternative development proposal ("ADP") in which she proposed to fill one half-acre of the cattail marsh to create a lupine-free building site. R. at 7. No federal permits were required for the ADP because construction of residential dwellings involving one half-acre or less of fill are authorized by the U.S. Army Corps of Engineers Nationwide Permit 29. *Id*. The ADP did, however, require a permit to fill the marsh pursuant to the Brittain County Wetland Preservation Law. *Id*. Ms. Lear's application for the Brittain County permit was denied in December 2013 on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and a residential home was not a water-dependent use. *Id*.

The Cordelia Lot, without any development restrictions, has a fair market value of $100,000. R. at 18. Property taxes on the lot total $1,500 annually. R. at 7. The Brittain County Butterfly Society has offered to pay Ms. Lear $1,000 annually for the privilege to conduct butterfly viewings on the Cordelia Lot. *Id*. Ms. Lear rejected this offer. *Id*.

Ms. Lear commenced this action in February of 2014, seeking a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively seeking just compensation from FWS and Brittain County for a regulatory taking of her property. *Id*.

STANDARD OF REVIEW

The proper standard of review for constitutional claims is *de novo*. *See United States v. Perelman*, 658 F.3d 1134, 1134-35 (9th Cir. 2011). This Court also reviews issues of ripeness *de*

novo. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). Therefore, all claims listed below are to be reviewed *de novo* by this Court of Appeals. A *de novo* review requires that the "appellate court must consider the matter anew, as if no decision previously had been rendered". *See Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1004 (9th Cir. 2006).

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's opinion regarding the constitutionality of the ESA regulating the take of a wholly intrastate, endangered species for the following reasons. The Endangered Species Act is not a valid exercise of Congress' power under the Commerce Clause as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by the construction of a single-family residence for personal use because a non-commercial, wholly intrastate endangered species being taken by a non-interstate activity cannot be a valid use of Commerce Clause power, no matter which Circuit's test this Court decides to apply.

The taking of the intrastate, non-commercial, Karner Blue Butterfly does not substantially impact interstate commerce. The proper *Lopez* category that can regulate the intrastate species is whether the activities substantially affect interstate commerce. As an intrastate, non-commercial species, the Karner Blue Butterfly cannot meet the four considerations set forth in *Morrison*, and therefore does not *substantially* affect interstate commerce. For these reasons it cannot satisfy the third category of regulation under *Lopez*.

The regulation of the Karner Blue Butterfly is not permitted as a necessary component of the ESA's valid, comprehensive regulatory scheme under the Commerce Clause or the imbedded Necessary and Proper Clause. The proper test here, from *Raich*, is whether the regulated activity,

the take, affects the market for a commodity. The Karner Blue Butterfly is not a commodity and does not frustrate any market or commodity. Therefore, the take of a Karner Blue Butterfly would not undercut the economic portion of the ESA's comprehensive economic scheme.

Ms. 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) because the law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure. The initial cost of applying for an ITP is $50,000 more than the Cordelia Lot would be worth if there were no development restrictions upon it. The cost of applying for an ITP to develop the Cordelia Lot is so exorbitant that it essentially deprives Ms. Lear of her property rights.

For a takings analysis, the relevant parcel is the Cordelia Lot as subdivided in 1965 because Ms. Lear does not have an ownership interest in any lot on Lear Island other than the Cordelia Lot. Property that has been formally subdivided into separate lots, each with their own separate ownership, is determinative of what the relevant parcel is for a taking analysis. King James Lear's deed only granted Cordelia Lear an ownership interest in the Cordelia Lot. It would be inappropriate to include property that the Appellee does not own when undergoing a takings analysis based on complete deprivation of economic value.

The fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years does not shield FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property because a decade long prohibition on development is nearly three times longer than any previously upheld moratoria on development. Furthermore, this decade long ban on developing the Cordelia Lot is contingent on whether or not Ms. Lear chooses to maintain the wild blue lupine fields through annual mowing. If Ms. Lear

chooses to maintain the wild blue lupine fields through annual mowing, the moratorium would last as long as the Karner Blue's continue to live on the Cordelia Lot, which is potentially in perpetuity.

The Brittain County Butterfly Society's offer to pay an annual rent of $1,000 per year for wildlife viewings does not preclude Appellee's takings claim for a complete deprivation of economic value under *Lucas v. South Carolina Coastal Council* because the revenue generated from the wildlife viewings would be less than the annual property taxes assessed upon the Cordelia Lot. To determine whether a regulation's economic impact has deprived an owner of all economically viable use of their property, this Court must compare the fair market value of the property both before and after the restrictions were placed on the property. The fair market value of the Cordelia Lot before the Appellants' restrictions was $100,000. After the restrictions were put into place, the Cordelia Lot had no recreational or commercial market value. Therefore, Appellants' regulations constitute a complete deprivation of economic value of the Cordelia Lot.

Moreover, these regulations will cause the Cordelia Lot to suffer an annual loss of $500 and will require that the property to become economically idle and left in its natural state. Regulations which force owners to lose money and forego a property's most beneficial uses should constitute a taking.

Public trust limits to do not inhere in the 1803 Congressional grant of title to Lear Island because public trust limitations did not apply to non-tidal navigable waterways in the United States until 1810. Under the public trust doctrine, the sovereign was deemed to hold title to all tidal waterways used for navigation. Non-tidal waterways were reserved for public use, but could be deeded to private individuals by the sovereign. When this English common law doctrine was carried over into the United States, federal grants for lands adjoining non-tidal waterways were

presumed to run to the high water mark, with title for the remainder of the riverbed left to the States.

This presumption could be overcome through express language in the grant which demonstrates an intent on the part of Congress to deed lands past the high water mark. Such express intent was clearly displayed in Congress' 1803 grant of Lear Island. Furthermore, the "equal footing doctrine" does not apply because the grant was executed while Lear Island was part of the Northwest Territory.

The federal and local restrictions placed upon the Cordelia Lot must be combined to consider whether a complete deprivation of economically beneficial use has occurred because the aggregate harm of the restrictions are indivisible and should be treated as a joint tort. Takings law and state tort law overlap in some instances. The Appellants' restrictions are similar to those of joint tortfeasors, in that neither Appellant's action would individually cause a complete taking. However, taken together, Appellants' actions restrict use on the entirety of the Cordelia Lot. While each Appellant's restriction is theoretically divisible, in a practical sense they are a single harm inflicted upon Appellee.

Courts analyzing takings claims have generally resisted various types of conceptual severance and have insisted upon viewing the parcel as a whole. This resistance of conceptual severance should also apply to different governmental actors whose regulations combine to restrict the Cordelia Lot as a whole.

LEGAL ARGUMENT

I. The Endangered Species Act is not a valid exercise of Congress' power under the Commerce Clause as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by the construction of a single-family residence for personal use because a non-commercial, wholly intrastate endangered species being taken by a non-interstate activity cannot be a valid use of Commerce Clause power no matter which Circuit's test this Court decides to apply.

The ESA is a regulation that uses the broad power of the Commerce Clause to assert jurisdiction over more than five-hundred different animal and plant species designated as "endangered." Endangered meaning "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The FWS has used the broad power of the Commerce Clause to regulate the "taking" of these species. U.S. Const. art. I, § 8, cl. 3. However, recent cases have shown that this broad power is not without limit, especially when it encroaches on areas that have been traditionally regulated by the states. *National Federation of Independent Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2589 (2012); *see United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

In *Lopez*, the Court decided that there were three "broad categories" of activity that Congress could regulate under the Commerce Clause. Congress can regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) the activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558. In 2000, the *Morrison* Court adhered to this notion by stating that "[w]hile we need not adopt a categorical rule . . . , thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

In 2005, the Supreme Court in *Gonzales v. Raich* added another possible category of how to achieve validity under the Commerce Clause. 545 U.S. 1, 24-25 (2005) (regulation can reach the Commerce Clause if it is "essential part of a larger regulation of economic activity") (quoting

Lopez, 514 U.S. at 561). The ESA "take" provision, in regards to the Karner Blue Butterfly, deals with a wholly intrastate population and thus only deals with pure intrastate commerce. 16 U.S.C. § 1532(19) ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct"). For this reason, the only avenues for this Court to rely on are the third category of *Lopez* and the *Raich* extension. *Lopez*, 514 U.S. at 558; *Raich*, 545 U.S. at 24-25. If the type of economic activity reaches one of these two categories, the federal government may regulate it. *Lopez*, 514 U.S. at 558.

A. The taking of the intrastate, non-commercial, Karner Blue Butterfly, *does not* substantially impact interstate commerce.

The district court incorrectly held that the proper regulated activity was the underlying land development. The ESA, however, regulates a take, no matter what the action causing the take is. By asserting that the planned development is the activity which is regulated, instead of the taking of the endangered species or the endangered species itself, the district court has followed the improper approach of the D.C. Circuit. *Rancho Viejo LLC v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) ("regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad it threatens"). This is an improper holding by the district court.

The district court in *GDF Realty Investors, Ltd. v. Norton*, also improperly considered the planned development to be the regulated activity. *GDF*, 326 F.3d 622, 640 (5th Cir. 2003). As the Fifth Circuit held, "[t]o accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors." *GDF*, 326 F.3d at 634. The proper activity to regulate is the actual taking of the species, not the planned development surrounding this taking. *Id. GDF* accurately held that the cave species take alone did not have a substantial effect on interstate commerce. *GDF*, 326 F.3d at 635. Likewise,

a take of the Karner Blue does not have a substantial effect on interstate commerce by itself as it is wholly intrastate, and has absolutely no commercial value.

The take of a Karner Blue is, in and of itself, factually similar to the provisions that were struck down in *Lopez* and *Morrison*. Both these laws, and the ESA's take provision attempt to regulate violent or potentially violent activities through the Commerce Clause. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. Although these are honorable causes, these acts do not substantially impact interstate commerce. *Lopez*, 514 U.S. at 561. In *Lopez*, the Court noted that there could be minute attachments to interstate commerce by carrying a gun on school property, just as there could be to the taking of a Karner Blue Butterfly, but to do so would require the Court to "pile inference upon inference," and this cannot stand on Commerce Clause legs. *Id.* at 567.

When looking at what the proper regulated activity is, *GDF* gives four factors to consider. 326 F.3d 628-29 (citing *Morrison*, 529 U.S. at 610-12). The first factor is whether the intrastate activity is economic in nature. *GDF*, 326 F.3d at 628. Here, the taking of a Karner Blue Butterfly is not economic in nature. The Supreme Court has held previously, in *Andrus v. Allard*, that a take of an endangered species can be economic in nature, but that was the take of a bald eagle, an animal with a clear economic black market. *Andrus*, 44 U.S. 51, 54-56 (1979). The Karner Blue has no such market.

The second consideration is whether there is a jurisdictional element in the statute, which limits its application to instances affecting interstate commerce. *GDF*, 326 F.3d at 628. There is no jurisdictional limit on the ESA regarding takes of Karner Blues. Any take, regardless of the reason, economic or not, is deemed illegal under the ESA. 16 U.S.C. § 1532(19). The take provision of the statute is not related only to takes of Karner Blues that are related to interstate

commerce. *Id*. For this reason, it has no "jurisdictional element" which is deemed to be outside the Commerce Clause power under *Lopez*. 514 U.S. at 561.

The third consideration is whether there are "any Congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce." *GDF*, 326 F.3d at 629 (citing *Morrison*, 529 U.S. at 612). In *TVA v. Hill*, "the Court found that plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Hill*, 437 U.S. 153, 184 (1978). However, this does not show that Congress found anything that would infer that they contemplated that the Karner Blue affected interstate commerce. Instead, this only shows the overall goals of the ESA, which do not have merit to regulate a wholly intrastate, non-commercial creature with no effect on interstate commerce. Even if the Court found this to constitute legislative history concerning the effect on interstate commerce, *Morrison* holds that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614.

The last consideration is whether the link between the intrastate activity and interstate commerce is proper or too attenuated. *GDF*, 529 U.S. at 612 (citing *Morrison*, 529 U.S. at 612). The take of a wholly intrastate, non-commercial species, by itself, is clearly too attenuated. *See GDF*, 326 F.3d at 637-38. However, unlike the holding in *GDF*, even under the aggregation principle set forth in *Wickard v. Filburn*, 317 U.S. 111, 124-28 (1942), the ESA's take provision cannot be aggregated to a point where it ventures across Commerce Clause lines, and into police power. *Morrison*, 529 U.S. at 618-19. As Chief Justice Roberts held in *NFIB*, "[t]he Constitution's express conferral of some powers makes clear that it does not grant others." 132 S. Ct. at 2577. If FWS were allowed to aggregate takes of all species to show that the effect on

interstate commerce was substantial, then it would render the Commerce Clause to be an unlimited power, capable of finding any activity that may take any species, regardless of its relation to interstate commerce, to be constitutional. Again, the government cannot simply stack inferences on top of one another to reach their conclusion that the regulated activity effects interstate commerce. *Lopez*, 514 U.S. at 567.

Lastly, even if this Court were to hold that the planned development is the proper reason for addressing the regulated activity, the district court improperly applied this reasoning in holding that a planned building of a self-use, single-family, residential home substantially affects interstate commerce. This is as far reaching as the Gun Free School Zones Act in *Lopez* in that a court would have the ability to hold that any business transaction, even those done wholly intrastate, effects interstate commerce, and this would require multiple "inferences" to be made. *Lopez*, 514 U.S. at 567-68. The dissent in *National Ass'n of Home Builders v. Babbitt* ("*NAHB*"), stated that the majority:

> concludes that Congress may regulate purely intrastate activities--e.g., the habitat modification of the fly--where the regulation will then affect items which are arguably in interstate commerce. Again, I do not see the stopping point. Congress is not empowered either by the words of the Commerce Clause or by its interpretation in Lopez to regulate any non-commercial activity where the regulation will substantially affect interstate commerce.

NAHB, 130 F.3d 1041, 1067 (D.C. Cir. 1997) (Sentelle, J., dissenting).

B. <u>The regulation of the Karner Blue Butterfly is not permitted as a necessary component of the ESA's valid, comprehensive regulatory scheme under the Commerce Clause or the imbedded Necessary and Proper Clause.</u>

In *Raich*, the Court held that a questioned regulation could be proper if it was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 24-25. This

established that even where the Commerce Clause cannot reach, the activity may still be regulated if it is "necessary and proper." U.S. Const. art. I, § 8, cl. 18. It is conceded that the ESA does permit *some* regulation of economic activity. *See Andrus*, 44 U.S. 51; *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). However, the proper test is whether the regulated activity affects the market for a commodity. *See Raich*, 545 U.S. 1 (regulating illegal marijuana growing), *Wickard*, 317 U.S. 111 (regulating sale of wheat). However, there is no market for Karner Blue Butterflies. It is not a commodity and therefore it is not valid under the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18. As such, the take of the Karner Blue would not "undercut" the economic portion of the ESA's comprehensive economic scheme. *Raich*, 545 U.S. at 24-25.

The ESA includes an economic scheme to regulate commodities of endangered species. *People for the Ethical Treatment of Property Owners* ("*PETPO*") *v. United States Fish & Wildlife Service*, 57 F. Supp. 3d 1337, 1346 (D. Utah 2014), *appeal docketed*, No. 14-4151 and 14-4165 (10th Cir. Jan 12, 2015). However, the regulation of a wholly intrastate, non-commercial species cannot be deemed a part of this scheme unless the take in question effects the market for a commodity. *PETPO*, 57 F. Supp. 3d at 1345-46. The Karner Blue does not frustrate any market or commodity. It is not a major food source for any interstate or commercial endangered species that comes across it in New Union, and quite simply, it has no known effect on its ecosystem. The loss of the Karner Blue Butterfly subpopulation in New Union, on Lear Island would not frustrate any part of the ESA's regulatory scheme. 16 U.S.C. § 1531. The take of a non-commercial, wholly intrastate species cannot be aggregated with all other species to show a frustration of the ESA's comprehensive scheme either. *PETPO*, 57 Fed. Supp. at 1346.

The Commerce Clause and the Necessary and Proper Clause give Congress very broad power when regulating acts that "substantially affect interstate commerce," *Lopez*, 514 U.S. at 558, or are an "essential part of a larger regulation of economic activity." *Raich*. 545 U.S. at 24-25 (quoting *Lopez*, 514 U.S. at 561). However, these powers are not so unlimited that they can encroach on a state's police power. *Morrison*, 529 U.S. at 618-19.

The Karner Blue Butterfly simply does not meet the four considerations of *Morrison*, 529 U.S. at 610-12, and this Court cannot pile "inference upon inference" to reach the conclusion that a take of a Karner Blue "substantially affects interstate commerce." *Lopez*, 514 U.S. at 567. The Karner Blue, likewise, is not a part of the larger economic, regulatory scheme of the ESA. 16 U.S.C. § 1531. It has no known effect on any commodities or markets of other, interstate or commercial species, *PETPO*, 57 F. Supp. 3d at 1345-46. For the above reasons, this Court should reverse the district court's holding that the ESA is a valid exercise of Congress' Commerce power, as applied to the wholly intrastate population of the Karner Blue Butterfly. R. at 7-8.

II. Cordellia 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) because the law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure.

Cordellia 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). Section 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 et seq., authorizes the Secretary of the Interior to grant a [incidental take] permit for any taking otherwise prohibited by § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), of the ESA if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1). "An incidental take permit provides those acting under permit authority with the assurance that their

activities may proceed without risk of violating the prohibitions of section 9 of the ESA." *Seiber v. United States*, 364 F.3d 1356, 1363 (Fed. Cir. 2004). The Secretary of Interior's decision whether or not to grant an ITP is a final determination regarding the "'extent of permitted development' on the land in question." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (citing *Macdonald v. City of Yolo*, 477 U.S. 340, 351 (1986).

The Fifth Amendment, incorporated to the states under the Fourteenth Amendment, limits the power of the federal government over property owners by providing: "nor shall private property be taken for public use without just compensation." U.S. Const. amends. V, XIV. In order for a plaintiff to claim that the government has taken their private property without just compensation, the takings claim must be "ripe". *Palazzolo*, 533 U.S. at 618; *see also Williamson City Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187 (1985). "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson City Regional Planning Commission*, 473 U.S. at 187. "[A] court cannot determine whether a regulation has gone 'too far'" until a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" has been made. *Kinzli v. Santa Cruz*, 818 F.2d 1449, 1453 (9th Cir. 1987); (citing *Macdonald v. City of Yolo*, 477 U.S. 340, 348 (1986)).

Nevertheless, even in the absence of an application, a claim may still be "ripe" if such an application would be an "idle and futile act." *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1146 n.2 (9th Cir. 1983), *cert. denied.* "[T]he law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure." *Hage v. United*

States, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996); *see* ***Loveladies Harbor, Inc. v. United States,*** 15 Cl. Ct. 381, 386-87 (Cl. Ct. 1988).

A. The takings claim against FWS is ripe without having applied for an ITP under ESA §10, 16 U.S.C. § 1539(a)(1)(B) because such application would be an *idle and futile* act.

The Supreme Court has indicated that, generally, at least one application for final determination must have been submitted before a takings claim can be considered "ripe". *Macdonald*, 477 U.S. at 350 n.7; *Kinzli*, 818 F.2d at 1449. Nevertheless, even if no application has been submitted, a claim may still be "ripe" if such an application would be an "idle and futile act." *Martino*, 703 F.2d at 1146 n.2.

If the plaintiff alleges that an application for a final determination is an "idle and futile act", "the plaintiff bear[s] the heavy burden of showing that compliance with local ordinances would be futile". *American Savings & Loan Ass'n v. City of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). Though no precise test for this "futility exception" has been articulated, *Kinzli*, 818 F.2d at 1454, the Supreme Court has noted "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination. *Macdonald*, 477 U.S. at 350 n.7 (1986); s*ee Williamson Planning Commission*, 473 U.S. at 205-06 (Stevens, J., concurring); *United States* v. *Dickinson*, 331 U.S. 745, 749 (1947).

Although FWS argues that Cordelia Lear's taking claim is not ripe because she has not applied for an ITP, she need not apply because the application would be an "idle and futile act." *Martino*, 703 F.2d at 1146 n.2. To obtain the necessary ITP's to develop the Cordelia Lot, Ms. Lear would need to develop a HCP and an environmental assessment document under the National Environmental Policy Act. R. at 6. The HCP would require Ms. Lear to provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the

access strip, and commit to maintaining the remaining lupine fields through annual fall mowing. R. at 6.

It would be an "idle and futile act" for Cordelia Lear to apply for an ITP because providing for additional contiguous lupine habitat on an acre-for-acre basis is an impossible requirement under the factual circumstances of this case. *Martino*, 703 F.2d at 1146 n.2. Her property is surrounded on three sides by water, and the remaining side borders a lot with its own independent owner. R. at 1-3. There is simply no available land in which Ms. Lear can expand to provide for such acre-for-acre contiguous lupine habitat. Developing a HCP will not change the fact that the Cordelia Lot is surrounded on all sides by either water or other property. It would be an impossible requirement for Cordelia Lear to provide acre-for-acre contiguous lupine habitat and therefore the process of performing the HCP would be an "idle and futile act." *Martino*, 703 F.2d at 1146 n.2.

B. The takings claim against FWS is ripe without having applied for an ITP under ESA §10, 16 U.S.C. § 1539(a)(1)(B) because such application would be so burdensome as to effectively deprive Cordelia Lear of her property rights.

Courts have held that "the law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure and is so burdensome that it effectively deprives the property of value. *See Hage*, 35 Fed. Cl. at 164; *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Stearns Co. v. United States*, 34 Fed. Cl. 264 (Fed. Cl. 1995).

The estimated cost for preparing an application for an ITP, including the required HCP and environmental assessment documents, would be approximately $150,000. R. at 6. This cost does not include the continuing cost of maintaining and mowing the lupine fields, which must be

done every fall. *Id*. The fair market value of the Cordelia Lot without any restrictions is $100,000. R. at 7. The disparity between the actual cost of the Cordelia Lot and the cost "to acquire a permit is so burdensome as to effectively deprive plaintiff[] of [her] property rights." *Hage*, 35 Fed. Cl. at 164. The cost to acquire an ITP would effectively deprive Ms. Lear of her property rights because such an application would exceed the worth of her entire parcel by $50,000. When the cost of a permit would grossly exceed the value of the entire property, application for such a permit must constitute an "idle and futile act." *Martino*, F.2d at 1146 n.2.

III. For a takings analysis, the relevant parcel is the Cordelia Lot as subdivided in 1965 because Cordelia Lear does not have an ownership interest in any lot on Lear Island other than the Cordelia Lot.

The relevant parcel for a takings analysis is only Ms. Lear's lot, as subdivided in 1965. One of the critical questions in takings analysis is determining how to define the denominator of the fraction. *Loveladies*, 28 F.3d at 1180. The test for a regulatory taking requires a comparison of the fair market value before the regulation and the fair market value after the regulation. *Id.* Though the Supreme Court has held that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments", *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978), property that has been formally subdivided into separate lots, each with their own separate ownership, is determinative of what the relevant parcel is for a taking analysis. *See Loveladies Harbor*, 28 F.3d 1171.

Sole ownership is defined as "[a]n ownership so complete that no other person has any interest in the property." *Sole ownership*, Ballentine's Law Dictionary (3d ed. 1969). "Rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a 'bundle of rights' that may be exercised in

respect to that object…" Jesse Dukeminier et al. *Property* 99 (8th ed. 2014) (citing *Moore v. Regents of the University of California,* 793 P.2d 479 (Cal. 1990) (Mosk, J., dissenting). This "bundle of rights" includes "the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." 63C Am. Jur. 2d *Property* § 27.

A. Whatever substantial value that remains in the Goneril and Regan Lots is independent of the Cordelia Lot and should not be included in the takings analysis for the Cordelia Lot.

Lear Island was originally divided into three separate and distinct lots by King Lear's 1965 deed to his three daughters. R. at 3. As a result, it would be improper to include the entirety of Lear Island as the relevant parcel for a takings analysis. Cordelia Lear simply does possess an interest in any lot on Lear Island other than the Cordelia Lot. She was not deeded an interest in either the Goneril or Regan Lots, she does not pay the property on any lot other than the Cordelia Lot, and she does not possess a single "stick in the bundle of rights" for any lot other than her own. When determining the relevant parcel for a taking analysis, it is inappropriate to include parcels of property the plaintiff does not own.

Furthermore, in 1965, Cordelia Lear's father deeded her a fee simple interest in only the Cordelia Lot, reserving for himself a life estate in the property. R. at 3. In 1965, the Cordelia Lot was not yet designated by the FWS as a critical habitat for the Karner Blue species of butterfly. R. at 9. In fact, the Cordelia Lot was not designated as such until 1992, R. at 9, thirteen years after the original deed granted Cordelia Lear an interest in the property at issue. R.at 3. As such, there is absolutely no evidence that the original subdivision of the property was done as a subterfuge to create a takings claim.

IV. The fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years does not shield FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property because the prohibition on development will continue as long as the Karner Blues survive on Lear Island, which is potentially indefinite.

The fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years does not shield FWS and Brittain County from a takings claim based upon a complete deprivation of the economic value of the property.

A. The proper analysis for when justice and fairness requires that the government compensate persons depends largely 'upon the particular circumstances in that case.

"The Fifth Amendment forbids the taking of private property for public use without just compensation." *Palazzolo,* 533 U.S. at 633. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn* Central, 438 U.S. at 123-24 (quoting *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960)). The Supreme Court has "eschewed any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central,* 438 U.S. at 124 (quoting *Goldblatt* v. *Hempstead,* 369 U.S. 590, 594 (1962)). Instead, the proper analysis for when "justice and fairness" requires that the government compensate persons "depends largely 'upon the particular circumstances [in that] case.'" *Penn Central,* 438 U.S. at 124 (quoting *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958)).

The circumstances of this case require that "in all fairness and justice" the responsibility of maintaining the Cordelia Lot as a protected habitat for Karner Blues "should be borne by the public as a whole." *Penn Central,* 438 U.S. at 123-24 (quoting *Armstrong,* 364 U.S. at 49). The

interest of protecting an endangered species is one which belongs to the public. It is unreasonable to expect one property owner to "pick up the tab" to their own detriment in order to protect an endangered species.

B. A ban on development that is contingent upon the survival of the Lear Island subpopulation of Karner Blue Butterflies cannot be considered a temporary taking because it may last in perpetuity.

If Cordelia Lear chose to refrain from mowing the fields, the Cordelia Lot would naturally revert to a successional forest, eliminate the butterflies' habitat, and lead to their extinction. R. at 6. It is true that in *Tahoe-Sierra*, the Supreme Court held that temporary moratorium on new property development did not result in a "taking". *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning* Agency, 535 U.S. 302, 332 (2002). This case is distinguishable from *Tahoe-Sierra*, however, in that the moratorium on development in *Tahoe-Sierra* only lasted thirty-two months. *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 306. In this case, the moratorium on development of the Cordelia Lot will last however long the Karner Blues continue to thrive on the Codelia Lot, potentially in perpetuity. Neither Cordelia Lear, Brittain County nor FWS seek the extinction of the Karner Blues, making this a non-option.

FWS's attempt to circumvent liability for a takings claim by relying on the prospective extinction on the Lear Island subpopulation of Karner Blue Butterflies was noted with irony by the district court. R. at 10. The purpose of the ESA, and those who enforce it, is to "halt and reverse species extinction", not actively promote it. *Hill*, 437 U.S. at 184. Even if FWS's argument was acceptable, it would still be upwards of ten years before all the Karner Blues would be taken. R. at 7. A ten-year prohibition on development is approximately three times longer than any other moratorium upheld by the Supreme Court. *See Tahoe-Sierra Preservation*

Council Inc., 535 U.S. 302 (upholding a 32-month moratorium on development). Furthermore, this ban on development may last in perpetuity, as it is contingent upon the survival of the Lear Island subpopulation of Karner Blues. Such an expansive and indefinite ban cannot be held to be temporary.

V. The Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing does not preclude a takings claim for complete loss of economic value because the property taxes for the Cordelia Lot will still exceed any revenue generated from the rent collected for wildlife viewings.

A. Legal background for categorical takings under *Lucas v. South Carolina Coastal Council*

Under the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*, when a government regulation "denies all economically beneficial or productive use of land," then such a regulation is considered a per se taking under the Fifth Amendment and requires just compensation. *Lucas*, 505 U.S. 1003, 1015 (1992). Justice Scalia noted that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id*. at 1017. Like permanent physical appropriations, a *Lucas* categorical taking is found "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 1015.

When all economically viable use for a property has been deprived through restrictions, the Takings Clause's compensation requirement may only be avoided if the "proscribed use interests were not part of [the owner's] title to begin with." *Id*. at 1027. In his majority opinion, Justice Scalia provided that such limitations on property development must "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 1029. Subsequent Supreme Court decisions clarified how to determine when a restriction on land use becomes a "background principle of the State's property law." In *Palazzolo*, the Supreme Court stated that "*Lucas* stands for the proposition that

any *new* regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquired title *after the enactment*." *Palazzolo*, 533 U.S. at 629 (emphasis added). Therefore, in order to become a "background principle", the restriction on use must have existed before the property was granted to the owner.

B. Brittain County Butterfly Society's offer to provide wildlife viewings does not provide an economically viable use for the Cordelia Lot

Appellants have contended that the Brittain County Butterfly Society's offer to rent the Cordelia Lot for $1,000 annually should preclude Appellee's takings claim for complete deprivation of all economic use of her property. R. at 12. However, Appellants' argument fails because the revenue generated from the $1,000 rent would still be less than the annual property taxes for the Cordelia Lot. A property which cannot generate more income than its property taxes is fundamentally without economic value. *Id*.

When determining whether the economic impact of a regulation has deprived an owner of all economic value of their property, a court "must compare the fair market value of the property before the alleged taking with the fair market value of the property after the alleged taking." *Bowles v. United States*, 31 Fed. Cl. 37, 46 (Fed. Cl. 1994); *see also Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986); *Loveladies Harbor*, 21 Cl. Ct. at 156–69. Once such calculations are performed on the Cordelia Lot, complete deprivation of all economic value is readily apparent. The district court found the fair market value of the Cordelia Lot is $100,000 without restrictions preventing the development of a single-family residence. R. at 7. Property taxes on the Cordelia Lot are $1,500 annually. *Id.* However, without the right to develop a single-family residence, the Cordelia Lot has no recreational or commercial market value. *Id.* The regulations at issue in this case have diminished the value of the Cordelia Lot from

$100,000 to $0. It is difficult to imagine a clearer example of a categorical taking under *Lucas* for the deprivation of all viable economic use of a property.

The *Lucas* court noted that one of the most important elements of property is profit: "'For what is the land but the profits thereof[?]' 1 E. Coke, Institutes of the Laws of England, ch. 1, § 1 (1st Am. ed. 1812)." *Lucas*, 505 U.S. at 1017. In context, Coke's use of the word "profit" is more properly understood as meaning a specific beneficial use of the land. 1 E. Coke, Institutes of the Laws of England, ch. 1, § 1(4)(g) (1st Am. Ed. 1812). Even with the $1,000 rent offered by the Brittain County Butterfly Society, the Cordelia Lot would still have no economically beneficial use because the revenue generated from that rent will not even fully cover the annual property taxes assessed on the Cordelia Lot. R. at 12. Under the regulations put forward by Appellants, Appellee's property would have no commercial or recreational market value and would operate at an annual loss of $500 after taxes.

C. Appellants' restrictions would force the Cordelia Lot to remain in its natural state

Not only would the Cordelia Lot be forced to sstain an annual loss of $500, but the Appellants' restrictions would force the Appellee to leave the property in its natural state. The *Lucas* court wrote that when regulations essentially force a property to remain in its natural state, the land is left "without economically beneficial or productive options for its use." *Lucas*, 505 U.S. at 1018. Taken together, Appellants' restrictions would force Appellee to suffer an annual loss of $500 and rob the property of any economically viable use. The *Lucas* majority held that when regulations force real property owners to "sacrifice *all* economically beneficial uses in the name of common good, that is, to leave his property economically idle, he has suffered a taking." *Id*. at 1019.

Appellee is currently being forced to make just such a sacrifice. The fact that the Brittain County Butterfly Society has offered to reduce the amount of monetary loss her property will suffer under these regulations from $1,500 annually to $500 annually does not somehow provide a new economic use for the Cordelia Lot. In order for a property to have an "economically viable use", it must have a value greater than zero.

VI. Public trust limits on uses of state navigable waters do not inhere in the Lear's 1803 congressional grant of title because the public trust doctrine did not apply to non-tidal navigable waterways in the United States until 1810.

A. The presumption that States retain title to lands below the high water mark in non-tidal navigable waterways may be overcome through express language in congressional grants.

Brittain County has argued that its public trust interest in the navigable waters around Lear Island, which prevent the filling and developing of wetland, are well-established background principles of state law under *Lucas* and *Palazzolo*. However, Brittain County's argument does not comport with either the common law doctrine of public trust limits or the statutory precedents interpreting these limits. Public trust limits are a common law doctrine dealing with the ownership of navigable waterways. *P.P.L. Montana, LLC v. Montana*, 565 U.S. 576, 589 (2012). Under this common law doctrine, the sovereign was deemed to hold title to tidal waterways and the sovereign could grant private individuals or entities title to non-tidal waterways. *Id.*

When this English common law doctrine was carried over to the United States, it was a general rule that federal grants of title to private individuals or entities for lands adjoining navigable waters only extended to the high water mark, with the remaining portion of the riverbed left with the States. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970). However, this general rule against granting lands below the high water mark could be overcome through express language

in the grant which clearly indicated that the federal government intended to deed the lands below the high water mark under non-tidal navigable waterways to private individuals. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). In the case at hand, the Congressional grant of Lear Island in 1803 clearly indicates Congress' express intent to deed lands past the high water mark of Lake Union by stating that "all lands under water within a 300-foot radius of the shoreline of said island" will be given to Cornelius Lear in fee simple absolute. R. at 4–5.

B. Non-tidal riverbeds were considered to be private property in the United States until 1810

While American courts did eventually move away from the distinction between tidal and non-tidal waterways in determining title to riverbeds in the nineteenth century, that shift did not begin to take place until 1810. *P.P.L. Montana, LLC*, 565 U.S. at 590 (citing *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810)). It was only after 1810 that U.S. courts began considering non-tidal riverbeds, like those surrounding Lake Union, to be held by the States. *P.P.L. Mont., LLC*, 565 U.S. at 590. Public trust limits for the non-tidal waterways did not exists in grants prior to 1810. Therefore, Brittain County's argument that their restriction of use for Lear Island is valid under the public trust doctrine must fail because no such public trust limitation existed at the time of the 1803 grant of Lear Island. The 1803 Congressional grant cannot be considered a "background principle" of state property law under *Lucas* because the "proscribed use" of public trust limitation did not exist when the island was deeded to Cornelius Lear.

C. "Equal footing doctrine" does not grant Brittain County title to riverbeds around Lear Island because the congressional grant was made while Lear Island was part of the Northwest Territory.

Similarly, Brittain County's argument that the "equal footing doctrine" should apply is also untenable. Under the "equal footing doctrine," new States admitted to the Union are given the same rights as the 13 original States. *Shively*, 152 U.S. at 57. Brittain County argues that this

doctrine provides them title to lands under water in the same manner it was provided to the original 13 states. This argument also fails because it clearly contradicts the 1803 Congressional grant. Congress granted Lear Island to Cornelius Lear in 1803 while the land was part of the Northwest Territory. R. at 4. In *Shively*, the Supreme Court stated that "[t]he United States, while they hold the country as a Territory, having all powers both of national and municipal government, may grant, for appropriate purposes, title or rights in the soil below high water mark. . . ." *Shively*, 152 U.S. at 58. This is precisely what Congress did in the 1803 grant for Lear Island and any "equal footing doctrine" argument presented by Brittain Country simply cannot hold water.

VII. The federal and local restrictions must be combined to consider whether a complete deprivation of economically beneficial use has occurred because the aggregate harm of the restrictions are indivisible and should be treated as a joint tort.

A. The restrictions of the Appellants resemble those of joint tortfeasors and applicable tort law should guide this issue of first impression

It is conceded by Appellee that neither the federal regulations offered by the FWS nor the local regulations offered by Brittain County, taken individually, would completely deprive the Cordelia Lot of all economically beneficial use. The district court was correct in determining that these restrictions, when taken together, have the joint effect of totally depriving the Cordelia Lot of all economic use and should be considered a taking. R. at 11. It is an issue of first impression for this Court as to whether concurrent federal and local regulations on the same property should be considered together when determining a categorical taking under *Lucas*. *Id*. As this is a novel question in takings law jurisprudence, this Court should apply tort principles to find that a complete deprivation of all economic use for the Cordelia Lot has taken place.

GoldIn *Lucas*, Justice Scalia acknowledged that takings jurisprudence and state tort law would overlap in some instances. *Lucas,* 505 U.S. at 1030. Justice Scalia laid out his test for a "total taking" which followed the test laid out for public and private nuisances in the *Restatement (Second) of Torts* § 826 and § 827. *Id*. Just as the facts in *Lucas* drew analogies to state nuisance laws, the facts of the present case are quite analogous to state tort law surrounding joint tortfeasors.

B. The restrictions placed on the Cordelia Lot by the Appellants are conceptually indivisible and form a single harm

The Cordelia Lot is 10 acres, with 9 acres consisting of upland and the remaining acre consisting of emergent cattail march wetland. R. at 5. The FWS has restricted the use of the nine acres of upland under the ESA, but has done nothing to restrict development on the one acre of marsh wetland. R. at 11. Conversely, Brittain County has no restrictions regarding the nine acres of wetland, but does restrict permits to fill wetlands for non-water-dependent uses. R. at 7. These regulatory harms, "while theoretically divisible, [are] single in a practical sense" in that they act concurrently to rob Appellee of any economically viable use of her property by restricting the Cordelia Lot as a whole. *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976).

C. Courts should avoid attempts by governmental actors to conceptually sever their regulations when, taken together, they regulate the entirety of a given parcel

The fundamental question that courts grapple with in determining whether a taking as occurred is whether the regulations at issue: "forc[e] some people alone to bear public burdens which, *in all fairness and justice*, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49 (emphasis added). This principle of fairness and justice would be thwarted if each Appellant's regulation is severed and viewed only in isolation, rather than as a singular harm. Courts have generally resisted attempts by governments to conceptually sever a property to avoid

violating the Fifth Amendment. *See e.g.*, *Penn Central*, 438 U.S. at 129–30 (holding that courts must look at the parcel as a whole to determine the nature and extent of a regulation's interference with individual rights); *see also Tahoe-Sierra Preservation Council*, 535 U.S. at 332 (holding that the temporal dimensions of the parcel must be considered alongside its physical dimensions when a court is determining what constitutes the entire parcel for takings purposes).

The Supreme Court has expressed great wariness towards attempts to sever both physical and temporal dimensions of a parcel under a takings analysis and an equal wariness must be applied to attempts to sever regulations of the same parcel by different governmental actors, as the FWS and Britain County have tried to do.

CONCLUSION

For the above reasons, Cordelia Lear respectfully requests that this Court REVERSE the district court's holding that the ESA is constitutional under the Commerce Clause, as applied to the wholly intrastate, non-commercial Karner Blue Butterfly. The Karner Blue does not substantially affect interstate commerce, and the taking of it would not undercut the ESA's comprehensive economic scheme. In the alternative, Ms. Lear requests that this Court AFFIRM the district court's decision that the application of both ESA's incidental take prohibition and the Brittain County Wetlands Preservation Law to Ms. Lear's property has resulted in an uncompensated taking of her property in violation of the Fifth Amendment. Ms. Lear's claim is ripe, the relevant lot is the Cordelia Lot, the relevant time period is the current permissible development of the property, public trust limits do not inhere in the Lear's 1803 congressional grant of title and the Cordelia Lot has been deprived of all economic value.

DATED: November 27, 2016

Respectfully Submitted,

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Counsel for Cordelia Lear, Plaintiff-Appellee-Cross Appellant