UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

- v. -

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant.

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

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Brief of Defendant-Appellant

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had jurisdiction over this case pursuant to 28 U.S.C. § 1331. Jurisdiction of this Court is invoked under 28 U.S.C. § 1291 as an appeal from a final decision of the United States District Court for the District of New Union. The United States District Court for the District of New Union entered a final judgment in this matter on June 1, 2016. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on June 9, 2016.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Under the Commerce Clause Power of the United States Constitution (U.S. CONST. art. I § 8, cl. 3), did Congress exceed their power by prohibiting a non-commercial taking as specifically applied to the wholly intrastate population of the Karner Blue Butterfly under Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1)(B) (2012) ("Section 9")?

II. Under 16 U.S.C. § 1539(a)(1)(B) (2012) of the ESA, ("Section 10"), is a property owner's regulatory takings claim ripe for review when the property owner failed to submit an Incidental Take Permit (ITP) application to the Fish and Wildlife Service (FWS) denying FWS the discretion to review and issue an ITP authorizing the otherwise unlawful development of the property?

III. When analyzing a regulatory takings claim, may a court exclusively rely on state property lines to define the relevant parcel, ignoring the "parcel as a whole" rule?

IV. Under the Takings Clause of the Fifth Amendment to the Constitution (U.S. CONST. amend. V.), are the state and federal governments required to compensate a landowner for the complete deprivation of economic value for property if it is the critical habitat for an endangered species and when the property will naturally destruct if the owner refrained from annual mowing for ten years and the property generated no income?

V. Under the Takings Clause, is a property owner precluded from a takings claim for complete loss of economic value of property against the state and federal governments when a butterfly society offered $1,000 in annual rent for wildlife viewing of the endangered butterflies?

VI. Under the Takings Clause, is a takings claim based on a wetland permit denial to fill part of a navigable lake precluded when a county wetland law inheres in the background principles of state nuisance or common law property for the preservation of navigation and public use?

VII. Under the Takings Clause, are a federal agency and county liable for a claim of complete deprivation of economic value when neither the federal regulation nor the county regulation completely deprives a landowner's property of economic value?

STATEMENT OF THE CASE

A. Proceedings Below

This is an appeal from a final judgment of the United States District Court for the District of New Union. In February 2014, Plaintiff-Appellee-Cross-Appellant Cordelia Lear ("Lear") filed suit against FWS and Brittain County (the "County"), State of New Union ("New Union") seeking compensation for the taking of her property under the Fifth Amendment. (R. at 4, 7.) Additionally, Lear challenged the ESA's constitutionality as applied to the taking of the wholly intrastate subpopulation of the Karner Blue Butterfly (the "Karner Blue") as a valid exercise of congressional power under the Commerce Clause. (U.S. CONST. art. I, § 8, cl. 3). (R. at 7.) Lear brought suit in district court, waiving any damages in excess of $10,000 in her takings claim against the United States of America and. (R. at 4., n. 4.)

On June 1, 2016, after a seven-day bench trial, the district court entered a final judgment: (1) dismissing Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of congressional power as applied to her property; (2) awarding Lear damages of $10,000 against FWS for the taking of her property; and (3) awarding Lear $90,000 in damages against the County for the taking of her property. (R. at 1, 4.) Following the district court's judgment, FWS and the County each filed a notice of appeal on June 9, 2016. (R. at 1.) Lear also filed a notice of appeal on June 10, 2016. (R. at 1.)

B. Statement of the Facts

Lear Island (the "Island") is a 1,000-acre island on Lake Union (the "Lake"), a large interstate lake traditionally used for navigation, in the County. (R. at 4.) In 1803, when present-

day New Union was part of the Northwest Territory, Congress granted Cornelius Lear a land grant for the Island, including title in fee simple absolute to the entire Island, all lands within a 300-foot radius of the shoreline. (R. at 4-5.) Since 1803, Cornelius Lear's descendants have occupied the Island as a homestead, farm, and as hunting and fishing grounds. (R. at 5.) During the latter half of the nineteenth century, the Island was used as a productive farm, and in the early twentieth century the Lears constructed a causeway connecting the island to the mainland. (R. at 5.) By 1965, King James Lear owned the island. (R. at 5.) Upon approval by the Brittain Town Planning Board (the "Planning Board") in 1965, King Lear subdivided the Island into three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. (R. at 5.) The Planning Board determined that each lot was developable with at least one single-family residence conforming to zoning requirements. (R. at 5.) As part of his estate plan, King Lear deeded each of the lots to his three daughters while still reserving a life estate in each lot, thereafter, built a home on the Regan Lot, and continued to live on the Goneril Lot homestead. (R. at 5.) Cordelia Lot (referred to as "the Heath"), includes nine acres of open upland fields, one acre of cove-land marsh that was historically open water and used as a boat landing. (R. at 5.) For decades, the Lear family kept open the access strip and nine-acres of the field through annual mowing in October. (R. at 5.) The Island became naturally wooded after agricultural use ended in 1965, and the Heath's access strip became covered with wild blue lupine flowers, which thrive in the sandy soil of the Island. (R. at 5.) The Goneril Lot's successional forest partially shades the Heath's lupine flowers, creating an ideal Karner Blue habitat because wild blue lupine fields are essential for the survival of the Karner Blue larvae. (R. at 5-6.) Karner Blue larvae can only feed on the blue lupine plant leaves. (R. at 5.) Karner Blues' eggs are laid in the fall and the larvae stay attached to the lupine until they emerge from chrysalis as butterflies and any

disturbance of the lupines during the larval and chrysalis stages causes the butterflies to die. (R. at 6.) In 1992, FWS designated the Heath as a critical habitat for the subpopulation of the New Union Karner Blue. (R. at 6.) The Karner Blue is an endangered species, and was added to the federal endangered species list on December 14, 1992. 50 C.F.R. § 17.11 (2015); 57 Fed. Reg. 59,236 (Dec. 14, 1992). (R. at 5.) The New Union subpopulation of Karner Blue is entirely intrastate and the Karner Blue does not migrate or travel across state lines. (R. at 5-6.) The only remaining Karner Blue population in New Union lives on the Heath, but Karner Blue populations survive in other states. (R. at 5.)

After King Lear's death in 2005, his three daughters came into possession of their deeded properties. (R. at 5.) In 2012, Cordelia Lear decided to build a house on her lot and contacted the New Union FWS field office to determine whether property development would require any permits or approvals due to the existence of the endangered butterfly population. (R. at 5-6.) An FWS agent advised Lear that any disturbance of the lupines, except the continued annual mowing, would constitute a "take" of the endangered butterfly. (R. at 6.) The FWS agent then advised Lear that she could obtain an ITP under Section 10 of the ESA, by submitting an application with a habitat conservation plan ("HCP") and obtaining an environmental assessment document under the National Environmental Policy Act ("NEPA"). (R. at 6.) The FWS agent also advised Lear that an approvable HCP would require a commitment to maintain the remaining lupine fields through annual mowing. (R. at 6.) On May 15, 2012, the New Union field office sent Lear a letter confirming that the Heath was a critical habitat, reiterating that a disturbance would be a "take", and then invited Lear to submit an ITP application and to reference FWS's Habitat Conservation Planning Handbook for information on developing an acceptable HCP. (R. at 6.) If Lear refrained from the annual mowing of the Heath, the lupine

field will naturally convert to a successional forest over ten years, eliminating the Karner Blues' habitat, and the New Union subpopulation of the Karner Blue would become extinct, unless a replacement habitat was created within a 1,000-foot radius of the existing fields. (R. at 6-7.)

Lear conferred with an environmental consultant who advised her that preparing an ITP application would cost $150,000. (R. at 6.) Lear opted to develop an alternative development proposal ("ADP") instead. (R. at 7.) The ADP would not disturb the lupine fields, but it would require filling in one half-acre of the marsh in the cove to create a site where Lear could build for a residential home. (R. at 7.) In August 2013, pursuant to the Brittain County Wetland Preservation Law of 1982 (the "Wetland Law"), Lear filed a permit application to fill the cove marsh with the Brittain County Wetlands Board (the "Board"). (R. at 7.) The Board denied the permit because wetlands can only be filled for water-dependent uses and a residential home site is not a water-dependent use. (R. at 7.)

In its current state, there is no market for a parcel like the Heath for recreational or agricultural use or timber land. (R. at 7.) The fair market value of the Heath without any restrictions preventing the development of a single-family home is $100,000, and the annual property taxes on the lot are $1,500. (R. at 7.) The Brittain County Butterfly Society (the "Society") has offered to pay Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season, but Lear rejected the Society's offer. (R. at 7.) Lear has not sought a reassessment of her property's value following the denial of the permit. (R. at 7.)

SUMMARY OF THE ARGUMENT

The ESA, as applied to the Karner Blue on the Heath, exceeds the power of the Commerce Clause. The Commerce Clause empowers Congress to regulate activity that

substantially affects interstate commerce. The ESA regulates any "harm" of an endangered species, which is inherently not commerce. The Karner Blue on the Heath is wholly intrastate subpopulation that concerns neither commerce nor an economic enterprise. Regulating the taking of the Karner Blue under the ESA is an abuse of the Commerce Clause because the taking of the subpopulation cannot be aggregated, there is not jurisdictional nexus between the species and interstate commerce, and there is no legislative history suggesting Congress intended to use the ESA to restrict takings by private landowners. Thus, regulating the taking of the Karner Blue under the ESA is an abuse of the Commerce Clause.

Lear's takings claim is not ripe for review because there was no final agency decision. Under the ESA, Lear could have sought an ITP from FWS to take of the Karner Blue. Review of a takings claim requires that a government entity have had the opportunity to exercise its discretion and reach a final decision. However, Lear did not submit an application, denying FWS the opportunity to review her application. Here, Lear does not satisfy the ripeness exception because Lear's application to FWS would not have been futile act. Lear's takings claim is not ripe for review.

For a takings claim analysis, the relevant parcel is the entire Island because the Island was under common ownership when the ESA and the Wetland Law were enacted. The land-use regulations on the Island are reasonable, and this remains unchanged by the passage of time or title. The Lear family held title when the regulations were enacted, and Lear's inheritance in title does not render the regulations unreasonable. Therefore, the Island is the relevant parcel for Lear's taking claim analysis.

FWS and the County are shielded from Lear's claim for complete deprivation of economic value. The Karner Blue habitat will naturally destruct in ten years if Lear refrains

from the annual mowing. Lear has not suffered a total deprivation of value of the Heath because the ESA and the Wetland Law are merely a limitation on use. FWS and the County are not required to compensate Lear for a partial and temporary regulatory taking because Lear will not experience a total loss of value of the Heath. The Society has offered Lear $10,000 in rent for wildlife viewing while the Karner Blue naturally destructs, if Lear chooses to stop mowing annually. Lear's takings claim based on the permit denial to fill the cove adjacent to the Heath is precluded under the public trust doctrine because New Union holds the title to the lands between the shoreline and below the mean high water mark of the Lake for public use. The Wetland Law is a permissible regulation inherent in the background principles of state law. Neither the County nor FWS are liable for Lear's total takings claim. The federal regulation of the ESA and the state regulation under the Wetland Law must be viewed separately because each law restricts only a portion of Lear's parcel. Therefore, neither FWS nor the County is liable for the complete deprivation of economic value of the Heath.

ARGUMENT

Section 9 of the ESA prohibits the unauthorized "take" of an endangered species. 16 U.S.C. § 1538(a)(1)(B). Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2012). The Takings Clause prohibits state and federal governments from taking private property for public use without just compensation. U.S. CONST. amend. V. A property owner can allege a regulatory taking of their property has occurred when the use of the property has been restricted and when there has been a total elimination of the use or value of the land. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

An individual's "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. A physical taking occurs when the government's action amounts to a physical occupation or invasion of property. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). Alternatively, a regulatory taking arises when the government's action restricts a property owner's use of his property. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (Fed. Cl. 2001). Regulatory takings are divided into two subcategories: a total taking claim and a partial regulatory taking. *Penn Cent. Transp. Co.*, 438 U.S. at 124. The Supreme Court has held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial use...[and] leave[s] his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). Here, under the ESA and the Wetland Law, the limitations placed on the Heath for the protection of the Karner Blue and preservation of public use amount to a partial regulatory taking. Challenges to the constitutionality of federal statutes are reviewed *de novo*. *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 198 (5th Cir. 2000). Ripeness is a question of law that is reviewed *de novo*. *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) The determination of the relevant parcel for takings analysis is a factual finding that appellate courts review for clear error. *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 3 (1st Cir. 1990). Challenges to both federal and state takings claims are reviewed *de novo*. *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1183 (9th Cir. 2012).

I. The ESA is an Abuse of the Commerce Clause Because the Take of the Wholly Intrastate Subpopulation of the Karner Blue Does Not Substantially Affect Interstate Commerce.

The ESA was enacted by Congress in 1973 "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the

conservation of such endangered species." 16 U.S.C. § 1531(b) (2012). The term "harm" includes any significant modification of the habitat of an endangered species without prior authorization "where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" from FWS violates Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.3 (2015).

The power under the Commerce Clause is not limitless. U.S. CONST. art. I § 8, cl. 3; *see, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *see also United States v. Morrison,* 529 U.S. 598 (2000). In *United States v. Lopez*, the Supreme Court held that the Commerce Clause permits Congress to regulate: (1) the channels; (2) the instrumentalities; and (3) the activities that substantially affect interstate commerce. 514 U.S. at 558-59. When determining whether a regulated activity substantially affects interstate commerce, a court will consider: (1) whether the regulated activity concerns commerce or an economic enterprise; (2) the presence of an "express jurisdictional element" limiting the application of the statute to activity which has "an explicit connection with or effect on interstate commerce"; (3) the challenged statute's legislative history and express congressional findings regarding the effect that the regulated activity has on interstate commerce; and (4) whether the "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated." *Morrison,* 529 U.S. at 610-12.

A. The Take Does Not Concern Commerce or an Economic Enterprise, and Cannot be Viewed in the Aggregate Because the ESA is not a Economic Regulatory Scheme.

Congress does not have the authority to prohibit the taking of the Karner Blue on the Cordelia Lot because the wholly intrastate subpopulation of butterfly does not concern commerce or an economic enterprise. Section 9 of the ESA regulates the taking of an endangered species, rather than commercial or economic activity. 16 U.S.C. § 1538(a)(1)(B).

However, Congress may regulate activity under the authority of the Commerce Clause when the regulated activity concerns commerce. *Lopez*, 514 U.S. at 561. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 exceeded the Commerce Clause power, finding that the Act criminalized the possession of a firearm in a school zone. *Id.* at 551. The Court reasoned that "[t]he possession of a gun in a school zone is in no sense an economic activity" and therefore was not subject to regulation under the Commerce Clause. *Id.* at 568.

The Court cannot aggregate the take of the Karner Blue because the ESA is not a comprehensive economic regulator scheme. In *Gonzales v. Raich*, the Supreme Court held that Congress's regulatory power extends to non-commercial intrastate activity by considering the aggregate affect of the regulated class of activity. 545 U.S. 1, 18 (2005). The Court found that Congress could regulate the non-commercial intrastate growth and consumption of marijuana because the regulation of this intrastate non-commercial activity was an essential part of the larger comprehensive economic regulatory scheme of the Controlled Substances Act (CSA). *Id.* at 30-32. The Court reasoned that exempting the growth and consumption of marijuana from CSA regulation would undermine the larger regulation of interstate "production, distribution, and consumption of commodities." *Id*. at 26. In limited circumstances, Congress can regulate non-commercial intrastate activity if the activity is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 36.

Here, the taking of the New Union Karner Blue is a non-economic activity and regulation under the ESA is unconstitutional. Economic activity can possibly result in a take of an endangered species; however, Section 9 of the ESA regulates a take of an endangered species in general. 16 U.S.C. § 1538(a)(1)(B). The district court improperly held that the ESA was

regulating an economic activity when the ESA prevented residential construction. (R. at 8.) Unlike the permissible regulation of wholly intrastate growth and consumption of marijuana as an economic activity in *Raich*, here, the taking of a wholly intrastate Karner Blue subpopulation is not an economic activity. (R. at 4-5.) The ESA's regulation of the non-economic intrastate activity of the Karner Blue is impermissible. If the ESA can regulate an intrastate butterfly population under the Commerce Clause, then the regulatory power of the Commerce Clause is boundless.

B. The ESA has no Jurisdictional Element, Legislative History, Congressional Findings or a Link Effecting Interstate Commerce Under the *Morrison* Factors.

The ESA does not contain an express jurisdictional element. There is no requirement for an express jurisdictional element limiting the reach of a regulation to a discreet set of activities with an explicit connection to interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 508 (4th Cir. 2000); *see also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003); *but cf., Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064-65 (D.C. Cir. 1997) ("[n]othing in [Section 9 of the ESA]...requires that the regulated activity affect interstate commerce or provides any jurisdictional nexus"). However, the inclusion of such an element would "all but ensure constitutional validity." *Gibbs*, 214 F.3d at 508.

There is no legislative history or express congressional findings regarding the effects of the take of the Karner Blue have on interstate commerce. Although Congress "was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet," Congress was explicit that "[e]nvironmental protection is the sole objective of the [ESA]." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178-79 (1978)(emphasis in original); *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 233 n.4

(D.C. Cir. 1982). The purpose of the ESA is to regulate "ecosystems" and "provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b).

If any link exists between the take of the Karner Blue and a substantial effect on interstate commerce, it is attenutated. Congress may only regulate non-economic and intrastate activity when there is a reasonable link between the regulated activity and a substantial effect on interstate commerce. *Raich*, 545 U.S. at 38. A link between the regulated activity and a substantial effect on interstate commerce must not be attenuated to ensure that Congress's commerce power does not become a general police power. *Lopez*, 514 U.S. at 567.

In *Morrison*, the Supreme Court held that the Congress impermissibly regulated gender motivated violent crimes under the Commerce Clause because the link between gender motivated acts of violence and interstate commerce was attenuated. 529 U.S. at 619. The Court rejected that a link existed between gender motivated violent crimes and interstate commerce based on a but-for causal chain, characterizing any link as attenuated. *Id.* at 615. The Court explained that if the but-for causal chain were permitted to establish a link to interstate commerce, Congress would be allowed to limitlessly regulate any crime via the Commerce Clause. *Id.* at 615-16.

Here, the take of Karner Blue does not have any effect, substantial or otherwise, on interstate commerce because the Karner Blue has no interaction with an economic market. (R. at 6.) The Karner Blue are neither bought nor sold, and the record is silent about the existence of any expressed interest in tourism or research prior to the filing of this suit. (R. at 7.) The ESA is an abuse of the Commerce Clause because any link between the take of the Karner Blue subpopulation and a substantial effect on interstate commerce is attenuated and relies on a but-for causal chain.

II. Lear's Takings Claim Is Not Ripe Because There is no Final Agency Decision and Lear Failed to Submit an ITP Application Under Section 10 of the ESA.

Under Section 9 of the ESA, the "take" of an endangered species is prohibited, unless an individual has been issued an ITP. 16 U.S.C. § 1538(a)(1)(B). Under Section 10 of the ESA, FWS has the discretion to issue an ITP to a private landowner when it finds that: (1) the taking will be incidental to the otherwise lawful activity; (2) the applicant will make practical efforts to minimize and mitigate the effect of the proposed taking; (3) the applicant will secure adequate funding for a HCP; (4) the likelihood of survival and recovery of the taken species will not be appreciably reduced by the taking; and (5) the measures that FWS determines are necessary will be met. *Id*. § 1539(a)(1)(B); 16 U.S.C. § 1539(a)(2)(A) (2012); 16 U.S.C. § 1539(a)(2)(B) (2012) . Pursuant to Section 10, after FWS grants an ITP, a private landowner is permitted to take a specific endangered species. *Id.* § 1539(a)(1)(B).

The Supreme Court has held that takings claims are not ripe for review until a landowner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion..." and "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001); *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Lear's taking claim is not ripe for review because Lear failed to file an ITP application with FWS. (R. at 7.).

A. Lear's Takings Claim is not Ripe for Review Because There is no Final Agency Action for This Court to Review.

Regulatory takings claims are not ripe for judicial review until the government entity has reached a final decision with "a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 186, 193. In *Hodel v. Va. Surface Mining &*

Reclamation Ass'n, the Supreme Court concluded that a regulatory taking claim challenging surface coal mining regulations was not ripe, finding that the challenged act provided a mechanism for coal producers and landowners to seek a waiver of the challenged land-use regulation. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).. The Court reasoned that the coal producers and landowners could not bring their claim in federal court at that time because the plaintiffs chose not to avail themselves of that mechanism. *Id.*

In *Morris v. United States*, the United States Court of Appeals for the Federal Circuit held that the regulatory takings claim of two landowners against the federal government was not ripe for judicial review because the landowners did not file an application for an ITP. 392 F.3d 1372, 1376 (Fed. Cir. 2004). The Federal Circuit reasoned the regulatory takings claim was not ripe until the landowners had given the agency the opportunity to exercise its discretion and make "reasonably clear or final the affect the regulation will have on the [landowners'] application." *Id.* at 1377-78.

Like the landowners in *Hodel* and *Morris* who chose not to avail themselves of the administrative procedures available to obtain permits potentially exempting them from the regulations, Lear failed to submit an application for an ITP which would have given her the ability to develop the Heath. (R. at 7.) Under § 1539(a)(2)(A), absent the submission of an ITP application, FWS had no opportunity to make a final decision whether to grant or deny an ITP permit to Lear and it is difficult to determine the extent of the ESA's restrictions on the Heath. (R. at 7.) Thus, Lear chose to forego the application process, preventing FWS from exercising its discretion and potentially issuing Lear an ITP.

B. Applying for an ITP Would Not Have Been Futile.

A regulatory takings claim can still be ripe for review absent a final agency decision under the futility exception. *Palazzolo*, 533 U.S. at 620. The futility exception is not a means for landowners to strategically avoid availing themselves to existing administrative remedies. Rather, the futility exception "serves 'to protect property owners from being required to submit *multiple* applications when the manner in which the first application *was rejected* makes it clear that no project will be approved.'" *Morris*, 392 F.3d at 1376 (quoting *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998)).

In *Palazzolo v. Rhode Island*, the Supreme Court held that a regulatory takings claim was ripe for review, even when the landowner had not obtained a final agency decision from the Rhode Island Coastal Management Council. 533 U.S. at 620-21. The Court reasoned that it would be futile for the landowner to continue submitting permit applications to fill the wetlands on his property with the regulating state agency because the agency's previous permit denials indicated that the property could not be filled or developed. *Id.* at 621. The Court found that "the submission of further and futile applications" is not required when it is apparent that development is impermissible. *Id.* at 625-26.

The potential cost of an ITP application does not give rise to the futility exception. *See, e.g., Morris*, 392 F.3d at 1376-77. In *Morris v. United States*, the United States Court of Appeals for the Federal Circuit held the takings claim of two landowners was not ripe for review because the landowners had not filed an ITP application to harvest the lumber of redwood trees growing on their property. 392 F.3d at 1375, 1378. A consultant informed the landowners that the cost of an ITP permit application would exceed the value of the property. *Id*. at 1374, 1377. The Federal Circuit rejected the assertion that the consultant could accurately predict the cost. *Id.* at 1376-77.

It would be neither futile nor unnecessary for Lear to submit an ITP application. Unlike the landowner's regulatory taking claim in *Palazzolo* was ripe after the agency denied the landowner's numerous permit applications, Lear has not received any decisions from FWS to indicate the extent of the ESA limiting land development on the Heath. (R. at 7.) Similar to the landowners in *Morris* who asserted that pursuing an ITP would be economically futile, Lear asserts that the cost of the ITP application is futile because her consultant estimated that the cost of the submitting an ITP application would exceed the fair market value of the Heath. (R. at 6, 9.) Relying solely on the estimate from Lear's consultant, the district court concluded that it would have been futile for Lear to apply for an ITP, finding that the cost of applying for an ITP would exceed the value of the Heath. (R. at 6, 9.) Lear's assertion that the ITP application satisfies the economic futility exception is without merit. Therefore, Lear's claim is not ripe for review because the futility exception is inapplicable and FWS had no opportunity to exercise its discretion.

III. The Relevant Parcel for a Taking is the Entire Island Because the Contiguous Lots Were Under Common Ownership When the Regulations Were Enacted.

When analyzing the relevant parcel, courts "must focus on 'the parcel as a whole,'" and apply a flexible approach, considering multiple factors. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 644 (1993); *Loveladies Harbor, Inc.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

Here, the entire Island is the relevant parcel for the takings analysis because the Lear family acquired all of the lots on the Island at the same time, and treated the entire island as one property for nearly 200 years. (R. at 5.) When the challenged regulations were enacted, all of the contiguous lots comprising the Island were under common ownership.

A. When the ESA and the Wetland Law Were Enacted Dictates That the Island is the Relevant Parcel of Land.

The mere passage of time or change of title does not render a land-use regulation unreasonable. *See, e.g., Palazzolo*, 533 U.S. at 627. In *Palazzolo v. Rhode Island*, a property owner, the successive title holder, sought compensation for his property, asserting that the waterfront zoning regulation was a taking after the Rhode Island Coastal Resources Management Council denied his application for waterfront property development. 533 U.S. at 611. The Court found that the property owner's takings claim mirrored the previous landowner, reasoning that the passage of time or title did not alter the reasonableness of a regulation on the property. *Id.* at 627.

Applying the *Palazzolo* Court's reasoning that the relevant parcel in a takings claim brought by a successive property owner mirrors the previous owner, here, the relevant parcel in Lear's takings claim mirrors King Lear's parcel. King Lear possessed all of the property on the Island when the regulations were enacted because he deeded each parcel to his daughters and reserved life estates in each, giving them future interests. (R. at 5.) If King Lear pursued a takings claim, the relevant parcel would have been the entire Island because King Lear still owned all of the lots on the Island. (R. at 5.) Like the passage of time or title could not make a regulation more reasonable in *Palazzolo*, the passage of time and title to Lear cannot make these regulations less reasonable. Therefore, the relevant parcel is the entire Island.

B. The Lots on the Island are Contiguous and Were Commonly Owned.

The formal subdivision of the Island is not a determinative factor in defining the relevant parcel. For example, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Supreme Court held that state law did not determine the relevant parcel for a takings analysis for a regulation that prohibited coalminers from mining certain portions of coal. 480 U.S. 470, 498 (1987). The

Court applied the "parcel as a whole" concept established in *Penn Central*. *Id*. The Court rejected considering support estates as separate parcels, reasoning the "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights" because Pennsylvania law recognized support estates as a distinct property interest. *Id*. The Supreme Court foreclosed any reliance on formal property boundaries created under state property law. *Id*; *see also Dist. Intown Props. v. D.C.*, 198 F.3d 874, 877-80 (D.C. Cir. 1999) (determining that the relevant parcel was the aggregate of the individual lots when the landowner had treated his property as a single contiguous unit under common ownership for decades before subdividing the land into nine separate lots).

Like the *Keystone* Court held that formal state property laws do not define the relevant parcel for a takings analysis, here, New Union state laws that recognize the lots as separate properties cannot define the relevant parcel. ESA regulation of the Island began with the 1992 endangered species listing of the Karner Blue and the critical habitat designation of the Heath. (R. at 5-6.) In 1992, King Lear was still in possession of all the subdivided lots on the Island because he retained ownership through a life estate of the entire Island until his death. (R. at 5-6.) Therefore, the parcel should be viewed as whole for a regulatory takings claim.

IV. FWS and the County are Shielded From Lear's Claim for Complete Deprivation of Economic Value of the Heath Because the Karner Blue Habitat Will Naturally Destruct in ten Years.

When a property owner has been completely deprived an economic or productive use of their private property, compensation for the property taken by the government for public use shall be "the full and perfect equivalent in money of the property taken." *Palazzolo*, 533 U.S. at 617; *United States v. Miller*, 317 U.S. 369, 373 (1943). If the government only takes a portion of the property "for a period of years," the government "essentially tak[ing] a leasehold in the

property." *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). The restrictions on land use will end after ten years upon the natural destruction of the Karner Blue when Lear refrains from the permissible annual mowing. (R. at 7, 10.) FWS and the County are shielded from a takings claim and are not required to provide compensation because the state and federal regulations merely place temporary limitations of use on the Heath that fall short of a full deprivation of economic value.

A. The Ten-Year Temporary Construction Moratorium on the Heath is a Partial Regulatory Taking.

A partial regulatory taking renders the land unusable by the landowner. *Penn Cent. Transp. Co.*, 438 U.S. at 130. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, the Supreme Court held that solely invalidating the flood protection-zoning ordinance was an insufficient remedy for the landowners when the ordinance prevented a church from rebuilding campgrounds that flooded before the enactment of the ordinance. 482 U.S. 304, 307-19 (1987). The Court determined the government needed to compensate the landowner for the "fair value for the use of the property during the period of the time" of the taking. *Id*. at 322. The Court remanded the case to the district court to determine the deprivation of the church's land use caused by the zoning ordinance. *Id*. at 320. A partial regulatory taking does not require compensation when the taking is not a *per se* permanent taking. *See, e.g., Tahoe-Sierra*, 535 U.S. at 302.

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, the Supreme Court held that there was no *per se* taking for roughly 2,000 owners who purchased the land because the property complied with building requirements for single-family residences challenged two moratoria totaling 32 months for a development imposed by the Tahoe Regional Planning

Agency in Lake Tahoe as a land-use limitation. 505 at 302, 312-14. The Court found the property owners were precluded from the *Penn Central* analysis after they alleged a permanent instead of a regulatory taking. *Id.* at 334-38. The Court found there was no compensable taking for the regulation's impact on the whole parcel because the landowners would not suffer a complete deprivation for a temporary restriction when the property value was recoverable when the regulation was lifted. 535 U.S. at 302, 318. The Court emphasized that solely analyzing the temporal aspect of a taking fails to allocate time for the permitting process, and delays associated with construction and development. *Id*. at 332-35.

Like the landowners in *Church of Glendale* who owned the property when the flood protection-zoning ordinance was enacted, Lear's family owned the Heath when the ESA and the Wetland Law have been effective on the Heath for decades. (R. at 5-7.) Just as the two moratoria were not a permanent taking in *Tahoe-Sierra*, here, the ten-year moratorium for construction on the Heath is not a permanent taking or complete deprivation because Lear can build a residence on the land after the natural destruction of the habitat. (R. at 7.) Here, the Heath is subject to a ten-year moratorium on construction. (R. at 6.) Lear claims a complete deprivation of economic value even though the Heath will be developable in ten years. (R. at 2, 7.) If Lear stopped mowing seven years ago, when she inherited the house, Lear would only have three years remaining on the land-use restriction. (R. at 5, 7.) Lear is not without recourse to build on or use the Heath immediately if she follows the appropriate steps if Lear: (1) ceases mowing annually; (2) submits an acceptable ITP. (R. at 5-7.) Thus, Lear's claim for the complete deprivation is not a remedy for a temporary taking because the federal and state regulations are temporary land-use restrictions on the Heath.

B. Lear Will not Suffer a Complete Economic Deprivation Because the Annual Mowing is a Land-Use Condition to Preserve the Karner Blue Habitat.

The government must compensate a property owner for a temporary taking if the taking "results from governmental action" which substantially burdens the property owner's leasehold interest by "extinguishing such an interest" or if the ordinance or regulation, causing deprivation the of land use is invalidated. *See, e.g., Church of Glendale*, 482 U.S. at 319, 322. The Supreme Court determined that the government should compensate a property owner for a taking when the regulation caused the following three economic injuries: (1) the economic impact; (2) the interference with the "distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Cent. Transp. Co.*, 438 U.S. at 123.

Lear is not entitled to compensation for the Heath because the taking has not substantially burdened Lear as a property owner. Here, the *Penn. Central* factors are inappropriate because like the landowners in *Tahoe-Sierra*, Lear is alleging a permanent taking, not a partial regulatory taking. (R. at 1.) Lear has not suffered a compensable taking because Lear had no financial interest in or income from the Heath that was extinguished by the regulation. (R. at 5.) Compensation is determined by the diminution of value of the land at the time when the ESA and the Wetland Law were passed. Unlike the landowners in *Church of Glendale* who suffered a compensable regulatory taking when the flood ordinance was enacted in response to same flood that stripped their property of a building, Lear has received no economic income from the property and had no pre-existing structure on the Heath for which she could suffer a deprivation from the regulations. (R. at 5.) Therefore, the federal and state regulations placed on the Heath to protect the critical habitat and to preserve the wetland do not limit the use of the land from the time of the regulation, nor do the regulations diminish the value at the time of take.

V. Lear is Precluded From a Takings Claim Because There is no Complete Loss of Economic Value for the Heath When the Society Offered Lear $10,000 in Rent for Wildlife Viewing Until the Natural Destruction of the Karner Blue Habitat.

A property owner must be denied "all economically beneficial or productive use of land." *Palazzolo*, 533 U.S. at 617 (quoting *Lucas*, 505 U.S. at 1015). "The mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations." *Palazzolo*, 533 U.S. at 624. Assuming arguendo, that the relevant parcel is the Heath, the analysis for the deprivation of value remains unchanged because the restriction is temporary and the Heath will recover *all* value when the prohibition is lifted. Lear will not suffer the complete deprivation of value for the Heath because (1) the prohibition will end in 10 years; and (2) the property can receive $10,000 in rent for wildlife viewing.

A. Lear has not Been Denied Economic Viability of the Heath Because Lear Could Earn $10,000 for Wildlife Viewing.

A court must determine the magnitude of the economic impact of the regulation. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539-40 (2005). A property owner has not been denied economic viability if the property owner still has a permissible or beneficial use for the property after the regulatory action. *See, e.g., Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir. 2000). The complete elimination of value is determinative of whether the property owner suffered a taking. *See Lingle*, 544 U.S. at 539.

In *Penn Cent. Transp. Co. v. City of New York*, the Supreme Court considered whether the property owner experienced a taking when both the New York City zoning laws and Landmarks Preservation Law were applied to the parcel of land under Grand Central Terminal. 438 U.S. at 107. In 1969, an amendment to the zoning laws allowed unused property rights in a commercial area to be transferred to a single lot, restricting the property owners' ability to develop or sell the land. *Id.* at 114-15. The Court reasoned that zoning laws were a "permissible governmental action even when prohibiting the most beneficial use of property" because the

property owners could still profit off the Terminal. *Id.* at 125-37. The Court found that the landowners' remaining rights to development and use of Grand Central terminal were valuable and "undoubtedly mitigate[d] whatever financial burdens the law imposed... [and must] be taken into account in considering the impact of regulation." *Id*. at 137.

In *Palazzolo v. Rhode Island*, the Court held that the successor in title to the waterfront land "failed to establish a deprivation of all economic value" for the 18-acre parcel after two ordinances designated a portion of the land a coastal wetland. 533 U.S. at 632. The Court reasoned that the remaining parcel after a state law designated a substantial portion of the land still "retained significant worth for construction of a residence" even though the property no longer had 80 subdivided lots or a private beach. *Id*. at 611-31. The original owner of the property owned 3 undeveloped beachfront parcels, subsequently; the corporate owner petitioned the local town for the division of the property. *Id.* at 613-14. Although the "postregulation acquisition of title" does not preclude a takings claim, the Court noted, "[a] purchaser or successive title holder... is barred from claiming that it effects a taking." *Id*. at 626-27.

Here, FWS and the County are shielded from Lear's claim for the complete loss of value of the Heath because the Society offered Lear $1,000 annually to view the Karner Blue. (R. at 7.) Just as the landowners in *Palazzolo* and *Penn Central* did not suffer a total loss of their property after the enactment of ordinances because the landowners maintained a beneficial use of their properties, Lear will not suffer a complete deprivation of value of the Heath when the property can still accrue value. (R. at 7.) The magnitude of the economic impact of the regulations on the Heath is not a permanent loss of economic viability because Lear can generate $10,000 for wildlife viewing until the natural destruction of the habitat. (R. at 7.)

Even though the income is less than the $1,500 in annual property taxes on the Heath, the mere existence of an income-generating activity extinguishes Lear's claim that the regulations have denied her all economic or beneficial use of the property. (R. at 7.) Therefore, the Heath has a beneficial use because the Society has offered to pay $10,000 for wildlife viewing. (R. at 7.)

B. Lear has no Source of Income from the Heath Because There is no Market for the Property.

Although land-use regulations may have an unanticipated and tangential impact on property values, treating land-use regulations as *per se* takings would make government regulation unaffordable and unworkable. *Tahoe-Sierra*, 535 U.S. at 324. The government is required to provide compensation when the government has a leasehold and when the government occupies the property. *United States v. Gen. Motors Corp.,* 323 U.S. 372 (1946). In determining the value of the leasehold for compensation, courts have analyzed the marketplace value of the property "as though the premises were rented on the open market." *United States. v. Banisadr Bldg. Joint Venture*, 65 F.3d at 378; *United States v. Right to Use & Occupy 3.38 Acres of Land, More or Less, in Alexandria, Va.*, 484 F.2d 1140, 1144 (4th Cir. 1973).

In *Tahoe-Sierra Pres. Council v. Tahoe-Sierra Reg'l Planning Agency*, the Supreme Court held that a temporary taking does not strip the property of its value because the restriction is not a complete deprivation or a "total loss" if the restriction "merely [causes] a diminution of value" and the property "will recover value as soon as the prohibition is lifted." 535 U.S. at 330-32 (quoting *Lucas*, 505 U.S. at 1019-20). The Court reasoned that property owners were not entitled to just compensation because the restrictions placed on the land did not interfere with the property owners' "investment backed expectations, " determining "that the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Id.* at 319, 330-42. The Court noted that the Constitution does not limit a regulation that prevents "a property owner

from making certain uses of her private property." *Id.* at 321-22; *see also McGuire v. United States*, 707 F.3d 1351, 1362 (Fed. Cir. 2013) (noting that the ability to "sell, assign, transfer, or exclude" is a basic property interest); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (finding that a prohibition on the sale of artifacts protected under the Migratory Bird Treaty Act was not a taking, noting that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking").

Similar to the landowners in *Tahoe-Sierra* who would recover value of their property when the regulation was lifted, here, Lear's full bundle of property rights for the Heath will remain in tact even though one strand of her property rights will be limited for ten years. (R. at 7.) Both the enactment of the Wetland Law, and the critical habitat designation of the Heath, occurred before Lear inherited the Heath from her father. (R. at 5-6.) Even though there is no market in the County for the Heath with the restriction, Lear asserts that the fair market value for the property with a single-family house is $100,000. (R. at 7.) The regulations were in effect when Lear inherited the parcel and there was no residence on the Heath. (R. at 7.) The annual wildlife viewing and tours provide Lear with a source of income that exists solely because the Heath is the critical habitat for the Karner Blue. (R. at 11-12.) Therefore, Lear retains a beneficial use of the Heath and has not suffered the complete loss from the regulations.

VI. Lear's Total Takings Claim Based on the Denial of the Wetlands Permit to Fill a Portion of the Adjacent Cove is Precluded Because New Union Holds the Lake in Public Trust.

Under the public trust principles inherent in title, the Supreme Court recognizes an exception precluding a landowner's taking claim that a government regulation caused a total elimination to a land's use or value when the government regulation was inherent in "background principles" of property or nuisance law existing when the property was acquired.

See, e.g., Lucas, 505 U.S. at 1003, 1029. The Court noted that the government cannot take away a property right that was never granted to or acquired by the property owner. *Lucas*, 505 U.S. at 1029. Each state exercises "ownership of and dominion and sovereignty over lands covered by navigable waters, or navigable lakes . . . in the interest of the public" constitutes a "background principle" precluding a total takings claim. *Shively v. Bowlby*, 152 U.S. 1, 47 (1894); *Palazzolo*, 533 U.S. at 630.

Here, Lear's total taking claim, based on the Board's permit denial to fill in a portion of the shoreline adjacent to the Heath, is precluded because New Union holds all lands covered by the Union in public trust, including the shoreline within a 300-foot radius of Lear Island. The Lake is a navigable lake, which passed to New Union when it became a state, and title to all land below the mean high water mark is held in public trust for the "benefit of the whole people." *See, e.g., Shively*, 152 U.S. at 57.

A. The Wetland Law Regulating Lake Union is a Permissible Regulation Entrenched in the Public Trust Doctrine.

A landowner's takings claim is precluded if the government regulation is inherent in background principles of a state's duty to preserve navigable water bodies for public use for public recreation and general commercial use. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The Supreme Court held that "ownership of and dominion and sovereignty over lands covered by navigable waters, or navigable lakes, within the limits of the several states, belong to the respective States." *Id.* at 435-37. A landowner's total taking claim is precluded if the State can establish that the regulation originates "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" developing from "common, shared

understandings of permissible limitations derived from a State's legal tradition" in the title itself. *Lucas*, 505 U.S. at 1029; *Palazzolo*, 533 U.S. at 630.

In *Esplanade Props., LLC. v. City of Seattle*, the United States Court of Appeals for the Ninth Circuit held a residential property developer's takings claim was precluded because the city's denial of the developer's proposal was inherent in the background principles of the state's law. 307 F.3d at 987. The court reasoned that the developer's construction plan for the property was inconsistent with the public trust that Washington State was required to preserve "the navigable tidelands of Elliot Bay" when the plan included "concrete pilings, driveways and houses." *Id.* at 980, 987. Despite the private ownership of the tideland, the court concluded Washington's public trust doctrine "ran with the title to the tideland properties and alone precluded" the property's development as well as the taking claim. *Id.* at 986; *see also Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 451 (1892) (maintaining that the state could not permit private riparian landowners for construction a that would "substantially impair the public interest in the lands and waters remaining").

Here, Lear's taking claim based on the Board's permit denial to fill the marsh is precluded because the Wetland Law is: (1) a reasonable regulation; (2) entrenched in the public trust doctrine; and (3) a background principle of New Union's law of property. Similar to the residential developer's taking claim in *Esplanade Properties* that was precluded because building residential structures on the tidelands was inconsistent with the public use, Lear's taking claim is precluded because filling one half-acre of the cove marsh adjacent to the Lake would impair public use. (R. at 7.) Just as the city in *Esplanade Properties* was duty-bound to deny the developer's permit, the Board is required to deny Lear's Wetland permit because Lear's private home does not promote public use and it would permanently destroy part of the Lake. (R. at 7.)

The Board denied Lear's permit because the County can only grant permits to fill wetlands for water-dependent use under the Wetland Law. (R. at 7.) Lear's taking claim based on the permit denial to fill the wetland is precluded because New Union has a duty to preserve the entirety of the Lake for public use as a background principle of state property law. The Board permissibly denied Lear's permit because the public use of the Lake would have been impaired if Lear filled the cove marsh. (R. at 7.)

B. New Union Holds all Land Below the Mean High Water Mark of the Lake in Public Trust and Lear Cannot Claim a Right to That Land.

The Lake is a navigable body of water held by New Union in public trust. A state holds the absolute right to all navigable waters and the soil under them within its borders. *Martin v. Lessee of Waddell*, 41 U.S. 367, 370 (1842). Navigable water bodies held by the state include waters that are tidally influenced, rivers that were navigable in fact at the time of statehood, and "great navigable lakes, which are treated as inland seas." *Shively*, 152 U.S. at 47; *see also Hardin v. Jordan*, 140 U.S. 371, 371 (1891) (finding that lakes not held by a state are usually small, privately owned, and not used for interstate navigation).

Each State is admitted to the Union "upon an equal footing with the original States in all respects." *Shively*, 152 U.S. at 48. The state has the right to govern the "title and right" of riparian landowners in the lands below the high water mark. *Id.* at 57. Congressional grants of territorial lands "convey of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created." *Shively*, 152 U.S. at 58. A property owner who originally received title to lands under the high water mark of a navigable lake through a congressional grant when the land was part of a U.S. territory cannot claim an absolute right to those lands after the territory ceases to exist. *Id*. at 57-58; *see also Hardin v.*

Jordan, 140 U.S. 371, 382 (1891) (holding that the State's right to regulate and control the shores of tidal waters and the land under them "[extends] to our great navigable lakes").

New Union holds title to all lands covered by the Lake to regulate for public use. In *Shively v. Bowlby*, the Supreme Court held that the property did not include title or right in the land below the high water mark and was bounded by the high water mark of the Columbia River. 152 U.S. at 58. The Court considered the property rights of a landowner who purchased a plot of land that included lands below the high water mark of the Columbia River from a man who had originally obtained title to the property through an Act of Congress when what was now the State of Oregon was still Oregon Territory. *Id.* at 59. The Court concluded that if the United States holds a territory it has the powers of both national and municipal government and can grant title or rights in the soil below the high water mark. *Id.* at 57. However, a newly created state's public trust right to the land below the high water mark supplants any congressional land grant. *Id.* at 58.

Here, New Union holds the Lake in public trust because the Lake is a large, navigable lake that has traditionally been used for interstate navigation. (R. at 4.) Similar to Lake Michigan in *Illinois Central*, the Lake is also a large interstate lake that was traditionally used for interstate navigation. (R. at 4.) The specific one-acre portion of the Lake, on which Lear bases her claim, is likewise navigable because the lake has historically been open water that has traditionally been used as a public recreational boat landing. (R. at 5.) It is firmly established that the Lake is a navigable lake, and New Union holds title to the Lake in trust for the people of New Union.

Moreover, New Union holds title to all lands covered by the Lake to regulate for public use because the Lake is navigable. Lear cannot claim she holds superior title to any lands below

the high water mark of the Lake. Analogous to the property owner in *Shively* who claimed to hold title to land below the high water mark of the Columbia River, Lear claims to hold superior title to "all lands under water within a 300-foot radius of the shoreline" of her plot that borders Lake Union. (R. at 5.) Like the property owner in *Shively* who claimed to hold title derived from an Act of Congress granted when that portion of the river and the adjoining land was part of Oregon Territory, Lear's claim originates from an 1803 Act of Congress of what was then part of the Northwest Territory and Lear's title to the lands below the high water mark of the Lake ceased to be effective when New Union was created. (R. at 4.) Lear's claim against the County based on Lear's wetland permit denial is precluded because the permit was denied pursuant to the Wetland Law. Under the public trust doctrine, the Wetland Law is a regulation inherent in the background principles of New Union's property law and Lear cannot claim she holds superior title to any lands below the Lake.

VII. The County and FWS are Not Liable for Lear's Total Taking Claim Because the Federal and County Regulations Should Be Considered Separately When Neither Regulation Completely Deprives the Property of Economic Value.

A landowner's total taking claim is barred if the regulation inheres in the background principles of a state's nuisance or property law. *Lucas,* 505 U.S. at 1029. Total takings are "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra*, 535 U.S. 302, 330 (2002) (emphasis in original) (quoting *Lucas*, 505 U.S. at 1017).

Here, Lear cannot prevail on a *per se* taking claim when neither the ESA nor the Wetland Law actually deprives the Heath of all economic value. (R. at 11.) Although the ESA prohibits construction on the nine-acre Heath, the ESA does not restrict filling the one-acre cove area. (R. at 5, 11.) Whereas, the Wetland Law only restricts filling the one-acre cove, the Wetland Law

does not prevent the development of a residential home on the remaining nine acres. (R. at 11.) The ESA and the Wetland Law leave the Heath, and even the Island, with a developable portion. (R. at 11.) The lower court properly equated the instant case to a joint tort; however, the lower court erred in concluding that Lear's harm was indivisible. (R. at 11.) FWS and the County are not jointly and severally liable because any harm Lear experienced is divisible. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (holding a railroad company separately liable for nine percent of costs incurred during EPA cleanup because a reasonable basis for apportionment existed). Lear's harm is divisible because the ESA and the Wetland Law were enacted at different times, restrict distinct parts of the property, serve independent purposes, and originate from separate areas of the law. When the ESA and the Wetland Law are considered separately, neither FWS nor the County completely deprive the property of economic value.

A. The ESA and the Wetland Law are Separate and Distinct Takings Claims Requiring a Separate Analysis.

The determination of liability and compensation for a taking of private property must be decided on the individual facts of each case. *United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966). There is no settled law addressing the specific question of whether a property owner can prevail on a total taking claim when a federal regulation and a county regulation separately restrict the use of different parts of a property. The analyses implemented in joint and several liability as well as in substantive due process claims both inform and support the argument for considering the restrictions separately. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976); *Esplanade Properties*, 307 F.3d at 978.

In both joint tort claims and substantive due process claims, courts conclude a claimant's harm is divisible and liability must be considered separately if the harm arises from separate and

distinct sources. *Velsicol Chem. Corp.,* 543 S.W.2d at 341. In *Velsicol Chem. Corp*., the Tennessee Supreme Court held that multiple tortfeasors were jointly and severally liable because it was practically impossible for the claimant to allocate liability for the indivisible harm. 543 S.W.2d at 338. The court considered whether a chemical manufacturer, who was being sued by residents of a neighboring community for the plant contaminating their air and water, could file a third-party complaint alleging five nearby plants who also operated in the same area and emitted pollutants should be held jointly and severally liable and concluded the third-party complaint could stand because the residents' harms were indivisible since liability for the injury could not be apportioned with reasonable certainty among the plants. *Id.* at 342; *see also Michie v. Great Lakes Steel Div., Nat'l Steel Corp.,* 495 F.2d 213 (6th Cir. 1974) (finding the diminution in the property value of homes was an indivisible harm when caused by nearby manufacturing companies releasing air pollutants). Alternatively, a claimant's harm is divisible when the injuries are separate, distinct, and can be apportioned with reasonable certainty. *Velsicol Chem. Corp*, 543 S.W.2d at 342-43. In *Holder v. Martin*, the Tennessee Supreme Court held that an automobile passenger's harm was divisible when the passenger died as a result of injuries sustained during two separate and successive car accidents. 407 S.W.2d 461, 465 (Tenn. 1966). In *Holder*, the passenger sustained severe injuries in the first accident; then suffered additional injuries en route to the hospital when the ambulance transporting him was involved in a collision. *Id.* The court found the defendants in *Holder* were not joint tortfeasors because two separate and distinct accidents occurred at different times and locations. *Id.* In *Esplanade Properties*, a landowner-residential property developer asserted substantive due process claims as well as *per se* takings claims against both Washington State and the federal government after the City of Seattle denied the landowner's application to develop shoreline property on Elliot Bay. 307 F.3d

at 980. The Ninth Circuit considered the state and federal claims separately because state due process claim implicated the Washington Constitution and federal due process claim implicated the U.S. Constitution. *Id.* at 982. Both harms and takings claims must be considered separately when harms are separate, distinct, and originate from independent sources.

Here, the ESA and the Wetland Law must be considered separately because they restrict development on separate parts of Lear's property, the regulations originate from distinct sources that were enacted at different times, and the "harm" can be easily apportioned. The effects of the ESA and the Wetland Law are analogous to the completely separate automobile accidents in *Holder* and the state and federal due process claims in *Esplanade Properties*. Like the successive collisions in *Holder*, the ESA and the Wetland Law are temporally and physically separate. The Karner Blue was added to the federal endangered species list in 1992 and the ESA restricts nine-acres of the Heath, whereas, the Wetland Law was enacted in 1982 and restricts the one-acre marshland. (R. at 5-7.) Like the state and federal substantive due process claims in *Esplanade Properties*, which originated from distinct sources of law; here, the ESA is a federal law enacted to promote the conservation of endangered species, and the Wetland Law was passed under New Union's public trust doctrine to protect the public interest in navigable waters. (R. at 5, 7.) Unlike the indivisible harms caused by multiple plants emitting pollutants into the air and water at the same time in *Velsicol* and *Michie*, Lear's harm is divisible because of the separate federal and local regulations. By contrast, the federal and local regulations separately affect different parts of Lear's property and divisibility are as simple as noting where the land ends and the water begins. (R. at 11.) The ESA and the Wetland Law must be considered separately to determine whether either FWS or the County is liable for Lear's total taking claim.

B. Lear has not Been Deprived of all Economic use of the Heath Because the Wetland Law Inheres in Background Principles of New Union's Property Law and the ESA is Only a Partial Taking.

A landowner's *per se* taking claim is precluded if the regulation inheres in the background principles of state property or nuisance law. *Lucas*, 505 U.S. at 1017. Courts have limited *per se* takings to the "extraordinary circumstance" when a government regulation leaves a landowner with an economically idle property that retains less than one percent of its original value. *Id*. at 1017. A *Lucas* taking merits compensation if the landowner is left with only a "token interest." *Palazzolo*, 533 U.S. at 631. However, courts have narrowly construed a token interest, limiting total takings to regulations where a landowner's property retains less than one percent of its residual value. *See Palazzolo*, 533 U.S. at 631; *see also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1173 (Fed.Cir.1994) (finding a *per se* taking when remaining value was "de minimis" at .625%).

In *Palazzolo v. Rhode Island*, a land developer purchased a twenty-acre property, largely consisting of saltmarsh, and submitted a proposal to fill most of the marsh the state coastal resources management council. 533 U.S. at 613. After the proposal was rejected, the land developer filed suit alleging the council's action reduced the land's value by 93%, resulting in a total taking under *Lucas*. *Id.* at 616. The Court concluded that the land developer had not been deprived of all economic use of his property because a small upland portion of the property could still be improved, leaving the property with six-percent of its appraised value. *Id.* at 629; *but cf., Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1114 (Fed. Cir. 2015) (finding a *per se* taking when a corporation's permit to fill a wetland under § 404 of the Clean Water Act in order to develop property on a barrier island was denied by the Army Corps of Engineers, resulting in a 99.4% diminution of the 4.99 acre plot's value.)

Here, neither the ESA nor the Wetland Law completely deprives Lear's property of economic value because each regulation leaves Lear with a significant portion of developable land. The County regulation only restricts one-acre of Lear's property, and like the land developer in *Palazzolo*, leaves her with nine acres of upland on which she could build a large residential home. (R. at 7.) The FWS regulation protecting the Karner Blue habitat restricts a nine-acre portion of Lear's property is only temporary because the habitat will be destroyed in ten years without annual mowing. (R. at 5-6.) Even if this Court concludes that the regulations should be combined, Lear's *per se* takings claim still without merit because the property is not economically idle. The Society's offer to pay Lear $1,000 annual rent for conducting butterfly tours on her land evidences that the property retains a productive, economically beneficial use. (R. at 7.) Unlike the corporation in *Lost Tree*, Lear's ability to obtain rent demonstrates that even if the local and federal regulations are combined she still retains at least 1% of the property's $100,000 fair market value without any restrictions. (R. at 7.) Neither FWS nor the County are liable for Lear's total taking claim because Lear's property retains some economic value because she has not suffered a total taking under *Lucas*.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant, Brittain County, New Union, respectfully requests that this Court reverse the decision of the United States District Court for the District of New Union remand the decision.

Respectfully Submitted,

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