Team No. 41

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

BRIEF OF CORDELIA LEAR
Plaintiff-Appellee-Cross Appellant

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a United States District Court for the District of New Union, which gives this court jurisdiction pursuant to 28 U.S.C. § 1291.

In addition, this court has jurisdiction over United States Fish and Wildlife Service ("FWS") for two reasons. First, Plaintiff has brought claims against it challenging the constitutionality of the Endangered Species Act ("ESA") § 10, 16 U.S.C. §§ 1531-1544 (2012), pursuant to 28 U.S.C § 1491. Second, the amount of damages does not exceed $10,000 in her takings claim against the United States pursuant to 28 U.S.C. §§ 1346(a)(2).

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear the Brittain County, New Union ("BCNU") claim because it involved federal subject matter jurisdiction pursuant to 28 U.S.C.§ 1331 and 28 U.S.C.§ 1337.

The district court's final order was entered on June 1, 2016. *See* R. at 1. The ("FWS") and ("BCNU") each filed a notice of Appeal on June 9, 2016. *Id.* Shortly thereafter, Cordelia Lear ("Lear") filed a notice of appeal on June 10, 2016. *Id.* The parties appeals were timely under 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUES

I. Whether the ESA, as applied to a wholly intrastate population without commercial value, is a valid exercise of Congressional power.

II. Whether Lear's taking claim against FWS and BCNU is ripe without having applied for an Incidental Take Permit ("ITP") that she knew would be denied for her inability to meet all the requirements for the permit.

III. Whether the takings analysis was accurately applied to the Cordelia Lot as subdivided in 1965, and not the entire Lear island where Lear does not own any of the remaining land.

IV. Assuming the relevant parcel is the Cordelia Lot, whether the moratorium on Lear's land constitutes a takings claim based upon complete deprivation of economic value of the property since the lot will become developable in ten years after the natural destruction of the Karner Blue Butterfly ("KBB") habitat.

V. Assuming the relevant parcel is the Cordelia Lot, whether the Brittain County Butterfly Society ("BCBS") offer to pay $1,000 annual rent for wildlife viewing precludes a takings claim for complete loss of economic value where the annual rent payment is de minimis in comparison with the annual amount of property taxes.

VI. Assuming the relevant parcel is the Cordelia Lot, whether the public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a wetlands county permit where no public trust rights in non-tidal navigable water such as Lake Union were recognized in Lear's 1803 congressional grant of title.

VII. Assuming the relevant parcel is the Cordelia Lot, whether FWS and BCNU are liable for a complete deprivation of the economic value of the Cordelia Lot when either the Federal or County regulation by itself would allow development of a single-family residence, but combined deprives Lear of property development.

STATEMENT OF THE CASE

After the ESA as administered by FWS and the Brittain County Wetlands Board precluded Lear from building on her land, she filed suit with The United States District Court for the District of New Union challenging the constitutionality of the ESA as applied to her situation. R. at 4. In addition, she asserted an uncompensated takings claim against both FWS and Brittain County for violating the Takings Clause of the Fifth and Fourteenth Amendments. *Id*. An Order of The United States District Court for the District of New Union dismissed Lear's claim of constitutionality as applied to her property and found in Lear's favor against FWS and BCNU for an unconstitutional taking of her property in violation of the Fifth Amendment to the Constitution. *Id.* Lear was awarded $10,000 in damages against FWS and $90,000 against BCNU for their property violation of the Fifth Amendment. *Id.* The parties filed a Notice of Appeal for judicial review of The United States District Court for the District of New Union holdings in the case. *Id* at 1.

STATEMENT OF THE FACTS

The Act that granted the Lear family ownership of the 1,000-acre parcel in Brittain County, New Union.

In 1803, an Act of Congress granted a 1,000-acre parcel of land in Brittain County, New Union, to an ancestor of Lear. R. at 4. In 1965, the Brittain Town Planning Board approved the parcel to be subdivided into three lots, each with approval for zoning conformance for at least one single-family residence. *Id.* at 5. In 2005, upon the death of her father, Lear became the riparian owner of the 10-acre Cordelia Lot, and the deeded lands underwater, in fee simple absolute. *Id.*

In addition to an access strip and an open field, the landscape of the Cordelia Lot consisted of "about one acre of emergent cattail marsh in a cove that historically was open water." *Id.* at 7. However, the Rivers and Harbors Act of 1899 led the U.S. Army Corps of Engineers to determine this non-tidal portion of Lake Union to "non-navigable." *Id.*

Cordelia's lot and the restrictions that prevent land development because of a critical habitat on her land.

When Lear decided to build a residence on her lot in 2012, she learned, that not only did a wholly intrastate population of an endangered butterfly species live and breed on the lupine fields of the "Heath", but the FWS determined her entire 10-acre property to be a critical habitat, according to 50 CFR §17.11 (2105). R. at 6. This recognition led to the Brittain County Butterfly Society ("BCBS") to offer her $1,000 annually "for the privilege of conducting butterfly viewing outings during the summer Karner Blue season." *Id*. at 7.

After a two-year effort of investigation and research into ways to both save the KBB and build a home on her lot, Lear learned that each of the two options she proposed were not possible. R. at 6 & 7.

Cordelia's attempt to abide by the ESA, but such attempt fails since she cannot meet the HCP requirement .

First, in April 2012, she requested guidance from the FWS on how to build on the Heath without disturbing the KBB. R. at 6. The FWS suggested filing for an Incidental Take Permit ("ITP") under the Environmental Species Act ("ESA"). *Id*. at 6. This approach was not feasible because, not only would it cost $50,000 more than the entire property was worth, it also included a requirement for the development of a Habitat Conservation Plan ("HCP") based on the availability of contiguous lupine fields to replace any that may be disturbed by development. *Id*. Lear's sister, Goneril, who refused to participate in any HCP, owned the only fields that were potentially available. *Id.*

Cordelia's alternate plan to build on her land without disturbing the critical habitat is denied by the Brittain County Wetlands Board.

Then, as an alternate option, in August 2013, Cordelia filed a permit application with the Brittain County Wetlands Board to fill one half-acre of the cove marsh, pursuant to the Brittain County Wetland Preservation Law, enacted in 1982. R. at 7. Although the current laws did not require federal approval, the state Board denied the permit application stating that "a residential home site was not a water-dependent use." *Id.*

With annual property taxes of $1,500, the impractical federal HCP plan, and the state rejection of her alternate building site plan, her property cost more money each year than it could generate in income. As a result, Cordelia was left with no options available to economically benefit from her own property.

STANDARD OF REVIEW

I. Judicial Review of Congressional Exercises of Enumerated Powers

In recent Commerce Clause cases, the Supreme Court determined, generally, that a facial challenge, combined with a close examination of the record, was the appropriate standard of review. Specifically, certain provisions of congressional acts were held to be unconstitutional on the grounds that they regulated noncommercial activity, which is outside the scope of Congress's authority. *See* Derek T. Muller, *Judicial Review Of Congressional Power Before And After Shelby County* v. *Holder,* 8 CHARLESTON L. REV. 287 (2013).

When undertaking its analysis in *Lopez* and *Morrison*, the Court primarily "considered whether the exercise of federal power, on the face of each act, was a valid exercise of power." *See* Muller, *supra*, at 287; *See United States v. Lopez*, 514 U.S. 549, 552, 567 (1995) (rejecting constitutionality of the Gun-Free School Zones Act of 1990); *United States v. Morrison*, 529 U.S. 598, 607, 613–14 (2000) (rejecting constitutionality of parts of the Violence Against Women Act of 1994).

In both *Lopez* and *Morrison,* the federal government failed to show a connection to interstate commerce in each individual instance of the regulated activity. *See Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598. Specifically, in *Lopez*, the Court explained that "the mere presentation of data-supported conclusions was not necessarily determinative." *See* Muller, *supra*, at 287. Similarly, in this case, the record merely proposes a conclusion that a future activity would occur, and therefore, following precedent*,* fails to show a clear connection to interstate commerce.

II. Judicial Review of Mixed Questions of Law and Fact

Judge Remus's findings: that Lear's claim for a uncompensated taking under the Fifth Amendment was ripe; that the relevant parcel is the Cordelia Lot; that the potential natural destruction of the lupine fields does not preclude her takings claim; that the BCBS offer to pay

$1,000 annually as rent for wildlife viewing did not preclude her takings claim based upon complete deprivation of economic value; that the public trust principles inherent in her property title do not preclude her takings claim; and that the ESA as administered by the FWS and a Brittain County, New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value; are subject to the clear-error standard of appellate review.

In this case, there are historical facts and well-established rules of law that clearly apply to those facts. The appellate review of those facts and the district court's application of the law requires an "essentially factual," clearly erroneous, review. *Husain* v. *Olympic Airways*, 316 F.3d 829, 835 (9th Cir. Cal. 2002).

SUMMARY OF THE ARGUMENT

The district court erred in holding that the ESA, 16 U.S.C. §§ 1531-1544 (2012), is a legitimate exercise of congressional power under U.S. CONST. art. I, § 8, cl. 3. as applied to a wholly intrastate population of KBB. The ESA is seeking to regulate non-economic activity and therefore the Act is unconstitutional in this case.

The district court correctly concluded that that Lear's claim for an uncompensated taking under the Fifth Amendment was ripe because a formal application for an Incidental Take Permit ("ITP") contemplated by ESA § 10, 16 U.S.C. § 1539(a)(1)(B) is futile.

The district court correctly concluded that the relevant parcel for the purpose of Lear's takings claim based upon complete deprivation of economic is the Cordelia Lot as subdivided in 1965 because Lear could only have economic benefit for the Cordelia Lot. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

The district court correctly concluded that the potential future natural destruction of the Cordelia Lot's lupine fields, which are the butterflies' habitat, does not preclude Lear's takings

claim. R. at 10.

The district court correctly concluded that the BCBS offer to pay $1,000 annually as rent for wildlife viewing did not preclude Lear's takings claim based upon a complete deprivation of economic value of her property. R. at 12.

The district court correctly concluded that the public trust principles inherent in Lear's title do not preclude her takings claim because at the time of the 1803 grant, the United States did not recognize any public trust rights in non-tidal navigable waters such as lake union. R. at 10.

The district court correctly concluded that the ESA, as administered by FWS, and a Brittain County, New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value. R. at 11.

ARGUMENT

I. THE ESA IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO A WHOLLY INTRASTATE POPULATION OF THE KARNER BLUE BUTTERFLIES AND IS THEREFORE UNCONSTITUTIONAL AS APPLIED.

The KBB is a wholly intrastate population, thus Congress has no authority to make rules governing the prohibition of taking of the butterfly habitat. Congress's power pursuant to the Commerce Clause states, "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. *See* U.S. CONST. art. I, § 8, cl. 3. The broader interpretation of the Commerce Clause authorized Congress to regulate intrastate activities if they were inextricably connected with interstate activities and had a direct effect on interstate commerce. *See* Bradford Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional under the Commerce Clause?* 78 U. COLO. L. REV. 375 (2007). The

Act permits Congress the authority to prohibit a taking of an endangered species under the following:

> § 1539. Exceptions
> (a) Permits.
> (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
> (B) any taking otherwise prohibited by section 9(a)(1)(B) [16 USCS § 1538(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

In *Lopez*, the Supreme Court identified three broad categories that Congress may use to regulate activity under its Commerce Clause power. *Lopez*, 514 U.S. at 557. "First, Congress may regulate the use of the channels of interstate commerce." *Id*. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relationship to interstate commerce." *Id* at 559. This case does not fall within either of the first two categories of Congress's power under the Commerce Clause. The United States District Court for the District of New Union seeks to hold the ESA constitutional as applied to the KBB based on the third category, which grants Congress power to regulate activity that have a substantial affect on interstate commerce.

A. <u>The ESA that regulates the prohibition of taking of the Karner Blue butterflies, a wholly intrastate population, does not have a substantial affect on interstate Commerce.</u>

The KBB is a population of butterflies that are limited in the New Union subpopulation on the Heath on Lear Island, but the KBB population is still thriving in other states. R. at 5 & 6. The KBB population in this local area, which the government seeks to control is wholly intrastate and has no effect on interstate commerce, as the Government has not listed any findings showing

that a taking of the KBB's habitat affected commerce. In *Lopez*, the court held that Congress's Gun-Free School Zones Act of 1990 that banned possession of a firearm that never traveled in interstate commerce or affected interstate commerce, could not be regulated by Congress under the Commerce Clause. *Lopez*, 514 U.S. at 557. Similarly, the KBB in the present case does not travel across any state boundaries and the Government has not provided any findings that can explain how the prohibition against a taking of the KBB habitat will affect commerce. In fact, the government is contending that "the natural destruction of the butterfly habitat in ten years …precludes Lear's takings claim, suggest that the Government does not deem this regulated activity of the KBB as an economic activity at all. R. at 2.

The Government's failure to require the annual mowing of the area in the Act to preserve the KBB's habitat and to ensure that they did not become extinct illustrates that the prohibition of a taking of the KBB habitat is not for interstate commerce purposes. In *Morrison*, the court held that intrastate activity is only considered when the activities themselves are economic in nature. *United States v. Morrison*, 529 U.S. at 598. The prohibition of the taking of the KBB's habitat is not economic in nature as such can be inferred based on the Act failing to require mowing of the land to preserve the KBB's habitat and the Government's failure to list the economic impact that will arise if the Act is not upheld. The ESA as related to the KBB has not provided any basis as to how the Act is related to the Commerce Clause. In a recent journal article, it was founded that "the ESA's text [in general] makes no attempt to rationally relate its regulation of endangered species to commerce of any kind." Kevin Simpson, *The Proper Meaning of "Proper": Why the Regulation of Intrastate, Non-Commercial Species Under the Endangered Species Act Is an Invalid Exercise of the Commerce Clause* 91 WASH.UNIV. L. REV. 169, 189 (2013). In *Lopez*, the court struck down the Gun-Free School Zones Act. *Lopez*, 514 U.S. at 557. In *Morrison*, the

court struck down Violence Against Women Act. *Morrison*, 529 U.S. at 598. In both of those cases the regulated activities were intrastate non-economic activity. *Lopez* and *Morrison* are analogous to the present case because the ESA is seeking to regulate non-economic activity and therefore the Act is unconstitutional as related to a wholly intrastate population of the KBB.

B. The United States Court of Appeals for The United States District Court for the District of New Union Circuit's finding that "the relevant activity is the underlying land development through construction of the proposed residence," is an insubstantial finding that will give rise to Congressional power being limitless.

The United States District Court for the District of New Union finding that the relevant activity to be regulated is Lear's land development through constructing the proposed property, and equating it to economic activity since it involves the purchase of building materials and the hiring of contractors and carpenters are too attenuated. R. at 8. In *NLRB*, the Court warned that our dual Government system "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them…would effectually obliterate what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The United States District Court for the District of New Union findings would mean that anything that remotely affected interstate commerce could be regulated by Congress under the Commerce Clause. However, such finding is in direct conflict with *Lopez's* rationale. In *Lopez*, the Government had argued that possessing a firearm substantially affects commerce in two ways. *Lopez*, 514 U.S. at 557. "First, the costs of violent crime are substantial, and, through the mechanism of insurance, those cost are spread throughout the population. *Id.* "Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. *Id.* The Court rejected those arguments because if accepted the Government's power would be limitless and Congress would be able to control any activity that

might lead to a violent crime, regardless off how indirect and tenuous the relationship to interstate commerce may be. *Id.* Similarly, to accept the United States District Court for the District of New Union's findings that Congress can regulate land development because the purchase of building materials is economic and the hiring of contractors and carpenters constitutes economic activity, is to extend Congress's power well beyond what the Constitution grants. In essence, the United States District Court for the District of New Union's findings would mean Congress can control any area of law as long as they can relate it back to some economic finding no matter how tenuous the relationship. The United States District Court for the District of New Union's finding that purchasing building materials and hiring contractors and carpenters are of economic activity will allow Congress to find any means to relate its power to interstate commerce even though such findings is insubstantial as it relates to interstate commerce. The United States District Court for the District of New Union findings of what Congress can control will obliterate national power from local power and such ruling directly conflicts with both *Lopez's* and *Morrison's* rationales.

The United States District Court for the District of New Union lists several cases as supportive precedent to establish that the ESA prohibition against a taking of a wholly intrastate species is a valid exercise of the Commerce power. R. at 8. However, those cases are distinguishable from Lear's on the facts. In many of those cases the Plaintiff's development of their property that constituted a take of the endangered species were for the Plaintiff's commercial motivations, whereas Lear's land development plans are not commercially motivated. *GDF Realty Invs. Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003). Specifically, in both *GDF Realty Invs.* and *Rancho Viejo*, the plaintiff's takings of the endangered species was to develop either a shopping center,

or a residential housing development, all of which were to ensure the plaintiffs economic gains. *GDF Realty Invs. Ltd.*, 326 F.3d at 624; *Rancho Viejo, LLC*, 323 F.3d at 1064. Also, in *Rancho Viejo* and *GDF Realty*, the plaintiffs had a substantial amount of land to build commercial property. In *Rancho Viejo* the plaintiff had 202 acres and in *GDF Realty* the plaintiff had 216 acres. *Rancho Viejo, LLC*, 323 F.3d at 1064; *GDF Realty Invs. Ltd.*, 326 F.3d at 624. Unlike the land development of Lear's property, where she only has 10 acres for personal use. R. at 5.

Also, in the cases the United States District Court for the District of New Union cites to as a means to support their finding, the facts were different because the Act was upheld based on the commercial value the endangered species has that Congress is seeking to protect. *See Gibbs v. Babbit,* 214 F.3d 483 (4th Cir. 2000); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Alabama-Tombigbee Rivers Coalition v. Kempthorne* 477 F.3d 1250 (11th Cir. Ala. 2007; *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011). Specifically, in *Gibbs*, the regulation was upheld because the endangered specie was commercially valuable livestock. *Gibbs,* 214 F.3d at 492. Lear's case is distinguishable from *Gibbs* as well as the other cases because the KBB are not commercially valuable livestock. "Similarly, many other threatened or endangered species that cross state lines lack significant commercial value." Bradford Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional under the Commerce Clause?* 78 U. COLO. L. REV. 375 (2007). The court has not acknowledged that the KBB's are economically valuable and the fact that the Act does not require mowing the lawn of the KBB's habitat to prevent extinction suggests that the KBB are not valuable livestock.

II. 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) .

A takings claim is ripe once the government has reached a final decision regarding the application of the regulated property, or when the governmental regulations prevent a landowner from developing on their land. *Palazzolo v. Rhode Island*, 535 U.S. 606, 618 (2001). Lear's claim without having applied for an incidental takings permit was ripe and did warrant judicial review because the regulation constituted a regulatory taking of her property. In *Lucas*, the court held that although Lucas did not fill out the "special permit" before being denied construction on his land, his failure to fill out the permit did not preclude him from any takings claim. *Lucas*, 505 U.S. at 1011. Lucas's claim was ripe because he alleged Article III injury that a taking had occurred on his property. *Id* at 1012. Similarly, this court should uphold the United States District Court for the District of New Union's ruling in which it held, Lear's failure to apply for an ITP did not make her claim unripe as her alleged injury was governmental regulatory taking. Lear's claim was ripe because even if Lear had applied for the permit, the application for such permit would have been futile and the expense of the permit futile. The expense of the permit alone exceeded the fair market value of the proposed property. Both of these limitations constituted an injury, therefore, judicial review was warranted.

A. Lear's takings claim was ripe because applying for such permit would be a futile act because the permit would be denied on the basis that she is unable to meet the requirements for the ITP.

Judicial review of Lear's takings claim is warranted because even if Lear had applied for the permit it would have been futile considering the fact that she would be unable to meet the threshold requirement of a habitat conservation plan. As the United States District Court for the District of New Union has explained in citing *Palazzolo*, 533 U.S. at 626 "a takings claimant need not perform a futile act, when the government has already declared a policy of denying the very sort of permit the claimant would need." R. at 9. Lear inquired about what permits she

would need to develop her land and the FWS agent Pidopter informed her that she could possibly obtain an ITP and that in order to file an application for the permit she would have to develop a HCP. R. at 6. The HCP would require her to "provide for contiguous lupine habitat on an acre-for-acre basis," the only contiguous land is Goneril Lot. R. at 6. The procedure Lear would have to undergo is futile because even if she does fill out the application it would be denied because she will not meet the HCP requirements since her sister, the owner of Goneril Lot, has already refused to consider any cooperation with an HCP that would impose restrictions on her property. R. at 6. As in *Palazzolo* where the court has held that a takings claimant need not perform a futile act before his claim can be considered ripe, Lear need not apply for such permit where she knows the application will be denied based on her inability to meet all the requirements. *Palazzolo*, *533* U.S. at 626.

B. Lear's takings claim was ripe because applying for such permit would be futile and burdensome because the expense with obtaining the permit was significantly high and exceeded the fair market value of the property at issue.

The application expense for the ITP exceeded the fair market value of the property at issue and the process to obtain the ITP is burdensome. The expense in preparing the required HCP for the KBB for an ITP would cost $150,000. R. at 6. Yet, the fair market value of the development of her single family home without any restrictions is $100,000. R. at 7. In *Hage*, the court determined that a plaintiff need not apply for a permit where the process to acquire a permit would be so burdensome, that it effectively deprived the plaintiffs of their property rights. *Hage v. United States*, 35 Fed C. 147, 164 (1996). The expense with obtaining the ITP made the takings claim ripe because the significant amount of money Lear would have to spend to obtain such permit would be futile because her property value would be substantially less than it is to obtain the permit. In addition, the process to acquire the permit was burdensome because she

would be required to spend money for a permit that she know she would be denied based on her failure to meet the HCP requirement. The ITP process is burdensome because in seeking to acquire the ITP she would be required to spend an immense amount of money to abide by the regulation. Lear's claims are ripe based on both the futile and burdensome effect the ITP application would have if Lear is required to follow it.

III. THE TAKINGS ANALYSIS IS RELEVANT TO CORDELIA'S LOT AS SUBDIVIDED IN 1965 AND NOT TO THE ENTIRE LEAR ISLAND.

FWS and BCNU's regulation constituted a takings relevant to Cordelia's lot as subdivided in 1965 because it denied Lear economical use of her land. In *Agins*, the Supreme Court stated that a "regulation will constitute a taking when either:(1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land." *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Lear gains no economic benefit from the entire Lear Island, therefore the relevant parcel is her lot individually.

A. The takings analysis is relevant to Lear's lot individually because the entire Lear Island is not economically beneficial to her.

FWS and BCNU argue that because Lear received the property as a gift the relevant investment backed expectations should be based on the original purchase when the entire property was purchased. R. at 9. The Defendants erroneously analogized the present case with *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), where the court held that the takings analysis applied to the whole parcel not just a portion where that particular lot had restrictions. In those cases the plaintiffs had an economic interest in the entire parcel beyond the single area where land

restrictions were present. Unlike Lear, where the Government's land restrictions on her acres would completely deny her economically viable use of her land. Her two sisters has an economic interests in the other parcels as they are the owners now of their respective lots. R. at 5. In *Keystone*, the court held that "where an owner possesses of a full bundle of "property" rights, the destruction of one strand of the bundle is not a taking." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 498. The Governmental regulations Lear is facing would deprive her of her full bundle of property rights because the ten acres the government is seeking to regulate is the only parcel on Lear's island where Lear has an investment backed expectation and is the owner.

FWS and BCNU also argues that a flexible approach to determine the parcels for takings analysis should take into account the values of other lots in the same division. R. at 9. In *Deltona Corp*, the plaintiff had purchased a $10,000 acre parcel on the Florida Gulf coast and was seeking to fill three bays some of the Bays permits, some were granted while one was denied. *Deltona Corp v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981). Deltona Corp's takings claim was denied because Deltona still had an investment-backed expectation in the areas where the permits were granted. *Id.* Deltona suffered a diminution in value as a result of the government's denial, but no takings analysis was relevant. *Id.* Lear's case is distinguishable from *Deltona* on its facts. Lear has not purchased any of the subdivided land, her parcel was deeded to her as a gift and the other parcels of the entire Lear island were deeded to her sisters. R. at 5. Lear has no rights to the subdivided land and she can only make decisions on her individual parcel as the facts illustrates she cannot make decisions regarding the other subdivided landed. For instance she would need permission to use other areas of Lear island, specifically asking her sister for use of part her parcel so that her land development project could meet certain requirements of the ITP. R. at 6. Lastly, Deltona only has a single land use restriction on

part of its acres and all the other parts no such restriction exist, whereas Lear's whole property will be deprived of economical gain if the taking analysis applies to the whole Lear island. *Deltona Corp*, 657 F.2d at 1192; *See e.g. Loveladies Harbor v. United States*, 28 F.3d 1171.

IV. THE POTENTIAL OF A FUTURE NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT DOES NOT SHIELD THE FWS AND BCNU FROM A TAKINGS CLAIM BASED UPON A COMPLETE DEPRIVATION OF THE ECONOMIC VALUE OF THE PROPERTY.

This court should uphold the findings of the trial court that the "potential natural destruction of the Karner Blues' habitat does not preclude" Lear from filing a takings claim now. R. at 10.

"The Fifth Amendment forbids the taking of private property for public use without just compensation. 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." *Tahoe-Sierra Pres. Council*, 535 U.S. at 321 (citing *Armstrong* v. *United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)).

The protection of an endangered species should be borne by the public, not by an individual. But, in this case, the existence of the entire New Union subpopulation of KBB is the sole responsibility of Lear. While her father was responsible for the design of the subdivision that created the Cordelia Lot, Cordelia, her father and their ancestors have carried the burden of ensuring the survival of the KBB.

By asking Cordelia to consider stopping the annual mowing and letting the Heath grow into a forest, she faced with the burden of, in effect, killing an endangered species in order to build a home on her property. This unreasonable and unfair option is the only option that the government has provided.

V. THE BRITTAIN COUNTY BUTTERFLY SOCIETY OFFER TO PAY $1,000 ANNUALLY IN RENT FOR WILDLIFE VIEWING DOES NOT PRECLUDE LEAR FROM A TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE.

Lear has suffered complete loss of economic value due to the government's regulations and the $1,000 rent does not prevent her from a takings claim. In *Lucas*, the court has maintained that a taking has occurred where the regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1016. Lear's property taxes for the Cordelia Lot is $1,500 annually. R. at 7. The amount the government would pay Lear for the rent is not economically beneficial. As the United States District Court for the District of New Union has accurately stated, "a piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value." R. at 12. Lear is not prevented from her takings claim for complete loss of economic value because she is denied both economic benefit and land development of her land. She is unable to build on her land and the $1,000 a year the Government is seeking to pay her in rent does not help her economically. Although the Government offered to pay for use of her property, the amount was de minimis and therefore did not preclude her takings claim for complete loss of economical value.

VI. PUBLIC TRUST PRINCIPLES INHERENT IN THE TITLE DO NOT PRECLUDE LEAR'S CLAIM FOR A TAKING BASED ON THE DENIAL OF A COUNTY WETLANDS PERMIT.

The public trust doctrine was first introduced by Roman law; as declared: "By the law of nature these things are common to mankind -- the air, running water, the sea and consequently the shores of the sea." *Nat'l Audubon Soc'y* v. *Superior Court*, 33 Cal. 3d 419, 433 (Cal. 1983).

From this origin, the English common law further developed the concept of the public trust, under which the Crown owned all navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people." *Id* at 434.

After the American Revolution, the trust resources "previously owned by the Crown passed to the American public in the thirteen states via the equal footing doctrine and each state was thus vested with the duty to hold public resources in trust for the people of the state." *See* Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005).

"A central feature of the public trust doctrine is that rules governing the use of natural resources exist in a dynamic relationship with evolving values of the community." *See* Kleinsasser, *supra*, at 421.

A. At The Time Of The 1803 Grant, The United States Did Not Recognize Any Public Trust Rights In Non-Tidal Navigable Waters Such As Lake Union.

In this case, the land granted by Congress, to Lear's ancestors in 1803, was part of the Northwest Territory and consisted of Lear Island and "all lands under water within a 300-foot radius of the shoreline of said island." R. at 4 & 5. At the time of the land grant, The trial court found that "the United States did not recognize any public trust rights in non-tidal navigable waters such as Lake Union. *See P.P.L. Montana L.L.C. v. Montana*, 132 S. Ct. 1215, 1227 (2012) (collecting cases suggesting the bed of non-tidal rivers were considered to be private property prior to 1810). R. at 4 & 5. Therefore, "no public trust navigational reservation can be presumed to have existed at the time of the Lear grant in 1803," and Lear's title in fee simple absolute cannot be determined to include any public trust limits. R. at 10.

VII. THE ESA AND THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW TOGETHER COMPLETELY DEPRIVE THE CORDELIA LOT OF ALL ECONOMIC VALUE.

Together, the regulations of the ESA and the Brittain County Wetlands Preservation Law do not allow for Lear to build a home on any part of her property and therefore, "completely deprive the Cordelia Lot of all economic value." R. at 10.

In 1965, the ancestors of Lear subdivided the larger 1,000-acre parcel with the intention of a building a single-family home on each lot, including the Cordelia Lot. R at 5. It was not until eight years later, in 1973, that Congress enacted the ESA, which through agency action determined the KBB to be an endangered species and the Heath to be a critical habitat. Less than a decade later, in 1982, Brittain County Wetlands Preservation Law was enacted and it was this law that that prevented Lear from filling a portion of the cove marsh.

Both of these regulations brought about property-use limitations enforced long after the purpose of the Cordelia Lot had been formally determined in the title of the property.

Similarly, in *Lucas,* two parcels of waterfront property were purchased in 1986 for the purpose of building single-family homes. In that case, it was only two years later, in 1988, that the state enacted legislation that had "the direct effect of barring [the construction] of any permanent habitable structures on his two parcels." *Lucas*, 505 U.S. at 1007.

In that circumstance, the Court held, that "when a regulation has deprived a landowner of all economically beneficial use, a threshold issue in determining whether compensation is due is whether the landowner's rights of ownership are confined by the limitations on the use of land which "inhere in the title itself."" *Lucas,* 505 U.S. at 1029. The property in *Lucas* was purchased and the land was titled for the purpose of building residential homes. There was no limitation on the property at the time of the title transfer. *See Lucas*, 505 U.S. 1003 (1992). Even though legislation was later enacted for the benefit of the public interest, the Court in *Lucas* "refused to

allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved." *Id* at 1028.

Similarly, as a result of the combined regulations, Lear is left with property that she must spend more to care for the property, than the property provides in income and, as the *Lucas* Court ruled, "the Fifth Amendment is violated when land-use regulation [] denies an owner economically viable use of his land." *Lucas*, 505 U.S. at 1016.

CONCLUSION

The ESA is seeking to regulate non-economic activity and therefore the Act is unconstitutional as related to a wholly intrastate population of the KBB. Therefore, this Court should reverse the district court's ruling.

The combined impacts of the federal and state regulations meant to protect the environment for the benefit of the public, amount to an unconstitutional taking of Lear's property in violation of the Fifth Amendment to the Constitution and have therefore deprived her of all economic value of her property.

The district court properly awarded damages as Lear is entitled to compensation from the FWS and Brittain County.

Therefore this Court should AFFIRM the district court's grant of damages.

Respectfully Submitted,

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Counsel for Cordelia Lear