Team No. 44

IN UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket 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.

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 UNITED STATES FISH AND WILDLIFE SERVICE, Defendant

Oral Argument Requested

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STATEMENT OF JURISDICTION

Cordelia Lear ("Lear") filed a claim against the United States Fish and Wildlife Service ("FWS") and Brittain County, New Union for uncompensated take of her property under the Takings Clause of the Fifth and Fourteenth Amendments. The United States District Court for the District of New Union had federal question jurisdiction pursuant to 28 U.S.C. § 1331, as the controversy surrounds the Endangered Species Act ("ESA"). 16 U.S.C. §§ 1531-1544. Parties cross-appealed; this Court has jurisdiction to review the district court's final order. 28 U.S.C. § 1291. The notices of appeal were filed in a timely manner. Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether the ESA is a valid exercise of Congress's Commerce Power.

II. Whether Lear's takings claim against FWS is ripe.

III. For takings analysis, whether the relevant parcel is the entirety of Lear Island or the Cordelia Lot.

IV. Whether the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shields FWS and Brittain County from a takings claim.

V. Whether the Brittain County Butterfly Society's offer precludes a takings claim.

VI. Whether public trust principles preclude Lear's claim for a taking.

VII. Whether FWS and Brittain County are liable for a complete deprivation of economic value when either federal or county regulation, by itself, would still allow Lear's development of a residence.

STATEMENT OF THE CASE

I. FACTS

Plaintiff Cordelia Lear owns property on Lear Island, a 1,000-acre island situated in the large interstate lake of Lake Union in the state of New Union. *Lear v. U.S. Fish & Wildlife Serv.*,

No. 112-CV-2015-RNR, slip op. at 4 (D.N.U. June 1, 2016). Lear Island first came into possession of the plaintiff's ancestors in 1803 by a congressional grant ("Lear Grant"), which granted title in fee simple absolute to the island and "all lands under water within a 300-foot radius of the shoreline of said island." *Id.* at 4-5. The grant was prior to New Union's statehood, and at the time Lear Island was part of the Northwest Territory. *Id.* at 4. This property remained in unity when the plaintiff's father, King James Lear, subdivided Lear Island in 1965, and deeded the subdivisions to his three daughters, including plaintiff Cordelia Lear. *Id.* at 5. Lear and her sisters came into possession of their subdivisions in 2005 upon King James Lear's death. *Id.*

Cordelia Lear's property is 10 acres large, located at the northern tip of Lear Island, and is comprised of an access strip, nine acres of uplands in an open field, and "one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing." *Id.* The nine acres of uplands are known as "the Heath," and have been "kept open by annual mowing by the Lear Family for several decades." *Id.* The Heath and the access strip are covered with wild blue lupine flowers, which provide habitat for an endangered species of butterfly, the Karner Blue. *Id.* Since 1992, the Karner Blue has been listed as endangered under the ESA. 50 C.F.R. § 17.11 (2015). The Heath was designated as critical habitat for this species in the same year. *Lear*, slip op. at 3. The cove, in turn, falls under the ambit of the Brittain County Wetlands Preservation Law ("BWCPL"), which requires permits for developing wetlands, but the cove would not require federal permission for development. *Lear*, slip op. at 7.

In April 2012, Lear sought to build a residence on her property but was informed by an FWS field agent at the New Union field office that "disturbance of the lupine habitat in the Heath other than continued annual mowing would constitute a 'take' of endangered butterfly." Ms. Lear was also informed by the agent that she can apply for an Incidental Take Permit ("ITP")

under the ESA. *Id.* at 6. An ITP may be authorized under the ESA if "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). The agent advised Lear that in order to apply for an ITP, she "would have to develop a habitat conservation plan ("HCP") for the Karner Blues," which "would have to provide for additional contiguous lupine habitat on an acre-for-acre basis" and "a commitment to maintain the remaining lupine fields through annual fall mowing." *Lear*, slip op. at 6. After Lear's inquiry and communication with agent Pidopter, on May 15, 2012 the FWS New Union field office sent Lear a letter confirming that all ten acres of her property were critical habitat for Karner Blue butterfly and "that any disturbance to the lupine fields other than annual mowing . . . would constitute a 'take' of the Karner Blues" under the ESA." *Lear*, slip op. at 6.

Lear did not pursue an ITP application, but instead developed an alternative development proposal ("ADP"), proposing to "fill one half-acre of the marsh in the cove to create a lupine-free building site." *Id.* at 7. Lear filed an application with the Brittain County Wetlands Board ("BCWB") in August 2013, seeking a permit to fill and develop the cove marsh. *Id.* The BCWB denied this application in December 2013. *Id.* Since BCWB's denial of her permit, Lear has not sought a reassessment of her property. The fair market value of her lot without restrictions on development of a single-family residential dwelling is $100,000, and her annual property taxes are $1,500. *Id.* Additionally, the Brittain County Butterfly Society offered to pay Lear $1,000 yearly for "conducting butterfly viewing outings during the summer Karner Blue season," but Lear has refused this offer. *Id.*

II. PROCEDURAL HISTORY

Ms. Lear commenced this action in the United States District Court for the District of New Union (the "District Court") in February 2014, seeking alternatively 1) declaratory relief

that the ESA was an unconstitutional exercise of congressional legislative power or 2) just compensation for a total regulatory takings of her lot. Ms. Lear did not advance a claim for a partial regulatory taking based on *Penn Central Transportation Co. v. City of New York*. *Id.* at n.3. Ms. Lear also waived any damages in excess of $10,000 against the United States of America, so that she could proceed with the case in the District of New Union. *Id.* at n.1.

After a seven-day bench trial, the District Court issued a judgment on June 1, 2016, 112-CV-2015-RNR. In the judgment, the court dismissed Ms. Lear's claim for declaratory judgment. *Id.* at 12. It held that the ESA was a constitutional exercise of the Commerce power as applied to her property. *Id.* at 8. In contrast, the District Court held in favor of plaintiffs on the request for just compensation, awarding Ms. Lear $10,000 damages against the FWS and $90,000 against Brittain County. *Id.* at 12. The District Court held that actions of both defendants combined to deprive Ms. Lear of all economic value, thus satisfying the *Lucas* Rule for a categorical takings. *Id.* at 11-12.

To reach this conclusion, the District Court had to conclude that 1) the claim was ripe for litigation because any ITP would be impossible for Ms. Lear to satisfy, *id.* at 9; 2) the relevant parcel for takings analysis was Ms. Lear's 10-acre lot, *id.* at 10; 3) the temporary nature of the deprivation did not preclude a categorical takings claim, as found in *Tahoe-Sierra*, *id.*; 4) the Brittain County Butterfly Society's offer to pay $1,000 annually for butterfly viewing did not preclude a complete economic deprivation, *id.* at 12; 5) public trust limits on use of state navigable waters did not inhere to the Lear's 1803 congressional grant of title, *id.* at 10-11; and 6) joint and several liability could apply to a takings claim and did apply in this instance, *id.* at 11. The District Court held for Ms. Lear on each one of these conclusions, as was necessary to grant her claim of a complete economic deprivation.

The FWS and Brittain County each filed a Notice of Appeal on June 9, 2016; Cordelia Lear filed a Notice of Appeal on June 10, 2016. Ms. Lear appeals the District Court's holding that the ESA is a constitutional exercise of congressional power under Article I, Section 8, Clause 3 of the U.S. Constitution, as applied to a wholly intrastate population of endangered species. The FWS, in turn, appeals the District Court's holding that a complete categorical takings had occurred, taking issue with its determinations in each of the six conclusions described in the preceding paragraph. Finally, Brittain County appeals both the District Court's holding that the ESA is a constitutional exercise of congressional legislative power as applied in this circumstance, and its holding that a complete categorical takings had occurred.

SUMMARY OF THE ARGUMENT

First, the ESA is a valid exercise of the Commerce Power, U.S. Const, art. 1, § 8, cl. 3, based on the four-factor test from *United States v. Lopez,* as well as considerable precedent from other circuit courts. Lear's act of building a home on critical habitat involves people and goods from across state lines. Her take of endangered butterflies creates a substantial effect on commerce, as endangered species are of immeasurable monetary value. Therefore, her construction is economic activity with a substantial relation to interstate commerce.

Second, Lear is precluded from a takings claim under the Fifth and Fourteenth Amendments. U.S. Const. amend. V; U.S. Const. amend. X, § 1. As a threshold matter, Lear's claims against FWS were not yet ripe. The FWS' advisory letter was neither a final agency action nor a legal question, and withholding judicial review at this point presents no major hardship to Lear. Additionally, because Lear Island was held in unity when the Endangered Species Act (the "ESA") was enacted, the entirety of the island is the relevant parcel for takings analysis. The conditions on development stemming from the ESA inhere to the property itself,

and are only a temporary diminution in value that satisfy Lear's economic expectations. Even if development is delayed, other economically viable uses remain. Public trust principles also preclude Lear's categorical takings claim against Brittain County, because the public trust in non-tidal navigable waters had been established prior to the Lear Grant in 1803, and therefore New Union took title to lands under navigable waters under the equal footing doctrine. Finally, the District Court erred in holding that a categorical regulatory taking occurred to Lear's property. Supreme Court precedents caution against adopting per se rules such as treating two separate regulatory limitations on development as a categorical taking, rather than examining them as separate takings. For each of these reasons, Lear has not suffered a complete economic deprivation under the *Lucas* Rule.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF THE COMMERCE POWER BECAUSE THE CONSTRUCTION OF THE LEAR RESIDENCE IS AN ECONOMIC ACTIVITY THAT WOULD SUBSTANTIALLY AFFECT INTERSTATE COMMERCE

The Supreme Court in *United States v. Lopez* provided the relevant test for determining Congress' authority to regulate under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. The Court delineated "three broad categories of activity":

> First, Congress may regulate the use of the channels of interstate commerce. 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. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-559 (1995). Courts have focused on both the first and the third category in determining the validity of the ESA. *See Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062,

1066 (D.C. Cir. 2003). Others have focused solely on the third category. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000).

This Court should uphold the lower court's decision under the third category of *Lopez*. The Court established a four-factor test to determine whether an activity was an "economic activity with a substantial effect on interstate commerce." *Lopez*, 514 U.S. at 561. This four-factor test was affirmed in *United States v. Morrison*, 529 U.S. 598 (2000). In the case at hand, the construction of a home on the lupine fields constitutes economic activity. In addition, the take of an endangered butterfly substantially affects interstate commerce. Because the construction of the Lear residence is economic activity that would substantially affect interstate commerce, this court should find the ESA prohibition against "take" of a listed species to be a valid exercise of the Commerce power.

A. **The Construction of a Residence is An Economic Activity Because it Involves the Purchase of Building Materials and the Hiring of Workers, Potentially from Interstate Channels**

Lear contends her activity on the lupine fields amounts only to land clearing and vegetation removal. Lear's misleading assertion ignores her proposed construction of a residence on the fields. Previous courts have held the construction of homes on land to constitute economic activity. *See Rancho Viejo, LLC v. Norton*, 323 F.3d at 1064 (addressing a similar project with the construction of a housing development in California); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d at 1043 (hereinafter "NAHB") (addressing the construction of a hospital and power plant on critical habitat for the Delhi Sands Flower-Loving Fly).

The first factor in the four-factor *Lopez* test is whether the regulated activity is an economic activity. This factor considers whether the activity has anything "to do with

'commerce' or any sort of economic enterprise . . ." *Rancho Viejo*, 323 F.3d at 1068. The development of Lear's home would involve the purchase of building materials, bought off-island and transported to her plot. It would also involve the hiring of workers, who presumably do not all live on the island and would travel across an interstate lake to participate in construction activity. These activities are like those in *Rancho Viejo* and NAHB, which the courts held constituted economic activity.

Rancho Viejo continues by applying the label of economic activity "however broadly one might define those terms." 323 F.3d at 1068. This emphasis on broad terms addresses a potential counterargument to applying *Rancho Viejo* or NAHB to the facts at hand. *Rancho Viejo* involved a 202-acre housing development, and NAHB involved a hospital and power plant. Both could be classified as commercial development, rather than the personal, residential home intended for Lear Island. Yet, courts have considered personal development to fall under the broad umbrella of economic activity.

> Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority. The *Lopez* Court's characterization of the regulation of homegrown wheat in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), as a case involving economic activity makes clear the breadth of this concept.

Gibbs v. Babbitt, 214 F.3d at 491. In *Wickard*, the court found that homegrown wheat, a personal, self-sustaining action, could be regulated. Even if produced only to meet a grower's own needs and not placed into the market, the growing of wheat constituted economic activity because it broadly affected the national market. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942). The construction of a building on Lear's property for personal use is likewise an economic activity.

B. The Take of an Intrastate Population of an Endangered Butterfly Substantially Affects Interstate Commerce by Involving People and Goods from Across State Lines and Impacting Endangered Species as a Whole

The remaining factors in the *Lopez* test discuss whether the activity substantially affects interstate commerce. The second factor considers "whether the statute in question contains an 'express jurisdictional element.'" *Rancho Viejo*, 323 F.3d at 1068. As noted in *Rancho Viejo*, all courts that have addressed this factor have concluded that the lack of an express jurisdictional element in the ESA is not fatal under the Commerce Clause. *Id.* The court in this case should decide similarly. The third factor "looks to whether there are 'express congressional findings' or legislative history 'regarding the effects upon interstate commerce' of the regulated activity." *Id.* at 1069. Previous courts have applied this factor to the ESA; all upheld the Act. As the court in *Rancho Viejo* held, "[N]either findings nor legislative history is necessary . . . the naked eye requires no assistance here." *Id.*

The fourth and remaining factor asks the court to decide "whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial." *Id.* The court should hold that the relationship between the building construction and interstate commerce is substantial because: (1) the construction will involve materials and people from outside the state, and (2) the regulated activity's effect on endangered species is of an "incalculable" monetary value.

1. The Construction Will Involve Resources from Outside the State

The construction of a building entirely on Lear Island substantially relates to interstate commerce. In *Rancho Viejo*, the court noted that the construction occurred near a major interstate highway; the construction would use materials and peoples from outside the state and attract workers and purchasers from across state lines. *Id.* Lear Island lies in Lake Union, which is a

large interstate lake, traditionally used for interstate navigation. *Lear*, slip op. at 1. The Lear family owns the entirety of the island, and has connected the island to the mainland by a causeway. *Id.* Like in *Rancho Viejo*, the construction of Cordelia Lear's residence presumably will involve construction workers and future purchasers from outside the state, due to the island's location and proximity to interstate channels.

The *de minimis* nature of Lear's economic activity plays no important role in the discussion of substantial effect. In *Lopez*, the court held, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558. The ESA's take provision regulates economic activity that has a substantial relation to interstate commerce. The small scale of Lear's economic activity does not change this analysis.

2. The Regulated Activity's Effect on Endangered Species is of an "Incalculable" Monetary Value

In *Gonzales v. Raich*, the Court held, "[i]f Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." 545 U.S. 1, 2 (2005). The *Raich* Court continued, "[t]hat the regulation ensnares some purely intrastate activity is of no moment." *Id.* at 22. Take of species in its totality has a substantial effect on interstate commerce. Various courts have commented on the value of the entire class of this nation's species.

> The House Report accompanying the Endangered Species Act explains that as human development pushes species towards extinction, "we threaten their-and our own-genetic heritage. The value of this genetic heritage is, quite literally, *incalculable*." H.R. Rep. No. 93-412, at 4 (1973). Biodiversity's value is not ethereal; its preservation produces economic gain in even the most narrow sense.[1]

[1] In *San Luis & Delta-Mendota Water Authority*, the delta smelt had no commercial value. 638 F.3d at 1167. The Karner Blue, however, itself has demonstrated economic value beyond its

Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d at 1273 (emphasis added). The ESA regulates the entire class of animal species. The loss of one branch of the Karner Blue has a substantial effect on national markets.[2] Cordelia Lear's intended construction of a residence on the lupine fields constitutes an economic activity that substantially affects interstate commerce, and is thereby subject to regulation under the Commerce clause.

II. APPLICATION OF THE ESA INCIDENTAL TAKE PROHIBITION AND THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW TO LEAR'S PROPERTY HAS NOT RESULTED IN AN UNCOMPENSATED TAKING OF HER PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

Lear advanced a claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that the limitations placed upon development of her property by the ESA and the BCWPL constitute a categorical regulatory taking. *Lear v. U.S. Fish & Wildlife Serv.*, No. 112-CV-2015-RNR, slip op. at 4 (D.N.U. June 1, 2016). The Twelfth Circuit Court of Appeals should reject this claim and reverse the District Court's holding for six reasons: (1) Lear's takings claim against FWS is not ripe; (2) the relevant parcel for takings analysis is all of Lear Island and not merely the Cordelia Lot; (3) extinction of the Karner Blue subpopulation in ten years precludes Lear's takings claim; (4) the Brittain County Butterfly Society's offer to pay for viewings precludes Lear's takings claim; (5) public trust principles inherent in Lear's title preclude application of *Lucas*, 505 U.S. 1003, and (6) the District Court should not have combined the ESA and BCWPL's limitations on development in determining whether a categorical regulatory taking had occurred.

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biodiversity benefits. The Brittain County Butterfly Society offered to pay $1,000 annually for the pleasure of butterfly viewing outings. *Lear*, slip op. at 4.

[2] In the most recent case involving the ESA, *San Luis & Delta-Mendota Water Auth. v. Salazar*, the court summarized the findings of previous courts as to the importance of endangered species to commerce. 638 F.3d 1163, 1176 (9th Cir. 2011).

A. Lear's Takings Claim is not Ripe, Because FWS' Action was Not Final or a Legal Question and Withholding Review Presents no Major Hardship

As a threshold matter, Lear's takings claim against the FWS is not ripe. Ripeness inquiries stem from the desire to prevent courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). The controlling test requires an evaluation of "fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* Proper analysis of this test requires a pragmatic balancing of these factors. *See Ciba-Geigy Corp. v. EPA*, 801 F.3d 430, 435 (D.C. Cir. 1986) ("depends on a pragmatic balancing of those two variables and the underlying interests which they represent"); *Cont'l Air Lines, Inc. v. Civil Aeronautics Bd.*, 522 F.2d 107, 124 (D.C.Cir. 1975) ("very much a matter of practical common sense. . ."). Based on a pragmatic balancing of the factors in the *Abbott* two-part test, Lear's takings claim is not ripe for litigation.

1. FWS' Letter to Lear was Not a Final Action or a Purely Legal Issue

The first prong of the *Abbott* test considers the fitness of the issues for judicial decision-making. The two factors to consider are: (1) whether the "issue tendered is a purely legal one," and (2) whether the issue is a "'final agency action' within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704." *Abbott*, 387 U.S. at 149.

First, the issue considered by FWS was whether Cordelia Lear's property would require any permits or approvals because of the existence of an endangered butterfly population. To make this determination, FWS needed only factual analysis of Lear's land and the effect of development on the species. Lear does not contest the applicability or legal basis of the ITP or HCP. This is unlike *Abbott Laboratories*, where the issue revolved around whether the agency

properly construed the Food, Drug, and Cosmetic Act. 387 U.S. at 149. This is also unlike *Ciba-Geigy Corp v. EPA*, where the EPA's position interpreted sections 2(q)(1)(F) and 2(q)(1)(G) of FIFRA as granting the agency authority to require labeling for groundwater contamination. 801 F.2d at 433. The present case involves purely factual analysis, as opposed to statutory interpretation. FWS' factual analysis of the issue is not ripe for judicial review.

Second, the issue does not represent a "final agency action." FWS' advisory letter to Lear does not represent a final agency action; it was an informal opinion that addressed a hypothetical situation. In addition, Lear did not submit an ITP application to FWS, thus not allowing FWS to exercise its full discretion in assisting and modifying ITP applications.

In *National Automatic Laundry and Cleaning Council v. Shultz* (hereinafter "NALC"), the court stated:

> To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue.

Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 699 (D.C. Cir. 1971). Hypothetical situations do not necessitate judicial intervention. *Id.* In NALC, the issue involved the actual and present operations of the Council's members; "[i]t did not seek to learn whether a proposed course of conduct would violate the law." *Id.* This contrasts with Lear's inquiry into her hypothetical property development. The FWS merely made an informal, advisory opinion on a future action. *See also N.Y. Stock Exch. v. Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977) (". . .we note first that appellants are challenging informal opinion letters rather than formal rules or policy statements."); *Bowler v. Hawke*, 320 F.3d 59, 60 (1st Cir. 2003) (holding an informal opinion letter did not appear to carry the force of law). FWS' correspondence and letter to Lear did not constitute a final agency action.

In addition, in *Ciba-Geigy Corp. v. EPA*, the court held that an agency action would be deemed final if "it gave no indication that it was subject to further agency consideration or possible modification." 801 F.2d at 437. The FWS has a great deal of discretion in assisting and modifying ITP applications. The court in *Morris v. United States* stated, "the agency has discretion to assist the Morrises with the application. Because we have no idea and no way to predict what influence the wielding of that discretion will have on the cost of the application to the Morrises, this case cannot be ripe." 392 F.3d 1372, 1377 (Fed. Cir. 2004). Because Lear did not follow through with the application, she did not give FWS the opportunity to exercise its discretion. Therefore, FWS' opinion cannot be subject to judicial review.

2. The Alleged and Prospective Cost and Futility of Lear's Permit Application do not yet Present a Significant Hardship to Lear

The second prong of the *Abbott* test considers the hardship of withholding judicial review to the complainant. 387 U.S. at 149. This analysis occurs along two vectors: cost of compliance and cost of defiance. The district court held that the cost of the HCP, as well as the futility of achieving the parameters in the FWS letter, presented a significant burden to Lear. *Lear*, slip op. at 6. The court relied on two cases, both of which are distinguishable—*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Hage v. United States*, 35 Fed. Cl. 147 (1996).

The district court used *Palazzolo* to demonstrate that "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." 533 U.S. at 626. The important distinction, however, is that in *Palazzolo*, the plaintiffs had already applied and been denied a permit. Lear never applied. FWS never denied her application. Lear could not rely on the agency's opinion to assert that her application would be futile. Similarly, the court in *Morris* stated definitively that a claimant cannot assume the cost of applying for an ITP is fixed or knowable. 392 F.3d at 1377. Lear could

not assert that the projected cost of the HCP (which Lear received from an outside environmental consultant and not FWS) made the ITP application unduly burdensome. She never applied for the permit and never followed through on established agency procedures for determining costs.

Palazzolo continues by acknowledging that landowners must follow "reasonable and necessary steps," including seeking any variances allowed by law. 533 U.S. at 620–21. Lear applied for an ADP with BCWB, which rejected the ADP based on a local zoning issue. Lear took no action after this denial. *Hage v. United States* refers to the Supreme Court case *Williamson County* which held that a takings claim is not ripe until the claimant seeks a variance from permit denial based on local zoning laws. 35 Fed. Cl. 147, 164 (1996) (referencing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 173 (1985)). Lear, through the ADP, created a plan that satisfied the parameters for an HCP. Lear did not disclose the ADP application to FWS, did not seek a variance for the permit denial, and did not use agency procedures to apply for an ITP. She did not allow either FWS or Brittain County to exercise their full discretion, and instead sought to use the courts to address an unripe case.

B. The Timing of the Lears' Subdivision of the Property, Their Economic Expectations, and Their Treatment of the Island as a Single Economic Unit Require that the Entire Island be Treated as the Relevant Parcel for a Takings Analysis

Federal takings analysis must be applied to the whole parcel of property in question, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326-27 (2002), as "determined by the federal law of takings considering the tradition in the historic common law." *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir. 2004). In the federal analysis, the timing of the regulation relative to the subdivision of a property weighs heavily in this determination. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). When determining the relevant parcel size, courts must also focus on the "economic

expectations of the claimant with regard to the property." *Forest Properties, Inc.*, 177 F.3d 1360, 1366 (Fed. Cir. 1999) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500-01 (1987)). In Supreme Court and other federal appellate cases, this economic expectations analysis pertains to whether a party treats a parcel as one unit for its development, mining, agriculture or other economic plans. *See, e.g., id.* In the instant case, both the timing of the regulation and the "economic expectations" weigh in favor of treating the entire Lear Island as the relevant parcel for takings analysis.

The timing issue favors this whole-island approach because the relevant regulations were created when Lear Island was held by King James Lear in its entirety. If a property is intact when the regulation in question is promulgated, takings jurisprudence directs that the un-subdivided parcel be used as the relevant parcel. *See Loveladies Harbor*, 28 F.3d 1171, 1181 (where subdivision of a property *before* the regulatory promulgation led the court to treat the smaller, 12.5 acre subdivided parcel (out of 250 acres) as the correct denominator for a complete takings analysis); *see also* Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723, 744 (1992). To do otherwise would allow property owners to construct "legalistic" divisions of property based on state law, rather than looking to the "economic reality of the arrangements." *See, e.g., Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1366 (Fed. Cir. 1999) (rejecting plaintiffs' assertion that relevant parcel consisted of 9.4 acres of submerged land affected by a wetlands 404 permit denial, rather than the entire 62-acre property, despite an option to purchase that was specific to the 9.4 acres).

In the Lears' circumstance, the timing of subdivision makes clear that the entire 1,000-acre island constitutes the "whole parcel" for purposes of a categorical takings analysis. The

island was not deeded to the Lear sisters until 2005, *Lear*, slip op. at 8, thirty-two years after the Endangered Species Act was signed in 1973 and thirteen years after the designation of the Heath as a critical habitat in 1992. *Id.* at 6. The Lears' estate was planned earlier, i.e. in 1965, *id.*, but federal courts have not treated the plans for transfer of a property or subdivision of a property as the criteria in question. *See, e.g.*, *Palm Beach Isle Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (referring to time of sale). Instead, federal courts have referred to the date at which the parcels were actually "bought" or "sold." *Id.* The Lears had thirty-two years to alter the subdivision based on the Endangered Species Act in such a way that would address Cordelia Lear's limited development rights. Instead, the subdivision scheme was kept in a form that provided Cordelia Lear with a constrained bundle of property rights related to this property.

The economic expectations factor also demands that the entire island be treated as the relevant parcel. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500-01 (1987) (discerning economic expectations to determine whether a categorical takings had occurred). For more than 200 years, the Lear family treated Lear Island as such a single economic unit for use as a homestead, and for hunting, fishing, and agriculture. Prior to 1965, the Island was held in unity. *See Lear*, slip op. at 5. Between 1965 and 2012, the Lears continued to manage the island as a single economic unit, mowing the 10 acres that became the Heath, and letting the remainder of the island secede to forest. *Id.* The effect of the practice was to concentrate any and all Karner Blue habitat exclusively on Cordelia Lear's property, as opposed to the surrounding subdivisions. *Id.* ("The Heath . . . was kept open, unlike the rest of the island, which naturally became wooded after agricultural use of the island ceased in 1965."). In actively managing and isolating this habitat, King Lear and the Lear family surrendered a stick in the "bundle of property rights" pertaining to development of the Cordelia Lot. Essentially, the Lears'

actions amounted to a voluntary construction of an implied easement on the property, *see infra* pt. II.C.3, such that any economic expectations of development must lay with the larger parcel.

With these "factual nuances" in mind, *Loveladies Harbor*, 28 F.3d, 1171 at 1181, and the timing issue weighing heavily for the government, *id.*, this court should reverse the trial court's narrow focus on a 10-acre parcel that was created largely for its aesthetic value. *C.f. Forest Properties, Inc., v. United States*, 177 F.3d 1360, 1362 (rejecting a categorical takings claim for "a particularly scenic spot" of lake-bottom habitat that had been subdivided for development). Determination of the relevant parcel is a conclusion of law, to be reviewed de novo. *Palm Beach Isle Associates v. United States*, 208 F.3d 1374, 1380–81. In this instance, the trial court held that "[f]ormal subdivision of a property into separate lots should be determinative." *Lear*, slip op. at 9. This holding is an error of law that attempts to substitute state law for the appropriate "federal law of takings considering the tradition in the historic common law." *Seiber v. United States*, 364 F.3d 1356, 1369. The appropriate federal analysis entails consideration of the regulation's timing and economic expectations as contingent on the size of the parcel. Both of those factors weigh in favor of treating the entire island as the relevant unit for takings analysis. *See Loveladies Harbor*, 28 F.3d, 1171 at 1181; *Forest Properties, Inc., v. United States*, 177 F.3d 1360, 1366 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500-01 (1987)). The court should therefore reverse and remand.

C. The Temporary Nature of Ms. Lear's Economic Diminution Means that She has not Suffered a Complete Economic Deprivation

Any claim of a categorical regulatory takings under *Lucas* must demonstrate that government action has completely deprived the plaintiff of all economic value in the affected property. *Tahoe-Sierra* at 330 (citing *Lucas* at 1017). Cordelia Lear's complaint fails this test because (1) any diminution in value of her property related to ESA protections is temporary; (2)

Cordelia Lear is not prohibited from developing her property, and (3) the limitation on development is one that inheres to the property itself.

1. The Temporary Diminution in the Value of Cordelia Lear's Property Cannot Constitute a Complete Deprivation of Property under Tahoe's Interpretation of the Lucas Rule

The test for assessing non-possessory actions for takings is outlined in *Penn Central*, and it applies in all instances except where the plaintiff suffers a complete economic deprivation, or a per se, categorical takings, as described in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1019 (1992). The Supreme Court clarified in *Tahoe-Sierra* that the *Lucas* exception did not apply where a limitation on property rights was temporary, even where it indefinitely delayed all residential development. *Tahoe-Sierra*, 535 U.S. 302, 311, 342 ("The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact."). Instead the Court clarified that the *Lucas* rule should only apply in the "extraordinary circumstances when *no* productive or economically beneficial use of land is permitted." *Tahoe-Sierra* at 330 (emphasis in original) (citing *Lucas* at 1017). The Court in *Tahoe-Sierra* further clarified:

> The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," . . . would require . . . *Penn Central.*

Id. The Court then declined to apply the *Lucas* rule to a total ban on residential development that stretched to six years, covering two moratoria and a stay issued by federal district court. *Id.* at 315, 342 (noting the length of the moratoria and declining to apply the categorical rule).

In *Tahoe-Sierra*, the Court rejected any bright line tests for permanence for three prudential reasons that all apply in this circumstance. *See id.* at 337-341. Specifically, the Court acknowledged that the state's planning interests weighed against application of the categorical

rule. *Id.* at 304, 339-340. Secondly, those interests extended beyond a single parcel. *Id.* at 340. Thirdly, protecting those interests would be impossible if compensation was required without further plans or permit applications. *Id.* ("We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen . . . at the same time, holding that those planners must compensate landowners for the delay."). Each of these factors applies to the FWS letter as well: FWS's request for an HCP serves a planning function. The HCP, in turn, is a document affecting not just plaintiff's land, but the surrounding parcels, as it requires contiguous replacement of Blue Karner habitat. Thirdly, if compensation was required, FWS would have a perverse incentive against listing species and designating critical habitats. *C.f. id.* (identifying incentives to reach premature planning decisions). For all these reasons, the Twelfth Circuit should decline to apply a categorical rule in this instance as well.

Other circumstances that federal courts must consider in assessing "complete economic deprivation" include: 1) the timing of the regulation relative to acquisition of the property, *see, e.g., Loveladies Harbor*, 28 F.3d, 1171 at 1181; and 2) "economic expectations," or lack thereof of the party seeking compensation. *See Keystone Bituminous Coal*, 480 U.S. at 498. These and other factors pertain to the "the metes and bounds that describe" the "geographic dimensions" and "temporal aspect of the owner's interest." *Tahoe-Sierra* at 331-32.

The District Court failed to analyze the length of the regulatory delay relative to the plaintiff's own delay in seeking to construct the single-family home. In *Tahoe-Sierra*, that comparison weighed heavily in the Supreme Court's holding: i.e. that a thirty-two-month moratoria stretching to six years did not constitute a complete economic deprivation. *Tahoe-Sierra* at 342. In the instant case, the Lear family waited forty-seven years after subdivision to begin seeking permits for construction of her home. *Lear*, slip op. at 5. Cordelia Lear herself

waited seven years before seeking permits. *Id.* A comparable delay of ten years is not a complete economic deprivation. *See Tahoe-Sierra* at 342.

Secondly, it is clear that Ms. Lear has no reasonable economic expectation that she can develop a single-family home on her property without conducting an HCP. The Fifth Amendment does not protect property owners from diminutions in value as assessed against unreasonable economic expectations. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161, (1980) ("[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection."). Instead, the Fifth Amendment protects against objective expectations. *See Good v. United States*, 39 Fed. Cl. 81, 109. If Cordelia Lear had any objective expectation that she would be able to develop a single-family home on her lot, it was obviated by the critical habitat designation in 1992. Ms. Lear had an objective expectation that development on her property would be limited by that designation, as evidenced by her solicitation of FWS officials. *See Lear*, slip op. at 6. She should have also had an attendant objective expectation that an HCP would cost a substantial sum of money. Ms. Lear might have arrived at this objective expectation had she hired a consultant at any time between the critical habitat designation in 1992 and the time when she sought to build a house in 2012. She may have reduced the current delay or expense by ceasing mowing on the Heath at an earlier date. Such steps would have apprised her of reasonable economic expectations and established her own investment-backed expectations. Instead, the Fifth Amendment does not protect her based on the unreasonable, subjective expectations she had instead. Under a weighing "of all the relevant circumstance" plaintiff has not suffered a complete economic deprivation. Instead she has suffered "a temporary restriction causing a diminution in value" which is not a taking "of the parcel as a whole . . . for the property will recover value when the prohibition is lifted." *Tahoe-Sierra* at 304.

2. Lear Cannot Have Suffered a Complete Economic Deprivation Because No Permit has been Denied and No Development Moratorium is Imposed

Economic deprivation arises when a "stick in the bundle of property rights" has been seized or diminished. *See Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979) (discussing the right to exclude as one stick in the bundle of rights). The deprivation itself may accrue when a permit has been denied or a moratorium has been enacted. *See*, *e.g.*, *Resource Investments, Inc.*, 85 Fed. Cl. 447, 484 (2009) ("Because it is the permit denial that can effect a regulatory taking, this court must examine the effect of that denial on plaintiffs' property interests.") (citing *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172–73 (Fed. Cir. 1991)). Critically, Cordelia Lear has not even submitted a permit application. Further, Ms. Lear may still develop the property through the development of an HCP. The FWS sent a letter to Ms. Lear informing her of this procedure. *See Lear*, slip op. at 5. This procedure is applicable to all private parties whose exercise of certain property rights may constitute a taking of an endangered species. 16 U.S.C. § 1539(a)(2)(A). The fact that Plaintiff incurs expenses in completing this procedure is relevant, but not dispositive to a takings analysis. See *Tahoe*-Sierra at 322. (emphasizing the breadth of factors that can be analyzed in a temporary regulatory takings).

3. Any Condition on Development Derives from a Necessity Easement Created by the Lears and Inhering to the Property Itself

The Fifth Amendment does not protect property owners from restrictions that inhere to their property. *Lucas* at 1029. The analysis of inherent restrictions derives from state nuisance and property law, concerning chiefly the collection of property rights attendant to properties of the particular type in question. *Id.* at 1029-31. Real estate property includes, by default, the right to develop unimproved land. *Id.* at 1030. However, that right can be surrendered or sold by a party through various instruments, e.g., express or implied easements. *See id.* at 1029-1030

("[W]e assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title."). Common law provides the basis of state law property rights in most jurisdictions, including New Union, and defines "necessity" and "prior use" easements as two implied easements, *see* Jill Gufstason, *Necessity of Use*, 25 AM. JUR. 2d Easements and Licenses § 27 (2016), the former of which is applicable to the case at hand.

A necessity easement requires three elements that match Cordelia's case: (1) a prior unity of ownership; (2) a necessity of use; and (3) the necessity must have existed at the time of the division of property and at the time of the suit. *Id.* In the instant case, unity of ownership existed on Lear Island until King James Lear passed away in 2005. *See Lear*, slip op. at 5. The development easement is necessary for the existence of the Karner Blue subpopulation of butterflies. *Id.* Finally, that necessity existed prior to 2005, as documented by the critical habitat designation in 1992; and it exists currently, as identified in the FWS letter. *Id.* This implied easement was created by the Lears themselves, who subdivided the property and mowed the Cordelia Lot to the exclusion of the other lots. *Id.*

The form of a necessity easement clarifies that conditions on development—i.e. the preparation of an HCP—inhere to the Cordelia Lot and thus do not constitute compensable takings. *See Lucas* at 1029. Granted, the application of a common-law necessity easement is imperfect. Previous unity of ownership—or a common grantor—is traditionally found between the easement holder and the property owner. *See, e.g.*, *D'Ambro v. Squire*, 204 A.D. 2d 921, 922 (1994). In the instant case, the FWS would constitute the de facto easement holder, able to enforce its rights in the property, *see Minimally Restrict Conservation Easement Acquisition*, 341 U.S. Fish and Wildlife Service Manual 6 (2008), whereas, the prior unity of ownership is between the Lears themselves. *See Lear*, slip op. at 5. The applicability of this common law

principle nonetheless serves the interests of justice. To require compensation based on the actions taken by the Lears—which Cordelia Lear expected would contribute to the presence of an endangered species—would allow other private landowners to extract cash payments from the government by subdividing property, hosting endangered species through land management, and then threatening those species through development. *See* Kennedy, Comment, 9 PACE ENVTL. L. REV. 723, 744. Cordelia Lear herself does not mean to extract payments by such a prospective scheme, but the granting of her requests would open the door to other parties in this manner.

D. Wildlife Viewing and Other Remaining Economically-Viable Uses That Are Historically Established in the Property Provide an Independent Basis for Holding that No Complete Economic Deprivation Has Occurred

The wildlife viewing value inherent to the Cordelia Lot points to other value and uses which collectively deny any argument for a complete loss of economic value. *Tahoe-Sierra* clarifies that 100% reduction in value is necessary for a categorical takings analysis. 535 U.S. at 330. Any remaining value should surpass a token interest. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631. At least one federal jurisdiction requires that the remaining value surpass the property taxes on the parcel. *See Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 490 (rejecting an argument that the sale of hay generating $2,000-$2,500 in revenue denied a categorical takings claim in part because it would be insufficient to pay property taxes); *Bowles v. United States*, 31 Fed. Cl. 37, 48–49 (1994). Courts may also restrict their review to uses which the land can be adapted to, and for which "there is a demand . . . in the reasonably near future." *See, e.g., Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158.

Notwithstanding those strictures on "value," Supreme Court precedent mandates that if any "use" remains, then no complete economic deprivation has occurred. *See Palazzolo*, 533 U.S. at 631; *see also Lucas*, 505 U.S. at 1044, (Blackmun, J., dissenting); *see also* James S. Burling,

Use Versus Value in the Wake of Tahoe–Sierra, in TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF *TAHOE–SIERRA* 99–106 (Thomas E. Roberts ed., 2003) (concluding that use is the crucial criterion, with value standing in as a proxy or shorthand). In *Palazzolo*, the Court summarily rejected a possible complete economic deprivation because the landowner could develop a "substantial residence" although development of a beach club was not possible. 533 U.S. at 631. The Federal Circuit has emphasized use as well. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1564–65 (1994) ("If a regulation prohibits less than all economically beneficial *use* of the land and causes at most a partial destruction of its *value,* the case does not come within the Supreme Court's 'categorical' taking rule.").

Cordelia Lear has both use and value in her 10-acre lot, thereby denying any categorical takings analysis. The use question was addressed by the District Court only within the context of one use: development of a single-family residence. That use is not eliminated. It is instead conditioned on creation of an HCP or a delay until the Karner Blue subpopulation expires. *See Lear*, slip op. at 6. Other historical and contemporary uses of the property remain undiminished. Importantly, the property was held for agricultural and recreational uses by the Lear family for 209 years. *Id.* at 5. More recently, the Lears established a conservation use in actively managing the Cordelia Lot for the creation of the Heath. *See supra* pt. II.C.3. The value of this and other uses exceeds the $1,000 per year that the Brittain County Butterfly Society is willing to pay for recreational use of the property. In particular, the market value of the Cordelia Lot, even with a delay on development, should be sufficient to demonstrate no complete economic deprivation. *See generally Florida Rock Industries v. United States*, 18 F.3d 1560 (discussing at length the use of market value as proof of economically-viable use despite elimination of limestone mining as a permitted use). The district court failed to account for this market value to future developers,

and to Lear herself in constructing a future residence. Such value cannot be negated solely by a delay. *See Tahoe-Sierra*, 535 U.S. at 315, 342.

Current conservation and recreational enjoyment and sale for future development are the appropriate uses to consider for property held by an individual for personal, rather than business use. *Compare Tahoe-Sierra*, 535 U.S. at 315, 342 (association of landowners retained use for future residential development) *with Resource Investments, Inc*., 85 Fed.Cl. 447, 493 (residential and agricultural uses did not provide economically-viable uses for two solid waste company plaintiffs). The District Court fails to asses such personal uses—i.e. future sale and current conservation and recreational enjoyment—although they are demonstrably in demand and plausible, because they are historically established. Accordingly, these non-development uses of the Cordelia Lot substantiate that no complete economic deprivation has occurred. This argument stands separate of those discussed above, providing an independent basis for reversing the District Court's holding.

E. Public Trust Principles Preclude Plaintiff's Takings Claim Against Defendant-Appellant Brittain County

In *Lucas v. South Carolina Coastal Council*, the Supreme Court held that the government bears no liability for a categorical taking when a limitation on developing private property "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. 1003, 1029 (1992). The public trust doctrine is such a "background principle" of property law that places restrictions upon land ownership under *Lucas*, 505 U.S. at 1029. *E.g.*, *Esplanade Props. v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 148 (2003). Under the public trust doctrine, state governments hold title to lands beneath navigable waters

for the interest of the public, unless title to such lands has been explicitly reserved by the federal government. *P.P.L. Mont. v. Montana*, 132 S. Ct. 1215, 1235 (2012).

The District Court held that public trust limits did not preclude Lear's takings claim for two reasons. First, because the United States "did not recognize any public trust rights in non-tidal navigable waters such as Lake Union" at the time of the Lear Grant. *Lear*, slip op. at 10 (citing *P.P.L. Mont.*, 132 S. Ct. at 1227). However, in contrast to the District Court's reasoning, multiple sources suggested that non-tidal navigable waters may fall under the public trust prior to 1803. *E.g.*, *Carson v. Blazer*, 2 Binn. 475, 482 (Pa. 1810) (opinion of Yates, J.)).

Second, the District Court held that public trust limits could not preclude Lear's takings claim, because the lands were granted to Cornelius Lear prior to New Union's statehood, and a prior congressional grant "gives superior title to the congressional grantee as against a subsequent 'equal footing' claim by a State." *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894)). However, the District Court failed to examine both the Northwest Territory Ordinance of 1787, 1 Stat. 51, art. IV (hereinafter "Northwest Ordinance"), which may have placed public trust limits upon Lake Union prior to the Lear Grant, and the presumption against conveyance of lands beneath navigable waters except in case of public exigency or international duty, established by Supreme Court jurisprudence. *Shively*, 152 U.S. at 58. The historical circumstances surrounding the Lear Grant must be analyzed before Brittain County's equal footing doctrine claim can be rejected. This Court should therefore reverse the District Court's holding that public trust limits do not preclude Lear's takings claim against Brittain County.

1. Prior to the Lear Grant, Public Trust Rights Existed in Navigable Waters

The District Court determined that "no public trust navigation reservation" could be presumed to exist at the time of the Lear Grant based upon the "suggest[ion]" by the Supreme

Court that "the bed of non-tidal rivers were considered to be private property prior to 1810." *Lear*, slip op. at 10 (citing *P.P.L. Mont*, 132 S. Ct. at 1227). Indeed, the public trust interest applied only to tidally influenced bodies of water under common law in England. *Shively*, 152 U.S. at 11-14. However, the Supreme Court did not itself define 1810 as the earliest date that non-tidal navigable waters were considered to fall under the public trust in the United States, stating instead that "[s]ome state courts came early to the conclusion that a State holds presumptive title to navigable waters" regardless of tidal nature. *P.P.L. Mont*, 132 S. Ct. at 1227.

In the earliest case cited by the Court in *P.P.L. Montana*, the Supreme Court of Pennsylvania determined that the owners of the banks of the Susquehanna River did not have a right to the waters of the river. *Carson*, 2 Binn. at 477-78. In this opinion, the court cited a statute enacted in 1771, in which the Susquehanna River was declared to be a "highway" and the state legislature made provisions "to improve the navigation thereof." *Id.* at 485 (opinion of Yeates, J.). Thus, this state court interpreted a public interest in non-tidal navigable waterways based on a statute passed prior to 1803. As a result, the public trust doctrine applied to some navigable, non-tidal bodies of water in the United States by the time of the Lear Grant in 1803.

The Northwest Ordinance similarly recognized a public interest in non-tidal navigable waterways, by reserving certain waterways connected to the Mississippi and St. Lawrence rivers in United States territory as "common highways" that should remain "forever free." 1 Stat. 51, art. IV. The Supreme Court recognized that the Congress of the Confederation in this ordinance had realized "the inappropriateness of the tidal test in defining our navigable waters" prior to 1803. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 120 (1921).

Thus, there is evidence that "the bed[s] of non-tidal rivers" were not exclusively "considered to be private property prior to 1810," in contrast to the District Court's holding. *Lear*,

slip op. at 10 (citing *P.P.L. Mont.*, 132 S. Ct. at 1227). As a result, the public trust interest predates the Lear Grant and should be considered a "background principle[]" of property law that precludes a categorical takings claim under *Lucas*. 505 U.S. at 1029.

2. Brittain County's Equal Footing Doctrine Claim Cannot be Rejected without Examining the Historical Circumstances of the Lear Grant

Under the equal footing doctrine, new states obtain title to lands beneath navigable waters within their borders at the time of statehood. *P.P.L. Mont.*, 132 S. Ct. at 1227-28; *Idaho v. United States*, 533 U.S. 262, 272 (2001) ("the default rule is that title to land under navigable waters passes from the United States to a newly admitted State") (citing *Shively*, 152 U.S. at 26-50). Lake Union was navigable at the time of statehood, because it was "traditionally used for interstate navigation," and the cove that Lear wishes to develop was "historically used as a boat landing." *Lear*, slip op. at 4-5. Thus, under the equal footing doctrine's default rule, New Union generally gained title to lands beneath the waters of Lake Union upon statehood, and holds these lands in the public trust.

The District Court rejected Brittain County's argument under the equal footing doctrine, reasoning that "a prior clear congressional grant," such as the Lear Grant, "gives superior title to the congressional grantee as against a subsequent 'equal footing' claim by a State." *Id.* at 10 (citing *Shively*, 152 U.S. at 57-58). We do not deny the fact that Congress granted "all lands under water within a 300-foot radius of the shoreline of [Lear] island" to Cornelius Lear in 1803, when New Union was not yet a state. *Id.* at 4-5. However, we argue that the District Court erred in rejecting Brittain County's public trust argument without undertaking a closer analysis of the historical context of the Lear Grant. Specifically, two historical facts must be examined: (1) whether the Northwest Ordinance established a public interest in the lands under Lake Union prior to the Lear Grant, 1 Stat. 51, art. IV; (2) whether there are facts sufficient to rebut the

"strong presumption" against conveyance of lands under navigable waters recognized by the Supreme Court. *Montana v. United States*, 450 U.S. 544, 552 (1981).

a. The District Court did not Determine Whether the Northwest Ordinance Superseded the Lear Grant

In 1787, the Northwest Ordinance established a temporary government for the United States territory encompassing lands northwest of the Ohio river. 1 Stat. 51 § 1. It provided that:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy . . . .

1 Stat. 51, art. IV. This statute therefore established in 1787 that certain waters in the Northwest Territory must remain freely navigable. The Supreme Court affirmed that this "public interest in navigable streams" in states formed from the Northwest Territory was clearly expressed by the Congress of the Confederation in the Northwest Ordinance and in a subsequent act of Congress. *Econ. Light & Power Co.*, 256 U.S. at 120 (citing Act of August 7, 1789, 1 Stat. 50, ch. 8).

At the time of the Lear Grant in 1803, New Union was a part of the Northwest Territory. *Lear*, slip op. at 4. If Lake Union is one of the navigable waters referenced by the Northwest Ordinance, this ordinance would have established a public trust interest in Lake Union prior to the Lear Grant. Under *Lucas*, such a public trust interest would serve as a background principle of property law, eliminating liability for Lear's categorical takings claim against Brittain County. *Lucas*, 505 U.S. at 1029. The District Court did not examine whether or not Lake Union comprised "navigable waters leading into the Mississippi and Saint Lawrence" or a "carrying place[] between the same." Northwest Ordinance, 1 Stat. 51, art. IV. This examination is crucial to determining whether public trust principles preclude Lear's takings claim.

b. The District Court did not Determine Whether a Public Exigency or International Duty Prompted the Lear Grant

The District Court rejected Brittain County's argument under the equal footing doctrine, citing the Supreme Court case *Shively* as holding that "a prior clear congressional grant gives superior title to the congressional grantee as against a subsequent 'equal footing' claim." *Lear*, slip op. at 10 (citing *Shively*, 152 U.S. at 57-58). However, in *Shively*, the Supreme Court also stated that, while the United States holds land as a territory prior to statehood, the government:

> [M]ay grant, for appropriate purposes, titles or rights in the soil . . . But they have never done so by general laws, and, unless *in some case of international duty or public exigency* . . . [have left] the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Shively, 152 U.S. at 58 (emphasis added). The Supreme Court recognized that the United States government did not typically grant lands beneath navigable waters in the absence of an international duty or public exigency. This principle has been recognized repeatedly. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196-97 (1987). Consequently, due to the link between state sovereignty and control of navigable waters, the Supreme Court has determined that "[a] court deciding a question of title to the bed of a navigable water" must start with a "strong presumption against conveyance." *Montana*, 450 U.S. at 552; *see Idaho*, 533 U.S. at 272-73.

The District Court did not undertake an analysis of what circumstances prompted the inclusion of lands beneath navigable waters in the Lear Grant or identify any public exigency or international duty as the basis of this grant. If no public exigency or international duty existed, then New Union's public trust interest should not be rejected. Thus, Brittain County's argument that public trust principles preclude its liability for a taking of Lear's land under *Lucas*, 505 U.S. at 1029, cannot be rejected without further inquiry into the details of the Lear Grant.

F. The ESA and the BCWPL Must be Considered Separately and Thus Do Not Deprive the Cordelia Lot of all Economic Value Under *Lucas*

Lear can only successfully assert a categorical regulatory taking under *Lucas*, 505 U.S. 1003, if the impacts of the ESA, 16 U.S.C. §§ 1531-1544 (2012), and the BCWPL are considered together. The ESA only prevents development of the Heath, leaving Lear free to develop the cove, and the reverse is true under the BCWPL. *Lear*, slip op. at 5-7. Considered separately, neither government action "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

The District Court held that the restrictions on development should be combined in evaluating whether a taking has occurred. *Lear*, slip op. at 11. In coming to its conclusion, the District Court analogized the situation to that of a joint tort stating that "where the harm is indivisible, each tortfeasor is jointly and severally liable to the plaintiff." *Id.* (citing *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976)). However, we argue that both the District Court's tort analogy and Supreme Court precedents on regulatory takings show that the development limits would be more accurately analyzed under the *Penn Central* regulatory takings framework, in which each regulation would be considered separately. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

1. Under the District Court's Joint Tort Analogy, the Effects of the ESA and the BCWPL are Comparable to Divisible Harms, Not Indivisible Harms

The District Court compared the separate, overlapping regulatory takings to a joint tort. *Lear*, slip op. at 11. In such circumstances, given an indivisible harm, each tortfeasor is liable for the whole harm. *Id.* (citing *Velsicol Chem. Corp.*, 543 S.W.2d 337). However, it is an equally clear tenet of tort law that when a harm is *divisible* each tortfeasor "is liable only for the damage

caused by his acts." *See Velsicol Chem. Corp.* 543 S.W. 2d at 342 (citing Roy D. Jackson, Jr., *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 406 (1939)).

An indivisible harm is defined as a situation in which "the harm is not even theoretically divisible, as death or total destruction of a building," or the harm is indivisible "in that the plaintiff is not able to apportion it among the wrongdoers with reasonable certainty." *Velsicol Chem. Corp.*, 543 S.W. 2d at 342. In such cases, the injured party may "sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.8 (1979) (citing Restatement (Second) of Torts §§ 433A(1), 881 (1965 & 1979)). The Supreme Court has recognized that such principles are patently inapplicable "where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor." *Id.* The Third Restatement of Torts likewise provides that liability should be apportioned separately for divisible harms. Restatement (Third) of Torts § 26 (2000).

Under established principles of tort law, the restrictions are better analogized to divisible than indivisible harms. The ESA prevents the plaintiff from developing the Heath, and the BCWPL separately limits development of the wetlands found in the cove. These restrictions are clearly divisible, from their sources in separate statutes, to their impacts on separate areas of the plaintiff's property. The present case is not analogous to a situation where harm is impossible to apportion, such as when a stream is polluted by several different factories, *Veliscol Chem. Corp.*, 543 S.W. 2d at 342, or when one site is contaminated by hazardous wastes from different sources, *e.g., United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993).

Since the takings effected by the ESA and the BCWPL are divisible, they should be considered separately under *Penn Central*'s takings framework, and not combined into a categorical regulatory taking under *Lucas*.

2. *Penn Central* Provides the Appropriate Framework for Obtaining Compensation in the Present Case

In the absence of applying *Lucas*, a property owner "deprived of all economic use of their property" is not necessarily "denied recourse," as the New Union District Court stated. *Lear*, slip op. at 11. Recourse is potentially available to the plaintiff under separate *Penn Central* analyses of the limitations that the ESA and BCWPL place upon development of her property. Indeed, while there is no precedent that examines the present situation of separate regulatory takings on one property, Supreme Court regulatory takings precedents nevertheless indicate that the *Penn Central* framework is more appropriate than the *Lucas* framework for the present case.

The Court has clearly stated that *Lucas* applies only in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," *Lucas*, 505 U.S. at 1017, and *Penn Central* applies otherwise. Only a 100% reduction in value will suffice to trigger *Lucas* analysis; not even a 95% reduction in value will suffice. *Lucas* at 1019 n.8; *see Cooley v. United States*, 324 F.3d 1297, 1306 (Fed. Cir. 2003) (regulatory taking of 98.8% of value requires *Penn Central* analysis). The Supreme Court has not suggested that *Lucas* should be viewed expansively, as evidenced when the Court declined to extend *Lucas* to regulatory takings that *temporarily* deprived property owners of all economically beneficial use of their property. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

Creating a rule that separate regulatory takings that affect development of the same property must be considered together under *Lucas* would contradict the Supreme Court's preference for analyzing the circumstances of each case. Justice O'Connor cautioned against

adopting such "*per se*" rules in her concurrence to *Palazzolo v. Rhode Island*. 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). Indeed, creating a new rule for analyzing separate regulatory takings on the same property is unnecessary, since *Penn Central* provides a framework for taking a fact-intensive approach to non-categorical regulatory takings. *Penn Central*, 438 U.S. at 124. Applying the *Lucas* framework to the case at bar would also ignore the timing of the ESA and BCWPL relative to when Lear gained title to her property. Reasonable investment-backed expectations form one of the prongs of the *Penn Central* test, 438 U.S. at 124, and the timing of an enacted regulation relative to the acquisition of title "helps to shape the reasonableness of [investment-backed] expectations." *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

In sum, Supreme Court regulatory takings precedents indicate that applying the fact-intensive approach of *Penn Central* to the present case is preferable to extending *Lucas* to create a new rule regarding situations with multiple different development restrictions on the same property. Such an approach would not necessarily deny Lear recourse even if she were "deprived of all economic use of [her] property," *Lear*, slip op. at 11, since *Penn Central* would provide her with a mechanism to obtain compensation for either or both regulatory takings.

CONCLUSION

For the foregoing reasons, defendant-appellant-cross appellee Fish and Wildlife Service respectfully requests this Court to affirm the District Court's dismissal of Lear's claim that the ESA is an unconstitutional exercise of the Commerce Clause, and reverse the District Court's holdings that FWS and Brittain County's actions constituted an unconstitutional taking of Lear's property in violation of the Fifth Amendment to the Constitution.