Team No. 45

**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*

# BRIEF OF APPELLANT UNITED STATES FISH AND WILDLIFE SERVICE

Oral Argument Requested

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## JURISDICTIONAL STATEMENT

Appellant Cordelia Lear filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1491(a). On June 1, 2016, the district court issued a final order ruling in favor of Cordelia Lear in part and the United States Fish and Wildlife Service in part, and against Brittain County. Cordelia Lear, United States Fish and Wildlife Service, and Brittain County filed timely notices of appeal challenging the district court's order. This Court has jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the Endangered Species Act is a valid exercise of Congress's Commerce Power as applied to an intrastate population of endangered Karner Blue butterflies that would be threatened by construction of a single-family residence on the property.

2. Whether Cordelia Lear's takings claim is ripe without having applied for an Incidental Take Permit under the Endangered Species Act § 10.

3. Whether the relevant parcel of land for the takings claim is the entirety of Lear Island or the Cordelia lot from the subdivided whole in 1965.

4. Assuming the relevant parcel is the Cordelia lot, whether a takings claim for complete deprivation of economic value is precluded because the lot will become developable after the Karner Blue butterflies die off naturally in 10 years.

5. Assuming the relevant parcel is the Cordelia lot, whether a takings claim for complete deprivation of economic value is precluded because the Brittain County Butterfly Society has offered to pay $1,000 per year in rent for use of the property.

6. Assuming the relevant parcel is the Cordelia lot, whether United States Fish and Wildlife Service is still liable for a complete deprivation of economic value even though its regulation, independent of a separate county regulation, allows development of a single-family residence on filled wetlands.

7. Assuming the relevant parcel is the Cordelia lot, whether public trust principles inhere in Cordelia Lear's title such that Brittain County may deny the wetlands fill permit without a taking.

## STATEMENT OF THE CASE

### I. CONGRESS GRANTED LEAR ISLAND TO CORNELIUS LEAR AS PART OF THE NORTHWEST TERRITORIES.

The United States acquired Lake Union and Lear Island as part of the Northwest Territories. R. 4. Lake Union is a large lake, traditionally used for interstate navigation. *Id.* Lear Island is a small island within Lake Union. *Id.*

In 1803, Congress granted Lear Island to Cornelius Lear (Cornelius). *Id.* The grant included "all lands under water within a 300-foot radius" of the island and some underwater land in the strait separating Lear Island from the mainland. R. 4–5.

In 1965, King James Lear (King), a descendant of Cornelius, deeded the island to his daughters: Cordelia Lear (Cordelia), Goneril Lear (Goneril), and Reagan Lear (Reagan). R. 5. He granted a 10-acre lot to Cordelia (Cordelia lot), a 440-acre lot to Reagan (Reagan lot), and a 550-acre lot for Goneril (Goneril lot). *Id*. King reserved a life estate in each lot for himself. *Id.* At that time, Brittain County's Town Planning Board determined that a single-family residence could be built on each lot according to zoning requirements. *Id.*

### II. THE LEAR FAMILY MADE PRODUCTIVE USE OF THE ISLAND AS A WHOLE THROUGHOUT OWNERSHIP OF THE PROPERTY.

From the time of the grant in 1803, Cornelius and his descendants resided on the island. R. 5. The family built a homestead on the area that would later become the Goneril lot, and used the island for farming, hunting, and fishing. *Id.* Following King's grant of the three lots, the family constructed another residence on the Reagan lot. *Id.*

The Cordelia lot is the only undeveloped lot. *Id.* It consists of an access strip 40 by 1,000 feet, an open field, and a one acre marshy cove (wetlands) that residents historically used as an open water boat landing. *Id.* The family refers to the field on the Cordelia lot as "the Heath," which they mow every October since agricultural use ended in 1965. *Id.* Because of the mowing,

blue lupine flowers grow on the Heath. *Id.* These flowers are a critical habitat for Karner Blue butterflies (Karner Blues). *Id.* Without mowing, the lot would naturally revert to a forest, eliminating the flowers and Karner Blues in about 10 years. R. 7.

## III. BRITTAIN COUNTY AND UNITED STATES FISH AND WILDLIFE SERVICE ENACTED REGULATIONS TO PROTECT THE ENVIRONMENT AND ENDANGERED SPECIES.

In 1982, Brittain County, located in New Union, enacted the Wetlands Preservation Law (Wetland Regulation), which requires permits to fill wetlands and only allows filling to support water-dependent uses. R. 6–7. The Wetland Regulation applies to wetlands around Lear Island. R. 6.

The Endangered Species Act (ESA) grants the United States Fish and Wildlife Service (FWS) authority to add species that are threatened by natural or manmade forces to the endangered list for protection. 50 C.F.R. § 17.1. In 1992, FWS added Karner Blues to the endangered species list and designated the Heath and the access strip on Lear Island as a critical habitat for the New Union population of Karner Blues. R. 6. Karner Blues exist in other states, but the only population in New Union lives on Lear Island and does not migrate or cross state boundaries because of limited flight distance and inability to travel without following a woodland edge. *Id.*

## IV. CORDELIA MADE AN INQUIRY WITH A FWS AGENT REGARDING DEVELOPMENT OF THE CORDELIA LOT, BUT DID NOT APPLY FOR AN INCIDENTAL TAKE PERMIT.

When King died in 2005, his three daughters came into possession of their respective lots. R. 5. In 2012, Cordelia decided to build a single-family residence on the Cordelia lot. *Id.* Cordelia contacted the FWS New Union field office in April 2012 to determine development requirements for the Cordelia lot despite the presence of Karner Blues. R. 6. She spoke to a FWS agent, who advised her that disturbing the lupine field would be a "take" of Karner Blues on the

lot, which is illegal under the ESA. *Id.*; 50 C.F.R. § 17.21(c). However, the agent also stated that she could obtain an Incidental Take Permit (ITP) under the ESA. R. 6. The agent advised her that the application for a permit would have to include a habitat conservation plan (HCP) for Karner Blues, and an environmental assessment pursuant to the National Environmental Policy Act. *Id.* Finally, the agent advised her that the HCP would need to provide for replacement habitat on an acre-for-acre basis, and would require continued annual mowing to preserve the Karner Blues' habitat. *Id.*

The only area adjacent to the Cordelia lot belongs to Cordelia's sister, Goneril, who stated that she would not cooperate in the development of a replacement habitat on her property. *Id.* Cordelia contacted a private environmental consultant who estimated that the HCP and environmental assessment would cost approximately $150,000. *Id.* FWS was not consulted and made no estimate. R. 7.

In May 2012, FWS sent Cordelia a letter advising her that all of her ten-acre property was critical habitat for Karner Blues, and that any disturbance would require an ITP. R. 6. The letter reiterated the same conditions specified by the agent. *Id.* It included a handbook with information on how to develop an HCP and submit an ITP application. *Id.*

## V. CORDELIA APPLIED TO BRITTAIN COUNTY FOR PERMISSION TO FILL THE WETLANDS ADJACENT TO THE CORDELIA LOT FOR DEVELOPMENT AND WAS DENIED.

Instead of pursuing an ITP as required by the ESA, Cordelia proposed to fill one-half-acre of the wetlands and an access causeway near the island so she could build a residence that would not disturb the Karner Blues' habitat. R. 7. Cordelia did not need federal approval for the proposal, because the Army Corps of Engineers allows filling of one-half-acre or less pursuant to Nationwide Permit 29. *Id.* However, Cordelia did need a permit to fill the wetlands under Brittain County's Wetland Regulation. *Id.* Cordelia applied for the permit with the County

Wetlands Board in August 2013, but the board denied her application in December 2013 because a single-family residence was not a water-dependent use as permitted by law. *Id.*

## VI. CORDELIA MADE NO ATTEMPT TO REASSESS HER PROPERTY VALUE IN LIGHT OF THE REGULATIONS.

The fair market value of the Cordelia lot without any limiting regulations on the development of a single-family residence was $100,000, and the corresponding annual property tax was $1500. *Id.* Cordelia did not assess the fair market value for the Cordelia lot after she became aware of the ESA regulation and Wetland Regulation. *Id.* The property has no value for timber or agriculture. *Id.* However, while there is no traditional market for the Cordelia lot without rights to develop a residence, the Brittain County Butterfly Society offered to pay $1,000 in rent for the privilege of conducting butterfly viewings on the Cordelia lot. *Id.* Cordelia did not accept the offer. *Id.*

## VII. CORDELIA FILED SUIT SEEKING COMPENSATION FOR THE RESTRICTION ON DEVELOPMENT INSTEAD OF FILING FOR AN ITP.

Cordelia filed suit in February 2014, two months after she was denied the wetlands fill permit. *Id.* Cordelia brought a civil action, instead of filing for an ITP as required by the ESA § 10. R. 1; 16 U.S.C. § 1539(a)(1)(B) (2012). Through this action, Cordelia sought a declaration that the ESA regulation was unconstitutional, and in the alternative, sought compensation from both FWS and Brittain County for regulatory taking of her property. R. 7.

The district court held that the ESA regulation of Karner Blues was a constitutional exercise of Congress's Commerce Power. R. 7–8. However, the court accepted Cordelia's takings claim and determined that both regulations completely deprived Cordelia of all property value in the Cordelia lot. R. 11. The court held that the regulation of Karner Blues was a taking with respect to the Cordelia lot because it was, at least, a decade long deprivation of any development rights. R. 10. Further, the court held that the public trust doctrine does not apply to

the Cordelia lot and did not insulate Brittain County from takings liability. R. 11. As a result of the takings claim, the court found FWS liable for $10,000 and Brittain County for $90,000 in damages. R. 12. FWS and Brittain County appealed to this court for review of the takings claim decision and Cordelia and Brittain County appealed to this court for review of the trial court's Commerce Power determination. R. 1.

## SUMMARY OF THE ARGUMENT

The ESA regulation of Karner Blues is a valid exercise of Congress's Commerce Power because it is substantially related to interstate commerce. The link between the regulation of Karner Blues and interstate commerce is not too attenuated, whether considering the regulation alone or the aggregate regulation of all endangered species under the ESA. First, the preservation of Karner Blues directly impacts interstate commerce, due to potential value of the butterflies and costs associated with preservation, and indirectly impacts other activities related to interstate commerce including Cordelia's proposed development. Second, the aggregate regulation of all endangered species under the ESA substantially affects interstate commerce because individual species have varying impacts on interstate commerce and the ESA is a comprehensive regulatory regime.

Furthermore, Cordelia's takings claim against FWS is not ripe for judicial decision. The claim is not ripe because Cordelia never applied for an ITP as the ESA requires. In addition, Cordelia does not know the burden of the application process because FWS has not given her a final assessment or communicated her expected financial obligation in the permitting process.

Even if Cordelia's claim is ripe, the ESA regulation and the Wetland Regulation do not completely deprive Cordelia of the economic use and value of the island and her parcel. First, the diminution in value is evaluated using the entire island, not simply the Cordelia lot, because

King did not partition the island until after the ESA regulation took effect. With development on other parts of the island, the regulations do not completely deprive the entire island of economic value when viewed as a whole.

Even if this court assumes the relevant parcel is the Cordelia lot, any deprivation of value will be temporary. The ESA regulation could become obsolete in 10 years if Cordelia stops mowing and the Heath reverts back to its natural habitat. Although Cordelia would not be able to develop her parcel for 10 years, a 10-year ban does not deprive Cordelia of all economic value because she will be able to develop after the Karner Blues die off naturally. Consequentially, Cordelia will be unjustly enriched if she receives compensation for a taking because in 10 years she will be able to develop on her lot and retain the takings compensation.

Further, the regulations do not deprive Cordelia of all the economic use and value of her lot. First, the Butterfly Society offered to pay Cordelia for the ability to see the Karner Blues on her lot. Although this rent was not her original intent with the property, this income is an economic use that confers value to her lot. Second, property taxes do not render the Cordelia lot valueless even though they currently exceed the rent the Butterfly Society is willing to pay. If the Cordelia lot has decreased in value, as the district court found, then the property taxes will also decrease given the connection to the property value. With the property taxes reduced, Cordelia will profit from the Butterfly Society's rent early on, conferring economic value to the property.

Additionally, the ESA regulation limits development on the Heath and the access strip but it allows Cordelia to develop in the wetlands on the Cordelia lot. Although both the federal regulation and the state regulation affect the value of the Cordelia lot, FWS is only liable for the deprivation of value caused by federal regulations or federal decisions. FWS is not liable for any

diminution in value caused by independent actions taken by Brittain County under their Wetland Regulation.

Finally, the public trust doctrine precludes a takings claim based on denial of the permit to fill wetlands under two theories. First, because the most basic principle of protecting navigable waters existed at the time of the original grant, state imposed limitations inhere in the grant. Second, New Union entered the United States on equal footing, which granted it presumptive title to the land under navigable waterways and the right to regulate this land without a taking.

## STANDARD OF REVIEW

Courts review the constitutionality of a statute under the Commerce Clause de novo. *United States v. Patton*, 451 F.3d 615, 620 (10th Cir. 2006). A takings claim under the Fifth Amendment is reviewed as a question of law that is based on factual determinations. *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004). The appellate court examines the trial court's "legal determinations de novo and its findings of fact for clear error." *Id.*

## ARGUMENT

### I. THE ESA REGULATION OF KARNER BLUES IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER BECAUSE IT IS SUBSTANTIALLY RELATED TO INTERSTATE COMMERCE.

The Commerce Clause allows Congress "to regulate commerce. . .among the several states." U.S. Const. art. I, § 8, cl. 3. Congress may regulate three broad categories of interstate commerce: channels of interstate commerce, instrumentalities of interstate commerce, or intrastate activities that substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549*,* 558–59 (1995); *United States v. Morrison,* 529 U.S. 598, 610 (2000). Courts afford congressional legislation a "presumption of constitutionality" and will only invalidate it upon a "plain showing" that Congress exceeded its constitutional limit. *Morrison*, 529 U.S. at 607. Here,

the regulation of the New Union subpopulation of Karner Blues is constitutional because it is an intrastate activity that substantially affects interstate commerce.

An intrastate activity substantially affects interstate commerce if the activity is economic in nature and the link between the activity and interstate commerce is not too attenuated. *Id.* at 610–12. Additionally, courts may find an activity has a substantial effect on interstate commerce if the legislation or congressional findings specifically detail the impact on interstate commerce. *Id.* Here, the ESA regulation of Karner Blues is not statutorily limited to interstate commerce and Congress made no explicit finding about the legislation's impact, so we rely on the economic nature of the activity and the link between the activity and interstate commerce. The ESA regulation of Karner Blues is a valid exercise of Congress's Commerce Power because the activity is economic and its relation to interstate commerce is not too attenuated.

### A. The link between the regulation of Karner Blues and interstate commerce is not too attenuated whether considering the regulation of Karner Blues alone or the aggregate regulation of all endangered species under the ESA.

Congress may regulate intrastate activity if courts can find a "rational basis" to link the activity to interstate commerce. *Lopez*, 514 U.S. at 557. However, this link must not pile "inference upon inference." *Id.* at 567.

In evaluating the link between an activity and interstate commerce, courts can focus on the activity alone or can aggregate the entire class of similar activities. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 636 (5th Cir. 2003). Here, the ESA regulation of Karner Blues has a substantial effect on interstate commerce whether evaluating the regulation of Karner Blues alone or whether aggregating the regulation of all endangered species under the ESA.

### 1. The preservation of Karner Blues directly impacts interstate commerce and indirectly impacts other activities related to interstate commerce.

Courts may determine a link is not too attenuated by observing the impact of the specifically regulated activity on interstate commerce. *Id.* Courts focus on both the direct impact of the regulated activity and the indirect impact of the regulated activity on related activities. *See Gibbs v. Babbitt*, 214 F.3d 483, 505–06 (4th Cir. 2000); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003).

For example, in *Gibbs*, the court found that the impact of the ESA protection of intrastate red wolves had a substantial effect on interstate commerce because of related economic interests in red wolf tourism, scientific research, and pelt trade. 214 F.3d at 505–06. Similarly, in *Rancho Viejo*, the court found that ESA regulations indirectly preventing the construction of a highway had a substantial effect on interstate commerce because the highway would have been constructed with materials and labor from interstate markets. 323 F.3d at 1069; *see also Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (holding the ESA protection of flies that then prohibited the construction of a commercial development had an interstate economic impact).

Here, both direct regulation of Karner Blues and the indirect impact on Cordelia's proposed development affect interstate commerce. First, regulation of Karner Blues affects interstate commerce through tourism and the potential for future economic research tied to all endangered species. *See Gibbs*, 214 F.3d at 505–06. The Brittain County Butterfly Society is interested in preserving tourism opportunities related to Karner Blues, which will bring interstate tourist revenue into Brittain County. *See* R. 7. Further, the materials and labor used to protect Karner Blues, including the lawn mower, likely come from both in-state and out-of-state sources. *See* R. 5.

Second, the impact on Cordelia's proposed development affects interstate commerce because materials and labor related to that development would likely come from out-of-state sources. *See Rancho Viejo*, 323 F.3d at 1069. Whether the court focuses its inquiry on protection of the Karner blues or the prohibition of the proposed development, the ESA substantially affects interstate commerce.

**2. The aggregate regulation of all endangered species under the ESA substantially affects interstate commerce because individual species have varying impacts on interstate commerce and the ESA is a comprehensive regulatory regime.**

Another way courts may determine a link between an activity and interstate commerce is not too attenuated is by aggregating the impact of the entire class of regulated activities on interstate commerce. *GDF Realty*, 326 F.3d at 636. Further, courts have allowed regulation of any activity that is part of a comprehensive regulatory regime that bears a substantial relationship to interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 24 (2005). Courts have found the ESA is a valid exercise of Congress's Commerce Power both based on the statute's aggregate effect on interstate commerce and its function as a comprehensive regulatory regime. *See GDF Realty*, 326 F.3d at 624; *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1167 (9th Cir. 2011).

For instance, in *GDF Realty*, the court held that the ESA is a valid exercise of Congress's Commerce Power when aggregating the impact of all endangered species on interstate commerce. 326 F.3d at 624. There, the court concluded that preservation of a cave species alone had a de minimis effect on interstate commerce. *Id.* However, the court held that the ESA was valid because it is economic in nature and substantially affected interstate commerce since allowing the take of one species would threaten the "interdependent web" of all species. *Id.* at

640; *see also* H.R. Rep. No. 93–412, at 10 (according to Congress, the "essential purpose" of the ESA is "to protect the ecosystems upon which we and other species depend").

In a concurrence in *Raich*, the Supreme Court suggested Congress's ability to regulate intrastate commerce may extend to any broad interstate federal regulatory regime if it could "undercut" interstate commerce and the means were "plainly adapted." 545 U.S. at 38–39 (Scalia J., concurring). There, the Controlled Substances Act (CSA) regulated the growth of solely intrastate medicinal marijuana in California. *Id.* at 5. The Court concluded that the CSA could prohibit intrastate, noncommercial cultivation because some of the medicinal marijuana could be diverted for interstate economic sale. *Id*. Justice Scalia reasoned that the Constitution's Necessary and Proper Clause justified regulation of intrastate commerce under a comprehensive scheme of interstate federal regulation. *Id.* at 38 (Scalia J., concurring). Another concurring opinion stated that courts cannot "excise individual applications of a concededly valid statutory scheme." *Id.* at 23 (Stevens J., concurring).

*Salazar* followed the reasoning of the *Raich* concurrence and held that the ESA regulation of the delta smelt, an intrastate fish species with no economic value, was constitutional as part of a comprehensive regulatory scheme that substantially relates to interstate commerce. *Salazar*, 638 F.3d at 1167. The ESA listed the delta smelt as a threatened species and designated its habitat for protection. *Id.* While the delta smelt had no direct connection to interstate commerce, the court reasoned that the ESA as a whole implicates interstate commerce. *Id.* at 1176. The court found the ESA might implicate interstate commerce by prohibiting current or future unanticipated commercial use of protected species, and may stimulate interstate commerce by regenerating dwindling populations of protected species or travelling for recreational or scientific observation of these species. *Id.* Finally, the court found that the genetic

biodiversity provided by protecting species improves interstate agriculture, aquaculture, and scientific research for medicine and other industries. *Id.*

Here, FWS's regulation of Karner Blues is valid because the regulation of all species under the ESA has a substantial effect on interstate commerce and the ESA regulation of Karner Blues is a valid part of a comprehensive regulatory regime in the ESA. First, the take of an intrastate species affects the "interdependent web" of all species since an impact on an intrastate species can have a ripple effect and impact other species. *See GDF Realty*, 326 F.3d at 624. The ESA as a whole regulates many species that are inextricably linked together; in this regard preservation of the Karner Blues affects all species. *See* H.R. Rep. No. 93–412, at 10.

Further, just like the protection of the intrastate delta smelt in *Salazar*, the protection of the intrastate Karner Blues is part of the comprehensive federal regulatory regime protecting all endangered species. *See* 638 F.3d at 1167; *see also Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007) (finding the ESA regulation of the Alabama sturgeon, another intrastate species with no economic value, was a valid exercise of the Commerce Power as part of a comprehensive interstate regulatory regime). Many of these species impact interstate commerce in a variety of ways: they may be sold in interstate commerce, interstate travelers may stimulate commerce through observation or scientific research, and these species contribute to overall biodiversity that stimulates industries including scientific and medicinal research. *See Salazar*, 638 F.3d at 1176. Because the ESA has a broad impact on a variety of species linked to interstate commerce, the regulation of the Karner Blues is a valid exercise of Congress's Commerce Power.

## II. CORDELIA DOES NOT STATE A COMPENSABLE TAKINGS CLAIM BECAUSE HER CLAIM IS NOT RIPE, AND THE ESA REGULATIONS AND THE WETLAND REGULATIONS DID NOT COMPLETELY DEPRIVE HER PROPERTY OF VALUE.

Under the Fifth Amendment, the government shall not take private property for public use without "just compensation." U.S. Const. art. V. A regulatory action is a *per se* taking under only two narrow circumstances. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). First, government action constitutes a per se taking when the government physically appropriates an owner's property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Second, government action constitutes a per se taking when a regulation completely deprives the owner of economic value and "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010, 1019 (1992).

Cordelia fails to state a claim under which she would be compensated for a per se regulatory taking under the *Lucas* approach for three reasons. First, Cordelia's takings claim is not ripe for adjudication. Second, the ESA regulations and the Wetland Regulation do not completely deprive the Cordelia lot of all economic value and use. Third, the public trust doctrine precludes using the Wetland Regulation as a basis for Cordelia's takings claim.

### A. Cordelia's takings claim against FWS is not ripe for litigation because Cordelia never applied for an ITP and the burden of the permitting process remains unknown.

Courts cannot hear a claim unless it is "ripe" for judicial resolution. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). Ripeness depends on two factors: the "fitness" of the issues for a judicial decision and the "hardship" on the claimant of withholding court consideration. *Salazar,* 638 F.3d at 1173. An issue is fit for judicial review if further factual development "will not significantly advance the court's ability to deal with the legal issues presented." *Id.* A claimant experiences hardship if withholding judicial decision

"imposes significant practical harm" upon them. *Id.* Courts balance fitness and hardship, giving less weight to fitness when hardship is great, and vice versa. *See id.*

A takings claim challenging the application of land-use regulation is generally not fit for judicial review until the government entity charged with implementing the regulation has reached a "final decision" regarding the application to the property at issue. *Williamson*, 473 U.S. at 186; *see also Greenbrier v. United States,* 193 F.3d 1348, 1359 (Fed. Cir. 1999) ("a takings claim is unlikely to be ripe until the property owner complies with [government] procedures"). Under the ESA, a person seeking to engage in acts that might take a listed species must file an application for an ITP that includes an HCP. 16 U.S.C. § 1539(a)(2)(A)(i)–(iv); *see also Morris v. United States*, 392 F.3d 1372, 1374 (Fed. Cir. 2004) (holding a plaintiff could not file a takings claim without first filing for an ITP).

Courts recognize two exceptions to the general permit requirement based on the plaintiff's hardship. First, a claimant need not file a permit application when all permissible uses of the property are already known and restricted. *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). In *Palazzolo*, the court held a takings claim was ripe because the claimant had already been denied two applications and the government gave "no indication" it would accept a modified application based on different purpose or scope. *Id.* Second, a claimant need not file an application when doing so would be futile or effectively deprive the property of value. *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996). In *Hage*, the court held a takings claim was ripe because the permit process would "effectively deprive plaintiffs of their property rights" by drawing into question vested rights tied to farmland with substantial personal investment. *Id.*

However, in *Morris*, the court limited these exceptions to cases involving the submission of multiple futile applications. 392 F.3d at 1376. There, the plaintiff never applied for an ITP

because he alleged that the permit cost more than the value of the property. *Id.* at 1374. The court held that the plaintiff's claim was not ripe for two reasons. *Id.* at 1376. First, the court found an application is futile only when subsequent applications will not overcome a prior rejection. *Id.* Second, the court found that the cost and effect on investment-backed expectations was unknowable until an application was filed because an applicant could request discretionary assistance from the administrative agency that may reduce the application's cost. *Id.* at 1377.

Here, Cordelia's claim is not ripe because she has not exhausted administrative remedies by filing an ITP. *See* R. 7. Cordelia decided not to file an application because she was told by a FWS agent and a subsequent letter from FWS that any disturbance other than her annual mowing, would constitute a take of the Karner Blues. *See* R. 6. However, the agent's statement and letter are not a final agency decision and cannot be equated with one without a full review. *See Williamson*, 473 U.S. at 186. Cordelia's claim does not fall within the *Palazzolo* exception because Cordelia did not file an initial application, unlike in *Palazzolo*, where the plaintiff filed two applications that were rejected by the agency. *See Palazzolo*, 533 U.S. at 607. Cordelia's claim is not futile and she cannot know if FWS would provide any means to overcome rejection because she has not filed for an ITP. *See Morris*, 392 F.3d at 1376. Thus, the agency has not released a final decision.

Additionally, Cordelia's claim is not ripe because the cost of a permit is currently unclear. While an environmental consultant told Cordelia the expected cost of the application process, she does not know if FWS may offer discretionary assistance that may reduce the cost of the application. *See id.* at 1377. Further, Cordelia's claim does not fall within the *Hage* exception for deprivation of property rights because Cordelia has not lost any vested rights in the property and did not previously invest in developing the property. *See* 35 Fed. Cl. at 164.

Cordelia did not start development before the regulation took effect and preliminary approval under zoning laws did not create a vested right. *See Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (U.S. Ct. Fed. Claims 1981) (holding preliminary knowledge that development may be approved according to regulations at the time of purchase does not create a vested right). While Cordelia may face financial obstacles in filing the application, her loss is less than the deprivation of previously exercised rights and investments.

Cordelia's takings claim is not ripe for judicial review because she has not filed an application, the cost remains unknown, and she has not previously invested in developing the property.

**B. The ESA regulation and the Wetland Regulation do not cause a per se regulatory taking because they do not completely deprive the Cordelia lot of its economic value or its economic use.**

A per se regulatory taking occurs in the "extraordinary case in which a regulation permanently deprives property of all value" and "all economically beneficial use[s]." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (internal citation omitted); *Lucas*, 505 U.S. at 1010. Generally, a property retains economic value if it retains an economic use. *See Palazzolo*, 533 U.S. at 621 (holding that the property retained part of its value because the owner had an additional economic use tied to upland development). A partial regulatory taking occurs when a regulation partially deprives the property of significant economic value and use. *Tahoe-Sierra*, 535 U.S. at 326.The court requires a fact-specific inquiry to determine if there is a partial regulatory taking. *See Palazzolo*, 533 U.S. at 617; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*).

The ESA regulation of Karner Blues and the Wetland Regulation are not a per se regulatory taking because they do not completely deprive Cordelia of all economic value and use of her property. First, these regulations do not completely deprive the entire island of value and

use, and these regulations to not deprive the Cordelia lot of value and use for the duration of Cordelia's property interest in her parcel. Second, the Butterfly Society's offer to provide rent preserves the property's value by providing new economic use. Third, the takings claim should not include the depreciation in value caused by the Wetland Regulation because the Wetland Regulation is an independent local government action.

**1. The ESA regulation and the Wetland Regulation only partially restrict development on the entire island and the ESA's indirect restriction on development is only temporary.**

The regulations do not cause a per se regulatory taking because the island has other economic use use and the restriction of development on the Cordelia lot is temporary.

In determining complete loss of economic value, courts focus on "the parcel as a whole." *Tahoe-Sierra*, 535 U.S. at 327. In other words, courts do "not divide a single parcel into discrete segments" when evaluating a takings claim. *Penn Central*, 438 U.S. at 130. Instead, an owner's entire property interest is defined both by its "geographic dimensions" and the "temporal" duration of the owner's interest. *Tahoe-Sierra*, 535 U.S. at 331–32.

Cordelia improperly segmented the property both physically and temporally in her takings claim. First, the parcel in question is not her ten-acre property but the entire island. As such, Cordelia's takings claim fails because Lear Island has other economic uses and retains its economic value throughout the whole unit. Second, even if the Cordelia lot is the focus of this court's inquiry, any diminution in value to that lot is only temporary and not a complete loss of economic value. In either case, the ESA regulation and the Wetland Regulation only partially restrict development and are therefore not a per se regulatory taking.

### i. The Cordelia lot should not be conceptually severed from Lear Island because FWS passed the ESA regulation to protect Karner Blues prior to formal division of the lots.

In considering the contours of physical property, courts emphasize the need for a "flexible approach" that takes into account a broad range of "factual nuances" rather than a bright-line rule. *Loveladies Harbor v. United States*, 28 F.3d 1171, 1180–81 (Fed. Cir. 1994); *see also Deltona Corp.*, 657 F.2d at 1192 (considering all of a developer's separate lots as a unit, rather than individually). "[F]actual nuances" can include "the timing of transfers in light of the developing regulatory environment." *Loveladies*, 28 F.3d at 1181. As such, courts consider the timing of the regulation and the timing of development when deciding whether to analyze the property in its entirety or in smaller sections. *See id.* However, the Supreme Court has "consistently rejected" dividing up physical property into discrete segments for a takings analysis. *Tahoe-Sierra*, 535 U.S. at 331.

The government may cause a taking where the government implements a regulation after a parcel has been approved for development. *See Loveladies*, 28 F.3d at 1181. In *Loveladies*, the state barred wetland fills in a location after the government already approved an initial development project. *Id.* Consequently, the court found a take of the remaining 12.5-acre undeveloped parcel because the government had approved the unfinished development. *Id.*

Here, the relevant lot for a takings analysis is the entirety of Lear Island, because Cordelia came into possession of her lot and attempted development after the regulation was in place. After King deeded the three lots in 1965, the retention of a life estate in each unified the island until King's death in 2005. *See* R. 5. The FWS promulgated the ESA regulation at issue here—listing the Karner Blues—in 1992. R. 5. The 1992 regulation prevented King and Cordelia from building a single-residence home on the Heath at that time. *See* R. 6. Cordelia cannot assert now that the regulation is a taking as applied to the Cordelia lot because her father's unifying

interest in the island terminated after the FWS promulgated the regulation. *See e.g. Deltona Corp.*, 657 F.2d at 1193 (holding no per se taking where regulations enacted after the lots were acquired prevented development on those parcels). The ESA regulation did not cause a per se taking when it was enacted because the Cordelia lot was still unified in the retained life estate and development continued on the rest of the island. *See* R. 5. As such, there is no per se regulatory taking if this court considers the island as a whole.

While the district court correctly noted that the Lear family did not engage in subterfuge or attempt to avert the regulation by dividing the island, this court should still consider the timing of the grant and ultimate division with respect to the ESA. *See* R. 10. Further, contrary to the district court's assertion that the division of a larger lot into discrete parcels should be determinative, as the court in *Loveladies* articulated, a flexible approach better accounts for the factual nuances here. *See* 28 F.2d at 1181. Avoiding bright line rules will discourage "strategic behavior on the part of developers" to divvy up parcels in advance of applying for development permits. *See id*. Therefore, this court should consider the island as a whole instead of the lots which came into existence after the ESA regulation was in place. The regulations do not create a per se regulatory taking or deprive the entire island of value because the lots belonging to the other Lear sisters are unrestricted by the ESA regulation. *See* R. 5; *Palazzolo*, 533 U.S. at 630-631.

**ii. The ESA regulation is only a temporary deprivation of economic value.**

The ESA regulation of Karner Blues does not cause a per se regulatory taking because, without mowing, the Heath and access strip will become forested, killing the Karner Blues and allowing Cordelia to develop the land. *See* R. 10.

A per se regulatory taking refers to a permanent deprivation of value throughout the duration of the property owner's interest. *Tahoe-Sierra*, 535 U.S. at 332 ("a fee simple estate

cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."). A temporary loss of economic value does not constitute a per se regulatory taking. *Id.* at 334. Temporary prohibitions on development can occur either by government moratoria, permitting processes, or natural events. *See id.* at 332; *Bass Enterprises*, 381 F.3d at 1368; *Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004).

The court in *Tahoe-Sierra* held that a 33-month delay in development only temporarily deprived the economic value of the property, and therefore was not a per se regulatory taking. 535 U.S. at 332. There, the local government imposed a moratorium which lasted less than three years. *Id.* at 306. The court reasoned that there was not a complete deprivation of value since the property owner maintained a fee simple interest in the property and it would recover value once the regulation was lifted or the permit was approved. *Id.* at 332. The court also rejected the developer's request to "sever" the land owner's fee simple estate into 32-month segments to determine whether the moratorium was a per se regulatory taking. *Id.* at 331. The court reasoned that dividing a property into temporal segments would be "circular" because every delay, including normal permit delays, would cause a per se regulatory taking. *Id.*

In this case, the restriction of development on the Cordelia lot is temporary. If Cordelia did nothing to the Cordelia lot, the Heath would revert to forest in 10 years, eliminating the only population of Karner Blues in New Union. *See* R. 7. With no more Karner Blues to protect, FWS would not impose further restrictions on development and Cordelia would be free to build. *See* R. 7; *Seiber*, 364 F.3d at 1365 (holding that the migration of an endangered owl species from a property ended the economic deprivation of an ESA regulation since it no longer applied).

Cordelia now has a fee simple interest in her estate so any deprivation of economic value would need to run until her death to be permanent. *See* R. 5. However, since Cordelia will be able to develop the land in 10 years, the deprivation of value is not permanent, and is therefore not a per se regulatory taking. *See* R. 7; *Tahoe-Sierra*, 535 U.S. at 332 ("a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted"). As in *Tahoe-Sierra* where the court did not sever the 32-month segment from the developer's fee simple property interest, here the court should not sever a 10-year segment from Cordelia's fee simple interest in the property. *See Tahoe-Sierra*, 535 U.S. at 331. Instead, the court should look at the full duration of Cordelia's interest to determine if the property retains value beyond the temporary 10-year regulation. *See id.* at 332. A 10-year delay in development is not sufficient to establish a per se, regulatory taking because a decade does not completely encompass Cordelia's temporal interest in the property. *See Bass Enterprises*, 381 F.3d at 1365 (holding that a delay of 44-months was a temporary taking and not a permanent taking).

Further, Cordelia would be unjustly enriched if her takings claim succeeded, undermining FWS's ability to protect future species. Cordelia could stop mowing her property and allow the natural growth to return, destroying the Karner Blues' habitat. *See* R. 7. Cordelia would be unjustly enriched because she would obtain compensation now and in 10 years she could regain the full value of her property without regulation. *See id.* In doing so, Cordelia would be paid twice for her single parcel.

In addition, with the possibility of Cordelia's property reverting to its natural state, the federal government should not pay for a taking that would not guarantee the protection of Karner Blues. Congress passed the ESA with the express purpose "to seek to conserve endangered

species and threatened species." 16 U.S.C. § 1531 (2012). FWS is tasked with effectuating this purpose by protecting the natural habitat and the Karner Blues as long as it can. *See* 50 C.F.R. § 10.1. Although FWS wants to protect Karner Blues in perpetuity, realistically, Cordelia is likely to let the Cordelia lot revert to its natural habitat. *See* R. 7. If FWS paid Cordelia for the full price of her property, it could limit FWS's ability to carry out Congress' intent and deny the benefit of preserving the Karner Blues.

**2. The Cordelia lot retains an economic use and value because the Butterfly Society has offered to pay rent for the ability to view the Karner Blues on her property.**

The ESA and the Wetland Regulation do not constitute a per se regulatory taking because the Butterfly Society's rent preserves an economic use of the property.

Regulations that "deny all economically beneficial or productive use of land" cause a per se regulatory taking. *Lucas*, 505 U.S. at 1015. Economic uses that enable a landowner to derive benefits from land ownership defeat a per se regulatory takings claim. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015). In addition, "the complete elimination of a property's value is the determinative factor." *Lingle*, 544 U.S. at 539. A regulatory action is not a per se regulatory taking if the owner retains more than a "token interest." *Palazzolo*, 533 U.S. at 631.

For example, the court in *Palazzolo* held that a government regulation was not a per se regulatory taking because the property retained an economic use that constituted a small percentage of the original value. *Id.* at 630–31. There, the government denied an owner development rights on the wetlands portion of the property, while simultaneously allowing development on the upland portion the property. *Id.* As such, the property retained 6.4 percent of its original value. *Id.* at 616. The court concluded the property retained enough value attributable

to owner's ability to develop upland, and therefore the regulation did not cause a per se regulatory taking. *Id.*

In contrast, the court in *Lost Tree Village* held that a denial of a wetlands fill permit constituted a per se regulatory taking because the property lost over 99 percent of its value and there were no additional economic uses. 787 F.3d at 1113. In that case, the Army Corps of Engineers denied a permit to fill wetlands in order to develop property. *Id.* at 1114. The property owners could not do anything with the property once the permit was denied except to sell. *Id.* at 1117. As such, the court held that the property owners were left no economic uses. *Id.* Without any economic use, the property had "de minimus" value and therefore a complete deprivation of economic value. *Id.* at 1116. However, the property owners had to demonstrate the extent of the loss in value caused by the permit denial, which included testimony by the owner's appraiser. *Id.* at 1114.

Here, Cordelia still retains an economic use of her property because the Butterfly Society has offered to pay Cordelia $1,000 rent to conduct viewings of Karner Blues on her property. *See* R. 7. As in *Palazzolo*, Cordelia's property still has an economic use—rent from the Butterfly Society. *See id.*; *Palazzolo,* 533 U.S. at 630–31. Although it was not her intended economic use, Cordelia would have guaranteed income from the Butterfly Society. *See* R. 7. In addition, Cordelia's failure to reassess her property makes it difficult for Cordelia to prove that her property has lost all of its economic value. *See* R. 7.

Unlike in *Lost Tree Village*, where the landowner demonstrated that he had lost over 99 percent of his property value using his own appraiser, here, Cordelia can only speculate as to the diminution in value. *See* R. 7; *Lost Tree Vill.*, 787 F.3d at 1114. Cordelia has not reassessed the value of her property, and does not know the value in light of restrictions under the ESA

regulation and the Wetlands Regulation. *See* R. 7. Furthermore, she does not fully know the benefit of the Butterfly Society's offer without that assessment. *See id.*

In addition, the property tax does not affect the value of the property, even though, the property tax currently exceeds the value of the property. *See id.* The property tax on Cordelia's property is likely to shrink because it is calculated using the value of the property. *See e.g.* Cal. Const. art. XIII, § 1 (stating that property is taxed at a percentage of fair market value). Any decrease in property value will be reflected in the property tax. For example, if Cordelia's property was appraised at $50,000, then her property taxes will likely be half of what they are now. *See* R. 7. Even if Cordelia's property were to depreciate in value, the property tax would not remain the same, and the income from the Butterfly Society would be relatively more valuable. *See id.* Ultimately, the Butterfly Society's offer is an economic use available to Cordelia, which confers economic value to her property. *See id.* With economic value and use, the Wetland Regulation and the ESA regulation do not constitute per se regulatory taking.

**3. Cordelia can develop on other parts of her parcel and FWS is not liable for the Wetland Regulations' impact on the Cordelia lot.**

The ESA does not deprive Cordelia of all economic uses because Cordelia can develop on the wetlands under the ESA. Although both the state and federal regulations impact the value of the land, FWS is not liable for the state regulation's independent deprivation of the economic use of the wetlands.

The federal government is responsible for a taking "only when its own regulatory activity is so extensive or intrusive as to amount to a taking." *Allain-Lebreton Co. v. Dep't of Army, New Orleans Dist., Corps of Engineers*, 670 F.2d 43, 45 (5th Cir. 1982). In order to be liable for a taking, the federal government must take "some affirmative act that deprives the plaintiffs of

their property or that interfered with or disturbed their property rights." *Custom Contemporary Homes, Inc. v. United States*, 5 Cl. Ct. 88, 90 (1984).

For example, the court in *Custom Contemporary Homes,* held that the federal government was not liable for a takings claim against New Jersey when the federal government did not participate in the state's decision-making process. *Id.* at 92. In that case, plaintiffs alleged that a highway planned to encompass their properties would render them "unmarketable and valueless." *Id.* at 90. However, the court found that although the federal government provided funding, it had not taken "affirmative acts" in the decision to build the highway or in the decision where to place the highway. *Id.* at 92. Therefore, the state was liable, not the federal government. *Id.*

In contrast, the court in *Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989) held that a federal actor could be liable for a takings claim where the state action was part of the overall federal statutory scheme. In that case, the Army Corps of Engineers required the property owners to obtain a Water Quality Certificate from the state as part of the application process under the Clean Water Act Section 404 permit. *Id.* at 552. Because the state's action could be imputed to the United States, the court evaluated the takings claim using both the Army Corp permit denial and the state certificate denial. *Id.* at 555. The court reasoned that the federal government cannot use state action as a "per se defense to a federal taking" where the federal government has "independent control" of the permit process and Congress created the "statutory framework" for the process under which the state acts. *Id.*

Here, FWS is not liable for a per se regulatory taking because the ESA does not deprive the Cordelia lot of all economic value on its own and FWS is not responsible for the depreciation in value attributable to the Wetland Regulation. The ESA regulation only limits development on

the Heath and the access strip where the Karner Blues are located, not on the one acre of wetlands. *See* R. 6.

Moreover, Cordelia's takings claim for the wetlands against FWS fails because the Wetland Regulation comes from an independent source of law unconnected to FWS or the ESA. *See* R. 7. The Wetland Regulation derives its authority from the state not from the federal government. *See* R. 10. Although wetland filling generally requires a permit from the Army Corps of Engineers, Cordelia's planned development in the wetlands is exempt from this permit. *See* R. 7. Unlike *Ciampetti*, where state approval was part of the CWA Section 404 permit process, here the Endangered Species Act does not require approval under the county's Wetland Regulation in order to issue a permit. *See id.*; *Ciampetti*, 18 Cl. Ct. at 556.

If the federal government is not in control of the state regulatory process, then the federal government would have to conduct countless hours of research to understand local, state, and regional regulations in order to avoid per se regulatory takings claims. While the federal government should be expected to conduct research for regulations it controls such as the Section 404 permitting process, it should not be held responsible for local government action where state and federal regulations converge independently to affect property value. *See Ciampetti*, 18 Cl. Ct. at 552. Unlike in *Ciampetti*, where the Army Corps of Engineers were in control of the permitting process, FWS has no control over how Brittain County structures its Wetland Regulation or how these regulations are implemented. *See id.* at 555.

Furthermore, the federal government was not involved in the County's denial of Cordelia's wetland fill permit. *See* R. 7. In fact, unlike *Ciampetti*, where the property owner was in the middle of the Section 404 permitting process, here, Cordelia needed no federal approvals. *See Ciampetti*, 18 Cl. Ct. at 552. In addition, Cordelia's decision to build in the wetlands

triggered Brittain County's Wetland Regulation rather than any federal action. *See* R. 7. The County has the sole authority to issue those permits. *See id.*; *see also Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84, 89 (1962) (holding that the federal government was not liable for a taking where it only provided funding and the county made all planning decisions).

In addition, the causes of Cordelia's alleged injury are easily divisible and therefore warrant two independent inquiries into the County's and FWS's liability. Unlike joint liability schemes in torts where injury causation and attribution can be difficult to determine, an industry of real estate appraisers and finance companies monitor and calculate property values and any changes in these values. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976) (holding that there is joint liability when "the independent acts of several actors concur to produce indivisible harmful consequences"). For example, house appraisers can determine a busy street's effect on a property's value.[1] These economic valuations of property allow for simple divisibility. *See Tahoe-Sierra*, 535 U.S. at 332 (splitting of temporal interest); *see also Lost Tree Vill.*, 787 F.3d at 1114 (calculating diminution of value using percentages). Deprivation of economic value in property is divisible in ways tort injuries are not, so it would be improper to extend tort rationale to property cases.

**4. Since the diminution in value of Cordelia's property is only partial and not complete, she must seek compensation under the partial takings claim analysis, instead of as a per se regulatory taking.**

Although Cordelia's per se regulatory takings claim fails, Cordelia can seek compensation for any alleged diminution of value caused by the regulations as a partial taking. Although partial takings claims generally result in smaller compensation, they proportionately

[1] Laura Barnhardt Cech, *Homeowners on busy streets deal with buzz, good and bad*, The Washington Post (December 12, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR2009121004795.html (finding that some appraisers deduct ten to twelve percent of a property's value if it is located on a busy street).

compensate property owners for a partial deprivation, whereas per se takings claims address a full loss of economic value. In this case, the ESA regulations do not completely deprive Cordelia lot of all its economic value or use, and therefore, FWS is not liable for a per se regulatory taking. *See* R. 7; *Lucas*, 505 U.S. at 1019. However, FWS can be liable for a partial deprivation of economic value caused by the ESA regulation because the government is liable for diminution in value caused by its own actions. *See Custom Contemporary Homes*, 5 Cl. Ct. at 90. However, such takings claims require a more fact-based inquiry because courts recognize the government's ability to enact regulations that affect property values and the government's need to regulate land use without fear of constant compensation to land owners. *See Penn Central,* 438 U.S. at 124 ("government may execute laws or programs that adversely affect recognized economic values"). In any case, Cordelia's takings claim is more appropriately analyzed as a partial taking and not a per se regulatory taking.

### C. New Union holds title to the soils under Lake Union in the public trust, and public trust principles preclude finding a taking by the Wetland Regulation.

The public trust doctrine derives from English common law Royal title to soils under tidal waters, which the first English settlers brought to America. *See Dutton v. Strong*, 66 U.S. 23, 32 (1861). In America, the public trust doctrine expanded to give states title to any soils under waters at the time of statehood. *See PPL Montana*, *L.L.C. v. Montana*, 132 S. Ct. 1215, 1227 (2012). As such, the state "holds presumptive title to navigable waters," including lakes and lakebeds. *Id.*; *Dutton*, 66 U.S. at 32. Under the public trust doctrine, a state has both the right and obligation to preserve navigable waterways for the public interest. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (*Illinois*) (holding that the public trust "requires the government of the state to preserve such waters for the use of the public").

While public trust principles arising from common law protect a traditional triad of navigation, commerce, and fishing, the state is not limited by those priorities when regulating waterways to advance the public interest. *See Illinois*, 146 U.S. at 453; *see also Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 434 (1983) (holding that the public trust doctrine permitted the state to regulate non-navigable feeder streams for the protection of a large, navigable lake).

The Wetland Regulation, which prevents filling of the lake for purposes that are not water-dependent, is a valid exercise of Brittain County's power under the public trust doctrine. Brittain County's purpose—protecting waters for public navigation—is among every state's most fundamental public trust principles. *See Illinois*, 146 U.S. at 453.

**1. The most basic public trust principle to protect navigable waters existed at the time of the original grant of title for Lear Island, which permits New Union to regulate wetlands without a taking.**

Navigability is the baseline minimum public trust principle imported from England, and was a background principle at the time of the grant or New Union's formation. *See Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois*, 146 U.S. at 445–46. In *Illinois,* the Supreme Court emphasized that a riparian rights holder has rights of access subject to state legislative restrictions "for the protection of the rights of the public" in the navigable waterway. *See* 146 U.S. at 445; *see also Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) (holding that a riparian owner has rights of access to the navigable waterway, subject to whatever limits the legislature deems proper under the public trust).

Cordelia's request to fill wetlands is covered by fundamental public trust principles obligating a state to regulate navigable waters. *See Illinois*, 146 U.S. at 453. While the wetlands are designated as "non-navigable," the same principles are implicated because it borders on the navigable waterway. *See* R. 7. Indeed, the wetlands were formerly open water used as a boat

landing, which indicates that the state has presumptive title. *See id.*; *see also Illinois*, 146 U.S. at 453. As these lands are held in trust, Brittain County's Wetland Regulation is a proper exercise of the public trust obligation and not a taking.

**2. New Union is the presumptive title holder to the land under Lake Union, including the lands granted to Cornelius in 1803 because New Union took title to the soils of navigable waters on equal footing with the existing states.**

New Union entered the United States on equal footing with the other states. Under the equal footing doctrine, "[u]pon statehood, the state gains title within its borders to the beds of waters then navigable." *PPL Montana,* 132 S. Ct. at 1227–28. Unlike the public trust doctrine, whose contours are a matter of state law, the equal footing doctrine is a constitutional foundation for title in the beds of navigable waters. *Id.* at 1235.

The United States holds "lands under navigable waters in acquired territory . . . for the ultimate benefit of future States" because of the importance of navigable waterways to the future state. *Idaho v. United States*, 533 U.S. 262, 272 (2001). While the United States retains control over a territory, it may grant title to waters and rights in the soil beds only for "appropriate purposes." *Shively*, 152 U.S. at 58. Therefore, a court considering a pre-statehood grant of land beneath navigable waters must "begin with a strong presumption against conveyance by the United States." *Montana v. United States*, 450 U.S. 544, 552 (1981).

The Supreme Court inferred a policy of Congress to grant away land under navigable waters only "in case of some international duty or public exigency." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). In fact, the Supreme Court has concluded only once that a pre-statehood grant intended to convey the lands under navigable waters to a private party. *See id.* at 197–98. Further, the public trust doctrine specifically limited the ability of the United States to grant away the rights it held in trust for future states while it possessed the Northwest

Territories. *See Shively*, 132 U.S. at 58 (holding grants can be made if they "do not impair the title and dominion of the future state").

New Union was admitted to the United States from the Northwest Territories on equal footing. *See e.g. Illinois*, 146 U.S. 434 (holding that Illinois, also cut from the Northwest Territories "was admitted into the Union in 1818 on an equal footing with the original states"). In *Illinois*, the rights derived from equal footing included presumptive title to the lake bed of Lake Michigan. *Id.* at 435. Lake Union is similarly an interstate navigable lake like Lake Michigan, and so the equal footing doctrine gives New Union the same public trust rights in this lakebed as Illinois has in Lake Michigan. *See* R. 4.

Early state supreme court cases extended the public trust to state ownership in the soils of non-tidal waters, and in a few instances, the state supreme court granted title retroactively to the time of statehood under the equal footing doctrine. *See PPL Montana*, 132 S. Ct. at 1227; *see e.g. Carson v. Blazer*, 2 Binn. 475, 476–78 (Pa. 1810) (interpreting a riparian owner's title in 1810 with respect to fishery activities begun in 1773); *United States v. Utah*, 283 U.S. 64, 89 (1931) (determining title retroactively to the soils of the Green River); *Oklahoma v. Texas*, 258 U.S. 574, 591–92 (1922) (determining title retroactively to the soils of a river in Oklahoma).

As a full grant of any of the soils under Lake Union would have impaired the dominion of the future state of New Union, Cordelia's title contains at a minimum the inherent limitations on impeding navigability, which precludes a taking for denying the right to fill the wetlands. Although the United States had authority to grant Lear Island to Cornelius, it did not have the full authority to grant title to the lakebed soils within 300 feet to Cornelius, and the strong presumption against granting those soils in fee simple should undermine a claim to title. *See* R. 1–2; *Illinois*, 146 U.S. at 453 (holding the abdication of title to a private party is not consistent

with a state's obligation to exercise the public trust). Since New Union currently holds title to navigable lakebed soils, Cordelia is precluded from bringing a takings claim against Brittain County.

## CONCLUSION

FWS implements the basic goals of the Endangered Species Act—protecting animal species and fostering biodiversity. Courts have continuously held that individual regulations under the ESA and the entire statutory framework of the ESA are constitutional under the Commerce Clause. The ESA regulation of the Karner Blues is no different. The district court acknowledged this precedent in holding the regulation to be constitutional. However, the district court erred in holding that the ESA regulation and the Wetland Regulation created a per se regulatory taking. Although Cordelia can no longer build a single-family residence home on her lot, the island and her lot have other economic uses that uphold the value of the lot. These regulations, at most, effect a partial deprivation of economic value. For the foregoing reasons, we respectfully request this court affirm the district court's decision that the ESA regulation of the Karner Blues is constitutional and reverse the district court's decision that the ESA regulation and Wetland Regulation constitute a taking.

Respectfully submitted,

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