Team 47

No. 112-CV-2015

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff–Appellee–Cross Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant–Appellant–Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant–Appellant.

ON APPEAL FROM

THE UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

BRIEF FOR UNITED STATES FISH AND WILDLIFE SERVICE

Defendant-Appellant-Cross Appellee

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JURISDICTIONAL STATEMENT

Appellant Fish and Wildlife Service (FWS) filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331. On June 1, 2016 the District Court entered an order in favor of Cordelia Lear (hereinafter Plaintiff Lear) against the FWS and Brittain County, and dismissing Plaintiff Lear's claim for declaratory judgement declaring the Endangered Species Act (ESA) unconstitutional. The District Court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the lower court erred in finding that the Endangered Species Act was properly enacted under the Commerce Power given to Congress by Article I, Section 8, Clause 3 of the United States Constitution, and that Congress may regulate endangered species as a class rather than an individual species population.

II. Whether the District Court should have found the takings claim not ripe for review; in the alternative, if the takings claim is ripe for review, whether the District Court should have defined the relevant parcel based on the entirety of Lear Island, whether the District Court should have found the relevant timeframe to be the property's lifetime value, whether District Court should have found Appellee was not denied all economically beneficial use of her property, and if she has been so deprived, whether the District Court erred in finding that the Public Trust Doctrine did not inhere in the title to Appellee's property, and finally, whether the District Court erred in holding that the federal and local restriction must be combined in assessing if a taking has occurred.

STATEMENT OF THE CASE

In April 2012, Appellee Plaintiff Lear contacted the FWS to inquire whether development on her property would require any permits or approvals due to the existence of endangered Karner Blue Butterflies on her property. R. at 6. Upon learning that the filing of an Incidental Take Permit (ITP) would require the development of a habitat conservation plan for the Karner Blues and a confirmation from the FWS that her property was critical butterfly habitat, Lear instead created an alternative development plan that would require filling in a marsh. R. at 6-7. The application for the permit to fill the marsh was denied pursuant to Brittain

County's Wetland Preservation law in December 2013. R. at 7. Lear commenced the initial action against FWSand Brittain County in February 2014, seeking just compensation for a regulatory taking of her property. R. at 7.

The United States District Court for the District of New Union made several conclusions of law in its initial order. First, the District Court found that the ESA was a valid exercise of Congress's commerce power. R. at 7. Second, the court found that the application of the ESA's incidental take prohibition and the Brittain County Wetlands law resulted in an uncompensated taking of Plaintiff Lear's land in violation of the Fifth Amendment to the United States Constitution. R. at 8. Judgment was entered awarding Plaintiff $10,000 in damages against the FWS and $90,000 against Brittain County. R. at 12.

STATEMENT OF THE FACTS

Lear Island Full Operation. Lear Island is located within Lake Union. R. at 4. By an Act of Congress, Lear Island was granted to Cornelius Lear in 1803 and has since been occupied by Lear and his descendant's. R. at 4, 5. The 1803 grant included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island." R. at 4, 5. In addition, Lear Island included an additional grant of the underwater shallow strait that separated Lear Island from the mainland. R. at 5.

Lear Island was originally used for homestead and agricultural purposes. R. at 5. During the latter half of the nineteenth century, Lear Island was used as a productive farm. R. at 5. The farm's produce was carried by boat from the northern end of the island to the mainland close to the straight that separates the island from the mainland. R. at 5. In the early twentieth century, the Lears constructed a causeway to improve access to and from the mainland. R. at 5.

Lear Island as Separate Parcels. In 1965, King James Lear owned the 1803 Lear Island grant. R. at 5. Lear decided to divide Lear Island into three parcels for his three daughters—550-acre for Goneril, 440-acre for Regan, and 10-acre for Cordelia. R. at 5. The Brittain Town Planning Board approved the sub-divided lots and concluded each lot could be developed in conformance with the zoning requirements for a single-family home. R. at 5. King James Lear deeded the lots to his daughters reserving life estates in each for himself. R. at 5. He continued to live on the original homestead on Goneril's lot, but also constructed a residence on Regan's lot. R. at 5. Lear died in 2005 and each of his three daughters came into possession of their deeded properties. R. at 5.

Plaintiff Lear's Lot. Plaintiff Lear's lot is identified as "The Heath." R. at 5. The Heath has been kept open by annual mowing by the Lears. R. at 5. The rest of the island became wooded after agricultural production ceased. R. at 5. Plaintiff Lear's lot is a total of 10-acres and sits at the tip of Lear Island. R. at 5.

Plaintiff Lear's lot has become covered with blue lupine flowers because of the sandy soil of Lear Island. R. at 5. The FWS determined that the Heath was a critical habitat for the New Union subpopulation of Karner Blues in 1972. R. at 6.

In 2012, Lear inquired about building a residential home on the lot. She was given lot regulation permit alternatives and decided to develop an alternative development proposal (ADP) that would not disturb the lupine fields. R. at 7. The ADP proposed to fill a one-half acre of the marsh in the cattail cove to create a lupine-free building site. R. at 7.

Endangered Species Act. The Endangered Species Act (ESA) is codified at 16 U.S.C. §§ 1531-1544. Section 9 contains the prohibition against any action that may adversely affect an endangered species or its critical habitat, known as a "take." 16 U.S.C. § 1538(a)(1)(B). Under

the ESA, "take" is defined as any action "to harass, harm, pursue, shoot, wound, kill, trap, capture or attempt to engage in any such conduct." *Id.* The Department of the Interior has defined the word "harm" in Section 9 to include "significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering" 50 C.F.R. § 17.3 (2004); *see also, Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and the word "harass" to include "actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2004).

However, the ESA is not inflexible. Section 10 of the ESA establishes several types of permits that allow the permittee to "take" a species without the accordant liability attaching to the action. 16 U.S.C § 1539. The first type of permit offered by the FWS (FWS), is the incidental take permit (ITP). *Id.* at §1539(a). An ITP authorizes a "take" incidental to otherwise lawful activity, such as real estate development. *Id.* A second type of permit is the enhancement of survival permit (ESP). *Id*. at §1539(b). An ESP allows landowners to implement conservation measure proactively in the present in exchange for guarantees allowing future development. *Id.*

Additionally, in 2003 the FWS pursuant to the authority granted it under the ESA promulgated 60 FR 24753-01, establishing a conservation banking system "to offset adverse impacts under the Endangered Species Act."[1] Conservation banking provides an economic incentive to landowners who permanently preserve their land and manage it for the preservation of endangered species. *Id.* In exchange for preserving the land in its natural condition, the FWS approves a specified number of habitat credits that the landowner may sell to developers or other

[1] *Conservation Banking: Incentives for Stewardship*, U.S. Fish and Wildlife Service (Aug. 2012), https://www.fws.gov/endangered/esa-library/pdf/conservation_banking.pdf.

project proponents who need to compensate for the unavoidable adverse impacts their projects may have on a species. *Id.*

Lear Island Wildlife. Plaintiff Lear's lot on Lear Island contains The Heath that is covered with blue lupine flowers. R. at 5. Blue lupine flowers are essential for the survival of the Karner Blue Butterflies. R. at 5. The Heath on Lear Island is home to the only Karner Blue Butterflies in New Union. R. at 5. The Karner Blue Butterfly is currently on the endangered species list and was added to the federal endangered species list in 1992. 50 C.F.R. § 17.11 (2015), 57 Fed. Reg. 59,239 (Dec. 14, 1992). These butterflies do not migrate because they cannot fly for long periods of time and require woodland edge corridors to travel. R. at 6. Without annual mowing of The Heath, the lupine fields would naturally convert to a forest of oak and hickory trees. R. at 7. This process would take about 10 years and would ultimately eliminate the Karner Blue Butterflies from New Union. R. at 7. The U.S. Army Corps of Engineers considers the cattail marsh on Lear's land as "non-navigable." R. at 7.

Fish and Wildlife Service Regulations. FWS declared The Heath as a critical habitat for the New Union Karner Blues subpopulation in 1992. R. at 6. In 2012, FWS told Plaintiff Lear Lear any disturbance of the Karner Blue butterflies would constitute a "take" of the endangered butterfly. R. at 6. FWS suggested that Plaintiff Lear apply for an ITP under section 10 of the ESA, but a habitat conservation plan (HCP) for the butterflies would have to be developed. R. at 6. For an HCP to be approved, Plaintiff Lear would need an additional lupine habitat and a commitment to maintain the annual mowing of The Heath. R. at 6.

Brittain County Regulations. Plaintiff Lear sought to fill the cattail marsh as her ADP. R. at 7. Pursuant to Brittain County Wetland Preservation Law of 1982, Plaintiff Lear needs a permit to do so. R. at 7. Plaintiff Lear applied for the ADP to fill the marsh and the permit was denied in

December 2013, stating that a permit to fill a wetland would only be granted for a water-dependent purpose.

STANDARD OF REVIEW

The District Court rendered a final judgment in favor of Plaintiff Cordelia Lear for a regulatory taking of her property and denied Plainittff Lear's request for declaratory judgment finding the ESA an unconstitutional exercise of Congress's Commerce power. The constitutionality of a federal regulation is reviewed *de novo. See United States v. Perelman,* 658 F.3d 1134, 1134-35 (9th Cir. 2011); *United States v. Vongxay,* 594 F.3d 1111, 1114 (9th Cir. 2010); *United States v. Bolanos-Hernandez,* 492 F.3d 1140, 1141 (9th Cir. 2007). Issues of ripeness are reviewed *de novo*. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011); *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). Agency determinations are reviewed for arbitrary, capricious or abuse of discretion not in accordance with the law. 5 U.S.C. § 706(2)(A).

SUMMARY OF THE ARGUMENT

The District Court correctly found that the ESA is a valid exercise of Congress's Commerce power. It is well established that Congress has the power to regulate intrastate commerce; commerce and economic activity are defined in broad terms and do not necessarily include items that are directly traded in commerce. In its broadest application, Congress's commerce power was upheld to prevent a commercial wheat grower from growing excess wheat for private use. In evaluating whether an endangered species population is involved in interstate commerce, courts review the aggregate of all endangered species even when evaluating a solely intrastate population. While this issue has not been reviewed by this court, the ESA has been

upheld as constitutional throughout the circuits. The District Court correctly denied Plaintiff's request for declaratory judgment invalidating the ESA.

The District Court erred in finding that the ESA, as applied to Plaintiff Lear's property affected a taking for which just compensation is due. First, the District Court erred in finding that Plaintiff Lear's takings claim against the FWS was ripe for judicial review, because a taking has not occurred until a permit has been denied. Plaintiff Lear did not apply for an ITP under § 10 of the ESA, FWS never reached a final decision on the merits, nor was she denied a permit. Thus, her taking claim is not ripe for review.

Second, the District Court incorrectly defined the relevant parcel as the Cordelia Lot, and not all of Lear Island. Under the parcel as a whole rule, courts look to the investment backed expectations of the claimant with regard to the property at issue, and whether the property has been treated as a single economic unit. Here, Plaintiff Lear has no reasonable investment backed expectations in the Cordelia Lot, because she inherited it by devise. The District Court also erred in finding that the relevant time period for takings analysis is the current permissible development period and not the property's entire lifetime value. Courts have repeatedly rejected such notions of conceptual severance.

Next, the district court erred in analyzing Plaintiff Lear's taking claim under the *Lucas* analytical framework and not the *Penn Central* bulwarks. In focusing solely on the uses prohibited by the challenged regulation and not those still permitted Plaintiff Lear has failed to show that she has been deprived of all economically beneficial use of her property, and a mere reshuffling of the benefits and burdens of public life is insufficient to establish a taking for which just compensation is due.

The district court also erred in finding that the public trust in navigable waters did not inhere in the island's title under the 1803 Congressional grant, because the cattail marsh at issue is a navigable in fact waterway. And finally, the district court erred in holding that the federal and local restrictions must be combined in considering whether a taking has occurred, because the ESA as a federal regulation preempts the county zoning ordinance.

ARGUMENT

I. THE ESA IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO A WHOLLY INTRASTATE POPULATION OF AN ENDANGERED BUTTERFLY THAT WOULD BE HARMED BY THE CONSTRUCTION OF A SINGLE FAMILY RESIDENCE.

The ESA is a valid exercise of Congress's Commerce Power as applied to a wholly intrastate population of an endangered species that would be harmed by the construction of a single family residence on a parcel of property designated as "Critical Habitat" for the species. Congress has the power to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, the persons or things in interstate commerce, and the activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Economic activity must be understood in broad terms. *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000); *See also Brzonkala v. Va. Polytechnic Inst. & State Univ.,* 169 F.3d 820, 835 (explaining that the Court has a "relatively broad understanding of such [economic] activity"). Commerce is the exchange of goods and services, trade or other business activities, traffic, and intercourse of commercial agents; in *Wickard v. Filburn*, the regulated interstate activity (wheat produced solely for producer's personal use) was held to be commercial because it affected market conditions. *GDF Realty Invs., v. Norton*, 326 F.3d 622 (2003) (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942). Courts "defer to the political judgments of Congress, recognizing that the "Commerce Clause represents a broad grant of federal authority." *Brzonkala*, 169 F.3d 820, 830 (4th Cir. 1999).

In *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court articulated four factors to consider when evaluating whether a law has a "substantial effect" on interstate commerce: first, whether the statute has anything to do with "commerce or any sort of economic enterprise, however broadly one might define those

terms"; second, whether the statute contains an "express jurisdictional element"; third, whether the "legislative history contain[s] express congressional findings regarding the effects upon interstate commerce"; and finally, whether the link between the regulated activity and the effect on interstate commerce is too "attenuated." Regulations have been upheld when the regulated activities "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially effects interstate commerce." Lopez, 514 U.S. at 561. Congress has the power to regulate purely intrastate activity when the activity is regulated under a regulatory scheme that bears a substantial relationship to interstate commerce. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1175 (9th Cir. 2011); *see also Wickard v. Filburn*, 317 U.S. 111, 128-29, 63 S. Ct. 82, 87 L. Ed. 122 (1942)).

Courts have repeatedly upheld § 9 of the ESA as a valid exercise of Congress's Commerce Power. *See e.g., Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007) ("[T]he Endangered Species Act is a general regulatory statute bearing a substantial relation to commerce."); *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir.1990) ("The commerce clause power . . . is broad enough to extend [federal] jurisdiction to local waters which may provide habitat to migratory birds and endangered species."); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011). The ESA has even been upheld under the Commerce Clause when applied to a wholly intrastate species. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (1997) (holding application of §9 of the ESA to an endangered species of fly found only in California was a proper exercise of Congress's power under the Commerce Clause). The application of §9 of the ESA to preclude proposed development on property containing six regulated species has been found to not exceed Congress's authority under Commerce Clause even when regulated

species had no effect on interstate commerce; effect of building shopping centers and apartment complexes, in aggregate, substantially affected interstate commerce. *GDF Realty Invs., v. Norton*, 326 F.3d 622 (5th Cir. 2003).

Section 9 of the ESA is a valid exercise of Congress's Commerce Power as applied to Plaintiff Lear's land. While the butterflies do not actively engage in intrastate commerce, the extinction of all endangered species (the aggregate of all endangered species) would substantially affect commerce. Congress's power to regulate endangered species under the ESA is well established throughout the circuits and has not been found to be an abuse of the legislative authority granted to Congress under the Commerce Clause. Therefore, the lower court's ruling must stand.

II. SECTION 9 OF THE ENDANGERED SPECIES ACT, AS APPLIED TO PLAINTIFF LEAR'S PROPERTY, DOES NOT AFFECT A TAKING FOR WHICH JUST COMPENSATION IS DUE BECAUSE PLAINTIFF LEAR HAS NOT ESTABLISHED THAT A TAKING HAS OCCURRED, OR BECAUSE PLAINTIFF LEAR HAS NOT BEEN DEPRIVED OF ALL ECONOMICALLY BENEFICIAL USE OF HER PROPERTY.

The Fifth Amendment Takings Clause provides, "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has explained that, "the aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.' " *Eastern Enterprises v. Apfel,* 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1998)). Where the government merely regulates the use of property, compensation is only required if the regulation unfairly singles out the property owner to bear a burden that should be borne by the public as a whole or deprives the owner of all economic use of the property. *See e.g. Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-25 (1978); *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003 (1992).

The regulatory taking was born in 1922 when Justice Holmes explained that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). In *Penn Central*, the court established a fact-specific, ad-hoc balancing test focused on the (1) "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action," to determine when a regulatory taking has occurred. 438 U.S. at 124.

When a property owner can show that a regulation has denied him "all economically beneficial or productive use of land," he has suffered a categorical taking. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Nonetheless, there is one major exception to *Lucas's* categorical taking rule. If the restriction imposed by the regulation was implicit in "background principles" of property or nuisance law existing when the property was acquired, then there is no taking. *Id.* at 1029.

There are two critical antecedents of any regulatory taking case. First, the claim must be ripe for review. A takings claim does not ripen until the appropriate government agency has reached a final decision, on the merits, concerning the application of the regulation to the property at issue. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 , 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). Second the relevant parcel must be identified. Defining the relevant parcel is important in determining if a regulatory taking has occurred under either the *Penn Central* or *Lucas* approach, because the relevant parcel establishes the baseline against which the economic impact of the regulation is measured. The majority in *Penn Central* emphasized:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment

> have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses . . .on the . . . parcel as a whole . . .

438 U.S. at 130-31; *See also Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1348 (Fed. Cir. 2004). The Court has repeatedly reaffirmed the parcel as a whole concept indicating that any definition of the relevant parcel requires a consideration of the "aggregate . . . in its entirety." *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002). In reaffirming the parcel as a whole concept, the Court has also explicitly rejected the idea of conceptual severance, whereby the relevant parcel is defined by the portion of the property directly affected by the regulation. *Id.* at 331; *see also Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust of S. Cal.,* 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.")

A. LEAR'S TAKINGS CLAIM AGAINST THE FISH AND WILDLIFE SERVICE IS NOT RIPE BECAUSE LEAR DID NOT APPLY FOR AN ITP UNDER ESA § 10, 16 U.S.C. § 1539(A)(1)(B).

By failing to apply an ITP, Plaintiff Lear's takings claim is not ripe. A takings claim is not ripe for judicial review "until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). The application process for an ITP allows a regulatory agency to review the proposed taking, and analyze the impact that the taking would have on the land. In the case of a permit to build on land designated with endangered species, a regulatory agency can review the impact that the proposed building will have on the species itself. The agency will also provide alternative proposals which minimize the dangers or damages, if alternatives are available.

Ripeness is a jurisdictional issue reviewed de novo. *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000).

Generally, until a permit has been denied, a taking has not occurred. *See Stearns Co. v. United States*, 396 F.3d 1354 (2005) (a taking does not occur at the time of application, but rather at the time of denial). "The futility exception simply serves 'to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be'" approved. *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998). Where an agency's decision after at least an initial application makes it clear that administrative remedies will not result in a different outcome, the remaining remedies are futile and the impact of the regulation on the use of the property is reasonably certain. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). Then a party may move forward with a takings claim absent a final decision from the government entity charged with implementing the regulations; the requirement of an initial application is not eliminated even when the filing of an ITP would cost more than the property is worth. *Morris v. United States*, 392 F.3d 1372 (Fed. Cir. 2004).

Plaintiff's claim that they may avoid filing an application for a permit if the procedure to obtain that permit is so burdensome that it effectively deprives the Plaintiff of their property rights. This exception only exists in *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996), where the court cites *Stearns Co.* in support of this proposition. 34 Fed. Cl. 264 (1995). *Stearns Co.* states that if a procedure is so burdensome deprives the property owner of value, a property owner need not apply for a permit. 34 Fed. Cl. 264 (1995). However, on appeal it was found that because the plaintiff had not applied for an initial permit, the appellate court had no way of knowing to what extent the proposed taking would have restricted the use of the property. *Id.*

The appellate court did not consider the burden placed on the plaintiff and found that absent an application, no regulatory taking had occurred and the issue was not ripe for review. *Id*. The lower court decision that *Hage* and the Plaintiff cite was reversed on this exact issue.

Because Plaintiff Lear did not file an application for an ITP, her takings claim cannot be ripe. It is well established that a final decision of an administrative court of a regulatory agency is necessary, even compelled, by the purpose of the permit application, which is to review the impact that the proposed building will have on the land. *Morris*, 392 F.3d 1372 (Fed. Cir. 2004). A party's failure to apply for an ITP not only deprives the regulatory agency of its opportunity to review the impact that the proposal will have on a species, but it also indicates that a taking has not occurred. *See Stearns Co.*, 396 F.3d 1354 (2005). Therefore, a taking has not only failed to occur, but the claim is not ripe for review because the court will be unable to understand what alternate plans exist, or the impact that the proposal will have on the endangered species.

Plaintiff Lear contends that an application was unnecessary under the futility rule, or because the process and procedure of the application was so burdensome that it deprives the property owner of his property's value. The purpose of the futility rule is to prevent a person from filing *multiple* applications, *after* an agency's decision has made it clear that no future decisions will have a different outcome. *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (emphasis added). The exception requires that a property owner have filed one application to prevent property owners from submitting multiple after the "first application was rejected." *Id*. Despite Lear's belief that FSW's comments constituted an application denial, the futility rule cannot apply because no application was ever submitted.

Plaintiff Lear also argues that the cost of the permit itself triggers the futility rule, as "that application for a permit would be futile where it is undisputed that the cost of applying for a

permit exceeds the fair market value of the property in question." Courts have never applied a cost-prohibitive concern to the matters of the futility rule. In the context of applications for ITPs courts have, on occasion considered the cost of an application and its relationship to the finality rule, however even there the courts have found that an application and denial of that application is compelled by the nature of the under-takings. *Morris*, 392 F.3d 1372 (Fed. Cir. 2004).

Plaintiff Lear and the lower court rely on *Hage* as establishing as law if "the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." R. at 9. However, *Hage* does not make this assertion, instead turning to *Stearns Co.*, which was later overturned on appeal on the notion that the case, without a denied application, was not ripe for review. The appellate court was unable to review all of the facts, denied the benefit of a previous ITP application. Here the appellate court is denied the same benefit because there was no application submitted. There was also no taking, because the FWS had not officially denied the plaintiff's application. Although the lower court recognized exceptions to the requirement for filing at least an initial ITP, those exceptions are not recognized as established law and therefore this issue should not have been considered ripe for review.

B. UNDER THE PARCEL AS A WHOLE RULE THE RELEVANT PARCEL IS ALL OF LEAR ISLAND AND NOT THE SUBDIVIDED PROPERTY KNOWN AS THE CORDELIA LOT.

There is no bright line rule for applying the parcel as a whole concept, instead courts take a flexible approach designed to account for factual nuances. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). In doing so, courts focus on the investment backed "expectations of the claimant with respect to the property" and whether a given property has been treated as a "single economic unit." *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005); *Forest Props., Inc. v. United States,* 177 F.3d 1360, 1365 (Fed. Cir. 1999).

It is axiomatic that "a reasonable investment-backed expectation' must be more than 'a unilateral expectation or an abstract need." *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980). "A property owner's reasonable investment-backed expectations are defined at the time the property is purchased." *Norman v. United States,* 63 Fed.Cl. 231, 267 (2004) (finding claimants could not have an investment backed expectations in property in which they had not invested), *aff'd* 429 F.3d 1081. The reason for considering the plaintiff's investment-backed expectations "is to limit recoveries to property owners who can demonstrate that they *'bought their property* in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Cienega Gardens v. United States,* 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quoting *Loveladies Harbor, Inc.,* 23 F.3d at 1177).

In *Murr v. Wisconsin*, the Wisconsin Supreme Court—following the federal circuit's approach—focused on the timing of the land acquisition in light of the burdening regulation to determine the extent of claimant's reasonable investment backed expectations. 359 Wis.2d 675 (2014). The court found that the parcel as a whole rule required treating claimants' two-contiguous lots together as the relevant parcel for takings analysis. *Id.* The Murrs' parents originally purchased the lots in question in 1960 and 1963. *Id.* The lots were then transferred to the Murr siblings in 1994 and 1995, activating a decades old county ordinance requiring that two adjacent parcels held in common ownership be treated as a single parcel for development purposes. *Id.* This ordinance had the effect of prohibiting the Murrs from developing or selling their undeveloped parcel. *Id.* The Murrs contended that the ordinance effectively eliminated all economically beneficial use of the undeveloped lot. *Id.* However, the court noted that the Murrs were not deprived any investment backed expectations they had in the undeveloped lot because

they took ownership to the lots subject to the ordinance, and thus never had an unfettered right to treat the lots separately. *Id.*

However, a regulation need not be enacted prior to the claimant's acquisition of the property in order for the regulation to restrict the landowner's use of the property. Courts have found that regulations enacted after property acquisition may still limit a landowner's reasonable investment backed expectation. *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999). In *Good*, the plaintiff purchased a 40-acre undeveloped tract of land, consisting of 32 wetland acres and 8 upland acres. *Id*. at 1357. In order to develop his land plaintiff was required to obtain dredge and fill permits under the Rivers and Harbors Act of 1899 and § 404 of the Clean Water Act. *Id.* During the permitting process—after several state and federal permits had already been granted—two separate species found on plaintiff's property were listed as endangered pursuant to the ESA. *Id.* This listing triggered FWS consultation under § 7 of the ESA. *Id.* The FWS found that plaintiff's development jeopardized the continued existence of both listed species on the property, and recommended denial of the permits accordingly. *Id.* Plaintiff challenged the application of the ESA to his property arguing that "the permit requirement of the Rivers and Harbors Act and the Clean Water Act are irrelevant to his reasonable expectations...because he obtained the federal dredge and fill permits required by those acts three times," and "was only denied a permit, on the provisions of the ESA, when two endangered species were found on his property." *Id.* at 1361. In rejecting plaintiff's argument that "since the ESA did not exist when he bought his land, he could not have expected to be denied a permit based on its provisions," the court noted that "[i]n light of the growing consciousness of and sensitivity toward environmental issues, [Plaintiff] must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get." *Id.* at 1363.

Meanwhile, the "single economic use" principle is used to assess whether the properties "are used as a unit so that each is dependent and related to the use of the other, or [whether they are] ... devoted to separate and distinct uses, so as to constitute independent properties." *Murr,* 359 Wis.2d 675. Following this principle, a court recently found that two adjacent farms constituted the relevant parcel when they were acquired by a single deed, contained an integrated drainage system, and were always treated as a single economic unit. *Brace v. United States,* 72 Fed. Cl. 337, 348 (2006); *See also, District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (holding that where the lots were purchased at the same time and treated as single indivisible property for more than twenty-five years, and continued to treat the lots as single economic unit after subdivision, the relevant parcel was all of owner's contiguous lots); *Forest Props.,* 177 F.3d at 1365-66 (holding that the relevant parcel included two tracts of land because their "development was treated as a single integrated project," despite the fact they were "acquired ... in different transactions at different times"). Single-unit treatment will even trump a lack of contiguity. *Ciampitti v. United States,* 22 Cl. Ct. 310, 320 (1991) (finding that plaintiffs entire 45-acres of land, acquired in separate transactions, was the relevant parcel and not the regulated lots, where plaintiff treated all the property the same for purchase and financing purposes).

Conversely, even where contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the entire purchase if the owner treats the parcels as distinct economic units. *Lost Tree,* 707 F.3d at 1293; *See also Palm Beach Isles,* 208 F.3d at 1381 (holding the 50.7 acre wetland portion of original 311.7 acre purchase constituted the relevant parcel where landowner "never planned to develop the parcels a s a single unit," and sold 261 acres of upland, oceanfront property prior to enactment of relevant regulatory scheme); *Loveladies,* 28 F.3d at

1181 (holding 12.5 acres from original 250 acre purchase constituted the relevant parcel where landowner developed and sold 199 acres before regulatory scheme was enacted and deeded the residual 38.5 acres to state in exchange for development permits).

In this case, Plaintiff Lear cannot establish any reasonable investment-backed expectations that are more than a "unilateral expectation or an abstract need," because a property owner's reasonable investment-backed expectations are defined at the time the property is purchased, and plaintiff never purchased the property. As a result plaintiff cannot establish that she bought the property in reliance on a state of affairs that did not include the challenged regulatory regime. Moreover, Plaintiff Lear's lot has never been purchased as an individual piece of property. In fact, the last and only time Lear Island (the larger parcel to which the Cordelia lot belongs) was purchased was 1803, when Cornelius Lear acquired the island by congressional grant. Thus, 1803 is the relevant date for defining the reasonable investment-backed expectations in regards to the property at issue.

The fact that the ESA was enacted subsequent to the 1803 purchase, 1965 subdivision of Lear Island, and the town planning board's determination that each "subdivided lot could be developed in conformance with zoning requirements with at least one single-family residence" is irrelevant for purposes of establishing a reasonable investment backed expectation in the context of defining the relevant parcel. Plaintiff Lear should have been aware that regulatory regimes and standards could change to her detriment making regulatory approval harder to acquire. While the town planning board determined that, the Cordelia lot conformed with zoning requirements for a single-family residence in 1965 no building permit was ever obtained under the 1965 state of affairs. Plaintiff Lear cannot argue that no building permit was acquired because she was not in

possession of the property, since her father constructed a residence for plaintiff's sister Regan shortly after subdividing.

Furthermore, from the time that Cornelius Lear acquired the island in 1803, it had been put to a single economic use as the Lear family homestead. No effort was made to distinguish separate parcels within the island until King James Lear subdivided the property in 1965. Even after the subdivision, the island continued to be used in its entirety as the Lear family homestead. King James Lear continued to reside on the island, and a home was built for his daughter Regan on her subdivided lot. The fact that King James Lear sought confirmation that each lot could be developed for single-family residential purposes, and not subdivision development, further indicates that the 1965 subdivision was intended to further the use of the island as the Lear family homestead.

Finally, reliance on the District Court's ruling that the Cordelia lot is the relevant parcel is ill founded. First, the District Court erred in failing to adhere to the "flexible" and "factually nuanced" approach espoused in *Loveladies Harbor*. Furthermore, the court misinterpreted *Loveladies Harbor*, which resulted in error, when the court found that the "subdivision of a property into separate lots should be determinative." Courts have never held such subdivision to be determinative, and rather, courts have repeatedly expressed concern that such a bright line rule "seriously underestimates the imagination of landowners" to strategically subdivide their land and that it would lead to "severance run amok." *See Lost Tree Village Corp v. U.S.*, 707 F.3d 1286, 1293 (Fed.Cir. 2013); *Dunes West Golf Club, LLC. v. Town of Mount Pleasant*, 401 S.C. 280, 310 (2013); *See also* Justice Stevens' dissent in *Lucas,* 505 U.S. at 1064-66.

The relevant parcel is all of Lear Island. In defining the denominator for the taking analysis as such, it is clear that no taking has occurred because Lear Island was not deprived of all

economically beneficial use. The regulated portion accounts for only about one-percent of the island's total land area.

C. UNDER THE PARCEL AS A WHOLE RULE, THE RELEVANT TIME PERIOD IS THE PROPERTY'S ENTIRE LIFETIME, NOT THE CURRENT PERMISSIBLE DEVELOPMENT OF THE PROPERTY.

The District Court erred by finding that the relevant time period for taking analysis is the current permissible development of the property. Under the parcel as a whole rule, the relevant time frame in a temporary regulatory taking claim is the property's entire lifetime value. *Tahoe-Sierra*, 535 U.S. 302, 331 (2002); *Cienega Gardens v. United States*, 503 U.S. 1266, 1281 (Fed. Cir. 2007). A temporary regulator taking only arises when what would otherwise be a permanent taking is temporarily cut short. *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed.Cir. 2001). The "essential element" for such a temporary taking "is a *finite* start and end to the taking." *Id.* (*emphasis added*).

In *Tahoe-Sierra,* petitioners challenged a local ordinance that established an all inclusive thirty-two-month moratorium on building. 535 U.S. 302. Petitioners argued that the moratorium effectuated a per se regulatory taking because they had been completely deprived of the ability to develop their property during the thirty-two-month period at issue. *Id.* The Supreme Court flatly rejected this argument:

> Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole."

Id. at 331. The court thus concluded that the District Court erred when it the disaggregated petitioner's property into temporal segments corresponding to the challenged regulation. *See also, Cienega Gardens v. United States,* 503 U.S. 1266, 1283 (holding that any economic impact to the plaintiffs must be evaluated with respect to the value of the property as a whole, and not limited to the discrete time period that the regulation was in force).

By its very nature, the ESA is a temporary regulation—either the species recovers to the point where it no longer needs protection or it goes extinct; in either situation the regulation falls out of force. However, in this case the alleged moratorium does not satisfy the "essential element" for a recognized temporary taking. The very nature of the regulation makes it is impossible to calculate a finite start and end to its impact, as such, it is not possible to calculate the economic impact on plaintiff since the regulatory impact is temporary but of an indeterminate length.

Furthermore, the development moratorium on Plaintiff's property is self-imposed. The ESA does not establish a moratorium, nor does it prohibit development all together. *Seiber v. United States*, 364 F.3d 1356, 1362 (Fed. Cir. 2004). Rather, it provides landowners the ability to obtain an incidental take permit ("ITP") before developing. *Id.* The ITP provides "those acting under permit authority with the assurance that their activities may proceed without risk of violating the prohibitions of section 9 of the ESA." *Id.* However, plaintiff is not required to obtain an ITP in order to develop her property. She is free to develop her property without an ITP, if she is willing to risk the potential liability for any "take" of Karner Blue Butterflies. This is no different than what would result if Plaintiff waits the estimated ten-years for woodland succession to overtake the heath, since her failure to maintain the heath in its current condition would result in "significant habitat modification" that would actually injure or kill Karner Blue

Butterflies by "significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3 (2004); *See also, Hill v. Tennessee Valley Authority,* 549 F.2d 1064 (1977), *cert. granted* 434 U.S.954, *aff'd* 434 U.S. 153 (holding *anything* affecting a designated critical habitat is an offense if it might be expected to result in the reduction in "number or distribution" of an endangered species of sufficient magnitude to place the species in further jeopardy.") As a result, Plaintiff would be subject to liability under the ESA in either development timeline, and in either circumstance, Plaintiff Lear would suffer the same penalty under the ESA without an approved application for an ITP.

The temporary nature of the regulation and the lack of any actual moratorium in the challenged regulatory regime preclude finding that the ESA has effectuated even a temporary taking of plaintiff's property.

D. THE CONTINUED ECONOMIC VIABILITY OF THE PROPERTY PRECLUDES PLAINTIFF'S TAKING CLAIM, BECAUSE IN ANALYZING A TAKING CLAIM THE FOCUS IS ON THE USES PERMITTED BY THE REGULATION NOT THOSE PROHIBITED BY IT.

In a vast array of circumstances, the government may execute regulations that adversely affect recognized economic values without the action resulting in a taking for which just compensation is due. *Penn Central,* 438 U.S. 104. "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 498 (1987). The critical question is whether the property owner has been denied "all or substantially all practical uses of [the] property." *Zealy v. City of Waukesha*, 201 Wis.2d 365, 374 (1996). In most instances use restrictions that serve a significant public purpose have been upheld against taking challenges, as in *Goldblatt v. Hempstead*, 369 U.S. 590 (1961); however, a statute that substantially furthers important public policies can so frustrate reasonable investment-backed expectations so as to

effect a "taking." *e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); *See also, Sierra Club v. Marsh*, 816 F.2d 1376 (Cal. 1987) ("Congress determined that projects that jeopardize continued existence of endangered species threaten incalculable harm; accordingly, . . . the balance of hardships and the public interest tip heavily in favor of endangered species."); *National Wildlife Federation v. Burlington Northern R.R., Inc.,* 23 Fed.3d 1508, 1510 (9th Cir. 1994) ("The 'language, history, and structure' of the ESA demonstrate that the balance of hardships and the public interest tips heavily in favor of protected species").

If the regulation is reasonably related to the promotion of the general welfare then diminution in value alone is insufficient to establish a "taking" claim. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (holding a 75% dimunition in valued caused by zoning law did not constitute a taking.); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding that a 87 ½ % decrease in value of property after zoning ordinance was enacted did not affect a taking). Indeed, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co.,* 260 U.S. at 413.

In this context, takings challenges must be resolved by focusing on the uses the regulation permits—not the uses prohibited. *Penn Central*, 438 U.S. at 135-38. A taking claim cannot be established by showing that a claimant has been "denied the ability to exploit a property interest that they heretofore had believed was available for development . . ." *Id.* at 128. Takings challenges have also been found devoid of merit when the challenged government action prohibits a beneficial use to which the individual parcel had previously been devoted. *Miller v. Schoene,* 276 U.S. 272 (1928) (holding that the government may properly make "a choice between the preservation of one class of property and that of the other").

In *Just v. Marinette County*, 56 Wis.2d 7, (1972), the Wisconsin Supreme Court was confronted with the question of whether ownership of a parcel of land is so absolute that an owner may change its nature to suit any of his purposes. The court answered the question in the negative, finding that "an owner of land has no absolute and unlimited right to change the essential natural character of his land so as [to] use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 17. The court went on to find that the application of the challenged regulation did not deprive the landowner of all economically beneficial use of his property because the owner was "not prevented from using his land for natural and indigenous uses." *Id.* Moreover, the court noted that changing the natural character of land to the detriment of the general public "by upsetting the natural environment and natural relationships" is an unreasonable use of land not protected from the state's regulatory authority. *Id.* at 18 (holding that destroying the natural character of a swamp or wetland so as to make the location amenable to human habitation, while more economically valuable, is not reasonable when it causes harm to the general public).

Similarly in *Taylor v. United States*, the plaintiff sought to build a home on his residentially zoned lot. No. 99-131 L (Fed. Cl. June 20, 2001). After purchase, and before the start of construction, a pair of Bald Eagles set up a nesting site on an adjacent property. *Id.* The nesting site was within 90 feet of plaintiff's planned development. *Id.* As a result, FWS notified plaintiff that clearing and construction of his property would make the area unsuitable for the eagles. *Id.* As such, any resulting abandonment of the nest would constitute a "take" under the ESA. *Id.* FWS went on to inform plaintiff that he would be able to proceed with construction if he applied for an ITP and was approved. *Id.* Plaintiff found the permitting and mitigation processes to onerous for his liking. *Id.* He declined to continue with his application, choosing to

file suit alleging a categorical taking. *Id.* The court found that there was no categorical taking because the ESA development restrictions did not deprive plaintiff's property of all economic value. *Id.*

In this case, the ESA does not deprive the Plaintiff Lear of all economically beneficial uses of her property. Simply because Plaintiff Lear's development is regulated by the ESA does not effect a taking, given the other economically viable uses of Plaintiff's property in its indigenous and natural state.

While the $1000 annual offer from the Brittain County Butterfly Society is, by itself, insufficient to establish the property's economic feasibility, it is nonetheless indicates the types of uses to which the property may put. Surely, there are other butterfly enthusiast associations who would pay to view the rare Karner Blue in its natural habitat. Plaintiff could also lease her property to scientists for a number of different research purposes. Furthermore, plaintiff could seek to establish a conservation bank for Karner Blue Butterflies on the Cordelia lot, thus transforming the unique ecology of her property into an engine of economic production.

Additionally, Plaintiff could maintain the property in its natural state, while also securing additional economic benefit for herself by raising goats or sheep. These herbivores will make the heath maintenance a self-sufficient process, eliminating the need for annual mowing *See,* Andrew Balmford, *Wild Hope: On the Front Lines of Conservation Success* 10, 12, 97 (2012) (describing a similar process in the United Kingdom, where sheep were used to prevent woodland succession—maintaining critical heath habitat for rare butterflies.) The sheep or goats can also provide additional economic return because plaintiff could sell the wool or milk the animals provide. Thus, it cannot be said that plaintiff has been denied all economically viable uses of her property.

Thus, plaintiff has failed to show demonstrate that the ESA effects a taking for which just compensation is due. She has failed to demonstrate a complete deprivation of all economically beneficial uses of the property. She focuses on only those uses restricted by the ESA. While, the ESA does burden plaintiff's use of her property, it does not prohibit all economically beneficial uses of the property. That plaintiff is unable to realize her preferred land use for the property is insufficient to establish a compensable regulatory taking.

E. THE DISTRICT COURT ERRED IN FINDING THAT NO PUBLIC TRUST NAVIGATIONAL RESERVATION EXISTED AT THE TIME OF THE LEAR GRANT.

The general right to public waters was established long before the state had title to convey to private parties. *Meunch v. Public Service Commission et al.*, 261 Wis. 492, 504 (1952). Riparian and littoral landowners accepted the burden to adjust their property to maintain public use of navigable waters. *Id.* at 505. Therefore, landowners do not have an "absolute and unlimited" right to alter the "essential natural character" of their land and use it in a manner that would injure the rights of others. *Just*, 56 Wis.2d 7.

Navigable waters are public waters free for navigation, as well as protected and preserved for recreation, fishing, and scenic beauty. *Meunch v. Public Service Commission et al.*, 261 Wis. 492, 504-05 (1952). Scenic beauty includes swamps, marshes, and wetlands as their vital role in balancing ecological systems create their own beauty in nature. *Just*, 56 Wis.2d at 17.

The legislature may designate local powers to protect and preserve the recreation, fishing, and scenic beauty by creating special zoning ordinances. *Menzer v. Village of Elkhart Lake et al.*, 51 Wis.2d 70, 78 (1971). Powers regulating zoning must be reasonable. *Just*, 56 Wis.2d at 17. It is established that it is not an unreasonable exercise of power to limit "private property to its natural uses" to "prevent harm to public rights." *Id.* Some changes are allowed so long as the changes do not cause harm. *Id.* However, damaging the general public's use of the wetlands by,

"upsetting the natural environment and the natural relationship is not a reasonable use of that land." *Id.* at 17-18. Specifically, courts have failed to adopt that the destruction of a wetland to make the location more suitable for human habitation as "a reasonable use of that land," regardless if the new use increases the landowner's economical value, if it causes harm to the general public. *Id.* at 18.

1. Cattail Marsh is a Navigable Waterway that Must Be Preserved for the Public's Use.

It is an accepted fact that Lake Union is a navigable waterway as it has traditionally been used for interstate navigation. However, this is not the case for cattail marsh. To determine navigability, the *Daniel Ball* test states that a waterway must be one of two things, "used" as a highway for commerce at the time a particular state was admitted to the union or "susceptible of being used" as a highway for commerce at the time a particular state was admitted to the union. 77 U.S. (10 Wall.) 557, 563 (1870). Cattail marsh satisfies the *Daniel Ball* navigability test because it was "susceptible of being used" as a highway for commerce when New Union gained statehood. Cattail marsh was historically an open body of water that was used as a boat landing. Since the Lear family began major production on the island in the late 19th century, it can be inferred that cattail marsh was susceptible of being used as a highway for commerce when New Union was admitted to the Union.

Furthermore, the current navigability of cattail marsh is irrelevant to its navigable status. Cattail marsh currently sits in a cove on the northern end of Cordelia's lot and is not used for commerce. In fact, the U.S. Army Corps of Engineers has rendered this piece of Lake Union as "non-navigable" for the purposes of the Rivers and Harbors Act of 1899. A waterway remains navigable for regulatory purposes even though it subsequently may become non-navigable

because of a change in conditions. *Economy Light and Power Company v. United States*, 265 U.S. 113, 65 (1921). Thus cattail marsh remains a navigable waterway if only in name.

2. A 'Taking' has Not Occurred Because Lear is Able to Use the Cattail Marsh In Its Natural State.

FWS's preservation of the Blue Lupine flowers and Karner Blue butterflies does not constitute a 'taking' because Lear is able to use the cattail marsh in its natural state. Successful takings claims occur when excessive police power restrict the private owner's natural use of the land. *State v. Herwig*, 17 Wis.2d 442, (1962) (holding that a 'taking' occurred when a police regulation prohibited hunting on farmland resulted in an unnatural waterfowl refuge that created substantial damage to the owner's property without just compensation); *Bino v. Hurley*, 273 Wis. 10, 21-22 (1956) (holding that a 'taking' occurred when an ordinance, attempting to prevent pollution, prohibited the owners of land surrounding a lake from using the lake).

For Lear's taking claim to be successful, she needs to claim that the FWS's critical Lupine habitat destroyed her cattail marsh property or prevented her from using the cattail marsh cove for recreation in its natural form. *State v. Herwig*, 17 Wis.2d 442, (1962); *Bino v. Hurley*, 273 Wis. 10, 21-22 (1956). However, Plaintiff Lear has been unable to establish those claims with the available information. Plaintiff Lear sought to disturb the cattail marsh's natural state for the construction of a residential home. As previously held in *Just*, economical improvement on a navigable body of water is not a reasonable destruction if it brings harm to the public's use of that land. *Just*, 56 Wis.2d 7. Filling the cattail marsh would prevent the public from the scenic beauty that the endangered Blue Lupine flowers and Karner Blue butterflies bring. Therefore, the restriction was well within the preservation of the cattail marsh's natural habitat and not a taking of Lear's property.

F. FWS'S FEDERAL REGULATION PREEMPTS THE BRITTAIN COUNTY STATE REGULATION RENDERING THE BRITTAIN COUNTY STATE REGULATION INVALID AND THE TAKING OF PLAINTIFF LEAR'S LOT IS INCOMPLETE.

The District Court, created by Congress and enforced by the New Union FWS field office, preempts the Brittain County Wetland Preservation Law as both regulations cannot simultaneously exist on Cordelia Lear's lot. Since the Supremacy clause invalidates state law that conflicts with Congressionally passed statutes, the Brittain County Wetland Preservation Law must be removed for Lear Island. U.S. Const. Art. VI, cl. 2.

The Supremacy Clause intervenes when federal and state laws conflict. U.S.C.A. Const. Art. VI cl. 2. The Supremacy Clause, also known as the Preemption Doctrine, invalidates the state law that interferes with or contradicts the federal law. *Tufariello v. Long Island R. Co.*, 458 F. 3d 80 (2006); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (stating that [preemption] is appropriate when state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."). Similarly, local statutes will also be preempted by federal law if Congress has specifically stated they will be preempted, the regulated subject matter permits no other option but preemption, or if the local statute stands as an obstacle to accomplish the full purpose of the federal law. *Rogers v. Larson*, 563 F. 2d 617 (1977).

Congress enables all federal departments and agencies, like FWS, to conserve both endangered and threatened species and federal departments are authorized to extend their authority to further the purpose of the ESA. 16 U.S.C.A. § 1531(c)(1). Congress has made it clear that when balancing the equities, "[Congress is] in favor of affording endangered species highest of priorities." *Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003).

Here, the New Union FWS field office is exercising its federal authority, specifically authorized by Congress, to protect the Karner Blue butterflies' habitat, the Lupine fields. The Brittain County Wetland Law is preventing the FWS from protecting this endangered species' habitat by imposing a state regulation on the same land. The Supremacy Clause must be applied here as both laws cannot coexist. According to *Hillsborough County*, preemption is appropriate when "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." 471 U.S. 707, 713 (1985). The state regulation is standing as an obstacle because Lear is unable to use her land. Without Lear's use of the land, the Lupine fields will go unmanicured and the Karner Blue butterfly habitat will disappear in New Union.

Thus, if the state regulation is removed, Lear is permitted to use her land for a residence and maintain the Karner Blue butterfly habitat.

CONCLUSION

For the aforementioned reasons FWS requests this Court to uphold the District Court's judgment pursuant to the application of the ESA to plaintiff's property and reverse all other conclusions of law.

Respectfully Submitted,

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Counsel for Fish and Wildlife Service