No. 16-0933

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

Cordelia Lear,

Plaintiff-Appellee-Cross Appellant

v.

Fish & Wildlife Service,

Defendant-Appellant-Cross Appellant

&

Brittain County, New Union,

Defendant-Appellant

BRIEF FOR FISH & WILDLIFE SERVICES

Team 49

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Jurisdictional Statement

The district court had federal-question jurisdiction over this suit under 28 U.S.C. § 1331. The district court issued a final order on June 1, 2016. Brittain County and Forest & Wildlife services timely filed a notice of appeal on June 9, 2016. Cordelia Lear filed a notice of appeal on June 10, 2016. This Court has jurisdiction under 28 U.S.C. §1291. Also, this Court already made the determination that it has jurisdiction.[1]

Statement of the Issues

1. Is the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?
2. Is Lear's takings claim against FWS ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?
3. For takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?
4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?
5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?

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[1] Record p. 2.

6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?
7. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

Statement of the Case

I. Procedural history.

Cordelia Lear filed a lawsuit against FWS and Brittain County.[2] Cordelia Lear sought a declaration that the Endangered Species Act was an unconstitutional exercise of congressional legislative power.[3] Alternatively, Cordelia Lear brought a claim for just compensation from FWS and Brittain County for a regulatory taking of her property.[4]

After a bench trial, the district court dismissed Cordelia's Lear claim that the ESA was an unconstitutional exercise of legislative power as applied to her property; "awarded damages of $10,000 in Lear's favor against the FWS for an unconstitutional taking of her property in violation of the Fifth Amendment to the Constitution; and [awarded] damages

[2] R. at 7.
[3] R. at 7.
[4] R. at 7.

in the amount of $90,000 against Brittain County for an unconstitutional taking of Lear's property in violation of the Fifth Amendment to the Constitution."[5]

The parties timely appealed the judgment.[6]

II. Factual Background

The Lear Family obtained ownership of Lear Island and underwater lands within 300 feet of the shoreline through a Congressional grant in 1803, when New Union was still part of the Northwest Territory.[7] The Family historically used Lear Island as a farm, homestead, and hunting and fishing grounds.[8] In 1965 King Lear divided the island into three parcels in his will so he could leave each daughter her own piece.[9] The 10-acre Cordelia Lot includes a 1-acre cove of unidentified shape and a 10-acre area referred to as "the Heath," which contains the only remaining intrastate population of the Karner Blue Butterflies.[10] Fish and Wildlife Services ("FWS") designated the Heath as a critical habitat for the butterflies because the lupine fields adjacent to a successional forest are an ideal habitat for the Karner Blues.[11]

The Heath was not originally a suitable habitat for Karner Blues; however, Cordelia Lear created a suitable habitat for the endangered species through voluntary and

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[5] R. at 4
[6] R. at 1.
[7] R. at 4.
[8] R. at 5.
[9] R. at 5.
[10] R. at 5-6.
[11] R. at 6.

discretionary annual mowing of the Heath.[12] Cessation of annual mowing would render the Heath unsuitable habitat for the Karner Blues.[13]

The current owner of the Heath, Cordelia Lear, wished to construct a home on the lot.[14] Cordelia Lear contacted FWS about any approvals or permits she might need in order to build a home.[15] FWS responded that construction would be a 'take' of the Karner Blue Butterflies.[16] But, FWS invited Cordelia Lear to apply for an Incidental Takings Permit (an "ITP").[17] Cordelia Lear, based on her calculations, estimated an ITP would cost about $150,000.[18]

Rather than pursuing an ITP, Cordelia Lear elected to submit an Alternative Development Proposal (the "ADP") to Brittain County authorities.[19] The ADP prosed The Brittain County Wetlands Board denied the ADP.[20]

Summary of the Argument

1. The Endangered Species Act (the "ESA"), as applied to the Heath, is a Constitutional exercise of Congressional Authority. The ESA is a comprehensive economic regulatory scheme. The 'take' prohibition is an essential part of that scheme.

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[12] R. at 5-7.
[13] R. at 5-7.
[14] R. at 5.
[15] R. at 6.
[16] R. at 6.
[17] R. at 6. An ITP requires a Habitat Conservation Plan (a "HCP"). FWS provided the minimum necessary elements of a HCP for Cordelia Lear's ITP application: an acre-for-acre replacement of any lupine fields destroyed due to construction and a commitment to annual mowing. R. at 6.
[18] R. at 6. The fair market value of the Heath without any restrictions is $100,000.
[19] R. at 7.
[20] R. at 7.

2. Cordelia's claim against FWS is not ripe for review. FWS never had the chance review Cordelia Lear's ITP application. Therefore, FWS never made a final decision. A ripe claim requires a final decision, which provides FWS the opportunity to determine how it wants to enforce the ESA. Cordelia Lear robbed FWS of that opportunity when she elected to submit an ADP to Brittain County authorities.

3. The relevant parcel for a takings claim is the parcel as a whole, which is the entirety of Lear Island. The Lear Family treated Lear Island as the family island—a single community—for over two hundred years. There is no bright-line rule that the relevant parcel for a takings claim is determined by a legal boundary. The owner's historical use and treatment determines the correct parcel.

4. The fact that the lot will become developable within 10 years of cessation of the Heath's annual mowing, precludes Lear's categorical takings claim because the alleged taking is merely temporary and cannot deprive the property of all economic value. Furthermore, the temporary moratorium on building cannot be a temporary taking because it is too short and is caused by Lear's own actions.

5. Brittain County Butterfly Society's offer to rent the Heath for wildlife viewing precludes Lear's takings claim because it shows a reasonable probability that (1) the land is physically adaptable for wildlife viewing and (2) there is a demand for a wildlife sanctuary in the near future.

6. New Union's public trust doctrine likely precludes Lear's takings claim based on the denial of a county wetlands permit because Lear's development plans may extend into Brittain County's public trust waters.

7. Lear concedes that neither the FWS or Brittain County's actions alone effect a regulatory taking. The regulations should not be considered together because their effect is easily theoretically and practically divisible. Combining the two regulations for takings jurisprudence would create unpredictability and chill efficient permitting and development.

Argument

I. As applied, the ESA is a valid exercise of the Commerce Power.

The ESA is a valid exercise of the commerce clause power as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction on Lear Island. Every Court of Appeals that has reviewed this issue is in agreement that the 'take' prohibition of a wholly intrastate species in the ESA is a valid exercise of Congress' Commerce Power.[21]

Congress' authority under the Commerce Clause includes the power to regulate activities that, viewed in the aggregate, affect interstate commerce.[22] An intrastate activity may be regulated if it is "an essential part of a larger regulation of economic

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[21] San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1177 (9th Cir. 2011); Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1277 (11th Cir. 2007); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003); GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622, 640-41 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 505-06 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057 (D.C. Cir. 1997). Meanwhile the Supreme Court has reviewed cases involving the Endangered Species Act several times, but has never questioned its constitutionality. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, (1997); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

[22] United States v. Lopez, 514 U.S. 549, 561 (1995); United States v. Morrison, 529 U.S. 598, 609 (2000); Gonzales v. Raich, 545 U.S. 1, 24 (2005).

activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[23] There are two factors to consider: (1) whether the ESA is an economic regulatory scheme, and (2) whether the take provision is essential to that scheme.[24] The ESA is an economic regulatory scheme.[25] Congress considered the economic effects of the ESA prior to enactment[26] and preserving biological diversity has commercial value.[27] And, the 'take' provision is an essential part of the ESA's scheme to save endangered species.[28] The take provision prevents the destruction of habitat that endangered species need to survive.

II. The claim is not ripe for review.

Lear's takings claim against FWS is not ripe because she did not apply for an Incidental Takings Permit (an "ITP"). A ripe claim requires a final agency decision and FWS must have that opportunity so it can implement an effective strategy to enforce the ESA. And since FWS invited Cordelia Lear to apply for an ITP, it cannot be considered a futile act.

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[23] Markle Interests, L.L.C. v. United States Fish & Wildlife Serv., 827 F.3d 452, 476 (5th Cir. 2016) (quoting raich p. 36).

[24] *Id.*

[25] *Id.* Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1); Alabama-Tombigbee Rivers Coal477 F.3d at 1273 (11th Cir. 2007); San Luis & Delta-Mendota Water Auth., 638 F.3d at 1177.

[26] H.R. Rep. No. 93-412, at 4 (1973).

[27] Markle Interests, L.L.C., 827 F.3d at 476.

[28] GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622, 639-40 (5th Cir. 2003).

The ESA prohibits a so-called "take" of an endangered species.[29] Regulations define a "take" as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" (each such action a "Take of an Endangered Species").[30] Under § 1538(a)(1)(B) of the ESA, the Take of an Endangered Species may be permissible if it is incidental to an otherwise lawful activity.[31] A permissible Take of an Endangered Species requires an Incidental Takings Permit (an "ITP").[32] ITP applications require a Habitat Conservation Plan (each such plan a "HCP").[33]

A. A ripe claim requires a final agency decision.

A claim for a regulatory taking is not ripe until the agency charged with implementing the regulations reaches a final decision regarding "the application of the regulations at issue."[34] The property owner must comply with the relevant permitting procedures before obtaining a decision on a takings claim.[35] FWS is charged with granting ITP applications under the ESA.[36] And, "[a] requirement that a person obtain a

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29 16 U.S.C.A § 1538 (West).
30 50 C.F.R. § 17.3.
31 16 U.S.C.A. § 1538 (West).
32 16 U.S.C.A. § 1539 (West).
33 50 C.F.R. § 17.3.
34 *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).
35 Morris v. United States, 392 F.3d 1372, 1376 (Fed. Cir. 2004).
36 16 U.S.C.A. § 1537a (West).

permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense."[37]

B. Case Law provides guidance on what constitutes a final agency decision.

Case law provides insight as to what constitutes a final agency decision in the context of an ITP application and a ripe takings claim. In order for a ripe takings claim, FWS must deny the ITP.

In *Morris*, the property owner decided not to file an ITP, with a HCP, because the owner expected the cost of the permit was greater than value of the property.[38] Instead, the property owner filed suit against the government for a takings claim.[39] The claim was not ripe, however, because there was no final agency decision.[40] Additionally, the cost of the ITP application was unknown until the agency had the chance to assist in the ITP process in a meaningful way.[41]

A property owner consulting with FWS in their decision to submit an ITP does not amount to a final agency decision.[42] In *Boise Cascade*, FWS inspected the property owner's land, at the owner's invitation, and determined proposed logging activity could amount to the Take of an Endangered Species.[43] FWS recommended that the property owner apply for an ITP.[44] The property owner did not apply for an ITP and still brought

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37 *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
38 Morris, 392 F.3d at 1374.
39 *Id.*
40 *Id.* at. 1376-77.
41 *Id.* at 1377.
42 *See* Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002).
43 *Id.* at 1341-42.
44 *Id.* at 1342.

a takings claim against the government.[45] But, no taking of the property occurred because FWS never denied the ITP. The initial denial of a permit remains a necessary condition for a ripe takings claim.[46]

A denial of an ITP application amounts to a final agency decision.[47] In *Seiber*, the property owner submitted an ITP application to FWS, which included a HCP.[48] Ultimately, FWS denied the ITP since the HCP mitigation proposals did not meet the meet the requisite criteria.[49] The property owners did request reconsideration, which was subsequently denied: twice.[50] The property owners were able to bring a ripe takings claim because the "regulatory scheme governing the ITP process deemed the government's action final and did not allow any further reconsideration."[51]

C. FWS never made a final decision.

FWS never made a final decision on whether Lear could obtain an ITP for her lot. Rather, Lear robbed FWS of that opportunity when she decided to pursue the Alternate Development Plan (the "ADP") with Brittain County. Thus, Lear's claim is not ripe for litigation.

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45 *Id.* at

46 *Id.* at 1347.

47 *See* Seiber v. United States, 364 F.3d 1356 (Fed. Cir. 2004).

48 *Id.* at 1360. After FWS failed to respond to the ITP application, the property owner sent a letter requesting notice of the ITP to be published in the Federal Registrar. FWS responded, stating that the agency was reviewing the ITP application, especially to determine if the HCP contained the necessary information.

49 *Id.* at 1361.

50 *Id.* at 1366

51 *Id.*

Lear elected to file suit before applying for an ITP. In both *Morris* and *Boise Cascade*, the property owner's cause of action was not ripe because FWS never denied the ITP. It did not matter that the property owner expected the cost of pursuing an ITP exceeded the value of her property or that FWS presented preliminary findings while viewing the property. Cost is unknown until FWS has a substantial opportunity to participate in the ITP process. And, a recommendation to pursue an ITP differs significantly from the denial of an ITP. In Lear's situation, she cannot know the cost of pursuing the ITP until FWS provides their insight. Also, Lear cannot treat FWS's invitation to apply for an ITP as a denial of an ITP.

Seiber provides an example of what constitutes a final agency decision—a denial. In *Seiber*, FWS denied both the landowner's application for an ITP and two motions for reconsideration. At this point, the landowner possessed a ripe cause of action that a court aught to review. Compared to the landowner in *Seiber*, Lear only completed the preliminary stages on the process to obtain FWS's decision on an ITP application.

D. FWS must have the opportunity to make a final decision so it can decide how to enforce the ESA.

FWS should be afforded the opportunity to review an ITP application before a landowner can assert a takings claim. It gives FWS a chance to make an informed decision prior to exercising their authority.[52] FWS is charged with protecting the Karner Blue Butterflies. Therefore, the agency should have an opportunity to carefully consider any action that threatens the continued existence of the species. In the case of the ITP,

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[52] Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 340 (2002).

that opportunity is the process of reaching a decision to grant or deny the permit. A court should not intervene until FWS makes that decision.

E. **Cordelia Lear seeking an ITP is not a futile action**.

At some point it is possible for a landowners pursuit of a permit to become futile.[53] In order to establish futility, the landowner needs to show that the regulatory authority established a policy of denying the desired permit.

Lear pursing an ITP would not be a futile action. FWS invited her to submit an application and offered instructions on how to do so. And, unlike the landowner in *Pallazo* (where not matter how small the proposed activity, the regulatory authority could not find a "compelling public purpose"[54]), Lear could obtain the permit at issue. FWS instructed that Lear's successful ITP application only needed: an acre-for-acre exchange and a promise to continue annual mowing. So rather than establishing a policy of denying Lear's permit, FWS encouraged her to apply by providing the minimum-necessary elements of a successful application.

III. The Relevant Parcel is the Entirety of Lear Island.

The entirety of Lear Island is the correct parcel for the purpose of a takings analysis. The family treated the island as one community. Further, landowners may not divide parcels in order to increase the likelihood that a court will find a regulatory taking occurred. And finally, there is no bright-line rule in regard to how to determine the correct parcel.

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[53] *See* Palazzolo, 533 U.S. at 620-21

[54] *Id.* at 620.

A takings analysis must focus on the "parcel as a whole."[55] Landowners may not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[56] Determining the correct parcel cannot be accomplished through "conceptual severance," instead a flexible approach must be utilized to establish what constitutes a single economic unit.[57]

A. How to determine the parcel as a whole.

The relevant parcel for a takings claim may consist of several legally distinct parcels.[58] In *Forest Properties*, the landowner purchased two separate tracts of land at different times.[59] Yet, the relevant parcel for a takings claim included both parcels.[60] The landowner treated the two parcels as a single unit, which was more important than the fact that the two parcels were separate legal entities.[61]

A community may be treated as a single economic unit.[62] And therefore, a parcel that is not part of the community may be severed for the purpose of deciding whether a regulatory taking occurred.[63] The landowner in *Lost Village* was able to establish that a particular plat was not part of the community and should be treated as a distinct parcel for

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55 Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 130–31 (1978); Tahoe-Sierra Pres. Council, Inc., 535 U.S. at 327.
56 Penn Cent. Transp. Co., 438 U.S at 130–31.
57 *See* Transp. Co., 438 U.S.; Tahoe-Sierra Pres. Council, Inc., 535 U.S.; Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999).
58 Forest Properties, 177 F.3d at 1365.
59 *Id.* at 1362
60 *Id.* at 1365.
61 *Id.*
62 Lost Tree Vill. Corp. v. United States, 707 F.3d 1286, 1294 (Fed. Cir. 2013).
63 *Id.*

a takings claim. The landowner did not include the plat at issue in the community development plan.[64] And for a substantial period of time, the landowner was unaware of its ownership of the plat.[65]

B. The parcel as a whole is entire Lear Island.

When King Lear deeded Lear Island to his daughters, the entirety remained within the family. [66] Disregarding the Lear family's treatment of Lear Island as one unified entity maintained by King Lear giving each daughter her own piece would subjugate the family's decisions and history to legal fictions.

The only people to possess ownership rights on Lear Island are members of the Lear Family. Similar to the facts in *Forest Properties*, Lear Island is treated as a single unit—the Lear's family unit. The Lear Family's history on Lear Island began with a productive-family farm and homestead, clearly treating the island as a single economic unit. What better reason could King Lear have to give each one of his daughters ownership rights in Lear Island, than to give each one the ability to participate in the continued development of the family community. And like *Lost Village*, a community must be treated as the relevant parcel in the context of a takings claim. The Lear Family has neither been unaware of their ownership of the entire Island, nor considered any portion of the Island as separate for planning the development.

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64 *Id.* at 1293.

65 *Id.* at 1294.

66 *See* Friedrich Baerwald, The Family as an Economic Unit, 24 Ford. L.R. 1, 116 (1955) (the family is the quintessential economic unit).

C. The conceptual doctrine prevents carving up the property to increase the likelihood of a takings claim.

Takings jurisprudence disfavors carving up property for the purpose of a takings case. [67] A landowner cannot conceptually sever property.[68] Carving up Lear Island for a takings analysis would only increase the likelihood Cordelia Lear receives an undue windfall through "conceptual severance." While there is no evidence the Lear family divided the Island for this purpose,[69] it remains inconspicuously convenient that the smallest parcel of the three contains the only suitable habitat for a particular endangered species. Consequently, it is the most likely parcel for which a regulatory taking could be granted. The Lear Family treated Lear Island as the family island for over 200 years; there is no reason to replace the Family's long history on Lear Island with formulistic boundaries now.

D. There is no bright-line rule.

In takings jurisprudence, there is no bright-line rule that legal boundaries establish the relevant parcel for a takings claim; instead a flexible approach must be used.[70] Therefore, the fact that the Island is now, for the first time, three separate entities is not determinative on the issue of the relevant parcel for a takings analysis. Two-hundred years of Lear Island as the Family Island trumps the relatively-recent legal boundaries.

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[67] Brace v. United States, 72 Fed. Cl. 337, 349 (2006), aff'd, 250 F. App'x 359 (Fed. Cir. 2007).

[68] Tahoe-Sierra, 535 U.S. at 331.

[69] King Lear did draft his will prior to the enactment of the ESA.

[70] Lost Tree Vill. Corp, 707 F.3d at 1293-94. In *Loveladies Harbor*, the landowner advocated for a bright-line rule that a legal boundary determines the relevant parcel for a takings claim. Yet, the determination of the correct parcel required a flexible approach based on the facts of the case. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

IV. The fact that the lot will become developable upon the natural destruction of the Blue Karner habitat in 10 years precludes Lear's taking claim based upon a complete deprivation of economic value of the property.

Lear's takings claim based upon a complete depravation of economic value of the property should be precluded. First, any restrictions on the Cordelia Lot are temporary because the lot will become developable upon the natural destruction of the Blue Karner Habitat in ten years. Temporary takings do not constitute categorical taking because they cannot deprive a property of all economic value. Second, even if a temporary taking could deprive a property of all economic value, it would not be considered a categorical taking. Furthermore, because the moratorium lasts for an acceptable length of time and Lear's discretionary actions cause the moratorium, the moratorium does not rise to the level of a temporary taking.

A. Temporary takings do not constitute categorical taking because they cannot deprive a property of all economic value.

First, because the presence Karner Blue population on Lear's land naturally will cease in 10 years if Lear discontinues the Heath's annual mowing, any restrictions on the Cordelia Lot should be considered temporary. The Supreme Court has held that a temporary moratorium or delay of development does not constitute a categorical taking of a landowner's property.[71] A categorical taking must be a permanent deprivation of the owner's use of the "parcel as a whole".[72] Both geographical and temporal dimensions must be considered when viewing the interest in a parcel as a whole.[73] A temporary moratorium cannot cause a complete deprivation of economic value of a property because

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[71] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002).
[72] *Id.*
[73] *Id.*

the property will recover all value when the moratorium is lifted.[74] Thus, because the moratorium on development of the Cordelia Lot is temporary, dependent on Lear's cessation of discretionary annual mowing, it cannot cause a categorical taking.

B. Temporary takings do not constitute categorical takings.

Second, even if Federal and State regulations could temporarily cause a complete deprivation the economic value of property, it would not be considered a categorical taking. In *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, the Supreme Court explicitly rejected the adoption of a categorical rule that a temporary deprivation of all economic use constituted a compensable categorical taking.[75] Rather, the court held that whether a temporary moratorium effects a taking "depends on the particular circumstances of the case" and should be analyzed as a non-categorical taking under the *Penn Central*[76] framework, *not* as a per se categorical taking.[77] Accordingly, because temporary takings do not constitute categorical takings, Lear's claim must fail as a matter of law.

C. Even if a temporary taking could constitute a categorical taking, the moratorium on development of Lear's property not rise to the level of a temporary taking.

Furthermore, even if a temporary taking could constitute a categorical taking, it would not in this case. The Lower Court erred in relying primarily on the length of the moratorium in determining that the potential natural cessation of the Karner Blue's

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74 *Id.*

75 *Tahoe-Sierra*, 535 U.S. 302 at 321.

76 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

77 *Tahoe-Sierra*, 535 U.S. 302 at 321.

presence within 10 years did not preclude Lear's categorical takings claim. When analyzing moratoriums, the moratorium's length is not necessarily the primary consideration in determining whether a delay rises to the level of a temporary taking.[78] Rather, all reasons for a moratorium should be taken into consideration, including delays caused by the party claiming a taking.[79] The Federal Circuit previously held that lengthy delays, even up to 10 years, are not necessarily extraordinary.[80] Additionally, a moratorium is temporary when it has a finite end, regardless of the fact that the regulation may be permanent when enacted.[81]

Here, the temporary moratorium on development is the result Lear's own discretionary actions. But for Lear's discretionary mowing of the Heath, the Blue Karners would not inhabit her property. The presence of the Blue Karners implicates the ESA, which hinders Lear's development plans for the Cordelia Lot. Moreover, Lear could easily mitigate the self-inflicted implication of the ESA by simply ceasing the Heath's annual mowing. Lear should not be allowed seek compensation from the government for a moratorium caused by her own discretionary actions. Additionally, the 10-year moratorium has a finite end and is not excessive when compared to past case law. Thus, the moratorium due to Lear's discretionary mowing of the Heath does not rise to the level of a temporary taking.

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78 Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001).
79 *Id.* at 1098.
80 *See* Williamson, 473 U.S. 172 (1985) (holding that an 8-year delay did not constitute a temporary taking); Bass Enterprises Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004) (holding that a 45-month delay was not extraordinary); *Wyatt*, 271 F.3d 1090 (holding that a nearly 10-year delay was not extraordinary).
81 Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 481-82 (Fed. Cl. 2009).

Any restrictions on the Cordelia Lot are temporary because the lot will become developable upon the natural destruction of the Blue Karner Habitat in ten years. Thus, the regulation has a finite end. Temporary takings do not constitute categorical taking because they cannot deprive a property of all economic value. Even if a temporary taking could deprive a property of all economic value, it would not be a categorical taking. Rather, it is a non-categorical taking subject to a *Penn Central* analysis. Furthermore, because the moratorium lasts for an acceptable length of time and Lear's discretionary actions cause the moratorium, the moratorium does not rise to the level of a temporary taking. For these reasons, Lear's takings claim based upon a complete deprivation of economic value of the property should be precluded.

V. Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing precludes a takings claim for complete loss of economic value.

Brittain County Butterfly Society's initial offer to pay $1,000 per year for wildlife viewing is sufficient to show an economically viable use that precludes a categorical taking claim. A categorical treatment for an alleged taking is triggered by the lack of economically viable use of a property.[82] A property's retention of value does not preclude categorical treatment when the claimant is without economically viable use of the property.[83] A property has an economically viable use, when it shows a "reasonable

[82] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992); Florida Rock II, 791 F.2d 893, 895-97 (Fed. Cir. 1986).
[83] Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001

probability that, at the time of the taking, the land was both physically adaptable for such use and that there was a need or demand for such use in the reasonably near future."[84]

The Brittain County Butterfly Society's offer indicates that the land shows a "reasonable probability" that the property has an economically viable use. First, the Butterfly Society's offer combined with the presence of Blue Karners on Lear's property show that the land was physically adaptable for use as a butterfly sanctuary and wildlife viewing area. Second, the initial offer shows that there is a demand for a butterfly sanctuary and wildlife viewing area at the time of the alleged taking. Although the Brittain County Butterfly Society's initial offer alone does not constitute an economically viable use,[85] it proves the reasonable potential for subsequent offers from wildlife interest groups that would generate income and constitute an economically viable use. Thus, the Brittain County Butterfly Society's initial offer to pay $1,000 per year for wildlife viewing is sufficient to show an economically viable use that precludes a categorical taking claim.

VI. Public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit.

Lear's claim for a taking based on the denial of a county wetlands permit is precluded by public trust principles. First, precedent is unclear on the scope of New Union's public trust doctrine; thus, the court should follow a rule that embodies the

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[84] Board of County Supervisors of Prince William County v. United States, 276 F.3d 1359, 1365 (Fed. Cir. 2002).

[85] A property that incurs more in taxes than it generates in income does not have an economically viable use because it is a net liability. Bowles v. United States, 31 Fed. Cl. at 37, 48-49.

intended substance and policy behind the doctrine. Second, Lear's proposed development may extend into public waters protected by New Union's public trust doctrine.

A. In the face of conflicting precedent, the court should follow a substantively accurate public trust doctrine.

First, the Lower Court erred in asserting that New Union could not have considered non-tidal navigable waters to constitute public trust waters because some case law suggests that non-tidal navigable waters did were not public trust waters in the United States before 1810.[86] Public trust doctrines are not uniform and each state deals with lands under navigable waters according to its own policy.[87] In addition to the case cited by the Lower Court, the Supreme Court has suggested that some states did may have considered non-navigable waters to constitute public trust lands from the outset.[88] Thus, there is no definitive precedent establishing the scope of New Union's protection for public trust waters. Therefore, the court should follow a public trust law that embodies the intended substance and policy behind the doctrine, rather than merely the traditional form.

Public trust laws were created to give sovereigns control of passages for commerce and navigation used for public purposes.[89] Public trust laws in the United States are derived from English law, which limited public trust waters to navigable tidal waters.[90] Because of the topographical differences between the United States and

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86 R. at 10.
87 PPL Mont., LLC v. Montana, 565 U.S. 576, 590 (2012).
88 Barney v. Keokuk, 94 U.S. 324, 338 (1896).
89 *Id.* at 337.
90 *Id.*

England,[91] today any United States water that is "navigable in fact" falls under the public trust doctrine.[92] Thus, good public policy dictates that for the purposes of public trust law in the United States, navigable waters should include both tidal and non-tidal waters. Therefore, non-tidal Lake Union could have fallen within the scope of New Union's public trust doctrine when it was established and modern public policy dictates that it should fall under the public trust doctrine.

B. Lear's proposed development likely extends into New Union's public trust waters under a modern public trust doctrine.

Second, under a modern public trust doctrine, Lear's proposed development likely extends into New Union's public trust waters. The lower court states that the "equal footing doctrine" does not allow Brittain County to claim title to the lands in dispute because King Lear's prior congressional grant gives Lear superior title to any lands under water within 300 feet of Lear Island's shoreline.[93] It is true that a prior congressional grant gives superior title to the congressional grantee against a State's subsequent equal footing claim. However, the superior title only applies to the lands actually granted.[94] Lear has superior claim to lands under water only within 300 feet of Lear Island's shoreline. Lear proposes to fill and develop half an acre of underwater lands in a cove that was historically open water used by boats. One acre is 43,560 square feet of land of any shape. The standard shape of an acre is 660 feet by 66 feet. In these dimensions, filling in half an acre of the cove would extend 330 feet beyond Lear Island's shoreline

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91 *Id.*

92 *Id.* at 336; PPL Mont., LLC, 565 U.S. at 590 (*citing* Shively v. Bowlby, 152 U.S. 1, 31 (1894).

93 R. at 10.

94 Shively v. Bowlby, 152 U.S. 1, 57-58 (1894).

and into navigable-in-fact public trust waters. The record is silent on the extent of the proposed development of the cove. Lear's proposed development may easily extend beyond the property granted in 1803 and into New Union's public trust waters. If this is the case, Lear's claim is precluded by New Union's "background principle" of public trust interests in navigable waters.

Lear's claim for a taking based on the denial of a county wetlands permit is precluded by public trust principles. Precedent is unclear on the scope of New Union's public trust doctrine and the court should follow a rule that embodies the intended substance and policy behind the doctrine. Under a substantively accurate public trust doctrine, Lear's proposed development may extend into New Union's public trust waters. Thus, Lear's takings claim is precluded by public trust principles inherent in title. Furthermore, the status of New Union's public trust principles is irrelevant to Lear's takings claim against FWS because FWS allows development of the cove. The undefined status of New Union's public trust doctrine should not provide Lear a unique takings claim against FWS.

VII. The ESA and Brittain County Wetland Preservation Law must be considered separately.

Under *Lucas*, when government regulation that deprives a landowner of all economically beneficial use of her land and the proscribed use does not constitute a taking that could have been prohibited by applicable nuisance law, the regulation effects a compensable taking.[95] Neither FWS nor Brittain County deprive Lear of all economically beneficial use of her land because neither precludes Lear from building a

[95] Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

single-family residence on the Cordelia Lot. Thus, as Lear concedes, neither regulation individually amounts to a taking under Lucas. However, Lear argues that the ESA and WPL must be considered together when performing a takings analysis. This claim is incorrect.

The federal ESA and local WPL should be considered separately for two reasons. First, the lower court errs in analogizing the facts of this case to a joint tort because the alleged harm caused by FWS and Brittain County is divisible.[96] Second, combining the regulations creates unpredictability for developers and federal actors. Thus, this court should refuse to set the dangerous precedent of combining federal and local regulations.

A. The alleged taking is not similar to a joint tort because the harm is divisible.

The alleged taking is not similar to a joint tort because the harm is divisible; thus, the alleged harms resulting from the federal and local regulations should be considered separately. Where the actions of two actors would not individually cause harm, but the actions combined cause a single and indivisible harm to the plaintiff, the actors are considered to be "joint tortfeasors" and are jointly and severally liable to the plaintiff.[97] "Indivisibility" of the harm is required to hold two actors jointly and severally liable.[98] To be indivisible, a harm must either be (1) indistinct and not theoretically indivisible, or

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[96] R. at 11.

[97] United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988) (citing Restatement (Second) of Torts §433a (Am. Law Inst. 1965).

[98] *Monsanto*, 858 F.2d at 171-72; Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342-43 (Tenn. 1976).

(2) practically indivisible because the plaintiff is unable apportion the harm among the actors with reasonable certainty.[99]

In our case, the alleged harm is a taking of Lear's property by FWS and Brittain County through the federal ESA and local WPL. The alleged taking is both theoretically and practically divisible; thus, FWS and Brittian County should not be considered as "joint tortfeasors" in a takings analysis. The alleged taking is theoretically divisible because FWS' authority under the ESA only restricts development of the Heath, not the cove. Conversely, the local WPL allows Brittain County to restrict development of the cove, not the Heath. Thus, the harms are distinct and the alleged taking of the Cordelia Lot is theoretically divisible.

Additionally, the alleged taking is practically divisible because the harm can be apportioned between FWS and Brittain County with reasonably, even absolute, certainty. Plaintiff concedes that, when considered individually, the FWS's enforcement of the ESA only restricts the Heath and Brittain County's enforcement only restricts the cove. Because the harm can be apportioned with more than reasonable certainty, the alleged taking is practically divisible. Therefore, since the alleged taking is both theoretically and practically divisible, FWS and Brittain County's actions must be considered separately and not jointly.

B. Combining the regulations would chill development and efficient governance.

Second, this court should be cautious to combine federal and local regulations in analyzing regulatory takings because the combination would create unpredictability for

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99 *Monsanto*, 858 F.2d at 171-72; Velsicol, 543 S.W.2d at 342 (Tenn. 1976).

developers and government actors and chill efficient development. The wide variety and constant evolution of local regulations, not merely on a state-by-state basis, but on a county-by-county and city-by-city basis creates a complex and unpredictable system that undermines the uniformity federal law strives toward. This unpredictable and varied system will clog government agencies attempting to consider all relevant factors in order to properly permit potential developments. Confusion over applicable law and inefficiency in permitting will chill efficient development. In order to prevent unpredictability and promote uniformity and efficiency, this court refuse to set a precedent of combining federal and local regulations.

The federal and local regulations should be considered separately because the harms are divisible and combining the regulations creates unpredictability for developers and federal actors. Thus, since Lear concedes that there is no categorical taking when the regulations are considered separately, her claim for a categorical taking must fail.

Conclusion

For these reasons, we ask the Court to: uphold the constitutionality of the application of the 'take' provision of the ESA and dismiss Corderlia Lear's claim against FWS because it is not ripe. For the purpose of a takings claim, the Court should consider the entirety of Lear Island as the relevant parcel. Alternatively if the relevant parcel is the Heath, we ask the Court to find: FWS is shielded from liability because the takings claim has a finite end; the Heath's economic value precludes a takings claim; public trust principles bar a takings claim; and the actions of FWS and Brittain County should be considered separately.