Team No. 50

Docket No. 16-0933

IN THE 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 States District Court for the District of New Union in
No. 112-CV-2015-RNR, Judge Romulus N. Remus

BRIEF FOR CORDELIA LEAR
PETITIONER

Oral Argument Requested

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STATEMENT OF JURISDICTION

This appeal concerns a final judgment of the United States District Court for the District of New Union. The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the matter involved the Endangered Species Act (the "ESA") and thus concerned a federal question. This appeal arises from the district court's entry of judgment dismissing Plaintiff-Appellee-Cross Appellant's claim for declaratory judgment and awarding damages against Defendant-Appellant-Cross Appellee United States Fish and Wildlife Service and Defendant-Appellant Brittain County, New Union. The district court's judgment is final, thus this Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291, which provides the courts of appeals with jurisdiction over appeals from all final decisions of the district courts of the United States.

STATEMENT OF THE ISSUES

I. Is the ESA a valid exercise of Congress's Commerce power when applied to a wholly intrastate population of an endangered butterfly?

II. Is Lear's takings claim against FWS ripe without having applied for an ITP?

III. For a takings analysis, is the relevant parcel all of Lear Island, or only the Cordelia Lot?

IV. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable in ten years deprive the property of its entire economic value?

V. 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?

VI. 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?

VII. 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. Facts

Lear Island has belonged to the Lear family since 1803, when the United States Congress granted the island to Cornelius Lear in fee simple absolute. (R. 4). The grant also included title to "all lands under water within a 300-foot radius of the shoreline of said island" as well as lands under water in the shallow strait separating Lear Island from the mainland. (R. 4-5). In 1965, King James Lear decided to divide Lear Island into three parcels, one for each of his daughters. (R. 5). The Brittain Town Planning Board approved the subdivision of each lot and determined each lot could be developed in conformance with zoning requirements with at least one single-family residence. (R. 5). A home already existed on the Goneril Lot at this time and one was constructed on the Regan Lot soon after the subdivision of the island. (R. 5).

Cordelia Lear ("Lear") now owns one of those three lots. (R. 5). Known as the Cordelia Lot, Lear acquired the ten-acre parcel upon the death of her father, King James Lear. (R. 5). Lear's lot, commonly referred to as "The Heath," is situated at the northern tip of Lear Island and consists of an access strip, cove, and nine acres of open field. (R. 5). Over the years, the Heath and access strip have become home to wild blue lupine flowers and the Karner Blue butterfly (the "Karner Blue"), whose larvae can only feed on the leaves of blue lupine plants. (R. 5). The Karner Blue was added to the federal endangered species list in December 1992, and the Heath was declared a critical habitat for the Karner Blue in the same year. (R. 5, 6). Populations of the Karner Blue exist in other states, but the only remaining Karner Blue population in New Union lives on the Heath. (R. 5).

The Heath has no marketability in its current state for agricultural or timber use. (R. 7). As for recreational use, there is no market for the Heath without the right to build a residence on

the property. (R. 7). Thus in April 2012, Lear decided to build a home on the Heath. (R. 5). Prior to beginning construction, Lear contacted the New Union Fish and Wildlife Service ("FWS") to discern whether building her home would require any permits or approvals due to the presence of the Karner Blue. (R. 6). A FWS agent informed Lear that any disturbance of the lupine habitat on the Heath other than annual mowing would constitute a "take" of the Karner Blue. (R. 6). The agent advised Lear that she could obtain an incidental take permit ("ITP"). (R. 6).

The ITP would require Lear to develop a habitat conservation plan ("HCP") and an environmental assessment document. (R. 6). To be approvable, the HCP would have to provide for continued annual mowing of the lupine fields in addition to contiguous lupine habitat on an acre-for-acre basis. (R. 6). Upon investigating the ITP process, Lear learned that preparing an ITP application would cost $150,000. (R. 6). Additionally, Lear learned that her sister, Goneril Lear, would not cooperate in any HCP that restricts her property, the lone property that is contiguous to the Heath. (R. 6).

Upon this realization, Lear decided to forgo pursuing an ITP application and instead developed an alternative development proposal ("ADP"). (R. 7). The ADP would call for filling one half-acre of the marsh within the Heath's cove so as to create a lupine-free site for Lear's home. (R. 7). Filling the cove would not require any federal permits, as this particular portion of Lake Union is considered "non-navigable" by the U.S. Army Corps of Engineers and construction of residences involving one half-acre or less of fill is authorized by the same entity. (R. 7). Filling the cove would, however, require a local permit pursuant to the 1982 Brittain County Wetland Preservation Law. (R. 7). Lear applied for the local permit but was denied on

the grounds that permits to fill wetlands would only be granted for a water-dependent use. (R. 7).

II. Procedural History

Following the denial of her permit application, Lear filed suit in the United District Court for the District of New Union. (R. 7). Lear sought a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively, just compensation from FWS and Brittain County for a regulatory taking of her property. (R. 4). The district court dismissed Lear's declaratory judgment claim but found that Lear had suffered an uncompensated takings in violation of the Fifth Amendment. (R. 12). The district court awarded Lear a total of $100,000 in damages, $10,000 against United States Fish and Wildlife Service and $90,000 against Brittain County, New Union. (R. 12). Lear, FWS, and Brittain County all filed Notices of Appeal to this Court. (R. 1).

SUMMARY OF ARGUMENT

This Court should hold that applying the ESA to the wholly intrastate population of the Karner Blue butterfly exceeds Congress's power under the Commerce Clause. In holding to the contrary, the district court erred in two ways: by (1) defining the relevant activity as the underlying land development and (2) considering "the purchase of building materials and the hiring of carpenters and contractors" sufficiently economic to affect interstate commerce. The proper definition of the relevant activity is the take of the Karner Blue, and economic activity does not encompass the construction of a single-residence home on a private island.

Alternatively, this Court should affirm the district court's holding the Lear has suffered an uncompensated taking in violation of the Fifth Amendment. Although she did not file an ITP, Lear's takings claim is ripe for review because the effect of the ESA on her property was

reasonably certain upon realizing she could not file a minimally acceptable ITP. The district court properly reviewed Lear's taking claim by looking to the Cordelia Lot alone as opposed to Lear Island as a whole. Although Lear Island has been in the Lear family for decades, a takings analysis considers the expectations of the claimant, not previous owners, and common ownership is insignificant where the parcel is no longer used as a singular economic unit. The future developability of the Cordelia Lot does not preclude her takings claim, for the duration of a taking goes to damages, not the cause of action. Likewise, the offer for butterfly viewing on the Cordelia Lot does not prevent Lear's takings claim because it is not an economically viable use of the land, as the annual rent would not even cover Lear's property taxes.

As for defenses to Lear's takings claim, neither FWS nor Brittain County can successfully establish one. Public trust principles do not preclude Lear's takings claim because the Congressional grant of Lear Island included an area of submerged waters and occurred before New Union achieved statehood. Any portion of the submerged waters excluded from the grant passed to New Union, but New Union has not upheld its responsibility to define for its citizen how those waters are affected by the public trust. FWS and Brittain County also attempt to avoid liability by challenging causation, but the two regulations combine to affect the taking in this case, each a proximate cause. As such, both FWS and Brittain County are both liable for the taking of the Cordelia Lot, and this Court should affirm the district court's finding of the same.

STANDARD OF REVIEW

The district court's denial of Lear's motion for a declaratory judgment is reviewed *de novo*. *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 63–64 (2d Cir. 2012). The district court's finding of an uncompensated taking is a question of law based on factual underpinnings, *Alves v. United States*, 133 F.3d 1454, 1456 (Fed. Cir. 1998), thus, in regard to that finding, this Court reviews the district court's legal analysis and conclusions *de novo* and its findings of fact for clear error, *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998).

ARGUMENT

I. This Court should hold that, when applied to the wholly intrastate Karner Blue population, the ESA then regulates noneconomic activity and thus is an invalid exercise of Congressional power.

Section 9(a) of the ESA prohibits the "take" of any endangered species. 16 U.S.C. §1538(a)(1)(B). The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Additionally, a "take" occurs upon "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3 (2015). But a "take" does not occur where an intrastate species is concerned, for such an application of the ESA regulates a non-economic activity and thus exceeds Congress's authority under the Commerce Clause.

The Commerce Clause gives Congress the authority to regulate three types of activities: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities having a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). When ruling on constitutional challenges to the ESA, courts have analyzed section

9(a)(1) of the ESA to fall under the third category. *See San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1272 (11th Cir. 2007); *National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1046 (D.C. Cir. 1997); *People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2015). Likewise, the district court utilized the "substantial effects test" when performing its constitutional analysis.

When deciding whether an activity substantially affects interstate commerce, courts must consider four factors. *United States v. Morrison*, 529 U.S. 598, 609 (2000). First, the economic nature of regulated activity; second, the presence of a jurisdictional element within the statute limiting its application to instances affecting interstate commerce; third, any Congressional findings or legislative history concerning the effect of the regulated activity on interstate commerce; and fourth, the attenuation of between the activity and its effect on interstate commerce. *Id.* at 610-12. The district court limited its analysis to the first factor, the economic nature of the regulated activity.

A. The district court erroneously defined the relevant activity, for the ESA regulates takes of endangered species, not land development.

The first step in determining whether a regulated activity substantially affects interstate commerce is to define the activity at issue. *Id.* at 610. The district court concluded the relevant activity in this case to be the underlying land development through the construction of Lear's proposed residence. But this definition is incorrect, for the substantial effects test assesses the economic nature of the *activity at which the statute is directed*. *United States v. Patton*, 451 F.3d 615, 623 (10th Cir. 2006) (emphasis added). The ESA regulates takings, not land development. Consequently, this Court should reverse the holding of the district court and remand this case with instruction as to the proper definition of the relevant activity.

A Commerce Clause inquiry must define the relevant activity as the object of the regulation, not the conduct with which it interferes. *See Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610. In *Lopez*, the Supreme Court confronted the Gun–Free School Zones Act of 1990, which forbade "any individual [to] knowingly [] possess a firearm at a place that [he] knows ... is a school zone." *Lopez*, 514 U.S. at 549. Throughout its analysis, the Court discussed the effect of "possession of a firearm in a local school zone" on interstate commerce—the very thing the act at issue regulated. *See id.* at 560-67. In *Morrison*, the Court addressed a constitutional challenge to the Violence Against Women Act, which regulated gender-motivated violence. *Morrison*, 529 U.S. at 601. As in *Lopez*, the *Morrison* Court's entire analysis focused on the object of the regulation: "gender-motivated crimes of violence." *See id.* at 613-20.

When faced with a Commerce Clause challenge to the ESA, the proper definition of the relevant activity is the take of an endangered specifies. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003); *see also Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (defining the relevant activity as the taking of red wolves on private land). In *GDF*, the defendant urged the court define the relevant activity as the plaintiffs' planned commercial development and then consider the development's effect on interstate commerce. *GDF Realty Investments, Ltd.*, 326 F.3d at 633. The Fifth Circuit Court of Appeals refused, noting that holding otherwise "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors . . . resulting in 'no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* at 634.

The Fifth Circuit is not alone in its concern for the effect of defining the regulated activity as an underlying commercial development. *See Rancho Viejo LLC v. Norton*, 334 F.3d

1158, 1158-60 (D.C. Cir. 2003) (en banc), cert. denied, 2004 U.S. LEXIS 1652 (U.S. Mar. 1, 2004) (Sentelle, J., dissenting from denial of rehearing en banc); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (stating the same). While the D.C. Circuit refused to rehear the *Rancho* case en banc, two judges wrote dissenting opinions to that refusal specifically to highlight the three-judge panel's inappropriate focus on the commercial development when defining the regulated activity. *Id.*

Defining the relevant activity as the take of an endangered species not only accords with case law and judicial concern but also with ESA guidance. For example, the Habitat Conservation Planning Book explains how both an HCP and ITP authorize "the incidental take of threatened or endangered species, not [] [] the underlying activities that result in take." U.S. Fish and Wildlife Service, Habitat Conservation Planning Handbook, 1-1, https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html.

Thus the proper consideration in this case is whether the take of the Karner Blue has a substantial effect on interstate commerce. The district court, however, erroneously defined the regulated activity as the underlying land development through construction of the proposed residence, a definition almost identical to that which was denied by the Fifth Circuit in *GDF*. Allowing the district court's definition to remain undisturbed contradicts Supreme Court precedent and results in "no limit to Congress' authority to regulate intrastate activities[.]" *GDF Realty Investments, Ltd.*, 326 F.3d at 634. Lear now asks this Court to reverse the district court's denial of Lear's declaratory judgment and remand this case with this instruction that the regulated activity be defined as the take of the Karner Blue.

B. Even if the district court correctly defined the regulated activity, it erroneously labeled the activity as economic.

In ruling on Lear's constitutional challenge, the lower court utilized the "substantial aggregate effects tests" and determined the relevant activity—the underlying land development—"clearly" economic because it involves "the purchase of building materials and the hiring of carpenters and contractors." (R. 8). But relying upon such a broad, sweeping statement of economic activity renders the ESA limitless. Consequently, the district court's ruling should be reversed.

While the Commerce Clause gives Congress the authority to regulate many things, that power must retain judicially enforceable limits. *Lopez*, 514 U.S. at 566. In *Lopez*, the U.S. Supreme Court utilized the "substantial effects test" to ultimately invalidate a federal act prohibiting the knowing possession of a firearm within school zones. *Id.* at 551. The Government argued that possessing a firearm within a school zone affected interstate commerce because such possession may (1) result in violent crimes, thereby increasing the cost of insurance throughout the nation and decreasing travel to "unsafe" areas, or (2) handicap the educational environments, thereby diminishing societal productivity. *Id.* at 564. The Court rejected both arguments because each made it "difficult to perceive any limitation on federal power, even in areas . . . where States historically have been sovereign." *Id.*

When analyzing challenges to the ESA, the D.C. Circuit has considered the use of out-of-state materials and workers demonstrative of an economic activity. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003); *National Ass'n of Home Builders v. Babbitt* (*NAHB*), 130 F.3d 1041, 1043 (D.C. Cir. 1997). In both *NAHB* and *Rancho*, the D.C. Circuit upheld the constitutionality of the ESA after noting that the projects involved would presumably be constructed using materials and people from outside the state and attract construction workers

and purchasers from both inside and outside the state. *See Rancho Viejo, LLC*, 323 F.3d at 1069; *NAHB*, 130 F.3d at 1048.

But as noted by Judge Sentelle in his dissenting *NAHB* opinion, "[t]he fact that activities like the construction of a hospital *might* involve articles that have traveled across state lines *cannot* justify federal regulation of the incidental local effects of every local activity in which those articles are employed." *NAHB*, 130 F.3d at 1063 (Sentelle, J., dissenting) (emphasis added). Judge Sentelle noted that focusing, "not on the [Karner Blue] in the channels of commerce, but everything else moving in the channels of commerce that may affect the [Karner Blue], . . . improperly inverts the third prong of *Lopez* and extends it without limit[,] [meaning] Congress may also regulate anything that is affected by commerce." *Id.*

Lear urges this Court to consider Judge Sentelle's concerns. Under the district court's ruling, so long as the activity at issue might involve the buying or selling of a good or service, the activity would be "economic" for the purposes of the Commerce Clause. Should this Court allow this logic to stand, the ESA is virtually limitless, as a court can fathom an economic transaction for almost any activity. Such logic would also contradict the seminal case of *Lopez*, for that case involved the buying and selling of goods: the *Lopez* defendant was paid to deliver the handgun to the school. *Lopez*, 514 U.S. at 551.

Even if this Court is persuaded to follow the logic of the D.C. Circuit, the matter at hand is distinguishable. This is not a case where a 280-home residential development is being constructed near a major interstate highway. *See Rancho Viejo, LLC*, 323 F.3d at 1069. Neither is this a case involving the construction of a hospital, power plant, and supporting infrastructure. *See NAHB*, 130 F.3d at 1043. Rather, this case concerns the construction of a single-dwelling residence on a private island. Goods and services will be purchased to construct the home and

friends will likely make the trip to see Lear, but the connection between the construction of Lear's home and the interstate economy pails in comparison to that in *Rancho* and *NAHB*. Those cases involve "large-scale residential development that . . . clearly [] affect interstate commerce." *Rancho Viejo, LLC*, 323 F.3d at 1080 (Ginsburg, J., concurring). The matter at hand, however, is more akin to "the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property," a party whom, "though he takes the [Karner Blue], does not affect interstate commerce." *Id.*

This Court is *not* asked to hold that the construction of a home is never an economic activity for purposes of a takings analysis. Rather, this Court is asked to hold that an *individual's construction of a single-family home on a private island for personal use* is a noneconomic activity for the purposes of a takings analysis. The Commerce Clause authorizes Congress to do many things, "but it does *not* authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce." *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1346 (D. Utah 2014). The district court's ruling allows for just that. Consequently, this Court should reverse the district court's holding that the ESA is a valid exercise of Congressional Commerce Power when applied to the Karner Blue.

II. Alternatively, this Court should affirm that Lear has suffered an uncompensated taking in violation of the Fifth Amendment.

The ESA is an invalid exercise of Congressional Commerce Power when applied to an intrastate species like the Karner Blue. But should this Court disagree, Lear now asks this Court to affirm the district court's finding that Lear has suffered an uncompensated taking in violation of the Fifth Amendment.

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. In addition to instances of physical invasion or confiscation, the Supreme Court has long held that "if regulation goes too far it will be recognized as a taking." *Greenbrier v. United States*, 193 F.3d 1348, 1357 (Fed. Cir. 1999). Courts have yet to devise a set formula for determining when government regulation of private property amounts to a regulatory taking, but the "categorical" takings doctrine makes clear that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name, of the common good, that is, to leave his property economically idle, he has suffered a taking." *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 984 (2002) (quoting *Lucas v. South Carolina Coastal* Council, 505 U.S. 1003, 1019 (1992)).

A. Lear's takings claim against FWS is ripe for judicial review because the impact of the ESA on the Cordelia Lot is reasonably certain.

Brittain County and FWS argue that Lear's taking claim is not ripe for judicial review solely because she failed to file an ITP. But if further administrative review cannot result in a more definite statement of the regulation's impact, then the property owner is not required to pursue that avenue before bringing a takings claim. *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004). Because Lear could not satisfy the *de minimis* requirements for an ITP, the effect of the ESA on her property was certain: she could not build without violating the ESA. This negated her need to apply for an ITP and rendered her claim ripe for judicial review.

Upon bringing a regulatory takings claim, a plaintiff must demonstrate that her case is ripe for judicial review. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985). To establish ripeness, a plaintiff typically must show two things: First, that "the government entity charged with implementing the regulations has

reached a final decision regarding the application of the regulations to the property at issue," and second, that the plaintiff sought "compensation through the procedures the State has provided for doing so." *Id.* 186-94. Because the district court addressed only the "final decision" prong of *Williamson*, Lear confines her argument herein to that prong alone.

FWS claims that Lear's case is not ripe for judicial review because Lear failed to file an ITP. Under the ESA, the Secretary of Commerce, acting through the National Marine Fisheries Services or FWS, may permit the taking of an endangered species if that taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). A "take" that complies with the terms and conditions set forth in a Section 10 ITP is exempted from the Section 9 prohibition and therefore lawful. 16 U.S.C. § 1539(c)(1)(B). As part of an application for an ITP, an applicant must also submit a conservation plan discussing the impact of the incidental takings, the steps the applicant will take to minimize the impact, the alternatives considered, and the reasons why the alternatives would not be implemented. *See* 16 U.S.C. § 1539(2)(A).

Requiring a person to obtain a permit like an ITP before engaging in a certain use of his or her property does not result in a *per se* "take." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 127 (1985). But the law does *not* require a person to apply for a permit if the procedure itself "is so burdensome that it effectively deprives the property of value." *Hage v. U.S.*, 35 Fed. Cl. 147, 164 (1996) (emphasis added). The cost of filing an ITP would have been so costly as to deprive the Cordelia Lot of all value, for preparing an ITP would cost Lear $150,000, a sum exceeding the property's fair market value by $50,000.

It is true that the FWS retains discretion regarding the cost of an ITP. *Morris*, 392 U.S. at 1377. But "[w]hile a landowner must give a land-use authority an opportunity to exercise its

discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

FWS may have maintained discretion regarding the cost of the ITP, but its actions made clear that it had no discretion over the requirement for a minimally acceptable ITP. Both an FWS agent and formal FWS letter offered Lear only method of building on her property without violating federal law: submitting an application for an ITP. Additionally, each FWS source made clear that an ITP application would require Lear to develop a HCP, which, to be acceptable, would *at a minimum* require all lupine fields disturbed by the development to be replaced with contiguous acreage. The *only* land contiguous to the Heath is the lot owned by Lear's sister, Goneril Lear. But Goneril has flatly refused to cooperate in any HCP that restricts her property. Consequently, Lear could under no circumstances file a minimally acceptable ITP.

FWS may argue that, despite these facts, Lear still should have filed the ITP for the sake of filing. But the ripeness doctrine does not require a landowner to submit applications for their own sake; rather, a petitioner is required to explore other development opportunities "only if there is uncertainty as to the land's permitted use." *Palazzolo*, 533 U.S. at 622. Here, no such uncertainty exists. Without the right to build a residence on the property, there is no market in Brittain County for recreational use of the Cordelia Lot. Further, the Cordelia Lot has no market in its current state for agricultural or timber use. Thus the Cordelia Lot's only permitted use is residential.

"Where the agency's decision makes clear that pursuing remaining 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." *Morris*, 392 U.S. at 1376.

FWS retained no discretion regarding the *de minimis* requirements for an acceptable ITP. Upon realizing that she could not satisfy that threshold, "the impact of the [ESA] on the use of [Lear's] property [was] reasonably certain," *id*. at 1376, thus her claim is now ripe for review.

B. The Cordelia Lot is the relevant parcel for the takings analysis.

Before determining whether a taking of a landowner's private property has occurred, the relevant parcel must be determined. FWS and Brittain County contend that Lear Island as a whole is the relevant parcel in this case, given the Lear family's historic ownership and use of the island. Where land is no longer used for a common purpose, however, historical singular ownership is irrelevant, *see Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), and property developed prior to regulation is excluded from a takings analysis, *Loveladies Harbor, Inc. v. United States*, 28 F.3d. 1171, 1181 (Fed. Cir. 1994). Lear Island is no longer used as a whole for a common economic purpose, and all lots other than Lear's were developed prior to the enactment of the regulations before this Court. Thus the Cordelia Lot alone is the relevant parcel for a takings analysis.

When determining the relevant parcel, courts utilize a flexible approach designed to account for factual nuances. *Forest Properties, Inc. v. U.S.*, 177 F.3d 1360, 1365 (Fed. Cir. 1999). Courts consider a number of factors when using this approach, none of which are alone dispositive: (1) the degree of contiguity between property interests; (2) the dates of acquisition of property interests; (3) the extent to which a parcel has been treated as a single income-producing unit; and (4) the extent to which the regulated lands enhance the value of the remaining lands. *Brace v. United States*, 72 Fed. Cl. 337, 348 (2006).

i. Lear Island is no longer treated as a single income-producing unit and Lear has evinced no desire to alter that status, thus the Cordelia Lot stands alone in this analysis.

Even where contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner treats the parcels as distinct economic units. *Palm Beach Isles Assocs.*, 208 F.3d at 1381. In *Palm Beach*, the Federal Circuit Court of Appeals found that only 50.7 acres of 311.7 acres constituted the relevant parcel for the takings analysis. *Id.* The Government requested the court consider the entire 311.7 acres as the relevant parcel because the land was purchased together by the plaintiff. *Id.* at 1380. The court refused, however, noting that the plaintiff never planned to develop the parcels as a single unit but rather conducted physically distinct and legally unconnected developments on the 311.7 acres. *Id.* at 1381. The fact that the land was at one time under common ownership could not justify combining the two tracts for the takings analysis. *Id.*

In this case, the entirety of Lear Island should not be considered the relevant parcel because the island is subdivided into three lots and treated as distinct units. Lear Island came into the Lear family by way of a single grant and has remained therein ever since, but this single grant and common ownership are insufficient to justify combining all three lots to form the relevant parcel. In this case, there are three legally distinct lots, each with a unique legal owner, transferred to that owner via a separate deed. Further, each lot is used for the unique purpose its owner has established. It is true Lear Island was once used as a farm, but the island no longer serves that communal purpose, thus rendering this case distinguishable from matters where the opposite held true. *See Brace*, 72 Fed. Cl. at 348 (treating two parcels as the whole because they historically and currently constituted a "farm enterprise").

The critical issue in this Court's inquiry is "the economic expectations of the *claimant* with regard to the property." *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013). The claimant in this case—Lear—did not develop economic expectations regarding Lear Island until she realized her father deeded her ten acres of Lear Island. At the time of this realization, Lear also became aware that the remainder of the island was split into to more lots, one for each of her two sisters. Nothing in the record suggests that Lear ever considered the three lots to be used for a common purpose or treated as a single unit. Thus despite the historic single-family possession and aggregate use of Lear Island, only the Cordelia Lot is the relevant parcel for this takings analysis.

ii. All property other than the Cordelia Lot was developed prior to the enactment of the regulations at issue, thereby excluding them from this analysis.

Even if this Court looks to the historical ownership by the Lear family, the relevant parcel should still be defined as the Cordelia Lot, for property developed prior to regulatory imposition should be excluded from the relevant parcel in a takings case. *Loveladies Harbor, Inc.*, 28 F.3d. at 1181.

In *Loveladies*, the Government contended the proper denominator for the takings analysis was the original 250-acre parcel or, at the least, the total acreage remaining unsold at the time the permit was denied. *Id.* at 1180. At that time, however, the plaintiffs owned only 51 undeveloped acres, for the other 199 acres had been developed and all but 6.4 of those acres had been sold. *Id.* The Federal Circuit Court of Appeals ultimately held the relevant parcel to be only that amount of land plaintiffs could actually develop. *Id.*

Like the land in *Loveladies*, Lear Island was developed prior to the imposition of the regulations at issue here. In 1965, King James Lear owned the entirety of the 1803 Lear Island grant but decided to divide Lear Island into three parcels. The Brittain Town Planning Board approved the subdivision of the property into those three lots and determined each lot could be developed in conformance with zoning requirements with at least one single-family residence. Soon thereafter, King James Lear constructed a home on the Regan Lot. A residence already existed on the Goneril Lot at that time. This development occurred well before Lear Island became burdened by the regulations at issue here today. The Brittain County Wetland Preservation Law was enacted in 1982, while the Karner Blue was not declared an endangered species until 1992. Because the Cordelia Lot was the only undeveloped lot on Lear Island at the time these regulations took effect, only the Cordelia Lot should be considered in this analysis. Consequently Lear asks this Court to affirm the district court's finding that the Cordelia Lot alone is the relevant parcel for this takings analysis.

C. The future developability of the Cordelia Lot does not prevent a takings claim, for a taking—even if temporary—is still a taking nonetheless.

The denial of Lear's permit resulted in the loss of any current developability of the Cordelia Lot. FWS and Brittain County highlight, however, that, should Lear refrain from mowing the Heath for ten years, the population of Karner Blue's will be eliminated, allowing Lear to build. But a temporary taking demands compensation, despite the existence of future developability. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 318 (1987). Consequently, the future developability of the Cordelia Lot does not prevent Lear's takings claim.

Where government action denies a party all use of her property for a period of time—even though not permanent—compensation is required. *Id.* at 322. In *First English*, the County

of Los Angeles adopted a local ordinance to provide interim flood protection. *Id.* at 307. The County contended that the regulation did not result in a taking because the regulation was only temporary. *Id.* at 310. The Supreme Court disagreed. *Id.* In reaching its decision, the Court looked to precedent involving the temporary government use of private property, such as the appropriation of private property by the federal government during wartime. *Id.* at 318. In those cases, "there was no question that compensation would be required for the Government's interference with the use of the property; [rather] the Court was concerned in each case with determining the proper measure of the monetary relief to which the property holders were entitled." *Id.*

Like the plaintiff in *First English* and the wartime property owners mentioned therein, Lear's property is potentially only temporarily affected by the ESA, should she postpone the construction of her home on the Cordelia Lot for ten years. For should Lear refrain from building or mowing the Cordelia Lot for ten years, the lupine fields in which the Karner Blue thrives will naturally be destroyed. But this temporary interference with Lear's ability to utilize her land is a taking nonetheless, and the Supreme Court has made clear that compensation shall not be denied simply because the government interference is not permanent in nature.

Lear does not ask this Court to formulate a categorical rule. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002) (denying plaintiff's request for a general takings rule based on years). Nor is this case involving normal delays associated with obtaining building permits, changes in zoning ordinances, variances, and the like. *Id.* at 352 (noting that such delays have historically been considered permissible exercises of police power). Rather, this case concerns a single individual who, if denied a takings judgment, would have to wait an entire decade before she can build a home for

herself on private land. Even the *Tahoe* Court felt "any moratorium that lasts for more than one year should be viewed with special skepticism." *Id.* at 341.

The *Tahoe* Court "[did] not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; [it] simply recognized that it should not be given exclusive significance one way or the other." *Id.* at 337. Lear does not ask for not exclusive significance. Rather, she asks this Court to recognize that, even though Lear can one day construct her home, until that day, she suffers a taking. The duration of the taking goes to damages, not to whether a compensable taking has occurred." *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010). This Court should thus affirm the district court's holding that the future developability of the Cordelia Lot does not preclude her takings claim.

D. The offer to pay annual rent for wildlife viewing on the Cordelia Lot does not preclude a takings claim because it does not result in an economically viable use of the property.

Due to the federal and local regulations, the Cordelia Lot is deprived of all economically beneficial use. Brittain County and FWS disagree, however, based solely on the Brittain County Butterfly Society's offer to pay annual rent in exchange for butterflying viewing on the Cordelia Lot. But the test is whether a party is deprived of all *economically viable use* of her property, not all use in general. *Lucas v. South Carolina*, 505 U.S. 1003, 1027 (1992) (emphasis added). The viewing offer would not provide enough income for Lear to cover the property taxes on the Coredelia Lot. As such, acceptance of the offer does not constitute an economically viable use of her property, thus Lear is deprived of all economically beneficial use of her land.

Although a property owner "necessarily expects" some uses of his land to be restricted by legitimate use of police power, limitations that "eliminate all *economically viable* use" are inconsistent with the Fifth Amendment's takings clause. *Lucas v. South Carolina*, 505 U.S.

1003, 1027 (1992) (emphasis added). In *Lucas* the underlying property was rendered economically valueless by a construction plan, and the Supreme Court ultimately held the landowner was due compensation. *Id.* at 1020. Since the landowner was deprived of the very use for which he acquired the property, and because of the construction restriction imposed on his land, he was prohibited from receiving any economic benefits from owning his property— a right afforded to him by the Constitution. *Id*. at 1019-20.

The Court pondered the various reasons for setting economically viable use as a benchmark, considering "what is the land but the profits thereof?" and the potential that such a deprivation actually equates a physical taking. *Id.* at 1017. The Court also noted that, where all economically viable use is depleted, the typical justifications for denying a takings claim did not apply: "[W]hen no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life[.]" *Id.*

The FWS and Brittain County argue that Lear is not deprived of all economically viable use of her land because the Brittain County Butterfly Society has offered to pay Lear $1,000 annually to conduct butterfly viewing outings. But the property taxes on the Cordelia Lot are $1,500 annually. If Lear accepts this offer, her property will have use, but not an *economical* use, for she will post a loss annually. Supreme Court precedent does not demand the loss of all uses of land to establish a taking—only economical uses. Lear satisfies this test, for The Heath has no marketability in its current state for agricultural or timber use and no market for recreational use without the right to build a residence on the property. Thus the *only* way Lear can use her land in an economically viable, profitable manner is to build a residence. The ESA and Brittain County Wetlands Preservation Law now deny her that ability.

The danger in allowing a "token interest" like the viewing offer to defeat a takings claim is the ability of a court or defendant to craft a variety of potential uses for property. But the *Lucas* Court addressed this concern in its response to Justice Steven's dissent. *Id.* at 1019 n.8. Justice Stevens expressed concern that a landowner deprived of 95% of his property's value would walk away with nothing. *Id.* But the majority assured that, while such a circumstance may occur, so too could the opposite, for "the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant to takings analysis[.]" *Id.*

Like the plaintiff in *Lucas*, Lear has a distinct expectation regarding the Cordelia Lot: the construction of a home, the very reason for which the property was deeded to her. Lear Island is already home to two single-family residences. Further, the Cordelia Lot has already received the approval of the Brittain Town Planning Board for the construction of one single-family residence on the lot. The lone obstacle preventing Lear from making that expectation a reality is the ESA and Brittain County Wetlands Preservation Law.

The government "may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo*, 533 U.S. at 631. The offer from the Brittain County Butterfly Society to pay Lear $1,000 annually in exchange for hosting wildlife viewings on her lot is not only a mere "token interest" but also a non-economically viable interest. Lear inherited this property with the expectation that she would one be able to build a home thereon. The regulations at issue have completely defeated that expected and thus rendered the Cordelia Lot void of economically viable use. Consequently, this Court should affirm the district court's finding that the offer to pay annual rent for butterfly viewings on the Cordelia Lot does not preclude a takings claim.

E. Public trust principles do not preclude Lear's takings claim.

Brittain County attempts to avoid liability by arguing that public trust principles and the equal footing doctrine preclude recovery by Lear. But where Congress granted submerged waters prior to a region obtaining statehood, the equal footing doctrine does not apply. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). Further, the public trust doctrine does not include no Consequently, this Court should affirm the district court's denial of Brittain County's asserted defenses.

i. The equal footing doctrine does not apply because a portion of the submerged land was granted to Cornelius Lear prior to New Union obtaining statehood.

Brittain County contends that the "equal footing doctrine" creates the presumption that the State of New Union took title to lands under water on the same terms as the thirteen original states, thus preventing Lear's takings claim. But Congress has the power to convey land beneath navigable waters prior to a region obtaining statehood. *Idaho v. United States*, 533 U.S. 262, 272-73 (2001). And where submerged lands are granted prior to statehood, that grant supersedes any claim by a state under the equal footing doctrine. *See e.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). All lands under water within a 300-foot radius of the Lear Island shoreline were conveyed in fee simple absolute prior to New Union obtaining statehood, thus the equal footing doctrine does not apply in this case.

The equal footing doctrine gives federal constitutional significance to questions regarding state riverbed titles. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012). The doctrine provides, upon obtaining statehood, a State takes title to all beds of water within its border that are then navigable or tidally influenced. *Id.* Until statehood, the United States held the lands under navigable waters in the Territories "in trust" for the future States that would be created, that is, *unless* the Federal Government chose to utilize its power under the Property

Clause to convey such land to third parties. *Utah Div. of State Lands,* 482 U.S. at 196 (emphasis added).

Consequently, a presumption of State title to a riverbed within its borders can be rebutted where submerged lands were the subject of a clear Congressional grant prior to statehood. *Id.* In such a case, the grant supersedes any claim by a state under the equal footing doctrine. *See e.g.*, *Choctaw Nation*, 397 U.S. at 620. Even if statehood is granted after the conveyance, such rights are not cut off; rather, they remain unimpaired, and the rights which otherwise would pass to the state by virtue of its admission into the Union are qualified accordingly. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Congress granted Lear Island to Cornelius Lear in 1803, a time when the Northwest Territory housed what is now New Union. Thus, despite the fact that the state of New Union was carved from the Territory, that which was granted to Cornelius Lear did not pass to New Union by virtue of the equal footing doctrine. It is true that, when Congress conveys land under navigable waters to a private party, the grant must make clear Congress intends to defeat the future State's claim to the land. *Utah Div. of State Lands*, 482 U.S. at 202. But in this case, such intent exists. The 1803 grant included title in fee simple absolute to all of Lear Island along with "all lands under water within a 300-foot radius of the shoreline of [Lear] island" as well as lands under water in the shallow strait separating Lear Island from the mainland. Thus, for the 300 feet of submerged land surrounding Lear Island, Brittain County cannot seek refuge under the public trust doctrine because the 1803 Congressional grant of that area limits the rights New Union acquired upon statehood. This Court should thus affirm the district court's finding of the same.

ii. Public trust limits do not preclude a takings claim because no evidence of background principles exist.

Even if this Court finds the New Union took some title to the submerged lands within its borders, Lear's takings claim may still proceed. The States have the obligation to define their respective public trust limits. *See, e.g., PPL Montana, LLC,* 132 S. Ct. at 1235 (noting "the public trust doctrine remains a matter of state law"). New Union has done such thing and consequently cannot look to the public trust doctrine now as a defense.

The aforementioned equal footing doctrine and public trust doctrine are related yet distinct. *Id.* The equal footing doctrine provides the State with title to the navigable waters and their beds in trust for the public, but the contours of that public trust depend upon the State, not the Constitution. *Id.* Thus it is the responsibility of the State to determine the scope of the public trust over waters within their borders. *Id.*

Such definition is critical, for it provides the State with a defense to takings claims: "[W]hen . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it," but a regulation will not result in a taking if it merely makes explicit what could have been prohibited under "background principles of the State's law of property and nuisance" that existed when the property was acquired. *Lucas*, 505 U.S. at 1030.

Determining what, if any, background principles of state law inhere in a plaintiff's title requires a multi-step process. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 452 (2011). "First, plaintiff must demonstrate that it possesses a property interest; second, defendant must identify background principles of state property or nuisance law that would limit plaintiff's proposed use of that property; and third, defendant must connect the state law to the facts of the case to demonstrate that the government's action does no more than duplicate the result that

could have been achieved in the courts under background principles of state law." *Id.* Only upon making this showing can defendant succeed in avoiding compensation. *Id.* The district court confined its analysis to the second and third steps of this process.

Brittain County argues that New Union's interest in preserving navigation and protecting other public trust interest in navigable waters constitutes a background principle of state law, thus precluding Lear's takings claim. Background principles reflect "common, shared understandings of permissible limitations derived from a state's legal tradition." *Palazollo*, 533 U.S. at 629-30. When analyzing a public trust defense to a takings claim, courts look for evidence of those shared understandings in case law, legislation, and state constitutions. *See Casitas Mun. Water Dist.*, 102 Fed. Cl. at 459 (listing California precedent pertaining to the state's policy of protecting and conserving water); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985-86 (2002) (highlighting Washington's case law, constitution, and legislation pertaining to the public trust in waters). But as noted by the district court, Brittain County has failed to put forth any precedent or legislation establishing the scope of New Union's protections for public trust waters.

Further weakening Brittain County's argument is the fact that this particular portion of Lake Union is considered "non-navigable" by the U.S. Army Corps of Engineers, and construction of residences involving one half-acre or less of fill is authorized in such areas by the same entity. Thus the federal government has spoken as to its relationship with this area. Brittain County has not. States do, arguably, have interests in lands beneath tidal waters having nothing to do with navigation. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). But only the States have the authority to define the limits of lands and waters held in public trust and to recognize private rights in such. *Id.* New Union has done no such thing. And even if

Brittain County were to blindly cite general common law as the basis of its public trust argument, such an effort would not prove beneficial, for it is "unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. *Lucas*, 505 U.S. at 1031. Consequently, Brittain County cannot meet its burden set forth in the second and third prongs of *Casitas*. This Court should thus affirm the district court's finding that public trust principles do not prevent Lear's takings claim.

F. Both FWS and Brittain County are liable to Lear because the federal and local regulations combined to "take" Lear's property.

FWS and Brittain County allege that a taking has not occurred because their respective regulations alone do not prohibit Lear from developing the Cordelia Lot. While one party alone may not cause a taking, that party is still liable where it it's a proximate cause. Consequently, the ESA and Brittain County Wetlands Preservation Law act together to deprive the Cordelia Lot of all economic value.

In a takings claim, a plaintiff must establish causation between the government action and the alleged deprivation. *Esplanade Properties LLC*, 307 F.3d at 984. When a government-defendant points to another government actor as the cause of the taking, courts have relied upon the same proximate cause test used when deciding if acts of nature or market forces are responsible for the taking. Jan G. Laitos, "The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit", 20 Wm & Mary Bill Rts. J 1181, 1232-33 (2012). In those cases, a plaintiff must show their injury was the "foreseeable or predictable result" of the government's actions, a "direct, natural, or probable" result of authorized government activity. *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 519 (Ct. Fed. Cl. 2009).

When determining the regulations responsible for a regulatory taking, courts consider the authority under which the regulation was made, whom the regulation benefits, and what, if any, other government entity compelled the regulation. *See B & G Enterprises, Ltd. v. United States*, 220 F.3d 1318, 1323-25 (Fed. Cir. 2000). In *B & G*, the plaintiff alleged a California law regulating tobacco vending machines resulted in a regulatory taking of its vending machine contracts. *Id.* at 1322. The plaintiff argued the federal government was also liable for the taking because a federal act conditioned state receipt of federal funds based on their tobacco laws. *Id.* The Federal Circuit Court of Appeals concluded that only the State of California was liable for the taking. *Id.* at 1325. The court made its determination after noting that California's legislature did not act under federal authority, order, or law when enacting the law but instead did so as an independent sovereign. *Id.* at 1324. The court also noted that the California law was not enacted for the benefit of the federal government or all Americans but rather for California citizens alone. *Id.*

Both the federal and local government are liable for the taking of Lear's property. Both regulations at issue—the ESA and the Brittain County Wetlands Act—were enacted independently. Each regulation is designed to benefit parties like the plaintiff: residents of Brittain County. Unlike *B & G*, this is not a matter where the federal government's regulation indirectly impacts Brittain County through funding or some other incentive; rather this regulation directly impacts Brittain County.

Nothing in the record suggests Brittain County acted under federal authority or direction when enacting the Brittain County Preservation Law, thus this case is distinguishable from matters involving such a relationship. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (en banc) (holding that the federal government liable for a taking where city acted

under federal authority); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (holding the federal government liable for a taking where state officials occupied the land under the authority of a federal order).

It is foreseeable that multiple regulations may result in the taking of personal property. Refusing to consider multiple regulations for the purpose of a takings analysis has dire practical circumstances, for such a practice would deny landowners recovery simply because a government entity found another government actor at which to point the finger. Case law instructs there may be more than one proximate cause, multiple factors that operate simultaneously, independently or together, to cause an injury. *In re Bendectin Litigation*, 857 F.2d 290, 309 (6th Cir. 1988). In such a case, each factor may be a proximate cause and held liable. *Id.* This Court should affirm the district court's finding that both FWS and Brittain County cause the taking of Lear's property and thus are liable for the taking of the Cordelia Lot.

CONCLUSION

This Court should hold the ESA does not apply to the wholly intrastate species of the Karner Blue. Such an application would regulate a non-economic activity and consequently exceed Congress's powers under the Commerce Clause. The district court erred in holding the contrary, and this Court should now reverse that ruling. In the alternative, this Court should affirm the district court's finding that Lear has suffered a taking and is due compensation from both FWS and Brittain County.