IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCIUT

September Term, 2016
Docket No. 16-0933

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant- Appellant- Cross Appellee

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant.

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

BRIEF OF APPELLANT- CROSS APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS ..... **III**

TABLE OF AUTHORITIES ..... **V**

JURISDICTIONAL STATEMENT **1**

STATEMENT OF THE ISSUES **1**

STATEMENT OF THE CASE **2**

STATEMENT OF THE FACTS **3**

SUMMARY OF THE ARGUMENT **5**

STANDARD OF REVIEW **6**

ARGUMENT **7**

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF CONGRESS'S CONGRESSIONAL POWER AS APPLIED TO THE SUBPOPULATION OF THE KARNER BLUE BUTTERFLY WHICH WOULD BE DESTROYED BY THE CONSTRUCTION OF A RESIDENCE..... 7

II. LEAR'S TAKING CLAIM AGAINST FISH AND WILDLIFE SERVICE IS NOT RIPE BECAUSE SHE HAS NOT APPLIED FOR AN INCIDENTAL TAKE PERMIT. 10

III. THE REGULATIONS AS APPLIED TO THE LEAR'S PROPERTY DOES NOT AMOUNT TO A TAKING BECAUSE THE CLAIMANT HAS NOT BEEN DEPRIVED OF ALL ECONOMIC BENEFIT. 11

A. THE RELEVANT PARCEL FOR THE TAKINGS ANALYSIS IS THE ENTIRE LEAR ISLAND CONSISTENT WITH LONG STANDING PRECEDENT BECAUSE HISOTRICALLY IT WAS HELD BY ONE OWNER WITH ONE RESIDENCE AND AS ONE PARCEL OF PROPERTY. 12

B. THE NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT IN TEN YEARS SHIELDS FISH AND WILDLIFE SERVICE FROM A TAKINGS CLAIM..... 14

C. THE PAYMENT OF THE $1000 OF RENT WOULD PRECLUDE CORDELIA FROM ALLEGING COMPLETE ECONOMIC DEPRIVATION OF HER PROPERTY AND ULTIMATELY FROM A TAKINGS CLAIM. 17

D. PUBLIC TRUST DOCTRINE PRECLUDES PLAINTIFF'S TAKING CLAIM BECAUSE THE COVE IS HELD IN PUBLIC TRUST BY THE STATE OF NEW UNION. 19

1. The cove meets the navigability test at time of statehood and therefore is held in public trust by State of New Union..... 19

2. The State of New Union has superior title to the Cove because the submerged lands passed to the State at the time of Statehood under the Equal Footing Doctrine 20

E. FISH AND WILDLIFE SERVICE AND BRITAIN COUNTY ARE NOT JOINT TORTFEASORS AND THUS THE ABILITY TO BUILD A SINGLE FAMILY RESIDENT DOES NOT DEPRIVE CORDELIA OF ALL ECONOMIC USE OF HER PROPERTY. 22

1. The actions of U.S Fish and Wildlife Service and Brittain County are clearly divisible and they should not be held responsible for the actions of the other as joint tort feasors. 22

2. The ability to build a single-family home on the property does not deprive the landowner of all economically viable and beneficial use of the land. 24

CONCLUSION 26

TABLE OF AUTHORITIES

Table of Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 10

Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007) 9

Andrus v. Allard, 444 U.S. 51 (1979) 13, 15

Bjustrom v. Trust One Mortgage Corp., 322 F.3d 1201 (9th Cir. 2003) 6

Califano v. Sanders, 430 U.S. 99 (1977) 10

Esplanade Props., LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) 19

GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) 8

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 8

Gonzales v. Raich, 545 U.S. 1 (2005) 7

Ill. C. R. Co. v. Ill., 146 U.S. 387 (1892 19

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 13, 14, 25

Landers v. E. Tex. Salt Water Disposal Co., 151 Tex. 251 (1952) 22

Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419 (1982). 11

Lucas v. S .C. Coastal Council, 505 U.S. 1003 (1992). 12, 17, 18, 19

Michie v. Great Lakes Steel Division, National Steel Corp., 495 F.2d 213 (6th Cir. 1974) 22, 23

Mount St. Scholastica, Inc. v. City of Atchison, 482 F. Supp. 2d 1281 (D. Kan. 2007) 6

Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) 11

Palazzolo v. Rhode Island, 533 U.S. 606 (2001). 10, 13, 14

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). 11, 12, 13, 24

Pollard v. Hagan, 44 U.S. 212 (1845). 20

PPL Mont., LLC v. Montana, 565 U.S. 576 (2012). 19

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) 8

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011). 9

Shively v. Bowlby, 152 U.S. 1 (1894). 21

Sierra Forest Legacy v. Sherman, 646 F.3d 1161 (9th Cir. 2011). 6

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 15, 16

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) (en banc) 10

United States v. Cazares, 121 F.3d 1241 (9th Cir. 1997). 6

United States v. Lopez, 514 U.S. 549 (1995) 5, 7

United States v. Lujan, 504 F.3d 1003 (9th Cir. 2007). 6

United States v. Morrison, 529 U.S. 598 (2000) 7

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 20, 21

Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976) 22, 23

Wickard v. Filburn, 317 U.S. 111 (1942). 7

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 10

Constitutional Provisions

U.S. Const. amend. V 12

U.S. Const. art I. § 8 Cl 8 7

U.S. Const. art. I, § 8, cl. 18 7

Statutes

16 U.S.C. § 1539(a)(1)(B) 1, 11, 17

50 C.F.R. § 17.3 (2015); 17

ESA § 10 1

ESA § 9(a)(1)(B) 17

Fed. R. App. P. 4(b) 1

U.S.C. §1291 (2006 1

JURISDICTIONAL STATEMENT

The appellant, United States Fish and Wildlife Service, appeals the district court's determination that Ms. Lear's claim was ripe as she did not follow proper procedures under ESA § 10, 16 U.S.C. § 1539(a)(1)(B), that the relevant parcel was Cordelia lot and not the entire parcel, that the potential future natural destruction of the habitat does not preclude a takings claim, Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Lear's takings claim, the public trust principles do not preclude Ms. Lear from a taking claim, and that FWS and Britain County are held as joint tort feasors. (R. at 1). FWS filed notice of his appeal on June 9, 2016, within fourteen-days after the entry of judgment as required by Fed. R. App. P. 4(b). (R. at 1). This Court has jurisdiction to review FWS's final judgment pursuant to 28 U.S.C. §1291. Brittain County, New Union joins FWS in all appeals except the Commerce Clause.

STATEMENT OF THE ISSUES

I. Under the Commerce Clause, is the Endangered Species act a valid exercise of congressional power when it is applies to protect a subpopulation of endangered species?

II. Under the Ripeness doctrine, is the Plaintiff's claim ripe when she has not applied for an incidental takes permit?

III. Under takings precedent, does a less than complete deprivation of economic use of a property preclude a plaintiff from a takings claim?

   A. Under taking precedent, should the inquiry analyze the relevant parcel as the entire island when historically it was held by one owner, with one residence and as one parcel of property?

   B. Under temporary takings precedent, does the natural destruction of the butterfly habitat preclude the Plaintiff from a taking claim based on complete economic deprivation of her land?

   C. Under takings precedent, does the payment of rent preclude the Plaintiff from alleging complete economic deprivation?

   D. Under the Public Trust doctrine, when a cove is held in public trust does it preclude a plaintiff from a takings claim?

      1. Under the Public Trust doctrine, when a body of water meets the test of navigability is it held in public trust?

2. Under the Equal Footing Doctrine, does the State of New Union have title to the cove when there is a strong presumption against statehood-submerged land grants?

E. Under tort and takings precedent, do actions which are clearly divisible and do not completely deprive the plaintiff of economic benefit amount to a taking?

1. Under tort law, do parties whose actions are clearly divisible to be held as joint tort feasors?

2. Under takings precedent, does the ability to build a single-family home preclude from a takings claim?

STATEMENT OF THE CASE

All parties take exception to the holding of the Court below. The crux of the issue is that Plaintiff Lear's lot is subject to regulation by two distinct sovereignties, the United States by and through the Fish and Wildlife Service (FWS) and Brittain County, a municipal corporation of the State of New Union. The Plaintiff, Lear, takes exception to the application of the Endangered Species Act in preventing the eradication of the subpopulation Karner Butterfly and takes exception to the County's application of New Unions Wetlands Preservation Law. Lear argues these combined regulations amount to a taking and that both the County and the FWS regulation in combination purportedly she is unable to build a single-family residence on her lot. Plaintiff sought no redress in state court for the denial of the permit application to build a residence in the marshlands (The Cove) on her property. The Plaintiff has also not applied for an Incidental Take Permit in order to build in the lupine field area where the protected Karner Butterfly lay eggs and form chrysalises. The Court below held that the both FWS and Brittain County are jointy liable for a taking of Lear's parcel; awarding $10,000 in damages against FWS and $90,000 against Brittain County. The lower court also dismissed Plaintiff's claim for declaratory judgment averring the Endangered Species Act is unconstitutional as applied to the wholly intrastate Karner Butterfly subpopulation. Both FWS and Brittain County filed their Notice of Appeal on June 9, 2016. Plaintiff, Lear filed a Notice of Appeal on June 10, 2016.

STATEMENT OF THE FACTS

Lear Island contains the last remaining habitat for Karner Blue Butterflies which are protected by the Endangered Species Act. (R at 4). The Lear's ownership of the island began in 1803 when Congress granted the land to Cornelius Lear. (R at 4). The grant included fee simple absolute title to the entire island as well as "all lands under water within a 300-foot radius of the shoreline of said island." (R at 4). Additionally, the grant included the right to the land under water of a strait that separated Lear Island from the main land. (R at 4). King James Lear and his predecessors have owned and occupied the property since 1803. (R at 5). The Island historically contained one residence and had been used for farming, hunting, and fishing grounds. (R at 5). Additionally, the Island was situated in a large interstate lake which was historically used for interstate navigation. (R at 4). The Lear family even constructed a causeway connecting the Island to the mainland. (R at 5).

In 1965, King James Lear had developed a plan to divide the island into three parcels, one for each of his daughters, Cordelia, Goneril, and Regan. (R at 5). In 1965 Brittain County confirmed that each of the lots would be developed in accordance with the county's ordinances and able to construct single-family homes. (R at 5). Each parcel was deeded to his daughters, while retaining a life estate in the properties for himself. (R at 5). King James built a home on Regan lot, but continued to reside in Goneril lot home. (R at 5). Upon King James passing in 2005, the three daughters came to own their respective parcels. (R at 5).

Cordelia decided she wanted to develop her parcel in 2012. (R at 5). The Cordelia parcel consisted of "an access strip that is 40 feet wide by 1,000 feet long, and an open field that comprises the remaining nine acres of uplands … there is about one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing." (R at 5). It is important to note that Cordelia's lot was home to "the Heath" which was kept open each year by mowing, unlike the rest of the island, which naturally became wooded. (R at 5).

The existence of the Heath lends itself to the Karner Blue Butterflies continued existence. (R at

5). The Karner Blue was added to the endangered species list in 1992 prior to Plaintiff's possession of her subdivided portion of the Island. (R at 5). The Karner Blue could survive in other places besides Cordelia's land, however, the Heath contains the only remaining subpopulation of the butterflies. (R at 5). The Karner Blue subpopulation is entirely intrastate and does not travel to other states. (R at 5). The Heath was declared the critical habitat for the Karner Blue Butterfly in 1978. (R at 6).

Cordelia sought to develop her parcel by first contacting New Union FWS as to whether developing her property would require their approval. (R at 6). At this time she was informed that in order to attempt to build she would have to apply for an Incidental Take Permit (ITP) and develop a habitat conservation plan (HCP). (R at 6). In order to fulfill an HCP and ultimately receive an ITP, Cordelia would have to provide an "additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip … [and] a commitment to maintain the remaining lupine fields through annual fall mowing." (R at 6).

Cordelia avers the fulfillment of the HCP to be impossible as Goneril Lear owns the only contiguous lot, and they do not speak or get along. (R at 6). In addition, the cost of procedures for the HCP consists of around one hundred and fifty thousand dollars. (R at 6). FWS of New Union subsequently confirmed that in order for an HCP to be approved it would require the acre for acre replacement and a commitment to mow and maintain the Heath. (R at 6). As the rest of the Island had turned into a wooded area once no longer maintained, so too would the Heath if Cordelia did not agree to continue to mow, ultimately eliminating the habitat for the Karner Blues. (R at 7).

Cordelia instead chose to pursue an alternative development proposal (ADP). (R at 7). Cordelia's ADP plan consisted of draining one half of the marsh in combination with building an additional causeway attached to the main causeway so as not to disturb the Karner Blue habitat. (R at 7). In order to fulfill the ADP, Cordelia would have to fill the cove marsh in accordance with Brittain County's Wetland Preservation Law. (R at 7). Cordelia's permit request was ultimately denied by Brittain County in December 2013 as "permits to fill wetlands would only be granted for a water-

dependent use, and that a residential home site was not a water-dependent use." (R at 7).

With the ability to build a single-family home on Cordelia Lot the fair market value is one hundred thousand dollars. (R at 7). In addition, the property taxes on the parcel are one thousand five hundred annually. (R at 7). Furthermore, Cordelia Lot cannot be used for "recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land." (R at 7). It is important to note that Plaintiff has not applied for a reassessment after the permit denial by Brittain County Wetland Preservation Group. (R at 7). Cordelia was offered one thousand dollars of rent annually by the Brittain County Butterfly Society but refused the payments. (R at 7).

SUMMARY OF THE ARGUMENT

Cordelia Lear's property is the only known habitat of the subpopulation of Karner Blue Butterfly in the State of New Union. The Karner Blue Butterfly is an endangered species and as such falls within the application of the Endangered Species Act (ESA). The Fish and Wildlife Service argue that the ESA as applied in protecting the critical habitat of the Karner Blue Butterfly is constitutional despite the constriction on the expansive reading of the Commerce Clause as seen in *United States v*. *Morrison*, and *United States v*. *Lopez*. The weight of authority in interpreting the ESA, as applied to the protection of a totally intrastate species, holds that the ESA is constitutional. The Fish and Wildlife Service next argues that Lear's taking claim is not ripe in that she has not applied for an incidental take permit in order to build on her portion of the Island while maintaining the habitat of the endangered butterfly. The Service also argues that the relevant parcel for the takings inquiry should be the entire Lear Island because one owner or family historically held it with one primary residence. Additionally, the weight of authority necessitates that the Court applies the "parcel as a whole approach" rather than analyzing a smaller portion of property affected by regulations; regardless of the subdivision of the former common owner. Furthermore, the Service argues that Lear has not been completely deprived of all economic benefit to her property because the property naturally revert back to a wooded area, and

the subpopulation of the Karner Blue Butterfly would no longer populate on her property. As such, the temporary building restrictions in the lupine fields do not amount to a taking. Lear has also not been deprived of all economic benefit in her property: despite the relevant parcel being the entire island, Lear has been offered $1000 annually by the Brittain County Butterfly Society as rent for wildlife viewing. These potential scenarios preclude her from arguing a total loss of economic benefit. Public trust principles also preclude Lear's claim because the marshland in which she sought a permit to build in, is held in public trust. The marshland, formerly known as the Cove, was historically open water and utilized as a boat landing on the large interstate lake. Lear failed to overcome the strong presumption against pre-statehood grants of submerged lands under navigable waters. As such, the Cove area is held in public trust and is inherent in her title. Lastly, the lower court improperly held the Service and Brittain County liable for the taking of Lear's property when the takings are distinct and divisible actions. Additionally, if Lear sought the proper permits from Service she would be able to construct a residence. Consequently, the Court erred in combining the purported harm from two legitimate exercise of regulatory powers to award damages to Lear.

STANDARD OF REVIEW

The Court reviews questions of law *de novo*. *Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1205 (9th Cir. 2003). The Constitutionality of a statute is considered a question of law and thus reviewed *de novo*. *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007). Ripeness is a question of law which should be reviewed under a de novo standard of review. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). When a reviewing court has to determine if there was an inverse condemnation, this should be reviewed *de novo*, as it is a question of law. *Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1296 (D. Kan. 2007). Questions of fact should be reviewed for clear error. *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997).

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF CONGRESS'S CONGRESSIONAL POWER AS APPLIED TO THE SUBPOPULATION OF THE KARNER BLUE BUTTERFLY WHICH WOULD BE DESTROYED BY THE CONSTRUCTION OF A RESIDENCE.

The lower court properly held that preventing the building on the lot in protecting the Karner Blue Butterfly subpopulation under the Endangered Species Act, did not exceed the Commerce Clause of the United States Constitution. The Constitution explicitly grants Congress the power to regulate interstate commerce pursuant to art I. § 8 Cl 8. Congress is authorized to make laws which shall be "necessary and proper to carrying into execution" an explicit grant of power, pursuant to art. I, § 8, cl. 18. The Supreme Court has interpreted the Commerce Clause broadly with some judicial restraint on activities historically left to state regulation and do not substantially affect interstate commerce. See generally *United States v. Morrison*, 529 U.S. 598; *United States v. Lopez*, 514 U.S. 549. Congress is vested with the power to regulate (1) the channels of interstate commerce; (2) regulate and protects the instrumentalities of interstate commerce, and persons or things in interstate commerce; or (3) regulate activities that substantially affect interstate commerce. *Gonzales v. Raich,* 545 U.S. 1, 17 (2005) (citing Perez *v. United States*, 402 U.S. 146, 146).

The third category is applicable to this case because the appellee-plaintiff challenges the application of the Endangered Species Act applied to a wholly intrastate subpopulation of the Karner Blue Butterfly. The Supreme Court has previously held that Congress may regulate purely intrastate activity if that activity may have a substantial aggregate effect over a particular class of activity in interstate commerce. *Gonzales,* 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357 (1971)) *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

Courts have consistently upheld the application of the Endangered Species Act (ESA) as applied to the protection of a totally intrastate species. The United States Court of Appeals for the D.C. Circuit upheld the take provision as applied to developers which sought to expand into a threated species. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). The Court reasoned that the

exercise of the ESA as applied to a wholly intrastate Fly was constitutional in furthering the Government's objective in preventing the transportation of endangered species in interstate commerce, and keeping the channels of interstate commerce free from injurious or immoral conduct. *Id*. at 1048. The Court further held that a take of these species would have a substantial effect on interstate commerce in depriving commercial actors of access to biodiversity. *Id*. at 1053.

The United States Court of Appeals for the Fourth Circuit also upheld the take provision as applied to a landowner or a totally intrastate wolf species. *Gibbs v*. *Babbitt*, 214 F.3d 483 (4th Cir. 2000). The Court reasoned that the species generates tourism, fosters scientific research, and is closely related to interstate markets of agricultural products, which substantially affects interstate commerce. *Id*. at 493.

The Fifth Circuit addressed a similar issue in the preventing a take of a totally intrastate subterranean invertebrates which resided in only two counties in Texas. *GDF Realty Invs*., *Ltd*. *v*. *Norton*, 326 F.3d 622 (5th Cir. 2003). The Court sided with the Fish and Wildlife Service and held that the ESA was an economic regulatory scheme and if applied to intrastate species and the application of the take provision could be aggregated with all other takes of such species to regulate the class of activities. *Id*. at 640.

The Court of Appeals for the D.C. Circuit again addressed the take provision in the ESA as applied to wholly intrastate species of a species of toad. *Rancho Viejo, LLC v*. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003). The Plaintiff, a real estate development company, sought to construct a housing development in California. *Id*. at 1064. The Fish and Wildlife Service determined that the purpose of the construction would jeopardize the endangered toad. *Id*. at 1064. The Plaintiff challenged the application as applied wholly to the interstate population of toads. *Id*. The Court held in the same line of authority as in *Babbitt* and found that *Lopez* and *Morrison* did not control because the Court found that the protection of endangered species was within what the Founders would have envisioned as a power vested to the National Government and not a power vested to the states. *Id*. at 1080.

Just as the other Circuits addressed the issue of the ESA applied to wholly intrastate species The Eleventh Circuit did as well as applied to a subpopulation of river sturgeon. *Alabama-Tombigbee Rivers Coal*. *v*. *Kempthorne*, 477 F.3d 1250 (11th Cir. 2007). The Court reasoned that the ESA as applied to the intrastate species was a legitimate exercise of congressional authority and that the regulation of intrastate species was part of the broader class of commercial activity in protecting bio-diversity. *Id*. at 1277.

The Court of Appeals for the Ninth Circuit also held consistent with the other circuits in finding the ESA constitutional as applied to wholly intrastate species. *San Luis & Delta-Mendota Water Auth*. *v*. *Salazar*, 638 F.3d 1163 (9th Cir. 2011). The Claimant, consisting of: almond, pistachio, and walnut growers, challenged the Fish and Wildlife Service application of the ESA which ultimately diverted water from their growing sites. *Id*. at 1167. The Court summarily concluded that the Growers activities were substantially related to interstate commerce *Id*. at 1177.

The United States District Court for the District of New Union rightfully concluded that the application of the ESA as applied to the Karner Blue Butterfly intrastate subpopulation was constitutional. Every circuit Court that has addressed the issue of applying the ESA to wholly intrastate species has held it lawful exercise of congressional power. Just as the Court in *Gibb* found that the protection of the red wolves affected interstate commerce of tourism, so too should this Court. As the record reflects, the subpopulation Karner Blue Butterfly has attracted interest from the Brittain County Butterfly Society. The only existing subpopulation known in the state of New Union is on the Lear Island, specifically Cordelia Lear's lot in the lupine fields. Just as the Court in *GDF Realty Invs*., *Ltd* analyzed the aggregation effect of the take of a totally intrastate species, so too should this Court. In the situation where the Karner Blue Butterfly habitat becomes compromised the Butterfly population in the State of New Union could be forever removed decreasing the bio-diversity of the state and the regional ecosystem. The ESA as applied to wholly intrastate species would be ineffective and the purpose and intent of the ESA would not be served. *Morrison* and *Lopez* should have limited bearing on this

decision because as the Court emphasized in *Rancho Viejo, LLC*, the protection of endangered or threatened species is a power that was envisioned for the Federal Government and not a power left to the states as was the nature of the regulation in *Morrison* and *Lopez*; *Morrison* (creating a private cause of action for sexual assault based offense) and *Lopez* (creating a federal offense for the possession of a firearm in a school zone). The lower Court correctly dismissed the Plaintiff's declaratory judgment action averring the ESA as applied protecting the intrastate subpopulation of Karner Blue Butterflies.

II. LEAR'S TAKING CLAIM AGAINST FISH AND WILDLIFE SERVICE IS NOT RIPE BECAUSE SHE HAS NOT APPLIED FOR AN INCIDENTAL TAKE PERMIT.

Lear's taking claim is not ripe due to her not receiving a final decision regarding the use of her property. Ripeness is a threshold doctrine which determines whether the court may hear the case under Article III and often coincides with a standing inquiry of whether the claimant has an injury-in-fact. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The Ripeness doctrine is a two-prong test in which the Court determines the fitness of the issues for judicial determination and the hardship to the parties in withholding court consideration. *Labs. v. Gardner*, 387 U.S. 136, 149 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). The Supreme Court has held that in order for a taking claim to be ripe, the landowner must receive a final decision regarding the application of regulations to the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001).

A claim that does not follow the appropriate procedure for redress pursuant to an alleged takings claim will be considered not ripe for judicial review. See generally, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson Cty*, the petitioner sought certiorari to review the United States Court of Appeals for the Sixth Circuit reinstatement of an award of damages for just compensation in respondent, bank's suit under the 5th Amendment. *Id*. The respondent's claim was dismissed due to the party not first seeking redress, locally, through requesting a variance or special exception. *Id*. at 143. The Court held that the Plaintiff's claim was premature and was not ripe for judicial review. *Id*. at 147.

Lear's claim is similar to that of the claim in *Williamson Cty*. Lear has had opportunity, after consulting with the United States Fish and Wildlife Service, to apply for an Incidental Take Permit that would allow her to build within the lupine fields if she can submit a HCP pursuant to 16 U.S.C. § 1539(a)(1)(B). Furthermore, Lear fails the two-prong ripeness test. Lear's claim is not fit for judicial review because Lear has not submitted a HCP nor has she applied for the Incidental Take Permit. As such, her taking claim should be precluded and deemed premature because she has not sought redress through the appropriate permitting system. Lear simply alleges the HCP is not feasible due to the cost and the requirement of implementing additional contiguous Karner Blue Butterfly habitat which would have to extend onto her estranged sister's land. The private relationships of adjoined landowners should not be of consequence in a taking claim. Additionally, the cost of pursuing the appropriate permits should not automatically make a takings claim ripe. Lear fails the second prong of the ripeness test because her hardship in her inability to litigate the claim is unsupported. Lear may seek redress for a taking claim against Brittain County severally, pursue the proper permitting, or negotiate with her adjoining landowners. As such Lear's taking claim is premature against the Fish and Wildlife Service.

III. THE REGULATIONS AS APPLIED TO THE LEAR'S PROPERTY DOES NOT AMOUNT TO A TAKING BECAUSE THE CLAIMANT HAS NOT BEEN DEPRIVED OF ALL ECONOMIC BENEFIT.

The 5th Amendment to the United States Constitution proscribes a taking of private property "without just compensation" U.S. Const. amend. V. The Supreme Court previously held that when the government authorizes a permanent, physical occupation or intrusion on private property the landowner must be compensated because the intrusion is a "per se" taking. See *Loretto v. Teleprompter Manhattan Catv Corp*., 458 U.S. 419, 425-441 (1982). The Supreme Court first addressed the concept of a regulatory taking in *Pa. Coal Co. v. Mahon,* 260 U.S. 393 (1922).), in holding that government regulation on land use will not necessitate just compensation under the Fifth Amendment, unless the regulation goes "too far". The Court established a multiple factor test for when a government regulation necessitates just compensation. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The

Court in *Penn Central*, held that the test requires inquiry into the economic impact on the value of property, the investment back expectation of the property owner, and the nature of the government action. *Id*. at 124.

The Supreme Court has also provided an alternative rule for regulatory taking: holding that a regulation will necessitate just compensation if it deprives the owner of a parcel of all economic value. See *Lucas v*. *S .C*. *Coastal Council*, 505 U.S. 1003 (1992). For this *Lucas* style taking there must be a substantial taking leaving the owner with no value in their land. *Id*.. Additionally there is "[t]he emphasis on the word "no" in the text of the opinion was … explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%". *Id*. Anything less than a "complete elimination of value," or a "total loss," the court acknowledged, would require the kind of analysis applied in *Penn Cent*. *Id*. *at 1019-1020*.

A. THE RELEVANT PARCEL FOR THE TAKINGS ANALYSIS IS THE ENTIRE LEAR ISLAND CONSISTENT WITH LONG STANDING PRECEDENT BECAUSE HISOTRICALLY IT WAS HELD BY ONE OWNER WITH ONE RESIDENCE AND AS ONE PARCEL OF PROPERTY.

Under the inquiry as to a regulatory taking, the court should analyze the Lear Island as a whole, consistent with the court has long standing precedent. The court should apply the "parcel as a whole" approach in the taking inquiry, rather than a smaller effected parcel. In other words, the Court should look to the see if there has been diminution to the entire parcel. The Court in *Penn Central* held: "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated". See *Penn Cent*. 438 U.S. at 130. The Court further stated that in the taking inquiry, "courts focus both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole". *Id*. In *Penn Central*, the owner of Grand Central Station challenged the City's Landmarks Preservation Law insofar as it prevented them from exploiting a property interest and did not provide just compensation. *Id*. at 107. The claimant sought review after the Landmarks Preservation Commission of New York designated the

property a landmark, which ultimately prevented the proposed construction of multistory office spaces above the terminal. *Id*. at 10. The Court formulated the ad hoc, three-part test mentioned above. *Id* at 137-138. The Court analyzed the parcel as a whole—rather than analyzing the vertical property interest above the terminal—and held that the regulation was not a taking which demanded just compensation. *Id*.

Similarly, the court in *Andrus v*. *Allard*, 444 U.S. 51 (1979) analyzed an "aggregate" approach to whether a person's personal property was deprived due to government regulation. The claimant, artifacts owner and seller, challenged his prosecution and seizure under the Migratory Bird Treaty Act and Eagle Protection Act for the possession and transportation of artifacts composed of feathers of protected birds. *Id*. The Court held that a reduction in value of the claimant's property, resulting from the seizure, was not a taking. *Id*. The Court instructed that a mere denial of traditional property use is not a taking. *Id*. at 65. The court explained that a property owner holds a "bundle of property rights" the removal of one strand does not give rights to a taking. *Id*.

The court again held that the taking inquiry should look to the diminution in value to parcel as a whole, not a smaller interest or portion. *Keystone Bituminous Coal Ass'n v*. *DeBenedictis*, 480 U.S. 470 (1987). The Claimant brought an action as a result of a state law requiring percentage of subsurface coal to remain intact to protect from ground subsidence. *Id*. The Court held that application of the state law did not constitute a taking and the Court cited to the *Penn Central* "parcel as a whole", analyzing all of the Coal which the claimant had claim to, and not the 2% of coal required to remain intact. *Id*.

The Court again followed in the long standing precedent of applying the parcel as a whole rule and disregarded the subdivision of a parcel under state law in *Palazzolo*. *Palazzolo*, 533 U.S. at 606. In *Palazzolo*, an individual investor with some associates bought parcels of land on Rhode Island Coasts that was comprised of mostly salt marshes, but also a portion of non-marshlands. *Id*. at 613. After the individual bought the other associates parcels became the sole shareholder of a corporation, the corporation sought a permission from a state agency to dredge an adjoining pond, fill parts of the salt

marshes, and develop a beach club on the property. *Id*. at 614. The state denied the proposed actions. *Id*. Subsequent to that, the Marshlands were deemed protected coastal wetlands by state regulations. *Id*. Then the corporation's charter ended and the land reverted to the landowner who again sought permission to develop the beach club and fill the marsh. *Id*. The regulatory agency denied such action and the State Court affirmed. *Id*. at 611.. As a result, the landowner sought an inverse condemnation claim arguing that he was deprived of all economic beneficial use. *Id*. at 615.. The Supreme Court affirmed in part and reversed in part, and remanded for a finding with application of the *Penn Central* test. *Id*. at 632.. The Court addressed the *Lucas* argument in applying the parcel as a whole rule, finding that the claimant was not deprived of all economic benefit because of the existence of the upland portion of the property which allowed for building a residence. *Id*..

The court improperly treated the Plaintiff's lot individually when applying the takings inquiry and should have considered Lear Island as a whole. Just as the Court analyzed the entire parcel of land in *Palazzo*, regardless of subdivision amongst several owners, so too should this Court. The Lear Island was held by King James Lear and his predecessors since 1803. The island had only one residence for much of its history after the 1803 grant. The subdivision was on part of the common owner and as such it should be considered as a whole. Also in Penn Central the court did not consider the smaller effected property interest on real property but rather the property interest as a whole. The Court in error, analyzed Lear's taking claim as applied to 10 acres of the roughly 1000-acre island. As Court also instructed in *Keystone*, "the courts should not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated". *Keystone Bituminous Coal Ass'n*. 480 U.S. at 473.

In light of the controlling precedent the Court should consider Lear Island as a whole.

B. THE NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT IN TEN YEARS SHIELDS FISH AND WILDLIFE SERVICE FROM A TAKINGS CLAIM.

***Temporary takings*.** Some owners of property seek to sever a property owner's interest when the regulation's restriction amounts to only a temporary restriction. *Tahoe-Sierra Pres*. *Council v*.

Tahoe Reg'l Planning Agency, 535 U.S. 302, 318 (2002). Such owners pursue compensation for a taking as they allege they have been deprived of one use of their property. *Id*. at 318. However, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus, 444 U.S. at 65-66*. Furthermore, "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abolished." *Tahoe-Sierra*, 535 U.S. at 318.

Tahoe Sierra exemplifies the unwillingness of courts to divide a property owners interest in the land so as to amount to a temporary taking. Lake Tahoe was becoming filled with runoff as the population around the lake began to grow. *Tahoe-Sierra*, 535 U.S. at 308. In attempts to fix the increased contamination, the local authorities passed two moratoria that limited the potential construction of the surrounding areas by preventing the removal of contiguous vegetation. *Id*. at 309. The moratoria lasted for a total of 32 months, while the average ownership of such a property consisted of 25 years. *Id*. at 312. Property owners filed an action that the moratoria operated as a taking and required compensation to the landowners. *Id*. at 314. The Court found the moratoria to fall into the category of a regulatory taking. *Id*. at 323.. However, the Court refused to separate any one stick in the bundle of ownership from the other and held that because the regulations had only a temporary impact on petitioner's fee simple interest in properties no categorical taking had occurred. *Id*. at 328. The Court chose to focus on land as a whole because the regulation prevented the development of a parcel for a temporary period of time to be conceptually no different than (1) a land use restriction that permanently denies all use on a discrete portion of property, or (2) that permanently restricts a type of use across all of the parcel. *Id*. at 329. Therefore, a permanent deprivation of the owner's use of the entire area is a taking of the parcel as a whole whereas a temporary restriction that merely causes a diminution in value is not. *Id*. at 331.. Therefore, a permanent deprivation of the owner's use of the entire area is a taking of the parcel as a whole, whereas a temporary restriction that merely causes a diminution in value is not. *Id*. at 331.. Finally, a fee simple estate cannot be rendered valueless by a temporary prohibition on

economic use, because the property will recover value as soon as the prohibition is lifted. *Id*.. The court ultimately found no taking of the property in considering the Penn Central factors. *Id*. at 343.

This case is similar to *Tahoe*. In *Tahoe* the court refused to sever the rights in property, as a small amount of time compared to the total ownership is less than a complete deprivation. In *Tahoe*, the moratoria restricted 32 months of a 25-year ownership. Here, under the assumption that habitat would naturally change in ten years, the ten year restriction is minute compared to the previous years of ownership of Cordelia and her future ownership rights. It is further important to hold Cordelia would own the property on average as long as the previous owner, being around forty years. Thus just as the time in *Tahoe* was a small segment of ownership, the ten years out of an average forty for Lear's is a minor restriction. Due to the similarity in the segments of time being taken out, this Court should adopt the rationale of the *Tahoe* court and find no separation of interest in Cordelia's ownership.

Furthermore, by not separating out any one temporal aspect of ownership in the Cordelia lot, her ownership would not be separated in accordance with the *Tahoe* court rationale. By focusing on the land as a whole, the *Tahoe* court saw the temporary restriction as merely a diminution in value. Here, the ten-year period, as merely a diminution in value, would preclude Plaintiff from a complete economic deprivation, as it is temporary in nature. Cordelia's investment backed expectations are not interfered with because she will in the future have full use of her property. The economic impact of the property is miniscule as there would only be a diminution in value for a temporary time period.

In the alternative, this property would regain value once the temporary restriction is lifted or once applies for the ITP. However, the temporary restriction lifts once the butterflies have become disappears. To continue, under the ESA "Section 9 of the ESA prohibits the "take" of any endangered species…"take" is defined by regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015); *See* ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). There is a commitment on behalf of the Plaintiff to maintain the parcel so as to prevent

the island to return to its natural wooded state. Thus, the property would only return to the natural state if the Plaintiff did not uphold the commitment to mow the property amounting to a take of the endangered species and thus violating the statute. Moreover, the restriction would be lifted if Plaintiff purses the proper ITP permit to potentially allow her to build. It is important to note the nature of the government action is to save a species from becoming extinct as that is Fish and Wildlife Service's goal in this small limitation on the Plaintiff's land.

Thus, the natural reversion of the butterfly habitat in ten years shields Fish and Wildlife Service from a takings claim. Furthermore, the restriction of building would be lifted if she were to pursue the ITP.

C. THE PAYMENT OF THE $1000 OF RENT WOULD PRECLUDE CORDELIA FROM ALLEGING COMPLETE ECONOMIC DEPRIVATION OF HER PROPERTY AND ULTIMATELY FROM A TAKINGS CLAIM.

The aforementioned *Lucas* rule is applied in situations in which a regulation goes too far as to deprive the property owner of all economically viable use of their property. *Lucas*, 505 U.S. at 1003. Additionally there is "[t]he emphasis on the word "no" in the text of the opinion was … explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%". *Id* The argument below exemplifies that is not the case here.

Lucas was the first case to provide just compensation for a regulation that completely deprived the owner of all economic benefit. Petitioner had bought two lots on the Isle of Palms in South Carolina. *Lucas*, 505 U.S. at 1006.. Two years later the legislature enacted a statue, which prevented the landowner from building any permanent structure. *Id*. The Court reasoned that when "an 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." *Id*. at 1019.. The Court further reasoned that "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. *Id*. at 1030.. Although the case was ultimately remanded *Lucas* set out the standard

for a total taking denying all of the economically beneficial use by a property owner. *Id*. at 1032..

This case is dissimilar from *Lucas*. In *Lucas* there again was no viable use of the property, where as here she would be given money for rent of her property amounting to economic use. The *Lucas* Court found no economically beneficial use of the property because he could not use if for any purpose. Here there is a purpose for the property through the rental. Additionally Cordelia could apply for an ITP with the potential ability to build a home. The *Lucas* court reasoned that a property owner has suffered a taking when the property is forced to remain idle. However, here the property is not idle and would remain in use. The payment of the $1000 of rent would preclude takings claim.

In opposition, Cordelia would argue that the rent paid annually does not even cover her taxes of the property and that her investment-backed expectations are diminished. However, the precedent has not established a need to cover every cost, but rather as long as there is some value left it would not amount to a taking. Furthermore, the use of the property in this way would not interfere with her investment backed expectations as she wanted to build a home amounting to more costs for herself, and here she would be getting paid. Additionally, the economic impact of regulation is minuscule, as Cordelia would be receiving compensation for the use of the island. Last, the character of the governmental action is constructive as it is to save a species of butterflies from going extinct. The potential ramifications of the loss of such a species, for example would lead to, among other things, less biodiversity, decline in tourism, and an adverse impact wildlife observation activities. Additionally, by allowing Cordelia to receive compensation for such a scenario would inundate the Courts. Surely, the Court does not want any landowner who is receiving compensation, but just not happy with the compensation to be able to bring suit.

Additionally, Cordelia would be able to build if she would complete the ITP application process in producing an HCP. Ultimately the application process is another route which Cordelia could pursue leaving some value in her property.

Thus, the payment of the $1000 of rent would preclude Cordelia from complete economic deprivation of her property and ultimately from a takings claim.

D. PUBLIC TRUST DOCTRINE PRECLUDES PLAINTIFF'S TAKING CLAIM BECAUSE THE COVE IS HELD IN PUBLIC TRUST BY THE STATE OF NEW UNION.

The Cove is held in public trust by the State of New Union because it was historically used as a boat landing in the large interstate navigable waterway, Lake Union. The 1803 land grant to Lear is unspecific as to whether the land submerged under the cove would be granted to Lear's predecessor. As such, the title to the Cove passed to the State of New Union upon statehood into the Union under the Equal Footing Doctrine. Lear's taking claim is precluded by the background principles in the title to the Cove. The Court in *Lucas*, highlighted that "background principles" of state law may prevent the claimants use for the purposes of preventing nuisance or protection of land in common ownership, and these principles "inhere in the title itself". *Lucas*, 505 at 1029. Furthermore, the State has no duty to indemnify a landowner for protecting public trust areas. See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002). (court affirmed dismissal of landowners taking claim based on public trust doctrine running with title and prevented shoreline property development).

1. <u>The cove meets the navigability test at time of statehood and therefore is held in public trust by State of New Union</u>

The Supreme Court, in the seminal case *Illinois Central Railroad Company,* held that each state holds in public trust lands submerged lands under navigable waterways which may be enjoyed for navigation. *Ill. C. R. Co. v. Ill.*, 146 U.S. 387 (1892).). A waterway is navigable if it is navigable in fact, the waterway is used, "*or are susceptible of being used*, in their ordinary condition as highways for commerce. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) (emphasis added). . A navigable waterway for the purpose being held in public trust by the state, must meet the navigability test, at the time the state entered into the union. *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012). The navigable in fact test also applies to lake utilized for interstate travel. *Utah Div. of State Lands* v. United States,

482 U.S. 193 (1987) (holding that the Great Salt Lake located completely in the State of Utah is navigable and Lakebed is held by the State in public trust).

Lake Union is a large *intestate* lake traditionally utilized for interstate navigation. The navigability test is satisfied under *The Daniel Ball* test because the lake was traditionally used for travel and is *susceptible to be used* as a highway of commerce. The Cove, being a logical extension of the lake, being historically open water, was historically utilized as a boat landing[1]. As a consequence, the submerged lands under the Cove, now marshlands, should be held in public trust and to inhere in Lear's title to the Heath.

2. The State of New Union has superior title to the Cove because the submerged lands passed to the State at the time of Statehood under the Equal Footing Doctrine

States admitted to the Union subsequent to the original thirteen colonies are granted title to the lands submerged under navigable waters on the equal footing doctrine. *Pollard v*. *Hagan*, 44 U.S. 212 (1845). There is a strong presumption against defeating a future state's rights to lands under navigable waters and a pre-statehood land grant by Congress of such lands beneath navigable waters will not be inferred unless the grant is clear or otherwise very plain. *Utah Div*. *of State Lands*, 482 U.S. at 193.

The seminal case addressing the intersection of the equal footing doctrine and the Public Trust Doctrine is *Pollard*. In *Pollard*, the plaintiff sought an ejectment, claiming title to the underwater soil in the Mobile Bay in Alabama granted to him by the Federal Government. *Pollard*, 44 U.S. at 219. The defendant, Hagan, laid claim to the same soils on the basis of that his grant of title was based on a Spanish Land Grant, older than Pollards. *Id*.. Furthermore, the court held that Alabama entered upon equal footing as the original states and as such the lands submerged under the navigable waters were reserved for the state. *Id*.at 230. The court reasoned that Congress had no municipal jurisdiction, sovereignty, or right to the land in question, except for temporary purposes. *Id*. at 224.. The court affirmed the State Supreme Court's holding finding Hagan the superior title holder. *Id*..

[1] The record is incomplete as to whether the Cove was open water at time of Statehood. It only reflects that it "historically was open water". The Record does not reflect the time of New Union's Statehood.

The court again, grappled with the issue of pre-statehood land grants in the beds of navigable waters in *Shively*. *Shively v*. *Bowlby*, 152 U.S. 1 (1894). In *Shively*, the issue before the court was whether the defendant wharf builder had title to lands below the high water mark, granted by the State of Oregon, or whether the plaintiff had superior title in receiving granted title to the same soils by the United States before Oregon's Statehood. *Id*. at 9. The court held that the State Grantee's title to be superior, despite the pre-statehood grant to plaintiff, Shively. *Id*. at 58. The court relying on several cases, including Poland, held that the Congress had no power to grant lands below the high water mark in territories unless it were necessary "to perform international obligations…or the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory" *Id*. at 48.

In *Utah Div*. *of State Lands* the court held that the bed of the Great Salt Lake was navigable and the title to bed of the lake was granted to Utah at statehood, despite acts of Congress reserving parts of the lakebed for reservoirs. *Utah Div*. *of State Lands, 482 U.S*. at 209. The court reasoned that the Acts of congress did not explicitly state its intention to defeat Utah's title to the bed under the equal footing doctrine. *Id*.

The court improperly found that public trust principles preclude the taking claim because of the pre-state land grant. What the lower court fails to address is the strong presumption against conveyance of submerged lands. As the court addressed in *Shively* and *Utah* even in the instance of a pre-statehood grant of submerged lands, the title reverts to the state to be held in public trust. As such, the title to the lands submerged below the Cove was granted to the State of New Union upon entry into the union on equal footing. The grant to Lear's predecessors is grants the submerged lands 300 feet out around the island, but does not specify if the lands submerged under the Cove is granted with the island. Additionally, the grant does not explicitly state its intention to defeat the future state's (New Union) title to the bed under the open water Cove.

E. FISH AND WILDLIFE SERVICE AND BRITAIN COUNTY ARE NOT JOINT TORTFEASORS AND THUS THE ABILITY TO BUILD A SINGLE FAMILY RESIDENT DOES NOT DEPRIVE CORDELIA OF ALL ECONOMIC USE OF HER PROPERTY.

1. The actions of U.S Fish and Wildlife Service and Brittain County are clearly divisible and they should not be held responsible for the actions of the other as joint tort feasors.

Tort feasors are generally divided into four categories "(1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); and (4) although there is no concert of action, nevertheless, the independent acts of several actors concur to produce indivisible harmful consequences. " *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976). The actions of Fish and Wildlife Service and Brittain County fall into the latter category.

In the situation where tort feasors are not deliberately acting in unison the following rules are applied. *Velsicol Chemical Corp*, 543 S.W.2d at 342. In the scenario of joint and several liabilities of an indivisible injury resulting from a concurrent but independent action of multiple wrong doers, each wrongdoer is liable for all of the damages. *Landers v. E. Tex. Salt Water Disposal Co.,* 151 Tex. 251, 256 (1952). Furthermore, any plaintiff cannot be put "in the impossible situation" of having to decipher which party is responsible for what part of the damages suffered. *Michie v. Great Lakes Steel Division, National Steel Corp.,* 495 F.2d 213 (6th Cir. 1974). Moreover, in deciphering joint and several liability "the must first find that the harm for which the plaintiff seeks damages 'indivisible'" *Id.* at 217.

The *Velsicol* case shows the court how parties can be considered joint tort feasors and if the situation arises where liability is indivisible, the parties will be held liable as joint parties. The residents and homeowners of Alton Park, for damages allegedly caused by the pollutants emitted from Velsicol's manufacturing plant, sued Velsicol. *Velsicol Chemical Corp*, 543 S.W.2d at 338. In turn Velsicol then filed a third party compliant against five third party defendants who each operated manufacturing plants around Velsicol's, holding them liable to Velsicol for the amount of the complaint. *Id.* The third party defendants argued they would not be liable as none of them could be considered joint tort feasors, the

court did not agree. *Id*. The court reasoned that simply alleging another party also contributed to the issue at hand did not amount to a possible right of indemnity. *Id*. at 339. However, the court ultimately found the complaint to stand due to the nature of the pollution and the inability of the plaintiff to decipher who ultimately was liable for each amount of the waste. *Id*. at 343.

The *Michie* case explains the concerns, which come along with multiple defendants. Thirty-seven plaintiffs filed suit against corporations that operated plants outside of Ontario, Canada. *Michie*., 495 F.2d at 214.. Plaintiffs alleged that the plants do not follow various regulations and discharge pollutants into the air, which travel on to their properties. *Id*. The court sought to decide whether defendants can be held joint and severally liable in a situation where the individual injuries could not be analyzed separately because the pollutants mix once they enter the air. *Id*. at 215. The court was wary of a plaintiff being left with no remedy as each defendant could point to the other resulting in no relief to the plaintiff. *Id*. at 218.. Thus the court shifts the burden to the "wrongdoer" to show who is liable for each cause. *Id*.. Ultimately the court rules in favor of the Plaintiff and refused the motion to dismiss the case by the defendants. *Id*..

This case is distinguishable from *Velsicol*. In *Velsicol* the contamination causes could not be separated and no one party could be found responsible for their own actions. The opposite occurs in this case as Fish and Wildlife Service regulates the endangered species on the land and Brittain County regulates the wetlands. The party's responsibilities are easily and definitively dividable. Furthermore, the alleged tortious act in *Velsicol* was one that in its nature is indivisible as the chemicals poured into the lake they could not be divided. Here, the alleged act is a restriction on property, lending itself to divisibility based on which regulation is limited what aspect of the land.

Michie is distinguishable from the case at bar. In *Michie*, the pollutants again could not be separated so as to hold each part responsible for their actions. However, here the actions of each party are distinguishable from one another as each regulation can be attributed to a governing body. Just as the *Michie* court was wary of leaving a plaintiff with no remedy, so too is this Court. Thus it is

important to note that the Plaintiff would not be left without a remedy, as Brittain County would be responsible for their actions. Once the burden shift to the potential wrongdoer to show who is responsible, being Fish and Wildlife Service, can direct the plaintiff to the proper party to be held responsible, Brittain County.

Thus, the actions of Fish and Wildlife Service and Brittain County are clearly divisible and they should not be held responsible for the actions of the other. And furthermore, this exemplifies that Fish and Wildlife Service would not be held jointly responsible for the actions of both their regulation and Brittain County's regulation.

2. The ability to build a single-family home on the property does not deprive the landowner of all economically viable and beneficial use of the land.

The analysis above considered the co-defendants being held jointly responsible. As established, their regulations are independent and distinct and thus they could be separated in liability. Now we turn to the concept of Fish and Wildlife Service being held responsible for its own actions. However, as shown below, the ability of the Plaintiff to build a single family home on the lot precludes her from a claim of complete economic deprivation.

The *Penn Central* case exemplifies that prevention of one use of a property owners rights does not amount to a deprivation of all other rights and does not amount to a regulatory taking. As mentioned above, the court found several factors to be important when examining the extent of the issue involved including: the economic impact, the extent to which the interference effects the investment back expectations, and the character of the government action. *Penn Cent*. *Transp*. *Co*., 438 U.S. at 124. The court reasons that it cannot simply be established as a taking because a landowner was denied the ability to utilize a property interest they believed they had. *Id*. at 130. The court further refused to separate parcels capabilities and chose to view the parcel as a whole. *Id*. The court found the regulation to be in the public's best interest. *Id*. at 131. Ultimately in weighing the factors the court found the regulation to not be a taking. *Id*. at 138..

In *Keystone*, the Pennsylvania legislature was found within its authority when it enacted a statute protecting the surface of a piece of property by restricting the subsurface right to mine. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 473. The court balanced both private and public interests and found that the burden on the plaintiffs was slight. *Id*. Furthermore, the court reasoned that the harm in one stick of the bundle of ownership does not amount to a taking. *Id*. *at* 497. Additionally, the miners were still capable of utilizing the 75% they would have been able to, either way, ultimately not interfering with their investment backed expectations. *Id*. *at* 500. Thus the segment of the coal that they were prevented from using would not be separated from their ownership as the court does not separate aspects of ones ownerships and instead views the parcel as a whole. *Id*. *at* 498.

This case should be ruled similar to *Penn Central*. In *Penn Central* they refused to legitimize an investment backed expectation that had not already existed. Here, the expectation of being able to build was there but arguably was not the original intentions of the landowners. Additionally, the parcels had traditionally been apart of a one-residence parcel. Thus, it was not until the parcel was subdivided for Cordelia and her sisters that she had the opportunity to consider building. The property had been owned for several years being used for farming and cultivation. Additionally, the lot was gifted to Cordelia; hence she had no investment in the property as she merely received the lot. Thus, Cordelia's investment backed expectations are met, as they have not been disrupted. Furthermore, just as in *Penn Central* the legislation was enacted for the public benefit, here too the protection of the butterfly is for the protections of the public. Thus, the primary use of the parcel not being utilized is not detrimental and the property owner as there still is utilization by the butterfly population of which Cordelia can reap the proceeds. The *Penn Central* court furthers the reasoning that a taking does not occur simply because a property owner does not have access to a right they believed they had. Subsequently, although the Plaintiff may not be able to build her home as soon as she wanted or where she wanted, the belief that she had the right to do so does not amount to a taking. It is additionally important to note that the Plaintiff could seek other uses in applying for an ITP or seeking redress in state court.

Although factually *Keystone* and this case differ the concepts used in both are similar. In *Keystone*, the court found the limitation on the coal utilization was slight. Just as the limitation on building here is slight. Furthermore, just as in *Keystone* they were still able to utilize a majority of their interest, so too can Cordelia. Thus the *Keystone* court found the segment of the coal which the property owners being prevented from using as not a complete deprivation, so too should this Court with Cordelia being able to build. In addition, *Keystone* court refused to separate out what the landowners could and could not do as segments of their interest in property. Here the Court should do the same as Cordelia can still utilize her property and claiming a taking would falsely lead to the conclusion that she cant utilize any.

The ability to build a single-family home on the property precludes Plaintiff from a taking claim.

Fish and Wildlife Service and Brittain County are not joint tort feasors and thus the ability to build a single family resident does not deprive Cordelia of all economic use of her property.

The actions by Fish and Wildlife Service do not amount to a taking as the regulations do not amount to a total and complete economic deprivation of all beneficial use of Cordelia's land.

CONCLUSION

For the foregoing reasons, Fish and Wildlife Service requests the Court reverse its decisions on the district court's determination that Ms. Lear's claim was ripe as she did not follow proper procedures under ESA § 10, 16 U.S.C. § 1539(a)(1)(B), that the relevant parcel was Cordelia lot, that the potential future natural destruction of the habitat does not preclude a takings claim, Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Lear's takings claim, the public trust principles do not preclude Ms. Lear from a taking claim, and that FWS and Britain County are held as joint tort feasors.