C.A. No. 16-0933

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
No. 112-CV-2015 (RNR)

BRIEF FOR PLAINTIFF-APPELLEE-CROSS APPELLANT CORDELIA LEAR

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STATEMENT OF JURISDICTION

Cordelia Lear (Lear) filed this action against the United States Fish and Wildlife Service ("FWS") and Brittain County, New Union ("Brittain County") for an uncompensated taking of her property under the Takings Clause of the Fifth Amendment and to challenge the constitutionality of the Endangered Species Act ("ESA"), 16 U.S.C. §1531 et seq. (2012). The United States District Court for the District of New Union ("District Court"), which had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1491, entered its judgment dismissing Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of legislative power as applied to her property, awarding damages of $10,000 in Lear's favor against the FWS for an unconstitutional taking of Lear's property, and awarding damages in the amount of $100,000 against Brittain County for an unconstitutional taking of Lear's property on June 1, 2016. (R. at 1, 12). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use.

2. Whether Lear's takings claim against FWS are ripe without having applied for an ITP under the ESA.

3. Whether the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965 are the relevant parcel for determining if a taking occurred.

4. Whether the natural destruction of the butterfly habitat in ten years shield FWS and Brittain County from a taking claim for complete deprivation of economic value to the property.

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

6. Whether the public trust principles inherent in title preclude Lear's claim for a

taking based on the denial of a county wetlands permit.

7. Whether 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

This appeal stems from the issuance of an Order of the District Court dated June 1, 2016. The District Court's order found building a residence is the relevant activity subject to regulation under the ESA and is a valid exercise of Congress's Commerce Power, awarded damages of $10,000 to Lear against the FWS for a taking of Lear's property, and awarded damages of $100,000 against Brittain County for a taking of Lear's property. R 4. Lear seeks to construct a residential home on her ten-acre property located on Lear Island. R. 5. The property is critical habitat for the Karner Blue Butterfly. R at 8. FWS notified Lear building the residence would be a "take" of the butterfly and prohibited under the ESA. *Id*. In order to avoid a take of the butterfly Lear sought a permit from Brittain County to build the residence in the wetland portion of her property. R. 6. Brittain County denied the permit. *Id*.

FWS and Brittain County filed timely Notice of Appeal on June 9, 2016. FWS and Brittain County seek review of the ripeness of Lear's claim, the relevant parcel of land to be considered for an unconstitutional taking of property, and whether the ESA and Brittain County Wetlands Preservation law must be considered in tandem for a taking claim. R. 1. Lear seeks review of the constitutionality of the ESA as valid exercise of Congress's Commerce power.

STATEMENT OF THE FACTS

I. THE COMMERCE CLAUSE

Article 1, Section 8, of the United States Constitution permits Congress "to regulate Commerce…among the several States…." The Supreme Court has identified three general categories Congress has the authority to regulate under its commerce power. "First, Congress can regulate the channels of interstate commerce. Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

II. THE ENDANGERED SPECIES ACT

The ESA was enacted in 1973 "for the purpose of protecting endangered and threatened species." 16 U.S.C. § 1531 et. Seq. The ESA creates a mechanism to list endangered or threatened species, and prohibits all persons to "take any such [endangered] species within the United States." 16 U.S.C. § 1538(a)(1)(b). A "take" of an endangered species is defined as "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). A "take" has been further defined by the FWS to include "significant modifications or degradations of a habitat which kill or injure protected wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *GDF Reality Investments, LTD v. Norton*, 326 F.3d 622, 625 (5th Cir. 2003) (quoting) 50 C.F.R. § 17.3.

III. CORDELIA LEAR AND THE KARNER BLUE BUTTERFLY

Lear Island, located in Lake Union, is collectively owned by Cordelia Lear and her two sisters. The Lear sisters inherited Lear Island from their father King James Lear.

King James Lear's estate divided Lear Island into three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. R. 5.

In 2012, Lear planned to build a single residence on her owned lot. Located at the northern tip of Lear Island, Lear's lot contains nine acre of upland, a 40-foot by 1,000-foot access strip, and approximately one acre of marshland. *Id*. The open field area has been referred to as the "Heath" by the Lear family because it was kept open, unlike the remainder of the island. *Id*. The Heath remains open due to an annual mowing by the Lear family. Without the annual mowing the nine acres would become woodlands like the rest of the island. R. 7.

The Heath and access strip have wild blue lupine flowers, which grow because the sandy soil on Lear Island and shade from the adjacent successional forest on the Goneril Lot provide ideal conditions. R. 5. The blue lupine flowers are habitat for the Karner Blue Butterfly, which require the leaves of the blue lupine plants as a food source. *Id*. The Karner Blue Butterfly is an endangered species. 50 C.F.R. §17.11. The Heath supports the only population of Karner Blue Butterflies in New Union, although populations of the butterfly exist in other states. *Id*.

In April 2012, Lear contacted the New Union FWS to determine if any permits were needed to develop her property. R. 6. The FWS advised Cordelia that any modification of the lupine habitat, other than the annual mowing, would constitute a "take" of the butterfly. *Id*. The FWS also advised Lear it was possible to seek an Incidental Take Permit (ITP) to permit developing the Cordelia Lot. *Id*. However, the ITP would cost Lear $150,000 for an environmental consultant to prepare the application, the habitat conservation plan (HCP), and environmental assessment (EA). *Id*.

On May 15, 2012, the FWS sent Lear a letter confirming the entire ten-acre property was critical habitat for the butterfly. *Id*. The letter invited Lear to submit an application for an ITP with an acceptable HCP and EA. *Id*. According to the FWS an acceptable HCP would require, at a minimum, that all acreage of lupine fields would be replaced with contiguous acres managed by Lear. *Id*. However, the only contiguous lands are the Goneril Lot and Lear is estranged from her sister. Lear's sister, Goneril, will not cooperate in any HCP that places restrictions on her property. *Id*. Without replacing the lupines on the Goneril Lot, Lear is unable to provide FWS with an acceptable HCP.

Rather than pursue an expensive and futile ITP, Lear developed another proposal that would not disturb the lupine fields. Lear proposed to fill one half-acre of the wetlands to create a building site. R. 7. Pursuant to the Brittain County Wetlands Preservation, Lear filed a permit seeking permission to fill the described wetland in August 2013. *Id*. The permit was denied in December 2013 because permits are only granted for water dependent use. *Id*. The permit denial by Brittain County, combined with the unlikely chance of obtaining an ITP, prevents Lear from developing any portion of her ten-acre lot.

SUMMARY OF THE ARGUMENT

The District Court's holding Lear's claims were ripe without filing for an ITP was proper. Ripeness is determined through a balancing test that weighs whether judicial review is appropriate against the hardships for the landowner. Preventing judicial review of Lear's claims would create an extreme undue hardship. In addition, there is a reasonable degree of certainty FWS lacks the discretion to permit any development, and the outcome of Lear's property is reasonably certain.

The relevant parcel for a takings analysis is the Cordelia Lot. The Supreme Court has held the relevant parcel for a takings analysis is a singular whole parcel of property. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Aggregating the Cordelia Lot with the rest of Lear Island, or conceptually severing any property rights of the Cordelia Lot, would be contrary to several Supreme Court decisions focused on a single parcel of property as the appropriate parcel for taking jurisprudence. *Id*.

The ESA is not a valid exercise of Congress's Commerce power. The Supreme Court decisions of *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), limit Congress's Commerce power to only regulate intrastate economic activity that substantially affects interstate commerce. The taking of the Karner Blue Butterfly is not an activity that substantially affects interstate commerce.

The District Court erred in determining the relevant economic activity under the ESA is the construction of a residence on Cordelia Lot. The ESA permits Congress to regulate any activity with no stopping point. *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 57 F.Supp.3d 1337 (D. Utah 2014). This Court should adopt the Fifth Circuits reasoning in *GDF Realty*, to include the totality of activities regulated by the ESA and not one specific activity that might be connected to interstate commerce.

The fact that the Cordelia lot will become developable upon the natural destruction of the butterfly habitat in ten years does not preclude a takings claim for complete loss of economic value, due primarily to the length of the deprivation. Neither does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing, as this amount does not even exceed the tax liability on the property.

Public trust principles do not apply here because no property of nuisance law regarding navigable waters existed at the time of the Congressional grant of Lear Island to Cornelius Lear and the title to the land was issued prior to the establishment of the equal footing doctrine. Lear's claim for a taking is not precluded by public trust principles. FWS and Brittain County are jointly and severally liable for a complete deprivation of Lear's property because their concurrent actions create the indivisible harm of a taking of Lear's property. An indivisible harm of a taking has occurred because Lear's property has no economically beneficial or productive value without the ability to build a single-family house on the Cordelia lot.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD LEAR'S TAKINGS CLAIMS ARE RIPE WITHOUT HAVING APPLIED FOR AN INCIDENTAL TAKE PERMIT

Generally, a question of ripeness is determined through a balancing test. *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967). The balancing test reviews the fitness of the issue against the hardships created by refusing judicial review. *Id*. When determining ripeness in takings claims, the claim is ripe for judicial review when "a property holder…obtain[s] a final [agency] decision regarding how it will be allowed to develop its property…," *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985), or when the economic impact of the regulation is determined to a "reasonable degree of certainty." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

The District Court properly held Lear's takings claims are ripe for two reasons. First, when the government has already declared a policy of denying the very sort of permit the claimant would need, the claimant need not perform a futile act. R. at 9.

Second, if the cost of applying for a permit exceeds the fair market value of the property in question the procedure is too burdensome and deprives the claimant of their property rights. *Id*. The review of the District Court's decision with respect to ripeness is reviewed de novo. *McGuire v. United States*, 707 F.3d 1351 (Fed. Cir. 2013). As such, this Court should uphold the District Court's decision holding Lear's claims are ripe.

A. The expense of seeking an incidental take permit is cost prohibitive and creates an undue hardship on Lear.

The Fifth Amendment of the Constitution prohibits the taking of private property for public use without just compensation. U.S. Const. Amend. V. The Takings Clause reifies innate principles of fairness and equity to ensure property owners are justly compensated by the government. The Court in *Palazzolo* endorsed this very idea. "The purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Palazzolo*, 533 U.S. at 617-618, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Lear is subject to bearing the hardships of being deprived of her property without just compensation. An interpretation of ripeness that requires Lear to file an ITP would create an absurd outcome where a landowner must spend capital in upwards of the fair market value of their property to seek judicial review. Furthermore, the review process can only provide just compensation equal to the value of the property. In Lear's case, filing an ITP would cost $150,000 in the hope to receive $100,000 in just compensation. R. at. 6. As such, Lear is faced with the decision to either engage in a cost prohibitive action to exhaust her administrative remedies, or bear the burden of leaving her land

undeveloped for the public enjoyment of the Karner Blue Butterfly. As such, Lear's takings claims are ripe.

Additionally, a claim is ripe for judicial review if there is a "direct and immediate" impact of the regulation. *Abbot*, 387 U.S. at 152. In *Abbot*, the Court held petitioner's claims were appropriate for judicial review because a direct effect of the Food and Drug Administration regulation created a hardship on petitioner drug companies. In particular, the Court held the drug companies faced a dilemma of either complying with time requirements and costs of changing their promotional material or risking prosecution. *Id*. *Abbot* is instructive to the issue of ripeness on appeal. Lear is faced with the dilemma of either abandoning the development of her property or facing prosecution for violating the ESA. The dilemma Lear faces is an undue hardship appropriate for judicial review.

B. A reasonable degree of certainty exists that the United States Fish and Wildlife Service would deny any incidental take permit.

A takings claim is ripe for judicial resolution "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." *Palazzolo*, 533 U.S. at 620. Lear's claim against the FWS and Brittain County satisfy both requirements of the *Palazzolo* test. First, it is clear the FWS lacks the discretion to permit any development. In particular, FWS designated the entire Cordelia Lot as critical habitat for the butterfly and would require a minimum of a one to one replacement of every acre developed by Lear. The only property contiguous with the Cordelia Lot is the Goneril Lot. R. at 6. Goneril Lear will not participate in any HCP that would increase land use restrictions on her lot. *Id*. As such, Lear has no available options to relocate the lupine fields and the agency will not permit any development.

Second, the permissible uses of Lear's property are known to a reasonable degree of certainty. The entirety of Lear's property is designated as critical habitat. The modification of critical habitat constitutes a take under the ESA. *GDF Realty*, 326 F.3d at 625. The ESA prohibits that take of any listed species, which includes habitat modification. 16 U.S.C. § 1538(a)(1)(b). As such, it is reasonably certain the permissible uses of Lear's property are limited to no development and are ripe for judicial review.

Additionally, Lear's preparation and filing of an ITP would cost $50,000 more than the fair market value of her lot. R. at 6. When the costs of pursuing the only administrative remedy available exceed the value of the property, the agency has no discretion to alleviate the financial burdens of the regulatory scheme. A regulatory taking is ripe for judicial review when the regulations and administrative procedures deprive a landowner of the economic viability of their property without a cost-effective alternative to resolve their claim.

II. THE CORDELIA LOT, RATHER THAN CONTIGUOUS PARCELS AGGREGATED ON LEAR ISLAND, IS THE WHOLE PARCEL RELEVANT FOR A TAKINGS ANALYSIS

The District Court held the relevant parcel for a takings analysis consists of the Cordelia Lot and not all of Lear Island. "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). This Court reviews questions of law de novo and reviews finding of facts for clear error. *Id*. As such, this Court should uphold the District Court's ruling on the basis that the Cordelia Lot is the relevant parcel for a takings analysis.

The Fifth Amendment of the Constitution prohibits "private property be taken for public use, without just compensation." U.S. Const. Amend. V. The first factor in determining whether a taking has occurred is defining the relevant parcel. *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412 (2011) *rev'd on other grounds*, 707 F.3d 1286 (Fed. Cir. 2013). The determination of the relevant parcel is commonly referred to as the denominator problem because the value of the property being taken is imposed on the value remaining in the property. *Id*. The value of a property may be deprived through regulations requiring the land to be left substantially in its natural state. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992).

Regulatory takings that are not categorical takings are analyzed under the framework established in *Penn Central*. *Lost Tree*, 797 F.3d 1286. The *Penn Central* standard is further articulated in *Lucas*. The Court in *Lucas* held, "[a]nything less than a complete elimination of value, or a total loss…would require the kind of analysis applied in *Penn Central*. *Lucas*, 505 U.S. at 1019-20.

Penn Central established a single parcel, rather than aggregate parcels, are relevant for takings analysis. *Penn Central*, 438 U.S. 104. In *Penn Central*, the company attempted to construct office buildings above Grand Central Terminal. *Id*. The company was denied a permit for construction and filed a takings claim against New York City. *Id*. The company argued the air rights of their property could be severed from their property rights. *Id*. The Court rejected the company's claim and held: "[t]aking jurisprudence does not divide a single parcel into discrete segments…." *Id*. at 130.

The Court held the relevant parcel for a takings analysis is the whole single parcel. *Id*. It would be inappropriate for a conceptual severance of property rights within a single

parcel, or to aggregate a single parcel with additional contiguous parcels. Rather, the Court's takings jurisprudence is applicable to an entire single parcel, not portions of a parcel or multiple parcels.

The whole single parcel precedent established in *Penn Central* has been upheld in subsequent decisions. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court held support estate cannot be severed for a takings analysis. 480 U.S. 470 (1987). Rather, the property interest relevant for a takings analysis is the whole single parcel. Furthermore, the Court in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency* held temporal segmentation was too extreme for a takings to have occurred. 535 U.S. 302 (2002). The Court was unwilling to aggregate all of the individual properties into the relevant parcel. *Id*. Instead, the Court elaborated on the "parcel as a whole" concept. *Id*. The Court defined a property interest as the "geographic dimensions and the term of years that describes the temporal aspect of the owner's interest." *Id*. at 331. The geographic dimensions are the parcel as a whole is relevant for a takings analysis, not part of the property interests, nor property interests related to other parcels.

The District Court's decision the Cordelia Lot is the relevant parcel is in accordance with the Court's precedent. Lear is the fee simple owner of the ten-acre lot. As such, her property interests are determined by calculating the entire Cordelia Lot. Aggregating the Cordelia Lot with the remaining lots on Lear Island would fly in the face of the "whole single parcel" precedent established by the Supreme Court. The fee title for each single parcel is the only relevant denominator for a takings analysis. Lear is not trying to sever property rights from her bundle of sticks; nor is she trying to include other

parcels to expand her bundle of sticks. As such, this Court should uphold the District Court's order confirming the Cordelia Lot as the relevant parcel for a takings analysis.

III. THE FACT THAT THE CORDELIA LOT WILL BECOME DEVELOPABLE UPON THE NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT IN TEN YEARS DOES NOT SHIELD THE FWS AND BRITTAIN COUNTY FROM A TAKINGS CLAIM BASED UPON A COMPLETE DEPRIVATION OF ECONOMIC VALUE OF THE PROPERTY.

It is well settled that "temporary" takings are compensable under the Takings Clause. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1011–12 (1992); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). Yet, FWS and Brittain County both advance the absurd argument that the fact that the lot will become developable upon the natural destruction of the butterfly habitat shields them from a taking claim based upon a complete deprivation of economic value of the property. The absurdity stems not only from the fact that such deprivation here would last for an entire decade, but also from FWS's reliance on the prospective extinction of the very subpopulation of Karner Blues it is fighting to protect as an argument against finding a taking of Plaintiff's property. This irony was not lost on the District Court. R. at 10.

FWS and Brittain County base their argument on the Supreme Court's decision in *Tahoe-Sierra*. However, as the District Court noted, that case is easily distinguishable. *Id.* In *Tahoe-Sierra*, an ordinance and a resolution in combination effectively prohibited all construction on sensitive lands near streams and wetlands in California for 32 months, and on sensitive lands in Nevada for eight months. *Tahoe-Sierra* at 312. Petitioners included individuals who purchased their properties prior to the effective dates of the

ordinance and resolution at issue, primarily "for the purpose of constructing 'at a time of their choosing' a single-family home 'to serve as a permanent, retirement or vacation residence.' *Id.* at 312–13. When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building." *Id.* at 313.

The Court noted the reasoning behind the efforts to protect Lake Tahoe:

> Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin has threatened the "'noble sheet of blue water'" beloved by Twain and countless others. As the District Court found, "dramatic decreases in clarity first began to be noted in the 1950's/early 1960's, shortly after development at the lake began in earnest." The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

Id. at 307 (citations omitted).

The Court began its analysis by rejecting the Petitioners proposed per se rule, stating, "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case…[W]e conclude that the circumstances in this case are best analyzed within the *Penn Central* framework." *Id.* at 321. The Court later added, "[i]n rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." *Id.* at 337.

The instant case is incredibly similar to *Tahoe-Sierra*. In the instant case, as in *Tahoe-Sierra*, two laws combine to prevent all development on the parcel at issue. In both case, this prevention of development, although spanning years, is temporary. The

laws in each case are intended to protect a rare natural wonder: Lake Tahoe and the New Union population of Karner Blue Butterflies. In both cases, when the landowners acquired their property, they had every reason to believe that they would be able to develop their land.

However, the cases differ in several important aspects. Most importantly, and as the District Court pointed out, the moratorium in the instant case will last for an estimated ten years, while the moratoria in *Tahoe-Sierra* only lasted only eight months and 32 months. Unlike the *Tahoe-Sierra* moratoria, which were set by regulation and guaranteed to expire, the ten-year hold on development here is only an estimate. The term will not just expire. Lear must take the affirmative step of refraining from mowing her fields, which her family has done for decades. It is absurd to expect Lear to allow her parcel to fall into disrepair for a decade, which will also guarantee the destruction of the New Union population of Karner Blues, before she can develop her property like the two neighboring parcels.

In the instant case, the District Court did not apply an unallowable *per se* rule, but rather, the court appropriately engaged in a factual inquiry. The length of time was one factor in the court's analysis, and one that weighed heavily in the Petitioner's favor. The court distinguished the instant case from *Tahoe-Sierra* because of the decade-long length of the taking and the absurdity of the suggested method of avoiding it at the expiration of the ten-year period. For this reason, the District Court properly found that the potential natural destruction of the Karner Blues' habitat did not preclude Lear's takings claim. Because the District Court was correct on this finding, and therefore did not abuse its

discretion or act unreasonable, the District Court's decision on this issue should be affirmed.

IV. THE BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY $1,000 PER YEAR IN RENT FOR WILDLIFE VIEWING DOES NOT PRECLUDE A TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE.

FWS and Brittain County further argue that the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing precludes a takings claim for complete loss of economic value. Again, the District Court disagreed, finding that the existence of this offer does not preclude a takings claim for complete loss of economic value. As the District Court noted, the Supreme Court established in *Lucas* that where government regulation leaves a property owner with no economically remunerative use of their property, a compensable taking has occurred without regard to balancing any public interests served by the regulation. R. at 11. Here, Lear has no economically remunerative use of her property.

As established above, in order to develop her property, Lear would have to spend $150,000 for an environmental consultant to prepare the application, the habitat conservation plan, and environmental assessment. This exceeds the fair market value of the property by $50,000. It is also undisputed that the property taxes on Lear's parcel are $1,500. The offer by the Brittain County Butterfly Society to pay $1,000 per year in rent for wildlife viewing does not even exceed the tax liability on the property. As the District Court found, Lear has clearly been deprived of all economic value of her property, and this finding should be affirmed. The Brittain County Butterfly Society's offer makes no difference. Under Tahoe-Sierra, Lucas, Penn Central, and the Constitution, Lear should be compensated for the taking of her property.

V. PUBLIC TRUST PRINCIPLES DO NOT PRECLUDE LEAR'S CLAIM FOR A TAKING BECAUSE NAVIGABLE WATER RIGHTS DID NOT EXIST AT THE TIME OF THE GRANT OF TITLE AND THE EQUAL FOOTING DOCTRINE DOES NOT APPLY.

The Supreme Court established the "public trust" doctrine as a permanent doctrine in *Illinois Central R.R. Co. v. Ill.*, 146 U.S. 387 (1892). Under this doctrine, the title to certain natural resources, such as navigable waters, is granted to the states as a trustee for the public. The Court determined that "[t]he control of State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453. In *Lucas v. S.C. Coastal Council*, the Supreme Court determined that, under the public trust doctrine, when regulations prohibit all economically beneficial use of land, "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but *must inhere in the title itself*, in the restrictions that background principles of the State's law of property and nuisance *already place upon land ownership*." 505 U.S. 1003, 1029 (1992). The Court recognized that "[t]he owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land." *Id.* at 1029.

Under the equal footing doctrine, a State gains title to the beds of waters then navigable upon its date of statehood. *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). The title to any land beneath water that is not navigable remains vested in the United States before statehood, "to be transferred or licensed if and as it chooses." *PPL Mont.*, 565 U.S. at 591(citation omitted). In *Daniel Ball*, 77 U.S. 557 (1870), the Court set the standard for determining

"navigability". The Court determined that rivers "[a]re navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* at 563; *United States v. Utah*, 283 U.S. 64 (1931).

As the Court noted in *PPL Montana*, the Court granted the right to *riverbed* titles, which were considered nontidal waters and subject to the United States, to the 13 original states in 1842. In this case, Congress granted Cornelius Lear the title in fee simple absolute to all of Lear Island, including land under water within a 300-foot radius of the shoreline and land under water in the strait separating Lear Island from the mainland, in 1803. R. at 4-5. The public trust doctrine does not apply because no property or nuisance law regarding navigational reservations existed in 1803 The equal footing doctrine does not apply as it is subsequent to the prior superior grant from Congress to Lear.

VI. FWS AND BRITTAIN COUNTY ARE LIABLE FOR A COMPLETE DEPRIVATION AS PLAINTIFF-APPELLEE HAS BEEN DEPRIVED OF ALL ECONOMIC USE OF HER PROPERTY.

The United States Constitution provides that private property shall not be "taken for public use, without just compensation." U.S. Const. amen. V. The Taking Clause requires just compensation to be paid when governmental action amounts to a taking. In order to present a valid claim for a compensable taking, a claimant must allege and prove by a preponderance of the evidence that (1) it has a specific property interest, and (2) the government has appropriated that interest, leaving the claimant without the use or benefit of that interest. *Lucas*, 505 U.S. at 1027-1029. Furthermore, the Supreme Court has recognized that the government may "take" property by either physical invasion or regulation. *Id.* at 1014-1015. The issue of whether a taking has occurred is a question of

law, reviewed de novo, based on factual underpinnings. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).

A. FWS and Brittain County's independent regulations create the single and indivisible harm of a taking of the Cordelia lot and they are jointly and severally liable.

Under the Restatement (Second) of Torts, § 433A, damages are apportioned among two or more individuals when contribution each individual causes a single harm. It has been established that when an indivisible injury occurs by the concurrent, but independent, acts of two or more persons, they are held jointly and severally liable for the harm. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976). In *Velsicol Chemical Corp.*, the court determined that an indivisible harm can be either a harm that "[i]s not even theoretically divisible, as death or total destruction of a building, or . . . while theoretically divisible, is single in a practical sense in that the plaintiff is not able to apportion it among the wrongdoers with reasonable certainty . . . ." 543 S.W.2d at 342.

In this case, the Cordelia lot is a 10-acre lot that is subject to the federal endangered species regulation, governed by FWS, and the Wetland Preservation Law, governed by Brittain County. R. at 5-7. While neither independent regulation alone would create a taking under *Lucas*, they are jointly and severally liable for a taking like *Monsanto* and *Velsicol*. The FWS regulation that protects the Karner Blues on the Cordelia lot in accordance with 50 C.F.R. § 17.11 (2015) provides for the ability to apply for an Incidental Take Permit ("ITP"), which would allow Lear to develop her property. R. at 6. The Wetland Preservation Law only pertains to filling in the one-acre cove marsh

of the Cordelia lot. R. at 7. The Wetland Preservation Law only allows wetlands to be filled for water-dependent use, not for a residential home. R. at 7.

However, these regulations cannot be separated from each other because the ability to develop portions of the Cordelia lot depends on both regulations. The ability to gain an ITP, in accordance with FWS, and develop a residence, while still protecting the Karner Blues, depends on the ability of Lear to gain permission to fill in half of the one-acre of cove marsh from Brittain County. These concurrent, independent, regulations create an indivisible taking of the Cordelia lot.

B. The Cordelia lot has no economic value without the ability to build a residence on the property.

In *Lucas*, the Court established that one of the regulatory actions that is compensable, regardless of the public interest that is advanced, "[i]s where the regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015 (citations omitted). When all economic use of real property has been sacrificed, an individual has suffered a taking. *Id.* at 1019. The Court determined that compensation may only be resisted if "[t]he logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.

Here, Lear Island was used as a homestead, farm, and hunting and fishing grounds since it was granted to Lear in 1803. R. at 5. When the island was divided in 1965, the Brittain Town Planning Board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence, including the Cordelia lot. R. at 5. Specifically, the Cordelia lot was referred to as "The Heath" because it was kept open by annual mowing. R. at 5. The fair market value of the Cordelia lot without any restrictions that would prevent development of a single-family

house on the lot is $100,000. R. at 7. Property taxes for the Cordelia lot are $1,500 annually. R. at 7. There is no market in Brittain County for a parcel such as the Cordelia lot 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. Defendant-Appellants argue that because the Brittain County Butterfly Society has offered to pay the Cordelia Lear $1000 annually for the privilege of conducting butterfly viewing, Plaintiff-Appellee is not without economically remunerative use of the property. R. at 12.

As under the test set forth in *Lucas*, there is no economically beneficial or productive use of the land of the Cordelia lot if Lear is unable to develop a single-family residence on the property and title to Lear Island and the Cordelia lot specifically proscribed the interest and ability to use the lot as a homestead with a single-family house. Furthermore, the amount offered by the Brittain County Butterfly is less than the annual property taxes on the Cordelia lot, therefore, it does not contribute any economic value to Lear or the Cordelia lot.

VII. THE ENDANGERED SPECIES ACT IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER.

The United States Constitution provides Congress the power "to regulate Commerce…among the several States…." U.S. Const. art. 1, §8, cl. 3. While Congress's Commerce power has been greatly expanded to regulate a vast array of activity, it is still subject to outer limits. *Lopez*, 514 U.S. 549. The outer limits of Congress's Commerce power are limited to regulation of the channels of interstate commerce, regulation and protection of the instrumentalities of interstate commerce, and regulation of activities that substantially affect interstate commerce. *Id*. The district court concluded the ESA is a

valid exercise of Congress's Commerce powers because developing land and construction is an economic activity. The constitutionality of the ESA presents a question of law in which this Court exercises de novo review. *United States v. Jones*, 231 F.3d 508, 513 (9th Cir. 2000).

A. The taking of the Karner Blue Butterfly is not an activity that substantially affects interstate commerce.

The Constitution permits Congress to regulate interstate commerce. U.S. Const. art. 1, §8, cl. 3. Congress's power to regulate commerce consists of three general categories. The three categories limit the scope of which activity Congress has the authority to regulate. The first two categories permit Congress to regulate the channels and instrumentalities of interstate commerce. *See United States v. Darby*, 61 U.S. 451 (1941); *Houston, East & West Railway Co. v. United States*, 34 U.S. 833 (1914). The taking of the butterfly is not a channel or instrumentality of interstate commerce. The butterfly does not "serve as a media for the movement of goods and persons in interstate commerce." 29 C.F.R. §776.29. As such, the ESA may only be sustained as a regulation of an activity that "substantially affects interstate commerce." *NLRB v. Jones & Laughlin Steel Corp.*, 57 U.S. 615, 624 (1937).

The taking of the Karner Blue Butterfly is not an activity that "substantially affects interstate commerce." *Id*. In *Lopez*, the Court indicated the commerce power is constrained by the "outer limits." *Lopez*, 514 U.S. at 557. The limits of the commerce power are constrained and "may not be extended so as to embrace the effects upon interstate commerce so indirect and remote…would effectually obliterate the distinction between what is national and what is local…." *Id*. citing *Jones & Laughlin Steel*, 301 U.S. at 337.

Furthermore, the *Lopez* decision is instructive on the limitations of Congress's Commerce power. In *Lopez*, the Court cited *Wickard v. Filburn*, 317 U.S. 111 (1942) as the "most far reaching example of Commerce Clause authority over intrastate activity. *Lopez*, 514 U.S. at 560. The Court indicated that unlike the Gun-Free School Zones Act (GFSZA), the statute at issue in *Wickard* was directly involved in regulating interstate commerce and commodities. *Id*. As such, the Court in found the GFSZA exceeded Congress's Commerce power because the GFSZA did not directly regulate interstate commerce, contained no jurisdictional element to limit the statutes reach, and the "costs of crime" impact would permit Congress to regulate any activity that might lead to crime regardless of the relation to interstate commerce. *Id*.

Morrison further articulated what constitutes an activity that substantially affects interstate commerce. In *Morrison*, the Court found the Violence Against Women Act (VAWA) exceeded Congress's Commerce power. The Court focused on four factors of the *Lopez* decision as determinative for Commerce Clause authority. *Id*. The first factor considered the statute was economic in nature. *Id*. at 610. Second, did "the statute contain an express jurisdictional element that might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with interstate commerce." *Id*. at 611. Third, were there any "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id*. at 611-612. Last, was the link between the statute and interstate commerce attenuated. *Id*. at 614.

Under the *Lopez* and *Morrison* framework the ESA exceeds Congress's Commerce power. In particular, the ESA is not a statute designed to be explicitly economic in nature. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). The ESA

regulates any taking of the butterfly, regardless of the specific activity. Furthermore, the ESA does not contain a jurisdictional element that limits the taking of the butterfly. Any activity that takes a butterfly is valid under the ESA. Congress provides no limit to the activity regulated under the ESA. Additionally, any link between a taking of the butterfly and interstate commerce is attenuated. If the federal government is permitted to regulate any take of an interstate species, regardless of the actual impact on interstate commerce, Congress's Commerce power would be limitless. As such, the ESA exceeds Congress's Commerce power as applied to a take of a wholly intrastate species of Karner Blue Butterflies.

B. The District Court erred in determining and development is the only relevant activity for a Commerce Clause analysis.

The ESA regulates the taking of the Karner Blue Butterfly. However, the taking of the Karner Blue Butterfly is a non-economic activity that is not substantially related to interstate commerce. In order to determine whether the regulated activity "substantially affects interstate commerce," *Lopez*, 514 U.S. at 599, is to define what activity is being regulated by the statute. *Morrison*, 529 U.S. at 610. The ESA specifically prohibits the taking of the butterfly regardless of the method used. Essentially, the ESA regulates every activity if a take of the butterfly occurs, whether it has a substantial relationship to interstate commerce or not.

The District Court erred in assessing only the development of the Cordelia Lot for its Commerce Clause analysis rather than the ESA as it relates to the taking of the butterfly as a whole. *GDF Realty*, is persuasive on this issue. In *GDF Realty*, the Fifth Circuit addressed an ESA challenge based on the taking of "Cave Species" related to commercial development. 326 F.3d 622. While the court in *GDF Realty* ultimately found

Congress had authority to regulate takes of intrastate species for other reasons, the Court indicated the proper scope for determining Congress's authority is the entire activities subject to regulation, and not one single activity. *Id*. at 634. Thus the District Court is required to compare any activities subject to regulation under the ESA and not only development of the Cordelia Lot.

However, several Circuit Courts have held one particular activity is determinative for Congress's Commerce power. In *Rancho Viejo, LLC, v. Norton*, 323 F.3d 1062 (D.C. Cir. 2002), the Court found a real estate development projects in riparian wetlands would jeopardize the arroyo toad. The development project created a specific circumstance to permit regulation under the ESA as a constitutional exercise of Congress's Commerce power. *Id*. Similarly, in *Gibbs v. Babbit*, 214 F.3d 484 (4th Cir. 2000) the Fourth Circuit held the "taking of red wolves implicates a variety of commercial activities and is closely related to several interstate markets." *Gibbs*, 214 F.3d at 492.

The focus on specific activities to determine whether Congress has the authority to regulate under the Commerce Clause is inconsistent with the *Lopez* decision. In *Lopez*, the Court held Congress did not have the authority to regulate possession of a handgun in a school zone. *Lopez*, 514 U.S. 549. The Court did not take into account the economic factor that Lopez was paid to carry the gun into the school zone. *Id*. Similarly, this Court should not cherry pick which activities might be related to interstate commerce. Instead, this Court should look to the ESA as a whole regulation that unconstitutionally permits Congress to regulate any activity that might "take" the endangered butterfly. As such, this Court should adopt the Fifth Circuit's reasoning that specific activities are not at issue for Congress's Commerce power; but rather, all activities that take the butterfly are relevant.

FWS further claims that any disturbance of the lupine habitat, other than the annual mowing would constitute a take of the endangered butterfly. R. at 6. The FWS determination that habitat modification constitutes a take is evidence that the regulation is not specific to the particular activity of development. Rather, the ESA must be read as a whole to consider any activity subject to regulation. If Congress can regulate any activity, either economic or non-economic, with the ESA there would be no limit to Congress's Commerce power, which is inconsistent with the limited use of the Commerce Clause in *Lopez*. *See PETPO*, 57 F.Supp.3d 1337.

CONCLUSION

As the District Court found, FWS and Brittain County are liable for a complete deprivation of the economic value as plaintiff-appellee has been deprived of all economic use of her property. FWS and Brittain County's independent regulations create the single and indivisible harm of a taking of the Cordelia lot and they are jointly and severally liable. The Cordelia lot has no economic value without the ability to build a residence on the property. The District Court should be affirmed in its holdings regarding these issues.

The District Court properly held that Cordelia Lear's takings claims are ripe without having applied for an incidental take permit. The expense of seeking an incidental take permit exceeds the fair market value of the property, is cost prohibitive, and creates an undue hardship on Lear. Furthermore, a reasonable degree of certainty exists that the United States Fish and Wildlife Service would deny any incidental take permit. In regards to the takings analysis, the Cordelia lot, rather than contiguous parcels aggregated on Lear Island, is the whole parcel. The facts that the Cordelia lot will become developable upon the natural destruction of the butterfly habitat in ten or that the

Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing does not preclude a takings claim for complete loss of economic value. In addition, public trust principles do not preclude Lear's claim for a taking because navigable water rights did not exist at the time of the grant of title and the equal footing doctrine does not apply.

However, the Endangered Species Act is not a valid exercise of Congress's commerce power. The taking of the Karner Blue Butterfly is not an activity that substantially affects interstate commerce. The District Court erred in determining the land development is the relevant activity for a Commerce Clause analysis. The District Court's findings on these issues should be reversed.