NO. 16-0933

THE UNITED STATES COURT OF
APPEALS FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant,

V.

UNITED STATES FISH AND WILD LIFE SERVICE
Defendant-Appellant-Cross Appellee, and

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant

(*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION.*
NO. 122-CV-2015-RNR)

BRIEF OF DEFENDANT-APPELLANT-CROSS APPELLEE UNITED STATES FISH AND WILDLIFE SERVICE

ORAL ARGUMENT REQUESTED

TEAM 56
Attorneys for the Defendant-Appellant-Cross Appellee

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JURISDICTIONAL STATEMENT

On June 1, 2016, the United States District Court for the District of New Union issued the judgment. Thereafter, the United States Fish and Wildlife Service filed a Notice of Appeal on June 9, 2016. The United States Court of Appeal for the Twelfth Circuit has jurisdiction from a final decision of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Given that the entire intrastate population of an endangered butterfly would be eliminated by the construction of a plaintiff's single-family residence, is the ESA a valid exercise of Congress's Commerce power?

II. Without having applied for an ITP as required by ESA §10, 16 U.S.C. § 1539(a)(1)(B), is plaintiff's takings claim ripe?

III. Is the relevant parcel for the takings analysis the entirety of Lear Island?

IV. Does the natural destruction of the endangered butterfly habitat shield FWS from a takings claim, assuming the relevant parcel is plaintiff's lot, based upon a complete deprivation of economic value of the property?

V. Does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent preclude a takings claim given the lack of a complete loss of economic value?

VI. Do public trust principles inherent in title preclude plaintiff's claim for a taking based on the denial of a country wetland permit?

VII. Should FWS be liable for a complete deprivation of economic value of plaintiff's lot if either the federal or county regulation, by itself, would still allow development of a single-family residence?

STATEMENT OF THE CASE

FWS L.E. Pidopter advised Cordelia to obtain an Incidental Take Permit ("ITP") by

filing a habitat conservation plan for the Karner Blues and an environmental assessment document. R. at 6. In order to obtain the ITP, Cordelia would need to maintain the lupine fields on an acre by acre basis. R. at 6. Cordelia chose not to pursue the ITP instead choosing to apply for an alternative development proposal ("ADP") that required a permit through the Brittain County Wetlands Board. R. at 6. After Brittain County denied Cordelia's permit, she commenced action against the FWS seeking judgment that the ESA is unconstitutional under the Commerce Clause and just compensation from FWS for a regulatory taking of her property. R. at 7. The district court found the ESA to be a valid exercise of Congress's Commerce power; however, the court ruled FWS owed just compensation to Cordelia for a regulatory taking of her property. R. at 7. Cordelia, FWS, and Brittain County all appealed to this court. Id. at 7.

STATEMENT OF THE FACTS

Cordelia Lear ("Plaintiff") owns property on Lear Island in Brittain County, New Union. R. at 4. Lear Island is a 1,000-acre island in Lake Union, a traditionally interstate body of water. R. at 4. In 1965, King James Lear owned the entirety of Lear Island and "all lands under water within a 300-foot radius of the shoreline of said island," in fee simple absolute granted by an Act of Congress in 1803 to his ancestor, Cornelius Lear. R. at 4-5. In creating an estate plan, King James Lear divided Lear Island into three parcels for his daughters Goneril, Regan, and Cordelia. R. at 5.

The Brittain Town Planning Board approved three lots that could be developed in conformity with the local zoning requirements: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia lot. R. at 5. At least one single-family residence was included in the zoning provision. R. at 5. King James Lear deeded the lots to his daughters, reserving a life

estate in each lot for himself. R. at 5. During this time, King James Lear built a residence on the Regan lot, while he remained living in the homestead on the Goneril Lot. R. at 5.

In 2005, King James Lear died and each daughter respectively came into possession of her deeded property. R. at 5. Plaintiff wished to build a single-family residence on the 10-acre property located on the Northern tip of Lear Island in 2012. R. at 5. A nine-acre open field and access strip on the 10-acre Cordelia lot comprise "The Heath," which the Lear family has kept open by annual mowing since discontinuing agricultural practices in 1965, unlike the remainder of the island. R. at 5. The Heath provides the only habitat for the Karner Blue butterfly, a federally protected species under the ESA since 1992. 50 C.F.R. § 17.11 (2015), R. at 5. Without annual mowing, the lupine fields on Lear Island would revert naturally to a successional forest, decimating the Karner Blue habitat. R. at 5. The Heath's conditions are ideal for fields of wild blue lupines, a plant that sustains life of Karner Blue larvae. R. at 5.

The only remaining population of Karner Blue butterflies in New Union exists exclusively on Lear Island. R. at 5-6. This species is nonmigratory—eggs are laid in the fall and hatch in the spring and summer, meaning the butterfly is entirely intrastate. R. at 6. Any disturbance in the larval and chrysalis stages would result in death of the butterflies. R. at 7. The Heath, adjacent to the forest on the Goneril lot, contains lupine fields imperative to Karner Blue habitat. R. at 7. Subsequently, the Fish and Wildlife Service ("FWS") designated The Heath as a critical habitat for the New Union subpopulation of the Karner Blues in 1992. R. at 6.

Cordelia contacted the New Union Fish and Wildlife Service field office inquiring about permits for building on her property because of the endangered species. R. at. 6. The FWS advised Plaintiff that any disturbance of The Heath, aside from the yearly mowing, would constitute a "take" under the Endangered Species Act ("ESA"). R. at 6. FWS also advised that

Cornelia might obtain an Incidental Take Permit under the § 10 of the ESA. R. at 6. Additionally, a habitat conservation plan and an environmental assessment document under the National Environmental Policy Act ("NEPA") would be required to file the permit request. R. at 6. Any HCP plan included a provision in which a contiguous lupine habit would have to exist on an acre-for-acre basis, including any disturbances, as well as a commitment to maintain the remaining lupine fields through the annual mowing. R. at 6. No one from Cordelia's family agrees to cooperate in any HCP proceedings that involve any restriction of property (at an estimated $150,000 cost of preparation of documents). R. at 6.

Following Cordelia's inquiry, the FWS sent a letter dated May 15, 2012, confirming that the entire ten-acre property was listed as a critical habitat for Karner Blues and that any other activity aside from the annual mowing would constitute a "take" of the Karner Blues in violation of § 9 of the Endangered Species Act. R. at 6. The letter also invited Cordelia to submit an application for an ITP, resources for developing a proper HCP, reiterated that the HCP would require all acreage of a disturbed lupine field to be replaced with contiguous acreage, and a provision in which the property owner would have to commit to maintaining the annual mowing if a new lupine field was created. R. at 6. If the mowing ceased, the natural ecological process of a natural conversion to successional forests would occur within a ten-year period and result in the extinction of the Karner Blue butterfly due to loss of habitat unless a replacement habitat was created within one thousand feet of the original habitat. R. at 7.

Cordelia developed an alternative development proposal ("ADP") that would not disturb any lupine fields. R. at 7. The ADP required a permit for filling the cove, pursuant to Brittain County Wetland Preservation Law enacted in 1982. R. at 7. Within the plan, Cordelia proposed to fill one half-acre of the marsh in the cove to create a building site. R. at 7. Additionally, an

access causeway was proposed to provide access from the shared mainland causeway without disturbing the access strip with lupines. R. at 7. The U.S. Army Corps of Engineers deemed this area of Lake Union "non-navigable" under the Rivers and Harbors Act of 1999, and thus no federal permit is required for the fill (see *Insurance of Nationwide Permit for Single-Family Housing*, 60 Fed. Reg. 38,650 (July 27, 1995)), R. at 7. In August 2013, Cordelia filed a permit with the Brittain County Wetlands Board to pursue the fill project. R. at 7. The Wetlands Board denied the permit in December 2013 on the grounds that permits to fill wetlands would only be granted for water-dependent use, and building a residence does not fit this category. R. at 7.

The current fair market value of the Cordelia Lot without restrictions on building a single-family residence is $100,000, with an annual property tax of $1,500. R. at 7. Brittain County has no market for a parcel for recreational use without the right to develop a residence on the property, nor does the property have any agricultural or timber land value. R. at 7. Despite this, the Brittian County Butterfly Society has offered to pay Cordelia $1,000 annually for access and butterfly viewing outings during the summer Karner Blue season, but Cordelia has rejected this offer. R. at 7. Since the denial of the initial permit, Cordelia has not sought reassessment of any property under the Brittian County Wetland Preservation Law. R. at 7.

STANDARD OF REVIEW

The district court has awarded plaintiff damages against the FWS and Brittain County, and has dismissed plaintiff's claim for declaratory judgment declaring the ESA unconstitutional. R. at 12. This court should review the district court's determination *de novo*. Questions of law are presented in this case, and therefore the appellate court should give no deference to the district court's determination of law regarding constitutional interpretation and statutory

definitions, but rather should review them anew. *United States v. McConney*, 728 F.2d 1195, 1200, (9th Cir. 1984).

SUMMARY OF THE ARGUMENT

The Commerce Clause of the Constitution grants Congress the power to regulate interstate commerce, and any other activities that substantially affect interstate commerce. Cordelia's desire to build upon her land, and effectively "take" (under the ESA) the wholly interstate Karner Blue butterfly population is a proper exercise of Congressional power. First, the ESA regulates the "take" of protected habitat, whether it is interstate or intrastate. Cordelia's plan to build on The Heath is a clear "take" of the Karner Blue habitat, thus the ESA has authority to permit or restrict the potential activity on protected lands. Second, under *Lopez*, the Commerce Clause regulates what may substantially affect interstate commerce, and Cordelia's activity of building a single-family home is considerably interstate and economic due to the resources and labor used from outside of Lear Island and New Union.

As a threshold issue, plaintiff's claim is not available for judicial review because it lacks ripeness and finality of agency action. Plaintiff's claim rest on a lack of final agency action because she never applied for an ITP and never gave FWS a chance to use their discretion. Her claim also fails to meet both prongs for ripeness and as such should not be given judicial review.

Under the Takings Clause of the Fifth Amendment, a government regulation shall not take private property for public use without just compensation. Two categories of regulatory takings exist: per se and categorical takings. Under the *Penn Central* balancing test, the ESA's protection of the Karner Blue butterfly population in New Union does not rise to the level of an uncompensated taking by the FWS. The balancing test requires court to analyze the economic

impact of the regulation and the investment backed expectations of the property owner with the character of the government action. In this case, the ESA's impact on Cordelia's property is limited to the nine acres of mowed lupine fields. The entirety of Lear Island, all 1,000 acres, is the relevant parcel. When analyzing the regulation's affect to the parcel as a whole, the ESA only applies to a nominal segment of the island. In addition, Cordelia's investment backed expectations are unaffected because she left her parcel in its natural state for 47 years after King James deeded it to her. When she finally decided to construct the single-family residence, she had full knowledge of the ESA's existence as well as the Karner Blues habitat on her property.

Additionally, the ESA does not deprive Cordelia of all economically viable use of her property; thus, the regulation does not rise to the level of a taking. Cordelia attempts to combine the ESA with the Brittain County Preservations law to justify a full economic deprivation of her land. However, the two regulations should not be combined because states are sovereign entities that enact their own laws. Even though both a state and federal regulation affect Cordelia's property interests, she cannot combine the two to justify an uncompensated taking under the Fifth Amendment.

ARGUMENT

I. THE ESA IS A VALID EXERCISE OF THE COMMERCE POWER APPLIED TO A INTRATSTATE POPULATION OF AN ENDANGERED BUTTERFLY THAT WOULD BE ELIMINATED BY A SINGLE-FAMILY HOME FOR PERSONAL USE.

The Constitution gives Congress the power to regulate *any* activities that substantially effect interstate commerce through its delegation in the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. *United States v. Lopez*, 514 U.S. 549 (1995). Congress codified under the ESA that it is unlawful to "take" an endangered species. 16. U.S.C. § 1538(a)(1). This "take" is defined as "to harass,

harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. §1532(19). Cordelia alleges that the district court erred in its determination that the ESA provisions (prohibiting a "take") to protect endangered species habitats is a constitutional practice. R. at 7. However, the court properly identified that the regulation of endangered species under the ESA is a valid exercise of its power under the Commerce Clause.

A. The Court Correctly Held That The ESA is a Valid Exercise of the Commerce Power Because the Regulated Intrastate Activity Substantially Affects Interstate Commerce.

Congress, using its delegated commerce power, regulates activity under three broad categories. *Lopez,* 514 U.S.549, 557 (1995). Congress may regulate the use of the channels of interstate commerce, regulate and protect the instrumentalities of interstate commerce, and regulate those activities having a substantial relation to interstate commerce. *Id.* at 558-559. Congress has power under the Commerce Clause to regulate intrastate commerce if it substantially affects interstate economic activity. *Id.* Congress has been granted greater breadth to regulate conduct and transactions under the Commerce Clause in modern interpretations. *United States v. Morrison*, 529 U.S. 598, 608 (2000). The dispute at hand is Cordelia's allegation that the ESA is a violation of the Commerce Clause by prohibiting her from building a single family home because she has improperly "taken" the federally protected Karner Blue butterfly population, confined to Lear Island alone. R. at 8. Cordelia alleges this wholly intrastate species violates Congress's authority under the Commerce Clause, but many circuit courts disagree. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 683 F.3d 1163 (9th Cir.), *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir.*), National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir.), *GDF Realty Invs. Ltd. v. Norton*, 326 F.3d 622 (5th Cir.) (all Circuits uphold the ESA as a

Constitutional under the Commerce Clause). This court should follow the precedent set forth by the other circuits.

The district court properly identified that the relevant underlying activity is land development through construction that is clearly economic—it involves the purchase of materials and hiring of construction laborers. R. at 8. The Karner Blue population, although concentrated on Lear Island alone, has economic value through butterfly viewings and other potential economic activity from outside of New Union. R. at 12.

In *Rancho Viejo,* the court determined that the application of the ESA on a prohibition to build a large hospital facility in order to protect a subpopulation of arroyo southwestern toad fell within the third *Lopez* category, concluding the regulated activity substantially affects interstate commerce. 323 F. 3d 1062, 1067 (D.C. Cir. 2003). The court further agreed that "the loss of biodiversity itself has a substantial effect on interstate commerce and that the protection of flies regulates and substantially affects commercial development activity which is plainly interstate." *Id.* (the D.C. Circuit has previously held that the ESA is a valid exercise under the Commerce Clause in *National Ass'n of Home Builders v. Babbitt* and uses this analysis in *Rancho Viejo*). Cordelia's development of a single family home will result in both a loss of biodiversity of the Karner Blue habitat as well as affect commercial activity, both clearly interstate economic activities. The court should uphold its ruling that the ESA is a valid exercise of Congress's Commerce Clause powers because the intrastate activity regulating the building of Cordelia's home is within the purview of Congress's delegated authority.

II. PLAINTIFF'S CLAIM IS NOT AVAILABLE FOR JUDICAL REVIEW BECAUSE IT LACKS FINALITY AND RIPENESS.

A. FWS has Not Issued a Final Agency Action, Therefore Plaintiff's Claim is Not Available for Judicial Review.

The Endangered Species Act is silent as to judicial review available to persons who have not yet engaged in the administrative process related to an Incidental Take Permit. Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704 describes the reviewable agency acts that are available for judicial review. Specifically, the Act says, "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." *Id*. Final agency action does not mean that plaintiff had a "reason to believe" that an agency would act in a certain way. *FTC v. Std. Oil Co*., 449 U.S. 232, 241(1980).

Furthermore, Cordelia's claim fails to meet the two-part test articulated by the supreme court for agency action to be considered "final". The first part of the test is that the agency action has to be definite, or "must mark the consummation of the agency's decision making process, it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). It cannot be said that FWS decision was final in regard to the ITP because plaintiff never applied for an ITP.

The second part of the test for finality is that the agency action must be one which legal consequences will flow. *Id*. Certainly, there will be legal consequences where rights and obligations will be determined when the FWS issues a decision, but FWS has not had an opportunity to formalize an opinion or response.

B. The District Court Improperly Held Plaintiff's Claim as Ripe for Judicial Review

Under the Ripeness doctrine, a federal court can only hear cases in which litigants seek judicial intervention for actual governmental inference. In *Abbott Laboratories v. Gardner,* 387 U.S. 136, (1967), the Supreme Court listed the two major criteria in deciding whether a case is ripe. First, a court must consider "the fitness of the issues for judicial decision" and second, "the hardship to the parties of withholding court consideration". *Id.* at 149. Speaking to the first issue, there are multiple factual issues still in dispute. Additionally, plaintiff has not yet exhausted all of the administrative remedies to use her land in the way she wishes.

The second issue this Court must consider, as outlined in *Abbott,* is the hardship to the parties if the court withholds consideration. Therefore, under the ripeness doctrine, this court cannot consider these claims unless Cordelia will suffer real consequences if the court declines to consider their claims. Plaintiff cannot be considered to suffer real consequences from actions not taken by an administrative agency as plaintiff has not yet filed any paperwork with the FWS. Final agency action, within the meaning of § 10 of the Administrative Procedure Act, 5 U. S.§ 704 is defined by the Act as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

The Court in *Abbott* articulated that the basic rationale of the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." *Id.* at 148. Plaintiff has not yet exhausted all administrative remedies and for the Court to entangle themselves at this point would be an interference in the legislative-appointed

administrative decision making process. There have been no real and concrete consequences resulting from government action because Plaintiff has never formally applied for an ITP.

Furthermore, the Supreme Court has held that requiring a person to obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense. *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996).

Finally, the District Court inappropriately applied the facts in *Palazzolo v. Rhode Island* to the facts in this case. 533 U.S. 606 (2001). The Court in *Palazzolo* held that if the procedure for obtaining a permit was so burdensome a to effectively deprive plaintiff of their property rights, then there is a taking. This case is strikingly different factually than the facts in *Palazzolo,* where the property owner had a final agency action. Plaintiff in this case, has other means to obtain continuous land needed for a successful ITP that are not so burdensome. Plaintiff can ask her sister with adjacent property for continuous land, or she can build on the access strip.

This court should follow the precedent of *Morris v. United States*, which has strikingly similar facts to this case. 392 F.3d 1372 (Fed. Cir. 2004). In *Morris*, the plaintiff filed a Fifth Amendment takings claim stemming from the ESA; however, plaintiff did not file an ITP with the FWS. As such, the Supreme Court found plaintiff's claim unripe for judicial review. *Id.* The Court clearly articulated, "When an agency provides procedures for obtaining a final decision, a takings claim is unlikely to be ripe until the property owner complies with those procedures" Id at 1377 (citing *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999)).

Furthermore, the Court defined a narrow exception to this rule when they said that "the failure to follow all applicable administrative procedures can only be excused in the limited circumstance in which the administrative entity has no discretion regarding the regulation's

applicability and its only option is enforcement." *Id*. There are no such facts in this case that show the FWS has no discretion regarding plaintiff's application.

Ultimately the Court in *Morris* held that Cordelia's claim was not ripe because there was no final agency decision, and even if the application for the ITP and accompanying HTP was costly, the agency had discretion to help plaintiffs with their application. *Id*. The same agency decision is at controversy in this case, and as such it must be said as a matter of law that the FWS has discretion to help plaintiff with her application, costs aside.

In *Morris*, through facts that are acutely similar to this case, the supreme court held that because plaintiff did not allow the federal agency to exercise its discretion, the claim was not ripe as a matter of law. This court should find the same.

III. THE ESA DOES NOT VIOLATE THE FIFTH AMENDMENT UNDER THE *PENN CENTRAL* OR *LUCAS* ANALYSIS

The court should reverse should reverse the Twelfth Circuit's ruling that the ESA violated the Takings Clause of the Fifth Amendment. In *Pennsylvania v. Mahon*, the United States Supreme Court recognized regulatory takings as a legitimate category of takings under the Fifth Amendment. *Pennsylvania v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court outlined a vague guideline that a regulatory taking occurs when a government regulation goes too far. *Id.* Two categories of regulatory takings exist. First, if a regulation deprives a landowner of all economically viable use of a piece of land, the taking is a per se taking, functionally equivalent to that of a physical taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Second, the court conducts a balancing test for non-categorical regulatory. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In this case, neither category of regulatory taking applies and the court should find no taking.

A. Under Both Penn Central and Lucas the Relevant Parcel for Takings Analysis is the Entirety of Lear Island.

The Fifth Amendment's takings clause mandates that the government "shall [not take] private property . . . for public use without just compensation." U.S. Const. Amend. V. As a threshold matter, a landowner claiming a taking under the Fifth Amendment must first establish a property interest that is compensable. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). Next, the court determines the relevant parcel to use as the basis to determine the economic impact of the regulatory governmental action. Although the Supreme Court has not articulated detailed guidance to aide in determining the relevant parcel, it has established that the "parcel as a whole" will be analyzed not merely the area impacted by the regulation. *Penn Cent. Transp. Co.* at 130-3; *see also*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). In addition, segmentation of a single parcel of property into separate, discrete segments is impermissible. *Tahoe-Sierra*, 535 U.S. at 319.

Since a definitive identification of the relevant parcel is a central inquiry to determine the economic impact of the regulation, both the State and the owner have reason to object to the equation of relevant parcel with deeded parcel. *Keystone*, 480 U.S. at 497 ("[O]ur test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property . . . ."). Yet, the Supreme Court admitted that defining the relevant parcel is a difficult question, the Court never thoroughly addressed. *See Palazzolo v. Rhode Island* at 631. The Supreme Court recognizes that there are many ways in which government regulations can affect the many interests landowners have in property. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).

Analyzing the relevant parcel provides a "flexible approach, designed to account for

factual nuances" for courts to employ. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). The economic expectations of the landowner regarding the property tend to be the focus to determine the relevant parcel. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999). When the landowner treats legally distinct parcels as a single, economic unit, those parcels may be recognized as one for takings purposes. *Id.* (citing *Keystone*, 480 U.S. at 500-01). Additionally, relevant considerations include the contiguity of the land, *Dist. Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 *cert. denied*, 531 U.S. 812 (2000), date of acquisition, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), and the extent to which the land is treated as a single unit. *Id.* at 1380; *Lost Tree*, 707 F.3d 1286, 1293 (Fed. Cir. 2013). The Supreme Court determined when a regulation takes all the economic value from a parcel, it is a categorical taking. *Lucas*, 505 U.S. at 1015-19 (1992). However, if some economic value remains in the land, it is a per se taking in which economic expectations of the landowner is only one of three two critical factors analyzed. *Penn Cent.*, 438 U.S. at 57-58.

In *Forest Props., Inc. v. United States,* the U.S. Army Corps. of Engineers denied a permit to dredge and fill the lake bottom portion of the parcel at issue. 177 F.3d at 1365. The Federal Circuit Court of Appeals analyzed the economic expectations of Forest Properties Inc. as well as the treatment of legally separate parcels as a single economic unit. *Id.* At the time Forest Properties acquired the land, the land would be treated as a single project to generate a single revenue stream. *Id.* Forest Properties argued that the land was legally separate, with different kinds of title to each portion as well as different regulatory agencies possessing jurisdiction over the parcels. *Id.* at 1366. The Federal Circuit noted, the economic expectations of the landowners can transcend the legal bright lines of the property. *Id.*

In this case, Cordelia's property interest is a fee simple in a 10-acre plot on Lear Island. R. at 5. However, Cordelia's 10-acre lot is one, contiguous property with her sister Goneril's lot, who possesses 550 acres, the distinct parcel on the 1000 acre Lear Island. R. at 5. In 1803, Congress granted Cornelius Lear the entirety of Lear Island. R. at 4. For 162 years, the entirety of Lear Island was treated as indivisible property, after which, in 1965, King James Lear, a descendant of Cornelius, deeded the land into three separate parcels, one for each of his daughters with a life estate in each for himself. R. at 5. Nevertheless, for 162 years, the entirety of Lear Island was used for residential, recreational, and farming purposes by all the inhabitants. R. at 5. In addition, the family mowed Cordelia's lot annually resulting in the open fields favorable to the Karner Blues. R. at 5. The simple act of mowing provides further evidence that Lear Island is a single unit and the deeded parcels are merely legal bright lines.

The mere act of apportioning a distinct lot to each daughter, does not separate the entirety of Lear Island for takings analysis. As the property owner with the original fee simple in the land, King James possessed the ability to geographically divide his island to his daughters. Thus, King James apportioned the entirety of the island to each daughter for the same use, to establish a single-family residence. R. at 5. The contiguous land is linked through common use and a common development plan. R. at 5. King James's daughters received the deeded land to each to construct a single-family residence and came into legal possession of the land after King James passed away in 2005. R. at 5. The mere act of dividing the island into three separate interests, is only a legal act. King James's economic expectations are in the deed in which he explicitly apportioned the island for the same use in each of the three deeds. R. at 5. Moreover, Cordelia had no economic expectations for her lot distinct from the economic expectations of the remainder of Lear Island. Legal distinctions established by state property law such as a sale or

disposition of a segment of the parcel, is not dispositive for identifying the relevant parcel. There is no dispute that Cordelia's fee simple estate is a legally distinct entity from the estates of Goneril and Regan; however, Cordelia's economic expectations must be viewed in conjunction with the entirety of Lear Island.

Not only does Lear island appear to be exclusively occupied by the Lear family but also it is only 1000 acres, 990 of which are owned by Cordelia's sisters. R. at 5. Although legally distinct from the property of her sisters, Cordelia's miniscule, 10-acre parcel possesses no value when detached from the rest of Lear Island. King James granted Cordelia only 10 acres compared to the 550 and 450 acre plats her sisters received. R. at 5. Cordelia could not have believed that her land could be developed or sold, separate from the land of her sisters. Additionally, for 47 years Cordelia left her parcel uninhabited with only annual mowing. R. at 6. With the family's help, the parcel became known as "the Heath". R. at 6. The family must have derived some benefit from the annual upkeep otherwise the mowing would have ceased; therefore, the Lear family implicitly appropriated Cordelia's lot to use and benefit of Lear Island.

B. FWS and Brittain County's Regulations Imposed on Cordelia Do Not Rise to a Per Se Regulatory Taking Under *Lucas* Because Cordelia is Not Deprived of All Economically Beneficial Use of Her Land.

The deprivation analysis requires the court to first determine the relevant parcel as the denominator from which to assess the economic impact. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321. In *Lucas*, the property owner bought two, beachfront properties to construct two residential homes. *Lucas*, 505 U.S. at 1008. Subsequently, South Carolina passed the Beachfront Management Act, which prohibited the property owner from constructing his homes on the two lots. *Id.* The Supreme Court determined the relevant parcel in that case were both residential lots owned by the property owner. *Id.* at 1020. The Court determined that the property owner

suffered a complete deprivation of economic use and held a taking occurred without further analysis; however, the *Lucas* court noted that per se takings are relatively rare. *Id.* at 1018. Next, the discussion determines how to measure all economically viable use. Under *Lucas*, the court measures a complete deprivation of economic use by analyzing the owner's intended use at the time the property is acquired. *Id.* at 1016 n.7, 1030.

In *Lucas*, the property owner purchased the beachfront lots with the intent of constructing several residential homes on the property. *Id.* at 1020. The *Lucas* court found a complete economic deprivation of the property; however, the Court noted anything less than 100 percent could not be analyzed under the *Lucas* rule. *Id.* at 1019, n.8.

In this case, the ESA does not violate the Fifth Amendment because Cordelia maintains sufficient economic use out of her property. Unlike the regulation in *Lucas*, nothing in the record indicates the ESA deprives Cordelia's parcel of all economic value. Further, the property owner in *Lucas* had a specific plan for the beachfront lots. Cordelia had no such a plan. Rather, the record indicates not only has her lot remained unaltered since it was deeded to her in 1965 but also she waited an additional seven years after King James's death to finally construct her home. R. at 5-6. Moreover, if this court agrees the relevant parcel is the entirety of Lear Island, arguably, Cordelia's parcel is more valuable as a sanctuary for the Karner Blue than as a single-family residence. As proof, the Brittain County Butterfly Society offered Cordelia $1,000 annually for Karner Blue viewings. R. at 7.

Moreover, if this court views the relevant parcel as only Cordelia's lot, then one-acre parcel that remains on Cordelia's lot can be used to construct a single-family residence. The record reflects that Cordelia lost all economic value of her land; however, that assertion by the Twelfth Circuit combines the Brittain County Wetland Preservation Law with the ESA. R. at 7.

This Court should not combine the two regulations and view each separately because state actions are autonomous from federal actions. Consequently, Cordelia should exercise her right to obtain an Incidental Take Permit under section 10 of the ESA from the FWS New Union field office and develop a habitat conservation plan. R. at 6. Until she completes all remedial action allowed to her by the FWS, she cannot claim that the FWS by enforcing the ESA deprived her of all economic use of her land.

C. Under Penn Central, the ESA and its Protection of the Karner Blue Butterfly Does Not Rise to a Taking Under the Fifth Amendment.

The ESA does not rise to a taking of Cordelia's lot under *Penn Central*. In *Penn Central v. New York City,* New York passed the Landmark Preservation Law, which prohibited Penn Central Railway Company from constructing an office building above its Grand Central Station in New York City. *Id.* at 115. Grand Central asserted that the Preservation Act abridged its air rights by prohibiting the construction. *Id.* at 119. Using the entire city block as the relevant parcel to analyze whether a taking occurred, the Court determined the preservation law did not constitute a taking that deprived Grand Central of all economically viable use of the property. *Id.* at 131. Generally, the parcel is not divided into distinct segments; rather, the parcel is analyzed in its entirety. *Id.* The Supreme Court determined the Preservation Law sought to preserve historical structures through a comprehensive plan that applied to property owners in the whole city. *Id.* at 132. The factors analyzed by the Court included: (1) the character of the government regulation; (2) the economic impact of the regulation to the distinct investment backed expectations of the property owner. *Id.* at 124.

1. FWS's Enforcement of the ESA had a Sufficient Public Purpose and Did Not Impose a Disparate Impact on a Targeted Population.

In *Penn Central*, the court found a sufficient public purpose to the landmark law enacted

by the city and determined the character of the government purpose favored the city. *Id.* at 134-35. Simply because a regulation will impact some property owners more than others, does not immediately qualify the regulation as a taking. *Id.* at 132. The Preservation Law applied to four hundred historical landmark sites throughout the city. *Id.*

In this case, the ESA's regulations span the entirety of New Union and affect all property owners. R. at 6. Further, the ESA promotes a public good by protecting endangered animals. Any economic burden suffered by Cordelia should be scrutinized in light of the regulation's societal benefits. Accordingly, the ESA's purpose of protecting the Karner Blue enhances Brittain County as whole because an integral part of prosperous society is safeguarding its wildlife. The Karner Blue habitat within the entire state of New Union depends on the longevity of the lupine fields. R. at 7. Moreover, the ESA has only a discrete impact on a segment of Lear Island, the parcel as a whole.

Like the regulation in *Penn Central*, the ESA does not intentionally cause a disparate impact to Cordelia's lot. Rather, the ESA applies to all property owners throughout New Union. R. at 6. The character of the ESA applies only to a portion of Cordelia's lot and does not exclusively apply to Cordelia's property. R. at 7.

2. The FWS's Enforcement of ESA Does Not Interfere with Cordelia's Distinct Investment-backed Expectations in Her Property Because She Has Not Substantially Invested in the Property; thus, the Regulation Imposes Minimal, if any, Economic Impact.

Under the preservation law, Penn Central could not construct an office building above Grand Central Station. *Id.* at 136. However, the law still permitted Penn Central to run Grand Central Station and continue to profit. *Id.* The Court found Penn Central's expected Grand Central to be a railroad station, not an office building and even after the law passed, Grand Central could still operate as a railroad station. *Id.* Moreover, Penn Central had not invested

substantially in the project at the time the law was enacted. *Id.*

In this case, although the Karner Blue was not an endangered species at the time Lear Island was deeded to Cornelius in 1803, the FWS added the butterfly in 1992, well before King James's life estate ended with his death in 2005. R. at 5. Unlike her sisters, Cordelia has not substantially invested in her land, rather, choosing to leave it in its natural condition. R. at 6. Cordelia's inaction directly led to the ideal environment for Karner Blues. R. at 6. As a property owner, Cordelia can expect to construct a single-family home on her land as the deed instructs. However, Cordelia's use of the land from the time she received the deed to the time she applied to build the home, does not prove that Cordelia expected to halt the mowing and ruin the Karner Blue's habitat. Like *Penn Central*, in which the court found that the Preservation Law did not interfere with Penn Central's expectations and still allowed Grand Central to be used as a railroad station, the ESA does not interfere with Cordelia's past or present use of her parcel. Rather, the ESA merely imposes prohibitions on the land that interfere with the Karner Blue habitat. R. at 6.

While the ESA prohibits the removal of the lupine fields because they are an ideal habitat for the Karner Blue, that prohibition only affects a discrete segment of Cordelia's lot. R. at 7. The remainder of Cordelia's lot, approximately one acre, can be still be used to construct a residential property. R. at 5. Nothing in the record indicates that at the time Cordelia acquired the land by deed, she expected to remove the lupine fields to construct a single-family residence. Rather, the record indicates that Lear family continued annual mowing of Cordelia's lot to maintain the lupine fields for 47 years. R. at 6. Cordelia's choice to remove the fields arose after both Brittain County and the FSA denied her total use of her land. R. at 7. The record indicates that without a single-family residence Cordelia's lot has a fair market value of zero. R. at 7.

However, that finding combines the Brittain County Wetlands Preservation Law and the ESA. This court should not combine both laws and look to only the ESA when determining whether a taking occurred. When analyzed alone, the ESA does not constitute a taking because the economic impact to the entirety of Lear Island is minimal.

IV. THE PUBLIC TRUST PRINCIPLES INHERENT IN PLAINTIFF'S TITLE PRECLUDE HER TAKINGS CLAIM.

Public trust principles inherent in plaintiff's title relating to water rights preclude her takings claim. These public trust principles surround the preservation and protection of the navigable waters that plaintiff seeks permission to fill in. There has been a long-established precedent that compensation is not required for development limits that "inhere in the title itself, in the restriction that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas* at 1029.

Generally, limitations on property rights cannot be newly created or legislated without compensation, unless these limitations are defined through background principles in a State's law of property and nuisance placed upon land ownership. See, *e.g., Annicelli v. South Kingstown*, 463 A.2d 133, 140 (R. I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge).

These background principles protecting public navigation and fishing rights over tidal lands, also known as the public trust doctrine, have remained a matter of state law. However, "under accepted principles of federalism, the States retain residual power to determine the scope

of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 576, (2012).

While it cannot be said that there are Public Trust principles protecting navigable waters, within the constitution or statutes of New Union; there remains through the equal footing doctrine, a federal interest in riverbed. This interest is held in trust by New Union. As such, plaintiff should be barred from a fifth amendment takings claim because of Brittain County's denial of her request to fill in water near the shore of her property. This court must recognize the long held precedent in *Lucas* that these very backgrounds principles of the trust that New Union is keeping for the federal government's riverbed title. 505 U.S. 1003 (1992).

CONCULSION

For the reasons stated above, FWS respectfully requests this court affirm the district court's decision to deny Cordelia Lear's argument that the ESA is not a proper exercise of the Commerce Clause. Further, this court should reverse the district court and find that (1) Cordelia's action against the FWS is not ripe, (2) the FWS did not violate the Fifth Amendment's Taking Clause when it enforced the ESA to protect the Karner Blue butterfly habitat on Lear Island because Cordelia did not suffer a complete economic deprivation of the value of her land entitling her to just compensation, and (3) public trust doctrine principles preclude Cordelia's takings claim.

DATED November 28, 2016

Respectfully Submitted,

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United States Fish and Wildlife Service