Team No. 58

DOCKET NO. 16-0933

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
PLAINTIFF–APPELLEE–CROSS APPELLANT-PETITIONER,

V.

UNITED STATES FISH AND WILDLIFE SERVICE,
DEFENDANT–APPELLANT–CROSS APPELLEE-RESPONDENT,

AND

BRITTAIN COUNTY, NEW UNION,
DEFENDANT–APPELLANT-RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION IN NO. 112-CV-2015-RNR, JUDGE ROMULUS N. REMUS

BRIEF FOR UNITED STATES FISH AND WILDLIFE SERVICE, RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1295. The final judgment of the United States District Court for the District of New Union was entered on June 1, 2016. The respondent filed a Notice of Appeal on June 9, 2016, and the court granted review on September 1, 2016.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

2. Is Lear's takings claim against FWS ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?

3. For takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?

4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?

5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?

6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?

7. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

STATEMENT OF CASE

This action arises out of the denial of applications before Respondents, Fish and Wildlife Service ("FWS") and the Brittain County Wetlands Board (the "Board"), which prohibit Petitioner, Cordelia Lear, from building a single-family residence on her portion of property located on Lear Island, State of Union. Petitioner challenged the constitutionality of the

Endangered Species Act ("ESA"), as applied to her, and sued for an uncompensated taking of her property under the Takings Clause of the Fifth and Fourteenth Amendments.

The lower court held that the ESA is a legitimate exercise of congressional power under Article I, Section 8, Clause 3 of the U.S. Constitution[1], as applied to a wholly intrastate population of the Karner Blue Butterfly. *Cordelia Lear v. U.S. Fish and Wildlife* Service, Order of the United States District Court got the District of New Union dated June 1, 2016 in 112-CV-2015-RNR. The lower court also held that Petitioner's claim for an uncompensated taking under the Fifth Amendment[2] was ripe since Petitioner did not apply for an Incidental Take Permit (ITP) contemplated by ESA §10, 16 U.S.C. §1539(a)(1)(B); that the relevant parcel for the purpose of Petitioner's takings claim based upon a complete deprivation of economic value under *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003 (1992) is the Cordelia Lot as subdivided in 1965 and not the entirety of Lear Island; that the potential future natural destruction of the Cordelia Lot's lupine fields, which are the butterflies' habitat, does not preclude Petitioner's takings claim; that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Petitioners takings claim based upon complete deprivation of economic value; that the public trust principles inherent in Petitioner's title do not preclude her takings claim; and that the ESA as administered by the FWS and Brittain County, New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value. *Id*.

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[1] Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. U.S. Const. art. I, § 8, cl. 3.

[2] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. 5.

Today, Lear Island contains the last remaining habitat in New Union for a federally-listed endangered species, the Karner Blue Butterfly. Decision and Judgment at 4. The specific subpopulation of the Karner Blue Butterfly, whose populations survive in other states, that exits on Lear Island, are the only remaining subpopulation in New Union, and are solely intrastate for purposes of migration. *Id.* at 4–5. The subpopulation lives exclusively on Petitioner's property, namely a ten-acre plot of land, on the one-thousand-acre island, that has been fostering the perfect habitat for Karner Blue Butterflies through years of annual mowing and perfect sandy soils needed for the growth of the only plant on which they can feed. *Id.* at 5. Specifically, decades of annual mowing prevents the property from becoming overgrown and allows the Heath to fill with wild blue lupine flowers, which are essential for the survival of Karner Blue larvae. *Id.*

At the time that the land, in which Petitioner has fully vested interest, was deeded to Petitioner's father, the island sat in a lake used traditionally for interstate navigation. *Id.* at 4. Petitioner's father deeded Petitioner a ten-acre portion of the island, which he owned in totality including "all lands under water within a 300-foot radius of the shoreline." *Id.* at 4–6. By the time Petitioner vested interest in her property in 2005, nine acres of the property had been designed a critical habitat for the subpopulation of Karner Blues for thirteen years. *Id.* at 5–6. The land had been designated a critical habitat during the same year the FWS added the Karner Blue to the endangered species list. *Id.* at 4. Twenty years later, Petitioner decided to build a house on her property, and inquired with the FWS about the possibility. Petitioner's property was valued at $100,000 dollars. The FWS advised Petitioner to obtain an ITP under the ESA § 10, but Petitioner could not secure additional property to develop a Habitat Conservation Plan ("HCP") and never filed an ITP. *Id.* at 6.

Rather than pursuing an ITP application, and knowing that "any disturbance to the lupine fields other than annual mowing" would constitute a 'take' of the butterfly in violation of ESA § 9, Petitioner sought a permit from the Board to fill one half-acre of her marsh property on which to build her house. *Id.* at 7. The Board denied the permit, reasoning that Petitioner could only fill in the wetlands for a water-dependent use. *Id.* Petitioner currently pays $1,500 in property taxes annually, but has "not sought reassessment of her property" following the Board's denial of her permit. *Id.* In addition to failing to reassess her property, Petitioner denied an offer by the Brittain County Butterfly Society to pay Petitioner $1,000 dollars annually "for the privilege of conducting butterfly viewing outings...during the summer season." *Id.*

SUMMARY OF ARGUMENT

This argument concerns two major issues. The first issue questions the exercise of congress' commerce power, as to whether the ESA can prohibit the taking of a completely intrastate species. The second issue concerns the limits of the Due Process Clauses of the Fifth and Fourteenth Amendments with respect to a series of takings issues.

The broad reach of the commerce power allows Congress to protect species and their habitats. This Court must uphold the determination of the lower court that the commerce clause can reach the wholly intrastate population of the endangered species, the Karner Blue Butterfly. The principles set forth in *U.S. v. Lopez*, 514 U.S. 549 (1995) and its progeny allow for the regulation of noneconomic activities including the destruction of a critical habitat. As such, Congress has not overstepped its bounds in applying the ESA to Petitioner's property.

Concurrently, the Constitution's Fifth Amendment protection that "private property [shall not] be taken for public use without just compensation" does not extend to Petitioner. U.S. Const. amend. V; U.S. Const. amend. XIV. Petitioner's takings claim

against FWS and Brittain County fails to meet the demanding takings standard, requiring complete deprivation of economic value, set forth in *Lucas* in multiple ways. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). Here because Petitioners failed to apply for the necessary permits and never received official agency action to appeal. As such, Petitioner's claim is not yet ripe for litigation.

Even if the court does find that the claim is ripe, the nature of the proceeding necessarily involves additional land that cannot be severed, and must be considered as a whole. As a result, the whole property required for consideration in the claim has significant economic value that is not diminished through the ESA protection of the land. Petitioner also fails the *Lucas* test because the restrictions on the property are temporary, and once raised, Petitioner will maintain full use of her land. Additionally, even with the building restrictions in place, Petitioner can still make money off of her land through tourism, clearly indicating some economic value. Because this Court recognized that *Lucas* creates an exception for when background principles of property law restrict the landowner's use of her property independent of the government regulation, and application of the public trust doctrine restricts Petitioner's right to fill in her wetlands, the Board's denial of Petitioner's permit does not constitute the proximate cause of her economic loss.

ARGUMENT

I. THE ESA IS A VALID EXERCISE OF THE COMMERCE POWER.

This Court has generally recognized that "Congress was concerned about the *unknown* uses that endangered species might have [and] about the *unforeseeable* place such creatures may have in the chain of life on this planet." *Tennessee Valley Auth. v. Hill*, 437 U.S. at 178–79, 98

S.Ct. 2279 (1978) (emphasis in original). Under the ESA Congress can protect species and their habitats through the Commerce Clause. U.S. Const. Art. I § 8, cl. 3. Through the Commerce Clause, Congress has the authority to regulate (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce...even though the threat may come only from intrastate activities; and (3) activities that "substantially affect interstate commerce." *U.S. v. Lopez,* 514 U.S. 549, 558, 115 S.Ct. 1624, 1629 (1995).

The D.C. Circuit held that Congress has the authority to regulate the use of non-federal lands under the ESA 9(1)(a), to protect an endangered species that is found in only a single state. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997). In *Nat'l Babbit*, the District of Columbia Circuit addressed the ESA as applied to the Delhi sand fly, found only in California. *Id.* at 1043. In interpreting *Lopez*'s third prong, the court reasoned that Congress could rationally conclude that intrastate activity regulated by § 9(1)(a) substantially affects interstate commerce for two reasons. *Id.* at 1046. First, the provision protects current and future interstate commerce that relies on the "biodiversity" that would otherwise face destruction. *Id.* at 1051. Second, the provision "controls adverse effects of interstate competition." *Id.*

Several courts have followed this rationale. *GDF Realty Invest., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1271–72 (11th Cir. 2007); *In re Delta Smelt Consol. Cases*, 663 F. Supp. 2d 922, 947 (E.D. Cal. 2009), *aff'd sub nom*. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

In the present case, the FWS added the Karner Blue Butterfly to the endangered species list before Petitioner vested interest in her property. While populations of the butterfly "survive in other states," the trial court acknowledged that the only remaining population of the butterfly

lives on Petitioner's Heath, and have no ability to move elsewhere, as they do not migrate. Furthermore, assuming, *arguendo*, these butterflies were not restricted to short flight distances, they must follow woodland edge corridors during their migration, and would fail at leaving the island.

While it remains unknown what, if any, beneficial medicines or resources may derive from the Karner Blue Butterfly, it is certain that allowing Petitioner to build a home would eliminate not only the butterfly from the island, but also the lupine flower. In the aggregate, if none of the intrastate butterflies were protected, then we face a loss of both species and the beneficial derivatives of each. While Petitioner argues that if she could destroy the Karner Blue's habitat in order to build a home, she would eliminate only the lupine fields and Karner Blues on Lear Island, the court must consider the economic impact of this effect in the aggregate. Such an allowance could lead to prospective homeowners choosing to buy overgrown property at a lower price in hopes to destroy the habitat during construction. Such an opportunity would create interstate competition, as homeowners would look to areas like the Heath to purchase more reasonable land. Thus, the lower court correctly ruled that the ESA is a valid exercise of Congress' commerce power.

II. APPLICATION OF THE ESA INCIDENTAL TAKE PROHIBITION AND THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW TO PETITIONER'S PROPERTY HAS NOT RESULTED IN AN UNCOMPENSATED TAKING OF HER PROPERTY AND DOES NOT VIOLATE THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution provides "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V; U.S. Const. amend. XIV. However a Fifth Amendment takings claim requires the deprivation of any economic use of property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886

(1992). Petitioner's claim against FWS and Brittain County fails to meet this demanding standard in multiple ways.

A. Lear's takings claim against FWS is not ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B).

As defined by this Court, the ripeness requirement "is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab. v. Gardner,* 387 U.S. 136, 149, 87 S. Ct. 1507 (1967).

Generally, a claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S. Ct. 3108 (1985); *Boise Cascade Corp. v. U.S.,* 296 F.3d 1339, 1349 (Fed.Cir.2002) ("[A]bsent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking."). This "finality" requirement is compelled by the nature of the takings inquiry, as evaluating whether the regulations effect in a taking mandates knowing to a reasonable degree of certainty what limitations the agency will place on the property. *See MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 350–51, 106 S.Ct. 2561 (1986). As a result, when agencies provide procedures for obtaining a final decision, a takings claim is unlikely to be ripe until the property owner complies with those procedures. *See Greenbrier v. U.S.,* 193 F.3d 1348, 1359 (Fed.Cir.1999). When additional administrative process could result in a more definite statement of the impact of the regulation,

generally, the property owner is required to first pursue that avenue of relief before bringing a takings claim. *Id.*[3]

Other courts have also held that a property owner's takings claims was not ripe when he failed to comply with procedures mandated by an agency, the National Marine Fisheries Service, under the ESA. *Morris v. U.S.*, 392 F.3d 1372, 1377 (Fed. Cir. 2004). In *Morris*, the statute required that an ITP applicant submit a HCP.[4] *Id*. at 1377. The property owner investigated the cost of filing an application for an ITP with the required HCP and determined that the cost was greater than the value of the trees or the property. As a result, they decided not to file an application for an ITP. *Id*. The Court of Appeals determined that the property owner's' claim was not ripe because there had been no final agency decision that has sufficiently fixed the cost of the application. *Id.* at 1376-77. Furthermore, the Supreme Court held that "to allow a claim to ripen on the assertion that the exercise of an agency's discretion would have a certain result, without permitting the agency to exercise that discretion would offend the requirement from *Abbott Lab. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507 (1967), that the issue be fit for review." *Morris v. U.S.*, 392 F.3d 1372, 1377–78 (Fed. Cir. 2004). Therefore, the property owner's claim cannot ripen until the agency refuses to exercise its discretion, or exercises discretion in a manner that

[3] "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." *Greenbrier v. U.S.,* 193 F.3d 1348, 1359 (Fed.Cir.1999).

[4] (2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefore submits to the Secretary a conservation plan that specifies— (i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. 16 U.S.C § 1539 (2000).

makes reasonably clear or final the affect the regulation will have on the property owner's application. *Id*. at 1378.

While generally a regulatory taking claim is not ripe until the government has reached a final decision regarding the application of the regulation to the property at issue, the Court in *Palazzo* determined that "[w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo v. Rhode Island,* 533 U.S. 606, 620, 121 S. Ct. 2448, 2459 (2001). Because of this determination, a property owner's submission of a proposal would meet the ripeness requirement once he takes reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property. *Id*. at 620-21. Such jurisprudence imposes obligations on property owners because a "court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S., at 348, 106 S.Ct. 2561.

However, the law does not require property owners to apply for a permit if the procedure itself is not a reasonable variance procedure. *See Loveladies Harbor, Inc. v. U.S.,* 15 Cl.Ct. 381, 386–387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), *aff'd* 28 F.3d 1171 (Fed.Cir.1994) (addressing variance procedures in a federal taking claim), and is so burdensome that it effectively deprives the property of value. *Hage v. U.S.*, 35 Fed. Cl. 147, 164 (1996); *see Stearns Co. v. U.S.,* 34 Fed. Cl. 264 (1995).

Pursuant to *Hage*, the same Court further defined such unreasonable and burdensome procedures as 'economic futility' under the ripeness doctrine. In Robbins, the Court held that

'economic futility' as defined in the petitioner's argument omits the second factor involved in showing futility and does not contemplate speculation as to the expense of the permitting process. *Robbins v. U.S.*, 40 Fed. Cl. 381, 388, *aff'd,* 178 F.3d 1310 (Fed. Cir. 1998). *Hage* cites two factors involved in a showing of futility, the first seemingly disappearing in petitioner's argument. First, the law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable procedure, and second, is so burdensome that it effectively deprives the property of value. *Hage v. U.S.*, 35 Fed. Cl. at 164. The Court further explains that without such permits, one cannot know whether, the cost of mitigation would be "economically impractical," or would, in fact, be akin to a permit denial. *Id*.

Furthermore, the Federal Circuit subsequently expounded that the 'economic futility' exception to ripeness simply serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Howard W. Heck, and Assocs., Inc. v. U.S.,* 134 F.3d 1468, 1472 (Fed.Cir.1998) (quoting *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 504 (9th Cir.1990)).

Petitioner's claim is not ripe for litigation as: (1), any ITA would include conditions that would be impossible to satisfy; and (2) a permitwould be futile as the cost of applying for the permit exceeds the value of the property, making the acquisition of the permit too burdensome.[5] Decision 9 ¶ 1. The Supreme Court has clearly held that when additional administrative process could result in a more definite statement of the impact of the regulation, generally, the property owner is required to first pursue that avenue of relief before bringing a takings claim. *Abbott*

[5] The permit in question refers to ESA § 10, 16 U.S.C. § 1539(a)(1)(B) stating: The Secretary may permit, under such terms and conditions as he shall prescribe—any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Lab. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507 (1967). Petitioner's case is nearly identical to *Morris* where a property owner investigated the cost of filing an application for an ITP with the required HCP and determined that the cost was greater than the value of the property. *Morris v. U.S.*, 392 F.3d 1372, 1377–78 (Fed. Cir. 2004). Like *Morris*, Petitioner has failed to take such reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering plans for the property, and thus there is no final agency decision for the court to review.

Petitioner's case differentiates from *Hage* in light of the court's holding in *Robbins*. As in *Robbins*, Petitioner has not demonstrated the futility described in *Hage* as she has not proven that the agencies procedure unreasonable. Without a permit procedure to identify the exact cost and impact of a project, the agency and petitioner cannot identify whether said project is economically impractical. Additionally, the Federal Circuit's explanation of 'economic futility' in *Howard W. Heck,* as a safeguard for property owners from being required to submit multiple applications further harms Petitioner's ripeness as she has failed to submit any permit application at all. *Howard W. Heck, and Assocs., Inc. v. U.S.,* 134 F.3d 1468, 1472 (Fed.Cir.1998). Therefore, Petitioner's takings claim based on a lack of application for an ITP is not ripe, but could be in the future if Petitioner applies for, and is denied, an ITP.

B. For takings analysis, the relevant parcel the entirety of Lear Island.

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, the Court instead focuses on both the character of the action and on the nature of the interference with rights in the parcel as a whole. *Penn. Cent. Transp. Co. v. New York City,* 438 U.S. 104, 130–31, 98 S.Ct. 2646, 2667–63

(1978). However, caselaw is sparse concerning which property should be included in the parcel as a whole where only part of the property owner's originally purchased acreage was still owned when the claimed taking was said to have occurred.[6] However, in *Deltona v. U.S.* the property owner maintained a different amount of acreage at the time of the taking from the amount which he originally purchased. *Deltona v. U.S.*, 228 Ct. Cl. at 490, 657 F.2d at 1188–89. In *Deltona*, the Court of Claims compared the reduced value of the property still owned after the claimed taking to "the total acreage of Deltona's original purchase." *Id*.

The Court has also held that not all properties held at the time of the taking are considered as part of the parcel as a whole. *Florida Rock Indus., Inc. v. U.S.,* 791 F.2d 893 (Fed.Cir.1986). In *Florida Rock,* the Federal Circuit excluded 1,462 acres out of a 1,560-acre total even though the property owner held the total parcel of 1,560 acres at the time of the claimed taking. *Id*. at 904-05. The court excluded the acres in question because they had become sporadically held units, and were no longer contiguous with the acres at issue. *Id*. Such physically non-adjacent or non-contiguous property cannot be considered as part of the single parcel as a whole just because it was formerly owned by plaintiff at one time. *Loveladies Harbor, Inc. v. U.S.*, 15 Cl. Ct. 381, 393 (1988) (citing *Am. Savings and Loan Assoc. v. County of Marin,* 653 F.2d 364, 369 (9th Cir.1981)).

Furthermore, in *Penn Central,* the landmark takings case that required property to be viewed as a whole, non-contiguous property was excluded from consideration. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131, 98 S.Ct. at 2663. In *Penn Central,* the Supreme Court held the affected area as only one of a number of scattered properties in downtown Manhattan held by the Penn Central Transportation Company at the time that the

[6] This is because in most cases the original acreage purchased and the acreage held by the landowner at the time of the taking have been one and the same. *See e.g., Agins v. U.S.,* 447 U.S. at 257, 100 S. Ct. at 2139; *Jentgen v. U.S.,* 228 Ct. Cl. at 533–34, 657 F.2d at 1211–12.

taking was said to have occurred. *Id.* at 115. The parcel designated by the court excluded scattered, non-contiguous properties. *Id.* at 130–31. Therefore, non-contiguous properties not at issue are excluded from the parcel as a whole for takings claims. *Loveladies Harbor, Inc. v. U.S.*, 15 Cl. Ct. 381, 393 (1988).

Petitioner argues that because Lear Island has been transferred to different parties the subdivided sections of the property should be determined separate lots. However, the principles set forth by the courts maintain that while not the entirely of a property need be considered for a parcel as a whole, contiguous properties are considered at issue. In Petitioner's case, land does exist that is contiguous to the Heath and Cordelia Lot. (Decision at 6, ¶ 3). The Goneril Lot, in addition to being contiguous to the Cordelia Lot, consists of successional forest adjacent to the Heath, that consists of lupine fields and creates the ideal habitat for the Karner Blues. As a result, a takings analysis requires at a minimum that the whole parcel include the Cordelia Lot and the contiguous Goneril Lot. (Decision at 6 ¶2). To be approvable, the HCP would have to provide for additional continuous lupine habitat, including and involving restrictions of Petitioner's sister's properties. The necessary restrictions on the contiguous Goneril Lot, and possibly the Regan Lot make the entirety of Leer Island the subject of the HCP, necessitating at a minimum the Cordelia and Goneril Lot's relevant parcels, and possibly the Regan Lot as well.

C. The butterfly habitat's natural destruction in the future precludes Lear's takings claim based upon a complete deprivation of economic value of the property.

In *Lucas*, the Supreme Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the same of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895 (1992). As this taking deprived the property owner

of all "economically viable use" of his property under the Fifth and Fourteenth Amendments, the owner is entitled to just compensation. *Id.* at 1003.

However, the Supreme Court later distinguished the takings rule from the holding in *Lucas* with respect to temporary deprivation of economic value. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 122 S. Ct. 1465, (2002). In *Tahoe-Sierra Preservation Council, Inc.* the Court held that the enactment of regulations implementing a building moratoria on a property did not constitute a per se taking of the landowner's property. *Id.* at 341-42. The Court determined that adopting a categorical rule that any deprivation of all economic use constituted a compensable taking would impose unreasonable financial obligations upon governments. *Id*. Hence, a permanent deprivation of the property owner's use of the entire area is considered a taking, however a temporary restriction that merely causes a diminution in value is not. It logically follows that a property cannot be rendered valueless by a temporary prohibition on economic use, as the property recovers the lost value as soon as the prohibition is lifted. *Agins v. City of Tiburon,* 447 U.S., at 263, n. 9, 100 S.Ct. 2138 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense' " (quoting *Danforth v. U.S.,* 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939)). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32, 122 S. Ct. 1465, 1484 (2002).

Petitioner argues that a potential ten-year building moratorium differentiates her case from *Tahoe Sierra Preservation Council, Inc's* thirty-two months. (Decision at 10, ¶ 2.)

However, Petitioner fails to offer a persuasive explanation for why this moratorium should be treated differently from ordinary permit delays. Additionally, Petitioner's argument breaks down under closer examination as there is no guarantee that a building permit will be granted, or that there will not be further delay. See, *e.g., Dufau v. U.S.,* 22 Cl. Ct. 156 (1990) (holding that 16–month delay in granting a permit did not constitute a temporary taking). Furthermore, in *Tahoe Sierra Preservation Council, Inc.* the Petitioner's argued that respondent "effectively blocked all construction for the past two decades." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 344, 122 S. Ct. 1465, 1490 (2002). However, despite Petitioner's claim that the moratoria could potentially deter construction for two decades, the Supreme Court still held that a taking had not occurred. Therefore, it logically follows that this Court would not find that a taking occurred when the potential construction bar would last only one decade.

D. Assuming the relevant parcel is the Cordelia Lot, 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.

The Fifth Amendment takings clause, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property "for public use without just compensation." U.S. Const. amend. V, XIV. The Supreme Court interpreted the takings clause to address "at least two discrete categories of regulatory action" that potentially constitute a taking: on the one hand, the "physical 'invasion'" of an owner's property; and, on the other hand, where a "regulation denies *all* economically beneficial or productive use of land."[7] *Lucas v. S.C.*

[7] If a governmental regulation neither constitutes a physical taking nor a regulatory taking that "deprive[s] a landowner of '*all* economically beneficial use'," then "regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2636 (1978)." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 528–29, 125 S. Ct. 2074, 2076 (2005). In *Penn Central*, the Supreme Court identified a three-factor test to determine whether a regulation constitutes a taking. First and second, the court should look to the "character of the government action," and the "regulation's economic impact on the claimant." *Penn Central*

Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992) (emphasis added). The Court reasoned that the government must be held liable to pay a landowner only when it deprives that person of "all economically beneficial uses," (*id.* at 1018), because such "total deprivation...is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017.

However, the Supreme Court has distinguished its application of regulatory takings from the "straightforward...*per se*" application of physical takings, by emphasizing that regulatory takings questions should follow an "ad hoc" approach that is designed for "careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 122 S. Ct. 1481 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636, 121 S. Ct. 2448 (2001) (O'Connor, J., concurring). Subsequently, courts have applied *Lucas* only to the "extraordinary circumstance" in which a regulation "permanently denies all *productive* use" or "economically beneficial use" of "an *entire* parcel," *Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302*, 319, 330 122 S. Ct. 1477, 1483 (emphasis added); and have denied recourse when finding that a regulation failed to deprive the landowner of all economic use of property, *id.* at 331. *See also Lucas,* 505 U.S. at 1019–20 n. 8 (explaining that a *Lucas* taking would not apply if the landowner's "property diminished in value [by] 95%"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448, 2464–65 (2001) (holding that a regulation leaving a landowner six percent of the property's total

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Transp. Co., 438 U.S. at 1987. Finally, the court should look to the extent to which the regulation interferes with the landowner's "distinct investment-backed expectations." *Id.* However, Petitioner does not advance a claim for a partial regulatory taking based on the principles of *Penn Central*. Therefore, as the Supreme Court held in *Tahoe-Sierra*, the only question before this court is "whether the rule set forth in Lucas applies--that is, whether a categorical taking occurred" that denies Petitioner "all economically beneficial use of [her] land." *Tahoe-Sierra*, 535 U.S. at 318, 122 S. Ct. 1476.

economic value did not constitute a taking, because it did not "leave the property 'economically idle'").

While acknowledging that a State "may not evade the duty to compensate" a landowner left with merely a "token interest," the Supreme Court, in *Palazzolo*, emphasized that a landowner's "ability to recover for deprivation of all economically beneficial use of property is not absolute," but "*confined by* limitations on *the use of the land which 'inhere in the title itself.*'" *Palazzolo*, 533 U.S. at 629, 121 S. Ct. 2464 (2001) (citing *Lucas*, 505 U.S. at 1029, 112 S. Ct. 2886 (1992)). (emphasis added). In *Palazzolo*, the Court held that a government regulation that restricted a landowner's parcel, valued at $3,150,000, to a value estimated at $200,000 dollars did not effect a taking. *Id.* at 631, S. Ct. 2464–65.

Other courts have also held that a government regulation did not effect a taking when a landowner failed to prove that it did not retain "permitted uses of their property" with "economically beneficial value." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 937 (Tex. 1998); *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); *see also Miskoweic v. City of Oak Grove*, 2004 WL 2521209, File No. C3-01-5977, *4 (Ct. App. Minn. Nov. 9, 2004), *rev. denied* (Jan. 20, 2005)(reasoning that landowners failed to demonstrate they lost all permitted uses of their property); *Tinnerman v. Palm Beach Cty*., 641 So. 2d 523, 526 (Fla. Dist. Ct. App. 1994) (holding that a Lucas taking did not occur, because the landowner still had "temporary uses for the property available to them…which generally do not require building permits").

In *Miskoweic*, the Minnesota Court of Appeals noted that productive uses include "recreational [uses], lake access, and general open space uses." *Miskoweic*, 2004 WL 2521209, *4. While Petitioner argues that the regulation diminishes the full economic value of her property because it lacks recreational or agricultural uses, the facts indicate that the property

retains productive uses. Petitioner's lot sits on a cove, and therefore has waterfront access. Further, without Petitioner's building of a home, she will have general open space uses, which she can use for paid viewing by the Brittain County Butterfly Society.

Moreover, Petitioner's lot is valued at $100,000 dollars, and her property taxes cost $1,500 annually. (Decision at 7, ¶ 18.) While Petitioner has not sought reassessment of her property, she argues that she loses all economically viable use of her property if she is prohibited from developing a single-family house on the land. However, Petitioner's land will not go economically idle if she uses her land to conduct butterfly viewing. The Brittain County Butterfly Society has offered to pay Petitioner $1,000 dollars annually, which constitutes ten percent of the total property value, for the privilege of conducting butterfly viewing outings during the summer season. (*Id.*)

The lower court reasoned that the Brittain County regulation deprives Plaintiff of all economic use of her land because the property will incur more in property taxes than it can generate in income. However, because Petitioner has not sought reassessment of her property, the parties are unaware of what property taxes Petitioner will owe without the potential for a house on her property.

Further, while the court, without citing any caselaw, suggests a bright-line rule that "a piece of real property which incurs more in property taxes" than its derives in income "has been deprived of all economic use," the cases on which it might rest support are inapposite. See *Res. Invest., Inc. v. U.S.*, 85 Fed. Cl. 447, 490 (2009) (addressing a piece of property that, prior to the government regulation, was "classified as open space" and, therefore, undervalued for tax purposes; and noting that "if plaintiffs developed the property for any interim economic use, they would [] lose this tax benefit"); *Bowles v. U.S.*, 31 Fed. Cl. 37, 49 (1994) (determining that the

government's alternative to use a holding tank sewage disposal system, instead of an underground septic system, would both decrease the value of the property and cost the landowner significant maintenance costs, leaving the landowner with less than ten percent value). The opportunity presented by the Brittain County Butterfly Society leaves Plaintiff with more than a token[8] interest, as she will retain at least ten percent of her current property value from this activity alone.

E. The Denial of a County Wetlands Permit was not the Proximate Cause of the Loss in Economic Value of Petitioner's Property, because the Public Trust Doctrine Precludes Petitioner's Claim

In *Lingle*, the Supreme Court recognized that its holding in *Lucas* created an exception for when the government could still remain exempt from providing just compensation for a "total regulatory taking[]." *Lingle*, 544 U.S. at 538. Per the Court's reasoning, such a situation arises when "'background principles of nuisance and property law' independently restrict the owner's intended use of the property." *Id.* Such an exception remains possible, because to succeed on a claim involving regulatory takings, a plaintiff must "establish both causation-in-fact and proximate causation" to show that the government regulation proximately caused the landowner's loss of economically viable use. *Tahoe-Sierra*, 216 F.3d at 783 & n. 33. When background principles of state law, therefore, precludes development regardless of the enacted regulation, the plaintiff's "claimed property right never existed." *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002).

In the present case, the "restrictions that background principles," *Lucas*, 505 U.S. at 1029, 112 S. Ct. 2886, placed upon Petitioner's right to build a home upon the one-half acre of

[8] As defined by Merriam-Webster Dictionary, "Token" means a "symbol" or "emblem." Merriam-Webster Online Dictionary. 2016. http://www.merriam-webster.com/dictionary/token?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (18 Nov. 2016),

marsh she requested to fill are grounded in the public trust doctrine. Generally, under a State's Public Trust Doctrine, the rights of the public are vested in the State regarding the dry sand areas landward of the mean high tide line. *See Just v. Marinette County*, 56 Wis. 2d 7, 18 (1972) ("Lands adjacent to or near navigable waters….are subject to the state public trust powers."). The Public Trust Doctrine subjects these lands to certain public rights: below the mean high tide line, the state owns both the jus privatum (private rights) and jus publicum (public rights) titles in fee simple absolute, as trustee for the public. *See* McQueen v. South Carolina Coastal Council, 580 S.E.2d 116 (2003) ("Historically, the State holds presumptive title to land below the high water mark….[including] in *jus publicum,* in trust for the benefit of all the citizens of this State."*); Just*, 56 Wis. 2d at 18 ("The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."). Even when a State gives up the private rights through sale of property ownership, it retains the public rights, which include "the right 'of navigation...fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as a corollary to...the use of public waters." *Esplanade*, 307 F.3d at 985 (internal citations omitted). Thus, a private owner effectively loses her right to exclude the public from access to those portions of land. The right of the State to inhere the public rights is so strong that it "can no more convey or give away this jus publicum interest than it can 'abdicate its police powers." *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 13 S. Ct. 110 (1982).

Courts have long held that states retain a special power over lands endowed in the public trust. In *Illinois Central R. Co. v. State of Illinois*, the Supreme Court addressed an issue that arose when the Illinois legislature—which had originally intended to pass legislation giving the

state control of commercially important parts of the shoreline of Lake Michigan, including an area near the Chicago River used as a harbor—decided at the last minute to give ownership to the Illinois Central Railroad Company instead, with the grant subject to certain restrictions on sale of the land and interference with public use. *Illinois Central R. Co. v. State of Illinois*, 146 U.S. 387, 433–34, 13 S. Ct. 110, 111 (1892). In adjudicating the issue, the Court held that the ownership of navigable waters of the harbor, and the lands under them, was a subject of public concern to the people of the state. *Id.* at 444–45. Some state courts have even held that the state has the authority to restrict a property owner's use of the dry-sand area of oceanfront real estate. *See State of Or. ex rel. Thornton v. Hay*, 462 P.2d 671, 676 (1969) (where the Supreme Court of Oregon held the state had authority to restrict a property owner's use of the dry-sand area through the English doctrine of custom).

While the 1803 grant to Cornelius Lear included a grant to "all the lands under water within a 300-foot radius of the shoreline of said inland," in fee simple absolute, (*id.*), this grant did not include the jus publicum rights described above. Through its Wetland Preservation Law, Brittain County has an interest in preserving the public's right to "other related recreational purposes," which might include fishing in the wetlands and viewing species, such as birds. See *Florida Rock Indus., Inc. v. U.S.*, 18 F.3d 1560, 1580 (Fed. Cir. 1994) (reasoning that wetlands have substantial economic value in their natural state). In fact, because the wild blue lupine flowers, which produce the only leaves that Karner Blue larvae can eat, thrive in the sandy soil produced by the wetland, (Decision at 2, ¶ 7), recreational viewing of these flowers and the butterfly is another public right preserved by the public trust doctrine. This further explains why Brittain County would agree to fill the wetlands only "for a water-dependent use," (*id.* ¶ 17), as

such a use would lend itself to the public's ability not only to retain rights to the wetlands, but also to continue to protect recreational viewing of the butterfly's habitat.

Furthermore, the lower court erred in relying on *P.P.L. Montana L.L.C. v. Montana, 132 S. Ct. 1215, 1227* (2012), because, in that case, the Supreme Court addressed the issue of non-tidal rivers. In the instant case, Lake Union is a large interstate lake and, at the time of 1803 grant to Cornelius Lear, was traditionally used for interstate navigation. (Decision at 1, ¶ 1.) Additionally, to being traditionally navigable, the cattail marsh at issue was historically open water used as a boat landing. (*Id.* ¶ 6.)

F. The ESA and the Brittain County Wetlands Preservation Law must be considered separately and thus do not completely deprive the Cordelia Lot of all economic value.

The lower court acknowledged that this case presents an issue of first impression before this Court about "whether a property owner can make a claim for a complete deprivation of economic value of a lot where federal regulations restrict one part of the property and local municipal regulations restrict another part." (Decision at 11.) *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 476, 107 S. Ct. 1232, 1237 (1987) (not addressing "various Pennsylvania laws and regulations" because they were not challenged); *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187, 105 S. Ct. 3108, 3116 (1985) (holding that the respondent's claim against various zoning regulations was not ripe for review); *see also Vanek v. State, Bd. of Fisheries*, 193 P.3d 283, 288 (Alaska 2008) (where the Alaska Supreme Court rejected a takings claim against multiple regulations). To advance this Court's interpretation in past cases, and to promote public policy that effectuates a fair system and limits spurious claims, the two regulations at issue must be considered separately.

Historically, when plaintiffs challenged land use regulations on economic grounds, courts used a rational basis test to determine whether the regulation violated a landowner's substantive due process right. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926) ("[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community.). However, through the last century, the Supreme Court—in examining exactions, *e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994); permanent takings, *e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982); and regulatory takings, e.g., *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922)—has set an increasingly high bar for plaintiffs to prove a government taking. The purpose of creating a stringent rule enforces the Supreme Court's intent that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation...does not apply to the *relatively rare situations* where the government has deprived a landowner of all economically beneficial uses." *Lucas*, 505 U.S. at 1018. (emphasis added).

In *Lucas*, this Court reasoned that "similar treatment" as applied in "permanent physical occupation" instances, "*i.e.,*...[a]ny *limitation* so severe [that it] cannot be newly legislated or decreed (without compensation)" must fall under the takings doctrine. *Id.* at 1029. (emphasis added). The use of the word "limitation," along with this Court's use of the term "entire property," *infra*, implies the consideration of how one, singular regulation, as applied to a landowner's property interest, affects the overall value of the landowner's entire parcel. A regulation's severe adverse impact on one portion of the property will not amount to a taking if the property continues to support a reasonable economic use. *Lucas*, 505 U.S. at 1029–30, 112

S. Ct. 2901; *Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302*, 319, 330 122 S. Ct. 1477, 1483.

In Petitioner's case, neither the regulation by the Wetlands Commission nor the regulation applied by the FWS effect a total diminution in value of Petitioner's property. As argued *infra*, Petitioner retains permitted uses through the Butterfly Society's offering to pay her $1,000 per year for butterfly viewing and her wetlands retain value in their natural state. Further, if Petitioner wanted to cease mowing and allow the lupine fields to become overgrown with a forest of oak and hickory trees, she would prevent herself from open space on which to grow a home.

The court's interest in limiting plaintiffs from piling on claims about multiple regulations to prove a categorical taking is obvious and pertinent. To aggregate claims would allow a plaintiff who would otherwise not bring forth a claim of total deprivation to acquire government funds. Such a rule would not only create spurious lawsuits, but would also go against the policy set forth in *Pennsylvania Coal Co. v. Mahon*, where Justice Holmes acknowledged that the "[government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 159 (1922).

This case exemplifies the exact ill that would arise if this Court allowed plaintiffs to aggregate claims. At the time Petitioner vested interest in the property, she knew that the land bequest to her was designated by the FWS as a critical habitat for the New Union subpopulation of Karner Blues. Moreover, she knew that the land on which she later requested a permit to build a house was a wetland, protected by Brittain County Wetland Preservation Law. While Petitioner lacks a claim even after aggregating both regulations, assuming, *arguendo*, that she

needed to aggregate her claims to effectuate a *Lucas* taking, it would be unjust to compensate her for the latter as she came to the property when the wetlands were already unbuildable.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgement of the United States District Court for the District of New Union and remand for further proceedings consistent with this opinion for the last six issues. However, this Court should affirm the District Court's determination that the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012), is a legitimate exercise of congressional power under Article I, Section 8, Clause 3 of the U.S. Constitution.

Respectfully submitted,

/s/ Team 58
Team 58

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