Team No. 59

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 16-0933

CORDELIA LEAR,

Plaintiff- Appellee- Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant- Appellant- Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant- Appellant.

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

BREIF FOR UNITED STATES FISH AND WILDLIFE SERVICE
Defendant- Appellant- Cross Appellee

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Plaintiff, Ms. Cordelia Lear ("Ms. Lear"), filed a complaint in the United States District Court for the District of New Union alleging an unconstitutional application of the Endangered Species Act (ESA) and alleging an uncompensated taking under the Fifth and Fourteenth Amendments, against Defendants, the United States Fish and Wildlife Service ("FWS"), and Brittain County, New Union ("Brittain County"). On June 1, 2016, the lower court dismissed Ms. Lear's ESA claim, but awarded her $10,000 in damages against FWS, and $90,000 in damages against Brittain County for unconstitutional takings violations under the Fifth and Fourteenth Amendments. Both FWS and Brittain County filed timely appeals of the damage awards on June 9, 2016, and Ms. Lear filed a timely appeal of the dismissal of the ESA claim on June 10, 2016. Following the lower court's final order, and pursuant to 28 U.S.C. § 1291, this court shall have jurisdiction over all appeals.

STATEMENT OF THE ISSUES

1. Whether the ESA is a valid exercise of Congress' Commerce power, as applied to a wholly intrastate population of an endangered species.
2. Whether the ESA regulation and the Brittain Counter Wetland Preservation Law constitute a regulatory taking such that Lear is entitled to just compensation under the Fifth and Fourteenth Amendments.
3. Whether public trust limitations preclude FWS and Brittain County from liability for a regulatory taking.

STATEMENT OF THE CASE

This is an appeal from a final order in the United States District Court for the District of New Union's awarding of damages to Ms. Lear against the FWS and Brittain County and

dismissing of Ms. Lear's claim that the ESA is unconstitutional as applied to her property. (R. at 12). Ms. Lear seeks to develop property designated as critical habitat for the Karner Blue Butterfly ("Karner Blues") for a residential home. (R. at 6). Ms. Lear argues that protection of the Karner Blues, wholly intrastate on her property, under the ESA is unconstitutional, and further contends that the permitting process required by the FWS is too burdensome and constitutes a taking of her property. (R. at 1, 7). Ms. Lear did not apply for a permit with FWS, instead filing for an alternative development proposal, subsequently denied by Brittain County. (R. at 7). Ms. Lear filed a complaint in February 2014 seeking a declaratory judgment that the ESA was unconstitutional as applied to her property, and seeking compensation from FWS and Brittain County for a regulatory taking of the property. (R. at 7).

On June 1, 2016, the lower court found (1) the ESA was a constitutional exercise of Congress' Commerce power, and (2) Ms. Lear was deprived of all economic value of her property as a result of a regulatory taking by FWS and Brittain County. (R. at 12). Ms. Lear was awarded $10,000 in damages against FWS and $90,000 in damages against Brittain County. (R. at 12). Ms. Cordelia Lear, FWS, and Brittain County all file Notices of Appeal challenging the lower court's judgement. (R. at 1).

STATEMENT OF THE FACTS

Lear Island is two miles long, one mile wide, and approximately 1,000 acres. (R. at 4). The Island is located on Lake Union, a large lake traditionally used for interstate navigation. (R. at 4). The entire island, including "all lands under water within a 300-foot radius of the shoreline" and the shallow strait separating the island from the mainland, was granted in fee simple absolute to Cornelius Lear in 1803 as part of an Act of Congress. (R. at 4-5). Traditionally used as a homestead, the Lear family utilized the island for farming, hunting

and fishing. (R. at 5). In 1965 the family stopped farming and King James Lear, the current owner, subdivided the island into three parcels to be deeded to his three daughters – Goneril, Regan, and Cordelia Lear – upon his death pursuant to the life estate. (R. at 5). King Lear lived out his life on the Goneril lot until his death in 2005. (R. at 5).

The lot in question in this case is Ms. Cordelia Lear's lot ("the Heath"). (R. at 5). The lot is approximately ten acres, consisting of nine acres of open field with a forty-foot wide, 1,000 foot-long access strip, and one acre emergent cattail marsh that was historically an open water cove used as a boat landing. (R. at 5). Unlike the natural wooded forest covering the rest of the island, the Heath has been maintained by annual mowing for decades, enabling the growth of blue lupine plants. (R. at 5). Without annual mowing, the lupine fields will naturally convert to a successional forest of oak and hickory trees. (R. at 7). If this were to occur without the creation of a replacement habitat within a 1,000-foot radius of the Heath, this subpopulation of Karner Blues would go extinct. (R. at 7).

Blue lupine plants are the only food of the Karner Blues' larvae, an endangered species living in the Heath. (R. at 5); 50 C.F.R. § 17.11. The Karner Blue was listed as an endangered species on December 14, 1992, 57 Red. Reg. 59,236 (Dec. 14, 1992), and FWS designated the Heath a "critical habitat" for the New Union subpopulation of the Karner Blues. (R. at 5-6). The Heath, a partially shaded lupine field adjacent to the successional forest of the Goneril lot, provides the ideal habitat for Karner Blues. (R. at 6). This subpopulation of Karner Blues is the only population in New Union. (R. at 6). While there are populations in other states, Karner Blues only migrate short distances as they must follow woodland edge corridors; thus, this population does not migrate at all. (R. at 5-6).

In April 2012, Ms. Lear contacted the New Union FWS office to inquire about developing her property given the presence of Karner Blues. (R. at 6). FWS informed Ms. Lear that any disturbance on the property, other than the annual mowing, would be considered a "take" of the Karner Blues under the ESA. (R. at 6). Ms. Lear was informed that she could apply for an Incidental Take Permit ("ITP") under section 10 of the ESA if she developed a Habitat Conservation Plan ("HCP") and conducted an environmental assessment under the National Environmental Policy Act. (R at 6). FWS advised Ms. Lear that the HCP should allocate additional contiguous lupine habitat on an acre for acre basis of the disturbed habitat, and include a commitment to maintain the annual mowing of the lupine fields. (R. at 6). Following this conversation, the FWS New Union office sent Ms. Lear a letter informing her that the entire ten-acre lot was critical habitat for the Karner Blue, and stating that any development on the property would constitute a "take" of the species in violation of the ESA. (R. at 6).

Based on the information FWS provided, Ms. Lear worked with an environmental consultant who advised her that the requirements set forth by FWS would cost $150,000. (R. at 7). Instead, Ms. Lear began developing an alternative development proposal (ADP) in which she would fill one-half acre of the marsh for her building site. Ms. Lear filed the required permit to fill the cove pursuant to Brittain County Wetland Preservation Law. (R. at 7). Brittain County denied the permit on the grounds that wetland fill permits are only granted for water-dependent use and a residential home is not a water-dependent use. (R. at 7).

The fair market value of Ms. Lear's property, without any building restrictions, is $100,000, and her annual property taxes are $1,500. (R. at 7). There is no market for the Heath as recreational, agricultural, or timber land; yet, the Brittain County Butterfly Society has offered to

pay Ms. Lear $1,000 annually to conduct butterfly viewings on her property during the summer months. (R. at 7).

Ms. Lear commenced this action in February 2014 seeking just compensation from FWS and Brittain County for a regulatory taking under the Fourth and Fifteenth Amendments, and for the unconstitutional exercise of Congress' Commerce power as applied to the ESA. (R. at 7). The lower court found in Ms. Lear's favor for the regulatory taking, but dismissed her ESA claim. (R. at 4). All parties have filed timely appeals. (R. at 1).

STANDARD OF REVIEW

This is an appeal from a decision of the United States District Court for the District of New Union. The lower court determined that the ESA was a valid exercise of Congress' Commerce power, and that the regulations did constitute a taking under the Fifth and Fourteenth Amendments. Whether the court correctly applied the established facts to the relevant constitutional standards is subject to *de novo* review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

SUMMARY OF THE ARGUMENT

To begin, the ESA is a valid exercise of Congress' Commerce power because the ESA's regulatory provisions are economic in nature. The ESA regulates activities, not species, and those activities impact both commerce and the economy. Ms. Lear's attempt to develop on her property is clearly an economic activity because that development would bring in materials and workers from out of state. Even if the activity being regulated is not the development of her property, but is instead the "take" of the Karner Blue, that activity is also economic and commercial in nature because the preservation of species has future consequences on commerce. By developing on her property, Ms. Lear would consequentially impact the Karner Blue,

affecting the future commerce of the species. Therefore, the ESA is a valid exercise of congressional power because its regulatory framework is commercial and economic in nature.

Second, Ms. Lear cannot claim a compensatory taking of her property because her claim is not ripe, the regulations do not deprive her property of all economic value, and the regulations must be assessed separately. Ms. Lear has not applied for an ITP with the FWS and has not exhausted all of her options for variances and other potential waivers of law. Until Ms. Lear files for an ITP or seeks local variances, her claim is not ripe for judicial review. Additionally, Ms. Lear has not lost all economic value of her property. Not only was she gifted the property, but the Brittain County Butterfly Society has offered to pay her $1,000 annually for wildlife viewing on her property. Moreover, the ESA does not prevent Ms. Lear from developing on the marsh of her property, and the Brittain County Wetland Preservation Law does not prevent Ms. Lear from developing on the Heath of her property. Neither the ESA, nor the Wetland Preservation Law, render Ms. Lear's property completely valueless. Thus, Ms. Lear has not lost all economic value of her property and cannot claim a compensatory taking.

Finally, Ms. Lear is not entitled to compensation for the Brittain County regulation because the Public Trust Doctrine inheres in the 1803 congressional land grant to Cornelius Lear. When background principles of property law that prevent an activity inhere in the title to the property, a landowner may not be compensated for a taking. Even absent the Wetland Preservation Law, Ms. Lear could not fill the marsh on her property because the Public Trust Doctrine, which traces its roots to Roman law, prevents a private entity from violating a trustee's responsibilities to public beneficiaries. In conclusion, Ms. Lear is not entitled to compensation for the fill restriction on her marsh because of public trust limitations.

ARGUMENT

I. THE ESA IS A VALID EXERCISE OF CONGRESS' COMMERCE POWER WHEN APPLIED TO A WHOLLY INTRASTATE SPECIES.

The ESA is a valid exercise of Congress' Commerce power, and thus, the lower court's ruling should be upheld. Congress' creation of the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) [hereinafter *TVA*]. In *TVA*, the Supreme Court concluded that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*." *Id.* at 184(emphasis added). Congress found that "various species of fish, wildlife, and plants in the United States [were being] rendered extinct as a consequence of economic growth and development untempered by adequate concerns and conservation." 16 U.S.C. § 1531(a)(1).

The ESA instructs the Secretary of the Interior to list any animal or plant species living in the United States that may be endangered or threatened, 16 U.S.C. § 1533(a), and prohibits the "take" of any endangered species. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). Included in the definition of "take" is harm, ESA § 3(19), which encompasses "significant habitat modification or degradation where it actually kills or injures" the endangered species. 50 C.F.R. § 17.3. The lower court's ruling should be upheld because the ESA is a valid exercise of Congress' Commerce power, even when applied to the Karner Blue, a wholly intrastate species.

A. The ESA is a valid exercise of Congress' Commerce power because it regulates activities, not species, which satisfies the precedent established in *Lopez*.

The Supreme Court in *U.S. v. Lopez*, 514 U.S. 549 (1995), established the controlling precedent which determines when a law is a valid exercise of Congress' Commerce power. The

Court identified three categories of activity that Congress may regulate under the Commerce Clause:

> First Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Id. at 558-59(citations omitted).

In order to determine whether an act "substantially affects interstate commerce," the Court in *Lopez* provided a four-factor test. *Id.* at 559-64. First, the Court must establish whether the regulation has anything "to do with 'commerce' or any sort of economic enterprise." *Id.* at 561. Second, the Court must determine if the act has an "express jurisdictional element that might limit [the act's] reach."[1] *Id.*at 562. Third, the Court will look to the "legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Id.* However, "[c]ongress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* Finally, the court will look at the relationship between the act and interstate commerce to determine if it is " 'too tenuous' to be regarded as substantial, such that if... accepted, the Court would be 'hard pressed to posit any activity by an individual that Congress is without power to regulate.' " *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067 (D.C. Cir. 2003) (quoting *Lopez* 514 U.S. at 564).

[1] Courts addressing this factor have stated that the "absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." *Rancho Viejo, LLC. v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003); *see also, Gibbs v. Babbit*, 214 F.3d 483, 487 (4th Cir. 2000); *Norton v. Ashcroft*, 298 F.3d 547, 557 (6th Cir. 2002); *Grooms Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000); *US v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999).

When applying the analysis set forth in *Lopez*, courts have held that the ESA is a valid exercise of Congress' Commerce power. *See, e.g.*, *National Assc. of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (1997)(holding that the ESA was a valid exercise of the Commerce Clause when FWS halted the construction of a hospital, power plant, and highway intersection project in the habitat of the endangered Delhi Sands Flower-Loving Fly)[hereinafter *NAHB*]. The court reasoned that the ESA could be upheld under the Commerce Clause via either the first or third rationales in *Lopez*. *Id.* at 1046.

Under the first rational—regulating the channels of interstate commerce—the court found that section 9(a)(1) of the ESA was justified for two reasons. *Id.* First, prohibiting "takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce." *Id.* Second, prohibiting takings of endangered species is within Congress' authority "to keep the channels of interstate commerce free from immoral and injurious uses." *Id.*(citations omitted).

Under the third rational—regulating activities that substantially affect interstate commerce—the court found "intrastate activity regulated by section 9 of the ESA substantially affected interstate commerce" in two ways. *Id.* at 1052. First, the ESA "prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it." *Id.* Second, the ESA "controls adverse effects of interstate competition." *Id.* Recognizing that the extinction of a species "diminish[es] a natural resource that could otherwise be used for present and future commercial purposes," the court found that decline in wild species substantially affects interstate commerce. *Id.* at 1053.

Under this third rational, the *NAHB* court further applied the *Lopez* four-factor test. First, it was clear that the regulated activity—building a hospital, power plant, and highway—involved

"commerce," and was plainly economic. *Id.* at 1056. Second, while the court did not address the jurisdictional factor, this alone is not dispositive. *See Ranch Viejo*, 323 F.3d at 1068. Third, the court in NAHB distinguished its case from *Lopez* by acknowledging that the legislative history of the ESA emphasized Congress' concern with protecting endangered species and the "future commerce related to that [bio]diversity." *NAHB*, 130 F.3d at 1051. Finally, the court determined that the activity to be regulated—the construction of a hospital, power plant, and highway intersection—involved "conditions under which commercial activity [took] place." *Id.* at 1056.

The court came to the same conclusion in *Rancho Viejo v. Norton*, holding that the ESA is a valid exercise of Congress' Commerce power. *Rancho Viejo*, 130 F.3d at 1069. "The ESA does not purport to tell toads what they may or may not do. Rather, section 9 [of the ESA] limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not the species taken." *Id.* at 1072. Moreover, the court presumed that because the housing development was " 'being constructed using materials and people from outside the state . . . [and] will attract' construction workers and purchasers 'from both inside and outside the state;' " the activity was clearly commercial and economic in nature. *Id.* at 1069 (quoting *NAHB*, 130 F.3d at 1048).

The court in *Rancho Viejo* also specified its ruling was not changed "by the fact that the arroyo toad . . . does not travel outside of California, or that Rancho Viejo's development . . . is located wholly within the state." *Id.* at 1069. Regardless of whether a species is wholly intrastate or interstate, courts have found the ESA to be valid under the Commerce Clause because of the aggregate effect of species loss the Act prevents. *See Rancho Viejo*, 130 F.3d at 1069; *Lopez*, 437 U.S. at 560-61; *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

B. The regulation of the Karner Blue under the ESA should be upheld because it fits squarely within the *Lopez* analysis and is a valid application of the law.

While the Twelfth Circuit has yet to decide if the *Lopez* analysis is appropriate, many circuits have applied the *Lopez* analysis in determining whether the ESA is valid under the Commerce Clause.[2] This Court should adopt the prevailing precedent and uphold the lower court's decision, finding that the ESA is a valid exercise of Congress' Commerce power.

To begin, the regulation of Ms. Lear's property to protect the Karner Blue butterfly should be addressed under the third category of Commerce Clause regulation – substantially affects interstate commerce. Under the *Lopez* four-factor test, the court must first determine whether the regulated activity deals with commerce and if it is economic in nature. Clearly the activity of building a house is commercial and economic in nature. In both *Rancho Viejo* and *NAHB*, it was determined that building is inherently commercial and economic because construction likely involves materials and people from outside of the state. Similarly, the construction of Ms. Lear's proposed home will likely involve builders and materials from outside of the state. Moreover, because Ms. Lear's property is less valuable without a house than with a house, it is possible that Ms. Lear may decide to sell the property. Given that Ms. Lear wishes to develop the property, her action is clearly economic in nature.

Second, while the ESA does not have a jurisdictional element, multiple courts have determined this factor to be non-dispositive. We see no reason here why the court would choose to separate itself from the overwhelming consensus among other circuits.

Third, Congress' intent in enacting the ESA was to protect endangered species no matter the cost. Because the Karner Blue is an endangered species, and the legislative history identifies the commercial value in protecting endangered species, the ESA is constitutionally valid.

[2] *Supra* note 1.

Finally, the relationship between the regulated activity of building of a home and interstate commerce is not attenuated. It is obvious that building a home on property that is the habitat of an endangered species will have a serious impact on that species. Just as the ESA does not purport to tell toads where they can live, neither does it purport to tell Karner Blues where they can live. The regulated activity, development on the Karner Blues' critical habitat, fits squarely into the purpose of the ESA—to protect and conserve species from extinction due to economic growth and development.

C. Even if this Court finds that development is not the regulated activity and instead finds that the "take" of the Karner Blue is the regulated activity, the take is still economic in nature.

The lower court correctly found that the regulated activity, the development of the property, was economic in nature, and that the ESA is a valid exercise of Congress' Commerce power. Were this Court to find that development is not the regulated activity, but instead find that the "take" of the Karner Blue is the regulated activity, that take is still economic in nature. The Fifth Circuit concluded that "the ESA is an economic regulatory scheme . . . [enacted] 'as a consequence of economic growth and development' . . . to protect the 'incalculable' value of biodiversity." *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452, 476-77 (5th Cir. 2016) (citations omitted). That court went on to say that "habitat protection and management . . . intersect with commercial development[,] – [underscoring] the economic nature of the ESA." *Id.* at 477. Because the protection of endangered species and critical habitats is an economic activity affecting interstate commerce, both the development of the property and the "take" of the Karner Blue are economic in nature. Thus, regardless of whether the development or the take is the regulated activity, this Court should uphold the lower court's ruling that the ESA is a valid exercise of Congress' Commerce power as applied to the Karner Blue.

II. MS. LEAR DOES NOT HAVE A REGULATORY TAKINGS CLAIM UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AGAINST FWS.

The Fifth Amendment of the U.S. Constitution provides that there shall be no "private property taken for public use without just compensation." U.S. Const. amend. V. The "Just Compensation Clause" has been incorporated against the states under the Fourteenth Amendment. *Chicago, B & Q.R. v. Chicago*, 166 U.S. 226, 239 (1897); U.S. Const. amend. IVX. The "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). Under the Fifth and Fourteenth Amendments, Ms. Lear does not have a regulatory takings claim against FWS because (A) the claim is not yet ripe, (B) the relevant parcel is the entirety of Lear Island, (C) the lower court erred by applying the *Lucas* Test instead of the *Penn. Central* "ad hoc" test for regulatory takings claims, and (D) even under the *Lucas* Test, there is not a complete deprivation of economic value to Ms. Lear's property.

A. Ms. Lear's takings claim is not yet ripe because Ms. Lear has not applied for an Incidental Take Permit under the ESA, and thus, FWS has made no final decision regarding her property.

Ms. Lear's takings claim is not ripe for litigation because the FWS has not yet reached a final decision regarding the application of the ITP to her property. In general, a regulatory takings claim "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 Cty. v. Hamilton Bank*, 473 U.S. 172, 186 (1985). A decision is "final" when "the extent of permitted development" on the property is determined by either the *Lucas* Test or the *Penn. Central* "ad hoc" test. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)(quoting *MacDonald v. County of Yolo*, 477 U.S. 340, 351 (1986)). However, these matters "cannot be

resolved in definitive terms until" a final decision "determin[es] the permitted use for the land." *Palazzolo*, 533 U.S. at 618. "[U]ntil the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," the takings claim is not yet ripe for litigation. *Williamson*, 473 U.S. at 191. In applying the Supreme Court's reasoning for when regulatory takings claims are ripe, the U.S. Federal Court of Appeals held that if the FWS has yet to make a final ruling on an ITP, the case is not ripe. *Boise Cascade Corp. v. U.S.*, 296 F.3d. 1339, 1341-42 (Fed. Cir. 2002). In *Boise Cascade*, the FWS required an ITP under section 10 of the ESA for a company who wished to log a portion of old growth forest, a habitat for the Spotted Owl, an ESA listed species. *Id.* Instead of filing for an ITP, Boise Cascade filed suit against the FWS for a regulatory takings claim. *Id.* at 1342. The court dismissed the claim because it was not yet ripe for litigation, as FWS had not made a final decision on whether to grant Boise Cascade the ITP. *Id.*

Ms. Lear's situation mirrors that of Boise Cascade. Ms. Lear was aware that in order to develop her land, she would need to file for an ITP because of the endangered Karner Blue habitat on her property. The Karner Blue was listed as an endangered species in 1992, however, Ms. Lear did not obtain ownership of her parcel until 2005. Additionally, the Lear family maintained the habitat for the Karner Blue for several decades before Ms. Lear attempted to develop her property. Furthermore, Ms. Lear inquired as to whether she could develop her property due to the butterflies' existence by contacting the FWS in 2012. Instead of following the proper procedure and working with the FWS by filing for the ITP, Ms. Lear chose instead to file a takings claim, just as Boise Cascade chose to do. Because of Ms. Lear's failure to file for an ITP, FWS has been unable to make a final, definitive decision regarding the development of her property, and thus, her takings claim is not yet ripe.

The lower court reasoned that while the final determination of a permit is generally the threshold for ripeness, a "takings claimant need not perform a futile act, when the government has already declared a policy of denying the very sort of permit the claimant would need." R. at 9. The lower court references *Palazzolo*, where the Supreme Court held that the claim was ripe for review because the "reasonable uses were known to a reasonable degree of certainty," such that it would have been futile to require a denial of a permit for a determination of ripeness. 533 U.S. at 620. The lower court's reliance on *Palazzolo* was in error as this case is easily distinguishable.

First, the Plaintiff in *Palazzolo* applied for and was denied two different permits, *id.* at 614-15, and the court found that alone could be considered a "final decision," *id.* at 621. However, the court went further to say that even if that was not enough for a final decision, further permit applications were not necessary because there was little doubt as to how the Council would find given its previous decisions. *Id.* In coming to this conclusion, the court found that:

> Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

Id.

Our case is distinguishable because not only has Ms. Lear failed to apply for an ITP with the FWS, but the Lear family has never applied for an ITP for the island property. Unlike in *Palazzolo* where the Council established a pattern suggesting it would deny any permit, there is no such pattern established here by the FWS. If it was clear that FWS would deny the ITP based on a policy or patterns of denial, FWS would never grant ITPs; this is simply not the case. Thus,

it cannot be said that FWS has a policy of denying ITPs such that it would have been futile for Ms. Lear to have applied for an ITP.

Additionally, the lower court also reasoned that denial of a permit application is not required for the determination of ripeness if the plaintiff "can establish that the procedure to acquire a permit is so burdensome as to effectively deprive [her] of [her] property rights." *Hage v. U.S.*, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996). Using this reasoning, the lower court found it undisputed that the cost of applying for a permit exceeded the fair market value of Ms. Lear's property, making any application for a permit so burdensome that it alone deprived her of her property rights.

However, the lower court's reliance on this reasoning alone is misguided. The Supreme Court has held "that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action." *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967)(overruled on other grounds in *Califano v. Sanders*, 430 U.S. 99, 97 (1977)). Furthermore, the Federal Claims Court stated "the ripeness doctrine requires that the relevant administrative agency reach a decision that actually affects the plaintiff before a court will adjudicate a challenge to the agency's action." *Stearns Co., Ltd. v. U.S.*, 34 Fed. Cl. 264, 269 (Fed. Cl. 1995)(referencing *Abbott Labs.*, 387 U.S. at 153). In neither *Hage*, relied upon by the lower court, nor *Stearns*, does the court equate "burdensome" to cost. *See generally Hage*, 35 Fed. Cl. at 147; *Stearns*, 34 Fed. Cl. at 264. For a permit procedure to be too burdensome, a Plaintiff must have already exhausted her options to achieve variances and other waivers of law. *Stearns*, 34 Fed. Cl. at 269. In *Stearns*, the only variance available to the Plaintiff was one that had already been denied; thus, the Court found that because the Plaintiff had exhausted all available appeals, the denial of that variance made the case ripe without the Plaintiff's

application and denial for the permit. *Id.* at 270. Ms. Lear has not exhausted her options to achieve variances or other waivers of law and has not been denied a permit by the FWS. The only action taken by Ms. Lear was in applying for an ADP with Brittain County. However, the ADP denial is not a waiver to the ITP she must obtain from FWS. Therefore, Ms. Lear's takings claim is not yet ripe.

Further, the lower court's interpretation is directly contradictory to the Supreme Court, which stated:

> We have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use his property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985).

Ms. Lear has not exhausted her available remedies. She has not applied for an ITP, with an initial cost of only $100.[3] She has not applied for any variances or legal waivers. Her sole evidence for the permit being too burdensome comes from a conversation with a FWS representative and an environmental consultant, and the denial of her permit to fill the marsh on part of her property by Brittain County. Ms. Lear isn't burdened by the ESA restrictions until a decision is reached by the FWS; she is free to use the property as desired. Finally, Ms. Lear does not know if her permit request falls into the category of a "low-effect HCP," which does not

[3] *See* U.S. Fish and Wildlife Service, *Federal Fish and Wildlife Permit Application Form, Incidental Take Permits Associated with a Habitat Conservation Plan (HCP)*, (Oct. 2013).

require the performance of an environmental assessment.[4] Although "burdensome" does not equate to cost alone, this category of ITP would cost Ms. Lear substantially less than the cost of performing a full environmental assessment. Thus, Ms. Lear's takings claim is not yet ripe.

Regarding the FWS approval or denial of permits, the Federal Circuit Court stated that an agency has discretion in assisting with a permit application. *Morris v. U.S.*, 392 F.3d 1372, 1377 (Fed. Cir. 2004). As a court has "no way to predict what influence the wielding of that discretion will have on the cost of the application," a case cannot be ripe without the denial or approval of a permit. *Id.* Here, the FWS has not exercised its discretion over the cost of an application because Ms. Lear has not submitted an application. The FWS has not restricted the use of Ms. Lear's property, and thus, no cost of compliance has resulted. Therefore, the cost of compliance is unknown since the FWS has not exercised its discretion over Ms. Lear's permit application and the burden on Ms. Lear is likewise unknown. In conclusion, this Court should find that Ms. Lear's takings claim is not ripe for judicial review.

B. In analyzing Ms. Lear's takings claim, the entirety of Lear Island is the relevant parcel because Lear Island was occupied as a single property from 1803 until 2005.

When performing a proper takings analysis, the Supreme Court "focuses . . . on . . . rights in the *parcel as a whole*." *Penn Central*, 438 U.S. at 130-31(emphasis added). In this case, that whole parcel is the entirety of Lear Island. The U.S. Court of Appeals for the Federal Circuit highlighted the fact that takings "precedent displays a flexible approach, designed to account for factual nuances." *Loveladies Harbor v. U.S.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). Not only does a flexible approach provide for better case-specific application, but it helps mitigate "strategic behavior on the part of developers" who may take advantage of a bright-line, inflexible rule. *Id.*

[4] *See* U.S. Fish and Wildlife Service Endangered Species Program, *Habitat Conservation Plans*, (Dec. 2005).

This flexible approach is appropriate here based on the land use. First, for almost three centuries the island remained in the possession of one family and was used as a homestead, farm, hunting and fishing parcel, and was never subdivided. It was not until 1965 when Ms. Lear's father, King Lear, decided to subdivide the island into parcels for his daughters. However, this subdivision was not complete until 2005, when King Lear died, because he retained a life estate interest in each of the three parcels. Second, Ms. Lear did nothing with her parcel for seven years after she received her parcel from her father. Given the use and design of the island, and the facts specific to this property, even though Lear Island has technically been subdivided, that division does not affect the analysis. Ms. Lear should not be allowed to benefit from her own inaction. Thus, the entirety of Lear Island is the relevant parcel on which to analyze Ms. Lear's takings claim.

C. The lower court failed to apply the correct *Penn. Central* "ad hoc" test to determine if the regulations constituted a compensable governmental taking.

A regulation will constitute a taking when it is subject to one of the following: (1) it "does not substantially advance a legitimate state interest," or (2) it "denies the owner economically viable use of her land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see also, e.g.*, *Nectow v. Cambridge*, 277 US 183, 188 (1929); *Penn Central*, 438 US at 138, n.36. While it is clear that both the ESA and the Brittain County Wetland Preservation Law advance legitimate state interests, the lower court did not address the first option of the analysis, instead only analyzing the second.

To determine whether a regulation is a takings under economically viable use of land, the Court must apply the *Penn. Central* "ad hoc" test to determine when "all fairness and justice require that economic injuries caused by public action be compensated by the government . . . ." *Penn Central*, 438 U.S. at 124. The *Penn. Central* "ad hoc" test weighs the following factors:

(1) the "economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the government action." *Id.* The character of the government action looks specifically at whether "the interference with property can be characterized as a physical invasion by government . . . [rather than] . . . some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* In all regulatory takings claims, the *Penn. Central* "ad hoc" test should be used except in "the extraordinary circumstances when no productive or economically beneficial use of land is permitted." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002)(quoting *Lucas*, 505 U.S. at 1017). As discussed below in subpart D, the lower court erred in determining Ms. Lear's property was deprived of "*all* economically beneficial uses." As such, the application of the *Lucas* Test was an error, and this Court should remand the case for analysis under the *Penn. Central* "ad hoc" test.

D. Even assuming the relevant parcel is solely the Cordelia lot and not Lear Island as a whole, there has not been a regulatory taking because there has not been a complete deprivation of economic value of the property.

i. There is not a complete deprivation of economic value because the land will be developable in the future due to the natural growth of the Heath.

The ESA regulation is not a taking because it is only a temporary restriction on Ms. Lear's ability to develop her land. The Supreme Court held that, "a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not." *Tahoe-Sierra*, 535 U.S. at 332. Moreover, the Court has held that a property that will recover in value is not completely deprived of economic value. *Id.*

Here, the ESA restriction only applies to the property so long as it remains the same as it is now. Currently, Ms. Lear is not required by the FWS or Brittain County to continue mowing

her property. Should Ms. Lear choose to end the mowing, the Heath will become overgrown, similar to the forestland of the rest of the island, and will no longer be a productive habitat for the Karner Blues. Given that, Ms. Lear would recover the full value of her property as residential developable land once the habitat that supports the Karner Blues is modified naturally. There is not a complete deprivation of economic value to Ms. Lear's property, but only a temporary taking. Thus, Ms. Lear's takings claim must be precluded.

ii. The takings claim is precluded because even though the property is no longer valuable as a residential property lot, the parcel is not rendered valueless.

The lower court erred it determining that there was a complete deprivation of economic value to Lear's property because a property is not rendered valueless when the original intended purpose of the property is no longer available. A property is only valueless if "*all* economically beneficial uses" of the land are completely deprived. *Lucas*, 505 U.S. at 1019. The Supreme Court specifies that this categorical rule will only apply if the diminution of value is 100%, not in cases where the diminution may only be 95%. *Id.* at 1019 n.8.

Even without the right to develop, a landowner retains many attributes to ownership of land, such as "the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id.* at 1044 (dissenting)(quoting *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979). As Justice Blackmun indicates, when a property owner may "picnic, swim, camp in a tent, or live on the property in a movable trailer," it cannot be said that the land has no economic value. *Id.* at 1044. Additionally, a property owner "retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." *Id.*

Thus, because the property retains economic value other than that of a residential property, the lower court erred in finding there was a complete deprivation of value of the property. First, Brittain County Butterfly Society ("Society") agreed to pay Ms. Lear $1,000 annual rent for the privilege of conducting wildlife tours on the property. The lower court determined that because the property taxes, $1,500 per year, were more than the Society's offer, that alone rendered the property without economic value. However, that was in error because the lower court did not take into account any other economic value of the property.

Second, Ms. Lear has owned the property for seven years without development or any desire to develop her property. For that time she has still been required to pay the $1,500 in annual property taxes. Thus, the option of paying $1,000 less in property taxes because of the income from the Society's rent is actually an economic benefit to her, not an economic deprivation.

Third, Ms. Lear, and any other owner, would not have access to the island without the ownership of that parcel, given that the rest of the island is privately owned by the other sisters. There is economic value in having access to the Island for swimming, hiking, camping, and wildlife viewing of the beautiful Karner Blues, even if Ms. Lear herself does not find value in those options.

Finally, the sale of the property has value. Ms. Lear was given the parcel as a gift, and thus, any sale of the property would be an economic benefit to her. Even without the option of building a residential property, the land has value for resale. For example, Ms. Lear's sisters may choose to purchase the land, expanding their own acreage, or a conservation organization or state government may choose to purchase the land to keep in trust for the benefit of the public.

Because the land retains value in many ways other than as a residential property, it cannot be said that the property is completely deprived of all economically beneficial uses.

iii. FWS is not liable for a complete deprivation of economic value of the lot because the ESA and the Brittain County Wetland Preservation Law must be considered separately.

When determining the deprivation of economic value to a property under a takings claim, each regulation applied to a property must be considered separately. The prevailing rule on what constitutes a regulatory taking, established in *Lucas*, states that "where regulation denies *all* economically beneficial or productive use of land . . . a given regulation [goes] 'too far' for purposes of the Fifth Amendment." *Lucas*, 505 US at 1015 (emphasis added). The Supreme Court found that the existence of developable lands on a property partially regulated "does not leave the property 'economically idle.' " *Pallazolo*, 533 U.S. at 630-31. The Court held that because the uplands portion of the property at issue could still be developed, all economic value was not deprived. *Id.* Following this analysis, the lower court erred in holding that the ESA restrictions should combine with the Wetland Preservation Law in assessing the deprivation of economic value to the property, because it failed to (1) properly interpret the rule established in *Lucas*, and (2) properly apply joint and several liability as construed in *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976).

First, according to the Supreme Court in *Lucas*, "[a]ny limitation . . . [that prohibits all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself." *Lucas*, 505 U.S. at 1029. The singular use of *limitation*, as opposed to the plural *limitations*, suggests that a single limitation which deprives a property of all economic value is considered a taking when not inherent in the title. In the current case, Ms. Lear's property isn't deprived of all economic value from a single limitation.

Rather, Ms. Lear argues multiple limitations combine to deprive her property of all economic value. Similar to the landowner in *Palazzolo*, Ms. Lear is not completely encumbered by the ESA restrictions, because the ESA does not bar her from filling the marsh area for development. Moreover, Ms. Lear is not completely encumbered by Brittain County's Wetland Preservation Law because the restriction does not bar her from developing the Heath. The lower court's reasoning goes against the plain language used by the Supreme Court in *Lucas*, and thus, the two regulations must be considered separately in determining complete economic deprivation.

Second, the lower court likens the combination of two regulations to a joint tort, citing *Velsicol*, by stating that each tortfeasor is jointly and severally liable for an indivisible harm. *Velsicol*, 543 S.W.2d at 342-43. The lower court seemingly ignored the key component of joint and several liability; liability is only extended to joint tortfeasors when the harm is indivisible. An indivisible injury is "an injury which cannot be apportioned with reasonable certainty to the individual wrongdoers." *Id.*(quoting *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952)). Here, it is clear the ESA restricts development on the Heath, and the Wetland Preservation Law restricts development on the cove marsh. Notwithstanding the fact that likening a joint tort to governmental land-use regulation has no precedent in law, doing so in this situation still would not result in joint and several liability to the FWS and Brittain County because each regulation is clearly divisible. Therefore, even applying joint tort principles to the land-use regulations at issue here does not allow the court to analyze the regulations together for the purposes of determining complete economic deprivation of the property. For the above mentioned reasons, the lower court erred in finding a complete deprivation of value of Ms. Lear's property.

III. THE PUBLIC TRUST LIMITATIONS ON USES OF STATE NAVIGABLE WATERS INHERE IN THE 1803 CONGRESSIONAL GRANT OF TITLE OF LEAR ISLAND, AND THUS, MS. LEAR IS NOT ENTITLED TO COMPENSATION.

A. At the time of the 1803 congressional grant of title of Lear Island, non-tidal navigable waters were, and continue to be, subject to public trust principles inherent in our common law.

"By the law of nature these things are common to mankind—the air, running water, [and] the sea." Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32(2) B.C. Envtl. Aff. L. R. 421, 423 (2005)(quoting J. Inst. 2.1.1.)[hereinafter *PPPR*]. The Public Trust Doctrine is a foundational background principle of modern civil law, tracing its roots back to the fifth century A.D. and Justinian Institute. *PPPR* at 423; *see generally* Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 Law Libr. J. 525 (2007). This, and many other background principles of our modern law, was adopted by English Common Law, and later incorporated by courts in the Original Thirteen Colonies via the equal footing doctrine. *PPPR* at 423-24. "Upon the American Revolution, [public trust] rights . . . were vested in the original states within their respective borders, subject to the rights surrendered by the constitution to the United States." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

Specifically, "[a]merican law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). The Supreme Court averred that a "state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 453 (1892). The Supreme Court highlighted the fact that,

unlike in England, waterways in this country are navigable for hundreds of miles inland and common law adoption of tide waters translates to navigable waters generally. *Id.* at 436.

The lower court found that although this is the modern understanding, the public trust rights in non-tidal navigable waters were not recognized by the U.S. at the time of the 1803 congressional grant to the Lear family, which included the underwater lands within 300-feet of the shoreline. However, this was in error. Court's as early as 1810 specified that public trust rights applied to non-tidal navigable waters. *Carson v. Blazer,* 2 Binn. 475, 478 (Penn. 1810).

> The common law principle is in fact, that the owners of the banks have no right to the water of navigable rivers . . . It is said . . . that by navigable rivers are meant, rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers . . . .

Id. While Ms. Lear may argue that this case is prior to her family's 1803 grant, that would be in error. This case specifically applies the common law principles, understood prior to this case. While the court did not formally decide the issue until 1810, the principle behind the decision was clear long before.

Furthermore, the Court in *Illinois Central* held,

> [T]he same doctrine as to the dominion and sovereignty over and ownership of lands under . . . navigable waters . . . applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters . . . and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Illinois Central, 146 U.S. at 436-37. Because Congress had no authority to grant the 300-foot radius of underwater land in fee simple absolute to the Lear's in 1803, the land remains in the public trust to be managed by the State of New Union. Therefore, both prior to and after the congressional grant of Lear Island in 1803, the non-tidal navigable waters in the grant were, and continue to be, subject to the public trust principles inherent in our common law.

Additionally, the lower court erred in finding that a prior congressional grant gives superior title to the congressional grantee. The equal footing doctrine grants a State, upon statehood, "title within its borders to the beds of waters then navigable (or tidally influenced . . .)." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589-90 (2012). However, "[g]rants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark and do not impair the title and dominion of the future state . . . ." *Shively*, 14 S. Ct. at 570.

Thus, precedent established by the Supreme Court directly contradicts the lower court's finding. In holding that the congressional grant of Lear Island in 1803 to Cornelius Lear was superior to the equal footing doctrine, the lower court failed to recognize that the title was subject to the principles of the Public Trust Doctrine in 1803, and cannot be granted away. Just as title conferred by congressional grant concedes to the limitations of the Public Trust Doctrine, so too does the title of the State to waters then navigable under the equal footing doctrine. Thus, regardless of which title is superior, both titles would be and are subject to the Public Trust Doctrine, and as such, may not be granted away to a private party.

B. Because the non-tidal navigable waters of the Cordelia lot are subject to the public trust, Ms. Lear is not entitled to compensation for her takings claim.

The Supreme Court stated that property limitations which already "inhere in the title itself, in the restrictions that background principles of the State's law of property . . . already place upon land ownership," do not entitle a landowner to compensation. *Lucas*, 505 U.S. at 1029. These background principles include the state's public trust interest in the non-tidal navigable waters, specifically, the marsh on the Cordelia lot.

While the lower court found no New Union specific precedent on the scope of the State's protection for public trust waters, the precedent is firmly rooted in our Constitutional law. *See*

Illinois Central, 146 U.S. at 452. As discussed above, the public trust is a clear background principle of the law of property, in place long before Ms. Lear acquired her property or planed to build a home on the property. Because the Court has held that the State holds navigable waters "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties," that must be the precedent applied here. *Id.* Thus, because it is clear the property is in the public trust, Ms. Lear is not entitled to any compensation under a takings claim.

CONCLUSION

FWS respectfully urges this Court to reverse the damage awards granted to Ms. Lear and uphold the ESA as a valid exercise of Congress' Commerce power. This Court should find that a compensatory regulatory taking of Ms. Lear's property has not occurred. Alternatively, this Court should decide that the Public Trust Doctrine precludes the FWS and Brittain County from liability for a regulatory takings claim. Finally, because Ms. Lear has not been deprived of all economic value of her property, this Court should remand the case for a proper takings analysis under the *Penn. Central* "ad hoc" test.

Dated: November 28, 2016

Respectfully submitted,

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