Team No. 6

IN THE 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.

On Appeal from the United States District Court
for the District of New Union

BRIEF OF FISH AND WILDLIFE SERVICE, Defendant–Appellant–Cross Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

All petitioners timely filed for appeal from a final decision of the United States District Court for New Union, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2012); *see Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 1. The United States District Court for New Union had jurisdiction because Cordelia Lear waived damages in excess of $10,000 against the United States and the lawsuit raises questions under the United States Constitution. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2012).

STATEMENT OF THE ISSUES

I. Is the takings provision of the Endangered Species Act, as applied to an intrastate population of the Karner Blue Butterfly, a valid exercise of Congress's Commerce Clause power?

II. Is Cordelia Lear's takings claim ripe, without having applied for an Incidental Take Permit under section 10 of the Endangered Species Act?

III. Is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?

IV. Assuming the relevant parcel is the Cordelia Lot, does the fact that the butterfly habitat will be naturally destroyed in ten years shield the FWS and Brittain County from a takings claim based upon complete deprivation of economic value of the property?

V. 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?

VI. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inhere in Cordelia Lear's title, thereby precluding Cordelia Lear's takings claim?

VII. Assuming the relevant parcel is the Cordelia Lot, did the district court err in applying joint and several liability where, independently, neither the ESA nor the Brittain County Wetlands Preservation Law would completely deprive the lot of economic value?

STATEMENT OF THE CASE

I. Facts

The Karner Blue Butterfly is an endangered species that was added to the federal endangered species list in December of 1992. Endangered and Threatened Wildlife and Plants: Determination of Endangered Status for the Karner Blue Butterfly, 57 Fed. Reg. 59,236, 59,242 (Dec. 14, 1992) (codified at 50 C.F.R. § 17.11 (2015)). The ideal habitat for Karner Blues are partially shaded lupine flowers near successional forests. *Id.* at 5. Karner Blues do not migrate, but, instead, lays eggs in the fall which spend the winter and then hatch in the spring; a second brood hatches later in the summer. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 6. Wild blue lupines are essential for the survival of Karner Blue larvae because they can only feed on the leaves of blue lupine plants, and Karner Blue larvae remain attached to blue lupines until they emerge from chrysalis as butterflies. *Id.* Thus, any disturbance of the lupines would result in the death of the butterflies. *Id.* Moreover, populations of Karner Blues have difficulty migrating to new habitats because they have short flight distances and, therefore, must follow woodland edge corridors. *Id.* at 6.

A subpopulation of the Karner Blue Butterfly is located on a ten-acre property known as the Cordelia Lot, which is on Lear Island in the state of New Union. *Id.* at 4–5. It is the only Karner Blue population in the state of New Union. *Id.* at 5. Lear Island is located within Lake Union and the island is two miles long by one-mile wide, consisting of approximately 1,000 acres in total. *Id.* at 4. Lake Union is a large interstate lake that has traditionally been used for interstate navigation. *Id.* at 4. The Cordelia Lot is situated at the northernmost tip of Lear Island and consists of an access strip, nine acres of open field, and one acre of emergent cattail marsh that was historically open water and used as a boat landing. *Id*. at 5. The open field has a significant amount of wild blue

lupines and is bordered by successional forest of oak and hickory trees—the ideal habitat for the Karner Blue. *Id*. As a result, the FWS designated the Cordelia Lot, with the exception of the cattail marsh, as critical habitat for the subpopulation of the Karner Blues in 1992. *Id.* at 6.

Originally, the entirety of Lear Island was granted to the Cornelius Lear, an ancestor of Cordelia Lear, in 1803 by an Act of the United States Congress, which was before New Union became a state. *Id.* at 4–5. Since the original grant, all of the island has remained within the Lear family, who have used it as a homestead, productive farm, and hunting and fishing grounds. *Id.* at 5. Eventually, Lear Island came into the possession of King James Lear who, in 1965, divided the lot into three parcels for each of his three daughters,[1] reserving a life estate in each lot for himself. *Id.* at 5. Prior to the division, King Lear obtained permission from the Brittain County Town Planning Board, who determined that each lot could be developed with one single-family residence. *Id.* After constructing a house on the Regan Lot, King Lear lived in the homestead on the Goneril Lot until he died in 2005, at which point each daughter obtained present possessory interests in their respective lots. *Id.* And while the Regan and Goneril Lots returned to their naturally forested state after agricultural operations ceased in 1965, the Lear family continued to mow the nine-acre open field on the Cordelia Lot each October, referring to it as "The Heath." *Id.*

In April 2012, Cordelia Lear contacted the New Union Fish & Wildlife Service (FWS) field office to inquire about the necessary permits and approvals for development of the Cordelia Lot. *Id*. at 6. Mr. Pidopter, the FWS agent, informed Ms. Lear that she would need to obtain an Incidental Take Permit (ITP) before she could develop the land and that she must also submit a Habitat Conservation Plan (HCP) along with an environmental assessment. *Id.* According to the

[1] The island was divided as follows: Goneril Lear was deeded the 550-acre Goneril Lot; Regan Lear was deeded the 440-acre Regan Lot; and Cordelia Lear was deeded the 10-acre Cordelia Lot.

FWS agent, an approvable HCP would require additional contiguous lupine habitat on an acre-for-acre basis and maintenance of the remaining habitat by annual mowing each fall. *Id.* Cordelia Lear investigated the cost of the ITP application and was informed by a third-party environmental consultant that it would cost $150,000. *Id.* The FWS later confirmed its stance in a letter inviting Ms. Lear to submit an application. *Id*.

Rather than pursue an ITP, Ms. Lear developed an alternative development proposal that would not disturb the lupine fields, by filling in the cattail marsh and building a causeway to the mainland. *Id.* at 7. However, Cordelia Lear could not obtain the necessary permit to fill the marsh because the Brittain County Wetland Preservation Law, enacted in 1982, only allowed permits to be issued for water-dependent uses. *Id.*

II. Procedural History

Consequently, in February 2014, Cordelia Lear commenced a lawsuit in the United States District Court for New Union against the FWS and Brittain County seeking, first, a declaration that the Endangered Species Act is an unconstitutional exercise of Commerce Clause power. *Id.* Alternatively, Cordelia Lear sought just compensation for a *Lucas* categorical taking. *Id.* The district court upheld the constitutionality of the Endangered Species Act, but it applied joint and several liability to find a compensable *Lucas* taking. *Id.* at 8, 12. All parties timely petitioned this Court for review. *Id.* at 1.

SUMMARY OF THE ARGUMENT

The United States District Court for New Union was correct in upholding the constitutionality of the Endangered Species Act (ESA), as applied to the Karner Blue Butterfly population on the Cordelia Lot, because it was a valid exercise of Commerce Clause power.

However, the district court erred in finding Cordelia Lear's taking claim was ripe for litigation and by holding that Cordelia Lear was entitled to compensation under the Fifth Amendment.

Commerce Clause. The Endangered Species Act is a constitutional use of legislative authority under the Commerce Clause because it creates a comprehensive scheme that maintains the current and future economic value of American ecosystems. Specifically, the "take" provision within the ESA directly impacts land development, scientific exploration, and ecotourism—all of which are economic and interstate in nature. Thus, even though this subpopulation of the Karner Blue Butterfly may be purely intrastate, its protection has a substantial aggregated economic effect.

Ripeness. Cordelia Lear's takings claim is not ripe because she has not applied for an Incidental Take Permit from the U.S. Fish and Wildlife Service (FWS). A landowner must exhaust administrative remedies before bringing a takings claim. Here, there was no final agency action and the FWS still had discretionary authority over ITP conditions, which could have provided for a more definite harm.

Categorical Taking. For a categorical taking, Cordelia Lear must show that the relevant parcel has been completely deprived of all economic value. The district court erred at multiple points in its takings analysis, and therefore the court wrongfully found a complete deprivation. First, the court erred in using only the Cordelia Lot as the relevant parcel, which falsely magnified the extent of economic deprivation. Lear Island has been in the exclusive possession of the Lear family since 1803 and the conveyances to Cordelia Lear and her sisters resulted in merely a fictional division. Thus, the entirety of Lear Island should be used as the relevant parcel, in which case the restrictions placed on the property by the ESA and Brittain County Wetlands Preservation Law do not completely deprive the property of economic value.

Second, assuming the relevant parcel is the Cordelia Lot, it cannot be completely deprived of economic value because section 9 of the Endangered Species Act will only apply for ten years, when butterfly habitat is naturally destroyed. The proper remedy for a temporary restriction on land is partial regulatory taking under *Penn Central*, which Cordelia Lear did not assert.

Third, a *Lucas* categorical taking is an extraordinary remedy limited to when there is "no productive or economically beneficially use" remaining in the property. The Brittain County Butterfly Society's offer of $1,000 in yearly rent is evidence that the property still maintains productive and economically beneficial uses, especially considering the temporary nature of the restrictions.

Fourth, public trust principles inhere in Cordelia Lear's title, which preclude a *Lucas* categorical taking. A landowner cannot claim compensation for land uses prohibited by background principles of nuisance and property law. Here, the land underneath Lake Union passed to the State of New Union and, therefore, New Union precedent defines the applicability and limits of public trust principles. The Brittain County Wetlands Preservation law is longstanding New Union precedent, and it prohibits Cordelia Lear from developing the cattail marsh. Thus, public trust principles preclude Brittain County's permit denial from factoring into the complete deprivation inquiry.

Finally, the court wrongfully applied the tort theory of joint and several liability to Cordelia Lear's takings claim. Joint and several liability is a tort remedy premised on the wrongful conduct of multiple defendants putting a plaintiff in the impossible position of proving which defendant caused the harm. In contrast to tort law, regulatory actions are distinct because governments must be able to exercise regulatory power for the public good. Thus takings jurisprudence exclusively balances a single regulatory action against its effect on the landowner's property. In effect, the

district court created a new cause of action, rather than merely shifting the burden of proof, and the district court's error must be corrected.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A CONSTITUTIONAL EXERCISE OF COMMERCE CLAUSE POWER BECAUSE ITS AGGREGATED EFFECTS HAVE A SUBSTANTIAL IMPACT ON INTERSTATE COMMERCE

A. Standard of Review

The New Union District Court's holding that the ESA is a valid exercise of Congress's Commerce Clause power is reviewed de novo. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1066 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003).

The constitutionality of the Endangered Species Act should be scrutinized under the rational basis standard of review. *United States v. Lopez*, 514 U.S. 514, 557 (1995); *see also Gonzales v. Raich*, 545 U.S. 1, 19 (2005). Constitutionality is presumed, and a congressionally enacted statute should only be invalidated upon a "plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (citing *Lopez*, 514 U.S. at 568, 577–78 (Kennedy, J., concurring); *United States v. Harris*, 106 U.S. 629, 635 (1883)); *cf. Ogden v. Saunders*, 25 U.S. 213, 270 (1827) ("It is but a decent respect due to the . . . legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.").

B. Argument

Congress derives its right to regulate interstate commerce from the United States Constitution, Article 1, Section 8, Clause 3, which permits Congress to regulate three broad categories of activity: (1) channels of interstate commerce, (2) instrumentalities of interstate

commerce, and (3) activities that have a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 558–59; *see also Raich*, 545 U.S. at 17; *Morrison*, 529 U.S. at 610. Here, the Endangered Species Act (ESA) purports to "conserve to the extent practicable" wildlife within the territory of the United States, thus the ESA's constitutional authority stems from its substantial effects on interstate commerce. 16 U.S.C. § 1531(a)(4) (2012); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1271 (11th Cir. 2007).

The established test to determine if a regulated activity has a substantial impact upon interstate commerce was established in *United States v. Lopez* and *United States v. Morrison*, and requires courts to analyze four factors: (1) the statute's relation to commerce or economic enterprise, (2) presence of an express jurisdictional element within the statute, (3) legislative history of express congressional finding regarding economic impacts on interstate commerce, and (4) the link between the activity at issue and its effect on interstate commerce. *Morrison*, 529 U.S. at 610–12; *Lopez*, 514 U.S. at 561–67. Under this analysis, courts must look at the aggregated economic effects of the Endangered Species Act, not the *de minimis* character of an isolated incident. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 630–32 (5th Cir. 2003); *see also Raich*, 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). An analysis of these factors and existing caselaw confirms that the district court did not err in upholding the ESA's constitutionality.

First, the Endangered Species Act creates a regulatory scheme that "bears a substantial relation to commerce." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011) (quoting *Raich*, 545 U.S. at 17). Commercial or economic activity is broadly interpreted. *Morrison*, 529 U.S. at 638. Thus an intrastate activity may have a direct relationship to commerce or, alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with

similar and related activity, can substantially affect interstate commerce." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 476 (5th Cir. 2016) (quoting *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002)). Under either pathway, the Endangered Species Act maintains a substantial relation to interstate commerce.

The text of the Endangered Species Act states that one primary goal of the Act was to regulate "economic growth and development," thus the statute is expressly related to economic enterprise and its relation to endangered species. 16 U.S.C. § 1531(a)(1) ("[V]arious species of fish, wildlife, and plants . . . have been rendered extinct as a consequence of economic growth and development . . . ."); *e.g.*, 16 U.S.C. § 1533(a)(1)(B) (2012) (using economic exploitation as factor for determination of endangered species status); 16 U.S.C. § 1538(a)(1) (2012). The economic enterprises regulated through the ESA come directly from its operative clauses, which prevent importing, possessing, selling, delivering, carrying, or taking any endangered species. *Id.* § 1538(a)(1). These terms directly and expressly regulate economic activity. *Id.* Thus, the Endangered Species Act directly regulates certain economic activities and clearly is related to economic enterprise. *Markle Interests, L.L.C.*, 827 F.3d at 476–77 ("[H]abitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA . . . ."); *see also Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1275–76.

A comprehensive regulatory scheme does not have to be *economic* in nature. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177. As long as the ESA is comprehensive and creates broad regulation, the economic impact of that regulation can be used when subjecting the act to constitutional scrutiny under the Commerce Clause. *Morrison*, 529 U.S. at 638; *Salazar*, 638 F.3d at 1177. It is clear from many court cases that the ESA provides for broad, comprehensive regulation of ecosystems. *See, e.g.*, *San Luis & Della-Mendota Water Auth.*, 638 F.3d at 1176

(listing the comprehensive nature of the ESA through other courts' decisions); *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1274; *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g*, 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). This is best stated in *Alabama-Tombigbee Rivers Coalition v. Kempthorne*: "Faced with the prospect that the loss of any one species could trigger the decline of an entire ecosystem, destroying a trove of natural and commercial treasures, it was rational for Congress to choose to protect them all." 477 F.3d at 1275. Thus, the first factor of the substantial effects test is met because the ESA creates a comprehensive regulatory scheme directly related to the commercial value of endangered species, the commercial value of ecosystems, and the directly related economic activity.

Second, although there is no express jurisdictional element within the "takings" statute, that factor is not outcome determinative and the ESA still passes constitutional muster. The controlling case, *Lopez*, does not require an express jurisdictional element. 514 U.S. at 561–62. In a case like this, "the absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." *See United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999); *see also United States v. Morales-De Jesus*, 372 F.3d 6, 14 (1st Cir. 2004); *Norton v. Ashcroft*, 298 F.3d 547, 557 (6th Cir. 2002); *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000); *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997); *United States v. Ahmed*, 94 F. Supp. 3d 394, 416–17 (E.D.N.Y. 2015). Thus, by meeting the other three factors in the substantial effects test, the ESA passes constitutional muster.

Third, the legislative history of the ESA indicates that Congress understood its significant interstate economic impacts. Congress reasoned that the Endangered Species Act would "permit the regeneration of that species to a level where controlled exploitation of that species can be resumed . . . otherwise it would have been completely eliminated from commercial channels." S. Rep. No. 91-526, at 3 (1970). Additionally, Congress failed to amend the definition of "take" in 1982 when it made amendments to other subsections of the statute, even though judicial decisions had applied the current definition to scenarios less obviously associated with commerce. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 9(b), 96 Stat. 1411, 1426 (1982) (codified as amended at 16 U.S.C. § 1538); *see, e.g.*, *Palila v. Hawaii Dep't of Land & Nat. Res*., 639 F.2d 495, 497–98 (9th Cir. 1981) (applying "take" provision to prevent state from maintaining feral sheep and goats in an endangered species' habitat). Thus, Congress understood this regulatory scheme to be economic in nature, satisfying the third factor in the substantial effects test.

Fourth, there is a strong link between regulated habitat modification and its effect on interstate commerce. As discussed above, "takings" under the Endangered Species Act are part of a class of activities established by the act in order to ensure continued economic value of wildlife. *See* 16 U.S.C. § 1538(a)(1). The restriction on "takings" directly impacts the three distinct interstate markets: housing and development, scientific research, and ecotourism.

The regulated activity under constitutional scrutiny within this case is "take," which is defined as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015). As *Lopez* stated, "[w]here a general regulatory scheme bears a substantial relation to commerce, the *de minimis* character of individual instance arising under that statute is

of no consequence." *Lopez*, 515 U.S. at 558. Thus, Appellant Lear's contention that the Endangered Species Act cannot regulate brush removal is focusing on the wrong activity. Here, analysis must be given to the aggregate effect of "take" as a whole definition. *See Rancho Viejo, L.L.C.*, 323 F.3d at 1072 (explaining why the aggregate of ESA's "takings" is allowed under *Morrison* analysis). The question then turns on whether the aggregated effects of "takings" substantially impacts interstate commerce.

The facts of this case highlight the economic nature of takings, specifically in the context of habitat modification. Habitat modification occurs when humans decide to develop protected land, thereby disrupting the current status quo of the ecosystem in order to obtain personal profit. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 692–93 (1995). The threat of habitat modification is one of the largest threats to the Karner Blue Butterfly, which is a central reason for the Karner Blue's listing as an endangered species. Endangered and Threatened Wildlife and Plants: Determination of Endangered Status for the Karner Blue Butterfly, 57 Fed. Reg. 59,236, 59,242 (Dec. 14, 1992) (codified at 50 C.F.R. § 17.11 (2015)). Cordelia Lear wants to build a home by modifying the Karner Blue's habitat, a goal that is economic in nature because such a project creates and uses economic wealth. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 4. Thus, by building a house and taking the Karner Blue habitat, Cordelia Lea would be directly engaging in interstate markets, which strongly supports upholding the ESA's constitutionality, here. *See, e.g*., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 271 (1964); *GDF Realty Invs., Ltd.*, 326 F.3d at 635, 640–41 (compiling cases and upholding the constitutionality of the statute, as applied to various cave species).

The Karner Blue Butterfly has inherent economic worth beyond its sale price. The Karner Blue Butterfly does have a sale price because is a rare species that is highly sought after in butterfly

collections, with its vibrant blue making it a desirable addition. Endangered and Threatened Wildlife and Plants: Determination of Endangered Status for the Karner Blue Butterfly, 57 Fed. Reg. 59,236, 59,242 (Dec. 14, 1992) (codified at 50 C.F.R. § 17.11 (2015)). Its economic value also extends into the future because it plays a critical role in biodiversity. The House best articulated this when debating the ESA noting that "the value of this genetic heritage is, quite literally, incalculable." H.R. Rep. No. 93-412, at 4 (1973). The diversity of species leads to economic advantages in scientific development, as genetic modification is common in our food production and advancement in modern medicine. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997); *see also Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1274; *Rancho Viejo, L.L.C.*, 323 F.3d at 1080.

One clear economic impact of the Karner Blue is its relation to ecotourism. During 2011, 71.8 million U.S. residents engaged in wildlife observation. United States Fish and Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 36 (2011). In doing so, they spent $54.9 billion, with 22.5 million individuals traveling away from home to participate in wildlife observation. U.S. Fish & Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 37 (2011). The general trend of wildlife viewing is increasing, with a nine-percent increase in total number of wildlife observers between 2001 and 2011. *Id.* at 52. Indeed, the Brittain County Butterfly Society offered to pay Cordelia Lear $1,000 per year in rent, if it were allowed to conduct tours on the property. *Id.* Thus, the Karner Blue has economic value both in the aggregate and in this specific instance.

In sum, Congress is afforded a high level of deference when it passes legislation. The takings provision of the ESA is a valid exercise of Commerce Clause power because it is an integral part of a comprehensive regulatory system, has a legislative history of Congress's

understanding of interstate commerce impacts, and the regulation directly ties into a variety of interstate commercial enterprises, such as ecotourism and scientific developments. Therefore, the ESA "takings" provision is a constitutional use of Congressional power and this Court should uphold the district court's decision on this issue.

II. CORDELIA LEAR'S TAKINGS CLAIM IS NOT RIPE BECAUSE SHE DID NOT RECEIVE A FINAL AGENCY DECISION AND THE FISH & WILDLIFE SERVICE STILL HAD DISCRETIONARY AUTHORITY

A. Standard of Review

Ripeness is a question of law that is reviewed de novo. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544 (4th Cir. 2013) (citing *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)); *see also Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1054 (Fed. Cir. 2015) (citing *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004)).

B. Argument

To establish Article III standing a plaintiff "must have suffered an injury in fact, meaning an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Cordelia Lear has not suffered an injury in fact because her harm is merely conjectural or hypothetical. By failing to apply for an ITP or engage in more significant discussion with the Fish and Wildlife Service (FWS), Cordelia Lear denied the FWS the opportunity to find feasible solutions to prevent the taking of a species while simultaneously allowing for the incidental taking of a habitat. *See* 16 U.S.C. § 1539 (2012). Thus, Ms. Lear's takings claim is not ripe for review.

A claim of 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." *Morris*, 392 F.3d at 1376 (quoting *Williamson Cty. Reg'l*

Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)). The process of applying for an Incidental Take Permit must be followed until it becomes clear that there will be no administrative relief. *See id.* at 1377. "This 'finality' requirement is compelled by the nature of the takings inquiry." *Id.* at 1376; *see also Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999) ("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." (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738–40 (1997)).

In evaluating if the regulations result in a taking there must be a "reasonable degree of certainty" in knowing what the limitations and costs will be to the Cordelia Lot. *See Morris*, 392 F.3d at 1376. "Where further administrative process could reasonably result in a more definite statement of the impact of the regulation, the property owner is generally required to pursue the avenue of relief before bringing a takings claims." *Id.* (citing *Greenbrier*, 193 F.3d at 1359). The FWS helps landowners in the pre-application phase by providing technical assistance, including site visits, evaluations of drafts, and development of mitigation strategies. U.S. Fish & Wildlife Serv., Endangered Species Permits: Explanation of the HCP Development Process, https://www.fws.gov/midwest/Endangered/permits/hcp/hcp_develop.html (last updated Apr. 14, 2015); *see, e.g.*, *Seiber v. United States*, 53 Fed. Cl. 570, 573 (2002) (discussing FWS offer to help plaintiffs modify application and expedite processing). By failing to apply for a permit or further engage with the local Fish and Wildlife Service, the FWS was denied the opportunity to pose and suggest alternative mitigation strategies that would have allowed all parties to avoid this litigation. Thus, Cordelia Lear's alleged harm has not been established with reasonable certainty because the

administrative process could have resulted in a "more definite statement of the impact of the regulation," and therefore her takings claim is not ripe for review. *See Morris*, 392 F.3d at 1376.

Furthermore, Cordelia Lear has not produced any evidence that her application for an ITP would be "futile." *See Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 4–7, 10. The "futility" exception to the finality rule does not apply unless the party claiming futility demonstrates that there is a very slim possibility or no possibility that the permit would be approved. *See Boise Cascade Corp. v. Bd. of Forestry*, 63 P.3d 598, 603 (Or. Ct. App 2003) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2002); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)). At no time did the FWS act as though they would not approve a proposal by Cordelia Lear. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 4–7. Further, the May 15 letter evidenced a willingness by the FWS to work with Ms. Lear to find a permissible way to develop the Cordelia Lot. *Id.* at 6. At the time Cordelia Lear brought this action, the FWS still had "discretion to exercise" over the Cordelia Lot, therefore the futility exception does not apply. *Suitum*, 520 U.S. at 739. In sum, Cordelia Lear denied the FWS its ability to exercise its discretion and coordinate a solution. Therefore, Ms. Lear's injury in fact is not concrete and, consequently, Cordelia Lear's takings claim is not ripe for review.

III. CORDELIA LEAR IS NOT ENTITLED TO COMPENSATION FOR A CATEGORICAL TAKING BECAUSE HER FEE SIMPLE ESTATE STILL RETAINS VALUE

Cordelia Lear bases her takings claim solely on the *Lucas* categorical taking rule, which requires payment of compensation to a landowner when a regulation deprives a property of "*all* economically beneficial uses." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 538 (2005) (quoting *Lucas,* 505 U.S. at 1019). The *Lucas* rule is a narrow exception to general regulatory takings jurisprudence and is

limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017). Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the balancing analysis applied in *Penn Central. Id.*; *see generally Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (establishing a balancing test for partial regulatory takings). To illustrate the narrowness of the rule and it limited application, only one ESA takings case has resulted in a compensable taking as of 2013. Robert Meltz, Cong. Research Serv., R31796, The Endangered Species Act (ESA) and Claims of Property Rights "Takings" 1–2 (2013) (citing *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001)). Likewise, Cordelia Lear cannot demonstrate that the Cordelia Lot has been completely deprived of value or use; indeed, she has not even sought reappraisal of the property following the alleged taking. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 7. Thus, this Court should reverse the district court and dismiss Cordelia Lear's takings claim.

A. Standard of Review

Whether a taking is a mixed question of law and fact. *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). Specifically, whether a taking has occurred and whether a taking is permanent are questions of law and are reviewed de novo. *Bass Enters. Prod. Co.*, 133 F.3d at 895; *see also Rogers v. United States*, 814 F.3d 1299, 1305 (Fed. Cir. 2015) (citing *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377 (Fed. Cir. 2008)); *Allegretti & Co. v. Cty. of Imperial*, 42 Cal.Rptr.3d 122, 127 (Cal. Ct. App. 2006). The underlying findings of fact are reviewed for clear error. *Bass Enters. Prod. Co*., 133 F.3d at 895.

B. Substance Over Form: All of Lear Island Is the Relevant Parcel

The District Court erred when it strayed from the "parcel as a whole" principle by accepting Cordelia Lear's conceptual severance argument, thereby using just the Cordelia Lot as the relevant parcel. This Court should use the entirety of Lear Island as the relevant parcel to better reflect the true character of the Lear family's ownership of the Lear Island, in which case there would be no complete deprivation for the temporary restrictions placed on the 1,000-acre island.

Under *Lucas*, a landowner must be completely deprived of all economically beneficial use of her property. *Lucas*, 505 U.S. at 1019. "The test for determining whether there has been a categorical taking of property requires the court 'to compare the value that has been taken from the property with the value that remains in the property.'" *Norman v. United States*, 63 Fed. Cl. 231, 252 (Fed. Cl. 2004) (citing *Forest Props., Inv. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)). The inquiry depends not only on the numerator (i.e., deprivation in value), but also on the court's determination of the denominator (i.e., relevant parcel) in the equation. *Lucas*, 505 U.S. at 1016 n.7; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

Despite the clear rule announced in *Lucas*, there is neither a bright-line rule nor an "'objective' way to define what the denominator should be." *Lucas,* 505 U.S. at 1054 (Blackmun, J., dissenting). However, the guiding principle, repeatedly espoused by the Supreme Court, is that courts must focus on "the parcel as a whole," not discrete segments of property. *E.g.*, *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." (citation omitted)); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978).

Thus, denominator caselaw "displays a flexible approach, designed to account for [the] factual nuances" in each case. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). "Above all, the relevant parcel should be functionally coherent," which involves considerations such as the dates of acquisition of property interests, the extent to which the parcel has been treated as a single unit, the extent to which the regulated lands enhance the value of the remaining lands, and the degree of contiguity between property interests. *Dist. Intown Props. L.P. v. District of Columbia*, 198 F.3d 874, 880 (D.C. 1999); *see also Cane Tenn., Inc. v. United States*, 62 Fed. Cl. 703, 709 (2004) (citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)). These considerations and relevant caselaw indicate that the entirety of Lear Island is the relevant parcel because it reflects the true character of the property.

To begin, Cordelia Lear obtained her interest in the land in 1965, when her father deeded the Cordelia Lot as a vested remainder in fee simple and reserved a life estate for himself. At first blush, this could suggest that the relevant parcel should be the Cordelia Lot, but when analyzing the remaining facts and considerations, it actually points to the entirety of Lear Island as the relevant parcel.

First, there is substantial contiguity between King Lear's ownership before the division, King Lear's possession during his life estate, and Cordelia Lear's possessory interest in the property. Contiguity must consider both the geographical dimensions of the property as well as the temporal contiguity of interests. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 331–32. The Cordelia Lot is immediately adjacent and, therefore, geographically contiguous with the Goneril Lot. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 6. Moreover, the Cordelia Lot is one of three subdivided parcels of Lear Island, which has been in the exclusive possession of the Lear family since 1803. *Id.* at 5. This is similar to the plethora of cases that treat

an entire development as the relevant parcel, not merely the acreage subject to restrictions. *See, e.g.*, *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (treating entire 2,280-acre development as relevant parcel, despite development in phases); *Forest Props., Inv. v. United States*, 177 F.3d 1360, 1365–66 (Fed. Cir. 1999) (treating all 62-acres as relevant parcel, even though permit denial only applied to 9-acres); *Warren Trust v. United States*, 107 Fed. Cl. 533, 565 (2012) (treating entire 18,000-acre property as relevant parcel, despite separate development and differing uses); *Deltona Corp. v. United States*, 657 F.2d 1184, 1188, 1193 (Ct. Cl. 1981).

In addition, Cordelia Lear's acquisition of ownership dovetails nicely with the contiguous interest consideration because her ownership is part and parcel with King Lear's. King Lear's reservation in life estate and Cordelia Lear's vested remainder "constitute[] one whole . . . carved out of the same inheritance, and both . . . vest at the same time and subsist together." Herbert T. Tiffany, 2 Tiffany Real Property § 319 (3d ed. West 2016). As recognized in *Resource Investments, Inc. v. United States*, "the 'whole' in 'parcel of a whole' include[s] temporal future interests as well as present possessor interests . . . recognized at common law." *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 477 (2009) (citing *Tahoe-Sierra Pres. Council*, 535 U.S. at 331–32). Thus, the court cannot ignore the shared ownership of the property and, while most contiguous parcel inquiries concern multiple lots owned by a single owner, unity of ownership is not dispositive because such a rigid rule would permit merely nominal divisions to defeat the true character of the property. *See Deltona Corp.*, 657 F.2d at 1193; *cf. City of Winston-Salem v. Tickle*, 281 S.E.2d 667, 674–75 (N.C. Ct. App. 1981) (treating vested remainder in fee simple as a substantial unity of ownership in state statutory inverse condemnation proceeding); *Calvert v. Denton*, 375 S.W.2d 522, 526 (1964) (finding subdivision of property a mere nominal division).

Second, the Cordelia Lot was not treated as an independent lot for any point in its existence. Where separate parcels are treated as a single economic unit, the parcels as a whole may constitute the relevant parcel. *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 700 (2004). Here, the entire island was treated as a single parcel from 1803 until 1965, and then continued to be treated as a single property from 1965 until 2005. Moreover, there is no evidence that Ms. Lear did anything with the property until she sought to build a single-family house in 2012. Property law encourages the property getting put to the highest and best use (e.g., economies of scale) and discourages the useless fragmenting of property; consistent with these fundamental principles, the Lear family should not be rewarded for an inefficient division of property that was never treated as a division. *See* John E. Fee, *Of Parcels and Property*, *in* Taking Sides on Takings Issues, at 114–15 (2002). In sum, the entirety of Lear Island should be used as the relevant parcel, and, consequently, this Court should reverse the district court and deny Cordelia Lear's categorical takings claim.

C. The FWS and Brittain County Are Shielded from a Takings Claim Based upon a Complete Deprivation of Economic Value

i. The 10-Year Temporary Development Restriction Does Not Completely Deprive the Fee Simple Estate of Value

Cordelia Lear has packaged her takings claim solely as *Lucas* categorical taking, therefore she must demonstrate that the ESA has entirely eliminated the value of her fee-simple estate. *Tahoe-Sierra Pres. Council*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1017. Cordelia Lear has failed to meet this high burden because the ESA will only apply for a limited number of years, until the Cordelia Lot returns to its naturally forested state. *Tahoe-Sierra Pres. Council*, 535 U.S. at 330; *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 7. At that point, the property will regain any significant value that may have been lost during the imposition of the regulation, if not the full value.

In determining whether value remains in a property, courts are required to examine property as a whole. *Tahoe-Sierra Pres. Council*, 535 U.S. at 331. This examination includes the potential use of the property over time. *Tahoe-Sierra Pres. Council*, 535 U.S. at 331–32; *see also* Daniel L. Seigel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 483 (2010). A temporary restriction on the use of land does not render property valueless because the property will regain value as soon as the regulation is no longer in effect and the prohibition is lifted. *Tahoe-Sierra Pres. Council*, 535 U.S. at 332. Indeed, the Supreme Court has expressly rejected the argument that a temporary restriction can completely eliminate economic value. *Id.* at 330.

Other courts have similarly denied recovery for a *Lucas* categorical taking where the restriction applied only temporarily. For example, in *Seiber v. United States*, the Federal Circuit determined there was not a categorical taking because, in evaluating the property as whole, the economic impact of the regulation did not permanently deprive the property of its entire value. *Seiber v. United States*, 364 F.3d 1356, 1367–68 (Fed. Cir. 2004). Applying *Seiber* to the facts at hand, the temporary economic impact of the ESA on the Cordelia lot does not completely deprive the entire property of its value. *Id.* Moreover, the $1,000 of yearly rent is evidence of the economic value that could be generated by the property in promoting some form of eco-tourism while the restriction is in place. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 7. Therefore, Cordelia Lear could receive some remuneration for 10-years and then, when the ESA restrictions are lifted, develop the property. This is not a complete deprivation in value.

For purposes of a *Lucas* analysis, some courts have distinguished between retrospective temporary regulations and prospective temporary regulations. *E.g.*, *Res. Invs., Inc.,* 85 Fed. Cl. at 476; *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992);

Williams v. City of Central, 907 P.2d 701, 705 (Colo. Ct. App. 1995). In contrast to prospectively temporary regulations, which at the outset are intended to be temporary, retrospective temporary regulations are initially intended to be permanent but are subsequently rescinded. Seigel & Meltz, *supra* at 496. Retrospective temporary takings are considered to leave open the door for a categorical takings claim because, when a restriction is intended to be permanent, its economic impact at the time of its imposition will be more onerous than a temporary regulation. *Id*. at 497; *see also Lucas*, 505 U.S. at 1012.

While the ESA applies for an indefinite amount of time, it only applies as long as Cordelia Lear continues to mow "The Heath," which, in the absence of a permit, she is under no obligation to do. Therefore, the ESA does not place the same onerous economic burden on Cordelia Lear as a permit requiring Cordelia Lear to maintain the existing habitat. *See Bass Enters. Prod. Co. v. United States*, 54 Fed. Cl. 400, 401–02 (2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004); *see also Leon Cty. v. Gluesenkamp*, 873 So.2d 460, 463 (Fla. Ct. App. 2004). Thus, the regulation is intended from the outset to be temporary, and Cordelia Lear will recoup some, if not all, of the economic benefit of the property once the ESA no longer applies. For this reason, Cordelia Lear has failed to demonstrate she will suffer a complete deprivation of economic benefit from the property and this Court should reverse the district court.

ii. The Offer of $1,000 in Yearly Rent Demonstrates That Cordelia Lot Retains Value Even with ESA Restrictions

The Brittain County Butterfly Society has offered Cordelia Lear $1,000 in yearly rent in exchange for the ability to conduct private tours on the property. This demonstrates that the property retains inherent economic value even with the associated ESA restrictions. *Lucas*, 505 U.S. at 1017. Therefore, Cordelia Lear has not suffered a complete deprivation of economic value and is not entitled to compensation under her *Lucas* categorical takings claim.

Regulatory takings doctrine has long established that determining whether a regulation goes too far depends upon the particular facts. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Determinations of liability in regulatory takings cases are "essentially ad hoc, factual inquiries" that require "complex factual assessments of the purposes and economic effects of government actions." *City of Monterey*, 526 U.S. at 720 (quoting *Lucas*, at 1015; *City of Escondido v. Yee*, 503 U.S. 519, 523 (1992)). Therefore, to determine whether Cordelia Lear has suffered a categorical taking, an assessment of the ESA and its economic impact on the property is required.

In making this assessment, the offer of $1,000 in yearly rent is evidence that the Cordelia lot has not been completely deprived of its economic value. The rental offer is a clear demonstration of the lakeside property's value, including potential resale value even with the development restriction. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring). A complete economic deprivation is not just a difficult proposition for the plaintiff to assert, it is nearly impossible. *See id.* (expressing doubt as to whether a beachfront lot could ever lose all of its value because of a development restriction).

Admittedly, the $1,000 per year in rent is by no means a large amount, or close to what the property might command on the rental market without restrictions. But while lower courts interpreting *Lucas* have applied the categorical rule to parcels retaining economic value that was *de minimis* in nature, the Supreme Court in *Tahoe-Sierra Preservation Council* held that *Lucas* was "limited to the 'extraordinary circumstance when no productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra Pres. Council*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017); *see also Loveladies Harbor, Inc*, 28 F.3d at 1181–82. The Supreme Court's adherence to a strict interpretation of "no productive or economically beneficial use" is made clear in *Palazzolo*

v. Rhode Island, where a 93% loss in value was insufficient to trigger Lucas because the landowner was left with value attributable to economic uses. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). Similarly, the rental offer provides sufficient evidence of the remaining value of the Cordelia lot attributable to economic uses because it demonstrates the willingness of parties to pay for the preservation of the habitat.

Cordelia Lear will likely point to the Federal Circuit's decision in *Lost Tree Village Corp. v. United States*, which ruled that only *economic* value should be considered when applying *Lucas*, and that a parcel's residual environmental value should be disregarded. *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117–18 (2015). However, this case is distinguishable because the Cordelia Lot's residual environmental value is capable of producing economic value, evidenced by the rental offer. *See id.* Speculative land uses are not considered in a takings inquiry, but the $1,000 offer in yearly rent is not speculative, rather it is tangible evidence of economic value. *Id.* at 116; *see Olson v. United States*, 292 U.S. 246, 257 (1934) (speculative land uses are not considered in a takings inquiry).

In sum, the $1,000 offer in yearly rent from the Brittain County Butterfly Society and the temporary nature of the ESA restrictions preclude Cordelia Lear from successfully claiming a complete deprivation under *Lucas* because both facts demonstrate that she currently may derive benefits and will be able to derive benefits from her ownership of the lot in the future. *Lost Tree*, 787 F.3d at 116; *see, e.g.*, *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984) (logging); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (landfilling); *United States v. Fuller*, 409 U.S. 488 (1973) (livestock grazing). Therefore, this Court should reverse the district court and find that there is no complete economic deprivation.

D. Public Trust Principles Inherent in Cordelia Lear's Title Preclude a Takings Claim Based on the Denial of the County's Wetland Permit

When a regulation implicates the *Lucas* categorical rule, the government can avoid the duty to pay compensation if it can prove that the proscribed interests were not a part of the title to begin with. *Lucas*, 505 U.S. at 1027; *see also* Carole N. Brown, *The Categorical Lucas Rule and the Nuisance Exception*, 30 Touro L. Rev. 349, 349 (2014). This requires the government to demonstrate that the regulatory action's results could have been achieved judicially, under a state's "background principles of nuisance and property law." *Lucas*, 505 U.S. at 1031. Such background principles serve as a defense to a plaintiff's takings claims, and may include: nuisance, and common law doctrines such as customs and the public trust. *See Palazzolo*, 533 U.S. at 629–30; Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. Envtl. Aff. L. Rev. 421, 429 (2005).

The background principle of property law that allows the denial of the wetland permit to Cordelia Lear is the long held doctrine of property law known as the public trust, which establishes that the state holds certain property in trust for the public. *See Illinois Cent. RR. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 475–78, 556–57 (1970). Thus, if Cordelia Lear's land under Lake Union is considered public trust land, it is subject to the government's right to take action in the public's interest. *See Summa Corp. v. California ex. rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984).

While the United States did not recognize any public trust rights in non-tidal navigable waters such as Lake Union at the time of the 1803 grant, the district court's analysis is misplaced. It is correct that in 1803 public trust rights were only extended to navigable tide-water and not non-tidal navigable waters; however, this distinction was done away with in *Illinois Central*

Railroad Co. v. Illinois. 146 U.S. 387*,* 435 (1892). Thereafter, if a body of water was determined to be navigable in fact when a state entered the union, the land underneath that water became a part of the public trust, allowing title to pass to the state. *Id.*

If it is determined that the adjacent portion of Lake Union was or is navigable in fact, then the land underneath that portion passed would have passed to the State of New Union in trust upon entering statehood. *See id*. To be navigable in fact, this portion of Lake Union must be used, or susceptible of being used, in its ordinary condition, as a highway for commerce over which trade and travel may be conducted in the customary modes of trade and travel on water. *P.P.L. Montana L.L.C. v. Montana*, 132 S. Ct. 1215, 1227–28 (2012). And under the equal footing doctrine, which ensures new states enter the union with the same rights and privileges as those before it, navigability is determined at the time of statehood and is based on the natural and ordinary condition of the water. *Id*.

The portion of Lake Union that Cordelia Lear owns meets the requirements of the navigable in fact test; therefore, upon entering the Union the state of New Union received ownership of the land. *Phillips Petrol. v. Mississippi*, 484 U.S. 469, 476 (1988). Lear Island was used as a productive farm, and produce was carried by boat from the island to the mainland. *Lear v. U.S. Fish and Wildlife Serv.*, No 112-CV-2015-RNR, slip op. at 5. Furthermore, the portion of the lake in question that is now emergent cattail marsh was historically open water and used as a boat landing. *Id.* Assuming New Union entered into statehood while these conditions still existed, that portion of the lake would have been susceptible for use as a highway for commerce in its natural and ordinary condition. *P.P.L. Montana L.L.C.*, 132 S. Ct. at 1227–28. Even if this portion of the lake was not still actually being used for transportation of goods from the island, it only must be susceptible to use as route for commerce to pass the navigability test, regardless of any

actual or lack of use. *United States v. Utah,* 283 U.S. 64, 83 (1931). Therefore, title of the land underneath Lake Union would have passed to New Union upon entering statehood and public trust principles can apply.

While the District Court asserted that they could not find applicable New Union precedent defining the scope of New Union's protections for public trust waters, they failed to recognize the Brittain County Wetland Preservation Law. Each individual state is entitled to define the limits and scope of their respective trust doctrines. *Phillips Petrol.*, 484 U.S. at 483. New Union has defined preserving wetlands adjacent to navigable waterways as being a part of their public trust doctrine by acquiescing to the Brittain County Wetland Preservation Law. This law was enacted in 1982, which indicates that for thirty-four years the legislature of New Union has seen no need to pre-empt or contradict a law that aims to protect and preserve wetlands. Therefore, the law is neither newly legislated nor decreed. *Lucas*, 505 U.S. at 1029.

Neither the Supreme Court, nor a court of the State of New Union has yet to define whether the source and scope of a state's public trust principles come from the state's constitution, statutes, common-law, or are a fundamental attribute of state sovereignty. *See* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. Davis L. Rev. 665, 686 (2012). Therefore, while the district was correct in asserting that no common law precedent existed establishing the scope of New Union's protections for public trust waters, they erred by not considering other sources of law by which to judge the scope. *See Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

As is correctly noted by the district court, Brittain County's equal footing argument holds no merit if the prior clear congressional grant of title to Lear was valid. There is no doubt that under the Constitution the Federal Government can defeat a prospective State's title to land under

navigable waters by a pre-statehood conveyance of the land to private party for a public purpose appropriate to the territory. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). However, the Court interpreted the congressional policy to grant away land under navigable waters only "in case of some international duty or public exigency." *Id.* (quoting *Shively v. Bowlby*, 152 U.S. 1, 50 (1894)). The Court has applied those principles a number of times, consistently acknowledging congressional policy to dispose of sovereign lands only in the most unusual circumstances. *Id.* Despite Congress's clear intention to grant away the land under the navigable waterway of Lake Union, no international duty or public exigency existed to justify such a grant. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Furthermore, when Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. *Utah Div. of State Lands,* 482 U.S. at 202. This requires the grant to affirmatively intend to defeat a future state's title to any such reserved land. *Idaho v. United States*, 533 U.S. 262, 273 (2001). There is no evidence suggesting Congress intended to defeat a future state's title to the submerged land. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87–90 (1918). Therefore, the title of the land beneath the portion of Lake Union in question belongs to the state of New Union and public trust principles would apply.

E. Joint and Several Liability is Entirely Incongruent with *Lucas* Categorical Takings

The district court's application of a joint and several liability to a categorical taking is misplaced. First, the court relied on a case that has since been abrogated in all but the most exceptional of circumstances after Tennessee followed the rest of the country in adopting comparative fault. *Barnes v. Kerr Corp*., 418 F.3d 583, 588–89 (6th Cir. 2005); *see also McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) ("[T]oday's holding renders the doctrine of joint and

several liability obsolete."). But most importantly, joint and several liability is a tort theory that is entirely incongruent with regulatory takings because there was no tortious conduct, joint and several liability cannot be reconciled with the Supreme Court's takings analysis, and, finally, joint and several liability was inappropriately used to create a cause of action.

i. *The FWS Never Acted Tortiously and a Categorical Taking under* Lucas *is Not Based in Tort*

The rule relied on by the New Union District Court was premised on conduct sounding in either negligence or nuisance,[2] neither of which are present here. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 343–34 (1976). Cordelia Lear does not allege any negligent or tortious conduct by FWS, but instead she brings a *Lucas* categorical takings claim based on the prohibitions of section 9 of the Endangered Species Act. In stark contrast to unreasonable conduct, the interference with Cordelia Lear's property rights arose from a "public program adjusting the benefits and burdens of economic life to promote the common good." *See Tahoe-Sierra Pres. Council*, 535 U.S. at 324–25 (quoting *Penn Cent. Transp. Co.,*, 438 U.S. at 124).

As the Supreme Court clarified in *Lingle v. Chevron U.S.A., Inc*., there are four types of inverse takings: (1) permanent physical invasions, (2) categorical regulatory takings, (3) partial regulatory takings, and (4) land-use exactions. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 538 (2005). However, only a small subset of takings claims can be analogized to tort—physical invasions—which are based on trespass, nuisance, or some other tortious conduct. *See Ridge Line,*

[2] The rule relied on by the district court was adopted in *Velsicol Chemical Corp. v. Rowe* and states: "Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit." *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 342–43 (1976) (quoting *Landers v. East Texas Salt Water Disposal Co*., 248 S.W.2d 731, 734 (Tex. 1952))).

Inc. v. United States, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003) (compiling physical invasion cases); *see also* Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1336–37 (1991) (discussing the limits of the symmetry between torts and takings claims). Even still, the alleged tortious conduct must rise to the level of a taking before it can become compensable. *Ridge Line, Inc.*, 346 F.3d at 1355–56. Despite the commonality of a compensable taking, physical takings are not analogous to regulatory takings; indeed, the Supreme Court has expressly stated that it "do[es] not apply . . . precedent from the physical takings context to regulatory takings claims." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323–24.

The only significant discussion of a non-physical invasion taking sounding in tort was dicta in Justice Kennedy's plurality opinion in *City of Monterey v. Del Monte Dunes at Monterey, Ltd*. 526 U.S. 687, 711–18 (1999). The issue in that case was whether the plaintiff was entitled to a jury trial on a section 1983 claim. *Id*. at 693. In his plurality opinion, Justice Kennedy reasoned that a section 1983 action against a city for failure to issue a permit sounded in common-law tort and, therefore, the plaintiff was entitled to a trial by jury. *Id.* at 711. Nevertheless, Justice Kennedy did not cite any regulatory takings cases in support of his argument. *Id.* at 715–16. Thus, *City of Monterey* is entirely distinguishable as both addressing an entirely unrelated legal question and also as unpersuasive dicta.

However much Cordelia Lear and the district court argue for use of a tort theory, Cordelia Lear did not bring a claim for a permanent physical invasion or any claim that could arguably be premised on some sort of tortious conduct. Rather, Cordelia Lear brought a claim for a *Lucas* categorical taking, premised solely on section 9 of the Endangered Species Act completely depriving the Cordelia Lot of its economic value. There was no affirmative conduct, affirmative duty to act, or, for that matter, any unreasonable conduct by FWS.

ii. *Longstanding Regulatory Takings Jurisprudence Focuses Solely on a Single Regulatory Action*

Combining regulations under a joint and several liability claim is entirely inconsistent with regulatory takings jurisprudence, which is centrally focused on whether a *single* regulation has deprived the landowner of all economic use. The district court's holding drastically extended existing precedent beyond its limitations.

In the Supreme Court's seminal case of *Pennsylvania Coal Co. v. Mahon*, Justice Holmes famously recognized the government's important role in protecting and improving the public condition, and thus concluded that only where regulatory action goes "too far" will it be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922). The Supreme Court has consistently reaffirmed that this inquiry relates to a singular regulatory action. *See, e.g.*, *Palazzolo*, 533 U.S. at 617–18; *Lucas*, 505 U.S. at 1015. For example, in the partial regulatory taking arena, the Court has committed itself to this principle by creating the three-pronged test in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104, 124 (1978). In the exaction arena, the government's regulatory action must have a "nexus" between the relinquishment and the government's demand, and the tradeoff must also be "roughly proportional." *Koontz v. St. Johns River Water Mgmt. Dist*., 133 S. Ct. 2586, 2600 (2013). It is a heavy factual inquiry to balance the government's interest in the specific regulation against that regulation's effects on the landowner, as the ultimate goal is to identify only those regulations that are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *See Lingle*, 544 U.S. at 538–39; *see also Palazzolo*, 533 U.S. at 617–18.

"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." *Penn. Coal Co.*, 260 U.S. at 413. And, "[l]and-use regulations are ubiquitous and most of them impact property values in some

tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford." *Tahoe-Sierra Pres. Council*, at 535 U.S. 324.

In effect, applying joint and several liability to regulatory takings allows a landowner to strategically bring a categorical takings claim when the combination of multiple regulations would completely deprive the property of economic value, even though the individual regulatory actions would be independently insufficient to find a complete taking. This argument is entirely inappropriate given the ubiquity of land use regulations at the federal, state, and local level. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 323 n.17, 324–25. Such a rule would be prohibitively expensive and discourage regulatory action or the enactment of laws in favor the public good that might have even the slightest impact on private property. *Id.* at 324–25; *cf. Id.* at 335 ("A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication."). Moreover, a *Lucas* categorical taking is the most extraordinary remedy for a landowner, and this court should not affirm a rule that allows landowners to bypass the general rule of law for what is intended to be a narrow exception. *See id.* at 337–39.

Such an erroneous rule would have profound effects on the FWS because the ESA takings provision applies nationwide and, as illustrated by the FWS funding for the Endangered Species program, the annual budget is tight—$175,955 in 2012. Eugene H. Buck et al., Cong. Research Serv., The Endangered Species Act (ESA) in the 112th Congress 21 (2012). If joint and several liability is the rule going forward, the FWS would be at a severe disadvantage because there is no way to know when a takings claim might arise. Thus, the unpredictable threat of large payouts to

landowners, like Cordelia Lear, would have the effect of chilling government regulation, such as FWS's future implementation of the ESA.

iii. *Joint and Several Liability Was Only Intended to be an Evidentiary Burden Shifting Mechanism*

Finally, the district court's joint and several liability rule was designed, originally, to be an evidentiary burden shifting mechanism for causation, where a plaintiff would have the impossible burden of showing which specific defendant contributed to which specific harm. *Velsicol Chem. Corp.*, 543 S.W.2d at 343; *Landers v. East Tex. Salt Water Disposal Co*., 248 S.W.2d 731, 734 (Tex. 1952); *Michie v. Great Lakes Steel Division, Nat. Steel Corp.*, 495 F.2d 213, 216 (6th Cir. 1974). Fundamentally different, the defendants in *Velsicol Chem. Corp.*, *Landers*, and *Michie* would otherwise have been liable to the plaintiffs because they tortiously caused compensable harms. But-for the impossible burden of proof, they would have been held liable. In stark contrast, neither FWS nor Brittain County would be held "liable" to Cordelia Lear in the absence joint and several liability. In effect, the district court's application of joint and several liability created a new cause of action, which the rule was never intended to do.

CONCLUSION

To sum, section 9 of the Endangered Species Act is a constitutional exercise of Commerce Clause power, as-applied to the subpopulation of the Karner Blue Butterfly on the Cordelia Lot, because the Karner Blue and the takings provision have a substantial aggregated economic impact on interstate commerce. *See* 16 U.S.C. § 1538(a)(1)(B) (2012).

However, Cordelia Lear does not have a valid categorical takings claim. First, her claim is unripe because she did not file an application for an ITP or attempt to work with the FWS to find alternative solutions. Thus, the harm to the Cordelia Lot is not reasonably certain at this time. Second, the Cordelia Lot has not been deprived of complete economic value because the

ESA restrictions only apply for a temporary time period, there are other economic uses of the property that will mitigate her losses during that temporary time period, and public trust principles preclude her from claiming deprivation for Brittain County's permit denial. Finally, joint and several liability is incongruent with this *Lucas* categorical taking because there was no tortious conduct, and regulatory taking jurisprudence focuses on solely on a single regulatory action and its effect, not the aggregated effect of multiple regulatory actions.

Thus, this Court should uphold the New Union District Court's ruling on the Endangered Species Act's constitutionality. However, because the District Court for New Union erred in defining the relevant parcel, analyzing complete deprivation under *Lucas*, and applying the tort theory of joint and several liability to a takings claim, this Court should reverse the district court and dismiss Cordelia Lear's Fifth Amendment takings claim.