Docket No. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Appellant,

and

BRITTAIN COUNTY, NEW UNION,

Appellant.

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

No. 112-CV-2015-RNR, Judge Romulus N. Remus

INITIAL BRIEF For APPELLANT

UNITED STATES FISH AND WILDLIFE SERVICE,

STATEMENT OF THE ISSUES:

I. Is the ESA a valid exercise of Congress's Commerce power in this case when application to a wholly intrastate population of butterfly is necessary and proper to enforce the broader statutory scheme?

II. Is Lear's takings claim ripe without ever submitting to final agency action and applying for an ITP under ESA §9?

III. For takings analysis, is the relevant parcel the entirety of Lear Island when the island was granted to the Lear family as one parcel, was subdivided into three parcels 162 years later, which were deeded back to same owner until his death 40 years later?

Issues 4 through 7 all assume the relevant parcel is the CORDELIA LOT only

IV. Does the temporary nature of the restriction shield FWS from liability when the natural destruction of the Karner Blue habitat in up to ten years would remove all ESA encumbrance on the Cordelia Lot.

V. Does an offer to pay $1,000 annual rent preclude a claim of complete loss of economic value when the offer was unsolicited by Lear and that amount decreases the yearly tax burden by 66%?

VI. Do public trust principles preclude a takings claim based on a denial of a county wetlands permit when the alternate development plan for the Cordelia Lot was for a water adjacent use?

VII. Is FWS liable for complete deprivation of economic value when Ms. Lear affirmatively protected the butterfly habitat for seven years and an unsolicited offer to offset the property's annual tax burden existed?

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The ESA is a valid exercise of Congress's Commerce Clause power, and the Necessary and Proper Clause guides the statute's reach to protect an intrastate population of protected butterfly. Accordingly, the ESA is a proper regulation of the use of the channels of interstate commerce and a proper regulation of activities that substantially affect interstate commerce.

Because Ms. Lear never applied for an ITP to begin building, her Fifth Amendment takings claim is non-judiciable for lack of ripeness. There was no sign in the record that an ITP application would have been futile or pointless, and there was no excessive administrative delay that would have absolved Ms. Lear of a responsibility to file a meaningful application.

The proper timeframe for the relevant parcel analysis is when the already-present population of Karner Blues was listed under the ESA. Because the island was still under a single owner at that time, the relevant parcel for takings analysis is the entirety of Lear Island.

The Karner Blue habitat is fragile and exists because the Lear family has been annually mowing the lot for decades. Without the active intervention of Ms. Lear, the natural destruction of the Karner Blue habitat would occur within ten years. Therefore, the regulatory effect on the Cordelia Lot is temporary and does not completely deprive the property of economic value.

The presence of an endangered species under the ESA necessarily sets the upper bounds for Ms. Lear's development expectations. Accordingly, without a reasonable expectation to build a home on the lot she was left with a yearly tax burden. The offer to pay $1,000 in rent per year offset that burden by 66% and therefore precludes a claim for complete loss of economic value.

Because Ms. Lear sought to fill the wetlands for a water-adjacent use, public trust principles inherent in title preclude Ms. Lear's takings claim. Federal Court precedent has used public trust to defeat claims based on a water-adjacent use, but have yet to do so for a water-dependent use.

The offer to pay rent for butterfly viewing also shows that there is an economically viable use to the property outside a residential home. The destruction of a single strand in a bundle of rights does not sever the bundle. Ms. Lear retains the right to exclude from her property and charge admittance. Therefore, there has not been a complete deprivation of economic value.

STATEMENT OF THE CASE

I. STATEMENT OF JURISDICTION:

This case is properly before this court because Ms. Lear waived any damages in excess of $10,000 in her takings claim against the United States of America. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987). Because Ms. Lear's right to relief necessarily depends on questions of federal law, including the takings clause of the U.S. Constitution, ESA § 9 and ESA § 10, it is appropriate for federal review. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986); 28 U.S.C. § 1331. This appeal is from a final order or judgment that disposes of all parties' claims.

II. STATEMENT OF FACTS:

Located in Brittain County, Lear Island covers 1000-acres and sits in the middle of Lake Union, a large lake traditionally used for interstate navigation. R. at 4. An Act of Congress gave Cornelius Lear title in fee simple absolute to the entirety of Lear Island in 1803. R. at 4. The descendants of Cornelius Lear have occupied Lear Island continuously since the congressional grant, using the island to homestead. R. at 5. At times in the 19th Century the homestead was a functioning and productive farm, carrying produce by boat to the mainland for sale. R. at 5.

In 1965 the entire island was owned by King James Lear, a descendant of Cornelius Lear. R. at 5. As part of an estate plan, Mr. Lear separated the island into three parcels to be passed to his three daughters after his life estate expired. R. at 5. The first lot consisted of 550-acres and was

to be inherited by Goneril Lear, and the second lot consisted of 440-acres and was left to Regan Lear. R. at 5. The third and final plot of land consisted of only 10 acres, and was left to Cordelia Lear. R. at 5. When King James Lear died in 2005 the daughters took possession of their deeded properties. Seven years later Cordelia Lear decided to build a home on her 10-acre plot. R. at 5.

The Cordelia Lot, located at the northern tip of Lear Island, consists mostly of an open field covering 9-acres known as "The Heath" connected to an access strip measuring 40 feet wide and 1,000 feet long. R. at 5. Additionally, there is 1-acre of emergent cattail marsh located in a cove formerly used as a boat landing that was historically open water. R. at 5. The majority of Lear Island was naturally wooded, but The Heath was kept open by annual mowing each October. R. at 5. Because of this annual mowing, wild blue lupine flowers grow to cover The Heath and connected access strip each year. R. at 5.

Karner Blue butterflies were added to the Federal Endangered Species List in December of 1992. Although there are other populations of Karner Blues that survive in other states, the only viable population of this beautiful blue butterfly in New Union can be found at The Heath on Lear Island. R. at 5. Karner Blues do not migrate to survive the winter. R. at 5-6. The butterflies lay eggs in the fall that lie dormant through the winter and hatch once spring returns, with another brood hatching in the summer. R. at 6.

The ideal habitat for Karner Blues consists of partially shaded lupine flowers near successional forests. R. at 6. The larvae, once hatched, remain attached to the leaves of the lupine flowers until their metamorphosis and any disturbance of the habitat during this crucial phase would result in the death of the butterflies. R. at 6. Once established in a habitat, Karner Blues cannot migrate to new territory. R. at 6. Accordingly, the Fish & Wildlife Service ("FWS") designated The Heath as a critical habitat for the New Union subpopulation of Karner Blues in

1978. R. at 6. Without the traditional annual mowing the lupine fields constituting the Heath would eventually be subsumed by the surrounding successional forests, thereby eliminating the habitat of the Karner Blue butterfly on Lear Island. R. at 7. This process would take ten years, by which point the only population of Karner Blues in New Union would be extinct. R. at 7.

In April of 2012 Cordelia Lear contacted the FWS to inquire whether development on her property would require any permits R. at 6. She was advised by a FWS agent that any disturbance of the lupine field other than the yearly mowing would constitute a "take" of the endangered butterfly under §9 of the Endangered Species Act ("ESA"). R. at 6. The Agent informed Ms. Lear that under §10 of the ESA she could obtain an Incidental Take Permit ("ITP"), R. at 6. The Permit would require contiguous lupine habitat to replace any land that was developed on an acre-for-acre basis as well as maintenance of the lupine fields each fall. R. at 6. Ms. Lear's sister owns the land contiguous to the Heath. R. at 6. She is estranged from Ms. Lear and has so far refused to consider any encumbrance to her property. R. at 6. According to an environmental consultant, the application for an ITP to develop on the Cordelia Plot would cost around $150,000. R. at 6.

Rather than engage in the application process for an ITP, Ms. Lear instead developed an alternate development proposal ("ADP") that sought to fill one half-acre of the old boat landing to create a butterfly-free building site. R. at 7. The ADP would create a roadway connection to the main causeway connecting the island to the mainland, thereby leaving the critical Heath access strip undisturbed. R. at 7. No federal approvals were required for the ADP. R. at 7.

A permit for the ADP was required by the county, the application to be approved by the Brittain County Wetlands Board ("Board") pursuant to the 1982 Brittain County Wetland Preservation Law. R. at 7. Ms. Lear submitted her permit application to the Board in August 2013, and in December 2013 the permit was denied on the grounds that permits to fill wetlands could

only be granted for a water-dependent use, for which a residence did not qualify. R. at 7. The fair market value of the Cordelia Lot, free of any encumbrances or restrictions that would prevent development of a home on the property, is $100,00. R. at 7. Property taxes are approximately $1,500 annually, and there is no market in Brittain County for a parcel such as the Cordelia Lot that cannot be used for to residential, agricultural, or silvicultural purposes. R. at 7. The Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly outings in The Heath. R. at 7.

III. PROCEDURAL HISTORY & RULINGS FOR REVIEW:

Ms. Lear commenced this action in February of 2014 seeking a declaration that section 9 of the Endangered Species Act ("ESA") was unconstitutional, or alternatively, that she is entitled to just compensation from both the FWS and Brittain County for a regulatory taking of her property. R. at 7. A seven-day bench trial was held before the US District Court for the District of New Union. R. at 4. The Court's judgment consisted of the following: (1) Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of legislative power was dismissed; (2) damages of $10,000 in Lear's favor against the FWS for an unconstitutional taking of her property were awarded; and (3) damages in the amount of $100,000 against Brittain County for an unconstitutional taking of Lear's property were awarded. R. at 4. Following the issuance of the district court's order, the United States FWS and Brittain County each filed a Notice of Appeal on June 9, 2016. R. at 1. Thereafter, Cordelia Lear filed a Notice of Appeal on June 10, 2016. R. at 1.

ARGUMENT

I. THE ESA IS A VALID EXERCISE OF THE COMMERCE CLAUSE WHEN APPLIED TO THE LEAR ISLAND POPULATION OF KARNER BLUE BUTTERFLIES.

Constitutionality of state action is reviewed *de novo*. *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1141 (9th Cir. 2007). When Congress prohibited the "taking" of certain species

under the ESA, it sought to prohibit a "class of activities" within the legislative reach of the Commerce Clause. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997). Congress's authority to reach into this "class of activities" to regulate a purely intrastate occurrence is legitimate and derives from the Necessary and Proper Clause of the U.S. Constitution. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964). The ESA is a proper regulation of the use of channels of interstate commerce for two reasons. *NAHB*, 130 F.3d at 1046. First, Congress has the authority to control the transport of endangered species in interstate commerce. *Id.* Second, Congress has the authority "to keep the channels of interstate commerce free from immoral and injurious uses." *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256 (1964). Congress may also regulate purely intrastate activity that does not qualify as a channel or instrumentality of interstate commerce if it has a substantial effect on interstate commerce. *United States v. Morrison*, 529 U.S. 598, 617 (2000).

A. The ESA Regulates A Class Of Activities Under Federal Power And Individual Instances Shall Not Be Excised As Trivial.

When Congress chooses to Constitutionally regulate a "class of activities…within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United* States, 402 U.S. 146, 154 (1971). As long as the general regulatory framework bears a "substantial relation to commerce," a federal statute reaches every violation no matter how minimal and localized the transgression may seem. *United States v. Lopez*, 514 U.S. 549, 558 (1995). The authority of Congress to regulate intrastate activities that are not themselves an immediate part of interstate commerce is derived from the Necessary and Proper Clause. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring). This ancillary authority allows "effective execution of the granted power to regulate interstate commerce." *Katzenbach*, 379. U.S. at 302.

The relevant question when deciding if a law with localized effect is necessary and proper to effectively regulate a class of activities is "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Gonzales*, 545 U.S. at 36 (Scalia, J., concurring) (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941). When examining employment regulations, the Court upheld wage and hour standards, *Darby*, 312 U.S. at 119-21, as well as a requirement that employers keep records to show compliance with the regulations, *id*. at 125. While the first requirement was upheld as having a "great effect on interstate commerce," *id*. at 122-23, the latter portion was sustained solely because "[t]he requirement for records even of the intrastate transaction is an appropriate means to a legitimate end." *Id*. at 125.

This same "class of activities" analysis was used in a pair of cases affirming the constitutionality of the Civil Rights Act when applied to small local restaurants or motels. In *Heart of Atlanta*, the Court upheld a requirement that hotels and motels provide accommodations to Negro guests. *Heart of Atlanta*, 402 U.S. at 247. The Court noted that Congress had long had power under the Commerce Clause to regulate the transportation of passengers in interstate commerce as a class of activities. *Id*. at 256. The Court noted there was "overwhelming evidence of the disruptive effect that racial discrimination has on commercial intercourse." *Id.* at 257. Accordingly, it did not matter that operating the Heart of Atlanta Motel was of a "purely local character," because "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id*. (quoting *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949).

In *Katzenbach* the Court applied the "class of activities" analysis when it upheld the same Act applied to restaurants, requiring accommodation of Negro guests if the restaurant "serves or offers to serve interstate travelers or a substantial portion of the food which it serves…has moved

in commerce." *Katzenbach*, 379 U.S. at 298. While the Court noted the separate and obvious effect that an exclusion of Negro patrons would have on the commercial flow of food to restaurants, the Court also noted how such exclusion restricts or even prevents Negroes from participating in interstate travel. *Id.* at 299-300. Despite the "purely local nature" of the restaurant in *Katzenbach*, application of the Civil Rights Act to its local operations was necessary and proper for Congress to effectively regulate "the transportation of passengers in interstate commerce" as a class of activities. *Id*. at 303-04. *See also Heart of Atlanta*, 402 U.S. at 256.

When Congress passed the ESA and prohibited the take of endangered species, it was regulating a "class of activities" within the Commerce Clause powers, and therefore application of § 9(a)(1) of the Act to wholly intrastate populations is constitutional. *NAHB*, 130 F.3d at 1046. In *NAHB*, the Court authorized ESA protection of the Dehli Sands Flower-Loving Fly, a tiny insect living in two counties in southern California. *Id*. at 1044. The record showed that this particular subspecies of flower-loving fly used to have other subspecies living nearby, until urban development destroyed the habitat and the other subspecies went extinct. *Id*. This can be compared directly with the current case facts. Like the Flower-Loving Fly, the Karner Blue is a small insect that requires a very particular habitat. R. at 5-6. Karner Blues do not migrate and so the populations that do exist are small and isolated, with the Lear Island population being the only one remaining in New Union. *Id*. If the ESA were not permitted to reach into New Union to protect the Karner Blues on Lear Island, localized species with particular habitat demands would be distinctly disadvantaged under the regulatory scheme.

The extinction of animals substantially affects interstate commerce by "diminishing a natural resource that could otherwise be used for present and future commercial purposes." *NAHB*, 130 F.3d at 1053. Additionally, the full value of the variety of plant and animal life that exists is

unknown and creatures lost to extinction today could have some valuable benefit yet undiscovered. *Id*. With literally incalculable value, the biodiversity Congress sought to protect with the ESA was within reach of the Commerce Clause power. *Id*. at 1054. The protection of endangered species is a legitimate end that Congress took great care to defend, and the protection of the Karner Blue is necessary and proper to affect that end. "Let the end be legitimate, let it be within the scope of the Constitution, and all means that are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

B. The ESA Properly Regulates The Use Of Channels Of Interstate Commerce.

When Congress seeks to regulate pursuant to the Commerce Clause powers, there are three broad categories under which that authority applies. *Lopez*, 514 U.S. at 558. Legislative authority covers the channels of interstate commerce, the instrumentalities of interstate commerce, as well as all activities that "substantially affect interstate commerce." *Id*. The Court has held that application of the ESA to a wholly intrastate insect population "is not a regulation of the instrumentalities of interstate commerce." *NAHB*, 130 F.3d at 1046. That same Court also held the ESA was a proper regulation of the use of the channels of interstate commerce, for two reasons. *Id*. First, by prohibiting the take of endangered species Congress can control their transport in interstate commerce. *Id*. Second, Congress has authority to keep the channels of commerce free from "immoral and injurious uses." *Id*. (quoting *Heart of Atlanta Motel Inc*., 379 U.S. at 256).

When a law prohibiting the intrastate possession of machine guns was challenged under the Commerce Clause, the Ninth Circuit upheld the law as properly regulating use of the channels of interstate commerce. *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1996). The court found it necessary to prohibit the possession of machine guns in order to effectively prohibit the interstate traffic in machine guns because possession is a necessary element of both transport and sale. *Id*. at

952. Quite similarly, the ESA prohibition on "taking" endangered species is necessary to prevent the interstate traffic in those species because if they are kept safely in their habitat, they cannot be transported in the channels of interstate commerce. *NAHB*, 130 F.3d at 1047. "One of the most effective ways to prevent traffic in endangered species is to secure the habitat…from predatory invasion and destruction." *Id*.

In upholding the application of the Civil Rights Act to local motels, the Court emphasized the "authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses." *Heart of Atlanta Motel Inc*., 379 U.S. at 256. When exercising this authority, it is of no consequence whether the regulated activity is of a "purely local character," because local activities could have a "substantial and harmful effect upon [interstate] commerce." *Id*. at 258. When federal wage and hour standards were challenged under the Commerce Clause, the Court noted such regulations were necessary to prevent a race to the bottom as states with high regulatory standards were disadvantaged by those willing to have lower standards. *Darby*, 312 U.S. at 115.

Congress can use its authority to clear the channels of commerce of injurious uses to better control the conditions under which commodities are produced for interstate commerce. *NAHB*, 130 F.3d at 1048. In *Darby*, Congress used this authority to instill record-keeping requirements to monitor and prevent labor exploitation in the interstate lumber industry. In *Heart of Atlanta*, this authority was used to outlaw racial discrimination in a hotel serving interstate guests. In *NAHB v. Babbitt*, this authority was used to prevent the eradication of the Dehli Sands Flower-Loving Fly by the construction of a hospital with materials from out of state, with employees and patients from both inside and outside the state. *NAHB*, 130 F.3d at 1048. That is comparable to the current case, where any home Ms. Lear would like to build is certain to have some materials or laborers from outside the state. By preventing the "take" of endangered species, Congress "prohibit[s] interstate

actors from using the channels of interstate commerce to 'promot[e] or spread evil, whether of a physical, moral, or economic nature." *NAHB*, 130 F.3d at 1048 (quoting *North American Co. v. S.E.C.*, 327 U.S. 686, 705 (1946).

C. The ESA Regulates Activities That Substantially Affect Interstate Commerce.

The 3rd and final area Congress may regulate under the commerce clause is "activities that substantially effect interstate commerce." *Morrison*, 529 U.S. at 617. In *Lopez*, the court held that regulation of purely local activity that is economic in nature must be sustained. *Lopez,* 514 U.S. at 570. This displaced the earlier standard of "direct effects" that unnecessarily placed emphasis on the "closeness" of the activity to commerce, rather than the qualitative impacts on commerce. *Wickard v. Filburn*, 317 U.S. 111, 122 (1942). The power to regulate substantial effects is derived in part from the necessary and proper clause. *Gonzalez*, 545 US. 1, 22 (2005).

The necessary step in this analysis is to determine whether the regulated activity has a "substantial effect on interstate commerce." *Lopez,* 514 U.S. at 570. This process begins with an assessment of legislative findings and the intent behind the "take" provision of the ESA. *NAHB*, 130 F.3d at 1050. The committee reports indicate unequivocally that one of the primary reasons Congress sought to protect endangered species was to ensure their continued availability in interstate commerce. H.R.Rep. No. 93-412, at 4-5 (1973). The committee concludes that the value of genetic diversity is so immense it is literally incalculable. *Id.* The genetic diversity of this country represents solutions to problems that have not arisen and answers to questions we have not yet asked. *Id.* The Senate Report on the ESA's forebear echoes similar sentiments. S.REP. NO. 91-526, at 3 (1969). Endangered species "may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants" and cannot afford to be "irretrievably lost." *Id.*

The *Lopez* court failed to find substantial effects on interstate commerce specifically because there were no congressional findings to that effect. *Lopez*, 514 U.S. at 562. The Committee and Senate reports regarding the ESA demand a result different from *Lopez*. Congress' specific findings alone are insufficient, however. Their conclusions based on those findings must survive rational basis scrutiny. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981). The *Hodel* case held that the scope of review for congressional exercise of the commerce power is relatively narrow. *Id*. The courts must defer to the reasoning of Congress if there is any rational basis for their conclusions. *Id*.

Congress' conclusions about § 9 of the ESA pass rational basis scrutiny for two reasons. First, preservation of biodiversity preserves the commerce derived from it. Additionally, § 9 prevents destructive interstate commerce. *Babbit*, 130 F.3d at 1053. Without § 9, a race to the bottom would ensue where individual states would have to lower their protections of endangered species to attract business and commerce. *Id.* at 1055. A federal congressional act protecting endangered species raises the floor, thereby decreasing the benefit that can be gained by racing to the bottom and disincentivizing the practice generally. *Id.*

II. MS. LEAR'S TAKINGS CLAIM IS NONJUSTICIABLE FOR LACK OF RIPENESS.

Ripeness questions are reviewed *de novo*. *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010). Ms. Lear's takings claim is nonjusticiable for lack of ripeness under 16 U.S.C. § 1539(a)(1)(B). Article 3 section 2 of the U. S. Constitution limits the judicial review of federal courts to live cases and controversies. U.S. Const. art. 3, § 2. This clause has been interpreted to require adverse parties with a genuine interest at stake. *Muskrat v. United States*, 219 U.S. 346, 360 (1911). In order to satisfy this requirement, a plaintiff must have judicial standing and demonstrate that their claim is ripe but not moot. *Poe v. Ullman*, 367 U.S. 497, 502 (1961). A claim is not ripe if its validity is contingent on future events that may or may not occur. *Id.* In

Abbott Laboratories v Gardner, the Supreme Court crafted a two stage test for assessing whether claims against agency actions are judicially ripe. 387 U.S. 136, 139 (1967). One, the issue presented must be fit for judicial decision. *Id.* Two, the agency action in dispute must be final in nature. *Id. See also Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

In the general context of land use, including incidental takings under the ESA, final agency decision has been interpreted to mean meaningful application for a building permit. *Lucas*, 505 U.S. at 1014. Justice Stevens explained the need for this interpretation best when he noted that Supreme Court cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). Ms. Lear must show she has applied for an ITP in order for her claim to be considered ripe, unless the *Lucas* exception applies. *Lucas*, 505 U.S. at 1014. The narrow circumstances that warrant application of the Lucas exception are not present here.

A. There Is Only One Narrow Exception To The ITP Ripeness Requirement.

The Supreme Court has held that in situations where applying for a permit would be futile or pointless, an exception exists and there is no need to apply for a permit to satisfy the final agency action prong of the ripeness test. *Lucas*, 505 U.S. at 1014. The federal claims court elaborated on this standard in the *Broad Water Farms* case, where the court concluded that a development permit is not required where no reasonable land owner would see any opportunity for development. *Broad Water Farm Joint Venture v. United States*, 35 Fed. Cl. 232, 237 (1996). The claims court has also applied the *Lucas* exception where there was excessive administrative delay in the permitting process. *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541, 548 (1996). Generally, the *Lucas* exception to the permit requirement applies in two scenarios. First, it applies where no

development would be approved regardless of whether a permit was submitted. *Lucas*, 505 U.S. at 1014. Second, it applies where procedural delays and administrative problems make the acquisition of a permit unduly burdensome. *Eastern Minerals*, 36 Fed. Cl. at 548. Currently settled law has never applied the *Lucas* exception to scenarios where development would likely be approved, but at a cost that discommodes the applicant.

Although this exception to the meaningful application requirement exists, the Supreme Court has suggested that ITP applications are presumptively not pointless. *Lucas,* 505 U.S. at 1011 (discussing how Lucas's claim might be different if the unusual circumstances in that case did not apply). This means that Ms. Lear has the duty of proving that no development would be approved. Finally, it should be noted that the ease with which landowners can interact with the ITP system has created a world in which no circuit court or the US Supreme Court has ever dismissed an ESA takings dispute for lack of ripeness.

B. Ms. Lear Did Not Apply For An ITP And The Narrow Lucas Exception Does Not Ameliorate Her Situation.

Ms. Lear's failure to apply for an ITP forecloses her ability to claim her grievance is ripe for judicial adjudication. Ms. Lear can only succeed in this matter if the facts at hand suggest an ITP application by her would have been futile, pointless, or unduly burdensome as defined by relevant case law. The facts here suggest that none of these conditions are present.

The question of the relevant parcel can be dispositive on this issue of ripeness. If the relevant parcel is the entirety of Lear Island there is no argument Ms. Lear's takings claim has been entirely foreclosed, as the Karner Blue habitat represents only a small portion of Lear Island. Additionally, there is nothing in the record to suggest administrative delay of the kind of at issue in *Eastern Minerals* to satisfy an exception. *Eastern Minerals*, 36 Fed. Cl. at 548. Assuming the relevant parcel is the entirety of Lear Island, Ms. Cordelia Lear's claim is most certainly not ripe.

However, even if the relevant parcel is solely the Cordelia Lot Ms. Lear's claim is still not appropriate for adjudication. The only fact in the record that can show her failure to apply for an ITP falls under the *Lucas* exception is the cost of the application. Ms. Lear may claim her "meaningful application" would be futile because a single environmental consultant claimed that the ITP process would cost approximately $150,000. R. at 6. This is insufficient justification for application of the *Lucas* exception for both doctrinal and policy reasons. The *Lucas* exception has only been applied when the justifications for doing so implicated the permitting agency's improper handling of the permit or their likely response to it. The cost of production of the ITP as contemplated here provides little evidence that development would take an inordinately long time to be approved. In fact, just the opposite seems to be true here. The FWS was affirmatively assisting Ms. Lear in creating a plan to include in her ITP. R. at 6.

Furthermore, allowing a single cost estimate from a private practitioner to be the dispositive factor in whether a claim is proper for adjudication has frightening implications. This amounts to outsourcing the interpretation of a cornerstone of Article 3 to individual private practitioners. One could easily envision a scenario in which prospective plaintiffs are able to manufacture ripe claims by visiting the consultant that will provide the most outrageous cost estimates. This is why, from a policy perspective, the *Lucas* exception must not be expanded beyond its current Supreme Court boundaries.

III. THE RELEVANT PARCEL FOR "TAKINGS" ANALYSIS IS THE ENTIRETY OF LEAR ISLAND, AS GRANTED BY UNITED STATES CONGRESS TO THE LEAR FAMILY IN 1803.

Constitutionality of state action is reviewed *de novo*. *Bolanos-Hernandez*, 492 F.3d at 1141. Regulatory takings decisions historically attempt a balance between private property interests and the government's interest in achieving public goals. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). As such, the Court invariably turns to principles of

"fairness and justice," instructed by how the property owner's reasonable expectations gain contour from State laws governing private property. *Lucas,* 505 U.S. at 1016 n.7. In regulatory takings cases, this Court's analysis must look at the "parcel as a whole," rather than individual property interests, to establish that a compensable constitutional taking has occurred. *Penn Cent,* 438 U.S. at 130-31. This parcel size analysis is crucial because a non-compensable taking can be disguised if the parcel is viewed too narrowly. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991). The property owner cannot divide the parcel into discrete segments in order to plead for compensation from a complete economic "taking." *Penn Cent,* 438 U.S. at 130.

A. The Proper Timeframe For The "Parcel As A Whole" Analysis Is When The Karner Blue Was Placed On The Endangered Species List.

The Supreme Court has recognized that the Fifth Amendment's promise of compensation for the "taking" of private property is calculated 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." *Penn Cent.* 438 U.S. at 123. This does not mean every encumbrance that government regulation places upon private property in turn warrants financial compensation. *Id.* at 124. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Federal Courts have designed a "takings" jurisprudence where compensation is granted under the Fifth Amendment only when public actions encumber private property in a way that violates these concepts of "fairness and justice."

This concept of "fairness and justice" requires considering the legitimacy of the State regulation alongside the reasonable economic expectations an individual has for their property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). (noting that State regulation violates the Fifth Amendment when no legitimate state interest is advanced or when it denies an owner

"economically viable use of his land"). The economic expectations of the property owner are a necessary fraction, with the numerator being the economic loss engendered by State action and the denominator being the property interest claimed by the owner. *Penn Central*, 438 U.S. at 130-31. The *Penn Central* Court delineated the relevant property interest as the "parcel as a whole," and since then Courts have wrestled with how to define the relevant parcel. *Lucas*, 505 U.S. at 1016 n.7 (noting the history of "inconsistent pronouncements by the Court" when examining the relevant parcel question).

When a property owner assesses the potential use of their land, it is not done in a vacuum. Her reasonable expectations gain contour and shape from the State's law of property—from the legal recognition that the State grants "the *particular interest in land* with respect to which the takings claimant alleges a diminution (or elimination of) value." *Id.* (emphasis added). When couched in such specific terms, the "particular interest" must take into account not only the affirmative rights granted by a fee simple in a piece of land, but also the necessary encumbrances that flow from Congress's power to legislate under the Commerce Clause. U.S. Const. art. 1, §. 8, cl. 3. Regulatory changes are an indelible part of modern property ownership, and a property owner can expect the use of his property to be restricted occasionally "by various measures…enacted by the State in legitimate exercise of its police powers." *Lucas*, 505 U.S. at 1027.

Under the guidance of "fairness and justice," the Lear Family's reasonable expectations for utilizing the island have undeniably changed over time. When the land was granted to Cornelius Lear by Act of Congress in 1803, it was in fee simple absolute. R. at 4. This title gives relatively unencumbered use of the entire island, and the record shows the Lear family used this bundle of rights in a free and diverse manner over the next 170 years. R. at 5. In 1973, the U.S. Congress passed the Endangered Species Act ("ESA"), offering blanket protection to species deemed by

Federal Agencies to be at a particular risk of extinction, even where "wholly intrastate populations" are involved. *See NAHB*, 130 F.3d at 1041. Once in place, this provided effective notice to all property owners, including the Lear Family, that the presence of a population labelled endangered under the ESA could potentially encumber their property rights. *See* ESA § 9(a)(1)(B), 16 U.S.C. 1538(a)(1)(B), (prohibiting the "take" of any endangered species).

The U.S. Fish & Wildlife Service ("FWS") added the Karner Blue Butterfly to the Endangered Species List in 1992. 57 Fed. Reg. 59,236 (Dec. 14, 1992). At that time, property owners within the reach of the ESA were effectively notified that the presence of a population of Karner Blue Butterflies would likely encumber their basic property rights under the ESA. The record does not reflect exactly when the butterfly population arrived on the island, but annual mowing kept the Heath cleared for "several decades," providing the habitat the Karner Blues required. R. at 5. Under the ESA the presence of the Karner Blue population on Lear Island necessarily defined the upper boundaries of any development expectations. If principles of "fairness and justice" rely on how an owner's "reasonable expectations have been shaped by the State's law of property" as the *Lucas* Court suggests, the relevant parcel analysis is applied when the Karner Blue brought Constitutional encumbrance to Lear Island. *Lucas*, 505 U.S. at 1016, n7.

B. The Subdivision Of Lear Island Was Insufficient To Divorce The Cordelia Lot From The Bundle Of Property Rights Associated With Lear Island.

In order for a property interest to be considered separate from another property interest in a taking analysis, it must be actually and distinctly separate. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. 130. When a property owner possesses a "bundle of property rights," eliminating the economic viability of "one strand of the bundle" does not create a compensable taking under the Fifth Amendment. *Andrus v. Allard*, 444

U.S. 51, 65-66 (1979). Property rights must be viewed in the aggregate, because the "takings" analysis focuses on the "nature and extent of [regulatory] interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. 130-31.

For two parcels to be viewed as separate for "takings" analysis, it is not enough to simply assert that there is an interest in developing the parcels separately. *Id.* at 130. When a city board denied permits to construct an office tower above a New York City landmark, developers alleged a compensable taking. *Id.* at 117-19. The developers noted that one hundred percent of the rights to develop the airspace directly over the landmark were destroyed by the ruling. *Id.* at 130. The Court rapidly dismissed this notion, stating that appellants could not establish a "taking" by merely "showing…they have been denied the ability to exploit a property interest that they heretofore believed was available for development." *Id.* The court viewed the landmark and the super-adjacent airspace as one parcel, ultimately finding no taking. *Id.* at 130-31.

Using "legalistic" mechanisms to split a single property interest into several distinct rights is insufficient to satisfy the relevant parcel of the takings analysis. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987). When Pennsylvania passed a law to prevent mining of coal that cause damage to buildings on the surface, coal companies alleged that this law constituted a compensable taking of their "support estate," a property interest unique to Pennsylvania property law. *Id.* at 474. The Court denied their "takings" claim, citing *Penn Central* for the proposition that "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500. *See also Andrus*, 44 U.S. 65-66 (noting that the right to sell property is merely one strand in bundle of rights, and therefore a prohibition on selling property is not in itself a taking).

When this concept is applied to Lear Island in 1992, it is clear that the relevant parcel is the entirety of the island. When King James Lear subdivided his land in 1965, he divided it into three parcels. R. at 5. While each of those lots were deeded to his daughters at this time, he retained a life estate in each property that would only vest in new owners at the time of his death. *Id*. For forty years, the property remained subdivided yet still under his ownership and control. *Id.* Throughout that period, the record shows no distinct investment by King James Lear that would evince an expectation the Cordelia Lot was to be used as a future development or homestead. The only actions taken by the Lear family on the Lot over that time were to keep the Heath clear with annual mowing, thereby establishing and protecting the Karner Blue habitat. *Id.* Any expectation that Ms. Lear has for her lot necessarily flows from the expectations that her father demonstrated while he was alive, and those expectations were based in large part on the rights and encumbrances the State assigned to his property. Accordingly, Ms. Lear should not now be able to claim a taking by restricting the relevant parcel to a size that conveniently shows a dramatic loss.

IV. The Relevant Time Period For Takings Analysis Is The Entirety Of Ms. Lear's Interest In The Property.

Constitutionality of state action is reviewed *de novo*. *Bolanos-Hernandez*, 492 F.3d at 1141. The relevant time period for a takings analysis is the entirety of the owner's interest in the property, as property interests cannot be severed into discrete timeframes in order to find a total take. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002). With property so divided, every delay would become a total ban. *Id.* The court has consistently rejected approaching the "denominator" question in takings analysis by focusing exclusively on the property during the moratoria. *Id. See also Keystone Bituminous,* 480 U.S. at 497. Instead, *Penn Central* regulatory takings analysis focuses on "the parcel as a whole," applied temporally and geographically. *Tahoe-Sierra*, 535 U.S. at 303.

A. The FWS And Brittain County Are Shielded From A Takings Claim Based On Complete Deprivation Of Economic Value Because Regulations Are Temporary.

The building restrictions on the Cordelia lot are only temporary because they will disappear when the butterflies are no longer present. Property interests must be viewed in their entirety, considering both "the metes and bounds describing its geographic dimensions, and the term of years describing its temporal aspect." *Tahoe-Sierra,* 535 U.S. at 303 (*citing* Restatement of Property §§ 7–9 (1936)). This requires the logical conclusion 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. *Id*. at 330–32. Hence, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. *See*. *Agins,* 447 U.S. at 263, n. 9.

The gravity of the impermanence of a ban can be seen in the Court's treatment of the restrictions in *Lucas* and *Tahoe-Sierra*. In Lucas, the regulation was found to be a "taking" because the ban on development "was unconditional and permanent," with no hypothetical point at which the future use interests of the land would spring back into existence. *Lucas,* 505 U.S. at 1012. On the contrary, the regulations at issue in *Tahoe–Sierra* were merely temporary measures. *Tahoe-Sierra*. 535 U.S. at 329. The mere fact the regulations in *Tahoe–Sierra* did not specify the exact date of their expiration did not sway the court to find them any less temporary. *Id. at* 329.

Here, restrictions on the Cordelia Lot are temporary. In the absence of annual mowing, the Karner Blues' habitat will be eliminated in ten years due to a natural conversion to a successional forest of oak and hickory trees. R. at 7. Currently, Ms. Lear is not required to mow the Heath annually in order to ensure the habitat remains for the Karner blue butterflies. She would only be required to actively maintain their access to suitable land in the event she wishes to obtain an Incidental Take Permit. R. at 6. With no affirmative requirement for Ms. Lear to maintain the

Heath, the building restrictions are only temporary in nature, and do not deprive Ms. Lear of all economic value of her property.

B. The Temporal Length Of The Ban Must Be Considered In Conjunction With Other Factors To Determine The Effect On The Property As A Whole.

After *Tahoe–Sierra* it is clear that, under the "whole parcel" rule, a *per se Lucas*-type regulatory taking cannot be premised on a governmental restriction that affects (1) only one portion of the owner's property, (2) only one type of interest within the property owner's "bundle" of interests, or (3) only one "temporal slice" of the property owner's fee interest. *See Penn Central*, 438 U.S. at 104; *Andrus*, 444 U.S. at 51; *Tahoe-Sierra*, 535 U.S. at 302. The duration of the restriction is one of the important factors that a court must consider in the appraisal of a takings claim, but the "temptation to adopt what amount to *per se* rules in either direction must be resisted." *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). Ms. Lear's entire fee simple interest in the Cordelia Lot from her time of inheritance in 2005 must be considered when analyzing the alleged taking to determine if the restrictions rise to the level of a complete deprivation of her economic interests in the property. *See Tahoe-Sierra,* 535 U.S. at 303.

Additionally, factors such as whether there was a physical invasion on the property help determine if the restrictions amount to a taking of the property as a whole. See *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1183 (Fed. Cir. 2004) (finding a compensable regulatory taking occurred where there was an actual physical appropriation of 6,741 hens for salmonella testing procedures). Many cases in which regulatory takings have required compensation are easily distinguishable from the case at hand because they involved actual physical appropriation of property, whereas Ms. Lear's case does not. In *Sartori v. United States*, when a Cease and Desist Order was in effect that denied the landowners the right to develop their property for a period of

nine and a half years, and such development was the sole intention of the purchase, no regulatory take was found without physical invasion of the property. 67 Fed. Cl. 263, 275 (2005).

Ms. Lear's case is analogous to *Sartori* as there is no physical invasion of the Cordelia Lot, and the outer bounds of the temporal restriction are only half a year longer than the Cease and Desist orders in *Sartori.* Additionally, there is nothing to say that the Karner Blue butterfly population would not be wiped out before this timeframe through some other disturbance, such as a fire, drought, storm, disease, or cold spell. The lower court's assertion that the period of 10 years was enough to distinguish the moratorium of building on the Cordelia Lot from the moratorium in *Tahoe-Sierra* is flawed.

V. THE BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY $1,000 PER YEAR IN RENT PRECLUDES A TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE.

Constitutionality of state action is reviewed *de novo*. *Bolanos-Hernandez*, 492 F.3d at 1141. When government regulation leaves a property owner with no economically remunerative use of their property, a compensable taking has occurred. *Lucas*, 505 U.S. at 1027-28. Central to the takings analysis is the extent to which the regulation has interfered with the property owner's distinct investment-backed expectations. *Penn Central,* 438 U.S. at 124 (1978). When determining if a compensable taking has occurred due a deprivation of any economically viable use, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land." *Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1072–73 (11th Cir. 1996).

A. Under The ESA, The Presence Of Karner Blue Butterflies On The Cordelia Lot Sets The Upper Boundary Of Economically Viable Use.

Any finding of complete deprivation of economic value of Ms. Lear's land must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations for the land, and thus should be based on the initial assumption that she could not do

more with the land than what she would be able to under the regulations in place at the time she inherited it. *See Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).

Takings jurisprudence points to three factors relevant to determining a party's reasonable investment backed expectations. *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1348 (Fed. Cir. 2001). Those factors are: (1) whether the plaintiff operated in a "highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase. *Id.*

A takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island,* 533 U.S. 606, 630 (2001). Justice O'Connor explained in her concurring opinion that the Court's "holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Id.* at 633, (O'Connor, J., concurring). Rather, she noted that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." *Id.*

The Federal Circuit applied this reasoning when it held portions of land subject to coal producer's surface mining leases were unsuitable for mining under the Surface Mining Control and Reclamation Act ("SMCRA"). Their analysis did not result in compensable partial regulatory taking of leases, even when the producer lost approximately 78 percent of one surfacing mining lease's value, and 92 percent of second lease's value. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004). The court's determination turned on reasonable expectations of the producer, who lacked reasonable investment-backed expectations of mining the land without

restriction because of a familiarity with SMCRA before acquiring the leases. *Id.* The court found that the coal producer should have anticipated the possibility of an unsuitability decision. *Id.*

The present case is similar to *Appolo* because Ms. Lear's reasonable investment backed expectation in the Lot could not have included building upon the Lot without restriction. She inherited the land in 2005. R. at 5. The Heath was designated in 1978 as a critical habitat for the Karner Blue butterflies, a species that was added to the Endangered Species list in 1992. R. at 5, 6. Ms. Lear did nothing with the land other than continuing the annual mowing of the Heath for seven years after she inherited the Lot. R. at 5. Ms. Lear was on notice at the time she inherited her property that the butterflies were on the Lot, portions of the Lot were considered a critical habitat for the butterflies, and that the butterflies were listed on the endangered species list. This was evidenced by her inquiry to the New Union FWS field office as to whether the existence of this endangered butterfly population would require any permits for development. R. at 6. Ms. Lear's reasonable investment backed expectations for her property should take into account her knowledge of the regulatory regime in place at the time she inherited the land. Ms. Lear's expectation to use the land in a way inconsistent with the ESA are not reasonable under a takings analysis. Any deprivation of economic value should be based on the initial assumption that she could not do more with the land than what she would be able to under the regulations in place at the time she inherited it.

B. The Offer to Pay $1,000 Yearly Rent For Wildlife Viewing Decreases The Tax Burden On The Property By 66%.

Because Ms. Lear's investment backed expectations in the Lot are viewed in consideration of the regulations in place at the time of her inheritance, she has no greater expectation than what was allowed under the restrictions in place to protect the endangered butterflies. When determining if a compensable taking has occurred due to the owner being deprived of any economically viable

use, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land." *Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1072–73 (11th Cir. 1996). *See also Baytree of Inverrary Realty Partners v. City of Lauderhill,* 873 F.2d 1407, 1410 (11th Cir. 1989) (holding that neither inability to develop exactly what developer wanted, deprivation of most beneficial use of land, nor severe decrease in value of property amounts to taking).

This logic was applied in *Andrus v. Allard*, where statutes prohibited commercial transaction of parts of birds legally killed before the enactment of the statutes. 444 U.S. at 66. It was held the statutes clearly barred the most profitable use of the property, but this was insufficient for a finding that a compensable taking occurred. *Id.* The Court held that a reduction in the value of property is not necessarily equated with a taking, and further concluded that "it is not clear that appellees will be unable to derive economic benefit from the artifacts." *Id.* In *Atlas Corp. v. United States,* a uranium mill alleged that the economic cost of government regulations was greater than the value of the mill, and that such a requirement was an unconstitutional taking under the Fifth Amendment. 895 F.2d 745, 756 (Fed. Cir. 1990). In the absence of a physical invasion onto the property the court found no taking largely because there was no claim that *all beneficial uses* of the property were destroyed. *Id*.

Justice Blackmun's dissent in *Lucas* shows how a property can still hold value, even though it was purchased with the intent to construct single family homes on it and such construction was barred with the enactment of a statute 2 years after the Lot's purchase. *Lucas*, 505 U.S. at 1044 (1992) (Blackmun, J., dissenting). Blackmun noted the property owner could still enjoy other attributes of ownership, 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. citing Kaiser Aetna,* 444 U.S. at 176. Ms. Lear can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, *e.g., Turnpike Realty Co. v. Dedham,* 284 N.E.2d 891 (1972) cert. denied, 409 U.S. 1108 (1973); *Turner v. County of Del Norte,* 24 Cal.App.3d 311 (1972); *Hall v. Board of Environmental Protection,* 528 A.2d 453 (Me. 1987).

There is evidence in the record that Ms. Lear is not without economically remunerative use of the property, as the Brittain County Butterfly Society has offered to pay her $1,000 annually for the privilege of conducting tours on the property. R. at 7. Because Ms. Lear's investment backed expectations in the Lot are shaped by the rights and encumbrances flowing from State property law, she has no greater expectation than what was allowed under the ESA. She inherited the land with the knowledge she would have to pay $1,500 in annual property taxes for the Lot. R. at 7. Her expectations were tempered by this annual payment along with her knowledge that the presence of the Karner Blues would likely restrict some uses of her property. Ms. Lear's subjective expectations are demonstrated by the fact that for seven years she made no additional investments in the property other than to continue with the annual mowing that maintained the butterfly habitat. R. at 6. Under these circumstances, Ms. Lear entered this land with very low expectations for economic gain from the land. The offer to use her land for wildlife viewing is an economic value that will preclude a takings claim for complete loss of economic value as it would alleviate 66% of the annual property tax value she knew she would be inheriting with the property.

Ms. Lear argues that the offered amount is less than the amount of annual property taxes on the Lot, and extends this to argue that a piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value. This definition goes too

far. The Brittain County Butterfly Society's offer was unsolicited and shows a market exists for butterfly viewing on the property. R. at 7. Ms. Lear can capitalize on this market, and come up with creative ways to use her land to her profit. Ms. Lear does not have the right to claim a compensable taking merely because she cannot execute what she considers to be the most profitable use of her property. She did not inherit the land with a reasonable expectation that she could in fact complete such buildings, and the loss of the most profitable use of the property is not enough to claim a compensable taking. For that, she must have lost all or substantially all economic value. Ms. Lear still retains many of the rights of landownership, such as the right to exclude others, the right to charge admission to come onto the property, and the right to enjoy recreational activities on her land. Therefore, her takings claim for complete loss of economic value should be precluded.

VI. PUBLIC TRUST PRINCIPLES INHERENT IN TITLE PRECLUDE MS. LEAR'S TAKINGS CLAIM BASED ON HER WATER-ADJACENT DEVELOPMENT PLANS.

Constitutionality of state action is reviewed *de novo*. *Bolanos-Hernandez*, 492 F.3d at 1141. Public trust principles inherent in title preclude Ms. Cordelia Lear's takings claim based on the denial of a county wetlands permit. The narrow issue of whether public trust principles can serve as a defense to a takings claim arising out of restriction on development of waters, wetlands, and water adjacent lands has yet to be decisively settled by the Supreme Court. The question came before the Federal Claims Court on two occasions, the first of which was *Tulare Lake Basin Water Storage District v. United States*. 49 Fed. Cl. 313 (2001). In *Tulare* the claims court declined to apply several possible defenses including the public trust defense, however the case was not appealed and the issue was not completely resolved. *Id*. at 321.

The question came before the court again in *Casitas Municipal Water District v. United States*. 76 Fed. Cl. 100 (2007), affirmed in part and reversed in part, 543 F.3d 1276 (Fed. Cir.

2008), rehearing en banc denied, 556 F.3d 1329 (Fed. Cir. 2009), dismissed on remand, 102 Fed. Cl. 443 (2011), affirmed, 708 F.3d 1340 (Fed. Cir. 2013). In the six plus year history of the case, the public trust question was never addressed on merits, in part due to ripeness concerns.

However, government defendants have succeeded in using a public trust defense in takings claims across many other circuits. In *Esplanade Properties*, a developer's takings claims were dismissed where public trust principles precluded development of a tidal zone. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 980-81 (9th Cir. 2002). Similarly, another takings claim was thwarted through the use of the public trust defense where a landowner was denied a permit to fill two coastal lots that were both entirely dry land at the time he purchased the property. *McQueen v. S.C. Coastal Council,* 580 S.E.2d 116, 118-19 (S.C. 2003). In a third case developers challenged a New Jersey regulation on development of waterfront property on takings grounds. In upholding the regulation, the court ruled that the regulated property was subject to public trust and so no takings claim would succeed. *Nat'l Ass'n of Homebuilders v. N.J. Dep't of Envtl. Prot.,* 64 F. Supp. 2d 354, 356, 360 (D. N.J. 1999).

These cases can be broadly grouped into two sets. Set 1, which includes *Tulare* and *Castias*, involves takings claims based on water use. *Tulare Lake Basin*, 49 Fed. Cl. at 315 (dealing with regulated use of water for irrigation); *Casitas Mun. Water Dist.,* 76 Fed. Cl. at 100 (dealing with restriction on operation of a public water supply project). Set 2, which includes *McQueen, National Association of Homebuilders*, and *Esplande Properties,* involves dry land development or its necessary predicates. In the first set of cases, the court either declined to apply the public trust principle as a defense or refused to reach that question. In the second set of cases, all the individual courts applied the public trust defense, inducing failure of the takings claims.

This alignment of factual backgrounds and legal results is no coincidence. These results are properly explained by the rule surrounding background principles in takings cases as defined in *Lucas*. *Lucas*, 505 U.S. at 1028. It is well settled that no takings action can succeed if a plaintiff does not have a presently vested property interest in the land that has been "taken". *Id*. at 1027. Background principles can prevent a plaintiff from ever having a vested interest that is capable of being taken. *Id.* at 1028. The Lucas decision defines background principles as any preexisting limitations on a claimant's property interest. *Id.* Practically speaking, this means that while a claimant may have had permission to engage in a particular activity or land use, they never had an unqualified entitlement to do so.

In the context of water dependent uses, the courts seem uncertain as to whether public trust principles can function as background principles. However, in the context of development of water adjacent properties the courts seem entirely certain that public trust principles do function as background principles precluding takings claims. This means answering the relevant question is as simple as inquiring into the nature of the use Ms. Lear desired for her property. The record unambiguously shows that Ms. Lear wanted to fill the marsh on her property in order to build a residential home. R. at 7. Ms. Lear was not seeking any water use or even a water dependent use. *Id.* This brings her situation firmly in line with both the Lucas conception of a background principle and the cases that apply public trust principles in that context. Accordingly, public trust principles in this case should preclude the Ms. Lear's claim for a taking.

VII. FWS And Brittain County Are Not Liable For A Complete Deprivation Of Economic Value On The Cordelia Lot.

Constitutionality of state action is reviewed *de novo*. *Bolanos-Hernandez*, 492 F.3d at 1141. No court has been able to conjure a formula to respond to every takings claim, and so the jurisprudence has developed "ad hoc, factual inquiries" to help this Court determine whether there

has been a complete deprivation of economic value on Ms. Lear's property. *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 224 (1986). Prominent among these factors is the level of interference with "reasonable investment backed expectations." *Kaiser Aetna*, 444 U.S. at 175. This reasonability is necessarily shaped by the rights that flow from her fee simple, tempered by the encumbrances constitutionally enforced by the state. *Lucas*, 505 U.S. at 1016 n.7. Ms. Lear knew about the Karner Blues when she inherited the property in 2005 and invested in maintaining their habitat for seven years. R. at 5-6. Additionally, the offer of $1,000 monthly rent added economic value to the property and demonstrated a potential reasonable return on investment by charging for butterfly viewing and camping on the site. Ms. Lear admits in the record that neither the state nor federal regulations individually amount to a taking. R. at 2. If FWS is not liable for taking Ms. Lear's property, then neither can Brittain County be.

A. The Application Of The ESA To The Cordelia Lot Did Not Interfere With Reasonable Investment Backed Expectations.

"A statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Cent.*, 438 U.S. at 127 (citing *Mahon*, 260 U.S. 393). Bringing the expectations of the property owner into the takings calculus allows the court to consider elements of "fairness and justice" built upon reliance. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation"* 80 HARV. L. REV. 1165, 1234 (1967). The Court has also noted that these investment-backed expectations must be objectively reasonable. *Kaiser Aetna*, 444 U.S. at 175. The Federal Circuit has further defined these reasonable expectations to necessarily include an appraisal of the "regulatory climate that existed when [property owner] acquired the subject property." *Good v. United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999). Accordingly, the

investment-backed expectations of the "reasonable" property owner are necessarily limited by the regulatory climate in place when the property was acquired.

In *Good*, purchasers of a 40-acre lot in the Florida Keys managed to secure federal, state, and local approval to dredge-and-fill their marshland plot to develop for residences and a marina. *Id*. at 1357. After all approvals, but before construction began, the Florida Legislature passed another law that created a statutory regime for development in certain state areas of "critical concern." *Id.* at 1358. While the property owner's development plan was being reviewed for compliance with the new Florida law, the County passed new restrictions that effectively prohibited the development from continuing as planned. *Id.* In holding that regulations applied after the property owners acquired their land did not amount to a taking, the court noted the "regulatory climate" at the time of property acquisition. *Id.* at 1361. The court noted that "rising environmental awareness translated into ever-tightening land use regulations…[s]urely Appellant was not oblivious to this trend." *Id.* at 1363. Especially dispositive was the fact that the property owners had waited seven years after property acquisition to begin building, allowing the regulatory climate to intensify further. *Id.* "Appellant's prolonged inaction…reduces [her] ability to fairly claim surprise when [her] permit application was denied." *Id.*

When Ms. Lear inherited her property in 2005, she inherited it with all the rights and encumbrances that were attached when her father owned it. Any "reasonable investment-backed expectations" must be analyzed by looking at the regulatory climate that existed when she acquired her property. *Id*. at 1361-62. The regulatory climate does not just include the statutory elements in place, but can also include those elements that are likely to exist in the near future. *Id.* at 1363. When Ms. Lear received her inheritance in 2005, the ESA had been in place since 1973, the Heath was listed as a "critical habitat" for the Karner Blues since 1978, and the Karner Blues had been

protected since 1992. R. at 5-6. The same "rising environmental awareness" noticed by the Federal Circuit in 1999 exists now, and adds contour to the regulatory climate informing Ms. Lear.

Much like the property owner in *Good*, Ms. Lear waited seven years after she acquired her property before her "investment-backed expectations" suddenly came into conflict with an environmental regulatory regime that had been in place for decades. She inherited her property after the death of her father in 2005, and it wasn't until 2012 that she decided to build a home on her lot. R. at 5. During this time period, her only investment in the Cordelia Lot was to continue the annual mowing that preserved the habitat of the Karner Blues. R. at 5-6. There was nothing that might show a reasonable outside observer she intended to build a home on her lot, and so Ms. Lear cannot now claim that the government needs to pay for the destruction of those expectations.

B. The Offer For Monthly Rent Increased The Economic Value Of The Property And Demonstrated A Potential Rate Of Return For Butterfly Viewing.

When denying compensation for a New York City landmark law the *Penn Central* Court specifically noted that despite the regulation, the property was "capable of earning a reasonable return." *Penn Central*, 438 at 129. This was important to the analysis because although the owners couldn't develop in the most profitable way imaginable, there were still ways to generate a return on their investment. *Id*. at 130. Ownership of property includes a "full bundle of…rights," and destruction of a single strand does not amount to a compensable taking because destruction of one profitable use is not destruction of all profitable uses. *Andrus*, 444 U.S. at 66.

When Congress sought to protect certain species of birds it passed two laws prohibiting the sale of bird feathers. *Id*. at 52-53. The government specifically applied this sales prohibition to those feathers gathered before the laws were passed, and owners of legally collected feathers sought compensation under the Fifth Amendment. *Id*. at 55-56. In addressing the claim, the Court disagreed with a lower court holding that the "prohibition wholly deprive[d] them of the

opportunity to earn a profit from those relics." *Id*. at 65. The Court noted the owners still retained the right to possess, transport, and devise their feathers as property, and with those remaining strands in their bundle of property rights it was possible to, "for example, …exhibit the artifacts for an admission charge." *Id*. at 66.

The Court's analysis from *Andrus* is highly instructive here. It has already been established that any expectations Ms. Lear had with respects to her property were tempered by the regulatory climate at the time. *Good*, 189 F.3d at 1361. Although she had little reasonable expectation for building a single family home, the destruction of this strand in her bundle of rights did not sever her rights entirely. She still retained the right to exclude, one of the most important aspects of property ownership and allows Ms. Lear to charge for admission. The Butterfly Society's unsolicited offer to pay $1,000 for butterfly viewings alleviates the annual tax burden by 66%, but it demonstrated that there was a potential market to view beautiful, endangered butterflies. R. at 7. More revenue could be generated on the property by providing access to seasonal camping that did not destroy the Karner Blue habitat. Registering the property as a conservation area could alleviate more of the tax burden. Additionally, the County would grant a fill permit for a "water-dependent use," which could allow a dock and marina for access to campgrounds. R. at 7. Although Ms. Lear's preferred use of the property is not allowed by a combination of regulations, it does not follow that she has suffered a "complete deprivation of economic value."

CONCLUSION

The ESA is a valid exercise of the Commerce Clause powers. Because Ms. Lear's reasonable expectations were necessarily tempered by the ESA's application, FWS asks this Court to find no "taking". Accordingly, we ask this Court to affirm the District Court's decision that the ESA is constitutional and overturn the District Court's award for compensation.