Team 62

Docket No. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

CORDELIA LEAR,
Plaintiff—Appellee—Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
Defendant—Appellant—Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,
Defendant—Appellant.

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

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Brief for Brittain County, New Union
Defendant—Appellant

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STATEMENT OF JURISDICTION

The parties in this case appeal a final order of the United States District Court for the District of New Union. The District Court properly had federal question jurisdiction over this case because Appellee Cordelia Lear's takings claim arises under the Fifth and Fourteenth Amendments of the U.S. Constitution. 28 U.S.C. § 1331. The Twelfth Circuit has appellate jurisdiction to review final decisions of the District Court and thus has jurisdiction over this case. 28 U.S.C. § 1291. The District Court issued its order on June 1, 2016. Brittain County ("the County") and the Fish and Wildlife Service ("FWS") each timely filed a Notice of Appeal on June 9, 2016. R. at 1. Cordelia Lear ("Lear") filed a Notice of Appeal on June 10, 2016. Id.

STATEMENT OF THE ISSUES

I. Is the Endangered Species Act ("ESA") a valid exercise of Congress' limited Commerce Power, as applied to the wholly intrastate population of Karner Blue butterflies present on Lear's subdivision?

II. Is Lear's takings claim against FWS ripe, given Lear's failure to apply for an Incidental Take Permit under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?

III. For the purpose of analyzing Lear's takings claim, is the relevant parcel the entirety of Lear Island or merely the Cordelia subdivision as delineated in 1965?

IV. Assuming the relevant parcel is the Cordelia subdivision, are FWS and Brittain County potentially liable for the complete deprivation of economic use of the subdivision when either the ESA or the Brittain County Wetlands Preservation Law would, by itself, allow the development of a single-family residence?

V. Assuming the relevant parcel is the Cordelia subdivision, do public trust principles inherent in title preclude Lear's takings claim based on the denial of a County wetlands permit?

VI. Assuming the relevant parcel is the Cordelia subdivision, does the fact that the subdivision will become developable in ten years, upon the natural destruction of the Karner Blue butterfly habitat, shield FWS and Brittain County from Lear's takings claim based upon the complete deprivation of economically viable use of the subdivision?

VII. Assuming the relevant parcel is the Cordelia subdivision, does the Brittain County Butterfly Society's offer to pay annual rent of $1,000 for wildlife viewing preclude Lear's takings claim for the complete loss of economic use of her subdivision?

STATEMENT OF THE CASE

This is a dispute about a piece of land and the laws that apply to it. Cordelia Lear ("Lear") is the deeded owner of a ten-acre subdivision ("the Cordelia subdivision" or "the subdivision") in Brittain County, New Union. R. at 5. Lear sought to develop a residence on her subdivision but was met with challenges from the Fish and Wildlife Service ("FWS"), enforcing the ESA, and Brittain County, enforcing the Wetlands Preservation Law. Based on the combined impact of these two unrelated laws, Lear brought a takings claim and other constitutional challenges against FWS and Brittain County. R. at 7.

The Cordelia subdivision is located on the northern tip of Lear Island ("the Island"), located within Lake Union. R. at 5. Lake Union is a large lake that has traditionally been used for interstate navigation. R. at 4. In 1803, Congress granted title to Lear Island to Cornelius Lear in fee simple absolute. Id. At that time, present-day New Union was part of the Northwest Territory. Id. The land grant purported to convey the entirety of the Island, as well as all submerged lands within 300 feet of the shoreline. R. at 4–5. The Lear family has occupied the Island continuously since 1803, using it as a homestead and productive farm. R. at 5. The original homestead is still located near the north end of the Island. Id. In the early 1900s, the family constructed a road connecting the Island to the mainland. Id.

In 1965, King James Lear, Cordelia Lear's father, purported to partition Lear Island into three subdivisions. Id. He deeded a subdivision to each of his three daughters, reserving a life estate in each: a 550-acre subdivision to Goneril, a 440-acre subdivision to Regan, and a ten-acre subdivision to Cordelia. Id. Soon afterward, King Lear built a residence on the Regan subdivision. Id. He continued to live in the homestead, located on the Goneril subdivision. Id. When King Lear died in 2005, each daughter came to possess her deeded subdivision. Id.

The Cordelia subdivision, also known as "the Heath," consists of an access strip and an open field. R. at 5. The subdivision also includes approximately one-acre of cattail marsh ("the marsh") in a cove that was historically open water, used as a boat landing. Id. The Heath is mowed annually and has, as a result, become covered with blue lupine flowers, which are essential for the survival of the endangered Karner Blue butterfly ("Karner Blue"). Id. In 1992, FWS listed the Karner Blue as an endangered species under the ESA. Id. FWS had previously designated the Heath as critical habitat for the New Union subpopulation of Karner Blues in 1978. R. at 6. Brittain County was not involved in either the designation or the listing. Id. The subpopulation of Karner Blues on the Heath is entirely intrastate; the butterflies do not migrate or cross state boundaries. R. at 5–6. Without annual mowing, the lupine fields on the Cordelia subdivision will naturally convert to a successional forest over about ten years, thus eliminating the butterfly habitat, and with it, the New Union subpopulation of Karner Blues. R. at 7.

In 2012, Cordelia Lear decided to build a residence on her subdivision. R. at 6. She contacted the New Union FWS field office in April 2012 to inquire about developing her property. Id. FWS advised her that any disturbance of the lupine habitat on her property, other than annual mowing, would constitute a prohibited "take" of the endangered Karner Blue butterfly and thus would require an Incidental Take Permit ("ITP") under the ESA. FWS explained that in order to apply for an ITP, Lear would have to develop a habitat conservation plan ("HCP") for the butterflies and an environmental assessment document under the National Environmental Policy Act ("NEPA"). Id. FWS also advised Lear that in order for FWS to approve the HCP, the plan would have to provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance on the access strip, as well as a commitment to maintain the remaining lupine fields through annual mowing. Id. In a follow up letter dated May

15, 2012, FWS reiterated the ITP and HCP requirements and invited Lear to submit an ITP. R. at 6. FWS also referred Lear to its Habitat Conservation Planning Handbook ("Handbook") for more information on developing an acceptable HCP. Id. Lear never submitted an application.

The Cordelia subdivision is bordered only by Lake Union and the Goneril subdivision. Id. According to the record, Goneril has refused to cooperate with any HCP for the Cordelia subdivision that would restrict the use of Goneril's property. Id. Rather than submit an ITP application, Lear proposed an alternate plan that involved filling one-half acre of the marsh to create a lupine-free development site.[1] Id. at 7. Pursuant to the Brittain County Wetlands Preservation Law of 1982 ("Wetlands Preservation Law"), Lear must acquire a permit to fill the marsh. Id. Lear applied for the necessary permit in 2013. Id. The County Wetlands Board denied her application because, pursuant to the Wetlands Preservation Law, permits to fill wetlands are only granted for water-dependent uses, which do not include residential development. Id.

There is currently no market for the Cordelia subdivision without the prospect of residential development. Id. at 7. Lear has not reassessed the value of her property since her permit application was denied by Brittain County, leaving the subdivision's current value unknown. Id. The subdivision likely does not have a market as agricultural or timber land, but this may change after natural processes allow for the growth of a successional forest. Id. Additionally, the Brittain County Butterfly Society offered Lear $1,000 annually for the privilege of conducting butterfly viewing outings on her property during the summer season. Lear declined the offer. Id.

[1] No federal approvals would be required for this project because the U.S. Army Corps of Engineers ("USACOE") considers this portion of the lake to be "non-navigable" for the purposes of the Rivers and Harbors Act of 1899 and because construction of residential dwellings involving one-half acre or less of fill is authorized under USACOE Engineers Nationwide Permit 29.

Appellee Cordelia Lear brought this action in U.S. District Court for the District of New Union in February 2014. Lear sought declaratory relief stating that the ESA is unconstitutional as applied to her property or, in the alternative, compensation from FWS and Brittain County for a regulatory taking of her property on the grounds that she has been deprived of all economically viable use of her land. The District Court held a seven-day bench trial and on June 1, 2016, issued a final order in this case. The District Court dismissed Lear's claim for declaratory relief on the constitutionality of the ESA and awarded damages against FWS and Brittain County for an unconstitutional taking of Lear's property, in the amounts of $10,000 and $90,000 respectively. All three parties timely appealed.

SUMMARY OF ARGUMENT

The ESA, as applied to the wholly intrastate population of Karner Blue butterflies located on Lear's subdivision, is unconstitutional under the Commerce Clause. Protecting the endangered butterflies is not substantially related to interstate commerce and thus is beyond Congress' power to regulate. Any connection between protection of the Karner Blues and commerce is tenuous and insufficient under binding Supreme Court precedent. Furthermore, the expansive view of the Commerce Clause adopted by the Court in other cases is inapposite because those cases involved statutes with inherently commercial purposes. In contrast, the ESA is intended to protect species and their habitat without regard to economic concerns.

Lear's claim against FWS is not ripe because Lear failed to submit an application for an Incidental Take Permit. An ITP grants a limited exception to the ESA's "take" provision and may have allowed Lear to construct her single-family home as desired. However, without receiving an ITP application, FWS was unable to reach a final decision regarding the development of the Cordelia subdivision, rendering Lear's claim unripe. In addition, Lear cannot

invoke the futility exception because she has failed to submit a single meaningful ITP application to FWS and because it is uncertain how FWS would have used its broad discretion in considering such an application.

The relevant parcel for analyzing Lear's takings claim is the entirety of Lear Island, not Cordelia's subdivision. For 200 years, the Lear family has treated the Island as a single entity. This has remained unchanged since the 1965 subdivision. Although King Lear purported to partition the Island into three subdivisions, he intended the entire Island to remain in the family and to function as a single unit. For example, the only access point to the mainland is located on Cordelia's land. Thus, the remaining two subdivisions can only be used in conjunction with the Cordelia subdivision. Case law clearly directs that deeded property lines are not dispositive in defining the relevant parcel for a takings analysis, especially in transactions among family members. Rather, this Court should consider the historical use of the Island as well as current treatment of the Island to find that the relevant parcel is the entirety of Lear Island.

The Court should consider Brittain County's Wetlands Preservation Law separately from the ESA when analyzing whether Lear has been deprived of all economically viable use of her subdivision. Lear seeks to combine the impacts of the ESA and the Wetlands Preservation Law, and argues that together, they constitute a taking. But this argument extends the theory of joint and several liability outside of the tort context, which the Supreme Court has been hesitant to do. In addition, it would be inequitable to hold Brittain County liable for the impact of the ESA because it is a federal statute over which the County exercises no jurisdiction or control.

Lear's takings claim is precluded under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), because the title to Lear Island granted to Cornelius Lear was limited by implied public trust easements. States, and occasionally the federal government acting as a

proxy, hold navigable waters and the lands beneath them in trust for use and enjoyment by the public. Although the title granted to Cornelius Lear in 1803 purported to grant title to the Island as well as to adjacent submerged lands, Congress did not have authority to make this grant unencumbered by public trust easements. Therefore, the title inherited by Cordelia Lear was a restricted one. By refusing to issue Lear a permit to fill the marsh–a navigable waterway–Brittain County merely made explicit restrictions that inhered in Lear's title as implied public trust easements. Thus, Lear's takings claim is precluded.

Lear cannot assert that she has suffered a per se taking under Lucas because her use of the subdivision will be limited under the ESA for ten years at most. In the absence of annual mowing, the lupine fields that serve as the habitat for the endangered Karner Blues will naturally convert to a successional forest and will no longer be able to support the butterfly population. At that point, the ESA will not prohibit the development of Lear's land because such development will not constitute the taking of an endangered species. Pursuant to binding precedent, a temporary restriction, even one that lasts several years, does not deprive a landowner of all economically viable use of her property and thus does not constitute a per se taking.

Finally, Appellee Lear cannot assert that she has been deprived of all economically viable use of her subdivision because she rejected the Brittain County Butterfly Society's offer to use her property for butterfly viewings on a paid basis. Lucas establishes a rigid rule: In order for a claimant to establish a per se taking, she must be left with *no* economically beneficial use of her land. 505 U.S. 1003. Even a 95% reduction in value is insufficient. Lear cannot meet this high burden, given the Butterfly Society's offer. Thus, her per se takings claim must fail.

ARGUMENT

I. Standard of Review

Questions of law are reviewed de novo and no deference is owed to the trial court. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The following seven issues are questions of law and thus should be reviewed by this Court de novo.

II. Application of the ESA to Lear's Subdivision Is Unconstitutional Under the Commerce Clause Because the Population of Karner Blue Butterflies on the Subdivision Is Entirely Intrastate.

The population of Karner Blue butterflies living on the Heath is located entirely within the state of New Union. Yet the lower court, ignoring well established Commerce Clause precedent, found that the Endangered Species Act ("ESA") constitutionally applied to bar development of the Heath in order to prevent the "take" of the species. Properly framed, the question is whether the underlying activity of protecting the butterfly population substantially relates to interstate commerce. The answer, dictated by solid Supreme Court precedent, is no.

Congress is permitted to regulate three categories of activity under the Commerce Clause: channels of commerce, instrumentalities of commerce, and activities that are substantially related to interstate commerce. U.S. v. Lopez, 514 U.S. 549 (1995). The Karner Blues are not a channel or instrumentality of commerce. Thus, the question before this Court is whether protecting the intrastate population of butterflies on the Heath is substantially related to interstate commerce. See San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174 (9th Cir. 2011) (noting, in an as applied challenge to the ESA, that the most applicable category is "substantial effects"); see also Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271 (11th Cir. 2007) (analyzing an as applied ESA challenge under the third category).

The Court in Lopez set forth four factors to consider in evaluating whether a law substantially affects interstate commerce: (1) whether the statute has anything to do with

commerce; (2) whether the statute contains an express jurisdictional element; (3) whether the legislative history contains findings related to the statute's effects on interstate commerce; and (4) whether the link between the regulated activity and the effect on interstate commerce is too attenuated. Id. at 561–65. The Supreme Court has never held, under the Lopez framework or any other, that protecting a wholly intrastate population of endangered species substantially affects interstate commerce. In fact, the Court has consistently refused to accept weak connections to interstate commerce as a basis for Congressional authority. See Lopez, 514 U.S. at 549–50 (striking down the Gun-Free School Zones Act on the grounds that any connection between gun possession in schools and interstate commerce would require the Court to "pile inference upon inference"); U.S. v. Morrison, 529 U.S. 598 (2000) (striking down a portion of the Violence Against Women Act because any deterrence of business and travel resulting from gender-motivated violence is too attenuated to satisfy the Commerce Clause).

By misconstruing the underlying activity as the development of Lear's land, the District Court avoided the clear mandate of Lopez and Morrison. The proper inquiry is whether the protection of the Karner Blue butterflies substantially relates to interstate commerce. San Luis, 638 F.3d at 1174–77 (framing the relevant activity as the protection of the threatened species); Alabama-Tombigbee, 477 F.3d 1250 (same). Applying the Lopez factors to this activity reveals that the ESA is unconstitutional as applied to Lear's subdivision. The activity of conserving species, like gun possession and violence against women, is not economic in nature. Further, it is undisputed that the ESA's take provision contains no jurisdictional element and is not supported by congressional findings regarding its impact on commerce. Finally, any impacts on interstate commerce are too attenuated to qualify under the Commerce Clause.

Every case that could be relied upon by Fish and Wildlife Service ("FWS") to support its as applied challenge is distinguishable. In Gonzales v. Raich, 545 U.S. 1 (2005), the Court held that the Commerce Clause permitted Congress to regulate marijuana that was legally cultivated for personal use under state law. The lynchpin of the Court's reasoning in Raich was the purpose of the Controlled Substances Act: to control supply and demand of controlled substances in both lawful and unlawful drug markets. Id. at 19. The Court reasoned that leaving home grown marijuana outside of this regulatory scheme would substantially affect price and market conditions of the interstate market and undermine the purpose of the statute.

In contrast to the regulatory framework at issue in Raich, the ESA is not in any way commercial. As emphasized by the Court, the Controlled Substances Act was intended to control the volume of drugs in the marketplace. This is an inherently commercial purpose. In contrast, the purpose of the ESA is to provide for the conservation of the ecosystems on which endangered and threatened species depend. 16 U.S.C. § 1531. Because there is nothing commercial about protecting endangered species, Raich does not govern this case.

Although lower courts have rejected as applied challenges to the ESA, these cases do not bind this Court. In addition, they are readily distinguishable. Take the two most recent holdings on this issue. In San Luis, 638 F.3d 1163, the Ninth Circuit concluded that application of the ESA to an intrastate species was proper because the ESA "bears a substantial relation to commerce." Id. at 1176–77. In reaching this conclusion, the court relied on a list of possible ways that protecting a species could "implicate[] economic concerns." Id. Because Lear has raised an as applied challenge, the generic theories listed in San Luis do not apply here. Indeed, the facts of this case show that there has never been overutilization of the Heath's butterflies nor any other commercial connection to the population. Alabama-Tombigbee is similarly

inapplicable. 477 F.3d at 1275 (rejecting an as applied Commerce Clause challenge to the ESA where the sturgeon at issue was "once harvested commercially, and over harvesting was one of the factors in the species' decline.").

The Supreme Court has consistently recognized its duty to enforce "meaningful limits" on Congress' power under the Commerce Clause. Lopez, 514 U.S. at 580. Binding precedent is clear that applying the ESA to an entirely intrastate population of butterflies to prevent the development of Lear's private land goes too far and must be declared unconstitutional.

III. Lear's Takings Claim Is Not Ripe Because FWS Has Not Issued a Final Decision on the Development of Her Subdivision and the Futility Exception Does Not Apply.

The District Court erred in finding that Lear's regulatory takings claim was ripe. In order for a takings claim to be adjudicated in a court of law, the claim must be ripe. Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 185 (1985). A regulatory takings claim is not ripe until a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" has been made. MacDonald, Sommer & Frtes v. Yolo County, 477 U.S. 340, 348 (1986). This final decision is an "essential prerequisite" to such claims because a "court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes." Id.

Here, Lear did not submit an application for an Incidental Take Permit ("ITP"), which prevented FWS from issuing a final approval or denial of her proposed development. Additionally, because Lear failed to submit a complete application, she cannot be certain of the full impact of the ESA on her ability to develop her property. As a result, Lear's takings claim is

not ripe and the futility exception to the ripeness requirement does not apply.[2] Therefore, Lear is precluded from bringing her claim in this Court.

A. FWS Did Not Issue a Final Determination for Ripeness Purposes Because Lear Never Submitted a Habitat Conservation Plan ("HCP") or Any Other Part of an ITP Application.

Lear's decision not to submit an ITP application prevented FWS from making a final decision and therefore Lear's takings claim is not ripe. Courts have consistently held regulatory takings claims to be unripe when a landowner fails to complete any necessary applications or requirements needed for an agency to make a final decision. See Greenbrier v. U.S., 193 F.3d 1348, 1359 (Fed. Cir. 1999) ("Where a government entity provides procedures for obtaining a final decision, a takings claim will not be ripe until the property Owner complies with those procedures."). Indeed, the Supreme Court has held that without a complete submission from a property owner outlining a plan for development in accordance with the relevant regulations, a government entity cannot make a final decision approving or denying the proposal as required for ripeness purposes. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."); see also McGuire v. U.S., 707 F.3d 1351, 1361 (Fed. Cir. 2013); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987).

[2] Because no party addresses this issue before the Court, Brittain County does not fully brief the ripeness issues as they apply to the takings claim against Brittain County. However, since the District Court decided to briefly rule on the claim against Brittain County in its decision, the County asserts that the takings claim Lear has made against it is also unripe. As required by the Supreme Court in *Williamson*, Lear did not complete a meaningful application for a fill permit with the Brittain County Wetlands Board because she did not seek any variances after her denial. *Williamson v. Hamilton Bank*, 473 U.S. 172, 191 (1985) (holding that until a determination is made that no variances can be granted, it is impossible to decide whether the landowner would be denied economically feasible use of his property, and thus the claim is not ripe).

Here, Lear refused to comply with the procedures necessary for FWS to make a final decision regarding the application of the ESA restrictions to her property. The FWS New Union field office informed Lear at least twice that any disturbance of the lupine fields would constitute a take of the Karner Blue butterfly in violation of § 9 of the ESA. R. at 6. FWS also informed Lear that it would be possible to obtain an ITP that would allow her to develop her property, but to do so Lear would need to submit an HCP as well as an environmental assessment under NEPA. Id. Yet, despite being informed of these requirements, Lear did not submit the HCP for consideration by FWS, nor did she pursue any other part of the ITP process. Id. at 7. As a result, FWS could not issue a final decision allowing or prohibiting development on the Cordelia subdivision. Lear cannot now insist that FWS's actions constitute a regulatory taking, when Lear's own failure to follow procedure prevented FWS from taking regulatory action on Lear's property in the first place. Thus, Lear's takings claim is not ripe and this Court cannot make a determination at this time.

B. The Futility Exception Does Not Apply Because Lear Has Not Submitted a Complete ITP Application and Because There Is Still Uncertainty as to the Cordelia Subdivision's Permitted Use.

Lear cannot claim that the futility exception prevents her from having to submit a complete ITP application for ripeness purposes. In the land use context, the futility exception protects property owners from filing *multiple* applications for property development when the government's decision after the first application makes clear that further applications will be denied. Howard W. Heck and Associates, Inc. v. U.S., 134 F.3d 1468, 1472 (Fed. Cir. 1998). This is distinct from suggesting that *no* applications for development need to be filed at all. Id. (holding that the futility exception did not apply to a property owner who had never submitted a complete application for a wetlands dredge-and-fill permit). In fact, courts have explicitly

rejected such a contention. Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990) ("[The futility exception] serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes clear that no project will be approved. The futility exception does not alter an owner's obligation to file one meaningful development proposal."); see also Williamson, 473 U.S. at n. 8 (approving of the contention that the futility test is not applicable where one meaningful application has not yet been made).

In the case at hand, Lear has failed to submit even one complete ITP application that could be reviewed by FWS. Therefore she cannot invoke the futility exception. Additionally, the District Court's reliance on Palazzolo v. Rhode Island is misplaced. In Palazzolo, the Supreme Court did not dispel with the need for one meaningful application prior to the invocation of the futility exception. Palazzolo, 533 U.S. 606, 625–26 (2001). Rather, the Court's holding clearly states that the futility exception is only applicable after the initial submission and denial of a land use application. Id. ("Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and *its denial of the application* makes clear the extent of development permitted . . . federal ripeness rules do not require the submission of *further* and futile applications . . . .") (emphasis added). Thus, Palazzolo does not support the idea that the futility exception can be invoked prior to the filing of an application. Therefore, Lear cannot use the futility exception to support her contention that her takings claim is ripe.

Furthermore, Lear cannot argue that submitting an application for an ITP is futile because FWS has discretion in approving or denying the ITP application and there is still uncertainty as to what it would decide regarding permitted use of the Cordelia subdivision. In the regulatory takings context, a claim is generally ripe only when the denial of land use applications reveals

that the agency has no discretion to permit development or the type and extent of development permitted are known "with a reasonable degree of certainty." Anaheim Gardens v. U.S., 444 F.3d 1309, 1316 (Fed. Cir. 2006). When this point of clarity is reached, the futility exception is applicable, as it is apparent that future land use applications will not produce different results. Id.

In the present case, no "reasonable degree of certainty" as to the approval or denial of the ITP has been reached. Here, Lear claims that FWS's informal letter, dated May 15, 2012, outlining the general requirements of an acceptable HCP and inviting Lear to submit an ITP application, demonstrates that no further discretion was available to FWS that would allow them to approve Lear's ITP application given her mitigation restraints. R. at 6. This is simply not true. First, the May 15th letter directed Lear to FWS's Habitat Conservation Planning Handbook ("Handbook") for more information on developing a complete HCP for submission as part of an ITP application.[3] Id. The Handbook clearly states that the type and location of mitigation habitat in an HCP can change depending on the circumstances and that FWS has discretion in which location it approves for mitigation habitat. The Handbook states:

> Generally, the location of replacement habitats should be as close as possible to the area of impact; it must also include similar habitat types and support the same species affected by the HCP. However, there may be good reason to accept mitigation lands that are distant from the impact area…. Ultimately the location of mitigation habitat must be based on individual circumstances and good judgment.

Handbook, p. 3–21.

Second, the Handbook makes clear that FWS Field Offices are not the sole entities evaluating and approving HCPs as a part of ITP applications. Handbook, p. 2–5, 6–27. In fact, the Handbook clearly states that "[p]roblems identified during the HCP development phase should be elevated to the Regional Offices early in the process for suggestions that might be

[3] U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK ("HANDBOOK") (1996).

helpful to the applicant and the Field Office for resolving differences." Handbook, p. 6–9. Based on information available to Lear in the Handbook, it is clear that FWS would have exercised significant discretion in considering her ITP application. By failing to follow through with the ITP procedures, Lear did not fully ascertain what impact the ESA would have had on her ability to develop her property. This uncertainty precludes her from utilizing the futility exception.

IV. The Entirety Of Lear Island Is the Relevant Parcel for Takings Analysis Based on the History of Lear Island, Its Treatment as a Single Parcel, and General Considerations of Fairness.

Cordelia Lear alleges that she has suffered a complete deprivation of all economically viable use of her subdivision under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Whether a complete taking has occurred largely depends on the extent of the relevant parcel. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). However, the U.S. Supreme Court has not provided clear guidance on this question, leaving "no 'objective' way to define what [the relevant parcel] should be." Justice Blackmun's dissent, id. at 1054. Instead, federal courts take "a flexible approach, designed to account for factual nuances." Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1181 (Fed. Cir. 1994); see also Ciampitti v. U.S., 22 Cl. Ct. 310, 319 (1991) (the court's aim "should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment").

In defining the relevant parcel, courts consider: (a) the extent of contiguous, commonly-owned property; (b) the extent to which properties have been treated as a single income-producing unit; (c) date(s) of acquisition; (d) the extent to which the claimant considers the property to be a single entity; and (e) general considerations of fairness. See, e.g., Dist. Intown Properties Ltd. P'ship v. D.C., 198 F.3d 874 (D.C. Cir. 1999); Deltona Corp. v. U.S., 657 F.2d 1184 (Ct. Cl. 1981); Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720 (2006). Definition of the relevant parcel rests on the totality of the facts and considerations, and no one

factor is determinative. Lost Tree Vill. Corp. v. U.S., 707 F.3d 1286 (Fed. Cir. 2013); E. Cape May Associates v. State, Dep't of Envtl. Prot., 343 N.J. Super. 110 (App. Div. 2001).

Lear Island is comprised of three contiguous subdivisions, each owned by one of the Lear sisters. R. at 5. The Lear Family acquired the Island as a single parcel, through a congressional grant in 1803. Id. at 4. The subdivisions were historically, and are to this day, inextricably linked in purpose and function, and have been regarded as a single entity for over 200 years. These factors and general considerations of fairness direct that the entirety of Lear Island is the relevant parcel for takings analysis.

A. The Entirety of Lear Island Is the Relevant Parcel for Takings Analysis Because the Island's Three Subdivisions Are Contiguous, Commonly-Owned Property.

The District Court defined the relevant parcel as Cordelia Lear's subdivision, relying on Loveladies Harbor. While a deeded property line is relevant to defining the relevant parcel in takings cases, it is not determinative. City of Coeur d'Alene v. Simpson, 142 Idaho 839 (2006) (where record titles to subdivisions are held by different family members and the subdivisions are operated together as one unit, the court should consider all relevant factual circumstances, including the purpose and character of the subdivision and the transfer of property).

The Lear Family has maintained ownership and occupancy of the entirety of Lear Island since its original acquisition in 1803. R. at 4–5. Although King Lear formally subdivided the Island in 1965, as a practical matter, nothing changed as a result. He continued to live in the homestead on the subdivision deeded to Goneril and took the liberty to construct a residence on the subdivision deeded to Regan. Id. at 5. Thus, King Lear treated the Island as if it remained entirely under his ownership. He also reserved a life estate in each subdivision, further demonstrating his intent for all three to remain contiguous property under the ownership of the Lear Family. Id. at 5. There is no suggestion that King Lear, or anyone in the Lear Family, ever

contemplated conveying any of the subdivisions outside the familial unit. Town of Jupiter v. Alexander, 747 So. 2d 395 (Fla. Dist. Ct. App. 1998) (holding that the relevant parcel included two non-contiguous lots because the claimant's intent was clearly integration of the parcels, where all development plans incorporated both lots and there was no evidence in the record that the claimant ever intended or explored separating the lots). As such, the purported subdivision and transfer of Lear Island was a mere change in legal form, not in substance, and should not be determinative in defining the relevant parcel for the purpose of Lear's takings claim. Forest Properties, Inc. v. U.S., 39 Fed. Cl. 56 (1997), aff'd, 177 F.3d 1360 (Fed. Cir. 1999) (where a property owner treats several non-contiguous parcels as one unit, defining the relevant parcel as a single parcel would improperly "elevate the style of the transaction over the substance of a property owner's treatment of a parcel," even though the owner acquired the parcels at various times, through separate legal transactions).

Because kinship ties can be exploited to gain unfair legal advantage, the Supreme Court has viewed transfers of property between family members with more scrutiny than ordinary, arms-length transactions. Helvering v. Clifford, 309 U.S. 331, 335 (1940) ("[W]here the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary"). Courts have even attributed property ownership between family members in some contexts. See City of Coeur d'Alene v. Simpson, 142 Idaho 839, 849 (2006) (when there is a transfer of property between family members, a "wink-and-a-nod agreement" could invalidate a purported contract).

As discussed above, the subdivision of Lear Island was a mere formality and the Island continues to be treated as if under common ownership. Lear's kinship ties with her sisters, the deeded owners of the contiguous subdivisions, further support the conclusion that Cordelia's

subdivision should not be isolated for the takings analysis. R. at 6. In an effort to make her deprivation appear more significant, Cordelia will likely repudiate kinship with Goneril, deeded owner of the neighboring subdivision, by alleging estrangement. Id. However, kinship ties and familial attribution of property ownership generally cannot be overcome by professed estrangement. Cerone v. Commissioner, 87 T.C. 1 (1986) (there is no exception to the family stock attribution rules of 26 U.S.C. § 318 due to family hostility or estrangement). Therefore, rather than relying on the ostensible subdivision of Lear Island or the relationship between the sisters, this Court should instead look to the historical unity and economic productivity of the Island as a whole. Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754 (2005).

B. The Entirety of Lear Island Is the Relevant Parcel for Takings Analysis Because the Island Has Been Treated as a Single Income-Producing Unit.

Courts consistently refuse to limit the relevant parcel to a subdivision's boundaries when its owner has treated the subdivision, along with others, as a single income-producing unit. See, e.g., Cane Tennessee, Inc. v. U.S., 62 Fed. Cl. 481 (2003) (relevant parcel included two non-contiguous tracts purchased by the same investor through two separate deeds because they were part of, and purchased in furtherance of, a single development plan); Appolo Fuels, Inc. v. U.S., 381 F.3d 1338 (Fed. Cir. 2004), cert. denied, 543 U.S. 1188 (2005) (holding that the relevant parcel for takings purposes included all land covered by two separate leases because the land was purchased as a single mining unit under a unified plan).

The Lear Family has benefited from great economic use of the Cordelia subdivision since acquiring the Island over 200 years ago. The Lear Family maintained the entirety of Lear Island as a single productive farm for decades. R. at 5. As part of the farm, the Heath was used to transport produce to market and provided the only road access to the mainland. Id. In keeping with this historical purpose, the Heath continues to provide the only means of access to the

Island. Id. Thus, cooperation amongst the three sisters was clearly envisioned by King Lear when he drafted the subdivisions in 1965. The uneven subdivision of the Island further illustrates King Lear's intent for the entirety of the Island to function as a single income-producing unit. The miniscule Cordelia subdivision is much smaller than the other two, comprising a mere one percent of the Island's total area. Id. The Heath could not have been expected to sustain an independent economic existence in 1965, nor can it be expected to today. Because the entirety of Lear Island continues to function as a single economic unit, it is the relevant parcel for takings analysis.

C. General Considerations of Fairness Further Dictate That the Entirety of Lear Island Is the Relevant Parcel for Takings Analysis.

Where a landowner's pre-regulatory action exacerbates a regulation's restrictions on the economic use of her property, general considerations of fairness dictate that a reviewing court should consider the property's historic boundaries and economic value in takings analysis. King Lear's subdivision of the Island constitutes a pre-regulatory action because it occurred prior to enactment of the ESA and the Wetlands Preservation Law. R. at 5. The uneven subdivision of the Island diminished the number of possible uses of the Heath, making it especially vulnerable to the effects of land use restrictions. Thus, it should be no surprise that Cordelia has alleged that the ESA and the Wetlands Preservation Law have completely deprived her of economically viable use of her land. In stark contrast, there is no evidence in the record that either of the other two subdivisions was noticeably affected by the regulations.

Defining the relevant parcel as the Cordelia subdivision would allow the Lear Family's pre-regulation subdivision of the Island to intensify the impact of the regulations on the Heath, artificially strengthening Cordelia Lear's takings claim. Ciampitti v. U.S., 22 Cl. Ct. 310 (1991) (expressing concern that "a taking can appear to emerge if the property is viewed too narrowly").

Thus, general considerations of fairness dictate that the entirety of Lear Island is the relevant parcel for takings analysis.

V. The Impact of Brittain County's Wetlands Preservation Law Should Be Considered Separately From the ESA and Alone Does Not Constitute a Taking Because it Does Not Prevent Lear from Developing Other Portions of Her Subdivision.

Brittan County's Wetlands Preservation Law restricts only one set of activities on Lear's land: filling the wetlands of the marsh to construct a development that is not water-dependent. R. at 7. The law does not prevent Lear from developing any other part of her subdivision. Lear's takings claim relies on a novel legal theory: The County is liable not only for the impact of its own law, but also for the restrictions imposed by federal law, over which the County exercises no authority or jurisdiction. According to Lear's argument, the Wetlands Preservation Law and the ESA combine to deprive Lear of all economically viable uses of her land. This argument, which borrows from tort the theory of joint and several liability, fails for several reasons.

First, joint and several liability has never been extended to the takings context. The foundational takings case Williamson, 473 U.S. 172, involved multiple regulations but cannot be used to support Lear's argument. In Williamson, the plaintiff argued that the application of a zoning ordinance (passed by the county legislative body) and various subdivision regulations (passed by the county planning commission) deprived him of all economically viable use of his land. Id. at 184. Although Williamson involved two sets of legal restrictions, its holding should not be relied upon here, for two reasons. First, the Court in Williamson did not reach a decision on the merits but rather dismissed the landowner's claim on ripeness grounds. Id. at 196–97. Thus, the Court's decision says nothing about how the impact of two different regulations should be considered in a takings analysis. Second, even if the Court had reached the merits, there is a key factual distinction between Lear's situation and Williamson. Both sets of regulations at issue in Williamson were the product of a single government entity: The county passed the zoning

ordinances and also developed the subdivision regulations. Id. at 176. Indeed, the Williamson County Planning Commission was responsible for enforcing both sets of regulations by approving each proposed plat before it was recorded. Id. Thus, the county exercised considerable control over all of the relevant regulations. In contrast, Brittain County does not exercise any control over the ESA. Indeed, the County was not involved in the listing of the Karner Blues as an endangered species. This distinction renders Williamson inapplicable and also demonstrates that it would be inequitable to hold the County liable for the application of the ESA.

Not only has the Supreme Court never extended the theory of joint and several liability to takings claims, the Court has expressly refused to apply it in other contexts. Indeed, the Supreme Court recently rejected an argument that joint and several liability should extend to restitution for child pornography. Paroline v. U.S., 134 S. Ct. 1710 (2014). The plaintiff in Paroline was a victim of child pornography who had been depicted in images trafficked on the internet and possessed by thousands of individuals. Id. at 1717. After one possessor pleaded guilty in federal court, the plaintiff sought restitution against him in the full amount of her losses. Id. at 1718. The Supreme Court rejected the plaintiff's aggregate causation theory, finding that "legal fictions developed in the law of torts" should not apply equally to the criminal context. Id. at 1724. The Court cautioned against taking these legal fictions "too far" and explained that the Court has been "reluctant to adopt aggregate causation logic in an incautious manner." Id. The Court reasoned that the case did not involve multiple wrongdoers acting in concert. Id. at 1725. In fact, the defendant had no contact with the vast majority of the other offenders. Id. Therefore, the Court concluded that holding him liable for the conduct of other "independently acting possessors and distributors" would be too severe a remedy. Id. at 1726.

The same is true here. Like Paroline, who had no contact with the other possessors and distributors of pornography, Brittain County has no relationship with FWS. Applying joint and several liability here would hold the County liable for the laws of an entirely separate, independent government agency, a result strongly disfavored in Paroline. Therefore, this Court should follow the Supreme Court's cautious approach and decline to "embrace the fiction" espoused by Lear. Id. Furthermore, it is not enough to simply argue that because the purpose of takings law, like the purpose of tort law, is to compensate individuals for their losses, the theory of joint and several liability should be imported from tort. The Court rejected this argument in Paroline. The Court acknowledged that the purposes of restitution overlap with the purposes of tort law, and that the "primary goal of restitution is remedial or compensatory." Id. at 1724–25. But the Court nevertheless refused to apply joint and several liability to claims of restitution. Therefore, the fact that takings law, like tort, seeks to compensate injured individuals is insufficient to sustain Lear's argument.

Even within the field of environmental law, there are reasons to reject Lear's theory of liability. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") imposes a joint and several liability scheme on potentially responsible parties but it does so through explicit statutory language. 42 U.S.C. § 9607 ("[T]he liability of an owner or operator or other responsible person under this section shall be *the full and total costs* of response and damages.") (emphasis added). Thus, where Congress intended for joint and several liability in environmental cases, it has made its intention clear. Cf. Paroline, 134 S. Ct. at 1724 (explaining that the Court has been cautious to extend joint and several liability beyond tort, especially "where there is no language expressly suggesting Congress intended that approach"). In contrast, in the takings context, there is no statutory language to look to nor has any clear rule

emerged from case law. In the absence of a clear mandate, joint and several liability should not be extended here.

Due to the lack of support for Lear's position, together with the Supreme Court's hesitation to extend joint and several liability beyond the tort context in the absence of explicit Congressional guidance, Lear's theory of liability should be rejected. Examined on its own, the Wetlands Preservation Law does not prevent Lear from developing any other portion of her property other than filling the marsh. Thus, it has not deprived her of all economically viable uses of her land and therefore does not constitute a taking.

VI. Public Trust Principles Preclude Lear's Takings Claim Based on Brittain County's Denial of a Permit to Fill the Marsh.

The American public trust doctrine can be traced back to English common law, pursuant to which, the King held title to certain submerged lands and was entrusted to serve and protect the public's right to use those lands. Illinois Cent. R. Co. v. State of Illinois, 145 U.S. 387, 458 (1892). Under the American doctrine, title to "[t]he shores of navigable waters, and the soils under them," was held in trust by the thirteen English colonies and then reserved to the original American states when they formed the union. Pollard v. Hagan, 44 U.S. 212, 230 (1845). The Supreme Court has emphasized that the public trust doctrine is "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." Illinois Cent. R. Co., 146 U.S. at 436–37. The Court has also established that lands submerged beneath navigable waters constitute public trust lands, consistent with tradition dating back to English common law. Id.

Virginia ceded the Northwest Territory to the United States pursuant to the Northwest Ordinance of 1787. Northwest Ordinance, 1 Stat. § 50, Article V. The deed of cession stipulated that "all the lands within the territory ceded . . . be considered as a common fund for the use and

benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever." Pollard at 221. The states of New Union, Ohio, Indiana, Illinois, Michigan, and Wisconsin were later formed from the territorial lands, and admitted to the United States "on an equal footing with the original States, in all respects whatever." Northwest Ordinance, 1 Stat. § 50, Article V. At statehood, New Union thus reserved the same rights and obligations regarding public trust lands as the original thirteen colonies.

A. The Public Trust Doctrine Is a Background Principle for the Purposes of Takings Analysis Under Lucas.

Cordelia Lear alleges that Brittain County's denial of a permit to fill the marsh constitutes a complete deprivation of her subdivision's economic use. Under Lucas, even if a landowner can show that a regulation resulted in the complete deprivation of economic use of her land, no taking will be found when the regulation "simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Lucas, 505 U.S. at 1004.

Public trust easements inhere in the title to lands submerged beneath navigable waters. Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198, 205 (1984) ("Although the landowner retains legal title to the property, he controls little more than the naked fee, for any proposed private use remains subject to the right of the State or any member of the public to assert the State's public trust easement."). These easements are property interests held in trust by the state for the use and enjoyment of the public. The state's authority and obligation to administer the trust through land use regulations derives from state property law. D.C. v. Air Florida, Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984) ("In this country the public trust doctrine has developed almost exclusively as a matter of state law"); Parm v. Shumate, 513 F.3d 135, 144 (5th Cir. 2007) (states have broad authority to regulate or prohibit the use of public trust lands).

Therefore, the public trust doctrine is a background principle for the purposes of takings analysis and under Lucas, precludes Lear's claim against the County. Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 986 (9th Cir. 2002) (holding that Washington's public trust doctrine precluded the coastal developer's takings claim because it is a background principle under Lucas).

B. The Public Trust Navigational Reservation Existed Prior to Cornelius Lear's Acquisition of the Marsh in 1803.

The District Court concluded that no public trust navigational reservation can be presumed to have existed at the time Congress granted title to the marsh to Cornelius Lear in 1803. In reaching this conclusion, the court relied on PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012) and the cases cited in that opinion. PPL Montana cited Carson v. Blazer, 2 Binn. 475 (Pa. 1810) for the contention that "a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide." The District Court's order relied heavily on the fact that Carson was decided in 1810, after Lear Island was granted to Cornelius Lear. PPL Montana,132 S. Ct. at 1227. However, the Carson suit was in fact filed in 1803 to resolve conflicting claims of fishing rights purportedly acquired in 1773 and 1796. Carson, 2 Binn. at 475. The Carson court held that large, navigable rivers such as the Susquehanna fall within the scope of the public trust and therefore no private party may assert exclusive fishing rights in such a river. Id. In so holding, the Carson court affirmed that the public trust navigational reservation existed at least as early as 1773, contrary to the District Court's finding. Id. at 475. Because the public trust navigational reservation existed prior to Cornelius Lear's acquisition of Lear Island, public trust easements inhered in Cornelius Lear's title to lands submerged beneath the navigable waters of Lake Union.

C. Cordelia Lear's Takings Claim Based on Brittain County's Denial of a Permit to Fill the Marsh Is Precluded Because the Marsh Is Public Trust Land Subject to the Public Trust Navigational Reservation.

No binding precedent defines the scope of New Union's public trust lands. However, lands submerged beneath navigable waters have historically been recognized as public trust lands and continue to be recognized as such in all five remaining states formed from the Northwest Territory. See, e.g., State ex rel. Merrill v. Ohio Dep't of Nat. Res., 130 Ohio St. 3d 30 (2014) (Ohio); U.S. v. Carstens, 982 F. Supp. 2d 874 (N.D. Ind. 2013) (Indiana); Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892) (Illinois); Scranton v. Wheeler, 179 U.S. 141 (1900) (Michigan); R.W. Docks & Slips v. State, 244 Wis. 2d 497 (2001) (Wisconsin). Given the original purpose of the public trust doctrine, its historical interpretation, and its consistent application in modern state law, lands submerged beneath navigable waters within New Union should be included within the public trust. It would be illogical to conclude otherwise.

For the purposes of the public trust doctrine, navigability is adjudged as of a state's entry to the union. PPL Montana, 132 S. Ct. at 1228. Lake Union has long been used for interstate navigation and the marsh Lear seeks to fill was historically open water, used as a boat landing. R. at 4–5. Thus, the marsh was navigable at the time New Union attained statehood and it, along with lands submerged beneath it, falls within the scope of the public trust. Because the marsh is public trust land, New Union has the authority and obligation to regulate use of the marsh to serve and protect the interests of the public trust. Illinois Cent. R. Co., 146 U.S. at 459 (protecting the public trust is part of the state's inherent sovereignty and "any act of legislation concerning [the use of public trust resources] affects the public welfare. It is therefore appropriately within the exercise of the police power of the state."). Brittain County's refusal to grant Lear a permit to fill the marsh pursuant to the Wetlands Preservation Law is thus a permissible exercise of New Union's sovereign authority under the public trust doctrine. Because

the County's refusal to issue Lear a permit to fill the marsh simply makes explicit restrictions that inhere in Lear's title as implied public trust easements, Lear's takings claim against the County is precluded under Lucas.

D. Congress Lacked Authority to Grant the Marsh to Cornelius Lear, Unencumbered by the Public Trust Navigational Reservation.

Under English common law, the King's ability to grant public trust land to private parties "was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge." Illinois Cent. R. Co., 146 U.S. at 458. In fact, each grant was subject to an implied public trust reservation and would be invalidated "so far as it assumed to . . . confer a right to impede or obstruct navigation." Id. The sovereign colony of Virginia held title to public trust lands within the Northwest Territory, subject to the same limitations on its ability to convey said lands into private ownership. States are similarly limited in their ability to convey public trust lands to private landowners. A grant of public trust lands unencumbered by public trust easements "has never been adjudged to be within the legislative power" and would be subject to revocation, if not invalidated completely. Id. at 453. "The state can no more abdicate its [public trust obligations] than it can abdicate its police powers in the administration of government and the preservation of the peace." Id.

Like the colony of Virginia prior to cession and New Union upon statehood, Congress had no authority to convey public trust lands into private ownership, unencumbered by public trust easements. Summa Corp., 466 U.S. at 205 ("[A]n ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State."). An entity cannot transfer property rights that it does not hold. Sherer-Gillett Co. v. Long, 318 Ill. 432, 434 (1925) ("It is a general, well-established principle that no one can transfer a better title than he has."). When the United States

acquired and held title to territorial public trust lands, it did so temporarily for the future states that would emerge from the territories. Knight v. United Land Association, 142 U.S. 161, 183 (1891). Virginia's cession of the Northwest Territory to the federal government for the express purpose of forming new states did not create in Congress power to convey public trust lands to private parties, free of the public trust easements that attached prior to cession. Finding otherwise would be inconsistent with historical practice and would threaten state sovereignty. "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which must be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." Pollard, 44 U.S. at 230.

Because Congress lacked authority to convey public trust lands to Cornelius Lear unencumbered by trust obligations, public trust easements inhered in Lear's title and were later reserved to New Union upon statehood. Therefore, although the 1803 Congressional grant purported to transfer title in fee simple absolute to the shores of Lear Island and "all lands under water within a 300-foot radius of the shoreline of said island," Cornelius Lear's title was "a qualified title, a bare technical title . . . held at all times subordinate to such use of the submerged lands . . . as may be consistent with or demanded by the public right of navigation." Scranton v. Wheeler, 179 U.S. 141, 163 (1900).

E. Even if the Marsh Is Not Public Trust Land, Cordelia Lear's Takings Claim Based on Brittain County's Denial of a Permit to Fill the Marsh Is Precluded Because the County May Regulate Use of the Marsh to Protect Nearby Public Trust Resources.

As custodian of the public trust, New Union has authority to regulate the use of private property within its jurisdiction to protect nearby public trust resources. Just v. Marinette Cty., 56 Wis. 2d 7, 18–19 (1972) ("Lands adjacent to or near navigable waters exist in a special relationship to the state. They . . . are subject to the state public trust powers"). Brittain County's

refusal to issue Cordelia Lear a permit to fill the marsh constitutes a permissible exercise of this regulatory authority.

Marshes provide important ecosystem services including shoreline stabilization, water purification, flood prevention, and the provision of habitat.[4] Even if the Cordelia marsh is not considered public trust land, it is undisputed that it is adjacent to Lake Union, an interstate navigable waterway that falls clearly within the scope of the public trust. Should the County determine that filling and developing the marsh would harm Lake Union, New Union (and therefore the County) has authority to deny Lear's permit application to further the public's interest in protecting Lake Union. Therefore, even if the Court determines that the marsh is not public trust land, public trust principles preclude Cordelia Lear's takings claim against the County.

VII. The Natural Destruction of the Karner Blue Butterflies' Habitat in Ten Years Precludes a Takings Claim Based Upon the Complete Deprivation of the Economic Value of the Cordelia Subdivision.

Lear's deprivation, if any, is temporary and thus does not constitute a complete taking of the subdivision's economic value. The Supreme Court has firmly established that a temporary restriction on a parcel of property, even if it prohibits all economic use during that time, does not constitute a per se taking. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency 535 U.S. 302, 332 (2002). "Logically, 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." Id. In the case at hand, as is common with species regulated by the ESA, the habitat for the endangered Karner Blue butterfly will disappear when natural forces

[4] *Protecting And Restoring America's Wetlands: Agency Actions To Improve Mitigation And Further The Goal Of "No Net Loss" Of Wetlands*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 2002 WL 31876415, Dec. 26, 2012.

convert the Cordelia subdivision back to a successional forest.[5] At that point, any ESA-based restrictions on developing the subdivision will be removed. R. at 7. Because Lear will regain the ability to develop a residential property on her land, current restrictions affect, at most, a temporary taking.

Any limitations on development of the Cordelia subdivision cannot constitute a categorical taking as Lear asserts. Whether a regulatory restriction on development constitutes a categorical taking depends upon whether the landowner is "left . . . without any present or future interest in economically viable use in their parcel as a whole, or only diminished value of their use interests." Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447, 484 (Fed. Cir. 2009) (citing Tahoe-Sierra, 535 U.S. at 329–31). In Santini v. Connecticut Hazardous Waste Management Service, the court found that the appellant's property recovered "at least some of its value" after the agency withdrew its announcement that the appellant's property was being considered as a site for the storage of nuclear waste, and therefore the property was not rendered valueless. Santini, 342 F.3d 118, 131 (2d Cir. 2003). See also Tahoe-Sierra, 535 U.S. at 332; Wyatt v. U.S., 271 F.3d 1090, 1097–98 (Fed. Cir. 2001).

Similarly, any restrictions on Lear's property will be lifted when natural processes eventually cause the habitat of the endangered Karner Blue butterfly to disappear, thereby eliminating any restrictions that the ESA may place on the Cordelia subdivision. R at 4. Further, in the present case, Lear will recover more than merely "some" of her property's value when the restrictions are lifted; the Cordelia subdivision may even increase beyond what it was valued

[5] The changing nature of ESA land use restrictions based on the disappearance of an endangered species within a particular area is not uncommon. *See* Boise Cascade Corp. v. U.S., 296 F. 3d. 1339, 1341 (Fed. Cir. 2002) (regulatory takings case brought after the Fish and Wildlife Service sought an injunction against a landowner's logging activities after finding a spotted owl on the property, only to lift the injunction once that owl had died).

prior to the restrictions.[6] Thus, Lear's property retains future economic use and therefore any applicable restrictions cannot be considered a categorical taking.

Furthermore, the District Court concluded that the ten-year period in which the restrictions will be in place is too long to constitute a temporary taking. R. at 10. This conclusion is erroneous and runs counter to the Supreme Court's holding in Tahoe-Sierra, which explicitly refused to create a categorical rule deeming takings over a certain length of time to be per se takings. Tahoe-Sierra, 535 U.S. at 341–42 (stating that creating a rule that any moratorium which lasts for more than a year is a per se taking is "too blunt an instrument" and that "fairness and justice" would be best served by implementing the factor test in Penn Central). In line with this holding in Tahoe-Sierra, courts have continuously held that regulatory delays and other temporary restrictions lasting years do not constitute per se takings, if they constitute takings at all. See Wyatt, 271 F.3d at 1094–95 (concluding that a delay of over six years did not constitute a regulatory taking); Williamson, 473 U.S. at 177–82 (finding that there was no taking after a regulatory delay of over seven years); Seiber v. U.S., 364 F.3d. 1356, 1371 (Fed. Cir. 2004) (holding that a two-year delay did not constitute a regulatory taking). In contradiction to this precedent, Lear wishes to assert that a ten-year restriction on development effects a permanent taking simply because it lasts longer than is convenient for her. Her argument not only ignores precedent, it also defies the logical and plain meaning of the term, "permanent." In short, the ten-year restriction on Lear's subdivision does not permanently deprive Lear of all value in her land and therefore cannot be deemed a per se taking.

[6] Given that without annual mowing the lupine fields on the Cordelia subdivision would naturally convert to a forest of oak and hickory trees, the value of the Cordelia subdivision may increase through the ability to harvest timber. R. at 7.

VIII. The Brittain County Butterfly Society's Offer to Pay $1,000 Per Year in Rent for Wildlife Viewing Precludes a Takings Claim Based Upon the Complete Deprivation of the Economic Value of the Cordelia Subdivision.

Lear's claim that she has been deprived of all economically remunerative use of her subdivision is simply not tenable. While Lucas does provide that a taking is presumed when all economically beneficial uses of a piece of property are restricted by regulation, the application of this rule is severely limited. Lucas, 505 U.S. at 1029. The Court in Lucas emphasized that its holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted . . . ." Id. at 1017 (emphasis in original). The Supreme Court underscored the rigidity of its rule, stating that a landowner whose property is diminished a full 95% of its original value would not qualify for Lucas's categorical rule. Id. at 1019 n. 8. Here, Lear ignores the inflexible nature of this rule by arguing that the restrictions placed on the Cordelia subdivision amount to a per se taking under Lucas, despite the fact that she retains the economic use of her property for butterfly tours. R. at 12. Because the restrictions imposed on the Cordelia subdivision fall short of eliminating all economic use of the property, Lear cannot utilize the categorical rule in Lucas to establish a complete takings claim.

Lear argues that her property is deprived of all economic use because of the lack of market value for the Cordelia subdivision without a single-family house. R at 7. In doing so, however, Lear focuses solely on the market value of the property and excludes consideration of other economically viable uses that the property still retains. As the Ninth Circuit has noted, "[f]ocusing the economically viable use inquiry solely on market value . . . could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry." Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432–33 (9th Cir. 1996). As such, many courts focus their inquiries on economic use, not value. Id.; see also Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 616 (9th Cir., 1993) ("[T]he existence of permissible uses

[generally] determines whether a development restriction denies a property holder the economically viable use of its property."); Lucas, 505 U.S. at 1019 ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

In the present case, the Cordelia subdivision has not been left economically idle. The Brittain County Butterfly Society has offered to pay Lear $1,000 annually in order to conduct butterfly viewing outings on Lear's property. R. at 7. Although Lear chose to reject that offer, it demonstrates that her property retains economic use as a tourist attraction. While the Cordelia subdivision may not retain resale value, economically beneficial uses clearly exist. This precludes a categorical takings claim.

Additionally, Lear cannot argue that the loss in value to her property, simply because it is significant, justifies her categorical takings claim. Courts have consistently held that the regulations which prevent even significant economic uses of a landowner's property do not necessarily constitute a taking generally, let alone a per se taking. See Andus v. Allard, 444 U.S. 51, 66 (1979) (holding that regulations that prevent the most profitable uses of the appellees' property were not dispositive of a taking); Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (finding that a 75% diminution in value caused by zoning law was not a taking). Further, Courts have been reluctant to apply Lucas even in cases where there is significant loss in value. See Cienega Gardens v. U.S., 331 F.3d 1319, 1344 (Fed. Cir. 2003) (implying that Lucas requires a loss of 100% of the property's value). In Palazzolo, the Court found that Lucas could not be applied to a takings claim against a wetlands regulation which deprived the landowner of 93% of his original land value because other economic uses could be applied to the property and therefore it was not economically idle. Palazzolo, 533 U.S. at 631. Lear is restricted in her ability

to develop a residence on the Cordelia subdivision–a restriction that could result in a significant depreciation in her property's value. R. at 7. This depreciation, Lear argues, is sufficient to justify a takings claim based on the complete deprivation of economic use. However, as Palazzolo and other cases demonstrate, this loss, significant though it may be, is not enough to justify a per se takings claim under Lucas while Lear still retains the ability to use her property for other purposes. Indeed, Lear's ability to conduct butterfly tours on her property for profit precludes a finding that the Cordelia subdivision has been completely deprived of economic use.

In short, Lear's retention of economically beneficial use defies the most basic requirement under Lucas: the complete elimination of economically remunerative or beneficial use. Therefore, Lear cannot support her contention that the restrictions on the Cordelia subdivision constitute a per se taking.

CONCLUSION

For these reasons, Brittain County respectfully requests that this Court reverse the holding of the trial court, reject Appellee Lear's takings claims, and declare that the ESA is unconstitutional as applied to the intrastate population of Karner Blue butterflies located on Lear's subdivision.