Team No. 63

C.A. No. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
Plaintiff-Appellant-Cross Appellant

v.

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

and

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant

On Appeal from the United States District Court
for the District of New Union
No. 122-CV-2015 (RNR)

BRIEF OF DEFENDANT-APPELLANT BRITTAIN COUNTY, NEW UNION

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JURISDICTIONAL STATEMENT

Cordelia Lear ("Lear") initiated this action against the United States Fish and Wildlife Service ("FWS") and Brittain County under the Takings Clause of the Fifth Amendment in the United States District Court for the District of New Union. Plaintiff also sought a declaratory judgment declaring the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 unconstitutional as applied to her property. Jurisdiction was proper in the district court under 28 U.S.C §§ 1346(a)(2), 1491(a)(1). Following a seven-day bench trial, the district court awarded the Plaintiff damages against FWS and Brittain County and dismissed Plaintiff's declaratory judgment claim on June 1, 2016. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), Brittain County filed a Notice of Appeal on June 9, 2016. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether prohibited "takes" of the New Union Karner Blue, a wholly intrastate and noncommercial butterfly, under Section 9 of the ESA is an invalid exercise of constitutional authority under the Commerce Clause?

II. Whether Lear's takings claim is ripe where (1) the FWS has not issued a final decision or the equivalent of one and (2) the real and concrete consequences of a FWS decision are unknown?

III. Whether the takings claim as to the cattail marsh is precluded by public trust principles when the wetlands were traditionally used for docking boats?

IV. Whether the relevant parcel for the taking analysis is the entirety of Lear Island where the island is contiguous to the affected property and was treated as a single indivisible property from 1803 to 1965?

V. If the relevant parcel is the Cordelia Lot, whether the property is deprived of all economic value where (1) the lot is fully developable in ten-years upon the natural destruction of the butterfly habitat; (2) the Brittain County Butterfly Society offered to pay $1,000 annually to conduct nature tours; and (3) the Brittain County Wetlands Preservation Law still allows development of a single-family home?

STATEMENT OF THE CASE

This is an appeal from the District Court for the District of New Union's grant of $90,000 in damages to Plaintiff Lear against Brittain County. R. at 12. In her complaint, Lear asserted a claim against FWS and Brittain County for an uncompensated taking of her property under the Takings Clause of the Fifth and Fourteenth Amendments. R. at 4. Additionally, Lear sought a declaratory judgment stating that the ESA is an unconstitutional exercise of legislative power as applied to her property. *Id*.

After a seven-day bench trial, the district court dismissed Lear's declaratory judgment claim and determined that the ESA is a legitimate exercise of congressional power under the Commerce Clause. *Id*. It held that the ESA was constitutional because the underlying land development is an economic activity that substantially affects interstate commerce. R. at 8. Next, the district court granted Lear's unconstitutional taking claim. R. at 12. The court held Brittan County and FWS were jointly and severally liable because the federal and state restrictions together precluded development of the residence on the Cordelia Lot. R. at 11. It awarded $90,000 in damages against Brittain County and $10,000 in damages against FWS. R. at 12. The United States (on behalf of Fish and Wildlife Services), Brittain County, and Lear all filed Notices of Appeal challenging all three aspects of the court's decision. R. at 1.

STATEMENT OF THE FACTS

The only remaining New Union population of endangered Karner Blue butterflies lives on Lear Island. R. at 2. Karner Blues are entirely dependent on their habitat of blue lupine flower fields to survive. Unlike butterflies such as the Monarch, Karner Blues do not migrate – their entire life cycle plays out in the lupine fields of Lear Island. R. at 2-3. The caterpillars survive by eating the lupine plant foliage, and remain attached to the lupines until they emerge

from their chrysalis as butterflies. *Id.* The Karner Blue in New Union only survives today because of the annual mowing of the fields in the fall - otherwise their habitat would be gradually taken over by oak and hickory trees that cover the rest of the island. R. at 4.

Lear Island is a long, narrow island in Lake Union, a large interstate lake. In 1803, Congress granted Lear Island to Cornelius Lear, when the island was still part of the Northwest Territory. R. at 1. Cornelius Lear and his decedents first used the island as a homestead, farm, as well as hunting and fishing grounds. In the early part of the twentieth century, the Lear family built a causeway to connect the island to the mainland by road. R. at 2.

In 1965, King James Lear, the sole owner of the island, decided to divide the island into three parcels as part of his estate plan for his three daughters. R. at 2. He reserved a life estate for himself in each parcel, and lived on the 550-acre Goneril Lot in the original homestead. *Id.* At that time, the Brittain Town Planning Board had approved the construction of at least one single-family residence on each lot. *Id.* Lear then built a home on the 440-acre Regan Lot that same year. From then on, agricultural use of the island ceased, and the 10-acre Cordelia Lot at issue remained untouched, except for annual mowing of the lupine fields in October. *Id.*

In 1978 the fields of blue lupine flowers known as "the heath" on the Cordelia Lot were designated as a critical habitat for the New Union Karner Blue butterflies by the Fish and Wildlife Services (FWS). R. at 3. In 1992 the Karner Blue was added to federal endangered species list. R. at 2.

Following the death of King James Lear in 2005, each of the three daughters inherited their parcels. Plaintiff, Cordelia Lear (LEAR), inherited the Cordelia Lot, the smallest parcel of the three parcels. Seven years later, in 2012, Lear decided to build a residence on the heath. R. at 2. She contacted the New Union Field Office to confirm existence of endangered butterflies in

April of that year. R. at 3. An FWS agent confirmed that the endangered butterfly population did live on Lear's property, and suggested that she prepare a habitat conservation plan (HCP) so that she might obtain an Incidental Take Permit (ITP). *Id.*

Outside of the Heath and the access strip, Lear's property includes a half acre of cattail marsh in the cove on the northern tip of the property. Historically, this area had been open water and was used as a boat landing R. at 2., but is now considered by the US Army Corps of Engineers to be "non-navigable" for the purposes of the Rivers and Harbors Act of 1899. In 1982, the marsh came under the protection of the Brittain County Wetlands Preservation Law (BCWPL). R. at 4. Instead of developing an acceptable HCP, Lear proposed to fill in the protected cattail marsh to create a lupine-free building site, and to create a causeway to the mainland road she shares with her sister Goneril. *Id.*

The Wetlands Board denied Lear's permit application on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site did not satisfy that requirement. *Id.* Lear has not sought reassessment of her property following the denial of the permit, and there is no market in Brittain County for the Cordelia Lot without the right to develop a residence. *Id.* Lear pays $1,500 in property taxes annually, and the Brittain County Butterfly Society offered to pay her $1,000 annually for summer butterfly viewing outings. Plaintiff rejected the offer, and brought this action in February 2014. *Id.*

STANDARD OF REVIEW

When reviewing a decision of the Court of Federal Claims following a trial, this Court reviews legal conclusions de novo and factual determinations for clear error. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1266 (Fed. Cir. 2009).

SUMMARY OF THE ARGUMENT

Section 9 of the Endangered Species Act as applied to the entirely intrastate population of New Union Karner Blue butterflies is an invalid exercise of constitutional authority under the Commerce Clause. Furthermore, Lear's claim is unripe because the FWS has not issued a final decision or the equivalent of one, and the real, concrete consequences of a FWS decision are unknown. When evaluating her takings claim, the court must look to the entirety of Lear Island in order to evaluate Lear's takings claim rather than just her individual parcel.

Lear's claim is precluded in three different ways. First, her claim is precluded by the fact that the Karner Blue faces natural destruction in the future. Next, Lear's takings claim based upon complete loss of economic value is precluded by the Butterfly Society's offer to pay $1,000 per year in rent. Third, her claim for a taking based on the denial of her county wetlands permit is precluded by the public trust principles inherent in her title. Finally, the FWS and Brittain County regulations should be considered separately because they affect separate and distinct parcels of the Cordelia Lot.

ARGUMENT

I. TAKE OF THE SUBPOPULATION OF THE NEW UNION KARNER BLUE BUTTERFLY IS NOT AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

The Commerce Clause authorizes Congress "to regulate Commerce… among the several States," U.S. Const. Art. I, §8, cl. 3. While Congress's maintains broad legislative authority under the Commerce Clause, it is not without limit. *United States v. Lopez*, 514 U.S. 549, 567 (1995). Throughout the twentieth century, the Supreme Court took a deferential approach to legislation enacted under the Commerce Clause. *Id.* Modernly, the Court is less deferential, emphasizing the "limit on the commerce power is inherent in 'our dual system of government.'"

United States v. Morrison, 529 U.S. 598, 608 n.3 (2000) (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)). In response to federalism concerns, the Court defined three categories of activity Congress is authorized to engage with under its commerce power. *Lopez*, 514 U.S. at 557. Congress may regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; (3) and activities that substantially affect interstate commerce. *Id.* at 558.

A. The Regulation of Takes of the New Union Karner Blue, an Intrastate, Noncommercial Butterfly, Does Not Involve the Regulation of An Economic Activity and Fails the "Substantial Effects" Test

Section 9 of the ESA prohibits the "take" of any endangered species. *See* 16 U.S.C. §1538(a)(1)(B). By its terms, Section 9 does not address the use of channels of interstate commerce, or the instrumentalities of or things in interstate commerce. Thus, Section 9 can be sustained in this case, if at all, only under the third category as a regulation of "activities that substantially affect interstate commerce." *See Lopez*, 514 U.S. at 559. Therefore, this brief will only address this category as applied to the wholly intrastate subpopulation of the New Union Karner Blue. R. at 8.

In considering whether Congress may prohibit "takes" of the New Union Karner Blue under its commerce power, this Court must not fall into the same trap as the district court. First, in dismissing the declaratory judgment declaring the ESA unconstitutional as applied to Lear's property, the district court erred in finding the relevant activity is the "underlying land development." R. at 8. Rather, the relevant activity is the "take" of the New Union Karner Blue. Second, adopting the analytical framework in *Lopez* and *Morrison*, the "take" of the New Union Karner Blue is not an economic activity that substantially affects interstate commerce. Moreover,

the district court incorrectly followed the weight of precedent because each case is inconsistent and distinguishable from the facts of this case.

B. The Regulated Activity Is The "Take" of the New Union Karner Blue, Not the Underlying Land Development.

The first step in determining whether an activity substantially affects interstate commerce is to define the "regulated activity" at issue. *Morrison*, 529 U.S. at 610. The proper focus is on the activity that is directly prohibited or regulated by the explicit terms used in the statute. *Id.* For example, in *Lopez*, the Court focused on the express language of the Gun Free School Zones Act in determining the regulated activity was the possession of a firearm in a school zone. *Lopez*, 514 U.S. at 561. Similarly, in *Morrison*, the Court looked to the language of the Violence Against Women Act and found the regulated activity was gender-motivated violent crimes. *Morrison*, 529 U.S. at 611.

Here, Section 9 of the ESA makes it unlawful for any person to "take" any endangered species. *See* ESA §9(a)(1)(b), 16 U.S.C. §1538(a)(1)(B). The statute defines "take" to encompass any activity that would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct" of any endangered species." 16 U.S.C. §1532(19). Thus, the ESA's text is decisive: Section 9 regulates takes. Notwithstanding the explicit terms of Section 9, the district court incorrectly held that the relevant activity is "the underlying land development." R. at 8.

Rather than examining the explicit terms in Section 9, the district court incorrectly reasoned, "the relevant activity is the underlying land development through construction of the proposed residence… involving as it does the purchase of building materials and the hiring of carpenters and contractors." *Id*. The district court followed the D.C. Circuit's flawed regulated activity analysis, which is the only circuit to find the regulated activity is something other than

the "take" of an endangered species. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1061, 1072 (D.C. Cir. 2003) (determining the regulated activity was the planned commercial development, not the arroyo toad that it threatens); *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1058-59 (D.C. Cir. 1997) (Henderson, J., concurring) (upholding ESA section 9 as applied to takes of a fly because it regulated commercial development that would degrade the fly's critical habitat).

The D.C. Circuit's regulated activity analysis has since been rejected by the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). That case concerned a Commerce Clause challenge to a regulation of the take of six species of invertebrates found only within two counties in Texas. *Id*. at 624. The plaintiff was prevented from pursuing a commercial development, but the court recognized the proper consideration was the full scope of activity being regulated, not a particular activity which may, coincidentally, be economic. *Id*. at 634. The court recognized that "the effect of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, it not directly regulating commercial development." *Id*. The court further reasoned "looking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause." *Id*. (quoting *Jones & Laughlin Steel Corp*, 130 F.3d at 1067 (Sentelle, J., dissenting) ("[n]owhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect").

Accordingly, the regulated activity in this case is the "take" of the subpopulation of New Union Karner Blue butterflies, not the underlying land development. Like in *Lopez* and *Morrison*, focusing on the activity that is directly prohibited by the explicit terms in Section 9,

the regulated activity is “takes” of the subpopulation of the New Union Karner Blue. Section 9 makes no reference to construction, purchasing building materials or hiring carpenters. R. at 8. As the Fifth Circuit in *GDF Realty* made clear, “Congress, through the ESA, is not directly regulating commercial development.” In this regard, the regulated activity is not the underlying land development. To hold otherwise would contradict the federalism principles enshrined in the U.S. Constitution.

C. The “Take” of the New Union Karner Blue Fails The “Substantial Affects” Test

After determining the regulated activity at issue, courts then use “the controlling four-factor test for determining whether a regulated activity ‘substantially affects’ interstate commerce. *United States v. Alderman,* 565 F.3d 641, 643 (9th Cir. 2009). Under *Lopez* and *Morrison*, this Court must consider the following: (1) Is the challenged federal regulation in furtherance of commerce or an economic enterprise; that is, does the regulation purport to regulate an economic activity? *Morrison*, 529 U.S. at 610. (2) Is the federal regulation supported by an express “jurisdictional element” which might limit its reach to a discrete set of activities that “additionally have an explicit connection with or effect on interstate commerce?” *Id*. at 611-612. (3) Is the federal action backed by express legislative “findings regarding the effects upon interstate commerce” or the regulated activity? *Id*. at 612. And, (4) is the connection between the regulated activity and substantial effect on interstate commerce attenuated? *Id*. Below, the district court made a clear error in failing to apply these four factors in determining whether “takes” of the New Union Karner Blue substantially affects interstate commerce.

1. The Take of the New Union Karner Blue is Not an Economic Activity

The first inquiry is whether the regulated activity is "some sort of economic endeavor." *Morrison*, 529 U.S. at 611. A statute that regulates activity that "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" is constitutionally suspect. *United States v Patton*, 451 F.3d 615, 624 (10th Cir. 2006). The judiciary is charged with ensuring "enforceable outer limits" by declaring certain intrastate activities to be noneconomic. See *Lopez*, 514 U.S. at 566. Therefore, in order to substantially affect interstate commerce, the legislation must purport an economic activity. *Morrison*, 529 U.S. at 613.

For example, in *Lopez*, the Court held that "possession of a gun in a school zone is in no sense an economic activity." *Lopez*, 514 U.S. at 561. The Tenth Circuit affirmed the Supreme Court's ruling in *Lopez*, stating it "makes sense, because the mere possession of a firearm does not constitute the buying, selling, production, or transportation of products or services, or any activity preparatory to it." *Patton*, 451 F.3d at 624. Conversely, the Fourth Circuit held "takes" of red wolves is an economic activity. *Gibbs v. Babbitt*, 214 F.3d 483, 498 (4th Cir. 2000). The court reasoned that "takes" of red wolves is an economic activity because the wolves affect tourism, scientific research, and commercial trade in pelts. *Id*. at 492. The court further reasoned that the wolves affect interstate commerce because they cross state lines. *Id*. But Gibbs did not explicitly determine that the ESA directly regulates economic activity, only that takes of the red wolves is an economic activity. *Gibbs,* 214 F.3d at 498.

In the present case, the take of the New Union Karner Blue is not an economic activity. A "take" is defined as any activity that would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct" of any endangered species." 16 U.S.C. §1532 (19). Like gun possession in *Lopez*, a "take" of the New Union Karner Blue is in

no sense an economic activity. The "take" of the subpopulation of the New Union Karner Blue butterfly does not constitute buying, selling, production or transportation of products or services, or any activity in preparation to it.

Moreover, the record does not reflect any economic value, which can be derived from the New Union Karner Blue. Unlike the red wolves in *Gibbs,* the Karner Blue does not affect tourism, scientific research nor is there a market for Karner Blue products. Additionally, unlike the red wolves in *Gibb,* the Karner Blue populations do not cross state lines because they have difficulty migrating to new habitats and their flight distance is short. R. at 6. In sum, it is clear that "takes" of the New Union Karner Blue "are not, in any sense of the phrase, an economic activity."

2. *The Section 9 Take Prohibition Contains No "Jurisdictional Element" That Would Limit the Prohibition to the Takes That Have an Explicit Connection to Interstate Commerce*

The second inquiry requires courts to consider whether the authorizing statute contains an "express jurisdictional element which might limit its reach to a discrete set of activities that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Here, the ESA states that "it is unlawful for any person subject to the jurisdiction of the United States to… take any [endangered or threatened] species within the United States" without regard to the effect a take may have on interstate commerce. *See* 16 U.S.C. §1538(a)(1)(B). Although the government could have limited its take prohibition to takes that substantially affect interstate commerce, it failed to do so. Thus, the regulation of New Union Karner Blue takes does not include any sort of jurisdictional limit that would ensure that the regulation prohibits a take that substantially affects interstate commerce. This weighs against a finding that the

government was acting “in pursuance of Congress’ power to regulate interstate commerce.” *Morrison*, 529 U.S. at 613.

3. The Regulation of New Union Karner Blue Is Not Supported By Express Legislative Findings Regarding the Effects of Intrastate, Noncommercial Species

The third inquiry depends on whether the authorizing statute for federal regulation or the statute's legislative history contains “express congressional findings” regarding the regulated activity's effects upon interstate commerce. *Lopez*, 514 U.S. at 562. However, “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.” *Morrison*, 529 U.S. at 614.

Here, there are no legislative findings regarding the effects of takes of intrastate, non-commercial endangered or threatened species on interstate commerce. While the legislative history of the ESA suggests that Congress was concerned with the “incalculable” value of endangered species' genetic heritage, this is far from an *express* finding that takes of particular species substantially affect interstate commerce. Here, the Court must not rely on this biodiversity rational and the potential economic consequences flowing from biodiversity. *But see Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *GDF Realty,* 326 F.3d at 638-39. Instead, the Court may rely solely on express findings that the regulated activity itself affects interstate commerce. See *Morrison*, 529 U.S. at 612.

Moreover, there are no express findings that threatened or endangered species takes generally, or the New Union Karner Blue takes specifically, substantially affect intestate commerce. Congress has provided no clear explanation for why a take of the New Union Karner Blue would substantially affect interstate commerce. Additionally, if such congressional findings do exist, Karner Blues can be found in other parts of the United States. R. at 5. Therefore, even if

Karner Blues did affect interstate commerce, there is no reason to assume the "take" of only the New Union subpopulation would substantially affect interstate commerce.

4. The Connection Between Takes of the New Union Karner Blue and Interstate Commerce Is Too Attenuated

Congress may regulate a noneconomic activity where there are "substantial" and not "attenuated" effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce. *Id*. at 614-616. Nevertheless, not every noneconomic activity can be attenuated because it could "obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557. *See Patton*, 451 F.3d at 628 ("Any use of anything might have an effect on interstate commerce, in the same sense in which a butterfly flapping its wings in China might bring about a change in weather in New York."). Attenuation is permissible if the regulation of the noncommercial activity "is an essential part of 'comprehensive legislation to regulate the interstate market in a fungible commodity," *Id.* at 627. *See also Raich v. Gonzales*, 545 U.S. 1, 17 (2005). For example, in order to protect bald eagles, the federal government prohibited the possession of eagle feathers in order to dispel the market for them. *See Andrus v. Allard*, 444 U.S. 51, 58 (1979). This was held to be a valid exercise of Congress's commerce authority. Similarly, in *Raich*, the Supreme Court held purely intrastate cultivation and possession of marijuana affected interstate commerce, even though it was not necessarily an economic activity because it had an effect on supply and demand. *Raich*, 545 U.S. at 12.

In the present case, the connection between the "takes" of the New Union Karner Blue and interstate commerce is too attenuated. Unlike the bald eagles feathers in *Andrus*, the New Union Karner Blue do not produce a fungible commodity. Likewise, unlike the purely in-state production of marijuana, the "takes" of New Union Karner Blue butterflies do not have an effect on supply or demand. Moreover, even if the New Union Karner Blue did produce a fungible

commodity or affected supply and demand, the butterflies are found elsewhere in the United State. Thus, the "takes" of only the New Union subpopulation would not "substantially" affect interstate commerce because they could be found elsewhere.

II. LEAR'S TAKINGS CLAIM IS NOT RIPE BECAUSE A RULING WOULD PREMATURELY INTERVENE IN THE ADMINISTRATIVE PROCESS AND ANY HARDSHIP SUFFERED BY DELAYING ADJUDICATION IS NOT SUBSTANTIAL ENOUGH TO INTERVENE

The district court committed a clear legal error in finding that Lear's takings claim was sufficiently ripe for adjudication. Lear's takings claim fails both prongs of the ripeness test established by the Supreme Court in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *see also Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998); *National Park Hospitality Association v. Dept. of the Interior,* 538 U.S. 803 (2003). First, the facts in this case are not sufficiently developed. In this regard, a decision at this stage would require the court to intervene in a complex administrative process established by Congress. Second, Lear cannot show futility because the FWS has not issued the functional equivalent of a denial of her permit. Finally, there has been no administrative decision that has actually harmed Lear in a way that actually deprives her of property.

A. Lear Cannot Establish A Taking Before FWS Has Had The Opportunity To Decide And Explain The Reach Of The ESA Regarding The Blue Karner Butterfly

This case is not ripe because Lear has not submitted a requisite Incidental Take Permit, 16 U.S.C. §1539(a)(1)(B). Section 10(a) of the Endangered Species Act, 16 U.S.C. §1539, allows the FWS to permit an applicant to engage in a prohibited "taking" of an endangered species under certain circumstances. First, the applicant must first submit a comprehensive

conservation plan. Lear was advised of this step when she contacted the New Union field office, but chose not to submit the plan. R. at 3,11.

In *Agins v. City of Tiburon*, 447 U.S. 225 (1980), the city's zoning ordinance permitted one to five single-family residences on the plaintiff's land. Before development, the plaintiff was required to submit a plan, so the city could determine how many residences it would allow within this range. *Id*. at 257. The Supreme Court remanded the case because plaintiffs had not submitted the development plan required by the ordinance. *Id*. at 255. When an ordinance requires at least one application for development and a plaintiff does not submit an application, the takings case cannot be ripe for decision. *Id*.

Because Lear has not submitted an Incidental Take Permit, the facts are not sufficiently developed to justify intervening in a complex administrative process. When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary of the Interior. 16 U.S.C. §§1533, 1540(f). Fashioning appropriate standards for issuing ITPs requires an expertise and attention to detail that exceeds the normal province of Congress. When Congress has entrusted the secretary with such broad discretion, the court is especially reluctant to substitute its views of wise policy for his. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687, 708 (1995).

After the submission of an ITP, the FWS must evaluate the plan by examining the following points after affording opportunity for public comment: (1) the proposed taking of an endangered species will be "incidental" to an otherwise lawful activity; (2) the permit applicant will minimize and mitigate the impacts of the taking "to the maximum extent practicable"; (3) the applicant has insured adequate funding for its conservation plan; and (4) the taking will not

appreciably reduce the likelihood of the survival of the species. *Babbitt,* 515 U.S. at 701; *see also Friends of Endangered Species, Inc. v. Janzten,* 760 F.2d 976, 981 (9th Cir. 1985).

Should a party contest the decision of the FWS to issue or deny an ITP, Section 706 of the Administrative Procedure Act (APA), 5 U.S.C. §706, will govern review of the Fish and Wildlife Service's actions concerning the Endangered Species Act (ESA), 16 U.S.C. §1530 et seq. Under the APA, the appropriate standard of review for administrative decisions involving the ESA is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. 5 U.S.C. §706(2)(A). Under this standard, administrative action is upheld if the agency has considered the relevant factors and articulated a rational connection between facts found and the choice made. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1991).

Cited by the Supreme Court in the *Babbitt* analysis, *Friends of Endangered Species* is the model identified by both the Senate and the House as the ideal cooperative response to a case where development threatened incidental harm to an endangered species of butterfly. *Babbitt,* 515 U.S. at 707. There, a developer purchased and sought to develop land where the Mission Blue Butterfly, an endangered species, lived. The developer worked with the county and environmental advocates to develop a Habitat Conservation Plan for the Mission Blue. The plan provided for habitat protection and real estate development that would not jeopardize the continued existence of the butterfly population. The FWS approved the ITP for the developers. Friends of Endangered Species, Inc., sued alleging that the agency had approved the permit based upon fundamentally flawed findings and that it abused its discretion. The 9th Circuit held that appellee agency's decision to authorize the taking was fully informed, well executed, and reasonable. *Friends,* 760 F.2d at 986.

Here, the facts in the present case have not ripened to the point where the court can justifiy intervening in an administrative process. The Supreme Court has consistently reaffirmed its reluctance to "determine what development will be permitted on a particular plot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not even been asked to exercise" *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

Other than obtaining a quote, there is no evidence that Lear has made any attempt to proceed with the habitat conservation plan. Moreover, there is no evidence as to whether the construction of a residence on the Cordelia Lot would actually significantly harm the Karner Blue butterflies. By ruling on this matter, the court would be denying the FWS the opportunity to make the kind of complex policy decision delegated to them by Congress. Furthermore, a key part of the FWS process for evaluating an ITP involves providing opportunity for public comment, which would be swept aside by a ruling at this stage. This court should not substitute its judgment for the expertise of the FWS prior to the submission of an ITP.

B. Lear Cannot Prove Futility Because FWS Has Not Issued The Functional Equivalent Of A Denial Of Lear's Proposed Development.

The fact that the FWS stated that any disturbance to the fields other than the annual mowing would be a "take" was a simple statement of the current status of the fields and a warning to Lear not to proceed without first submitting a plan, in compliance with ESA §10(a). R. at 3.

The Supreme Court in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), provided guidance on when a decision is final that may make it easier for landowners to claim a takings case is ripe. The Court held that a takings claim is ripe when it is clear the agency lacks discretion to permit any development, "or the permissible uses of the property are known to a

reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620. While the Court in *Palazzolo* did find that it is not necessary to make a formal outright denial of an application, there is no indication that the interactions Lear has had with the FWS qualify as the equivalent of a denial. A decision is final when the agency indicates that the only development it would allow must be consistent with existing plans and regulations, and that the development proposed by the plaintiff does not comply.

Lear asserts that the FWS's letter stating that an acceptable HCP would require that all acreage of lupine field disturbed by development be replaced by contiguous acreage, as well as a commitment to maintain the annual mowing represents conditions that are "impossible" for her to satisfy. Under *Babbitt*, Lear must only show in her application that (1) her proposed taking of the Karner Blue will be "incidental" to an otherwise lawful activity; (2) the permit applicant will minimize and mitigate the impacts of the taking "to the maximum extent practicable"; (3) that she has insured adequate funding for its conservation plan; and (4) the taking will not appreciably reduce the likelihood of the survival of the species. *Babbitt* at 701.

The letter from the FWS and the statements from Agent Pidopter are not sufficient for Lear to prove futility. As the First Circuit held in a rent control case, there must be special circumstances indicating that a permit application is not a "viable option," or that "the granting authority has dug in its heels and made it transparently clear" that the permit will not be granted. *See Gilbert v. City of Cambridge* 932 F.2d 51 (1st Cir. 1991). A "sort of inevitability" is required, and the prospect of refusal must be certain or nearly so. *Id.* at 61. There is no evidence in the record that points towards the FWS inevitably denying Lear's ITP. Lear did not submit any application. The FWS has not had the chance to make a fully informed, well-executed, and reasonable decision. If her permit had been denied, Section 706 of the Administrative Procedure

Act would have provided a very clear standard with which the court could have evaluated the FWS actions regarding the Heath.

C. Pre-Enforcement Judgment Is Not Justified Because Lear's Harm is Not Substantial

The district court erred in using the fair market value of the property to determine whether the ITP was overly burdensome to Lear. The district court should have used the traditional ripeness test of real and concrete consequences rather than a comparison of fair market value of the property and the cost of the permit. No administrative decision has affected Lear in any way that actually deprives her of property. The fact that Lear would have to spend money in order to submit an application does not equal a per se taking of property. *Hage v. United States,* 35 Fed. Cl. 147 (1996). Citing *Hage*, the district court misstated, "the law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure and is so burdensome that it effectively deprives the property of value" R. at 6; *Hage,* 35 Fed. Cl. at 150. But unlike this case, the plaintiffs in *Hage* were already suffering from concrete administrative action.

· In *Hage*, plaintiffs were cattle ranchers who lost their business when the federal government constructed a damn and blocked the flow of water to their property. *Id*. at 159. The real and concrete consequences resulting from the government action were that they could not water or feed their cattle. *Id*. at 163. There administrative procedure was futile because plaintiffs were already effectively deprived of their property. *Id*. at 168. To deny plaintiffs the opportunity to bring their taking claims would have denied plaintiffs due process of law. *Id*. at 165.

Unlike the cattle ranchers in *Hage*, who had already suffered a loss of property as a result of an administrative agency, Lear has not suffered any concrete consequences. When confronted with an administrative procedure, the ripeness doctrine requires that the relevant agency reach a

final decision that actually affects a plaintiff before the court may adjudicate a challenge to the agency's action. The requirement that Lear obtain a permit before engaging in a certain use of her property does not itself take the property in any sense. Lear would have access to due process should her application be denied.

The district court ruled that the $150,000 cost of preparing a habitat conservation plan renders any application for an ITP futile, based upon the value of the lot without any permit to build. R. at 6. Yet a difficult position "does not necessarily equal a futile position." *Williamson and MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 350, n.7 (1986); *Good v. United States*, 39 Fed. Cl. 81, 102 (1997). The FWS has not required that Lear maintain the heath in its original condition. Lear cannot plead futility just because she is faced with long odds or demanding procedural requirements. The letter that Lear received from FWS gave her notice of the obstacles she would face in obtaining an ITP, it did not automatically exonerate her from seeing the application process through to the end. *Howard W. Heck & Assocs. v. United States,* 37 Fed. Cl. 245, 252 (1997).

Finally, there is still a question as to whether Lear would even be harmed by the statute. In *Abbott Laboratories v. Gardner*, Congress amended the Federal Food, Drug, and Cosmetic Act to require prescription drug manufacturers to print the generic name of the drug in large letters along with the proprietary name of the drug on all packaging. *Abbott*, 387 U.S. at 138 (1967). Importantly, the statute did not specify whether the generic name had to be used every time brand name was used on the package. *Id.* at 139. Without a ruling on this issue, the plaintiffs would have had to *immediately* undergo a very costly and wasteful rebranding of all products, or risk severe civil and criminal penalties from statutory noncompliance. Id. at 153. The court held that when the legal issue presented is fit for judicial resolution, and where a

regulation requires an immediate and significant change in the plaintiff's conduct, access to the courts under the Administrative Procedure Act must be permitted. *Id*.

Unlike the plaintiffs in *Abbott*, Lear is not backed into a corner, she simply does not want to go through the process required by statute that might grant her the very relief she now seeks. Without a ruling on the issue, Lear would have to apply for an ITP in order to move forward with developing the critical habitat. This ITP could be approved, especially if she is able to show that the construction of a single residence home will not significantly decrease the chances of Karner Blue survival. No civil or criminal penalties would apply to her if she stopped her annual mowing.

In sum, facts have not yet sufficiently developed, FWS has not issued a final decision or the equivalent of one, and Lear is unable to show futility or clear and consequential harm as the result of an administrative action. The district court prematurely intervened in a complex administrative process. This court should hold that Lear's case is not yet ripe for adjudication.

III. PLAINTIFF'S TAKINGS CLAIM IS PRECLUDED BECAUSE NEW UNION RETAINS RESIDUAL POWER TO DETERMINE THE SCOPE OF THE PUBLIC TRUST OF LAKE UNION

Cornelius Lear's original Congressional Grant does not give Cordelia Lear superior title over the state of New Union as to the waters of Lake Union. Under *Shively v. Bowlby*, 152 U.S. 1, 58 (1894), grants by Congress to settlers within a territory do not impair the title and dominion of the future state. In this regard, the district court erred in its application of *PPL Montana LLC. v. Montana*, 132 S. Ct. 1215, 1227 (2012), in holding Lake Union is a non-navigable water. R. at 10. To determine state title under the equal-footing doctrine, navigability is determined at the time of statehood and based upon the natural and ordinary condition of the water. Lake Union has historically been used for interstate travel, and the cove at issue has historically been used for

boat docking. Furthermore, non-tidal waters have been entitled to the navigable water status. *Shively,* 152 U.S. at 8.

A. A Congressional Grantee Does Not Have Superior Title over an Equal Footing Claim by a State

The issue in *Shively* concerned a dispute over the title to lands below the Colombia River. *Id*. at 3. Originally, Shively had been given a Congressional grant of land while Oregon was a territory. *Id*. The land was bordered by the Colombia River, and included lands below the high water mark of the river. *Id*. Shively then divided the grant into four parcels, conveying one parcel that was later sold to Bowlby. *Id*. Bowlby then obtained a deed from the State of Oregon to the tidelands in front of his parcel and constructed a wharf. *Id*. at 9. Shively's heir then asserted that the original Congressional grant gave him title to the tidal lands where Bowlby had built the wharf. *Id.*

Lear's ancestor had been given a Congressional Grant that included the Cordelia Lot while New Union was still a part of the Northwest Territory. Like Shively's heir, this original parcel included lands that extended under Lake Union. Lear's father divided the lot into three parcels, and now she contends that her title to marshlands that extend under Lake Union is superior to New Union's claim over those same lands. Once New Union became a state, all grants and laws applicable to the Northwest Territory became null and void, and all lands became the property of the state of New Union. *Id.* at 50.

In *Shively,* the Supreme Court reasoned that the Congressional Grant to Shively was as King Charles II's Grant of New York, New Jersey, and Martha's Vineyard was to the Duke of York. *Id*. at 15. The grant was intended to be a trust for the common use of "the new community about to be established, to be freely used for all for navigation and fishery." *Id*. at 49. After the

Revolution, the "people of each state became sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use." *Id*.

While land is a territory, the United States has all the powers of both national and local government. In order to encourage the settling of land, Congress made grants, such as those in *Shively* and to Lear's ancestor. The navigable waters within those grants were to remain public highways and be held in public trust for future states. Once new states were admitted to the Union, they would have the same rights as original states in regards to underwater lands within their borders. Grants by Congress of public lands within a territory to settlers such as *Shively* and to Lear's ancestor do not impair the title and dominion of the future state. Therefore, New Union retains residual power to determine the scope of its public trust over waters within its borders, subject to the federal Commerce Clause and admiralty powers.

B. Because State Title Under The Equal Footing Doctrine Is Determined By Navigability At The Time Of Statehood, New Union Has Title To The Waters Of The Wetlands

The district court erred in applying the navigability of the lake at the time of the grant to Lear, when it should have analyzed whether a public trust navigational reservation existed at the time New Union became a state. New Union waters navigable at the time of statehood are held in the public trust, and the contours of that public trust do not depend on the Constitution. *PPL Montana*, 132 S. Ct. at 1235. The public-trust doctrine remains a matter of state law, subject to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. When New Union was incorporated into the Union, it took title to the navigable water and their beds in trust for the public. *Shively,* 152 U.S. at 36. Contrary to the district court's opinion, the United States did in fact recognize public trust rights in non-tidal waters such as Lake Union. R. at 7. In *Shively*, the Court noted that the non-tidal lakes were waters were

essentially treated as inland seas, and the State had sovereign authority over the lands under them. *Id.* at 46.

Navigable waters, particularly interstate waters, are always held in the interest of the public by the sovereign. While the original grant to Cornelius Lear granted the title to the lands under the water, the waters themselves were not granted to Lear. Under the equal footing doctrine, navigability is determined at the time of statehood and based on the "natural and ordinary" condition of the water. *PPL Montana*, 132 S. Ct. at 1228. The state title remains subject to federal regulatory authority, which includes waters that were once navigable but are no longer. *Id*. Under both state and federal rules, the waters of the interstate Lake Union are held in public trust.

1. A public trust navigational reservation can be presumed because the cattail marsh was traditionally used for docking boats in an interstate lake

Because Lear does not have superior title to the marsh under the equal footing doctrine, and because Lake Union was a navigable water at the time New Union became a state, New Union has the authority to determine the scope of the public trust of the marsh. The cattail marsh protected by the Wetlands Statute is located in a cove that was historically open water and was used for boat docking. R. at 2. The district court failed to engage in an analysis of the historic use of the marsh, which would result in a presumption of a public trust navigational reservation.

The fact that the cove has become a cattail marsh does not invalidate New Union's public trust over the waters. Furthermore, Brittain County has a significant interest in limiting the use of the cattail marsh to water dependent uses. Due to their high levels of nutrients, freshwater marshes are one of the most productive ecosystems on earth. They provide feeding and resting grounds for migratory birds and help to control erosion, assimilate nutrients, and protect water sources. *See Rapanos v. United States,* 547 U.S. 715, 719 (2006).

IV. THE DISTRICT COURT ERRED BECAUSE THERE WAS NOT AN UNCONSTITUTIONAL TAKING OF PLAINTIFF'S PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The judgment against Brittain County should be reversed because Plaintiff's property did not suffer an unconstitutional categorical taking. The Supreme Court adopted the categorical taking rule in *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003 (1992). There, the Supreme Court held when a landowner must leave his property "economically idle," there is no need to balance the interest of the public against the interests of the landowner. *Id*. at 1019. In other words, a categorical taking is found only in the "extraordinary circumstance" when no productive or economically beneficial use of the land is permitted." *Id*. at 1017. Conversely, if the government action results in less than a 100% diminution in value, then there is no categorical taking, but there may be a partial taking. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Here, Lear does not advance a claim for a partial regulatory taking. Therefore, the only issue addressed in this brief is whether Lear's property suffered a complete deprivation of economic value equating to a categorical taking.

This court should reverse the district court's holding because Lear's property did not suffer categorical taking. First, the relevant parcel is the entirety of Lear Island, and as such, there is no complete deprivation of economic value. Second, even if the relevant parcel is the Cordelia Lot, the regulations do not deprive Lear of "all economically beneficial uses" of her property. Based on the facts, Lear cannot meet the "heavy burden" to establish a categorical taking of her property. *See Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 493 (1987). Brittain County is not required to pay Lear just compensation because there is no categorical taking under the Fifth Amendment.

A. The Relevant Parcel is the Entirety of Lear Island, Not the 10-Acre Coredlia Lot

Under the proper relevant parcel analysis, this Court should reverse the district court's holding that the relevant parcel is the Cordelia Lot as subdivided in 1965. The district court misinterpreted and improperly relied on *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) by rejecting the application of the "flexible approach" in defining the relevant parcel. The district court reasoned that *Loveladies Harbor* rejects the application of the flexible approach where ownership of the relevant lots has been transferred to different parties. R. at 10. While *Loveladies Harbor* concluded that land developed or sold before the regulatory environment existed should not be included in the relevant parcel, the court only came to that conclusion after taking into "account the factual nuances" present in that case. *Id*. at 1181; *see also Palm Beach Isles Associates v. Unites States*, 231 F.3d 1354, 1361 (Fed. Cir. 2000) (affirming the proper relevant parcel analysis is the flexible approach taking into account factual nuances in the case). Below, the proper flexible approach analysis will be applied to Lear's property. Under the flexible approach, the relevant parcel is the entirety of Lear Island and as such, there is no categorical taking.

1. Under The "Flexible Approach" Analysis, the Relevant Parcel is All of Lear Island

In defining the relevant parcel, the "effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991). Consequently, federal and state courts have consistently applied factors such as, the degree of the property's physical unity, common ownership, common use, and the owners' intentions when the property was acquired, to define the relevant parcel.

For example, in *Deltona Corp. v. United States*, 657 F.2d 1184, 1188 (1981), the plaintiff purchased a 10,000 acre parcel, with the intention of developing a thoroughly integrated, unified residential community. Although the plaintiff was granted permits to dredge several portions of this property, following the passage of the Clean Water Act, it was denied permits to perform the same task, which led to plaintiff filing a taking claim. *Id*. at 1189. While the Clean Water Act frustrated plaintiff's reasonable investment-backed expectations, the court held there was no taking because plaintiff had derived other economic benefits from its property. *Id*. at 1192. Taking into account the Supreme Court's admonition in *Penn Central*, that "[t]aking jurisprudence does not divide a single parcel into discrete segments," the court refused to focus solely on the parcels for which plaintiff had previously been denied a permit. *Id*. Instead, the court considered the value of contiguous uplands, as well as other portions of the property which permits had been granted. *Id*.

Similarly, in *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), the court held the relevant parcel was the entirety of the land plaintiff purchased in 1961, not the subsequently subdivided eight parcels affected by the permit denial. There, the court analyzed the degree of contiguity, dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. *Id*. at 880. The court concluded the relevant parcel was the plaintiff's apartment building combined with the eight adjacent lawn parcels because they were spatially and functionally contiguous, and had been treated by the plaintiff as a single indivisible property for more than 25 years. *Id.*

When the property is contiguous, when title is in the same owners, when the property has historically been used for the same purposes, or when it has been treated as a single unit of

property by its owners, the courts have held it constitutes the relevant parcel, notwithstanding such purely formal matters as lot lines. *But cf. Palm Beach Isles,* 208 F.3d at 1380-1381 (holding the relevant parcel is only the 50.7 acres, as opposed to the 311.7 acres purchased because the two parcels are separated by a road, were never part of a common development scheme and are subject to different zoning).

In light of the factual nuances, the relevant parcel is the entirety of Lear Island. First, Lear Island and the Cordelia Lot are physically contiguous. Unlike the road separating the two parcels in *Palm Beach Isles*, there are no physical barriers between the Cordelia Lot and Lear Island. R. at 5.

Second, like the entirety of plaintiff's property in *District Intown*, Lear Island is owned by the Lear family since 1803 and was treated as a single indivisible property until 1965, totaling 162 years. *Id*. During that time, Lear Island was used as a homestead, a productive farm, and for hunting and fishing. *Id*. In this regard, Lear cannot claim she has been denied all economic benefit of the property.

Third, permits have been granted to build single-family residences on Lear Island in the past. *Id*. Similar to the Clean Water Act that affected the plaintiff's permit denials in *Deltona Corp*, the Endangered Species Act has frustrated Lear's investment-backed expectations because she is being denied a permit to build a single-family residence on the Cordelia Lot. *Id*. This permit denial does not constitute a taking because Lear has derived other economic benefits from Lear Island. Thus, the factual nuances of this case show the relevant parcel is the entirety of Lear Island.

Nevertheless, Lear defines the relevant parcel as the Cordelia Lot as subdivided in 1965. Considering the Cordelia Lot is the only portion of Lear Island affected by the regulation, Lear is

violating "taking jurisprudence by dividing a single parcel into discrete units" to succeed in her takings claim. However, "defining the property interest taken in terms of the very regulation being challenged is circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331 (2002). The Supreme Court has consistently rejected this approach to the relevant parcel question because every restriction would become a total ban."

B. Even If The Cordelia Lot Is The Relevant Parcel, Lear Did Not Suffer A Categorical Taking Because The Property Will Be Fully Developable In Ten Years Upon The Natural Destruction Of The Critical Habitat

The Cordelia Lot did not suffer a complete deprivation of economic value because the lot will be fully developable in ten-years upon the natural destruction of the Karner Blue critical habitat. In *Tahoe-Sierra*, the Supreme Court rejected the landowner's suggestion that a temporary deprivation of all economically viable use should be subject to a Lucas per se rule by distinguishing a 32-month moratorium from a "permanent 'obliteration of value' of a fee simple estate." *Id.* The Supreme Court held "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*. at 332. Additionally, the Court held that finding a categorical taking in *Tahoe-Sierra* would violate the "parcel-as-a-whole" rule because dividing property into temporal segments would cause "every delay to become a total ban." *Id*. at 331.

Despite this clear guidance from the Supreme Court, the district court rejected this argument because, unlike the natural destruction of the Karner Blue habitat, the *Tahoe-Sierra* moratorium did not extent for an entire decade. R. at 10. Yet the Supreme Court has condoned delays up to "approximately eight years." *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Furthermore, the length of the delay is not necessarily the primary factor to be considered in determining whether a taking occurred. *Wyatt*

v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001). Other considerations include the nature of the permitting process, other reasons for any delay, and whether there is a showing of bad faith. *Tabb Lakes, Ltd. v. United States*, 10 F.3d. 796, 799 (Fed. Cir. 1993).

In this case, a categorical taking cannot be found because Lear is only temporarily prohibited from building on the Cordelia Lot. The record indicates that without the annual mowing of the Heath, the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees, eliminating the Karner Blues' habitat in ten-years. R. at 7. While the ten-year natural succession process is longer than the moratorium in *Tahoe-Sierra*, a categorical taking still has not occurred. To hold otherwise would violate the Supreme Court's established parcel-as-a-whole rule by dividing the Cordelia Lot into ten-year temporal divisions. This sort of property division was rejected in *Tahoe-Sierra* and an alternative holding would open the floodgates for categorical takings based on delays.

Further, the length of the delay is not determinative. The district court mentions the irony of the FWS relying on the prospective extinction of the very subpopulation of Karner Blues it is fighting to protect to as an argument against finding a taking the Cordelia Lot. R. at 7. However, the true irony lies in the fact Lear is attempting to unjustly receive compensation for the negative repercussions of her own actions. If it weren't for Lear's annual mowing of the Heath, the ESA would not have designated the Cordelia Lot a critical habitat for the Karner Blues. Consequently, if Lear stopped the annual mowing, the lupine fields necessary for the Karner Blue habitat would naturally convert to a successional forest. This ten year ecological process would result in the extinction of the New Union subpopulation of Karner Blues. Thus, it was Lear's actions—the annual mowing in October—that made her property a critical habitat for the Karner Blue in the

first place. Brittain County should not be required to compensate Lear for land-use regulations she imposed upon herself.

C. The Cordelia Lot Did Not Suffer A Categorical Taking Because The Brittain County Butterfly Society's Offer To Pay Lear $1,000 Annually For Wildlife Viewing Does Not Leave The Cordelia Lot Economically Idle.

A categorical taking occurs when a regulation destroys all "economically beneficial *or* productive use of the land." *Lucas*, 505 U.S. at 813. This question turns on the "economic impact of the regulation," measured by the change, if any, in the fair market value caused by the regulatory imposition. *Penn Central*, 438 U.S. at 124. *But see Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996) (relying solely on "market value" allows "external economic forces," such as inflation, to artificially skew the takings inquiry). To calculate fair market value, the court also considers the relationship of the owner's investment and the owner's opportunity to recoup its investment. *Florida Rock Industries v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994). *See also McCandless v. United States*, 298 U.S. 342, 345 (1936) (fair market value is "most profitable use to which the land can probably be put in the reasonably near future").

The Butterfly Society's offer to pay Lear $1,000 annually to conduct viewing tours on her property precludes her categorical taking claim. Below, the district court held that the Butterfly Society's offer to pay Lear $1,000 annually to conduct tours on the property was not an economically remunerative use because the offer is less than the $1,500 in annual property taxes on the lot. R. at 12. The district court stated: "A piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value." R. at 12. This holding is flawed because the district court erroneously equates economic "use" with

economic “value.” Additionally, Lear has failed to provide sufficient evidence for a categorical taking claim.

First, an economic “use” enables a property owner to derive benefits from landownership. *Lost Tree Village Corp v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015). Logging, landfilling, and livestock grazing are examples of economic uses. See, e.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, (1984); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *United States v. Fuller*, 409 U.S. 488 (1973). *See also Lost Tree Village*, 787 F.3d at 1117 (holding sale of land is not an economic use). In the present case, the record states there is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land. R. at 7. This finding is irrelevant because the Butterfly Society’s offer to pay Lear $1,000 annually to conduct butterfly viewing tours is a valid economic use. Like logging, landfilling or livestock grazing, the butterfly tours enable Lear to derive a benefit from her landownership from the $1,000 annual payment. The fact that there is no market to sell a parcel like the Cordelia Lot in Brittian County is of no consequence because the sale of the land is not an economic use.

The Butterfly Society’s offer to pay Lear $1,000 annually is the most profitable use to which the Cordelia Lot can be put in the reasonably near future. Considering Lear inherited the lot, the only “investment” she makes in the property is paying the $1,500 per year property taxes. In this regard, the Butterfly Society’s $1,000 offer provides Lear with a generous opportunity to recoup her $1,500 per year investment. Therefore, it cannot be said that the Cordelia Lot has been deprived of all “economically beneficial *or* productive use of the land.”

Second, it is not possible, absent a valid determination in the record of the "after imposition" value of the land, to know if a taking occurred. *Florida Rock*, 18 F.3d at 1573. *See also Seiber v. United States*, 364 F.3d 1356, 1371-72 (Fed. Cir. 2004) (finding no taking when appellant failed to introduce sufficient evidence to show the value of the property was reduced by the denial of the permit). Here, Lear has not sought reassessment of her property following Brittain County's permit denial. R. at 7.

Finding a categorical taking requires the court to "compare the value that has been taken with the value that remains," and Lear has failed to produce sufficient evidence to show Brittain County's permit denial "deprives all economically beneficial or productive use" of the Cordelia Lot. The fact that the Butterfly Society's offer to pay $1,000 annually is less than the current property taxes equating to $1,500 is irrelevant because the property taxes are based on the $100,000 valuation of the property before the permit denial. It is impossible to find a 100% diminution in value without knowing the current value of the parcel. Thus, Lear failed to carry her heavy burden to prove a categorical taking.

D. The ESA And The Brittain County Wetlands Preservation Law Should Be Considered Separately Because Each Law Acts Upon A Clearly Distinguishable Parcel Of The Lot.

1. Regulations that merely restrict would not individually amount to a taking cannot combine to deprive the Cordelia Lot of all economic value.

A regulation such as the Brittain County Wetland Preservation Law ("BCWPL") that merely prohibits Lear from filling in a delicate marsh ecosystem to under the public trust of New Union is not a categorical taking. A government regulation that prohibits landlords from evicting tenants unwilling to pay a higher rent *Block v. Hirsh,* 256 U.S. 135 (1921); that bans specific private uses of a portion of an owner's property, *Village of Euclid v. Ambler Realty Co.,*

272 U.S. 365 (1926); *Keystone Bituminous*, 480 U.S. 470 (1987); or that forbids the private use of certain airspace, *Penn Central,* 438 U.S. 104 (1978), does not constitute a categorical taking.

A restriction is not a complete economic deprivation where plaintiff has opportunities to submit plans for development. The BCWPL may not allow Lear to construct a house, but she can still use the marsh for any number of water dependent uses. Furthermore, the ESA does not prohibit all construction on the Heath, it simply imposes a requirement that Lear obtain a permit first.

2. Any restrictions on the Cordelia Lot are clearly attributable to either the federal or county governments

The Cordelia Lot is distinguishable from the stream in *Velsicol Chem. Corp. v. Rowe,* 543 S.W.2d 337 (Tenn. 1976), cited by the district court. The requirement of indivisibility can mean that the harm is not even theoretically divisible, as in the total destruction of a building or the death of a person. *Id*. at 338. Alternatively, the harm may be theoretically divisible but is single in a practical sense because the plaintiff is not able to apportion it among the wrongdoers with reasonable certainty. *Id*.

In *Velsicol*, residents and homeowners sued Velsicol Chemical Corporation for damages caused by pollutants emitted from its chemical manufacturing plant in their neighborhood. *Id*. The residents alleged that the emissions had contaminated the air and water and thus constituted a nuisance. *Id*. Veliscol filed a third-party complaint against five other defendants, alleging that each operated a plant in the area, and as such were liable for recovery made by the plaintiffs. *Id*. The court held when an indivisible injury has been caused by concurrent, but independent, wrongful acts or omissions, a defendant would be jointly and severally liable. *Id.* at 343.

Examples of such indivisible injuries cited in *Veliscol* included cases where (1) it could not be determined whether victim had died in one car accident or a second accident once the

victim was in the ambulance and (2) where air pollutants from multiple defendants had intermingled, caused diminution of the value of plaintiff's property and impaired their health. *See Holder v. Martin,* 4017 S.W.2d 461 (1966); *Michie v. Great Lakes Steel Division, National Steel Corp*., 455 F.2d 213 (6th Cir. 1974).

Lear's situation is distinguishable from the plaintiffs in *Veliscol* and factually similar cited cases. Lear's property is subject to completely separate and distinct laws. Any consequence of the laws acting together on Lear's property is attributable to either the County or the Federal government. The BCWPL specifically applies to cattail marsh, and the Endangered Species Act as enforced by the Fish and Wildlife Service specifically applies to the critical habitat of the endangered Karner Blue. Finally, the fact that the Army Corps of Engineers does not require a permit for the wetlands at issue or consider it navigable does not preempt Brittain County from enacting its own regulations. *Bartell v. Minnesota*, 284 N.W.2d 834 (Minn.1979).

CONCLUSION

For the foregoing reasons, Brittain County respectfully requests that the Court reverse the district court's determinations on the following points and instead find that (1) the ESA Section 9 as applied to the New Union population Karner Blue Butterfly is a violation of the Commerce Clause; (2) that even if it is not, Lear's claim for a taking is not ripe because a final decision has not been reached by the FWS and intervention in the complex administrative process is not justified by any clear and consequential harm to Lear; (3) even if it is ripe, there was not a constitutional taking of Lear's property in violation of the fifth amendment; (4) Lear's takings claim as to the denial of the wetlands permit is precluded because of New Union's public trust over Lake Union; and (5) that the ESA and the BCWPL be considered separately because each law acts upon a clearly distinguishable parcel of Lear's property.