Team No. 64

Docket No. 16-0933

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH 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

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

Brief for Brittain County, New Union
Defendant-Appellant

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STATEMENT OF JURISDICTION

The District Court had jurisdiction under Art. III, section 2 of the United States Constitution, and 28 U.S.C. § 1331 because the claim arises under the Fifth and Fourteenth Amendments to the Constitution, and additionally under 28 U.S.C. § 1346(a)(2) for money damages against the United States not exceeding $10,000. The District Court entered a final judgment on June 1, 2016. R. 1. Brittain County and the U.S. Fish & Wildlife Service timely filed an appeal on June 9, 2016; Cordelia Lear filed a timely appeal on June 10, 2016. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final judgment of the United States District Court for the District of New Union.

STATEMENT OF THE ISSUES

I. The Endangered Species Act (ESA) allows alteration of critical habitat by applying for and receiving an Incidental Take Permit. Lear did not apply for a permit but filed suit alleging a complete deprivation of all beneficial use of her property resulting from the ESA regulation of her land. Is Lear's claim ripe for adjudication prior to seeking a permit?

II. Congress has the power to regulate activities that substantially affect interstate commerce only when the activity is commercial in nature. The Karner Blue Butterfly (the Butterfly) is a wholly intrastate species that is not inherently commercial. Does Congress have the power to regulate the take of the Butterflies under the Commerce Clause?

III. A regulatory takings analysis must assess the "parcel as a whole." Lear Island is isolated, and has been owned in whole by the Lear family since 1803. Is the relevant parcel for a takings analysis a subdivision amounting to 1% of Lear Island?

IV. A *per se* regulatory taking occurs when a regulation permanently deprives an individual of all economically beneficial use of her property. The critical habitat designation will cease to burden to the Cordelia Lot when it is no longer a habitat for the Butterfly. Has Cordelia Lear (Lear) suffered a *per se* regulatory taking?

V. A *per se* taking claim requires a total loss of property value. Lear received an offer of compensation for viewing the Butterflies on her property. Has Lear suffered a *per se* taking under *Lucas*?

VI. Under *Lucas*, takings claims based on background principles of state law preclude a

regulatory taking. One such principle, the public trust doctrine, protects the beds and shores of navigable waters for public purposes. Does Lear have a valid takings claim for a regulation protecting trust resources?

VII. The Constitution requires compensation for regulations that deprive an owner of her property. Brittain County's regulation would allow the full use of the dry land area of the Cordelia Lot. Is Brittain County required to compensate Lear?

STATEMENT OF THE CASE

This is an appeal from a seven day bench trial conducted in the District Court for the District of New Union. R. 4. Plaintiff Cordelia Lear (Lear) alleged a regulatory taking by Brittain County, New Union and the U.S. Fish & Wildlife Service (FWS). *Id.* Lear alleged that the combined application of Brittain County's Wetlands Preservation Law and FWS's designation of critical habitat for an intrastate population of the Karner Blue Butterfly under the Endangered Species Act (ESA) amounted to a complete deprivation of all economically beneficial use of her property. *Id.* Lear did not allege a partial takings claim. R. 8. Despite not having applied for a permit, or received a decision, from FWS regarding application of its regulation to Lear, the District Court found that Lear's takings claim was ripe. R. 9. The District Court further concluded that FWS's extension of ESA protection to a wholly intrastate species was a valid exercise of Congress' power to regulate interstate commerce. R. 7–8.

In the takings analysis, the Court aggregated FWS's regulations with Brittain County's wetlands law, and concluded that combined, the regulations affected a total taking of the portion of Lear Island known as the Cordelia Lot. R. 8–11. This conclusion rested on findings that natural extinguishment of the FWS regulation did not prevent the takings claim, that an offer for $1,000 per year rental did not preclude a complete deprivation of all economic value of the property, and that New Union had no public trust interest in the historically navigable cove that is subject to Brittain County's wetlands law. R. 10. The District Court found the fair market

value of the Cordelia Lot to be $100,000, R. 7, and awarded an apparently joint and several judgment in favor of Lear in that amount. R. 12. However, the Court's jurisdiction over the FWS was limited to a maximum of $10,000 damages. *See* 28 U.S.C. § 1346(a)(2) (2012) (waiving sovereign immunity and consenting to suit in U.S. District Courts for claims not exceeding $10,000). The Court imposed a judgement in that amount against FWS and a judgment of the remaining $90,000 against Brittain County. R. 12. Brittain County timely filed this appeal on June 9, 2016. R. 1.

STATEMENT OF FACTS

Lake Union is a large interstate lake traditionally used for interstate navigation, located partially in Brittain County, New Union. R. 4. An 1803 Act of Congress granted the Lear Family fee simple absolute to Lear Island, a 1,000-acre island within Lake Union. *Id.* The grant included underwater land within a 300-foot radius of the shoreline. R. 3–4. Historically, the Lear family occupied the land in a single homestead, using it for hunting and fishing. R. 5. Since 1803, the Island has passed in fee simple through the Lear family. *Id.* In 1965, King James Lear held title to the entire island and determined to subdivide it into three lots. *Id.* While recording subdivisions of three future lots, King James Lear retained a life estate in the entirety of the Island. *Id.* Upon King James Lear's death in 2005, the three subdivided lots became present possessory interests passing to his three daughters. *Id.*

The Cordelia Lot consists of 10 acres on the northern tip of Lear Island. *Id.* Within the 300-foot radius of underwater lands granted lies a small cove abutting the Cordelia Lot. *Id.* Presently, the cove contains a one-acre emergent cattail marsh. *Id.* Historically, the cove consisted of open water, which the Lear family used as a boat landing. *Id.* In 1982, Brittain County enacted the Wetland Preservation Law, which allows the County Wetlands Board to

grant permits for water dependent uses. R. 7. The emergent cattail marsh is covered by this regulation. *Id.* The uplands of the Cordelia Lot, known as the Heath, consists of approximately nine acres of wild blue lupine fields. R. 5. Additionally, there is an approximately one acre access strip, also covered with wild blue lupines. *Id.* The family's annual mowing maintains the lupine fields, without which the fields would revert to a successional forest in 10 years. *Id.* In 1992, the U.S. Fish & Wildlife Service (FWS) listed the Karner Blue Butterfly (the Butterfly) as an endangered species under the Endangered Species Act (ESA), and designated the Heath as a critical habitat for the wholly intrastate New Union subpopulation of the Butterfly. R. 5–6.

In 2012, seven years after coming into possession of the Heath, Cordelia Lear (Lear) decided to build a residence on the Lot. R. 5. Lear contacted FWS, who informed her that development in the Heath would require a permit under section 10 of the ESA. R. 6. A section 10 permit requires an application detailing the scope of development, and a proposed habitat conservation plan. *Id.* As informally advised by the local FWS Field Office, development in the Heath would require an offset of equivalent contiguous lupine acreage. *Id.* The Field Office invited Lear to submit the required application to begin the process of approving proposed development. *Id.*

Declining to seek a FWS permit, Lear generated an Alternate Development Proposal, seeking to fill a half-acre of the emergent cattail cove. R. 7. Unlike the development in the Heath, Lear did submit a permit application to the Brittain County Wetlands Board. *Id.* The Board denied the permit in December 2013, concluding that the proposed development was not water dependent. *Id.*

Free of any restrictions, the Cordelia Lot has an appraised value of $100,000; Lear failed to get an appraisal following Brittain County's permit denial. *Id.* Current property taxes are

$1,500 per year. *Id.* The Brittain County Butterfly Society offered to pay Lear $1,000 annually to view the Butterfly, which Lear rejected. *Id.*

STANDARD OF REVIEW

The District Court's interpretation of the United States Constitution is reviewed *de novo*. *See e.g. Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016); *Hollis v. Lynch*, 827 F.3d 436, 443 (5th Cir. 2016). The District Court's legal conclusions following a bench trial are also reviewed *de novo*. *See e.g. Paolino v. JF Realty, LLC*, 830 F.3d 8, 15 (1st Cir. 2016).

SUMMARY OF ARGUMENT

Cordelia Lear's (Lear's) claim of a total deprivation of all beneficial use of her property is not ripe for adjudication absent a final decision from the U.S. Fish & Wildlife Service (FWS) as to the scope of development that may or may not be permitted on the relevant land. The District Court erred in considering as final an informal letter from the local Field Office which invited Lear to begin the permitting process.

Regardless, the FWS regulation is unconstitutional as applied to the intrastate population of the Karner Blue Butterfly (the Butterfly). The regulation does not substantially affect interstate commerce and Congress' powers under the Commerce Clause are limited to those activities that, in aggregate may have this substantial effect. Regulation of the Butterfly fails to pass the factors articulated in *United States v. Lopez*, primarily because incidental take of a wholly intrastate species in the course of non-commercial activity simply bears no connection to interstate commerce.

If the Court reaches the takings claim, Lear Island as a whole is the relevant parcel for the analysis. The Supreme Court has eschewed dividing the property into segments, and affirmed the

parcel as a whole as the relevant basis for a regulatory takings analysis. The District Court erred in failing to evaluate all facts, relying on a single fact of present ownership as conclusive, for the relevant parcel analysis. A proper application of the correct legal test demonstrates that Lear Island as a whole is the relevant parcel for the takings analysis.

Even if the Cordelia Lot were the relevant parcel, Lear still cannot establish a *per se* permanent taking of all economically beneficial use of the Lot under *Lucas*, because the regulation is neither permanent nor precludes deriving economic benefit. The FSW regulation only applies so long as Lear continues to mow the Heath, preserving the critical habitat. Furthermore, while the regulation is in effect Lear is in a position to receive $1,000 annually from the Butterfly Society to view the Butterflies on her property. While the regulation may amount to a partial taking, Lear failed to even plead such a claim.

The public trust doctrine bars Lear's takings claim against Brittain County. A total takings claim has no basis when the property owner never held the right at issue to begin with. The public trust conditions the bed and banks of all navigable waters, including Lake Union. Lear never held the right to fill or develop the lake bed, precluding her takings claim.

Finally, Brittain County's and FWS's regulations cannot be aggregated to manufacture a total takings claim. The District Court's application of a joint and several liability theory is neither applicable to a takings claim, nor consistent with the actual judgment rendered. The effects of Brittain County's regulation are clearly divisible from the effect of the FWS regulation, as demonstrated by the separate judgment actually entered. Furthermore, the judgment inequitably distributes damages to avoid a jurisdictional defect, and should be reversed by this Court.

ARGUMENT

I. This Court should decline jurisdiction over this case because Cordelia Lear's claim is not ripe where she neither applied for a permit nor received a final decision from FWS.

A government regulation gives rise to a taking under the Fifth Amendment[1] only when it "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It is axiomatic that in order to determine if a taking has occurred, a reviewing court must know how far the government's regulation goes. *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986). In this case, Cordelia Lear (Lear) alleges that application of U.S. Fish & Wildlife (FWS) regulations prohibiting unpermitted alteration of the Karner Blue Butterfly's (the Butterfly's) habitat (aggregated with Brittain County's regulations governing wetland development) affect a total taking, depriving her of any economically beneficial use of her property. R. 4. However, Lear never sought a final decision from FWS as to the application of the regulations to her particular circumstances, namely through seeking an Incidental Take Permit (ITP). *See* 16 U.S.C. § 1539 (2012). Because Lear did not seek a permit or receive a final decision from FWS, Lear's takings claim is not ripe for adjudication.[2]

The Supreme Court has held that a regulatory taking can be evaluated only after the agency responsible for the regulation has conclusively spoken. *See Williamson Cty. Reg'l.*

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[1] The Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's Takings Clause against the states. U.S. CONST. amend. XIV, § 1; *see also Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[2] Ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734, n. 7 (1997). Here, the lack of any final agency decision applying the regulation to Lear or directly imposing obligations on her implicates Article III's case or controversy requirement. *See Ash Creek Min. Co. v. Lujan*, 934 F.2d 240, 244 (10th Cir. 1991). However, even where the Court concludes ripeness here is prudential, the Court should still decline jurisdiction where the undetermined scope of the regulation directly controls the claim of a complete deprivation of property. *See MacDonald*, 477 U.S. at 348.

Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 186 (1985). Here, Lear has not even submitted a proposal for FWS to speak to, and the FWS Office with delegated authority to approve or deny permits has offered no opinion at all. The District Court erred both in considering an initial letter from a Field Office to be a binding "policy" of FWS, and in concluding that the application procedure was so burdensome as to effectively be a taking itself. R. 9.

A. Cordelia Lear's takings claim against FWS is not ripe because no final decision about the application of the regulation has been made.

The Supreme Court has made clear that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *see also Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981); *Williamson Cty.*, 473 U.S. at 186. A regulatory taking is effected only after "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty.*, 473 U.S. at 186. This requirement is not satisfied by mere intermediate opinions, but is met only when the decision is one where the agency has conclusively determined the full extent of allowable development. *MacDonald*, 477 U.S. at 352–53. Thus, even where a decision rejecting some development is made, if there is a possibility that a less intensive development might be approved, a takings claim is not ripe for adjudication. *Id.* at 353, n. 9. Only where the decision is such that the agency lacks further discretion to authorize even a lesser development and the "permissible uses of the property are known" has a takings claim ripened. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

The letter from the local FWS Field Office fails the Supreme Court's finality standard for three reasons. First, the letter from the Field Office, unlike the decision from the Coastal

Management Council in *Palazzolo*, was issued by an office other than the decision-making body, which makes the opinion expressed non-binding and not final. *See Beekwilder v. United States*, 55 Fed. Cl. 54, 62 (Fed. Cl. 2002) (telephone calls and letter from agency did not establish binding policy on the agency or obviate need to seek a permit to ripen claim); *Nat'l. Wildlife Fed'n. v. U.S. Forest Serv.*, 861 F.2d 1114, 1123–24 (9th Cir. 1988) (Land Management Planning Office recommendations not a final decision where decision was entrusted to Forest Service Director). Second, the Field Office letter was issued prior to the determination of all relevant facts impacting the decision to allow development. Most pressingly, Lear failed to even submit a development proposal specifying the proposed extent of habitat alteration or a proposed habitat conservation plan (HCP). *See* 16 U.S.C. § 1539(a)(2) (2012) (prohibiting FWS from approving a permit absent an HCP). Lastly, unlike the denial in *Palazzolo*, the Field Office letter here did not in any way restrict the substantial discretionary authority of FWS in granting an ITP.

The District Court's conclusion that the Field Office letter "declared a policy" on behalf of FWS erred in giving such weight to an informal letter of an intermediary office. R. 9. As the FWS's and National Marine Fisheries Services' (the Services') Habitat Conservation Planning Handbook notes, it is not the Field Office, but rather the Regional Office of FWS that makes ITP decisions. U.S. DEPT. OF INTERIOR, FISH & WILDLIFE SERV., U.S. DEPT. OF COMMERCE, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK [hereinafter HANDBOOK], 2-5 to 2-6 (Nov. 4, 1996). Rather, FWS makes clear that the Field Office merely "advises" the Regional Office. *Id.* at 2-3. The Field Office thus lacks authority to "declar[e] a policy" regarding a permitting condition that would be binding on either FWS or Lear. R. 9; *see also Beekwilder*, 55 Fed. Cl. at 62. Unlike *Palazzolo*, where the agency with decision-making

authority issued an official application denial, the Field Office letter to Lear was a mere invitation to begin the application process and was not a formal decision document from FWS. *See Palazzolo,* 533 U.S. at 619–620. The declaration in *Palazzolo* was a formal interpretation of the agency's regulations that limited the agency's discretion; here, the Field Office letter does not purport to interpret any statute, regulation, or policy and merely states the agency's preference for complete conservation of critical habitat.

In addition to not being an authoritative statement from the decision-making arm of the agency, the Field Office letter is distinct from *Palazzolo* in the timing, and the amount of information known at the time the letter was sent. In *Palazzolo*, the decision-making Council based its denial on review of multiple development proposals and a fully articulated plan of the scope of development. *Id.* at 613–14. By contrast, the Field Office letter sought to *begin* the process of an application, and was issued prior to Lear's even proposing a development. R. 6. It is illogical to assume that FWS can condition development before Lear formally proposed the development or a drafted an HCP. *See* HANDBOOK, at 6-24 to 6-25 (describing the need for permit conditions adopted in a *final* HCP, at the *end* of the permit approval process). Unlike the final decision in *Palazzolo*, the Field Office letter was at best an initial opinion subject to change as more information became available.

Lastly, nothing in the Field Office letter purported to remove FWS's discretion in approving or denying an ITP. The denial in *Palazzolo* was ripe because the Council lacked discretion to allow any development, which made the full extent of the regulation known. *Palazzolo*, 533 U.S. at 619–620. Here, by contrast, FWS has ample discretion in determining the avoidance, minimizing, or mitigation of take through the ITP process generally. *See* HANDBOOK, at 7-3 (describing factors FWS considers in assessing mitigation adequacy); *id.* at 7-5 (noting

FWS's authority to approve ITPs with conditions as "necessary and appropriate" to the particular proposal); *see also Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 120 F. Supp. 2d 1005, 1022 (M.D. Fla. 2000) ("The Service is not required to select all available measures or even the best measures. Rather, it must select measures that minimize and mitigate impacts to the maximum extent practicable."). Such discretion can be, and has been, used by FWS to approve ITPs with less than 1 to 1 ratios of habitat conservation, despite the local Field Office's purported "policy." R. 9; *see e.g. Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 984 (9th Cir. 1985). Where FWS retains such discretion, only a final decision on a permit application will clarify the actual extent to which FWS regulations burden Lear's property, and ripen the regulatory takings claim. The District Court's holding that the Field Office letter was a final decision is thus in error and should be overturned by this Court.

B. The projected cost of applying for an Incidental Take Permit does not render the process so burdensome as to effect a taking.

The District Court similarly erred in concluding that the FWS permit procedures are a taking because the burden of procuring a permit effectively deprives Lear of her property. *See* R. 9. The Supreme Court directly rejected this view, holding that a "requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." *Riverside Bayview*, 474 U.S. at 127. Alternately, the District Court relied on Lear's consultant, who estimated the cost of seeking an ITP as more than the fair market value of the property, to conclude that seeking a permit would be futile. However, this argument fails as a matter of law because the cost of procuring an ITP permit can be mitigated by FWS, making any estimation of cost prior to seeking FWS assistance mere speculation.

In a factually analogous case, landowners brought a takings claim against the National Marine Fisheries Service, which noted the landowner's proposed timber harvesting would likely

result in the take of endangered species. *Morris v. United States*, 392 F.3d 1372, 1374 (Fed. Cir. 2004). The plaintiffs, like Lear did here, engaged a consultant who concluded the cost of potential permitting would exceed the value of their property. *Id.* at 1375. The Federal Circuit rejected this argument and held that the claim was not ripe absent an application for a permit. *Id.* at 1376–77. Relying on the Services' Handbook, which authorizes and directs the Services to assist in applications, the Court held that the "assumption that the cost of applying for the ITP is fixed and knowable is simply incorrect." *Id.* at 1377; *see also* HANDBOOK, at 2-2 to 2-4 (directing Field Offices to "assist" the applicant throughout the ITP process). The Court further noted the uncertainty of estimating cost where the agency has "discretion concerning what [plaintiffs] must do to complete a satisfactory [permit application]." *Morris*, 392 F.3d at 1377; *see also* HANDBOOK, at 1-9 (describing a less-costly low-effect permit application which FWS may allow where the activity involves a "relatively few acres of habitat"); *id.* at 3-36 (noting that Regional Director has discretion to impose or waive certain requirements of permit applications). Here, while Lear may have received an estimate, this estimate cannot approximate the actual cost without knowing FWS's available assistance or considering its discretion in approving an acceptable permit application. As such, the claim that the burden of submitting a permit application itself effects a taking is in error and should be rejected by this Court. Lear failed to present a claim ripe for adjudication and thus this Court should order the case dismissed.

II. The take provision of the Endangered Species Act as applied to the Karner Blue Butterfly is beyond Congress' regulatory power under the Commerce Clause because it does not substantially affect interstate commerce.

Even assuming Lear's claim is ripe, section 9 of the Endangered Species Act (ESA), as applied Lear's lot which prohibits the "take" of the Karner Blue Butterfly (the Butterfly), is

beyond Congress' regulatory power under the Commerce Clause. 16 U.S.C. § 1538 (2012). The Commerce Clause grants Congress the power "to regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. This includes, as relevant here, the power to regulate activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). While some courts have held that the ESA is related enough to commercial activity to fall under this category, these cases primarily deal with circumstances where take is to further commercial purposes, such as creating shopping centers or selling the species for profit. *See e.g. GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000). Here, take would be incidental to the construction of a non-commercial, personal residence on private property. This is similar to the most recent case on the issue, where the court held that the federal government could not regulate take of the Utah Prairie Dog on private land under the Commerce Clause. *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2014).

The Supreme Court has been clear that Congress can regulate purely local activities if they are part of an economic class of activities with substantial effects on interstate commerce. *See Wickard v. Filburn*, 17 U.S. 111 (1942)*; Gonzales v. Raich,* 545 U.S. 1 (2005). However, it has also been clear that this power is only relevant where "a general regulatory statute bears a substantial relation to commerce." *Lopez,* 514 U.S. at 558; *see also United States v. Morrison*, 529 U.S. 598, 610–12 (2000). Regulations regarding this intrastate population of the Butterfly do not bear this substantial relation because they fail to meet the four factors articulated by the Supreme Court in both *Lopez* and *Morrison.* The Court laid out the applicable factors as whether or not (1) the law, by its terms, relates to "commerce or any sort of economic enterprise;" (2) the law contains an express jurisdictional statement limiting applications to commercially-related

scenarios; (3) the legislative history contains express findings regarding its effects on interstate commerce; and (4) the connection between the law and the economic impacts is too "attenuated." *Lopez,* 514 U.S. at 561–67; *see also Morrison*, 529 U.S. at 610–12. Applied to take of the Butterfly on private land, section 9 does not fulfill these factors, and therefore exceeds Congress' constitutional powers.

A. Regulating a wholly intrastate population of the Karner Blue Butterfly does not relate to commerce.

The Supreme Court was clear in both *Lopez* and *Morrison* that the regulated activity *itself* must be commercial in nature. *Lopez,* 514 U.S. at 557, *Morrison*, 529 U.S. at 617. The provision at issue here, section 9(a)(1)(B) of the ESA, prohibits take of any endangered species. 16 U.S.C. § 1538(a)(1)(B) (2012). Regulations define the term "take" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015). The Butterfly was listed due to habitat destruction. Determination of Endangered Status for the Karner Blue Butterfly, 57 Fed. Reg. 59,236, 59,236 (Dec. 14, 1992) (codified at 50 C.F.R. pt. 17). Neither the terms of the act itself nor the regulations, nor the listing decision explicitly mention commerce of any sort. The District Court erred in concluding that the proposed residence in this case was sufficiently commercial in nature to justify regulation of a wholly intrastate subpopulation. Lear's plan to build a private residence is in no way a commercial venture. This stands in stark contrast to others who have made as-applied challenges to the ESA, like the plaintiffs in *GDF Realty* who planned to construct "a shopping center, a residential subdivision, and office buildings." *GDF Realty*, 326 F.3d at 633. Here, neither the proposed residence nor the take of the Butterfly is commercial in nature.

In *Lopez*, the Court struck down the Gun-Free School Zones Act, which prohibited guns within school zones. *Lopez*, 514 U.S. at 561. Despite the fact that the law at issue directly impacted sale of firearms, the Court reasoned that possession of a gun within a school zone "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id*. Likewise, the incidental taking of the Butterfly through modifying a wholly intrastate lupine field is not an essential part of some sort of larger regulatory scheme targeting commerce.

The Supreme Court held in *Wickard* that wheat grown for personal consumption on private land was regulable under the Commerce Clause because, in aggregate, all such wheat across the country could significantly impact the national wheat market. 17 U.S. at 128. The aggregation principle does not boost this activity to the level of significantly impacting interstate commerce, however, because unlike the wheat in *Wickard*, incidental takes on private land are not commercial.

B. As applied to the Karner Blue Butterfly, the take provision of the Endangered Species Act fails the additional Lopez *factors.*

The take provision of the ESA is a broad prohibition of activities that result in killing or injuring the Butterfly, whether or not they relate to commerce. As applied here, Lear would be equally liable were she to accidentally step on a Butterfly as if she were to collect and sell the Butterfly. This is again similar to *Lopez*, where the Court found that the provision at issue had no "express jurisdictional element which might limit its reach." 514 U.S. at 562. Here, FWS has not only failed to differentiate between take resulting from economic activities and purely accidental take related to personal, non-economic activity, but has further extended the ESA to a wholly intrastate, non-commercial species. This regulation is therefore much too sweeping to fall within Congress' Commerce Clause powers.

Additionally, while Congress "need not make particularized findings in order to legislate," *Perez v. United States*, 402 U.S. 146, 156 (1971), the lack of legislative history connecting the dots between Butterfly decline and commerce weighs against the constitutionality of this regulation. *See Lopez*, 514 U.S. at 1632. In its listing decision for the Butterfly, FWS cites habitat destruction due to development, lack of natural disturbance, and fragmentation as contributing to the species' need for protection. 57 Fed. Reg. at 59,236. The determination does not include any discussion of interstate commerce.

The final *Lopez* factor also indicates that the take provision is unconstitutional applied here because the connection between taking the Butterfly and interstate commerce is simply too attenuated. In *Lopez*, the Court rejected a "cost of crime" argument that guns in school zones increased crime that could have implications for interstate commerce. 514 U.S. at 564. It also rejected a "national productivity" argument under which "Congress could regulate any activity that it found was related to the economic productivity of individual citizens." *Id*. Here, the connection is equally remote. The Butterflies themselves do not move in interstate commerce, and any takes by Lear on private land will not impact commerce generally. As applied here, section 9 of the ESA regulates Lear's use of her lot. In doing so, the federal government attempts to reach into local zoning law. This is beyond the scope of the Commerce Clause. Accordingly, this Court should reverse the District Court and hold that as applied to Lear and the Cordelia Lot, the prohibition on incidental take is unconstitutional.

III. Applying the appropriate test, which considers all relevant facts, the relevant parcel for the takings analysis is Lear Island as a whole.

If the Court reaches the takings claim, the District Court's analysis should be rejected as legally flawed in several aspects. The Court erred in including Brittain County's regulation

which burdens only public trust lands not subject to private ownership, aggregating unrelated local and federal regulations, and concluding of a total deprivation of all beneficial use. Underlying these legal flaws is the District Court's foundational error of excluding 99% of Lear Island in the analysis of the relevant parcel size against which to judge the effect of the regulation. R. 5, 10.

Contrary to Supreme Court precedent, which has repeatedly reaffirmed a preference for using the entirety of the parcel, and contrary to the majority of appellate courts that employ a functional balancing test to discern the appropriate parcel size, the District Court relied on the single fact of "formal subdivision" as "determinative" of the analysis. R. 10; *see also e.g. Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency*, 535 U.S. 302, 327 (2002); *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999). This ruling ignores both the proper legal test and the relevant facts. The proper test is a factor-based inquiry that assesses not only current ownership, but also how the parcel was treated since acquisition, and the physical contiguity of the property. Here, the relevant parcel is Lear Island as a whole, not merely the small lot Lear recently took possession of after the regulation took effect.

A. The appropriate test for assessing the relevant parcel is a factor-based inquiry that reviews all relevant circumstances.

Rather than limiting the inquiry to a single fact, the proper analysis for the relevant parcel should account for all "factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). This approach accords with Supreme Court law characterizing regulatory takings (as opposed to physical takings) as "ad hoc, factual inquiries" which require "careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 535 U.S. at 322 (internal quotations omitted). Accordingly, lower courts employ factor-based tests to

determine the relevant parcel. *See e.g. Dist. Intown*, 198 F.3d at 880; *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed.Cir.1999); *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 617 (S.C. 2013). Factors considered include 1) the contiguity of the parcel, 2) the date of acquisition of the parcel, 3) the extent to which relevant parties treated the parcel as a single lot, and 4) the extent to which the regulated lot may benefit unregulated lots. *See Dist. Intown*, 198 F.3d at 880.

B. The factor-based test demonstrates that the relevant parcel is Lear Island as a whole.

A proper application of these factors demonstrates the relevant parcel is Lear Island as a whole, and the District Court's holding is in error. First, the contiguity and isolation of the parcel, an island with only a single causeway to the mainland of New Union, weighs heavily in favor of considering the whole Island as the parcel, not merely the "northern tip." R. 5; *see also Dist. Intown*, 198 F.3d at 880 (finding relevant that lots were "spatially and functionally contiguous"). Second, Congress granted Lear Island as a single parcel in 1803, weighing in favor of assessing the Island as a whole. R. 4–5. Third, the Lear family continually treated Lear Island as a single parcel for nearly two centuries and passed it from generation to generation as a single lot, with a single homestead, further confirming the relevant parcel is the whole Island. *See* R. 4–6. Lastly, the family maintained the Heath through regular mowing and utilized the cove as a boat landing, demonstrating that this portion of the parcel benefits the whole Island. R. 5. The factual circumstances together show that the relevant parcel is Lear Island as a whole.

C. The District Court erred by considering ownership as a determinative fact.

The District Court's conclusion, resting solely on the current ownership of the lots is in error. *See* R. 10. The Supreme Court in *Lucas* expressly disapproved of an analysis dependent

solely on common ownership. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, n. 7 (1992); *see also Dist. Intown*, 198 F.3d at 881 (noting that *Lucas* "casts aspersions on the . . . elevation of one factor, unity of ownership, over other factors in determining the relevant parcel"). To the contrary, Courts have found the relevant parcel to include subdivisions that were more recently conveyed to a third party. *See e.g. Ocean Palm Golf Club P'ship. v. City of Flagler Beach*, 139 So. 3d 463, 472 (Fla. Dist. Ct. App. 2014), *rev. den*, 160 So. 3d 897 (Fla. 2015). Further, to the extent that unity of ownership is a factor that is considered, the relevant time period for ownership is the time at which the regulation went into effect. *See Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 457 (Mass. 2006) (holding that the "intuitive starting point" for determining the relevant parcel is a consideration of "all contiguous property held by the same owner *at the time the taking occurred*") (emphasis added). Here, the alleged takings occurred in 1982 when the Wetland Preservation Law was enacted and 1992, when the Heath was designated critical habitat. R. 6–7. At that time, the present interest was a life estate covering all of Lear Island in favor of King James Lear. R. 5. The subdivision creating the Cordelia Lot did not become a present interest until 2005, nearly twenty-five years after Brittain County's regulation. R. 5. A future, not-yet-possessory interest in the Lot is insufficient to dictate the relevant parcel, even if ownership were the controlling factor.

The District Court's analysis of the relevant parcel failed to apply the appropriate test and erroneously relied on a single fact that neither concludes the analysis nor even weighs in favor of severing the parcel. As such, this Court should reverse the District Court and hold that the relevant parcel is Lear Island as a whole.

IV. The FWS regulation is not a permanent deprivation of all economically beneficial use of the parcel because it is temporary.

The Takings Clause traditionally protects individuals against a *physical* invasion of their property by the government without compensation. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). While the text of the Constitution does not reference regulatory takings, the Supreme Court has recognized regulatory takings claims when the regulation is the functional equivalent of a physical invasion. *Id.* at 539. If a regulation results in anything less than a total loss of value to the property owner, the takings claim must be analyzed under *Penn Central*.[3] *See Penn. Cent.*, 438 U.S. 104; *see also Lingle*, 544 U.S. at 538. Only in the incredibly rare circumstance where a property owner is deprived of all economically beneficial use of her land may a plaintiff assert a *per se* takings claim under *Lucas*. *Lucas*, 505 U.S. at 101; *Lingle*, 544 U.S. at 539.

A. The FWS regulation is functionally temporary, and thus cannot be a permanent per se *regulatory taking.*

Cordelia Lear's total takings claim must fail because the regulation affecting her property will cease to apply to the Lot when she chooses to allow the successional forest to grow, replacing the Butterfly habitat. In determining whether a *per se* regulatory taking occurred, the Court must look at the property as a whole, including both physical boundaries of the land and the term of years available to the owner. *Tahoe-Sierra,* 535 U.S. at 327, 332. In a *per se* regulatory taking claim under *Lucas*, "the complete elimination of a property's value is the determinative factor." *Lingle*, 544 U.S. at 539. While a state cannot leave only a "token interest" to avoid providing compensation, *Palazzolo,* 533 U.S. at 631, a temporary prohibition on all economic use is not a *per se* taking when "the property will recover value as soon as the

[3] Lear declined to plead a taking under *Penn Central*. R. 8, n.3. As such, this claim is foreclosed. *See Tahoe-Sierra,* 535 U.S. at 334.

prohibition is lifted." *Tahoe-Sierra,* 535 U.S. at 332. Accordingly, the Supreme Court has refused to sever "temporal slices" when analyzing a takings claims. *Id.*

In *Tahoe-Sierra*, the Supreme Court found that a temporary moratorium on development which prevented property owners from developing their land for six years[4] was not a *per se* taking under *Lucas*. *Id.* at 337–38. The Court reasoned that severing the time during the development ban from the rest of the time the owner had an interest in the fee simple estate was inconsistent with the requirement to consider the property as a whole. *Id.* at 331.

Lear's claim must fail because her argument impermissibly assumes FWS's regulation is permanent while she holds the power to render it a temporary moratorium. The regulated habitat will cease to exist in 10 years, if Lear stops annually mowing the Heath, lifting any ban on development. Thus, Lear's argument impermissibly severs the present and immediate future from the rest of her temporal interest. As in *Tahoe-Sierra*, where the Court found the owner's interest in the parcel post-moratorium precluded a *per se* takings claim, the temporary prohibition on development here does not extinguish or diminish Lear's future interest in the property. Accordingly, because Lear failed to demonstrate how the regulations permanently deprive her of all use of her property, she cannot make a *per se* takings claim.

B. The FWS regulation is prospectively temporary and is distinct from an unequivocal permanent regulation later invalidated.

To the extent that Lear argues that FWS's regulation is permanent and requires compensation, she relies on inapplicable precedent. *See First English Evangelical Lutheran Church v. Los Angeles Cty., Cal.,* 482 U.S. 304 (1987). There, the Supreme Court decided only

[4] While the *Tahoe-Sierra* majority characterized the moratoria as a 32-month prohibition on development, the dissent noted that plaintiffs were unable to use their land for six years. *Tahoe-Sierra*, 535 U.S. at 343 (Rehnquist, C.J., dissenting).

the remedial question of whether compensation was required for temporary regulatory takings, not whether the plaintiff actually demonstrated a temporary regulatory taking. *Id.* at 313.

Furthermore, unlike the prospectively temporary regulation that applies to the Cordelia Lot, *First English* applies to an unequivocally permanent regulation cut short by Court intervention. *Id.* at 310. The Supreme Court decision in *Arkansas* is similarly inapplicable, due to the physical damage caused by the regulation. *Arkansas Game & Fish Comm'n. v. United States*, 133 S. Ct. 511, 521 (2012). Unlike *Arkansas*, no aspect of the regulations physically intrudes on or damages Lear's land. Rather, it is Lear, who annually mows the Heath, actively ensuring that the FWS regulation continues to apply.

Lear's failure to bring a claim under *Penn Central* is fatal to her case.[5] A *per se* regulatory taking is exceedingly rare, and foreclosed when the regulation is temporary; this Court should not broaden the doctrine to allow Lear to avoid the fact-specific inquiry demanded by the Supreme Court. *See Tahoe-Sierra*, 535 U.S. at 333 ("[T]he default rule remains that, in the regulatory context, we require a more fact specific inquiry.").

Accordingly, the prospectively temporary halt on development is insufficient to establish a *per se* regulatory taking of the Cordelia Lot. If the Court holds that Lear suffered a *per se* regulatory taking, it would be granting Lear a windfall at the expense of the people of Brittain County. Concededly, if Lear received a final decision from FWS requiring preservation of the Butterfly habitat in perpetuity, she could establish a takings claim. As it stands, however, by

[5] To the extent that Lear attempts to analogize the temporary prohibition on development to an extraordinary delay in the permitting process, her claim is also foreclosed by her failure to allege a partial taking under *Penn Central*. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002) ("Whether a particular extraordinary delay constitutes a taking is governed by *Penn Central*, just as are temporary moratoria.").

forcing Brittain County and FWS to compensate Lear for a temporary regulation, she receives both immediate compensation for the fee simple estate while retaining full control of the parcel and with the option of developing when the regulation terminates. This Court should reverse the District Court's judgment and hold that no *per se* taking under *Lucas* has occurred.

V. The Butterfly Society's offer to pay an annual fee demonstrates that the regulations have not deprived the Cordelia Lot of all economically beneficial use.

In an alleged *per se* taking under *Lucas,* the plaintiff has the burden to show that the regulation precludes *all* economically beneficial uses. *Lucas,* 505 U.S. at 1019; *Keystone Bituminous Coal Ass'n v. DeBenedicts,* 480 U.S. 470, 493 (1987). Specifically, this requires that a regulation permanently deprive the entire parcel of "all value." *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004) (citing *Tahoe-Sierra,* 535 U.S. at 329–332). Even a 95% loss in value is insufficient for a plaintiff to establish a *per se* regulatory taking under *Lucas*. 505 U.S. at 1019 n.8. Accordingly, even if the Court finds that the regulations constitute a permanent deprivation, Lear must further establish that the entire parcel is valueless.

A. The parcel retains enough value from the Butterfly Society's lease offer to preclude a per se *takings claim.*

The Butterfly Society offered to pay Lear $1,000 annually to view the Butterfly on the Cordelia Lot. Assuming Lear ceases mowing the Heath, allowing for the natural cessation of the Butterfly habitat, Lear could receive $10,000 over the estimated 10 years the regulation affects the Lot. While Lear chose to reject this offer, it sufficiently demonstrates that the Lot has not suffered a total taking under *Lucas*.

In *Palazzolo*, the Supreme Court held that the plaintiff failed to establish a *per se* taking when he demonstrated that the regulation caused the fair market value of the entire parcel to fall

from $3,150,000 to $200,000, around a 93% diminution in property value. 533 U.S. at 616. Here, the Butterfly Society's offer to pay $10,000 over the prospective life of the regulation defeats Lear's claim that the regulation caused the deprivation of *all* economically beneficial use. Lear can only demonstrate that her property value will fall from $100,000 to $10,000, a 90% diminution, during the prospective life of the regulation, which is a lesser diminution than the Court rejected in *Palazzolo*.

B. Lear's failure to profit does not establish a per se *regulatory taking.*

Even though the property taxes of the Cordelia Lot exceeds the yearly rental offer from the Butterfly Society, this fact alone is insufficient to establish a *per se* takings claim. The Takings Clause "does not guarantee property owners an economic profit from the use of their land." *Cummins v. Robinson Twp.*, 770 N.W. 2d 421, 448 (Mich. Ct. App. 2009). In *McGuire*, the Court found no regulatory taking where the government removed a bridge providing access to a farmer's leased parcel, causing the lease to have a negative market value through a failure to generate income. *McGuire v. United States*, 97 Fed. Cl. 425, 440 (Fed. Cl. 2011). In *Cummins*, the Court likewise found no regulatory taking where a town's building code required plaintiffs to rebuild their homes causing them to incur debt in excess of their homes equity. 770 N.W. 2d at 443.

This Court should not constitutionalize a right to profit. Much like the courts in *McGuire* and *Cummins*, which found no *per se* taking had occurred despite a negative market value, this Court should hold that while the Lot is not currently profitable, the Constitution does not guarantee a profit on land. This is particularly appropriate when there is no evidence that Lear was earning a profit during the seven years she paid property taxes while allowing the land to sit idle. *See* R. 5 Lear cannot now rely on her lack of profit to insert a *Penn Central* factor, her

investment backed expectations, into a *per se* analysis under *Lucas*. The only inquiry for the Court is whether the land retains any economic value. As noted, the Butterfly Society's offer, which amounts to 10% of the total property value precludes a total deprivation under *Lucas*. *See Palazzolo*, 533 U.S. at 616.

C. There has been no per se *regulatory taking because Lear's property retains economically beneficial uses.*

The right to transfer interest in land is one of the sticks in the bundle of property rights. *Palazzolo*, 533 U.S at 628. Courts have refused to sever distinct property rights from the rest of the bundle to consider whether a *per se* taking has occurred. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (declining to consider the limitation on a single property right separately from the entire bundle in holding that a regulation limiting hunting on personal property did not constitute a *per se* taking under *Lucas*). Lear's claim is based solely on a temporary prohibition of development on her parcel, but she retains the right to lease the property to the Butterfly Society.[6]

Similar retention of other sticks in the property bundle have precluded a *per se* takings. In *Maritrans*, the Court determined there had been no *per se* taking when a regulation required plaintiff's single hull barges to be phased out of service. *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1348–49 (Fed. Cir. 2003). While plaintiffs claimed there was no commercially viable use for the barges and they had little value as scrap, the Court found that the barges could be used for income prior to their retirement dates, could be sold, or could generate insurance payouts in case of an accident. *Id.* at 1354. The court reasoned that "[t]aking away a property's

[6] Lear also retains other important property rights such as the right to exclude, the right to use for the property for recreation, the right to water dependent development in the cove, and the right to transfer the property. Lear also retains an unencumbered fee simple once the regulation is no longer in effect.

most beneficial use does not by itself constitute a compensable taking," and emphasized viewing the course of the regulatory action over time. *Id.* at 1354–55.

The FWS regulation results in less loss than in *Maritrans*, where the Court found no *per se* taking. In *Maritrans* the regulation phased out the barges, but the barges could be used as the owner intended until their retirement date. *Id.* Here, the limited amount of time in which the Lot has diminished value will end and the entire value will be restored. Additionally, just like the barges in *Maritrans* that were deprived of their most beneficial use but could be used as scrap or sold, Lear could get a permit for water dependent development in the cove, or she could lease the lot to the Butterfly Society or other similar organizations.

For these reasons, the Court should reverse the District Court's judgment and find that a *per se* takings claim is precluded.

VI. The public trust doctrine precludes Cordelia Lear's takings claim under *Lucas* because her title never included the right to fill in a portion of Lake Union.

In *Lucas*, the Supreme Court indicated that a "total takings" claim could be defeated if the property right limited by the regulation is one the owner never held because it was limited by a background principle of state law. *Lucas*, 505 U.S. at 1028. Here, the public trust doctrine is one such background principle and bars Lear's takings claim regarding the Brittain County's Wetlands Preservation Law.

Rooted in ancient Roman and English law, the public trust doctrine is a recognition of the sovereign's responsibility to preserve and protect certain resources for the public good. *See Glass v. Goeckel*, 703 N.W.2d 58, 63–64 (Mich. 2005), *Nat'l Audubon Soc. v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983). This rule "passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to [the state]." *Glass*, 703 N.W.2d at 64. Though

sovereigns can sell or lease such property, it is conveyed subject to public trust limitations. *Id.* at 65. Courts have made the distinction between a *jus publicum* public right to certain resources or pursuits and a *jus privatum* private property right subject to the public trust. *See Shively v. Bowlby*, 152 U.S. 1, 13 (1894). The bed, banks, and waters of Lake Union are a public trust resource, and as such Lear has no takings claim for limitations on her use of those resources imposed pursuant to the doctrine.

A. The bed, banks, and waters of Lake Union, including the cattail cove, are encompassed by the public trust doctrine.

The cattail cove is within the scope of the modern public trust doctrine. The ancient Roman public trust doctrine was limited to "the air, running water, the sea, and therefore the seashores." JUSTINIAN, INSTITUTES, bk. II, tit. I, § 1 *reprinted and trans. in* THOMAS, THE INSTITUTES OF JUSTINIAN, TEXT, TRANSLATION AND COMMENTARY (Amsterdam: N. Holland Publishing Co., 1975). However, it has evolved through the ages to keep pace with modern needs. In one such evolution, the Supreme Court recognized the need to expand the definition of navigability: while all navigable streams in England were in fact tidal, in the United States there are "thousands of miles of public navigable water, including lakes and rivers in which there is no tide." *Genesee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851). The Court found nonsensical a rule that extended jurisdiction to tidal waters but not to other navigable waters, and held that "[t]he lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." *Id.* at 457–58.

State courts have applied this same logic to include lakes in the public trust doctrine. *See Nat'l Audubon Soc.,* 658 P.2d, *Nedtweg v. Wallace*, 208 N.W. 51 (Mich. 1926); *Illinois Cent. R. R. Co. v. Illinois*, 146 U.S. 387 (1892). Some states have explicitly included marshes as well. *See*

Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987). The public trust doctrine historically protected "access to navigable waters and shorelands, and thus the trust encompassed the right of navigation and fishery." *Id.* 1073. The public trust can only adequately protect these rights by protecting navigable lakes as well as oceans and tidal rivers. *People v. Silberwood*, 67 N.W. 1087, 1088 (Mich. 1896), *Illinois Cent.,* 146 U.S. at 435. Lake Union, a large interstate lake, has traditionally been used for interstate navigation and fishing, R. 4, and falls within the scope of the traditional public trust doctrine in the United States. Further, states have also extended the scope of the rights protected by the trust doctrine to include recreational uses, or any potential public use. *See Orion,* 747 P.2d at 641, *Montana Coal. for Stream Access v. Curran*, 682 P.2d 163, 170 (Mont. 1984). Thus, the potential public uses available on a large lake like Lake Union also point to the inclusion of Lake Union in the public trust.

B. Any property right Cordelia Lear may claim in the lake bed surrounding the Island is conditioned by the public trust; because she never held the rights of the trustee she has no takings claim upon their exercise.

The public trust conditions any conveyance of trust lands, as a sovereign does not have the power to extinguish those public rights. *See Nedtweg,* 208 N.W. at 17; *Glass,* 703 N.W.2d at 66; *Illinois Cent.*, 146 U.S. at 453; *Shively*, 152 U.S. at 48. Any conveyance therefore remains subject to these rights, which function similarly to an easement or servitude.[7] *See e.g. Shively*, 152 U.S. at 48. The District Court held that Lear's title is not so conditioned because the 1803 grant to her ancestors occurred prior to popular recognition of lakes as included in the public trust. R. 10. This conclusion is in error for two reasons: first, Lear herself took title long after

[7] Though the District Court relied on *Shively* for the proposition that prior clear congressional grant can give superior title to the grantee, R. 10, the *Shively* Court also noted that this title is *jus privatum* and still subject to *jus publicum* rights. *Shively*, 152 U.S. at 48.

courts began to recognize lakes as within the doctrine. And second, the Supreme Court in *Genesee Chief* in fact holds that, at least for the purposes of admiralty, the 1789 Congress intended jurisdiction to "depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public." *Genesee Chief*, 53 U.S. at 457.

Even assuming that Lear's title predates this understanding of the trust, courts have recognized lakes as subject to the trust and applied the restrictions retroactively. *See Illinois Cent.,* 146 U.S. at 435*, Lincoln v. Davis*, 9 N.W. 103, 104 (Mich. 1884). With respect to lands formerly believed unencumbered by the trust, the Supreme Court of California held that lands "still physically adaptable for trust uses" would be considered subject to the trust, exempting only areas that had already been filled or altered to the point where protected uses were no longer possible. *Berkeley v. Superior Court*, 606 P.2d 362, 373 (Cal. 1980). Here, the cattail cove has not been filled or altered. It is, therefore, subject to the public trust, and Brittain County's protection of those trust rights is not a taking. Lear never held the property right to develop the bed of Lake Union in a way inconsistent with the public trust, even within the 300-foot radius of her grant.

C. The State of New Union holds title to the beds and banks of Lake Union under the equal footing doctrine, precluding Cordelia Lear's takings claim.

Article IV, section 3, clause 1 of the Constitution requires that all new states to enter the Union enter on an equal footing with those in existence. *Pollard v. Hagan*, 44 U.S. 212, 222 (1845). This includes taking title to the beds and banks of navigable waters, as the original states held such title as trustee. *Id.* at 221. Lake Union is, concededly, a navigable water. R. 4. The State of New Union therefore holds title to the bed and banks under the equal footing doctrine,

and any conditions imposed on those submerged lands in its role as trustee do not constitute a taking.

It is irrelevant that the Army Corps of Engineers has determined that the cattail cove area is not navigable for the purposes of the Rivers and Harbors Act of 1899. *See* R. 7. It is the state of the waters at the time of admittance to the Union, rather than their current state, that is relevant for establishing title. *State v. Venice of Am. Land Co*., 125 N.W. 770, 771 (Mich. 1910), *PPL Montana, LLC v. State*, 229 P.3d 421, 428 (Mont. 2010). The area historically was open water and used as a boat landing, R. 5, and therefore is "navigable" for the purposes of the equal footing doctrine. The court in *PPL Montana* also notes that there are multiple tests for navigability, and failure under one of them is not determinative of others. 229 P.3d at 437. The test for the equal footing doctrine is the character of the water at the time of statehood. *Id.* at 428. The cattail cove falls under the equal footing doctrine and is held in trust by New Union. The Wetland Preservation Law is an exercise in protection of trust resources and thus cannot give rise to a takings claim.

VII. Brittain County's regulation cannot be aggregated with other, independent regulations to manufacture a *per se* takings claim.

Lear waived damages against FWS in excess of $10,000 in order to stay within the jurisdiction of the District Court. R. 4, n.1. The District Court relied on the theory of joint and several liability in determining that the effects of the regulations of Brittain County and FWS could be considered in combination. R.11, *citing Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976). The Court then issued a separate judgment requiring Brittain County to pay 90% of the fair market value of the Cordelia Lot due to the Board's denial of a permit to fill one half

acre of the cove abutting Lear's approximately 10-acre property.[8] The District Court erred in applying joint and several liability to a takings claim because the burden placed on the Cordelia Lot by each regulation is divisible, and the Court's judgment results in a disproportionate burden on Brittain County.

A. The lower court erred in applying a tort liability theory to a takings claim.

The use of *Velsicol* as an analogy in the present case is inapplicable to takings claims. In *Velsicol*, the Court found that a defendant whose chemical manufacturing plant contaminated the air and water with pollutants had the right to seek contribution from other manufacturing plants in the area when an indivisible injury was caused by independent, concurrent, wrongful acts by two or more actors. *Velsicol*, 543 S.W.2d at 339, 343. For several reasons, *Velsicol* cannot be applied to a Lear's takings claim.

First, unlike the injury of polluted air and water in *Velsicol*, the alleged taking in this case is clearly divisible. Brittain County's regulation affects only the historically open-water cove abutting Lear's property, while the FWS regulations impact the 10-acre lupine covered land. Second, unlike the polluters in *Velsicol*, Brittain County has not committed a wrongful act that would justify placing the burden on the defending party to sort out liability. Again, because Lear never applied for a permit from FWS, it is impossible to know at this stage whether Lear is even prevented from development on land area the property. Finally, unlike *Velsicol*, where each defendant could seek contribution from other defendants, here the District Court relied on a

[8] If the Court had actually issued a joint and several judgment either defendant would be liable for the whole of the judgment. *Velsicol,* 543 S.W.2d at 340 (noting that each of the joint tort feasors are "liable for the entire injury done"). The District Court could not issue a joint and several judgment greater than $10,000 without destroying jurisdiction as the Tucker Act only provides for the District Court's jurisdiction where monetary damages do not exceed $10,000 against the United States. 28 U.S.C. §§ 1346(a)(2), 1491 (2012).

theory of joint and several liability but then issued a separate judgment. Because the judgment is separate, Brittain County cannot seek contribution from the United States.

The court should analyze the effects of these regulations independently because "just compensation" infers that a government body should only be responsible for the alleged deprivation which it caused. U.S. CONST. amend V. In *Palazzolo*, the Supreme Court held that a regulation extending to only a portion of the lot was insufficient for a total taking. 533 U.S. at 631. Here, Brittain County's regulation burdens only the cove adjoining a 10-acre lot. R. 7. Thus, Brittain County's regulation does not amount to a total taking under any reading of *Lucas*. Despite this, Brittain County is being held 90% liable for a *per se* taking of the Cordelia Lot, which is primarily impacted by the FWS regulation.

Under the lower court's theory, plaintiffs could combine any number of regulations to find a *per se* taking. This would inappropriately broaden the relatively rare circumstance in which *Lucas* applies. Lear cannot now shoehorn what is really two separate partial takings claims against two separate parties into a single *Lucas* total takings claim by adding up the effects of independent regulations. The Court should reverse the District Court's holding of liability for a total taking, and dismiss the judgment against Brittain County.

B. Brittain County's liability, if any, must be proportional to the amount of property its regulations burden.

Even if the District Court did not err in aggregating these regulations for the takings analysis, this Court should still separate the regulations to analyze appropriate compensation. In *Good*, while not dealing with aggregated regulations, the Court found that local restrictions independently affecting the fair market value of the parcel would be relevant in determining just compensation owed by the government. *Good v. United States*, 49 Fed. Cl. 81, 103 (Fed. Cl. 1997). This Court should follow the analysis of *Good*, and base any compensation on the extent

to which each regulation causes a deprivation to Lear.[9] Lear declined to seek a reassessment of the Lot after denial of a Wetland permit from Brittain County, and has thus failed to meet her burden proving damages against Brittain County. *See* R. 7. Accordingly, this Court should reverse the judgment of damages against Brittain County.

CONCLUSION

For the reasons stated above, Brittain County, New Union respectfully requests this Court to reverse the judgment of the District Court, and decline jurisdiction over the unripe claim. If the Court holds the claim ripe, it should find the U.S. Fish & Wildlife Service regulation of the Karner Blue Butterfly unconstitutional as applied to the plaintiff. Finally, if the Court reaches the takings claim, it should reverse the judgment finding a total taking of plaintiff's property and dismiss the award of compensation against Brittain County.

DATED November 28, 2016.

Respectfully Submitted,

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Counsel for Brittain County, New Union

[9] To the extent that Lear claims this result would be unfair because her claim against the United States cannot exceed $10,000, this argument is precluded by Lear's deliberate choice to waive those claims in order to dictate the forum for this action.