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.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BRIEF FOR DEFENDANT–APPELLANT–CROSS APPELLEE

TEAM 65
COUNSEL FOR DEFENDANT–APPELLANT–CROSS APPELLEE,
NOVEMBER 28, 2016

QUESTIONS PRESENTED

1. Whether the Endangered Species Act is a valid application of Congress' Commerce power as applied to the Karner Blue butterfly population on Lear Island.

2. Whether Plaintiff's takings claim is valid despite having never applied for an Incidental Take Permit as required by the Endangered Species Act.

3. Whether Plaintiff's takings claim based on a complete deprivation of economic value is precluded based on public trust principles and relevant federal and county regulations.

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STATEMENT OF FACTS

Plaintiff Cordelia Lear ("Plaintiff") is the owner of a 10-acre parcel of property on Lear Island, known as the Cordelia Lot. (R. at 5.) Lear Island is a 1000-acre island in Lake Union, located in Brittain County, New Union. (R. at 4.) Lear Island is a large interstate lake, which has been traditionally used for interstate navigation. (R. at 4.) Plaintiff's ancestors have occupied Lear Island since 1803, when Congress granted Cornelius Lear title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island." (R. at 4.) Cornelius Lear and his descendants have made various economic uses of Lear Island, including as a homestead, commercial farm, and hunting and fishing grounds (R. at 5.)

In 1965, Plaintiff's father King James Lear, who owned the entire 1803 Lear Island grant, divided Lear Island into three parcels – one for each of his three daughters Goneril, Regan, and Cordelia. (R. at 5.) At the time of the subdivision, the Brittain Town Planning Board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence. (R. at 5.) When King James Lear deeded each of the lots to his three daughters, he reserved a life estate in each lot for himself. (R. at 5.) He subsequently constructed a residence on the Regan Lot, while continuing to live on an existing homestead located on the Goneril Lot. (R. at 5.) Each daughter came into possession of her property upon King James Lear's death in 2005. (R. at 5.)

The Cordelia Lot consists of a nine-acre open field, one acre of emergent cattail marsh in a cove that was historically open water and was historically used as a boat landing, and a 40-foot by 1000-foot access strip. (R. at 5.) The open field and access strip ("the Heath") have been kept open by annual mowing in October by Lear family members for decades, preventing them from becoming wooded like the rest of Lear Island did after agricultural use ceased in 1965. (R. at 5.)

The Heath is currently covered with wild blue lupine flowers, which are essential for the survival of Karner Blue butterfly larvae. (R. at 5.) The Karner Blue is an endangered species, which was added to the federal endangered species list in December of 1992. (R. at 5.) The only remaining population of Karner Blues in New Union lives on the Cordelia Lot, is entirely intrastate, and does not migrate or travel across state boundaries. (R. at 5-6.) The Heath was designated by the Fish and Wildlife Service ("FWS") as critical habitat for the New Union subpopulation of the Karner Blues in 1992. (R. at 6.) Without annual mowing, the lupine fields in the Heath would naturally convert to successional forest, eliminating the Karner Blues' habitat. (R. at 7.) This process would take about ten years, and would result in the local extinction of the New Union subpopulation of the Karner Blues unless a replacement habitat was created within a 1000-foot radius of the existing fields. (R. at 7.)

Plaintiff decided to build a residence on her lot in 2012. (R. at 5.) In April 2012, Plaintiff contacted the FWS New Union field office to inquire whether development of her property would require any permits or approvals because of the existence of the endangered butterfly population. (R. at 6.) Plaintiff was advised by a FWS agent that any disturbance of the lupine fields in the Heath other than continued annual mowing would constitute a "take" of the Karner Blues. (R. at 6.) The agent advised Plaintiff that it was possible to obtain an Incidental Take Permit ("ITP") under the Endangered Species Act ("ESA"), but that she would have to develop a Habitat Conservation Plan ("HCP") that met various requirements in order for an ITP to be approved. (R. at 6.) The cost of preparing an HCP would be $150,000. (R. at 6.) In May 2012, the FWS New Union field office sent Plaintiff a letter confirming that the entire Cordelia Lot was a critical habitat for Karner Blues, and reiterating the statements made by the FWS field agent in April. (R. at 6.) The letter also invited Plaintiff to submit an application for an ITP, and

referred her to a planning handbook for information on developing an acceptable HCP to submit with an ITP application. (R. at 6.) Plaintiff did not pursue an ITP application, and FWS did not have an opportunity to make a decision regarding Plaintiff's property. (R. at 7.)

In lieu of the ITP application, Plaintiff developed an alternative development proposal ("ADP") that would not disturb the lupine fields. (R. at 7.) In the ADP, Plaintiff proposed to fill one half-acre of the marsh in the cove to create a lupine-free building site, together with an access causeway to avoid disturbing the access strip. (R. at 7.) The U.S. Army Corps of Engineers considered this portion of Lake Union to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899, and no federal approvals would be required for the project. (R. at 7.) However, the ADP required a permit to fill the cove marsh under the Brittain County Wetland Preservation Law, which was enacted in 1982. (R. at 7.) In August 2013, Plaintiff filed a permit application with the Brittain County Wetlands Board, which was denied in December 2013. (R. at 7.)

The fair market value of the Cordelia Lot without any restrictions that would prevent the development of a single-family house on the lot is $100,000. (R. at 7.) Property taxes on the Cordelia Lot are $1500 annually – however, Plaintiff has not sought a tax reassessment following the permit denial. (R. at 7.) There is no market for the Cordelia Lot except as residential property. (R. at 7.) The Brittain County Butterfly Society has offered $1000 annually for the privilege of conducting butterfly viewing outings during the summer, but Plaintiff rejected the Society's offer. (R. at 7.)

Plaintiff commenced the present action in February 2014. (R. at 7.)

SUMMARY OF THE ARGUMENT

Congress has the power to regulate Commerce among the several states. The Court has construed this to include the power to regulate intrastate economic activity that in aggregate has a substantial effect on interstate commerce. The ESA prohibits the "take" of endangered species, which includes activities which harm the species through habitat modification or degradation. The underlying land development necessary to the construction of Plaintiff's planned residence would cause habitat degradation for the purpose of the ESA's takings prohibition. This land development is economic activity: it relies on the use of construction companies, engineers, contractors, and carpenters, all of whom engage in and affect interstate commerce. Furthermore, the protection of endangered species generally is valid under Congress' Commerce power, as endangered species can potentially be utilized in furtherance of interstate commerce, and the ESA protects the potential future commercial exploitation of species.

In order for a regulatory takings claim based on complete deprivation of economic value to be valid, the claim must be ripe, the relevant parcel must be determined, and the parcel must actually be deprived of all economic value. Plaintiff's regulatory takings claim is not ripe because she actively chose not to apply for an ITP – an application that would be necessary for FWS to reach a final decision regarding the Cordelia Lot, and ultimately for Plaintiff to begin her land development plans. Plaintiff's claim is further invalidated by public trust principles inherent in the 1803 grant of title to Cornelius Lear, as the public retains an interest in navigable waters that takes precedence over the private ownership of Lear Island.

The relevant parcel for takings analysis is the whole of Lear Island rather than the Cordelia Lot itself, because the history surrounding the subdivision of Lear Island, and King James Lear's activities on Lear Island after he conveyed the Cordelia Lot to Plaintiff, indicate

that Plaintiff's economic expectations were based on the use of Lear Island as a whole. Plaintiff has not suffered a complete deprivation of economic value because two residences are located on Lear Island, and controlling case law states that the existence of even a single house on a property precludes a finding of complete deprivation of economic value. Even if the relevant parcel is just the Cordelia Lot, it has not been deprived of all economic value for several reasons. Federal regulations do not affect all of Lear Island, and would permit construction of a residence at the property's cove area. Federal and county regulations should be considered separately, as the harm caused by each is not indivisible and can be apportioned. In spite of the federal and county restrictions on development, the Cordelia Lot still has economic value, as evidenced by the fact that Plaintiff has been offered payment for use of the property to conduct butterfly viewing outings. Furthermore, since the Endangered Species Act will no longer apply to the Cordelia Lot in 10 years due to natural changes, the parcel will regain any lost economic value at that point because Plaintiff will be free to build a single-family residence.

ARGUMENT

I. THE ESA AS APPLIED TO THE INTRASTATE KARNER BLUE POPULATION ON CORDELIA LOT IS A VALID EXERCISE OF COMMERCE POWER.

The ESA's takings clause regulates fundamentally economic activities which have a substantial impact on interstate commerce: both the commercial utilization of endangered species and the underlying development which can affect species' habitats are plainly economic in nature. Section 9 of the ESA prohibits the "take" of any endangered species; it defines that "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B); ESA § 3(19), 16 U.S.C. § 1532(19). The land development proposed by Plaintiff would cause "harm"

to the Karner Blue butterfly population, defined by the ESA as "an act which actually kills or injures wildlife…[which] may include 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). Plaintiff argues that these activities are noneconomic and the ESA's regulation is unconstitutional when applied to the Karner Blue. See United States v. Morrison, 529 U.S. 598 (2000) (holding that intrastate activity must be economic in nature for regulation under the Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995). The argument that protecting the Karner Blue population is not an economic activity misses the mark, as the underlying activities regulated by the ESA's incidental take prohibition are economic in nature. The underlying land development necessary to the construction of Plaintiff's residence would cause significant habitat modification and degradation, and every circuit court to consider this question has found such land development to constitute valid economic activity for the purpose of Congress' Commerce power.

A. The Takings Prohibition As Applied to Cordelia Lot's Karner Blue Population is Economic in Nature

Congress has the power to "regulate Commerce . . . among the several States." U.S.C.A. Const. Art. I, § 8, cl 3. The Supreme Court has held that de minimis, intrastate activity can be aggregated to have a substantial aggregate effect on interstate commerce so long as the underlying activity is economic in nature. See Lopez, 514 U.S. at 558-59; Morrison, 529 U.S. at 609; see also Wickard v. Filburn, 317 U.S. 111, 124 (1942) (commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce"). The ESA's take prohibition covers economic activities including "significant habitat modification or

degradation" 50 C.F.R. § 17.3 (2015). The District Court recognized that, when analyzing whether an activity would cause "significant habitat modification or degradation," the relevant activity for the ESA is the "underlying land development through construction." (R. at 8). These activities may include "land clearing" and "vegetation removal," which numerous courts have held to be economic when they occur in order to develop the land for construction. See, e.g., Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003) ("[T]he regulation of commercial land development, quite 'apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce.'") (quoting Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1059 (D.C. Cir. 1997)); GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648, 661 (W.D. Tex. 2001) ("[T]heir planned development of the Property clearly qualifies as economic activity. Activity doesn't get much more economic or commercial in character than building a Wal–Mart, office buildings, and an apartment complex."), aff'd, 326 F.3d 622 (5th Cir. 2003).

Plaintiff's desire to build a "single-family house" on her property, (R. at 4), is land development for construction, which various circuits have held to be an economic activity. See, e.g., GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (finding that construction of residential buildings was economic in nature); see also Rancho Viejo, 323 F.3d at 1069. That the house is for her own use, (R. at 4), is irrelevant, as the District Court points out that the construction would still need to rely on engineers, carpenters, and contractors, which implicates the economic nature of land development. (R. at 8). Plaintiff mistakenly assumes that the ESA's takings regulation would prohibit all "land clearing" or "vegetation removal" activities, but the ESA is clear that these activities are only prohibited if they would cause "significant habitat modification or degradation." Land development, to prime the land for

construction, would cause this level of significant habitat modification. Whether land development is residential or commercial, it still constitutes a "disturbance to the lupine fields" and thus a taking of the Karner Blue; the purpose of the construction has no bearing on the underlying process of land development, which is plainly economic in nature. (R. at 6).

B. Both Cordelia's Proposed Land Development and The Regulation of the Karner Blue Population Substantially Affect Interstate Commerce

Plaintiff's proposed land development activities and, more generally, the regulation of endangered species substantially affect interstate commerce. In Lopez and Morrison, the Court set forth "the controlling…test for determining whether a regulated activity substantially affects interstate commerce." San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174 (9th Cir. 2011) (quoting United States v. Alderman, 565 F.3d 641, 647 (9th Cir. 2009)). In Gonzales v. Raich, the Court elaborated on these factors, holding that intrastate regulations must "bear a substantial relation to commerce," and that so long as they do bear a substantial relation to commerce, "the *de minimis* character of individual instances arising under that statute is of no consequence." 545 U.S. 1, 17 (2005).

Beyond the individual economic nature of land development, which involves "the purchase of building materials and the hiring of carpenters and contractors," the regulation of endangered species also bears a substantial relation to interstate commerce. (R. at 8). In fact, every single circuit court to address a challenge to the economic nature of Section 9's takings regulation has upheld the ESA and its takings prohibition. See Salazar, 638 F.3d at 1177; Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1277 (11th Cir. 2007); Rancho Viejo, LLC, 323 F.3d at 1069; GDF Realty Investments, 326 F.3d at 640–41; Gibbs v. Babbitt, 214 F.3d 483, 505–06 (4th Cir. 2000); Nat'l Ass'n of Home Builders, 130 F.3d at 1057 (D.C. Cir. 1997). In Salazar, the Ninth Circuit stated that the protection of endangered species

within one state implicates interstate commerce because "[a] species might become threatened or endangered precisely because of overutilization for commercial . . . . purposes," "the ESA protects endangered or threatened species, in part, by prohibiting all interstate and foreign commerce in those species," "the ESA protects the future and unanticipated interstate-commerce value of species," and "regeneration of a threatened or endangered species might allow future commercial utilization of the species." Salazar, 638 F.3d at 1176-77 (internal citations omitted). The Ninth Circuit was careful to note that this was not an exhaustive list of the various ways the ESA bears on interstate commerce.

Under both the Supreme Court and circuit court Commerce Clause jurisprudence, the ESA's takings prohibition validly targets economic activities that, in aggregate, can have a substantial impact on interstate commerce. The fact that the relevant Karner Blue population is wholly intrastate is irrelevant, as both the habitat and the species itself can be utilized in ways implicating the interstate economy. The ESA's regulations impact exactly that potential interstate utilization of both the Karner Blue and its habitat.

II. PLAINTIFF'S TAKINGS CLAIM AGAINST THE FISH AND WILDLIFE SERVICE IS NOT RIPE FOR LITIGATION.

Plaintiff's regulatory takings claim against FWS is not ripe because she never formally applied for an ITP and consequently failed to obtain a final decision from FWS regarding her development plans. See Palazzolo v. Rhode Island, 533 U.S. 606, 618-20 (2001) ("The central question in resolving the ripeness issue . . . is whether petitioner obtained a final decision . . . determining the permitted use of the land."). A claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson Cty. Reg'l

Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). However, when a government entity provides procedures for obtaining a final decision, a takings claim will not be ripe until an affected property owner complies with those procedures. Greenbrier v. United States, 193 F.3d 1348, 1359 (Fed. Cir. 1999); see also Williamson Cty., 473 U.S. at 186-88 (holding that takings claim was not ripe because property owner did not seek zoning variance); Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003) (holding that permit denial constituted a final decision for takings purposes).

Here, FWS did not have the opportunity to reach a final decision regarding Plaintiff's development plans because Plaintiff failed to apply for an ITP when invited by FWS to do so. (R. at 6.) Since Plaintiff failed to follow this procedure, her takings claim is not ripe. Greenbrier, 1348 U.S. at 1359. The fact that pursuing an ITP application was, in Plaintiff's view, both burdensome and expensive does not relieve her of the duty to follow proper procedure. Parties are not excused from following procedures merely because an adverse decision would be likely, or because they impose stringent requirements for being approved. Barlow & Haun, Inc. v. United States, 805 F.3d 1049, 1058 (Fed. Cir. 2015); Greenbrier, 193 F.3d at 1359.

The District Court erred in holding that Plaintiff's application for an ITP would be futile. (R. at 9.) The Supreme Court has held that pursuit of an application is futile if either a government agency lacks discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty from the record. Palazzolo, 533 U.S. at 620. Plaintiff's situation does not meet the first requirement, as FWS has the discretion to grant an ITP to Plaintiff should she choose to apply for one. 16 U.S.C. § 1539(a)(1)(B). Plaintiff also does not meet the second requirement because she has not established that the permissible uses of property were known to a reasonable degree of certainty; doing so would require a final ITP

determination. See, e.g., Barlow & Haun, 805 F.3d at 1059 (finding that application was not futile because agency did not have an opportunity to make a specific determination regarding appellant's property rights); Greenbrier, 193 F.3d at 1359 (holding that application was not futile because agency had granted permission to prepay mortgage loans in three out of eight similar instances). In addition, the fact that an application is very costly and time-consuming is not enough to establish futility. See Lakewood Assocs. v. United States, 45 Fed. Cl. 320, 333 (Fed. Cl. 1999) (rejecting futility claim where plaintiff claimed that following agency procedure would "have cost hundreds of thousands of dollars, would have taken several years, and would have done nothing to advance [the] permit application to either approval or denial").

In order for Plaintiff's takings claim to be ripe, she would either need to obtain a final decision from FWS regarding her property, or show that applying for an ITP would be futile. As she has done neither, her takings claim is not ripe.

III. THE RELEVANT PARCEL FOR TAKINGS ANALYSIS IS THE WHOLE OF LEAR ISLAND.

When determining whether a government action has caused a taking, courts must focus both on the character of the action, and "on the nature and extent of the interference with rights in the parcel as a whole . . . ." Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 130-31 (1978). The "parcel as a whole" analysis requires "a flexible approach, designed to account for factual nuances." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994), abrogated on other grounds by Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004). The most important factors to consider are "the economic expectations of the claimant with respect to the property" and whether separate parcels are treated as a "single economic unit." Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005). Other relevant

factors include: (i) the degree of contiguity between property interests; (ii) the dates of acquisition of property interests; (iii) the extent to which a parcel has been treated as a single income-producing unit; and (iv) the extent to which the regulated lands enhance the value of the remaining lands. Brace v. United States, 72 Fed. Cl. 337, 348 (Fed. Cl. 2006).

Here, the record requires that this Court should treat all of Lear Island as the relevant "parcel as a whole" for takings analysis. Members of the Lear family have owned Lear Island since 1803, and the entire island was used for agricultural purposes until 1965. (R. at 5.) Lear Island was therefore treated as a single economic unit before King James Lear subdivided the property into three lots. See Brace, 72 Fed. Cl. at 348 (treating legally-separate parcels as single economic unit). Indeed, since King James Lear retained a life estate in all three parcels and remained in actual possession of them, (R. at 5), they still formed a single economic unit until his death – despite the fact that they were legally separate, and that Plaintiff and her sisters had legal title to their respective parcels throughout that time (R. at 5.) Plaintiff's economic expectations when title passed to her in 1965 were tied to use of Lear Island as a single economic unit because of King James Lear's occupation and use of all three subdivisions. See Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (analyzing economic expectations related to subdivision of parcels, including how project was treated as "a single integrated project" from the outset).

The "other relevant factors" from Brace further indicate that Lear Island is the relevant parcel. The three subdivisions are contiguous and were created at the same time; and Lear Island was treated as a single income-producing unit both when it was being used for agricultural purposes immediately before being subdivided, and by King James Lear for 40 years after being subdivided (R. at 5.)

If the relevant parcel for takings analysis is Lear Island as a whole, then Plaintiff's property has not suffered a complete deprivation of economic value. Residences are located on both the Regan Lot and the Goneril lot. (R. at 5). In Palazzolo, the Supreme Court held that a regulation permitting a landowner to build only a single residence on his property did not cause a complete deprivation of economic value, since such a regulation "does not leave the property 'economically idle.'" Palazzolo, 533 U.S. at 631. The facts here are analogous – Plaintiff cannot claim that her property has been deprived of all economic value when existing regulations permitted the construction of two houses, which themselves have economic value.

Overall, analysis of Petitioner's economic expectations, along with the history surrounding the subdivision of Lear Island, indicates that the relevant parcel for takings analysis is Lear Island.

IV. PUBLIC TRUST PRINCIPLES INHERENT IN TITLE PRECLUDE PLAINTIFF'S TAKINGS CLAIM.

Plaintiff's claim for a taking against Brittain County, based on its regulations that affect the cove and underwater area of plaintiff's property, fails due to inherent public trust limits. In Lucas v. South Carolina Coastal Council, the Supreme Court recognized that there are limitations that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). The District Court erred in construing this as *dicta* because the Court's conclusion in Lucas, that "[it]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land," was integral to its decision in the case. Lucas, 505 U.S. at 1031. The public

trust limitations are based on common-law principles already established in 1803 and inherent in the title to Cordelia Lot, which prevents Plaintiff from succeeding on her claim.

While the District Court noted that the U.S. Army Corps of Engineers considers the marsh area that Plaintiff hoped to fill currently "non-navigable," (R. at 7), it failed to focus on the significant fact that the marsh area has historically been navigable. The District Court even recognized that the cove "historically was open water and was historically used as a boat landing." (R. at 5). If the District Court's analysis was based on the common-law principles that existed at "the time of the Lear grant in 1803," (R. at 10), then this Court should look to the state of the land when grant was made, rather than simply limiting analysis to only its current state. In Scranton v. Wheeler, the Supreme Court recognized that "in every grant of lands bounded by navigable waters where the tide ebbs and flows…there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner." Scranton v. Wheeler, 179 U.S. 141, 56-57 (1900) (quoting Sage v. City of New York, 154 N.Y. 61, 79 (1897)). When Congress granted title of Lear Island and Cordelia Lot to Cornelius Lear in 1803, the marsh land that plaintiff now hopes to fill was navigable. The public trust principles inherent in that grant of title remain, as the marsh area remains potentially necessary to "the water front as to aid navigation for the benefit of the general public." Scranton, 179 U.S. at 57.

The District Court also misconstrued P.P.L. Montana L.L.C. v. Montana, 132 S. Ct. 1215 (2012). P.P.L. Montana recognized that under English common-law, "the public retained the right of passage" for both "royal rivers" and "nontidal waters." Id. Thus, if the marsh area was passable at the time of the 1803 grant, could be made passable again, or could be necessary to "aid navigation," then P.P.L. Montana urges a ruling against Plaintiff. Scranton, 179 U.S. at 57.

This common-law principle is exactly the sort that Lucas held can defeat a takings claim such as Plaintiff's. Lucas, 505 U.S. at 1029. Furthermore, P.P.L. Montana noted that "while the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard." P.P.L. Montana, 132 S. Ct. at 1227. For Congressional grants after the Revolution, courts found that "[t]he common law principle is in fact, that the owners of the banks have no right to the water of *navigable* rivers," holding that the *navigability* of the waters is the essential question when analyzing the public trust principles of the property. Carson v. Blazer, 2 Binn. 475, 477-78 (Pa. 1810); see also Cates' Ex'rs v. Wadlington, 12 S.C.L. 580, 583 (1822). Because these common-law principles existed at the time of the 1803 Lear grant, Plaintiff cannot succeed on her claim.

V. THE CORDELIA LOT HAS NOT BEEN DEPRIVED OF ALL ECONOMIC VALUE.

Assuming *arguendo* that the relevant parcel for takings analysis is the Cordelia Lot rather than the whole of Lear Island, Plaintiff's claim for a taking based on a complete deprivation of economic value fails as a matter of law.

A. Federal and State Regulations Must be Considered Separately for Plaintiff's Takings Claim

Federal regulations do not deprive Plaintiff's property of Cornelia Lot of all economic value. The ESA takings regulation only prohibits Plaintiff from taking action that would disturb the lupine fields on her property, (R. at 6), and does not prohibit Plaintiff's development of the cove area, (R. at 11). Federal regulations would allow Plaintiff to fill the cove area and construct her single-family residence there, and under Palazzolo her property cannot have been deprived of all economic value. Palazzolo, 533 U.S. at 631 (rejecting a takings claim when wetlands

regulations only affected most of plaintiff's property and allowed development of a residence on the property's uplands).

It is not necessary for this Court to consider federal regulations and Brittain's county regulations together to determine if there is a deprivation of the economic value of Cordelia Lot. (R. at 11). The District Court erred in analyzing plaintiff's claim under the theory of a joint tort, because any potential harm caused by the federal and country regulations is not indivisible. (R. at 11). Velsicol Chem. Corp. v. Rowe held that, for an injury to be indivisible, the plaintiff must not be "able to apportion it among the wrongdoers with reasonable certainty." Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342 (Tenn. 1976). Plaintiff's injury is not indivisible, as it is possible to economically apportion the injury between federal regulations and county regulations. See, e.g., United States v. Western Processing Co., Inc., 734 F.Supp. 930, 938 (W.D. Wash. 1990) ("If there is a single harm that is theoretically or practically indivisible, each defendant is jointly and severally liable for the entire injury. However, if there are distinct harms that are capable of division, then liability should be apportioned according to the contribution of each defendant.") (quoting United States v. Stringfellow, 661 F.Supp. 1053, 1060 (C.D. Cal. 1987)). Here, there are two "distinct harms that are capable of division." Id. Plaintiff's first harm is being prevented from constructing a residence where it would impact the lupine habitat, (R. at 6), and the second is being prevented from constructing a residence at the cove area, (R. at 7). Plaintiff's residence would be valued differently whether constructed on the lupine fields or the cove area, and her construction costs would differ between the two building sites. Damages could be apportioned between these two harms, as apportionment does not require exact certainty. Velsicol, 543 S.W.2d at 342. So long as plaintiff can reasonably apportion a difference between building sites,

the District Court erred in holding the harm indivisible and analyzing the federal and state regulations in combination.

Even if Plaintiff is unable to build her single-family house anywhere on her property due to the combination of federal and county regulations, this restriction does not amount to leaving her property "economically idle." See Lucas, 505 U.S. at 1019. In Lucas, the Supreme Court held that a plaintiff has suffered a taking when she "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good." Id. While the federal and county regulations prevent Plaintiff from building a residence, they do not prevent all types of development on Plaintiff's property. Brittain County rejected Plaintiff's ADP permit application because "permits to fill wetlands would only be granted for water-dependent use," which is a type of development that can be economically beneficial. (R. at 7). Even combined, the federal and county regulations do not ask Plaintiff to "sacrifice *all* economically beneficial uses" of her property, as neither of the two would prevent Plaintiff from developing the wetlands for a water-dependent use.

B. The Projected Destruction of the Butterfly Habitat in Ten Years Precludes Plaintiff's Takings Claim

The ESA will only affect Plaintiff's property if the population of Karner Blues remains. Accordingly, the provisions of the ESA will not apply to Plaintiff's property if she ceases to mow the Cordelia Lot for a period of ten years. (R. at 10.) Because of this fact, the ESA only acts as a temporary development moratorium on the Cordelia Lot.

A Lucas per se taking occurs only in the "extraordinary case" when a regulation permanently deprives the entire property in question of its *entire* economic value, which does not occur with temporary development moratoria. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 329-32 (2002). In Tahoe-Sierra, the Supreme Court

explicitly rejected application of the Lucas rule to temporary development moratoria, holding instead that whether a taking has occurred in such an instance should be governed by the ad hoc test of Penn Central Trans. Co. v. New York, 438 U.S. 104 (1978). Tahoe-Sierra, 535 U.S. at 332, 342 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."). Plaintiff does not advance an alternative claim for a temporary taking under the Penn Central framework. (R. at 8 n.3.)

The District Court erred when it distinguished the present case from Tahoe-Sierra because "[t]he *Tahoe-Sierra* moratorium did not extend for an entire decade." (R. at 10.) In response to the dissent's suggestion that a delay of six years or more should be treated as a Lucas per se taking, the Tahoe-Sierra Court distinctly rejected the notion that a long-term temporary moratorium was enough for a per se taking. Tahoe-Sierra, 535 U.S. at 339 n.34 (rejecting a categorical rule not "because the relevant 32-month moratorium is just not that harsh" but rather "because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations…."). The difference in the length of effect between the regulations at issue here and in Tahoe-Sierra is not enough to convert a temporary taking into a Lucas per se taking.

C. The Brittain County Butterfly Society's Offer to Pay Rent for Wildlife Viewing Demonstrates that the Cordelia Lot has Economic Value

As noted, for a Lucas per se taking to occur, the regulation in question must permanently deprive a parcel of property of all its economic value. E.g., Tahoe-Sierra, 535 U.S. at 329-32; Palazzolo, 533 U.S. at 631 (holding that 93% decrease in value not sufficient to trigger Lucas per se taking); Lost Tree Village Corp. v. United States, 115 Fed. Cl. 219, 231 (Fed. Cl. 2014), aff'd, 787 F.3d 1111 (Fed. Cir. 2015) (holding that Lucas taking had occurred because parcel had lost 99.4% of its value, and remaining value did not reflect any economic use). Here, Plaintiff has

been offered $1000 per year by the Brittain County Butterfly Society ("Society") to conduct butterfly viewing outings on the Cordelia Lot. (R. at 7.) This activity represents an economic use of the property, and demonstrates that the regulations at issue have not deprived the property of all its economic value.

Although the annual property taxes on the Cordelia Lot are greater than the amount offered by the Society for use of the property, (R. at 7), this fact is not enough to establish that the property has been deprived of all economic value. In cases where a court concluded that a proposed economic use was not viable due to property tax implications, the amount of property tax due on the property (along with other costs) with that use was established in the record. See, e.g., Resource Investments, Inc. v. United States, 85 Fed. Cl. 447, 489-90 (Fed. Cl. 2009) (describing evidence that interim economic use of land would subject owners to seven years' worth of increased back taxes, along with penalties and interest); Bowles v. United States, 31 Fed. Cl. 37, 48-49 (Fed. Cl. 1994) (describing evidence regarding taxes and costs of government's alternative economic use). By contrast, Plaintiff has not sought any reassessment of her property following Brittain County's denial of a permit to fill the cove marsh. (R. at 7.) The lack of evidence on this issue makes it impossible to determine whether the recalculated property tax burden will be less than the amount offered by the Society. Consequently, Plaintiff cannot establish whether the Cordelia Lot has been deprived of all economic value.

CONCLUSION

For the aforementioned reasons, this Court should affirm the District Court's ruling that the ESA is a valid exercise of the Commerce power, and reverse the District Court's ruling in all other matters.

Respectfully submitted,
/s/_____
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