Team # 66

No. 16-0933

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

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BRIEF FOR PLAINTIFF-APPELLEE-CROSS APPELLANT

November 28, 2016

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Parties/Persons

BC	Brittain County
Cordelia	Ms. Cordelia Lear
FWS	Fish and Wildlife Service
Goneril	Ms. Goneril Lear

Terms

ESA	Endangered Species Act
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
NEPA	National Environmental Policy Act
NJDEP	New Jersey Department of Environmental Protection

STATEMENT OF THE ISSUES

1. Under the Commerce powers granted by the United States Constitution, Art. 1, § 8, Cl. 3, and the Endangered Species Act (ESA), did the U.S. Fish and Wildlife Service (FWS) exceed the scope of its power when it applied to a wholly intrastate population of an endangered species of butterflies and left Ms. Lear's land with no economic value?
2. Under the ESA's incidental take permit (ITP) provision, the Takings Clause of the Fifth Amendment of the U.S. Constitution, and Brittain County's (BC) Wetlands Preservation Law, has Ms. Lear's lot been deprived of all economic value when an ITP application would be futile, her separately zoned lot has been deprived of all but a de minimus value, and her inaction would likely remove the need for an ITP in ten years?

STATEMENT OF JURISDICTION

Jurisdiction in this court is proper, as this case is on appeal from a final judgment of the United States District Court for the District of New Union, which disposed of all claims in this matter. 28 U.S.C. § 1291 Cir. R. at 4. The district court disposed of the case in its Decision and Judgment, filed on June 1, 2016, and a Notice of Appeal was timely filed on June 10, 2016. 12th Cir. R. 1.1.

STATEMENT OF THE CASE

Lear Island was granted to Cornelius Lear in 1803 by an act of Congress when the state of New Union was a part of the Northwest Territory. 12th Cir. R. 4.7. The land granted consisted of 1,000 acres of land above water, land underwater within 300 feet of the island shore, and additional lands under a shallow strait, which separated Lear Island from the mainland. 12th Cir. R. 4-5. The lake is wholly intrastate and was traditionally used for intrastate navigation. 12th Cir.

R. 4.1. The title for the land was granted in fee simple absolute, and the Lear family has occupied Lear Island in various capacities -- as a homestead, for fishing, and as a productive farm -- until around the year 1965. 12th Cir. R. 4.1, 5.2. In 1965, King James Lear subdivided Lear Island into three lots, each zoned for a single-family residence, which passed to his three daughters upon his death in 2005: (1) a 550-acre lot for Goneril Lear, which included the original homestead; (2) a 440-acre lot for Regan Lear, which included a home built around 2005; and (3) a 10-acre lot for Cordelia, which is at issue in this case. 12th Cir. R. 5.3-4.

Cordelia's lot consists of the access strip to the main land, a nine-acre open field of wild blue lupine flowers (the "Heath"), and one acre of emergent cattail marsh, which the U.S. Army Corps of Engineers considers non-navigable under the Rivers and Harbors Act of 1899. 12th Cir. R. 5.5-7, 7.16. The lupine flowers, which grew in response to annual mowing in the fall, are critical to the larval and chrysalis stages of a wholly intrastate population of Karner blue butterflies, listed as endangered in 1992. 12th Cir. R. 5.8-9. It is estimated that, without the annual mowing, the lupine fields would become overgrown within ten years, resulting in the extinction of this population. 12th Cir. R. 7.15. This is the only population of Karner blue butterflies in the state of New Union, although there are other populations in the United States. 12th Cir. R. 5.8-9. The cattail marsh was open water and was historically used as a boat landing. 12th Cir. R. 5.5.

In April of 2012, Cordelia decided to build a single-family home on her lot, so she approached the New Union FWS office to inquire about a permit to build. 12th Cir. R. 5.4 6.11. The office told Cordelia that (1) any activity on the island other than mowing the heath would constitute a "take" under ESA; and (2) she could apply for an Incidental Take Permit (ITP),

which would require her to develop a Habitat Conservation Plan (HCP) and an Environmental Assessment (EA) document under the National Environmental Policy Act (NEPA). 12th Cir. R. 6.11. Further, FWS stated that the HCP would require an "additional contiguous lupine habitat on an acre-for-acre basis," in addition to maintaining the current mowing schedule. *Id.* The only way to satisfy the acre-for-acre requirement is to work with Goneril, who has refused to cooperate in any HCP that involves restrictions on her property. 12th Cir. R. 6.12. According to an environmental consultant, the cost for preparing the HCP and environmental assessment documents would be $150,000, significantly more than the $100,000 fair market value of the lot if there were no building restrictions. 12th Cir. R. 6.13, 7.18. Cordelia received a follow-up letter from FWS on May 15, 2012, reiterating the requirements for the ITP and inviting her to submit an ITP application after she reviewed the FWS's Habitat Conservation Planning Handbook for developing an acceptable HCP to submit with the ITP application. 12th Cir. R. 6.14.

Given the cost to prepare the permit and the impossible conditions placed upon the HCP, Cordelia developed an alternate plan, which would involve filling a one-half acre portion of the wetlands and creating an access causeway, which would neither require a federal permit nor disturb the lupine habitat. 12th Cir. R. 7.16. Brittain County rejected her application for a permit to fill the wetlands pursuant to the Brittain County Wetland Preservation Law of 1982, which only permits wetlands to be filled for a "water-dependent use." 12th Cir. R. 6.17. Cordelia's lot does not have any timber or agricultural uses, and there is no market for the land without the right to build a residence. 12th Cir. R. 7.18. Cordelia rejected the Brittain County Butterfly Society's offer to pay $1,000 per year to conduct butterfly viewings; however, this amount would not even cover the $1,500 annual property taxes. *Id.*

Cordelia filed this action in February of 2014, after FWS and BC joined to deprive her land of all economic value alleging (1) that the ESA, as applied to her situation, was an impermissible use of Congress' Commerce Powers; and (2) that the actions of FWS and BC constituted a compensable, regulatory taking under the Fifth Amendment. 12th Cir. R. 7.19. On June 9, 2016, the trial court denied her first allegation and granted her second allegation. 12th Cir. R. 1. FWS and BC timely appealed on June 10, 2016. *Id.*

SUMMARY OF THE ARGUMENT

The constructive denial of Cordelia's permit by FWS is an impermissible use of congressional power under the Commerce Clause. The building of a single home on a privately owned lot on Lear Island does not fall under the first two of the *Lopez* categories, and it's aggregation in the third category does not amount to a significant use of commerce within the construction industry. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Nor does the building of a single home lend itself to the *Morrison* factors for a wholly intrastate activity because the intent of Congress was to target major contributors to species extinction, not a single person. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003).

Cordelia Lear's takings claim is ripe, because the government cannot require someone to exhaust administrative remedies that are unduly burdensome or futile. *Hage v. United States*, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996). In this case, the conditions that Cordelia would need to meet in order to obtain an ITP are impossible, and this futile process would cost $150,000, which is certainly unduly burdensome given the circumstances. 12th Cir. R. 6.11-13.

For the purposes of this takings analysis, the relevant plot of land is the Cordelia Lot. FWS and BC argue, erroneously, that Cordelia's investment-backed expectations go beyond her

ownership of the Cordelia Lot, because her family has enjoyed the entirety of Lear Island for over 200 years. 12th Cir. R. 9. Relevant case law consistently holds that for the purposes of a takings analysis, the relevant parcel is the entire parcel of land owned by the plaintiff. *See generally Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Keystone Bituminous Coal Ass'n v. DeBendictis*, 480 U.S. 470 (1987); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171. Because there is no indication of bad faith on the part of Cornelius Lear's formal subdivision of the property in 1965, and because Cordelia's claim involves the entirety of the land she owns on the island, the relevant parcel for the present takings analysis is the Cordelia Lot. 12th Cir. R. 5.3.

The relevant time period for the takings analysis is the current permissible development of the Cordelia Lot. Although in *Tahoe-Sierra Pres. Council*, the Court concluded that a moratorium lasting longer than one year is not necessarily an unconstitutional taking, Cordelia's case is distinguishable. *Tahoe-Sierra Pres. Council*, 535 U.S. at 341. Whereas the 32-month moratorium in *Tahoe-Sierra Pres. Council* was deemed reasonable, it cannot be said that the ten-year wait expected of Cordelia is a reasonable, temporary delay. *Id.* at 314; 12th Cir. R. 10.

Additionally, there are no background principles of property that inhere in the title to the land, including the equal footing doctrine. The Lear family was granted the land while the land was a part of the Northwest Territory, and these grants must be left "undisturbed." *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894).

Although neither FWS's nor BC's restrictions on Cordelia's use of her land amounts to a complete taking of her land standing alone, the restrictions combine to deprive her property of all economic value. 12th Cir. R. 11. FWS and BC should, therefore, be held jointly and severally

liable for compensating Cordelia for the taking of her land in much the same way that joint tortfeasors are held liable to a plaintiff. Joint tortfeasor jurisprudence relies on policy arguments about fairness; if joint tortfeasors were immune from liability in cases where they did not act in concert, and the harm is indivisible, then aggrieved plaintiffs would be deprived of any recourse. *See generally Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976). FWS and BC also argue that the Cordelia Lot has not been deprived of all economic value, because an environmental group offered to pay Cordelia $1000 per year to visit and view the butterflies on her property. 12th Cir. R. 12. However, this de minimis interest would not even cover the annual property taxes on the lot. *Id.*

STANDARD OF REVIEW

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, [sic] denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). As the present question is one of law, depending to no extent on a review of the facts, it is appropriately reviewed de novo, with no deference to the district court's decision. *Buford v. United States*, 532 U.S. 59, 64 (2001).

ARGUMENT

Generally, it is impermissible for someone to "take" a species protected under the Endangered Species Act; however, there is an exception when an individual is engaged in an "otherwise lawful activity." *Morris v. United States*, 392 F.3d 1372, 1374 (Fed. Cir. 2004).

I. THE ESA IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESS' COMMERCE POWER AS APPLIED TO THE KARNER BLUE BUTTERFLIES ON CORDELIA LEAR'S LOT, BECAUSE THE CONNECTION BETWEEN THE WHOLLY INTRASTATE BUTTERFLY POPULATION AND ANY COMMERCIAL ACTIVITY IS TOO TENUOUS AND BECAUSE IT WOULD NOT BE REASONABLE TO CONCLUDE THAT CORDELIA'S PROPOSED ACTIVITY WOULD RESULT IN DESTRUCTIVE INTERSTATE COMMERCE.

Congress's Commerce power under Article I, Sec. 8, of the Constitution is limited to three distinct areas of activity; (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities having a substantial impact on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). If the activity is economic in nature, a court may consider it in aggregate with all similar activities. *Wickard v. Filburn*, 317 U.S. 111, 130 (1942). To assess whether a wholly intrastate activity falls under the purview of the Commerce Clause, courts perform an analysis of include whether: (1) the regulated activity has a connection with "commerce," such as the construction of a public hospital or supporting infrastructure; (2) there is any language in the statute that indicates a jurisdictional element, such as "in or affecting commerce" language; (3) the legislative history indicates an intent to regulate this activity under the Commerce Clause; and (4) the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003) (citing *Morrison*, 529 U.S. at 609). Lastly, economic activity must be construed broadly. *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000).

In *Gibbs*, private property owners argued that the prohibition to take red wolves, which were being reintroduced to North Carolina, exceeded Congress' Commerce Power. *Gibbs*, 214 F.3d at 492. In holding to the contrary, the court cited tourism (acknowledging that, while 41 of the 75 wolves lived on private land, their continued survival was critical to the success of the

program as a whole), scientific study (citing at least three studies on red wolves), pelt-trading, and effects on livestock and agricultural products as connections to commerce. *Id.* at 493-95.

In *Home Builders*, a construction lobbying group, argued that the regulation of a wholly intrastate species of fly, which only existed in eleven populations within an eight-mile radius in California, exceeded Congress' powers under the Commerce Clause. *National Ass'n of Home Builders v. Babbit,* 130 F.3d 1041, 1043 (D.C. Cir. 1997). The court found that the regulation was constitutional because (1) the "loss of biodiversity" that occurs when a species is entirely extinct, has a "substantial effect" on interstate commerce and (2) by analogizing this case to the destructive nature of air pollution and mining, it helps prevent "destructive interstate commerce." *Home Builders*, 130 F.3d. at 1046, 1054-55.

The developers in *Rancho Viejo* sought to build a 202-acre development, where it would significantly impact one of the last few remaining habitats for the arroyo southwestern toad, including installing a fence that blocked the path between the toad's habitat and breeding grounds. *Rancho Viejo*, 323 F.3d at 1064-64. In finding that this was a lawful exercise of congressional commerce power, the court reasoned that the "substantial" construction projects in this development were sufficiently connected to interstate commerce to satisfy the *Morrison* factors. *Id.* at 1069-70.

In *GDF Realty*, a permit was denied for a 216-acre development when the construction activity would have resulted in a "take" under the ESA. *GDF Realty Invs., Ltd. V. Norton*, 326 F.3d 622, 624 (5th Cir. 2003). In rejecting the claim of no relation to commerce, the court cited concerns over "losses of genetic variations" and scientific study of the organisms. *GDF Realty*, 326 F.3d at 631, 637.

In the case at hand, Ms. Lear seeks to build a single-family home on the property left to her by her father. 12th Cir. R. 5.3. The district court asserted that building on the property may require the purchase of some materials that have traveled in interstate commerce, and may require hiring a contractor, which may have some negligible impact on interstate markets for contractors over all. However, the construction-related activity here is a personal home, not a multi-acre housing development or infrastructure project. A *Lopez* analysis determines that building a single-family home is neither a channel of interstate commerce, such as a road or river, nor an instrumentality of interstate commerce, such as a car or boat. To determine if this is an activity having a substantial impact on interstate commerce, economic activities may be viewed under the aggregate; however, even this fails to place Cordelia's home under the purview of the Commerce Clause. Cordelia is not attempting to build a subdivision, or any type of major construction project. She is simply attempting to build a home for her personal use. This is not the type of activity intended to be regulated under the Commerce Clause because, in the aggregate, most people do not build a new home, but purchase an existing home or a home built by a developer under a large construction project.

Next, an analysis under the *Morrison* factors will indicate that the wholly intrastate activity of building a home for personal use cannot be regulated under the Commerce Clause. First, building a home generally has, at least, a small connection with "commerce;" however, previous cases have only analyzed large-scale construction projects, not a single person building a home on privately owned property. There is language in the ESA that indicates that it was intended to regulate activities related to commerce, so this factor is present. Third, the findings and purposes indicate that a critical purpose is to "develop and maintain conservation programs

which meet national . . . standards," which indicates that Congress intended to target activities having a major effect on endangered species, not a single homeowner attempting to build a home for her to use. 16 U.S.C. § 1531(a)(5). Lastly, the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. There is no indication that Cordelia will contract with out-of-state businesses or purchase materials that have crossed state lines; however, even if she does, the effects on commerce by a single home being built are too small to be regarded as substantial.

The allegation that, where a statute itself bears a substantial relation to commerce the smaller instances where the regulated activity does not relate to commerce are of no consequence, does not hold merit here. *Rancho Viejo*, 323 F.3d at 1077. Previous cases declaring regulation of the taking of wholly intrastate populations constitutional differs in critical ways from the case at hand. First, many cases sought to regulate large-scale construction activity as opposed to a single-family home for personal use. *Rancho Viejo*, 323 F.3d at 1064 (pertaining to a 202-acre housing development); *Home Builders*, 130 F.3d. at 1043 (pertaining to reconfiguration of an intersection for ease of access to a new hospital being built); *GDF Realty*, 326 F.3d at 624 (pertaining to a 216-acre development).

Second, the species at risk were part of a designed reintroduction plan, *Gibbs*, 214 F.3d at 487, or a species which is only present in limited areas in one state. *Rancho Viejo*, 323 F.3d at 1064 (pertaining to the "Delhi Sands Flower-Loving Fly," which exists only in California); *Home Builders*, 130 F.3d. at 1043 (pertaining to the "arroyo southwestern toad," which exists only in California and Mexico); *GDF Realty*, 326 F.3d at 624 (pertaining to six species of "subterranean invertebrates" existing only in Texas). Unlike the species at issue in *Home*

Builders, *Gibbs,* and *Rancho Viejo*, there are Karner blue butterfly populations in other states, and a reduction in habitat for this species would not only not extinguish this population, but would also not affect populations in other states as the butterflies do not travel far distances.

Instead, the FWS seeks to force her to do nothing with her land for at least ten years, because anything, except annual mowing, might have an adverse impact on the butterflies' survival. This application of the ESA is an overreach of congressional powers under the Commerce Clause, as any relation to commerce is too tenuous, the *Morrison* factors do not lead to the same conclusions when analyzing a single-family home, and, even in the aggregate, the building of single homes does not amount to "substantial effects" on interstate commerce.

II. THE ESA AND THE BC WETLANDS PRESERVATION RESTRICTIONS HAVE COMBINED TO CONSTITUTE A COMPLETE DEPRIVATION OF THE ECONOMIC VALUE OF THE CORDELIA LOT, BECAUSE CORDELIA LEAR NEED NOT PURSUE FUTILE NOR UNDULY BURDENSOME ADMINISTRATIVE REMEDIES, THE ANNUAL PROPERTY TAXES ON THE LOT EXCEED ITS ECONOMICALLY REMUNERATIVE USES, AND THE RESTRICTIONS ON HER LAND ARE NEITHER TRANSIENT NOR INCONSEQUENTIAL.

A. Cordelia Lear's Takings Claim Is Ripe, Because the ITP Application Process Would Be Unduly Burdensome and Futile, Costing $150,000 and Necessarily Requiring an HCP, the Conditions of Which Are Impossible for Her to Meet.

Cordelia Lear's takings claims against FWS and BC are ripe. Generally, a person must follow reasonable and necessary steps to apply for, and be denied, a permit before they may claim a compensable, regulatory Fifth Amendment taking. *Hage v. United States*, 35 Fed. Cl. 147, 164 (Fed. Cl. 1996). Specifically, a land-use takings claim is ripe when the government agency implementing the regulations has had an opportunity to grant any discretionary waivers or variances and issued a final decision regarding how the regulation would affect the property at issue. *Palazzol*o, 533 U.S. at 618. An exception applies when the procedure for filing a permit is "so burdensome that it effectively deprives the property of value" and the "plaintiff[] of their

property rights." *Hag*e, 35 Fed. Cl. At 164. The federal government also cannot require a landowner to complete a futile task. *Id.*

The dispute in *Hage* arose in 1978, after the plaintiffs bought a ranch in Nevada comprised of a ditch easement to access water (in which they asserted a property right) and grazing areas (under a lease with the National Forest Service (NFS)). *Hage*, 35 Fed. Cl. at 153. The plaintiffs alleged, in part, (1) that the introduction of elk by NFS constituted a taking of their water rights, which they asked the state of Nevada to arbitrate their ditch constituted a taking. *Id.* at 160. The defendants filed a motion for summary judgment and claimed the water rights and ditch maintenance issues were not ripe, because the state was still adjudicating the matter, and the plaintiffs needed to file for, and be denied, a permit for the maintenance on the ditch. *Hage*, 35 Fed. Cl. at 161-62. In denying the motion on these issues, the court held that (1) because the adjudication of the water issue had been pending for nearly ten years and was still anticipated to take another five years for a draft decision, requiring the plaintiffs to wait for this decision would be an affront to the concept of due process; and (2) where the permit process itself is unduly burdensome, a claim may be ripe without actually participating in the process. *Hage*, 35 Fed. Cl. at 163, 164.

The plaintiff in *Palazzolo* filed a takings claim after he was denied a permit to fill eleven out of the eighteen acres of salt marsh on his beachfront property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 611, 613 (2001). The state claimed that his claim was unripe because he was only denied a fill permit for the eleven acres, and a different proposal (to fill fewer acres) may be granted. *Palazzolo*, 533 U.S. at 620-21. In dismissing this claim, the Court held that a claim is ripe once the reaches of the regulation are relatively known given any variances or waivers

allowed by law. *Palazzolo*, 533 U.S. at 620. The plaintiff was not required to continue submitting proposals in the hopes that one would finally be approved by the board. *Palazzolo*, 533 U.S. at 621.

The plaintiffs in *Morris* claimed the only economic value on a parcel of land they purchased for $2,500 was the timber in "six large old-growth redwood trees" and sought an ITP to harvest them, because the removal would interfere with the behavior patterns of protected fish in a nearby river. *Morris*, 392 F.3d at 1374. The Morris' asserted their claim is ripe because, even though they declined to apply for the ITP, they asserted the cost to prepare the permit was more than $10,000 and that this cost was a constructive denial of their application. *Morris*, 392 F.3d at 1374-75. In rejecting this argument, the court held that constructive denial does not apply where the permitting process is "merely complex, arduous, or expensive," but instead applies when the impacts of the regulation are known to a reasonable degree of certainty. *Morris*, 392 F.3d at 1376.

Here, Cordelia has not applied for an ITP because of the excessive cost to prepare the HCP and Environmental Assessment (EA) documents. 12th Cir. R. 6.13. Additionally, FWS's requirement that she replace the lupine fields on an acre-for-acre basis is so burdensome and futile as to deprive Cordelia of her property rights. 12th Cir. R. 6.11. The cost to prepare the HCP and EA documents, as estimated by an environmental consultant, would be $150,000, which is 50 percent higher than the assessed value of the property without the building restrictions. 12th Cir. R. 6.13, 7.18. This estimate also does not include the costs to actually complete and maintain the HCP. *See* 12th Cir. R. 6.13.

FWS and BC may claim that Cordelia's choice of an environmental consultant is a voluntary cost and cannot be used to satisfy the burdensome exception to ripeness. This reliance is misplaced; however, because one reason for an immediate denial of an ITP is if the "applicant is not qualified to conduct the proposed activities." FWS, NMFS, *Habitat Conservation Planning Handbook*, Chapter 7: Issuance Criteria for Incidental Take Permits, A(5) (Nov. 1996). There is no evidence that Cordelia would be able to conduct the activities required for the HCP, so she must seek an expert to meet the criteria required by FWS. *See generally* 12th Cir. R. 6.12.

FWS explicitly stated that Cordelia must replace the land on an acre-by-acre basis with land on an adjacent lot, the only one of which belongs to Goneril, who has is estranged from and has refused to assist Cordelia. 12th Cir. R. 6.12. FWS is not able to waive the adjacent requirement, as it encompasses the core purpose behind the HCP for Karner blue butterflies. 12th Cir. R. 6.14. Cordelia attempted to take reasonable steps to satisfy this requirement; however, the only option that meets the HCP requirements has been foreclosed. 12th Cir. R. 6.12. As such, requiring Cordelia to file an ITP, when she knows she cannot satisfy the requirements, is futile and cannot be required of her.

Additionally, FWS does not have discretion to grant any waivers or variances, which has fixed the effects of the regulation on the property to a reasonable degree of certainty. *See generally* 12th Cir. R. 6.14.

Like the plaintiffs in *Palazzolo*, Cordelia's claim is ripe despite not filing for a permit, because the agency has issued a decision which makes clear how the regulation will affect the property, and requiring her to submit a permit application would be both futile and unduly burdensome.

B. The Relevant Plot for Ms. Lear's Taking Claim Is the Cordelia Lot, Because She Only Has Investment Backed Expectations in Her Own Land – Not All of Her Family's Land – and a Flexible Approach to the Denominator Determination Is Inappropriate Where There Has Been a Good-Faith, Formal Subdivision of a Property Into Separate Lots.

The Supreme Court has consistently held that the investment-backed expectations of the property owner must be considered for the purposes of a takings analysis. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (quoting *Palazzolo*, 533 U.S. at 636); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Those cases dictate that, where a regulation interferes with the investment-backed expectations of a property owner, this is a factor holding particular significance in the takings analysis. *Tahoe-Sierra Pres. Council*, 535 U.S. at 336; *Keystone*, 480 U.S. at 495. Additionally, the Court has rejected arguments that properties can be conceptually severed and subdivided for the purposes of a takings analysis (often referred to as the "denominator" question). *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 (citing *Keystone*, 480 U.S. at 497). Instead, "the relevant question . . . is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644 (1993); *see Penn Cent. Transp. Co. V. City of New York*, 438 U.S. 104, 130-31 (1978). In the present case, FWS and BC argue for a flexible approach to the denominator question, "which takes into account the value of other lots in the same subdivision." 12th Cir. R. 9. However, the courts have rejected such approaches, holding that, except in cases where property owners convey property in bad faith in anticipation of a takings cause of action, a bright-line rule must be employed such that "the denominator of

the takings fraction is that parcel for which the owner seeks a permit." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

In *Tahoe-Sierra Pres. Council*, the Tahoe Regional Planning Agency imposed temporary moratoria (lasting a total of about 32 months) on the development of land adjacent to Lake Tahoe. *Tahoe-Sierra Pres. Council*, 535 U.S. at 306. Plaintiffs, who owned property in the Lake Tahoe Basin, filed suit demanding compensation for the regulatory taking that the moratoria constituted. *Id.* at 312. The Court held that the moratoria did not constitute a regulatory taking, because, among other reasons, plaintiffs' investment-backed expectations were not substantially disrupted, as the moratoria were temporary in nature, and they could develop their land after the moratoria were lifted. *Id.* at 342.

Plaintiffs in *Keystone* argued that certain sections of the Subsidence Act, which prohibited mining of the "support estate" that causes damage to structures on the surface estate, constituted a regulatory taking of their land. *Keystone*, 480 U.S. at 476, 478. In an attempt to show that the Act constituted a regulatory taking of their property, plaintiffs argued that the relevant denominator for the takings analysis should be the support estate portion of the lands affected. *Id.* at 497. The Court disagreed with this argument, holding that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

Similarly, in *Penn Cent.*, plaintiffs argued that the Landmarks Law deprived them of the use of the airspace above the train station terminal, and that "irrespective of the value of the

remainder of their parcel," this constituted a regulatory taking of that airspace. *Penn Cent.*, 438 U.S. at 130. The Court rejected this argument, holding that

> '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Id. At 130-31.

In *Loveladies*, a slightly more nuanced approach was required. In that case, as part of a compromise with the New Jersey Department of Environmental Protection (NJDEP) (which initially denied a permit to fill 51 acres of land), the Loveladies sought to develop a 12.5 acre parcel of land, which was part of a larger 50-acre parcel of land. *Loveladies*, 28 F.3d 1171, 1174 (Fed. Cir. 1994). In making this deal, the Loveladies had effectively traded the economic value of 38.5 acres of their land in exchange for being able to fill and develop the remaining 12.5 acres of undeveloped land. *Id.* at 1181. After making this deal, the Loveladies were still denied a permit to fill the 12.5 acre parcel in question. *Id.* at 1174. On appeal for their takings claim, the Court held that the trial court rightfully excluded the 38.5 traded acres from the takings analysis. *Id.* at 1181. The court said

> This is only logical since whatever substantial value that land had now belongs to the state and not to Loveladies. It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the caregivers. This leaves the conclusion that the relevant property for the takings analysis is the 12.5 acres . . . ."

Id.

Upon Cornelius Lear's death in 2005, the 10-acre lot known as the Cordelia lot was conveyed in fee simple absolute to Cordelia Lear, with no possessory interest in it remaining

with any other Lear family members. 12th Cir. R. 5.3-4. She, therefore, only has investment-backed expectations in the Cordelia lot, not in any portion of the rest of the island. FWS and Brittain County argue that Cordelia is attempting to conceptually sever Lear Island, using the Cordelia lot as the denominator for the takings analysis in much the same way that the plaintiffs did in *Keystone* and *Penn Cent.* 12th Cir. R. 9. This is a mischaracterization of the situation. The investment-backed expectations of the Lear family with respect to all of Lear Island are not at issue, because when Cornelius Lear died, each of his daughters received a specific plot of land, creating investment-backed expectations in each of them with respect to her portion of the island which would mirror those expectations that Cornelius Lear had at the time of the formal subdivision in 1965. 12th Cir. R. 5.3-4.

Indeed, "[a]t the time of the subdivision, the Brittain County Planning Board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence." 12th Cir. R. 5.3. Cordelia is not conceptually severing her land to create a winning denominator, because her claim involves the entirety of the land that she owns. The fact that the rest of the island is owned by people who are related to her does not apply to the analysis. The cases above clearly illustrate that for the purposes of a takings analysis, the relevant parcel is the entire parcel of land owned by the plaintiff. *See generally Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). In this case, Cordelia owns no more than the Cordelia lot, and she has not attempted to subdivide that lot for the purposes of the denominator question. 12th Cir. R. 5.3. There is also no indication that Cornelius Lear conveyed Lear Island to his daughters in bad faith

in such a way as to prepare for a takings cause of action, so the bad faith exception discussed in *Loveladies* does not apply. *Loveladies*, 28 F.3d at 1181. Therefore, the relevant parcel for the present takings analysis is the Cordelia lot.

C. The Relevant Time Period for Takings Analysis is the Current Permissible Development of the Property, Because Extinction of the Karner Blue Butterflies is Estimated to Take a Decade, Which Cannot be Considered a Temporary Governmental Activity, as it is not a Transient nor Inconsequential Occupancy, and it is not the ESA Itself Which is Temporary but, Rather, its Applicability to Cordelia Lear's Land.

A regulation that limits "only a portion of the parcel – whether limited by time, use, or space" does not deprive the owner of all economic value. *Tahoe*, 535 U.S. at 319. A parcel may not be subdivided into discrete segments, including temporally, to conclude a property has been stripped of all economic value. *Tahoe*, 535 U.S. at 327. However, when a statute that "wholly eliminate[s] the value" of land results in no productive or economically beneficial uses, that is a compensable, complete taking. *Tahoe*, 535 U.S. at 330.

The plaintiffs in *Tahoe* argued that a 32-month building moratorium justified a segmented view of the taking and removed all economic value. *Tahoe*, 535 U.S. at 314. In striking down this reasoning, the court held that the moratorium was intended as a temporary restriction to better formulate a development plan that preserved the beauty of Lake Tahoe. *Tahoe*, 535 U.S. at 332, 336-37. Because plaintiffs would be allowed to develop their lands after the moratorium was over, and because the moratorium was not going to last for an unreasonable amount of time, the Court held that the disruption with their investment-backed expectations was not sufficient to constitute a regulatory taking. *Id.* at 341-42. Although the Court declined to adopt a bright-line rule for what length of time shall constitute an unconstitutional delay, it did express that "any moratorium that lasts for more than one year should be viewed with special

skepticism. *Id.* at 341.

In the present case, the butterfly population on the Cordelia lot will die off in approximately ten years if she ceases her annual mowing. 12th Cir. R. 7.15. FWS argues that their restrictions are by nature temporary, because Cordelia needs only to wait ten years, and then the endangered species that they seek to protect will no longer present a barrier to her land development. 12th Cir. R. 10. In addition to the obvious irony of such a position, a decade-long delay can by no means be considered a reasonable, temporary delay. Additionally, it is unlikely that the ten-year estimate for how long it will take the butterflies to die off can be relied upon with a great deal of certainty. For these reasons, the relevant time period for the present takings analysis is the current permissible development of the property.

D. Neither FWS nor BC May Assert an Affirmative Defense Based on Public Trust Principles Inherent in the Title.

The equal footing doctrine holds that states admitted after the adoption of the Constitution "have the same rights as the original States" with regard to lands under navigable waters, with the exception of land granted by the federal government while the area was a territory. *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894). Generally, under the equal footing doctrine, when a territory became a state, all lands under navigable waters within that state belong to that state, except where the federal government had granted land for specific purposes. *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926). Such purposes, which grant rights to the title holder that the state cannot supersede, include the granting of land: (1) as a performance of international obligations, (2) to improve the usage for commerce, or (3) to carry out other public purposes. *Id.* at 54-55. The equal footing doctrine does not apply to non-navigable waters. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012).

In *Shively*, a couple was deeded lands by the federal government, which included a portion of the Columbia River. *Shively*, 152 U.S. at 9. The state of Oregon subsequently deeded the tide lands to the couple, and they constructed a wharf, which extended into the river. *Shively*, 152 U.S. at 9-10. The court held that the federal land grant superseded any claim to the tide lands by the state and, under state law, the issuance of the deed by the state made the wharf-builder the lawful owner of the land. *Shively*, 152 U.S. at 58.

In *Holt State Bank*, the state of Minnesota filed for quiet title to, and to prohibit the use by third parties of, navigable lands under water formerly within the Red Lake Reservation, which was "relinquished and ceded" to the federal government in 1890. *Holt State Bank*, 270 U.S. at 52-54. The purpose of the land transfer from the reservation was for the lands to be sold by the federal government for the benefit of the Chippewas Tribe. *Id.* at 53-54. The state of Minnesota claimed that, because the land under the water was navigable, and the federal government had not explicitly set the land aside as a land grant, it ceded to the state upon its admission. *Holt State Bank*, 270 U.S. at 54. The court held that the lake was navigable under the current standard, and the federal government's lack of specific language regarding the ownership of the land under the navigable waters evidenced a lack of intent to transfer the land under the water. *Id. at 59.* The court agreed with Minnesota, holding that the lake was navigable, and, absent a specific grant of land while Minnesota was still a territory, the equal footing doctrine granted the land to the state upon admission. *Holt State Bank*, 270 U.S. at 57-58.

In *PPL Mont.*, the state of Montana sought lease payments from hydroelectric activity on several rivers within the state after allowing the facilities to operate without payment for several decades. *PPL Mont.*, 565 U.S. at 586-87. The court found that the rivers were not navigable at

the time of Montana's entry into the Union in 1889, and, although there was some evidence of recreational use, this could not overcome the "usefulness for 'trade and travel.'" *PPL Mont.*, 565 U.S. at 600 (quoting *United States v. Utah*, 283 U.S. 64, 75-76 (1931)).

Here, there is no question that the Lear family was granted all of Lear Island, including lands submerged within 300 feet of the island, while New Union was still a part of the Northwest Territory. 12th Cir. R. 4.1.

E. The Cordelia Lot has Been Deprived of all Economic Value, Because FWS and BC Have Combined to Preclude Anything but the $1,000 per Year de Minimus use of the Land Which Would not Even pay the Annual Property Tax, and Defendants Should be Held Jointly and Severally Liable for the Reasons Underlying Joint Tortfeasor Jurisprudence.

The restrictions of Cordelia's land must be combined when determining whether a take has occurred. The prevailing rule on divisible harms when two or more actors create an indivisible harm is that the actors should be held jointly and severally liable. *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976). In *Velsicol*, the defendants were Velsicol Chemical and five other companies that the plaintiff claimed were responsible for polluting the air and water in Alton Park. *Id.* at 338. The defendant Velsicol interpled the five other parties, alleging that they were liable to Velsicol for a portion of any damages that the plaintiffs were entitled to in their nuisance suit. *Id.* The interpled parties sought dismissal of the third-party complaint for failure to state a claim, as they asserted that they were not joint tortfeasors and, therefore, not responsible for contribution or indemnity. *Id.* The Tennessee court reversed the dismissal for failure to state a claim, finding that the defendants could be considered joint tortfeasors even without a finding that the tortfeasors acted in concert. *Id.* 343. It was the joint

and indivisible harm that was important when determining whether to identify the defendants as joint tortfeasors.

FWS and BC argue that because each of them is only responsible for a portion of the take of Lear's property, they cannot be held responsible for a complete regulatory taking, as neither of them took the whole, and because they did not act in concert. 12th Cir. R. 11. Equitable principles of tort law apply liability to joint tortfeasors when the harm that the plaintiff experiences cannot be apportioned easily, because the plaintiff would otherwise be deprived of any remedy. *See Generally Velsicol,* 543 S.W.2d 337, (Tenn. 1976). This policy of ensuring that a harmed plaintiff has recourse applies with equal weight to Cordelia's present situation. Although BC and FWS are not tortfeasors, the policy behind joint tortfeasor jurisprudence dictates that Cordelia should not be left without recourse. While BC and FWS did not act in concert, their actions taken together in regulating the property result in an indivisible harm to Cordelia. The whole of Cordelia's property is regulated in such a way that none of her property can be used to build a single-family dwelling. The ESA does not permit Cordelia to build on her land. 12th Cir. R. 6.11, 6.14. Through an ITP, she could seek permission to build on her land, but only if she can replicate the habitat acre for acre. 12th Cir. R. 6.11. Cordelia does not have any other land to offer, so she is barred from using what she has. BC will only permit her to use her marshland for water dependent uses, which have no economic value without a single-family dwelling accompanying it. 12th Cir. R. 7.17. They point to the land that the ESA bars development of as an alternative. The result is a complete bar on the building of a single-family dwelling on her land or any other economically viable use.

FWS and BC argue that her land is not deprived of all economic value because she has been offered $1,000 per year to allow an environmental group to view the butterflies. 12th Cir. R. 12. In *Palazzolo v. Rhode Island*, the petitioner sought a judgment against the State of Rhode Island, asserting that his land had been subject to a complete regulatory taking. 533 U.S. 606 (2001). His land was made up of a good deal of wetlands and held by a corporation with the petitioner as the sole owner of stock. *Id.* at 611, 616. A regulation was passed to protect coastal land from environmental degradation. *Id.* at 614. The corporate charter was revoked, resulting in the sole share being transferred to the petitioner. *Id.* The petitioner filed multiple plans with the Rhode Island Costal Resources Council, and all of his plans were rejected. *Id.* at 621. The plans were all for massive development to the petitioner's property. *Id.* The petitioner claimed that the rejection of every plan for the property demonstrated that his property could not be used for any economically advantageous use, and that it had, therefore, been deprived of any economic value. *Id.* at 615.

The State claimed that the petitioner's claim was not even ripe, because he had not exhausted his remedies, as he had not filed a more modest proposal. *Id.* at 619. They identify his ability to build a house on part of his property as proof that he was not deprived of all economic value. *Id.* at 621. They also claim that when he took title, he knew that the property was subject to regulations, and, therefore, the regulations did not constitute a take. *Id.* at 626. The Court agreed that Palazzolo's property had not been deprived of all economic value, as he still retained a development value of $200,000 in the uplands parcel where a house could be built. *Id.* at 631. The fact that the parcel could not be used as he intended for development did not reach a total deprivation of value.

Cordelia's claim is easily distinguished from Palazzolo's in that BC's and FWS's claims that she can simply build on the other parcel ignores the aggregate effect of the regulations. Cordelia's only potential value from the property is a nominal fee from an environmental group visiting once a year, paying $1,000 annually to view the endangered butterflies. 12th Cir. R. 12. This nominal amount is less than the annual tax payments on the parcel, which would result in an annual net loss on the property of $500. *Id.* The Court in *Palazzolo* made clear that "[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo* 533 U.S. at 616.

The Court rejected the argument that Palazzolo's knowledge of the regulations constituted notice which would defeat his takings claim. *Id.* at 627. The Court found that accepting this argument would deny the successor to a property from being transferred the rights that the property owner possesses at transfer and would result in such a claim being defeated often, as such claims take a long time to ripen. *Id.* Cordelia obtained her land from her father, whose ancestor, King Lear, obtained the land by congressional grant. Cordelia does not lose her claim to investment-backed expectations because she obtained the land after the regulations were passed, because the relevant expectations were those of her father when he formally subdivided the property.

When considered together, the regulations on Cordelia's property by FWS and BC result in a complete regulatory taking that deprives Cordelia's property of any economic value. The nominal fee that she might obtain from an environmental group would result in an annual net loss of $500, but even if she were able to benefit from the $1000 payment a year, this token interest would not defeat her takings claim.

CONCLUSION

For the foregoing reasons, the application of the ESA to the wholly intrastate population of butterflies is an unconstitutional exercise of Congress' Commerce power. In the alternative, should the Court find that it was a constitutional exercise of Congress' Commerce power, two regulations, state and federal, combined to create a complete regulatory taking that deprives her land of any economic value, and Cordelia is therefore entitled to compensation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellate Brief has been served by electronic mail this 28th day of November, 2016 to:

Counsel for the Government
United States Attorney's Office
500 Indiana Avenue, NW
Washington, D.C. 20037
nelmcc@law.pace.edu

Counsel for Brittian County
123 Fake Street
Union, New Union 99935
nelmcc@law.pace.edu