Team 7

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 Consolidated Petitions for Review by the United States Court of Appeals for the Twelfth Circuit

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BRIEF FOR THE DEFENDANT-APPELLANT-CROSS APPELLEE, FISH AND WILDLIFE SERVICE

/s/ Team 7
Team 7
Counsel for Defendant-Appellant-Cross Appellee,
United States Fish and Wildlife Service

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STATEMENT OF JURISDICTION

The Appellants, United States Fish and Wildlife Service ("FWS") and Brittain County, New Union, seek review of the final order of the United States District Court for the District of New Union issued on June 1, 2016. The district court had proper jurisdiction to hear the case under 28 U.S.C. § 1331 (2012). The order of the district court is final, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?
2. Is Lear's taking claim against FWS ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(b)?
3. For takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?
4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?
5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?
6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?

7. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself would still allow development of a single-family residence?

STATEMENT OF THE CASE

I. Summary of the Facts

a. Lear Island

Lear Island consists of 1,000 acres and is approximately two miles by one mile. R. at 4. The island is surrounded by Lake Union, located in the State of New Union. R. at 4. Lear Island was granted to Cornelius Lear ("Mr. Lear") in fee simple absolute in 1803 by an Act of Congress. R. at 4. This grant included all lands under water within 300 feet of the shoreline and land underwater in the strait separating Lear Island from the mainland. R. at 4. In 1965, Mr. Lear divided up the island into three parcels for his daughters. R. at 5. The parcels are as follows: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. R. at 5. In 1965, it was determined that each lot could develop a single-family residence as long as it conformed with the zoning requirements. R. at 5. In 2005 when Mr. Lear passed away, Cordelia Lear ("Ms. Lear") inherited the Cordelia Lot, a fee simple absolute interest in ten acres on Lear Island, known by the family as the Heath. R. at 5.

The Cordelia Lot is on the Northern part of the Island and consists of an access strip (40 feet by 1000 feet), an open field (nine acres), and a cattail marsh cove (one acre). R. at 5. It is known as the Heath because this is the only part of the island that was kept open by annual mowing from becoming naturally wooded after agriculture use of the island ceased in 1965. R. at 5. The one-acre marsh cove was historically open water and used as a boat landing. R. at 5.

Wild blue lupine flowers cover the access strip and the open field. R. at 5. The lupine flowers are necessary for the Karner Blue Larvae which only feed on the leaves of this flower. R. at 5. This location on the Cordelia Lot is ideal for the Karner Blue Butterfly ("Butterfly") because of the shaded flowers near the wooded part of the Island. R. at 5. The Brittain County Butterfly Society ("the Society") has offered Ms. Lear $1000 annually to be able to conduct butterfly viewings during the hatching season. R. at 7. The fair market value of the Cordelia Lot without any restrictions on development of a single family home is $100,000. R. at 7. The property taxes are $1,500 annually. R. at 7. The property does not have any market as agricultural, timberland, or recreational land without the right to develop a residence. R. at 7. However, Ms. Lear has not sought reassessment of her land since the fill permit was denied.

b. The Regulations

The Karner Blue Butterfly was added to the federal endangered species list on December 14, 1992 and is still currently listed. R. at 5. The Heath was designated by the FWS as a critical habitat for the Butterfly population in New Union. R. at 6. The Butterfly population on Lear Island, specifically the nine-acre open field on the Cordelia Lot, is the only remaining Butterfly population in the State of New Union. R. at 5. The Butterfly does not migrate and it hatches eggs in the spring and summer. R. at 6. The Butterfly is only an intrastate species because it has a short flight distance and must follow woodland edges. R. at 6. Because the larvae remain attached to the flowers' leaves, any disturbance of the flowers during the development stages would cause death. R. at 6.

In April 2012, Ms. Lear contacted the FWS office to inquire about development on her property and whether any permits would be required because of the Butterfly population. R. at 6. A FWS agent advised Ms. Lear that anything other than mowing the Health annually would

constitute a taking under the Endangered Species Act ("ESA"). R. at 6. The agent also advised Ms. Lear that she could obtain an Incidental Take Permit ("ITP") which could potentially allow her to do more than mow the Heath annually. R. at 6. Ms. Lear would need to create a Habitat Conservation Plan ("HCP") and an environmental assessment document under the National Environmental Policy Act to file for the ITP. R. at 6. In order to protect the Butterflies she would also need to create new contiguous acreage to replace the acres that were destroyed by development and commit to the annual fall mowing. R. at 6. To do this would cost about $150,000. R. at 6. If the annual mowing ceased, then the woodlands would take over eliminating the Butterflies. R. at 7. This process would take about ten years. R. at 7.

The land that is contiguous to the Cordelia Lot is the Goneril Lot. R. at 6. The FWS sent Ms. Lear a letter following up her inquiry into the ITP. R. at 6. The FWS confirmed that the ten acres of the Cordelia Lot is a critical habitat for the Butterflies and that any disturbance would be a "take" in violation of the ESA. R. at 6. The letter further invited Ms. Lear to apply for a ITP and directed her to the Habitat Conservation Planning Handbook for further information. R. at 6.

Rather than pursue the ITP application, Ms. Lear decided to create an Alternative Development Proposal ("ADP"). R. at 7. Ms. Lear proposed to fill one-half acre of the marsh in the cove to create a lupine-free building site with an access causeway to be able to reach the mainland without disturbing the access strip that contained the flowers. R. at 7. This portion of the lake is considered to be non-navigable for purposes of the Rivers and Harbors Act of 1899 and federal approval would not be required for the filling it. R. at 7. However, pursuant to the Brittain County Wetland Preservation Law, enacted in 1982, the ADP does require a permit to fill the marsh. R. at 7. Ms. Lear filed a permit application but was denied because permits would only be approved for a water-dependent use. R. at 7.

II. Procedural History

The United States District Court for the District of New Union found that the ESA is a valid exercise of Congress's Commerce power and that a taking of Ms. Lear's property without just compensation occurred. R. at 7-9. The court first addressed the commerce power issue and cited to *United States v. Lopez* and *United States v. Morrison* stating that "when relying on the substantial aggregate effects of an activity on interstate commerce as the basis for regulation under the Commerce power, the relevant regulated activity must itself be economic in nature." R. at 8. The court reasoned that the land development through construction using building materials and hiring workers is an economic activity. R. at 8.

The District Court addressed several issues under the takings claim. R. at 8-12. First, the court discussed ripeness. R. at 9. The court found the takings claim was ripe because pursing a permit is not necessary if a landowner can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights. R. at 9. Additionally, the court held that the relevant parcel to the takings claim is the Cordelia Lot and not Lear Island as a whole. R. at 9. The court found that a flexible approach was not applicable and when ownership of the lots has been transferred to different parties they should be considered separately. R. at 10. Furthermore, the court held that the takings analysis should be considered at the current permissible development of the property and not after a ten year process of natural succession and destruction. R. at 10. The court distinguished the facts of Ms. Lear's case from that of *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency*, stating that this was nothing like the moratorium that had occurred in *Tahoe-Sierra*. R. at 10. The court concluded that the potential natural destruction of the Butterfly's habitat does not preclude Ms. Lear's takings claim. R. at 10.

The court also addressed whether the public trust doctrine precluded the takings claim. R. at 10. The court held that at the time of the 1803 grant to Mr. Lear, which included lands under water within 300 feet of the shoreline, the United States did not recognize any public trust rights in non-tidal navigable waters. R. at 10. Lastly, the court addressed the issue of whether the federal and local restrictions should be considered together or separately under the takings claim. R. at 11. The court compared this situation to that of a joint tortfeaser and concluded that both agencies would be responsible and held jointly and severally liable, similar to a tortfeaser. R. at 11. Ultimately, the court found that Ms. Lear has been deprived of all economic use of her property and that FWS and Brittan County were liable for just compensation of the takings. R. at 11-12. The court awarded damages to Ms. Lear and dismissed her claim for declaratory judgment. R. at 12. The court found the FWS owed Ms. Lear $10,000 in damages and Brittain County owed Ms. Lear $90,000 in damages. R. at 12.

Upon the decision of the District Court, the FWS and Brittain County both filed a Notice of Appeal on June 9, 2016. R. at 1. Ms. Lear filed a Notice of Appeal on June 10, 2016. R. at 1. Ms. Lear is appealing the finding that the ESA is a valid exercise of the Congress's Commerce power as applied to an intrastate animal. R. at 1. The FWS is appealing the holding that Ms. Lear's claim was found to be ripe, that the relevant parcel is only the Cordelia Lot, that the potential for natural succession does not preclude the takings claim, that the $1000 from the Society did not preclude the takings claim, that the public trust doctrine did not also preclude the takings claim, and finally that the ESA and the local wetlands law were to be considered together under the takings claim. R. at 1-2. Brittain County is appealing the same issues as FWS except argues that the ESA is unconstitutional when applied to the Butterfly. R. at 2.

SUMMARY OF THE ARGUMENT

The ESA is a valid exercise of Congress's Commerce power because the preservation of species is substantially related to interstate commerce, as indicated by the four factor analysis in *San Luis & Delta-Mendota Water Authority. v. Salazar*. *See* 638 F.3d 1163, 1174 (9th Cir. 2011).

One way the ESA affects interstate commerce is through the protection of biodiversity. The ESA is also substantially related to commerce because interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species. The Society has offered to pay Ms. Lear to be able to conduct butterfly-viewings. This would stimulate interstate commerce because groups would be traveling interstate to visit and observe the Butterflies. Additionally, the preservation of the Butterfly substantially affects interstate commerce because it prevents the destruction of a natural resource, and thereby protects the current and future interstate commercial actors, such as universities, hospitals, pharmaceutical companies, and many more, who may come to rely on the Butterfly as a marketable medicinal or tourism product.

The Fifth Amendment of the United States Constitution states that private property shall not be taken for public use without just compensation. *See* U.S. CONST. amend. V. A regulatory taking occurs when a regulation burdens the ownership of a property so much that it essentially takes all value from the land. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303 (2002). Ms. Lear's takings claim is not ripe because she has not applied for the ITP. A takings claim that challenges land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the specific property at issue. *Palazzolo v. R.I.*, 533 U.S. 606,

618 (2001). Here, because Ms. Lear only chose to file the wetlands permit and not the ITP, the court does not have a final decision of which to base the takings claim off. Because the court does not have a final decision on the ITP, there is no way for the court to determine how far the regulation has gone and if it has gone too far.

Under the takings analysis, the relevant parcel to be considered is the entirety of Lear Island because takings jurisprudence does not divide the land into segments and attempt to decide if each segment of the land has been depleted of economic value. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). This takings claim should only include Lear Island because it was originally granted to Mr. Lear as a whole. Even though it is divided now, it still remains in the same Lear family and therefore it should be considered in its entirety.

The moratorium of natural destruction precludes Ms. Lear's takings claim as well. A moratorium of development does not equate to a per se taking. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350 (Fed. Cir. 2002). "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." *Tahoe-Sierra*, 535 U.S. at 332. This moratorium under the *Penn Central* analysis is not a taking. It is clear that Ms. Lear did not have an investment-backed expectation. She did not pay any value for the land, and she had actual and constructive notice that the lot was impacted by the existence of the preservation efforts towards both the Butterfly and the wetlands. Additionally, once the natural destruction moratorium has occurred, the Cordelia Lot will be just as valuable and most likely worth more than it would currently with a home built on it. By denying Ms. Lear the filling of the wetlands the County is regulating wetlands in a way that protects the ecosystem. This moratorium although long, is beneficial to the island's ecosystem and to Ms. Lear. Because it would benefit both Ms. Lear and the

ecosystem it should not be found as a taking.

Furthermore, Ms. Lear's takings claim is barred because New Union has a public trust doctrine in the marsh. Because the public trust doctrine is a background principle recognized to preclude a taking claim, a takings cannot occur. The background principles inquiry which the United States Supreme Court established in *Lucas* is a defense to any takings claim. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). New Union's public trust has always existed through the Brittain County Wetland Preservation Law, which was enacted in 1982 to preserve Lake Union's wetlands and waters within Lake Union. This public trust doctrine reserves a public property interest in the wetlands and coastline despite the grant of the island to Mr. Lear. Although the land was granted to Mr. Lear in 1803, the land that was granted did not contain the full rights of the wetlands. New Union as a trustee of the wetlands has the ability to prevent their destruction and a duty to preserve them for future use.

Lastly, FWS is not liable for a takings claim because the analysis of the regulations on Ms. Lear's property needs to be examined separately. When establishing the *Lucas* categorical takings analysis, the Supreme Court stated that a taking will only be found when it has been established that "a" government regulation has deprived the property owner of all economic benefits. The Court used the word "a" which means a single regulation. Furthermore, under the denominator test, courts look to determine what portion of the land should be considered in the takings analysis. The numerator is the economic harm to a particular parcel caused by a government regulation. *See* Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 FORDHAM L. REV. 1957, 1959 (2002). The denominator is the total unregulated economic value of the relevant parcel against which the economic harm is compared to. *Id.*

As *Keystone* held, the court should look at the one strand—in this case the one regulation, as applied to the entirety of the parcel. The Court found 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." *Keystone*, 480 U.S. at 470. According to Supreme Court precedent, the Cordelia Lot should be looked at in its entirety which puts ten acres as the denominator and nine acres as the numerator or the economic harm. As such, the ESA alone does not affect a taking because the regulation does not affect the entire parcel. This fraction shows that a taking under Lucas does not exist; therefore, FWS should not be liable.

The ESA is a valid use of the commerce clause. Ms. Lear's taking claim should be dismissed because it is not ripe and the FWS is not responsible for a taking that has not occurred. The takings claim is precluded by the moratorium of natural destruction, the offer of $1000 for butterfly-viewing, the public trust doctrine, and because each regulation is considered separately. The FWS should not be held responsible.

STANDARD OF REVIEW

Questions regarding the exercise of Congress's Commerce power are questions of law, and therefore reviewed de novo. *United States v. Lopez*, 514 U.S. 549, 611 (1995). The question of ripeness is a question of law, and therefore, reviewed de novo. *National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013); *Greenbrier v. United States*, 193 F.3d 1348, 1356 (Fed. Cir. 1999). Whether a government entity is liable for a complete deprivation of the economic value of Cordelia's Lot is reviewed under the Fifth Amendment taking analysis, which involves a question of law based on factual underpinnings. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (establishing legal criteria to guide the "essentially ad hoc, factual inquiries"). As such, the facts shall be reviewed under the clearly erroneous

standard, and the law as applied to those facts shall be reviewed de novo. *See also Lucas*, 505 U.S. at 1030-31.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER BECAUSE IT SUBSTANTIALLY RELATES TO INTERSTATE COMMERCE.

The ESA is a valid exercise of Congress's Commerce power because it substantially relates to interstate commerce and even if the ESA only affects an intrastate population of species, the de minimis characteristic of this population is of no consequence. There are three categories of activity that Congress may regulate under its commerce power: (1) the regulation of the use of the channels of interstate commerce; (2) the regulation and protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce (even if only from intrastate activities), and (3) the regulation of activities that have a substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558-59. *See also United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *San Luis*, 638 F.3d at 1174. The taking of an endangered species is regulated by Congress's Commerce power as an activity that substantially affects interstate commerce because the regulation prevents destruction of biodiversity (which protects current and future interstate commerce that relies upon biodiversity) and because it controls the adverse effects of interstate competition. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1054 (D.C. Cir. 1997). Furthermore, Congress has the power to regulate purely intrastate activity as long as the activity is being regulated in a way that substantially relates to interstate commerce. *See San Luis*, 638 F.3d at 1175. *See also GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (finding that the ESA take provision as applied to an intrastate species of insect was a valid use of the Commerce Clause because biodiversity has a substantial effect on

interstate commerce). Congress has the power to regulate intrastate endangered species because the listing process is an integral part of the larger regulation of a class of economic activities involving the preservation of wildlife. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1272 (11th Cir. 2007). Additionally, "[i]t is well established . . . that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs v. Babbit*, 214 F.3d 483, 500 (4th Cir. 2000). *See also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1079 (D.C. Cir. 2003).

There are four factors used to determine if a law has a substantial effect on interstate commerce: (1) whether the statute has anything to do with commerce (this can be broad); (2) whether the statute contains an express jurisdictional element; (3) whether the legislative history contains express congressional findings regarding the effects upon interstate commerce; and (4) whether the link between the regulated activity and the effect on interstate commerce is too attenuated. *San Luis*, 638 F.3d at 1174. Additionally, courts have acknowledged that in the aggregate the extinction of an endangered species will have a substantial effect on interstate commerce; therefore, it does not matter that it is impossible to calculate the precise impact of the extinction of a species. *See National Ass'n of Home Builders*, 130 F.3d at 1046. Biodiversity for example "has a real, substantial, and predictable effect on both the current and future interstate commerce . . ." making the de minimus character of the ESA incidents of no consequence. *Id.* 1055 n.14.

In *San Luis & Delta-Mendota Water Authority v. Salazar*, the issue before the court was whether sections seven and nine of the ESA violated the Commerce Clause. 638 F.3d at 1167. The FWS released a biological opinion stating that California's water project was modifying the habitat of the Delta smelt, and would likely lead to their extinction. *Id.* at 1167-68. The FWS's

biological opinion included a "reasonable and prudent alternative plan" that would protect the smelt at critical times of the year. *Id.* at 1168. If the California Department of Water Resources and State Water Project were to implement this plan, they would be insulated from liability under the "no-take provision" of the ESA. *Id.* A collective group known as the Growers sued the FWS arguing that their almond, pistachio, and walnut farms were experiencing substantially reduced water deliveries as a result of the decision to use the alternative plan. *Id.* The Growers argued that because the Delta smelt are a purely intrastate species, they have no commercial value, and the ESA as applied to the water diversion project was an invalid exercise of Congress's Commerce power. *Id.*

The court applied the *Lopez* and *Morrison* cases which established that Congress has the power to regulate purely intrastate activities that are part of an economic class of activities and that they have a substantial effect on interstate commerce. *Id.* at 1174. The court held that the ESA "bears a substantial relation to commerce." *Id.* at 1174. The court gave several reasons for how the ESA implicates economic concerns and how it has a substantial effect on commerce including that the ESA protects the future and unanticipated interstate-commercial value of the species and interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species. *Id.* at 1176. The court held that the ESA is substantially related to interstate commerce because the statute at issue did not need to be a purely economic or commercial in nature and even though the "ESA may ensnare some purely intrastate activity," the court refused "to exercise individual components of that larger scheme." *Id.* at 1177.

In *National Association of Home Builders v. Babbitt*, the court similarly found that the ESA's prohibition against the taking of an endangered species is a proper exercise of the

commerce clause to regulate the channels of interstate commerce. 130 F.3d at 1067. When the National Association of Home Builders brought action against the FWS challenging the application of section 9(a)(1) of the ESA, which makes it unlawful for any person to "take" an endangered species, it was upheld that Congress's Commerce powers do extend to the ESA. *Id.* at 1043; 16 U.S.C.A. § 1532(19) (West). The appellants challenged that Congress lacked authority to regulate the use of Californian land for the purposes of protecting a fly. *National Ass'n of Home Builders*, 130 F.3d at 1045. To support their argument, the appellants relied on *Lopez*, where the Court repealed Congress's Gun Free School Zone Act as not being substantially related to interstate commerce. *Id.* at 1045-46. However, in applying *Lopez* to the California flies, the court found that protecting endangered species, in the aggregate, is substantially related to interstate commerce. *Id.* at 1046. The court noted that fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species, so therefore it is important to keep plants and animals alive for their potential future medicinal value. *Id.* at 1052.

Further, the court held that the taking of an endangered species "falls within Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes." *Id*. at 1048. In *Heart of Atlanta Motel v. United States*, the Court deemed racism to be immoral and injurious, and upheld the authority of the Commerce Clause as a way to eradicate such behavior. 379 U.S. 241, 272 (1964). Likewise, in *United States v. Darby*, the United States Supreme Court upheld the Commerce Clause to prevent the immoral or injurious nature of labor exploitation by upholding federal minimum wage standards. 312 U.S. 100, 112 (1941); *See also National Ass'n of Home Builders*, 130 F.3d at 1048. The same reasoning is applicable to empower the ESA, through the Commerce Clause, to prevent the taking of

endangered species. *National Ass'n of Home Builders*, 130 F.3d at 1048.

As stated in *San Luis*, there are multiple reasons why the ESA is substantially related to interstate commerce. One example in particular suggests that, interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species. This is applicable to the Butterfly and Lear Island; simply because the Butterfly does not travel across any state boundaries does not mean that it is not substantially related to interstate commerce. The Society's offer to pay for butterfly-viewing means that groups would be traveling interstate to visit and observe the Butterflies. Additionally, scientists may wish to visit and conduct studies on the Butterfly, especially since this is the only place within New Union where they can be found and observed. Therefore, the ESA's regulation of the Butterfly is a valid exercise of Congress's Commerce power because it is substantially related.

Here, like in *National Association of Home Builders*, the Butterfly may be regulated under the first and third elements of the *Lopez* test. Firstly, the protection against the taking of the Butterfly is clearly a "use of the channels of interstate commerce." As it was described in detail in *National Association of Home Builders*, the Court has upheld many cases, such as *Darby* and the *Heart of Atlanta*, in order to rid the channels of interstate commerce of injurious uses. The taking of an endangered species, no matter the species, is injurious to mankind's future, and therefore within Congress's power to regulate. Any time a species is permanently eradicated, mankind can no longer access that species genes for scientific purposes, which may prove invaluable to mankind's future health and welfare. For instance, a cure for cancer could be found in a plant or animal, and it would be injurious to future generations to let these species become extinct.

The ESA's regulation preventing the taking of the Butterfly also passes constitutional muster when examined under the third prong of the *Lopez* analysis, being that the preservation of the Butterfly, or any endangered species, is substantially related to interstate commerce. Whether it is substantially related because of the zoos that buy and sell species, or through the universities that study rare species in an effort to cure diseases and promote overall human welfare, it still is substantially related to interstate commerce. The ESA prevents the destruction of a natural resource and thereby protects the current and future interstate commercial actors such as universities, hospitals, pharmaceutical companies, and so on, who may come to rely on the Butterfly as a marketable medicinal or tourism product.

II. MS. LEAR'S TAKINGS CLAIM IS PRECLUDED BECAUSE IT IS NOT RIPE AND MS. LEAR HAS NOT BEEN DEPRIVED OF ALL ECONOMICALLY BENEFICIAL USE OF THE CORDELIA LOT.

Ms. Lear's takings claim is precluded for multiple reasons. First, the claim is not ripe due to Ms. Lear's failure to apply for an ITP. Second, the relevant land that should be considered under this takings analysis is the entirety of Lear Island and not merely the Cordelia Lot. Third, even if this court only considers the Cordelia Lot under this takings analysis, the facts that the Butterfly's habitat will naturally destruct in the future, that the Society has offered to pay for annual butterfly-viewing, and that public trust principles are inherent in title, all preclude a takings claim. Finally, even if this court only considers the Cordelia Lot under this takings analysis, Ms. Lear has not been deprived of all economically beneficial use of her Lot under a *Lucas* or *Penn Central* regulatory takings analysis. The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, states that private property shall not be taken for public use without just compensation. *See* U.S. CONST. amend. V. The purpose of the takings clause is "to bar the government from forcing some

people alone to bear public burdens, which, in all fairness and justice should be borne by the public as a whole." *Hage v. United States,* 35 Fed. Cl. 147, 158 (1996).

A court must first address whether the takings claim is ripe for review. Ripeness is a doctrine that is designed to prevent the courts from disagreements over administrative polices or until the disagreement has taken effect in a concrete way by the challenging parties. *National Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 807-08 (2003). For a court to determine if a takings claim is ripe, it must evaluate the fitness of the issues for a judicial decision and the hardship the parties would experience by withholding court consideration. *See id.* at 808; *San Luis*, 638 F.3d at 1173; *Hage*, 35 Fed. Cl. at 162.

Once a court has found that a takings claim is ripe, it must then apply a takings analysis. Takings claims generally fall into two categories: physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992). A physical taking consists of an occupation of all or part of an individual's property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). A regulatory taking occurs when a regulatory or administrative regulation burdens a property so much that it must be viewed as having been taken. *Tahoe-Sierra*, 535 U.S. at 303. *See also Hendler v. United States*, 36 Fed. Cl. 574, 585 (1996). A regulatory takings analysis is applied here because the ESA has listed the Butterfly as an endangered species and thus a regulation has affected Lear Island, specifically affecting the Heath which is located on the Cordelia Lot. A physical takings analysis does not apply to this case because the government has not physically occupied the Cordelia Lot; rather, the ESA's regulation is limiting Ms. Lear's use of the Cordelia Lot.

A. Ms. Lear's takings claim is not ripe because Ms. Lear has not applied for a permit relating to the Heath and therefore a final decision regarding development of the land has not been rendered.

This takings claim is not ripe because Ms. Lear has not applied for the ITP, and as a result the FWS has had no opportunity to render a final decision on whether or not she has been deprived of the economically beneficial use of the land. A takings claim that challenges land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the specific property at issue. *Palazzolo*, 533 U.S. at 618. When a state agency has provided a final decision, the court can better determine constitutionally whether a regulation has deprived a landowner of all economically beneficial use of the property. *See id.* It is problematic for a court to make a takings decision without knowledge as to the extent the agency has actually restricted the landowner's capacity to develop the land in question. *See id.* Before bringing the suit the landowner must have first "followed reasonable and necessary steps to allow [the] regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Id.* at 620-21; *See also Tahoe-Sierra*, 535 U.S. at 303. As a general rule, until these ordinary processes have been followed, the extent of the restriction on property is unknown and a regulatory takings has not yet been established. *Palazzolo*, 533 U.S. at 621.

In *Palazzolo v. Rhode Island*, almost all of the landowner's property was designated as coastal wetlands under Rhode Island law. *Id.* at 618. The owner wanted to develop a private beach club, so he sent three different applications requesting permits to fill the salt marshes. *Id.* at 613-14. The permit was approved once; however, the approval was withdrawn due to adverse environmental impacts that needed to be addressed. *Id.* at 614. The owner did not contest the

ruling. *Id.* Shortly after the permit withdrawal, the salt marshes became protected coastal wetlands due to the passage of new legislation. *Id.* The landowner again filed an application to fill his land; however, since the applications were filed after the new legislation was passed, the permits were once again denied. *Id.* at 614-15.

The Court applied the ripeness doctrine stating that "a takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulation has reached a final decision." *Id.* at 618. The court found that the land-use permit application only became ripe when the agency had reached their final decision." *Id.* at 621. Additionally, the Court found that a taking had not occurred because the Coastal Resources Management Council testified at trial that the elevated section of the parcel still had an economic value of $200,000, and they would have granted permission to build a residence on that part of the parcel. *Id.* 621-22. The Court held that when a state agency has reviewed an application and has made a clear decision regarding the extent of the development permitted, then ripeness has been satisfied. *Id.* at 625-26.

Ms. Lear has not fulfilled her obligation, contrary to the plaintiff in *Pallazzolo*, because she has not filed all permit applications applicable to her land to give the FWS an opportunity to consider the entire developmental plans for the Lot. Ms. Lear never filed for an ITP for the property. The only action Ms. Lear took with regard to permits for the Cordelia Lot, was inquiring whether or not she needed a permit because of the Butterflies. A FWS agent advised her that she would need to apply for an ITP and to create a habitat conservation plan for the Butterflies. A letter was also sent to Ms. Lear inviting her to submit an application for an ITP and directed her towards the FWS's Habitat Conservation Planning Handbook. Rather than apply for the permit as advised, Ms. Lear decided that she would create an ADP. Through this

action, she did apply for a permit to fill the one-half acre marsh in the cove. However, the permit was denied on the grounds that a permit to fill the wetlands would only be granted for a water-dependent use and a residential home is not water-dependent. Since, Ms. Lear failed to apply for an ITP to develop the nine-acre field, the court cannot render a decision on the takings claim without a complete final decision reached by the FWS. Without presenting the court with a final governmental decision regarding the development of the nine other acres, the takings claim is not ripe.

B. The relevant parcel is the entirety of Lear Island because the land at issue is always looked at in its entirety.

Under the takings analysis, the relevant parcel to be considered is the entirety of Lear Island. When examining whether a land has been taken and compensation is owed, a court "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497; *Tahoe-Sierra*, 535 U.S. at 327; *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981). In deciding whether a particular governmental action has affected a taking, the United States Supreme Court focuses on both the character of the action and the nature of the interference with rights in the parcel as a whole. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497. *Tahoe-Sierra*, 535 U.S. at 327; *Deltona Corp.*, 657 F.2d at 1192; *Tabb Lakes Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (holding that the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands, but rather the parcel as a whole). The reason takings are applied as a whole rather than dividing land up is because real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. *Tahoe-Sierra*, 535 U.S. at 303. Both dimensions must be considered if the interest is to be viewed in its

entirety. *Id.* at 304. *See also Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 472 (Fla. Dist. Ct. App. 2014) (finding that two privately owned parcels that were once owned together were to be considered as one because there is a substantial overlap in the land).

In *Zealy v. City of Waukesha*, the court determined whether the zoning of land as a conservancy district in order to protect wetlands constituted a constructive taking of property for which a landowner should be compensated. 548 N.W.2d 528, 529 (Wis. 1996). The land at issue consisted of 10.4 contiguous acres. *Id.* at 529. The city rezoned the land and created a conservancy district, which included 8.2 acres of the landowner's land. *Id.* The landowner had never submitted an application for a building permit to the city for residential construction on the land. *Id.* The court found that the "United States Supreme Court has never endorsed a test that segments a contiguous property to determine the relevant parcel; rather, the Court has consistently held that a landowner's property in such a case should be considered as whole." *Id.* at 532. The court stated that if it was required to use a rule that allowed for segmenting the land, it would require ascertaining a landowner's subjective intent before being able to evaluate the claim and this would both confuse zoning agencies and the courts adjudicating such claims on an already inherently complex issue. *Id.* at 533. The court found that the landowner's entire parcel was at issue and not just the 8.2 acres. *Id.* The court was unpersuaded by the segmentation argument considering the Supreme Court has never endorsed that test. *See id.* The court held that no taking occurred and when viewed as a whole, the parcel retained a combination of residential, commercial, and agricultural uses. *Id.* at 534.

Considering that a rule of segmentation has never been endorsed by the Supreme Court, this court should follow the abundance of on-point precedent and find that Lear Island should be viewed as a whole, and not segmented into the Cordelia Lot. The island was granted as a whole

to Mr. Lear. Lear Island has remained in the family and was only divided so that each daughter would have their own spot on the island. If this court were to only consider the Cordelia Lot and not the whole island under this takings analysis, this court would be setting a precedent that would not be upheld by the U.S. Supreme Court. This consideration would also require future cases to look at a landowner's subjective intent, which the court advised would convolute an already complex issue. Additionally, from the metes and bounds standard typically used by the court, the Cordelia Lot is only 10 acres of the 1000 acres that consists of Lear Island. If the court applies a segmenting rule, it would be a contradictory ruling to *Zealy*, in that the landowner is attempting to only use the land that has been regulated and not use the parcel as whole. Since this court is bound by the United States Supreme Court, it should follow the precedent that disallows segmenting of parcels for the purpose of a takings analysis. As such, the relevant parcel is the entirety of Lear Island and not just the Cordelia Lot which consists of only 1/100 of the island's land.

C. Even if the relevant parcel is the Cordelia Lot, the takings claim is precluded because the Cordelia Lot has not been deprived of all economic value.

Although the relevant parcel should be the entire Lear Island and not just the Cordelia Lot, under an assumption that the only parcel to consider in this takings analysis is the Cordelia Lot, the takings claim is still barred because Ms. Lear's Lot retains economic value. The Supreme Court has established two types of regulatory takings analysis: the categorical *Lucas* test and the ad hoc *Penn Central* analysis. The categorical analysis was determined in *Lucas v. South Carolina Coastal Council*, in which the Court held that a regulatory per se categorical taking occurs when a landowner is left with absolutely no economical beneficial use due to the regulation. 505 U.S. at 1035. The *Penn Central* ad hoc analysis is used when a per se categorical taking has not occurred and the court must apply the facts specific to the alleged

taking. *Penn Central*, 438 U.S. at 131. The Supreme Court recognized three factors for the *Penn Central* analysis which are (1) the extent to which the regulation has interfered with the property owner's reasonable investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the governmental action at issue. *Id.* at 124. Under both the *Lucas* and *Penn Central* analysis, Ms. Lear has not been subjected to a taking because she still has economically beneficial use of the Cordelia Lot through a moratorium of natural destruction, a payment of $1000 annually from the Society, and because each regulation affecting the land should be considered independently of one another. Additionally, Ms. Lear has a complete defense to a takings claim under the background principles.

1. The takings claim is precluded because the Cordelia Lot will become developable upon the natural destruction of the Butterfly's habitat.

The Cordelia Lot has not been deprived of all economic benefits because Ms. Lear will be able to develop the land into residential use once the natural destruction of the Butterflies' habitat occurs. This moratorium of natural destruction precludes the takings claim. A moratorium of development does not equate to a per se taking. *Boise Cascade Corp.*, 296 F.3d at 1350. "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." *Tahoe-Sierra*, 535 U.S. at 332. The Supreme Court has held that a moratorium should be analyzed under the *Penn Central* analysis because it directs the inquiry to the proper considerations, one of them being the length of the delay. *Id.* at 304.

Under a *Penn Central* analysis, three factors must be weighed in order to determine whether a regulatory taking has occurred. *See Penn Central*, 438 U.S. at 124. The three factors include an investment-backed expectation, the economic impact, and the character of the governmental action. *Id.* An investment-backed expectation is an objective, fact specific inquiry

into what the plaintiffs should have anticipated. *Norman v. United States*, 63 Fed. Cl. 231, 261 (2004). To determine the economic impact, the court is required to evaluate the change in fair market value as a result of the regulation. *Id.* at 270. To determine the character of the governmental action at issue, the court must balance the liberty interest of the private property owner against the government's need to protect the public interest through imposition of a restraint. *Id.* at 282.

In *Tahoe-Sierra*, the question presented to the court was whether a moratorium on development imposed during the process of devising a land-use plan amounts to a taking of property requiring compensation. 535 U.S. at 306. Two moratoriums took place to be able to study the impact of development on Lake Tahoe and to design a strategy for environmentally sound growth. *Id.* The moratorium took place for thirty-two months. *Id.* The Court reasoned that *Lucas* did not apply because it was "carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value . . ." *Id*. at 332. The Court found that there was not a taking and stated that *Penn Central* is the best approach to decide cases with a moratorium issues. *Id.* at 343. The Court reasoned that moratoriums do not have to have a specific time frame, but the time frame should be considered when determining if a taking had occurred because there is an "interest in facilitating informed decision making by regulatory agencies." *Id.* at 341-42.

The Supreme Court stated that the "financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether." *Id.* Additionally, courts have found instances where a moratorium actually increases the value of a landowner's property. *Id.* at 341. *See also Growth Props, Inc. v. Klingbeil Holding Co.,* 419 F. Supp. 212, 218 (W.D.N.Y. 1976) (holding that land

values expected a 20% growth rate during a five-year moratorium on expansion); *Forest Prop., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (finding that the parcel increased in value in spite of a permit denial to develop the property). A land value increase was also expected in Lake Tahoe due to the assurances that the lake would remain in its pristine state. *Tahoe-Sierra*, 535 U.S. at 341. "We should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole." *Id.*

In *Norman v. United States*, the court denied a takings claim under the *Penn Central* analysis. 63 Fed. Cl. at 252. In examining whether a regulation interfered with a property owner's investment-backed expectations, the court reasoned that knowledge of an actual or potential regulatory imposition is precluded from asserting an investment-backed expectation claim. *Id.* at 262. The court found that the landowners were sophisticated real estate developers who had both actual and constructive knowledge of their permitting process. *Id.* at 266. The court also found that the landowners did not have a reasonable investment-backed expectation that development of the property would not be hindered by regulatory imposition. *Id.* at 270. Furthermore, the court found that the government had a legitimate public welfare obligation to preserve wetlands and that the unnecessary destruction of wetlands violates environmental laws and is contrary to public policy. *Id.* Ultimately, the court concluded that a regulatory taking had not occurred under the *Penn Central* analysis. *Id.* at 287.

This court should view the period of time up until the destruction of the Butterfly habitat as a land development moratorium that is not a categorical taking based on the holding in *Tahoe-Sierra*. Ms. Lear should take this time to appropriately apply for the ITP or to wait for the value of the land to increase. During this time, she can allow her property value to grow and plan a building development that would be beneficial to her and the Cordelia Lot. Although the

destruction may take longer than the time needed in the *Tahoe-Sierra* case, the Supreme Court found that the length of time for the moratorium is only a factor and that the appropriate analysis to use in determining if it is a taking, is the *Penn Central* analysis.

Here, this moratorium under the *Penn Central* analysis is not a taking. When looking at the first factor, it is clear that Ms. Lear did not have an investment-backed expectation. She did not pay any value for the land, and she had actual and constructive notice that the lot was impacted by the existence of the preservation efforts towards both the Butterfly and the wetlands. The Butterfly had been on the endangered species list for twelve years before the Cordelia Lot was deeded to Ms. Lear in 2005. Additionally, the Wetland Preservation Law was enacted in 1982 which put Ms. Lear on notice that regulation regarding the wetlands could affect development of the Cordelia Lot. Mr. Lear may have had an investment-backed expectation when he deeded the lots to his daughters and inquired with the Brittain Town Planning Board if each lot could be developed with a single-family residence. However, Ms. Lear did not come into possession of the Cordelia Lot until 2005. This means that she did not have the same expectation that her father did in 1965 because at that time Butterfly had not been listed nor had the wetlands law been enacted.

This court should find that although the current economic impact may be large, once the natural destruction moratorium has occurred, the Cordelia Lot will most likely increase in value. Lastly, the governmental action is appropriate here. By denying Ms. Lear the ability to fill the cove, the County is regulating wetlands in a way that protects the ecosystem. However, Ms. Lear is not even completely barred from filling the wetlands because the denial was based on the fact that her home was not a water-dependent use. Additionally, Ms. Lear has not even applied for an ITP to see whether or not there is an option for development on the Heath. Finally, this

Moratorium is part of nature with no governmental interference. Under *Penn Central*, Ms. Lear does not have a valid regulatory takings claim because of the natural destruction moratorium.

2. Ms. Lear's takings claim is precluded because it does not amount to a complete loss of economic benefit since the Society has offered to pay $1,000 annually for wildlife viewing.

The takings claim is precluded because Ms. Lear has not been deprived of all economic benefit of her land since the Society has offered to pay Ms. Lear $1000 per year in exchange for the Society's ability to conduct butterfly-viewings. A takings occurs when a landowner has been deprived of all economic beneficial use to their land. *Lucas*, 505 U.S. at 1026. The deprivation of all economically beneficial use must be a complete deprivation equaling a 100% loss. *See Lucas*, 505 U.S. at 1019 n.8.

In *Lucas v. South Carolina Coastal Council*, the court addressed whether a landowner had been subjected to a taking of private property that required the payment of just compensation. *Id.* at 1007. The landowner bought two residential lots in South Carolina, where he intended to build single-family homes. *Id.* After purchasing the lots, the legislature enacted an act that stopped the landowner from building structures on his parcel. *Id.* at 1007. The Supreme Court established that when a landowner has been deprived of all economically beneficial use, then he has suffered a taking. *Id.* at 1019.

Ms. Lear has not been deprived of all economically beneficial use of the Cordelia Lot and therefore she does not have a takings claim under *Lucas*. Ms. Lear has the ability to profit from her land and even earn $1000 annually from the Society. Although there is no market for the Cordelia Lot for recreational, agricultural, or timber use, she can still use the land for the butterfly viewing and potentially other activities if she had filed for other permits. This court should apply the *Lucas* analysis, and hold that since Ms. Lear has not lost 100% of the land's

value, there is no categorical taking.

3. The takings claim is precluded because the public trust principle of protecting the marsh cove is a background principle defense to a takings claim.

New Union has a public trust doctrine in the marsh; therefore, Ms. Lear's takings claim should be precluded. Because the public trust doctrine is a background principle recognized to preclude a takings claim, a takings cannot occur. The background principles inquiry which the Supreme Court established in *Lucas* are a defense to any takings claim. *Lucas*, 505 U.S. at 1029. *See also* Michael C. Blumm, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARVARD ENV. L. REV. 321, 327 (2005). A classic example of a background principle is a public or private nuisance. *Lucas*, 505 U.S. at 1035. The public trust doctrine is a key aspect of property law that places natural resources in the hands of the sovereign, which holds such resources in trust on behalf of the public. Lance Noel & Jeremy Firestone, *Public Trust Doctrine Implications of Electricity Production*, 5 MICH. J. ENVTL. & ADMIN. L. 169, 170-71 (2015). As trustees, states have a fiduciary duty to conserve and maintain natural resources for future generations. *Id.* Protecting the country's wetlands is important because they "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). "Healthy wetlands are valuable resources that prevent public harms by maintaining water supply and quality, mitigating the effects of flooding and erosion, and providing habitat for hundreds of species." *See* Blumm, HARVARD ENV. L. REV. 29 at 337.

In *Esplanade Properties, LLC v. City of Seattle*, property owners were challenging the legality of the city's denial of their application to develop shoreline property. 307 F.3d 978, 979-

80 (9th Cir. 2002). In addressing the takings claim issue, the court found that a taking had not occurred because a background principle, specifically the public trust doctrine, occupied the land and precluded the landowners from prevailing in a takings claim against the city. *Id.* at 984. The court stated that "a deprivation by the government of all beneficial uses of one's property results in a taking unless, *inter alia*, the 'background principles' of state law already serve to deprive the property owner of such uses." *Id.*

The court reasoned that the public trust doctrine was relevant because the doctrine reserves a public property interest in tidelands and the waters flowing over them, despite the sale of these lands into private ownership. *Id.* at 984. The court stated that the "state can no more convey or give away this [ ] interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'" *Id.* at 985 (quoting *Illinois Cent. R.R. v. Ill.*, 146 U.S. 387, 453 (1892)). The court held that this public trust doctrine has always existed in Washington through both its constitution and Washington's Shoreline Management Act ("SMA"). *Id.* The SMA was necessary because unrestricted construction on the privately owned or public-owned shorelines is not in the public's interest. *Id.* at 986. The court ultimately found that because development of the coastline would be inconsistent with the public trust doctrine, a takings claim is precluded. *Id.* at 987.

Ms. Lear's takings claim is insufficient because the public trust doctrine serves as a background principle defense to her claim. Similar to the State of Washington, New Union's public trust has always existed through the Brittain County Wetland Preservation Law which was enacted in 1982 to preserve the wetlands and waters within Lake Union. This public trust doctrine reserves a public property interest in the wetlands and the waters flowing through them despite the grant of the island to Mr. Lear. As noted in *Esplanade Props., LLC*, the state cannot

(and did not) convey the shoreline of public water any more than it could relinquish other more obvious rights such as the government's police powers. Therefore, although the land was granted to Mr. Lear in 1803, he did not obtain the rights over the wetlands. New Union as a trustee of the wetlands, has the ability to prevent their destruction and a duty to preserve them for future use. Ms. Lear does not have a takings claim because the complete rights to the wetlands was never hers to begin with.

4. The FWS and Brittain County are not liable for a takings claim because each regulation should be considered separately.

The FWS is not liable for a takings claim because the regulations affecting Ms. Lear's property needs to be examined separately. The Supreme Court held in *Lucas* that "[wh]ere a plaintiff is able to demonstrate that a government regulation totally deprives property of all economic value, a taking will be found . . ." *Good v. United States*, 39 Fed. Cl. 81, 96 (1997) (citing *Lucas*, 505 U.S. at 1027). In addition to this takings analysis, courts have also turned to the denominator test in order to determine whether or not a taking has occurred.

When defining the *Lucas* categorical takings analysis, the Supreme Court stated that a taking will only be found when it has been established that "a" government regulation has deprived the property owner of all economic benefits. The issue under *Lucas* then becomes what is included in the takings analysis. The denominator test has been adopted by courts to determine what portion of the land should be considered in the takings analysis. The numerator is the economic harm to a particular parcel caused by a government regulation. *See* Allee, 70 FORDHAM L. REV. at 1959. The denominator is the total unregulated economic value of the relevant parcel against which the economic harm is compared to. *Id.* If the fraction is for example 18/18, then it would constitute a taking under *Lucas*; however, if the fraction is only 18/20, then a taking has not occurred. *Id.*

In *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court ruled that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole. 480 U.S. at 497. In Pennsylvania, legislation was passed that prohibited coal mining in areas beneath protected structures in order to prevent damage collapse. *Id.* at 470. Petitioners brought forth a takings claim for the money they were losing from not being allowed to mine. *Id.* The Court found 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.* Additionally, a denominator issue was brought before the Court in *Palazzolo.* In a near identical situation to this issue before this court, the petitioners argued that the uplands parcel of the land was distinct from the wetlands area, and therefore the parcels should be looked at separately. *Id.* at 609. Unfortunately, that argument was dismissed for lack of proper standing because it was not presented in the petition for certiorari.[1] *See Palazzolo*, 533 U.S. at 631.

Similarly, this court should look only at the "single strand" to determine if a taking has occurred. This is because the Court used the word "a" in *Lucas*, which means a single regulation, instead of using the plural tense, for example, stating that a plaintiff is able to *demonstrate that government regulations* totally deprive the landowner of the economic value of their land. The rule lacks the plural and therefore should not be read into what the Supreme Court has already clearly established. Furthermore, under *Lucas* a total deprivation of economic value has not occurred based on the denominator test. In this case, the land affected by the ESA regulation only applies to nine acres, not the entire parcel. As *Keystone* held, the court should

[1] The Court stated that "[t]his contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction." However, the Court denied reviewing this issue because "[t]he case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."

look at the one strand—in this case the one regulation, as applied to the entirety of the parcel. According to Supreme Court precedent, the Cordelia Lot should be looked at in its entirety which puts ten acres as the denominator and the "one strand" of nine acres as the numerator or the economic harm. As such, the ESA alone does not affect a taking because the regulation does not affect the entire parcel.

It would be unfair to combine a federal regulation with a state regulation to conclude a taking has occurred because the Supreme Court has never held that more than one regulation is to be considered. Additionally, based on precedent, the denominator should be the entire parcel and not just the nine acres that the ESA directly affects. Therefore, since the individual regulation does not affect the entirety of the parcel, FWS should not be liable because a takings has not occurred.

CONCLUSION

The ESA is a valid exercise of Congress's Commerce power because it is substantially related to commerce. Furthermore, under the regulatory takings analysis this court should find that Ms. Lear's takings claim is not ripe because she has not applied for a ITP. Ms. Lear's takings claim is also precluded because she has not been deprived of all economic value of the land. This court should consider all of Lear Island and not just the Cordelia Lot. Ms. Lear has the ability to earn $1000 annually from the Society. Additionally, the moratorium of natural destruction and the public trust doctrine also preclude the takings claim. Lastly, both regulations should not be combined to determine if a taking occurred because the Supreme Court stated that a taking occurs when one regulation has deprived the landowner of all economic value. Since a regulatory taking has not occurred, FWS should not be liable to Ms. Lear for the $10,000 judgment and the action should be dismissed.