Docket 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.

(Appeal from the United States District Court for the District of New Union in No. 112-CV-2015)

BRIEF OF DEFENDANT-APPELLANT BRITTAIN COUNTY, NEW UNION.

Oral Argument Requested

Attorneys for the Defendant-Appellant,
Brittain County, New Union

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of New Union. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (2012) because the claims arose under the laws of the United States, namely the Endangered Species Act ("ESA") and the Takings Clause of the Fifth Amendment. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2012). The notice of appeal was filed in a timely manner. Fed. R. App. 4(a).

STATEMENT OF THE ISSUES

I. Is the ESA's taking provision a valid exercise of Congress's Commerce power, as applied to the Karner Blue Butterfly found on the Cordelia Lot?
II. Is Cordelia Lear's takings claim ripe, despite failing to apply for an Incidental Taking Permit?
III. Is the relevant parcel in this takings analysis the entirety of Lear Island or the subdivided Cordelia Lot?
IV. Assuming the relevant parcel is only the Cordelia Lot, is Cordelia Lear entitled to compensation for a total taking when the property retains future economic value?
V. Assuming the relevant parcel is only the Cordelia Lot, does the $1,000 offer for wildlife viewings preclude a total taking claim for complete loss of economic value?
VI. Assuming the relevant parcel is only the Cordelia Lot, do public trust principles inherent in title preclude a takings claim based on the denial of the county wetlands permit?
VII. Assuming the relevant parcel is only the Cordelia Lot, should the Fish and Wildlife Service and Brittain County be jointly liable for a total taking, even though their respective regulations only restrict portions of the property?

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of New Union. Specifically, this case involves the application of the ESA and a municipal wetlands law to the property owned by Cordelia Lear ("Plaintiff"). The Plaintiff wants to build a single-family residence on the property. However, this property is inhabited by the Karner Blue Butterfly, an endangered species. As required by the ESA, the Fish and Wildlife Service ("FWS") directed the Plaintiff to apply for an Incidental Take Permit ("ITP") in order to build on the area of the

property inhabited by the butterfly. Instead of applying for an ITP, the Plaintiff created an alternative development plan ("ADP") in which she would build on another portion of her property containing wetlands. However, Brittain County denied the Plaintiff's permit to build on the wetlands because the proposed residence did not meet the County's "water-dependent use" requirements.

The Plaintiff filed this suit against the FWS and Brittain County. The Plaintiff waived any damages in excess of $10,000 in her takings claim against the United States, allowing her to proceed with her claim in the United States District Court for the District of New Union. In her lawsuit, the Plaintiff sought a declaration that the ESA is an unconstitutional exercise of Congressional legislative power. Alternatively, the Plaintiff claimed that both the FWS and Brittain County took her property without just compensation, thereby violating the Takings Clause of the Fifth and Fourteenth Amendments. The Plaintiff only brought a total takings claim and did not advance a claim for a partial or temporary taking. The parties endured a seven-day bench trial before the United States District Court for the District of New Union.

The Court determined that the ESA is a valid exercise of Congressional power under the Commerce Clause. Additionally, the Court awarded the Plaintiff damages of $10,000 against the FWS and $90,000 against Brittain County for an unconstitutional taking of the Plaintiff's property. All three parties appealed and now seek review from this Court.

STATEMENT OF FACTS

The facts of this case center on two separate regulations placed on the Plaintiff's property and how these regulations impact her property rights.

Lear Island History. Lear Island is a 1,000-acre island located in Brittain County, New Union. R. at 4. Lear Island sits within Lake Union, a large interstate lake traditionally used for interstate navigation. *Id*. In 1803, Congress granted Cornelius Lear title in fee simple absolute to

all of Lear Island, including lands underwater within 300 feet of the shoreline. R. at 4-5. In the early twentieth century, the Lear family built one causeway that connects Lear Island to the mainland of Brittain County. R. at 5. Cornelius Lear and his descendants have occupied the entire island since 1803, primarily using the land as a homestead. *Id*.

In 1965, King James Lear, owning the entirety of Lear Island, sought to divide the island into three parcels, one for each of his three daughters. *Id*. King Lear created the 550-acre Goneril Lot, 440-acre Regan Lot, and 10-acre Cordelia Lot. *Id.* King Lear then deeded the respective lots to his daughters, while reserving a life estate in each lot for himself. *Id*.

The Plaintiff came into possession of the Cordelia Lot in 2005, upon the death of her father, King Lear. *Id*. The Cordelia Lot is only accessible through the main portion of Lear Island. *Id.* The 10-acre Cordelia Lot consists of an access strip, a nine-acre open field covered in lupine flowers, and one acre of wetlands. *Id*. The wetlands are in a cove, accessible to open water, and were traditionally used as a boat landing. *Id.* The Lear family has kept the nine-acre lupine field, also known as the "Heath," open by annual mowing. *Id*. The Heath is inhabited by the Karner Blue Butterfly, an endangered species. R. at 6.

Karner Blue Butterfly Protection. The Karner Blue Butterfly obtained the protection of the ESA in 1992. *Id*. Although Karner Blue Butterflies are found in other states, the last remaining population in New Union lives on the Heath of the Cordelia Lot. *Id*. This subpopulation on the Heath is entirely intrastate and does not cross any State boundaries. *Id*. Accordingly, in 1992, the FWS designated the Heath as a critical habitat for the New Union subpopulation of Karner Blue Butterfly. *Id*.

FWS Permit Recommendation. In April 2012, the Plaintiff contacted the FWS to inquire whether she would need any permits to build a single-family residence on the Heath of the

Cordelia Lot. R. at 4, 6. The FWS advised the Plaintiff that any disturbance of the Heath, other than continued annual mowing, would constitute a "take" of an endangered species. R. at 6. However, the FWS informed the Plaintiff that it was possible to obtain an ITP under section 10 of the ESA. *Id*.

The FWS field agent advised the Plaintiff to include in her application a habitat conservation plan ("HCP") for the Karner Blue Butterfly. *Id*. The field agent also informed the Plaintiff that an approvable HCP would provide for additional contiguous lupine habitat on an acre-for-acre basis and a commitment to continue annual mowing of the remaining lupine fields. *Id*. Without the annual mowing, the natural ecological process would eliminate the Karner Blue Butterfly's habitat in approximately ten years. R. at 7.

Wetlands Protection. The Plaintiff elected not to pursue an ITP, and instead proposed an ADP that would not disturb the lupine fields. *Id*. The Plaintiff proposed filling one-half acre of the wetlands to create a building site, along with a connecting causeway to provide access to the shared mainland causeway. *Id*. Brittain County denied the wetlands fill permit, however, because the 1982 Brittain County Wetlands Preservation Law only allows wetlands to be filled for water-dependent uses. *Id*.

The fair market value of the Cordelia Lot is $100,000. *Id.* The Lot requires $1,500 in annual property taxes. *Id*. However, the Plaintiff has not sought a reassessment of the value of the Cordelia Lot since the denial of the permit under the Brittain County Wetlands Preservation Law. *Id*. Moreover, the Plaintiff rejected an offer from the Brittain County Butterfly Society of $1,000 per year for the right to conduct butterfly viewing outings during the summer. *Id*.

The Plaintiff filed a lawsuit against the FWS and Brittain County. *Id.* The Plaintiff claimed that the ESA is unconstitutional, and, in the alternative, brought a takings claim against

both the FWS and Brittain County. *Id.* The District Court held that the ESA is a valid exercise of Congressional power and awarded damages against the FWS and Brittain County for an unconstitutional taking. All three parties appealed and now seek review from this Court. R. at 4.

SUMMARY OF THE ARGUMENT

Under the Commerce Clause, Congress has the power to regulate three categories of activities among the States. Specific to this case is Congress's power to regulate activities that "substantially affect interstate commerce." Thus far, the Supreme Court has held that only activities which are "economic in nature" substantially affect interstate commerce. Because the ESA specifically prohibits the taking of endangered species, this Court must evaluate whether the taking of the Karner Blue Butterfly "substantially affects" interstate commerce. As this butterfly is neither economic nor commercial, there is no substantial effect on the commerce of the United States. Additionally, the ESA is a statute focused primarily on conservation and not economic activity. Therefore, Congress does not have the power to regulate this intrastate butterfly on the Plaintiff's property.

For a regulatory taking, a taking is not ripe until the regulating government agency issues a final decision. The ESA prohibits the taking of certain species, but will grant an ITP with an acceptable application. The approval or denial of an ITP is typically viewed as the final decision for ESA takings. Here, the Plaintiff did not apply for an ITP before she brought her takings claim. Further, the District Court erred in finding that: the FWS declared a policy denying the Plaintiff a permit; the permit would exceed the fair market value of the property; and the permit process is overly burdensome. Therefore, the Plaintiff's takings claim is unripe and should be barred.

In a takings analysis, courts are instructed to view the "parcel as a whole" to determine whether a taking warrants compensation. In applying the "parcel as a whole" rule, the court

should focus on the "reasonable investment-backed expectations" of the claimant and whether a given property is treated as a "single economic unit." Courts should also balance "fairness and justice" to ensure that both the rights of property owners and governmental interests are protected. Here, the Plaintiff has no reasonable investment-backed expectations in the Cordelia Lot because she had notice of the regulatory restrictions on the Lot when she received ownership of the property. Equally important, the Lear family has treated Lear Island as a single parcel for over 200 years. Thus, fairness and justice support viewing the entirety of Lear Island as the relevant parcel, and not solely the subdivided Cordelia Lot.

Even if this Court finds that the Cordelia Lot is the relevant parcel, a total taking has not occurred. To qualify as a total taking, the property must have 100% of its economic value physically taken or restricted. The regulations on the Cordelia Lot are at most a moratorium because the Plaintiff will have full use of the entire property in the near future. The Supreme Court has held that moratoriums are temporary takings and not total takings. Therefore, the Plaintiff's total takings claim fails.

Similarly, the Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing precludes a total takings claim. Total takings law is replete with "all-or-nothing" scenarios where a plaintiff lost nearly all the beneficial use of his or her land, and yet was not due compensation. Moreover, the $1,500 property tax does not negate the value of the Butterfly Society's offer. It is not the government's responsibility to ensure the marketability and profitability of a citizen's land. The offer is evidence that economically beneficial uses still exist. Further, courts have held that monetary benefits are not the only definition of "beneficial use." Accordingly, the present economic value of the property precludes the Plaintiff's total takings claim.

Even if the relevant parcel is solely the Cordelia Lot, public trust principles inherent in title preclude the Plaintiff's claim against Brittain County. The cove of the Lot provides access to Lake Union, which as a "navigable-in-fact-waterway," makes it part of the public trust. The District Court improperly held that Lake Union could not be included in the public trust in 1803. Further, the Supreme Court has held that the conveyance of title by Congress to the soil beneath a navigable waterway becomes void upon the admittance of a state into the Union, and is thereafter regulated according to state law. Therefore, the grant of the underwater lands to the Lears in 1803 became void when New Union became a state. Additionally, the Plaintiff's claim is precluded because filling public trust wetlands equates to a nuisance arising from the background principles of state law.

Finally, the ESA and the Brittain County Wetlands Preservation Law must be considered separately. In a novel question, the District Court applied what it incorrectly called the "prevailing" tort rule of joint liability to a takings case. However, most states apply either several liability or modified joint and several liability. Further, the damages here are easily divisible. Even if the Court finds a total taking, the County should only be liable for, at most, ten percent of the value of the property based upon the one acre restricted by the County wetlands law.

STANDARD OF REVIEW

A district court's conclusions of law are reviewed *de novo*. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Here, the facts upon which the District Court rendered its judgment are not in dispute. Rather, the County argues that the District Court misapplied the law in finding a total taking. Therefore, this Court should review the District Court's order *de novo*.

ARGUMENT

I. The Endangered Species Act Is an Unconstitutional Exercise of Congress's Commerce Power Because the Taking of the Brittain County Subpopulation of Karner Blue Butterfly Does Not Substantially Affect Interstate Commerce.

The Commerce Clause provides Congress with the limited power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. ART. I, § 8, CL. 3. In interpreting the Commerce Clause, the Supreme Court recognizes three categories of activity among the States that Congress may regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.[1] *See United States v. Lopez* 514 U.S. 549, 558-59; *United States v. Morrison*, 529 U.S. 598, 608-09. Thus far, the Supreme Court has held that only activities that are "economic in nature" qualify as "substantially affect[ing] interstate commerce." *Morrison,* 529 U.S. at 613.

For example, in *Lopez*, the Supreme Court held that the Gun Free School Zones Act, which prohibited the possession of firearms within 1,000 feet of a school zone, did not regulate an economic activity substantially affecting interstate commerce and therefore was unconstitutional. *Lopez,* 514 U.S. at 567-68. Similarly, in *Morrison*, the Supreme Court held that the Violence Against Women Act, which provided a federal civil remedy for victims of gender-based violence, did not regulate economic activity substantially affecting interstate commerce, and therefore was an unlawful exercise of the Commerce Power. *Morrison*, 529 U.S. at 627.

Here, the FWS asks this Court to find that the taking of the Karner Blue Butterfly on the Cordelia Lot is an economic activity that affects interstate commerce. Based on an examination of the Supreme Court's Commerce Clause jurisprudence, however, the FWS and District Court's

[1] It is undisputed that the ESA's taking provision is not regulating a channel or instrumentality of interstate commerce. Therefore, it must survive judicial scrutiny under the "substantial effects" analysis as described in *Lopez* and *Morrison*.

claims are in error. The regulated activity is the taking of the Karner Blue Butterfly, which is categorically a noneconomic activity. The Plaintiff taking this butterfly has little to no effect on interstate commerce. Additionally, the ESA is fundamentally a conservation statute, leaving Congress without constitutional authority to regulate this wholly intrastate butterfly.

A. The Regulated and Relevant Activity Is the Taking of the Karner Blue Butterfly and Not the Proposed Construction of a Private Residence.

Before determining whether an activity substantially affects interstate commerce, the activity at issue must be identified. *Morrison*, 529 U.S. at 610. To do so, courts are instructed to examine the activity "expressly regulated" by Congress. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). Here, the District Court improperly determined that "the relevant activity is the underlying land development through construction of the proposed residence." R. at 8. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069.

Other courts have entirely rejected this inference-based interpretation of "regulated activity." As the Fifth Circuit noted, "Congress, through [the] ESA, is not directly regulating commercial development." *GDF Realty*, 326 F.3d at 634. The ESA specifically states: "[W]ith respect to any endangered species . . . it is unlawful for any person . . . to . . . take any such species within the United States." 16 U.S.C. § 1538(a)(1)(B). Therefore, the plain language of the ESA requires this Court to determine whether taking an endangered species, i.e., the Karner Blue Butterfly, "substantially affects" interstate commerce.

Even if this Court finds that the regulated and relevant activity is the underlying land development, building one private residence on private property does not "substantially affect interstate commerce." *See, e.g., Jones v. U.S.*, 529 U.S. 848, 854-55 (2000). In *Jones*, the Supreme Court held that the proper inquiry is "the function of the building itself, and then a determination of whether that function affects interstate commerce." *Id.*

There is no evidence to support the District Court's claim that purchasing building materials or hiring contractors would require any interstate activities. R. at 8. Additionally, this Court must look at the function of the proposed single family residence. *Jones*, 529 U.S. at 854-55. One residential home on an island does not affect interstate commerce. To accept the opposite view would "effectually obliterate" the limiting purpose of the Commerce Clause, as "[t]here would be no limit to Congress' authority to regulate intrastate activities." *GDF Realty*, 326 F.3d at 634. Therefore, this Court should follow the plain language of the ESA and reverse the District Court's finding.

B. The Taking of a Noneconomic, Intrastate Butterfly Does Not Satisfy the *Lopez* and *Morrison* Test for Substantially Affecting Interstate Commerce.

After establishing that the regulated and relevant activity is the taking of the Karner Blue Butterfly, the Court must then determine whether the activity "substantially affects" interstate commerce. To do so, the Court must evaluate whether the: (1) regulation relates to an economic activity; (2) statute contains an "express jurisdictional element" which might limit the regulation's reach; (3) legislative history contains "express congressional findings regarding the effects upon interstate commerce;" and (4) connection between the regulated activity and substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 610-12. This balance is required to show "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557. Here, the District Court erred by relying upon factually and legally distinguishable decisions from other circuits, and failed to balance the four factors articulated in *Morrison*.

1. The Regulation Does Not Relate to an Economic Activity Because the Plaintiff's Taking of the Karner Blue Butterfly Is Not an Economic Activity.

The first factor a court must assess under *Lopez* and *Morrison* is whether the regulated activity includes an "economic endeavor." *Morrison*, 529 U.S. at 611. The Supreme Court has

upheld "congressional Acts regulating intrastate economic activity where [the Court] concluded that the activity substantially affects interstate commerce." *Lopez*, 514 U.S. at 559-60. Acts previously upheld include: regulations involving coal mining, credit transactions, restaurants utilizing substantial interstate supplies, and inns and hotels catering to interstate guests. *Id.*

Logic, however, cannot support finding that the taking of the Brittain County Karner Blue Butterfly is similar to any of the aforementioned economic activities. Yet, the FWS asks this Court to find that a mere butterfly, possibly never seen by any resident of New Union besides a member of the Lear family, is somehow an economic activity affecting the commerce of the United States. As the late Justice Scalia stated, "[A]lthough Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to 'pile inference upon inference' . . . to establish that noneconomic activity has a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 31 (2005) (Scalia, J., concurring). The Karner Blue Butterfly in Brittain County has little commercial or economic value, and is found on just nine acres of private land. Hence, the taking of this butterfly is categorically noneconomic.

2. No Jurisdictional Element Exists to Ensure that Regulated ESA Takings Have a Substantial Affect on Interstate Commerce.

The next factor this Court must consider is whether the ESA's takings provision contains an "express jurisdictional element which might limit [the regulation's] reach to . . . an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12. In other words, courts look to whether there is language in the statute limiting regulation only to activities that affect interstate commerce. *Id.* This jurisdictional element is necessary to help "establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Id*. at 612.

The ESA's statutory language makes it illegal for "any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States." 16 U.S.C. §1538(a)(1)(B). Plainly absent in the statute is any specific language stating that the endangered species must affect interstate commerce. *Id.* Therefore, the ESA's takings provision is missing a jurisdictional element with an "explicit connection" to interstate commerce.

3. The Intrastate Regulation of Taking the Brittain County Karner Blue Butterfly Is Not Supported by Legislative History.

The third factor is whether the ESA or the statute's legislative history contain "express congressional findings" to support regulating the activity's effects upon interstate commerce. *Morrison*, 529 U.S. at 612. Such findings help courts "evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no substantial effect is visible to the naked eye." *Id.*

The ESA's plain language makes no reference to the effects of endangered species on the economy or interstate commerce. *See* 16 U.S.C. §§ 1531 ("The Congress finds and declares that . . . these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."). Notably absent from this language is any use of the words "economic" or "commercial." *Id.* This is because the ESA is a statute focused on biodiversity and conservation, not the economy or regulation of interstate commerce. As one scholar stated, "[t]he biodiversity argument comes close to saying that because the earth is necessary for interstate commerce, anything that adversely affects the earth can be regulated by Congress." John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 177, 199 (1998). However, this is the exact type of over-regulation that the Supreme Court found unconstitutional in *Lopez* and *Morrison*. *See United States v. Patton*, 451 F.3d 615, 632 (10th Cir. 2006).

Furthermore, the FWS final rule listing the Karner Blue Butterfly as an endangered species contains no express findings that establish the butterfly's relationship with interstate commerce. *See* 57 Fed. Reg. 59,236 (Dec. 14, 1992). The FWS final rule simply summarizes the history of the Karner Blue Butterfly, lists certain characteristics of the animal, and future conservation measures. *Id.* Noticeably absent from the rule is any discussion about the economic market or substantial effect this butterfly has on interstate commerce. *Id.* As such, both the ESA and the FWS final rule are silent on any alleged effect this butterfly has on interstate commerce.

4. The Connection Between Takes of the Karner Blue Butterfly and Interstate Commerce Is Attenuated.

The final factor in the balancing test is whether the substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 612. In *Morrison*, the Court rejected aggregating the "costs of crime" and "national productivity" arguments because they would "permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Id.* (quoting *Lopez*, 514 U.S. at 564). In doing so, the Court explained that this type of aggregation would attenuate the claimed substantial effect on interstate commerce. *Id.* Similarly, if the Commerce Clause grants Congress the power to regulate the Karner Blue Butterfly, future courts would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. Therefore, the FWS and Plaintiff's argument in support of constitutionality is attenuated.

After properly considering the four factors articulated in *Morrison*, the balancing test shows that Congress has no power to regulate this taking under the Commerce Clause. The taking is not an economic activity; there is no jurisdictional element limiting regulation;

legislative history does not support the regulation; and the connection to interstate commerce is attenuated. Therefore, the District Court's holding should be reversed.

C. The ESA Is Not a Larger Regulation of Economic Activity Because the Primary Focus of the Statute Is Conservation.

Despite the clear answer provided by a proper analysis of *Lopez* and *Morrison*, other circuits have "piled inference upon inference" to find that the ESA is constitutional. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007). In these cases, both the *Salazar* and *Kempthorne* Courts misconstrued the Supreme Court's holding in *Gonzalez v. Raich*. 545 U.S. at 27-28. In *Raich*, the Supreme Court held that Congress, through the Controlled Substances Act ("CSA"), could regulate the growth of purely intrastate medical marijuana because it had a substantial effect on the regulation of the interstate supply, consumption, and market of marijuana. *Id.*

The ESA, however, is readily distinguishable from the CSA and *Raich's* limited holding, as the ESA is regulating takings that do not have a larger economic purpose. *See PETPO v. U.S. Fish and Wildlife Service*, 57 F. Supp. 3d 1337, 1346 (C.D. Utah 2014). Rather, the ESA's primary purpose is on conservation, not supply or consumption. *Id.* Applying *Raich* to the taking of the Utah Prairie Dog, a wholly intrastate species found on private land, the *PETPO* Court held that the Commerce Clause "does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce." *Id.* In *PETPO*, the Court found that ESA takes "differ[] significantly from *Raich* in one important way: takes of the Utah prairie dog on non-federal land would not substantially affect the national market for any commodity regulated by the ESA." *Id.* Similarly, the taking of the Karner Blue Butterfly on the Cordelia Lot would not substantially affect any national market or have any effect on interstate commerce.

Therefore, *Raich* supports a finding that Congress has no regulatory authority under the ESA over the Karner Blue Butterfly.

The Tenth Circuit once quipped, "[A]ny use of anything might have an affect on interstate commerce, in the same sense [that] a butterfly flapping its wings in China might bring about a change of weather in New York." *Patton*, 451 F.3d at 618. However, it is the duty of the judiciary to provide the appropriate checks and balances on Congress's attempts to overstep its constitutionally-granted powers. The Supreme Court has emphatically held that "the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Morrison*, 529 U.S. at 619. The balancing test established in *Lopez* and *Morrison* affirms that the role of regulating and protecting the Karner Blue Butterfly should be left to Brittain County, and to the State of New Union. To hold otherwise would "effectively obliterate the distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

II. The Plaintiff's Takings Claim Is Not Ripe Because She Failed to File an Appeal from a Final Incidental Taking Permit Decision.

For a regulatory taking, a claim "is not ripe until the government entity charged with implementing the regulation has reached a final decision." *Morris v. U.S.*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 472 U.S. 172, 186 (1985)). In the ESA context, "the final decision requirement has been held to mean that the takings claim is not ripe until an ITP has been applied for and, usually, denied." ROBERT MELTZ, CONG. RESEARCH SERV., RL31796, THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS "TAKINGS" 6 (2013).

The finality requirement is necessary to show to "a reasonable degree of certainty what limitations the agency will, pursuant to the regulations, place on the property." *Morris*, 392 F.3d at 1376. This means that "when an agency provides procedures for obtaining a final decision, a

takings claim is unlikely to be ripe until the property owner complies with those procedures." *Id.* Accordingly, thus far, "no court has been willing to excuse a plaintiff's failure to even *apply* for an ITP." MELTZ, CONG. RESEARCH SERV., at 6 (emphasis in original).

A. The Plaintiff Failed to Follow the ESA Permit Procedures Because She Never Applied for an ITP.

The ESA prohibits the "take" of certain listed species, but grants the Secretary the power to permit "incidental takings." *See* 16 U.S.C. §§ 1538-1539. To receive an ITP, "a person wishing to engage in acts that might effect a 'take' of a listed species must file an application [with the FWS] that includes a Habitat Conservation Plan ('HCP')." *Morris*, 392 F.3d at 1374; *see also* 50 C.F.R. § 222.307 (outlining the permit process under the ESA for an incidental taking). This is not an option, but rather is a requirement under the ESA to ensure the proper procedures are followed. *See* 16 U.S.C. § 1539 (a)(1)(B); *Morris*, 392 F.3d at 1377-78. Filing for an ITP also allows the FWS an opportunity to work with the property owner to develop an appropriate plan. *Morris*, 392 F.3d at 1377-78.

Here, the Plaintiff never filed an ITP, therefore rendering her takings claim premature. The District Court found that the government declared a policy denying the Plaintiff an ITP by requiring a condition that "would be impossible for [the] Plaintiff to satisfy." R. at 9. The District Court also granted the Plaintiff a "futility exception" based on the premise that the permit process would exceed the value of her property and would be burdensome. *Id.* However, both findings by the District Court are in error.

B. The FWS Never Declared a Policy Denying the Plaintiff a Permit.

The District Court incorrectly found that the FWS "declared a policy" denying the Plaintiff a permit. The Court claimed that the FWS recommendation letter constituted a condition that the Plaintiff could not satisfy. Rather, the letter simply advised the Plaintiff that an

acceptable HCP would include replacing disturbed lupine field with contiguous lupine field. *Id.* Relying on *Palazzolo v. Rhode Island*, the District Court held that there was no need for the Plaintiff to apply for an ITP, as this application would be futile. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

While the Supreme Court has held that federal ripeness rules do not require the submission of "further and futile applications with other agencies," the facts of the *Palazzolo* case are easily distinguished from the present case. In *Palazzolo*, the plaintiff applied a total of three times for a permit to build on wetlands with local county restrictions. *Id.* at 618-19. After the third application was denied, the plaintiff instituted a takings claim. *Id.* The Supreme Court rejected the county's argument that the third denial was not a final decision, and held that any further applications would be futile. *Id.* at 626. Here, the District Court is attempting to analogize a recommendation in a letter to the rejection of three applications. However, there are clearly factual and legal differences.

The Supreme Court has held that the permit process is designed to help property owners receive permission to use the property as desired. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985). In *Riverside Bayview*, the Court stated:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

Id. Thus, the FWS letter was not a final decision but rather a recommendation to the Plaintiff to pave the way for the approval of her ITP. The Plaintiff claims that the recommendation "would be impossible to satisfy" as she is estranged from her sister, thereby eliminating the "contiguous land" option. R. at 9. However, there is no evidence that the Plaintiff apprised the FWS of the circumstances, such that an alternative plan could be formulated. *Id.* The Plaintiff received the

recommendation from the FWS, and decided unilaterally to pursue an ADP. Had the Plaintiff informed the FWS of her alleged limitation to the property, a variance may have been granted or the FWS could have provided an alternative recommendation.

C. The "Futility Exception" Is Not Applicable Because the Cost of the Permit Does Not Exceed Fair Market Value of the Property and Is Not Inherently Burdensome.

The District Court erred by finding that the permit process would exceed the fair market value of the property and be overly burdensome. First, "[t]he cost of an ITP application is *unknowable* until the agency has had some meaningful opportunity to exercise its discretion to assist in the process." *Morris*, 392 F.3d at 1377 (emphasis added). In *Morris*, the plaintiffs contacted the National Marine Fisheries Service ("NMFS") to visit and evaluate whether harvesting protected trees would constitute a taking. *Id.* at 1374. The NMFS agent advised the plaintiffs that the action would effect a taking, and therefore they should apply for an ITP. *Id.* The plaintiffs obtained an estimate which stated that the cost of the ITP would exceed the value of the property, and immediately filed a takings action. *Id*. In rejecting the plaintiffs' claims of a taking, the *Morris* Court stated that "the [plaintiffs'] claim cannot ripen until the agency refuses to exercise its discretion, or exercises its discretion in a manner that makes reasonably clear or final the effect the regulation will have on the [plaintiff's] application." *Id.* at 1377-78.

Here, the FWS was never given the opportunity to fully exercise its discretion to assist in the process of formulating an ITP. It is thus unknown what the FWS could have done to reduce any alleged costs of the ITP. Therefore, the "futility exception" does not apply when the costs of the Plaintiff's ITP are "unknowable." *Id.* at 1377.

Additionally, the process of obtaining an ITP under the ESA is not "inherently burdensome." The *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* directs the FWS to assist the applicant and advise the property owner on "key policy

and substantive issues."[2] If allowed, the FWS is to play an active role to ensure that the ITP process is as palatable as possible. The Plaintiff, however, never gave the FWS the opportunity to reduce or eliminate the claimed burden, as she immediately pursued an ADP.

The Plaintiff failed to follow ESA procedures and filed a takings claim prematurely. These procedures would have provided the FWS with the adequate information it needed to determine what actions were appropriate concerning the Plaintiff's property. While the District Court granted the Plaintiff an exception, "[t]he futility exception . . . applies only where the agency's conduct operates as a constructive denial of a permit, not where the permitting process is merely complex, arduous, or expensive." *Morris*, 392 F.3d at 1375. Therefore, the District Court erred by granting improper exceptions to the general rule of ripeness.

III. The Relevant Parcel for the Takings Analysis Is the Entirety of Lear Island Because the Plaintiff Has No Reasonable Investment-Backed Expectations and Has Always Treated Lear Island as a Single Economic Unit.

The District Court incorrectly determined that the relevant parcel for this taking is the Cordelia Lot, and not all of Lear Island. The District Court relied on the "formal subdivision" of Lear Island into three separate parcels, and treated this fact as dispositive. However, the Supreme Court has flatly rejected a cookie-cutter approach to determining the relevant parcel. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) ("[The Court focuses on] the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."). Instead, courts should evaluate the "entire property interest at stake rather than individual property interests to determine if a regulatory taking has occurred." Laura J. Powell, *The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases*, 89 WASH. L. REV. 151, 160 (2014).

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[2] *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (Nov. 4, 1996), http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf. *See* pages 1-15 and 2-3.

In applying the "parcel as a whole" rule, courts must focus on the "reasonable investment-backed expectations" of the claimant and whether a given property is treated as a "single economic unit." *Penn Central*, 438 U.S. at 123-25. Additional relevant factors include: "(i) the degree of contiguity between property interests; (ii) the dates of acquisition of property interests; (iii) the extent to which a parcel has been treated as a single income-producing unit; and (iv) the extent to which the regulated lands increase the value of the remaining lands." *Brace v. U.S.*, 72 Fed. Cl. 337, 348 (2006), *aff'd* 250 Fed. Appx. 359 (Fed. Cir. 2007), *cert. denied* 552 U.S. 1258 (2008). These factors are not decisive by themselves, but are "weighed together, taking into account all relevant circumstances." Powell, *The Parcel as a Whole*, 89 WASH. L. REV. at 160. However, the "regulation's economic impact" often determines whether a regulatory taking has occurred. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact.")

In order to balance the government's interests with private property interests, the Supreme Court relies on overarching principles of "fairness and justice" to guide the *ad hoc* decision. *Penn Central*, 438 U.S. at 123-24. When appropriately balanced, these economic and fairness factors demonstrate that there were no reasonable investment-backed expectations for the Cordelia Lot. Additionally, the three subdivided lots on Lear Island have all been treated as one parcel and a single economic unit. Therefore, the appropriate denominator for the takings analysis is the entirety of Lear Island, and not the Cordelia Lot.

A. The Plaintiff Has No Reasonable Investment-Backed Expectations for the Cordelia Lot Because She Had Notice of the Regulatory Restrictions and Made No Financial Investment in the Lot.

For any regulatory takings claim to succeed, "the claimant must show that the government's regulatory restraint interfered with [her] investment-backed expectations in a manner that requires the government to [provide] compensat[ion]." *Good v. U.S.*, 189 F.3d 1355,

1360 (Fed. Cir. 1999) (quoting *Loveladies Harbor v. U.S.*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)). As the Supreme Court has stated, "[a] landowner cannot demonstrate a taking 'simply by showing [it was] denied the ability to exploit a property interest.'" *Penn Central*, 438 U.S. at 130. These investment-backed expectations must be "reasonable and based on existing conditions," and "not merely a unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984).

For example, in *Good v. United States*, the Court denied compensation to a property owner who, after receiving several permits to fill wetlands on his property, was denied a renewal of a wetlands fill permit under the Endangered Species Act. *Good*, 189 F.3d at 1363. Despite the owner purchasing the property with the intention to develop it, the Court determined that:

> the property owner had notice over a nearly twenty-year period of an existing regulatory scheme that made the proposed project potentially difficult or impossible to complete. [Therefore], the owner had not demonstrated that he held reasonable investment-backed expectations.

Id. Similarly, the Plaintiff here cannot claim she had reasonable investment-backed expectations to build on the Cordelia Lot. The Plaintiff's fee simple rights to the Cordelia Lot did not vest until her father passed away in 2005. At that time, the Brittain County wetlands regulation had been in place for twenty-three years, and the Karner Blue Butterfly had been listed under the ESA for thirteen years. As in *Good*, these regulatory schemes put the Plaintiff on notice that the right to build on the property would likely be restricted. *Good*, 189 F.3d at 1361.

Additionally, the Plaintiff made no economic investment in the ten-acre parcel. Lear Island was granted by Congress in 1803, and was inherited by her father, who then subdivided lots to his daughters. With no personal financial stake in the Cordelia Lot, any compensation would amount to a "windfall," which should be viewed with special scrutiny. *Id.*; *see also*

Palazzolo, 533 U.S. at 635 ("[S]ome property owners may reap windfalls and an important indicium of fairness is lost.") (O'Connor, J., concurring).

B. The Plaintiff and Her Family Have Always Treated Lear Island as a Single Economic Unit.

The Supreme Court has held that where legally separate parcels are treated as a single economic unit, "together they may constitute the relevant parcel." *Keystone Bituminous Coal Ass'n v. DeBenedicts*, 480 U.S. 470, 497 (1987). As other courts have aptly noted, "[T]he United States Supreme Court has never endorsed a test that segments a contiguous property to determine the relevant parcel." *Zealy v. City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996). Rather, the Court has consistently held that a property in such a case "should be considered as a whole." *Id.*

For example, the Massachusetts Court of Appeals has previously held that the "parcel as a whole" rule required the Court to examine an entire thirty-eight lot parcel, and not just the legally subdivided parcel that was unbuildable due to a wetlands by-law, as all of the lots were contiguous and used together. *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*, 673 N.E.2d 61, 70-71(Mass. App. Ct. 1996). In a similar case, the same Court held that even though one of eleven legally subdivided lots could not be developed, there was not a taking because there was still "economically beneficial use of the original parcel as a whole." *Zanghi v. Board of Appeals of Bedford*, 807 N.E.2d 221, 224 (Mass. App. Ct. 2004).

It is undisputed that Lear Island has been treated as one parcel for over 200 years. Since 1803, Cornelius Lear and his descendants have occupied the entirety of Lear Island. R. at 5. The family built one causeway that connects the island to the mainland of Brittain County. *Id.* Without this causeway, none of the subdivided lots would have value, much less access to society. Similarly, the Cordelia Lot is only accessible through the main portion of Lear Island. *Id.* Just like the Courts in *FIC Homes* and *Zanghi*, this Court should not view the subdivision of

Lear Island as dispositive. Instead, the Court should treat the parcel in the same way the Plaintiff and her family have: as one economic unit with access to all family members.

C. Justice and Fairness Support Viewing the Entirety of Lear Island as the Relevant Parcel.

Finally, in making a Fifth Amendment takings determination, courts must assess whether a claimant's proffered conception of the "parcel as a whole" comports with principles of "fairness and justice." *Penn Central*, 438 U.S. at 123-24. The Supreme Court stated:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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.

Armstrong v. U.S., 364 U.S. 40, 49 (1960). *Armstrong* supports the idea of a "balancing test within a balancing test." Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 574-75 (2007). In other words, courts should not only consider the relevant parcel as a whole, but also balance "fairness and justice" throughout the analysis. *Id.* The Supreme Court reiterated the importance of achieving "fairness and justice" in both *Palazzolo* and *Tahoe-Sierra*. *See Palazzolo*, 533 U.S. at 633 (discussing the balancing role of "fairness and justice"); *see also Tahoe Sierra*, 535 U.S. at 336 (discussing whether "fairness and justice" would support categorical takings rules).

The District Court's determination that the Cordelia Lot is the relevant parcel for this taking clearly violates the concepts of "fairness and justice." The Lear family has enjoyed the benefits of owning Lear Island for more than 200 years. Moreover, the Island given to the family by Congress is worth approximately $10,000,000.[3] R. at 4. The regulations placed on 1% of the property serve societal interests in both protecting Endangered Species and preserving the

[3] The fair market value of the Cordelia Lot is $100,000. R. at 5. Therefore, the entirety of Lear Island is worth approximately $10,000,000 based on a $10,000 per acre calculation.

County's wetlands. While it is unfortunate that the Karner Blue Butterfly populates the location in which the Plaintiff would like to build a house, this fact does not support treating the Lot as the denominator in a takings analysis. Based on the Supreme Court's takings jurisprudence, the relevant parcel is clearly Lear Island. Any other interpretation would be "unfair" and "unjust."

IV. Assuming the Relevant Parcel Is Only the Cordelia Lot, the Plaintiff's Total Takings Claim Fails Because the Lot Retains Future Economic Value.

Even if this Court finds that the Cordelia Lot is the relevant parcel, a total taking has not occurred because the lot will be developable in the future, thereby retaining economic value. In a takings case, there are two types of analysis: (1) a total taking under *Lucas*; and (2) a temporary or partial taking under *Penn Central*. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central*, 438 U.S. 104 (1978). According to the Plaintiff and the District Court, since the Plaintiff cannot build a home on her property today, she deserves to be compensated for the lost value of her entire property. However, this approach was unequivocally rejected by the Supreme Court. *See Tahoe-Sierra*, 535 U.S. at 341.

In *Tahoe-Sierra*, the Court held that a 36-month building moratorium was not a total taking because it did not deny the property owner of all economic value. *Id.* at 339. The Court stated that this type of moratorium was, at most, a temporary taking and not a total taking. *Id.* The Court reaffirmed that any taking that results in less than a 100% loss of economic value would not meet the requirements under *Lucas*. *Id.* at 330. Instead, these temporary takings claims should be brought and analyzed under the *Penn Central* balancing test. *Id.* ("Anything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*."). Since the plaintiffs in *Tahoe-Sierra* failed to argue that a temporary taking has occurred, the Supreme Court refused to apply a *Penn Central* balancing test. *Id.* Instead, the

Court held that, under *Lucas*, the plaintiffs did not suffer a taking as they did not lose 100% of the economic value because they could use the property in the future. *Id.* at 341.

A. The Building Moratorium Does Not Deprive the Plaintiff of All Economic Value Because the Cordelia Lot Is Developable in the Future.

The District Court attempted to rationalize a total taking by noting that the moratorium in *Tahoe-Sierra* was shorter than the proposed moratorium for the Plaintiff. Admittedly, the District Court is correct in finding that the moratorium would likely last longer than the 36 months in *Tahoe-Sierra.* However, the Supreme Court has refused to formulate a rule that moratoriums lasting longer than a certain amount of time would count as total takings. *Id.* at 321. Instead, the Court held that a property "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332.

Applying the holding in *Tahoe-Sierra*, the building moratorium on the Cordelia Lot clearly does not deprive the Plaintiff of all economic value. The Plaintiff has the ability to use and develop the Cordelia Lot in the future, once the moratorium is naturally lifted through the ecological process. Thus, the Plaintiff's total takings claim brought under *Lucas* fails to meet the requirement for total loss of all economic value.

B. The Plaintiff Failed to Bring a Temporary Taking Claim Under *Penn Central.*

In rejecting the total takings claim under *Lucas*, the *Tahoe-Sierra* Court noted that its holding did not preclude an analysis of a temporary taking under *Penn Central. Id.* at 317-18. However, the *Tahoe-Sierra* Court did not apply the *Penn Central* balancing test because the plaintiffs failed to bring a temporary takings claim. *Id*. Similarly, the Plaintiff in this case failed to bring a temporary or partial takings claim under *Penn Central*. R. at 8 ("Plaintiff does not advance a claim for a partial regulatory taking based on *Penn Central*."). Therefore, this Court should only analyze the taking under the *Lucas* rule.

Even if this Court undertakes a *Penn Central* analysis *sua sponte*, despite the Plaintiff's failure to raise the issue, a temporary takings claim would fail. As discussed above, the Plaintiff cannot establish the necessary "reasonable investment-backed expectations" that is the crux of a temporary taking. *Lingle*, 544 U.S. at 540. Since the Plaintiff is not claiming a partial or temporary taking, this Court should heed the Supreme Court's advisement in *Tahoe-Sierra* and not find a temporary taking where one has not been properly alleged. Hence, the Plaintiff's total takings claim against Brittain County and the FWS fails.

V. Assuming the Relevant Parcel Is Only the Cordelia Lot, There Is Not a Total Takings Because the Cordelia Lot Has Current Economic Value.

Even if the relevant parcel is only the Cordelia Lot, the Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing precludes a takings claim for complete loss of economic value. The Plaintiff was not deprived of *all* beneficial use of her land, even if she cannot develop the land in the manner that she had hoped.

A. The Plaintiff is Not Deprived of All Beneficial Use Because the Cordelia Lot Can Be Used in Other Economic Ways.

A total taking under *Lucas* may only be found in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017 (emphasis in original). Importantly, the *Lucas* Court went so far as to suggest that not even a "95%" diminution in property value may suffice. *Id.* at 1019 n.8. Further, the Supreme Court has repeatedly reaffirmed that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation *permanently* deprives property of *all value*." *Tahoe-Sierra*, 535 U.S. at 332 (emphasis added). Accordingly, jurisdictions have been generally unforgiving with the application of the *Lucas* rule to property owners, rarely finding that a total taking has occurred. Patricia E. Salkin, *Total Takings Cases and Principles*, 2 Am. Law. Zoning § 16:7 (5th ed.).

The reality is that, in some cases, the landowner with a 95% loss will get nothing, while the landowner with a total loss will recover in full. *Lucas*, 505 U.S. at 1019 n.8. The Court is clear that "takings law is full of these 'all-or-nothing' situations." *Id*. For example, no total taking occurred where a company's land lost 91% of its value after its mining permit was revoked. *Rith Energy, Inc. v. U.S.*, 270 F.3d 1347, 1351-53 (Fed. Cir. 2001). In a New York state case, the court held that certain wetlands regulations, which decreased the value of the property by 95% and left a "bare residue" of the property's value, did not constitute a categorical taking under *Lucas*. *Friedenburg v. New York State Dept. of Environmental Conservation*, 767 N.Y. S.2d 451, 460 (App. Div. 2003).

The Supreme Court also suggests that it is incorrect to assume that "the only uses of property cognizable under the Constitution are developmental uses." *Lucas*, 505 U.S. at 1019, n.8. Contrarily, there are "a number of noneconomic interests in land. . . ." *Id.* For example, the Seventh Circuit held that a city landmark ordinance did not deprive a property owner of "all economically beneficial or productive use of its property." *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 368 (7th Cir. 1998). The Court found that, even with a landmark designation and denial of demolition permits, the property owner could alternatively use the property as its office or a museum. *Id*. at 368.

Here, the Plaintiff asserts that her property has no value unless there is a house on the Cordelia Lot. However, the Butterfly Society's offer demonstrates that the Plaintiff's land has current value, even if it is not in the manner in which she hoped. Additionally, the Lot can be used for other aesthetic or recreational purposes. While there may be a decrease in property value, this alone does not meet the total loss requirement of *Lucas.* Specifically, the Plaintiff still maintains ownership of a piece of property that can provide her income. Therefore, the current

economic uses of the Cordelia Lot prelude the Plaintiff's total takings claim.

B. The Property Tax Does Not Negate the Lot's Current Economic Value Because It Is a Fixed Cost of Property Ownership.

The amount of the property tax does not negate the current economic value of the Cordelia Lot. The property tax is simply a cost of owning the property; it is unavoidable. State courts, which typically hear more takings cases than federal courts, have noted that "[t]he takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority." *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994). Further, the Texas Supreme Court explained that "[p]urchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." *Id*.

This Court should apply the *Taub* holding to the Plaintiff's case, as it is not the responsibility of the FWS or Brittain County to ensure the marketability or profitability of her land. With one monetary offer for butterfly exhibits, it is possible that the Plaintiff could obtain additional offers, further solidifying the monetary value of her property. Frankly, without the offer, the Plaintiff would still pay $1,500 per year in property tax, as she has been doing for almost a decade. Thus, the Butterfly Society's offer provides the Plaintiff with current economic value for the land, along with its aesthetic and recreational uses. Therefore, a total takings claim under *Lucas* is precluded.

VI. Assuming the Relevant Parcel Is Only the Cordelia Lot, the Plaintiff's Claim Fails Because Public Trust Principles Inherent in Title Preclude a Taking.

Even if the relevant parcel is only the Cordelia Lot, public trust principles inherent in title preclude the Plaintiff's claim for a taking based on the denial of a county wetlands permit. The District Court incorrectly held that no public trust reservation existed in 1803, the Congressional grant was superior to a subsequent "equal footing" claim by New Union, and that background

principles of state property law did not preclude a takings claim against the County. R. at 10. However, all of these findings were in error.

A. The Land Below Lake Union Is Part of the Public Trust Because Lake Union is Navigable-in-Fact.

Under the public trust doctrine, navigable waterways are "held in trust for the people of the state, that they may enjoy the navigation of the waters." *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). In the United States, the public trust doctrine applies to navigable waters that are non-tidal as well as tidal. *See PPL Mont. LLC v. Montana*, 132 S. Ct. 1215, 1226-27 (2012).

In determining whether a waterway is navigable, and thus whether the land below the water is subject to the public trust doctrine, courts employ the Supreme Court's four-part "navigability-in-fact" test. *See The Daniel Ball*, 77 U.S. (10 Wall.) 557, 562 (1870). Under that test, waterways are navigable in fact if they are used:

> [1] in their ordinary condition, [2] as highways for commerce, over which trade and travel are or may be conducted [3] in the customary modes of trade and travel on water . . . [4] when they form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on.[4]

Id.

Here, the Plaintiff's property meets the requirements for the navigability-in-fact test. First, Lake Union meets the "trade or travel" prong as it has traditionally provided an interstate commercial waterway for the transportation of produce from the island to the mainland. R. at 5. Additionally, the wetlands that the Plaintiff desires to fill were historically open water used as a boat landing for said commercial transport. *Id*. Second, the "customary modes" prong has been interpreted to mean that a waterway must be capable of navigation simply by a small boat or

[4] The Supreme Court later eliminated the "ordinary condition" requirement in *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 407 (1940).

canoe, which would certainly have been a mode of commercial transportation when the island was granted in 1803, and for much of its history. *See*, *e.g.*, *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002). Lake Union and the cove meet this prong because the shallow cove of Lake Union has historically been used for a boat landing. R. at 5. Moreover, the depth needed for navigability in 1803 was not great, as most boats were of much smaller size than boats typically used for commerce today. Finally, the "highway for commerce" prong is clearly met, as the cove of the Cordelia Lot originates from and flows into the navigable, interstate waters of Lake Union. *Id.*

The Plaintiff further asserted that Lake Union, as a non-tidal water, was not included in the public trust at the time of the 1803 grant. In determining that the Plaintiff's claims to lands under water within 300 feet of the shoreline did not fall within public trust limits in 1803, the District Court relied upon a collection of state court cases cited in *PPL Montana*, 132 S. Ct. at 1227. However, the District Court's reliance upon the cases cited within *PPL Montana* is inapposite.

First, while the state court cases cited in *PPL Montana* represent the dates at which *those* particular states adopted the public trust doctrine for non-tidally-influenced waters, they do not demonstrate that other states, including New Union, had not previously adopted the doctrine. In fact, the Court in *PPL Montana* simply suggested that after the American Revolution in the 1770s, states began changing their standards for the public trust away from the tidal requirement. *Id*. at 1227. Further, the District Court failed to consider the Supreme Court's navigability-in-fact test, which clearly demonstrates that the lands underwater within 300 feet of the shoreline would have been considered navigable at the time of the Congressional grant, and thus limited by public trust principles. Since Lake Union is navigable-in-fact and non-tidal waters are included in the

public trust, the land below Lake Union is properly subject to the public trust. *Id.* at 1226.

B. The 1803 Congressional Grant of the Land Below Lake Union to the Lear Family Is Void Under the "Equal Footing" Doctrine Because Only the State of New Union Had Authority to Grant the Underlying Lands.

If the subject land is determined to be below a navigable waterway and thus part of the public trust, any conveyance of title by Congress to the underlying soil became void upon the state's accession to the union. *See Shively v. Bowlby*, 152 U.S. 1 (1892). In *Shively*, the defendant brought suit to quiet title to lands below the high-water mark on the Columbia River that he had acquired pursuant to a purchase from the State of Oregon. *Id*. at 2. The defendant claimed that the grant held by the plaintiff from the United States passed no title or right as against a subsequent deed from the state to the defendant. *Id*. The Plaintiff appealed the judgment of the Oregon Supreme Court, which declared that the land belonged to the defendant. *Id*. at 8. The Supreme Court affirmed the decision, holding that navigable waters and the soils beneath them remain public highways. *Id*. at 58. Moreover, the Court affirmed that once a state accedes to the union, all grants and laws applicable to the former territory become null and void, and all lands become property of the state, to be regulated and disposed of according to state law. *Id.*

In arriving at its holding, the *Shively* Court explained that:

> [g]rants by Congress of portions of the public lands [below navigable waterways] within a Territory to settlers thereon, though bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use…to the sovereign control of each State.

Shively, 152 U.S. at 58. Thus, any title to the lands below Lake Union that were conveyed to the Lears by the 1803 Congressional grant became null and void upon the accession of New Union as a state – regardless of when that occurred. In order for the Lears' title to be valid, they must demonstrate a right to the land conveyed to them by New Union. There is no evidence on the

record that the Lears ever received title from the state, and, therefore they show no valid claim to the land beneath Lake Union.

C. *Lucas* Precludes Compensation for the Plaintiff's Claim Because Filling Public Trust Wetlands Constitutes a Nuisance.

While the holding in *Shively* nullifies the Plaintiff's claim of title to lands below Lake Union, *Lucas* also holds that compensation is not required for development limits that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1004. The Supreme Court has stated that "zoning and permit regimes are a longstanding feature of state property law," as "[z]oning regulations existed as far back as colonial Boston." *Tahoe-Sierra*, 535 U.S. at 352. Additionally, environmental law scholars generally agree that wetland protection regulations qualify as longstanding features of state property law, as English law sought to prevent the destruction of wetlands even before the colonies enacted zoning regulations. *See, e.g.,* Michael C. Blumm, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 358 (2005).

Collectively, the judicial system's traditional emphasis on the importance of wetlands to the environment and the Supreme Court's recognition of background principles of state property law show that the County's denial of a wetlands fill permit constitutes a restriction already placed upon land ownership at the time of the Congressional grant. *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 672 (5th Cir. 1992) (noting that the destruction of wetlands could produce an "environmental catastrophe" and that wetlands are critical to flood control, water supply, water quality, and wildlife). Accordingly, denials of dredge and fill permits are not subject to takings liability because such denials simply prevent the equivalent of a nuisance. *See* Blumm at 337 (*citing* Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The*

Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule," 29 ENVTL. L. 939, 971). For this reason, Brittain County's regulation denying the Plaintiff a fill permit is immune from any *Lucas* takings claim.

VII. Assuming the Relevant Parcel Is Only the Cordelia Lot, FWS and Brittain County Are Not Jointly Liable Because the Regulations Are Clearly Divisible.

Even if the relevant parcel is only the Cordelia Lot, the ESA and the Brittain County Wetlands Preservation Law must be considered separately. The two regulations cover different portions of the Lot and were enacted ten years apart. The ESA is the regulatory scheme that conflicts with the Plaintiff's desire to build on the Cordelia Lot. The Wetlands Preservation Law, however, does not prohibit any construction on the Heath, which makes up 90% of the Cordelia Lot. Accordingly, the County's regulation does not deprive the Plaintiff of all economic value. Therefore, the FWS and Brittain County should not be held jointly and severally liable.

A. The District Court Erred by Applying a Minority Rule of Tort Law to the Cordelia Lot Because Most Jurisdictions Apply Several or Modified Joint and Several Liability.

In an attempt to answer a novel question of law, the District Court chose to apply a doctrine of tort law to this taking claim. However, the District Court erred by claiming that joint and several liability is the "prevailing" rule. Rather, the trend in the United States has shown a move away from pure joint and several liability. *See Joint and Several Liability*, 1 Comparative Negligence Manual §1:24 (3d ed.). Currently, only eight states apply pure joint and several liability, where the plaintiff may collect any portion of the judgment from either defendant. *See* American Tort Reform Association, *Joint and Several Liability Rule Reform.*[5] However, fourteen states apply pure several liability while twenty-eight states apply modified joint and several liability. *Id*. Most states shy away from pure joint and several liability, as it often creates unfair

[5] American Tort Reform Association, *Joint and Several Liability Rule Reform*, http://www.atra.org/issues/joint-and-several-liability-rule-reform (last visited Nov. 17, 2016).

liabilities amongst the tortfeasors.

The District Court stretched tort liability, *sua sponte*, into property and takings law. This Court, however, should not apply a rule that is in fact the minority rule across the country. Specifically, the County regulation only restricts about one acre of wetlands within the entire ten-acre property. If the regulation were actually a taking, it equates to only a 10% liability for the County. In states applying a form of modified joint liability, which is the predominant rule, it would be extremely unlikely for a court to require a party with 10% fault to pay 90% of the overall damages. *See, e.g.*, *Narkeeta Timber Co., Inc. v. Jenkins*, 777 So.2d 39, 42 (Miss. 2000) (In a state applying modified joint liability, the court held that a defendant who was 20% at fault could not be held liable for more than 50% of the judgment).

B. The Alleged Damages Should Be Apportioned Because the Regulations Are Divisible.

Even if this Court finds a total taking, the damages are easily divisible and should be apportioned. The Restatement Second of Torts § 433A provides:

> (1) Damages for harm are to be apportioned among two or more causes where
> (a) there are distinct harms, or
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

Id. The Restatement supports the idea of fair and equitable apportionment of fault when damages are clearly divisible.

In the present case, the county wetlands regulation was in place ten years before the ESA's regulation and does not restrict the same portion of the property. Therefore, a reasonable basis for determining the liability for each defendant is to allot the damages based on the percentage of the Cordelia Lot that each law restricts. *See, e.g., Roebuck v. Duprey*, 274 A.D.2d 620, 621 (N.Y. 2000) (In a modified joint liability state, "while it is sometimes the case that tortfeasors who neither act concurrently nor in concert may nevertheless be considered jointly

and severally liable, this occurs [only] in those instances where certain injuries are 'incapable of any reasonable or practicable division or allocation among multiple tort-feasors.'"). Under this approach, the FWS would be liable for 90%, while Brittain County would be liable for 10%.

The District Court played the role of the Plaintiff's lawyer and applied a minority rule of tort law to a property takings case, without regard to the fairness towards the Defendants. The fact that the Plaintiff forfeited any damages over $10,000 against the FWS is a procedural bar that she elected to place upon herself. This Court should not punish the County for the Plaintiff's decision to forfeit possible damages. Accordingly, the ESA and the County wetlands law should be considered separately, which precludes a total takings claim. In the alternative, this Court should reverse the $90,000 judgment against the County.

CONCLUSION

The ESA is an unconstitutional violation of Congressional power under the Commerce Clause because the Karner Blue Butterfly does not substantially affect interstate commerce. In the alternative, the Plaintiff's takings claim fails because it is not ripe, as she failed to apply for an ITP. Additionally, the parcel as a whole rule supports viewing Lear Island as the relevant parcel for the takings analysis, and not the subdivided Cordelia Lot. If the Court finds that the Cordelia Lot is the relevant parcel, a total taking has not occurred because the lot retains future economic value. The property also retains current economic value through the $1,000 annual payment from the Butterfly Society. Furthermore, public trust principles inherent in title preclude a taking against the County. Finally, the ESA and County Wetlands regulations are clearly divisible, and any alleged damages should be apportioned. Therefore, this Court should reverse the order of the District Court, and find in favor of the positions asserted by Brittain County.

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Respectfully submitted,
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