Team No. 16

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 16-0933

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-RNR

BRIEF FOR CORDELIA LEAR
Plaintiff–Appellee–Cross Appellant

Oral Argument Requested

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union has jurisdiction under 27 U.S.C. § 1331 because this case raises federal questions under the Fifth Amendment of the United States Constitution, the Sixth Amendment of the United States Constitution, and the Endangered Species Act ("ESA") § 10, 16 U.S.C. § 1539(a)(1)(B). This Court has jurisdiction to review the decision of the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is the ESA a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of endangered butterfly?

II. Is Cordelia Lear's takings claim against the U.S. Fish and Wildlife Service ("FWS") ripe without having applied for an Incidental Take Permit ("ITP") under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)?

III. For takings analysis, is the relevant parcel the entirety of Lear Island or the Cordelia Lot, as subdivided in 1965?

IV. Assuming the relevant parcel is the Cordelia Lot, does the potential for future development upon the natural destruction of the butterfly habitat preclude a takings claim based upon complete deprivation of economic value?

V. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent preclude a takings claim for a complete loss of economic value?

VI. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Cordelia Lear's claim for a taking based on the denial of a county wetlands permit?

VII. Assuming the relevant parcel is the Cordelia Lot, have the ESA and Brittain County's Wetlands Preservation Law combined to deprive the Cordelia Lot of all economic value?

STATEMENT OF THE CASE

Statement of Facts

Lear Island is located in Lake Union, which has traditionally been used for interstate navigation. R. 4. The island was granted to Cornelius Lear in 1803; the grant included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island." R. 4-5.

The Lear family has occupied Lear Island since the 1803 grant. R. 5. King James Lear owned the entirety of Lear Island. R. 5. As part of an estate plan, King James Lear divided Lear Island into three parcels in 1965, conveying a fee simple estate to each of his daughters, Goneril, Regan, and Cordelia. R. 5. He reserved a life estate for himself in each parcel. R. 5. The Brittain Town Planning Board approved the subdivision of the property into three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot. R. 5. At the time of the subdivision, the planning board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence. R. 5.

King James Lear died in 2005. R. 5. In 2012, Cordelia Lear decided to build a residence on her lot. R. 5. The Cordelia Lot consists of an access strip that is 40 feet wide by 1,000 feet long, and an open field that comprises the remaining nine upland acres. R. 5. In addition, there is about one acre of emergent cattail marsh in a cove that was historically open water. R. 5. The Cordelia Lot is referred to as "The Heath" because the field is kept open by annual mowing each October. R. 5.

The Karner Blue is an endangered species. 50 C.F.R. § 17.11 (2015). It was added to the federal endangered species list on December 14, 1992. 57 Fed. Reg. 59,236 (Dec. 14, 1992). The only remaining population of the butterfly in New Union lives on The Heath of Lear Island.

R. 5. The Heath and the access strip have become covered with wild blue lupine flowers, which are essential for the survival of Karner Blue larvae. R. 5. Any disturbances of the lupine flowers during the larval and chrysalis stages would result in the death of the butterflies. R. 6. Karner Blue populations have difficulty migrating to new habitats; their flight distance is short, and they must follow woodland edge corridors. R. 6. The New Union subpopulation of Karner Blue is entirely intrastate and does not travel across any state boundaries. R. 6. The Heath was designated by FWS as critical habitat in 1992. R. 6.

In April 2012, Cordelia Lear contacted the New Union FWS field office to inquire whether development of her property would require any permits or approvals because of the existence of the endangered butterfly population. R. 6. FWS agent, L.E. Pidopter, advised Cordelia Lear that any disturbance of the lupine habitat in The Heath other than continued annual mowing would constitute a "take" of the endangered butterfly. R. 6. Pidopter also advised Cordelia Lear that it was possible to obtain an ITP under section 10 of the ESA. R. 6. However, in order to file an application for an ITP, Cordelia Lear would have to develop a habitat conservation plan ("HCP") for the Karner Blue and an environmental assessment document under the National Environmental Policy Act ("NEPA"). R. 6. An environmental consultant hired by Cordelia Lear determined that preparing and ITP application would cost $150,000. R. 6. The New Union FWS field office confirmed Pidopter's findings in an official letter to Cordelia Lear on May 15, 2012. R. 6.

The only land that is contiguous to The Heath is the Goneril Lot. R. 6. Cordelia Lear is estranged from her sister, and Goneril Lear has refused to cooperate in any HCP that involves restrictions on her property. R. 6.

Without annual mowing, the lupine fields on the Cordelia Lot would naturally convert to a successional forest of oak and hickory trees, eliminating the Karner Blue's habitat. R. 7. After ten years, this natural ecological process would result in the extinction of the New Union subpopulation of the Karner Blue, unless a replacement habitat was created within a one-thousand-foot radius of the existing fields. R. 7.

Rather than pursue an ITP application, Cordelia Lear developed an alternative development proposal ("ADP"). R. 7. In the ADP, Cordelia Lear proposed to fill one half-acre of the marsh in the cove to create a lupine-free building site. R. 7. Because the U.S. Army Corps of Engineers ("Army Corps") considers this portion of Lake Union to be "non-navigable" under the Rivers and Harbors Act of 1899, no federal approvals are required. R. 7.

Brittain County required a permit to fill the marsh, pursuant to the Brittain County Wetland Preservation Law, which was enacted in 1982. R. 7. In August 2013, Cordelia Lear duly filed a permit application with Brittain County Wetlands Board. R. 7. The permit was denied in December 2013, on the grounds that permits to fill wetlands would only be granted for a water-dependent use. R. 7.

The fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family house on the lot is $100,000. R. 7. Property taxes on the Cordelia Lot are $1,500 annually. R. 7. There is no market in Brittain County for a parcel such as the Cordelia Lot without the right to develop a residence on the property. R. 7. The Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season, but she has rejected the offer. R. 7.

Procedural History

Cordelia Lear appeals the district court's determination that the ESA is a valid exercise of the Commerce Clause, as applied to a wholly intrastate species. R. 1. FWS appeals the district court's decision that Cordelia Lear's claim was ripe without having to apply for an ITP; that the relevant parcel for Cordelia Lear's takings claim based upon complete deprivation of economic value under *Lucas* is the Cordelia Lot; and that potential future natural destruction of the Cordelia Lot's Lupine fields does not preclude Cordelia Lear's takings claim. R. 1-2. Additionally, FWS appeals the district court's determination the Brittain County Butterfly Society's offer to pay $1,000 for wildlife viewing did not preclude Cordelia Lear's takings claims; that public trust principles do not preclude Cordelia Lear's takings claims; and that the ESA administered by FWS and a Brittain County New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value. R. 2. Brittain County agrees with FWS regarding all aspects of Cordelia Lear's takings claim, but agrees with her that the ESA is unconstitutional as applied to the wholly intrastate population of the Karner Blue Butterfly. R. 2.

On June 9, 2016, both FWS and Brittain County filed a timely notice of appeal, following the district court's order on June 1, 2016. R. 1. Thereafter, Cordelia Lear filed a timely notice of appeal on June 10, 2016. R. 1. On September 1, 2016, this Court consolidated the petitions and granted review. R. 3.

SUMMARY OF ARGUMENT

Congress cannot validly exercise its commerce power under the ESA as applied to a wholly intrastate species. As such, Congress has exceeded its power by attempting to regulate take of the Karner Blue Butterfly.

Even absent application for proper permits, Cordelia Lear's takings claim against FWS is ripe because the agency has made a final jurisdictional determination. Furthermore, applying for an ITP would constitute a futile act. Pursuit of a permit is unnecessary if applying for a permit is so burdensome that it has deprived the property owner of her property rights.

The relevant parcel for the purposes of the takings claim is the Cordelia Lot because it is the only parcel to which Cordelia Lear has property rights. Accordingly, this Court's taking analysis should be limited to the Cordelia Lot.

A categorical taking is not precluded even if there is potential for development after the natural destruction of the Karner Blue Habitat. Cordelia Lear's property has been rendered economically valueless. FWS has acted in bad faith because the intended deprivation of Cordelia Lear's property is not "temporary." Regardless of the Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing, the Cordelia Lot is still deprived of all economic value. The amount offered is less than the amount that Cordelia Lear pays in annual property taxes.

Cordelia Lear's takings claim is not precluded by any background principles inherent in her title. Brittain County and FWS have failed to show that "background principles of the state's law of property and nuisance" bar Cordelia Lear from using the cove for non-recreational purposes. As such, no public trust navigational reservation can be presumed to have existed at the time of the Lear Grant in 1803. Furthermore, without precedent from New Union courts or a statute, this Court has no basis for including the marsh in the cove in the taking's analysis.

The ESA and the Brittain County Wetlands Preservation Law have combined to deprive the Cordelia Lot of all economic value. The Fifth Amendment focuses first and foremost on

protecting individual landowners. Therefore, federal and local laws must be combined when assessing any diminution in value.

ARGUMENT

I. THE ENDANGERED SPECIES ACT IS AN INVALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO THE KARNER BLUE BUTTERFLY, A WHOLLY INTRASTATE SPECIES.

Section 9 of the ESA prohibits the "take" of any endangered species. § 9, 16 U.S.C. § 1538(a)(1)(B). "Take" of any endangered species includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (West 2015). By prohibiting the "take" of the Karner Blue, FWS is attempting to regulate noneconomic activities such as land clearing and vegetation removal. R. 8. Since the regulated activity must itself be economic in nature, FWS's attempt to regulate "take" of a wholly intrastate species is an invalid exercise of the Commerce Clause.

A. Incidental Taking of a Wholly Intrastate Species on Private Land Does Not Implicate the Commerce Clause.

The Commerce Clause empowers Congress to regulate commerce, not ecosystems. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Sentelle, J., dissenting). Interstate commerce powers cannot extend to take of an intrastate species. *Id.* at 1061. Congress may only regulate intrastate activities if those activities exert a "substantial economic effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)); *United States v. Morrison*, 529 U.S. 598, 613 (2000).

The Supreme Court in *United States v. Lopez* outlined "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. 549, 558 (1995). The Court held that the Gun-Free School Zones Act of 1990 ("GFSZA") exceeded Congress's authority

under the Commerce Clause. *Id.* at 551. Striking down GFSZA, the Court determined that possession of a gun in a school zone—the regulated activity, did not fall within any of the three categories Congress may regulate, namely: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) regulations that have a substantial effect on interstate commerce. *Id.* at 558-59.

The Court in *United States v. Morrison* followed the same line of reasoning when evaluating the Violence Against Women Act ("VAWA"). The Court noted that VAWA focuses on where gender motivated violence occurs, rather than violence directed at the instrumentalities of interstate commerce. 529 U.S. at 609. Thus, the "proper inquiry" was whether the regulated activity—gender motivated violence—had a substantial effect on interstate commerce. *Id.* Using the test articulated in *Lopez*, the Court determined that VAWA exceeded the limits of the Commerce Clause because gender motivated violence was neither an economic activity nor directed at interstate commerce. *Id.* at 614-16.

In the same vein as *Lopez* and *Morrison*, the court noted in *People v. United States Fish and Wildlife Service ("PETPO")* that while the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate the take of a purely intrastate species that has no effect on interstate commerce. 57 F.Supp.3d 1337 (D. Utah 2014). In *PETPO*, the species being regulated—the Utah prairie dog—is an endangered species located entirely within Utah. *Id.* at 1341. The issue the court focused on was whether Congress has the power to regulate "takes" of the Utah prairie dog on non-federal land. *Id.* at 1343. Applying the three considerations articulated in *Lopez*, the court concluded that the "Commerce Clause does not authorize Congress to regulate takes of Utah prairie dogs on non-federal land." *Id.* at 1344. Looking to *Morrison*, the court also noted that the take of the Utah prairie dog did not have a

substantial effect on interstate commerce. *Id.* Allowing otherwise would allow Congress to use the Commerce Clause to regulate anything that might affect the ecosystem, giving Congress unlimited and unreasonable power. *Id.*

Here, the proper focus is the specific activity being regulated under the ESA, which is take of the Karner Blue. Cordelia Lear was advised that any activity other than the annual mowing of The Heath would constitute a take. R. 6. Thus, developing her property would disturb the blue lupine fields and constitute a take of the Karner Blue. R. 6. However, land clearing and vegetation removal are purely noneconomic activities. R. 8. Cordelia Lear simply intends to build a single-family residence for her own use on her private property. R. 4. Although these activities would be considered "take" of the Karner Blue, they simply do not have any effect on interstate commerce. As such, regulation of the Karner Blue population within New Union is an invalid exercise of the Commerce Clause. It neither falls into the three categories articulated in *Lopez*, nor does it satisfy the "substantial effects" standard articulated in *Morrison*. Here, FWS has failed to create a nexus between interstate commerce and the take of the Karner Blue. Allowing the Commerce Clause to regulate the Karner Blue would give Congress unreasonable and unlimited power. Given the absence of interstate commercial activity connected to take of the Karner Blue, the district court erred in holding that FWS has authority to regulate the taking of the Karner Blue.

B. Congress Exceeds Its Reach of Power by Attempting to Regulate Future, Noncommercial, Intrastate Activities.

As stated above, disturbing the habitat of intrastate species is not commercial in nature. *Babbitt*, 130 F.3d at 1064. Regulating potential future effects on interstate commerce is also an invalid regulation of economic activity. *NFIB v. Sebelius*, 567 U.S. __, 132 S. Ct. 2566, 2590 (2012). Economic activity must be preexisting activity. *Id.* at 2591. Thus, the district court

erred in determining that Cordelia Lear's future activities, such as the use of building materials and the hiring of contractors that travel through the channels of interstate commerce constitutes economic activity that falls under the purview of the Commerce Clause. R. 8. *See also Babbitt*, 130 F.3d at 1064 (Sentelle, J., dissenting) (recognizing that the ESA's "take" prohibition "does not control commercial activity"); *GDF Realty Inv., LTD. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003) (noting that Congress is not directly regulating commercial development through the ESA); *Gibbs v. Babbitt*, 214 F.3d 483, 508 (4th Cir. 2000) (Luttig, J., dissenting) (arguing that the take of an endangered species is not "an activity that has obvious economic character and impact").

Regulation of an intrastate commodity is only valid under the Commerce Clause if it affects an interstate market. *Raich*, 545 U.S. at 1. After the Drug Enforcement Agency entered the Respondent's home and destroyed her marijuana plants, Respondent filed suit seeking to keep the Controlled Substances Act ("CSA") from being enforced against her. *Id.* Ultimately, the Court upheld Congress's authority to regulate the intrastate production and possession of marijuana. *Id.* at 9. The Court noted that the "substantially effects test" allows Congress to regulate purely local activities if those class of activities have a "substantial effect" on interstate commerce. *Id.* at 17. The Court further explained that Congress may regulate an activity if the "total incidence" of that activity poses a threat to the "national market." *Id.* The Court explained that the CSA was "quintessentially economic" because it regulates the production, distribution, and consumption of commodities for which there is an interstate market. *Id.* at 25-26.

In *SWANCC*, the Court found that filing isolated ponds did not have a substantial effect on interstate commerce. *SWANCC v. United Army Corps of Eng'r*, 531 U.S. 159 (2001). Although the Army Corps was authorized under the Clean Water Act to "regulate the discharge

of dredged or fill materials into navigable waters," the Court determined that the Army Corps did not have authority to regulate discharges into isolated intrastate ponds used by migratory birds. 33 U.S.C. § 1344(a); *SWANCC*, 531 U.S. at 164-65. The Court found that the proper inquiry was whether the intrastate ponds related to interstate commerce, not the manner in which Petitioner wished to use her property. *SWANCC*, 513 U.S. at 173.

In *Raich*, the Court acknowledged the existing interstate market for marijuana. 545 U.S. at 25. Here, no such interstate market exists for the Karner Blue. The only evidence the district court is able to produce is the Brittain County Butterfly Society's offer to pay Cordelia Lear $1,000 annually to view the Karner Blue. R. 7. The district court errs by suggesting that the underlying land development through construction of the proposed residence implicates the Commerce Clause, through the purchase of building materials and the hiring of carpenters and contractors. R. 8. Unlike marijuana, which travels interstate, the activities relating to take of Karner Blue are entirely restricted to intrastate commerce. Congress did not enact the ESA and a prohibition on "take" to regulate the purchase of building materials and the hiring of carpenters and contractors. The prohibition on "take" is to prevent endangered species from being harmed. § 3, 16 U.S.C. § 1532(19).

Although Lear Island is located in Lake Union, a large interstate lake that has been used for interstate navigation, the Cordelia Lot has no substantial effect on interstate commerce. R. 4. The Cordelia Lot is private property owned by Cordelia Lear and she merely seeks to build a single-family home for her personal use. R. 4-5. In *SWANCC*, the Court determined that the commerce power did not extend to isolated ponds that were used by migratory birds. 531 U.S. at 164-65. Here, FWS is attempting to take this a step further by regulating take on an entirely privately owned parcel that is used by a wholly intrastate species that never migrates. R. 5-6.

FWS has overstepped its bounds by attempting to regulate how Cordelia Lear wishes to use her property, because her future development activities have no effect on interstate commerce.

II. CORDELIA LEAR'S TAKINGS CLAIM AGAINST FWS IS RIPE FOR LITIGATION WITHOUT HAVING APPLIED FOR AN ITP.

A. Cordelia Lear Received a Jurisdictional Determination from FWS Which Constitutes Final Agency Action.

A claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). A final decision by FWS helps inform the constitutional determination of whether the regulation deprived the landowner of "all economically beneficial use of the property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). These matters cannot be resolved in definite terms until the court knows the extent of the permitted development of the land in question. *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 351 (1986).[1]

The Supreme Court in *United States Army Corps of Engineers v. Hawkes Co., Inc.*, held that a jurisdictional determination of the property in question constitutes final agency action, thus making Petitioner's claim ripe. 578 U.S. __, 136 S. Ct. 1807 (2016). The Clean Water Act requires landowners to obtain a permit before they discharge any pollutants into the "waters of the United States." *Id.* at 1809. However, the permitting process is often expensive, arduous, and long. *Id*. To obtain individual permit, the average applicant "spends 788 days and $271, 596 in completing the process, without counting the costs of mitigation or design changes." *Id.*

[1] Although no party addressed this issue before the district court, the district court noted that Cordelia Lear's takings claim against Brittain County is similarly ripe, since the Constitution of the State of New Union does not include a just compensation clause nor do the State's statutes provide a procedure for seeking just compensation. *See Williamson Cty.*, 473 U.S. at 194.

at 1812. Given the difficulty in obtaining a permit, the Army Corps allows landowners to obtain a jurisdictional determination, specifying whether a particular property contains "waters of the United States." *Id.* at 1809.

After the Respondents in *Hawkes* applied for a permit to discharge fill from their peat mining operations, the Army Corps advised Respondents that if they wished to pursue their application, the permitting process would take years and cost over $100,000. *Id.* at 1813. The Court held that jurisdictional determination constituted final agency action from the Army Corps. *Id.* The Court thus distilled a two-part test in determining whether agency action is final: (1) the action must mark the consummation of the agency's decisionmaking process; and (2) the action must be one which rights and obligations have been determined or from which legal consequences will flow. By issuing a jurisdictional determination, the Army Corps in effect "ruled definitely" that Respondent's property contains "waters of the United States." *Id.* at 1814. Given the finality of a jurisdictional determination, Respondent's claim was ripe without having to pursue the permitting process.

Pidopter's decision, which was affirmed by FWS's official letter to Cordelia Lear, should be considered a jurisdictional determination that the ESA's prohibition on "take" applies to the Cordelia Lot. As in *Hawkes*, this constitutes final agency action, thus making Cordelia Lear's claim ripe. Cordelia Lear's satisfies the two-part test articulated in *Hawkes*. First, Pidopter advised Cordelia Lear she must obtain an ITP by developing an HCP and preparing an environmental assessment under the National Environmental Policy Act ("NEPA"). R. 6. Pidopter's findings were confirmed by FWS's New Union field office in a letter dated May 15, 2012. R. 6. Section 9 of the ESA makes it "unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered fish or wildlife] species." 16 U.S.C. § 1538(a).

The letter marks the consummation of FWS's decisionmaking process that section 9 is applicable. Second, legal obligations stem from FWS's determination. Section 11 of the ESA authorizes civil or criminal enforcement by government entities, and it also contains a sweeping citizen suit provision. 16 U.S.C § 1540. Because of FWS's determination that ESA protections extend to the Cordelia Lot population of Karner Blue, Cordelia Lear becomes legally liable under section 11 for any intentional damage to the lupine fields. As a result, Cordelia Lear now must apply for an ITP under section 10. To be approved for an ITP, Cordelia Lear would be obligated to provide additional contiguous lupine habitat on an acre-for-acre basis. R. 6. Pidopter's advice and FWS's letter has in effect controlled how Cordelia Lear must proceed if she wishes to develop her property. R. 6.

B. Pursuit of a Permit is Unnecessary if the Procedure for Applying for a Permit is So Burdensome it Has Deprived Cordelia Lear of Her Property Rights.

Although section 9 of the ESA prohibits a person "to take any such species within the United States," section 10 provides an exception to the prohibition on "take," through the form of an ITP. § 9, 16 U.S.C. 1538(a)(1)(B); § 10, 16 U.S.C. 1539. An ITP thus allows a taking otherwise prohibited by section 9(a)(1)(B). *Id.* Before an ITP can be issued, an applicant must submit a HCP. § 10, 16 U.S.C. § 1539(a)(2)(A). As stated above, the permitting process is "expensive, arduous, and long." *Hawkes*, 136 S. Ct. at 1809.

A central issue in *Palazzolo v. Rhode Island* was whether the landowner had obtained a final decision. 533 U.S. 606, 618 (2001). The Court rejected the Rhode Island Supreme Court's reasoning that doubt still remained as to the extent of the development the council would allow on Petitioner's parcel. *Id.* at 619. Thus, once it has become clear that an agency lacks discretion, even absent application for the proper permits, a takings claim has likely ripened. *Id.* at 620. Government authorities may not burden property by imposing unfair land use procedures, and

the ripeness doctrine does not require a landowner to submit to permitting requirements for their own sake. *Id.* at 621-22 (citing *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)). Accordingly, a takings claimant need not perform a futile act, when the government has already declared a policy of denying the very sort of permit the claimant would need. *Id.* at 626; *see Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013) (noting that a claimant need not first seek and be denied compensation before proceeding with his or her takings claim).

By requiring Cordelia Lear to obtain an ITP, FWS has in effect rendered her powerless to control and use her property. R. 6. Pidopter advised Cordelia Lear that while it was possible to obtain an ITP, she would also have to develop a HCP. R. 6. However, the cost of the permitting process is greater than the value of the property. R. 6-7. Preparation of an application for an ITP, including the required HCP and environmental assessment documents, would cost $150,000. R. 6. The fair market value of Cordelia Lear's lot without any restrictions is valued at $100,000. R. 7. Furthermore, Pidopter advised Cordelia Lear that in order to have an approvable HCP, her HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis. R. 6. The only land that is contiguous to The Heath is the Goneril Lot, and Goneril Lear has refused to consider cooperating with any HCP that involves restrictions on her property. R. 6. FWS has advised Cordelia Lear to undertake actions that are impossible for her to satisfy. Even if Cordelia Lear decides to undertake the cost of applying for an ITP and creating a HCP, there is no indication, like the Court noted in *Palazzolo* that FWS will accept Cordelia Lear's HCP and grant her an ITP.

Pursuit of a permit is unnecessary if a plaintiff can establish that the procedure to acquire a permit is so burdensome as to effectively deprive the plaintiff of her property rights. *Hage v.*

United States, 35 Fed. Cl. 147, 164 (1996). The Plaintiffs in *Hage* operated a cattle ranch that depended on rights-of-way permits issued by the government, which granted the ranchers access to water from the Toiyabe National Forest. *Id.* at 153. The government modified the ranchers' permit and ultimately impounded the cattle after the ranchers had missed removal deadlines specified in the permit. *Id.* The court determined that the ranchers' claims were ripe because the ranchers alleged real and concrete consequences resulting from current government action. *Id.* at 163. Thus, applying for a permit would itself constitute a taking because the permit process denied the ranchers access to rights-of-way to the water. *Id.* at 164.

As in *Hage*, requiring Cordelia Lear to apply for an ITP and creating an HCP would be so burdensome, it would amount to depriving Cordelia Lear of her property rights and constitute a taking. To possibly obtain an ITP, FWS requires Cordelia Lear to develop an HCP and provide additional contiguous lupine habitat on land that she simply does not have. R. 6. The only land that is contiguous is owned by Cordelia Lear's sister Goneril who has refused to cooperate in any HCP that would involved restrictions to her property. R. 6. Thus, requiring Cordelia Lear to expend more money for a permitting process exceeds the value of her property effectively results in a taking.

III. THE CORDELIA LOT IS THE RELEVANT PARCEL BECAUSE IT IS THE ONLY PARCEL ON LEAR ISLAND TO WHICH CORDELIA LEAR HAS PROPERTY RIGHTS.

Although Lear Island was once owned in its entirety, since 1965, it has been divided among three new owners. R. 5. In 1965, King Lear deeded the Cordelia Lot to Cordelia Lear, reserving a life estate for himself. R. 5. The Brittain Town Planning Board approved this subdivision. R. 5. After King James Lear died in 2005, Cordelia Lear became the only individual with a property right to the Cordelia Lot. R. 5. Since 1965, Cordelia Lear has had no

discernable present or future property interest outside the Cordelia Lot. Consequently, this Court's takings analysis should only focus on the Cordelia Lot.

"The right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (citing *United States v. Perkins*, 163 U.S. 625, 627-28 (1896)). Negating King James Lear's conveyance because he once owned and profited from the entire island would ignore the United States' long tradition of upholding an individual's right to pass on property.

A. The Supreme Court's Jurisprudence Does Not Mandate Combining Contiguous Parcels for Takings Analyses.

In 1978, the Supreme Court rejected the idea that a single parcel should be divided into separate property interests for deciding takings claims and established the "parcel as a whole" doctrine. *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 131 (1978). In *Penn Central*, the company wanted to build an office tower in the air space above the Grand Central Terminal. *Id.* at 117. The permit application was denied, prompting a takings claim. *Id.* at 119. The company sought to segment the air rights from the Terminal. *Id.* However, the Court held that types of property rights in a *single* parcel could not be segmented in order to more easily show that substantial property value had been eliminated. *Id.* at 131.

Penn Central's rejection of the companies' segmentation theory was clear and had a major effect on takings jurisprudence. However, the Court's ruling did nothing more than reject the idea that a single parcel can be divided into separate strands of property interests. *Id.* Brittain County and FWS will argue that *Penn Central* established that the "relevant parcel" should be the aggregation of all the owners' parcels subject to regulations. However, *Penn Central's* ruling does not imply that contiguous parcels must be aggregated. In fact, the company in *Penn Central* owned at least eight other properties in the area, including properties

adjacent or contiguous to the Terminal. *Id.* at 115. However, the Court still did not use an aggregative approach to examine the diminution of the Terminal's property value.

Here, Cordelia Lear is not attempting to divide the property interests of her parcel in order to show a diminution in value. She is simply pointing to the entire deprivation of value of her parcel, the only parcel to which she has property rights. In contrast, Brittain County and FWS would like to use the extreme aggregative approach and include the *entire* Lear Island in the taking analysis. The Supreme Court has rejected that approach, and to include any other parcel would be a drastic departure from *Penn Central.*

B. The Supreme Court Has Determined That the Relevant Parcel Analysis Should be Fact Driven.

In *Loveladies Harbor v. United States*, the Court allowed a parcel to be segmented because different parties owned each parcel. 28 F.3d 1171, 1181 (D.C. Cir. 1994). The developer, Loveladies, bought 250 acres and developed all but 51 acres. *Id.* at 1174. All but one of the fifty acres were wetlands and needed to be filled in order to be developed. *Id.* Loveladies sought state and federal permits and was allowed to develop only 12.5 of the 51 acres. *Id.* New Jersey received the development rights of the remaining acres in exchange for the permit. *Id.* at 1180. Loveladies then pursued a federal permit from the Army Corps and was denied the permit. *Id.* When a takings claim was filed and the relevant parcel issue arose between the 12.5 acres and the entire 51 acres, the Court emphasized the need for a flexible, fact based approach. *Id.* at 1180. The Court said that the 38.5 acres that had been promised to New Jersey in exchange for the permit should not be included because "whatever substantial value that land had now[,] belongs to the state and not the Loveladies." *Id.* Here, the Court determined that if another party owns a contiguous parcel of land, the parcel should not be included. *Id.*

In the present case, the remainder of the Lear Island has been deeded to other individuals. King James Lear divided Lear Island into three parcels, one for each of his daughters. R. 5. In 1965, he deeded the Cordelia Lot to Cordelia Lear. Consequently, as of 1965, Cordelia Lear only had property rights over the Cordelia Lot. R. 5. The substantial value of the remainder of the island belongs to other members of the Lear family. R. 5. Consequently, the Court should find that only the Cordelia Lot is the relevant parcel for this analysis.

C. Cordelia Lear's Fifth and Fourteenth Amendment's Private Property Rights Must Be Protected.

The aggregation theory, which will often, work to the detriment of landowners, defies the Fifth and Fourteenth Amendment's protections of private property. Protection of private property is essential to liberty and a free society. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring) ("[T]he right to own and hold property is necessary to the exercise and preservation of freedom."). For example, in 1897, the Court declared that "[n]ext in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897). In a free government, almost all other rights would become worthless if the government possessed an unchecked power over the private property of every citizen. *Id.*

To guarantee this protection, the Framers designed the judiciary to be the ultimate protector of property and liberty. *See United States v. Lee*, 106 U.S. 196, 218-20 (1882) (acknowledging the judiciary must enforce the guarantees of the Fifth Amendment). Only if the judiciary fulfills this duty will property and liberty be secure. Employing the aggregation theory in this case would undermine Cordelia Lear's property rights and would go against the Framer's intentions. By affirming the lower court's decision, this Court has an opportunity to protect King

James Lear's conveyance of the parcel to Cordelia Lear and uphold Cordelia Lear's right to use her property or to be compensated when that right has been abrogated.

IV. THE POTENTIAL FOR DEVELOPMENT AFTER THE NATURAL DESTRUCTION OF KARNER BLUE HABITAT DOES NOT PRECLUDE A CATEGORICAL TAKING.

FWS and Brittain County argue that the latent natural destruction of the endangered Karner Blue's habitat precludes a categorical takings claim. However, *Tahoe-Sierra* is distinguishable, and the restrictions imposed by the ESA have resulted in a per se taking of Cordelia Lear's property under *Lucas*.

A. This Court Should Affirm the Trial Court's Factual Finding that the Cordelia Lot is Economically Valueless.

1. The Cordelia Lot is economically valueless under *Lucas*.

A regulation that denies a property owner all "economically viable use of his land" is a categorical taking under the Fifth Amendment. *Lucas*, 505 U.S at 1003. In 1986, David Lucas purchased two residential lots on a barrier island, intending to build one single-family home on each lot. *Id.* at 1003. In 1988, South Carolina passed the Beachfront Management Act to prevent further erosion of state beaches. *Id.* at 1038. After the legislation was implemented, Lucas was barred from building any permanently habitable structures on his parcels. *Id.* at 1003. This made Lucas' property "economically valueless." *Id.* at 1036. The Supreme Court held that such a severe restriction is a per se "total taking," which requires fair compensation. *Id.* at 1047. However, if the desired use is already impermissible under state nuisance or property law, then these background principles limit the "total taking" inquiry. *Id.* at 1030. Therefore, the Supreme Court remanded and instructed South Carolina to determine whether background principles already limited Lucas' proposed use. *Id.* at 1031.

Similar to *Lucas*, Cordelia Lear has suffered a "total taking," which requires adequate compensation. As a result of the ESA and Brittain County Wetlands Preservation Law, Cordelia Lear is unable to build any habitable structure on her property, which is the only economically viable use of the land. R. 7. As will be discussed, New Union's interest in preserving navigation and protecting public trust interests in navigable waters do not constitute "background principles" of state law. Therefore, Cordelia Lear's property is "economically valueless," as defined by *Lucas*.

2. Loss of economic value is a factual determination best left to the district court.

Rule 52(a)(6) of the Federal Rules of Civil Procedure lays out the standard of review for questions of facts: "Findings of fact . . . must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52. An appeals court should affirm a trial court's factual determinations unless, based on a review of the entire record, the court is "left with the definite and firm conviction that a mistake has been committed." *Pullman-Standard v. Swint*, 456 U.S. 273, 284-85 (1982). In *Lucas*, the trial court found that the Beach Front Management Act had deprived Lucas' property of all economic value. 505 U.S. at 1020. In his concurrence, Justice Kennedy expressed skepticism about this determination: "I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction." *Id.* Nonetheless, Kennedy concurred with the five majority justices, stating that "[the Court] must accept the finding as entered below." *Id.* at 1033-34.

This Court should likewise uphold the trial court's explicit finding that "there is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land." R. 7. In *Lucas*, the Supreme Court upheld the trial court's

finding, despite conceivable arguments that Lucas' property might still be used for a recreational activity, such as picnicking or swimming. 505 U.S. at 1044. While FWS and Brittain County might argue that the lot is conceivably useful for another purpose, perhaps hunting, the trial judge closely examined the issue and determined the property presently lacks any economically viable use. The trial judge is best positioned to make factual determinations because he has presided over the trial, heard testimony, and has the greatest understanding of the evidence. Therefore, the trial court's reasonable determination that the Cordelia Lot has been rendered economically useless should be upheld.

B. *Tahoe-Sierra* Does Not Preclude Cordelia Lear from Suffering a Categorical Taking.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court limited a plaintiff's ability to temporally divide the "parcel as a whole." The Court held that a thirty-two month moratoria on construction did not constitute a per se taking. 535 U.S. 302, 303 (2002). To prevent environmentally damaging stormwater runoff, the Tahoe Regional Planning Agency ("TRPA") "imposed two moratoria . . . on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan." *Id.* at 302. The trial court found that the moratoria temporarily deprived landowners of all viable economic use of their property. *Id.* The Court did not overturn this factual finding. *Id.* at 303. Rather, the Court held that "[severing] a thirty-two month segment from the remainder of each fee simple estate . . . would ignore *Penn Central's* admonition to focus on 'the parcel as a whole.'" *Id.* Therefore, the Court found that the *Penn Central* factors should be applied, rather than any categorical rule. *Id*. at 304.

Tahoe-Sierra answered a narrow question. In *Tahoe-Sierra*, the majority states on three separate occasions that its decision was a narrow one. *Id.* at 307, 314, 318. The limited question

that the Court chose to address was "[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking." *Id.* at 314. The Court focused on the specific moratoria and did not decide that a temporary restriction could never constitute a taking. The majority stated, "In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." *Id.* at 337. Rather than adopting the Ninth Circuit's more absolutist language, the Court merely upheld the Ninth's Circuit's conclusion. *Id.* at 321. Therefore, while restricted, the application of *Lucas* to temporary regulatory takings is not entirely foreclosed.

1. By arguing for the extinction of the Karner Blue, FWS has acted in "bad faith."

In *Tahoe-Sierra*, the Supreme Court listed seven theories under which the case might have been decided in the landowners' favor. *Id.* at 333. One scenario was if TRPA had not acted in "good faith." *Id.* at 334. By arguing for the potential eradication of the Karner Blue, FWS is not acting in good faith. Allowing an agency to avoid the costs of regulatory action by labeling it "temporary" invites manipulation. Given the law of diminishing returns, the Government can theoretically always argue that a loss over a "temporary" period will never equal the full value of a parcel over the infinite duration of a fee simple estate. Some courts have gone along with this logic, finding that very extreme diminutions cannot compel application of the *Lucas* rule. For example, even a 95% diminution in the property value of a plaintiff's beachfront lot from $665,000 to $31,500 was insufficient to apply the *Lucas* per se rule. *Friedenberg v. N.Y. State Dep't of Envtl. Conservation*, 767 N.Y.S.2d 451, 458–59 (N.Y. App. Div. 2003). However, such an extreme reading of *Lucas* opens the door to abuse, a risk that the Supreme Court foreshadowed when limiting it's *Tahoe-Sierra* holding.

FWS has indeed manipulated takings law and acted in "bad faith." The agency has forced Cordelia Lear to either eradicate the endangered population or accept the reality of owning a perpetually valueless parcel of land. The ESA technically is only intended to protect species as long as they remain endangered. However, very few species are ever delisted, and the Karner Blue specifically has shown little signs of improvement. For example, the species is considered locally extinct in Canada. COSSARO Candidate Species at Risk Evaluation Form for Karner Blue (short version), June 2010, (Can.) http://files.ontario.ca/environment-and-energy/species-at-risk/stdprod_086365.pdf. Further, the only known population in New Union is the Cordelia population. R. 5. FWS has taken a perplexing legal position in this case because the agency hopes that a ten-year development delay will deter Cordelia Lear from constructing her residence. Because FWS's overarching goal is the protection of the Karner Blue, the agency's true intent is for the restriction to last much longer than ten years, potentially indefinitely. Unlike the *Tahoe-Sierra* moratoria, there is no clear, definite end to the restriction of Cordelia Lear's development rights. The ESA serves a valuable public purpose, but principles of "fairness and justice" are not served when the onus of the Act's implementation is thrust upon one landowner, without any compensation for the loss suffered. This Court should recognize the potential of *Lucas* to provide landowners with a clear remedy in the face of a government agency's bad faith distortion of the Supreme Court's takings jurisprudence.

2. To protect landowners, such as Cordelia Lear, this Court should limit *Tahoe-Sierra* and apply *Lucas*.

Tahoe-Sierra is distinguishable on several grounds, and the *Lucas* categorical rule should govern this case, rather than *Penn Central*. The question of which standard to apply "depends upon the particular circumstances of the case." *Tahoe-Sierra*, 535 U.S. at 321. As noted in the opinion below, "the *Tahoe-Sierra* moratorium did not extend for an entire decade." R. 10. A

regulation that completely deprives a landowner of any economically viable use of her land for at least a decade should warrant heightened scrutiny under *Lucas*. In effect, FWS has imposed upon Cordelia Lear a conservation easement of unlimited scope but limited duration. There is no logical basis for distinguishing a temporary conservation easement from a temporary easement to facilitate construction of a road, for which compensation is unequivocally required. See *Parsson*, 101 Ohio App.3d at 520. In each scenario, private land has been pressed into public service, and the landowner is deprived.

The underlying rationale for *Tahoe-Sierra* is entirely absent in the present case. The Supreme Court justified its decision in *Tahoe-Sierra* because "a narrower rule excluding normal delays in processing permits, or covering only delays of more than a year . . . [would] impose serious constraints on the planning process. Moratoria are an essential tool of successful development." 535 U.S. at 304. The Tahoe moratoria arose in the context of land use planning. However, this restriction arises in the context of endangered species protection. FWS is not engaged in long-range land use planning, so this Court faces no comparable risk of hampering planning officials by finding that Cordelia Lear has suffered a per se taking.

Furthermore, a *Lucas* test provides greater clarity than *Penn Central*. While determining exactly when a parcel has become "economically valueless" may require a judicial fact finder, *Lucas* provides a useful benchmark by which landowners and administrators alike can measure governmental decisionmaking. Opponents of a categorical rule often express concern that *Lucas* increases uncertainty and liability for governments, thus hampering urban planning. However, these concerns are overblown. Lawyers will not bring cases where the potential recovery is *de minimis*. If there is no real injury, a landowner will either not file suit or recover little or nothing after trial. For example, in *City of Los Angeles v. Richards*, the city temporarily destroyed access

to a landowner's parcel. 10 Cal. 3d 385, 387 (1973). While this was deemed a temporary taking, the landowner had no current plans to develop her land, so she was only entitled to nominal damages. *Id.* at 390. *Lucas* does not subject government agencies to the risk of unchecked liability when imposing temporary restrictions. This Court should provide greater clarity by applying the categorical *Lucas* test here.

V. THE CORDELIA LOT HAS BEEN DEPRIVED OF ALL ECONOMIC VALUE, DESPITE THE BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY $1,000 PER YEAR FOR WILDLIFE VIEWING.

This Court should uphold the district court's determination that the offer to pay Cordelia Lear $1,000 annually "for the privilege of conducting tours on the property . . . is less than the amount of annual property taxes on the lot. A piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value." R. 12. A parcel of land that costs the landowner more in property tax than could be earned from the land has no present value and is highly unmarketable.

A. The Cordelia Lot's Total Deprivation of Economic Value is a Factual Determination for the Trial Court.

As previously mentioned, Rule 52(a)(6) of the Federal Rules of Civil Procedure establishes a standard of review under which a trial judge's factual determination should only be overturned if it is "clearly erroneous." Fed. R. Civ. P. 52. Notably, the *Lucas* Court deferred to the trial court's judgment that a complete deprivation actually took place, rather than providing an independent analysis. 505 U.S. at 1036. In *Lucas*, the trial court found that the 1988 Beachfront Management Act rendered the landowner's fee simple interest in his two beachfront lots "valueless." *Id.* at 1007. Thus, the majority entirely avoided any attempt to quantify the diminution in value. In contrast, Justice Stevens' dissent labeled the "denominator problem" as

the dispositive question. *Id.* at 1054. Between these two approaches, this Court should respect the fact-finding capacity of the trial judge.

The district court is best positioned to assess the present and future economic value of the Cordelia Lot. To determine a regulation's economic impact on a property owner, a court must compare the landowner's loss, the numerator, to the value remaining in the property, the denominator. At some point, the remaining value is so low that the property becomes valueless, and a per se *Lucas* taking occurs. This type of inquiry is particularly technical and fact heavy. Trial judges are naturally better equipped to decide questions of fact because they preside over trials, hear testimony, and are most familiar with the evidence of each case. Therefore, the district court was well positioned to find that Cordelia Lear's property is economically valueless. The $1,000 offered by the Brittain County Butterfly Society does not sufficiently compensate Cordelia Lear for the annual property taxes that she must pay. R. 12. The court further found that there is presently no market in Brittain County for the Cordelia Lot. R. 7. These determinations are reasonable. A ten-acre, severely restricted parcel on a secluded island is not ideally suited for economic viable uses. The district court's findings fall well within the deferential "clearly erroneous" standard. Therefore, this Court should uphold the determination that the Butterfly Society's offer to pay $1,000 does not offset the complete loss of value suffered by Cordelia Lear.

B. If This Court Chooses to Re-Examine the Trial Court's Factual Finding, the Parcel is Still Economically Valueless.

A categorical taking cannot be overcome by leaving a property owner with a mere "token interest." *Palazzolo*, 533 U.S. at 631. In *Palazzolo*, a landowner brought an inverse condemnation action against the Rhode Island Coastal Resources Management Council, alleging that the agency's denial of his application to fill wetlands and construct a beach club constituted

a "total taking." *Id.* at 611. However, the Supreme Court rejected this claim; the property undisputedly retained a value of $200,000 because the landowner could still build a single-family home. *Id*. at 631. The Court recognized that a token interest in the property would be insufficient: "assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Id*. In the Court's opinion, the ability to build a residence, instead of a beach club, was much more than a token interest. *Id*.

In contrast, the Butterfly Society's offer to pay $1,000 per year is a mere "token interest." In addition to being less than the annual property tax, this amount is only one percent of the estimated value of the property if Cordelia Lear were permitted to construct a single-family home. R. 7. Cordelia Lear would be operating the property at a loss. R. 7. While *Tahoe-Sierra* limited the ability of a landowner to temporally divide the "parcel as a whole," that problem does not arise here. The Butterfly Society's offer necessarily assumes that Cordelia Lear will continue maintaining the fields so that there are butterflies to observe. Therefore, the agreement is intended to continue in perpetuity. A deal that leaves the property owner managing the property at a loss is insufficient to preclude a taking. Property that loses money is by definition valueless. Therefore, this Court should affirm the district court's determination that the Cordelia Lot has lost all value, despite the Butterfly Society's offer.

VI. CORDELIA LEAR'S CLAIM FOR A TAKING IS NOT PRECLUDED BY ANY BACKGROUND PRINCIPLES INHERENT IN HER TITLE.

In *Lucas*, Justice Scalia created a narrow defense to a constitutional taking if the beneficial use of a landowner's property would already be prohibited by background principles of the state's law of property and nuisance. 505 U.S. at 1029. Lucas purchased two residential lots of shoreline property. *Id.* at 1007. Following his purchase, South Carolina passed a law that

effectively barred Lucas from erecting any permanent structures on his property, draining both of his parcels of their value. *Id.* The Court created a special rule for property that is restricted by both statute and a state's common law of property and nuisance. *Id.* at 1029. If a parcel is already restricted by the state's common law, and a regulation simply reinforces or reaffirms these restrictions, a regulatory taking has not occurred. *Id.*

The public trust doctrine is a "background principle" that can have an effect on the economically beneficial uses of the land, making it a plausible defense in takings claims. The Supreme Court recognized public trust doctrine in *Illinois Central Railroad Co. v. Illinois* and applied the doctrine to void the states' grant of a 1000-acre portion of Lake Michigan's bed to private interests. 145 U.S. 387, 464-65 (1892). The use of the navigable waters of the harbor and of the lands under them was determined to be a public concern. *Id.* at 455. Justice Field said that the land grant was "not consistent with the exercise of that trust which requires the government of the State to preserve [navigable waters and the lands under them] for the use of the public." *Id.* at 453. Therefore, the governmental cannot alienate lands held in trust. *Id.* at 455. This case laid the groundwork for states to regulate and protect navigable waters for public use.

Later, the states were given the right to define the limits of the lands that they are required to protect and were given the right to recognize private rights in such lands as they see fit. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 475 (1988). Accordingly, others states have extended the reach of their public trust beyond navigable waters. *See Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d (Cal. 1983) (upholding the protection of fish habitat in Mono Lake and its tributaries to the potential detriment of vested water rights); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (determining that the public trust

doctrine extends to dry sand beach areas for both access to and limited use of the ocean and foreshore).

Additionally, under accepted principles of federalism, the states retain residual power to determine the scope of the public trust over waters within their borders. In *PPL Mont., LLC v. Montana*, power companies that owned hydroelectric facilities on several rivers in Montana sued the State and sought a determination of whether the companies were obligated to pay the State for using certain riverbeds. 565 U.S. 576, 580 (2012). The Supreme Court required that a river be examined on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, was navigable and fell within the state's protection. *Id*. Therefore, the lower court erred when it found that Montana owned the riverbeds where the company's facilities were located because the rivers in question were navigable at those locations. *Id.* at 588. This case highlights the emphasis the Court puts on determining whether waters in question fall within the scope of the State's protection.

In *Phillips Petroleum*, the Court laid the foundation for the States to establish the scope of its public trust. However, New Union does not have any such regulations or common law precedent to show that the scope of New Union's public trust doctrine extends to non-navigable waters or only includes non-navigable waters. Brittain County has argued that New Union's interest in preserving navigation and protecting other public trust interests in *navigable* waters constitutes a background principle. The Army Corps considers the portion of Lake Union in question to be "non-navigable." R. 7. Brittain County will argue to extend New Union's public trust to non-navigable waters. However, without any statutory or judicial precedent from New Union courts, this Court cannot include the marsh in the cove in the taking's analysis.

Consequently, this Court should find that Cordelia Lear's takings claim is not precluded by the permit denial.

VII. THE ESA AND THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW HAVE COMBINED TO DEPRIVE THE CORDELIA LOT OF ALL ECONOMIC VALUE.

FWS argues that the ESA does not prevent Cordelia Lear from filling the cove and constructing a residence there. Similarly, Brittain County asserts that the Wetlands Preservation Law only applies to the waters surrounding Lear Island and does not restrict Lear Island. Thus, neither law renders Cordelia Lot valueless on its own force. However, the broad purpose of the Fifth Amendment is to protect private property interests. Adopting FWS's and Brittain County's position would create a substantial loophole in takings doctrine, leaving individual landowners vulnerable. Therefore, this Court should find that the ESA and Wetlands Preservation Lot combine to completely deprive the Cordelia Lot of all value.

A. Federal and Local Restrictions Must Be Combined When Determining Whether a Taking Has Occurred.

In *Palazzolo*, a landowner brought a categorical takings claim against the Rhode Island Coastal Resources Management Council for denying his application to fill eighteen acres of protected wetlands and construct a beach club. 533 U.S. at 611. The council found that the proposed development did not satisfy the standards for obtaining a "special exception" to fill the salt marsh because the development served no "compelling public purpose." *Id.* at 606. However, "the trial court accepted uncontested testimony that an upland [portion] of the property would have an estimated value of $200,000 if developed." *Id.* at 621. Council officials testified at trial that they would have allowed petitioner to build a substantial residence on the upland portion. *Id.* at 622. Therefore, a *Lucas* claim for deprivation of all economic use was precluded. *Id.* at 632.

Unlike *Palazzolo*, the ESA has rendered the non-wetlands portion of the Cordelia Lot undevelopable. While the wetland protection laws in both cases only impact a piece of the landowner's property, Palazzolo's parcel retained substantial value. Cordelia Lear's parcel retains no value. R. 8-9. The Fifth Amendment primarily focuses on protecting private citizens: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Therefore, takings analysis naturally begins by looking at the position of the individual landowner. If the landowner has been left with a valueless property, the analysis ends there, and the *Lucas* per se rule applies. Other factors, such as the nature of the government action, only become relevant under *Penn Central* if a complete deprivation has not occurred. This Court should look first and foremost at the position of the landowner. Cordelia Lear is unable to build any habitable structure or use her property for any other economically viable use. Because of this complete deprivation, compensation is due under *Lucas*. The amount that each law has contributed should only become relevant when allocating damages.

B. FWS and Brittain County Are Jointly and Severally Liable for the Taking of Cordelia Lear's Property.

When federal regulations restrict one part of the property and local municipal regulations restrict another part, both parties must be held liable. FWS and Brittain County claim that their own regulation, by itself, leaves some portion of Cordelia Lot developable. However, looking at each law independent of the other would unjustly leave Cordelia Lear without any recourse. The present situation is not unlike a case involving joint tortfeasors, where neither actor alone causes an injury, but both actors combine to cause harm. The prevailing rule in cases where the harm is indivisible is that each tortfeasor is jointly and severally liable. Restatement (Third) of Torts: Apportionment Liab. § 10 (2000). Between innocent plaintiffs and culpable defendants, the latter should bear this risk. *Id*. In tort law, a tension sometimes arises between joint and several

liability and comparative fault. However, no such tension exists here. Cordelia Lear has not contributed to her property's loss of economic value. Existing background principles that limit her property right would also be accounted for under a *Lucas* analysis when determining the fair market value.

While this case presents a seemingly novel scenario of mutually exclusive regulations combining to cause a complete deprivation, several courts have previously dealt with overlapping regulations. In *Good v. United States*, a landowner alleged a taking after the Army Corps denied his permit to dredge and fill wetlands. 39 Fed. Cl. 81 (1997). FWS argued that the agency should not be liable for a categorical taking because the landowner would not have a "reasonable probability" of developing his parcel under existing state and county wetlands laws. *Id.* at 81, 84. The court rejected this logic: "state and local development restrictions are relevant in a federal takings case and may be considered in arriving at fair market value." *Id.* However, overlapping state restrictions could not serve as a total defense to a *Lucas* per se claim. *Id*. at 105.

In *Ciampetti v. United States*, a developer owned 573 contiguous lots. 18 Fed. Cl. 548, 550 (1989). Approximately 206 lots fell within a federal wetlands area. *Id.* Of those 206 lots, 167 were also located within protected state wetlands. *Id.* The Department of Justice argued that New Jersey's implementation of land use and zoning laws had already restricted the landowner's development. *Id.* at 555. However, the court held that implementation of the Clean Water Act's Section 404 Permit Program was an independent regulatory action. *Id.* at 556. "Assuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking." *Id.* Therefore, the Army Corps was held

responsible for its own actions, and the overlapping restrictions did not insulate the federal government from liability. *Id.*

In both *Good* and *Ciampetti*, the courts chose to focus first and foremost on the deprivation of the landowner. Similar to *Good* and *Ciampetti*, the Wetlands Preservation Law and ESA are distinct regulatory actions with distinct permitting processes. Cordelia Lear has suffered a taking, so compensation is required. Just as the overlapping nature of regulations cannot serve as a takings defense, the combination of mutually exclusive regulations should not serve as a defense. Finding otherwise would create an anomalous situation. Both culpable parties could escape liability by pointing the finger at one another, leaving Cordelia Lear with a valueless parcel and no legal remedy. Agencies at different levels of government frequently collaborate. Therefore, adopting FWS's and Brittain County's position would open the door to exploitation. Imposing joint and several liability on both FWS and Brittain County provides a judicially manageable solution to a potential loophole in takings doctrine. The district court is well equipped to apportion compensation between FWS and Brittain County based on relevant factors, such as the area restricted by each law or the relative feasibility of development in either location.

CONCLUSION

Congress lacks authority to exercise its commerce powers as applied to a wholly intrastate species. Since it is clear that Cordelia Lear's application for an ITP would be futile, her claim for litigation is ripe even without have applied for an ITP. As such, the relevant parcel with respect to Cordelia Lear's takings claim is the Cordelia Lot because it is the only parcel Cordelia Lear can claim ownership over. Cordelia Lear has suffered a total taking. Even if there is a possibility to develop the Cordelia Lot after natural destruction of the lupine fields, a

categorical takings claim is not precluded. Despite the Brittain County Butterfly Society's offer to pay $1,000 per year for wildlife viewing, the Cordelia Lot is still economically valueless. The ESA's and the Brittain County Wetlands Preservation law have combined to effectively take Cordelia Lear's property without just compensation. Lastly, Cordelia Lear's takings claim is not precluded by any background principles. No public trust navigational reservation can be presumed to have existed at the time of the Lear Grant in 1803. Public trust rights do not apply to the marsh in the cove because the waters are non-navigable, thus making the public trust doctrine inapplicable.

Dated: November 28, 2016

Respectfully Submitted,

Team No. 16