Team No. 27

C.A. 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

BRIEF OF PLAINTIFF CORDELIA LEAR

Oral Argument Requested

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JURISDICTIONAL STATEMENT

The Court of Appeals shall have jurisdiction over appeals from all final decisions of the Districts Courts of the United States. 28 U.S.C. § 1291. Cordelia Lear claimed jurisdiction in the District Court pursuant to 28 U.S.C. §§ 1346(a)(2) and 1491(a)(2). Ms. Lear waived any damages in excess of $10,000 in her takings claim against the United States, allowing her to proceed with her claim in District Court. The District Court entered final judgment resolving all claims on June 1, 2016. Therefore, this Court has jurisdiction over Cordelia Lear's appeal under § 1291.

ISSUES PRESENTED

I. Is the Endangered Species Act a valid exercise of Congress's commerce power, as applied to a wholly intrastate population?

II. Is Cordelia Lear's takings claim against the Fish and Wildlife Service ripe without having applied for an Incidental Take Permit under Endangered Species Act § 10?

III. For takings analysis, is the relevant parcel the entirety of Lear Island or merely the Cordelia Lot?

IV. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the Fish and Wildlife Service and Brittain County from a takings claim based upon a complete deprivation of economic value of the property?

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 for wildlife viewing 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, are the Fish and Wildlife Service and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

STATEMENT OF THE CASE

Introduction

On December 14, 1992, the United States Congress listed the Karner Blue Butterfly ("Karner Blue"), as a federally endangered species. 50 C.F.R. 17.11 (2015); 57 Fed. Reg. 59,236 (Dec. 14, 1992). Then, in 1993, the United States Fish and Wildlife Service ("FWS") designated nine acres of privately owned land on Lear Island ("Island") as critical habitat for Karner Blues. Decision ("Dec.") 6. Though found in other states, the population of Karner Blues on the Island are the only population within the state of New Union and do not travel off the Island. Id.

Plaintiff, Cordelia Lear, is the lawful property owner of the property the Karner Blues occupy. Id. at 5. The restrictions imposed by the FWS and Brittain County upon Ms. Lear's land have made it impossible to either build a home or sell the land for full fair market value. Id. At 7. Ms. Lear contends that the Karner Blue is a wholly intrastate species with no commercial value, therefore the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., exceeds the Congressional authority to regulate the taking of such a species under the Commerce Clause. Ms. Lear believes that because the Karner Blues on her property cannot be regulated under the ESA, she is not required to obtain an Incidental Take Permit ("ITP") in order to build her personal residence on her property. Ms. Lear is also challenging Brittain County's denial of her wetland fill permit on the grounds that Brittain County has no authority, under any public trust doctrines, to require a wetland fill permit on her property.

Factual Background

The Lear family has owned the Island, a 1,000 acre island in Lake Union, New Union, since 1803. Dec. 4. Cordelia Lear is a direct descendant of the original settlor of the Island. Id.

The land has been continuously owned and used by the Lear family since 1803 as a homestead, farm and hunting and fishing grounds. Id. at 5.

In 1965, per Brittain Town Planning Board approval, Lear Island was divided into three parcels and each lot was deeded to Ms. Lear and her two sisters, respectively. Id. In 2005, after the death of Ms. Lear's father, Ms. Lear and her sisters came into possession of their deeded properties. Id. In 2012, Ms. Lear decided to build a residence on her lot. Id.

Ms. Lear's lot (approximately ten acres, forty feet wide and one thousand feet long) is located at the northern end of the Island. Id. Ms. Lear's parcel is comprised of the nine-acre upland open field ("The Heath") and one acre of cattail marsh. Id. This marsh was historically open water and used as a boat landing. Id. The Heath remains an open field because the Lear family mows it annually every October. Id. Without the Lear family's annual mowing of the Heath, this field would be a wooded area like the rest of the Island. Id.

As a result of the family's annual mowing, wild blue lupine flowers grow in The Heath. Id. These lupine flowers are an important habitat of Karner Blue larvae, a federally listed endangered species since 1992. Id. Karner Blues are found in many other states, and there is a very small population of Karner Blues on the Island. Id. at 5-6. This population of Karner Blue does not leave the Island. Id. at 6.

In April 2012, Ms. Lear, fully aware of the Karner Blue's status as an endangered species, contacted the FWS to inquire on the types of approvals and permits she would need to build her homestead on her lot. Id. The FWS informed Ms. Lear that she would need an ITP in order to get approval for her plans, and additionally informed her that she would need to develop a costly and time-consuming Habitat Conservation Plan ("HCP"). Id.

Ms. Lear's sister, whose parcel abuts Ms. Lear's property, refuses to assist Ms. Lear in developing an HCP. Id. Furthermore, the cost of preparing an ITP permit and creating an HCP would cost Ms. Lear One Hundred Fifty Thousand Dollars ($150,000). Id.

On May 15, 2012, the FWS sent Ms. Lear a letter confirming that her entire lot was designated critical habitat for the Karner Blues and that any disturbance other than the annual mowing was a "take" of the Karner Blues. Id. The letter also reiterated that Ms. Lear would need an ITP permit and would need to submit an "acceptable" HCP that would require mitigation and continuation of mowing The Heath every October. Id.

Ms. Lear, unable and unwilling to pursue an ITP application, submitted a reasonable Alternative Development Proposal ("ADP"), which would leave The Heath alone and untouched. Id. at 7. Instead, Ms. Lear would fill one half of the marsh to create a lupine-free building site. Id. This marsh is non-navigable and construction of homes involving half an acre or less of fill is authorized by the U.S. Army Corps of Engineers Nationwide Permit 29. Id. Though no federal approval would be needed for this permit, Brittain County required a permit to fill the marsh. Id.

In August 2013, Ms. Lear filed a permit application with the Brittain County Wetlands Board ("The Board"). Id. In December 2013, The Board denied the permit, claiming the house site was not a water-dependent use. Id.

Ms. Lear's property, without any restrictions on it, has a fair market value of One Hundred Thousand Dollars ($100,000). Id. However, Ms. Lear will be unable to sell her land with the current restrictions for any economically beneficial use (recreational, agricultural, or timber land). Id. The annual property taxes on Ms. Lear's property are One Thousand Five Hundred Dollars ($1,500). Id. The Brittain County Butterfly Society has offered to pay Ms. Lear One

Thousand Dollars ($1,000) annually to view the Karner Blues during the summer season. Id. Ms. Lear has rejected the Butterfly Society's offer. Id.

Due to the FWS and The Board's restrictions on her property, Ms. Lear is unable to gain any economically beneficial use from her land and has taken her plight to the courts.

Procedural History

Ms. Lear brought suit against the FWS and Brittain County (collectively "Defendants") in the United States District Court for the District of New Union, seeking a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively, seeking just compensation from FWS and Brittain County for a regulatory taking of her property. Id. A seven-day bench trial was held before the District Court. Id. at 4. The District Court issued an Order on June 1, 2016: dismissing Ms. Lear's claim that the ESA was an unconstitutional exercise of legislative power as applied to her property and awarding Ms. Lear total damages of One Hundred Thousand Dollars ($100,000) for an unconstitutional taking of her property in violation of the Fifth Amendment of the Constitution – Ten Thousand Dollars ($10,000) against the FWS and Ninety Thousand Dollars ($90,000) against Brittain County. Id. Defendants each filed a Notice of Appeal with this Court on June 9, 2016, and Ms. Lear filed a Notice of Appeal June 10, 2016. Id. at 1.

STANDARD OF REVIEW

Appellate review of the administration of the ESA is governed by the Administrative Procedure Act. 5 U.S.C. § 551 *et seq*. This Court will review Issue I *de novo* because it is a constitutional challenge under the Commerce Clause. United States v. Vasquez, 611 F.3d 325, 327 (7th Cir. 2010). For Issues II through VII, this Court will review and defer to the District Court's determinations absent any definite position that the District Court committed any clear error of judgment in its conclusions. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984).

SUMMARY OF ARGUMENTS

The ESA is not a valid exercise of Congress's Commerce power as applied to a wholly intrastate species such as the Karner Blue, because the prohibition of taking an intrastate species is not an economic activity and it does not substantially affect interstate commerce. The Karner Blue has no commercial value, does not travel outside of New Union, and does not meet the goals of Congress to preserve biodiversity through interstate commerce.

Second, Cordelia Lear's taking claim against the FWS is ripe without having applied for an ITP because Ms. Lear can establish that the procedure to acquire a permit is so burdensome as to effectively deprive her of her property rights, therefore pursuing a permit would be futile.

Third, the relevant parcel for the takings analysis is only the Cordelia Lot. Since Cordelia Lear has owned the lot, it has been treated as a legally separate parcel from her sisters lots. Additionally, only the Cordelia Lot was undeveloped both when she inherited her lot and even before the passing of the statutes at issue. Even if the court were to use the flexible approach advanced by the FWS and Brittain County, the factual nuances support having the Cordelia Lot being the relevant parcel for a takings analysis because Ms. Lear's parcel only borders a portion of one of the other lots on the Island, she has had the parcel for a relatively short period of time, and the other parcels were developed prior to the enactment of the relevant statutes.

Fourth, the eventual destruction of the Karner Blue's habitat does not shield the FWS and Brittain County from a takings claim. Their action still amounts to a temporary taking requiring compensation. Although a temporary taking usually requires the regulation at issue to end, doing so would be pointless here because there is a definite and concrete period of ten years, which is how long it will take the Karner Blues to go extinct if The Heath was no longer mowed.

Fifth, Brittain County Butterfly Society's offer to pay rent for wildlife viewing does not preclude a takings claim for complete loss of economic value because their offer does not give Ms. Lear an economic benefit.

Sixth, public trust principles inherent in title do not preclude Ms. Lear's claim for a taking based on denial of county wetlands permit because the public trust doctrine does not apply to Lear Island. The wetland is not a navigable water and title to the Island and surrounding waters were never transferred to the state under the Equal Footing Doctrine.

Finally, the FWS and Brittain County are jointly and severally liable for the complete deprivation of economic value to Ms. Lear's lot because, even though individually the regulations do not reach a Lucas taking, together they do and the harm cannot be practically divisible.

ARGUMENT

I. THE ESA IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER AS APPLIED TO A WHOLLY INTRASTATE SPECIES BECAUSE THE TAKE OF KARNER BLUES IS NOT AN ECONOMIC ACTIVITY AND WILL NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

The United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. Pursuant to the Commerce Clause, Congress has the power to regulate the channels of interstate commerce, objects in interstate commerce, and economic activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995). In determining whether the regulation is authorized under the Commerce Clause, this Court must consider:

> (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.

United States v. Stewart, 451 F.3d 1071, 1136-37 (9th Cir. 2006) (citing United States v. Morrison, 529 U.S. 598, 610-12 (2000)). Congress has made no express finding about prohibiting takes of intrastate species and the ESA states no jurisdictional limit; therefore, the focus of this case is on parts one and four.

A. Prohibiting a "taking" of the Karner Blues, an intrastate species, is not an economic or commercial activity.

In order to have regulatory authority under the Commerce Clause, the regulated activity must be commercial or economic in nature. Stewart, 451 F.3d at 1074. If the regulated activity has no commercial value and is not an economic activity, Congress lacks authority under the Commerce Clause to regulate it. See e.g. Lopez, 514 U.S. at 561 (striking down the Gun-Free School Zones Act); see also Morrison, 529 U.S. at 613 (striking down the Violence Against Women Act). Any regulation of an intrastate, non-economic activity is likely unconstitutional. United States v. Riccardi, 405 F.3d 852, 866 (10th Cir. 2005).

Here, the ESA seeks to prohibit the "take" of the Karner Blue, but there is no commercial value for this intrastate species and the prohibition of a take has no economic value.

1. *The Karner Blues in New Union have no commercial value.*

For a species to have commercial value, there must be real interest in the species for some economic activity, such as scientific research, hunting, or tourism. See Gibbs v. Babbit, 214 F.3d 483, 492-95 (4th Cir. 2000) (red wolves had commercial value because scientists do research on the wolves, tourists go to see them, and there may be a trade in their pelt).

The Karner Blues on Ms. Lear's lot have no commercial value; they are not used in research, they have no harvesting value, and are not a keystone species on the Island. The FWS and Brittain County would argue that there is commercial value for the Karner Blues in wildlife viewing, as Brittain County Butterfly Society have offered to pay to view the butterflies on Ms.

Lear's property. Dec. 7. However, the Karner Blues are located on a privately-owned island, isolated from the rest of New Union. Id. at 6. These butterflies do not travel to the mainland and in fact stay solely on Ms. Lear's property. Id. Ms. Lear has turned down the offer to allow wildlife viewing on her property, and the FWS and Brittain County cannot compel her to allow strangers onto her private property for this purpose. Therefore, there is no commercial value in viewing the Karner Blues on Ms. Lear's property.

2. *Prohibiting a take of intrastate species is a non-economic activity.*

An economic activity is the "production, distribution, and consumption of commodities." Gonzales v. Raich, 545 U.S. 1, 24-26 (2005) (quoting Webster's Third New International Dictionary 720 (1966)). A regulated activity will be considered non-economic if it has "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." Morrison, 529 U.S. at 611.

The regulated activity here is the prohibition of taking an intrastate species. Section 9 of the ESA prohibits the "take of any endangered species." 16 U.S.C. § 1538(a)(1)(B). To take a species means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" 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 (2015). Congress sought to protect endangered species from takings to ensure the "continuing availability of a wide variety of species to interstate commerce". National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1050 (D.C. Cir. 1997) ("NAHB").

Prohibiting the take of the New Union Karner Blues is a non-economic activity because it has no effect on commerce or any sort of economic enterprise. Prohibiting the take of a wholly

intrastate species like the Karner Blue does not fall into the "production, distribution, and consumption" of any type of commodity. Raich, 545 U.S. at 26. Furthermore, prohibiting a take of an intrastate species does not further the goals that Congress intended by prohibiting takings in the first place, as the Karner Blues do not contribute to the "variety of species in interstate commerce." Dec. 5; NAHB, 130 F.3d at 1050.

B. The take of Karner Blues has no substantial effect on interstate commerce.

"Where the regulated activity is not commercial in nature, Congress may regulate it only where there are 'substantial' and not 'attenuated' effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce." Morrison, 529 U.S. at 614-16. A regulated activity's effect on interstate commerce must be both direct and substantial to withstand scrutiny under the Commerce Clause. United States v. Patton, 451 F.3d 615, 625 (10th Cir. 2006). When it comes to a species that is not an object in interstate commerce and does not affect interstate commerce, a take can only be regulated if the take itself substantially affects interstate commerce. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring).

Here, Ms. Lear's take of the Karner Blues occurs though building a single-family home on her property for her own use. Dec. 5. Building a personal residence is not commercial in nature and would not be easily classified as substantially affecting interstate commerce. See NAHB, 130 F.3d at 1059. Ms. Lear is not proposing a large-scale residential development, which would more likely affect interstate commerce; a homestead is more analogous with a homeowner moving dirt to landscape his property. See Rancho Viejo, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

The prohibition against "taking" of the Karner Blue is not commercial or economic in nature, it has no connection to a regulatory scheme, and it does not substantially affect interstate

commerce. As such, Congress has no power under the Commerce Clause to prohibit the taking of an intrastate species like the Karner Blue.

II. CORDELIA LEAR'S TAKING CLAIM AGAINST THE FWS IS RIPE WITHOUT HAVING APPLIED FOR A ITP UNDER §10 OF THE ESA BECAUSE OBTAINING AN ITP WOULD BE A FUTILE ACT.

Section 10 of the ESA permits a taking only if it is incidental to carrying out an otherwise lawful activity. 16 U.S.C. §1539(a)(1)(B). A takings claim is ripe when the government has reached a final decision regarding the application of the regulations to the property at issue. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). However, when the government already has a policy of denying the same type of permit the claimant would need, there is no requirement for a takings claimant to perform a futile act. Palazzolo v. R.I., 533 U.S. 606, 625-26 (2001). Pursuing a permit is also unnecessary if the Plaintiff can establish that "the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." Hague v. United States, 35 Fed. Cl. 147, 164 (1996).

Here, the FWS advised Ms. Lear that she should apply for an ITP, but any ITP would require conditions impossible for Ms. Lear to satisfy. Dec. 9. First, Ms. Lear would have to pay $150,000 to prepare an ITP application, including the required HCP and other documents. Id. at 6. This means Ms. Lear would pay more than fair market value of the property ($100,000) just to apply for an ITP. Id. Second, Ms. Lear had no guarantee that after submitting the ITP application, she would be approved for a permit. Essentially, Ms. Lear would be performing a costly futile act in order get a "final decision" from the government. See Palazzolo, 533 U.S. at 625-26. Therefore, Ms. Lear would not need to seek an ITP permit before her takings claim became ripe.

III. FOR A TAKINGS ANALYSIS, THE RELEVANT PARCEL IS ONLY THE CORDELIA LOT BECAUSE THE CORDELIA LOT IS LEGALLY SEPARATE FROM THE REST OF LEAR ISLAND AND THE OTHER LOTS WERE PREVIOUSLY DEVELOPED BEFORE CORDELIA LEAR ACQUIRED THEM.

When determining the scope of the impact of a government regulation, for a takings analysis, courts look at the parcel as a whole. See e.g. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 130-31 (1978); see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002). However, it is not always black and white as to what is the relevant parcel. Courts will look at the specific circumstances to determine what exactly is the whole. Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100, 105 (2002). Using the "flexible approach," the courts will look at, "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands, *and no doubt many others* . . . ." Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (emphasis added). Generally, parcels that are either legally undevelopable or were developed prior to the government action do not count towards the relevant parcel. See Loveladies Harbor v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994). Additionally, if an owner has legally separate parcels and treats them as a single unit, then those parcels together might constitute the relevant parcel. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500-1 (1987).

A. The Cordelia Lot has always been legally separate from the other lots on Lear Island since Cordelia Lear has owned the lot.

A particular parcel, treated as legally separate from other parcels, will be the relevant parcel. Contra Keystone 480 U.S. at 500-1. Likewise, already developed property, not subject of the government regulation, is not considered for the relevant parcel. See Loveladies, 28 F.3d at 1181. These facts, in addition to, "no doubt many others," Ciampitti, 22 Cl. Ct. at 318, are examined by the court to see what property it will look at in determining if a complete deprivation of economic value has occurred. Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 (1992).

Although it is not guaranteed, when legally separate property interests are treated as the same by the owner, those interests might be viewed as the relevant parcel. See Keystone, 480 U.S. at 500-1. If an owner thinks of and treats the interests as the same or part of its bundle of rights, then it does not make any sense to treat them as separate simply for the owner's convenience. See Keystone, 480 U.S. at 500-1; see also Seiber v. United States, 364 F.3d 1356, 1369 (Fed. Cir. 2004) (The relevant parcel was all 200 acres owned by the Plaintiff and not each tree affected by an ITP denial). In fact, in most takings cases that use all the property owned by the plaintiff the owner tries to severe the multiple property interests owned. See Seiber, 364 F.3d at 1369; compare Keystone, 480 U.S. at 500-1 (The mineral estate and the support estate together were the relevant parcel as they were always treated as one by the owner and thus a taking did not occur), with Ciampitti, 22 Cl. Ct. at 321 (All the land the plaintiff bought in one purchase was treated as the relevant parcel and not just the plots subject to federal wetland restrictions and thus a taking did not occur).

However, as is the situation here where the Cordelia Lot is legally separate from the Goneril and Regan Lots, legally separate properties will not be considered in determining the takings impact. Dec. 5; see Loveladies, 28 F.3d at 1181. Since the Cordelia Lot was created, it was separate from the other lots on the Island; in fact, it was not developed, unlike the other lots, and referred to as The Heath. Dec. 5; see Lost Tree Village Corporation v. United States, 707 F.3d 1286, 1293 (Fed. Cir. 2013); contra Keystone, 480 U.S. at 500-1. Once King James Lear died, each daughter, including Ms. Lear, inherited their own separate lot on the Island – the only difference being that Ms. Lear's lot was the only one not already developed. Dec. 5; see Loveladies, 28 F.3d at 1174. Upon Ms. Lear's inheritance, her lot was legally separate from the other lots and was treated as separate from the others and so she has absolutely no property

rights to the rest of the Island. Dec. 5; see Loveladies, 28 F.3d at 1181. When a property owner does not have any rights in certain property because it has effectively been conveyed away, that property should not be considered for a takings analysis, "This is only logical since whatever substantial value that land had now belongs to the state and not to Loveladies." Loveladies, 28 F.3d at 1181; contra Keystone, 480 U.S. at 501.

B. Even using the "flexible approach" endorsed by the FWS and Brittain County, which examines the factual nuances of a case to determine the parcel, only the Cordelia Lot should be examined.

The FWS and Brittain County suggest using a flexible approach in determining the relevant parcel by looking at the factual nuances of the case. See Loveladies, 28 F.3d at 1181; see also Ciampitti, 22 Cl. Ct. at 318. The 10-acre Cordelia Lot only borders a miniscule portion of the 550-acre Goneril Lot. Dec. 6; see Ciampitti, 22 Cl. Ct. at 318 (contiguity). Ms. Lear inherited the Cordelia Lot eleven years ago and only waited seven years to begin the development process. Dec. 5; see Ciampitti, 22 Cl. Ct. at 318 (date of acquisition). Even if the analysis were to begin with the entire island, the other two lots would have to be removed from analysis because they were previously developed before the enactment of both the ESA and the Brittain County Wetland Preservation Law and before Ms. Lear inherited the Cordelia Lot. Dec. 5, 7; see Loveladies, 28 F.3d at 1174. These developments occurred before any regulatory scheme emerged by both the state and the federal government and for the purposes of determining the scope of this regulatory impact, the previously developed lands should be excluded. Dec. 5, 7; see Loveladies, 28 F.3d at 1174; see also Lost Tree, 707 F.3d at 1288.

The district court's ruling that the Cordelia Lot is the relevant parcel should be upheld as the Cordelia Lot has always been treated as legally separate and the other lots were developed prior to Cordelia Lear inheriting her property.

IV. THE EVENTUAL NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT DOES NOT SHIELD BRITTAIN COUNTY OR THE FWS FROM A TAKINGS CLAIM BECAUSE A TEMPORARY TAKING STILL OCCURS.

The regulation barring development upon Cordelia Lear's property deprives her of its use and enjoyment for the next ten years and she must be compensated, under the Just Compensation Clause, even though the restriction will end ten years from now. See U.S. Const. Amend. V; First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 307 (1987). It is long recognized that a Plaintiff must be compensated when a government regulation deprives use of their land, even temporarily. See e.g. First English, 482 U.S. at 307 (Ordinance barring rebuilding was a taking for the period the ordinance was effective); see also Kimball Laundry Co. v. United States, 338 U.S. 1, 3 (1949) (A temporary taking occurred for the period when the Army took over use of Plaintiff's plant for laundry services for approximately three years); AMTRAK v. Certain Temp. Easements Above the R.R. Right of Way in Providence, R.I., 357 F.3d 36, 42 (1st Cir. 2004) (A temporary taking occurred when AMTRAK condemned temporary easements for air rights for three years); Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 1582 (Fed. Cir. 1990) (A temporary taking occurred when the Corps prohibited mining activities for six years).

Even if a taking by the government is temporary, "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" First English, 482 U.S. at 314 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). Claiming a regulation is temporary should not be a blanket statement that absolves a regulating agency of its responsibility to rightfully compensate a landowner when a regulation has deprived all economic use. Tahoe-Sierra, 535 U.S. at 347 (Rehnquist, C.J., dissenting).

A. A government regulation depriving all beneficial use of land, even if it is temporary, is still a taking requiring compensation.

A regulation depriving an owner of usage of their property is a taking, whether temporary or permanent. First English, 482 U.S. at 311. When a government regulation amounts to a taking, just compensation is required. Id. at 314-15. Even though the regulation which deprives all economic use will be temporary, this does not mean that the government should be discharged from their requirement to provide just compensation; especially if the restriction continues for an overly burdensome amount of time. See Tahoe-Sierra, 535 U.S. at 347 (Rehnquist, C.J., dissenting). Temporary takings require a definite time period, generally after the regulation at issue has elapsed or been withdrawn. Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).

The ADP and the denial of the fill permit, under the Brittain County Wetland Preservation Law, have eliminated any viable economic use of the Cordelia Lot. Dec. 7. Having to wait ten years until the endangered Karner Blue's habitat is destroyed results in a temporary taking by the government of the Cordelia Lot. Dec. 7; see First English, 482 U.S. at 318; Tahoe-Sierra, 535 U.S. at 347; AMTRAK, 357 F.3d at 41. This ten-year restriction, to wait for the Karner Blues to die off, creates much more of a burden than a 32-month moratorium used to try and develop a regional development plan. Dec.7; see Tahoe-Sierra, 535 U.S. at 312. As a policy reason, labelling a building restriction that deprives all economic use as temporary should not absolve the government of any takings liability. Tahoe-Sierra, 535 U.S. at 347 (Rehnquist, C.J., dissenting).

B. Although a temporary taking claim requires the regulation to end, it would be fruitless to deny Cordelia Lear's claim because the takings period has a definite period of ten years.

For a temporary takings analysis, it is usually required that the regulation or action at issue has ended by the time a temporary taking claim is brought forward. See Creppel, 41 F.3d at 632 ("Thus, property owners cannot sue for a temporary taking until the regulatory process that began it has ended."); Kimball, 338 U.S. at 3 (Temporary taking period was the four years the Army

occupied the facility). This requirement is so the plaintiff, and the court, can know the extent of the injury, else the economic injury is pure speculation. See Creppel, 41 F.3d at 632. If the regulation has no listed end date then the property owner cannot provide a specific time in which to calculate value lost. Id.

However, it would be futile to make Cordelia Lear wait ten years to bring her claim. Dec. 7; see e.g. Creppel, 41 F.3d at 632. Ms. Lear's injury duration is not speculative but definitive: "After ten years, this natural ecological process would result in the extinction of the New Union subpopulation of the Karner Blues…" Dec. 7; contra Creppel, 41 F.3d at 632. Once ten years go by, then the *official* temporary taking period ends and Ms. Lear's property recovers its market value. Making Ms. Lear wait ten years would be futile when it is known that adhering from mowing her property will result in the extinction of the local Karner Blues. Dec. 7; contra Creppel, 41 F.3d at 632. Additionally, allowing the FWS and Brittain County to not be required to provide just compensation for temporarily depriving Ms. Lear of all economic value would be contrary to takings law which requires compensation for any taking that occurs. Dec. 10; see San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable").

V. BRITTAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY RENT FOR WILDLIFE VIEWING DOES NOT PRECLUDE A TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE BECAUSE THEIR OFFER DOES NOT GIVE CORDELIA LEAR AN ECONOMIC BENEFIT.

"When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Lucas, 505 U.S.at 1019. "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." Palazzolo, 533 U.S. at 631. The FWS and Brittain County's regulatory restriction of Ms.

Lear's land amounts to a taking because Ms. Lear, having no economically viable use for her land, may do nothing but leave it "economically idle." Lucas, 505 U.S. at 1019.

It is inappropriate for the FWS and Brittain County to assert that the Brittain County Butterfly Society's offer to pay $1,000 annually to view the butterfly in the summer months is an "economically viable" option for Ms. Lear. The property taxes alone amount to $1,500 a year, meaning Ms. Lear is not gaining any economic benefit from the offer. Dec. at 7.

By leaving Ms. Lear with the only option of "wildlife viewing" for her property, the FWS and Brittain County have left her with a "token interest" in her property. Dec. at 11; see Palazzolo at 631. Ms. Lear's complete economic deprivation is not overcome by the Butterfly Society's offer to pay, therefore Ms. Lear is not precluded from asserting a takings claim.

VI. PUBLIC TRUST PRINCIPLES INHERENT IN TITLE DO NOT PRECLUDE CORDELIA LEAR'S CLAIM FOR A TAKING BASED ON THE DENIAL OF COUNTY WETLANDS PERMIT BECAUSE THE PUBLIC TRUST DOCTRINE DOES NOT APPLY TO LEAR ISLAND, AS THE WETLAND IS NOT A NAVIGABLE WATER AND TITLE TO THE ISLAND AND SURROUNDING WATERS WERE NEVER TRANSFERRED TO THE STATE.

"The public trust doctrine is the idea that there are some resources, notably tidal and navigable waters and the lands under them that are forever subject to state ownership and protection in trust for the use and benefit of the public." Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699, 699 (2006). However, public trust doctrines are predicated on the idea that the natural resources in question are meant to be held in trust for the public. Ms. Lear's wetland is on privately owned property granted to the Lear family before New Union was even a state. Dec. 5. As the Island was never intended to be held in trust for the public, Brittain County has no claim to public trust principles to preclude a takings claim.

A. No public right in preserving navigable waters exists to Cordelia Lear's non-tidal, non-navigable water.

There is a well-established public interest in "the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." United States v. Cress, 243 US 316, 323 (1917). In these circumstances, the State may claim a public right to the water and soil of all navigable waters, generally a valid defense against government takings claims. There is no public right, however, to private, non-navigable waters because they are inaccessible to the public and have no effect on navigation.

Ms. Lear's wetland, a mere acre of wetland that drains out into Lake Lear, is a privately owned, non-tidal, non-navigable water body. Dec. 6. Therefore, New Union cannot claim a public right exception to Ms. Lear's takings claim on the basis of protecting navigable rights. Id. Furthermore, New Union has no claim to the title of the waters on the Island under the Equal Footing Doctrine because at the time New Union became a state, Congress had already granted the island to King Lear. Though the waters in the lake may become state property, the waters on the Island itself do not transfer unto New Union.

B. New Union did not receive title to the waters on the Island under the Equal Footing Doctrine as it was already titled to the Lears before New Union became a state.

The Equal Footing Doctrine stands for the principle that all states admitted to the Union under the Constitution have the same rights as the original thirteen states. PPL Mont., LLC v. Montana, 565 U.S. 576, 590 (2012). This includes the right to navigable waters, which are traditionally a state owned right. United States v. Holt State Bank, 270 U.S. 49, 56 (1926). However, if the rights have been granted to a third party before the state was admitted to the Union, those rights will remain with that third party and will not pass to the state. Id. at 54.

"Though the State received title to submerged lands forming the bed of navigable rivers within its borders pursuant to the Equal Footing Doctrine…the State could not receive title to a river island that was in existence at the time of Statehood, as it was not then part of the bed of the navigable waterway." Scott v. Lattig, 227 US 229, 244 (1913). "Although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island…" Id.

Here, the United States titled the land and waters within 300 feet of the Island to the Lear family before New Union became a state. Dec. 6. As such, when New Union became a state, the title already granted to the Lears by the United States did not transfer to New Union but instead stayed with the Lears. As the land had already been sold to the Lears before New Union became a state, New Union may not claim title to the Lear's waters under the Equal Footing Doctrine.

The wetland on the Island is a non-navigable water body the United States granted to the Lears before New Union became a state. The wetland, though historically a boat landing, is currently a cattail marsh that the federal government has already designated as non-navigable waters. Id. Therefore, New Union does not have any public trust claims that would preclude Ms. Lear's takings claim against Brittain County.

VII. FWS AND BRITTAIN COUNTY ARE JOINTLY AND SEVERALLY LIABLE FOR COMPLETE DEPRIVATION OF ECONOMIC VALUE TO CORDELIA LEAR'S LOT BECAUSE, EVEN THOUGH INDIVIDUAL REGULATIONS DO NOT REACH LUCAS, TOGETHER THEY REACH LUCAS AND THE HARM CANNOT BE PRACTICALLY DIVISIBLE.

Under common law rules, when two or more persons act independently to cause a single, indivisible harm, they are held jointly and severally for the entire harm. United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) (applying tort liability to federal environmental statute). The proper approach should be to look to the combined effect of the several acts: "If the acts result in

separate and distinct injuries, then each wrongdoer is liable only for the damage caused by his acts. However, if the combined result is a single and indivisible injury, the liability should be entire. Thus, the distinction to be made is between injuries which are divisible and those which are indivisible." Roy D. Jackson, Jr., *Joint Torts and Several Liability,* 17 Tex. L. Rev. 399, 406 (1939). "The requirement of 'indivisibility' can mean either that the harm is not even theoretically divisible…or that the harm, while theoretically divisible, is single in a practical sense in that the plaintiff is not able to apportion it among the wrongdoers with reasonable certainty…" Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976).

As the common law tort rule has been applied to federal environmental statutes, it is reasonable to apply the same principles to federal takings claims. Ms. Lear has been unable to develop her lot due to the cumulative effect of FWS and Brittain County's regulatory restrictions. First, FWS has taken her land as critical habitat, and even though she may seek an ITP, there is no guarantee her permit proposal will be approved, and she will have paid $150,000 just to get the permit application together. Dec. 6. Ms. Lear would be unable to afford this application, therefore she submitted the ADP. Id. She was denied once again by the Board, this time she was unable to fill her wetland. Id. at 7. Ms. Lear is now left with land she cannot use unless she waits ten years to return to its natural state or pay $150,000 for an ITP. Id. at 6, 7. Therefore, Ms. Lear has suffered a taking from the cumulative effects of the federal and state restrictions. Because these restrictions work in tandem, Ms. Lear may not be able to assign each of the Defendants their appropriate share of the harm, therefore FWS and Brittain County should be held jointly and severally liable. See Velsicol, 543 S.W.2d at 337.

CONCLUSION

For the foregoing reasons, Ms. Lear respectfully asks the Court to reverse the District Court's decision on the following issue and instead find that: the ESA is not a legitimate exercise of congressional power under the Commerce Clause, as applied to a wholly intrastate population of Karner Blues. This Court should then affirm the District Court's following decisions. First, Ms. Lear's taking claim is ripe without having applied for an ITP. Second, the relevant parcel for the takings analysis is merely Cordelia's lot. Third, the eventual destruction of the Karner Blue's habitat does not preclude Ms. Lear's taking claim. Fourth, Brittain County Butterfly Society's offer to pay rent for wildlife viewing does not preclude a takings claim based upon complete deprivation of economic value. Fifth, the public trust principles inherent in title do not preclude Ms. Lear's takings claim. Finally, FWS and Brittain County combine to deprive Ms. Lear's lot of all economic value.