Pace Environmental Law Review Online Companion

Volume 8
Issue 1 *Twenty-Ninth Annual Jeffrey G. Miller National Environmental Law Moot Court Competition*

Article 5

November 2017

# Measuring Brief (Cordelia Lear)

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# TWENTY-EIGHTH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

## Measuring Brief*

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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*.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

## JURISDICTIONAL STATEMENT

Plaintiff Cordelia Lear (Cordelia) filed an initial action in the United States District Court for the District of New Union asserting an uncompensated takings claim against the Fish and Wildlife Service (FWS or the Government) and Brittain County (the County), and challenging the constitutionality of applying Congress' Commerce powers under the Endangered Species Act, 16 U.S.C. § 1531 et seq. (2012) (ESA). R. at 4.[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2012) because the issues arose "under the Constitution." This action is an appeal from a final decision and judgment issued by the District Court on June 1, 2016 awarding Plaintiff damages for an uncompensated taking, dismissing the constitutional challenge, and disposing of all parties' other claims. R. at 1, 12. Final decisions from the District Court are appropriately under the jurisdiction of this Court for review. 28 U.S.C. § 1291.

## ISSUES PRESENTED

I. Whether Congress's Commerce power extends through the ESA to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce.

II. Whether Cordelia's takings claim is ripe for review without applying for an ITP when the cost for the permit application alone would exceed the total property value.

III. Whether a takings analysis of the Cordelia Lot should include the entirety of Lear Island as the relevant parcel, despite the vesting of Plaintiff's distinct fee simple absolute interest in the ten-acre lot.

IV. Whether a categorical takings claim based on deprivation of economically beneficial use is prevented by the possibility

1. Citations with "R. at __" refer to the Record of the Final Problem, revised on November 7, 2016.

of the natural destruction of the Karner Blue's habitat in ten years.

V. Whether a takings claim based on no remaining economically beneficial use is precluded by an offer to pay an annual rent totaling less than the cost of yearly property tax on the Cordelia Lot.

VI. Whether public trust principles inhere in Cordelia's title so as to prevent her takings claim resulting from the denial of a county wetlands permit.

VII. Whether FWS or the County can avoid joint liability for a takings claim when the Cordelia Lot is left with no economically beneficial use as a result of the combined regulations.

## STATEMENT OF THE CASE

The Fifth Amendment upholds important values of fairness and justice by protecting private landowners from bearing an individual burden when government intrudes on their property. The type of government intrusion demanding just compensation was traditionally physical occupation, regardless of how insignificant, and has expanded to include both eminent domain powers and regulatory powers. Where an individual property has been subjected to regulation that goes too far, leaving a property with no economically beneficial use, an aggrieved party may bring an action in court demanding just compensation. Here, Cordelia Lear brought an action seeking just compensation for the regulatory deprivation of *any* development of her property – a violation of the Fifth Amendment that offends public notions of fairness and requires just compensation.

Regulatory takings doctrine has undergone significant transformation over the last century, however, courts have made clear that private property rights are a well-protected bedrock of American law. FWS has asserted regulatory authority through a tenuous and improper application of the Commerce Clause as applied to an isolated interstate population of Karner Blue butterflies on Lear Island. The result when combined with the Brittain County Wetlands Law completely deprives Cordelia of all economically

beneficial use of her land. FWS and Brittain County, by denying joint liability, seek to obstruct Cordelia Lear's Fifth Amendment right to just compensation for the actual loss suffered as a result of the combined regulations.

## STATEMENT OF THE FACTS

Located in Brittain County in the State of New Union, Lear Island is a 1,000-acre island near the edge of Lake Union, a large interstate lake. R. at 4. In 1803, while present-day New Union was still a part of the Northwest Territory, Congress granted Lear Island and its surrounding submerged lands within 300 feet of the shoreline (the Grant) to Cornelius Lear in fee simple absolute. R. at 4, 5. By 1965, King James Lear had inherited the fee simple absolute interest in the entirety of Lear Island. R. at 4, 5.

In 1965, the Brittain Town Planning Board approved subdivision of the property into three lots, and determined that each lot could develop at least one single-family residence. R. at 5. King Lear deeded each of the three lots separately to his daughters, reserving a life estate for himself. *Id.* Cordelia Lear took possession of her deeded property in 2005 when King Lear died. *Id.*

Lear Island contains the last remaining habitat of the New Union subpopulation of Karner Blue Butterfly, a federally listed endangered species. R. at 5. The FWS designated the Karner Blue an endangered species in 1992, and concurrently designated the Cordelia Lot as critical habitat. *Id.* Cordelia asserts claims against FWS and Brittan County for an uncompensated taking of her property under the Takings Clause of the Fifth and Fourteenth Amendments. *Id.*

The property that is the subject of this action (the Cordelia Lot) comprises ten acres of the 1,000-acre Island, not including any submerged lands. R. at 5, n.2. The Cordelia Lot consists of a 40-foot by 1000-foot access strip and an open field comprised of nine acres of uplands. *Id.* Fronting the lot is about one acre of emergent cattail marsh in a cove that was historically open water and used as a boat landing (the Cove). *Id.* The Cordelia Lot has been kept open by annual mowing each October and is covered by wild blue lupine flowers, essential for the survival of the Karner Blue. *Id.*

In 2012, Cordelia contacted the New Union FWS bureau to inquire if development of her property would require any permits due to the presence of the Karner Blue. R. at 6. FWS advised her that the entirety of the Cordelia lot was critical habitat, and "any disturbance" other than annual mowing "would constitute a take" in violation of the ESA. *Id.* The FWS agent advised Cordelia that in order to obtain an ITP under section 10 of the ESA, she would have to develop a habitat conservation plan (HCP) and perform an environmental assessment under the National Environmental Policy Act. *Id.* The FWS further advised in their May 15, 2012 letter that an HCP would only be approvable if she provided for contiguous lupine habitat within a one-thousand-foot radius of the existing fields, and if she committed to maintaining the remaining lupine fields through annual mowing. *Id.* Cordelia does not own any surrounding contiguous land, and the neighboring owner has refused any cooperation. *Id.* Preparation of an ITP, including the required HCP and environmental assessment documents, would cost $150,000. *Id.* The fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family home is $100,000. R. at 7.

Without annual mowing, the Karner Blue habitat could disappear naturally; a process that would take an estimated ten years. R. at 7. The result would be extinction of the New Union subpopulation of Karner Blues. *Id.* Cordelia developed an Alternative Development Proposal (ADP) that would not disturb the lupine fields. *Id.* In the ADP, Cordelia proposed filling one half-acre of the marsh in the Cove to create a lupine-free building site, together with an access causeway. *Id.*

No federal approval is required for the ADP because the U.S. Army Corps of Engineers has determined this portion of Lake Union to be "non-navigable" for purposes of the Rivers and Harbors Act of 1899, and because construction of residential dwellings involving one half-acre or less are authorized by the U.S. Army Corps of Engineers Nationwide Permit 29. R. at 7. Pursuant to the County Wetlands Law, enacted in 1982, the ADP required a permit to fill the cove marsh. *Id.* Cordelia duly filed a permit application with the Brittain County Wetlands Board in August 2013. *Id.* In December 2013, the County denied Cordelia's permit application on the grounds that permits to fill wetlands would only be granted

for a water-dependent use, and that a residential home site was not a water-dependent use. R. at 6.

There is no market in Brittain County for a parcel like the Cordelia lot for recreational use without the right to develop a residence on the property, nor does the Cordelia Lot have any market as agricultural or timber land. R. at 7. Property taxes on the Cordelia Lot are $1,500 annually. *Id.* The Brittain County Butterfly Society has offered to pay Cordelia $1000 annually to conduct butterfly viewings which she declined. R. at 7.

In February 2014, Cordelia filed an action 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 when applied to a wholly intrastate population, or alternatively, just compensation from both the County and FWS because the regulations together restrict all economically beneficial use of the land. *Id.*

## STANDARD OF REVIEW

The possible standards of review for a district court opinion are de novo, clear error, or abuse of discretion. *See Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The standard applied depends on the context of the issues on appeal. *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). De novo is the appropriate standard for issues predominantly involving interpretation of law, while factual determinations by the District Court must be upheld absent clear error. Fed. R. Civ. P. 52(a)(6). Furthermore, the clear error standard applies to "findings based on documentary evidence" in addition to oral testimony. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 541 (1948)).

## SUMMARY OF ARGUMENT

FWS regulation of the Cordelia Lot under the ESA is an overreach of the Commerce Clause, which allows federal regulation of commerce between states. When Congress asserts authority over an activity using the Commerce Clause, that activity must be economic in nature and have a sufficient effect on interstate commerce. Unlike ESA cases that have upheld Commerce Clause authority, the present case is entirely absent of any interstate activity. Not even tenuous connections such as those of tourism or scientific research will take place on the private land of Cordelia Lear. The regulation here goes beyond a mere prohibition on development to encompass "any disturbance" of the Karner Blue, effectively disallowing any use or enjoyment of the lot. Therefore, regulating development on the Cordelia Lot through the Commerce Clause is an improper extension of federal authority.

As a threshold matter, the takings claim currently before this Court is ripe for review. The actions of FWS and the County are final, and the absence of any permissible use of the property is known to a reasonable degree of certainty. Additionally, the $150,000 cost of pursuing an unattainable ITP is more than the value of the Cordelia Lot itself. Requiring Cordelia to follow such strict formality before judicial review becomes available constitutes an undue burden, and is not a necessary step when faced with administrative futility. The Court should find this issue ripe for review because the Supreme Court has specifically identified futility as an exemption to a final decision.

The ten-acre Cordelia Lot is the relevant parcel for a regulatory takings analysis. King James Lear deeded his fee simple interest in the Lot to Cordelia in 1965, and she was vested with full possession and ownership of the Lot in fee simple absolute when King Lear passed away in 2005. The Cordelia Lot is now a distinct and separate estate from the neighboring lots. As such, the ten-acre lot is the "denominator," or baseline of value in the takings analysis "ratio," whereby the loss of beneficial use of the property is the "numerator." Because the severance of the Lear Island Parcels was legal and final rather than "conceptual," there is no basis for the assertion that the Lear Island lots should be considered as a single parcel.

The regulations preventing development of the Cordelia Lot are permanent, and categorical treatment of the takings claim should be upheld. Unlike the Supreme Court's interpretation of temporary building moratoria, the analysis of the present case does not leave any future interest remaining in the parcel as a whole. Categorical regulatory takings look only to the interest lost at the time property use was restricted. Moreover, no regulatory taking is truly "permanent" because regulations can always be changed. It would be improper to rely on a hypothetical adjustment of the regulation's current deprivation of all economic use of the property, thus the Court should find a categorical taking occurred.

Additionally, Cordelia's categorical takings claim is not precluded by the offer from the Britain County Butterfly Society. A purported economic gain that is less than the expense of property tax and actually results in a net loss is per se a non-economically viable use. Furthermore, it is evident that even land so heavily regulated as to have no remaining beneficial use still retains some value. Government regulations cannot, within the confines of the Fifth Amendment, eviscerate private land rights and leave behind only a token value without paying compensation. This Court should affirm Cordelia's valid categorical takings claim based on a complete loss of economically beneficial use.

Public trust principles do not inhere in Cordelia Lear's rights of ownership and use of the riparian lands fronting the Lot. In 1803, Lear Island was granted to Cordelia's ancestor by the United States Congress before the admission of the State of New Union. At that time, the U.S. Government had sovereign authority over what was then the Northwest Territory. When Congress granted the Island and its surrounding submerged lands to Cornelius Lear in fee simple absolute, the U.S. was divested of its sovereign title over the Grant, and therefore did not convey it to the State upon admission to the Union. Thus, Brittain County has no authority to regulate Cordelia's riparian lands under a public trust theory.

FWS and Brittain County should be held jointly liable for the total deprivation of all economically beneficial use of the Cordelia Lot. The Fifth Amendment prohibition on uncompensated taking of property is extended to the States (and Counties) by the Fourteenth Amendment, rendering both FWS and the County generally

liable for Fifth Amendment Takings Clause violations. Regulatory takings analysis centers on the loss suffered by landowners, rather than the benefits accrued or harms prevented by regulation. Because Cordelia was deprived of all economically beneficial use of her property, a categorical taking has occurred, and requires just compensation equal to the fair market value of the property. An absence of Federal appellate case law either enforcing or barring joint agency liability makes this an issue of first impression for a Federal Circuit Court. This Court should avoid potentially injurious precedents and affirm Fifth Amendment protections against uncompensated takings by finding FWS and Brittain County jointly liable.

## ARGUMENT

### I. THE COMMERCE POWER DOES NOT EXTEND TO AN INTRASTATE SPECIES THAT DOES NOT AFFECT INTERSTATE COMMERCE

The lower court erred when it found that the ESA is a valid exercise of the Congress' Commerce power, as applied to a wholly intrastate population of an endangered butterfly. *People for Ethical Treatment of Prop. Owners v. United States FWS*, 57 F. Supp.3d 1337, 1343 (D. Ut. 2014). FWS seeks to regulate activity that is noneconomic in nature that has no effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding the Gun–Free School Zones Act unconstitutional in part because it had "nothing to do with 'commerce' or any sort of economic enterprise); *United States v. Morrison* 529 U.S. 598, 617 (2000). FWSs confirmation to Cordelia that "any disturbance" other than annual mowing would constitute a take in violation of the ESA exceeds the limits of federal power. R. at 6; *See Rancho Viejo, LLC v. Norton,* 323 F.3d 1062, 1077 (D.C. Cir. 2003) (rationalizing that the focus is on the activity that the government seeks to regulate). By placing limitations on any disturbance, FWS seeks to regulate activity with no effect on interstate commerce like that of "a hiker's casual walk in the woods." *See Rancho Viejo, LLC*, 323 F.3d at 1077.

The District court erroneously found that the relevant activity being regulated is the underlying land development through construction of the proposed residence. The inclusion of the language "any disturbance" indicates the impermissible extent of government reach. R. at 8; *See GDF Realty Investments, Ltd. V. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (en banc); *Rancho Viejo, LLC* 323 F.3D at 1077. Furthermore, the regulation does not prohibit the taking of the Karner Blue for any purpose involving tourism or scientific research. *Gibbs v. Babbitt* 214 F.3d 483, 493 (4th Cir. 2000). Therefore, this court should reverse the lower court's holding and find that the ESA is not a valid exercise of Congress' Commerce Power as applied to the Karner Blue butterfly.

### A. The Karner Blue Population is Completely Confined to the Cordelia Lot, and an Extension of the Commerce Clause is Unwarranted

The ESA prohibits the take of any endangered species. 16 U.S.C. § 1538(a)(1)(B). By prohibiting the take of an entirely intrastate species, FWS is regulating noneconomic activities such as land clearing and vegetation removal that do not involve interstate commerce. R. 8. Congress has authority to regulate the use of interstate commerce, and protect the instrumentalities of, or persons or things in, interstate commerce. *People for Ethical Treatment of Prop. Owners*, 57 F.Supp.3d 1343. The regulated activity must be economic in nature when relying on the substantial aggregate effects as the basis for regulation under the Commerce power. *Lopez*, 514 U.S. at 561; *Morrison* 529 U.S. at 617; *Mississippi Commission on Environmental Quality v. E.P.A.*, 790 F.3d 138, 182 (D.C. Cir. 2015) (holding ozone pollution has economic consequences on interstate commerce); *Allied Local & Regional Manufacturers. Caucus v. U.S. E.P.A.*, 215 F.3d 61, 82 (D.C. Cir. 2000) (regulating environmental hazards that have effects in more than one state**)**. The Commerce Clause does not authorize Congress to regulate takes of a "purely intrastate species that has no substantial effect on interstate commerce." *People for Ethical Treatment of Prop.* Owners, 57 F.Supp.3d at 1346.

There is a logical stopping point for the court's rationale in upholding the constitutionality of the Commerce power. In *Rancho Viejo*, the Chief Judge distinguishes large-scale construction of a housing development that *does* affect interstate commerce from the

"homeowner who moves dirt in order to landscape his property," explaining that although he "takes the toad, that does *not* affect interstate commerce." 323 F.3d at 1080 (Chief Judge Ginsburg, concurring) (emphasis added). Without this limitation, "any kind of activity[]" could be regulated by the government, "regardless [of] whether that regulated activity ha[s] any connection with interstate commerce." *Id.* Unlike large scale development projects, disturbance of the Cordelia Lot has no effect on interstate commerce. *See id.*

### B. The Regulation is Not Necessary to Sustain Any Economic Activity

Regulating the take of an endangered species under the Commerce Clause has been upheld when such regulation sustains interstate economic activity. *Gibbs v. Babbitt* 214 F.3d at 493. For example, the Commerce Clause can be used to regulate the preservation of a species where scientists and tourists may seek out the animal, thus traveling from other states and utilizing interstate commerce channels. *Id.* The New Union subpopulation of the Karner Blue does not affect interstate commerce through any such activities, as they exist *only* on the private land of Cordelia. *Id.* at 494. Without such a link to economic activity, Congress' Commerce power is not valid. *See id.* at 493-95.

In the instant case, upholding of the commerce clause would be a limitless application of federal protection. *See GDF Realty Investments, Ltd.* 362 F.3d at 292. Applying the commerce clause here would "convert the ESA to an economic regulatory statute." *Id.* The effects of the Karner Blue butterfly on interstate commerce are too attenuated to pass constitutional muster. *See id.* at 292 (citing *Morrison,* 529 U.S. at 612).

## II. THE TAKINGS CLAIM IS RIPE BECAUSE FURTHER PURSUIT OF A PERMIT WOULD BE FUTILE

The taking of Cordelia's property occurred when FWS promulgated the rule designating her property as critical habitat, pursuant to 16 U.S.C. § 1533(a)(3)(A)(i) (2012) (requiring that critical habitat for an endangered species shall be designated concurrently

with listing). 57 Fed. Reg. 59,236 (Dec. 14, 1992). The FWS confirmed this when they advised Cordelia that her "entire ten-acre property" was critical habitat and that "any disturbance" would constitute a take in violation of the ESA. R. at 6. The advisory letter of May 15, 2012 constituted a constructive denial of an ITP, and provided sufficient information concerning the prohibitive restrictions on the Cordelia Lot to constitute a final agency action. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Any further effort towards an already unattainable ITP would also be unduly burdensome, therefore causing this claim to be ripe. *See Hage v. United States*, 35 Fed.Cl. 147, 164 (1996); *Robbins v. United States*, 40 Fed. Cl. 381, 387 (aff'd) (Fed. Cir. 1998).

### A. Cordelia's Claim is Ripe for Review Because the Agency Action Constituted a Final Decision

Under the ripeness doctrine, courts examine (1) the hardship the aggrieved party will suffer from withholding judicial review and (2) the fitness of the issue for judicial decision. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In the present case, FWS and the County have acted through regulatory mechanisms to deprive Cordelia all economic use of her property. This case is ripe for review because the denial of development is determinative, and without judicial intervention Cordelia will lose all economic use of her land. *See id.*

A takings claim is ripe when an "agency charged with implementing the regulation has reached a final decision regarding their application to the property at issue." *Palazzolo*, 533 U.S. at 607 (citing *Williamson County Regional Planning Community v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). A final decision does not occur until the responsible agency determines the extent of permitted development on the land. *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). Here, FWS confirmed the extent of the permitted development on the land with the May 15, 2012 letter stating "any disturbance" other than the annual mowing "would constitute a 'take'" in violation of the ESA. R. at 6.; *Palazzolo*, 533 U.S. at 618-19. FWS explained the extent of the regulation on the Cordelia Lot with finality, which eliminates all beneficial use of the property. *See id.*

The court in *Williamson Cty.* establishes the two-part test for ripeness. 473 U.S. at 186. The test requires that (1) a landowner

obtain a final decision regarding the application of the challenged regulations to his property and (2) utilizes any state procedures for obtaining just compensation if they are available. *Id*. at 190-94. In the present case, the second prong of the *Williamson Cty*. test is inapplicable because the State of New Union does not have a just compensation clause, nor does the State have a statute providing for a procedure seeking just compensation. R. at 9, n. 5; s*ee Williamson Cty*., 473 U.S. at 194. The first prong was satisfied when FWS effectively reached a final decision regarding the applicability of the ESA to the Cordelia Lot, and provided Cordelia with conditions that were impossible to satisfy. R. at 9; *see id*.

In takings claims, the *Williamson Cty*. finality requirement applies to decisions about how a plaintiff's own land may be used. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997); *see Williamson Cty*., 473 U.S. at 186. FWS advised Cordelia about conditions that made the ITP unattainable, and confirmed that its discretion was exhausted in regards to the use of her land. R. at 9; *Id*. Therefore, further pursuit of an ITP is not necessary and an application would be futile. *See Suitum*, 520 U.S. at 739 (1997); *Williamson Cty*., 473 U.S. at 186. FWSs conduct therefore amounted to a "constructive denial" of the ITP. R. at 9; *see Palazzolo*, 533 U.S. at 626.

The District Court correctly held that if procedures to acquire a permit are so burdensome to effectively deprive plaintiffs of property rights, pursuing a permit is unnecessary. R. at 9 (citing *Hage,* 35 Fed. Cl. at 164). Requiring Cordelia to replace the lupine field with contiguous acreage is not only burdensome but also impossible because that acreage exists on land she does not own whose owner refuses to have restrictions on her property. R. at 6; *see Hage*, 35. Fed. Cl. at 164. Moreover, the cost of preparing the permit would be more than the value of the property, with the outcome still resulting in a denial. R. at 6, 7. Therefore, this Court should find the issues ripe for review.

### B. An ITP Application would be Futile Where the Permit Necessarily Includes Conditions Impossible for Cordelia to Satisfy

Landowners must pursue avenues to provide relief but they are not required to take "patently fruitless measures," and here, an ITP application would be futile. *MacDonald Sommer & Frates*,

477 U.S. at 359*; Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1501 (1990) (Holding that the futility exception excuses property owners from resubmitting proposals to arrive at a final administrative decision); *Macdonald*, 477 U.S. at 350 n.7. Further steps towards the ITP will not change whether FWS issues the permit or not, thereby making any attempts futile. R. at 9; *see Del Monte Dunes*, 920 F.2d at 1501; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, n. 3. (1992) (noting that a permit would not be issued, application or no application). Unlike in *Robbins*, where a permit was not sought and the cost was unknown, the cost of mitigation here is ascertained to be "economically impractical," and the conditions precedent are deemed impossible to satisfy. R. at 9; 40 Fed.Cl. at 388.

Here, the regulatory taking challenge is ripe because the unequivocal nature of the regulations that prohibited Cordelia from developing a residence on her property would make an ITP application meaningless and akin to a permit denial. *Palazzolo*, 533 U.S. at 619; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1171 (Fed. Cir. 1991); *Robbins*, 40 Fed.Cl. at 388. When the permissible uses of the property are known to a reasonable degree of certainty and it is clear that the agency lacks discretion to permit any development, a takings claim is likely ripe. *Palazzolo*, 533 U.S. at 620. Development of Cordelia's property would be impermissible as burdened by FWS's regulation. *See id.*

Defendant's cite *Morris v. United States*, in arguing that Cordelia's claim is not ripe, however, in that case, the costs of applying for a permit were not known and the plaintiffs' takings theory was not grounded in any agency restriction on the use of their property. R. at 9; Morris v. United States, 392 F.3d 1372, 1376-77 (Fed. Cir. 2004). Unlike the present facts, the agency in *Morris* had not exercised its discretion in a manner that made reasonably clear or final the affect the regulation would have on the permit application. 392 F.3d at 1378. The burden on the Cordelia Lot cripples all economically beneficial use by prohibiting "any disturbance," and is ripe for judicial review. R. at 6.

## III. THE RELEVANT PARCEL FOR TAKINGS ANALYSIS IS THE CORDELIA LOT AND NOT THE ENTIRETY OF LEAR ISLAND

The legal and factual circumstances in this case dictate that the relevant parcel for a takings claim is the Cordelia Lot. At the time of subdivision, King Lear conveyed each of the three lots to his three daughters by deed, but retained for himself a life interest. R. at 5. Upon the death of King Lear in 2005, individual and distinct fee simple absolute ownership rights to the three Lear Island lots vested respectively in each of his daughters. Therefore, the Cordelia Lot was legally severed from the other two Lear Island lots, precluding a compelled re-aggregation of the estates for the purposes of a takings analysis.

### A. The Death of King James Lear in 2005 Vested a Distinct Fee Simple Ownership Right in Cordelia Lear

Cordelia Lear's estate of fee simple absolute in the Cordelia lot was vested in her upon the expiration of her father's life estate in 2005. Prior to 2005, Cordelia held a vested remainder in her respectively deeded lot because a future interest is vested if it is certain to take effect in possession or enjoyment. Restatement (Third) of Property § 25.3 (Am. Law Inst. 2011). Before subdividing the Island, King James Lear held a fee simple absolute interest in the entirety of Lear Island, handed down from the original 1803 grantee, Cornelius Lear. R. at 4, 5. When King Lear subdivided Lear Island in 1965, he "deeded each of the lots, *respectively*, to his three daughters, reserving a life estate *in each lot* for himself." R. at 5 (emphasis added). It was therefore King Lear's manifest intent that the three lots be held separately, in fee, by his daughters. *See id.* Thus, when King Lear died in 2005, Cordelia Lear came into individual possession and ownership of her lot. *Id.* Based on common law principles of succession, and without anything in the record to indicate otherwise, it must be assumed that Cordelia acquired a fee simple absolute interest in her lot when her full rights vested.

### B. The Cordelia Lot Must Be Considered Separately from the Other Lear Island Lots for Takings Analysis

Because Cordelia Lear owns a fee simple interest in her ten-acre lot, distinct from the fee simple interests of her sisters in the other two lots, the relevant parcel for the takings claim must be the Cordelia lot alone. For the purpose of determining whether a government action constitutes an unconstitutional taking, a court must consider the "nature and extent of the interference with rights in the parcel as a whole[.]" *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 130-131 (1978). The Supreme Court has rejected "conceptual severance" arguments designed to manufacture takings claims. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002). However, "conceptual severance" arguments such as that in *Tahoe-Sierra* are sometimes advanced for the purpose of attempting to disaggregate some portion of a combined property interest (in *Tahoe-Sierra*, a temporal disaggregation) as a distinct interest unto itself. *Id*. Such legal subterfuge, however, is not required here.

The existence of an estate in fee simple absolute, vested with the Plaintiff, alleviates the Court's need to struggle with the "denominator" or "relevant parcel" question in a takings deprivation analysis due to the fee simple estate's "rich tradition of protection at common law." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). Determination of whether a regulatory taking has occurred requires a comparison between "the value that has been taken" from a property and "the value that remains." *Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470, 497 (1987). Thus, in the regulatory takings "fraction," the "relevant parcel" furnishes the "denominator," or the total *interest in property* against which the deprivation of value or use is measured. *See id.* Cordelia Lear's interest in her lot is hers alone, and she holds no interest in the lots of her sisters. The severance of interest in the Cordelia Lot was manifested in fact by the subdivision of the Island in 1965, before the existence of the regulatory burden, and a formal subdivision of land creates a new group of smaller "denominators" out of the larger pre-subdivision "parcel as a whole." *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed.Cir. 1994) (holding that lands transferred before

the creation of the re environment should not be included in the denominator).

### C. Brittain County's Claim that the Relevant Parcel is the Entire Island Runs Contrary to Prior County Action

Evidently Defendant Brittain County was aware of and approved the division of Lear Island into separate lots. In 1965, the Brittain Town Planning Board approved the subdivision of Lear Island, and determined that each lot could be developed with at least one single family home. R. at 5. The subdivision approval and zoning determination occurred before King Lear executed the three deeds to his daughters. *Id*. Thus, King Lear could just as easily have conveyed any or all of the three lots to complete strangers if he had so chosen. Had that been the case, it is doubtful that Brittain County or FWS would attempt to claim, as they do now, a subsequent re-merging of interests with respect to the three lots.

## IV. NO ECONOMICALLY BENEFICIAL USE REMAINS IN THE CORDELIA LOT, CONSTITUTING A PERMANENT TAKING REQUIRING COMPENSATION

The Supreme Court is clear that when a property owner is made to sacrifice "*all* economically beneficial uses in the name of the common good" a taking has occurred. *Lucas*, 505 U.S. at 1019 (emphasis in original). Furthermore, the only appropriate remedy to the occurrence of a taking is through compensation. *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 306-07 (1987). The Wetlands Law and the designation of the entire Cordelia Lot as critical habitat deny Plaintiff any opportunity for development. R. at 6-7. As the regulations stand, the Cordelia Lot has no present or future economically beneficial use and the Plaintiff must be compensated. *See Tahoe-Sierra*, 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019).

### A. A Categorical Taking Accrued When the County Denied the ADP and FWS Constructively Denied Development on the Cordelia Lot

The Fifth Amendment protects property owners from government invasion by preventing private property from being "taken for public use, without just compensation." U.S. Const. amend. V. When such an effect is accomplished through regulations that "wipe out" any remaining economic use of a property, the regulation is considered to be a per se taking. *Lucas*, 505 U.S. at 1016-18. It has been repeatedly held that when a regulatory takings claim arises from the denial of a permit, the appropriate analysis of a takings claim is at the time of the denial. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1171-73 (Fed. App. Ct. 1991) (holding that a taking occurs when economic development is prevented).

In the present case, the County denial and FWS action through issuance of the May 15, 2012 letter prevent all development or use of the Cordelia Lot. R. at 6; *Whitney*, 926 F.2d at 1171-73. Subsequent events that occur after the fact – if they occur at all – do not change the interests that were taken from an owner at the time a regulation takes effect. *Whitney*, 926 F.2d at 1172-73. Put another way, determining whether the denial effectuated a categorical taking depends "*only* on the effect of that particular denial on plaintiffs' property interests at the time of the denial." *Resource Investments, Inc., and Land Recovery, Inc. v. United States*, 85 Fed.Cl. 447, 484 (2009) (emphasis in original).

A takings claim that may be cut short, whether by consequence of legislative amendment or otherwise, does not have the effect of diminishing what was initially taken. *See Tahoe-Sierra*, 535 U.S. at 327-28. The *Tahoe-Sierra* Court in fact quoted Justice Brennan that "the government must pay just compensation for the period commencing on the date which the regulation first effected a 'taking,'" which was later endorsed in *First English*. *Id*. at 328 (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 658 (1981)). Put simply, "the valuation of property which has been taken must be calculated as of the time of the taking." *First English*, 482 U.S. at 320.

Here, Defendants advance a position based on the hypothetical extinction of the species which the FWS regulations seek to protect. R. at 7. It is improper for a court to look beyond acts of certainty and instead rely only on mere possibility when determining the value of what was taken. *See First English*, 482 U.S. at 320; *Board of County Supervisors of Prince William County, VA v. United States*, 276 F.3d at 1359, 1365 (2002) (noting any consideration of proposed land uses must be identifiable and be probable to occur in the "*reasonably* near future.") (emphasis added). Thus, any decision regarding Cordelia's categorical taking must look directly at the loss she suffered at the time, and not towards speculation. *See United States ex rel and for Use of Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 276 (1943) (finding in condemnation suit that future land use cannot be "too remote and speculative to have any legitimate effect upon the valuation.").

### B. No Present or Future Economically Beneficial Use Remains in the Cordelia Lot

The majority in *Tahoe-Sierra* emphasized that application of the categorical takings rule is still appropriate when there is a total taking of the parcel as a whole. 535 U.S. at 329-32. There, the Court excluded from categorical treatment only properties in which a landowner retained some economically beneficial use in the future. *Id.* Thus, whether a permit denial constitutes a categorical taking of the parcel as a whole turns on future economically viable use in the parcel as a whole. *Id.*

The landowners in *Tahoe-Sierra* never faced a permanent restriction from the 32-month moratorium in contention. *Id.* at 306. From the beginning the restriction was temporary, with a start date and – although unspecified at the outset – a finite end to the development prohibition. *Id.* Accordingly, the Court found the landowners had been deprived economic use of their property for only a finite and temporary period of time, and therefore retained a future interest. *Id.* at 311. Although the future interests were diminished in value, they nevertheless remained intact, which the Court found dispositive in finding no taking of the parcel as a whole. *Id.* at 317 n.13.

Unlike *Tahoe-Sierra*, the regulations imposed on the Cordelia lot restrict all economically beneficial use of the parcel as a whole,

not merely a temporal segment. 535 U.S. at 332. Here, like in *Lucas*, the restrictions on the Cordelia Lot do not include a termination date or a condition upon which the ability to develop would be reinstated. 505 U.S. at 1010-11. Defendants argue that a hypothetical future in which the Cordelia Lot could become developable leads to the conclusion that Cordelia retains a future economically beneficial use of the land. As the regulations stand, there is no other way to read the permit denial than as permanent. *See Whitney Benefits*, 926 F.2d at 1172-73 (holding that taking accrued when statute was enacted). Only in retrospect could the present regulations be read as temporary. *See Tahoe-Sierra*, 535 U.S. at 329-30.

Defendant's logic would render *Lucas* and the entire class of categorical regulatory takings inapplicable to virtually any set of facts. A regulation, no matter how permanent it may presently seem, can always be amended or rescinded. *See Hendler v. United States*, 952 F.2d 1364, 1376 (Fed.Cir. 1991). All takings are in fact temporary, whether the interest taken is "a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." *Id.* Moreover, "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting). When a would be permanent taking is cut short, it does not change what was previously taken. *See Seiber v. United States*, 364 F.3d 1356 (Fed.Cir. 2002); *Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed.Cir. 2004) (noting that whether a takings claim is temporary or permanent may be unknown when it accrues).

The *Tahoe-Sierra* decision was limited in scope to circumstances where an end point was discernable and definite, and cannot be extended to include hypothetical scenarios. *See Seiber*, 364 F.3d at 1368 (noting that *Tahoe-Sierra* may only reject a per se taking for "temporary development moratoria" and not regulations that are temporary only because they were changed); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350-52 (Fed.Cir. 2002) (noting that *Tahoe-Sierra* only rejected categorical taking for temporary moratoria). Therefore, the Court should appropriately determine that Plaintiff suffered a loss of all economically beneficial use of her land based on the presently discernible future. *See First English*, 482 U.S. at 320.

### 1. The distinction between temporary and permanent takings is irrelevant when a landowner is deprived of all economically beneficial use of their land

The facts of this case present restrictions that are permanent by their own text as applied to the Cordelia Lot. *See Tahoe-Sierra*, 535 U.S. at 329-30. However, even read as temporary there would be no distinction because Cordelia has no economically beneficial use remaining. *First English*, 482 U.S. at 318. Nowhere in the Takings Clause is there a distinction between permanent takings and temporary takings; indeed, *First English* upholds that "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the constitution clearly requires compensation." 482 U.S. at 318.

Furthermore, the effect of a regulatory taking that deprives an owner of all use is "the equivalent of a physical appropriation," for which the only remedy is just compensation. *Lucas*, 505 U.S. at 1017. The only appropriate calculation in the present case is to determine just compensation owed for the complete deprivation of Cordelia's property, and the simple prospect of the restrictions being lifted in the future cannot factor into the Court's decision. *See First English*, 482 U.S. at 318-20.

## V. ECONOMIC USE IS THE APPROPRIATE TEST, AND A TOKEN RETENTION OF VALUE OR REVENUE RESULTING IN ECONOMIC LOSS DOES NOT RENDER CATEGORICAL TREATMENT INAPPOSITE

A property owner left without any economically viable use of their land has been subjected to a loss analogous to that of a physical taking, constituting a per se categorical taking. *Lucas*, 505 U.S. at 1017 (citing *San Diego Gas*, 450 U.S. at 652 (dissenting opinion)). "[F]or what is the land but the profits thereof[?]" *Id.* (citing E. Coke, Institutes, ch. 1, § 1 (1st Am. Ed. 1812). A lack of *beneficial* economic use, not whether any land value or revenue source remains, determines categorical treatment. *Lucas*, 505 U.S. at 1015; *see also Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1365 (Fed.Cir. 2000); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 895-97 (Fed.Cir. 1986).

### A. Economic Use is the Determinative Factor for a Categorical Takings Claim

The majority opinion of the *Lucas* court articulated that uses of the land were critical in the analysis of categorical regulatory takings. 505 U.S. at 1019. Prior history of takings litigation shows "an abiding concern for the productive use of, and economic investment in, land." *Id*. at n.8. In fact, the Court in *Lucas* focuses their inquiry on the remaining economically viable use of the property without ever requiring that the land be truly valueless. *See id*. at 1026-28. The Court reiterates that physical appropriations, no matter how insignificant or how great the public interest, must be justly compensated. *Id.* at 1029 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)). In comparing land rendered useless through regulation to that of a physical appropriation, *Lucas* stated "[w]e believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial *use* of land." *Id*. at 1029 (emphasis added).

Similar analysis in the Federal Circuit affirms the proposition that a lack of economically beneficial use is the crux of a categorical takings claim. *See Palm Beach*, 231 F.3d at 1365. In *Palm Beach*, the plaintiff asserted a categorical takings claim based on denial of a wetlands permit. *Id.* at 1364. The Court discussed the analysis of this type of claim as requiring "sufficient denial of economically viable use," reasoning that when an owner is left with no rights "except bare legal title" the government must pay for the property interest taken. *Id*. at 1363. The appropriate inquiry in the present case is therefore whether Cordelia was deprived of economically beneficial use of the property. *See Lucas*, 505 U.S. at 1017.

After being denied the necessary permits to alter her property in any way, Cordelia possesses nothing more than empty title to a piece of land. R. at 6. The combined restrictions effectively confiscate the land from Cordelia, placing it on equal footing with that of a physical appropriation. *See id.* at 1029; R. at 6 (FWS May 15, 2016 letter confirming that "*any* disturbance" to Cordelia's property aside from annual mowing "would constitute a 'take' of the Karner Blues.").

In contrast to the application of economically beneficial use in categorical takings is the finding of a reduction in value. When a future economically beneficial use remains intact such as that of a temporary moratorium set to expire, only a diminution in value

has occurred, and not a denial of all economically beneficial use. *See Tahoe-Sierra*, 535 U.S. at 317. Thus, the proper reading of *Tahoe-Sierra* limits the Court's holding to whether the value of future economically beneficial use, if any exists, can be considered when evaluating a categorical takings claim. *See id.* The Court unsurprisingly found a future interest existed, and therefore categorical treatment was inappropriate. *Id.* at 330-32. However, *Tahoe-Sierra* affirmed the application of *Lucas* to instances when "*no* productive or economically beneficial use of land is permitted." *Id.* at 330 (emphasis in original). As applied to the restrictions on the Cordelia Lot, it would be a mischaracterization of *Tahoe-Sierra* to use a 'no remaining value' standard rather than 'no remaining beneficial use.' *Id.* 329-32.

### B. Courts Cannot Use Token Interests Remaining in Land or Nominal Revenue Resulting in a Net Loss to Avoid the Duty to Compensate

Although value remains an important part of the calculation in takings claims, its usefulness is only in determining the amount of compensation to be paid. *Palm Beach*, 231 F.3d at 1363-64. Property does *not* need to be rendered valueless in order to proceed with a categorical takings claim. *Resources Investments Inc.*, 85 Fed.Cl. at 488; *see Palazzolo*, 533 U.S. at 631. Courts have rejected assertions that merely because a property retains a token interest – as all property arguably does to some degree – categorical treatment is no longer an available option. S*ee Lucas*, 505 U.S. at 1044; *Palazzolo*, 533 U.S. at 631. FWS and the County cannot escape the requirement to provide just compensation in reliance on remaining value in the land itself, regardless of the form, so long as there is no economically beneficial *use* that remains. *Palazzolo*, 533 U.S. at 631.

Reliance on Brittain County Butterfly Society's offer of payment to assert an economically beneficial use exists is unfounded and misleading at best. In the strictest sense, a yearly revenue of $1,000 is economic in nature, however Defendant's misrepresent judicial interpretation of economically beneficial use. It is true that economically beneficial use does not mean only an ideal use, or the most profitable use. *See id.* at 632. For example, *Palazzolo* found a landowner that retained the ability to construct a substantial residence was not deprived of all economically beneficial use,

despite aspirations to develop on a much larger scale. *Id.* at 631. However, when a proposed land use that generates revenue actually results in an overall net loss, the use cannot be economically beneficial. *Bowles v. United States*, 31 Fed.Cl. 37, 48-49 (1994) (finding that allegedly profitable uses incapable of paying property taxes are not economically viable).

In the present case, the mere existence of an offer does not justify finding a per se economically beneficial use. Indeed, the Supreme Court has observed that takings jurisprudence "is characterized by 'essentially *ad hoc,* factual inquiries'" designed to carefully examine the relevant circumstances. *Tahoe-Sierra*, 535 U.S. at 322 (quoting *Penn. Central*, 438 U.S. at 124). Examining the circumstances of this case elucidates the incongruity of Defendant's assertion with logic; namely that an offer amounting to less than the property tax constitutes economic value. *See Bowles*, 31 Fed.Cl. at 48-49; R. at 7. At the bare minimum, without even covering the property taxes of the Cordelia Lot the Brittain County Butterfly Society's offer does not reject Cordelia's categorical takings claim. *Bowles*, 31 Fed.Cl. at 48-49.

Furthermore, no other economically beneficial uses have been identified – a burden that falls on the Defendants. *Resources Investments*, 85 Fed.Cl. at 490. Any proposed uses must show a reasonable probability that "the land [is] both physically adaptable for such use and that there is a need or demand for such use in the reasonably near future." *Board of Cty. Supervisors of Prince William Cty. VA*, 276 F.3d at 1365. Nothing in the record suggests any viable uses for the Cordelia Lot exist. R. at 7. To the contrary, FWS has informed Cordelia that "any disturbance" whatsoever to the entire ten acres would constitute a "take" in violation of the ESA. 16 U.S.C. § 1538 (a)(1)(B). Consequently, Cordelia's takings claim based on a complete deprivation of economic use is not precluded.

## VI. PUBLIC TRUST PRINCIPLES DO NOT PRECLUDE CORDELIA LEAR'S TAKINGS CLAIM

The public trust doctrine does not impede Cordelia's takings claim because it does not apply to lands granted by Congress prior to a state's admission to the Union. The public trust doctrine limits private uses of lands beneath navigable waterways held by the sovereign states. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387,

436-37 (1892). However, in 1803 the U.S. Federal Government granted the fee simple interest in Lear Island and the surrounding submerged lands to the Lear family, predating statehood and nullifying any State or County public trust authority over the submerged lands of the Lear Island grant. Without authority under a public trust theory, Brittain County must compensate Cordelia for depriving her of the use of her property.

### A. The Lear Island Grant Is Not Subject to the Public Trust Doctrine Because It is Not Under the Sovereign Authority of New Union

#### 1. Sovereignty is the fundamental basis of the public trust doctrine

The right of the states to regulate submerged lands under the public trust doctrine flows from the transfer of sovereignty to state governments from their predecessor sovereign. In their 1842 decision in *Martin v. Lessee of Waddell*, the Supreme Court established for the original thirteen states an "absolute right to all their navigable waters and the soils under them." 41 U.S. 367, 410 (1842). The Court in *Martin* traced this sovereign right to "principles of national law," whereby sovereigns of all nations have presumptive authority to control or dispose of lands in their possession. *Id.*at 393. In the treaty concluding the Revolutionary War, the King of England ceded his sovereignty over the Thirteen Colonies to the new United States government. *Id.* at 394. The colonies became states, and the states assumed the role of sovereign over their respective lands[2], subject only to such rights as were constitutionally surrendered to the Federal Government. *Id.* at 410.

When the United States acquired new territories, the Federal Government assumed "the entire dominion and sovereignty" over those lands "so long as they remain[ed] in a territorial condition." *Shively v. Bowlby*, 152 U.S. 1, 48 (1892). As new states were organized and admitted to the Union, each new state succeeded the

2. The sovereignty of state governments is delegated to them by their citizens through the political process, thus any reference to state sovereignty incorporates the collective sovereignty of "the People" as established in the U.S. Constitution. *See* U.S. Const. preamble.

U.S. as sovereign over lands held in trust for the public within state borders, putting new states on "equal footing" with the original thirteen as coequal sovereigns. *See id.* at 49; 57-58. Thus, when a portion of the Northwest Territory was organized as the State of New Union, the U.S. Government conferred sovereign rights on the State along with title to public lands therein, to hold in trust for the benefit of the public.

### 2. The predecessor sovereign's grant of Lear Island and its submerged lands precludes the successor sovereign's claim of public trust authority

While holding the Territories as sovereign, the U.S. had "the power to make grants of lands below high water mark of navigable waters." *Shively*, 152 U.S. at 48. In 1953, Congress expressly exempted such grants from the public trust in the Submerged Lands Act of 1953 (SLA). 43 U.S.C. § 1301 et seq. (2012). The SLA defines "lands beneath navigable waters" as all lands within state borders covered by tidal or nontidal waters. *Id.* § 1301(a)(1) (describing nontidal waters navigable at the time of admission); *id.* § 1301(a)(2) (regarding tidelands and coastal zones). However, the SLA goes on to specifically exclude from that designation any submerged lands "lawfully patented and conveyed by the United States." *Id.* § 1301(f). Thus, the sovereign right of states to control the use and disposition of lands beneath navigable waters is restricted by any allodial rights granted by the U.S. prior to statehood; "such rights are not cut off by the subsequent creation of the state, but *remain unimpaired*[.]" *U.S. v. Holt State Bank*, 270 U.S. 49, 54-55 (1926) (collecting cases affirming the Federal Government's sovereign right to alienate submerged Territorial lands prior to a state's admission to the Union) (emphasis added).

There is no factual or legal basis under a public trust theory to support Brittain County's denial of liability for a taking. In 1803, the United States Congress granted Lear Island and its surrounding submerged lands in fee simple absolute to Cornelius Lear. R. at 4. At the time, Lear Island and present-day New Union were part of the Northwest Territory, thus under the sovereign authority of the Federal Government. *Id.*; *see Shively*, 152 U.S. at

48. New Union was eventually admitted as a state[3] and was granted sovereignty over Federal lands under the "equal footing" doctrine. *See Shively*, 152 U.S. at 57-58; R. at 4. However, because the submerged lands of the Grant were granted to Cornelius Lear before statehood, those lands were not conveyed to New Union upon admission and are not considered "lands beneath navigable waters" under the SLA. R. at 4; 43 U.S.C. § 1301(f) (2012). Thus, the County has no sovereign authority over those lands and cannot freely regulate them under the public trust doctrine.

### B. Without Regulatory Authority Under the Public Trust Doctrine, Brittain County's Wetland Preservation Law Constitutes a Complete Deprivation of the Beneficial Use of Cordelia Lear's Submerged Lands

Cordelia is entitled to the sole use and occupancy of the wetlands between the lateral boundaries of the Cordelia Lot, and deprivation of that use constitutes a taking. Fee title to the Grant was passed down through generations of the Lear family, resting in 1965 with King James Lear. R. at 5. When King Lear subdivided the island and deeded the subject property to Cordelia, she acquired an indefeasible vested remainder in the fee simple title to the Cordelia Lot. *Id.*; Restatement (First) of Property § 157, cmt. h (Am Law Inst. 1936).[4] Her father's death in 2005 vested Cordelia

3. The Record does not indicate when New Union was admitted as a state. This factual omission would be a source of contention if the parties had to argue the issue of whether the Cove constituted "navigable waters" under a presumption of New Union's sovereign public trust authority. The statutory definition of "lands beneath navigable waters" looks to whether a waterway was navigable at the time a state enters the Union. 43 U.S.C. § 1301(a)(1) (2012). The past use of the Cove as a boat landing might spur the Government to argue that those waters were navigable in fact when New Union was admitted. R. at 5. Without knowing the date of New Union's admission or the range of dates during which the Cove was "historically" used for landing, it would be difficult to construct a timeline either supporting or debunking such an argument. Fortunately, the Court is relieved of the need to adjudicate that issue, as the record furnishes other facts with enough specificity to render the Government's public trust theory moot, as discussed *supra.* p. 28.

4. Comment h in the Restatement (First) of Property reads in relevant part: "When an otherwise effective conveyance [in this case, the Cordelia Lot deed as conveyed to Cordelia in 1965] of. . .land. . .creates one or more prior interests [King James Lear's reserved life estate],. . .and provides. . .that upon the expiration of such prior limited interest [the 2005 death of King Lear], the ownership in

with full title to her lot in fee simple absolute. Because the subdivision of the island did not include the deeded submerged lands, and because the record does not indicate that King Lear disposed of the entire submerged lands of the Grant in a will or other devise, we must assume that Cordelia inherited an equal share of any intestate submerged lands as a tenant in common with her sisters. 26B C.J.S. *Descent and Distribution* § 36 (collecting cases holding that the property of an unmarried intestate descends to his or her children in equal shares); *Cahaba Forests, LLC v. Hay*, 927 F.Supp.2d 1273, 1281 (M.D. Ala. 2013) (extending the Alabama Supreme Court's holding that heirs of an intestate become tenants in common with undivided interests).

However, her riparian right to use and occupy submerged lands is limited to the portion that abuts her littoral estate. *See Houston v. U.S. Gypsum Co.*, 569 F.2d 880, 884 (5th Cir. 1978) (holding that riparian rights of a littoral landowner extend laterally only to the property line of the adjacent littoral landowner). Thus, even if Cordelia may be presumed to hold an undivided one-third ownership *interest* in the intestate submerged lands, her beneficial *use* of any submerged lands is limited to the Cove.

## VII. FWS AND BRITTAIN COUNTY ARE JOINTLY LIABLE FOR A TOTAL TAKING BECAUSE THE FIFTH AMENDMENT DEMANDS COMPENSATION FOR THE COMPLETE DEPRIVATION OF PLAINTIFF'S PROPERTY

The Fifth Amendment prohibits the uncompensated taking of private property by the U.S. Government, while the Fourteenth Amendment extends that prohibition to the states. U.S. Const. amend. V, XIV § 1; *e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 713 (2010) (holding that the Takings Clause – as applied against the states – prohibits the states from taking either riparian rights *or* real property without just compensation). Thus, the federal and state governments – and by extension, counties – are mutually obliged by

fee simple absolute of the land. . .shall belong to a person who is presently identifiable [Cordelia Lear, as named on the deed of 1965], such person has an indefeasibly vested remainder."

Constitutional mandate to compensate private landowners for takings, and the Federal Courts must check any governmental dereliction of that obligation.

### A. Regulatory Takings Jurisprudence Has Consistently Upheld the Fifth Amendment Prohibition on Uncompensated Deprivation of Property Rights

Regulatory takings case law reflects a commitment to effectuate judicial standards consistent with Constitutional protections of private property rights. The U.S. Supreme Court first enunciated the regulatory takings doctrine in *Pennsylvania Coal Co. v. Mahon*. 260 U.S. 393, 415 (1922). Governments may regulate private property to a certain point without compensation, but if regulation goes "too far," it is recognized as a taking under the Fifth Amendment. *Id.* Thus, if a state or local government exercises its police power to regulate private property, or if the Federal Government imposes restrictions on property through a proper exercise of its Commerce power, the Fifth Amendment and Due Process Clause require that such regulation does not result in the destruction of the landowner's Constitutional rights. *See id.* at 413-14.

The Takings Clause bars governments from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo*, 533 U.S. at 617-18 (citing *Armstrong v. United States*, 36 U.S. 40, 49 (1960) (holding that a "fair interpretation" of the Takings Clause requires compensation of landowners for losses when the inverse benefits of those losses accrue to the public)). The principles of "fairness" and "justice," though not expressly in the Fifth Amendment, are the governing policy standards for judicial interpretation of the Takings Clause.

### B. Losses Incurred by Private Landowners Are the Fundamental Consideration in Determining Fifth Amendment Liability

Regulatory takings analysis centers squarely on the private landowner's losses and deprivation of rights in their property. Even where the Supreme Court has held that a regulatory taking did not occur, that conclusion relies on an assessment of the

degree to which the value of the ownership interest is diminished. *Penn. Coal*, 260 U.S. at 419. In the words of Justice William O. Douglas, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *U.S. v. Causby*, 328 U.S. 256, 261 (1946). The Supreme Court's *Keystone Bituminous* test for regulatory takings compares "the value that has been taken" and "the value that remains." 480 U.S. at 497. Thus, in the regulatory takings "fraction," wherein the "relevant parcel" furnishes the "denominator," the degree to which the owner's property rights are infringed supplies the "numerator." *Id.* Put another way, the landowner's loss – and destruction of the right to enjoy and use the land – is the determinative value in the analysis. *See id.* Whether a taking has occurred has nothing to do with the social value of the regulatory mechanisms by which that loss is imposed. *See id.*

Regulations will result in a compensable taking if they categorically deny a landowner's use of her land, regardless of any public benefits that may accrue from regulations, or the public nuisances or harms that the regulations may prevent. *See Lucas*, 505 U.S. at 1026. As Justice Scalia points out, the distinction between compensable takings and mere deprivations not requiring compensation would be "difficult, if not impossible to discern" if based on the government's justifications for regulation rather than losses incurred in fact by the landowner. *Id.* Such losses are the only measurable indicia by which a deprivation of property interests can be consistently evaluated from case to case. *Id.* Thus, the calculation for determining whether a total regulatory taking has occurred is decidedly landowner-centric.

### C. Faithful Application of Established Fifth Amendment and Regulatory Takings Precedent Compels a Finding of Joint FWS and County Liability

When adjudicating a regulatory takings claim, the courts must first determine if a property owner has been left without economically viable use of the property. *Lucas*, 505 U.S. at 1017. Courts will only proceed to the next element of the applicable test when it has been decided whether the loss incurred by the landowner as a result of the land use restrictions constitutes either a *Lucas* per se

categorical taking or a *Penn. Central* partial regulatory taking. *See Palm Beach*, 231 F.3d at 1363-64. If a *Penn. Central* partial taking is found to have accrued, a court will next consider "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. However, if the land use restrictions are found to deny the landowner *all* economically viable use of the property, a *Lucas* categorical taking has occurred, and at that point the nature of the land use restrictions may be considered as part of the calculus to fix the extent of monetary damages. *Palm Beach*, 231 F.3d at 1363. Upon a finding of a total regulatory taking, the issue of investment-backed expectations becomes moot, and "both law and *sound constitutional policy* entitle the owner to just compensation." *Id.* at 1364 (emphasis added). In other words, the causes of a total loss will only be examined after it is found that a loss has occurred. By that point, because the loss has occurred, the landowner is entitled to just compensation regardless of which or how many agencies have caused the loss. The Fifth Amendment expressly prohibits uncompensated takings; it does not limit the range of potentially liable takers.

In the present case, the Federal regulation prohibiting disturbance of the Karner Blue's habitat and the County Wetlands Preservation Law prohibiting development of the Cove combine to deprive Cordelia Lear of all economically beneficial use of both the ten-acre Cordelia Lot and the developable riparian lands in which Cordelia owns a right of use and occupancy. *See* R. at 6, 7. Because the restrictions completely deprive Cordelia of the beneficial use of her property, a categorical taking has occurred. *Lucas*, 505 U.S. at 1026. The next step in a categorical takings analysis is to determine the monetary damages sufficient to meet the Fifth Amendment mandate of just compensation.[5] *Palm Beach*, 231 F.3d at 1363. The amount of compensation is measured by the property's fair market value, although the nature of the use restrictions may be considered as a factor in determining government liability. *Id.* However, because the restrictions in this case create

5. An assessment of the owner's expectations regarding future use would only be relevant in determining what *portion* of the property had been encumbered by the restrictions if a *partial* taking were found to have been imposed. *Palm Beach*, 231 F.2d at 1363-64. Because Cordelia has suffered a categorical taking, any argument based on the applicability of a *Penn. Central* partial regulatory takings test must fail.

a blanket prohibition on any development or other economically viable use, Cordelia is entitled to the fair market value of her property.

A review of federal Fifth Amendment case law yields no precedent barring the joint liability of a federal and county agency for a total regulatory taking. Neither does it unearth any precedent to the contrary. The Fifth and Fourteenth Amendments provide unequivocally for just compensation when private property is taken by the Federal and State Governments. U.S. Const. amend. V, XIV § 1; *e.g.*, *Palazzolo*, 533 U.S. at 617. The states, in turn, delegate their police power to local governments, typically by way of legislative grant. 1 Local Govt. Law § 2:6. Accordingly, FWS and Brittain County share a mutual obligation to abide by the limits on government power specified in the U.S. Bill of Rights. Citizens of the County, as citizens of the State, are also citizens of the United States, and therefore equally protected under the Fifth Amendment from uncompensated takings on the part of any government agency: federal, state, and local. U.S. Const. amend. XIV §1. Citizen rights, and the government obligation to protect them, operate at all levels of the federalist system.

This case presents a unique opportunity for this Court to set a precedent that establishes a common law protection of Fifth Amendment rights against aggregated regulatory takings. The alternative – to hold that two restrictions that are separate partial takings do not require compensation despite effectuating in fact a total taking – would invite potential agency collusion and abuses of the Fifth Amendment. Such a rule could be interpreted as judicial acquiescence to government windfalls resulting from strategic regulation by multiple agencies. Hence, in the interests of justice and fairness, this Court should find FWS and Brittain County jointly liable for the total taking of Cordelia Lear's property.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks the Court to reverse the district court's determination on the following point and instead find that: ESA protection of an intrastate population of the Karner Blue butterfly is not a valid exercise of FWSs regulatory authority under the Commerce Clause. Plaintiff further

asks the court to affirm the district court's rulings that: (1) Plaintiff's takings claim is ripe because requiring her to pursue an ITP would constitute an undue burden; (2) the Cordelia Lot, rather than the entirety of Lear Island, is the relevant parcel for a takings analysis; (3) the suggestion that the property may become developable upon the natural destruction of the Karner Blue in ten years does not bar Plaintiff's takings claim of a complete deprivation of economic value; (4) the Brittain County Butterfly Society's offer to pay $1,000 per year in rent does not preclude Plaintiff's taking claim of a complete loss of economic value; (5) public trust principles do not inhere in Plaintiff's title because the public trust does not include lands Congressionally granted before statehood; and (6) FWS and Brittain County are jointly liable for a complete deprivation of economic value of the Cordelia Lot under a fair and just interpretation of the Fifth Amendment.