UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

September Term, 2016

Docket No. 16-0933

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross Appellee,

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant.

Appeal from the United States District Court for the District of New Union in No. 112-CV-2015-RNR, Judge Romulus N. Remus

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BRIEF OF DEFENDANT-APPELLANT-CROSS APPELLEE UNITED STATES FISH AND WILDLIFE SERVICE

Counsel for Defendant-Appellant-Cross Appellee

UNITED STATES FISH AND WILDLIFE SERVICE

QUESTIONS PRESENTED

1. Did the lower court err in holding that the Endangered Species Act ("ESA") is a valid exercise of Congress's Commerce power as applied to a wholly intrastate population of an endangered butterfly?

2. Did the lower court err in holding that the Plaintiff's claim for an uncompensated taking under the Fifth Amendment was ripe for litigation when she failed to apply for and Incidental Take Permit ("ITP") under the ESA?

3. Did the lower court err in holding that the relevant parcel was the Cordelia Lot?

4. Did the lower court err in holding that the potential natural destruction of the lupine fields, which are the butterflies' habitat, does not preclude the Plaintiff's takings claim?

5. Did the lower court err in holding that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude the Plaintiff's takings claim based upon complete deprivation of economic value?

6. Did the lower court err in holding that public trust principles inherent in the Plaintiff's title do not preclude her takings claim?

7. Did the lower court err in holding that the Endangered Species Act as administered by The United States Fish and Wildlife Service ("FWS") and a Brittain County, New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value?

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JURISDICTION

The judgment of the United States District Court for the District of New Union was entered on June 1, 2016. On September 1, 2016 this Court granted the Appellant's Notice of Appeal. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STANDARD OF REVIEW

The United States District Court for the District of New Union erred as a matter of law when it held that FWS exercised an unconstitutional taking of the Plaintiff's property in violation of the Fifth Amendment to the Constitution. When a circuit court of appeals reviews decisions based on constitutional issues, review of the District Court's application is *de novo*. A district court's decisions on mixed questions of law and fact involving constitutional issues are also reviewed *de novo*. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007).

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Plaintiff/Appellee, Cordelia Lear, ("Plaintiff") filed this action against Defendant/Appellant FWS in February 2014, seeking a declaration that the ESA was an unconstitutional exercise of congressional legislative power, or alternatively, seeking just compensation from FWS and Brittain County, New Union for a regulatory taking of her property. Rec. p. 7. This Court is being asked to reverse the decision of the United States District Court for the District of New Union, which found in the Plaintiff's favor on six of the seven issues concerning her takings claim in violation of the Fifth Amendment. Rec. p. 1; 2.

B. STATEMENT OF FACTS

Lake Union is a large interstate lake, which has traditionally been used for interstate navigation. Rec. p. 4. In 1803, Lear Island, a 1,000 acre island in Lake Union, as well as "all lands under water within a 300-foot radius of the shoreline of said island," was granted in fee simple absolute to Cornelius Lear by an Act of Congress. Rec. p. 4; 5.

Lear descendants have occupied Lear Island since the 1803 grant, using it as a homestead, farm, and hunting and fishing grounds. Rec. p. 5. The island was once used as a productive farm, which produce was carried by boat to the mainland. *Id.* In 1965 however, the entirety of the 1803 grant was owned by King James Lear, who consequently divided into three parcels for his three daughters as part of his estate plan. *Id.* The Plaintiff was to receive the smallest of the three lots, the Cordelia Lot, which consisted of only ten acres. *Id.* King James Lear deeded each of the lots to his daughters and reserved a life estate in each for himself. *Id.* In 2005, the Lear daughters came into possession of their life estate properties, and in 2012 Plaintiff decided to build a residence on her lot ("Cordelia Lot"). *Id.*

The Cordelia Lot consists of an access strip and an open field ("The Heath"), both of which have been kept open by annual mowing for several decades. *Id.* The Heath and the access strip have become covered with wild blue lupine flowers. *Id.* Fields of wild blue lupines are essential for the survival of Karner Blue larvae, an endangered species that can only feed on the leaves of the plants. *Id.* Because of the presence of partially shaded lupine flowers near successional forests, the Heath is the ideal habitat for the Karner Blues, and was designated by the FWS as a critical habitat for the New Union subpopulation of the Karner Blues in 1992. *Id.* at 6. Any disturbance of the lupines during the larval and chrysalis stages would result in the death of the butterflies. *Id.*

Plaintiff contacted the New Union FWS field office to see whether development of her property would require permits or approvals. *Id.* She was advised that any disturbance of the habitat other than continued annual mowing would constitute a "take" of the endangered butterfly. *Id.* She was advised to obtain an ITP under section 10 of the ESA, and was told that in order to apply for an ITP, she would first have to develop a habitat conservation plan ("HCP") and an environmental assessment document under the National Environmental Policy Act ("NEPA"). *Id.*

The Plaintiff investigated the cost of preparing the HCP and was advised that preparation of an application for an ITP would cost $150,000. *Id.* Instead of the costly pursuit of an ITP, Plaintiff developed an Alternative Development Proposal ("ADP") that would not disturb the lupine fields, in which she proposed to fill one half-acre of the marsh in the cove to create a lupine-free building site, together with an access causeway to provide entryway from the shared mainland causeway without disturbing the access strip. *Id.* at 7. Brittain County Wetlands Board denied her permit application to fill the cove marsh, on the grounds that permits would only be granted for a water-dependent use. *Id.*

Property taxes on the Cordelia Lot are $1,500 annually. *Id.* The Brittain County Butterfly Society offered to pay the Plaintiff $1,000 annually for the privilege of conducting butterfly viewing outings during Karner Blue season, but she rejected this offer. *Id.*

SUMMARY OF THE ARGUMENT

FWS agrees with the District Court's determination that the ESA, is a legitimate exercise of Congressional power under Article I, Section 8, Clause 3 of the United States Constitution; even when applied to a wholly intrastate population of endangered species because the total

extinction of that intrastate species, which would result from the Plaintiff's proposed construction, would have a substantial effect on interstate commerce.

However, FWS takes issue with the District Court's decision in regards to the ripeness of the Plaintiff's takings claim pursuant to the Fifth Amendment since the Plaintiff did not apply for an ITP pursuant to E.S.A. § 10, 16 U.S.C. § 1539(a)(1)(B). The District Court further erred when it held that the relevant parcel--for the purpose of the Plaintiff's takings claim based upon complete deprivation of economic value under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)--is the Cordelia Lot as subdivided in 1965 and not the entirety of Lear Island.

The District Court erred again when it ruled that the potential ten-year natural degeneration of the Cordelia Lot's lupine fields and butterflies' habitat does not preclude the Plaintiff's takings claim**.** A successful takings claim requires a showing of complete deprivation of economic value. If the Plaintiff could develop her lot restriction-free in ten years, the restriction would be temporary and not result in a complete deprivation of economic value. Also, the District Court improperly ruled that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Plaintiff's takings claim. If a third party is willing to pay for, or put a price tag on, the preservation of the endangered butterfly, then the critical habitat would not be deprived of all economic value, and the Plaintiff has no takings claim.

FWS also takes issue with the District Court's ruling that the public trust principles inherent in Plaintiff's title do not preclude her takings claim, since public trust issues are a matter of state law and are a separate issue from the equal footing doctrine as applied in *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012).

And finally, FWS takes issue with the District Court's finding that the ESA as administered by FWS and a Brittain County, Wetlands Preservation Law for New Union, combine to deprive the Cordelia Lot of all economic value, since she had no investment backed interest from the time she gained title in filling the marsh, as the county regulation was in effect prior to her obtaining title. FWS urges this Court to consider the effect of the ESA separate from that of the New Union Wetlands Preservation Laws; in spite of the effects of the ESA there is developable land on the Cordelia Lot of Lear Island.

ARGUMENT

I. The District Court did not err in determining that the ESA is a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly, because the extinction would have a substantial effect on interstate commerce.

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States v. Darby*, 312 U.S. 100, 118 (1941).

That is to say, "[e]ven if…activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce [whether or not] such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard v. Filburn*, 317 U.S. 111 (1942). Accordingly, Congress is empowered to adopt legislation that regulates activities which substantially affect interstate commerce.

The ESA seeks to conserve the habitats of endangered and threatened species as well as provide a program for the conservation of such species. Once a species is listed as endangered, the act further prevents a "take" of any member of that species. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined by regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2015).

In evaluating whether [the ESA] is a regulation of the use of the channels of interstate commerce or activity that substantially affects interstate commerce, the court may look not only to the effect of the extinction of the individual endangered species, but also to the aggregate effect of the extinction of all similarly situated endangered species. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). In that case, the Court properly prohibited the entire taking of an endangered fly which only existed intrastate where a hospital was going to be built on a major portion of their critical habitat. Pursuant to, *United States v. Lopez*, 514 U.S. 549 (1995), the *Babbit* Court held that the prohibition of a taking of an entirely intrastate species was a proper exercise of Congress's Commerce Power in two circumstances: (1) when it had a substantial relation to interstate commerce and, (2) when it was a regulation of the use of channels of interstate commerce.

Regarding the first circumstance, "Congress is…empowered by its authority to regulate the channels of interstate commerce to prevent the taking of endangered species in cases like this where the pressures of interstate commerce place the existence of species in peril." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). Since a hospital was being constructed using materials and workers from outside the state, and would thus attract

employees, students, and patients from outside the state, the *Babbit* Court reasoned its construction would have an effect on interstate commerce.

Incidentally, it would be dangerous to assume that only contractors and supplies from New Union would be used for construction, because the record is silent as to construction plans for the development on Lear Island. The Plaintiff may end up seeking contractors from another state who offer a better price or more guarantees. Even if she does hire contractors exclusively from New Union, they may have to subcontract work to specialists from other States, or purchase unique materials which cannot be found in New Union. If construction workers and materials from other states are used on the Cordelia Lot in New Union, then the pressures of interstate commerce would certainly be placing the existence of the New Union Karner Blue Butterfly in peril even though the activity is occurring exclusively in New Union.

Further, each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes. To allow the extinction of single seemingly invaluable species therefore deprives the economy of the option value of that species. *Id.* at 1043. The potential value of the New Union sub-species is apparent, even if the home building is not considered sufficient economic activity for purposes of affecting interstate commerce.

In this case, total extinction of this unique sub-species would substantially affect interstate commerce by foreclosing any possible commercial activity. Since the elimination of the New Union Karner Blue Butterfly would have a staggering effect on biodiversity nationwide, and Congress is granted the authority to control local incidents that affect interstate commerce, it is proper for the ESA to regulate their taking notwithstanding their non-migratory status. It is

clear from the record below that the New Union Karner Blue Butterflies have value; the Brittain County Butterfly Society is willing to pay the Plaintiff $1,000.00 per year for the preservation of their critical habitat. This is precisely the type of value that the local economy is being deprived of, which was discussed in *Nat'l Ass'n of Home Builders v. Babbitt.*

In regards to the second circumstance established by *Babbit*, "the power of Congress to regulate the channels of interstate commerce provides a justification for section 9(a)(1) of the ESA for two reasons. First, the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority to keep the channels of interstate commerce free from immoral and injurious uses." *Id.* at 1046.

Effective trafficking regulation of an endangered species depends on securing it from invasion and destruction by ensuring the exclusion of the species to its critical habitat. In this case the New Union sub-population of the Karner Blue Butterfly is non-migratory. Rec. pg. 5; 6. Removal of the endangered sub-species from its critical habitat on Lear Island, through the use of out of state construction workers and out of state supplies, would impose similarly immoral and injurious results on the channels of interstate commerce as those that *Babbit* sought to prevent concerning preservation of the fly's habitat. In *Caminetti* v. *United States*, 242 U.S. 470 (1917), the Court explained that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."

Further evidence in support of FWS's claim is found in *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272 (11th Cir. 2007), where the 11th circuit ruled that the ESA was

a constitutional exercise of Congress' commerce power as applied to a wholly intrastate population of endangered species. The *Ala.-Tombigee Rivers Coal* Court based its ruling on *United States v. Lopez* where the Supreme Court held that aggregation of economic effects is permissible where the federal action in question is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. The ESA seeks to conserve the habitats of endangered and threatened species as well as provide a program for the conservation of such species 16 U.S.C. § 1538(a)(1)(B). In essence, the ESA exists to protect endangered species. Some endangered species exist exclusively intrastate. Since the ESA exists to protect endangered species, it would undercut the regulatory scheme of the act if intrastate endangered species were not afforded the same protection as their interstate counterparts. To rule the regulation of a wholly intrastate endangered species under the ESA an unconstitutional exercise of Congress' commerce power, would effectively render the ESA moot and ineffective.

Here, since the purpose of the ESA is to conserve the habitats of endangered and threatened species as well as provide a program for the conservation of such species, it would be improper to prohibit its application to the endangered New Union sub-species of the Karner Blue Butterfly. Even though the New Union sub-species is non-migratory and exists exclusively intrastate, it was classified as endangered in 1992. Rec. pg. 5. Accordingly, the ESA should be afforded the opportunity to protect them as doing so is an essential part of a larger regulation of economic activity.

In conclusion, developing the Cordelia Lot on Lear Island may result in hiring contractors from other states who could use materials from other states, which in turn has a substantial effect on interstate commerce. Monies from New Union could potentially be paid to workers from out

of state who will spend that money in their home state. Further, the taking of the entire species of the New Union Karner Blue Butterfly resulting from the proposed construction on the Cordelia Lot could have an effect on the more general populations elsewhere. This situation is akin to the third category of activity regulated by Congress' Commerce Power in *Lopez;* those activities having a substantial relation to, or effect on, interstate commerce. Additionally, to allow the extinction of even a seemingly invaluable species therefore deprives the economy of the option value of that species. And finally, prohibiting the ESA's regulation of the New Union sub-species of the Karner Blue Butterfly would undercut the essential purpose of the regulatory scheme which is to protect endangered species.

II. The Plaintiff's takings claim against FWS is not ripe because she did not exhaust her administrative remedies by first applying for an ITP pursuant to ESA § 10, 16 U.S.C. § 1539(a)(1)(B).

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court listed the two major criteria in deciding whether a case is ripe. First, a court must consider "the hardship to the parties of withholding court consideration" and, second, "the fitness of the issues for judicial decision." *Id.* at 149. "Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" *Id.*

The general rule is that a claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985).

Here, the Plaintiff argues that by requiring her to apply for an ITP permit, FWS is forcing her to forfeit her property rights to the Cordelia Lot on Lear Island. However, a similar argument was rejected by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985). In that case, the Court stated that, "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense…" *Id.* at 126-127. The very essence of a 'permit' is grounded in the theory that permission may be granted or not. In that sense, there has been no final decision by any agency regarding the status of the Plaintiff's property rendering the Plaintiff's takings claim unripe.

In, *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004), the Court rejected an identical argument ruling that a plaintiff's takings claim was not ripe for litigation where they failed to complete an ITP and HCP pursuant to the ESA The ITP was necessary because "[w]here further administrative process could reasonably result in a more definite statement of the impact of the regulation, the property owner is generally required to pursue that avenue of relief before bringing a takings claim." *Id.* at 1376.

Here, the Plaintiff made no attempt to comply with the ITP process. Instead, she pursued an ADP which is not required or typically considered by FWS in determining the developmental possibilities of a particular piece of property. Since it remains to be seen whether or not the Plaintiff will be able to obtain an ITP, there is no final decision by any agency actually affecting the Plaintiff.

To the contrary, FWS agent L.E. Pidopter explained in detail to the Plaintiff exactly what was required in order to obtain an ITP "Pidopter…advised Plaintiff that it was possible to obtain an ITP under section 10 of the ESA, but in order to file an application for such a permit, the Plaintiff would have to develop a HCP for the Karner Blues and an environmental assessment

document under NEPA. Rec. pg. 6. Therefore, the Plaintiff's takings claim is not ripe for review for this court because there has been no final agency decision regarding the status of her property.

The futility exception which the Plaintiff attempts to invoke only serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

Here, Plaintiff seeks to invoke the exception because she was advised by an environmental consultant that preparation of an application for an ITP including the required HCP and environmental assessment documents would cost $150,000.00. Rec. pg. 6. According to her, this cost is so unreasonable and over-burdensome that it has resulted in a taking of her property because she cannot comply with the requirements. However, she has made no attempt to comply the procedure at all. Further, there is no evidence on the record to support the conclusion that the Plaintiff cannot afford the $150,000.00 anyway. Nor is there any evidence indicating how this mysterious "environmental consultant" came to the conclusion that $150,000.00 would be the actual cost of the application. Also, since the Brittain County Butterfly Society has offered the Plaintiff $1,000.00 per year in return for the preservation of the Karner Blue Butterfly's critical habitat, then perhaps they would be willing to help her with the cost of the ITP application. Instead of consulting a different environmental specialist or taking the Butterfly Society up on their offer, the Plaintiff simply chose to not comply with the application process and pursue an ADP instead. Her monies would have been much better spent on the ITP and HCP which were actually required by the ESA.

In conclusion, the Plaintiff's takings claim is not ripe because she has not completed the ITP and HCP pursuant to the ESA Since she refuses to comply with the administrative remedies at her disposal, there has been no final agency decision to make her claim ripe. Further, the futility exception raised by the Plaintiff and discussed in *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996) is not applicable because the Plaintiff has not completed an initial ITP application. The futility exception has only applied in cases like this in regards to a second application process. The Plaintiff's perception that the cost associated with the initial application is unreasonable does not relieve her of complying with them.

III. For a takings analysis, the relevant parcel is the entirety of Lear Island, not the Cordelia Lot as subdivided in 1965.

The last clause of the Fifth Amendment states, "... nor shall private property be taken for public use, without just compensation." The clause was meant to limit the government to taking property without some amount of compensation. The Takings Clause was applied to the states in *Chicago, B. & Q. Railroad Co. v. Chicago*, 166 U.S. 226 (1897). For a takings analysis, Lear Island must be considered in whole and not as divided parcels defined by the sole property owner.

First, the Court should determine that the proper owner and the owner's interest to be considered is King Lear. In determining the relevant parcel for a takings analysis, the Supreme Court has historically used "reasonable investment backed interests" of property owners. *Penn Central Transp. Co. v. New York City*, 438 U.S (1978). In considering reasonable investment backed interests, it is useful to imagine the 'bundle of sticks' which dictates what rights a property owner has to their property. For example, a property owner who owns in fee simple absolute, maintains all of the sticks in the bundle and can do with them as he pleases. Whereas,

the owner of a life estate would not possess all of the sticks in the bundle thus not as many rights to use their property in any way they see fit. While consistently treating individual parcels of land owned in fee simple as property for purposes of the Fifth Amendment, [the] Court also has considered individual rights or "sticks" associated with the land to be property. *See Michael A. Heller, The Boundaries of Private Property*, 108 Yale L.J. 1163, 1191 n.146 (1999).

Here, the reasonable investment backed interest lies with King James Lear's estate because he is the one who still owns the lots on Lear Island in fee simple absolute. His daughters only have their respective lots for each of their lives; then the remainder in fee simple absolute reverts to their father's estate. Thus, the Plaintiff has no investment backed interest in her property and to allow her to consider her lot exclusively for a takings analysis, would create a slippery slope whereby the Court continues to let property owners divide their land into smaller and smaller portions until a taking has occurred. Because King James Lear maintains an investment backed interest through owning the entire island in fee simple absolute, it is proper to consider the entire island for a takings analysis as opposed to the separate lots he has divided.

Courts cannot apply *Lucas* or *Penn Central* without first determining which property has been affected—in other words, what should be the "denominator" in the analysis. For example, the use of the property is determined by where the boundary of the parcel is actually located. A regulation that prevents use of one particular acre could potentially eliminate any or all economically viable use of a parcel of that particular acre, but, in whole, only restrict a mere percentage of a ten acre plot where the regulated acre is located. Determining the correct parcel is important; the court should identify the portion of property that is used for the takings analysis.

Second, the Court should consider the Lear Island as a whole because precedent has established that taking a "parcel" in its entirety without breaking it up is preferred for takings analysis. The Court has stated,

> [t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole... *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-131 (1978).

Here, the Plaintiff has attempted to separate the respective lots and create different parcels without taking consideration of the character of the regulation and the interference with the parcel as a whole. According to *Penn Central*, courts must take consideration of the parcel as a whole and not divide up the parcel with some exact or magical formula.

The *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) case is also helpful. In *Palazzolo*, the Court referred to the entire contiguous portion of land owned by Palazzolo as "the property." *See generally Id*. at 611. The "property" originally was purchased by Palazzolo as three separate lots under state law and was subsequently subdivided into eighty lots. *Id*. at 613. When the Plaintiff Palazzolo attempted to develop the property, there were seventy-four plots that remained ready for development. *Id*. Palazzolo made three attempts to develop the property, but Rhode Island denied Palazzolo the proper permits to begin development each time. *Id*. at 613-614. Some years later, Palazzolo hired counsel and filed an inverse condemnation action. *Id*. at 615. The Court held that because the petitioner maintained economic value from a portion of the property, which, again, consisted of seventy-four lots under state boundary rules, the court below had not erred in concluding that petitioner's property had not been 100% diminished in value and thus did not implicate the test annunciated in *Lucas v. South Carolina Coastal Council*. *Id*. at 632 and 643 (Steven's dissent). Taking this into consideration, if the Court had treated each lot as a

"property" for Fifth Amendment purposes, it would have found that there had been a 100% diminution in value of the property in question.

Palazzolo shows why boundary lines of the property owner alleging a taking should not, by itself, determine the contours of the property at issue for Fifth Amendment purposes. The seventy-four lots were in a physically contiguous area owned by the Palazzolo. In the present case, the Plaintiff and King Lear, just like the Plaintiff in Palazollo, could have chosen a different number of lots to carve out of the land area or to create a different type of divide.

Further, the formal boundary lines between lots under state law reveal nothing about the burden on the property owner to establish particular lines for the relevant parcel to be considered. Thus, the lack of clarity in taking a parcel independent from the whole, contiguous body of land is unsuitable in determining what constitutes "the property" for Fifth Amendment purposes. They are "legalistic distinctions," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987), and the lines determined should not originate in the hands of the sole property owner.

Finally, in *Andrus v. Allard*, 444 U.S. 51 (1979), the Court stated, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. Because the property owners retained other rights associated with the property (e.g., rights to possess, transport, and donate), the Court found no taking.

In conclusion, the Court here must determine that Plaintiff had all the "bundle of sticks" at the time of the regulation implementation before dividing the relevant parcel into separate lots. Since the Plaintiff does not hold all of the rights, and her interest is less than whole, a taking has not occurred. Since the Plaintiff does not have the right to arbitrarily determine what the relevant

parcel is for a takings analysis, she does not have the right to assert a takings pursuant to the Fifth Amendment.

IV. The fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shields FWS from a takings claim because there can be no complete deprivation of economic value where a property restriction is only temporary.

In *Tahoe-Sierra,* the United States Supreme Court held that both the geographic dimensions and the temporal aspects must be considered when a property interest is being viewed in its entirety. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 332 (2007). Therefore, when there was a permanent deprivation of the owner's use of the entire property, it was a taking of "the parcel as a whole." *Id.* The Court further held that temporary restrictions which caused only a diminution in value did not equate to a taking of "the parcel as a whole." *Id.* The Court stated that because the property would recover its value as soon as the restriction was lifted, the estate could not logically be rendered completely valueless. *Id.*

Here, similar to *Tahoe-Sierra,* in the event that annual mowing ceases, the butterflies will die naturally within ten years. Because of this, the Plaintiff will regain the use of her property in ten years' time. Therefore, consistent with the ruling in *Tahoe-Sierra*, the Plaintiff cannot logically claim that her estate has been rendered completely useless by FWS's temporary protection of the Karner Blue butterfly habitat.

The United States Supreme Court has also held in *Agins v. Tiburon,* that were city ordinances would limit development, the ordinances did not prevent the best use of appellants' land nor extinguish ownership, because appellants were free to pursue their reasonable investment expectations by submitting a development plan to local officials. *Agins v. Tiburon,* 447 U.S. 255, 262 (1980).

Here, like *Agins*, the Plaintiff is only limited in duration to a period of ten years before the butterfly population becomes extinct on its own and she would be free to build as she pleases. Further, as in *Agins*, she is also free to pursue the best use of her land upon presenting a ITP as well as a HCP as is required under the ESA.

V. The Brittain County Butterfly Society's offer to pay the Plaintiff $1,000 per year for the preservation of the Karner Blue Butterfly's critical habitat further precludes her takings claim because her property has not been completely deprived of all its economic value.

Lucas makes clear that "no economic value" may remain for purposes of establishing a takings claim. The Court stated, "[w]e think, in short, that there are good reasons for our frequently expressed belief that 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 v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992). The Court further states,

> [i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992). *See also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330-331 (U.S. 2002).*

The rule for no economic value remaining is the standard in which the Court determined takings analysis.

Thus, the Brittan County Butterfly Society's offer to pay certain monies on an annual basis creates economic value in the property. Due to economic value existing, the *Lucas* standard

has not been met. The Butterfly Society's offer will preclude Plaintiff from making a valid takings claim because there is not a total deprivation of economic value in the property.

VI. Public trust principles inherent in title preclude the Plaintiff's claim for a taking based on the denial of a county wetlands permit because public trust issues are a matter of state law and are a separate issue from the equal footing doctrine.

The public trust doctrine is an old doctrine whose principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 1234 (2012). It provides that state governments own navigable waterways and tidelands in trust for the common use of the public. James Salzman & Barton H Thompson, Jr., *Environmental Law and Policy* 272-275 (4th ed. 2010). Throughout history, the law has treated certain resources, particularly tidelands and other navigable waterways, as public commons belonging to everyone, regardless of private ownership. *Id*. Courts have held that the public trust flows from state law, not from the federal constitution. *PPL Mont., LLC v. Montana, 565 U.S. 576, 1235 (2012).* Unlike the equal footing doctrine which is a constitutional issue, the public trust doctrine is strictly a matter of state law. *Id.* at 1234.

In *PPL Montana,* a power company which owned and operated hydroelectric facilities on several rivers in Montana sued the State, seeking a determination that the company did not have an obligation to pay compensation for its use of riverbeds at locations near its facilities. *Id.* at 1222. The State filed a counterclaim, contending that it owned the riverbeds under the equal footing doctrine and therefore charge the power company rent. *Id.* The Supreme Court reversed the Montana Supreme Court's ruling that the State owned the riverbeds at issue and could charge rent for use of the riverbeds, because the court did not assess whether of the rivers were

navigable or non-navigable on a segment-by-segment basis at the time Montana entered the Union. *Id.* at 1220.

The Court held in *PPL Montana* that in order to determine State title to lands under water under the equal footing doctrine, the court must look specifically at the individual segments of each stream and determine whether the segments were actually navigable at the time of statehood. If the stream segments were navigable at the time of statehood, then title was with the State. *Id.*

The Court held that equal footing title to riverbeds and public trust guarantees of public access and freedom of navigation are two completely separate inquiries. *Id.* at 1235. While equal footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution, but are instead determined solely by the laws of the States. *Id.* at 1235.

The case at bar can be distinguished from *PPL Montana*, because here, the court is not being asked to determine who holds title to the waters, but instead is being asked to determine the scope of the public's rights to travel on navigable waters of an intrastate lake. The time of statehood, which is relevant in determining title under the equal footing doctrine, is irrelevant to the application of the public trust doctrine, as the scope and application of the public trust doctrine is a matter of state common law and is left to the judges of each state. *Id.* at 1235. Therefore, the District Court applied an incorrect standard in determining the issue of the public trust principles in this case, as they looked at what was inherent in title at the time of statehood, similar to the test required under the equal footing doctrine.

Because public trust issues are a matter of state law, states are not uniform in their application of the public trust doctrine. For example, in *Illinois Central Railroad Co. v. Illinois*,

the state of Illinois granted over 1,000 acres underlying Lake Michigan along the Chicago shore to the Illinois Central Railroad for commercial development, and then four years later decided to sue to invalidate the original grant. *Ill. C. R. Co. v. Ill.*, 146 U.S. 387, 454 (1892). The Illinois Supreme Court ruled in the State's favor holding that the grant was either voidable or *void ab initio*. *Id.* at 453.

In *Illinois Central Railroad Co.*, the court held that navigable waterways are important to the public and that the State holds title to those lands in trust for the people so that they can enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. *Id.* at 452.

This case is similar to *Illinois Central Railroad Co*. because it involves a large interstate lake as well, which people frequent for recreational and other purposes.

The California Supreme Court in *Marks v. Whitney*, illustrated the expansion of the public trust doctrine to tidelands *Marks v. Whitney*, 6 Cal. 3d 251, 257 (1971). In this case, when a man who owned tidelands bordering a Northern Californian bay threatened to fill and develop them, a neighboring property owner who would have lost access to the bay sued. *Id.* at 256. The court held that, except in limited situations, the private owner of tidelands holds title subject to the state's public trust. *Id.* at 259. They further held that any member of the public can bring a lawsuit to enforce the public trust and enjoin actions that would violate the trust. *Id.* at 260. The court held that the purposes of the public trust are flexible with changing needs of the public. *Id.* at 259. The court went on to state that one of the most important purposes of the public trust doctrine today is to preserve tidelands so that they may serve as environments which provide food and habitat for birds and marine life. *Id.*

This case illustrates the States' broad discretion in applying and even changing the scope of the public trust doctrine. While some states have limited its application, others have interpreted it rather broadly to protect the environment and habitats for animals and marine life, as is urged in this case.

VII. FWS is not liable for a complete deprivation of economic value of the Cordelia Lot when the federal or county regulation, by itself, would still allow development of a single-family residence.

The United States Supreme Court first began looking at an individual's reasonable investment backed expectations for purposes of a takings analysis in *Pennsylvania Coal Co. v. Mahon*, where they reversed the Pennsylvania Supreme Court's holding that a statute, which was admitted to destroy rights of property and contract which existed prior to the statute, was a legitimate exercise of the State's police power and did not amount to a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922). The United States Supreme Court held that the Kohler Act, which prevented coal companies from mining coal under homes, was an unconstitutional taking of the coal company's rights under a valid contract, since the deed to the land had given the coal company the rights to mine all coal under the house and had given the homeowners the surface rights to the property only. *Id.* at 412. The Court held that the plaintiff's should have contracted for more land-rights if that was their goal, but that the later enacted statute could not take away the coal company's rights which it had previously contracted for. *Id.* at 416.

The Supreme Court further elaborated on the "reasonable investment backed interest" factor in *Palazzolo v. Rhode Island.* In this case, a man who owned a waterfront parcel of coastal wetlands in Rhode Island sued the Rhode Island Coastal Resources Management Council,

asserting that the application of wetlands regulations which prohibited the development of the wetlands constituted a taking of the property without just compensation. *Palazzolo v. Rhode Island,* 533 U.S. 606, 611 (2001). The Supreme Court held in this case that because the regulations existed prior to his ownership of the property, he had no reasonable investment backed expectations to develop the wetlands, and therefore could not recover on a takings claim. *Id.* at 626.

This case is similar to *Palazzolo* because here, the county wetlands regulations went into effect in 1982, and before the Plaintiff's property interest arose in 2005. Rec. p. 5; 7. Because there was no provision in her title predating the regulation and giving her explicit authority to develop the wetlands, under the rule in *Palazzolo,* she could not have had an investment backed expectation in developing the wetlands. Therefore, the county regulation should be considered irrelevant to her takings analysis and should not be considered for purposes of her takings claim, as it was in place prior to the occurrence of her property interest. The only regulation that should be considered for purposes of Plaintiff's takings claim therefore, should be the ESA regulation, which does not restrict Plaintiff's use of the entire property, including filling of the cove area and development of a residence there.

CONCLUSION

The District Court below improperly found in favor of Plaintiff on six out of seven issues regarding her takings claim against FWS. Based on existing United States Supreme Court precedent, the lower court should not have held that there was an uncompensated taking of Plaintiff's property under the Takings Clause of the Fifth and Fourteenth Amendments. Therefore, this Court should reverse the decision of the Court below on issues two through seven which found in favor of the Plaintiff, and affirm the District Court's holding that the ESA is a

valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly.

CERTIFICATE OF SERVICE

This document certifies expedited mailing of one copy of the foregoing brief to my opponent on this 28 day of November, 2016.

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Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This document certifies that this brief was completed using Word software, Times New Roman font, in 12-point type. It contains 8,540 words. The brief complies with the length requirements of this Court.

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Counsel for Appellants