Team # 55

Appeal No. 16-0933

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CORDELIA LEAR
Plaintiff-Appellee-Cross Appellant,

vs.

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 APPELLEE
CORDELIA LEAR

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JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1358, and 1367. A timely notice of appeal of the district court's final order entered on June 1, 2016 was filed on June 10, 2016.

PRELIMINARY STATEMENT

This case concerns the constitutional rights of Cordelia Lear as a property owner. Lear Island has been owned by the Lear Family for more than 200 years, given to King Lear through a congressional grant and taken care of by a lineage of Lears until being conveyed to Cordelia Lear in 2005. Ms. Lear wants to build a single-family residence on her lot so she can continue to live in the place she has spent her entire life. Because of Lear family's diligence and love of wildlife, the perfect habitat for the New Union subpopulation of the Karner Blue Butterfly has been created on the Cordelia Lot. This space, known as "The Heath" and comprises nine of the ten acres of the Cordelia Lot. Once a year, the Lears mow the Heath to preserve the butterfly habitat. Because the Karner Blue Butterfly is listed as an endangered species, Ms. Lear is prohibited from building a single-family residence on the Heath, as this would cause harm to the butterfly's habitat which constitutes a taking under the Endangered Species Act.

The remaining one acre of the Cordelia Lot is made up of wetlands. Pursuant to Section 404 of the Clean Water Act, no federal permits are required for Ms. Lear to construct a single-family residence of one half-acre or less in size. However, the Brittain County Wetland Preservation Act permits development in wetlands only for water dependent uses. In 2013, Brittain County denied Ms. Lear's permit application to develop the wetlands in order to support a one half-acre single-family residence. Ms. Lear has been left with no possible location on the Cordelia Lot to build a single-family residence. Because there is no market in the area for 10

acres of undevelopable land on an island, the Cordelia Lot has been deprived of all economic value.

STATEMENT OF ISSUES

1. Whether the ESA is a valid exercise of Congress's Commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use;
2. Whether Lear's takings claim against the Fish and Wildlife Service ("FWS") is ripe without having applied for an Incidental Take Permit under ESA § 10, 16 U.S.C. § 1539(a)(1)(B);
3. Whether the relevant parcel for takings analysis is the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965;
4. Assuming the relevant parcel is the Cordelia Lot, whether the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property;
5. Assuming the relevant parcel is the Cordelia Lot, whether the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing precludes a takings claim for complete loss of economic value;
6. Assuming the relevant parcel is the Cordelia Lot, whether public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit; and
7. Assuming the relevant parcel is the Cordelia Lot, whether FWS and Brittain County are liable for a complete deprivation of the economic value of the Cordelia Lot when either

the federal or county regulation, by itself, would still allow development of a single-family residence.

STANDARD OF REVIEW

The district court's rulings on each issue are subject to *de novo* review.

FACTS AND PROCEEDINGS BELOW

A. Lear Island

Lear Island, an island in Lake Union, was granted to Cornelius Lear in 1803 by an Act of Congress, when present-day New Union was still part of the Northwest Territory. *Lear v. U.S. Fish & Wildlife Serv.*, No. 112-CV-2015-RNR, slip op. at 1 (D. of New Union June 1, 2016) (*Lear)*. The 1803 grant included title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island," as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland. *Id.*at 1-2. Cornelius Lear and his descendants have occupied Lear Island since the 1803 grant, at one point using part of the island as a productive farm. *Id.* at 2. In the early twentieth century, the Lear Family constructed a causeway connecting the island to the mainland by road. *Id.*

In 1965, King James Lear owned the entirety of the 1803 Lear Island grant. *Id.* As part of an estate plan, King James Lear determined to divide Lear Island into three parcels, one for each of his daughters Goneril, Regan, and Cordelia. *Id.* The Brittain Town Planning Board approved the subdivision of each lot, and determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence. *Id.* King James Lear died in 2005, and Cordelia Lear came into possession of her deeded property, the 10-acre lot in dispute in this case. *Id.* The acreage of the Cordelia Lot does not include deeded lands

underwater, but her property interest includes lands underwater within a 300-foot radius of the shoreline of her property. *Id.*

B. The Cordelia Lot

The Cordelia Lot consists of an access strip and an open field which together comprise nine acres of uplands, and one acre of emergent cattail marsh in a cove that was, historically, open water and used as a boat landing. *Id.* The nine-acre access strip and open field, the Heath, has been kept open by annual mowing by the Lear Family for several decades. *Id.* Unlike the rest of the island, which became wooded after farming ceased in 1965, the Cordelia Lot was kept open by annual mowing each October. *Id.* The Heath becomes covered with blue lupine flowers, essential for the survival of Karner Blue larvae, which require the leaves of blue lupine plants for their food source. *Id.* The ideal habitat for the Karner Blues consists of partially shaded lupine flowers near successional forests. *Id.* The Cordelia Lot is adjacent to the successional forest on the Goneril Lot, which provides the shade to create the ideal habitat for Karner Blues. *Id.* at 3. Any disturbance of the lupines during the larval or chrysalis stages would result in the death of the butterflies. *Id.*

The Karner Blue is an endangered species. 50 C.F.R. § 17.11 (2015). It was added to the federal endangered species list on December 14, 1992. 57 Fed. Reg. 59,236 (Dec. 14, 1992). The only remaining population of the butterfly in New Union lives on the Heath on Lear Island. *Id.* at 2. Karner Blues do not migrate. *Lear* at 2-3. The Heath was designated by the FWS as critical habitat for the New Union subpopulation of the Karner Blues in 1992. *Id.* at 3.

C. The ESA and Brittain County Wetland Preservation Act

In April 2012, Cordelia Lear contacted the New Union FWS field office to inquire whether development of her property would require any permits or approvals because of the

existence of the endangered butterfly population. *Id.* FWS agent L.E. Pidopter advised Ms. Lear that any disturbance of the lupine habitat in the Heath other than continued annual mowing would constitute a "take" of the endangered butterfly. *Id.* Following Ms. Lear's inquiry to the FWS, the FWS New Union field office sent Ms. Lear a letter on May 15, 2012 confirming that her entire ten-acre property was a critical habitat for the Karner Blues. *Id.* The letter further specified that any disturbance to the lupine fields other than annual mowing during the month of October would constitute a "take" of the Karner Blues in violation of Section 9 of the ESA. *Id.* Ms. Lear investigated the cost of preparing a required habitat conservation plan ("HCP") for the Karner Blues, and was advised by an environmental consultant that preparation of an application for an incidental take permit ("ITP"), including the required HCP and environmental assessment documents, would cost $150,000. *Id.*

Rather than pursue an ITP application with FWS, Ms. Lear developed an alternative development proposal ("ADP") that would not disturb the lupine fields. *Id.* at 4. In the ADP, Ms. Lear proposed to fill one half-ace of the marsh to create a lupine-free building site, together with an access causeway to provide access from the shared mainland causeway without disturbing the access strip. *Id.* As the U.S. Army Corps of Engineers considers 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-ace or less of fill is authorized by U.S. Army Corps of Engineers Nationwide Permit 29, no federal dredge-and-fill permits issued by the Army Corps under Section 404 of the federal Clean Water Act would be required for this project. *Issuance of Nationwide Permit for Single-Family Housing*, 60 Fed. Reg. 38,650 (July 27, 1995). The ADP required a permit to fill the cove marsh, pursuant to the Brittain County Wetland Preservation Law, which was enacted in 1982. *Lear* at 4. In August 2013, Ms. Lear duly filed a permit

application with Brittain County Wetlands Board. *Id.* The permit was denied in December 2013, on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site is not a water-dependent use. *Id.*

D. Economic Value

The fair market value of the Cordelia Lot were there no restrictions on the construction of a single-family home on the lot is $100,000. *Id.* Property taxes on the Cordelia Lot are $1,500 annually. *Id.* There is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor is there any market for this property in its current state as agricultural or timber land. *Id.* Ms. Lear has not sought reassessment of her property following the denial of the permit under the Wetland Preservation Law. *Id.* However, the Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season. *Id.*

E. Proceedings Below

Ms. Lear commenced this action 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 for a regulatory taking of her property. *Id.*

The district court (Remus, J.) granted Ms. Lear $10,000 damages against defendant FWS, and $90,000 damages against defendant Brittain County. The court also dismissed Ms. Lear's request for declaratory judgment based on the theory that the ESA is unconstitutional as applied to her property. *Id.* at 9.

The court first concluded that the ESA is a valid exercise of Congress's Commerce Power. *Id.* at 4-5. The court found that the relevant activity is the underlying land development

through construction of the proposed residence. *Id.* at 5. Because construction necessarily includes purchasing building materials and hiring carpenters and contractors, the court concluded that construction of a proposed residence is clearly an economic activity. *Id.* There is no precedent for this holding in the Twelfth Circuit, but the court relied on the weight of authorities from other circuits in reaching this holding. *Id.*

The district court next concluded that the application of the ESA and the Brittain County Wetlands Preservation Law resulted in an uncompensated taking of Ms. Lear's property in violation of the Fifth and Fourteenth Amendments. *Id.* at 5-9. In finding that the application of these distinct regulations resulted in a regulatory taking, the court also found that the claim was ripe, the relevant parcel for taking analysis is the Cordelia Lot only, the relevant time period for takings analysis is the current permissible development of the property, public trust limits on uses of state navigable waters do not inhere Lear's 1803 grant of title, and the Cordelia Lot has been completely deprived of all economic value by this taking. *Id.*

The court came to the above conclusions rather quickly, with little explanation, with the exception of the deprivation of economic value argument. In the court's opinion, the combined impact of the ESA and wetland regulations must be combined in order to perform a takings analysis. *Id.* at 8. This decision was made not necessarily because of precedent, but because it was the equitable approach. *Id.* The court determined that were it to consider the regulations separately, there would be no recovery for property owners deprived of all economic use of their land, instead the court opted to analyze the regulations under an analysis similar to that of a joint tort. *Id.* In the last part of its opinion, the court applied a *Lucas* analysis to the economic value of Ms. Lear's property and concluded that the combined regulations deprive the Cordelia Lot of all economic value. *Id.* In doing so, the court did not find the Butterfly Society's offer of $1,000

precluded Ms. Lear from bringing a takings claim, as the offer was for less than the yearly taxes on the property. *Id.* at 9.

SUMMARY OF ARGUMENT

The ESA is not a valid exercise of the commerce power when it is applied to an intrastate species of butterfly located entirely on private property. Challenges to the commerce power give classifications to help determine when the Commerce Clause applies. Additionally, the characteristics of private property and Federal jurisdiction aid in the determination that the commerce power does not apply to this specific situation. In the event that the court disagrees with the analysis of the commerce power, the argument moves to the issue of ripeness. Precedent has given a test and exceptions which prove the issue is ripe. Furthermore, the Cordelia Lot is the relevant parcel for a takings analysis.

The subdivision of Lear Island in 1965 sufficiently created three separate parcels with varying economic values, and there is precedent for this court to restrict the analysis of the impact of economic value to the Cordelia Lot, not to Lear Island as a whole. Following this argument, the Brittain County Butterfly Society's offer of $1,000 per year for wildlife viewing does not preclude Ms. Lear's takings claim because the offer is less than the annual taxes on the Cordelia Lot. Nor do public trust principles inherent in title preclude Ms. Lear's takings claim as New Union cannot regulate the wetlands on the Cordelia Lot as a matter of public trust when those wetlands are not a part of the public trust. The congressional grant of 1803 predates New Union's statehood, and therefore the lands underwater within a 300-foot radius of the shoreline are private property held in fee simple by Ms. Lear. Finally, we argue that the two regulations limiting development of the Cordelia Lot should be considered in combination, not separately.

Considering the regulations separately leaves Ms. Lear with no redressability for the complete economic deprivation of her property.

ARGUMENT

I. The ESA is not a valid exercise of Congress's Commerce power when applied to an intrastate population of an endangered butterfly which is minimally connected to commerce and located entirely on privately owned property.

The Commerce Clause gives Congress the power "to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. CONST. Art I, § 8, cl. 3. The Court found in *United States v. Lopez* (Lopez) that the Commerce Clause allows Congress to regulate activities under "three broad categories:" 1) "the use of channels of interstate commerce," 2) "instrumentalities of interstate commerce," and people, things, or goods moving in interstate commerce," and 3) economic activities that substantially relate to or affect interstate commerce. 514 U.S. 549, 558 (1995). Individual intrastate activities can be found to fall under the third category if the activity, when aggregated, would substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). This power is offset by the question of whether or not the activity can be rationally concluded to affect interstate commerce. *Lopez*, 514 U.S. 549, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. N.C. 2000).

The Endangered Species Act (ESA), Section 9(a)(1)(B) prohibits persons "subject to the jurisdiction of the United States" from taking any endangered species "listed pursuant to section 4" of the ESA. 16 U.S.C. § 1538(a)(1)(B). Section (a)(2)(B) of the ESA prohibits persons "subject to the jurisdiction of the United States" from removing any plant species listed under Section 4 "from areas under Federal jurisdiction." 16 U.S.C. § 1538(a)(2)(B).

The case at hand not only involves a wholly intrastate species of butterfly, but a species which is located only on a privately owned island held in fee simple absolute. Characteristics of

private property, specifically rivalrousness, allow property owners to restrict others' use of the property, even to the point of exclusion. See generally *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 563 N.W.2d 154, (1997)**.** Although governments may impose restrictions on the property, other individuals can be excluded from entering any of the three subdivided parcels on the island or the island as a whole. *See generally Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 **(**1978)**.** Additionally, courts have found that the statement "areas under Federal jurisdiction" does not apply to private property that is "merely regulated by the federal government." *N. Cal. River Watch v. Wilcox*, 547 F. Supp. 2d 1071, (N.D. Cal. 2008). While this statement was made in relation to 16 USCS § 1538(a)(2)(B), it should be applied to the limited circumstance found here.

A. The court should find that a species of butterfly located exclusively on a private island is minimally connected to interstate commerce and is therefore not a valid exercise of the Commerce Clause.

United States v. Lopez questioned the validity of the Gun-Free School Zones Act of 1990. 514 U.S. 549. The Act, which was passed by Congress and scrutinized under the authority of the Commerce Clause, restricted individuals from knowingly possessing a firearm near a school. The Supreme Court found that the Commerce Clause allows Congress to regulate 1) "the use of channels of interstate commerce," 2) "instrumentalities of interstate commerce," and people, things, or goods moving in interstate commerce," and 3) economic activities that, when aggregated, substantially relate to or affect interstate commerce. 514 U.S. 549, 558.

Gibbs v. Babbitt, 214 F.3d 483, used the *Lopez* test to determine whether taking of red wolves from private property was a valid exercise of the commerce clause. *See Lopez*, 514 U.S. at 558. Red wolves were reintroduced to Alligator River National Wildlife Refuge in eastern North Carolina and the Pocosin Lakes National Wildlife Refuge in Tennessee in an attempt to

bolster populations in their original habitat area. *Gibbs*, 214 F.3d 483 Local farmers and ranchers were concerned about their ability to defend their property from these animals which were considered to be a "menace to citizens and animals in the Counties." *Id*. at 490. The Court found that while the first two prongs of the *Lopez* test did not apply, the third prong was satisfied in that taking of the wolves was directly related to interstate commerce. *Gibbs*, 214 F.3d at 492; *See Lopez*, 514 U.S. at 558. Red wolves are studied by scientists and followed by tourists. Red wolf pelts have been sold and traded commercially, and if the population were to be substantially regenerated, commercial trade would be allowed to be reinstated. The Court found importance in not extending the power of the Commerce Clause to situations so remote as to remove the distinction between local and national issues. *Gibbs*, 214 F.3d at 490.

In the question at hand, we must focus on the third category of the *Lopez* test as it is the only portion that directly relates to the species of butterfly in question. According to the Butterfly Conservation website, http://butterfly-conservation.org/45/why-butterflies-matter.html (last visited Nov. 27, 2016), butterflies in general have intrinsic, aesthetic, and health values, which are mostly realized through people's enjoyment of seeing the butterflies. Butterflies have educational and scientific value in that they are studied both children and scientists. Butterflies are promoters of healthy ecosystems, they are pollinators, tourists travel to see certain species, and collectors enjoy collecting them. *Id*. This particular Karner Blue Butterfly, which is not the only species of Karner Blue in the United States, but is the only species found in New Union, is located on a privately owned island. In order for people to see or study the New Union butterfly, they would have to obtain permission or criminally trespass onto private property. The property includes 300 feet of land that is under water, so even a person in a boat would need to view the butterfly from a great distance through high-powered binoculars. This exercise of the right of

alienation virtually removes the butterfly from the stream of commerce. This is unlike *Gibbs v. Babbitt* where the wolves were studied by scientists, followed by tourists, and could potentially have commercial trade value. 214 F.3d 483. The wolves in *Gibbs* were found to be directly related to the stream of commerce. *Id*. While the *Gibbs* court held that the regulation of the wolf was a proper use of the commerce clause, it found importance in not extending the commerce power to remote situations that would diminish the distinction between local and national issues. *Id*. The New Union Karner Blue Butterfly is one such situation where the connection to commerce is so remote that the question of local vs. national regulations with respect to a single individual's fee simple property comes into question.

B. The Court should find that regulation of a butterfly located entirely on private property which the owner does not plan to develop for commercial purposes is not a valid exercise of the Commerce power.

The District Court for the District of New Union determined that the Commerce Clause is applicable to a wholly intrastate species. Each of these cases the court cited involved groups or individuals who were involved in or planned to be involved in directly commercial activities. These cases all acknowledge the necessity for a substantial or explicit connection to interstate commerce.

In the case at hand, Cordelia Lear is an individual who seeks to build a single family home on her property. The house Ms. Lear hopes to build and the property which she owns are not associated with commercial activity beyond the actual materials and construction which would be with associated with building the home. The District Court for the District of New Union cited multiple cases, including *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640–41 (5th Cir. 2003); *Nat'l*

Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057 (D.C. Cir. 1997) as examples of precedent showing that "the ESA prohibition against an unpermitted "take" of a wholly intrastate species is a valid exercise of the Commerce power." Ms. Lear does not dispute that the ESA regulating a wholly intrastate species of butterfly is a valid exercise of the Commerce power. What is in dispute is the ESA, as applied to a wholly intrastate species of butterfly located entirely on private property and barring the building of one single family residence. The specifications of "located entirely on private property" and "one single family residence" distinguish Ms. Lear's situation from each of the cases the lower court cited. Each of the previously cited cases involved a species which was located in the general area, including on the property in question. Each of the previously cited cases also involved commercial activities of some sort. These cases only relate minimally to the case at hand. Furthermore, each of the cited cases acknowledged necessity for substantial connection to interstate commerce. In contrast to the cited cases, the case at hand is only connected to interstate commerce through the building of one single family home in which the owner plans to reside.

C. Similar to 16 USCS § 1538(a)(2)(B), land inhabited by a species of animal which is contained entirely on private property and does not leave that property should not be subject to Federal jurisdiction.

The question of ESA regulation on private land has been addressed in multiple cases. Courts have generally found that ESA regulations apply to animals on private property because animals tend to wander from public to private lands. For example, in *Gibbs v. Babbitt*, 214 F.3d 483, wolves were reintroduced to wildlife refuges, but often found on private lands. However, 16 U.S.C. § 1538(a)(2)(B), discussing endangered plants, includes specification of "areas under Federal jurisdiction." The phrase "areas under Federal jurisdiction was left undefined until recently. In *River Watch*, the court distinguished "areas under Federal jurisdiction" from "private

property that is merely regulated by federal government" finding that Congress did not intend for "areas under Federal jurisdiction" to extend to private property that falls under the general regulation of the federal government. 547 F. Supp. 2d 1071, (N.D. Cal. 2008). It is arguable that this specification is not included in Section 1538(a)(1) because of the nature of animals to wander from one property to the next.

In the case at hand, the endangered butterfly is located on one piece of privately owned property. The butterfly does not travel beyond the borders of the property due to the distance between the island habitat and any other suitable habitat on the mainland. This is more like a plant contained on private property than an animal which travels from publicto private property. Therefore, the *River Watch* determination of private property regulated by the federal government should be applied to the Cordelia Lot. Additionally, if FWS wanted to protect the butterfly on public lands, they could engineer a habitat on public lands and introduce the butterfly to that habitat, ensuring regulation of the area.

II. Lear's takings claim is ripe without applying for an incidental take permit because it passes the Abbott Labs test, applying for a permit with the ESA would cost more than the property is worth, and amending the Brittain County permit application is a futile action.

Abbott Labs v. Gardner outlined a two factor test which asks whether an issue is "ripe." The factors consider whether the issue is fit for judicial decision and the hardship to the parties without the court's consideration. 387 U.S. 136 (1967); *Hage v. United States*, 35 Fed. Cl. 147 (1996). The first factor questions whether the issue is something the agency is better fit to decide than the court, such as a technical or regulatory interpretation question in which the agency has expertise. The second factor asks what price will be paid if the judicial decision is delayed. In *Hage*, the court asserts that if the "plaintiff will suffer real consequences" due to lack of judicial review, then the court is "obligated" to hear the case. 35 Fed. Cl. 147.

While there are exceptions, courts typically look to whether or not the agency's action is final and whether or not the applicant has exhausted all administrative remedies within the agency. *Id*. If the agency action is final, the issue is usually considered to be ripe. *Id*. If the agency action is not final, all administrative remedies should be exhausted prior to filing suit. *Id*. There are, however, exceptions to finality and exhaustion. One such exception, recognized in *Hage*, states that there is no need to apply for a permit prior to filing suit when applying for a permit is "so burdensome as to effectively deprive plaintiffs of their property rights." *Id*. The Supreme Court carved out additional exceptions in *Palazzolo v. Rhode Island*, which considers whether an act such as amending a permit is futile. 533 U.S. 606 (2001) If the act would be futile, then the act is not required to be performed prior to filing suit. *Id*.

A. The court should hold that in accordance the *Abbott Labs* test, the issue at hand is ripe because the issue is one best decided by the court and delaying judicial decision would create great hardship for the plaintiff.

In the case of *Abbott Labs*, Congress amended the Federal Food, Drug, and Cosmetic Act in such a way that would require prescription drug companies to withdraw, dispose of, and revise all forms of advertising as well as the labels on every bottle of product. 387 U.S. 136. The Commissioner of Food and Drugs promulgated a regulation for enforcement of the Act. *Id*. The rule had not been enforced when Plaintiff brought suit, so the Supreme Court outlined a two question test to determine if the action was ripe. *Id*. The first question asked whether the agency or the court was better fit to respond to the issue at hand. The Court held that the issue of "whether the statute was properly construed by the Commissioner…" was purely legal, and therefore better suited to be answered by the court. *Id*. The second question asked what the hardship would be in delaying the judicial decision. To this question, the Court found the

regulation would have direct and immediate consequences if the pharmaceutical companies did not comply, therefore the claim was ripe. *Id*.

In the case at hand, Cordelia Lear seeks to build a single family home, but is prohibited from building on 90% of her land due to an ESA critical habitat designation for an endangered butterfly and on the other 10% by the county's wetland designation. In April of 2012, Ms. Lear contacted U.S. Fish and Wildlife Service (FWS) to inquire about development on her property with respect to the critical habitat designation. The office agent informed Ms. Lear that any disturbance would constitute a take, and that she would need to apply for an incidental take permit ("ITP") under Section 10 of the ESA. Upon learning that the ITP would include development of a habitat conservation plan ("HCP"), Ms. Lear contacted an environmental consultant who informed her that the cost of the HCP would be $150,000. If there were no restrictions barring the construction of a single-family home, the fair market value of Ms. Lear's land would be $100,000 – $50,000 less than the cost of the HCP.

Applying the *Abbott Labs* test, we ask first whether the question at hand is one that is better determined by the agency or by the court. 387 U.S. 136. In this case, the question is whether a Fifth and Fourteenth Amendment taking has occurred. In *Abbott Labs*, the question asked whether the Commissioner properly construed the statute. *Id*. The question was not a determination of a technical issue or an interpretation of an agency regulation, and was therefore outside the scope agency's expertise. The question at hand is one of Constitutional rights. The question does not involve a technical issue, or an interpretation of a regulation. It is therefore outside the scope of the agency's expertise. The *Abbott Labs* court held the question there was purely legal and best answered by the court. *Id*. The question at hand is purely legal and the kind of question that is best answered by the court.

The second step of the *Abbott Labs* test is to ask what would be the hardship in delaying judicial decision. 387 U.S. 136. The hardship in delaying until Ms. Lear receives a final decision from FWS would be an expense of $150,000 to Ms. Lear. The expense, which is $50,000 more than the value of the land with no restrictions, would not be reimbursed by FSW no matter what their determination. This is like *Abbott Labs* where the pharmaceutical companies were being required to destroy or retract and revise all forms of advertising and recall all packages of their products to revise the labels. 387 U.S. 136. This process of revising all advertising and labels would be extremely costly to the companies. In the case at hand, the only alternative for Ms. Lear to be able to build in the critical habitat area would be to build the house and then face whatever civil or criminal charges FSW imposes in accordance with the ESA Section 11. Similarly, the *Abbott Labs* court noted that the pharmaceutical companies could choose not to pull all advertising and product to make the necessary revisions; but the agency would then be able to impose civil and possibly criminal penalties on the companies. *Id*. The *Abbott Labs* court held that the companies faced direct and immediate consequences if they did not comply. *Id*. Like in *Abbott Labs*, Ms. Lear faces direct and immediate consequences if she does not comply with the ESA. Therefore, the court should find the issue to be ripe.

B. The court should find that applying for a permit with Fish and Wildlife is an excessive burden which deprives the plaintiff of property rights, making the issue ripe for judicial review.

Courts have found exceptions to requirements of final agency action and exhaustion of remedies through cases such as *Hage v. United States*. The *Hage* court found that an issue is ripe when applying for a permit would be so burdensome that simple application would "effectively deprive plaintiffs of their property rights." 35 Fed. Cl. 147. The plaintiff in *Hage* accused the defendant of taking Plaintiff's ditch rights-of-way and permits which allowed Plaintiff's cattle to

graze and drink water on government lands. *Id*. Plaintiff argued that this taking forced the ranchers out of business and the permit process would force a sacrificing of vested water rights. *Id*. The court found that general limitations requiring the owner to apply for a permit for certain uses do not equate to a *per se* taking. However, if the act of applying for the permit would be extremely burdensome, the court held there is no need to apply for the permit in order for the issue to be ripe. *Id*.

In the case at hand, filing for an ITP would be so expensive that the burden of applying deprives Ms. Lear of her right to beneficial use of her land, making the application unnecessary for the issue to be found ripe. In order for Ms. Lear to obtain an ITP, she must provide FWS with an HCP, which would require the services of an environmental firm and cost $150,000. This is like *Hage* where the plaintiff showed that by requiring them to apply for a permit, "the Forest service [was] forcing them to forfeit their vested ditch rights-of-way." 35 Fed. Cl. 147. The *Hage* court found that when a permitting procedure deprives plaintiffs of their property rights, applying for the permit prior to judicial review is not necessary. *Id*. Similarly, this court should find that a permitting process requiring an assessment which costs $150,000 – $50,000 more than the property would be worth without limitations – equates to divesting Ms. Lear of her property rights, making the issue ripe for judicial review.

C. <u>The court should find that the Brittain County determination is a final decision, that further futile applications are not necessary, and therefore, the issue at hand is ripe.</u>

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) the plaintiff invested in a large amount of property with the intent to develop the property, but was barred from developing a certain parcel by lack of approval from multiple agencies. Plaintiff hoped to build a beach club on a large acreage he owned, but the land contained salt marshes listed as protected coastal wetlands. Plaintiff sought to fill the marsh, but permits filed with multiple government agencies were

denied or rejected. *Id*. The court held that generally, ripeness is not found in a takings claim until the landowner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development." *Id*. at 620-621. However, filing and re-filing permits in hopes of obtaining a positive answer was determined to be futile. Therefore, the court held that when filing a permit is a futile action, a person does not need to file the permit in order for the action to be ripe. *Palazzolo*, 533 U.S. 606.

In the case at hand, Ms. Lear was forced to explore alternative plans to build her residence, but found those ideas barred as well. When Ms. Lear realized the impracticability of filing for an ITP, she turned to the option of filling one half-acre of the marsh and building an access causeway that would not disturb the endangered butterfly. Filling the marsh would not require federal approval, but would require a permit in accordance with the Brittain County Wetland Preservation Law. Ms. Lear applied for a permit from the Brittain County Wetlands Board but the permit was denied on the grounds that building a house is not a water-dependent use. This is like *Palazzolo v. Rhode Island* where the plaintiff wanted to build a beach club, requiring a salt marsh to be filled. 533 U.S. 606. The court held that Plaintiff's prior applications were final agency decisions and that when the agencies make clear that revised permits will be denied on similar grounds, re-applying is a futile act. *Id*. Plaintiff did not need to engage in futile acts to obtain a final decision which would allow judicial review. In the case at hand, the Brittain County Wetlands Board issued a final decision and is therefore ripe judicial review .Additionally, the Board clearly indicated that building a residential home will not be approved, making application for alternative plans futile. Any approval of an ITP from FWS would include a provision for mitigated acreage. The only possible location for the mitigation lands are in the wetlands. Because the fill does not meet the requirements of the Brittain County Board, there is

no difference between a permit application for mitigated lands and the permit application the Board has already denied. Therefore, it is logically impossible for petitioner to fulfill the requirements to obtain an ITP, making this application a futile act as well. Like *Palazzolo*, this court should find that the agency's action was final, that filing futile permit applications is unnecessary, and therefore, the issue at hand is ripe.

III. The relevant parcel for the takings analysis is the Cordelia Lot rather than the entirety of Lear Island.

A challenge to prohibitions to economic use of the land can only be applied to the current circumstances on the property in question. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Even when a single owner holds multiple parcels of land which have been divided, the question of taking applies to the parcel of land which has some "economically feasible use." *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

When prohibitions to economic use of land are challenged, the current circumstances of the property in question are the circumstances which should be considered. The plaintiff in *Lucas* purchased two parcels of residential land on a barrier island in South Carolina. Plaintiff's plan was to build houses on each parcel, but legislation was enacted which affected Plaintiff's land and he was barred from building on the property. *Lucas*, 505 U.S. 1003. The South Carolina Supreme Court determined that the purpose of the legislation was a "noncompensable exercise of police power." The U.S. Supreme Court rejected the overly broad interpretation and remanded the case, instructing the lower court to apply the states' property laws in accordance with the "circumstances in which the property is presently found." *Id*.

Questions of taking apply to the portions of land which have financially beneficial uses, even when the owner holds multiple parcels. The plaintiff in *Loveladies Harbor* owned a total of 51 acres of marshland, 50 of which needed to be filled to have some economic value. 28 F.3d

1171 (Fed. Cir. 1994). Through a series of events, the state issued a permit to allow the plaintiff to fill 11.5 acres, but conferred with the Army Corps of Engineers (Corps) to bar the necessary federal permit. *Id*. The Corps argued that the applicable property in question was the entire 51 acres, but the court held that the taking of the property interest only applied to the 12.5 acres (1 acre which had already been filled and 11.5 which the state issued a fill permit for) which had an economic use. *Id*.

The current condition of the property in question requires the court to only consider the Cordelia Lot when determining whether or not a taking has occurred. When the Karner Blue Butterfly was added to the endangered species list and Lear Island designated as critical habitat, the entire island was held by a single owner. Ms. Lear is now the owner of one small parcel of Lear Island, which is the only parcel with suitable habitat for the butterfly. In *Lucas*, the South Carolina Supreme Court attempted to extend regulation to the land in such a way that removed Plaintiff's possibility of being compensated for the regulatory taking. 505 U.S. 1003. The U.S. Supreme Court instructed the court to apply state law to the current circumstances of the property. Similarly, this court should apply the regulation to the current state of the property in question rather than allowing the regulation to be extended in such a way that prohibits Ms. Lear's potential compensation for the regulatory taking.

Even if Lear Island was still held by a single owner, the only portion of the island which should be considered for a takings analysis is the Cordelia Lot. The only lot on Lear Island which currently has restrictions on the economically beneficial use is the Cordelia Lot. The greatest beneficial use of the other two lots on Lear Island would be logging, which, if done properly, would benefit the Karner Blue Butterfly rather than harm it. This is similar to *Loveladies* where the landowner held 51 acres, but only 12.5 had economically beneficial use. 28 F.3d 1171. The

Loveladies court held that the takings analysis only applied to the property with an economic use. *Id*. Like in *Loveladies*, this court should find that the only parcel with economically beneficial use, and therefore the only parcel which is fit for a takings analysis, is the Cordelia Lot.

IV. The fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years does not shield the FWS and Brittain County from a takings claim.

The Supreme Court has considered temporary regulatory takings of a property owned in fee simple as a block to compensation. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (Tahoe-Sierra*)*. Considered a "temporary taking," the deprivation of all economic value for a period of time does not necessarily require compensation to the property owner. *Id.* Most important, the Court explicitly held "that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance…" *Id.* at 337. In other words, a *Penn Central* balancing analysis is called for.

Although the endangered butterflies, and their habitat, will disappear from the Heath in ten years through a natural destruction process if not maintained by an annual mowing, this in no way shields the FWS and Brittain County from a takings claim. A "temporary taking" may be relieved of the payment of compensation to a landowner where it represents an effort to create a public benefit. For example, a moratorium on development may be instituted by a planning agency in the interest of creating a regional plan, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, (U.S. 2002). However, the facts of this case in no way resemble *Tahoe-Sierra.*

First, there is no moratorium here. Second, there is no claim by a government agency that a public good is present to balance against the harm suffered by petitioner, who is unable to develop her property to build a personal residence. In fact, just the opposite is true: the natural

destruction of the entire butterfly population through a decade of landscaping neglect — a public harm — is paired with the private harm to the landowner. Thus,

The case for a government agency defendant in a takings claim is strongest when the proposed regulation is regional in scope and confers benefits on all landowners, benefits which exceed the detriment to landowners who must place their development plans on hold. In contrast, the case at hand involves *no* moratorium and *no* planning process by an agency. In fact, the ten-year delay to the landowner does not involve any positive action by an agency. Rather, the basis for the ten-year wait to make the parcel developable by petitioner is a *natural process* in which the rare habitat and endangered butterflies would be destroyed. Accordingly, there is no public benefit to the delay, only a private benefit. This is the opposite of precedents involving a temporary taking, all of which balance, under the *Penn Central* test, a private harm to the inconvenienced property owner against a public benefit.

Furthermore, the restriction in this case will last a decade, if not more. The courts have not found a temporary taking which would preclude compensation for a taking lasting such a significant amount of time. If this court should determine that the combined effects of these land use regulations can fit within the category of "temporary," it should not use that determination to find an ultimate bar to Lear's takings claim. Analysis is still required to determine the full force and effect of these regulations upon Lear's property use, which at the very least denies development on the entirety of the Cordelia Lot for at least ten years.

Finally, there are good policy reasons not to set a precedent in which a landowner would be rewarded for destroying the habitat of an endangered butterfly. It was the suggestion of FWS agent L.E. Pidopter to stop mowing the Heath until the habitat is destroyed, which would take at least ten years. This suggestion undercuts the entire spirit behind the ESA. Neither the landowner

not the FWS want to see the butterfly population extirpated; in fact, the opposite is true. The ESA was created to protect endangered species and allow the species population rebound. Likewise, the landowner, Ms. Lear, has a demonstrated commitment to maintaining the endangered habitat through an annual mowing. It would be perverse to incentivize the destruction of the butterfly colony and habitat, yet that is exactly what the FWS suggestion promotes.

V. The Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing does not preclude a takings claim for complete loss of economic value.

The correct test to use in this case is the, admittedly more complicated, *Penn Central* analysis. This *ad hoc* analysis considers three factors to determine whether or not a regulation has gone "too far" and therefore requires compensation: (1) the nature of the governmental regulation, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectation. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, at 124 (1978). A regulatory taking is more readily discernible when "the interference with property can be characterized as a physical invasion by government." *Id.* (*citing Goldblatt v. Hempstead*, 369 U.S. 40, 49 (1960)). The Ohio Supreme Court has succinctly explained the mathematics involved to determine whether a complete deprivation of economic value has occurred; the denominator is the value of the parcel being considered, the numerator is the value of the property being deprived as a result of the regulation. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, at 21 (2002). If this fraction equals anything less than 1, the *Penn Central* analysis applies. The offer from the Butterfly Society merely causes this court to perform a more rigorous analysis; it does not preclude a takings claim on the basis of the Cordelia Lot being left with a fraction of a fraction of its economic value.

Assuming that the regulations' effects are combined in the takings analysis, we must review the nature of both, the economic impact of both, and the interference of both with investment-backed expectations. While all three are important factors to consider in a takings analysis, not all three are necessarily required to find a taking. *See* Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?,* 31:3 Urban Law Journal; Journal of Urban and Contemporary Law 3. This test requires a balancing of the three factors to determine whether or not a regulation went "too far." In *Penn Central*, the Court did not end its analysis after determining that the state law was not rendered invalid due to its failure to provide compensation. 438 U.S. at 135-36. The Court went on to analyze the additional factors laid out above, to determine that the New York state law did not go too far. *Id.* The Court determined that Penn Central Station had not been deprived of all economic value because the owners were not able to build a skyscraper above the building. *Id.* This reasoning rested on two thoughts; (1) Penn Central was still economically valuable as a historic landmark and a functioning train station, and (2) the owners had not proposed a smaller project to determine the full impact of the state law on their ability to develop the property. *Id.*

To find a regulation which deprives a property of its entire economic value, this court need look no further than the later case of *Lucas v. S.C. Coastal Comm.*, 505 U.S. 1003 (1992) (*Lucas)*. In that case, a state regulation deprived the property owner from all development rights to his beachfront property on a barrier island off South Carolina. *Id.* at 1006. Mr. Lucas purchased two pieces of coastal property in South Carolina, prior to the enactment of a state regulation restricting development of coastal properties. *Id.* These restriction, according to the trial court, were instituted in order to protect against a public nuisance (construction of housing harms the sand dune habitat, which is a natural barrier against hurricanes and other storms), and

to confer a public benefit (the protection of rare sand dunes habitat). *Id.* Lucas challenged the regulation as a Fifth Amendment taking–as applied to the states through the Fourteenth Amendment. *Id.* In a Justice Scalia penned decision, the Supreme Court reversed the South Carolina Supreme Court's determination that the regulation did not constitute a compensable taking. *Id.* at 1032. The regulation in *Lucas* is distinguishable from the regulation in *Penn Central* because while Penn Central was deemed a historic landmark through the regulation, Lucas's property did not have any substitute economic value outside of development interests, and because it did not allow for any development of the property. In contrast, the owners of Penn Central were not entirely restricted from any development.

The only substantive difference between the economic deprivation of the land in *Lucas* and the deprivation of the Cordelia Lot is the $1,000 offer from the Brittain County Butterfly Society. Applying the mathematics of the Ohio Supreme Court, the value of the property would be $1,000 more than the value of the property being deprived. Because the fraction equals less than one, there is less than a complete deprivation of economic value to the property being regulated, and the court must use a *Penn Central* analysis. Despite lacking a complete deprivation of economic value, mere breadcrumbs of value should not preclude the court from finding a compensable taking. The economic value of the Cordelia Lot, because of the regulations, is more analogous to the harm to the economic value of the property presented in *Lucas*. Unlike the property value inherent in Penn Central Station, a train station with a brisk retail business as well as a historic landmark, the Cordelia Lot has no current or resale value. The Brittain County wetland ordinance prevents Lear from developing any part of the acre of wetlands on the Cordelia Lot, and the Endangered Species Act prevents Lear from developing any part of the nine acres known as the Heath. There is no plan, big or small, that Lear could

submit to either agency that would allow Lear to develop any part of her property. Unlike the state law in *Penn Central*, these regulations prevent any and all development of the Cordelia Lot. The offer of the Butterfly Society to pay $1,000 per year for access to the habitat is not sufficient to preclude a successful Fifth Amendment takings claim, as it fails to even cover the taxes on the property. On a parcel of land with no current or future economic value, Lear would be forced to pay $500 out of pocket for taxes every year. This leaves Lear with less than mere crumbs of economic value, as she would lose money every year she owns the Cordelia Lot.

In the alternative, this court could use the collateral source rule used in tort law and in fact apply a *Lucas* analysis. Using the mathematics of the Ohio Supreme Court, when the ratio works out evenly 1:1 it is almost without a doubt that a compensable taking has occurred. The governments should not receive the benefit of the Butterfly Society's gratuitous offer of $1,000 per year. In torts, when a driver negligently causes an injury to another driver, a pedestrian, or property, they are generally liable for compensatory damages despite the possible insurance coverage of the complainant. For example, health insurance covers all medical bills for the other driver in the hypothetical above, but the tortfeasor would still be liable for damages. The rationale is that the tortfeasor should not receive the benefit of the injured party's insurance coverage. Similar to the situation in this case, the Butterfly Society has offered to pay a small fee per year for access to the island, but the governments should not receive the benefit of that offer. Should this court agree with this argument, the Brittain County Butterfly Society's offer of $1,000 would not preclude Lear from pursuing a takings claim.

Brittain County and FWS assert that the $1,000 of economic value means that the Cordelia Lot has been deprived of economic value. While it is true that the Lot has not been *completely* deprived of all economic value, it is not necessary under a *Penn Central* analysis for

a piece of property to be completely deprived of economic value. This mere crumb of value is not sufficient to preclude a takings claim. Furthermore, the court should not consider the $1,000 gift as indicative of economic value, as the governments should not receive the benefit.

VI. Public trust principles inherent in title do not preclude Lear's claim for a taking based on the denial of a county wetland's permit.

Defendant Brittain County asserts that public trust principles should preclude Lear's claim on the premise that the state of New Union is charged with protecting the wetlands for use by the public. This argument is fundamentally lacking of support because the Congressional grant of Lear Island predates the state entering the union. The seminal case on this subject is *Shively v. Bowlby*, in which the Supreme Court provides a rich history of public trust principles. 152 U.S. 1 (1892). The Court recognized that as the country was being formed, many public lands became part of the United States through various land purchases, treaties, or other types of exchanges, these lands were essentially held in trust by the federal government until states were formed and recognized. *Id.* at 48. The common law rule that all lands underwater beneath the high-water mark were considered public lands was applicable to the federal government as well as the several states. Often referred to as the equal footing doctrine, as new states entered the union they were granted equal property rights to these lands as the 13 original states. *See id.* at 26-28. While the Court had been reluctant to find an act of Congress giving lands to individual citizens as including these public lands, the Court stated that this was not a hard and fast rule– that Congress did in fact have the authority to grant lands underwater to individuals despite the traditional right to these lands being held in trust, and subsequently vested in the individual states. *Id.* at 48. The Court concluded that Congress does have the power to grant away lands under the high water mark of navigable waters in any territory of the US. *Id.* While the Court did not find that Congress did so in *Shively*, it failed to find this Congressional grant because

Congress failed to make it. *Id.* at 58. The final paragraph of the opinion, and littered otherwise throughout, states that the grant contains no grant of title or right in the land below the high water mark. The question before the Court was whether or not the grant included title to lands under the high water mark. *Id.*

Ms. Lear is not precluded from a takings claim because of public trust principles inherent in owning property. *Shively* controls this case, while simultaneously–and crucially–being distinguishable. The question of whether Congress has the power to grant away lands under the high water mark has been answered, and need not be answered by this court. The difference between the congressional grant of 1803 to King Lear and the grant contested in *Shively* is the explicit inclusion of "all lands under water within a 300-foot radius of the shoreline…" Congress had the authority to, and did, grant away lands under the high water mark of Lake Union to King Lear in 1803. This title in fee simple was later transferred to Cordelia Lear upon her father's passing, and the rights contained in the original grant cannot be abrogated by the state through a claim of public trust principles.

VII. FWS and Brittain County are liable for a complete deprivation of the economic value of the Cordelia Lot because the deprivation should be combined as a joint action, not taken as separate actions.

Because each regulation completely deprives the regulated land of all economic value, even considering the regulations separately still leaves the Cordelia Lot completely deprived of economic value. The one acre of wetlands is rendered economically useless by the Brittain County wetlands ordinance, so FWS's argument that their regulation of the nine acres of butterfly habitat leaves Lear with an acre of developable land is factually incorrect. The FWS regulation leaves Lear with an acre of economically useless land. This argument works the same against Brittain County.

The court below reasoned that through joint and several liability, the regulations should be considered in combination, and this court should do the same. Joint and several liability would allow Lear to recover for the loss of economic value in her property, with an easy apportionment of the liability: 90% to FWS, 10% to Brittain County. Precluding Lear from pursuing a takings claim against both parties collectively would most likely leave her with no remedy, despite a very-near complete deprivation of economic value. It is not equitable for a property owner to own 10 acres of worthless property, as a result of government regulations, without compensating the owner for the loss of economic value. If the regulations were to be treated separately, and the court were to find that neither completely deprived Cordelia Lot of economic value, it would set a dangerous precedent moving forward. The federal government could assert ESA protections to a portion of someone's property, leaving an otherwise regulated piece of that property out of their regulation, and completely avoid having to compensate the landowner.

CONCLUSION

For the foregoing reasons, Ms. Lear requests this court affirm in part and reverse in part the decision of the district court. We request that this court affirm the granting of damages in the amount of $10,000 against FWS and $90,000 against Brittain County. We further request this court reverse the finding that the ESA, as applied, is not a constitutional exercise of Congress's Commerce Power.