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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ORDER

Following the issuance of an Order of the United States District Court for the District of New Union dated June 1, 2016 in 112-CV-2015-RNR, the United States Fish and Wildlife Service ("FWS") and Brittain County, New Union each filed a Notice of Appeal on June 9, 2016. Thereafter, Cordelia Lear filed a Notice of Appeal on June 10, 2016.

Lear takes issue with the district court's determination that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544 (2012), is a legitimate exercise of congressional power under Article I, Section 8, Clause 3 of the U.S. Constitution, as applied to a wholly intrastate population of Karner Blue Butterfly.

FWS takes issue with the district court's decision with respect to its holding: that Lear's claim for an uncompensated taking under the Fifth Amendment was ripe since Lear did not apply for an Incidental Take Permit ("ITP") contemplated by ESA § 10, 16 U.S.C. § 1539(a)(1)(B); that the relevant parcel for the purpose of Lear'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; that the potential future

natural destruction of the Cordelia Lot's lupine fields, which are the butterflies' habitat, does not preclude Lear's takings claim; that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Lear's takings claim based upon complete deprivation of economic value; that the public trust principles inherent in Lear's title do not preclude her takings claim; and that the ESA as administered by FWS and a Brittain County, New Union Wetlands Preservation Law combine to deprive the Cordelia Lot of all economic value.

Brittain County agrees with FWS regarding all aspects of Lear's takings claim, but agrees with Lear that the ESA is unconstitutional as applied to the wholly intrastate population of Karner Blue Butterfly.

This Court has previously determined it has jurisdiction of the case and that the Federal Circuit does not.

Therefore, it is hereby ordered that each of the parties brief all of the following issues:

1. Is the ESA 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? (FWS argues the ESA is a valid exercise of the Commerce power; Lear and Brittain County argue it is not.)

2. Is Lear's takings claim against FWS ripe without having applied for an ITP under ESA § 10, 16 U.S.C. § 1539(a)(1)(B)? (Lear argues it is ripe; FWS and Brittain County argue it is not.)

3. For takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965? (FWS and Brittain County argue the entire island is the relevant parcel; Lear argues the Cordelia Lot is.)

4. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of the property? (FWS and Brittain County argue the butterfly habitat's natural destruction in the future precludes Lear's takings claim; Lear argues it does not.)

5. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value? (FWS and Brittain County argue it does; Lear argues it does not.)

6. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit? (FWS and Brittain County argue public trust principles preclude Lear's takings claim; Lear argues they do not.)

7. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence? (Lear argues that even though the regulations would not individually amount to a taking under *Lucas*, the ESA and the Brittain County Wetlands Preservation Law together completely deprive the Cordelia Lot of all economic value; FWS and Brittain County argue

that the ESA and the Brittain County Wetlands Preservation Law must be considered separately and thus do not completely deprive the Cordelia Lot of all economic value.)

SO ORDERED.

Entered this 1st day of September, 2016.

[NOTE: No decisions entered or documents dated after September 1, 2016 may be cited in briefs or oral arguments.]

United States District Court for the District of New Union

Cordelia Lear,	:	
Plaintiff,	:	112-CV-2015-RNR
v.	:	Decision and Judgment
United States Fish and Wildlife Service,	:	
Defendant,	:	
and	:	
Brittain County, New Union	:	
Defendant.	:	

This case involves the application of the Endangered Species Act ("ESA") and a municipal wetlands law to Plaintiff's property on Lear Island in Brittain County, New Union. Lear Island contains the last remaining habitat for the New Union subpopulation of the Karner Blue Butterfly, a federally listed endangered species. Plaintiff seeks to build a single-family house for her own use on her irregularly shaped ten-acre property on Lear Island. Plaintiff challenges the constitutionality of the ESA as applied to her situation and asserts a claim against both the Fish and Wildlife Service ("FWS") and Brittain County for an uncompensated taking of her property under the Takings Clause of the Fifth and Fourteenth Amendments.[1]

A seven-day bench trial was held before this Court. Based on the Findings of Fact and Conclusions of Law set forth below, this Court enters judgment: 1) dismissing Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of legislative power as applied to her property; 2) awarding damages of $10,000 in Lear's favor against the FWS for an unconstitutional taking of her property in violation of the Fifth Amendment to the Constitution; and 3) awarding damages in the amount of $90,000 against Brittain County for an unconstitutional taking of Lear's property in violation of the Fifth Amendment to the Constitution.

FINDINGS OF FACT

1. Lear Island is an island in Lake Union and is approximately two miles long and one mile wide, consisting of 1,000 acres. Lake Union is a large interstate lake, which has been traditionally used for interstate navigation. Lear Island was granted to Cornelius Lear in 1803 by an Act of Congress. At the time, present-day New Union was part of the Northwest Territory. The 1803 grant included title in fee simple absolute to all of Lear Island and to "all lands under water

[1] Lear waived any damages in excess of $10,000 in her takings claim against the United States of America, allowing her to proceed with her claim in this Court. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987); *Shaw v. Gwatney*, 795 F.2d 1351, 1356 (8th Cir. 1986); *Goble v. Marsh*, 684 F.2d 12, 15 (D.C. Cir. 1982). She did not waive damages in excess of $10,000 against Brittain County.

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.

2. Cornelius Lear and his descendants have occupied Lear Island since the 1803 grant, using the island as a homestead, farm, and hunting and fishing grounds. During the latter half of the nineteenth century, the island was a productive farm, and produce was carried by boat from the island to the mainland. The original homestead is still located close to the north end of the island, near the strait that separates the island from the mainland. In the early twentieth century, the Lear Family constructed a causeway connecting the island to the mainland by road.

3. In 1965, King James Lear owned the entirety of the 1803 Lear Island grant. 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. The Brittain Town Planning Board approved the subdivision of the property into three lots: the 550-acre Goneril Lot, the 440-acre Regan Lot, and the 10-acre Cordelia Lot[2]. At the time of the subdivision, the Brittain Town Planning Board determined that each lot could be developed in conformance with zoning requirements with at least one single-family residence. King James Lear then deeded each of the lots, respectively, to his three daughters, reserving a life estate in each lot for himself. Shortly after deeding the properties to his daughters, King James Lear constructed a residence on the Regan lot, for use by his daughter Regan. He continued to live in the homestead, located on the Goneril Lot.

4. King James Lear died in 2005, and each of the three daughters came into possession of their deeded properties. In 2012, Plaintiff Cordelia Lear decided to build a residence on her lot.

5. The Cordelia Lot is situated at the northern tip of Lear Island. The lot consists of an access strip that is 40 feet wide by 1,000 feet long, and an open field that comprises the remaining nine acres of uplands. In addition, there is about one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing.

6. The nine-acre open field and access strip has been kept open by annual mowing by the Lear Family for several decades. The family has referred to the Cordelia Lot as "The Heath" because it was kept open, unlike the rest of the island, which naturally became wooded after agricultural use of the island ceased in 1965. The Heath was kept open by annual mowing each October.

7. The Heath and the access strip have become covered with wild blue lupine flowers, which thrive in the sandy soil of Lear Island. Fields of wild blue lupines are essential for the survival of Karner Blue larvae, which can only feed on the leaves of blue lupine plants. The ideal habitat for the Karner Blues consists of partially shaded lupine flowers near successional forests.

8. 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).

9. Although populations of Karner Blues survive in other states, the only remaining population of the butterfly in New Union lives on the Heath on Lear Island. Karner Blues do not

[2] The acreage figures do not include deeded lands underwater.

migrate. Instead, eggs are laid in the fall, overwinter, and hatch in the spring. A second brood hatches in the summer. Karner Blue larvae remain attached to lupine plant foliage until they emerge from chrysalis as butterflies, and any disturbance of the lupines during the larval and chrysalis stages would result in the death of the butterflies. Karner Blue populations have difficulty migrating to new habitats as their flight distance is short, and they must follow woodland edge corridors. The New Union subpopulation of Karner Blue is entirely intrastate and does not travel across any State boundaries.

10. The Heath, consisting of lupine fields adjacent to the successional forest on the Goneril lot, provides ideal habitat for the Karner Blues, which thrives in partially shaded lupine fields. The access strip provides particularly good partially shaded habitat for Karner Blues. The Heath was designated by the FWS as critical habitat for the New Union subpopulation of the Karner Blues in 1992.

11. 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. FWS agent L.E. Pidopter advised Plaintiff that any disturbance of the lupine habitat in the Heath other than continued annual mowing would constitute a "take" of endangered butterfly. Pidopter also advised Plaintiff that it was possible to obtain an Incidental Take Permit ("ITP") under section 10 of the ESA, but in order to file an application for such a permit, Ms. Lear would have to develop a habitat conservation plan ("HCP") for the Karner Blues and an environmental assessment document under the National Environmental Policy Act. Pidopter advised Ms. Lear that in order to be approvable, an HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis, including any disturbance of the access strip. Pidopter also advised that an approvable HCP would require a commitment to maintain the remaining lupine fields through annual fall mowing.

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

13. Cordelia Lear investigated the cost of preparing the required HCP for the Karner Blues, and 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.

14. Following Cordelia Lear's inquiry to the FWS, the FWS New Union field office sent Cordelia Lear a letter on May 15, 2012 confirming that her entire ten-acre property was a critical habitat for the Karner Blues and 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. The letter invited Plaintiff to submit an application for an ITP and referred her to the FWS's Habitat Conservation Planning Handbook for information on how to develop an acceptable HCP to submit with an ITP application. The FWS letter reiterated that an acceptable HCP would require, at a minimum, that all acreage of lupine field disturbed by development would have to be replaced with contiguous acreage, and that the property owner would have to commit to maintain the remaining and newly created lupine fields by annual mowing each October.

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

16. Rather than pursue an ITP application with the FWS, Plaintiff developed an alternative development proposal ("ADP") that would not disturb the lupine fields. In the ADP, Plaintiff 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 access from the shared mainland causeway without disturbing the access strip. 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-acre or less of fill is authorized by U.S. Army Corps of Engineers Nationwide Permit 29, *see Issuance of Nationwide Permit for Single-Family Housing*, 60 Fed. Reg. 38,650 (July 27, 1995), no federal approvals would be required for this project.

17. The ADP required a permit to fill the cove marsh, pursuant to the Brittain County Wetland Preservation Law, which was enacted in 1982. In August 2013, Plaintiff duly filed a permit application with Brittain County Wetlands Board. 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 was not a water-dependent use.

18. The fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family house on the lot is $100,000. Property taxes on the Cordelia Lot are $1,500 annually. There is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land. Plaintiff has not sought reassessment of her property following the denial of the permit under the Brittain County Wetland Preservation Law. The Brittain County Butterfly Society has offered to pay Cordelia Lear $1,000 annually for the privilege of conducting butterfly viewing outings during the summer Karner Blue season, but she rejected the Society's offer.

19. Plaintiff then 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.

CONCLUSIONS OF LAW

1. THE ESA IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER.

Section 9 of the ESA prohibits the "take" of any endangered species. *See* ESA § 9(a)(1)(B), 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 behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015). Citing *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), Plaintiff argues that the ESA, by prohibiting the "take" of an intrastate species, seeks to

regulate noneconomic activities such as land clearing and vegetation removal. *Lopez* and *Morrison* reflect that, when relying on the substantial aggregate effects of an activity on interstate commerce as the basis for regulation under the Commerce power, U.S. Constitution art. I, § 8, cl. 3, the relevant regulated activity must itself be economic in nature. *See Morrison*, 529 U.S. at 617. In *Lopez*, the Court struck down the Gun-Free School Zones Act. *See* 514 U.S. at 561. In *Morrison*, the Court struck down the Violence Against Women Act, which made certain gender motivated acts of violence a federal crime. *See* 529 U.S. at 617. In both cases, the Court held that Congress lacked authority under the Commerce power to regulate noneconomic activity.

Plaintiff argues that the prohibition against "taking" an intrastate species such as the Karner Blue, like gun possession and rape, are noneconomic activities that cannot support the assertion of legislative authority under the Commerce Clause. However, this Court finds that the relevant activity is the underlying land development through construction of the proposed residence, and that this activity is clearly an economic activity, involving as it does the purchase of building materials and the hiring of carpenters and contractors. Although the Twelfth Circuit has not addressed the question, every court of appeals that has considered a Commerce Clause challenge to the ESA "take" prohibition has upheld the Act. This Court follows the weight of precedent and likewise holds that the ESA prohibition against an unpermitted "take" of a wholly intrastate species is a valid exercise of the Commerce power. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007); *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); *Gibbs v. Babbitt*, 214 F.3d 483, 505–06 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997).

2. APPLICATION OF THE ESA INCIDENTAL TAKE PROHIBITION AND THE BRITTAIN COUNTY WETLANDS PRESERVATION LAW TO PLAINTIFF'S PROPERTY HAS RESULTED IN AN UNCOMPENSATED TAKING OF HER PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

Plaintiff also asserts a takings claim against FWS and Brittain County. Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Lear argues that the application of ESA and Brittain County Wetlands Preservation Law combine to deprive her of any economic use of her property,[3] and thus constitute a regulatory "take" of her property requiring just compensation under the Fifth and Fourteenth Amendments.

The Fifth Amendment to the Constitution provides that "nor shall private property be taken for public use without just compensation."[4] This Court concludes that the combined application

[3] Plaintiff does not advance a claim for a partial regulatory taking based on the principles of *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–28 (1978). *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 317–18 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000), *aff'd* 535 U.S. 302.

[4] The Just Compensation Clause of the Fifth Amendment has been incorporated against the states through the Fourteenth Amendment's Due Process Clause. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

of the ESA prohibition against "taking" the Karner Blue and the Brittain County Wetlands Preservation Law have resulted in the taking of Plaintiff's property without compensation.

A. Plaintiff's Takings Claim Against the FWS is Ripe for Litigation.

Defendant FWS argues that Plaintiff's takings claim is not ripe, as Plaintiff never formally applied for an ITP, citing *Morris v. United States*, 392 F.3d 1372, 1376–77 (Fed. Cir. 2004). However, a takings claimant need not perform a futile act, when the government has already declared a policy of denying the very sort of permit the claimant would need. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001). Here, the FWS advised Plaintiff that any ITP would of necessity include conditions that it would be impossible for Plaintiff to satisfy. In addition, this Court finds that application for a permit would be futile where it is undisputed that the cost of applying for a permit exceeds the fair market value of the property in question. Pursuit of a permit is also unnecessary if a Plaintiff can establish that "the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." *Hage v. United States*, 35 Fed. Cl. 147, 164 (1996).[5]

B. The Relevant Parcel for Takings Analysis is the Cordelia Lot, Not All of Lear Island.

FWS and Brittain County argue that the relevant parcel for determining whether the ESA and Brittain County Wetlands Preservation Law restrictions allow some residual economic use of the lot should be the entire Lear Island, not just the Cordelia Lot. In their view, since Cordelia Lear received her property as a gift from her father, the relevant "investment backed expectations" for the economic value of the property should be based on her ancestor's acquisition of the entirety of Lear Island by congressional grant in 1803. The Defendants argue that the Lear family, having enjoyed and exploited the entirety of Lear Island for nearly two centuries before subdividing it into three lots, cannot now claim that it has been deprived of all economic value because one of those lots has restrictions. They add that the Supreme Court has, in its more recent takings cases, rejected so-called "conceptual severance" arguments that would apply a takings analysis to just one portion of a combined property. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) (rejecting claim based on current permissible uses of property separate from future permissible uses after moratorium expiration); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500–01 (1987) (rejecting claim that "support estate" was distinct property for purpose of takings analysis of a Pennsylvania law that prohibited mining of coal support pillars); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978) (rejecting claim that air rights were distinct from existing surface use of property). FWS and Brittain County argue instead for a "flexible approach" to determining the relevant parcel for takings analysis, which takes into account the value of other lots in the same subdivision. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981).

[5] Although no party addressed the issue before this Court, this Court notes that Plaintiff's takings claim against Brittain County is similarly ripe, since the Constitution of the State of New Union does not include a just compensation clause nor do the State's statutes provide a procedure for seeking just compensation. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).

Whatever the merits of this flexible approach, this Court rejects the application of such an approach where ownership of the relevant lots has been transferred to different parties. Formal subdivision of a property into separate lots should be determinative. *See Loveladies Harbor*, 28 F.3d at 1181. There is no evidence that the subdivision was undertaken as a subterfuge to create a takings claim. Accordingly, the relevant parcel for takings analysis is the Cordelia Lot.

C. The Relevant Time Period for Takings Analysis is the Current Permissible Development of the Property.

Citing *Tahoe–Sierra*, Defendants FWS and Brittain County argue that any restrictions on the Cordelia Lot should be considered temporary, since all Plaintiff would need to do is refrain from mowing her fields and after ten years the natural processes of succession will result in the elimination of the Karner Blues' habitat. Although *Tahoe–Sierra* held that the imposition of a multiyear building moratorium was not a complete deprivation of the economic value of the underlying property, *see* 535 U.S. at 332, this Court finds the instant circumstances to be distinguishable. The *Tahoe–Sierra* moratorium did not extend for an entire decade. Moreover, this Court notes the irony of the FWS relying on the prospective extinction of the very subpopulation of Karner Blues it is fighting to protect as an argument against finding a taking of Plaintiff's property. Accordingly, this Court concludes that the potential natural destruction of the Karner Blues' habitat does not preclude Plaintiff's takings claim now.

D. Public Trust Limits on Uses of State Navigable Waters Do Not Inhere in the Lear's 1803 Congressional Grant of Title.

Brittain County argues that it has no liability for a taking of the Cordelia Lot, as the limits on filling and developing lands underwater are well-established public trust limits. Brittain County relies on dicta in *Lucas* suggesting that, in limited circumstances, compensation is not required for development limits that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029. Brittain County argues that the New Union's interest in preserving navigation and protecting other public trust interests in navigable waters constitutes such a "background principle" of State law. However, Brittain County points to no applicable New Union precedent (and this Court has been unable to locate any) establishing the scope of New Union's protections for public trust waters. Predicting how a New Union court would rule on such matters is unnecessary, however, as this Court finds that at the time of the 1803 grant to Cornelius Lear, which included lands under water within 300 feet of the shoreline, the United States did not recognize any public trust rights in non-tidal navigable waters such as Lake Union. *See P.P.L. Montana L.L.C. v. Montana*, 132 S. Ct. 1215, 1227 (2012) (collecting cases suggesting the bed of non-tidal rivers were considered to be private property prior to 1810). Thus, no public trust navigational reservation can be presumed to have existed at the time of the Lear grant in 1803. Brittain County also argues that, under the "equal footing doctrine," the State of New Union must be presumed to have taken title to lands under water on the same terms as the thirteen original states. *See id.* at 1227–28. However, the equal footing doctrine does not avail Brittain County, as a prior clear congressional grant gives superior title to the congressional grantee as against a subsequent "equal footing" claim by a State. *See Shively v. Bowlby*, 152 U.S. 1, 57–58 (1894). Accordingly, the State of New Union (and by

extension Brittain County) cannot claim any inherent public trust limits on the development of lands underwater that were part of the 1803 grant.

E. The Cordelia Lot Has Been Completely Deprived of All Economic Value.

FWS and Brittain County make two arguments against finding that the ESA restrictions deprive the Cordelia Lot of all economic value. First, the Defendants argue that neither the ESA nor any other federal regulation precludes development of a residence in the cove area, together with a causeway for access. Similarly, the Brittain County Wetlands Preservation Law does not prohibit any development in the Heath. As a consequence, in Defendants' view, neither regulation completely deprives the Cordelia Lot of all economic value. Second, FWS and Brittain County argue that, in any event, the willingness of the Brittain County Butterfly Society to pay to run butterfly tours demonstrates that the property retains some economic value even if it cannot be developed. Neither argument is persuasive.

1) *The Federal and Local Restrictions Must Be Combined to Consider Whether a Take Has Occurred.*

FWS argues that because the ESA restrictions do not restrict filling of the cove area and development of a residence there (nor does any other federal regulation), the Cordelia Lot has not been completely deprivedof all economic value of by the FWS. *See Palazollo*, 533 U.S. at 631 (holding the existence of developable uplands can defeat a takings claim based on wetlands regulations affecting most, but not all, of property). It is questionable whether the *Palazollo* holding even applies where the unrestricted "land" is all actually under water and cannot be developed without fill. However, in this case, unlike *Palazollo*, the non-federally restricted portion of the property cannot be developed, because of the existence of local restrictions. For its part, Brittain County makes the reciprocal argument that the Wetlands Preservation Law does not prohibit any construction in the causeway and Heath.

This case presents the apparently novel question of whether a property owner can make a claim for a complete deprivation of economic value of a lot where federal regulations restrict one part of the property and local municipal regulations restrict another part. Accepting FWS's and Brittain County's arguments would mean that a property owner deprived of all economic use of their property would be denied recourse, as the federal government and local government each claim that their own regulation, by itself, leaves some developable portion. This situation is not unlike the case of a joint tort, where neither actor acting alone causes a harm, but both actors acting together cause a harm. The prevailing rule is that, in such a case, where the harm is indivisible, each tortfeasor is jointly and severally liable to the plaintiff. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976). Accordingly, both FWS and Brittain County are jointly and severally liable for any taking of Plaintiff's property.

2) *Plaintiff Has Been Deprived of All Economic Use of Her Property.*

The Supreme Court established in *Lucas* that where government regulation leaves a property owner with no economically remunerative use of their property, a compensable taking has occurred without regard to balancing any public interests served by the regulation. The

Defendants argue that Plaintiff is not without economically remunerative use of the property, as the Brittain County Butterfly Society has offered to pay Plaintiff $1,000 annually for the privilege of conducting tours on the property. This is less than the amount of annual property taxes on the lot. A piece of real property that incurs more in property taxes than it can generate in income is by definition without economic value. Accordingly, Plaintiff has been deprived of all economic use of her property and is entitled to compensation from the FWS and Brittain County.

CONCLUSION

For the foregoing reasons, judgment is hereby entered as follows:

1) Awarding Plaintiff $10,000 damages against defendant United States Fish and Wildlife Service;
2) Awarding Plaintiff $90,000 damages against defendant Brittain County; and
3) Dismissing Plaintiff's claim for declaratory judgment declaring the ESA unconstitutional as applied to her property.

So entered:

/s/ Romulus N. Remus

Romulus N. Remus

U.S.D.J.