Boise Cascade Corporation vs. Board of Forestry, (OR 1998). Brief *amicus curiae* of Audubon Society of Portland, filed in on August 20, 1998, in the Oregon Court of Appeals, in support of the State of Oregon's appeal of trial court finding that State Board of Forestry endangered species regulations protecting spotted owl breeding sites resulted in regulatory taking.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae Audubon Society of Portland submits this brief in support of the Oregon State Board of Forestry and urges the Court to reverse the judgment below.[1]

While this appeal presents many grounds for reversing the finding of a taking, this brief focuses on a single issue: whether a finding of a taking is precluded under the principles of property and nuisance law limiting the scope of the private property interests alleged infringed in this case. Under Oregon common and statutory law, the State owns the birds and other wildlife within its jurisdiction as a trustee for the general public. Protection of this public property right through adoption and enforcement of regulations to protect wildlife does not infringe on any private property right because no landowner has the constitutional right to infringe on the public's antecedent rights in wildlife. In addition, the regulations at issue in this case do not effect a taking because they parallel state public nuisance doctrine which prohibits private parties from invading a common public right, including public rights in wildlife.

The present case arises from restrictions imposed by the State of Oregon to prevent a timber company from harming a nesting pair of endangered spotted owls and the core habitat area surrounding the birds' nest site. Under regulations adopted by the Board of Forestry to protect the public's rights in wildlife, Boise Cascade was prohibited from cutting trees in close proximity to the nest or to otherwise take action that would cause the birds to leave the nest. See Interim Requirements for Northern Spotted Owl Nesting Sites, section 624-24-809. Stated simply, the Board's regulations drew a protective circle around the nest and proscribed any cutting of trees within that circle while the nest remained active. After the female owl died and the male owl abandoned the nest, the Board lifted its restrictions on harvesting of timber on the site.

In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the U.S. Supreme Court held that no property owner can demonstrate that a regulatory restriction effects a taking if he or she has no property right to engage in the restricted conduct in the first place. *See also Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994). In this case, Boise Cascade contends that the owl protection measures effected a taking of its real

property interests. Under Oregon property and nuisance law, however, the public has a superior property right in the owl itself which limits the scope of Boise Cascade's private property rights under Oregon law. Boise Cascade has no property right to engage in private activity which infringes upon the public's rights in wildlife, at least in the absence of specific public authorization, which obviously was not granted in this case. Moreover, Boise Cascade has no right to create a public nuisance by destroying these public wildlife resources. In accordance with *Lucas* and *Stevens*, these background principle of Oregon law preclude a finding of a taking.

We emphasize that this analysis does not purport to address what types of wildlife protection measures the State of Oregon should adopt as a matter of sound public policy. Nor does it suggest that the restrictions imposed in this case are necessarily fair, or whether the legislature should provide some type of compensation for landowners' lost profits as a result of the presence of protected wildlife. And it does not suggest that wildlife protection measures should not be subject to judicial supervision under appropriate statutory standards, or on some constitutional basis other than the takings clause. The point offered by *amicus* is simply that, given the doctrine of public ownership of wildlife and other background principles of Oregon law, the restrictions in this case do not result in a constitutional taking.[2]

ARGUMENT

1. Regulatory Restrictions Which Parallel Background Principles of State Property and Nuisance Law Do Not Effect a Taking.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the U.S. Supreme Court established that land use regulations do not effect a taking if they simply parallel background principles of state property or nuisance law. As the Court put it, governmental restrictions do not constitute a taking where the restrictions 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. *Id.* at 1029.

The Court distinguished between regulatory restrictions newly legislated or decreed, *id.* at 1029, and regulations relating to proscribed use interests [which] were not part of [the owner's] title to begin with. *Id.* at 1027. On the one hand, the Court affirmed that the takings clause imposes definite limits on how stringently government can regulate uses of private property pursuant to its general police powers, ruling that a regulation which eliminates all of a property's economic value presumptively effects a taking. On the other hand, the Court ruled that regulation of private property, no matter how stringent, does not effect a taking if the limitation imposed by the regulation inhere[s] in the title itself under State property or nuisance doctrine. *Id.* at 1029. When a regulatory restriction parallels State-defined limitations on the property interest, the Court said, [t]he use of the[] propert[y] for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of these background principles of nuisance and property law explicit. *Id.* at 1030.

The concept of background principles obviously reflects substantial deference to State definitions of the nature and scope of private property rights. This deference is consistent with the basic principle that takings jurisprudence is guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. *Id.* at 1027. The Court characterized as simply unexceptional the conclusion that the takings clause does not require compensation for restrictions already proscribed by background principles of state law, [i]n light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments. *Id.* at 1030, quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). *See also*

Phillips v. Washington Legal Foundation, 118 S.Ct. 1925, 1930 (1998) (affirming that the Constitution protects rather than creates property interests, [and therefore] the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law').

The background principles defense applies to all types of regulatory takings claims. *Lucas* itself involved a prohibition against the use of private real property. The Supreme Court held that this use restriction could be upheld, even though it deprived the owner of all value in the property, if it was supported by background principles of South Carolina property or nuisance law. The *Lucas* court also indicated that this defense is equally available when a taking allegedly results from a government-mandated physical occupation of private property. *See Lucas*, 505 U.S. at 1028 (observing that the Court assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the owner's title in defense of a physical occupation-type taking claim), citing *Scranton v. Wheeler,* 179 U.S. 141, 163 (1900) (interests of riparian owner in the submerged lands... bordering on a public navigable water are held subject to government's navigational servitude).

Consistent with *Lucas*, Oregon courts have rejected takings challenges to regulations which parallel restrictions on private property rights rooted in the background principles of Oregon law. In particular, the Oregon Supreme Court in *Stevens v. City of Cannon Beach*, 317 Or. 131 (1993), *cert. denied*, 510 U.S. 1207 (1994), held that Oregon's customary public property rights in the ocean beach precluded a takings claim challenging regulations restricting private development of the beach. The plaintiff in that case sought permits from the Oregon Department of Parks and Recreation and the City of Cannon Beach to build a seawall along the beach to prepare the property for motel development. After the State and the City denied the permits, the owners filed an inverse condemnation action under the State and Federal Constitutions. The trial court granted the motion to dismiss, and the judgment was affirmed by the Oregon Court of Appeals and a unanimous Supreme Court. The U.S. Supreme Court denied the petition for *certiorari* filed in the case.

The Oregon Supreme Court analyzed the takings claim at some length in light of the U.S. Supreme Court's *Lucas* decision, and concluded that rejection of the takings claim was supported by that decision. In a series of prior rulings the Oregon Supreme Court recognized that the public has a property right to use the dry beach along Oregon's ocean shore under the common law doctrine of custom. *See State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969); *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989). In *Stevens*, the Court held that rejection of permit application to protect the public's customary right to use the ocean beach did not effect a taking because, quoting *Lucas*, the doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the... restrictions that background principles of the State's law of property... already place upon land ownership. 317 Or. at 142, *quoting Lucas*, 505 U.S. at 1029. The Court concluded that because the 'proscribed use interests' asserted by plaintiffs were not part of plaintiffs' title to begin with, *id.* at 150, the takings claim was properly dismissed.

Consistent with its decision in *Stevens*, the Oregon Supreme Court in *Dodd v. Hood River County,* 317 Or. 172, 855 P.2d 608 (1993), observed that a government defendant is not liable for a taking, even where the regulation eliminates all of the property's value, if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with, *id.* at 614, quoting *Lucas*, 505 U.S. 1027. In addition, this Court's decision in *McDonald v. Halvorson*, 92 Or.App. 478, 760 P.2d 263 (1988), *rev'd on other grounds,* 308 Or. 340, 780 P.2d 714 (1989), though decided prior to *Lucas*, is entirely consistent with this analysis. The defendants in that case argued that if plaintiffs were successful in asserting a right to use the defendants' beach, the exercise of that right would effect a taking. The court disagreed:

Defendants... fail to establish the primary element for a 'taking' claim, that is, a protected property interest. State law is the source of the sticks that constitute

a property owner's bundle of rights.... *Thornton v. Hay*... made it clear that any title to ocean shore land between the lines of mean high tide and visible vegetation has historically been encumbered with the public's recreational easement.... Defendants have no protected property interest in the public's easement over the 'dry-sand area,' and therefore there can be no 'taking.'

92 Or. App. at 487-88 (Emphasis added; footnotes omitted).

Since Lucas, the courts have frequently rejected takings claims where such claims are barred by background principles of state property law. *See, e.g.*, *Coastal Petroleum v. Chiles*, 701 So.2d 619 (Fl.Ct. App. 1997) (state law barring oil and gas development along Florida coast not a taking because private rights to engage in development limited by public rights in lands under navigable waters); *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P. 2d 1246, 1268 (Haw.1995), *cert. denied*, 517 U.S. 1163 (1996) (relying on *Stevens,* and concluding that private rights in real estate held for development purposes are subject to native Hawaiian property rights*); Hunziker v. State,* 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) (right to develop site of Indian burial mound not part of the bundle of rights owner acquired under Iowa law). Likewise, following *Lucas*, the courts have rejected takings claims when such claims are precluded by background principles of state nuisance law. *See, e.g.*, *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025 (Colo.App. 1995) (State-mandated superfund clean up not a taking because site a nuisance); *Palazallo v. Coastal Resources Management Council,* CA No. 88-0297. (R.I. Sup.Ct., October 24, 1997) (denial of permit to fill wetlands not a taking because wetlands destruction would cause a public nuisance). *See also United States v. Cherokee Nation*, 480 U.S. 700, 704 (1987) (exercise of federal navigational servitude on otherwise privately owned land does not effect a taking); *National Audubon Society v. Superior Court,* 189 Cal.Rptr 346, 360 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (owners who purchase or acquire property subject to public rights do not have a claim for compensation under the takings clause).

II. Wildlife Management Regulations Do Not Effect a Taking Because They Merely Parallel Limitations on Private Property Established By The Doctrine that the State Owns Birds and Other Wildlife.

Under established common law principles, the State owns birds, such as the spotted owl, as well as other wildlife, as trustee for the people. The public's interest in wise use and conservation of wildlife represents a public property right which is antecedent to and superior to conflicting private property rights. Accordingly, wildlife protection measures which protect the public's background property rights in wildlife do not effect a taking. As discussed below, this principle is firmly established, not only in Oregon, but in other jurisdictions across the United States.

Public Ownership of Wildlife

The Oregon courts have long recognized the doctrine of public ownership of wildlife.

As the Oregon Supreme Court stated in *Bowden v. Davis,* 205 Or. 421, 441, 289 P.2d 1100 (1955): [A]ll wild animals... are recognized as being the property of the state. *See also, e.g., Fields v. Wilson,* 186 Or. 491, 498, 207 P.2d 153 (1949) (Wild animals [are] *ferae naturae,* and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common), *quoting Monroe v. Withycombe*, 84 Or. 328, 334, 95 P. 227 (1917) (internal quotations omitted); *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908) (It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being

asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all of its citizens.).

The Oregon common law principle of public ownership of wildlife has been restated and reaffirmed in the Oregon statutes. ORS 498. 002 states that Wildlife is the property of the state. ORS 496.004 confirms the broad scope of the public ownership by defining wildlife to encompass all five classes of invertebrates, fish, wild birds, amphibians, reptiles, and wild mammals. (An earlier version of the statutory provision affirming public ownership of wildlife, ORS 1971, section 498.005 (repealed), contained essentially the same language as the current provision: wildlife of the State of Oregon shall always and under all circumstances be and remain the property of the State. *See also* OL 1913, Ch. 232, section 1; OL 1920, Ch. X, section 2268; General Laws of Oregon 1921, Ch. 153, section 1; Oregon Code 1930, Ch. II, section 39-201; OCLA 1940, Ch. 2, section 82-201.) The current provision affirming public ownership of wildlife is codified in the title of the Oregon statutes addressing fish and game regulation, but the general language of this provision, like the common law rule, obviously encompasses wildlife of all types. *See* State Attorney General Opinion, 35 Op. Att'y Gen. 720, 724, n. 1 (1971) (noting that under the common law the state owns *all* wild animals) (Emphasis in original).

Every other state in the United States apparently recognizes the doctrine of public ownership of wildlife as well. *See, e.g.*, *State of Montana v. Fertterer*, 841 P. 2d 467 (Mont. 1992) (referring to the long established and well recognized principle of law that ownership of wild animals is vested in the state); *Shepherd v. State of Alaska*, 897 P.2d 33, 40 (Alas. 1995) (the state acts as 'trustee' of the naturally occurring fish and wildlife in the state for the benefit of its citizens); *State of Texas v. Bartee*, 894 S.W. 2d 34, 41 (Tx. 1994) (common law of Texas and the rest of the United States is that the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its citizens in common). *See generally* 35 Am.Jur. 643, section 1 (1967 & 1998 Supp.) (The[] ownership of [fish and game] , while they are in a state of freedom, is in the state in its sovereign capacity as the representative of and for the benefit of all people in common.). As in Oregon, many states have codified the common law rule of public ownership of wildlife. *See* Ruth S. Musgrave & Mary Ann Stein, STATE WILDLIFE LAWS HANDBOOK (1993) (listing 32 states with laws affirming public ownership of wildlife).

The common law rule of public ownership of wildlife is one of the most venerable principles known to the law. Indeed, since at least the era of the Roman empire, the law has accorded the public unique rights in the management of wildlife. Under Roman law, wild animals were subject to common ownership, and a landowner had no ownership rights in wildlife passing over his land. *See* J.C. Thomas, TEXTBOOK ON ROMAN LAW 167 (1976). Under English common law, which built upon the Roman legal tradition, the sovereign held an exclusive prerogative to animals over and above the interests held by individual landowners. *See* 2 W. Blackstone, COMMENTARIES 417-18. Upon the founding of the United States, the king's sovereign rights in wildlife were transferred to the individual states, which assumed the responsibility to act as trustee[s] to support the title [in wildlife] for the common use. *Arnold v. Mundy*, 6 N.J.L. 1, 70 (N.J. 1821). *See generally* Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U.L. REV. 703 (1976) (observing that, in addition to determining who could take wildlife, early American lawmakers actively managed wildlife by adopting closed seasons on certain species, providing protection during breeding periods, and restricting hunting when animals were in poor condition).[3]

Public Rights in Wildlife Traditionally Trump Private Rights in Land.

Oregon courts, like courts in other jurisdictions, have repeatedly held, in a variety of different contexts, that public ownership rights in wildlife limit the private property rights of individuals and private firms. As the Washington Supreme Court has said, emphasizing the unique status of government regulations designed to protect wildlife: To a layman, and even to a lawyer who has not had occasion to deal with the subject, the extent of the power of the states with reference to

fish, game, and all wild life within their borders is perfectly astounding. *Cook v. State of Washington,* 74 P.2d 199, 201 (Wash. 1937)

The Oregon Supreme Court expressed the basic principle in *State v. Hume*, *supra*: [A]s an incident of public ownership of wildlife, the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture. 52 Or. at 5-6. In that case, the Court affirmed a criminal conviction for canning salmon without a State license, which was available from the State only upon payment of a significant fee. While expressing doubt about the validity of this type of economic regulation in other contexts, the Court had no difficulty upholding this regulation of a wild fishery, for the right to fish is at best only a privilege which the state may grant or withhold at its pleasure. *Id*. at 6. The Court endorsed the State's plenary authority to conserve wildlife populations, observing that the unrestricted taking... of fish that are valuable for food, usually causes their extermination, and therefore [t]he taking of salmon by any means could be prohibited for a reasonable time, at least, in order to permit the number of such fish to be augmented by a propagation of the species. *Id.* at 7.

To like effect, in *Thompson v. Dana*, 52 F.2d 759 (D.Or.1931), a federal court, applying Oregon law, rejected the claim that the closure of a portion of the McKenzie River to fishing effected a violation of the plaintiffs' property rights, even though this action destroyed plaintiffs' business of guiding anglers down the McKenzie River. The court ruled that the state has always held the power to close the stream to angling, because [c]onservation of fish for the common good of all citizens of a state is paramount, and reasonable regulations to attain that end do not infringe upon the property [rights protected by] the Constitution of the United States. *Id.* at 762.

The public ownership doctrine has been held to limit a wide variety of sticks in the property rights bundle. For example, the public ownership doctrine has been held to support stringent restrictions on the right to hunt or otherwise exploit wildlife. Thus, in *Fields v. Wilson*, 186 Or. 491, 207 P.2d 153 (1949), the Oregon Supreme Court rejected a challenge to a state-controlled monopoly on the trapping of beavers, stating:

The right to kill game is a boon or privilege granted, either expressly or impliedly,

by the sovereign authority, and is not a right inhering in any individual. Consequently,

nothing is taken from the individual, and his constitutional rights are not infringed when he is denied the privilege or when limitations are placed on the killing or marketing of game

Id. at 499-500. *See also Anthony v. Veatch*, 189 Or. 462, 474, 220 P.2d 493 (1950), *appeal dismissed*, 340 U.S. 923 (1951) (The right of the state... in its sovereign capacity in trust for its people, to regulate and even to prohibit the capture of fish in navigable waters within its borders, has been asserted by this court, and is sustained by the weight of authority.); *State v. Pulos*, 64 Or. 92, 95, 129 P. 128 (1913) (the taking of [a duck] is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit).

Turning to other jurisdictions, in *Farris v. Arkansas*, 310 SW. 2d 231 (Ark. 1958), the Supreme Court of Arkansas rejected a takings challenge to a state law prohibiting a private landowner from selling fish raised entirely on private waters on his land. The court recognized the right of a private owner to take fish and wildlife upon his own land, which the court characterized as a a property right, as much as any other... distinct right incident to the soil. *Id.* at 235. At that same time, the court also stated that this private right is not an unqualified and absolute right, because it must *always yield* to the state's ownership and title [in wildlife], held for the purposes of regulation and preservation for the public use. *Id.* (Emphasis added) The court continued: These two ownership rights – that is to say, the general ownership for one purpose, and the qualified or

limited ownership of the individual, growing out of his ownership of the soil are entirely consistent with each other, and in no wise conflict. *Id.* at 235, *quoting Arkansas State Game & Fish Commission v. Storthz,* 29 S.W.2d 294, 296 (Ark. 1930). The owner is free to do whatever he desires to do with such game fish, *just as long as he does not undertake to use them in such a manner as would conflict with the purposes of the general ownership of the state; which purposes are to regulate and preserve the wild life resources of the state for the people. Id.* (Emphasis added).

Similarly, in *Maitland v. The People*, 23 P.2d 116 (Colo. 1933), the Supreme Court of Colorado upheld, in the face of a takings challenge, a fine assessed against a landowner for killing a deer on his private land within the limits of a state-designated game refuge. The court said: The power of the state to make regulations tending to conserve the game within its jurisdiction is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity, and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game from the greed of the hunters. *Id.* at 117.

Providing yet another example of application of the public ownership doctrine, the courts have routinely rejected claims that the government infringes on private property rights when wild animals eat farm crops or otherwise damage private property within their natural habitat. In the landmark case of *Barrett v. State of New York*, 116 N.E. 99 (N.Y. 1917), a landowner claimed that government-sponsored reintroduction of beavers effected a taking when the beavers damaged valuable trees. The court rejected the claim, stating:

[w]herever protection is accorded [to wildlife] harm may be done to the individual. Deer

or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confined to its discretion.

It exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result. Id. at 100.

See also Moerman v. State of California, 21 Cal.Rptr.2d 329 (Ct.App. 1993), *cert. denied*, 511 U.S. 1030 (1994) (state not liable for a taking for reintroducing tule elk which were destroying plaintiff's fences and eating forage intended for livestock); *Maitland v. The People*, 23 P.2d at 117 (rejecting claim that proliferation of game on private land within state-designated refuge, and resulting destruction of plaintiff's crops, infringed on private property rights, noting that whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection, but such incidental injuries are not sufficient to render the protecting statute unconstitutional). Consistent with this reasoning, courts also have rejected objections to government restrictions on an owner's ability to kill or injure wild animals which threaten to harm private property. *See Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied,* 490 U.S. 1114 (1989) (rejecting challenge to ESA regulations prohibiting killing of endangered grizzly bear brought by livestock owner assessed a civil penalty for shooting grizzly bear in order to protect sheep); *Leger v. Louisiana Department of Wildlife and Fisheries,* 306 So.2d 391 (La.Ct. App. 1975) (private landowner has no right to kill deer on his property in order to prevent damage to potato crop); *cf. State of Oregon v. Webber*, 85 Or.App. 347 (1987) (affirming criminal conviction for killing deer to protect hay crop where owner failed to seek state permit for killing).

In addition, the courts have held that the public ownership doctrine provides special support for warrantless searches of open private lands where wild animals are present in order to enforce state fish and game laws. As a California court of appeals stated, California's pervasive scheme of regulating wildgame hunting would be a futile pursuit without frequent and unannounced

patrols. *Betchart v. Department of Fish & Game*, 205 Cal. Rptr. 135, 137 (1984) (affirming warrantless search of private lands because California wildlife is publicly owned). *See also State v. McHugh*, 630 So.2d 1259, 1264 (La. 1994) (approving warrantless random stops of boats by state wildlife agents to check for violations of waterfowl bag limits, and stating that [t]here can be no doubt that the state's interest in safeguarding the wildlife and the fisheries for the benefit of the people is compelling.). *Accord State of Oregon v. Tourtillott*, 289 Or. 845, 859, 618 P.2d 423 (1980), *cert. denied*, 451 U.S. 972 (1981) (affirming constitutionality of game checkpoint, emphasizing the substantial... governmental interest in the enforcement of laws for the preservation of wildlife).

Finally, courts have routinely recognized the right of a state to sue private parties for money damages for unauthorized injury to the public's wildlife. In *State of Washington v. Gillette*, 621 P.2d 764 (Wash.Ct.Apps. 1980), the Washington Court of Appeals affirmed, based on the public ownership doctrine, an award of damages in favor of the State Department of Fisheries against a landowner who destroyed salmon eggs by running a tractor through a streambed, stating that the food fish of the state are the sole property of the people and the state, acting for the people, is dealing with its own property, 'over which its control is as absolute as that of any other owner over his property'. *quoting State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1103 (Wash. 1936). *See also In re Steuart Transportation Co.*, 495 F.Supp. 38 (E.D. Va. 1980) (recognizing right of state and federal governments to sue for damages to public wildlife resources caused by oil spill); *Attorney General v. Hermes*, 339 N.W.2d 545 (Mich Ct. App. 1993) (recognizing that public ownership rights in fish support damages action for conversion brought by Attorney General based on harvesting of fish in violation of State fishing regulations).[4]

Necessary Protections for Endangered Species Trump Private Rights.

Consistent with the foregoing precedent, the public ownership doctrine also precludes the conclusion that endangered species regulations effect a taking. Indeed, so far as we are aware, *no case* in the country has resulted in a final ruling concluding that public measures to protect endangered species result in a compensable taking.

In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal.Rptr.2d 338 (Cal.Ct.App. 1993), a case quite similar to the present action, the California forestry board denied a timber company permission to cut trees absent satisfactory plans to mitigate adverse impacts on several endangered species, including the marbled murrelet and the spotted owl. The company contended that these restrictions rendered timber harvest operations on their private lands uneconomical and effected a taking. The California court of appeals rejected the takings claim, observing that other courts have generally rejected the claim that a wildlife law is unconstitutional because it curtails the uses to which real property may be put. *Id.* at 345. Specifically relying on the background principles defense articulated in *Lucas*, the court stated that wildlife regulation of some sort has been historically part of the pre-existing law of property. *Id.* at 347. (The Supreme Court of California subsequently denied review in this case, but instructed the reporter of decisions not to publish the court of appeals opinion. *See* 1994 Cal LEXIS 1388). *See also Flotilla Game and Freshwater Fish Commission v. Flotilla*, 636 So.2d 761 (Fla. Ct. Apps. 1994) (rejecting takings challenge arising from a proscription against land development within 750 feet of a nesting bald eagle established by Florida state officials pursuant to federal habitat management guidelines).[5]

The courts also have rejected takings claims based on injury caused to private property by protected endangered wildlife. Thus, for example, in *Christy v. Hodel*, 857 F.2d 1324, 1334 (9th Cir. 1988), a livestock owner challenged as a taking Department of Interior regulations which prohibited the killing of an endangered grizzly bear in order to protect domestic sheep from being killed by the bear. Relying on the many prior decisions (some of which are discussed above) which have rejected government liability for destruction of private property by protected wildlife, *id*. at 1334-35, the court dismissed the takings claim. *See also Mountain States Legal Foundation*

v. Hodel, 799 F.2d 1423 (10th Cir. 1986) (rejecting claim by owners of private grazing lands that damage to their lands by wild horses and burros protected by the Wild Free-Roaming Horses and Burros Act effected a taking).

III.Hughes v. Oklahoma And Other Decisions Interpreting the Federal Commerce or Privileges and Immunities Clauses Do Not Affect the Validity of the Doctrine of Public Ownership of Wildlife As a Background Principle of Oregon Property Law.

A handful of relatively recent U.S. Supreme Court decisions contain broad language seemingly dismissive of the entire doctrine of public ownership of wildlife. For example, in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), the Court referred to the public ownership doctrine as a 19th century fiction. *Id.* at 335, *quoting Douglas v. Seacoast Products, Inc,* 431 U.S. 265 (1977). Similarly, in *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) the Court described the public ownership doctrine as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. While this language could be interpreted to undermine the notion that the public ownership doctrine represents a relevant background principle of state law in the context of a takings claim, that reading would be mistaken.

First, it is apparent that the statements in *Hughes* and other cases are explained by and logically confined to their particular context, challenges to protectionist state legislation under the commerce or privileges and immunities clauses of the U.S. Constitution. *Hughes*, for example, involved an appeal by a Texas resident from a conviction under an Oklahoma statute prohibiting the transport outside the state of minnows procured from Oklahoma waters. *Douglas* involved a commerce clause challenge to a Virginia law forbidding fishing by federally licensed ships owned by nonresidents. *Toomer* likewise involved a constitutional challenge to a state statute discriminating against out of state commercial fisherman, but one brought under the privileges and immunities clause. In discussing the doctrine of state ownership of wildlife in these cases, the Court was simply explaining its conclusion that state public ownership doctrine cannot, under the federal Supremacy Clause, stand in the way of federal constitutional provisions designed to prevent balkanization of the national economy. There is no basis for thinking these decisions have any particular significance outside of that context.

In *Hughes*, the Supreme Court overruled its decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), in which the Court sustained a Connecticut statute forbidding the transportation beyond the State of game birds that had been lawfully killed within the State. The *Geer* decision rested on the theory that the prohibition in that case did not effect interstate commerce. According to this theory, the State owns all the wildlife in the state and therefore can condition the ownership of game taken within the state by prohibiting its removal from the state. The state's power to condition private property rights in wildlife implies, in turn, that the sale of wildlife is not commerce at all. As the Court explained in *Hughes*, Justices Field and Harlan dissented in *Geer*. They would have affirmed the State's power to provide for the protection of wild game, but only 'so far as such protection... does not contravene the power of Congress in the regulation of interstate commerce.' 441 U.S. at 328, quoting *Geer*, 161 U.S. at 541 (Field, J., dissenting); *id.* at 543 (Harlan, J., dissenting).

In *Hughes*, the U.S. Supreme Court effectively embraced the position of the dissenters in *Geer* and overruled that decision. However, the Court confined its holding to the commerce clause context, stating that [w]e now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of natural resources, and therefore expressly overrule Geer. *Hughes*, 441 U.S. at 335. Emphasizing the narrowness of its decision, the Court stated that the general rule we adopt in this case makes ample allowance for preserving, *in ways not inconsistent with the Commerce Clause*, the legitimate state concerns for conservation and protection of wild animals. *Id.* at 335-36 (emphasis added). *Hughes* and other related decisions leave the public ownership

doctrine untouched as the basis for state regulation of wildlife, so long as the regulation does not implicate the anti-economic-protectionist goals of the federal commerce clause and the privileges and immunities clause. *See Shepherd v. State of Alaska*, 897 P.2d 33, 40, (1995) (state ownership doctrine retains full vitality absent a conflict with paramount federal interests).

Second, an expansive reading of *Hughes* would contradict the deference to state definitions of property interests which is at the heart of federal takings jurisprudence. Just a few months ago, the U.S. Supreme Court in *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925, 1930 (1998) reaffirmed that the Constitution protects rather than creates property interests, and that the very existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' *See also Lucas*, 505 U.S. at 1030 (referring to the Court's traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments).

Whatever other differences may distinguish the U.S. Supreme Court's commerce clause and takings jurisprudence, it is clear that the takings clause, rather than trumping State definitions of property rights, depends upon and incorporates State definitions of private property rights. It would literally turn federal takings jurisprudence on its head to conclude that the takings clause could be interpreted to encourage or authorize disregard for state property norms, including the doctrine of public ownership of wildlife.

Finally, numerous state court decisions, decided since *Hughes*, have rejected the suggestion that the U.S. Supreme Court's commerce clause decisions have eliminated the public ownership doctrine as a basis for state wildlife management. For example, in *State of Montana v. Fertterer*, 841 P.2d 467, 440 (Mont. 1992), the Montana Supreme Court affirmed the convictions of several individuals for killing game without a license, rejecting the argument that *Hughes* effectively preclude[d] reliance on the traditional rule that wild game in Montana is public property. The court said that Hughes in not controlling in this case , because there were no claims of discrimination against non-residents based on the federal interstate commerce, equal protection, or privileges and immunities clauses. 841 P.2d at 470. *See also Shepherd v. State of Alaska*, *supra* (state ownership doctrine applies absent conflict with paramount federal interests).[6]

IV.The Restrictions Imposed By OAR 629-24-809 Do Not Effect a Taking

Because They Simply Parallel Background Principles of Oregon

Property and Nuisance Law.

The regulations adopted by the Oregon Board of Forestry to protect the spotted owl and its habitat do not effect a taking because they impose limitations on the use of private property which parallel limitations already inherent in Boise Cascade's private property interests under background principles of Oregon law.

Under OAR 629-24-809, whenever the State Forester determined that a forestry operation will conflict with protection of a nesting site of the northern spotted owl the operator had to obtain the State Forester's approval of a written plan. The plan of operation was required to provide, at a minimum, for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat; and (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period for use during nesting. The critical period of use is the time period between March 1 and September 30, each year.

In accordance with this requirement, the Board of Forestry rejected plaintiff's proposal to log a 64-acre parcel of its land, except that the Board authorized the logging of up to 8 acres of the property, subject to compliance with the time limitations in OAR 629-24-809(b).

This restriction on plaintiff's ability to use its land effected no taking because it simply parallels the limitations inherent in plaintiff's title by virtue of the public ownership doctrine. As the Oregon Supreme Court stated in *State v. Hume*, 52 Or. at 5-6, the legislative assembly may enact such laws as tend to protect the species from injury by human means. *See also Thompson v. Dana*, 52 F.2d at 762 (conservation of wildlife for the common good of all citizens is paramount, and therefore reasonable wildlife protection measures do not infringe upon... [private] property [rights protected by] the Constitution of the United States).

In addition, the Board of Forestry's spotted owl regulations did not effect a taking because they parallel limitations imposed on Boise Cascade under Oregon public nuisance doctrine. A public nuisance results from the invasion of a right common to members of the public generally. *Smejkal v. Empire Lite-Rock,* 274 Or. 571, 574, 547 P.2d 1363 (1976), citing *Raymond v. Southern Pacific Co.,* 259 Or. 629, 488 P.2d 460 (1971). The regulations at issue in this case prevent a public nuisance because they prevent actions which would destroy the public's rights in wildlife. *See Columbia River Fishermen's Protective Union v. City of St. Helen's,* 160 Or. 654, 661, 87 P.2d 195 (1939) (enjoining as a public nuisance private actions which resulted in pollution and injured fish owned by the State as trustee for the public and interfered with the common right of the citizens of the state to fish).

The fact that this regulation aims at the conservation of an endangered species, rather than management of a game animal, does not affect the conclusion that the regulation is supported by background principles of state law. Indeed, the Oregon Supreme Court has explicitly endorsed under the public ownership doctrine the power of the State to adopt measures designed to avoid the extermination of a species. *State v. Hume*, 52 Or. at 6. To be sure, in the past, when the State's and the nation's wildlife resources were more abundant, wildlife management measures commonly focused on regulating the taking of species to maintain sustainable quantities of game and fish for commercial exploitation But the public's legal rights in its wildlife are entitled to the same, if not greater, protection when the state is acting to protect a species from going over the brink of extinction. *See Christy v. Hodel*, *supra*; *Sierra Club v. Department of Forestry & Fire Protection*, *supra*. *See also Lucas v. South Carolina Coastal Council,* 505 U.S. at 1031 (observing that changed circumstances or new knowledge may make what was previously permissible no longer so).

While Boise Cascade contended at trial that the Board of Forestry's regulations protecting the spotted owl effected a kind of physical-occupation taking, *compare Mountain States Legal Foundation, supra* (rejecting a challenge to wildlife regulations on a physical- occupation theory), this contention is irrelevant to the resolution of this case. Whether the takings claim in this case is interpreted as a regulatory taking claim or physical taking claim, the background principles of Oregon law preclude a finding of a taking under either theory. *See Stevens v. City of Cannon Beach*, *supra* (restrictions to preserve customary public right to occupy ocean beach not a taking under State background principles); *McDonald v. Halvorson*, 92 Or.App. at 488 (Defendants have no protected property interest in the public easement over the 'dry-sand area,' and therefore there can be no taking.'). *See also Cook v. The State of Washington*, 74 P.2d 199, 201 (Wash.1937) (the state has the absolute right to maintain its game and wild animals upon any and all private lands, and in that there is no element of trespass or taking).[7]

In addition, the conclusion that there is no taking in this case is not affected by the fact that the regulations are designed not only to protect the owl directly, but also to protect critical habitat upon which the owl depends for its survival. *See Flotilla Game and Freshwater Fish Commission v. Flotilla*, *supra* (rejecting takings challenge arising from a proscription against land development within 750 feet of a nesting bald eagle).

As a matter of common sense, avoiding destruction of critical habitat can be as essential for vindicating the public right to protection of the spotted owl as avoiding direct killing of the bird. As the Oregon Supreme Court observed in an analogous case involving the threat of pollution to public rights in fish:

The regulatory power of a state extends not only to the taking of its fish but also

over the waters inhabited by the fish. Its care of the fish would be of no avail if it had no power to protect the waters from pollution.

Columbia River Fishermen's Protective Union v. City of St. Helen's, 160 Or. at 663. Similarly, the State's power to protect public ownership rights in the spotted owl would be of no avail if the State lacked the power to protect, at least temporarily, a portion of the habitat area upon which the owl depends for its survival. *See also* Trial Transcript, at 355 (testimony of Joe Clint Smith) (observing that cutting trees inside core area would result in a take of a spotted owl nesting site).

The recent U.S. Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), supports the conclusion that protection of public rights in wildlife necessarily authorizes the State to prevent destruction of some portion of wildlife habitat. The case involved a challenge to a provision of the federal Endangered Species Act making it unlawful for any person to take any endangered or threatened species, which the Act defined to mean harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or to attempt to engage in such conduct. The Department of Interior interpreted the term harm in regulations as follows:

Harm in the definition of 'take' in the Act means an act which actually

kills or injures wildlife. Such an act may include *significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering*.

Id. at 691 (Emphasis added). The Supreme Court upheld the Department's regulations and, in language that is directly applicable to the scope of public ownership rights in wildlife under Oregon law, said that an ordinary understanding of the word 'harm' supported the Department's regulations:

The dictionary definition of the verb form of 'harm' is 'to cause hurt or

damage to: injure'.... In the context of the ESA, that definition naturally encompasseshabitat modification that results in actual injury or death to members of an endangered or threatened species. Respondents argue that the Secretary [of the Interior] should have limited the purview of 'harm' to direct applications of force against protected species, but the dictionary definition does not include the word 'directly' or suggest in any way that only direct or willful action that leads to injury constitutes 'harm.'

Id. at 697.

For many years, consistent with ancient common law tradition, Oregon courts have recognized the public's paramount rights in the birds and other wildlife within the State's borders. *See, e.g.*, *Monroe v, Withycombe*, 84 Or. 328 (1917); *State v. Hume*, 520 Or. 1 (1908).

The takings claim asserted in this case represents a frontal attack on these rights long held for the benefit of all the citizens of Oregon. The right of the public to decide how to manage its public wildlife resources requires reversal of the finding of a taking in this case.

FOOTNOTES

[1] Simultaneously with the filing of this brief, Audubon Society of Portland is filing a motion with the Court seeking leave to file this brief amicus curiae. The interest of Audubon Society of Portland in this case is set forth in the motion.

[2] While these arguments were not discussed at great length in advance of or during the trial, they were adequately raised for the purpose of preserving the issues for appeal. In addition, because the State owns wildlife as trustee for the citizens as a whole, the defense to a taking claim based on public ownership of wildlife should be deemed non-waivable.

[3] In comparison with the doctrine of public ownership of wildlife, the regulatory takings doctrine is a remarkably recent innovation. As U.S. Supreme Court Justice Antonin Scalia has observed, prior to the early 20th century, it was generally thought that the takings clause reached only a 'direct appropriation' of property ..., or the functional equivalent of a 'practical ouster of [the owner's] possession'." Lucas, 505 U.S. at 1014. Recent legal scholarship confirms that the drafters of the takings clause did not originally intend for the clause to apply to regulations under any circumstance. See John F. Hart, Colonial Land Use Law and its Significance for Modern Takings Doctrine, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995).

[4] Courts addressing the validity of wildlife laws and regulations sometimes appear to use language which treats the public ownership doctrine and the states' general police power as potentially interchangeable bases for regulations protecting wildlife. See, e.g., Anthony v. Veatch, 189 Or. 462, 474 (1950). For the purpose of determining whether the government has the authority to act, there apparently is no substantive difference between these two legal theories. But for the purpose of determining whether wildlife-protection regulations effect a taking, the public ownership doctrine creates a distinctive defense not available in the case of regulations supported only by the general police power. The Lucas decision highlights the importance of distinguishing between these two alternative bases for wildlife regulations for the purpose of evaluating takings claims challenging such regulations.

[5] Numerous commentators also have recognized that the public ownership doctrine naturally fits into the Lucas framework of background principles of state law. See, e.g., Oliver Houck, Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property To Protect Them Constitute 'Takings'? 80 IOWA L. REV. 297, 308-21 (1995); Comment, Lucas and Endangered Species Protection: When 'Take' and 'Takings' Collide, 27 U.C. DAVIS L.REV. 185 (1993)

[6] Commentators have reached the same conclusion. As Professor Oliver Houck succinctly put it, the Court in Hughes "did not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the citizens of a state." 80 IOWA L.REV. 297, 311 n. 77. See also Carl D. Etling, Who Owns the Wildlife?, 3 ENVIRON-MENTAL LAW 28 (Spring 1973) (describing the "import" of the Toomer decision to be "that even though a state may have plenary authority over its wildlife, it cannot avoid or circumvent the command the Commerce Clause where it permits its fish to be placed in the stream of commerce").

[7] Furthermore, because the State owns wildlife as a trustee, rather than in an ordinary proprietary sense, the State cannot plausibly be described as having effected a physical occupation in the same sense that ordinarily gives rise to takings liability on that theory. See Dolan v. City of Tigard,

512 U.S. 374 (1994) (government effected a physical occupation by demanding bike path and public greenway). Furthermore, the presence of wildlife is by nature almost always transitory, as in this case, and therefore the asserted occupation of private land by wild animals cannot be said to be "permanent," as the U.S. Supreme Court has required for application of the rule governing physical occupations. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment entered by the trial court in this case.

Respectfully submitted,

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