IN THE SUPREME COURT OF THE STATE OF OREGON

COAST RANGE CONIFERS, LLC, an Oregon limited Liability Company	)	
	)	SC No. S51342
Plaintiff-Appellant, Respondent on Review	)	CA No. A117769
v.	)	
STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY	)	
Defendant-Respondent, Petitioner on Review.	)	

BRIEF OF *AMICI CURIAE* AUDUBON SOCIETY OF PORTLAND, FRIENDS OF THE COLUMBIA GORGE, INC., INSTITUTE FOR FISHERIES RESOURCES, LEAGUE OF WOMEN VOTERS OF OREGON, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AND OREGON TROUT, INC. IN SUPPORT OF PETITIONER ON REVIEW STATE OF OREGON

On Review of the Decision of the Court of Appeals, dated September 21, 2003,
By Landau, Presiding Judge, and Armstrong and Wollheim, Judges

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Amici Curiae Audubon Society of Portland, Friends of Columbia Gorge, Institute for Fisheries Resources, League of Women Voters of Oregon, Pacific Coast Federation of Fishermen's Associations, and Oregon Trout, Inc. respectfully submit this brief *amicus curiae* in support of the State of Oregon. Many of the *amici* previously filed a brief in this case in the Court of Appeals urging the Court to affirm the trial court's grant of summary judgment to the State, and the *amici* filed a brief urging this Court to grant the State's petition for review. The *amici* now urge reversal of the judgment of the Court of Appeals.

STATEMENT OF INTERESTS

Audubon Society of Portland is a statewide environmental organization based in Portland, Oregon that promotes the enjoyment, understanding, and protection of native birds, other wildlife, and their habitats. Audubon Society of Portland has a long history of advocacy on behalf of preservation of wildlife resources, and has appeared as a party or as a friend of the court in numerous legal proceedings relating to the protection of threatened and endangered species in the Pacific Northwest.

Friends of the Columbia Gorge, Inc. is a nonprofit organization with members in more than 3,000 households dedicated to protecting and enhancing the scenic, natural, cultural, and recreational resources of the Columbia River Gorge National Scenic Area. Friends participates in approximately 250 land use, development, and logging reviews

every year; files watchdog appeals and litigation; and testifies in legislative matters.

The Institute for Fisheries Resources is a nonprofit organization dedicated to the conservation, protection, and restoration of aquatic resources and watersheds in the Pacific Northwest. Most of its members are commercial fishermen a majority of whom are salmon fishermen. The Institute is particularly interested in preservation and restoration of resources needed for protection and restoration of Pacific Salmon. The Institute is affiliated with the Pacific Coast Federation of Fishermen's Associations and manages the Association's resource conservation program.

The League of Women Voters of Oregon is a nonpartisan, grassroots political organization that supports the informed, active participation of citizens in government in order to build better communities statewide. The League supports policies that promote both conservation and development of land as a natural resource, in accordance with Oregon's land use goals, and supports protection of private property rights commensurate with overall consideration of public health and environmental protection.

Oregon Trout, Inc. is a nationwide nonprofit organization based in the State of Oregon. It is dedicated to the protection of native wild fish and the ecosystems that sustain them. The organization has been active for some 15 years in promoting protection and restoration of native wild fish species and supporting habitat. Oregon Trout, Inc. is not a sport or commercial fishing group, but is interested in conservation of native fish as an indicator of overall ecosystem health.

Pacific Coast Federation of Fishermen's Associations is a nonprofit commercial fishing industry trade association. It represents approximately 4,000 commercial fishermen and fishing boat owners who make their living from the harvest of marine fish resources. The association is interested in the health of watersheds because watershed health is necessary to the health and preservation of Pacific coast salmon. Logging can affect watershed health by, among other things, altering water temperatures or changing stream morphology. Just as logging can adversely affect bald eagles and forest habitat for bald eagles, logging can adversely affect salmon and salmon habitat.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question presented by this case is whether a land owner is entitled to financial payment under Article I, Section 18 of the Oregon Constitution because it has been restricted from engaging in timber harvesting that would destroy the nesting area for a bald eagle, our national emblem and a protected species under the federal Endangered Species Act. The applicable regulations permitted Coast Range Confers ("CRC"), the plaintiff forestry company, to proceed with harvesting of trees on over 75% of the land at issue in this case, or on 31 acres out of the total 40 acres making up the property. At the same time, the owner was prohibited from harvesting trees on most of the remaining nine acres, so long as the area remains an active nest site. Because eagles exhibit great fidelity to specific nest sites, especially when an eagle pair has used a specific site successfully in the past to produce offspring, scientists consider the

protection of eagle nesting sites critical to the long-term protection and recovery of the species.

In concluding that a taking occurred, the Court of Appeals made two fundamental errors. First, it failed to appreciate that the Oregon courts, like the courts in virtually every other jurisdiction in the United States, have embraced the "parcel as a whole" rule for the purpose of analyzing regulatory takings claims. Straightforward application of the parcel as a whole rule in this case requires reversal of the Court of Appeals' conclusion that plaintiff established a taking. The Court of Appeals focused exclusively on the nine acres subject to restriction, and because it believed that plaintiff had been denied all economically viable use of that area, it concluded that a taking had occurred. Instead, the Court of Appeals should have treated the relevant parcel as the entirety of the 40 acres that make up this property and, like the Circuit Court, rejected the taking claim as a matter of law.

Second, even if, using a proper parcel definition, the claim met the threshold for a regulatory taking, the Court of Appeals should have rejected this claim based on the longstanding doctrine of public ownership of wildlife. This case is different from the run of the mill takings dispute because it involves not simply a restriction on the use of private property, but an effort by the State to protect the public's own property interests. Under the law of Oregon (and every other state in the nation) all wild animals are held in trust by the State for the benefit of all the citizens. Therefore, in enforcing the regulations

to protect bald eagles, the Board of Forestry and the Department of Forestry acted to defend public property rights and to prevent an invasion of public rights amounting to a public nuisance. Because no private property owner can claim a right to use his or her property in a manner inconsistent with background principles of state property or nuisance law, this claim fails at the threshold. For this second, independent reason, the judgment of the Court of Appeals should be reversed.

ARGUMENT

I. THE PARCEL AS A WHOLE RULE GOVERNS, AND SHOULD CONTINUE TO GOVERN, ANALYSIS OF REGULATORY TAKINGS CLAIMS UNDER ARTICLE I, SECTION 18 OF THE OREGON CONSTITUTION.

A. Across the Country, Federal and State Courts Consistently Apply the Parcel as a Whole Rule in Regulatory Takings Cases.

While the Court of Appeals' decision rejecting the parcel as a whole rule contradicts well-settled Oregon law, it represents an equally dramatic departure from the general rule followed throughout the United States, in federal as well as state court. In an effort to assist the Court in resolving this issue, the *amici* will first compare the Court of Appeals' treatment of the parcel issue in this case with decisions of other federal and state courts. The *amici* will then address why the decision contradicts Oregon law and is contrary to common sense, the language and original understanding of the Oregon takings clause, and basic principles of takings jurisprudence.

The principle that a regulatory taking claim must be analyzed in relation to the

"parcel as a whole" is one of the most fundamental rules of federal takings law. As the U.S. Supreme Court explained in its landmark decision in *Penn Central Transp. Co. v. New York City*, 438 US 104 (1978),

> "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole.*"

Id. at 130–31 (emphasis added). In other words, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 US 470, 497 (1987) (quoting *Andrus v. Allard*, 444 US 51, 65–66 (1979)).

In accord with this principle, the U.S. Supreme Court has repeatedly rejected the idea that the relevant unit of property for the purpose of takings analysis can be defined by focusing on the specific property interest or geographic portion of the property being regulated. For example, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 US 602 (1993), the Court rejected the claimant's attempt to segment the property, and stated,

> [W]e rejected this analysis years ago in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is

whether the property taken is all, or only a portion of, the parcel in question. *Id.* at 644.

The U.S. Supreme Court's latest and most comprehensive discussion of the parcel as a whole rule appears in its decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002). The issue in the case was whether a relatively lengthy planning moratorium restricting development around Lake Tahoe effected a compensable taking. To resolve the issue, the Court was required to consider whether it should analyze the impact of the regulation by focusing solely on the period the moratorium was in effect, as urged by plaintiffs in that case. The Court rejected this approach as inconsistent with the parcel as a whole rule, which it said had to be applied in the "'many different dimensions'" of property, including the "'physical,'" the "'functional,'" and the "'temporal dimension.'" *Id.* at 318 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F3d 764, 774 (9th Cir 2000)). Thus, the Court explained,

> "Th[e] requirement that 'the aggregate must be viewed in its entirety' explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U.S. 51 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox*, 274 U.S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 70 (1987), were not considered regulatory takings. In each of these cases, we affirmed that where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking.' *Andrus v. Allard*, 444 U.S. at 65–66."

Id. at 327.

In *Tahoe-Sierra* the U.S. Supreme Court stated that the parcel as a whole rule for regulatory takings cases does *not* apply to actual physical occupations of private property, where the Takings Clause gives rise to an obligation to pay compensation, "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Id*. at 322. The Court said that the different rule for physical occupations was based on the "longstanding distinction" between occupations of private property and restrictions on property use. As the Court explained, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways." *Id*. at 324. On the other hand, "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Id*. at 324. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435 (1982) (stating that a permanent physical occupation of a person's property "is perhaps the most serious form of invasion of an owner's property interests").

Applying these clear Supreme Court teachings,[1] the lower federal courts have

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[1] The Court of Appeals incorrectly observed that the U.S. Supreme Court "has rather exasperatingly wandered back * * * and forth * * * and back again" on the parcel issue, citing the decision in *Kaiser Aetna v. United States*, 444 US 164 (1979), as an example of the Supreme Court's supposed deviation from the parcel rule. However, *Kaiser* is a physical occupation-type takings case, and as the Supreme Court explained in *Tahoe-Sierra*, takings claims based on physical occupations are governed by a different rule than the parcel as a whole rule that applies in regulatory takings cases. *See* 535 US at 325. In fact, contrary to the Court of Appeals' statement, the U.S. Supreme Court has

consistently applied the parcel as a whole rule in regulatory takings cases. Most telling for the purpose of this case is *Seiber v. United States*, 364 F3d 1356 (Fed Cir 2004), *cert den*, ___ US ___, 2004 WL 2073328, 73 USLW 3179 (US, Oct. 4, 2004) (No 04-100). *Seiber* involved a claim against the United States under the federal Takings Clause, but the case involved essentially identical facts to this case, arose from the State of Oregon, and the plaintiffs were represented by the same counsel representing the plaintiffs in this case. The plaintiffs owned a 200-acre parcel of timberland, 40 acres of which were included in a protected nesting area for the endangered northern spotted owl designated by the U.S. Fish and Wildlife Service. The U.S. Court of Federal Claims rejected the regulatory taking claim and the U.S. Court of Appeals for the Federal Circuit affirmed, relying on the parcel as a whole rule. Rejecting plaintiffs' argument that the takings analysis should focus on the 40 restricted acres rather than the 200-acre parcel as a whole, just as the plaintiffs in this case contend that the analysis should focus on the 9 restricted acres rather than the 40-acre parcel as a whole, the federal appeals court stated that "[t]he Supreme Court has repeatedly instructed that the impact of an alleged taking must be considered in terms of the 'parcel as a whole.'" *Id.* at 1368. Accordingly, the court ruled that the restrictions on timber harvesting did not effect a taking because they "did not deprive the Seibers' [*sic*] of all economically viable use of the timber on the two

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been remarkably consistent, over a period of at least several decades, in applying the parcel as a whole rule in regulatory takings cases.

hundred-acre parcel." *Id.* at 1370.

If any further proof were required that application of the federal parcel rule would bar the claim in this litigation, plaintiff itself has supplied the demonstration. On April 8, 2002, plaintiff filed a complaint in the U.S. Court of Federal Claims alleging a taking based on restrictions on timber harvesting on the site at issue in this case, but based on the parallel regulations enforced by the U.S. Fish and Wildlife Service rather than those of the State of Oregon. *See Coast Range Conifers v. United States*, No 02-295L. On November 15, 2002, the United States filed a motion to dismiss or, alternatively, for summary judgment. The United States, relying specifically on the U.S. Supreme Court's then very recent decision in *Tahoe-Sierra*, argued that the parcel as a whole rule barred the claim. Before the U.S. Court of Federal Claims had an opportunity to rule on the United States' motion, plaintiff sought leave to voluntarily dismiss its complaint. On June 11, 2003, the court issued an order granting the motion, bringing the federal side of this litigation to a complete close. No clearer demonstration can be imagined that, based on the parcel rule applied under the federal Constitution, pursuing this suit would have been utterly frivolous.

Other federal and state courts have applied the parcel rule, under both the federal and state constitutions, in factual circumstances that are materially indistinguishable from this case. For example, in a particularly well-reasoned decision, the U.S. Court of Appeals for the District of Columbia Circuit ruled that a taking claim based on denial of a permit

to develop several building lots had to be analyzed, not by focusing on the lots themselves, but by assessing the impact of the regulation on the larger real estate parcel of which the lots were a part. *District Intown Properties Ltd v. District of Columbia*, 198 F3d 874 (DC Cir 1999), *cert den,* 531 US 812 (2000). Similarly, in *K& K Construction, Inc. v. Department of Natural Resources*, 575 NW2d 531 (Mich), *cert den,* 525 US 819 (1998), the Michigan Supreme Court ruled that the effect of wetlands development restrictions had be to be evaluated by taking into account other contiguous acreage that had already been developed or could be developed in the future. Likewise in *Zealy v. City of Waukesha*, 548 NW2d 528 (Wis 1996), the Wisconsin Supreme Court ruled that restrictions on wetland development had to be evaluated in light of the plaintiff's entire real estate holding, not simply by focusing on the restricted acres of the property.

Indeed, so far as we know, every state in the nation that has considered the question has refused to embrace the narrow parcel definition adopted by the Court of Appeals in this case. It is also noteworthy that several of Oregon's neighbors have expressly embraced the parcel rule. *See Presbytery of Seattle v. King County*, 787 P2d 907 (Wash), *cert den*, 498 US 911 (1990); *City & County of San Francisco v. Golden Gate Heights Investments*, 14 Cal App 4th 1203, *cert den,* 510 US 928 (1993).[2]

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[2] Application of the parcel rule is not affected in the least by the fact that a claimant, such as CRC in this case, may already have exploited all or most of the remaining economic potential of the property at issue. In *Rith Energy v. United States*, 270 F3d 1347 (Fed Cir 2001), *cert den,* 536 US 958 (2002), the U.S. Court of Appeals for the Federal Circuit concluded that a restriction on mining did not effect a taking given

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B. Contrary to the View of the Court of Appeals, Oregon Courts Have Consistently Applied the Parcel Rule Under the Oregon Constitution.

While the Oregon Courts have had relatively few opportunities to delve into the parcel issue in applying Article I, section 18, it is clear, contrary to the analysis of the Court of Appeals, that they have embraced the parcel as a whole rule.

In *Stevens v. City of Cannon Beach,* 317 Or 131, 854 P2d 449 (1993), a case brought under both the federal and the state takings clauses, the Court affirmed rejection of a takings challenge to regulations restricting development along the shorefront. While the regulations barred plaintiffs from making certain uses of the property, they did not bar them from building a single-family home as well as other structures. "Because [the regulation] makes provisions for certain economically viable uses of private beaches and dunes," the Court said, "we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property." *Id*. at 148. While the Court did not invoke the parcel as a whole rule in *haec verba*, the Court's decision plainly represents an application of the parcel rule in the functional dimension, that is, in terms of the uses the owner is permitted, and is not

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that the claim had to be analyzed in relation to the claimant's entire mineral property, including the portions the claimant had already exploited. Similarly, in *Deltona v. United States*, 657 F2d 1184, 1188, 1192 (Fed Cir 1981), *cert den*, 455 US 1017 (1982), involving a takings claim by a wetlands developer, the Federal Circuit defined the relevant parcel to include adjacent acres which the claimant had previously filled and developed.

permitted, to make of the property. Every case rejecting a taking challenge to zoning restrictions on permitted uses in designated areas applies the parcel rule in this sense. *See Tahoe-Sierra*, 535 US at 323 (citing *Village of Euclid v. Ambler Realty*, 272 US 365 (1926)), as an example of the application of the parcel rule). Thus, in *Stevens*, the Court has demonstrated its fidelity to the parcel rule in a case decided under Article I, Section 18.

Furthermore, the parcel rule is implicit in the Court's repeated statement that a taking only occurs under the Oregon Constitution when a regulation deprives the owner of all economic use of the property. *See Dodd v. Hood River County*, 317 Or 172, 182, 855 P2d 608 (1993). The premise of this formulation is that so long as the regulation allows the owner some use of the property—*i.e.*, leaves some use of the property, apart from the interest or portion subject to the restriction—there is no taking. In other words, Oregon's established takings jurisprudence, which self-evidently rejects the idea that *every* regulatory constraint is a taking, necessarily embraces the notion that economic impact must be analyzed in relation to the parcel as a whole.

The conclusion that Oregon follows the parcel rule also is supported by at least one prior decision of the Court of Appeals, a decision which the Court of Appeal in this case ignored or overlooked. In *Multnomah County v. C.T. Howell*, 9 Or App 374, 496 P2d 235 (1972), the court addressed a taking claim under Article I, Section 18, based on a zoning classification that allegedly rendered approximately one-third of the owner's 13-acre

property economically useless. Reversing the trial court, the Court of Appeals rejected the taking claim, and stated,

> "The reasonableness of a zoning ordinance must be tested by its effect on *the whole* of [the landowners] contiguous property, not simply the effect on a portion thereof. Therefore, the mere fact that an ordinance prevents an owner from using a portion of his property for a nonconforming purpose would not constitute a taking."

Id. at 379–80 (emphasis added). It is difficult to imagine a more straightforward application of the parcel rule, which required the Court of Appeals to treat CRC's contiguous 40-acre property as the relevant parcel in this case.

Finally, the decisions of this Court applying the federal Takings Clause also provide indirect support for the conclusion that Oregon follows the parcel rule. While the Court has said that the federal and state takings clauses should *not necessarily* be given an identical reading, it has often assumed that they do have an identical meaning. *See, e.g.*, *Stevens v. City of Cannon Beach*, 317 Or 131, 135 n 5, 854 P2d 449 (1993)*; GTE Northwest, Inc. v. Public Utility Comm'n*, 321 Or 458, 468 n 6, 900 P2d 495 (1995). Combining the premise that the federal and state takings clauses are usually interpreted to mean the same thing with the Court's recognition that the parcel rule does apply under the federal Takings Clause, it is a reasonable inference that the parcel rule should probably apply under the Oregon Constitution as well. In *Cope v. City of Cannon Beach*, 317 Or 339, 855 P2d 1083 (1993), a case brought exclusively under the federal Constitution, the Court addressed the question of whether a prohibition on the use of property for short-

term rentals denied the owners all economic use of the property. The Court held that it did not, pointing out that the owners could enter into long-term rental arrangements or occupy the property themselves. The Court rejected the argument that plaintiffs could establish a taking by focusing solely on the ban on short-term rentals, 317 Or at 346, citing federal cases for the rule that "'where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety.'" *Keystone Bituminous Coal Ass'n. v. DeBenedictis,* 480 US 470, 497 (1987) (*quoting Andrus v. Allard,* 444 US 51, 65–66 (1979)). Applying the Court's frequently used assumption that the federal and state takings clauses have the same meaning, *Cope* supports application of the parcel rule in this case under the Oregon Constitution.

The Court of Appeals nonetheless believed that it was compelled, based on two decisions of this Court, to reject the parcel rule. *See* 189 Or App at 46–48 (discussing *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), and *Boise Cascade Corp. v. State ex rel. Bd. of Forestry,* 325 Or 185, 935 P2d 411 (1997)). Upon analysis, neither decision supports the Court of Appeals' conclusion.

Fifth Avenue, which is not accurately described in the Court of Appeals decision, involved a plainly distinguishable set of facts. The landowner brought suit challenging certain zoning restrictions imposed on a portion of its 20-acre property, as well as government plans to acquire certain other portions of the property by eminent domain. As

discussed above, exercises of regulatory power and direct appropriations are distinct types of government action, and the rules governing claims for compensation based on each type of action are not the same. *See Tahoe Sierra*, 535 US at 323 ("Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.") Thus, under the special facts in *Fifth Avenue*, it did make sense for the Court to divide the subject property into two separate parcels. That ruling provides no support, however, for disregarding the parcel as a whole rule when, as in this case, the challenged government action is clearly a regulatory restriction. *See also Dodd v. Hood River County*, 317 Or 172 181, 855 P2d 608 (1993) (recognizing that *Fifth Avenue* involved an expropriation of private property for public use, to which a "different test" applies).

Boise Cascade also cannot reasonably be read to reject the parcel as a whole rule. First, there is no actual discussion of the parcel issue in the case. It is literally impossible to believe, in light of the numerous prior Oregon court decisions applying the parcel as a whole principle, that the Court could have established a novel parcel rule under the Oregon Constitution without saying so.

Second, at the stage of the litigation when the appeal came before this Court, the plaintiff was still pursuing both a regulatory taking theory (under which the parcel rule

does apply) and a physical-occupation taking theory (under which the parcel rule does not apply). Thus, it was not, strictly speaking, inconsistent with the parcel rule that applies in regulatory takings cases for the Court to allow Boise Cascade to proceed with its claim at that stage.[3]

Third, the conclusion that the Court did not address the parcel rule is supported by the procedural posture of the case: the Court was reviewing the trial court's grant of a motion to dismiss. Based on the premise that a claim of denial of all economic use represents an allegation of fact (not a conclusion of law) for the purpose of a motion to dismiss, *see Boise Cascade Corp. v. Board of Forestry*, 131 Or App 538, 545, 886 P2d 1033 (1994), and reading the complaint with the generosity appropriate at that stage of the litigation, *see* 325 Or at 198, it is not surprising that the Court allowed the case to proceed. The Court's conclusion that the trial court erred in dismissing the complaint did not prejudge the question of whether, in light of the actual facts of the case, the parcel rule might require rejection of Boise Cascade's claim.

Indeed, as the actual facts of the *Boise Cascade* case have unfolded, it has become

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[3] In a subsequent decision, the Court of Appeals ruled that Boise Cascade's physical-occupation takings theory failed as a matter of law and had to be rejected. *See Boise Cascade Corp. v. State of Oregon,* 164 Or App 114, 125–27, 991 P2d 563 (1999), *rev den,* 331 Or 244, 18 P3d 1099 (2000), *cert den*, 532 US 923 (2001). That ruling is consistent with the view that the physical-occupation theory should be confined to "relatively rare" cases where the fact of taking can be "easily identified." *Tahoe-Sierra*, 535 US at 324. In this case, the trial court rejected CRC's claim that it suffered a *per se* taking based on the physical occupation theory. CRC appealed on that issue to the Court of Appeals, but the Court of Appeals did not address the issue.

apparent that the actual parcel is far different from the parcel as described in Boise Cascade's complaint. The actual parcel dispute in *Boise Cascade* was not really about whether the relevant parcel is 64 acres or 56 acres, as the Court of Appeals suggested, but rather about whether the relevant parcel is 1770 acres. As the Court of Appeals explained in a 1999 decision in the *Boise Cascade* case, once the facts had emerged,

> "In 1988, Boise acquired 1,770 acres of commercial timberlands in Clatsop County and conducted some logging activities on its property. Also in 1988, the Oregon Department of Fish and Wildlife designated the northern spotted owl as a threatened species. In 1990, the State Forester adopted an administrative policy precluding timber harvesting within a 70-acre area around known spotted owl nesting sites * * * . In 1991, Boise sold all of those commercial timberlands except for a 64-acre parcel (the Walker Creek site), which the buyer refused to accept due to the presence of a northern spotted owls nest on the site."

Boise Cascade Corp. v. ex rel. Bd. of Forestry, 164 Or App at 116. The fact that the Court of Appeals, following this Court's 1997 decision in *Boise Cascade*, was assessing Boise Cascade's claim in the context of its entire 1770-acre holding demonstrates that the Court of Appeals did not believe that *Boise Cascade* established a novel, narrow parcel definition under the Oregon Constitution.[4]

Fourth, following the Court's 1997 decision, Boise Cascade abandoned its claim

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[4] The parcel question in the *Boise Cascade* case has still not been directly addressed, much less resolved, because the Court of Appeals, in its latest decision in the case, ruled that the trial court should have considered whether the regulatory taking claim should have been dismissed at the threshold on ripeness grounds. *See Boise Cascade Corp. v. Board of Forestry*, 186 Or App 291, 63 P3d 598 (2003). If and when an Oregon appellate court ever reaches the merits of the *Boise Cascade* case, it is self-evident that the State will argue, and is entitled to argue, that the relevant parcel is the 1770 acres.

under the Oregon Constitution and proceeded solely under the Federal Constitution. *See Boise Cascade*, 164 Or App at 117. If Boise Cascade (which is represented by the same counsel who represents CRC in this case), had believed that this Court had rejected the parcel rule under Article I, Section 18, and thereby greatly expanded the scope of Oregon's regulatory takings law, it is incredible to suppose that it would have abandoned its claim under the Oregon Takings Clause. In other words, the tactical decisions of CRC's legal counsel belie the conclusion that *Boise Cascade* established a novel, narrow parcel rule under the Oregon Constitution.

In sum, under the governing law of Oregon, it is plain that the proper parcel in the present case is the 40 acres owned by CRC, not the nine acres subject to restriction. Because the Court of Appeals failed to apply the governing Oregon precedents defining the relevant parcel, its decision must be reversed.[5]

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[5] CRC argued in the Court of Appeals that it was entitled not only to segment the property in the horizontal dimension (by focusing on the nine restricted acres rather than the full 40-acre parcel) but in the vertical dimension as well (by focusing on the trees alone, rather than the trees and the ground on which they stand). CRC's argument for vertical segmentation is largely academic, given that all or most of the value of this property is based on the value of the timber. In other words, separating the trees from the ground would not significantly affect the measure of the impact of the restrictions on the property's value. *See Boise Cascade v. Board of Forestry*, 131 Or App 538, 545, 866 P2d 1033 (1994) (rejecting the identical argument in a similar case as "close to academic"). Furthermore, the argument is wrong, for at least two reasons. CRC has contended that under Oregon law it possesses a legally distinct interest in the trees and for that reason the trees should not be aggregated with the land into a single "parcel." As a matter of Oregon law, however, standing trees are considered part of the realty, not a distinct property interest. *See Hink v. Bowlsby,* 199 Or 238, 243, 260 P2d 1091 (1953); *Parsons v. Boggie*, 139 Or 469, 473 (1932). Furthermore, even if CRC were right about Oregon law, that

C. As A Matter of First Principles, the Court Should Apply the Parcel As a Whole Rule.

Even if there were some ambiguity in the decisions of this Court on whether the parcel as a whole rule applies under Article I, Section 18 of the Oregon Constitution, the Court should, as a matter of first principles, embrace the parcel rule.

First, the parcel rule is simply a practical necessity if modern government is going to function at all. As Justice Oliver Wendell Holmes observed decades ago, in the landmark case *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 413 (1922), "Government could hardly go if to some extent values incident to property could not be diminished without paying for every such change in the law." If the impact of a regulatory restriction

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would make no difference in this takings case, because whether the trees represent a distinct legal interest under state law does not determine whether they are part of the same parcel as the underlying land for takings purposes. *See Keystone Bituminous Coal Ass'n. v. De Benedictis,* 480 US 470, 500 (1987) (rejecting the argument that a regulation took a "support estate," observing "that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights"); *Penn Central Transportation Co. v. City of New York,* 438 US 104, 130 (1978) (rejecting the argument that railroad company could separate "air rights" from the underlying building for the purpose of takings analysis).

The decision in *Hawkins v. City of Le Grande*, 315 Or 57, 843 P2d 400 (1993), upon which CRC relied below to support a myopic focus on the standing timber, is distinguishable on its facts on the ground that the government action in that case involved a physical invasion (flooding) of private property, not a restriction on use. As discussed above, the parcel as a whole rule does not apply if a government action involves actual physical occupation. Furthermore, *amici* respectfully suggest that the conclusion in *Hawkins* that growing vegetation can be legally severed from the land was mistaken. *Hawkins* reflects a misreading of this Court's earlier decision in *Paulus v. Yarborough*, 219 Or 611, 347 P2d 620 (1959), which did not fundamentally alter the rule that trees are part of the realty, but merely recognized a narrow exception to the rule (when the trees are subject to a contract of sale) that has no logical application outside of that narrow context.

had to be analyzed in relation to the specific interest or portion of the property being regulated, then literally *every* regulation would be a taking. In the words of the U.S. Supreme Court in *Concrete Pipe & Prods., Inc v. Construction Laborers Pension Trust*, 508 US 602, 644 (1993), "[t]o the extent that any portion of property is taken, that portion is *always* taken in its entirety." (Emphasis added.) The Court rejected this segmentation approach as completely untenable, stating that "the relevant question* * * is whether the property taken is all, or only a portion of, the parcel in question."[6] *Id*.

Second, the parcel as a whole rule comports with ordinary intuitions about the nature and scope of a property holding. When a citizen owns property, especially land, "the property" is generally understood to be the entire contiguous property the owner possesses, not legalistic sticks in the property. Likewise, an investor generally treats a single contiguous parcel of real property as the pertinent unit of investment. Accordingly, using the whole parcel as the basic framework for analysis comports with the primary focus in takings cases on the economic impact of a regulation on a property investment.

Third, the parcel rule supports a doctrine of regulatory takings that is faithful to the

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[6] While the U.S. Supreme Court has embraced the parcel as a whole rule, it has rejected the more expansive approach of defining the relevant property to include the entirety of a takings claimant's property holdings, or even all of a claimant's property holdings in a particular location. *See Lucas v. South Carolina Coastal Council*, 505 US 1003, at 1016 n 7 (1992) (rejecting the relatively expansive approach to parcel definition adopted by the New York Court of Appeals in *Penn Central Transportation Co. v. New York City*, 42 NY2d 324 (1977)). Thus the parcel as a whole rule followed by the U.S. Supreme Court reflects a balance designed to ensure genuine protection for property owners under the Takings Clause without destroying government itself.

original understanding of the Oregon Takings Clause. A scholar recently concluded that the Takings Clause of the Oregon Constitution was originally intended to require compensation only for physical occupations of private property. *See* Teaney, "Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory 'Takings' Are Not Compensable Under a Traditional Originalist View of Article I, section 18 of the Oregon Constitution," 40 *Willamette Law Rev* 529 (2004). Without suggesting that the Court should consider abolishing regulatory takings doctrine altogether, this historical analysis indicates, at a minimum, that regulatory takings doctrine should be confined to extreme circumstances that are tantamount to physical occupations. *See Coast Range Conifers*, 189 Or App 531, 543, ___ P3d ___ (2003) ("It is not until the late nineteenth century, long after the adoption of the Oregon Constitution, that courts began to entertain the idea that the takings clause might apply to something other than a physical acquisition."). By way of comparison, the history of the federal Takings Clause shows that the drafters of that provision thought it only applied to physical appropriations (*see Lucas v. South Carolina Coastal Council*, 505 US 1003, 1014 (1993)), and the U.S. Supreme Court has accordingly limited the threshold for regulatory takings to "the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 US 172, 199 (1985). Applying the same approach to Oregon's constitutional history, regulatory takings under the Oregon Constitution should similarly

be confined to cases where the adverse economic effect of a regulation is so severe that it is tantamount to a physical occupation.

Fourth, the parcel as a whole rule respects and reaffirms the separation of powers between the different branches of Oregon government. It has long been recognized that basic decisions about social and economic policy should generally be made by the legislature, not the courts. Absent the parcel rule, claimants could invoke the Takings Clause to mount a legal challenge virtually every time government acts to restrict the use of real or commercial property in any fashion. As a result, courts would be forced to intrude upon legislative judgments on a routine basis. In this case, adoption of CRC's parcel argument and acceptance of its takings claim would overturn the judgment of Oregon's elected legislative and executive officials about the appropriate regulatory strategy to pursue species conservation.

Fifth, the parcel as a whole rule assists the courts in arriving at a fair and just estimate of the real-world economic impact of a regulation on a particular property owner, in accord with the overall objective of takings jurisprudence to promote fairness and justice. For example, the parcel rule allows a court to differentiate between the situation where the owner of a one-acre property may be barred from making any economically productive use of the property, and the owner of a 1000-acre property who may be subject to the same one-acre restriction but who can obviously work around the restriction with little or no impairment to the value of her investment. In this sense, the

parcel rule allows the courts to consider the proportional effect of a particular restriction based upon the circumstances of the individual land owner.

In a related vein, the parcel rule also allows the courts to implement the principle that the "benefits [of regulation] must be considered along with any diminution in market value that the [owners] might suffer." *Agins v. City of Tiburon*, 447 US 255, 262 (1979). Under the parcel rule, courts can assess both how an owner is burdened by a regulation and how the same regulation (or other government actions) may have enhanced the value of the property. Typically, a regulation may limit an owner's use of his property, but application of the same regulation to neighboring landowners may benefit the first owner by providing valuable community protections and increasing the value of available development opportunities. In other words, the parcel as a whole rule permits consideration of both the bitter and the sweet of regulation, by including not only that portion of the property burdened by regulation but other parts that are benefitted by the regulation as well.

The principle is fully applicable in this case, involving protection of endangered birds. Reductions in the volume of commercial timber cut from other private and federal public lands in the Pacific Northwest, due to the presence of endangered species, actually resulted in significant increases in stumpage prices on private lands. *See* U.S. Department of Agriculture, The 1993 RPA Timber Assessment Update, Report RM-GTR-259, at 35 ("western regions have experienced very rapid stumpage price increases in recent years

because of declining public timber harvests"). Thus, the regulatory protections for endangered species, considered in a broader context, have had both negative and positive effects for private land owners. The parcel rule allows the courts to take these broader impacts on property values into account.[7]

Finally, continued adherence to the parcel as a whole rule in Oregon will avoid an unfortunate divergence between federal and state law. The significance of this potential divergence is enormous. As discussed, the claimants in this case abandoned a suit under the federal Takings Clause when it became crystal clear, in light of the decision in *Tahoe-Sierra*, that the claim would fail based on the parcel as a whole rule; yet this essentially identical suit against the State can proceed, according to the Court of Appeals, under the Oregon Constitution. Similarly, in November 2003, following the Court of Appeals' ruling in this case, the Oregon Circuit Court rejected the applicability of the parcel rule in *Seiber v. State Board of Forestry* (Circuit Court for Lynn County, Case No 01-0333), and a jury subsequently rendered a substantial verdict against the State. Yet, as discussed

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[7] Of course, not every specific regulation returns to the property owner an exactly equivalent benefit from application of the regulation to her neighbors. As the U.S. Supreme Court explained in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 US 470 (1987),

> "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received."

Id. at 492 n 21.

above, the Federal Circuit has flatly rejected the Seibers' essentially identical claim against the United States under the federal Takings Clause based on the parcel rule. It is difficult to predict how many other, similar takings cases wait in the wings.

The threatened divergence between federal and state law on the parcel issue is troubling in several respects. First, it would make the outcome of takings litigation depend upon the fortuitous circumstance of whether a restriction was imposed by the federal or state government. It also would mean that when the federal and state governments have overlapping regulatory requirements, as often occurs in our federal system, all takings liabilities would be imposed on Oregon taxpayers alone.

For the foregoing reasons, if there were any doubt about the issue as a matter of first principles, this Court should affirm that the parcel as a whole rule must be applied to claims brought under Article I, Section 18 of the Oregon Constitution. On this basis alone, the decision below should be reversed.

II. THE TAKING CLAIM IN THIS CASE IS INDEPENDENTLY BARRED BY THE TRADITIONAL DOCTRINE OF PUBLIC OWNERSHIP OF ALL WILD ANIMALS

There is an entirely separate and independent reason why the taking claim in this case must be rejected: the bald eagles that the State is seeking to protect are owned by the State in trust for all the citizens, and the State has a right to protect its property rights in the eagles, without incurring liability under the Takings Clause, by restricting private activity that would kill or injure the eagles and trespass on the public's rights. Thus, this

case is unlike the typical regulatory takings case, arising from restrictions on the ability to develop land, mine minerals, or cut trees. Such a typical case starts from the premise that the property at issue, though legitimately subject to public regulation, is entirely private, and asks whether the regulation goes "too far" and therefore represents a taking. In this relatively special case, by contrast, the taking issue is not even joined because no private landowner can claim a protected right to use his land in a way that would destroy or injure the public's wildlife. In legal terms, the public ownership doctrine supports rejection of CRC's claim because it represents a "background principle" of state property and nuisance law that bars the claim at the threshold.

A. The Doctrine of Public Ownership of Wildlife is Well Established.

In Oregon (as in every other state in the nation) "wild animals represent *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.'" *Fields v. Wilson*, 186 Or 491, 498, 207 P2d 153 (1949) (quoting *Monroe v. Withycombe*, 84 Or 328, 334, 165 P 227 (1917)); s*ee also 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*"). Oregon long ago codified the common law doctrine of public ownership of wildlife. *See* ORS 498.002(1) (declaring wild animals to be "the property of the state").

The doctrine of public ownership of wildlife is one of the most venerable principles in the law. "The laws of practically all of our States are founded upon the common law of England by virtue of which all property rights in '*ferae naturae*' were in the sovereign." *Cook v. State*, 74 P2d 199, 201–02 (Wash 1937); s*ee also Arnold v. Mundy*, 6 NJL 1, 71 (NJ 1821) (explaining how the public ownership doctrine was transmitted from Great Britain to the colonies and in turn to the States); 2 William Blackstone, COMMENTARIES at 417–18 (explaining application of public ownership doctrine in Great Britain); Thomas A. Lund, "Early American Wildlife Law," 51 *NYUL Rev* 703 (1976).

This Court has repeatedly recognized that the public's rights in wildlife limit private property rights. In *Fields v. Wilson*, the Court rejected a challenge to a state-controlled monopoly on beaver trapping, stating that

> "[t]he right to kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, and it 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 * * * of game."

186 Or at 499–500 (emphasis added); s*ee also State v. Pulos*, 64 Or 92, 95, 129 P 128 (1913) (the taking of wildlife is "not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit"). As a result of the public ownership doctrine, this Court has declared, "the legislative assembly may enact such laws as tend to protect the species from injury by human means." *State v. Hume*, 52

Or 1, 5, 95 P 808 (1908).

In *Thompson v. Dana*, 52 F2d 759 (D Or 1931), *aff'd*, 285 US 529 (1932), the federal district court in Oregon rejected a claim that closure of the McKenzie River to fishing violated plaintiff's property rights by destroying his business. The court ruled that "the state has always held the power to close the stream entirely to angling" because "[c]onservation of fish for the common good of all citizens of a state is paramount." *Id*. at 762. "[R]easonable regulations to attain that end do not infringe upon the *property protective* * * * clauses of the Constitution of the United States." *Id*. (emphasis added).

Turning to jurisdictions beyond Oregon, the U.S. Court of Claims (now the U.S. Court of Appeals for the Federal Circuit) has recognized that the doctrine of public ownership of wildlife limits rights in private lands. In *Bishop v. United States*, 126 F Supp 449 (Ct Cl 1954), *cert den*, 349 US 955 (1955), the Court of Claims ruled that a proclamation issued under the Migratory Bird Treaty Act barring hunting of wild geese on plaintiff's farm did not effect a taking. The court rejected the claim that plaintiff had been deprived of his property rights, for the reason that "[n]o citizen has a right to hunt wild game except as permitted by the State." *Id*. at 451. The court also rejected a taking claim premised on destruction of plaintiff's crops by protected geese, stating that "[t]he measures best adapted to [the protection and preservation of game] are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." *Id*. at

452 (quoting *Barrett v. State*, 116 NE 99, 427 (NY 1918)). One judge dissented, stating that "if the circumstances are so extraordinary, as they are alleged to be in this case, that the accomplishment of the public purpose of protecting the wild fowl results in the destruction of a private owner's use of his land, I think the public treasury must compensate the owner." *Id*. at 453. The majority, relying on the doctrine of public ownership of wildlife, rejected this position.

Decisions from many other jurisdictions are in accord with these rulings. For example, in *Cook v. State*, the Washington Supreme Court stated that "the State has the absolute right to maintain its game and wild animals upon any and all private lands, and in that act *there is no element of trespass or taking*." 74 P2d at 201 (emphasis added); *see also id.* ("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."). In the seminal case of *Barrett v. State*, the New York Court of Appeals rejected a taking claim based on property damage caused by State-protected beavers:

> "[T]he general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed."

116 NE at 100.

Historically, the doctrine of public ownership has often been applied in cases involving game animals, and indeed this doctrine provides the foundation for the longstanding, unquestioned public authority to regulate tightly the taking of game animals on private lands. But the doctrine applies to all wildlife, and logically should apply with even greater force, when an entire species is threatened with extinction. Thus, in *State v. Sour Mountain Realty, Inc.*, 714 NYS2d 78 (NY App Div 2000), the New York appellate division rejected a taking claim based on an agency order directing a landowner to remove a "snake proof" fence the owner had installed to keep timber rattlesnakes, a Envtl. Conserv. Law § 11-0105 (McKinney 1999), which codifies the doctrine of public ownership of wildlife, the court stated that the "State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power" without triggering the Takings Clause. 714 NYS2d at 84; *see also Christy v. Hodel*, 857 F2d 1324 (9th Cir 1988) (rejecting taking claim based on regulations protecting endangered grizzly bears); *Florida Game & Freshwater Fish Comm'n v. Flotilla,* 636 So2d 761 (Fla Dist Ct Apps), *rev den*, 645 So2d 452 (Fl 1994) (rejecting taking claim based on restriction on development within 750 feet of an active eagle nest site).

Furthermore, the courts have recognized that the public ownership doctrine applies not only to activities that immediately kill or injure wildlife (*e.g.*, the use of guns or traps) but also to activities that will indirectly lead to the same result. Thus, in *Columbia River*

Fishermen's Protective Union v. City of St. Helens, 160 Or 654, 87 P2d 195 (1939), the Court, relying in part on the public ownership doctrine, overturned dismissal of a suit to restrain pollution of the Willamette and Columbia Rivers. The court affirmed that the State's authority "extends not only to the [direct] 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." *Id*. at 663. Similarly, in the case of *Barrett v. State*, the New York Court of Appeals held that the public ownership doctrine justified protection not only of the beavers themselves but also supported a prohibition against the destruction of their "dams, houses, homes or abiding places of same." 116 NE at 100; *cf. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 US 687 (1995) (upholding, based on the language of the statute and sound science, an Endangered Species Act regulation defining a "take" of an endangered species as including destruction of critical habitat upon which the species depends for its survival).[8]

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[8] CRC might possibly attempt to challenge the continuing vitality of the state ownership doctrine on the basis of some language in certain U.S. Supreme Court decisions holding that the states' traditional sovereign authority over wildlife does not preclude the enforcement of federal mandates that preempt or displace state law. *See, e.g., Hughes v. Oklahoma,* 441 US 322, 333–34 (1979). But these decisions are irrelevant to the application of the state ownership doctrine in a takings case, where there is no conflict with any federal mandate, and instead the nature and scope of the "property" alleged to be taken is defined exclusively by state law. They are even further afield in a taking suit such as this brought under the State constitution in state court. *See Shepherd v. State Dept. of Fish & Game*, 897 P2d 33, 41–43 (Alaska 1995) (explaining that *Hughes* addresses whether wildlife represents goods in commerce, not the scope of government authority to conserve wildlife within its jurisdiction); Oliver A.Houck, "Why Do We Protect Endangered Species and What Does That Say About Whether Restrictions On Private

B. The Public Ownership Doctrine Supports Rejection of CRC's Taking Claims.

The public ownership doctrine supports the conclusion that CRC's taking claim must be rejected because CRC lacked a protected property right to conduct the proposed logging operation under "background principles" of Oregon "property" and/or "nuisance" law.

In *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1029 (1992), the U.S. Supreme Court established that regulatory restrictions do not effect a taking if they "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." An essential prerequisite for a valid taking claim is that the claimant must demonstrate that she possesses an actual property interest; absent such a showing, a taking claim fails at the threshold. *See Phillips v. Washington Legal Found.*, 524 US 156 (1998).

This Court has specifically embraced *Lucas*'s "logically antecedent inquiry" in takings cases. In *Stevens v. City of Cannon Beach*, 114 Or App 457, 835 P2d 940 (1992), *aff'd*, 317 Or 131, 854 P2d 449 (1993), *cert den*, 510 US 1207 (1994), a beachfront property owner claimed that the City of Cannon Beach caused a taking by denying an

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Property to Protect Them Constitute 'Takings?,'" 80 *Iowa L Rev* 297, 311 n 77 (1995) (the Supreme 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"); c*f. Phillips v. Washington Legal Found*., 524 US 156 (1998) (for the purpose of the Takings Clause of the Fifth Amendment, the scope of, and limitations on, private property interests are defined by state, not federal law).

owner a permit to build a seawall, effectively barring the owner from developing the property for hotel/motel purposes. The Oregon Court of Appeals recognized that, under Oregon law, "the public had acquired the right to use the dry sand area of Cannon Beach under the 'doctrine of custom,'" and that "[t]hat right was * * * superior to the rights of owners of property in the area, insofar as they sought to use it in ways that could obstruct or interfere with the public's use." 114 Or App at 459. "In short," the court concluded, the taking claim had to be rejected because "plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations." *Id.* at 460. This Court specifically endorsed the Court of Appeals' reasoning based on background principles. "When plaintiffs took title to their land," the Court wrote, "they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired.'" 317 Or at 143.

Numerous other courts around the country have relied on the background principles idea to support rejection of regulatory takings claims. For example, the Pennsylvania Supreme Court overturned a takings award based on a state law restricting coal mining operations on the ground that the mining operations could properly be prohibited under Pennsylvania nuisance law. *See Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania*, 799 A2d 751 (Pa 2002). In the court's words, "the government is not required to pay Property Owners to refrain from taking action on their land that would have the effect of polluting public waters." *Id*. at 775; s*ee also Rith*

Energy, Inc. v. United States, 44 Fed Cl 366 (1999), *aff'd on other grounds*, 247 F3d 1355 (Fed Cir 2001), *cert den*, 122 S Ct 2660 (2002) (taking claim by mining company barred by background principles of Tennessee nuisance law prohibiting water pollution). Other courts have rejected takings claims based on the limitations imposed on private property interests by the traditional public trust doctrine. *See, e g.*, *Esplanade Properties, LLC v. City of Seattle*, 307 F3d 978 (9th Cir 2002); *National Audubon Society v. Superior Court*, 658 P2d 709, 723 (Cal 1983), *cert den*, 464 US 977 (1983); *cf. Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P2d 1246 (Haw 1995), *cert den,* 517 US 1163 (1996) (involving native Hawaiian property rights). And, as indicated above, *Lucas* background principles also have been invoked in the specific context of takings claims based on regulations designed to protect wildlife. *See, e.g., State v. Sour Mountain Realty, Inc.*, 714 NYS2d 78 (NY S Ct, App Div 2000).; *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal Rptr.2d 338, 345 (Cal Dist Ct App 1993) (review denied and opinion ordered not published) (rejecting taking claim based on timber harvesting restrictions designed to protect the endangered marbled murrelet and the spotted owl, stating that the claimant's property interests were subject to "preexisting regulation by the state's laws of property or nuisance," and that "wildlife regulation of some sort has been historically a part of the preexisting law of property").[9]

[9] The Louisiana Supreme Court invoked the public ownership doctrine in its recent ruling overturning a $1.3 billion takings award based on economic injuries Louisiana oystermen allegedly suffered as result of the construction of a major coastal restoration

In this case, the taking claim can properly be rejected on the ground that restrictions on timber operations are consistent with background principles of Oregon property *and* nuisance law.[10]

First, the doctrine of public ownership of wildlife is certainly a "background principle" of Oregon property law within the meaning of *Lucas*. Under Oregon property law, the State possesses a sovereign public ownership right in wildlife. Because that right precedes and is superior to any conflicting private private property interests, regulations designed to protect the public's rights in bald eagles cannot effect a taking. As a matter of Oregon property law, no private land owner in Oregon can claim a protected property right to engage in activity that threatens to destroy the public's wildlife.

In addition, the restriction imposed by the Board of Forestry also is supported by

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project. *See Avenal v. State*, ___ So ___, 2004 WL 2365216, 2003-3521 (La Oct 19, 2004) ("The state owns the oysters. La RS 56:3. Thus, the State could not take its own property.").

[10] As discussed above, the Court of Appeals did not address CRC's separate claim that the Board of Forestry restrictions effected a *per se* taking under a physical occupation theory. It is unclear whether CRC intends to pursue that claim, given that this theory has consistently been rejected in the context of takings claims based on forestry restrictions designed to protect endangered species. *See Boise Cascade Corp. v. State ex rel. Bd. of Forestry*, 164 Or App 114, 991 P2d 563 (1999), *rev den*, 331 Or 244, 18 P3d 1099 (2000), *cert den*, 532 US 923 (2001). *See also Boise Cascade Corp. v. United States*, 296 F3d 1339, 1354 (Fed Cir 2002), *cert den*, 538 US 906 (2003) ("We agree with the Oregon Court of Appeals that Boise's argument is merely an attempt to convert a regulatory takings claim, governed by *Penn Central* * * * into a per se taking governed by the more generous rule of *Loretto*.") In any event, the background principles defense would apply on the same terms to a potential physical occupation claim as it does to a regulatory taking claims. *See Lucas,* 505 US at 1028–29.

background principles of Oregon "nuisance" law. A public nuisance is defined as, among other things, "an invasion of a right that is common to all members of the public." *Mark v. Oregon,* 158 Or App 355, 974 P2d 716 (1999), *rev den*, 329 Or 479 (1999) (citing section 521B of the *Restatement (Second) of Torts*.) The public's rights in wildlife, which are held by the State in trust for the benefit of all the people are, by definition, rights common to the general public. In addition, CRC's proposed timber operation certainly represented an unreasonable interference with the public's rights in wildlife; the proposed logging operation would have destroyed an active bald eagle nest site, threatened to kill or injure individual birds, and increased the risk of extinction of the entire species. Because the restrictions on CRC's logging operations protect rights common to the general public, CRC's taking claim is barred by background principles of nuisance law.

The analysis by the Pennsylvania Supreme Court in *Machipongo v. Commonwealth of Pennsylvania*, 799 A2d 751 (Pa 2002), is directly applicable to this case. Owners of coal interests challenged as a taking a restriction on coal mining designed to protect streams from acid mine discharges. The state asserted a nuisance defense and, reversing the trial court, the Pennsylvania Supreme Court ruled that the state should have been permitted to stand on this defense. Relying on the Pennsylvania legal rule that "the public has a right not to suffer acid mine discharge into its public waters," and the *Restatement (Second) of Torts*, § 521B, the court said, "if the Commonwealth is able to show that Property Owners' proposed use of the stream would unreasonably interfere

with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation." 799 A3d at 773, 774. The Court emphasized that the State, in order to take advantage of this defense, did not have to demonstrate to a complete certainty that the proposed mining would actually produce acid mine drainage. "It is enough if the Commonwealth can prove that further mining in the UFM [unsuitable for mining] area had a 'high potential to cause increases in [pollution].'" *Id*. at 775. The same reasoning supports rejection of the taking claim in this case based on background principles of nuisance law.[11]

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[11] The *amici* recognize that in *Boise Cascade Corp. v. State ex rel. Bd. of Forestry,* 164 Or App 114, 991 P2d 563 (1999), the Court of Appeals rejected the applicability of the "nuisance defense" in a similar case. The *amici* submit, however, that the appeals court's decision on this point was mistaken and should not be followed by this Court. First, the appeals court ignored its own precedent establishing that a violation of public rights, such as the public right to the protection of wild animals, can constitute a public nuisance under Oregon law. *See Mark v. Oregon*, 158 Or App 355, 974 Pd 716 (1999). Second, the court erred in suggesting that there is "no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance." 164 Or App at 127. For example, the Oregon statutes expressly grant those engaged in "timber practices" broad immunity from nuisance actions, *see* ORS 30.936, 30.937, demonstrating that the legislature believed timber operations can indeed constitute a nuisance in some circumstances. It would be both nonsensical and unfair for the timber industry to be shielded from nuisance actions, but to conclude that the state cannot shield itself from claims by the timber industry by relying on the same doctrine. Finally, the appeals court unsuccessfully sought to distinguish this Court's decision in *Columbia Fishermen's Union v. St. Helens,* 160 Or 654, 87 P2d 195 (1939), primarily on the ground that the case involved destruction of aquatic wildlife rather than terrestrial wildlife. There is no basis in logic or precedent for making this type of distinction in the application of the public ownership doctrine, for both fish and other wildlife are embraced by the public ownership doctrine.

Significantly, the Court of Appeals did not address whether public rights in wildlife qualify as a background principle of Oregon "property" law. Therefore, the

C. The Record Shows that the Board of Forestry Regulations Were Narrowly Tailored to Prevent Direct Killing of or Injury to Bald Eagles.

Finally, CRC's taking claim should be rejected because the Board of Forestry's regulations and the Department of Forestry's regulatory actions fit comfortably within the public ownership doctrine. While it is an interesting legal question how far the government could rely on the public ownership doctrine to justify protection of habitat areas that are merely useful or helpful in species management, this case does not raise that question. Rather, this taking claim is based on a very narrowly drawn restriction on habitat destruction, grounded in scientific research and investigation, specifically designed to protect individual eagles from death or injury. If the longstanding public ownership rights to the protection of bald eagles and other wildlife are to mean anything at all in the context of timber harvesting that threatens wildlife survival, those rights must support rejection of this taking claim.[12]

Under applicable Oregon law, the Board of Forestry is required to adopt rules

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court's decision does not cast any doubt on that alternative branch of the background principles defense.

[12] The Court is fortunate to have an exhaustive administrative record explaining the decisions of the Department of Forestry and the Oregon Board of Forestry. Exhibit 1 to the State's Motion for Summary Judgment (filed August 16, 1999) includes all of the evidence included in the administrative record for CRC's appeal to the Oregon Board of Forestry from the State Forester's denial of Written Plan No. 98-37729. Exhibit 2 to the State's Motion includes all of the evidence included in the administrative record for CRC's appeal of the denial of Written Plan No 99-37157. Exhibit 3 contains all of documentary materials relied upon in the rulemaking proceeding that culminated in the promulgation of the Board of Forestry's bald eagle rules.

establishing standards for forest practices on privately owned lands. ORS 527.710(1). More specifically, the Board is required to determine whether any particular commercial forestry operation will "conflict" with protected "resource sites, " and, if such a conflict is likely to occur, to "consider the consequences of the conflicting uses and determine appropriate levels of protection." ORS 527.710(3)(b). Protected resource sites are defined to include the roosting, foraging, and nesting sites of specified endangered and threatened avian species.

In 1991, pursuant to this statutory mandate, the board promulgated its so-called "eagle rule," which identified eagle nesting sites, roosting sites, and foraging perches as resource sites that may present conflicts with forestry operations. OAR 629-665-0200. The rule defined nesting resource sites to include the nest tree itself as well as "all identified components," which in turn are defined to include "all perching and fledgling trees, replacement trees and forested buffer around the nest tree." OAR 629-665-0220(1). The bald eagle rule was based on an extensive scientific "technical review," including a review of dozens of scientific articles, by the Oregon Department of Forestry. The rule identified the various "key components" that are "essential to the use and productivity of a bald eagle nest site over time." The nesting tree and adjacent perching and fledgling trees were deemed essential in order for the eagles to successfully use the nest site and rear their young. The forested buffer was needed to create a visual barrier between the nesting birds and human activities to prevent disturbances that would cause the birds to

leave the nest.

The State Forester's basic position in response to CRC's various applications to log in the vicinity of this active nest site was that CRC would be required, at least so long as the nest remained "active," to protect an area with a 400-foot radius around the nest tree containing the resource site necessary to protect the eagles. In addition, the State Forester took the position that CRC should leave an additional 100-foot "feathered buffer," in which a limited amount of logging would be permitted, around the resource site. The purpose of the feathered buffer was to provide a physical barrier to winds that might topple trees included in the resource areas, as well as an area in which some windthrow could occur without reaching the critical inner circle. As one of the Board's witnesses testified, abrupt forest edges are particularly susceptible to damage from high winds, and based on his experience with other eagle nest sites, the feathering approach was likely to be effective in reducing wind resistance along the forest edge and minimizing windthrow. Testimony of Rod Krahmer (April 8, 1999) (Ex 2, p 409). Without this feathered buffer, it would have been a virtual certainty that some of the trees in the resource area would have been destroyed by wind, reducing the chances that this site would serve as a successful nest site.

In response to CRC's consolidated appeals from the State Forester's denial of permission to cut additional timber, the Board upheld the State Forester's actions in their entirety. Specifically, the Board said that the no-harvest area "established by CRC's

August written plan was reasonable to protect the resource site and [that] CRC [had] not alleged any factual or legal basis why the resource site should be changed." Ex 1, p 567. The Board also observed that "CRC's proposed operation would lead to resource site destruction, as well as to abandonment by bald eagles and/or reduced productivity (reproductive success) by bald eagles" in violation of the bald eagle rules. Ex 1, p 568.

In challenging the State Forester's decision, CRC made three arguments, each of which the Board rejected. First, CRC argued that bald eagles are not "occupying the nest site at the present time" and therefore logging the site would not have had any direct adverse effect on the eagles. As a legal matter, the Board responded, "for purposes of determining whether to approve a proposed forest operation that is shown to conflict with a bald eagle nesting site, it is irrelevant whether the nest site is 'occupied' at any particular point in time."[13] Ex 1, p 568. More fundamentally, as the Department of Forestry witnesses explained before the Board of Forestry, this objection ignored the basics of eagle biology. On the one hand, it is correct that eagles only use the nest site during the breeding season; during other parts of the years eagles resident in Oregon will "migrate" to other parts of the state or region. On the other hand, long-term maintenance of nest sites is critical to the overall strategy for protecting bald eagles because eagles

[13] The Board's eagle rule defines an "active nest tree" as a nest tree "in which a bald eagle has nested in the past, and that the State Forester determined to be structurally capable of successful future use, whether or not the tree still contains a nest." OAR 629-665-0220(1)(a).

exhibit extraordinary fidelity to their nests from year to year. Testimony of Rod Krahmer (January 11, 1999) (Ex 1, pp 694, 709); Testimony of Rod Krahmer (April 8, 1999) (Ex 2, p 435). If forced to change nests on a frequent basis, reproductive success drops sharply. In fact, one study cited in the record showed that eagles that occupy the same nest each year yielded 1.05 offspring per year, while eagles that were forced to change their nesting location annually produced only 0.60 offspring per year. *See* Beaver Creek Eagle Nesting Site Summary and Biological Opinion (January 6, 1999) (Ex 1, p 377, 380). Thus, maintaining nest sites from year to year, even during periods of the year when eagles have migrated elsewhere, is crucial to the long-term reproductive success and recovery of this species.

Second, CRC argued that it is unlikely that the bald eagles would actually return to this particular nest site in the future. However, the Board observed in its order that the "Department submitted the testimony of two expert witnesses that it is likely that bald eagles will use the nest site in the future." Ex. 1, p. 568. CRC did not present any evidence to the contrary. Moreover, one study cited in the record showed that bald eagle pairs are highly likely to use the same nest site for a number of years. Ex. 1, p. 369. In that study, data gathered over a six-year period indicated that the probability of an eagle pair returning to a nest site after a successful nesting attempt was 88%, and that even eagles that were unsuccessful at a particular nest site returned to the same nest site the following year at an average rate of 68%. *Id.*

Finally, CRC argued that it was unnecessary to protect the bald eagle nest as a public resource. However, CRC failed to provide any evidence to support this argument. On the other hand, the Board observed that the Department of Forestry had "submitted the testimony of two experts that destruction of this nest site would lead to reduced productivity of the bald eagle pair, and that bald eagles on the Oregon Coast are not meeting the productivity goals of the Bald Eagle Recovery Plan." Ex 1, p 569. The Board concluded that "it is necessary to protect this nest site in order to carry out the legislative direction in ORS 527.710 that the Board allow harvest of timber consistent with providing for the overall maintenance of threatened and endangered species." *Id.*

In sum, the evidence in the administrative proceedings underlying this taking case clearly demonstrate that the restrictions that generated this claim were grounded in careful scientific inquiry and narrowly tailored to prevent actual harm or serious injury to identifiable bald eagles. The Board and the Department acted with care and precision to defend the public's rights to the protection of the public wildlife, and their actions cannot provide the basis for a legitimate taking claim.

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CONCLUSION

For all of the foregoing reasons, the Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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