IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF OF 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.

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

---

HARDY MYERS, OSB No. 64077
Attorney General
MARY H. WILLIAMS, OSB No. 91124
Solicitor General
DAVID F. COURSEN, OSB No. 84201
Assistant Attorney General
Department of Justice, Appellate Division
1162 Court St. NE
Salem, OR 97310
503/378-4402
Attorneys for Petitioner

Phillip D. Chadsey, OSB No. 66028
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204
503/292-9534
Attorney for Respondent

Bart A. Brush, OSB No. 93220
Attorney at Law
621 SW Morrison St., Suite 900
Portland, Oregon 97205
503/221-8651
Attorney for *Amici Curiae*
Audubon Society of Portland,
Institute for Fisheries Resources,
League of Women Voter of Oregon,
Pacific Coast Federation of
Fishermen's Associations, and
Oregon Trout, Inc.

Nathan Baker, OSB #00198
Friends of the Columbia Gorge, Inc.
522 SW 5th Avenue, Suite 820
Portland, OR 97204-2125
503/241-3762 x101
Attorney for *Amicus Curiae*
Friends of the Columbia Gorge, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

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's Petition for Review. Several of the *amici curiae* previously filed a brief in the Court of Appeals urging the Court to affirm the trial court's grant of summary judgment to the State. The *amici curiae* now urge the Court to grant the State's Petition for Review and to reverse 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, and 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 and a majority of

these 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 nationwide non-profit organization based in the State of Oregon. It is dedicated to protection of native wild fish and 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 non-profit 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.

ARGUMENT

I. THE APPLICATION OF THE PARCEL AS A WHOLE RULE UNDER THE OREGON CONSTITUTION REPRESENTS AN IMPORTANT LEGAL ISSUE THAT CALLS FOR CLEAR RESOLUTION BY THIS COURT.

The issue of how to define the "denominator" for the purpose of analyzing the economic impact of a regulation is perhaps the most fundamental issue in takings law. The decision of the Court of Appeals departs from that Court's own precedent on this issue, at least impliedly contra-dicts the prior rulings of this Court, and would make the takings law of Oregon radically inconsistent with the law of the United States and other States. This remarkable ruling, which has no basis in the text or original understanding of the Oregon Takings Clause, should be promptly reviewed and reversed by this Court.

Any attempt to assess the economic impact of a regulation on a property owner raises a key, underlying issue: economic impact in relation to what? If one focuses solely on the single stick in the proverbial bundle of sticks representing property that is restricted by a regulation, then virtually every restriction would be a taking. But as Oliver Wendell Holmes observed decades ago, "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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The solution, adhered to by virtually every jurisdiction in the United States, is to focus on the economic impact on the "parcel as whole." In the real estate context, this generally that

a taking claim based on a land use restriction must be evaluated by considering the impact of the restriction in relation to the owner's entire contiguous landholding.

Prior to the decision below, it was settled law in the Oregon Court of Appeals that takings claims under the Oregon Constitution should be resolved using the parcel as a whole rule. In Multnomah County v. C.T. Howell, 9 Or.App 374 (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 landowner's] 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 use would not constitute a taking.

Id. at 379-380.

This longstanding reading of the Oregon Takings Clause is consistent with the U.S. Supreme Court's settled interpretation of the Takings Clause of the U.S. Constitution. As the U.S. Supreme Court has explained:

> Takings 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 on the character of the action and on the nature of the interference with rights in the parcel as a whole.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002). See also Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). The reading of Article I, §18 in Multnomah also is consistent with the parcel rule followed by other state courts. See, e.g., Presbytery of Seattle v. King County, 787 P.2d 907 (Wash.), cert. denied, 498 U.S.911 (1990); City & County of San

Francisco v. Golden Gate Heights Investments, 14 Cal.App4th 1203, cert. denied, 510 U.S. 928 (1993).

So far as we are aware, this Court has never expressly addressed the application of the parcel rule in takings analysis under the Oregon Constitution. Nonetheless the parcel rule is implicit in the Court's repeated statement that a taking only occurs when a regulation deprives the owner of all economic use of the property. See Dodd v. Hood River County, 317 Or. 172, 182 (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 portion subject to the restriction – there is no taking. In other words, Oregon's established takings jurisprudence, which obviously rejects the idea that every regulatory constraint is a taking, is implicitly based on the notion that economic impact must be analyzed in relation to the a parcel as a whole.

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. Ap. 46-48, discussing Fifth Avenue Corp. v. Washington Co., 282 Or. 591 (1978), and Boise Cascade Corp. v. Board of Forestry, 325 Or. 185 (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 his 20-acre property, as well as government plans to acquire certain other portions of the property by eminent domain. 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 necessarily the same. See Tahoe Sierra, 535 U.S. 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 arguably 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 only challenged government action is a regulatory restriction. See also Dodd v. Hood River County, 317 Or. at 181 (recognizing that Fifth Avenue involved a taking for a 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 as a whole question in the case. It is difficult to believe that the Court declared dramatic new law on this important issue of takings law 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). See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 (1992) (stating that a physical occupation results in a taking "no matter how minute the intrusion"). Thus, it was not, strictly speaking, inconsistent with the parcel rule for the Court to allow Coast Range Conifers to proceed with its claim at that stage.[1]

[1] 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 (1999), review

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. Apparently relying 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 (1994), and reading the complaint with the generosity appropriate at that stage of the litigation, see 325 Or. at 198, it is hardly remarkable that the Court allowed the case to proceed. The Court's conclusion that the trial court erred in dismissing the complaint should not be read as a rejection of the parcel as a whole rule or prejudging 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 apparent that the actual parcel is far different from the parcel as described in Boise Cascade's complaint. As the Court of Appeals explained in its subsequent 1999 decision, based on an examination of the actual facts rather than the allegations in plaintiff's complaint:

> In 1988, Boise acquired 1770 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 are around known spotting 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.

---

denied, 331 Or. 244 (2000), cert. denied, 532 U.S. 923 (2001). That ruling is consistent with the U.S. Supreme Court's view, in applying the federal Takings Clause, that the physical-occupation theory should be confined to "relatively rare" cases where the fact of taking can be "easily identified." Tahoe-Sierra, 535 U.S. at 324

Boise Cascade Corp. v. State of Oregon, 164 Or.App. at 116. Thus, the actual parcel dispute in Boise Cascade, contrary to the suggestion of the Court of Appeals, has not been about whether the relevant parcel is 64 acres or 56 acres, but rather about whether the relevant parcel is 1770 acres.[2]

Fourth, the Court of Appeals is incorrect in suggesting that the State, in its briefing in Boise Cascade before the Court of Appeals, argued that the 64-acre tract then owned by plaintiff, rather than the 56 acres subject to the regulation, was the appropriate parcel for the purpose of takings analysis. See Respondent's Brief, at 22-23, filed in the Oregon Court of Appeals December 10, 1993, The Court of Appeals' mistaken reconstruction of what the parties were actually debating apparently led the court to a mistaken impression that the parcel issue was front and center in the case. It was not.

Fifth, following the Court's 1997 decision, Boise Cascade abandoned its claim under the Oregon Constitution and proceeded solely under the Federal Constitution. See Boise Cascade Corp. v. State of Oregon, 164 Or. App. at 117. If Boise Cascade (which is represented by the same counsel who represents Coast Range Conifers in this case), had believed that this Court had rejected the parcel rule under Article I, § 18, and thereby greatly expanded the scope of Oregon's regulatory takings law, it never would have abandoned its claim under the Oregon Takings Clause.

---

[2] 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 (2003). If and when a 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.

For the foregoing reasons, amici submit that the parcel rule has been well established in Oregon for several decades, and no precedent of this Court required the Court of Appeals to ignore that rule. The Court should grant review to correct the Court of Appeals' departure from settled law and its confusing mischaracterization of this Court's precedents. Even if the Court rejects this position, however, it is clear, at a minimum, that the Court of Appeals' decision displays considerable confusion about the parcel issue. Given the importance of the parcel issue, the Court should grant review to resolve the confusion.

II. THE DECISION OF THE COURT OF APPEALS, UNLESS REVERSED, WILL CREATE A STRIKING INCONSISTENCY BETWEEN OREGON LAW AND FEDERAL LAW.

The decision of the Court of Appeals, unless reversed, would make the law of Oregon strikingly inconsistent with the law in other jurisdictions, in particular the law governing claims against the United States under the federal Takings Clause.

As discussed, the U.S. Supreme Court has consistently followed the parcel as a whole rule in regulatory takings cases, dating back at least to the landmark decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).[3] Thus, the U.S. Court of Appeals for the Federal Circuit, which has appellate jurisdiction over virtually all takings claims against the United States, has consistently applied the parcel

[3] The Court of Appeals incorrectly states that the U.S. Supreme Court "has rather exasperatingly wandered back.. and forth... and back again" on the parcel issue, citing in particular Kaiser Aetna v. United States, 444 U.S. 164 (1979), as an instance of the U.S. Supreme Court's alleged departure from the parcel rule. However, Kaiser is a physical occupation-type takings case, and as the Supreme Court explained in Tahoe Sierra, physical occupations are distinguishable from use restrictions. See 535 U.S. at 325. In the context of regulatory takings challenges to use restrictions, such as the present litigation, the U.S. Supreme Court has been absolutely consistent in applying the parcel rule for decades.

rule in evaluating regulatory takings claims under the Fifth Amendment. See Rith Energy, Inc. v. United States, 270 F.2d 1347 (Fed. Cir. 2001), cert. denied, 536 U.S. 958 (2002) (mineral resources); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed.Cir.1993) (wetlands).

The conflict created by the Court of Appeals decision between Oregon and United States law on the parcel issue is especially striking in the context of the extensive, ongoing litigation over endangered species restrictions on commercial logging in Oregon. Coast Range Conifers, Boise Cascade and other Oregon land owners, all plaintiffs in takings litigation in the Oregon courts, are simultaneously pursuing claims with respect to the exact same lands in the U.S. Court of Federal Claims under the federal Takings Clause based on restrictions imposed under federal Endangered Species Act. The plaintiffs in those cases are represented by the same counsel representing Coast Range Conifers in the present case. The claims in federal court have so far failed, largely because of the parcel as a whole rule.

Most significantly, Coast Range Conifers brought an unsuccessful taking claims against the United States, with respect to the same property at issue in this case, based on restrictions imposed on CRC's proposed logging under the federal Endangered Species Act. See Coast Range Confers 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 argued that, applying the traditional parcel as a whole rule, the plaintiff could not show the kind of serious economic impact necessary to establish a taking. 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. The Court issued an

order granting the motion on June 11, 2003, bringing the federal side of this litigation to a complete close.

The wisdom of CRC's tactical decision to withdraw its federal case was subsequently confirmed by the decision of the U.S. Court of Appeals for the Federal Circuit in Seiber v. United States, ___ F.3d ___, 2004 WL 830172 (Fed.Cir., Apr 19, 2004). In that case, which involves facts very similar to facts to this case, and which also arose from the state of Oregon, the federal appeals court affirmed rejection of a federal regulatory takings claim based on the parcel as a whole rule. The plaintiff owned a 200 acre parcel, 40 acres of which were included in a nesting area for the endangered spotted owl designated by the U.S. Fish and Wildlife Service. The court rejected the claim that the restrictions denied the plaintiffs all economically viable use of their property, emphasizing 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.'"[4]

As a result of the Court of Appeals ruling on the parcel issue in this case the parallel litigation in the Oregon courts threatens to follow a very different course. In November 2003, in Seiber v, State Board of Forestry (Circuit Court for Lynn County, Case No. 01-0333), the trial court, relying in part on the Court of Appeals' ruling on the parcel issue in this case, ruled that the parcel as a whole does not apply under Article I, § 18, and the jury subsequently rendered a verdict against the State. This result, of course, flatly contradicts the Federal Circuit's rejection of the Seibers' essentially identical claim

[4] In the federal-court companion to the Boise Cascade case in which this Court issued its 1997 decision, the U.S. Court of Appeals for the Federal Circuit dismissed the taking claim on ripeness grounds and did not even reach the merits of the takings issue. See Boise Cascade v. United States, 296 F.3d 1339 (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003).

against the United States under the federal Takings Clause. In addition, plaintiffs in this litigation and the long-running Boise Cascade case will obviously seek to rely on the Court of Appeals' approach to the parcel issue. It is difficult to predict how many other takings claims, based on endangered species rules or other types of regulations, wait in the wings across the state of Oregon.

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, often encountered in our system of "cooperative federalism," of whether a restriction was imposed by the federal or state government. It also would mean that where the federal and state governments have overlapping responsibilities for imposing regulatory constraints, all or virtually all of the financial liabilities would be imposed on Oregon taxpayers alone. Given these serious fairness issues, the Court should grant the State's petition for review to definitively resolve whether or not this ostensible divergence between federal and state law actually exists.

III. TRADITIONAL PUBLIC RIGHTS IN WILDLIFE ARGUE FOR A RESTRAINED READING OF THE TAKINGS CLAUSE IN THIS CASE.

A further reason the Court should grant the Petition for Review is that the Court of Appeals' decision fails to consider the special, longstanding power of the State, acting on behalf of all the citizens, to protect the public's wildlife from harm. The typical regulatory takings case, arising from restrictions on the ability to exploit land, mine minerals, or cut trees, involves the question of how far the government can go in regulating private property without triggering an obligation to pay financial

compensation. Such a typical case starts from the premise that the property at issue, though legitimately subject to public regulation, is entirely private.

This and other similar cases, however, stand on a very different footing, because they involve not only private property rights (in the land and the trees) but also public property rights (in the animals whose existence is being threatened by human activity). See Fields v. Wilson, 166 Or. 491 (1949) ("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... in its sovereign capacity for the benefit of and in trust for its people in common."). Thus, in this special context, the takings issue is not simply whether private rights are being limited, but whether a landowner is seeking to invade public rights in a fashion that it has no right to do in the first place. The proposal by CRC to cut a bald eagle nesting area does not represent an exercise of any recognized private property right, but a trespass upon public rights.

This Court has said in other, similar contexts that superior public rights in certain resources can bar takings claims based on restrictions on the exercise of private rights in those resources. See Stevens v. City of Cannon Beach, 317 Or. 131 (1993), cert. denied, 510 U.S. 1207 (1994), quoting Lucas v. South Carolina Coastal Council, 505 U.S. at 1029 ("we conclude that the common law doctrine of custom as applied to Oregon's ocean shores "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership"). See also Dodd v. Hood River, 317 Or. at 183 (a taking claim necessarily fails if the "logically antecedent inquiry into the nature of the owners' estate shows that the proscribed use interests were not part of the owner's title to begin with"). The same type of

consideration of the paramount public interest in the protection of the public's wildlife was required, but not given, in this case.

Thus, the Court should grant review for the additional reason that the Court of Appeals' ruling creates a serious conflict with this Court's longstanding recognition of the public's legal rights to the protection on its wildlife.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Review and reverse the judgment of the Court of Appeals on the merits.

Respectfully submitted,

Bart A. Brush, OSB No. 93220
Attorney At Law
900 American Bank Building
621 SW Morrison Street
Portland, Oregon 97205-3823
503-221-8651

Nathan Baker, OSB #00198
Friends of the Columbia Gorge, Inc.
522 SW 5th Avenue, Suite 820
Portland, OR 97204-2125
503/241-3762 x101

Of COUNSEL:
John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
202-662-9850

May 5, 2004