UNITED STATES COURT OF FEDERAL CLAIMS

Coast Range Conifers, LLC, an Oregon limited liability corporation,	)	
	)	No. 02-295L
Plaintiff,	)	
	)	Judge Lawrence M. Baskir
v.	)	
	)	
United States,	)	
	)	
Defendant.	)	

MEMORANDUM OF AMICI CURIAE AUDUBON SOCIETY OF PORTLAND, INSTITUTE FOR FISHERIES RESOURCES, OREGON TROUT, INC., AND THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS IN SUPPORT OF THE UNITED STATES

December 20, 2002.

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Audubon Society of Portland, Institute for Fisheries Resources, Oregon Trout, Inc., and Pacific Coast Federation of Fishermen's Associations ("conservation amici") respectfully submit this brief amicus curiae in support of the motion of the United States to dismiss or, alternatively, for summary judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The conservation amici are dedicated to the protection of the wildlife, fisheries, and other natural resources of the Pacific Northwest. The conservation amici have an interest in this case because it raises potentially far reaching legal challenges to government authority to protect wildlife, in general and in the state of Oregon in particular. These groups are participating as amici curiae in the parallel litigation which Coast Range Conifers ("CRC") is pursuing in the Oregon courts based on the Oregon Board of Forestry restrictions affecting the same property which is the subject of this action.

The conservation amici agree with and support the position of the United States that this claim is not ripe. They also agree that the Court should dismiss, either as a matter of law or based on the undisputed documentary evidence, CRC's Penn Central, Lucas, Agins, and Loretto claims.

In an effort to assist the Court, and to avoid burdening the Court with repetitive argument, the conservation amici focus on three specific issues. First, the conservation amici address the parcel as a whole rule, which, in amici's view, provides the appropriate framework for analyzing – and

rejecting – CRC's Penn Central and Lucas claims. The amici anticipate that CRC may contend in this case, like it has contended before the Oregon courts, that (1) the relevant property should be defined by separating out from its entire, contiguous 40-acre property the (at most) 7 -acre portion for which the U.S. Fish and Wildlife Service declined to issue an incidental take permit under the Endangered Species Act, and (2) that the trees on the property should be treated as distinct from the land underneath the trees. Conservation amici submit that both arguments for artificially segmenting the relevant property are wrong and should be rejected.

Second, the conservation amici address why CRC's takings claims should be dismissed for the independent reason that the bald eagle, like other wildlife found in nature, is a public property resource. Under longstanding Oregon law (which in this respect is identical to the law of every other state), the state of Oregon owns all wildlife found within its borders as trustee for the citizens of the state. Based on this "background principle" of Oregon law, CRC's regulatory taking claims must be rejected because no private property owner can claim the right to engage in an activity which will kill or seriously injure the public's wildlife. In addition, the public ownership doctrine supports the conclusion that CRC lacks sufficient investment expectations to support its regulatory takings claims.

Third, amici address why the court should dismiss as matter of law CRC's claim that the ESA restriction ostensibly failed to substantially advance a legitimate government interest. This type of claim raises an issue under the Due Process Clause, not the Takings Clause. It is well

established that this Court lacks jurisdiction over claims brought under the Due Process Clause which, unlike the Takings Clause, is not a money-mandating constitutional provision.

ARGUMENT

I. The Parcel as a Whole Rule Bars This Regulatory Taking Claim.

Perhaps the most fundamental rule in regulatory takings law is that a claim must be analyzed in relation to the "parcel as a whole." As the U.S. Supreme Court stated earlier this year in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002):

> 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 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 1481, quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (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 Assn v. DeBenedictis, 480 U.S. 470, 479 (1987), quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

The Supreme Court has expressly rejected the idea that the relevant parcel can be defined by focusing on the specific portion of the property being regulated. "[D]efining the property interest taken in terms of the very

regulation being challenged is circular." Tahoe, 122 S.Ct. at 1483. Following the parcel as a whole rule, the Supreme Court has "consistently rejected such an approach to the 'denominator' question." Id. at 1483.

More generally, the parcel rule is essential to a balanced interpretation of the Takings Clause. If the impact of regulations had to be analyzed in relation to the specific property interest being restricted, then regulations would "always" result in a finding of a taking. Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602,643 (1993). The parcel rule ensures that regulatory takings remain relatively rare, vindicating both the original, narrow understanding of the Takings Clause, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 n.15 (1992), and leaving fundamental choices about social and economic policy, for the most part, to elected representatives. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

The parcel rule also implements the principle that, under the Takings Clause, "the benefits [of regulation] must be considered along with any diminution in market value that the [owners] might suffer" as a result of regulation. Agins v. City of Tiburon, 447 U.S. 255, 262 (1979). Using the parcel as a whole rule, courts can assess both how an owner's use of certain parts of property is burdened by regulation and how the same regulation may enhance the value of the rest of the property. In this case, CRC was delayed for a short period from exploiting one small portion of its 40-acre property. But the value of the timber on the balance of the property (as well as on CRC's other lands in the region) may well have increased in value as a result of ESA regulations. See U.S. Department of

Agriculture, 1993 RPA Timber Assessment, Report RM-GTR-259, at 35 (as a result of ESA restrictions, "western regions have experienced very rapid stumpage price increases because of declining public timber harvests"). The parcel as a whole rule helps takings law achieve fundamental fairness by ensuring that both the negative and positive impacts of regulation get factored into the analysis.

Conservation amici anticipate that CRC will seek to avoid the effect of the parcel as a whole rule based on either or both of two theories: first, that the parcel should be defined, in the horizontal dimension, by focusing solely on the approximately 7-acre portion of CRC's 40 acres restricted under the ESA, and second, that the parcel should be defined, in the vertical dimension, by focusing solely on the timber on CRC's land while ignoring the land itself. Neither potential theory has any merit.

A. The Parcel in the Horizontal Dimension.

In the real property context, courts have considered various factors in defining the relevant parcel in the horizontal dimension. The boundaries of the owner's physically contiguous ownership represent the most basic consideration. See, e.g., District Intown Properties Limited Partnership v. District of Columbia, 198 F.3d 874, 880 (D. C. Cir. 1999), cert. denied, 531 U.S. 812 (2000); K & K Const., Inc. v. Department of Natural Resources, 575 N.W.2d 531, 537 (Mich.), cert. denied, 525 U.S. 819 (1998). Other important factors include the date or dates of acquisition of the property, see, e.g., Zealy v. City of Waukesha, 548 N.W. 2d 528 (Wisc. 1996); Ciampitti v. United States, 22 Cl. Ct. 310, 320 (1991), and the degree to which the owner has treated the entire property as a unit for management

purposes. See, e.g., Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed.Cir), cert. denied, 528 U.S. 951 (1999); Naegele Outdoor Adver. v. City of Durham, 844 F.2d 172, 176 (4th Cir.1988).

The Federal Circuit and this Court have routinely defined a claimant's relevant parcel, in the horizontal dimension, to include the owner's entire contiguous landholding. Thus, in Walcek v. United States, 303 F.3d 1349, 1355-56 (Fed. Cir. 2002), the Federal Circuit recently ruled that "[t]he Court of Federal Claims properly analyzed the permit's impact with respect to the value of the entire 14.5-acre parcel," and not simply the owner's restricted wetlands, citing Tahoe. Similarly, in Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed.Cir.1993), the Federal Circuit held that "the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands," but rather the parcel as a whole. For an application of this principle to forest lands in a case essentially identical to this case, see Seiber v. United States, 53 Fed. Cl. 570, 579 (2002), in which the court stated: "The alleged taking apparently did not affect plaintiffs' property as a whole, as they were able to log 15 acres and were planning before the permit requirement was lifted to log 25 more on another area of their property. Thus, even if plaintiffs were able to prove that the 40 acres were taken, it would not have been a compensable taking because plaintiffs' property interest as a whole was not impacted to the extent required" to establish a taking under the Fifth Amendment.

Application of the parcel rule is not affected in the least by the fact that CRC already reaped economic benefit by cutting most of the trees on the rest of its 40 acres. In Rith Energy v. United States, 270 F.3d 1347

(Fed. Cir.2001), cert. denied, 122 S.Ct. 2660 (2002), the Federal Circuit concluded that a restriction on mining did not effect a taking because 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 F.2d 1184, 1188, 1192 (Fed. Cir. 1981), cert. denied, 455 U.S. 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.

In the Oregon courts, CRC has cited several Federal Circuit decisions in an attempt to evade application of the parcel rule to its property. In fact, none of these Federal Circuit decisions supports CRC's position. In Florida Rock Industries v. United States,791 F.2d 893 (Fed Cir. 1986), cert. denied, 479 U.S. 1053 (1987), the court focused on only 98 acres out of the larger tract of 1560 acres held by the plaintiff. However, the Federal Circuit explicitly stated that since the Army Corps of Engineers was imposing the same restriction on all 1560 acres, it was irrelevant how the parcel was defined. Thus, the analysis in Florida Rock does not support CRC's segmentation argument. Moreover, the facts of Florida Rock stand in stark contrast to the facts of this case. In Florida Rock the company was prohibited from exploiting any portion of the property, whereas in this case the company was permitted to exploit, and in fact has successfully exploited, the lion's share of the property.

Nor does the decision in Whitney Benefits Inc. v United States, 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991), support CRC's

position on the parcel issue. One of the plaintiffs in that case possessed only a mining interest and therefore its mining interest arguably represented its "parcel as a whole." The other plaintiff had purchased a limited amount of the surface estate in fee in order to facilitate its planned mining operations. Under these unique facts, the court said that the government could not define the relevant property to include this plaintiff's surface ownership. The court said that the purchase of the surface property to facilitate mining was clearly "a part of the investment backing for [the claimant's] expectations, not unlike a purchase of mining equipment." Id. at 1174. See Cane Tennessee, Inc. v. United States, 54 Fed.Cl. 100 (2002) (adopting this narrow reading of Whitney Benefits)

Finally, CRC has attempted to rely on the decision in Loveladies Harbor v. United States, 28 F.3d 1171 (Fed. Cir. 1994), by suggesting that the Federal Circuit carved 12.5 acres out of the owner's original 250-acre parcel because the 12.5 acres was subject to regulatory restrictions. In fact, the court excluded most of the original 250 acres because the owner had developed and sold off these portions of the property years earlier, before the regulatory regime was put in place. Furthermore, with respect to the specific 12.5-acres, the court did not define this area as the relevant property because it was the portion subject to regulatory restrictions. While most of the 12.5 acres was wetlands, part of the 12.5 acres was uplands. Thus, far from supporting CRC's position, "Loveladies Harbor argues against treating the property burdened by the regulation separately from contiguous property." District Intown, 198 F.3d at 881 (emphasis added).

CRC also has contended that the decisions of the Oregon Court of Appeals and of the Oregon Supreme Court in Boise Cascade Corp. v. Board of Forestry, 886 P.2d 1033 (Or. App. 1994), and Boise Cascade Corp. v. Board of Forestry, 935 P.2d 411 (Or. 1997), adopt the idea that the relevant parcel is defined by the area subject to the regulatory restriction. Even if these decisions supported CRC's position, they are obviously not binding precedent in this Court. In any event, CRC misreads these Oregon's precedents. Neither of these decisions, which do not explicitly discuss the parcel as a whole rule, contradict the Oregon Supreme Court's earlier, explicit embrace of the parcel as a whole rule. See Cope v. City of Cannon Beach, 855 P.2d 1083 (1993).

Under the foregoing principles and precedents, the relevant parcel includes, at a minimum, the entire 40-acre tract. The property represents a single contiguous physical unit. CRC acquired the entire 40 acres at one time as part of a larger land swap and has consistently managed the tract as a unit for the single purpose of commercial timber production. These are textbook facts for the application of the parcel rule in the horizontal dimension.

Applying the proper definition of the relevant parcel, it is plain that CRC cannot establish a regulatory taking in this case. CRC obviously cannot show the kind of "permanent obliteration" of value necessary to establish a taking under Lucas. See Tahoe, 122 S.Ct. at 1483. Nor can CRC establish a taking under Penn Central. The Supreme Court has made clear that, even under Penn Central, a regulation can rise to the level of a taking only in "extreme circumstances." United States v. Riverside

Bayview Homes, Inc., 474 U.S. 121, 126 (1985). See also Walcek v. United States, 49 Fed. Cl. 248, 271 (2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002) ("With one possible exception, this court has... relied on diminutions well in excess of 85 percent before finding a regulatory taking.") Given that the restrictions affect less than 25% of CRC's property, the economic threshold for a taking is not met. In addition, given that ESA restrictions were a central consideration in the land swap under which CRC acquired this property, and given the public's longstanding rights to protection of its wildlife (see section II, infra), CRC can hardly contend that it had a reasonable expectation of being immune from regulation under the ESA. Finally, as to the character of the regulation, the Endangered Species Act is national legislation which creates a significant degree of reciprocity of advantage for all affected landowners.

The conclusion that there was no taking in this case is simply bolstered by the fact that the restrictions were intended, from the outset, to remain in place only for so long as the area remained an active nest site. In fact, they remained in place for only a few years.

B. The Parcel in the Vertical Dimension.

CRC also has contended that it should be permitted to segment its property in the vertical dimension, on the theory that the trees it seeks to cut represent a property interest distinct from the land itself. The court need not, strictly speaking, address this potential argument in order to resolve CRC's regulatory takings claims. Once the parcel is defined to include CRC's entire 40-acre tract, regardless of whether the focus is on the trees, or the trees and the land combined, it is clear that CRC's

regulatory takings claims must fail under either Lucas or Penn Central. However, CRC's attempt to limit the scope of the relevant parcel in the vertical dimension is also mistaken, providing yet additional support for the conclusion that CRC's regulatory takings claims must be rejected.

CRC has contended, first, that the trees and the land beneath should be treated as distinct legal units because an interest in timber is a separate, identifiable property interest under Oregon law. Even if CRC were correct about state law, however, this point does not support CRC's segmentation argument. The Supreme Court has repeatedly rejected segmentation based on arguments that the regulated portion of the property represents a legally distinct property interest under state law. For example, in Penn Central, the Court rejected the contention that the company could establish a taking by demonstrating that its legally distinct "air rights" had been interfered with. Similarly, in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), the Court rejected a claimant's 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." Id. at 500.

In any event, the premise of CRC's argument is incorrect. Under longstanding Oregon precedent, the trees standing on CRC's property do not represent a legally distinct property interest from the underlying land. It is black letter law in Oregon, as in most other states, that "Timber growing upon land is as much a part of the real estate as the soil on which it grows." Parsons v. Boggie, 11 P.2d 280, 281 (Or.1932). See also Hink v. Bowlslby, 260 P.2d 1091, 1093 (Or.1953) ("Standing timber is part and

parcel of the real property and is considered of itself as real property until severed from the soil.") Because CRC's position that Oregon law defines standing timber as a distinct property interest is mistaken, CRC's argument that state law provides a basis for treating timber and land separately for the purpose of takings analysis collapses of its own weight.

CRC has relied upon Paullus v. Yarborough, 347 P.2d 620 (Or. 1959) to support its position. But that decision establishes only a very narrow exception to the general rule that timber is part of the realty, and the exception has no possible relevance in this case. The Court in Paullus, interpreting the provisions of the Uniform Sales Act, determined that standing timber should be regarded as "goods" (that is, a form of personal property), distinct from the land, when the timber is the subject of a sales contract imposing a specific duty on the purchaser to "sever" the trees from the land. This narrow ruling has no bearing on the continuing validity of the general rule that standing timber is part of the real estate. Indeed, in Burkhart v. Cartwright, 350 P.2d 185, 188 (Or. 1960), decided one year after Paullus, the Oregon Supreme Court reaffirmed the general rule that "[g]rowing timber is real property." Id. at 30, citing Anderson v. Moothart, 260 P.2d 1091 (Or.1953). Because CRC holds both the land and the timber at issue in this case for its own use, and no sales contract for the timber is involved, the narrow Paulus exception is beside the point.

CRC also has relied on Hawkins v. City of La Grande, 843 P.2d 400 (Or.1993), as well as Boise Cascade Corp. v. Board of Forestry, 886 P.2d 1033 (Or. App. 1994) (which cites and relies upon Hawkins, 886 P.2d. at 1037), for the proposition that, under Oregon law, trees should be treated

as distinct from the underlying land for the purpose of takings analysis. But neither Hawkins nor Boise Cascade supports this point.

Hawkins involved a claim for compensation, premised on tort and inverse condemnation theories, by farmers whose crops were destroyed when municipal officials, faced with an overloaded municipal sewage treatment facility, released massive quantities of untreated sewage down a natural slough. The officials gave downstream owners no warning about the release. As the Oregon Supreme Court tersely described the resulting catastrophe, "The effluent killed growing crops... at farms downstream along the slough." 843 P.2d at 402. Based on these facts, the court ruled that the action of the city officials resulted in a taking.

While the court in Hawkins focused on the effect of the flooding on the plaintiffs' crops, the court's analysis cannot properly be read to contradict the parcel as a whole rule. The court stated, "we hold that the destroyed crops, although growing from the land, are a separate entity, capable of being separately damaged and are not subject to limiting rules applicable to real property." 843 P.2d at 407, citing Paullus. However, the critical point is that Hawkins involved flooding, which is a form of physical occupation. There is no question, and amici do not dispute, that the parcel as a whole rule does not apply to a taking claim based on a physical occupation. See Tahoe, 122 S.Ct. at 1479. The Oregon court's disregard of the parcel rule in Hawkins, which involved government flooding of private property, does not affect the general rule in regulatory

takings cases that trees are part of the realty under the parcel as a whole rule.[1]

II. CRC's Regulatory Claims Are Independently Barred by the Doctrine of Public Ownership of Wildlife.

Even if CRC's regulatory taking claims were otherwise viable, there is an additional consideration which supports rejection of CRC's claims. This case, unlike most takings cases, does not involve an ordinary conflict between the government's normal regulatory authorities and the Takings Clause. Instead, it involves bald eagles and the public's special authority to protect these and other wildlife. Under the so-called "public ownership" doctrine, the state owns all wild animals found in nature as trustee for the people. The public ownership doctrine supports rejection of CRC's regulatory takings claims at the threshold because it represents a "background principle" of state law which bars CRC from claiming a right to engage in activities on its land which kill or seriously injure these animals. In addition, the public's right to the protection of its property right in the eagles threatened by CRC's proposed timber operation undermines, at a minimum, the reasonableness of CRC's investment expectations and, in turn, the merits of its demand for financial compensation under the Takings Clause.

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

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[1] Insofar as the Oregon Court of Appeals in Boise Cascade relied on the language in Hawkins, the Court of Appeals erred in assuming that the holding in Hawkins could logically be extended beyond the context of physical occupations.

In Oregon (as in every other state) "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, 207 P.2d 153, 156 (Or.1949), quoting Monroe v. Withycombe, 165 P. 227, 229 (Or. 1917). See also State v. Hume, 95 P. 808, 810 (Or. 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 P.2d 199, 201-202 (Wash. 1937). See Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. 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). See generally Thomas A. Lund, "Early American Wildlife Law," 51 N.Y.U.L. Rev. 703 (1976).

Oregon courts have repeatedly recognized that the public's rights in wildlife limit private property rights. In Fields v. Wilson, supra, the Oregon

Supreme 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.

207 P.2d at 156-57 (emphases added). See also State v. Pulos, 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 sees fit"). As a result of the public ownership doctrine, the Oregon Supreme Court has declared, "the legislative assembly may enact such laws as tend to protect the species from injury by human means." State v. Catholic, 75 Or. 367, 374, 147 P 372 (1915).

In Thompson v. Dana , 52 F.2d 759 (D. Or. 1931), aff'd, 285 U.S. 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 always held the power to close the stream to angling" because "[c]onservation of fish for the common good of all citizens of the state is paramount." "[R]easonable regulations to attain that end do not infringe upon the property protective... clauses of the Constitution of the United States." Id. at 762 (emphasis added).

Likewise, the U.S. Court of Claims, prior to the creation of the modern Court of Federal Claims and the U.S. Court of Appeals for the

Federal Circuit, recognized that the doctrine of public ownership of wildlife limits rights in private lands. In Bishop v. United, 126 F. Supp. 449 (Ct.Cls. 1954), cert. denied, 349 U.S. 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 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 N.E. 99, 427 (N.Y. 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 must compensate the owner." Id. at 453. The majority, relying on the doctrine of public ownership of wildlife, rejected this position. (The decisions of the former Court of Claims represent, of course, binding precedent in this Court. See South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982)).

Decisions from other jurisdictions are in accord with these rulings. For example, in Cook v. State, supra, the Washington Supreme Court stated that "the state has an 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 P.2d at 201. 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, supra, the New York Court of Appeals rejected a taking claim based on property damage caused by State-protected beavers:

> The 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 N.E. at 101-02.

Historically, the doctrine of public ownership has primarily been applied in cases involving game animals. But the doctrine certainly applies, 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 N.Y.S.2d 78 (N.Y. S.Ct., App. Div. 2000), a New York appellate court 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 "threatened" species under New York law, off its property. The court relied in part on New York Environmental Conservation Law, §11-0105 (McKinney 1999), which codifies the doctrine

of public ownership of wildlife, and stated: 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. Id. at 84. See also Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (rejecting taking claim based on regulations protecting endangered grizzly bears); Florida Game & Freshwater Fish Comm'n v. Flotilla, 636 So.2d 761 (Fla.Ct.Apps.), review denied, 645 So.2d 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 which would directly kill or injure wildlife (e.g., with guns or traps) but also to activities which will indirectly lead to the same result. In Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939), the Oregon Supreme 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." 160 Or. at 663, 87 P.2d at 198 (emphasis added). Similarly, in Barrett v. State, supra, 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." Cf. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,

515 U.S. 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).[2]

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

The public ownership doctrine is relevant to the takings analysis in this case in several different ways. First, it supports the conclusion that CRC's takings claims must be rejected because CRC lacked a protected property right to conduct the proposed logging operation under

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[2] While CRC has not, so far as we know, made this argument, CRC might possibly challenge the continuing vitality of the state ownership doctrine on the basis of some language in certain U.S. Supreme Court decisions holding that states' traditional sovereign authority over wildlife does not preclude the enforcement of federal mandates which preempt or displace state law. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 333-34 (1979). But these decisions are irrelevant to the application the state ownership doctrine in a takings case. See, e.g., Shepard 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). See also Houck, "Why Do We Protect Endangered Species and What Does That Say About Whether Restrictions On Private Property to Protect Them Constitute 'Takings'"?, 80 Iowa Law Review 297 (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"). Cf. Phillips v. Washington Legal Found., 524 U.S. 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).

"background principles" of State "property" and/or "nuisance" law. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the 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." Id. at 1029. 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 U.S. 156 (1998)

The courts have relied upon Lucas's "logically antecedent inquiry" to resolve regulatory takings cases in different contexts. For example, in Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. App. 1992), aff'd, 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994), the Oregon courts considered a claim that a city effected a taking by denying an owner a permit to build a seawall along the ocean shore, effectively barring the owner from developing the property. 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." "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." Stevens, 835 P.2d at 942. The Oregon Supreme Court

affirmed on the ground that the Court of Appeals' decision was consistent with the teachings of Lucas. "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.'" Stevens, 854 P.2d at 456.

Similarly, earlier this year, the Pennsylvania Supreme Court overturned a takings award based on a state law restricting coal mining operations. See Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002). The court ruled that the Commonwealth was entitled to defend against the taking claim on the ground that "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. See also Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (taking claim barred by public property rights in tidelands); Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 903 P.2d 1246 (Haw. 1995), cert. denied, 517 U.S. 1163 (1996) (taking claim barred by native property rights); National Audubon Society v. Superior Court, 658 P2d 709, 723 (Cal. 1983), cert. denied, 464 U.S. 977 (1983) (taking claim barred by public rights in water resources).

In accord with these rulings, the Court of Federal Claims has frequently recognized that a relevant "background principle" can defeat a taking claim at the threshold. See Marks v. United States, 34 Fed.Cl. 387, 403 (1995), aff'd, 116 F.3d 1496 (Fed.Cir.1997), cert. denied, 522 U.S.

1075 (1998) (takings claim barred by navigational servitude); Rith Energy, Inc. v. United States, 44 Fed. Cl. 366 (1999), aff'd on other grounds, 247 F.3d 1355 (Fed. Cir. 2001), cert. denied, 122 S.Ct. 2660 (2002) (taking claim barred by background principles of Tennessee nuisance law prohibiting water pollution). See also Abrahim-Youri v. United States, 139 F3d 1462, 1468 (Fed. Cir. 1997) (abrogation of citizen's claim against Iran by U.S. government was not a compensable taking because, under Lucas, "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity").[3]

This case, involving the doctrine of publicly owned wildlife, is properly governed by the same analysis. The doctrine of public ownership of wildlife

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[3] In Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001), the Court acknowledged that the California public trust doctrine and other "background principles" of California law might bar takings claims based on limitations on water withdrawals under the Endangered Species Act. However, the Court rejected the defense in that case because state regulatory authorities had not themselves prohibited plaintiffs from making the water withdrawals. The conservation amici question whether the court was correct in Tulare Lake in concluding that the scope of background limitations on title should vary with state regulatory policy. Cf. Bishop v. United States, 126 F.Supp.449 (Ct.Cls. 1954) (rejecting regulatory takings challenge to federal wildlife regulation based on state public ownership doctrine.) However, it is sufficient for present purposes to recognize that Tulare Lake is distinguishable because there is no conflict between the Oregon Board of Forestry's restrictions protecting the bald eagles on this property and those imposed by the U.S. Fish and Wildlife Service.

is certainly a "background principle" of Oregon property law within the meaning of Lucas. Because, under Oregon property law, public rights in wildlife are paramount over private property interests, ESA regulations protecting the public's rights in bald eagles cannot be viewed as a taking. As a matter of law, no private land owner in Oregon cannot claim a property right to engage in activity which threatens to destroy the public's wildlife.[4]

For essentially the same reasons, the ESA restriction also is supported by 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." See Restatement (Second) of Torts, §521B. 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, which would have destroyed an active bald eagle nest site, certainly represented an "unreasonable interference" with the public's rights in wildlife. The proposed logging operation threatened to harm individual birds and

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[4] While CRC has not presented a viable physical-occupation claim, as the United States has explained in its memorandum, see also Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed.Cir. 2002), the background principles defense would apply on the same terms to CRC's physical occupation claim as it does to the regulatory takings claims. In Lucas, the Supreme Court indicated that background principles can bar a physical occupation claim on the same basis as a regulatory taking claim. See 505 U.S. at 1028-29.

increased the risk of extinction of the entire species. Because the ESA restrictions on CRC's logging operations protected 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, supra, is directly applicable. As discussed, 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," id., at 773, and the Restatement (Second) of Torts, §521B id., 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." Id. at 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," the Court said, "that further mining in the UFM [unsuitable for mining] area had a high potential to cause increases in [pollution]." The same reasoning supports

rejection of the taking claim in this case based on background principles of nuisance law.[5]

Finally, whether or not the public ownership doctrine represents an absolute bar to a taking claim based on background principles of state property and/or nuisance law, the doctrine certainly should be relevant, at a minimum, in determining the reasonableness of CRC's "investment-backed expectations." (See section I, supra.) The reasonableness of a clamant's investment-backed expectations is a well recognized factor in takings analysis. See Penn Central Transp. Co. v. New York City, 438 U.S. at 124; see also Lucas v. South Carolina Coastal Council, 505 U.S. at 1034 (Kennedy, J., concurring); Good v. United States, 189 F.3d 1355 (Fed.Cir. 1999) (reasonableness of an owner's investment expectations is a relevant factor in deciding whether a claimant can recover under Lucas) The fact that a proposed land use activity would invade public rights in wildlife certainly helps define, at a minimum, the reasonableness of a

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[5] The conservation amici recognize that in Boise Cascade Corp. v. State of Oregon, 991 P.2d 563 (Or. App.1999), the Oregon Court of Appeals rejected the applicability of the "nuisance defense" in a similar case. The amici submit that the Oregon Court of Appeals ruling was mistaken because, among other things, the court ignored its own precedent establishing that a violation of public rights can constitute a nuisance under the Restatement definition. See Mark v. State Department of Fish and Wildlife, 974 P.2d 716, 719 (Or.Ct. App. 1999). But it is sufficient for present purposes to recognize that the Oregon court did not address whether public rights in wildlife qualify as a background principle of "property" law, as opposed to "nuisance" law, under Lucas. The doctrine of public ownership of wildlife is most naturally viewed as an aspect of state property law.

claimant's expectations. See R.W. Docks & Slips v. State, 628 N.W.2d 781 (Wisc. 2001) (where proposed filling would infringe on public trust in tidelands, claimant lacked reasonable investment-backed expectations sufficient to support a taking claim).

Thus, even if the public ownership doctrine did not block these claims at the threshold, it certainly supports their rejection on the merits.

III. CRC's "Substantially Advance" Claim Raises a Due Process Issue, Not a Takings Issue.

Finally, the Court should reject CRC's contention that the ESA restrictions effected a taking because they allegedly "failed to substantially advance a legitimate government interest." The amici have difficulty discerning the possible factual basis for this claim in this case. In any event, the claim that a regulation fails to substantially advance a legitimate governmental interest raises an issue under the Due Process Clause, not the Takings Clause. This court lacks jurisdiction over such a claim and, accordingly, should dismiss it.

So far as we are aware, neither this Court nor the Court of Appeals for the Federal Circuit has ever found that a regulatory use restriction effected a taking based on this ostensible takings test. To the contrary, this court has repeatedly questioned the existence of this supposed takings test, at least outside the narrow (and for present purposes irrelevant) context of development exactions. See Loveladies Harbor, Inc v. United States, 15 Cl. Ct. 381, 390 (1988) ("no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced"); Bamber v. United States, 45 Fed Cl. 162, 165

(1999) (observing that the "substantially advance" takings test "has not had a fruitful life" and that it has only been "outcome determinative" in the context of exactions). As we explain below, the Court of Federal Claims' skepticism about this test is well founded. It is not a takings test at all.

While the language in various Supreme Court decisions over the last several decades provides some support for the existence of this ostensible test, it is clear today that a majority of the current Supreme Court recognizes that this type of allegation raises a due process issue, not a takings issue. The most recent Supreme Court case to directly address the issue is Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The case involved the constitutionality of federal legislation imposing retroactive liability on coal mining companies to pay for health benefits for retired workers. Four Justices, led by Justice O'Connor, concluded that the legislation effected a taking and did not reach the companies' due process claims. Id. at 537-78. Justice Kennedy concurred in the judgment that the legislation was unconstitutional, but did so under due process principles, expressly rejecting the applicability of the Takings Clause to the companies' claims. Id. at 545-47. Four justices dissented from the holding that the legislation was unconstitutional, but expressly agreed with Justice Kennedy that takings analysis was improper, and that the appropriate framework of constitutional analysis lay under the Due Process Clause. Id. at 554-57.

Justice Kennedy's concurring opinion highlights the incongruity of hearing what are, in reality, substantive challenges to the wisdom of governmental actions under the Takings Clause:

> The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. See, e.g., Agins v. City of Tiburon, 447 U.S. at 260 (zoning constitutes a taking if it does not "substantially advance legitimate state interests"). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional. Given that the constitutionality [of the legislation] appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under the general due process principles rather than under the Takings Clause.

524 U.S. at 545. Justice Kennedy therefore expressly concluded that the case was "controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws." Id. at 547.

Justice Breyer, writing for himself and three other justices, agreed with Justice Kennedy that

> the plurality views the case through the wrong legal lens. The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property... for public use, without just compensation." U.S. Const., Amdt 5. As this language suggests, at

> the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes "private property" to serve the "public" good.

524 U.S. at 554 (emphasis in original). A five-justice majority of the Supreme Court thus expressly held that challenges to the legitimacy of government actions properly lie under the Due Process Clause, rather than the Takings Clause.

In the four years following Eastern Enterprises, the Supreme Court has touched upon the validity of "substantially advance" takings claims only tangentially, and these decisions provide no basis for disregarding the holding of the five-justice majority in Eastern Enterprises. In City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), the Court upheld a jury finding of a taking reached upon instructions that included the theory that the city's repeated rejection of a development proposal failed to "substantially advance a legitimate public purpose." Id. at 700. However, the outcome of the case turned on the Court's ruling the city had waived any objection to the instructions and therefore could not legitimately challenge the test applied by the lower courts before the Supreme Court. Indeed, the city, operating without the benefit of the Supreme Court's subsequent decision in Eastern Enterprises, had affirmatively proposed the jury instructions. Id. at 704. Thus, the outcome in Del Monte Dunes does not undermine the substantive legal holding in Eastern Enterprises that challenges to the legitimacy of government actions raise a due process issue, not a takings issue.

Indeed, there is a great deal in Del Monte Dunes which reinforces the holding in Eastern Enterprises. No member of the Court spoke, on the merits, in defense of the ostensible substantially advance takings test. In addition, five of the justices (not exactly the same five justices in the five-justice majority in Eastern Enterprises) either wrote opinions, or joined in opinions, indicating that the outcome in Del Monte Dunes should not be taken as an endorsement of the substantially advance test. See id. at 732 n. 2 (Scalia, J., concurring in part and concurring in the judgment); see id. at 753 n.12 (Souter, J., dissenting , joined by Justices O'Connor, Breyer, and Ginsburg). Notably, the justices reserving the issue of the validity of the substantially advance test included Justice Antonin Scalia, generally viewed as the leading property rights champion on the Court. In sum, Del Monte Dunes supports (and certainly does not undermine) the conclusion that the substantially advance test is not a legitimate takings test at all.

Most recently, in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Supreme Court briefly referred to this ostensible takings test, including it in a list of possible legal theories which the plaintiffs might have asserted to challenge the TRPA's development moratorium. Without addressing the legal merits of such a claim, the Court ruled that it was foreclosed by the factual record. Thus, Tahoe does nothing to undermine Eastern Enterprises either.

While the holding by the five justices in Eastern Enterprises was not expressed in a majority opinion, the majority's ruling is nonetheless binding precedent for the lower federal courts. As the Federal Circuit recognized in its en banc decision in Commonwealth Edison Corp. v. United States, 271

F.3d 1327, 1339 (Fed. Cir. 2001) (en banc), cert. denied, 122 S.Ct. 2293 (2002), "we are obligated to follow the views of [the] majority" in Eastern Enterprises." Other circuit courts have also recognized the binding effect of the five-justice majority in Eastern Enterprises. See Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3rd Cir.) ('We are bound to follow to follow the five-four vote against the taking claim in Eastern."), cert. denied, 528 U.S. 963 (1999); Holland v. Big River Minerals Corp., 181 F.3d 967, 606 (4th Cir. 1999), cert. denied, 528 U.S. 1117 (2000); Parella v. Ret. Bd of the R.I. Employees Retirement Sys., 173 F.3d 46, 58 (1st Cir. 1999).[6]

A number of lower federal and state courts, in accordance with the holding in Eastern Enterprises, and in accordance with the viewpoint of this Court, have rejected the ostensible substantially advance test as a general takings standard. See, e.g., Simi Investment Co. v. Harris County, Inc., 256 F.3d 323 (5th Cir. 2001) (on application for rehearing) (claims of

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[6] In these post-Eastern Enterprises cases, the Federal Circuit and the other courts of appeals specifically focused on the conclusion by the five-justice majority that a valid takings claim requires some "identifiable" property interest. But the reasoning of these courts that the five-justice majority established binding law is equally applicable to the second legal proposition on which the five-justice majority agreed, that is, that "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." 524 U.S. at 545 (Breyer, J.). See Simi Investment Co. v. Harris County, Inc., 256 F.3d 323 (5th Cir. 2001) (on application for rehearing) (expressly ruling that Eastern Enterprises requires the conclusion that claims of "illegitimate and arbitrary governmental abuse" of private property rights must be addressed under the Due Process Clause rather than the Takings Clause).

"illegitimate and arbitrary governmental abuse" of private property rights must be addressed under the Due Process Clause rather than the Takings Clause); Mission Springs, Inc v. City of Spokane, 954 P.2d 250, 257-58 (Wash. 1998) (city's allegedly "arbitrary" denial of permit stated a claim under the Due Process Clause, not the Takings Clause); Brunelle v. Town of South Kingston, 700 A.2d 1075, 1083 n. 5 (R.I. 1997) (overruling trial court ruling that "a regulatory taking can be compensable if the ordinance in question does not substantially advance any legitimate state interest," and stating that "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause"). Numerous commentators also have recognized that a substantially advance claim raises a due process issue, not a takings issue. See, e.g., S. Keith Garner, "'Novel' Constitutional Claims: Rent Control, Means Ends Tests, and the Takings Clause, 88 Cal. L. Rev. 1547 (2000); Lawrence Berger, "Public Use, Substantive Due Process and Takings – an Integration," 74 Neb. L. Rev. 843, 883 (1995).

Apart from the force of precedent, the ostensible substantially advance takings claim founders on first principles. First, this ostensible takings test is inconsistent with the fundamental character of regulatory takings law. The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," payment of compensation. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987). The basic inquiry is whether the government has imposed restrictions "so severe that they are

tantamount to a condemnation or appropriation of the property." Tahoe–Sierra Preservation Council v Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1478 n.17 (1987). When the government has so restricted the use and value of private property that it has taken it, the government will be permitted to proceed only on the condition that it pay.

By contrast, a substantially advance claim, like a forthright due process claim, focuses on whether the government action is proper (regardless of whether the government pays) and on whether the government should be permitted to proceed at all. The issue of liability under the so-called "substantive" branch of due process analysis turns not on economic impact, but on the degree of irrationality or arbitrariness of the government action. "This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." Eastern Enterprises, 525 U.S. at 545 (Kennedy, J.)

The substantially advance test also conflicts with the language and original understanding of the Takings Clause. The drafters of the Bill of Rights intended the Takings Clause to apply, as its language suggests, only to "direct condemnations" or "physical appropriations." Tahoe-Sierra, at 1478. Reasoning by analogy, the Supreme Court has extended the clause to regulatory restrictions which are similar in terms of economic impact to condemnations or appropriations. The substantially advance theory would permit a takings claimant to proceed based on the irrationality of the government action, regardless of its economic impact, This theory has no logical foundation in the language or original understanding of the

Takings Clause. Cf. Tampa Hillsborough County Expressway Authority v. AGWS Corp., 640 So.2d 54 (Fla. 1994) (rejecting the substantially advance takings theory specifically to avoid the risk that "just compensation" would be conferred on land owners suffering only nominal economic injuries).

The substantially advance test also is inconsistent with the requirement that a taking be for a "public use." As stated by Justice Brennan in his influential dissent in San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981), an otherwise lawful government action which rises to the level of a taking is distinguishable from the "different case... where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use'" Id. at. 656 n.23 (emphasis added). "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking." First English, at 314 (emphasis added). In other words, an action that fails to substantially advance a legitimate state interest, i.e., is not "otherwise proper" and does not serve a "public use," cannot be regarded as falling within the scope of the Takings Clause. See also Rith Energy, Inc v. United States, 247 F.3d 1355, 1366 (Fed Cir. 2001), cert. denied, 122 S.Ct. 2660 (2002) (a taking claimant is "required to litigate its takings claim on the assumption that the administrative action was both authorized and lawful").

Finally, the substantially advance test is inconsistent with the principle articulated in Armstrong v. United States, 364 U.S. 40, 49 (1960), that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If a regulation advances a legitimate public purpose, "it is axiomatic that the public receives a benefit while the offending regulation is in effect." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. at 656 (Brennan, J., dissenting). On the other hand, if a regulation fails to advance a legitimate state purpose, then it is equally axiomatic that no legitimate "public" burden has been imposed. In that circumstance, the principles of "fairness and justice" which animate the Takings Clause simply do not apply.[7]

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[7] As a matter of history, the substantially advance takings test arose as a result of inadvertent muddling of takings and due process precedents. The substantially advance test was first mentioned in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). That the Agins Court was applying a due process test rather than a takings test is confirmed by the precedent the Court relied upon, Nectow v.City of Cambridge, 277 U.S. 183 (1928), which involved a claim that an ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment." Id. at 183. Furthermore, the page in the Nectow opinion to which Agins refers quotes from Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), another due process case. Similarly, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 127 (1978), another regulatory takings decision which recites a variant of the Agins means-ends test, also relied on a due process precedent, Goldblatt v. Hempstead, 369 U.S. 590 (1962). Numerous commentators have recognized that the "substantially advance" test was simply lifted out of substantive due process jurisprudence. See, e.g., Kennth Bley, "Substantive Due Process and Land Use: The Alternative to a Taking Claim," in Takings: Land

While the Supreme Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994), are sometimes cited in support of the existence of a general substantially advance takings test, these precedents do not support this ostensible test. First, it is debatable whether these decisions support application of a substantially advance test in any context. Nollan and Dolan address a special, narrow problem under the Takings Clause – the constitutionality of exactions requiring owners to grant the public physical access to their properties as a condition of receiving a regulatory permit. Standing alone, the requirements imposed by the government in those cases would have effected per se physical-occupation takings under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). The question the Court addressed in those cases was whether a finding of a taking could be avoided because the physical-occupation mandate, rather than being imposed directly, was imposed as a condition of permits which the owners could have refused to accept. The Court concluded that a finding of a taking should not be automatic in these circumstances. At the same time, recognizing the seriousness of the intrusion on private property interests, the Court ruled that the government could impose this type of condition only if there were an "essential nexus" between the condition and the regulatory objective the government was trying to advance, Nollan, at 837, as well as a "rough proportionality" between the

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Development Conditions and Regulatory Conditions After Dolan and Lucas, 280, 291 (1967) ("The authority for the first prong of Agins is no authority at all; it was a case based solely on the due process clause."

burden imposed by the condition and the projected impacts of the development. Dolan, at 391.

While both Nollan and Dolan cite the "substantially advance" language from earlier Supreme Court decisions, these references are dictum and do little if anything to support the validity of this ostensible takings test, even in the narrow context of development exactions. While the ostensible "substantially advance" test bears a general similarity to the "essential nexus" and "rough proportionality" tests, those tests are actually different from, and much narrower than, the ostensible substantially advance test. The "essential nexus" and "rough proportionality" tests rest on their own logical foundation, and continue to apply, whether or not the substantially advance test represents a valid takings inquiry.

Second, even if Nollan and Dolan support the existence of a substantially advance test in the context of exactions, they do nothing to support the existence of such a test outside that context. See Bamber v. United States, supra (Nollan and Dolan are the only cases in which this takings test has been "outcome determinative'). As the Supreme Court held in City of Monterey v. Del Monte Dunes at Monterey Ltd., supra, the analysis in Nollan and Dolan cannot be extended "beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 703. See also Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 216 F.3d 764, 772 n. 11 (9th Cir 2000), aff'd, 122 S.Ct. 1465 (2002) ("The [Supreme] Court has held that the Nollan/Dolan test is

inapposite to regulatory takings cases outside the context of excessive exactions".)[8]

Viewing CRC's substantially advance claim through the lense of due process, it is plain that this claim must be rejected as a matter of law. Under the Tucker Act, the Court of Federal Claims has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491. The Court of Federal Claims has jurisdiction, of course, over claims for financial "compensation" under the Takings Clause. It is black letter law, however, that the Due Process Clause, unlike the Takings, is not a money-mandating constitutional provision. See Crocker v. United States, 125 F.3d 1475, 1476 (Fed.Cir. 1997). Accordingly, this Court lacks jurisdiction to hear CRC's substantially advance claim.

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[8] If, contrary to this argument presented in text, CRC were entitled to advance a substantially advance claim under the Takings Clause in this Court in a case such as this, the standard of review for such a claim would necessarily be identical to the "rational basis" standard applied in the review of economic regulations under the Due Process Clause. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487 n. 16 (1987); id. at 511 n. 3 (Rehnquist, J., dissenting). See also City of Monterey v. Del Monte Dunes at Monterey Limited, 526 U.S. at 701 (upholding jury instructions to the effect that "[t]he regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective") (emphasis added).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the memorandum filed by the United States, the Court should dismiss CRC's claims a matter of law and/or grant the United States summary judgment.

Respectfully submitted,

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