IN THE COURT OF APPEALS OF THE STATE OF OREGON

COAST RANGE CONIFERS, LLC, an Oregon Limited Liability Company,	)	
	)	CA No. A117769
Plaintiff-Appellant,	)	
	)	TC No. 011423
v.	)	
STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY,	)	
Defendant-Respondent	)	

BRIEF OF AMICI CURIAE AUDUBON SOCIETY OF PORTLAND; INSTITUTE FOR FISHERIES RESOURCES; OREGON TROUT, INC.; and PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS

Appeal from the Judgment of the Circuit Court for Lincoln County
The Honorable Robert J. Huckleberry, Judge

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I. STATEMENT OF THE CASE

Amici curiae adopt and incorporate by reference the Respondent State of Oregon's statement of the case.

II. SUMMARY OF ARGUMENT

Amici curiae Audubon Society of Portland, the Institute for Fisheries Resources, Oregon Trout, Inc., and Pacific Coast Federation of Fisherman's Associations ("amici") respectfully submit this brief in support of the State of Oregon. This brief seeks to assist the Court by providing a focused analysis of a few of the important issues raised by this case.

A. The contention of Coast Range Conifers ("CRC") that this claim should be analyzed as a per se physical occupation of private property is foreclosed by this Court's precedent as well as persuasive decisions from other jurisdictions.

B. Addressing this claim as a regulatory taking claim under the parcel as a whole rule, the claim must be rejected because the challenged restriction limits commercial forestry on only nine acres out of CRC's 40-acre parcel.

C. The conclusion that no taking occurred in this case is reinforced by the principle that a property owner cannot claim a protected right to engage in activities which harm publicly owned wildlife.

D. The allegation that the Board of Forestry's order "failed to substantially advance a legitimate state interest," even if it were correct, cannot support a taking claim.

III. ARGUMENT

A. The Per Se Physical Occupation Claim Is Barred by Applicable Precedent and Is Wrong As a Matter of Law.

CRC contends that the Board of Forestry's restriction on commercial timber operations designed to avoid injury to the nesting bald eagles on the property effects a "physical occupation" of its property supporting a per se claim for compensation. This claim, especially before this Court, borders on the frivolous.

In Boise Cascade Corp. v. State of Oregon, 164 Or.App. 114, 124-27, 991 P.2d 563, 569-70 (1999), review denied, 331 Or. 244, 18 P.3d 1099 (2000), cert. denied, 532 U.S. 923 (2001), this Court considered and rejected a physical-occupation claim which, apart from the fact that it involved a spotted owl rather than an eagle, was essentially identical to this case. CRC points to no persuasive reason for this Court to depart from its prior precedent. See also Seiber v. State Board of Forestry, Order of Linn County Circuit Court (No. 9800649, December 8, 1999), aff'd without opinion, 17 Or.App. 319, 37 P.3d 259 (2001), review denied, 334 Or. 260, 47 P.3d 486 (2002), petition for certiorari pending (rejecting per se physical occupation taking claim in another case essentially identical to Boise Cascade). Recently, several federal courts, in cases arising from Oregon, have likewise rejected this takings theory. See Boise Cascade Corp. v. United States, 296 F.3d 1339, 1354 (Fed. Cir. 2002) ("We agree with the Oregon Court of Appeals that Boise's argument is merely an attempt to convert a regulatory takings claim... into a *per se* taking); Seiber v. United States, 2002 WL 3100261 (U.S.Ct.Fed.Cls., Sept. 4, 2002). Finally, the U.S. Supreme Court's recent decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002), supports these rulings by confirming the sharp distinction between physical-occupation and regulatory takings claims and by describing legitimate *per se* physical occupations claims as "relatively rare" and "easily identified." Id. at 1479.[1]

Moreover, the plaintiff's physical-occupation claim simply makes no sense. The Board of Forestry has restricted a use of the property based on the presence of bald eagles. By no logic can this regulation be characterized as effecting a physical occupation of private property.

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[1] The Court of Claims decision in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313 (U.S. Ct.Fed. Cls. 2001), upon which CRC attempts to rely, has not yet been subjected to review by the U.S. Court of Appeals for the Federal Circuit and is inconsistent with the analysis followed by this Court in Boise Cascade and by the U.S. Supreme Court in Tahoe.

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

Addressing this claim as a type of alleged regulatory taking, it is clear that there was no taking under the "parcel as a whole rule." The restriction affects only nine acres. But the nine acres have to be considered, at a minimum, as part of the larger 40-acre Beaver Tract. Viewing the taking claim from this perspective, the Circuit Court was correct in rejecting the claim.

1. This Regulatory Taking Claim is Governed by the Parcel as a Whole Rule.

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). The Oregon Supreme Court has recognized the same principle, stating that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Cope v. City of Cannon Beach, 317 Or. 339, 346, 855 P.2d 1083, 1087 (1993), quoting Keystone Bitiminous Coal Assn v. DeBenedictis, 480 U.S. 470, 479 (1987), in turn quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

As a result of the parcel rule, a taking cannot be established, as CRC seeks to do in this case, by focusing exclusively on the 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. Under this

approach, as the Supreme Court said in Tahoe, "the moratorium and the normal permit process alike would constitute categorical takings." Id. Likewise, regulations would always result in takings if claimants could segment property geographically by focusing on those portions which are restricted, or if claimants could segment property by focusing on those uses which are barred while ignoring those uses which are allowed. "We have consistently rejected such an approach to the 'denominator' question," the Court said. Id. at 1483.

CRC obfuscates the relevant precedents. For example, CRC asserts (Brief, at 39) that the U.S. Supreme Court's discussion of the parcel issue in Keystone was dictum, and that the Court actually rejected the taking claim because the proposed mining would produce a nuisance. This is incorrect. The Court rejected the taking claim by squarely relying on the parcel rule, see 480 U.S. at 497, and the Court did not rely on a nuisance rationale. While acknowledging that the Supreme Court in Penn Central applied the parcel as a whole rule, CRC objects (Brief, at 39) that the Court cited "no legal authority" to support its decision. In fact the Court in Penn Central did cite longstanding legal authority in support of the parcel rule. See 438 U.S. at 130. The more important point, of course, which CRC does not even attempt to refute, is that the Supreme Court has repeatedly applied the parcel rule in cases since its1978 Penn Central decision.

Most egregiously, while recognizing (Brief at 41) that the Supreme Court in Tahoe applied the parcel rule, CRC states that the Court also "reaffirmed" its "earlier statement" in Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993), that "a 'portion of property' can be taken, if taken in its entirety." This is a complete misrepresentation of the meaning of Concrete Pipe. What the Court said was, if the parcel as a whole rule were ignored, then any particular portion of a property could be characterized as having been taken in its entirety. The Court in Concrete Pipe rejected this approach. "[T]he relevant question," the Court stated, "is whether the property taken is all, or only a portion of, the parcel in question." Id. at 644.

CRC also cites (Brief, at 40) several passages – which actually are dictum – from the Court's decisions in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and Palazzolo v. Rhode Island, 533 U.S. 606 (2001), which raised questions about the parcel rule. But those statements certainly did not overrule the Court's prior precedents endorsing and applying the parcel rule. More importantly, in its recent decision in Tahoe, the Court reaffirmed the parcel as a whole rule, effectively putting to bed the questions previously raised about the parcel rule in Lucas and Palazzolo.

2. CRC Cannot Establish a Taking in Light of the Parcel as a Whole Rule.

CRC makes two, related arguments in its attempt to establish a regulatory taking. First, it contends that even though the nine acres which are the subject of its application are included within a larger 40-acre tract, the takings analysis should focus solely on the nine acres. Second, focusing on the nine acres, CRC contends that the takings analysis should consider only the trees on the nine acres and disregard the underlying land. As we explain, both of these arguments are foreclosed by the parcel as a whole rule.

The Parcel Rule in the Horizontal Dimension. In defining the relevant parcel in the horizontal dimension, the courts have considered various factors. The courts have placed the greatest emphasis on whether the property represents a physically contiguous unit. 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 or 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 (1999), 528 U.S. 951 (1999); Naegele Outdoor Adver. v. City of Durham, 844 F.2d 172, 176 (4th Cir.1988).

Applying these principles, courts routinely hold that takings claims brought by resource companies or developers must be evaluated by looking not simply at the restricted area of the claimants' property but, at a minimum, at the owners' entire geographically contiguous land holdings. Thus, in Animas Valley Sand & Gravel Inc. v. Board of County Commissioners of LaPlata County, 38 P.3d 59, 68 (Colo. 2001), the Colorado Supreme Court ruled that a sand and gravel operator's taking claim had to be evaluated in relation to the clamant's entire 42 acres, not simply the 33 acres which were within a restricted river corridor. Similarly, in District Intown, supra, the federal appeals court held that the relevant parcel was not the nine lots which the owner was prohibited from developing but rather the owner's larger parcel from which the nine lots had been subdivided.

Applying these principles to this case, the relevant parcel includes, at a minimum, the entire 40-acre Beaver Tract. The property represents a single contiguous unit. CRC acquired the entire 40 acres at one time as part of a larger land swap. CRC has consistently managed the property as a unit for the single purpose of commercial timber production. These are textbook facts for the application of the parcel rule.

In seeking to persuade the Court to focus solely on the nine acres which it now seeks to harvest, CRC apparently relies on the fact that it has already harvested the trees on the balance of the 40-acre parcel. This position has no basis in either law or common sense. The courts have ruled, in a variety of contexts, that previously exploited resources or developed land should be included in the relevant parcel. For example, in Rith Energy v. United States, 270 F. 3d 1347 (Fed. Cir.2001), cert. denied, 122 U.S. 2660 (2002), the federal appeals court concluded that a prohibition on future mining did not effect a taking because the coal that the claimant had already mined on the property had to be included in the relevant parcel. 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 developer seeking permission to fill wetlands, the appeals court defined the relevant parcel to include adjacent acres which the claimant had previously obtained permission to develop.

Furthermore, this approach of segmenting the property would produce different treatment of the landowner who develops his property in increments, leaving only a small restricted portion, as compared to the landowner who develops a similar property as a unit. A legal rule which required the courts to draw such distinctions would be nonsensical as well as unfair.

CRC reads (Brief at 5, 41) the prior decisions of this Court and the Oregon Supreme Court in Boise Cascade Corp. v. Board of Forestry, 131 Or. App. 538, 886 P.2d 1033, 1041 (1994), and Boise Cascade Corp. v. Board of Forestry, 325 Or. 185, 935 P.2d 411 (1997), as adopting the idea that the relevant parcel is defined by the area subject to the regulatory restriction. However, neither of these decisions discusses the parcel as a whole rule, or even mentions the fact that the Oregon Supreme Court embraced the parcel as a whole rule in Cope v. City of Cannon Beach, 317 Or. 339, 855 P.2d 1083 (1993). It is simply implausible that the courts in Boise Cascade – without even mentioning the parcel as a whole rule – could have intended to establish a radical new approach to the parcel issue.

Moreover, both of these decisions simply address whether the plaintiff's pleadings could survive a motion to dismiss. They did not examine, based on actual evidence, whether the claims could succeed under the parcel as a whole rule. Boise Cascade's pleadings met the minimal legal test for a taking by alleging, for example, that "the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated." 131 Or. App. at 551, 886 P. 2d at 1041. Had the Boise Cascade litigation reached the fact-finding stage, there can be no question that the parcel as a whole rule would have been relevant in deciding the actual merits of the claims.

Finally, CRC cites (Brief at 42 -43) a handful of decisions from other jurisdictions which ostensibly define the relevant parcel, in accordance with CRC's theory, by "focus[ing] on the particular property interest that is the subject of the regulation." Upon close examination, none of these decisions supports CRC's position.

CRC thoroughly misstates the significance of the Federal Circuit decision in Florida Rock Industries v. United States,791 F.2d 893 (Fed Cir. 1986), cert. denied, 479 U.S. 1053 (1987), by implying that the court carved 98 acres out of a tract of 1560 acres because the 98 acres represented the area subject to regulatory constraint. In fact, the Federal Circuit 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 for the purpose of deciding the case. In other words, Florida Rock stands in stark contrast to this case, in which commercial forestry operations are restricted on less than twenty-five percent of the property and the rest of the property has been available for commercial exploitation.

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 self-evidently 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 by pointing to the owner's surface ownership. In these circumstances, the court said, 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.

Finally, CRC misrepresents 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 actually 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).

The Parcel in the Vertical Dimension. CRC also errs in contending that it is entitled to segment its property in the vertical dimension by treating the trees on its land as a property interest distinct from the land itself for the purpose of takings analysis. (Even if CRC were correct about the parcel issue in the vertical dimension, the regulatory taking claim should still be rejected based solely on application of the parcel rule in the horizontal dimension. Cf. Boise Cascade, 886 P.2d at 1037 (describing the issue of the "separability of the timber and the land" as "close to academic")).

First, CRC contends that the land and the timber should be treated as distinct legal units because an interest in timber is a "separate property interest" under Oregon common law. Even if CRC were correct about Oregon law, this point does not support CRC's segmentation argument. The U.S. Supreme Court has repeatedly rejected segmentation arguments in takings cases based on the fact that the regulated portion of the property represented a legally distinct property interest. Thus, 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, the Oregon Supreme Court, in Cope v. City of Cannon Beach, supra, stated that where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." 317 Or. at 346, 855 P.2d at 1087, quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

Second, CRC's argument must be rejected because the premise of the argument is incorrect. Under longstanding Oregon Supreme Court precedent, the trees standing on CRC's property are not legally distinct from the underlying land. Indeed, is black letter law in Oregon, as in most other states, that, "Timber growing upon land is as much of a part of the real estate as the soil on which it grows." Parsons v. Boggie, 139 Or. 469, 473, 11 P.2d 280, 281 (1932). See also Hink v. Bowlslby, 199 Or. 354, 357, 260 P.2d 1091, 1093 (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

common law defines standing timber as a distinct property interest is mistaken, CRC's argument that Oregon common law provides a basis for treating timber and land separately for the purpose of takings analysis collapses of its own weight.

CRC relies upon Paullus v. Yarborough, 219 Or. 611, 347 P.2d 620 (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 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), 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 validity of the general rule that standing timber is part of the real estate. Indeed, in Burkhart v. Cartwright, 221 Or. 26, 30, 350 P.2d 185, 188 (1960), decided one year after Paullus, the Oregon Supreme Court expressly recognized the point, stating, "Growing timber is real property and any conveyance thereof separate and apart from the land must be in writing," citing Anderson v. Moothart, 198 Or. 359, 260 P.2d 1091 (1953) "unless the agreement is such that the growing timber falls within the definition of 'goods' under the Uniform Sales Act," citing Paullus. 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 exception recognized in Paulus is beside the point.

CRC relies on Hawkins v. City of La Grande, 315 Or. 57, 843 P.2d 400 (1993), as well as the prior decision of this Court in Boise Cascade Corp. v. Board of Forestry, 131 Or. App. 538, 886 P.2d 1033 (1994) (which cites and relies upon Hawkins; 131 Or.App. at 544-45, 886 P.2d. at 1037), for the proposition that 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, decided to release massive quantities of untreated sewage down a natural slough. The officials gave downstream owners no warning about the release. As the Supreme Court tersely described the resulting catastrophe, "The effluent killed growing crops... at farms downstream along the slough." 315 Or. at 60, 843 P.2d at 402.

The Court, in addressing the claim that the city had taken the farmers' crops, did not discuss the Oregon rule that, absent a sales contract, standing crops (or trees) are considered part of the underlying real property. Instead, 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." 315 Or. at 70, 843 P.2d at 407. In support of this conclusion the Court relied on Paullus. However, the Court failed to observe that there was no factual or legal basis in the record of Hawkins for applying anything other than the general rule that trees and crops are part of the realty. Thus, the language in Hawkins is arguably in tension with the precedents of the Oregon Supreme Court recognizing that trees are part of the realty.

The ruling in Hawkins can and should be reconciled with Parsons and Hink and other precedents recognizing that trees are part of the realty on the ground that Hawkins involved a physical occupation rather than a regulatory restriction on the use of property. The taking in Hawkins was effected by flood waters released by government officials onto private property. Government flooding of private property is a quintessential example of a taking by physical occupation. See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); see generally Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) (discussing Pumpelly and other flooding cases). When the government physically occupies private property, the parcel as a whole rule does not apply. See Tahoe, 122 S.Ct. at 1479. Thus, because Hawkins involved government flooding of private property, it was entirely logical for the

Oregon Supreme Court not to apply the parcel rule in that case. But the ruling does not alter the fact that, as a general matter, trees are part of the realty, or affect the principle that, in a challenge to a regulatory use restriction, the parcel as a whole rule governs.

With respect to this Court's application of Hawkins in Boise Cascade I, amici respectfully suggest that the Court's prior analysis was mistaken. The Court's discussion of the issue was brief: "The state's argument concerning the separability of the timber and the land is adversely answered by Hawkins v. City of La Grande, 315 Or. 57, 70-71, 843 P.2d 400 (1992), and its efforts to distinguish that case do not persuade us." As discussed above, the Court then went on to observe that the issue was "close to academic" based on the facts of the case.

The important point, apparently overlooked by the Court in Boise Cascade, is that it would be a major, unwarranted extension of the holding in Hawkins, which involved a physical occupation, to apply the same non-segmentation approach to a taking claim based on a use restriction. That novel approach would contradict the longstanding Oregon precedent treating trees and the underlying land as inseparable features of the owner's real property as well as the parcel as a whole rule. The Court should recognize that it erred in assuming that Hawkins could be extended in this fashion.

Finally, CRC contends that, apart from Oregon common law, the trees on its land should be treated as distinct from the underlying land based on Article I, section 18 of the Oregon Constitution. According to CRC (Brief at 42), language added to the constitutional provision in 1920 "provide[s] that if the government puts to a 'beneficial use' the various 'raw products' of the land, including forests, it is required to pay compensation." CRC derives from this reading of the constitutional text the conclusion that a taking claimant, in challenging a restriction on the use of the "raw products" of the land, is entitled to treat a raw product as separate property interest for the purpose of takings analysis.

This entire argument is premised on an incorrect reading of the last clause in Article I, section 18, which states: "provided, that the use of all roads, ways and waterways necessary to promote the

transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use." This language does not say what CRC says it says. This language in no way suggests that natural resource companies enjoy some special immunity from the general principles of regulatory takings law, including the parcel as whole rule. Instead, the clause narrowly focuses on whether the establishment of "roads, ways and waterways" necessary to transport raw products constitutes a "public use." The self-evident purpose of ths language was to remove any doubt that exercises of the power of eminent domain by the State to establish roads and others rights-of-way for use by resource companies in transporting their products serve a "public use" and are within the State's power. This portion of Article I, section 18 is of no help to CRC's regulatory taking claim.

C. Rejection of This Taking Claim Also is Supported by the Fact That the Board's Order Protects the Public's Wildlife From Harm.

The foregoing is sufficient to dispose of this takings case. The physical occupation claim fails as a matter of law. The regulatory claim has to be analyzed using the parcel as a whole rule, meaning that the Board's order restricted the use of less than 25% of the relevant property. No court in America has ever found a regulatory taking based on such a modest restriction. Indeed, we do not understand CRC to seriously contend that it can prevail on its regulatory taking claim if it loses on the parcel point.

However, there is another factor which makes this case different from other takings cases and which provides additional support for the State's position. This case, unlike most other regulatory takings cases, does not simply involve the interplay between the State's general police power and the Takings Clause. It also involves the power of the State to protect a publicly owned resource – the wild animals resident in the State. As we explain below, the fact that the Board's order involves an effort to protect public wildlife provides a further, independent basis for rejecting this taking claim. At a

minimum, the threat to public wildlife posed by the CRC's proposed timber operation must be treated as a relevant factor in evaluating the merits of this taking claim.

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

The fact that wild animals are public property in Oregon (and every other State) is indisputable. "[W]ild 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, 166 Or. 491, 496, 207 P.2d 153, 156 (1949), quoting Monroe v. Withycombe, 84 Or. 328, 332-39, 165 P. 227, 229 (1917). See also State v. Hume, 52 Or. 1, 5, 95 P. 808, 810 (1908) ("It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens.") Oregon long ago codified this common law doctrine. 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 known to 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 right to defend it rights in wildlife can limit the exercise of private property interests. 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 or marketing of game.

186 Or. at 499-500, 207 P.2d at 156-57 (emphases added). See also State v. Pulos, 64 Or. 92, 95, 129 P 128 (1913) (the taking of wildlife is "not a right, but is a privilege, which may be restricted, prohibited or conditioned, as the lawmaking power sees fit"); State v. Catholic, 75 Or. 367, 374, 147 P 372 (1915) (as an incident of the state's ownership of wild animals, "the legislative assembly may enact such laws as tend to protect the species from injury by human means").

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 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).

Many decisions from other jurisdictions are in accord. 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. ("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, 116 NE 99 (N.Y. 1917), 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."

Id. at 101-02.

Historically, the doctrine of public ownership was primarily applied in cases involving game animals. But the doctrine certainly applies, and logically should apply with even greater force, when an en entire species is threatened with extinction. In State v. Sour Mountain Realty, Inc., 714 N.Y.S.2d 78 (N.Y. S.Ct., App. Div. 2000), a New York 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 codified the public ownership doctrine, and stated that the "State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power" without triggering the Takings Clause. Id. at 84. See also Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (rejecting taking claim based on regulations designed to protect 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 altering the physical environment which would lead to the death or injury of wildlife. 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 held that the public ownership doctrine justified protection not only of the beavers themselves but of 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 US 687 (1995) (upholding, based on the language of the statute and sound science, an Endangered Species Act regulation defining a "take" of an endangered species as including destruction of critical habitat upon which the species depends for its survival).

2. The Public Ownership Doctrine Supports Rejection of This Taking Claim.

The public ownership doctrine is potentially relevant to the takings analysis in this case in several different ways. First, it can support the conclusion that the taking claim must be rejected because CRC lacks a protected property right to conduct the proposed logging operation under "background principles" of State "property" and/or "nuisance" law. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the U.S. Supreme Court established that regulatory restrictions do not effect a taking if they "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Id. at 1029. See also Dodd v. Hood River, 317 Or. 172. 183, 855 P.2d 608 (1993), stating that a taking claim must fail "'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with'." (Quoting Lucas, 505 U.S. at 1027.)

Oregon courts have relied upon this "logically antecedent inquiry" to resolve regulatory takings cases in several different contexts. In Stevens v. City of Cannon Beach, 114 Or. App. 457, 835 P.2d 940 (1992), aff'd, 317 Or. 131 (1993), cert. denied, 510 U.S. 1207 (1994), this Court considered a claim that the city effected a taking by denying an owner a permit to build a seawall along the ocean shore, effectively barring development of the property as a hotel or motel. The Court read the Oregon Supreme decision in State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), as establishing "that 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," this 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, 114 Or. App. at 460. 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, 317 Or. at 143 (quoting Thornton, 254 Or. at 598).

This Court applied the same analysis in Kinross Copper Corp. v. State of Oregon, 160 Or. App. 513, 981 P.2d 833 (1999), on rehearing, 163 Or. App. 357 (1999), review denied, 330 Or. 71 (2000), cert. denied, 531 U.S. 960 (2000). In that case the Court affirmed rejection of a taking claim by the holder of unpatented mining rights based on the state's denial of a wastewater discharge permit for a mine. Relying in part on the statutory declaration that "[a]ll water within the state from all sources of water supply belongs to the public," ORS 537.110, the Court said, "If the plaintiff has a private property right to discharge wastewater into the publicly owned waters of the state, the right must have come into existence... after compliance with state law regarding the creation and recognition of state water rights."

Because the claimant had not complied with these procedures, the Court ruled, it had never acquired any property right to discharge into the public waters of the state. "In short," the Court said, "plaintiff's takings claim is predicated on the loss of a right that it never possessed, namely, the 'right' to discharge mining wastes into the waters of the state. It necessarily follows that, in denying plaintiff's application for a permit to conduct that activity, the state has not effected a taking of private property within the meaning of either the state or federal constitutions." Kinross, 160 Or. App. at 525-26.

Courts in other jurisdictions have reached similar results. On May 30, 2002, 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). Applying the same analysis which this Court used in Kinross, the court said that the Commonwealth was entitled to defend against the taking claim on the theory 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, 2002 WL 31190846 (9th Cir., Oct. 3, 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).

This case, involving the doctrine of publicly owned wildlife, is properly governed by the same analysis. The doctrine of public ownership of wildlife is unquestionably 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, the Board order cannot be viewed as a taking. It is irrelevant that CRC may not have intended or desired to kill or injure the bald eagles present on the property. CRC does claim a property right to destroy the specific tree in which the eagles are nesting

(as well as adjacent fledgling and roosting trees). See Board of Forestry Order, January 25, 1999, at 22. According to the state's expert evidence, destroying this nest site would prevent the eagles from reproducing at the site, reduce these eagles' overall chances of reproductive success, and interfere with the Board's ability to carry out its duty to ensure the bald eagle's long-term survival. See Id. at 22-23. The public ownership doctrine precludes this taking claim because the doctrine not only protects the animals themselves, but also the "dams, houses, homes or abiding places of same."

For related reasons, the Board rule also is justified under background principles of Oregon "nuisance" law.[2] "A public nuisance is an invasion of a right that is common to all members of the public." Mark v. State Department of Fish and Wildlife, 158 Or. App. 355, 360, 974 P.2d 716 (1999), citing section 521B of the Restatement (Second) of Torts. The public's rights in wildlife, which are held by the state in trust for the benefit of all the people, are unquestionably rights "common to the general public." In addition, CRC's proposed timber operation certainly represents an "unreasonable interference" with the public's rights in wildlife because it threatens to harm individual animals and would increase the risk of extinction of the entire species. Thus, because the Board's order protects rights "common to the general public," CRC's taking claim is barred by background principles of nuisance law.

The analysis employed by the Pennsylvania Supreme Court in Machipongo v. Commonwealth of Pennsylvania, supra, is directly applicable to this case. The owners of coal interests challenged as a taking a restriction on coal mining designed to protect streams from acid mine discharges. The state

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[2] The amici acknowledge that this contention arguably asks the Court to reconsider its rejection, in Boise Cascade Corp. v. State of Oregon, 164 Or. App. 114, 991 P.2d 563 (1999), of a nuisance defense in a similar case. We simply observe that the Court stated in that case that the State "offer[ed] no authority" in support of its position. Id. at 126, Moreover, the Court in Boise Cascade did not address the separate question of whether the claim might by barred based on background principles of property law, as opposed to nuisance law, or whether the public ownership doctrine, even if not a complete bar to a taking claim, should at least inform an owner's "reasonable investment-backed expectations."

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 section 821B of the Restatement (Second) of Torts, 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.

Finally, whether or not the public ownership doctrine justifies an absolute bar to a taking claim based on background principles of state property and/or nuisance law, the doctrine certainly must be relevant, at a minimum, in determining the reasonableness of CRC's "investment-backed expectations." 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 in the judgment). The fact that a proposed private land use activity would improperly invade public rights certainly helps define the reasonableness of a claimant's expectations. See R.W. Docks & Slips v. State, 628 N.W.2d 781 (Wisc. 2001) (because private interest in filling tidelands is subordinate to public rights in navigable waters, claimant lacked reasonable investment-backed expectations sufficient to support a taking claim). It would be a harsh and remarkable result if the public ownership rights at stake in this case did not inform the Court's judgment about this taking claim.

D. CRC's "Substantially Advance" Claim Does Not Raise a Legitimate Issue Under the Takings Clause.

The Court also should reject CRC's contention that the Board effected a taking because its order allegedly "failed to substantially advance a legitimate state interest." For a number of reasons, the facts of this case preclude recovery based on this theory. But the larger point is that the ostensible substantially advance test is not a takings test at all. It is a due process test. Because this allegation does not frame an intelligible takings issue, this portion of CRC's taking claim should be rejected as a matter of law.

The most recent U.S. Supreme Court case to directly address this issue is Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The case involved both due process and takings challenges to the Coal Industry Retiree Health Benefit Act. Four Justices, led by Justice O'Connor, concluded that the Coal Act effected a taking under the Fifth Amendment, and found it unnecessary to address the due process claim. Justice Kennedy, who cast the decisive vote in favor of the plaintiff, rejected the takings claim but concluded that the Act violated the Due Process Clause. Four Justices concluded that the Coal Act neither violated the Due Process Clause nor effected a taking.

The significant point for present purposes is that a majority of the justices agreed that plaintiff's assertion that the Act was arbitrary and unreasonable not only did not state a taking claim, but positively precluded a taking claim. Justice Breyer, speaking for himself and three other justices, stated that the Takings Clause did "not apply" because the clause refers "to the taking of 'private property... for public use without just compensation.'" Id. at 554. "As this language suggests," he said, "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government activity, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public good.'" Id. (emphasis added). Justice Kennedy endorsed this analysis and stated that the case ultimately raised a

question about the "legitimacy" of the Coal Act and therefore did not involve a viable taking claim. Id. at 545. According to Justice Kennedy, the Court had to first resolve the question of the Coal Act's legitimacy under the Due Process Clause, "reserving takings analysis for cases where the government action is otherwise permissible." Id. at 546 (emphasis added). Unless the government action is "legitimate" and "permissible," Kennedy said, it cannot support a claim for compensation under the Takings Clause. The reasoning of the five-justice majority in Eastern Enterprises means that the alleged failure of a government action to substantially advance a legitimate state interest must be treated as raising a due process issue, not a takings issue.

Although the views expressed by the fractured majority in Eastern Enterprises do no represent a square holding, the lower federal courts have treated the views of the five-justice majority as binding authority. See Commonwealth Edison Corp. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc), cert. denied, 122 S.Ct. 2293 (2002) (expressing agreement "with the prevailing view that we are obligated to follow the views of [the] majority" in Eastern Enterprises).

A number of lower federal and state courts, both pre- and post-Eastern Enterprises, have rejected the ostensible substantially advance takings test. See, e.g., Simi Investment Co. v. Harris County, Inc., 256 F.3d 323 (5th Cir. 2001) (on application for rehearing) (claims of "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 reject the ostensible substantially advance takings test. 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).

While the U.S. Supreme Court, in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), upheld a taking claim based on a jury instruction incorporating the "substantially advance" theory of takings liability, the decision does not contradict Eastern Enterprises. The defendant city in Del Monte Dunes waived any objection to the jury instructions incorporating the substantially advance test, and therefore the Supreme Court ruled that the city had no standing to challenge the substantially advance test. Thus, the fact that the Supreme Court upheld the finding of a taking in Del Monte Dunes case has no precedential significance.

Furthermore, a careful reading of the different opinions in Del Monte Dunes demonstrates that the decision actually reinforces Eastern Enterprises. No member of the Court spoke in defense of the ostensible substantially advance takings test. In addition, five of the justices either wrote opinions, or joined in opinions, expressly reserving the question of the validity of the substantially advance test, indicating that the result in the case should not be taken as an endorsement of the test. See 526 U.S. 687, 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 expressing doubt about the substantially advance test included Justice Antonin Scalia, who, based on his earlier decision in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), had generally been viewed as the leading champion on the Court of this ostensible takings test. In sum, Del Monte Dunes supports (and certainly

does not undermine) the conclusion that the substantially advance test is not a legitimate takings test.[3]

Accordingly, the Court should reject this portion of plaintiff's taking case on the ground that the ostensible "substantially advance" test is not a taking test at all. CRC might have asserted a similar claim under the Due Process Clause, in which case the claim would certainly have failed under the applicable rational basis test. It is sufficient for present purposes, however, to recognize that CRC has not asserted a viable taking claim at all.[4]

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Circuit Court.

DATED this _____ day of October, 2002.

Respectfully submitted,

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[3] The conclusion that there is no general "failure to substantially advance" test for evaluating takings challenges to restrictions on the use of property does not affect the "essential nexus" and "rough proportionality" tests applicable in cases in which a landowner is effectively required to deed property to the public. See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[4] In the alternative, even if the Court were to conclude that some type of means-ends analysis were appropriate in addressing takings challenges to use restriction such as this, the standard of review should be no different than ordinary "rationale basis" review. See Del Monte Dunes, 526 U.S. at 704 (testing land use restrictions to determine if they are "reasonably related" to legitimate public interests). Cf. Rogers Machinery, Inc v. Washington County, 181 Or. App. 369, 45 P.3d 966, review denied, 334 Or. 492 (2002) (heightened scrutiny does not apply to monetary exaction imposed by general legislation). Under the rational basis standard, the Circuit Court was obviously correct in rejecting this claim.

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