IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION -- SECOND DIVISION

THE STATE OF NEW YORK and
JOHN P. CAHILL, as COMMISSIONER
OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

No. 99-03232

Plaintiffs-Respondents,

against

SOUR MOUNTAIN REALTY, INC.

Defendant-Appellant.

AMICUS CURIAE **BRIEF OF PUTNAM-HIGHLANDS AUDUBON SOCIETY IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

John D. Echeverria

Jon T. Zeidler
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9850

July 27, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591 (1998)
Albany Area Builders Ass'n v. Town of Clifton Park, 172 A.D.2d 54 (3d Dept.1991)
Anthony Wilkinson Livestock Co. v. McIlquam, 83 P. 364 (Wyo. 1905)
Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821)
Attorney General v. Hermes, 339 N.W.2d 545 (Mich Ct. App. 1993)
Barrett v. State, 220 N.Y. 423 (1917)
Bauer v. Game, Forestation and Parks Comm'n, 293 N.W. 282 (Neb. 1940)
Bay View, Inc. v. Ahtna, 105 F.3d 1281 (9th Cir. 1997)
Betchart v. Dep't of Fish & Game, 205 Cal. Rptr. 135 (Cal. Ct. App. 1984)
Breezy Point Cooperative, Inc. v. City of New York, 176 A.D.2d 909 (2d Dept. 1991)
Camfield v. United States, 167 U.S. 518 (1897)
Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied, Christy v. Lujan*, 490 U.S. 1114 (1989)
Coastal Petroleum v. Chiles, 701 So.2d 619 (Fla. Ct. App. 1997), *cert denied*, 118 S.Ct. 2369 (1998)
Columbia River Fisherman's Protection Union v. City of St. Helens, 87 P.2d 195 (1939)
Cook v. State of Washington, 74 P.2d 199 (1937)
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977)
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)
Ellis v. Marsh, 164 Misc.2d 135 (Sup. Ct. Albany Co. 1995)
Farris v. Arkansas State Game and Fish Comm'n, 310 S.W. 2d 231 (Ark. 1958)
Fed. Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987)
Fields v. Wilson, 207 P.2d 153 (1949)
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)
Flotilla Game & Freshwater Fish Comm'n v. Flotilla, 636 So.2d 761 (Fla. Ct. App. 1994)
Geer v. Connecticut, 161 U.S. 519 (1896)
Hughes v. Oklahoma, 441 U.S. 322 (1979)
In re Delaware River at Stilesville, 131 A.D. 403 (3d Dept. 1909)
In re Steuart Transportation Co., 495 F.Supp. 38 (E.D. Va. 1980)
Kim v. City of New York, 90 N.Y.2d 1, *cert. denied*, 118 S.Ct. 50 (1997)
Lawton v. Steele, 152 U.S. 133 (1894)
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)
Maitland v. The People, 23 P.2d 116 (Colo. 1933)
Massar v. New York State Thruway Authority, 34 Misc.2d 195 (Ct. Cl. 1962)
Moerman v. State of California, 21 Cal.Rptr.2d 329 (Cal. Ct. App. 1993), *cert. denied*, 511 U.S.

1031 (1994)
Mountain States Legal Found. v. Hodel, 799 F.2d 1423 (10th Cir. 1986), *cert denied*, 480 U.S. 951 (1987)
People v. Bootman, 180 N.Y. 1 (1904)
People v. Chimbers, 91 Misc. 2d 927 (Sup. Ct. Madison Co. 1977)
Phelps v. Racey, 60 N. Y. 10 (1875)
Phillips v. Washington Legal Found., 118 S.Ct. 1925 (1998)
Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 903 P. 2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996)
Rains v. Washington Dep't of Fisheries, 575 P.2d 1057 (Wash. 1978)
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)
Schwartzman v. Berle, 98 Misc.2d 936 (Sup. Ct. Rockland Co. 1979)
Scranton v. Wheeler, 179 U.S. 141 (1900)
Seawall Assoc. v. City of New York, 74 N.Y.2d 92, *cert. denied*, 493 U.S. 976 (1989)
Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 1999 WL 506593 (N.C. App. July 20, 1999)
Shepherd v. State of Alaska, 897 P.2d 33 (Alas. 1995)
Sierra Club v. Dep't of Forestry & Fire Protection, 26 Cal.Rptr.2d 338 (Cal. Ct. App. 1994)
Sloup v. Town of Islip, 78 Misc.2d 366 (Sup. Ct. Suffolk Co. 1974)
Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert*. *denied*, 507 U.S. 987 (1993)
State ex rel. Bacich v. Huse, 59 P.2d 1101 (Wash. 1936)
State v. McHugh, 630 So.2d 1259 (La. 1994)
State v. McKinnon, 133 A.2d 885 (Me. 1957)
State of Montana v. Fetterer, 841 P.2d 467 (Mont. 1992)
State of Oregon v. Tourtillott, 618 P.2d 423 (1980), *cert. denied*, 451 U.S. 972 (1981)
State of Texas v. Bartee, 894 S.W.2d 34 (Tx. 1994)
State of Washington v. Gillette, 621 P.2d 764 (Wash. Ct. App. 1980)

Stevens v. City of Cannon Beach, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994)
Toomer v. Witsell, 334 U.S. 385 (1948)
Town of Islip v. Zalak, 165 A.D.2d 83 (2d Dept. 1991)
Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 167 N.W.2d 311 (Mich. Ct. App. 1969)
United States ex rel. Bergen v. Lawrence, 848 F.2d 1502 (10th Cir.), *cert. denied*, 488 U.S. 980 (1988)
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
Yee v. Escondido, 503 U.S. 519 (1992)

STATUTES AND ORDERS

N.Y. Envtl. Conserv. Law §11-0105 (McKinney 1999)

MISCELLANEOUS AUTHORITY

2 W. Blackstone, Commentaries
Carl D. Etling, *Who Owns the Wildlife?*, 3 Envtl. L. 28 (1973)
Oliver Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property To Protect Them Constitute 'Takings'?* 80 Iowa L. Rev. 297 (1995)
Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. Rev. 703 (1976)
Ruth S. Musgrave & Mary Ann Stein, State Wildlife Laws Handbook (1993)
J.C. Thomas, Textbook on Roman Law 167 (1976)

IN THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION -- SECOND DIVISION
THE STATE OF NEW YORK and
JOHN P. CAHILL, as COMMISSIONER
OF THE NEW YORK STATE

DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Case No. 99-03232

Plaintiffs-Respondents,

against

SOUR MOUNTAIN REALTY, INC.,

Defendant-Appellant.

INTRODUCTION AND SUMMARY OF ARGUMENT

Putnam Highlands Audubon Society respectfully submits this *amicus curiae* brief in support of the plaintiffs-respondents State of New York *et al.* and urges the Court to affirm the Supreme Court's grant of a preliminary injunction directing the defendant-appellant to remove a "snake proof" fence erected without a permit in violation of the New York Endangered Species Act.

Putnam Highlands Audubon Society ("PHAS") is a New York not-for-profit corporation with approximately 475 members from Putnam and southern Dutchess Counties. PHAS is dedicated to the preservation and restoration of wildlife and wildlife habitat in the Putnam Highlands, including the area effected by Sour Mountain Realty's actions at issue in this case. PHAS has a stake in this controversy because, unless the decision and order of the Supreme Court is upheld, the State's longstanding authority to protect wildlife and habitat in the Putnam Highlands will be severely impaired. In addition, PHAS has a general interest in upholding the State's authority to manage and protect publicly owned wild animals throughout the State of New York for the benefit of all the citizens of the State.

PHAS seeks to assist the Court in resolving this appeal by addressing a single contention made by appellants: that the Supreme Court's award of injunctive relief in favor of the State improperly failed to consider Sour Mountain Realty's private property rights protected by the takings clause of the Fifth Amendment of the U.S. Constitution. For several independent reasons, there is no merit to this contention and this Court should reject it.

First, as a threshold procedural matter, Sour Mountain Realty ("SMR") has no ripe "taking" claim to assert because SMR never sought, much less was denied, a permit from the N.Y. Department of Environmental Conservation to construct the snake-proof fence. Absent a ripe constitutional taking claim, SMR is not entitled to assert an alleged taking to challenge the preliminary injunction.

Furthermore, a taking claim provides no basis for challenging the preliminary injunction. The takings clause does not generally bar the government from proceeding with an action. Instead, in certain limited circumstances, it requires the government to pay financial compensation as a condition of proceeding. Thus, assuming SMR had a ripe and a valid taking claim (it has neither), such a claim would provide no basis for challenging the preliminary injunction entered by the Supreme Court. At most, it would provide the basis for a claim for financial compensation against the State.

Finally, on the merits, there is no substance to SMR's constitutional taking claim. Contrary to SMR's argument, the State's prohibition against erecting and maintaining a snake-proof fence to prevent harm to timber rattlesnakes and their habitat does not effect a "physical occupation" of

SMR's property. Also, even if the prohibition against SMR's fence could be viewed as a physical occupation, a finding of a compensable taking would be precluded by the well established doctrine of public ownership of wildlife, which has long supported extensive limitations on private property rights to safeguard wild animals. Lastly, again contrary to SMR's argument, a land owner has no absolute constitutional property right to fence its property in order to block wild animals from making usual and customary use of their natural habitat.

ARGUMENT

I.SMR Has No Ripe Taking Claim and Therefore Cannot Object to the Preliminary Injunction Based on the Takings Clause.

As a threshold matter, SMR's challenge to the preliminary injunction should be rejected because SMR's taking claim is not ripe and therefore provides no basis for objecting to the preliminary injunction.

As explained in the Brief of the State of New York *et al.,* Brief for Plaintiffs-Respondents, at 28 & n. 25, SMR was required to but failed to apply for a permit to construct the snake-proof fence. As the Supreme Court's findings confirm, the fence results in a "taking" under the Endangered Species Act, and therefore SMR was not permitted to proceed with erection of the fence without first obtaining a permit under the Act. Having disregarded this permit requirement, SMR cannot now object under the takings clause of the 5th Amendment to the requirement that this fence, illegally constructed without a permit, be removed.

It is settled New York law that an owner cannot challenge a regulatory requirement as a taking without first having applied for and been denied permission to proceed in accordance with the regulations. *See Breezy Point Cooperative, Inc. v. City of New York*, 176 A.D.2d 909 (2d Dept. 1991) (claim that street mapping effected a taking not ripe when plaintiff failed to pursue available administrative remedies); *Albany Area Builders Ass'n v. Town of Clifton Park*, 172 A.D.2d 54 (3d Dept.1991) (takings claim against town for imposing limits on building permits not ripe when landowner failed to apply for a variance); *Ellis v. Marsh*, 164 Misc.2d 135 (Sup. Ct. Albany Co.1995) (claim that designation of property as wetland effected a taking not ripe because owner never sought permit to conduct activity in wetlands). In short, SMR could not evade the permitting process for the fence and then turn around and challenge the requirement to obtain a permit as a taking.

Because SMR never applied for the permit, it also cannot object under the takings clause to enforcement of the permit requirement through an injunction. Thus, for example, in *Town of Islip v. Zalak*, 165 A.D.2d 83 (2d Dept. 1991), the town brought an action against a landowner for illegally operating a waste transfer station without the necessary permit from the town. The owner sought to defend on the ground that the town's permit ordinance unconstitutionally terminated a pre-existing use without a reasonable amortization period. The Court rejected this property rights argument on ripeness grounds, because administrative relief had not "been sought and denied" under the ordinance. *Id.* at 94. Like the owner in *Town of Islip*, SMR, which has never sought or been denied a permit to build the fence, cannot object to an injunction enforcing the permit requirement as a violation of its property rights.

II.Even if SMR Had a Ripe Claim, a Taking Claim Provides No Basis for Objecting to the Issuance of the Preliminary Injunction.

As a second threshold point, even if SMR had a ripe taking claim to assert, such a claim would provide no basis for objecting to the Supreme Court's issuance of a preliminary injunction in favor of the State.

The takings clause does not generally bar the government from proceeding with an action, but instead simply requires the government to pay financial compensation as a condition of proceeding. This reflects the basic principle that the takings clause "does not prohibit the taking of private property but, instead, places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987); *see also Bay View, Inc. v. Ahtna*, 105 F.3d 1281, 1284-85 (9th Cir. 1997) ("the government is not prohibited from taking private property; indeed the eminent domain clause contemplates the government will take private property as needed for public purposes, so long a it pays compensation").

Consistent with this understanding, if SMR had a viable taking claim to assert, that claim would, at most, support a right to seek financial compensation, not a right to relief in an equitable proceeding. As the U.S. Supreme Court said in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), generally speaking "[e]quitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985) (same); *but cf. Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality opinion) (recognizing exception to rule against availability of injunctive relief in takings suits challenging government-mandated transfers of money). It is clear that, if the State of New York has in fact effected a taking of SMR's property, SMR is entitled to seek financial compensation for the taking from the State. However, SMR is not entitled to relief in an equitable proceeding to stop the alleged taking.

For this second reason, the Court should affirm the Supreme Court's entry of injunctive relief in favor of the State, without the necessity of even addressing the merits of SMR's takings argument. However, as discussed below, it is also clear that, on the merits of the underlying substantive takings issue, SMR is mistaken in arguing that the State's prohibition against the erection and maintenance of the snake-proof fence effected a taking. To the contrary, that action is consistent with and supported by a venerable legal tradition upholding the State's broad authority to protect and manage wild animals, including wildlife and wildlife habitat located on private real property.

III.The State's Prohibition Against the Erection and Maintenance of the Snake-Proof Fence Did Not Effect a Taking.

SMR contends that the State's prohibition against the maintenance and erection of a snake-proof fence effected a "physical occupation" of its property, thereby seeking to invoke one of the categories of *per se* regulatory takings recognized by the U.S. Supreme Court. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 442 (1982).[1] This argument cannot be sustained, for several different reasons.

First, the State's prohibition against SMR erecting and maintaining its snake-proof fence does not represent a physical occupation of private property. Wild animals occupying their natural habitat do not produce the kind of government-authorized physical occupation of private property which triggers *per se* physicial-occupation takings analysis. Furthermore, a government prohibition against construction and maintenance of a fence in order to protect the land's natural condition is not the kind of affirmative governmental intrusion into private property rights which triggers *per se* analysis.

Second, even if application of the New York Endangered Species Act in this case might be viewed as effecting a type of physical occupation, there would be no compensable taking in this case because the restrictions are consistent with and supported by the longstanding doctrine of state ownership of wildlife. Under the U.S. Supreme Court's landmark decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), even if a government action would otherwise effect a taking, it does not result in a taking to the extent that it is consistent with and supported by "background principles" of State property or nuisance law. The doctrine of public ownership of

wildlife, described in detail below, represents a "background principle" of New York property law which independently precludes a finding of a taking in this case.

Finally, contrary to SMR's position, there is no "right to fence" exception to the established rule that restrictions on the use of private property in order to protect public rights in wild animals do not result in a taking under the Fifth Amendment.

Before directly addressing the specific arguments advanced by SMR, it will be useful to provide a thumbnail sketch of the impressive body of law, in New York State and around the country, which supports broad public authority to manage and protect wild animals and their habitat located on privately owned lands.

1. The State of New York Has Broad Authority to Manage and Protect Wildlife in Order to Protect Public Property Rights in Wild Animals.

The State of New York, like every other State in the nation, owns all the wild animals in the State as trustee for all the citizens of the State. Because of wild animals' special status as a kind of public property, the State has extraordinarily broad powers to manage and protect wildlife. As the Washington Supreme Court has put it: "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 wildlife within their borders is perfectly astounding." *Cook v. State of Washington*, 74 P.2d 199, 201 (1937).

1. The Doctrine of Public Ownership of Wild Animals

.

The doctrine that the State owns all the wild animals in the State for the benefit of the general public has long been recognized by New York courts. As the New York Court of Appeals stated in *Barrett v. State*, 220 N.Y. 423 (1917):

[O]wnership [of wild animals] 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. 427. *See also People v. Bootman*, 180 N.Y. 1, 9 (1904) ("The wild game within the state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so."); *Sloup v. Town of Islip*, 78 Misc.2d 366, 367 (Sup. Ct. Suffolk Co. 1974) ("Migratory marine fish are *ferae naturae* and are the property of the state."); *People v. Chimbers*, 91 Misc.2d 927, 928 (Sup. Ct. Madison Co. 1977) ("Ownership of fish and game, within the State, is in its sovereign capacity and the State has the general right to protect fish and game.").

This common law principle has been restated and reaffirmed by statute. Chapter 43-B of the Consolidated Laws of New York states,

The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership.

N.Y. Envtl. Conserv. Law §11-0105 (McKinney 1999).

Like New York, every other state in the United States also recognizes the doctrine of public ownership of wildlife.[2] *See, e.g.*, *Fields v. Wilson,* 207 P.2d 153 (1949) (Wild "animals [are] *ferae naturae,* and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common")*; Shepherd v. State of Alaska*, 897 P.2d 33, 40 (Alas. 1995) ("the state acts as 'trustee' of the naturally occurring fish and wildlife in the state for the benefit of its citizens"); *State of Texas v. Bartee*, 894 S.W. 2d 34, 41 (Tx. 1994) (common law of Texas and the rest of the United States is that "the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its citizens in common"). As in New York, many states also have codified the common law rule of public ownership of wildlife. *See* Ruth S. Musgrave & Mary Ann Stein, State Wildlife Laws Handbook (1993) (listing 32 states with constitutional or statutory provisions affirming public ownership of wildlife).

1. The Broad Public Authority to Protect Public Rights in Wild Animals

.

New York courts, like courts in other states, have repeatedly held, in a variety of different contexts, that the public ownership rights in wildlife support broad public authority to manage and protect wild animals located on privately owned land.

For example, in *Barrett*, *supra*, the Court of Appeals held that the State did not infringe on private property rights when it prohibited land owners from "molesting" wild beavers present on their land who destroyed a valuable stand of trees. *Accord Massar v. New York State Thruway Authority*, 34 Misc.2d 195, 197 (Ct. Cl. 1962) (rejecting a claim for damages where a motorist hit a wild deer, and stating that "[t]he government has the right to protect wild animals for the benefit of the public at large and no one has the right to complain of incidental injuries which may occur as a result"). These rulings are consistent with decisions from other jurisdictions recognizing that owners have no constitutional right to compensation from the public for private property damage caused by wild animals. *See, e.g., Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert denied*, *Christy v. Lujan*, 490 U.S. 1114 (1989) (rejecting claim that landowner has "a right to protect [private] property from immediate destruction by federally protected wildlife"); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (rejecting claim for compensation where federally managed wild burros and horses caused extensive damage to private grazing lands); *Moerman v. State of California*, 21 Cal.Rptr.2d 329 (Cal. Ct. App. 1993), *cert. denied*, 511 U.S. 1031 (1994) (state not liable for destruction of fences and loss of forage caused by reintroduced tule elk); *Maitland v. The People,* 23 P.2d 116, 117 (Col. 1933) (rejecting claim that destruction of plaintiff's crops by wild game infringed on owner's property rights, observing that "whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection," but "such incidental injuries are not sufficient to render the protecting statute unconstitutional").

Familiar and widespread restrictions on the place, time and manner of hunting, including hunting by those who own the land on which the game is being pursued, are also based on the public ownership doctrine. Thus, in *Schwartzman v. Berle*, 98 Misc.2d 936 (Sup. Ct. Rockland Co. 1979), the Court rejected a challenge to the New York Department of Environmental Conservation's denial of an application of a hunting permit, observing that "[p]reservation of fish and game is a matter within the public interest since, without adequate and special protection, they would be wasted and destroyed. It is, therefore, within the ambit of the State's police power to enact laws for the preservation of fish and game to secure their beneficial use in the future to the citizens of the State." *Id.* at 938 (internal citations omitted). *See also Maitland v. The People*, 23 P.2d 116, 117 (Colo. 1933) ("The power of the state to make regulations tending to conserve the game within its jurisdiction is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity, and as

an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game from the greed of the hunters."); *Bauer v. Game, Forestation and Parks Comm'n*, 293 N.W. 282 (Neb. 1940) (owner of land included within designated game refuge area not deprived of property right by prohibition against hunting on his own property); *State v. McKinnon*, 133 A.2d 885 (Me. 1957) (same).

In a related context, in *Farris v. Arkansas State Game and Fish Comm'n*, 310 S.W.2d 231 (Ark. 1958), the Supreme Court of Arkansas rejected a takings challenge to a state law prohibiting an owner from selling fish raised in private waters on his own land. The Court characterized the right of an owner to take fish and wildlife upon his own land as a "a property right, as much as any other distinct right incident to his ownership of the soil." *Id.* at 235. At the same time, the Court stated that this right is not an "unqualified and absolute right," because it "must *always yield* to the state's ownership and title [in wildlife], held for the purposes of regulation and preservation for the public use." *Id.* (Emphasis added).

Courts in New York and other states also have upheld State authority to require the modification or even destruction of private property in order to protect publicly owned wildlife, even to the point of upholding the right of state agents to enter onto private property for such purposes. Thus, in *In re Delaware River at Stilesville*, 131 A.D. 403 (3d Dept. 1909), the Court rejected a dam owner's challenge to a State requirement that it construct a fish ladder. The owner argued that, because the dam had been lawfully constructed under state law, the State could not impose new obligations on the owner. The Court disagreed, noting, "[t]he people of the state have as an easement in the stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply ..., and no riparian proprietor upon a stream has the right to obstruct the free passage of the fish to the detriment of other riparian proprietors or of the public." *Id.* at 411. The Court concluded, "[e]nforcing the easement relating to fish, and requiring the petitioner to put in a fishway as in effect a condition of maintaining its dam, is not the taking of private property without making just compensation, as the petitioner cannot be deprived of a right which it never possessed." *Id.* at 418-9.

The courts also have held that the public ownership doctrine provides support for warrantless searches of private lands where wild animals are present in order to enforce state fish and game laws. As a California court of appeals stated, "California's pervasive scheme of regulating wildgame hunting would be a futile pursuit without frequent and unannounced patrols." *Betchart v. Dep't of Fish & Game*, 205 Cal. Rptr. 135, 137 (Cal. Ct. App. 1984) (affirming warrantless search of private lands because California wildlife is publicly owned). *See also State v. McHugh*, 630 So.2d 1259, 1264 (La. 1994) (approving warrantless random stops of boats by state wildlife agents to check for violations of waterfowl bag limits, and stating that "[t]here can be no doubt that the state's interest in safeguarding the wildlife and the fisheries for the benefit of the people is compelling."). *Accord State of Oregon v. Tourtillott*, 618 P.2d 423 (1980), *cert. denied*, 451 U.S. 972 (1981) (affirming constitutionality of "game checkpoint," emphasizing the "substantial... governmental interest in the enforcement of laws for the preservation of wildlife").

Courts also have routinely recognized the right of a state to sue private parties for money damages for unauthorized injury to the public's wildlife. In *State of Washington v. Gillette*, 621 P.2d 764 (Wash. Ct. App. 1980), the Court affirmed, based on the public ownership doctrine, an award of damages in favor of the State Department of Fisheries against a landowner who destroyed salmon eggs by running a tractor through a streambed. The Court stated, "the food fish of the state are the sole property of the people and the state, acting for the people, is dealing with its own property, 'over which its control is as absolute as that of any other owner over his property.'" *Id.* at 766, *quoting State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1103 (Wash. 1936). *See also In re Steuart Transportation Co.*, 495 F.Supp. 38 (E.D. Va. 1980) (recognizing right of state and federal governments to sue for damages to public wildlife resources caused by oil spill); *Attorney General v. Hermes*, 339 N.W.2d 545 (Mich. Ct. App. 1993) (recognizing that public

ownership rights in fish support action for damages by Attorney General based on harvesting of fish in violation of State fishing regulations).

Finally, the established public right in New York State and around the country to protect publicly owned wildlife has been recognized to include the right to prevent destruction of the habitat upon which wildlife depends for its existence. As the Oregon Supreme Court explained, public authority to protect wildlife would be to "no avail" if the public did not also have the power to protect critical habitat from destruction. *Columbia River Fisherman's Protection Union v. City of St. Helens*, 87 P.2d 195, 198 (1939).

In *Barrett*, the New York Court of Appeals recognized that public wildlife management authority extends to habitat protection, upholding the constitutionality of a law prohibiting the disturbance of "any wild beaver or the dams, houses, homes or *abiding places* of same." 220 N.Y. at 425. (citing New York Laws 1904, c. 674 §1) (emphasis added). The destruction of wildlife habitat, to paraphrase *Barrett*, "result[s] in driving away" the wildlife. "The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power." *Id.* at 429. Courts in other states have reached the same conclusion. *See Sierra Club v. Dep't of Forestry & Fire Protection*, 26 Cal.Rptr.2d 338 (Cal. Ct. App. 1994) (rejecting takings challenge to California Forestry Board denial of timber company proposal to cut trees on private land absent satisfactory plans to mitigate adverse impacts on endangered species); *Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84 (2d Cir. 1992), *cert*. *denied*, 507 U.S. 987 (1993) (rejecting takings claim where developer barred from building on winter deer yard); *Flotilla Game & Freshwater Fish Comm'n v. Flotilla*, 636 So.2d 761 (Fla. Ct. App. 1994) (rejecting takings challenge arising from a proscription against land development within 750 feet of a nesting bald eagle); *Township of Grosse Ile v. Dunbar & Sullivan Dredging Co.*, 167 N.W.2d 311, 316 (Mich. Ct. App. 1969) (upholding rezoning which prevented owner of island and adjoining riparian rights from dumping fill in river as within the reasonable exercise of state power to protect "fish and game habitat").[3]

B. **The Endangered Species Act As Applied in This Case Did Not**

Result in a Physical-Occupation Taking of SMR's Property.

SMR contends that application of the New York Endangered Species Act resulted in an uncompensated physical occupation of SMR's private property in violation of the takings clause of the Fifth Amendment. This contention is plainly wrong, as discussed below. First, government protection of wildlife in its natural habitat does not effect a "physical occupation" within the meaning of the relevant precedents. Second, even if there were a physical occupation, there still would be no taking in view of the State's extensive authority to protect public property rights in wild animals.

1. <u>The Lack of A Physical Occupation.</u>

Most fundamentally, there cannot be a physical occupation-type taking in this case because wild animals located in their natural habitat cannot be said to be "physically occupying" private real property within the meaning of the applicable precedents.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 442 (1982), the U.S. Supreme Court stated that a "permanent physical occupation of property" is a *per se*, or presumptive, taking. In that case the Court held that a New York law authorizing cable companies to enter onto private property to install cable facilities effected a compensable physical taking. The Court "affirm[ed] the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."

Id. at 441. When the physical occupation category applies, the Court stated, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id*. at 434-5. At the same time, the Court emphasized that its holding was "very narrow," *id*. at 441, a point the Court has repeated in subsequent decisions rejecting takings claimants' efforts to expand upon *Loretto*. *See Fed. Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 251 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 527-28 (1992).

To be sure, as SMR points out, the physical-occupation *per se* rule is not limited to physical occupations of private property by government officials or agents. It applies, for example, to physical occupations of private property by third parties authorized to occupy the property by public law or regulation. *See e.g.*, *Loretto*, 458 U.S. at 427. And it applies not only to occupation of private property by persons, but also in cases where the government has placed or authorized the placement of physical things on private property, such as by flooding private land by building a dam, or by installing a "telegraph or telephone lines, rails, and underground pipes or wires." *Id.* at 430. However, there is not the least suggestion in any U.S. Supreme Court decision, or any other court decision of which we are aware, that the physical occupation *per se* rule extends to regulations safeguarding wildlife in their natural habitats. In fact, all the relevant authority is to the contrary.

First, it is nonsensical to attempt to characterize the presence of wild animals in their natural habitat as a kind of government-authorized occupation. Thus, in *Moerman v. State of California*, 21 Cal.Rptr. 329 (Cal. Ct. App. 1993), *cert. denied*, 511 U.S. 1030 (1994), the California Court of Appeals rejected a physical-occupation taking claim where protected tule elk had damaged the owner's crops and fences, observing that "the distinction between tule elk and cable television personnel or equipment [like in *Loretto*] should be obvious. The tule elk are wild animals who roam across private and public property." Similarly, in *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986), a federal appellate court rejected the claim that federal protections for wild horses located on private lands resulted in a physical taking, describing as a "fallacy" the plaintiff's "argument that the wild horses are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the [plaintiff's] property."

The State of New York's prohibition against erection and maintenance of a snake-proof fence is most accurately viewed as a regulation of the use of land, rather than as a government-mandated physical occupation of private property. *Compare Southview Associates v. Bongartz*, *supra* (describing rejection of application to develop site of winter deer yard as a form of regulation rather than a physical occupation). In this case, the State has simply barred a proposed alteration of the natural condition of the land, and has taken no affirmative action of any kind to place wildlife on land where it does not naturally belong.

The Court of Appeals decision in *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989), upon which SMR relies, supports the conclusion that protection of wildlife naturally present on the land cannot be viewed as effecting a physical occupation-type taking. In *Seawall* the Court concluded that a single room occupancy preservation ordinance effected a taking, but explicitly distinguished the "forced intrusion of strangers" at issue in the case, *id.* at 104 , from unsuccessful takings challenge to rent control regulations protecting pre-existing tenants. *Id.* at 105. *Compare Yee v. Escondido*, 503 U.S. 519 (1992) (concluding that an ordinance which effectively locked in existing tenants of mobile homes at below-market rents did nor result in a physical occupation). If a landlord may be required to accept continued occupancy of his property by existing tenants without suffering a physical-occupation taking, it is impossible to see how a regulation which bars alteration of the natural condition of the land can be found to effect a physical occupation.

The decision of the Washington State Supreme Court in *Rains v. Washington Dep't of Fisheries*, 575 P.2d 1057 (Wash. 1978), also is instructive. The plaintiff sought a permit to excavate a creek running through his property in order to prevent flooding. The state denied the permit because the excavation would have destroyed important fish habitat. When the creek overflowed and caused major property damage, the owner filed a claim for inverse condemnation. The Court rejected the claim, observing that where a taking has been found, "affirmative action on the part of the government was involved." *Id.* at 1060.

In this case, the flooding was due to a "force majeure." No action by the state caused the flooding, there was no project or public improvement, and there was no actual public use. Neither was there any permanent infringement preventing the original use of the land nor a total appropriation of appellant's property.

The most that can be said here is that, in the exercise of its police power to protect fish life for the benefit of all its citizens, the state restricted the extent to which appellant could change the bed of Morse Creek. Controlling work in a stream bed is within the purview of regulating and protecting state fisheries.

Id. See also Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 1999 WL 506593 (N.C. App. July 20, 1999) (rejecting takings claim where prohibition on construction of seawalls led to erosion and loss of property because erosion was a "naturally occurring phenomen[on]" "merely incidental" to the regulations at issue).

Finally, the conclusion that the presence of protected wildlife on private property does not result in a physical-occupation taking is not only supported by the law, but also represents a practical result as well. Under *Loretto*, financial compensation is owed for a genuine physical occupation-type taking without regard to the economic impact of the government action. *Loretto*, 458 U.S. at 435. Accordingly, if the physical occupation rule applied to all types of wildlife management and protection regulations, as SMR suggests, the public would be subjected to potentially unlimited liability, and absurd windfalls would be granted to landowners who suffer no economic injury whatsoever from the natural presence of game and other wildlife on their property.

2. The "Background Principle" of Public Ownership of Wild Animals.

In addition, even if protection of wild animals in their natural habitat could be viewed as a type of physical occupation, a finding of a compensable taking would be precluded under the New York doctrine of public ownership of wild animals.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992), the U.S. Supreme Court established that, even when a government action would otherwise effect a *per se* taking, there is no taking if the government action parallels "background principles" limiting the scope of the property interest allegedly invaded. Moreover, the Court specifically stated that this rule applies when, as in this case, a *per se* taking is alleged based on an asserted government-mandated physical occupation of private property. *See Id.* (observing that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the owner's title" in defense of a physical occupation-type taking claim), citing *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (interests of "riparian owners in the submerged lands... bordering on a public navigable waterway" are held subject to public's navigational servitude).

Following U.S. Supreme Court precedent, the Court of Appeals has recognized that background principles of New York property law will in fact defeat a physical-occupation taking claim. In particular, in *Kim v. City of New York*, 90 N.Y.2d 1, *cert. denied*, 118 S.Ct. 50 (1997), the Court ruled that New York City's placement of fill material on the plaintiff's property in order to support an adjacent city road, though plainly a type of physical occupation, did not result in a

compensable taking because the owner held his property subject to the common law obligation in New York to provide support to public roadways. *See also Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591 (1998) (rejecting claim by landowners that recreational boaters' use of river violated landowners' property rights, based in part on *Lucas*).

Other courts across the country also have recognized that background principles of state property law trump constitutional taking claims. *See, e.g.*, *Stevens v. City of Cannon Beach*, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994) (holding that Oregon's customary public property rights in the ocean beach precluded a takings claim challenging regulations restricting private beach development); *Coastal Petroleum v. Chiles*, 701 So.2d 619 (Fla. Ct. App. 1997), *cert denied*, 118 S.Ct. 2369 (1998) (state law barring oil and gas development along Florida coast not a taking because private rights to engage in development limited by public property rights in lands under navigable waters); *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 903 P. 2d 1246, 1268 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996) (concluding that private rights in real estate held for development purposes are subject to native property rights).

Accordingly, in this case, if it were plausible to view the State's requirement that SMR not injure the timber rattlesnake and its habitat as a kind of physical occupation, there still would be no compensable taking. The State's action in prohibiting SMR's fence in order to prevent harm to wild animals reflects and is consistent with the background principle of New York law that all wild animals in the State represent public property held by the State for the benefit of all the citizens. The State cannot be said to have "taken" SMR's property because, by virtue of the public ownership doctrine, SMR never possessed a constitutional right to use its private property to intrude on this public property right in the first place.[4]

C. There is No "Right to Fence" Exception to the State's Authority to Protect and Manage Wild Animals on Private Property.

In an apparent attempt to evade the force of the public ownership doctrine, SMR argues that the State's otherwise expansive authority to manage and protect wildlife is subject to an exception when the owner seeks to fence its property and preclude wild animals from entering onto its property at all. In SMR's view, whatever other duties the public ownership doctrine may place on a landowner, it has an absolute and unqualified property right to fence its property, regardless of the fence's effect on wildlife and regardless of what burdens (if any) the presence of wildlife would impose on its ability to use the property. This argument is without merit and the Court should reject it.

First, this purported exception is fundamentally inconsistent with the public ownership doctrine itself and the breadth of public authority to protect and manage wild animals. *Compare In re Delaware River at Stilesville*, *supra* (because "[t]he people of the state have as an easement in the stream the right to have fish inhabit its waters... no riparian proprietor upon a stream has the right to obstruct the free passage of the fish to the detriment... of the public"); s*ee also Barrett*, 220 N.Y. at 427 ("no one can complain of the incidental injuries that may result" where the legislature acts to protect wild life). It makes no sense to suggest, given the numerous responsibilities private land owners have to refrain from injuring wild animals, that an owner can avoid these responsibilities by the device of erecting a fence to bar wild animals from the property altogether. For example, if an owner has no basis to object to state protections for wild animals actually present on his land and causing personal property damage, *see* pp. 8-9 (discussing authorities), an owner cannot logically claim an absolute right to completely exclude wild animals from their natural habitat. Application of this illogical reasoning would be especially inappropriate in this case given that SMR has not completed the application review process either for the construction of its fence or its proposed mine and therefore cannot point to any demonstrable economic burden whatsoever as a result of the prohibition against the snake-proof fence.

SMR cites several decisions in an effort to support the purported exception to the public ownership doctrine, but in fact none of these decisions establishes any such exception. First, SMR points to *Barrett v. State*, *supra*. In that case, as discussed, the Court of Appeals *rejected* a claim for compensation by an owner whose valuable stand of trees was destroyed by beavers. The Court's decision contains a ringing and frequently quoted affirmation of the "general right of the government to protect wild animals." *Barrett*, 220 N.Y. at 427. Moreover, the Court specifically rejected property damage caused by wild animals as a basis for financial liability:

Whenever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.

Id.

To be sure, the Court noted in passing that the State statute being enforced in that case did not prohibit either the driving away or fencing out of beavers that were actually destroying the owner's property. The Court simply observed that the constitutionality of a statute which contained such a prohibition raised a separate "question we do not decide" in this case. Thus, contrary to SMR's argument, *Barrett* does not establish that landowners have a right to build a fence in order to exclude wild animals. To the contrary, the point the Court actually did decide, that is, that landowners have no claim to financial compensation from the public based on property damage caused by wild animals, emphasizes the breadth of public authority to protect wild animals. *See Id.* at 428 ("[W]herever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interest of the public require, but what measures are necessary for the protection of such interests."), citing *Lawton v. Steele,* 152 U.S. 133, 136 (1894).

The federal court decisions upon which SMR relies to establish this supposed exception are equally unavailing. In *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc), *cert denied*, 480 U.S. 951 (1987), the Court *rejected* a takings claim by ranchers who objected to the presence on their private lands of wild horses protected under the federal Wild Free-Roaming Horses and Burros Act. The Court observed, in accordance with the traditional public ownership doctrine, that, "[i]t is well settled that wild animals are not the private property of those whose lands they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people'." *Id*. at 1426, quoting *Geer v. Connecticut,* 161 U.S. 519 (1896). "In exercising their powers to 'preserve and regulate the exploitation of an important resource,'" the Court said, "both the state and federal governments have often enacted sweeping and comprehensive measures to control activities that may adversely affect wildlife." *Id.* at 1427.

With respect to the issue of fencing, the Court simply observed that it was "not clear" that the ranchers "are completely prevented from taking measures to protect their forage from wild horses without running afoul of the proscriptions" of the Wild Free-Roaming Horses and Burros Act. *Id.* at 1428 n. 8. At the same time, however, the court cited the case of *Anthony Wilkinson Livestock Co. v. McIlquam*, 83 P. 364 (Wyo. 1905), for the proposition that a landowner is not prohibited from building a fence on his own property, "*unless by so doing he invades some right of another, or violates some public statute" Id.* (emphasis added). In short, the Court simply concluded that the federal Act at issue in the case apparently did not preclude the building of fences enclosing private property; however, as indicated by the Court's discussion of *McIlquam*, it certainly left open the possibility that Congress could impose such a prohibition.

In *Christy v. Hodel,* 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, *Christy v. Lujan*, 490 U.S. 1114 (1989), upon which SMR also relies, the 9th Circuit *rejected* the claim that federal regulations

barring a livestock owner from killing a grizzly bear to protect his sheep violated the owner's property rights. Insofar as it addresses the issue of fencing, the case focused on a due process claim rather than a takings claim. The Court first rejected the argument that the due process clause creates a fundamental right to defend private property against federally protected wildlife. Second, applying the traditional due process "rational relation" test, the Court concluded that the grizzly bear regulations rationally furthered a legitimate government purpose. The Court referred to the fact that, under the regulations at issue, the owner retained the right to fence out grizzly bears in order to bolster its conclusion that restrictions on killing grizzlies rationally furthered the concededly legitimate purpose of protecting the grizzly bear. This statement hardly establishes a broad right to fence exception in challenges to wildlife regulations brought under the takings clause.

Finally, *Camfield v. United States*, 167 U.S. 518 (1897), the last decision upon which SMR relies, tends to support, not undermine, the State's authority to regulate the placement of a fence in order to protect publicly owned wildlife. In that case, the owner held numerous individual sections of property in a checkerboard fashion mixed with federal lands in the State of Colorado, and had constructed a fence enclosing thousands of acres of both his and the public's land. The Court held that the United States did not violate the owner's property rights by requiring removal of the fence, despite the fact that the fence was located entirely on private land. The Court explicitly recognized that it was economically impractical for the owner to fence his individual sections, *id.* at 528, but nonetheless held, "[c]onsidering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, ... it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual." In short, this decision upholds, rather than denies, the government's power to require the removal of private fences to protect important public interests. *See also United States ex rel. Bergen v. Lawrence,* 848 F.2d 1502 (10th Cir.), *cert. denied*, 488 U.S. 980 (1988) (upholding district court order requiring removal of fence enclosing public and private land in order to protect antelope being injured by fence, and expressly mentioning that the same remedy might be appropriate in the case of a fence excluding antelope only from private land).

Read most charitably in favor of SMR, the *dictum* in these cases can be understood to recognize, at most, that a landowner may have a right to fence its property in order to prevent actual physical damage to his property by wild animals. But certainly the language in these decisions cannot be read to support an absolute and unqualified right under the takings clause to fence property for no reason other than a desire not to have the wildlife present on one's land, much less to avoid public regulatory review to determine if certain restrictions on the use of the property may be necessary to safeguard the public's wildlife. Thus, even assuming these cases can be read to support a narrow exception to public authority based on the public ownership doctrine, that exception would not apply in this case, because SMR does not, and cannot, contend that the presence of the threatened timber rattlesnakes on its property has caused or will cause any actual physical damage to its property.

CONCLUSION

For the foregoing reasons, as well as those set forth in the decision and order of the Supreme Court, the State of New York, and other *amici curiae* in this case, the Court should affirm the decision of the Supreme Court.

Respectfully submitted,

John D. Echeverria
Jon T. Zeidler
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.

Washington, D.C. 20001
(202) 662-9850

July 27, 1999

NOTES

[1] The U.S. Supreme Court also has recognized that a regulation can effect a taking if it eliminates all of a property's economic value. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1993). SMR does not, and obviously could not, contend that the prohibition against its snake-proof fence along the border of its property eliminated all of the property's economic value.

[2]The common law rule of public ownership of wildlife is one of the most venerable principles known to the law. Under Roman law, wild animals were subject to common ownership, and a landowner had no ownership rights in wildlife passing over his land. See J.C. Thomas, TEXTBOOK ON ROMAN LAW 167 (1976). Under English common law, which built upon the Roman legal tradition, "the sovereign held an exclusive prerogative to animals" over and above the interests held by individual landowners. See 2 W. Blackstone, COMMENTARIES 417-18. Upon the founding of the United States, the King's sovereign rights in wildlife were transferred to the individual states, which assumed the responsibility to act "as trustee[s] to support the title [in wildlife] for the common use." Arnold v. Mundy, 6 N.J.L. 1, 70 (N.J. 1821). See generally Thomas A. Lund, Early American Wildlife Law, 51 N.Y.U. L. Rev. 703 (1976).

[3] While a handful of U.S. Supreme Court decisions contain language seemingly dismissive of the doctrine of public ownership of wildlife, those decisions cannot properly be read to contradict State common law and statutory recognition of public ownership rights in wild animals. For example, in Hughes v. Oklahoma, 441 U.S. 322 (1979), the Court referred to the public ownership doctrine as a "19th century fiction." Id. at 335, quoting Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). Similarly, in Toomer v. Witsell, 334 U.S. 385, 402 (1948), the Court described the public ownership doctrine as "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Upon analysis, it is apparent that the statements in Hughes and other cases are explained by and logically confined to their particular context, that is, challenges to protectionist state legislation under the commerce or privileges and immunities clauses of the U.S. Constitution. These decisions do not affect the conclusion that the public ownership doctrine is alive and well as a matter of state wildlife law, as recognized by numerous state courts, see State of Montana v. Fetterer, 841 P.2d 467, 470 (Mont. 1992) (rejecting the argument that Hughes "effectively preclude[d]" reliance on the traditional rule that wild game in Montana is public property); Shepherd v. State of Alaska, 897 P.2d 33 (1995) (state ownership doctrine applies absent conflict with paramount federal interests), and by commentators, see Oliver Houck, Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings," 80 Iowa L. Rev. 297, 311 n. 77 (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"); Carl D. Etling, Who Owns the Wildlife?, 3 Envtl. L. 28 (Spring 1973) (describing the "import" of the Toomer decision to be "that even though a state may have plenary authority over its wildlife, it cannot avoid or circumvent the command of the Commerce Clause where it permits its fish to be placed in the stream of commerce").

In contrast to the commerce and privileges and immunities clauses of the U.S. Constitution, the takings clause has been read to incorporate and rely upon state law. See Phillips v. Washington Legal Found., 118 S.Ct. 1925, 1930 (1998) (affirming that "the Constitution protects rather than creates property interests," and that the very "existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law"). Thus, in the context of a takings claim under the Fifth Amendment, the state public

ownership doctrine, far from being preempted, can actually govern resolution of the federal constitutional claim.

[4]The fact that the public ownership doctrine precludes a finding of a taking when government is acting to protect wild animals does not, of course, address whether the State may wish in this or any other circumstance to provide financial incentives to land owners who accommodate wild animals on their land. For example, while numerous states recognize that the public ownership doctrine precludes constitutional claims for financial compensation based on injury to private property caused by wild animals, it is also true that many states have established public accounts to provide compensation to owners in such circumstances. See, e.g., Wyo. Stat. § 23-1-901 (1998). The point is simply that the extent to which public should provide such financial compensation is a matter appropriately resolved as matter of legislative policy, and cannot be resolved by any fixed constitutional rule. See Phelps v. Racey, 60 N. Y. 10, 14 (1875) ("The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds.... The measures best adapted to this end 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.").

SMR has asserted that construction of its fence was designed to serve a variety of other purposes apart from excluding the threatened timber rattle snake from its property. While the circumstances of this case cast some doubt on the validity of these other justifications, they are irrelevant to the resolution of this case. As the Supreme Court opinion makes abundantly clear, the Court enjoined SMR from erecting and maintaining a fence only to the extent that it was a snake-proof fence. This case never would have arisen if SMR had built another type of fence to serve other objectives and had not built a fence specifically designed to interfere with the snake's migration pattern and to block access to its natural habitat.