NO. 72266-8

SUPREME COURT
STATE OF WASHINGTON
SDS LUMBER COMPANY, a Washington corporation; SDS Co., a Washington general partnership, and its successor in interest, SDS Co., LLC,
Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,
Appellants.

BRIEF OF *AMICUS CURIAE* WASHINGTON ENVIRONMENTAL COUNCIL

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I. INTRODUCTION

Amicus curiae Washington Environmental Council (WEC) submits this brief in support of the Department of Natural Resources (Department) to address two issues: (1) how to define the "relevant parcel" in this regulatory takings case, and (2) whether the claim is barred by the principle of Washington property law that all wildlife is owned by the State for the benefit of the people. The WEC urges the Court to reverse the judgment below.

II. STATEMENT OF INTEREST

The WEC, a statewide nonprofit organization with approximately 2500 individual members and 90 affiliated organizations, has an interest in this case because its mission is to protect, preserve, and restore the environment of Washington State and the Pacific Northwest.

III. STATEMENT OF THE CASE

The WEC adopts the Department's Statement of the Case.

IV. ARGUMENT

A. The Relevant Parcel Is the 5100-Acre Contiguous Property Which SDS Manages for Timber Production.

The Department's brief provides a thorough description of the U.S. Supreme Court and Washington Supreme Court precedent supporting the "parcel as a whole" rule. Instead of replowing that ground, this brief seeks to assist the Court by (1) setting forth the basic justifications for the parcel as a whole rule; and (2) analyzing the precedents on the parcel issue cited in the briefs of SDS and the Pacific Legal Foundation (PLF).

1. The justifications for the "parcel as a whole" rule.

Under the parcel rule, the economic effect of a restriction must be assessed, not in relation to the specific portion of the property subject to the restriction, but in relation to the owner's property as a whole. There are several justifications for the rule.

First, the parcel rule supports a balanced doctrine of regulatory takings. It provides meaningful protection for private property interests and also provides elected officials reasonable latitude to adopt regulations to safeguard environmental quality and other aspects of public welfare. On the one hand, if the impact of a restriction had to be evaluated in relation to the portion or interest subject to the restriction, then regulations would "always" result in takings. *Concrete Pipe & Prods., Inc v. Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993). Under this approach, any regulation could be characterized as eliminating all of the economic value of - and thus "taking" - some stick in the bundle of property rights. The U.S. Supreme Court long ago rejected this approach for, as Justice Holmes stated, "Government could hardly go on if to some

extent values incident to property could not be diminished without paying for every such change in the law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

On the other hand, the economic effect of a regulation could be analyzed in relation to the entirety of an owner's property holdings, or at least all the owner's holdings within a particular region or community. This approach, which the U.S. Supreme Court also has rejected, would so dilute the apparent economic effect of any restriction that a regulation would hardly ever be a taking. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1016 n. 7 (1992) (rejecting the expansive approach to parcel definition adopted by the New York Court of Appeals in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324 (1977)).

Instead, this Court and the U.S. Supreme Court have adopted the reasonable approach of treating an owner's single contiguous property as the relevant parcel, especially when it is held and managed for a single economic purpose, as in this case. This approach is based on the logical presumption that a single physical block of property will ordinarily represent the appropriate unit for the purpose of takings analysis. It also reflects the reasonable approach of trying to assess the economic impact of a regulation in relation to the investment being affected, considering that an owner's single contiguous property ordinarily represents a unitary investment.

The parcel rule also supports a doctrine of regulatory takings which is faithful to the original understanding of the Takings Clause. The drafters of the Bill of Rights did not believe the Takings Clause should encompass regulations at all. *See Lucas* 505 U.S. at 1028 n. 15 (Scalia, J.). Instead, they believed that the Takings Clause would only apply to direct appropriations of private property. The parcel rule limits regulatory takings to those restrictions which are so significant that they are tantamount to the kind of direct appropriations contemplated by the drafters of the Bill of Rights.

The parcel as a whole rule also respects the separation of powers between the different branches of government. Decisions about social and economic policy should, in general, be made by the legislature, not the courts. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). Absent the parcel rule, claimants could trigger the Takings Clause in virtually every case and force the courts to intrude upon legislative judgments on a routine basis. In this case, adoption of SDS's parcel argument and acceptance of its takings claim would overturn the Washington legislature's considered judgment on how best to pursue species conservation.

The parcel rule also allows the courts to implement the principle that, under the Takings Clause, "the[] benefits [of regulation] must be considered along with any diminution in market value that the [owners] might suffer." *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1979). Under the parcel rule, the courts can assess both how an owner is burdened by a regulation and how the same regulation or other government actions may have enhanced the value of the owner's property. In this case, reductions in the volume of commercial timber cut from the federal public lands, largely due to the presence of the endangered spotted owl, resulted in significant increases in stumpage prices on private lands. See U.S. Department of Agriculture, The 1993 RPA Timber Assessment Update, Report RM-GTR-259, at 35 ("western regions have experienced very rapid stumpage price increases in recent years because of declining public timber harvests"). Thus, the regulatory protections for the spotted owl, considered as a whole, may actually have had a net positive impact on the value of SDS timber holdings. The parcel rule allows the court to take this important equitable consideration into account.

Notwithstanding the overwhelming precedent favoring the parcel rule, and the sound justifications for the rule, SDS proposes that the relevant parcel be defined as the specific 232 acres which it has proposed to log. SDS seeks to justify this approach by arguing that the 232 acres represents a reasonable unit for a commercial timber harvesting operation. One problem with this approach is that it would allow claimants to convert many zoning and other ordinary land use restrictions into takings, contradicting the basic understanding that the Takings Clause is reserved for

"extreme circumstances." *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121, 126 (1985). Another problem with this approach is that it does not offer an objective basis for defining the relevant parcel. Instead, it would allow different takings claimants to define similar parcels differently for takings purposes depending upon their subjective decisions about how to use the land. It also would invite land owners to shape their development proposals in order to manufacture takings claims that otherwise would not be recognized.

Taking a somewhat different tack, PLF at 12 argues that regulatory use restrictions should be equated with physical occupations of private property. According to PLF, a physical occupation can result in a taking regardless of the size of the property on which the occupation takes place, and the same approach should be applied in evaluating regulatory use restrictions. The flaw in this argument is that a physical occupation is different from a use restriction. "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies an owner's property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 456 U.S. 419, 438 (1982) (emphasis in omitted), and "such an invasion is *qualitatively more severe* than a regulation of the use of property..." *Id*. (emphasis added).

This Court recognized the distinction between a physical occupation and a use restriction in *Manufactured Housing Communities v. State of Washington*, 142 Wn.2d 347, 13 P.3rd 183 (2000). The Court held that a deprivation of a "fundamental attribute" of property ownership, such as the right to dispose of property, or the right to prevent a physical occupation, standing alone, can result in a taking. However, as explained at length in the concurring opinion of Justice Sanders, a fundamentally different analysis applies in a case involving a takings challenge to a use restriction. As he stated, "deprivations of the fundamental right to possess, exclude, or transfer *do not* implicate what use has been taken, or remains." *Id*. at 382 (emphasis added). By contrast, "[u]se restrictions must be evaluated based on their impacts *on the entire property*." *Ibid*. (emphasis added).

2. Precedent does not support the position of SDS and PLF.

SDS and PLF offer inaccurate and misleading descriptions of certain precedents handed down by the U.S. Supreme Court and other courts. The WEC offers a more objective reading of these cases.

First, quoting *dictum* from the U.S. Supreme Court's decisions in *Palazzolo v. Rhode Island*, 121 S.Ct. 448 (2001) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), SDS and PLF seek to portray the parcel issue as quite unsettled, going so far as to say "that the [Supreme] Court itself has not provided the answer" to the parcel question. SDS at 9. As the State explains in its brief, this version of the law is contradicted by at least a half dozen U.S. Supreme Court decisions as well as the decisions of this Court.

SDS and PLF also seriously over-read the language in *Lucas* and *Palazzolo*. In *Lucas* there was never any issue about whether the two building lots at issue in the case represented the relevant parcel. Justice Scalia observed in a footnote that the precision of takings analysis depends upon the definition of the parcel. See *Lucas*, 505 U.S. at 1016, n. 7. But that observation did not alter the established parcel rule. Indeed, just a year later in *Concrete Pipe & Prods., Inc v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), a unanimous Supreme Court explicitly reaffirmed the parcel as a whole rule. In *Palazzolo*, the Court applied the parcel as a whole rule by evaluating the taking claim in relation to the claimant's entire contiguous property, including both the restricted wetlands and unrestricted uplands. *Palazzolo's* Supreme Court counsel attempted to argue before the high court, for the first time in the case, that *Palazzolo* should be permitted to segment the property. The U.S. Supreme Court ruled that the issue had been waived. In sum, neither *Lucas* nor *Palazzolo* contains any ruling which disturbs the settled parcel as a whole rule.[(1)]

SDS and PLF also seriously misrepresent the teachings of other decisions. For example, SDS at 15 describes *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978) as "suggesting that the regulation should define the relevant parcel," pointing to the fact the Supreme Court defined the parcel in that case as the city block which was the site of Grand Central Terminal However, the Court used the city block as the relevant parcel because it represented the company's contiguous ownership, not because it was a regulated portion of a larger parcel. SDS is wrong when it asserts that the Supreme Court excluded from the parcel other "contiguous" properties owned by the company which were not subject to regulation; the other properties the Court excluded were not contiguous but merely "*in the vicinity* of Grand Central Terminal." *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) (emphasis in original). *Penn Central* would, for example, support excluding from SDS's relevant parcel other noncontiguous timber properties SDS owns in the vicinity of this 5100-acre parcel; it does not support subdividing this single contiguous property.

SDS at 17 and PLF at 10 also misrepresent the decision in *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). They suggest the court carved 12.5 acres out of the owner's original 250-acre parcel because the 12.5 acres was the portion restricted under the Clean Water Act. 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, prior to Act's adoption. By contrast, in this case, SDS continues to own the entire 5100-acre property.

Furthermore, with respect to the 12.5-acres at issue in *Loveladies Harbor*, the court did not define this area as the relevant property because it was the portion restricted under the Clean Water Act. While most of the 12.5 acres was wetlands, part of the 12.5 acres was uplands. Thus, far from supporting SDS'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).

Similarly, PLF at 11 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). PLF implies that the court carved 98 acres out of a tract of 1560 acres because the 98 acres represented the area subject to restriction. In fact, the Federal Circuit stated that since the Army Corps of Engineers would impose the same restriction on all 1560 acres, it was irrelevant how the parcel was defined. *Florida Rock* stands in stark contrast to this case, where commercial forestry operations are restricted, for a period, on approximately 5% of the property, but the rest of the property is not subject to the same restriction.

Finally, SDS at 18 offers a mistaken description of *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000). SDS implies that the court ignored the larger 311.7 acre parcel in favor of a smaller 50.7-acre portion because only the latter portion was subject to regulation. In fact, following the approach in *Loveladies Harbor*, the court excluded several hundred acres from the parcel because they had been sold off a few decades earlier. Furthermore, the court emphasized that the owner had never managed the entire 311.7 for a single common development purpose. By contrast, SDS retains ownership of the entire property and has managed the entire tract for timber production.

In sum, the parcel rule is alive and well, and none of the cases cited by SDS and PLF support jettisoning the rule. [(2)]

B. SDS's Taking Claim Is Barred by the Background Principle of Washington Property Law That All Wildlife Is a Public Resource Owned by the State for Benefit of the People.

A second, independent reason SDS's taking should be rejected is that the regulation parallels the "background principle" of Washington law recognizing that the public owns all wild animals within the state and that the State of Washington, as the public's representative, has plenary authority to protect the public's property rights in wildlife.

An owner cannot demonstrate a regulatory taking if the owner lacks a private property right to engage in the regulated conduct under background principles of state law. This principle was recognized by the U.S Supreme Court in *Lucas*, 505 U.S. at 1027, and by this Court in *Guimont* v. *Clarke*, 121 Wn.2d. 586, 598, 854 P.2d 1 (1993). Regulations cannot "take" private property if the restrictions "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." *Lucas*, 505 U.S. at 1029. This principle reflects the importance, in any takings case, of whether the claimant has a protected property interest to begin with, *see Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998), and the fact that, under our system of federalism, takings jurisprudence is "guided by the state's power over, the 'bundle of rights' that [owners] acquire when they obtain title to property." *Lucas*, 505 U.S. at 1027.

Following *Lucas*, courts across the country have ruled that takings claims are barred at the threshold if the regulations are designed to enforce restrictions which background principles of state law already place on private property interests. *See, e g., Stevens v. Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (customary public rights to use the ocean beach); *State v. The Mill*, 887 P.2d 993 (Colo. 1994) (threat of spread of radioactive contamination a nuisance); *Coastal Petroleum v. Chiles*, 701 So.2d 619, 624 (Fla. Ct. App. 1997) (public trust doctrine as applied to coastal waters).

The relevant background principle in this case, rooted in the Washington law of property, is that the sovereign owns all wild animals for the benefit of the public. As the Court explained in the case of *Cook v. State,* 192 Wash. 602, 607, 74 P.2d 199 (1937), "[t]he 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." The Court said 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," *id*. at 607. It also observed that "the extent of the power of the state[] with reference to fish, game, and all wild life within [its] borders is perfectly astounding." *Ibid*. Indeed, this legal doctrine is one of the most venerable known to the law, stretching back to early English common law and even Roman law. *See Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821); 2 William Blackstone, COMMENTARIES at 417-18; Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U.L. Rev. 703 (1976). *See also, State of Washington v. Gillette*, 27 Wn. App. 815, 820, 621 P.2d 764 (1980), observing that "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."

The courts of this state and many other states have relied upon this venerable principle of state property law to justify the rejection of takings claims. In *Cook*, the Washington Supreme Court rejected the claim that the State was liable for a taking because protected beavers had caused serious economic injury to the claimant's commercial property, stating that the "killing, taking, and regulation of game and other wild life [are] subject to *absolute* governmental control for the common good." *Cook v. State*, 192 Wash. at 607-608 (emphasis added).[(3)] For a sampling of similar decisions, see *Barrett v. State*, 220 NY 423, 116 N.E. 99, 101-102 (1917); *Farris v. Arkansas*, 310 S.W. 2d 231, 235 (Ark. 1958); *Bauer v. Game, Forestation and Parks Comm'n*, 293 N.W.2d 282 (Neb. 1940); *State v. McKinnon*, 133 A.2d 885 (Maine, 1957).

The principle also has been applied more recently in the specific context of endangered species regulation. In *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S. 2d 78 (2000), the New York Appellate Division rejected a claim that the State effected a taking by requiring an owner to remove a "snake proof" fence designed to keep timber rattlesnakes, a threatened species, from foraging on the owner's property. The court cited several reasons for rejecting the claim, including

the fact that the doctrine of public ownership of wildlife "is a venerable principle that can properly serve as a legitimate basis for the exercise of [the] police power." 714 N.Y.S. 2d at 84, citing New York Environmental Conservation Law, §11-0105 (McKinney 1999) (codifying the doctrine of state ownership of wildlife). *See also Christy v. Hodel,* 857 F.2d 1324, 1334 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (rejecting a takings challenge to an endangered species regulation, stating that "[n]umerous cases have considered, and rejected, the argument that destruction of private property interests by protected wildlife constitutes a governmental taking").[(4)]

While the background principle of public ownership of wildlife has its most direct and obvious application when a regulation restricts an owner from shooting or otherwise directly killing a wild animal, it also applies to indirect killings when necessary to vindicate the public rights at stake. As the Oregon Court Supreme Court eloquently observed in *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or. 654, 663 (1939), involving the state's power to protect a public fishery from pollution, the state's power to protect the fish "would be of no avail if it had no power to protect the waters from pollution." See also *State of Washington v. Gillette*, *supra* (affirming an award of damages against a land owner who destroyed salmon eggs by running a tractor through a stream bed). *Cf. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 708 (1995) (ruling that "harm" to an endangered species under the Endangered Species Act includes "significant habitat modification or degradation that actually kills or injures wildlife").[(5)]

The WEC recognizes the potentially broad scope of governmental authority based on the public ownership doctrine and acknowledges that many questions might be raised about whether and how the doctrine should be applied in particular circumstances. However, the Court need not attempt to resolve all of these possible questions in this case. Application of the public ownership doctrine *in this case* is comfortably supported by clear precedent as well as common sense. This case involves an effort to protect a specific, identified pair of nesting owls by drawing a small, temporary protective cordon around the nest so long as the nest site remains active. The regulation has been drawn in accordance with sound science to actually protect the individual birds from harm if not death. Finally, this regulation is being enforced not simply to protect these individual birds, but to help prevent the extinction of an entire species.

It also bears emphasis that the public ownership defense, assuming it bars a taking claim, in no way immunizes wildlife regulations from legal challenge on other grounds, including traditional administrative law principles or other provisions of the federal or state constitutions, such as the Equal Protection Clause or the Due Process Clause. See *Asarco, Inc. v. Department of Ecology*, 2002 WL 437952 (Wash., March 21, 2002) (Bridge, J. dissenting) (concluding that a legal challenge to government regulation raised a due process issue, not a takings issue). Of course, no such alternative claims are involved in this case.

V. CONCLUSION

For the foregoing reasons, as well for the other reasons set forth in the brief of the Department of Natural Resources, the Court should reverse the judgment below.

Dated this 19th day of April 2002.

Respectfully submitted,

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DECLARATION OF SERVICE

I am an employee in the law office of Jeffrey M. Eustis, over the age of 18 years and competent to be a witness herein. On April 19, 2002 copies of the foregoing document were mailed to the following parties of record, first class postage prepaid:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true to the best of my knowledge and belief.

Dated at Seattle, Washington on April 19, 2002.

_____

Kathleen McLemore

1. Numerous lower federal and state courts have recently applied the traditional parcel rule, rejecting the idea that *Palozzolo* or *Lucas* effected or presaged any change in the parcel rule. *See, e.g, Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*, 38 P.2d 59, 69-69 (Colo. 2001); *Rith Energy, Inc. v United States*, 270 F.3d 1347, 1349-50 (Fed. Cir. 2001); *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289 (Alaska. 2001).

2. PLF at 11, n. 1 also cites several additional cases which purportedly define the relevant parcel "as the portion of the property subject to the confiscating regulation." In fact, *Karam v New Jersey*, 705 A.2d 1221 (N.J. Sup. Ct. 1998), explicitly rejected PLF's position, ruling that the claimant's restricted riparian land and the adjacent upland property had to be treated as one parcel. *Quirk v. Town of New Boston*, 663 A.2d 1328 (N.H. 1995), also rejected PLF's position, ruling that a restricted "buffer area" had to be analyzed as part of the property as a whole. *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania*, 719 A.2d 19 (Pa. Commw. Ct. 1998), does adopt PLF's position on the parcel issue, but that ruling is currently on appeal to the Pennsylvania Supreme Court. Finally, PLF at 12 cites a student law review note which advances a novel approach to the parcel issue. See John E. Fee, Unearthing the Denominator in

Regulatory Takings Claims, 61 U.Chi.L.Rev.1535 (1994). So far as we know, no appellate court in the United States has embraced the author's proposed test.

3. The Court recognized that in a criminal proceeding an owner charged with harming wildlife could offer a defense on the ground that the action was "necessary" to protect life or property "against imminent and threatened injury." *Cook v. State*, 192 Wash. at 611, citing *State v. Burk,* 114 Wash. 370, 195 P.16 (1921). This exception obviously does not apply in this case, which is not a criminal proceeding and does not involve an imminent threat of injury.

4. The doctrine of public ownership of wild animals supports endangered species regulations under the Takings Clause in the same fashion that it supports more traditional game management regulations. Application of this background principle in both contexts is based on the fact that all wild animals belong to the public. Furthermore, even if protection of endangered species were regarded as a new application of this established doctrine, that would hardly make it illegitimate. *See Lucas*, 505 U.S. at 1031 ("changed circumstances or new knowledge may make what was previously permissible no longer so").

5. It might be contended that recognizing that the public "owns" wildlife supports PLF's position that regulations safeguarding wild animals on private property effect a kind of "physical occupation" of the property. The short answer to this possible contention is that government owns wildlife in its sovereign capacity, not in an ordinary proprietary sense, and therefore the government cannot be said to have occupied private property by protecting species from harm. So far as we know, every court that has considered the question has rejected the argument that government restrictions on the use of property to prevent harm to wildlife can effect a physical-occupation type taking. *See, e.g., Boise Cascade Corp. v. Board of Forestry*, 991 P.2d 563 (Or. Ct.Apps. 1999), *cert. denied*, 532 U.S. 293 (2001); *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc*., 636 So.2d 761 (Fl.Ct.Apps., 1994).