IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KLICKITAT COUNTY
SDS LUMBER COMPANY, a Washington Corporation; SDS Co., a Washington General Partnership,

Plaintiffs,
v.
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,

Defendant.

NO. 93-2-00003-6

BRIEF OF AMICUS CURIAE
WASHINGTON ENVIRONMENTAL COUNCIL

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae, Washington Environmental Council, submits this brief in support of the State of Washington, Department of National Resources.[1]

As Amicus understands the SDS Lumber Company and SDS Co. complaint, the companies seek payment for an alleged taking of some 230 acres of their timbered land.[2] They assert that under both the Washington and United States Constitutions, application of state regulations restricting logging in a Northern Spotted Owl nesting area renders their property valueless. As a result of this alleged loss, plaintiffs say they are entitled to money from the public. Plaintiffs also assert, as they did in the earlier iteration of this case,.[3] that the state's regulations result in a physical occupation of their property. That is, plaintiffs offer two theories of recovery for a taking: they argue entitlement to recovery for a total loss of economic value as discussed in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed.2d 798 (1992), hereafter Lucas, and they claim entitlement to recovery under a "possessory" taking theory as discussed in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed.2d 868 (1982), hereafter, Loretto.[4]

Plaintiffs' claimed right to money is precluded because plaintiffs can only establish a taking if they suffer a loss of all economic value in the property or if the state requires that plaintiffs suffer a physical occupation of their property. Neither circumstance exists in this case. Plaintiffs' 230 acres is part of a much larger contiguous parcel of over 5,000 acres. Plaintiffs cannot establish a taking because there is no claim the whole of the property is rendered valueless. At most, plaintiffs are inconvenienced in that they are for a time prohibited from logging this relatively small 230 acre portion of their property. Such inconvenience does not rise to the level of a taking under the Washington and the United States Constitutions.

In addition, plaintiffs do not articulate a valid claim the state has occupied their property. The Northern Spotted Owl is a wild animal, not a state agent, and no state action causes the owl to occupy plaintiffs' land or timber. Plaintiffs' takings claim, if it is to be considered at all, must be viewed as one seeking money for a regulatory taking, not for a possessory taking.

In any event, a finding that plaintiffs suffered a regulatory taking would be inappropriate because plaintiffs do not possess a right to harvest timber in a manner that harms state-owned resources. This state, as sovereign and as trustee for all its citizens, owns and manages state wildlife resources, including the Northern Spotted Owl, for the benefit of all the state's citizens. Private land owners have no constitutional right to public money as a result of this state's exercise of its right to protect these public resources.

Furthermore, plaintiffs participate in a highly regulated industry. When plaintiffs acquired their property, this state had in place a forest practices act that included provisions requiring scrutiny of any forest practices that had the potential for a substantial impact on the environment. In addition, the state legislature had established means to classify endangered wildlife. Any reasonably alert organization engaged in the timber industry would expect regulations might follow protecting endangered wildlife. Plaintiffs should not complain because laws and regulations in place when they acquired the property have evolved because of a recognition the owl and its habitat require protection.

Finally, even if plaintiffs' claim of a taking were cognizable, it must wait until plaintiffs have explored available administrative relief. Washington regulations exempt from critical habitat designation those lands for which the applicant has obtained an incidental take permit from the Secretary of the Interior under 16 USC §1536(b) or 1539(a). WAC 222-16-080(6)(a). This provision would permit plaintiffs' proposed timber harvest to fall outside regulations that identify specific critical habitat thresholds for Northern Spotted Owl nest sites.[5] Plaintiffs' failure to pursue regulatory relief from the requirement to maintain owl habitat precludes their prosecution of this case.

ARGUMENT

I. Plaintiffs' property has not been stripped of all or even a significant portion of its economic value.

Both the Washington State and United States Constitutions offer compensation to a landowner whose property is taken for public use. Washington's Constitution provides, in part, that no "private property shall be taken or damaged for public or private use without just compensation having first been made... ." Const. art. I, §16.[6] The Fifth Amendment to the United States Constitution guarantees that "private property [shall not] be taken for public use, without just compensation."

Both state and federal court decisions discuss relevant considerations governing relief for plaintiffs asserting a taking. Lucas, 505 U.S. 1003, explains that when the state regulates property in such a manner that the landowner is deprived of all economically viable use, a taking is generally effected. See also, Guimont, 121 Wn.2d 586.

The definition of the property allegedly taken is of primary importance in any inverse condemnation suit. The opinions of both Washington and federal courts caution litigants that the constitutional prohibitions against taking do not mean that application of regulations affecting the income potential of a mere portion of one's property opens the public fisc to the affected property owner. In Presbytery of Seattle v. King County, 114 Wn.2d 320, 334-35, 787 P.2d 907 (1990), cert. denied, 498 U.S. 911 (1990), the Washington Supreme Court reminded the litigants that it has consistently viewed a parcel of regulated property in its *entirety*. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property. **** Similarly, our own state case law demonstrates that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety.

Emphasis in original with citations and footnotes omitted. See also, Department of Natural Resources v. Thurston County, 92 Wn.2d 656, 668-70, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1979). Clearly, this state's Supreme Court does not support plaintiffs' application of regulations as a kind of property partitioning tool to configure the property so as to make a taking claim more attractive. That is, the court tells plaintiffs they may not carve out a portion of a whole ownership and then claim a taking of the dismembered portion.

Similarly, the United States Supreme Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978), hereafter Penn Central, said [t]aking 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 governmental 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.[7]

The allegedly "taken" 230 acres are correctly understood as a portion of plaintiffs' 5,151 acre contiguous ownership. Any exploration of whether the state's regulations effect a taking must consider the entire 5,151 acres.[8] To say otherwise is to ignore both the Washington and the United State's Supreme Courts' opinions telling those seeking compensation for a taking that their claims must assert a taking of the whole of the property, not just a slice of it.

Amicus adherence to the "whole parcel rule" is not to say that others share this view without reservation. In the earlier proceedings before this court, amicus Pacific Legal Foundation urged this court to adopt the view expressed by John E. Fee in "Unearthing the Denominator in Regulatory Taking Claims," 61 Univ. Chicago L.R., Vol. 61 P 1535 (1994). The author suggested a taking claim should be possible for any portion of an owner's property that could house an independently viable use. That is, the relevant parcel in a taking claim should be whatever portion of the property the owner is able to show could be isolated and set off as an independently functional unit.

The effect of adopting this view would not only be contrary to the generally accepted state of the law but would also be a boon to those with the good fortune to have parcels sufficiently large to permit ad hoc divisions into various independent tracts. By doing no more than drawing lines on a property map, the landowner with a sufficiently large parcel could simply identify a portion or portions of the burdened property that could support a use and claim a taking of each such portion. The landowner would, in effect, not only have the benefit of whatever use was not burdened by the regulation, but also money from the public for those portions of the property subject to the regulation. This happy windfall for the landowner makes the public the guarantor of a landowner's profit in spite of regulations needed to protect public resources.

In advancing its argument, Pacific Legal Foundation recognized that the Supreme Court in Penn Central, said that takings jurisprudence does not divide property into discrete portions but rather focuses on the regulation's effect on the property viewed as a whole. Penn Central, 430 U.S. at 130-31. The Foundation took comfort, nonetheless, in a comment in Lucas, 505 U.S. at 1016 n 7, in which the court expressed some doubt about the appropriate calculus. The court said that where a regulation required a developer to leave 90 percent of a rural tract in its natural state, it was "unclear" whether the court would "analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." The court identified the matter as "this difficult question" and said the answer might lie in how the owners "reasonable expectations have been shaped by the State's law of property... ." Id.

Of course, in the instant case, the value of the 230 acres subject to the owl habitat regulations hardly approaches 90 percent of the total value of plaintiffs' contiguous acreage. Further, the language in Lucas does not undermine the test in Penn Central. Only a year after the Lucas opinion, the court issued Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), hereafter Concrete Pipe. In that case, the Supreme Court reaffirmed the Penn Central whole property rule admonishing that claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the

relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

In restating the prohibition against slicing up property to aid takings claims, the court made it clear that Lucas does not tell a landowner that he or she may use the restricted portion of the property as the proper denominator in a takings calculation.

It is important to observe that the cases cited addressing the need to consider the whole parcel when deciding whether property has been taken do not base this requirement on the attitude or motive of the property owner. In a regulatory takings case, the court must consider the whole parcel, not as the result of an analysis of property-owner motive, but because "property" as used in the takings clause has been interpreted to mean the whole of the property, not just a slice of it. A portion of a parcel may be the proper subject of a takings analysis when the claim is based on a physical occupation (of a portion of an ownership as in Loretto); but, as will be discussed, a physical occupation is not at issue in the instant case. See Concrete Pipe, 508 U.S. at 643-44.

Finally, focusing solely on the restricted portion of property may help plaintiffs assert a loss of all value, but the focus skews the nature of the property interest and may open the door to mischief. As the Federal Court of Claims advised:

This Court must be wary of focusing solely on the particulars of a transaction. Such a myopic approach would allow sophisticated real estate investors to design a transaction so as to segregate those parts of a parcel which could run afoul of regulations, such as the Clean Water Act, and maximize the possibility of a successful taking claim. As noted in Ciampitti, `a taking can appear to emerge if the property is viewed too narrowly.'

Forest Properties, Inc. v. U.S., 39 Fed. Cl. 56, 73 (1997).[9]

Notwithstanding plaintiffs' insistence, then, the instant case should not be seen as a squabble over 230 acres. Amicus urges this court adhere to the Washington and United States Supreme Courts' expressed view that the whole of the owner's property be considered, not just a portion of the whole. So considered, the claim leads to one conclusion: the state has not taken plaintiffs' property.[10]

II. Application of state rules prohibiting destruction of owl habitat does not cause an occupation or a seizure of plaintiffs' property.

Plaintiffs complaint includes an allegation that the state's actions since 1992 have imposed and continue to impose a public wildlife reserve on the property which has deprived and continues to deprive SDS Co. and SDS Co., LLC of any economically viable use of these entities [sic] lands, and deprives SDS Lumber Company of the economic benefits of harvesting and manufacturing the merchantable timber to be generated from the site.

First Amended Complaint at 7, ¶ 20. This allegation suggests plaintiffs view the state regulation as imposing a possessory servitude on the property. That is, plaintiffs apparently believe the regulation protecting the owl turns their property into a variety of public preserve for the owl under which plaintiffs are forced to suffer a kind of foreign occupation. The complaint evidences a misunderstanding of the holding in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419.

Under Loretto, the portion of an owner's property forced to suffer a physical occupation may be considered "taken" and the owner entitled to compensation. Such physical invasions or occupations are sometimes called "per se" or possessory takings.[11] It is a mistake, however, to confuse application of a regulation with a physical invasion of property. Regulations affecting use

are not "per se" takings in the sense discussed in Loretto. See, U.S. v. Sperry Corp., 493 U.S. 52, 62 n 9, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989).

Importantly, and contrary to plaintiffs' apparent view of the law, the state effects a physical taking only when it *requires* the landowner to submit to a physical occupation of his land. See, Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed.2d 153 (1993). Nothing in the state's regulation seizes the property and forces plaintiffs to take in and offer comfort to Northern Spotted Owls. No act of the state places the owls on that property; if the owls appear, they do so by their own quite inscrutable wild will. Rather, the regulation works to prohibit destruction of owl habitat while the owls are present on the property.

The Northern Spotted Owl, then, is not an agent of the state and does not carry with it the power to occupy land. The state may "own" the bird in the sense that the owl is a public resource the state is entitled to protect, but the state does not own the owl in the sense that the state exercises any control or direction over its conduct.[12] If one seeks to assign responsibility for owl movements and nesting habits, one must look to the owl, not the state. The bird's presence on plaintiffs' land is the result of its wild nature, not the government; and, therefore, the owl may not properly be considered an instrumentality of the government legally or physically capable of occupying property in the sense plaintiffs urge in the complaint. See Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 384-87, 98 S.Ct. 1852, 65 L.Ed.2d 354 (1978) and Christy v. Hodel, 857 F.2d 1324. In Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1426-28 (10th Cir. 1986), cert. denied 480 U.S. 951 (1987), the court rejected plaintiff's assertion that wildlife protection regulations effected a physical occupation of private property. In doing so, the Tenth Circuit Court of Appeals described as "well settled" the proposition that wild animals are "a sort of common property whose control and regulation are to be exercised `as a trust for the benefit of the people.'"[13]

Washington courts share this view. In Cook v. State, 192 Wash. 602, 607-610, 74 P.2d 199, 201 (1937), the court refused an invitation to find a taking where state regulation included plaintiffs' property in a wildlife sanctuary and thereby prohibited killing of or trapping fur bearing and game animals. The animals, muskrat and beaver, damaged plaintiffs' property and reduced its value, but the court found the state had "an absolute right" to maintain wild animals on private lands, and in doing so, "there is no element of trespass or taking." Cook v. State, 192 Wash. at 607.[14]

Somewhat more recently, the Washington Supreme Court refused to find a taking when a county declined to issue a permit for development at a density that would adversely impact bald eagles. Department of Natural Resources v. Thurston County, 92 Wn.2d 656. The court treated the eagle habitat as a valuable environmental resource. It found no taking in part because not all possibility for development was foreclosed, but it also stated that the regulation did not work a physical invasion of the property. At the close of the opinion, the court said it noted "there is no physical intrusion or damage created by the regulation... ." Department of Natural Resources v. Thurston County, 92 Wn.2d at 669.

In its discussion, the Court cited Rains v. Department of Fisheries, 89 Wn.2d 740, 575 P2d 1057 (1978). In that case, a property owner was denied a permit to alter a creek bed serving as fish habitat. The creek subsequently overflowed and damaged the owner's property. The owner alleged a physical taking of the property. The Washington Supreme Court rejected the assertion the state's action caused the flooding. It treated the matter as one in which the state exercised its police power to protect fish life; that is, it treated it as a regulatory matter, not one of government possession of property. The court said:

Whatever damage resulted to appellant's property, it cannot be said that it was caused by any affirmative act of the state. Even if the state is to some extent indirectly responsible for the damage, there was no public use involved, but simply a regulation deemed necessary for the

protection of fish life. Damage under such circumstances can be said to be damnum absque injuria. The trial court was correct in dismissing the claim for inverse condemnation.

Rains v. Dept. of Fisheries, 89 Wn.2d at 747. In other words, the state must act affirmatively to occupy property, and regulating uses to protect wild animals and their habitat does not qualify as an occupation.

Similarly, in Maple Leaf Investors, Inc. v. Dept. of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977), the court rejected the claim that denial of a permit for construction within a floodway was a taking by physical occupation. The court said the establishment of a flood control zone and of regulations restricting development was not

a public improvement in the usual sense of the term. **** The State does not propose to build any facilities or to take any action which would increase the flow of water over appellant's property or flood its land. The State acquires no property interest in appellant's land nor is it being set aside for a public use. Thus, the contention of appellant that the action by the State is the equivalent of the State acquiring a flowage easement over its property, while asserted with great vigor, is without force... .

Maple Leaf Investors, Inc. v. Dept. of Ecology, 88 Wn.2d at 733, citations omitted.

It may be helpful to consider a quite recent Oregon Court of Appeals decision rejecting a claim similar to that at issue in this case that a regulation protecting habitat for nesting Northern Spotted Owls resulted in a physical occupation of private property.[15] Boise Cascade Corp. v. Board of Forestry, 164 Or. App. 114, ---- P.2d ---- (1999) hereafter, Boise. The Boise court cited Pumpelly v. Green Bay Co., 80 U.S. (13 Wall) 166, 181, 20 L. Ed. 557, 561 (1871), in which the United States Supreme Court advised that where real estate is "invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking... ." The court contrasted that holding with a later Supreme Court ruling that where a flood occurred as a consequence of a forest fire that destroyed a watershed area, government regulation of construction within a flood zone should be analyzed under the law governing regulatory takings. See, First Lutheran Church v. Los Angeles County, 482 U.S. 304, 308, 107 S. Ct. 2378, 96 L. Ed.2d 250 (1987). The Oregon court said the plaintiff had not stated a claim for physical occupation under Loretto, noting there are

significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood in our hypothetical described above than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly*, or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there.

Boise, 164 Or. App. at 126.[16]

In sum, Washington, federal and neighboring state jurisprudence recognizes that claims of taking by physical occupation and claims of taking property through regulations that render it valueless are entirely separate.[17] The separation should be maintained in this case and the instant controversy regarded as one reviewable as asserting a regulatory taking.

III. Background principles of Washington law establish that the state may regulate land uses as necessary to protect its wildlife resources without having to pay landowners who may be inconvenienced by such regulations.

The Supreme Court in Lucas held that a property owner cannot demonstrate a regulation effects a taking if he or she lacked a property right to engage in the regulated conduct in the first place. Lucas, 505 U.S. at 1027; see also, Guimont 121 Wn.2d at 598. In Lucas, the Supreme Court also reminded the reader that the courts look to state law to define the property right under a takings analysis. Lucas, 505 U.S. at 1030; Lakeview Development Corp. v. City of South Lake Tahoe, 915 F.2d 1290 (9th Cir 1990), cert. denied, 501 U.S. 1251 (1991); Guimont, 121 Wn.2d at 602 n 2; see also, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972). Government restrictions do not effect a taking 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; Guimont 121 Wn.2d 598.[18]

The Washington Supreme Court has long recognized the state's right to control and protect wildlife, based on the state's ownership of all wildlife, even as against a property owner's claim of a private property right.[19] This recognition evidences the fact that this state's "background principles" of property law limit a landowner's right to exercise his or her property rights in a manner that harms protected wildlife.

In Cook v. State, 192 Wash. at 607, the Washington Supreme Court said the state "has the 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."[20] See Cook v. State, 192 Wash. 602. The court traced this authority to the common law of England "by virtue of which all property rights in *ferae naturae* were in the sovereign." Cook v. State, 192 Wash. at 607. It said:

The killing, taking, and regulation of game and other wild life were subject to absolute governmental control for the common good. This absolute power to control and regulate wildlife passed with the title to the game and wild life to the several states subject only to the applicable provisions of the Federal constitution.

Cook v. State, 192 Wash. 607-608. It characterized this inherited power to control and regulate as "absolute.[21] Id.

Implicit in Cook v. State is the necessary fact that protection of wildlife includes protection of the environment necessary to wildlife existence. It would make little sense to identify a species as endangered, prohibit its taking and then permit destruction of the habitat upon which the species depends. Protection of wildlife includes protection of wildlife habitat. [22] This quite basic principle is present in the Washington Court of Appeals opinion in State of Washington v. Gillette, 27 Wash. App. 815, 621 P2.d 764 (1980). In that case, the court affirmed an award of damages in favor of the State Department of Fisheries and against a landowner who destroyed salmon eggs by running a tractor through a stream bed. The court expressed the state's right by advising "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., quoting State ex rel. Bacich v. Huse, 187 Wash. 75, 79, 59 P.2d 1101 (1936).

The Oregon Supreme Court addressed the matter of habitat protection in Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939). The issue in that case was damage to salmon habitat through pollution of the Willamette and Columbia rivers. The court found not only that the state held title to migratory fish, even while in the free state, but that the state could act to protect fish habitat. The court said that the "regulatory power of a state extends not only to the 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." Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. at 663, 87 P2d at 198. [23]

A California Court of Appeal addressed habitat protection in Sierra Club v. Dep't. of Forestry & Fire Protection, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1994). The California Court of Appeal for the Fifth District rejected a challenge to a California Forestry Board denial of a timber company's proposal to cut trees on private land absent satisfactory plans to mitigate adverse impacts on endangered species. The court said

A landowner whose valuable stands of old-growth forest are infested with protected species is subject to state regulations designed for the legitimate purpose of such protection. The cases cited above clearly indicate that the federal and state governments may regulate and protect rare species on private lands without, ipso facto, triggering an unconstitutional taking of private property on which the species are present.

That authority necessarily upholds governmental protection of such species while on the land of an unconsenting landowner or leaseholder. In particular we note that Barrett, supra, upheld such state regulation in order to protect beavers which occupied the land in question and denuded it of the standing timber constituting its only real economic asset.

Sierra Club v. Dep't. of Forestry & Fire Protection, 26 Cal. Rptr. 2d at 345 citing Barrett v. State, 220 N.Y. 423, 425-28, 116 N.E. 99, 101-102 (1917). The Barrett v. State case treated the state as a trustee for the people when it reintroduced beaver into an area. The court refused to find plaintiff entitled to compensation as a result of a state law prohibiting molestation or disturbance of any wild beaver, "or the dams, houses, homes or abiding places of same." In other words, the landowner was not free to destroy wildlife habitat.[24]

Both the Nebraska and Maine courts found owners of land included in a game refuge were not deprived of a property right through state prohibitions on hunting within the refuges. Bauer v. Game, Forestation and Parks Comm'n, 293 N.W. 282 (1940) and State v. McKinnon, 133 A.2d 885 (1957).

Nesting sites were recognized as a resource worthy of protection in a Florida case. The Florida court declined plaintiffs' invitation to award damages for an alleged taking as a result of a proscription against development within 750 feet of a bald eagle nesting site. Flotilla Game and Freshwater Fish Commission v. Flotilla, 636 So.2d 761 (1994).

Some may complain that the protection granted the owl and its habitat is new and has nothing to do with the more ancient sovereign authority to protect the king's animals. Acceptance of this view would mean the state is forever locked into protection of those animals our ancestors thought needed protection and no others. The state's background principles of property law would be meaningless if the state were unable to recognize and act upon changing conditions. Indeed, the Lucas court specifically said that "changed circumstances or new knowledge may make what was previously permissible no longer so... ." Lucas, 505 U.S. at 1031.

An older case, but none the less instructive, from New York, rejected a dam owner's challenge to a state requirement for a fishway. The court did not agree with the owner's claim the state could not impose the obligation. It found the people of the state had as an easement in the stream the right to have fish inhabit its waters and freely pass to their spawning beds. It said that enforcing the easement relating to the fish and requiring the riparian owner to put up a fishway as a condition of maintaining the dam was not a taking "as the petitioner cannot be deprived of a right which it never possessed." In re Delaware River at Stilesville, 131 A.D. 403, 418-19, 115 N.Y.S. 745, 754 (3d Dept. 1909).

One might also argue that the Northern Spotted Owl should be treated differently than wildlife harvested for food or having a more immediate utility to people. This argument is shortsighted. Protection of endangered species furthers a legitimate government objective. The United States Supreme Court noted The Endangered Species Act reflects a congressional intent "to halt and reverse the trend towards species extinction, whatever the cost." TVA v. Hill, 437 U.S. 153, 184, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Also in that case, the court reviewed the history of the Endangered Species Act in and identified as "typical" portions of the Report of the House Committee on Merchant Marine and Fisheries regarding the need for the legislation. As quoted in TVA v. Hill, 437 U.S. at 178, the report noted

The value of this genetic heritage is, quite literally, incalculable.

From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations*. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

Emphasis added by the Court.

IV. This state has a long history of regulations governing logging, and those participating in the industry must expect the regulations will evolve to meet public needs.

"For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment backed expectations in a manner that requires the government to compensate him." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (D.C. Cir. 1994). The claimant's expectations must be reasonable, and one who buys with knowledge of a restraint could be said to have no reliance interest or to have assumed the risk of loss. Loveladies Harbor, Inc. v. United States, 28 F.3d at 1177. See generally, Good v. U.S., 189 F.3d 1355, 1360-61 (D.C. Cir. 1999) summarizing cases addressing this issue. In the same vein, the Washington Supreme Court noted that expectations must be distinct, in the sense that the expectation must have some concrete manifestation, and reasonable, in that the expectation must be appropriate under the circumstances. Presbytery, 114 Wn.2d at 336, n 30. Plaintiffs' apparent expectation of a timber harvest without interference from environmental regulation is not reasonable.

Logging is a highly regulated industry. As discussed in DNR v. Marr, 54 Wn. App. 589, 593, 774 P2d 1260 (1989), Washington's Forest Practices Act, RCW 76.09.010 et seq, was enacted to foster the state's timber industry and protect the environment. The act was first adopted in 1974, and it established a system of three state agencies, the Forest Practices Board, the Department of Natural Resources and the Forest Practices Appeals Board, to administer the act. RCW 76.09.050 (1974 Laws chapter 137), when first passed, set out three classes of forest practice. In 1975 the fourth class was added to the initial three classes. 1975 Laws chapter 200 §2. Class IV is that class of forest practice having the greatest impact on public resources, that is, forest practices "(d) which have a potential for a substantial impact on the environment and therefore require an evaluation by the department [Department of Fish and Wildlife] as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act... ." RCW 43.21C.037(3) requires Class IV forest practices to be evaluated by the department. This provision was adopted in 1981. 1981 Laws chapter 290 §1.

Recognition that animal species were endangered and in need of protection is nearly as old as the forest practices legislation. In 1980, the Legislature in Laws 1980 chapter 78 §13 gave the director of the Department of Fish and Wildlife authority to classify wildlife as endangered.[25] The Northern Spotted Owl was listed as endangered in 1988. Former WAC 232-12-014.[26]

The Northern Spotted Owl was not listed as a threatened species by the United States Fish and Wildlife Service (FWS) until 1990.[27] However, the owl "received much scientific attention" for a much longer period. Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 480 (W.D. Wa. 1988). In January 1987, the federal Fish and Wildlife Service was petitioned to list the owl as endangered. Id. The agency declined to do so, and its decision was overturned in the cited case. In November, 1988, the court remanded the matter to the agency with instructions to provide an analysis for its decision that listing the owl as threatened or endangered was not currently warranted. Northern Spotted Owl, 716 F.Supp. at 482. Of course, the owl was finally listed.

Participation in a heavily regulated industry means business must expect to be regulated and must expect the regulations will be changed from time to time. In District Intown Properties v. District of Columbia, ---- F.3d ---- (D.C. Cir., Dec. 17, 1999) the court rejected a taking claim based on a denial of permission to build townhouses in an area designated as an historic landmark. The developer argued it was entitled to rely on its original investment backed expectation and added that its expectation could have reasonably changed. The court responded, notwithstanding this expectation, that when the developer purchased the property, it was subject to existing regulations and should have expected to continue to be subject to regulation.[28] The court added a helpful comment about reasonable business expectations:

Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends. *** In this case, [plaintiff] was in the real estate business, with a history of restriction of development for the purpose of preserving historic sites.

Citation omitted.

Before plaintiffs acquired the 230 acres, the state had in place machinery for addressing endangered wildlife and for review of forest practices having significant impacts on the environment.[29] Existence of that machinery, within the context of a regulated industry, is sufficient to warn the industry that environmental regulations might be promulgated that would effect changes in their practices.[30] Later, the federal agency's activity leading to the owl listing and Washington's listing gave direct and obvious warning to any reasonably alert timber company. Plaintiffs should not now complain of frustration of their expectation to harvest timber without fear of regulation. [31]

Plaintiffs' circumstance is not unlike the developer in Good v. U.S., 189 F.3d 1355. In that case, the developer brought a takings claim based on a denial of a request to fill a wetland to facilitate a residential development. The denial was issued because the proposal posed a threat to certain endangered species. The developer complained that when the property was purchased, there was no Endangered Species Act and, therefore, he could not have expected to be denied a development permit based on its provisions.

The Federal Circuit Court of Appeals found the land owner's position "not entirely unreasonable" but rejected it for a number of factors including when the property was purchased, the regulatory agency (in that case, the Army Corps of Engineers) had said it would consider wildlife, conservation and other public interest factors in permitting decisions. The developer was aware that there were difficulties in obtaining the several approvals necessary. Also, the court found a "rising environmental awareness translated into ever-tightening land use regulations" to which the developer was not oblivious. Good v. U.S., 189 F.3d at 1362. The court said the developer had to be "presumed to have been aware of the greater general concern for environmental matters during the period of 1973 [when the property was purchased] to 1980 [when he began efforts to develop it]." Id., at 1363. The court concluded the developer must have been aware that standards and conditions governing the permits could change to his detriment and that regulatory approval would become harder to get. Id. In sum, the developer "lacked the reasonable investment-backed expectations that are necessary to establish that a government action effects

a regulatory taking." Id. Again, plaintiffs' should not complain because the regulatory climate, in place and developing at the time and soon after plaintiffs acquired the property, has, in the last several years, become more restrictive.

V. The companies' claim for compensation is not ripe for judicial consideration because regulatory relief is available through an "incidental take permit."

The earlier action between the parties resulted in a finding that the companies failed to exhaust available administrative remedies in that they retained the ability to file a new application and complete an Environmental Impact Statement and had not done so. Order on Cross-Motions For Summary Judgment and Related Motions at 8. This court rejected the state's companion argument that plaintiffs' claim was not yet ripe because the companies had not sought an "incidental take permit" from the Secretary of The Interior. Id. Under 16 U.S.C §1539(a), the secretary may permit an otherwise impermissible taking of an endangered species if the take is incidental to and not the purpose of the otherwise lawful activity, in this case, timber harvesting. If the applicant obtains an incidental take permit, a forest practice application will not be classified or conditioned as a "Class IV-Special" based on state critical wildlife habitat designation under WAC 222-16-080(1), or federal critical habitat designation [WAC 222-16-050(1)(b)(ii)], as long as the forest practice is consistent with

(a) A habitat conservation plan and permit or an incidental take statement covering such species approved by the Secretary of the Interior or Commerce pursuant to 16 U.S.C. §1536(b) or 1539(a)... .

WAC 222-16-080(6)(a). In other words, Washington's Forest Practices Act incorporates provisions of the federal Endangered Species Act. If the landowner secures an incidental take permit from the federal authorities and proposes to conduct the harvest in conformity with that permit, the Class IV-Special designation will be removed. It is through the Class IV-Special designation that the state imposes review under the State Environmental Policy Act (SEPA) and with it the substantive SEPA conditions to mitigate adverse impacts identified in this review process. See WAC 222-10-041(4) for the critical habitat thresholds.[32]

Amicus understands the state will ask the court to reconsider its view. Amicus supports that request. Washington regulations provide a means to avoid the Class IV-Special designation and, consequently, the restrictions designed to preserve owl and owl habitat.[33] The result is removal of the regulatory prohibition against harvesting the timber plaintiffs find objectionable and upon which their demand for money rests.[34]

Worth noting again is the Oregon Court of Appeals decision in Boise, 164 Or. App. 114, discussed earlier. The Oregon court considered whether Boise's suit for compensation should have proceeded to judgment in the trial court notwithstanding Boise's failure to seek an incidental take permit. The state argued that Boise should be required, before pursuing a suit for a taking, to explore obtaining an incidental take permit from the Department of The Interior under 16 USC §1531 to 1544. The state regulatory scheme permitted an exception to the owl habitat protection regulations if the forest operator obtained a permit. Former OAR 629-24-809(5).

In ruling Boise's claim was not ripe, the Oregon court cited Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed.2d 126 (1985). In that case, the Supreme Court found a claim for compensation not ripe because the plaintiff had not sought approval for any other than one of several possible development plans and had not sought variances that might permit development. See also, Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed.2d 1 (1981) in which the court discussed the requirement to seek administrative relief and Agins v. Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed.2d 106 (1980).

Washington requires no less of a plaintiff. In Orion Corp. v. State, 109 Wn.2d 621, 632, 747 P.2d 1062 (1987) the court found application for a particular permit futile and so refused to accept the state's argument the matter was not ripe for review. Nonetheless, the court advised the litigants that the court, under most circumstances, would not find a claim ripe "until the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied `all reasonable use of its property...'" citing Williamson v. Hamilton Bank, 473 U.S. at 184. In Presbytery of Seattle v. King County, 114 Wn.2d at 339, the court quoted with approval a statement in McDonald, Somer & Frates v. Yolo County, 477 U.S. 340, 352, 106 S. Ct. 2561, 91 L. Ed.2d 285, 295-96 (1985), rehearing denied, 478 U.S. 1035 in which the court said that its cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

In Washington, the potential benefit of seeking an incidental take permit is even greater than in Oregon. As noted, this state's regulation provides relief from review under SEPA and the substantive SEPA conditioning to meet critical habitat thresholds if the owner obtains an incidental take permit and proposes to harvest the timber consistently with the permit terms. The Oregon rule only provided that exceptions to the owl nesting site protection provisions "may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." Former OAR 629-24-809(5), emphasis supplied.[35]

In sum, plaintiffs' failure to explore available regulatory relief leaves the matter of whether, in fact, plaintiffs lost all viable economic use of the claimed property open to question. Until this avenue is explored and a final determination is issued, plaintiffs' claim is premature.

CONCLUSION

Amicus supports the state's motion for summary judgment.
Respectfully submitted,

Jeffrey M. Eustis, WSBA 9262
505 Madison Street, Suite 209
Seattle, Washington 98104
(206) 625-9515
Attorney for Amicus Curiae
Washington Environmental Council

John T. Bagg OSB No. 74021
362 Jerris Ave. S.E.
Salem, Oregon 97302
(503) 581-3056
Of Counsel for Amicus Curiae
Washington Environmental Council

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

[1]The declaration of the council's interest is included in its motion to appear filed this date.

[2]In the earlier litigation in this case, the size was described variously as 230 acres and 232 acres. This brief refers to 230 acres because that figure appears in the current complaint.

[3]See "Complaint and Petition For Judicial Review" filed January 11, 1993.

[4]Plaintiffs' complaint does not include an assertion they have suffered a taking under the alternative criteria discussed in Guimont v. Clarke, 121 Wn.2d. 586, 603-604, 854 P.2d 1 (1993), hereafter, Guimont. That is, they do not claim that a portion of their property has been taken and that they are entitled to compensation because the government action does not safeguard the public interest in health, safety, the environment or the fiscal integrity of an area, or because the regulation "seeks less to prevent harm than to impose on those regulated the requirement of providing an affirmative public benefit." See Robinson v. Seattle, 119 Wn.2d 34, 14-15, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992). Were they to make such a claim, it would fail ecause this state's jurisprudence holds regulations protecting the environment to be a legitimate subject of the state's police power. In addition, it is clear that the regulations at issue serve more to prevent harm to a valuable state resource, in this case the spotted owl, than to affirmatively provide a public benefit. See Robinson v. Seattle, 119 Wn.2d at 49 and Schreiner Farms, Inc. v. Smitch, 87 Wn. App. 27, 38, 940 P2.d 274 (1997) citing with approval the statement in Pacific N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1013 (9th Cir), cert. denied, 513 U.S. 918 (1994) that "protection of wildlife is one of the state's most important interests."

[5]As the state advises, additional regulatory relief is available under state regulations governing a Landowner Option Plan (LOP). See the state's discussion of ripeness in its Memorandum in Support of Summary Judgment.

[6]Plaintiffs' complaint alleges a loss of all economic value and does not claim their 230 acres are "damaged" in some fashion distinct from loss of economic value. In any event, in Manufactured Housing Communities of Wash. v. State, 90 Wash. App 257, 951 P.2d 1142 (1998), review allowed, the Court of Appeals examined and rejected the argument that Article I, §16 of the Washington State Constitution provides greater protection for private property owners than the Fifth Amendment to the United States Constitution and concluded the provisions are to be read coextensively.

[7]See also, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 498, 107 S. Ct. 1232, 94 L.Ed.2d 472 (1987) and Tabb Lakes Ltd. v. U.S., 10 F.3d 796 (Fed. Cir 1993).

[8]As the state pointed out in its "Response to Plaintiffs' Motion for Summary Judgment" filed June 7, 1995 as part of the earlier iteration of this case, the 230 acres meets all three of the criteria Washington courts regard as relevant for determining the parcel in condemnation proceedings: "unity of ownership, unity of use and contiguity." State v. McDonald, 98 Wn.2d 521, 526, 656 P.2d 1043 (1983). That is, the bit of land plaintiffs urge this court to regard as the relevant unit of property is held in common ownership with the rest of the 5,151 acres, is a contiguous part of the 5,151 acres and it is used with the rest of the 5,151 acres for the growing and harvesting timber.

One could argue that all of plaintiffs' timberland in this state should be brought into the takings equation. See the state's discussion of the relevant unit of property in its "Memorandum in Support of Defendants' Motion For Summary Judgment" filed this date. Plaintiffs' insistence on restricting the inquiry to 230 acres makes far less sense in terms of the takings calculus in Lucas than considering the entirety of plaintiffs' timber enterprise, no matter where located in this state.

[9]The citation is to Ciampitti v. U.S., 22 Cl. Ct. 310, 319 (1991)

[10]Plaintiffs make no allegation that the state's regulations have rendered the whole of the 5,151 acres without value or economic use.

[11] Even a presumptive taking may be defeated if the allegedly taken interests were not part of the plaintiff's title to begin with. Lucas, 505 U.S. at 1027. In the instant case, the nature of plaintiffs' property interest is relevant to an understanding of whether it suffered a taking. As discussed below, plaintiffs' property interests did not include an unfettered right to log timber if such activity damaged a state resource, in this case, the owl.

[12] In Toomer v. Witsell, 334 U.S. 385, 402, 68 S. Ct. 1156, 92 L. Ed. 2d 1460 (1948), the court explained that decisions referring to government ownership of wildlife used 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." In Hughes v. Oklahoma, 441 U.S. 322, 335, 99 S. Ct. 1727, 60 L. Ed.2d 250 (1979), the court called the public ownership doctrine a "19th century fiction." While the characterizations may seem disparaging of the doctrine of public ownership of wildlife, they do not signal the end of the doctrine, along with its recognition of the states as the owners and protectors of wildlife. The comments are better understood to caution that while a state has plenary authority over the wildlife within its borders, it may not use that authority to avoid or circumvent the Commerce Clause. See Carl D. Etling, Who Owns the Wildlife?, 3 Env. L. 22, 28 (Spring 1973) and 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 (1975)

[13]The language quoted in Mountain States Legal Foundation v. Hodel, 799 F.2d at 1426-28, is from Greer v. Connecticut, 161 U.S. 519, 528-29, overruled on other grounds, Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed.2d 250 (1979).

[14] See footnote 21, infra.

[15]Plaintiff Boise Cascade Corporation based its claims for compensation, as do the plaintiffs here, in both regulatory and possessory takings theories. Boise brought suit against the State of Oregon alleging a taking of certain of its timber near the Oregon coast. The suit was occasioned by the State Board of Forestry's denial of a permit to harvest an area serving as habitat to a pair of nesting Northern Spotted Owls and protected as such by an administrative rule. The state's rule, former OAR 629-24-809(1)(a), required any forest operation, including logging, that would conflict with the protection of an owl nesting site must provide a "70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat." Logging was not permitted within that habitat area.

[16] The court acknowledged Boise had stated a claim for a regulatory taking. Id.

[17] The California Court of Appeal for the First District said the state was not liable for damage by elk reintroduced in an area who visited plaintiff's property, destroyed fences and ate forage intended for livestock. Moerman v. State of California, 21 Cal. Rptr.2d 329, 332-34 (Cal. Ct. App. 1993), cert denied, 511 U.S. 1030 (1994). The court flatly denied the reintroduction of Tule Elk caused a physical occupation as in Loretto; and, in addition, found plaintiff did not present a regulatory taking claim in the trial court and so could not do so on appeal. The court cited Christy v. Hodel, 857 F.2d 1324 and Mountain States Legal Foundation v. Hodel, 799 F.2d at 1426 in support of its holding. The California court thought the distinction between a television cable placement as in Loretto and Tule Elk, "obvious." Moerman v. State of California, 21 Cal. Rptr.2d at 332.

[18] The limit on takings claims existing in the state's property law works to defeat both regulatory and possessory claims. That is, the limitation on an owner's property right exists no matter whether the claim is based on a regulation or a physical occupation. In Lucas, 505 U.S. at 1028, the court advised that it would permit the government, in a physical occupation taking claim, to assert a pre-existing permanent easement as a limitation on the owner's title.

[19] Courts elsewhere have rejected takings claims when the claim is measured against the state's background principles of property law. In Stevens v. City of Cannon Beach, 317 Or. 131, 854 P.2d 449 (1993), cert denied, 510 U.S. 1207 (1994), the Oregon Supreme Court found that Oregon's customary public property rights in ocean beaches precluded a taking claim challenging regulations restricting beach development (specifically, a seawall in aid of a motel development). The decision in Stevens v. Cannon Beach drew upon the state's longstanding treatment of beaches as a public resource. In other words, the court drew upon "background principles" of Oregon law to arrive at its conclusion. The court found the state had, for at least 80 years, claimed an interest in the dry sand area of the beach and concluded the public's use of the dry sand area was one of the restrictions that Oregon's own background principles of property law placed upon land ownership. Stevens v. City of Cannon Beach, 317 Or at 143, 854 P.2d 456-57.

The California Supreme Court held that owners who purchase or acquire property subject to a public trust may not claim a vested right to bar recognition of the trust or take action to carry out its purposes. Nat. Audubon Soc. v. Super. Ct. of Alpine Cty., 33 Cal.3d 419, 189 Cal. Rptr. 346 658 P.2d 709, cert. denied, 464 U.S. 977 (1983).

[20] The court also noted, however, that the landowners would have been justified in removing or killing animals if necessary to protect their lives or business. Of course, spotted owls do not threaten lives or property. This limited exception does not alter the state's general authority to enforce its wildlife and habitat protection measures pursuant to its "absolute right to maintain its game and wild animals upon any and all private lands... ." See Cook v. State, 192 Wash. at 607-610 and footnote 22, infra.

[21] The rule of public wildlife ownership is drawn from principles in existence in ancient times and does not represent some recent intrusive government scheme to deprive landowners of their entitlement. Under Roman law, animals were subject to common ownership, and the landowner did not enjoy ownership of wild animals passing over his land. See J.C. Thomas, TEXTBOOK ON ROMAN LAW 167 (1976). English common law recognized the "sovereign held an exclusive prerogative to animals" which was superior to the interests of individual landowners. 2 W. Blackstone, COMMENTARIES 417-17. The individual states of this union assumed a similar responsibility to act as trustee in support of wildlife for common use. See Arnold v. Mundy, 6 NJL 1, 70 (NJ 1821); Thomas A. Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976). See also the discussion of the English and American common law traditions in Cook v. State, 192 Wash. at 607-610.

Some mention of the court's comment about the state's power as subject to the applicable provisions of the Federal constitution may be appropriate. The court was speaking of a landowner's right to kill animals as "necessary" to protect life or property "against imminent and threatened injury... ." Cook v. State, 192 Wash. at 611. The court did not identify the constitutional right, but cited State v. Burke, 114 Wash. 370, 195 P. 16 (1921), a criminal case in which a defence of necessity to a charge of killing wildlife was incorrectly rejected by the trial court. The right, then, while not specifically identified in either case, appears to be derived from a right to life and property and requires a showing of immediacy and grave seriousness of harm. Of course, in this case, the owls are not threatening lives or damaging property.

[22] This principle is reflected not only in this state's forest practices regulations but in federal legislation protecting endangered species. In Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 708, 115 S. CT. 2407, 132 L. Ed.2d 597 (1995) the United States Supreme Court held that the word "harm" appearing as part of the definition of "take" in the Endangered Species Act included "significant habitat modification or degradation that actually kills or injures wildlife."

[23] A federal district court in Virginia recognized a state right, along with the federal government, to sue for damages to public wildlife resources resulting from an oil spill. In re Steuart Transportation

Co., 495 F. Supp 38 (E.D. Va. 1980). In Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir 1992), cert. denied, 507 U.S. 987 (1993), the court rejected the takings claim of a developer prohibited from building a vacation home development on winter deer grazing habitat.

[24] The court spoke of the state action as an exercise of its police power. Barrett v. State, 116 N.E. at 101. See also Rains v. Washington Dep't. of Fisheries, 89 Wn.2d at 746 wherein the court said a state restriction on changing a stream bed was an exercise of the police power. This state traditionally speaks of the common law right to control wildlife as an exercise of the police power. In Cawsey v. Brickey, 82 Wash. 653, 657, 144 P. 938 (1914), the court addressed a statute prohibiting personal dominion over game animals as but declaratory of the common law. Whatever special or qualified rights or, more correctly speaking, privileges, a land owner may have as to game, while it is on his own land, though protected by the laws of trespass as against other persons, have no protection, because they have no existence, as against the state. Since the title to game is in the state for the common good, the state's right to control, regulate or prohibit the taking of game wheresoever found and on whosesoever land is an inherent incident of the police power of the state.

Use of the term in the wildlife protection context, then, does not signal a departure from the basic rule that public authority to protect wildlife rests on public ownership of wildlife.

[25] The law is codified at RCW 77.12.020(6).

[26] The administrative scheme for listing species is now found in WAC 232-12-297.

[27] The owl was proposed for listing as a threatened species in June, 1989. 54 Fed Reg 26666 (June 23, 1989). The bird was listed as threatened a year later. 55 Fed Reg 26114 (June 26, 1990).

In Washington, the owl was listed as endangered in 1988. Former WAC 232-12-014. Earlier, in 1976, the initial permanent forest practice rules included a "Class IV-Special" provision that called for review and permit conditioning under the State Environmental Policy Act before a forest practice could be conducted on land "known to contain the nest or breeding grounds of any threatened or endangered species as designated by the Department of Game as in accordance with federal criteria and procedure, and approved by the Board" Former WAC 222-16-050(1)(a). In 1982, the rule was changed to include a breeding pair or the nest or breeding grounds of a threatened or endangered species or land within the critical habitat for such species as designated by the United States Fish and Wildlife Service. Former WAC 222-16-050(1)(a) [1982]. Rules governing habitat changed periodically until the present rule was finalized in 1996.

[28] See also Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 412-16, 103 S. Ct. 697, 74 L. Ed.2d 569 (1983), declining an invitation to hold that regulatory changes affecting a contractual relationship in a heavily regulated industry violated the constitutional prohibition against impairment of contracts.

[29] SDS Co. acquired 160 of the 230 acres in June, 1983. In June of 1988, the company acquired the remaining 70 acres. See "Memorandum in Support of Plaintiffs' Motion For Partial Summary Judgment on Liability," page 4, filed April 7, 1995.

[30] See the state's discussion of the regulatory history in its "Memorandum in Support of Defendants' Motion For Summary Judgment" filed this date.

[31] Plaintiffs' circumstance is not unlike that of the petitioners in Dodd v. Hood River County, 317 Or. 172, 182-85, 855 P.2d 608 (1993). In that case, the Oregon Supreme Court rejected petitioners' view they had a reasonable investment backed expectation to build a non-forest

dwelling (retirement home) on land designated for forest uses and prohibiting dwellings unless necessary and accessory to a forest use. When petitioners purchased the land, it was zoned for forest use, but local county regulations permitted dwellings. In place, however, were statewide land use "goals" including Statewide Land Use Planning Goal 4 which had been interpreted as limiting uses of such property to those uses necessary and accessory to a forest use. The county was in the process of revising its land use controls to conform to the statewide land use goals. Plaintiffs sought approval to build after the county had completed revisions and changed its ordinance to prohibit dwellings unless they were necessary and accessory to a forest use. The court found petitioners expectations they had "an absolute right to build a dwelling on their land in the future were not reasonable." Dodd v. Hood River County, 317 Or. at 185, 855 P2d 615-17.

[32] The rule discusses owl habitat in "spotted owl special emphasis areas" (SOSEA). The areas are mapped in WAC 222-16-086.

[33] In its Memorandum in Support of Summary Judgment addressing ripeness issues, the state advises that other means exist under which plaintiffs may obtain regulatory relief. The landowner and the state may develop a Landowner Option Plan (LOP). WAC 222-16-100. The plan offers an exemption from SEPA review and conditioning for activities affecting critical habitat. See WAC 222-16-080(6)(e).

[34] In this regard, it should be noted that a requirement one seek a permit before undertaking a particular land use does not itself "take" property. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 106 S. Ct. 455, 88 L. Ed.2d 419 (1985). See also Tabb Lakes, Ltd v. U.S., 10 F.3d 796 (Fed. Cir 1993); and Moore v. U.S., 943 F Supp 603, 613 (E.D. Va. 1996).

[35] The Oregon court rejected Boise's argument that there was no guarantee that the incidental take permit, if granted, would lead to approval of the company's logging plan. It said "nothing in Williamson, Hodel or Agins implies that a waiver or variance must be `a sure thing' in order for a plaintiff to be required to pursue such a remedy before bringing a takings claim." Boise, 164 Or. App. at 131.