IN THE COURT OF APPEALS OF THE STATE OF OREGON
MARSHA SEIBER AND ALVIN SEIBER, Linn County Circuit Court No. 980649
Plaintiffs-Appellants

and OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiff, CA A108914

v.

STATE OF OREGON, by and through the Oregon State Board of Forestry,
Defendant-Respodent,

and

AUDUBON SOCIETY OF PORTLAND, OREGON TROUT, INC., PACIFIC COAST FEDERATION OF FISHERIES, and INSTITUTE FOR FISHERIES RESOURCES,

Intervenors-below.

BRIEF OF AMICI CURIAE AUDUBON SOCIETY OF PORTLAND, ET AL

Appeal from the Judgment of the Linn County Circuit Court
Honorable Daniel R. Murphy, Judge

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INTRODUCTION

Amici curiae, Audubon Society of Portland, Salem Audubon Society, Oregon Trout, Inc., Pacific Coast Federation of Fishermen's Associations and Institute For Fisheries Resources submit this brief in support of the State of Oregon, Board of Forestry (board). *Amici* will address the Seiber's argument that the board's administrative rule restricting commercial logging that would destroy Northern Spotted Owl nest sites effects a physical occupation of their property. *Amici* argue the board's restriction on commercial forest logging (1) does not cause a physical occupation of plaintiffs' property; and (2) in any event, the board's rule does not effect a taking because a landowner has no right under Oregon property law to harm public wildlife without the state's authorization.

SUMMARY OF ARGUMENT

The Board of Forestry rule prohibiting certain forest operations around an active Northern Spotted Owl nest is a use restriction. It is imposed for a limited period of time to protect nesting owl habitat. The regulation restricts commercial forest operations, more specifically, logging, and it does not address other uses or put the owner's land into public service to any greater or lesser degree than any other use restriction fashioned to promote public purposes. A restriction on use occasioned by the presence of a wild animal does not transform a use restriction into a physical taking.

Even if this restriction were viewed as creating a physical occupation of private property for public use, there would be no "taking" of the landowners' property. Under this state's and the federal constitutions, the scope and limits of the owners' title to property are defined by background principles of state property law. In Oregon, the state holds wild animals under its sovereign authority for the benefit of its citizens. The state has the authority to determine the conditions under which wildlife may be taken or harmed, and no property owner has a right to harm wildlife without state permission. Because the landowners' title must be understood to incorporate the state's right to protect its wildlife, a temporary regulatory limit on logging operations in order to protect a public wildlife resource takes nothing from the landowners.

ARGUMENT

I.The Seibers' suffered no occupation of their property as a result of the board's regulation protecting Northern Spotted Owl habitat.

1. The board rule.

It may be useful to provide a short outline of the board's habitat rule and its operation. In 1987, in order to help protect threatened and endangered species as identified by the Oregon Department of Fish and Wildlife (ODFW) and as listed under the federal Endangered Species Act, the Oregon Legislature directed the board to establish inventories of "resource sites,"[1]including "[s]ensitive bird nesting, roosting and watering sites." *See*TA "1987 Or Laws ch 919 §14(3)(a)(A), (B)" \c 1 \l "1987 Or Laws ch 919 §14(3)(a)(A), (B)"1987 Or Laws ch 919 §14(3)(a)(A), (B).

In June, 1988, ODFW promulgated rules identifying the Northern Spotted Owl as a threatened species.

Former OAR 635-100-105(5).The United States Fish and Wildlife Service listed the owl as a threatened species in 1990.

55 Fed Reg 26114 (June 26, 1990).
The 1987 legislature also required the board to determine whether forest practices would conflict with resource sites identified in the inventories. If forest practices would cause conflicts, the board was required to consider the consequences of the conflicts and determine appropriate levels of protection. *See*

1987 Or Laws ch 919, §14(3)(b). The board was required to implement its conclusions by adopting "rules appropriate to protect resource sites in the inventories required by paragraph (a) of this subsection." 1987 Or Laws ch 919, §14(3)(b). [2]

Because the Northern Spotted Owl was listed as an endangered wildlife species, and because owl nesting sites were included in the definition of "sensitive resource site" within the meaning of

the law, the board determined what forest practices would conflict with the spotted owl nesting sites and promulgated rules to protect the sites.

In promulgating rules to protect nesting sites, the board furthered the legislature's requirement that an endangered species, the Northern Spotted Owl, be protected from extinction. The board's efforts are seen in the rule the Seibers insist results in a taking of their property,*former* OAR 629-24-809, now OAR 629-665-0210. The rule provides that when the State Forester receives a written plan, as is required before a logging operation may begin, he must determine whether the proposed operation conflicts with a resource site. If he finds a conflict, he applies the "appropriate levels of protection" set out in the rule for protection of Northern Spotted Owl nesting sites. OAR 629-665-0020(1)(b)(B). The rule requires that the written plan provide, among other things, for a "70-acre area of suitable spotted owl habitat encompassing the nest site." OAR 629-665-0210(1)(a)(b).

Importantly, the rule applies only to "operations" as defined in ORS 527.620(9). Therefore, the rule applies to commercial logging and other forest practices, but it does not apply to other land uses which may be permissible under local comprehensive land use plan and zoning codes. [3]

That is, Board of Forestry jurisdiction and its owl habitat rule do not address other permissible land uses, such as recreational, residential and commercial uses as may be permitted by the local land use planning jurisdiction. Also, because "operation" is defined to mean "any commercial activity relating to the growing or harvesting of forest tree species," the rule does not prohibit cutting trees for firewood, to improve a view or for any other non-commercial reason not involving the sale of timber.

The rule only addresses the maintenance of the 70-acre core area during commercial operations as needed to protect the nest site; it does not address other landowner activities, even those other activities that may affect the nest site. For example, even though the board rule serves, ultimately, to protect the owl, the board's rules do not address hunting the owl or any other animal species. Such activities fall under the regulatory authority given ODFW.
See generally 0RS chapter 496 addressing application, administration and enforcement of wildlife laws.

The Board of Forestry acts within the legislature's grant of authority to regulate forest practices, the board is not an overseer of all activities on forest land or of creatures in the forest. *See* ORS 526.016; 527.610 to 527.770 (the Oregon Forest Practices Act).

In light of this understanding of the character and scope of the board's rule, it is clear the rule is a restriction on the use of property, and it does not effect a physical occupation of land. This court arrived at the same conclusion given the same issue in *Boise Cascade Corp. v. Board of Forestry* , 164 Or App 114, 126, 991 P2d 563 (1999). Plaintiffs present no convincing reason to depart from the holding in that case. Indeed, plaintiffs cite no case offering convincing authority supporting their claim of physical occupation.

B. OAR 629-665-0210 is a use restriction which neither causes nor authorizes occupation of the Seibers' property.

In *Loretto v. Teleprompter Manhattan CATV Corp* ., 458 US 419, 102 S Ct 3164, 73 L Ed2d 868 (1982), hereafter, *Loretto*, a New York state statute required landlords to permit cable television companies to install certain facilities on the landlords' property. When considering the case, the U.S. Supreme Court recognized a special, "narrow" category of regulations that effect a "permanent physical occupation authorized by the government... ." [4]*Loretto*, 458 US at 426. When a regulation falls within this category, the court treats it as a *per se* or presumptive taking of private property for public use. The court emphasized the character of the invasion in the case

before it was "qualitatively more intrusive" than an ordinary regulatory restriction on use of property. *Loretto,* 458 US at 441. It found a taking because "property rights in a physical thing have been described as the rights to possess, use and dispose of it. To the exent that the government permanently occupies physical property, it effectively destroys each of those rights." *Loretto*, 458 US at 435.

Following *Loretto*, the Oregon Supreme Court in *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 900 P2d 495 (1995), found an Oregon Public Utility Commission rule requiring installation of telephone equipment owned by a third party on the plaintiff's property effected a physical invasion and as such required compensation under the Oregon and federal constitutions. In that case, as in *Loretto*, the government's requirement resulted in a physical occupation by a human instrumentality. That is, it was a deliberate human act that placed a constructed object on the physical property of another, effectively occupying physical space otherwise available to the property owner. In contrast, the board's rule *responds* to the presence of a nesting pair of owls by limiting the forest practice *uses* to which the owner may put the property.

The Seibers argue the rule authorizes an occupation because it interferes with their right to exclude the owls from their property. App Br at 7-8. Of course, the owl is totally ignorant of this claimed state authorization and could not care less if it is given, withheld or written into the Oregon Constitution. More importantly, contrary to the apparent assumption on the part of the plaintiffs in this case, the board's rule does not address an owner's efforts to exclude owls. It does not address owner activities, other than forest practices, that would cause owls to leave the land. Such prohibitions are found in federal regulation under endangered species measures and in other state regulations. *See* 16 USC § 1531 *et seq*; 50 CFR § 17.3; and ORS 496.171 to 496.182 and OAR 635-100-0080 to 635-100-0160 controlling threatened and endangered species listings and ORS 496.605 to 496.715, addressing enforcement of wildlife laws. The rule simply tells the owner not to log the property for the time the owls are nesting. OAR 629-665-0210(1).[5]

In substance, the regulation is a restriction on one kind of use. The restriction imposed in the case at bar has effects on one well regulated property activity, forest practices; it does not have effects on the whole of the property owners' bundle of sticks. [6]

Worth considering in this regard is the Circuit Court's opinion in *Southview Associates, Ltd. v. Bongartz* , 980 F2d 84 (2nd Cir 1992), *cert. denied*, 507 US 987 (1993), hereafter, *Southview*. In that case, the court found no physical taking of property where a restriction was imposed on a vacation home development request in order to protect necessary deer habitat. The court said the owner was not deprived on his right to possess the land, exclude persons (or even the deer), use other portions of the property and use the protected area for activities that did not endanger the deer. [7]

The court stressed that the case before it presented no absolute, exclusive physical occupation. It explained:

To the extent the Board has allowed the deer to 'invade' Southview's land, this 'invasion' is relatively minor, consisting of an occasional, seasonal and limited habitation by no more than 20 deer. Minor physical intrusions are not physical takings. [*Citing Loretto*, 458 US at 426, 102 S Ct at 3171] Indeed, the deer activity displaces only a few sticks in the bundle of rights that constitute ownership. *See* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 589 (1981). In any event, no absolute dispossession of Southview's property rights has occurred. *See Loretto*, 458 US at 435 n. 12, 102 S Ct at 3176 n. 12. Under *Loretto*, there has been no physical taking.

Southview Associates, Ltd. v. Bongartz , 980 F2d at 95. As in the *Southview* case, the Oregon Board of Forestry owl habitat rule may inhibit a landowner's use of the property, but in doing so, the landowner suffers no physical occupation.

In *Florida Game and Freshwater Fish Commission v. Flotilla*, 636 So 2d 761 (1994), a developer claimed a physical taking because he was prohibited from developing land within 750 feet of a bald eagle nesting tree. The state court rejected the claim admonishing that [t]he government physically occupies property when it permanently deprives the owner of his 'bundle' of private property rights, including the right to possess and dispose, as well as the right to prevent the government from using the occupied area. As a factual matter, Flotilla lost neither the right to possess nor convey the affected areas, and further retained the right to use the property in any way that would not disturb the eagles' natural habitat. Certainly the government was not possessed of the property. This case is more truly characterized by the fact-intensive inquiry the law associates with regulatory takings rather than physical takings. *Florida Game and Freshwater Fish Commission v. Flotilla*, 636 So 2d at 764. [8] Again, the plaintiffs in this case are not permanently deprived of any property right. They are temporarily limited only in a single use of their property.

A governmental action effects a physical taking where it *requires* the landowner to submit to a physical occupation. Here, the landowners' application to harvest timber brings into play the board's regulation which, in turn, imposes a restriction on property use. The restriction goes to the landowners' activity, logging, it does not create a physical occupation of land.

The Northern Spotted Owl is not an agent of the State of Oregon.

The fact the board's rule imposes a use restriction and does not create an occupation should preclude any recovery against the state under the theory advanced in plaintiffs' brief to this court. Whether or not plaintiffs might have a "regulatory" taking claim is not part of this case. It is worth adding, however, that there is an additional fundamental error in the plaintiffs' argument. Plaintiffs ignore the fact that whether an owner may have owls in his or her timber is not the result of a state action. The board does not own the owl in a proprietary sense. *Fields v. Wilson*, 186 Or 491, 498-99, 207 P 153 (1949).

It has no control over owl conduct. *Christy v. Hodel*, 857 F2d 1324 (9th Cir 1988). Wild animals do not occupy land as agents of the public. *See Moerman v. State of California*, 21 Cal Rptr2d 329, 332-34 (Cal Ct App 1993). The owl is not a stand-in for an occupying government. Arguing the owl occupies particular real estate at the behest of the government is simple nonsense.

This court discussed this specific issue in *Boise Cascade Corp. v. Board of Forestry*, 164 Or App 114. In that case, as in this, plaintiff argued the board's owl habitat regulation effected a physical occupation of private property. In rejecting this view, this court considered the holding in *Pumpelly v. Green Bay Co.*, 80 US (13 Wall) 166, 181, 20 L Ed 557, 561 (1871) in which the United States Supreme Court said 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... ." This court contrasted that holding with a later one in which a flood occurred as a result of a forest fire that destroyed a watershed area, and the Supreme Court ruled that a subsequent government regulation of construction within the flood zone should be analyzed under the law governing regulatory takings, not takings by physical occupation. *See*, *First Lutheran Church v. Los Angeles County* , 482 US 304, 308, 107 S Ct 2378, 96 L Ed2d 250 (1987). In addressing plaintiff's claim based on the physical occupation described in *Loretto*, this court advised that 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.

In accord with this analysis, in *Moerman v. California* , *supra*, a California court rejected the contention that tule elk, introduced to promote recovery of the species, effected a physical occupation by observing that "the distinction between tule elk and cable television personnel or equipment [as in *Loretto*] should be obvious. The tule elk are wild animals who roam across private and public property." Similarly, In *Mountain States Legal Foundation v. Hodel* , 799 F.2d 1423, 1428 (10th Cir. 1986), a federal appeals court rejected the claim that federal protections for wild horses located on private lands resulted in a physical taking, describing as a "fallacy" the plaintiff's "argument that wild animals are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the [plaintiff's] property."

The decision of the Washington State Supreme Court in *Rains v. Washington Department of Fisheries* , 575 P.2d 1057 (1978), also is instructive. The plaintiff sought a permit to excavate a creek running through his property in order to prevent flooding. The state denied the permit because the excavation would have destroyed important fish habitat. When the creek overflowed and caused major property damage, the owner filed a claim for inverse condemnation. The Court rejected the claim, observing that where a taking has been found, "affirmative action on the part of the government was involved." *Id.* at 1060.

In this case, the flooding was due to a "force majeure." No action by the state caused the flooding, there was no project or public improvement, and there was no actual public use. Neither was there any permanent infringement preventing the original use of the land nor a total appropriation of appellant's property. The most that can be said here is that, in the exercise of its police power to protect fish life for the benefit of all its citizens, the state restricted the extent to which appellant could change the bed of Morse Creek. Controlling work in a stream bed is within the purview of regulating and protecting state fisheries. *Id. See also Shell Island Homeowners Ass'n v. Tomlinson* , 134 N.C.App. 217, 517 S.E.2d 406, 415 (1999), rejecting a regulatory taking claim where prohibition on construction of seawalls led to erosion and loss of property because erosion was a "naturally occurring event" that was "merely incidental" to the regulations.

In sum, natural events and entities having some connection to government use regulations do not enter property and take it. Natural events, whether found in owl willfulness or in raging flood waters do not belong to the class of occupiers discussed in *Loretto* and cases following.

Finally, the Seibers also argue the board's rule causes a physical occupation because it creates a "servitude." If this view were correct, then any regulation restricting use in order to achieve a public safety, public resource or other public value objective could be said to create such intrusion. For example, a zoning regulation prohibiting all but residential uses in a particular area might be said to effect a physical occupation by employing a residential-use-only "servitude" on the property. A set-back requirement designed to permit emergency access around structures may be said to create such an occupation in favor of a public purpose. Setbacks from certain streams to protect salmon spawning habitat [[9] may be so described as occupations, as might restrictions on cutting in times of high fire danger [ORS 477.625-477.670; OAR 629-043-0070].

Certainly, seasonal hunting regulations lend themselves to this odd view. A seasonal restriction on deer hunting could be viewed as authorizing an occupation of the land by deer the landowner is prohibited from harvesting from December through September. Similarly, restrictions on selling diseased cattle could be regarded as a government occupation of the owner's land by the sick cow. *See* ORS 596.311 to 596.470.

One can twist most any regulation into an occupation if one views restrictions protecting some public interest as, in effect, physically planting that interest on private property. The plaintiffs cite no precedent to support such a view of government regulation, and this case presents no reason to create such a property-rights revolution to the public's detriment.

Background principles of Oregon law bar takings claims based on state regulations that protect public wildlife resources. **A. Background principles of Oregon law define state authority and the landowners' property rights.**

The United States Supreme Court held a property owner may not demonstrate a regulation effects a taking if he or she lacked the property right to engage in the regulated conduct in the first place. *Lucas v. South Carolina Coastal Council* , 505 US 1003, 1027, 112 S Ct 2886, 120 L Ed2d 798 (1992). 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 US at 1029. The court's emphasis on "background principles" reflects its traditional deference in Fifth Amendment takings cases to state-law definitions of property interests. Indeed, its takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas*, 505 US at 1027. *See also Phillips v. Washington Legal Found.* , 524 US 156, 164, 118 S Ct 1925, 141 L Ed2d 174 (1998).

The affirmation in *Lucas* that a state has a defense to a takings claim if it shows its regulation is grounded in background principles of state property law applies to all types of takings claims. The court found a use restriction could be upheld against a taking claim even if it takes all value in the property. Importantly, it also said it would permit the government to assert a pre-existing limitation on the owner's title in defense of a taking claim based on physical occupation. *Lucas*, 505 US at 1028. That is, the defense of background principles of state property law is applicable to both a regulatory and a physical occupation taking claim.

The Oregon Supreme Court applied background principles of Oregon property law when rejecting a taking claim based on the denial of a permit for a beachfront development. *Stevens v. Cannon Beach* , 317 Or 131, 143, 854 P2d 449 (1993), *cert. denied*, 510 US 1207 (1994). The court said the asserted right was in conflict with the public's customary right to use the ocean beaches. It found the state, for at least 80 years, claimed an interest in the dry sand area of the beach for public use, and it 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 on land ownership.

This court similarly applied a background principle of Oregon water law to sustain the denial of a taking claim predicated on an assumed right to discharge mine wastes into an Oregon stream. In *Kinross Copper Corp. v. State of Oregon* , 160 Or App 513, 981 P2d 833 (1999); *on rehearing*, 163 Or App 357, 988 P2d 400 (1999), *review denied*, 330 Or 71 (2000), the plaintiff mining company claimed a right, incident to its mining claim, to discharge mine processing waters. The state's refusal to grant a permit for that discharge gave rise to a taking claim. In rejecting the claim, this court cited *Lucas,* tracing the evolution of Oregon's control over water, and concluded plaintiff had no viable common law right to use water incident to the mining claim. In other words, the mining company had no private interest in using the waters of this state in a manner outside of or in contravention of this state's established authority to control state waters. *See also, Dodd v. Hood River County*, 317 Or 172, 183, 855 P2d 608 (1993) in which the Oregon Supreme Court cited with apparent approval the comment in *Lucas*, that there is no regulatory

taking "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." [10]

B. Background principles of Oregon law prohibit the taking of wildlife and the destruction of habitat.

Public ownership of wildlife represents a long held "background principle" of Oregon property law. [11] The Supreme Court reaffirmed the principle that this state holds wildlife in its sovereign capacity to conserve and protect wild animals for public benefit in *Fields v. Wilson* , 186 Or at 498-99. *See also*, *Bowden v. Davis* , 205 Or 421, 441, 289 P2d 1100 (1995). The interest is not of ownership in a proprietary sense, but as trustee for all state citizens. *State v. Hume* , 52 Or 1, 5, 95 P 808 (1908); *Monroe v. Wythcombe*, 84 Or 328, 334, 95 P 227 (1917). [12]

This interest is far more ancient than the 80 year public custom of traveling on the beach. The states, on admission to the union, took up the English common law regarding the sovereign's rights in wildlife. [13] The common law establishes the state acts as trustee to protect wildlife for the benefit of its citizens. *See Shepherd v. State Dept. of Fish & Game* , 897 P2d 33, 40;*State of Texas v. Bartee*, 894 SW 2d 41 (1994); *Arnold v. Mundy* , 6 N.J.L. 1, 71 (NJ 1821). *See also* Musgrave and Stein, STATE WILDLIFE LAWS HANDBOOK (1993) listing 32 states with laws addressing public ownership of wildlife.

In Oregon, because the absolute right of control of wildlife is vested in the state, the state may control private property as necessary to prevent harm to public wildlife resources. [14] *State v. Hume* , 52 Or at 4-5. In *Fields v. Wilson* , 186 Or at 499-500, the Supreme Court rejected a challenge to a state controlled monopoly on beaver trapping, advising [t]he right to kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, and it is not a right inhering in any individual. Consequently, nothing is taken from the individual, and his constitutional rights are not infringed when he is denied the privilege or when limitations are placed on the killing or marketing of game.

See also, State v. Pulos , 64 Or 92, 95, 129 P 128 (1913) in which the court said the taking of wildlife was "not a right, but is a privilege, which may be restricted, prohibited or conditioned, as the lawmaking power sees fit." The Oregon Supreme Court in *State v. Hume* explained that if taking of wild fish for canning is unrestricted, it causes their extermination; and to prevent extermination, the court affirmed that the state may pass laws controlling the time and manner of taking fish, or even establish a temporary prohibition on taking fish. *State v. Hume*, 52 Or at 6-7. As an incident of the state's ownership of wild animals, the court said, "the legislative assembly may enact such laws as tend to protect the species from injury by human means." *See also State v. Catholic*, 75 Or 367, 374, 147 P 372 (1915).

Similarly, in *Thompson v. Dana* , 52 F2d 759 (D Or 1931), *affirmed*, 285 US 529 (1932), the United States District Court rejected a claim that closure of part of the McKenzie River to fishing violated plaintiff's property rights, even to the extent of destroying his business. The court ruled "the state always held the power to close the stream to angling" because "[c]onservation of fish for the common good of all citizens of a state is paramount, and reasonable regulations to attain that end to not infringe upon the property protective, the equality, nor even the commerce clauses of the Constitution of the United States." *Thompson v. Dana*, 52 F2d at 762.

It may be argued, as did plaintiffs below, that while the state has the sovereign authority to protect wildlife on private property, this authority does not include a right to restrict land uses in order to protect endangered species habitat. *See Plaintiffs' Combined Reply Memorandum* at 5; *Brief Amici Curiae of Pacific Legal Foundation, et al* at 24-30. This argument is mistaken.

First, as a logical matter, it should make no difference how an owner's actions that kill or harm a wild animal bring about that result.

The background principle at issue in this case ultimately focuses on the animals themselves and safeguards the public's sovereign rights in wild animals. These rights are invaded in exactly the same fashion and to exactly the same degree regardless of whether animals are killed directly, such as by shooting or trapping them, or they are killed indirectly by destroying nesting habitat upon which individuals of the species depend for their survival.

The Oregon Supreme Court adopted essentially this reasoning in *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or 654, 87 P2d 195 (1939), hereafter, *Columbia River*. The court, relying in part on the State's traditional sovereign authority over wildlife, overturned dismissal of a suit to restrain pollution of the Willamette and Columbia Rivers. In the course of its opinion, the court affirmed that the state's regulatory power "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*, 160 Or at 663. Likewise in this case, the State's acknowledged power to protect the Northern Spotted Owl from harm would be "of no avail" if the State could not exercise this power to prevent destruction of active owl nest sites [15]

Second, plaintiffs' argument below flies in the face of biologists' understanding of how certain land use activities can actually harm Northern Spotted Owls and currently threaten their continued existence. Recent scientific research shows that the primary cause for the decline of the Northern Spotted Owl, and the primary factor limiting the owls' recovery, is the destruction of suitable nesting sites. *See* Brief of *Amici* Biologists. While a certain number of owls are no doubt shot and otherwise killed or injured by direct means, these acts are of lesser importance than the destruction of nesting habitat which is necessary to the species' future existence. If the limitations on private title based on the State's well established power to manage and protect wildlife did not encompass destruction of critical nesting habitat, the State's background principle designed to protect public rights in wildlife would not apply to the most significant threat to those rights. Thus, modern science supports the common sense conclusion that this background principle of Oregon law protecting wildlife must limit an owner's right to harm owls by destroying their critical nesting habitat. [16]

Finally, there is simply no legal support for plaintiffs' narrow view of this background principle. Plaintiffs below attempted to draw a false distinction between limitations on the taking of wildlife and rights in real property. An owner's right to hunt, the most obvious and traditional form of taking of wildlife, is a "a property right, as much as any other ... distinct right incident to the soil." *Farris v. Arkansas* , 310 S.W.2d 231 (Ark. 1958). Yet from their arguments below, plaintiffs apparently agree that this property right is held subject to the background principle that the public owns all wildlife, and the State has sovereign authority to manage and protect wildlife for public benefit. *See Farris v. Arkansas*, 310 SW2d at 235 stating an owner's right to take fish and game was a property right but not an unqualified or absolute one. The right is subject to limitations; it "must always yield to the state's ownership and title [in wildlife], held for the purposes for regulation and preservation for the public use." Thus, according to plaintiffs' own understanding, the sovereign authority to protect wildlife is an inherent limitation on title to real property.

Furthermore, the courts have specifically recognized that the sovereign public ownership of wildlife is an inherent limitation on owner's right to harm wild animals by destroying critical habitat upon which the animals depend for their survival. The Oregon Supreme Court's decision in *Columbia River, 160 Or 654,* upholding State authority to protect fish habitat from pollution in order to protect the public's fish represents binding authority on this point. To the same effect, in the seminal case of *Barrett v. State* , 220 NY 423, 425-28, 116 NE 99, 101-102 (1917) the New York Court of Appeals upheld against a takings challenge the state's prohibition on molestation or disturbance of beaver or their "dams, houses, homes or abiding places of same" [17]

notwithstanding the landowner's complaints of damage to his property. *See also Florida Game and Freshwater Fish Commission v. Flotilla*, 636 So. 2d 761 holding that a rule restricting development within 750 feet of a bald eagle nest did not constitute a taking. [18]

Most recently, the Appellate Division, Second Department of the New York Supreme Court affirmed the principle that public ownership of wildlife limits an owner's rights to destroy wildlife habitat. In *State v. Sour Mountain Realty, Inc.* , 714 NYS2d 78 (2000), the court upheld an injunction against a landowner's construction of a fence that would separate the den of a threatened species, the timber rattlesnake, from its foraging areas. The court found that the "snake-proof" fence would block the snake's access to traditional foraging areas and otherwise disorient and disturb the animals. The court first rejected the argument that the state lacked the authority under state law to protect wildlife habitat from destruction. It then rejected the defendant's assertion that the state's action resulted in a constitutional taking of private property. The court found that the defendant could establish neither a regulatory nor a physical taking. Most importantly for present purposes, the court relied on *Barrett v. State* , *supra*, affirming state authority to protect wildlife and New York Environmental Conservation Law, §11-0105 (McKinney 1999), codifying state ownership of wildlife, when concluding that the "State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power." *State v. Sour Mountain Realty, Inc.*, 714 NYS2d at 84.

These rulings are consistent with the more general principle that there is no violation of an owner's property rights when protected wildlife causes damage to private property or when an owner is prevented from killing or harming wild animals that threaten some economically productive use of real property. In *Commonwealth v. Higgings* , 178 NE 536 (1931) the Massachusetts Supreme Court found no taking as a result of restrictions on trapping used to protect a commercial chicken house from foxes. In *Christy v. Hodel* , 857 F2d at 1334, the court upheld restrictions against killing an endangered grizzly bear threatening a landowner's livestock. The court in the latter case noted that of the "courts that have considered whether damage to private property by protected wildlife constitutes a 'taking,' a clear majority have held that it does not and that the government does not owe compensation." *Christy v. Hodel* , 857 F2d at 1334. *See also State v. Webber* , 85 Or App 347, 736 P2d 220 (1987), *review denied*, 304 Or 56 rejecting a landowner's claim of a right to kill state protected deer damaging the landowner's crop. [19]

Were there any remaining question of the state's authority, and need, to protect habitat in order to protect public rights in wildlife, one need only look to the U.S. Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 US 687, 115 S Ct 2407, 132 L Ed2d 597 (1995). The Court ruled that a provision in the federal Endangered Species Act prohibiting a "take" of an endangered species applies to critical habitat destruction that would harm the species. The ESA defines "take" to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such conduct. The Court upheld a Department of Interior interpretation of "harm" to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. The Court's reasoning was entirely straightforward:

The dictionary definition of the verb form of 'harm' is to cause hurt or damage or to 'injure'.... In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview to direct applications of force against protected species, but the dictionary definition does not include the word 'directly' or suggest in any way that only direct or willful action that leads to injury constitutes 'harm.' *Id.* at 169. In other words, the U.S. Supreme Court specifically rejected the same crabbed interpretation of the terms "take" and "harm" in the ESA that the plaintiffs below urged apply to the

traditional sovereign authority to protect public wildlife from death or injury. The Supreme Court's common sense interpretation of the terms "take" and "harm" in the ESA support adoption of the same common sense interpretation of the scope of public authority to safeguard the public's wildlife under Oregon property law. [20]

Finally, it is worthwhile to emphasize the narrow scope of the background principle of sovereign authority to protect wildlife as applied in this case. *Amici* are not contending that this longstanding principle of Oregon property law would justify rejection of takings claims based on any and all kinds of regulatory protections for habitat which might be useful in supporting wildlife populations. Consideration of such a broad principle would be unwarranted on the facts of this case. *Amici* simply contend that the public authority to protect wildlife, rooted in the sovereign ownership of all wild animals, includes the authority to control, at least temporarily, critical habitat destruction that would cause actual death or injury to individual members of an endangered species. As discussed, common sense, sound science and established legal precedent support this modest proposition.

CONCLUSION

Amici urge this court reject plaintiffs' arguments and affirm the trial court's decision.

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Footnotes:

[1] A "resource site" includes any wildlife species listed as threatened or endangered by the ODFW or under the federal Endangered SpeciesAct. ORS 527.710(3)(A). By board rule, the "resource site" refers to the "nest tree, roost tree or mineral watering place, and all identified key components," that is, to those attributes required to maintain the use and productivity of the nest site. OAR 629-600-0100(33).

[2] The present codifications of these legislative efforts may be found at ORS 527.610 to 527.770, the Oregon Forest Practices Act. The board's specific rulemaking duties are codified at ORS 527.710

[3]There are alternatives to maintenance of the 70-acre core area. The forester may waive or modify the requirement if an alternative practice will provide equal or better results, if an alternative offers less environmental damage or if the forest operator or owner is able to secure a federal incidental take permit. *See* OAR 629-605-0100(1), (2) and 629-665-0210(5). In this case,

plaintiffs filed suit before seeking modification of the 70-acre core area under any of these options.

[4] In later cases, the court has noted again the narrowness of this categorical rule for physical occupations. *See, for example*, *FCC v. Florida Power Corp.*, 480 US 245, 251, 107 S Ct 1107, 94 L Ed2d 282 (1987) and *Yee v. City of Escondido*, 503 US 519, 527-28, 112 S Ct 1522, 118 L Ed2d 153 (1993).

[5] The rule is triggered when the State Forester finds there is an "active resource site." That term means a site that has been used in the recent past by a listed species, such as the Northern Spotted Owl. OAR 629-600-0100(2) defines a "nesting site" to be a tree containing a spotted owl nest or an "activity center" of a pair of owls capable of breeding. Repeated observation is needed to support a determination that a pair of owls, capable of breeding, occupy an activity center.

[6]The Seibers' argument suggests they believe they have a generalized constitutional right to log their property without government restriction. To the extent they make such a claim, it lacks support. *See* the discussion of the relationship of use restrictions to claims constitutionally protected rights are infringed upon in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* , 459 US 400, 412-16, 103 S Ct 697, 74 L Ed2d 569 (1983).

[7]The *Southview* court compared the case before it to *Yee v. City of Escondido*, 503 US 519, 530-32, wherein the Supreme Court found mobile home park owners could not claim a rent control ordinance worked an occupation of their property. The court noted no government compulsion was present in that case because the petitioners voluntarily rented their land to the mobile home owners and were not compelled to continue to do so. *See also, FCC v. Florida Power Corp.*, 480 US at 247, wherein the court held no physical taking occurred as a result of a regulation controlling the rates utility companies can charge cable television operators who lease utility poles. The court said there was no government compulsion requiring the company to continue to lease poles to third parties.

[8]To be sure, some state courts have found reason to hold that protecting animal habitat requires payment to the affected landowner. In *Shellnut v. Arkansas State Game & Fish Commission*, 258 SW2d 570, 574 (1953), the Arkansas Supreme Court ruled that establishment of a game refuge and attendant closure of neighboring private land to hunting caused a landowner's crops to be destroyed by deer. The loss, according to the court, was compensable as a taking because the landowner suffered a loss of the "common and necessary" use of the property. This holding has not been followed in the Ninth and Tenth Circuit Courts of Appeal and was undermined in *Farris v. Arkansas State Game & Fish Commission*, 310 SW 2d 231, 237 (1958) where the court found no taking of a fish farmer's property where state regulations prohibited the sale of game fish raised in privately owned waters. Similarly, *State v. Herwig*, 16 Wis 2d 635, 117 NW2d 335, 340 (1962) making a similar finding has not found significant followers in appellate courts.

[9]OAR 629-640-0000 *et seq*. sets out forest operation restrictions for protection of this state's waters.

[10]Other jurisdictions apply background principles of state law to preserve important state resources in the face of takings claims. In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P2d 1246 (1995), *cert. denied* 517 U.S. 1163 (1996), the Hawaii Supreme Court relied on traditional aboriginal gathering rights and the Hawaii constitutional recognition and protection of those rights when rejecting a developer's claim that such native rights must yield to private property interests. Further, where the protected resource is held as a public trust, such as with a state's long held dominion over tidewater lands, the landowner's title

to such property does not convey a right to develop such land without state approval. In one such case, the New Jersey Supreme Court reminded the developer that the sovereign never waives the right to regulate use of public trust property. *Karam v. New Jersey* , 723 A2d 1221, 1228-29 (NJ 1999), *cert. denied* 120 Sup. Ct. 51 (1999). Similarly, a Florida court rejected a takings challenge brought as a result of a state prohibition on offshore drilling. Drilling would interfere with the public trust responsibility to protect land held in trust for all the people. *Coastal Petroleum v. Chiles*, 701 So2d 619, 624 (Fl. Dist. Ct. App. 1997), *review denied*, 707 So2d 1123 (1998), *cert. denied,* 118 S.Ct. 2369 (1998). *See also, National Audubon Society v. Superior Court* , 189 Cal.Rptr. 346, 360, 658 P2d 709, 723 (1983), *cert. denied*, 464 U.S. 977 (1983), decided before *Lucas* and addressing appropriation of water, in which the court extensively discussed the primacy of public trusts and opined that enforcement of a trust does not constitute a taking because it does not divest anyone of title to property.

[11]The Oregon common law doctrine of state ownership of wildlife is codified at ORS 498.002(1). The statute declares wildlife to be "the property of the State."

[12] While plaintiffs have not made this argument on appeal, the vitality of the state ownership doctrine might conceivably be challenged on the basis of some language in modern U.S. Supreme Court decisions holding that states' traditional sovereign authority over wildlife does not preclude the enforcement of supervening federal enactments addressing wildlife management. *See, e.g., Hughes v. Oklahoma* , 441 U.S. 322, 333-34, 99 S Ct 1727, 60 L Ed2d 250 (1979). But these decisions are irrelevant to the scope of this state law principle in the absence of federal law. *See, e.g., Shepard v. State Dept. of Fish & Game*, 897 P2d 33, 41-43 (Alaska 1995) explaining the discussion in *Hughes v. Oklahoma* and other cases addressed wildlife treated as goods in commerce, not a state's authority to regulate wildlife within its jurisdiction. *See also* Houck, "Why Do we Protect Endangered Species and What Does that Say About Whether Restrictions On Private Property to Protect Them Constitute 'Takings'"? 80 *Iowa Law Review* 297 (1995) arguing the Supreme Court in Hughes "did not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the citizens of a state." For the purpose of the Takings Clause of the Fifth Amendment, it is clear that the scope, and limitations of, private property interests are defined by state, not federal law. *See Phillips v. Washington Legal Found.,* 524 US 156; *Lucas* , 505 U.S. at 1030.

[13]The sovereign has exclusive right to wildlife, over and above any interests of landowners. 2 W. Blackstone, COMMENTARIES 417-18. Further discussion of the states' rights to wildlife may be reviewed inThomas A. Lund, "Early American Wildlife Law," 51 N.Y.U. L Rev. 703 (1976).

[14]The cases cited above and later in this brief show this principle is applicable throughout the country.

[15]While the California Supreme Court directed that the reporter of decisions not publish the case, a California Court of Appeal convincingly rejected a taking claim very much like that presented here. In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal.Rptr.2d 338 (Cal.Ct.App. 1993), the California Forestry Board denied a timber company permission to log trees absent satisfactory plans to mitigate the adverse effects on several endangered species, including the spotted owl. The company contended that the restrictions rendered timber harvest operations uneconomical and effected a taking. The California Court of Appeals rejected the takings claim, observing that other courts "have generally rejected" the claim that a wildlife protection measure is unconstitutional "because it curtails the uses to which real property may be put." *Id*. at 345. Referring specifically to *Lucas'* discussion of "background principles," the Court stated that "wildlife regulation of some sort has been historically part of the pre-existing law of property." *Id*. at 345. The case has no precedential value, but is included here because of the Court of Appeal's willingness to follow its state's background principles of property law when disposing of a taking claim based on facts similar to those at bar.

[16] For the reasons discussed, we submit that longstanding principles of Oregon law support, indeed compel the conclusion that the sovereign authority to protect the public's wildlife requires rejection of this takings claim. It is noteworthy, however, that the U.S. Supreme Court has said that the scope of state background principles will evolve because "changed circumstances or new knowledge may make what was previously permissible no longer so." *Lucas* , 505 U.S. at 1031. If it believed settled law did not resolve this case, the Court could well conclude that the decline in Northern Spotted Owls to the point of endangerment, and the threat to the owls' future existence caused by massive habitat destruction in recent decades, represent "changed circumstances" within the meaning of *Lucas*. The Court could also conclude that biologists' modern understanding that destruction of active nest sites is the primary threat to the owl and represents "new knowledge." *See* Brief of *Amici* Biologists. Again, *amici* think it is unnecessary for the Court to address these issues because this case can and should be resolved in favor of the board based on settled law. But if the Court were to take a different view, it should analyze the relevance of these "changed circumstances" and "new knowledge."

[17] The court in *Barrett v. State* gave emphasis to what it described as the "general right of the government to protect wild animals... ." It characterized this right as "too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people." *Barrett v. State*, 116 NE at 100. The court added that the state's protection of wildlife may harm the individual, but "no one can complain of the incidental injuries that may result." *Id*.

[18]The *Barrett v. State* case followed *In re Delaware River at Stilesville*, 131 AD 403, 418-19, 115 NYS 745, 754 (3d Dept. 1909) in which the court refused to find the state lacked authority to impose an obligation for a fishway. It found the state had a right to require the landowner to put up a fishway as a condition of maintaining a dam and that such a requirement was not a taking because "petitioner cannot be deprived of a right which it never possessed."

[19]Courts in some other jurisdictions have suggested that an owner may have a privilege to exclude unwanted wildlife from his or her land, such as by erecting a fence. We are aware of no Oregon precedent supporting this possible exception, and there appear to be strong arguments that construction of a fence to exclude wildlife does invade public rights, at least when excluding wildlife from some portion of its natural habitat would inflict actual harm on the wildlife. *State v. Sour Mountain Realty, Inc.*, *supra*. It is unnecessary for this Court to consider this question because this case only involves a restriction on the use of land designed to prevent injury to a nesting bird already present on the property. The Board rule does not, by its terms, address an owner's ability to attempt to exclude an owl from the property. *Christy v. Hodel*, 857 F.2d 1324 in which the court rejected a rancher's taking claim that prohibition against "taking" endangered grizzly bears in order to protect sheep effected taking of private property. The court noted that "neither the ESA nor the regulations appear to forbid a property owner from attempting to fence out grizzly bears or drive them away by nonharmful means." Other provisions of state (and federal law) control certain efforts owners might take to exclude or drive away wildlife by means that would harm the animals, but those provisions are not at issue in this case.

[20]There should also be no question of the wisdom of protecting animal species from extinction. In*TVA v. Hill*, 437 US 153, 178, 98 S Ct 2279, 57 L Ed2d 117 (1978), the Supreme Court quoted the Report of the House Committee on Merchant Marine and Fisheries regarding the need for endangered species legislation. 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. Certainly, only short-sighted interest is served by claiming the modern state has no right to act as trustee for wildlife or may only exercise that right upon payment to affected landowners. The state's right and duty to protect wildlife has not

changed; it still exists, and it should no more be dependent on payment to landowners than it was in the last century or in the century before that.