

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

MARSHA and ALVIN SEIBER,
Plaintiffs,
vs.
STATE OF OREGON,
Defendant

No. 980649

MEMORANDUM OF AMICI CURIAE
AUDUBON SOCIETY OF PORTLAND,
OREGON TROUT, INC., PACIFIC COAST
FEDERATION OF FISHERMEN'S
ASSOCIATIONS, AND INSTITUTE FOR
FISHERIES RESOURCES IN SUPPORT OF
THE STATE OF OREGON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGEMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae Audubon Society of Portland, Oregon Trout, Inc., Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources submit this brief in support of the State of Oregon and urge the Court to reject plaintiffs' taking claim.¹

There are many grounds for rejecting this claim, but this brief focuses on a single issue: whether a finding of a taking is precluded under the principles of property and nuisance law limiting the scope of private real property interests in the State of Oregon. Under Oregon common and statutory law, the State owns the birds and other wildlife within its jurisdiction as a trustee for the general public. Protection of this public property right through adoption and enforcement of regulations to protect wildlife does not infringe on private property rights because no landowner has the constitutional right to infringe on the public's rights in wildlife. In addition, the regulations at issue in this case do not effect a taking because they parallel state public nuisance doctrine which prohibits private parties from invading a common public right, including public rights in wildlife.

The present case arises from restrictions imposed by the Board of Forestry to prevent logging operations from harming nesting endangered spotted owls and the core habitat areas surrounding the birds' nest site. Under the regulations adopted by the Board to protect the public's rights in wildlife, the Seibers are prohibited from cutting trees in close proximity to an owl nest or to otherwise take action that would cause the birds to leave the nest. See Interim Requirements for Northern Spotted Owl Nesting Sites, section 624-24-809. Stated simply, the Board drew a protective circle around the nest and proscribed any cutting of trees within that circle while the nest remains active.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the U.S. Supreme Court held that no property owner can demonstrate that a regulatory restriction effects a taking if he or she has no property right to engage in the restricted conduct in the first place. *See also Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994). In this case, the Seibers contend that the owl protection measures effected a taking of their real property interests. Under Oregon property and nuisance law, however, the public has a property right in the owl itself which limits the scope of the Seibers' private property rights. The Seibers

have no absolute property right to engage in activity which infringes upon the public's rights in wildlife, at least in the absence of specific public authorization, which obviously was not granted in this case. Moreover, the Seibers have no right to create a public nuisance by destroying these public wildlife resources. In accordance with *Lucas* and *Stevens*, these "background principles" of Oregon law preclude a finding of a taking.²

Amici emphasize that this analysis does not purport to address what types of wildlife protection measures the State of Oregon should adopt as a matter of sound legislative policy. Nor does it suggest whether the legislature should or should not provide some type of "compensation" for landowners' lost profits as a result of the presence of protected wildlife. And it does not suggest that wildlife protection measures should not be subject to judicial supervision under appropriate statutory standards, or on some constitutional basis other than the takings clause. The point offered by the *amici* is simply that, given the doctrine of public ownership of wildlife and other background principles of Oregon law, the restrictions in this case cannot result in a constitutional taking as a matter of law. In plaintiffs' view, they have the absolute right to exercise their private property rights by logging the trees on their land regardless of the resulting destruction of public rights in wildlife. This one sided view represents a threat not only to public rights in the endangered owl, but also to other public wildlife resources (including invaluable aquatic resources such as Pacific Salmon) that depend upon the biologically healthy forest ecosystems which the legislature intended to protect by the Forest Practices Act.

Public property rights and private property rights are entitled to equal protection and respect as a matter of constitutional law. Thus, there is no taking in this case.

ARGUMENT

I. Regulatory Restrictions Which Parallel Background Principles of State Property or Nuisance Law Do Not Effect a Taking.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the U.S. Supreme Court established that land use regulations do not effect a taking if they simply parallel background principles of state property or nuisance law. As the Court put it, government restrictions do not constitute 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." *Id.* at 1029.

The Court distinguished between regulatory restrictions "newly legislated or decreed," *id.* at 1029, and regulations relating to "proscribed use interests [which] were not part of [the owner's] title to begin with." *Id.* at 1027. On the one hand, the Court affirmed that the takings clause imposes definite limits on how stringently government can regulate uses of private property pursuant to its general police powers, ruling that a regulation which eliminates all of a property's economic value presumptively effects a taking. On the other hand, the Court ruled that regulation of private property, no matter how stringent, does not effect a taking if the limitation imposed by the regulation "inhere[s] in the title itself" under State property or nuisance law. *Id.* at 1029. When a regulatory restriction parallels State-defined limitations on the property interest, the Court said, "[t]he use of the propert[y] for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of these background principles of nuisance and property law explicit." *Id.* at 1030.

The concept of "background principles" reflects the high degree of deference the U.S. Supreme Court has always accorded State definitions of the nature and scope of private property rights. 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." *Id.* at 1027. The Court characterized as simply "unexceptional" the conclusion that the

takings clause does not require compensation for restrictions proscribed by background principles of State law, "[i]n light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments." *Id.* at 1030, quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). See also *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925, 1930 (1998) (affirming that "the Constitution protects rather than creates property interests, [and therefore] the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'").

The "background principles" defense applies to all types of regulatory takings claims. *Lucas* itself involved a regulatory restriction on the use of private real property. The Supreme Court held that a use restriction could be upheld, even if it deprives the owner of all value in the property, if it is supported by background principles of property or nuisance law. The *Lucas* court also indicated that this defense is equally available when a taking allegedly results from a government-mandated "physical occupation" of private property. See *Lucas*, 505 U.S. at 1028 (observing that "the Court assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the owner's title" in defense of a physical occupation-type taking claim), citing *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (interests of "riparian owner in the submerged lands ... bordering on a public navigable water" are held subject to public's navigational servitude).

Consistent with *Lucas*, Oregon courts have rejected takings challenges to regulations which parallel restrictions on private property rights rooted in the background principles of Oregon law. In particular, the Oregon Supreme Court in *Stevens v. City of Cannon Beach*, 317 Or. 131 (1993), cert. denied, 510 U.S. 1207 (1994), held that Oregon's customary public property rights in the ocean beach precluded a takings claim challenging regulations restricting private beach development. The plaintiff in that case sought permits from the Oregon Department of Parks and Recreation and the City of Cannon Beach to build a seawall along the beach to prepare the property for motel development. After the State and the City denied the permits, the owners filed an inverse condemnation action under the State and Federal Constitutions. The trial court granted the motion to dismiss, and the judgment was affirmed by the Oregon Court of Appeals and a unanimous Supreme Court. The U.S. Supreme Court denied a petition for *certiorari* filed in the case.

The Oregon Supreme Court analyzed the takings claim at some length in light of the U.S. Supreme Court's *Lucas* decision, and concluded that rejection of the takings claim was supported by that decision. In a series of prior rulings the Oregon Supreme Court recognized that the public has a property right to use the dry beach along Oregon's ocean shore under the common law doctrine of custom. See *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969); *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989). In *Stevens*, the Court held that rejection of a development proposal to protect the public's customary right to use the ocean beach does not effect a taking because, quoting *Lucas*, "the doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the... restrictions that background principles of the State's law of property... already place upon land ownership'." 317 Or. at 142, quoting *Lucas*, 505 U.S. at 1029. The Court concluded that because the "'proscribed use interests' asserted by plaintiffs were not part of plaintiffs' title to begin with," *id.* at 150, the takings claim was properly dismissed.

Consistent with its decision in *Stevens*, the Oregon Supreme Court in *Dodd v. Hood River County*, 317 Or. 172, 855 P.2d 608 (1993), observed that a government defendant is not liable for a taking, even where the regulation eliminates all of the property's value, "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," *id.* at 614, quoting *Lucas*, 505 U.S. 1027. In addition, the Oregon Court of Appeals, in *McDonald v. Halvorson*, 92 Or.App. 478, 760 P.2d 263 (1988), *rev'd*

on other grounds, 308 Or. 340, 780 P.2d 714 (1989), though decided prior to *Lucas*, is entirely consistent with this analysis. The defendants in that case argued that if plaintiffs were successful in asserting a right to use the defendants' beach, the exercise of that right would effect a taking. The court disagreed:

Defendants... fail to establish the primary element for a 'taking' claim, that is, a protected property interest. State law is the source of the sticks that constitute a property owner's bundle of rights.... Thornton v. Hay... made it clear that any title to ocean shore land between the lines of mean high tide and visible vegetation has historically been encumbered with the public's recreational easement.... Defendants have no protected property interest in the public's easement over the 'dry-sand area,' and therefore there can be no 'taking.'

92 Or. App. at 487-88 (Emphasis added; footnotes omitted).

Courts in other jurisdictions have likewise rejected takings claims where such claims are barred by background principles of state property law. See, e.g., *Coastal Petroleum v. Chiles*, 701 So.2d 619 (Fl.Ct. App. 1997), *cert denied*, 118 S.Ct. 2369 (1998) (state law barring oil and gas development along Florida coast not a taking because private rights to engage in development limited by public rights in lands under navigable waters); *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P. 2d 1246, 1268 (Haw.1995), *cert. denied*, 517 U.S. 1163 (1996) (relying on *Stevens*, and concluding that private rights in real estate held for development purposes are subject to native Hawaiian property rights); *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) (right to develop site of Indian burial mound not part of the "bundle of rights" owner acquired under Iowa law). Courts have also rejected takings claims when such claims are precluded by "background principles" of state nuisance law. See, e.g., *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025 (Colo.App. 1995) (State-mandated superfund clean up not a taking because site a nuisance); *Palazallo v. Coastal Resources Management Council*, CA No. 88-0297. (R.I. Sup.Ct., October 24, 1997) (denial of permit to fill wetlands not a taking because wetlands destruction would cause a public nuisance). See also *United States v. Cherokee Nation*, 480 U.S. 700, 704 (1987) (exercise of federal navigational servitude on otherwise privately owned land does not effect a taking); *National Audubon Society v. Superior Court*, 189 Cal.Rptr 346, 360 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (owners who purchase or acquire property subject to public rights do not have a claim for compensation under the takings clause).

II. Wildlife Management Regulations Do Not Effect a Taking Because They Merely Parallel Limits on Private Property Rights Established By The Doctrine that the State Owns Birds and Other Wildlife.

The State of Oregon owns birds, such as the spotted owl, as well as other wildlife, as trustee for the people. The public's interest in wise use and conservation of wildlife represents a public property right equal in importance to private property rights. Accordingly, wildlife protection measures which protect the public's "background" property rights in wildlife do not effect a taking. As discussed below, this principle is firmly established, not only in Oregon, but in other jurisdictions across the United States.

A. The State Owns Wildlife for the Benefit of the General Public.

The Oregon courts have long recognized the doctrine of public ownership of wildlife.

As the Oregon Supreme Court stated in *Bowden v. Davis*, 205 Or. 421, 441, 289 P.2d 1100 (1955): "[A]ll wild animals... are recognized as being the property of the state." See also, e.g., *Fields v. Wilson*, 186 Or. 491, 498, 207 P.2d 153 (1949) (Wild "animals [are] *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the

state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common"), quoting *Monroe v. Withycombe*, 84 Or. 328, 334, 95 P. 227 (1917) (internal quotations omitted); *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908) ("It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all of its citizens.").

The Oregon common law principle of public ownership of wildlife has been restated and reaffirmed by statute. ORS 498.002 states that "Wildlife is the property of the state." ORS 496.004 confirms the broad scope of public wildlife ownership by defining "wildlife" to encompass all five classes of vertebrates, "fish, wild birds, amphibians, reptiles, and wild mammals." (An earlier version of the statutory provision affirming public ownership of wildlife, ORS 1971, section 498.005 (repealed), contained essentially the same language as the current provision: wildlife of the State of Oregon "shall always and under all circumstances be and remain the property of the State." See also OL 1913, Ch. 232, section 1; OL 1920, Ch. X, section 2268; General Laws of Oregon 1921, Ch. 153, section 1; Oregon Code 1930, Ch. II, section 39-201; OCLA 1940, Ch. 2, section 82-201.) The current provision affirming public ownership of wildlife is codified in the title of the Oregon statutes addressing fish and game regulation, but the general language of this provision, like the common law rule, encompasses wildlife of all types. See also State Attorney General Opinion, 35 Op. Att'y Gen. 720, 724, n. 1 (1971) (noting that "under the common law the state owns *all* wild animals") (Emphasis in original).

Every other state in the United States apparently recognizes the doctrine of public ownership of wildlife as well. See, e.g., *Shepherd v. State of Alaska*, 897 P.2d 33, 40 (Alas. 1995) ("the state acts as 'trustee' of the naturally occurring fish and wildlife in the state for the benefit of its citizens"); *State of Texas v. Barte*, 894 S.W. 2d 34, 41 (Tx. 1994) (common law of Texas and the rest of the United States is that "the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its citizens in common"). As in Oregon, many states have codified the common law rule of public ownership of wildlife. See Ruth S. Musgrave & Mary Ann Stein, STATE WILDLIFE LAWS HANDBOOK (1993) (listing 32 states with laws affirming public ownership of wildlife).³

B. The Public Rights in Wildlife Limit Private Rights in Land.

Oregon courts, like courts in other jurisdictions, have repeatedly held, in a variety of different contexts, that public ownership rights in wildlife limit the private property rights of individuals and private firms. As the Washington Supreme Court has said, emphasizing the unique status of government regulations designed to protect wildlife: "To a layman, and even to a lawyer who has not had occasion to deal with the subject, the extent of the power of the states with reference to fish, game, and all wild life within their borders is perfectly astounding." *Cook v. State of Washington*, 74 P.2d 199, 201 (Wash. 1937).

The Oregon Supreme Court expressed the basic principle in *State v. Hume*, *supra*: "[A]s an incident of" public ownership of wildlife, "the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture." 52 Or. at 5-6. In that case, the Court affirmed a criminal conviction for canning salmon without a State license, which was available from the State only upon payment of a significant fee. While expressing doubt about the validity of this type of economic regulation in other contexts, the Court had no difficulty upholding this regulation of a wild fishery, "for the right to fish is at best only a privilege which the state may grant or withhold at its pleasure." *Id.* at 6. The Court endorsed the State's plenary authority to conserve wildlife populations, observing that the "unrestricted taking... of fish that are valuable for food, usually causes their extermination," and therefore "[t]he taking of salmon by any means could be prohibited for a reasonable time, at least,

in order to permit the number of such fish to be augmented by a propagation of the species." *Id.* at 7.

To like effect, in *Thompson v. Dana*, 52 F.2d 759 (D.Or.1931), *aff'd*, 285 U.S. 529 (1932), a federal court, applying Oregon law, rejected the claim that the closure of a portion of the McKenzie River to fishing effected a violation of the plaintiffs' property rights, even though this action "destroyed" plaintiffs' business of guiding anglers down the McKenzie River. The court ruled that "the state has 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 do not infringe upon the property [rights protected by] the Constitution of the United States." *Id.* at 762.

The public ownership doctrine has been held to limit a variety of sticks in the private property rights bundle. For example, the public ownership doctrine has been held to support stringent restrictions on the right to hunt or otherwise exploit wildlife. Thus, in *Fields v. Wilson*, 186 Or. 491, 207 P.2d 153 (1949), the Oregon Supreme Court rejected a challenge to a state-controlled monopoly on the trapping of beavers, stating:

"The right to kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, and 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"

Id. at 499-500. See also *Anthony v. Veatch*, 189 Or. 462, 474, 220 P.2d 493 (1950), *appeal dismissed*, 340 U.S. 923 (1951) ("The right of the state... in its sovereign capacity in trust for its people, to regulate and even to prohibit the capture of fish in navigable waters within its borders, has been asserted by this court, and is sustained by the weight of authority."); *State v. Pulos*, 64 Or. 92, 95, 129 P. 128 (1913) ("the taking of [a duck] is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit").

Turning to other jurisdictions, in *Farris v. Arkansas*, 310 SW. 2d 231 (Ark. 1958), the Supreme Court of Arkansas rejected a takings challenge to a state law prohibiting a private landowner from selling fish raised entirely on private waters on his land. The court recognized the right of a private owner to take fish and wildlife upon his own land, which the court characterized as a "a property right, as much as any other... distinct right incident to the soil." *Id.* at 235. At the same time, the court also stated that this private property right is not an "unqualified and absolute right," because it "must *always yield* to the state's ownership and title [in wildlife], held for the purposes of regulation and preservation for the public use." *Id.* (Emphasis added). The court continued: "These two ownership rights -- that is to say, the general ownership for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil are entirely consistent with each other, and in no wise conflict." *Id.* at 235, *quoting Arkansas State Game & Fish Commission v. Storthz*, 29 S.W.2d 294, 296 (Ark. 1930). "The owner is free to do whatever he desires to do with such game fish, *just as long as he does not undertake to use them in such a manner as would conflict with the purposes of the general ownership of the state; which purposes are to regulate and preserve the wild life resources of the state for the people.*" *Id.* (Emphasis added).

Similarly, in *People v. Truckee Lumber Co.*, 48 P. 374 (Cal. 1897), the court enjoined a sawmill operator from dumping sawdust and other waste into the Truckee river to prevent injury to the fishery. The court declared: "The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens ... is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes...." *Id.* at 375. The court then concluded: "The mere fact, therefore that the interference

or obstruction complained of may in fact be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property." *Id.*

In *Maitland v. The People*, 23 P.2d 116 (Colo. 1933), the Supreme Court of Colorado upheld, in the face of a takings challenge, a fine assessed against a landowner for killing a deer on his private land within the limits of a state-designated game refuge. The court said: "The power of the state to make regulations tending to conserve the game within its jurisdiction is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity, and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game from the greed of the hunters." *Id.* at 117. See also *Bauer v. Game, Forestation and Parks Comm'n*, 293 N.W. 282 (Neb. 1940) (owner of land incorporated into game refuge not deprived of property right by prohibition against hunting on his own property); *State v. McKinnon*, 133 A.2d 885 (Me. 1957) (same).

Providing yet another example of application of the public ownership doctrine, courts have routinely rejected claims that the government infringes on private property rights when wild animals eat farm crops or otherwise damage private property within their natural habitat. In the landmark case of *Barrett v. State of New York*, 116 N.E. 99 (N.Y. 1917), a landowner claimed that government-sponsored reintroduction of beavers effected a taking when the beavers damaged valuable trees. The court rejected the claim, stating:

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

Id. at 100. See also *Moerman v. State of California*, 21 Cal.Rptr.2d 329 (Ct.App. 1993), *cert. denied*, 511 U.S. 1030 (1994) (state not liable for a taking for reintroducing tule elk which were destroying plaintiff's fences and eating forage intended for livestock); *Maitland v. The People*, 23 P.2d at 117 (rejecting claim that proliferation of game on private land within state-designated refuge, and resulting destruction of plaintiff's crops, infringed on private property rights, noting that "whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection," but "such incidental injuries are not sufficient to render the protecting statute unconstitutional").

Consistent with this reasoning, courts also have rejected objections to government restrictions on an owner's ability to kill or injure, or otherwise exclude wild animals which threaten to harm private property. In *Barrett v. State*, *supra*, the court upheld legislation prohibiting the destruction of beaver "dams, houses, homes or abiding places" on private property, stating:

The object [of the Act] is to protect the beaver. That object as we decide is within the power of the state. The destruction of dams and houses will result in driving away the beaver. The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power.

Barrett v. State, 116 N.E. at 101.

Similarly, in *Commonwealth v. Higgins*, 178 N.E. 536 (Mass. 1931), the court upheld the constitutionality of a statute under which a farmer was convicted for placing fox traps on his own land but beyond a statutorily prescribed distance from his hen house. The court acknowledged,

but was not swayed by the evidence that foxes had done damage and were likely to do further damage to the farmer's chickens, and that the prohibited location for the traps was the only practicable location for catching the foxes. The Court concluded: "This decision is reached with full appreciation of the hardship to farmers and raisers of poultry in restricting their means of defense against so cunning an enemy as the fox. Farmers have been made subject to both favorable and unfavorable legislation which has been upheld." *Id.* at 538. *See also Greer v. State*, 150 S.E. 839, 840 (Ga. 1929) (rejecting landowner's claim that a regulation of steel traps "impose[d] unreasonable restriction upon defendant in the protection of his fowls, in that it says where he shall build his fowl-house, and should defendant's pen or pasture for his fowls extend a greater distance from his fowl-house than one hundred feet he is not permitted to protect them by the use of steel traps or other like devices"); *Collopy v. Wildlife Commission, Department of Natural Resources*, 625 P.2d 994 (Colo. 1981) (private landowner whose property was incorporated in a wildlife refuge for geese has no right to kill geese even though the geese were causing damage to the property); *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (rejecting challenge to ESA regulations prohibiting killing of endangered grizzly bear brought by livestock owner assessed a civil penalty for shooting grizzly bear in order to protect sheep); *State of Oregon v. Webber*, 85 Or.App. 347 (1987) (affirming criminal conviction for killing deer to protect hay crop where owner failed to seek state permit for killing).⁴

In addition, the courts have held that the public ownership doctrine provides special support for warrantless searches of private lands where wild animals are present in order to enforce state fish and game laws. As a California court of appeals stated, "California's pervasive scheme of regulating wildgame hunting would be a futile pursuit without frequent and unannounced patrols." *Betchart v. Department of Fish & Game*, 205 Cal. Rptr. 135, 137 (1984)

(affirming warrantless search of private lands because California wildlife is publicly owned). *See also State v. McHugh*, 630 So.2d 1259, 1264 (La. 1994) (approving warrantless random stops of boats by state wildlife agents to check for violations of waterfowl bag limits, and stating that "[t]here can be no doubt that the state's interest in safeguarding the wildlife and the fisheries for the benefit of the people is compelling."). *Accord State of Oregon v. Tourtillott*, 289 Or. 845, 859, 618 P.2d 423 (1980), *cert. denied*, 451 U.S. 972 (1981) (affirming constitutionality of "game checkpoint," emphasizing the "substantial... governmental interest in the enforcement of laws for the preservation of wildlife").

Courts also have upheld State authority to require the modification or destruction of private property in order to protect or restore publicly owned wildlife, even to the point of upholding the right of state agents to enter onto private property for such purposes. Thus, in *Stoughton v. Baker*, 4 Mass 522 (1808), the court held that it was not a taking of property to require a dam owner to construct and pay for a fish ladder for fish passage. According to the court, an implied limitation on dam operation is "that fish not be limited in their passage up the river to cast their spawn." This "limitation," continued the court, "must extend to give a right to the government to enter and remove obstructions, which if not removed would defeat the limitation." *Id.* at 529. Similarly, in *Cottrill v. Myrick*, 12 Me 222 (1835), a private dam owner challenged the right of state officials to enter his property and destroy his dam. The court upheld the right of the state to undertake such an action because "the common law rights of the riparian proprietor" yield to the "paramount claims of the public." *Id.* at 229. According to the court, where the state has the right to regulate the fishery, it may pass legislation authorizing entry on private land for the purpose of destroying obstacles to fish passage. *Id.* at 233. *See also Parker v. The People*, 111 Ill. 581, 588 (1884) ("The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership."); *State v. Roberts*, 59 N.H. 484 (1879) (state has right to regulate "the destruction or preservation of fish, their free passage,

and the use of the water as a highway" even where streams are nonnavigable and on private land).

Finally, courts have routinely recognized the right of a state to sue private parties for money damages for unauthorized injury to the public's wildlife. In *State of Washington v. Gillette*, 621 P.2d 764 (Wash.Ct.Apps. 1980), the Washington Court of Appeals affirmed, based on the public ownership doctrine, an award of damages in favor of the State Department of Fisheries against a landowner who destroyed salmon eggs by running a tractor through a streambed. The court stated, "the food fish of the state are the sole property of the people and the state, acting for the people, is dealing with its own property, 'over which its control is as absolute as that of any other owner over his property'." *Id.* at 766, quoting *State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1103 (Wash. 1936). See also *In re Steuart Transportation Co.*, 495 F.Supp. 38 (E.D. Va. 1980) (recognizing right of state and federal governments to sue for damages to public wildlife resources caused by oil spill); *Attorney General v. Hermes*, 339 N.W.2d 545 (Mich Ct. App. 1993) (recognizing that public ownership rights in fish support damages action for conversion brought by Attorney General based on harvesting of fish in violation of State fishing regulations).⁵

C. Public Rights in Wildlife Include the Right to Protect Habitat Upon Which Wildlife Depend for Their Existence.

The right of the state of Oregon to protect wildlife includes the right to prevent indirect destruction of wildlife by the destruction of the habitat upon which they depend for their existence.

As the Oregon Supreme Court held in a case involving the threat of pollution to public rights in fish:

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 Fisherman's Protection Union v. City of St. Helens, 160 Or.654, 663, 87 P.2d 195 (1939) (emphasis added). The Oregon Court was citing from a leading legal encyclopedia of the time, *Ruling Case Law*, the relevant portion of which stated, "It is immaterial whether the water is navigable or not; to the extent that streams are common passageways for fish to and from their breeding and feeding grounds, they are public waters and subject to governmental regulation...." 11 R.C.L. §35 (1916).

Like Oregon, other states have held that, in order to protect wildlife, the state can block destruction of the habitat upon which wildlife depend, including habitat located on private land.

In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal.Rptr.2d 338 (Cal.Ct.App. 1993), a case very similar to the present action, the California forestry board denied a timber company permission to cut trees absent satisfactory plans to mitigate adverse impacts on several endangered species, including the spotted owl. The company contended that the restrictions rendered timber harvest operations on their private lands 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 law is unconstitutional "because it curtails the uses to which real property may be put." *Id.* at 345. Specifically relying on the "background principles" defense articulated in *Lucas*, the court stated that "wildlife regulation of some sort has been historically part of the pre-existing law of property." *Id.* at 347. (The Supreme Court of California subsequently denied review in this case, but instructed the reporter of decisions not to publish the court of appeals opinion. See 1994 Cal LEXIS 1388).

In *Commonwealth v. Sisson*, 75 N.E. 619 (Mass 1905), the state fish and game commission required a mill owner to install a blower to prevent sawdust from being discharged into a stream. The mill owner claimed that the regulation would destroy his business and therefore amounted to a taking of his property. The court rejected the claim and dismissed the mill owner's assertion that his right to mill trumped the right of the state to protect the fish and the "stream itself." *Id.* at 620-1. The court held that the legislature had properly exercised its power to resolve conflicts between the rights of the mill owner and the rights of the public, concluding that the mill owner's proper recourse was through the legislature. *Id.* at 622. See also *Meriwether Sand & Gravel Co. v. State*, 26 S.W.2d 57, 60 (Ark. 1930) (enjoining gravel pit operator from discharging washings from its gravel beds because they "rendered [the stream] unfit for propagation or habitat of fish"); *Township of Grosse Ile v. Dunbar and Sullivan Dredging Co.*, 167 N.W.2d 311, 316 (Mich.App. 1969) (upholding rezoning which prevented owner of island and adjoining riparian rights from dumping fill in river as within the reasonable exercise of state power to protect "fish and game habitat"); *State v. Southern Coal & Transportation Co.*, 71 W.Va. 470 (W.Va 1912) (holding that state may protect the "propagation of fish from injury" by making it an offense to put into a stream sawdust from a mill or sulphur water from a mine, "though such stream be the natural receptacle of such drainage, or it be impracticable to drain the mine otherwise"); *Southview Associates, Ltd. v. Bongartz* 980 F.2d 84 (2d Cir. 1992), cert. denied, 507 U.S. 987 (1993) (rejecting takings claim where developer prohibited from building on winter grazing habitat of deer); *Flotilla Game and Freshwater Fish Commission v. Flotilla*, 636 So.2d 761 (Fla. Ct. Apps. 1994) (rejecting takings challenge arising from a proscription against land development within 750 feet of a nesting bald eagle established by Florida state officials pursuant to federal habitat management guidelines).

The recent U.S. Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), supports the common sense conclusion the public rights in wildlife necessarily authorize the State to prevent destruction of wildlife habitat. The case involved a challenge to a provision of the federal Endangered Species Act making it unlawful for any person to "take" any endangered or threatened species, which the Act defined to mean "harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or to attempt to engage in such conduct." The Department of Interior interpreted the term "harm" in regulations as follows:

Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include *significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.*

Id. at 691 (Emphasis added). The Supreme Court upheld the Department's regulations and, in language that is directly applicable to the scope of public ownership rights in wildlife under Oregon law, said that "an ordinary understanding of the word 'harm'" supported the Department's regulations:

The dictionary definition of the verb form of 'harm' is 'to cause hurt or damage 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 [of the Interior] should have limited the purview of 'harm' 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 697. If the federal government, in the exercise of its authority to protect spotted owls, can legitimately exercise that authority to protect habitat upon which the owl depends for its survival, then it follows, *a fortiori*, that the State of Oregon, in the exercise of its authority to protect public rights in wildlife, also can act to prevent harm to wildlife habitat.

D. The Public Ownership Doctrine Supports the Public's Right to Restrict Previously Lawful Activities.

Regulation of otherwise lawful land uses in order to protect wildlife is entirely consistent with the background principles defense established by the U.S. Supreme Court in *Lucas, supra*. In deciding whether a regulation amounts to a taking under *Lucas*, the issue is not whether the particular use of the land, such as logging, was traditionally lawful at common law, but whether the activity now creates a threat of harm to wildlife and is therefore subject to state restrictions to protect the public's property rights in wildlife or prevent a public nuisance. See *Lucas*, 505 U.S. at 1030 (it is "open to the State at any point to make the implication of these background principles of nuisance and property law explicit").

As demonstrated above, courts have frequently upheld state regulation of traditional land uses in order to prevent harm to wildlife, despite the fact that such uses were not themselves *per se* unlawful and were in fact of benefit to the public. See e.g. *State v. Southern Coal & Transportation Co., supra* (regulation of coal mining), *Commonwealth v. Sisson, supra* (regulation of a lumber mill), *Meriwether Sand and Gravel Co. v. State, supra* (regulation of a gravel pit). Although these activities had been carried on for decades, in some cases centuries, without any state regulation, courts upheld the imposition of new regulations under the doctrine of state ownership of wildlife when it later became clear that the lawful activities were being carried out in a way that harmed the public rights in wildlife. Thus, in *Cottrill v. Myrick, supra*, the court denied a claim for compensation where local officials entered onto private property and destroyed a dam, even though the dam owner established that no fish had "been used and accustomed to pass" along the dammed stream in recent memory and that his dam had been in place for decades without regulation. The court concluded that, "[o]bstacles created, may be overlooked or tolerated, but, as the country settles and the fisheries become more an object of interest, they may receive the fostering care of the legislative power." *Id.* at 231.

Similarly, in *Stoughton v. Baker, supra*, a dam owner challenged a requirement that he install a fish passage device as a taking of private property. The dam in question had been in place for almost 200 years before the legislature adopted a law requiring dam owners to install such devices. The court rejected a challenge to the law, concluding that the obligation to provide fish passage, "being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights." *Id.* at 528. See also *Meriwether Sand & Gravel co. v. State*, 26 S.W.2d at 59 (enjoining discharge from gravel pit into fish habitat even though gravel pit had been in operation for some 30 years prior to the complaint, because it "cannot be said that the full extent of the injury could have been foreseen or the damage ascertained at the time of the beginning of the operations of appellant's plant").

III. The Restrictions Imposed By OAR 629-24-809 Do Not Effect a Taking Because They Parallel Background Principles of Oregon Property and Nuisance Law.

The regulations adopted by the Board of Forestry to protect the spotted owl and its habitat do not effect a taking because they impose limitations on the use of private property which parallel limitations already inherent in the Seibers' private property interests under background principles of Oregon law.

Under OAR 629-24-809, when the State Forester determines that a forestry operation "will conflict with protection of a nesting site of the northern spotted owl" the operator must obtain the State Forester's approval of a written plan of operation. The plan must provide, at a minimum, for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat; and (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period for use during nesting. The critical period of use is the time period between March 1 and September 30, each year.

In accordance with this requirement, the Board of Forestry rejected plaintiffs' proposal to log a 40-acre parcel of its land.⁶

This restriction on plaintiffs' ability to use their land effected no taking because it simply parallels the limitations inherent in plaintiffs' title by virtue of the public ownership doctrine. As the Oregon Supreme Court stated in *State v. Hume*, 52 Or. at 5-6, "the legislative assembly may enact such laws as tend to protect the species from injury by human means." See also *Thompson v. Dana*, 52 F.2d at 762 (conservation of wildlife "for the common good of all citizens is paramount," and therefore reasonable wildlife protection measures "do not infringe upon... [private] property [rights protected by] the Constitution of the United States").

In addition, the Board's spotted owl regulations did not effect a taking because they parallel limitations imposed on the Seibers under Oregon public nuisance doctrine. A public nuisance results from the invasion of "a right common to members of the public generally." *Smejkal v. Empire Lite-Rock*, 274 Or. 571, 574, 547 P.2d 1363 (1976), citing *Raymond v. Southern Pacific Co.*, 259 Or. 629, 488 P.2d 460 (1971). The regulations at issue in this case prevent a public nuisance because they bar actions which would destroy the public's rights in wildlife. See *Columbia River Fishermen's Protective Union v. City of St. Helen's*, 160 Or. at 661 (enjoining as a public nuisance private actions which resulted in pollution and injured fish owned by the State as trustee for the public and interfered with "the common right of the citizens of the state to fish").

While the Seibers contend that the Board's regulations protecting the spotted owl effected a kind of physical-occupation taking, compare *Mountain States Legal Foundation, supra* (rejecting a challenge to wildlife regulations on a physical- occupation theory), this contention is irrelevant to the resolution of this case. Whether the takings claim in this case is interpreted as a regulatory takings claim or physical takings claim, the background principles of Oregon law preclude a finding of a takings under either theory. See *Stevens v. City of Cannon Beach, supra* (restrictions to preserve customary public right to occupy ocean beach not a taking under State background principles); *McDonald v. Halvorson*, 92 Or.App. at 488 ("Defendants have no protected property interest in the public easement over the 'dry-sand area,' and therefore there can be no taking."). See also *Cook v. The State of Washington*, 74 P.2d 199, 201 (Wash.1937) ("the state has the absolute right to maintain its game and wild animals upon any and all private lands, and in that there is no element of trespass or taking").⁷

The fact that this regulation aims at the conservation of an endangered species, rather than management of a game animal, does not affect the conclusion that the regulation is supported by background principles of state law. The Oregon Supreme Court has explicitly endorsed under the public ownership doctrine the power of the State to adopt measures designed to avoid the "extermination" of a species. *State v. Hume*, 52 Or. at 6. To be sure, in the past, when the State's and the nation's wildlife resources were more abundant, wildlife management measures commonly focused on regulating the taking of species to maintain sustainable quantities of game and fish for commercial exploitation. But the public's legal rights in its wildlife are entitled to at least the same -- if not greater -- protection when the State is acting to prevent a species going over the brink of extinction. See *Christy v. Hodel, supra*; *Sierra Club v. Department of Forestry & Fire Protection, supra*. See also *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1031 (observing that "changed circumstances or new knowledge may make what was previously permissible no longer so"). Indeed, so far as we are aware, no case in the country has resulted in a final ruling concluding that public measures to protect endangered species on endangered species habitat result in a compensable taking.

The conclusion that there is no taking in this case is also not affected by the fact that the regulations are designed not only to protect the owl directly, but also to protect critical habitat upon which a nesting pair of owls depends for their survival. As discussed above, courts have long recognized that the authority to protect public rights in wildlife necessarily includes the authority to regulate destruction of critical habitat. As a matter of common sense, preventing

destruction of critical habitat of a nesting pair of owls is as essential for vindicating the public right to protection of the owls as preventing the direct killing of the owls themselves. As the Oregon Supreme Court expressly held in *Columbia River Fisherman's Protective Union v. City of St. Helens*, *supra*, the power of the State to protect fish would be of "no avail" if the state could not also protect fish habitat. *Id.* at 663. The State's power to protect the spotted owl would likewise be of "no avail" if the State lacked the power to protect the owl's habitat.

Consistent with this reasoning, every other court which has been presented with this type of claim has rejected it. See *Sierra Club v. Department of Forestry & Fire Protection*, *supra* (relying on *Lucas* "background principles" defense to reject takings challenge arising from state imposition of restrictions on logging private land absent satisfactory plans to mitigate adverse impacts on several endangered species, including spotted owl). See also *Flotilla Game and Freshwater Fish Commission v. Flotilla*, *supra* (rejecting takings challenge arising from a proscription against land development within 750 feet of a nesting bald eagle established by Florida state officials pursuant to federal habitat management guidelines). Numerous commentators also have recognized that the public ownership doctrine naturally fits into the *Lucas* framework of background principles of state law. See, e.g., 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, 308-21 (1995); Comment, *Lucas and Endangered Species Protection: When 'Take' and 'Takings' Collide*, 27 U.C. DAVIS L.REV. 185 (1993).

Finally, it is beside the point that the Board's regulations include restrictions on logging which the State formerly believed were unnecessary to protect public rights in wildlife. Fifty years ago, these restrictions on logging were not necessary to protect the public's property interest in wildlife because owls were not endangered. The forests of the State were largely intact and there was ample habitat for the survival of plentiful wildlife. Circumstances have changed, however. The logging practices of the past several decades now threaten the public's long standing property rights in wildlife by pushing the spotted owl and other species to the brink of extinction. Exercising its legitimate authority, the Board has now taken perfectly lawful and appropriate steps to protect the public's rights. The takings claim asserted in this case represents a frontal attack on the State's ability to protect the rights long held by the State for the benefit of all the citizens of Oregon. The right of the public to decide how to manage its public wildlife resources requires that the Court reject this takings claim.

IV. Hughes v. Oklahoma And Other Decisions Interpreting the Federal Commerce or Privileges and Immunities Clauses Do Not Affect the Validity of the Doctrine of Public Ownership of Wildlife As a Background Principle of Oregon Property Law.

While the Seibers do not specifically advance the argument, it could be contended that the public ownership doctrine does not defeat the takings claim in this case because the U.S. Supreme Court has discarded the public ownership doctrine as a basis for state protection of wildlife and wildlife habitat. That contention would be mistaken.

A handful of U.S. Supreme Court decisions contain broad language seemingly dismissive of the entire doctrine of public ownership of wildlife. For example, in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Court referred to the public ownership doctrine as a "19th century fiction." *Id.* at 335, quoting *Douglas v. Seacoast Products, Inc*, 431 U.S. 265 (1977). Similarly, in *Toomer v. Witsell*, 334 U.S. 385, 402 (1948), the Court described the public ownership doctrine as "but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Upon careful analysis, however, it is obvious that these decisions do not affect the conclusion that the public ownership doctrine is a relevant background principle that defeats a takings claim.

It is apparent that the statements in *Hughes* and other cases are explained by and logically confined to their particular context, challenges to protectionist state legislation under the

commerce or privileges and immunities clauses of the U.S. Constitution. *Hughes*, for example, involved an appeal by a Texas resident from a conviction under an Oklahoma statute prohibiting the transport outside the state of minnows procured from Oklahoma waters. *Douglas* involved a commerce clause challenge to a Virginia law forbidding fishing by federally licensed ships owned by nonresidents. *Toomer* likewise involved a constitutional challenge to a state statute discriminating against out of state commercial fisherman, but one brought under the privileges and immunities clause. In discussing the doctrine of state ownership of wildlife in these cases, the Court was simply explaining its conclusion that state public ownership doctrine cannot, under the federal Supremacy Clause, stand in the way of federal constitutional provisions designed to prevent "balkanization" of the national economy. There is no basis for thinking these decisions have any particular significance outside of that context.

In *Hughes*, the Supreme Court overruled its decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), in which the Court sustained a Connecticut statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state. The *Geer* decision rested on the theory that the prohibition in that case did not effect interstate commerce. According to this theory, the State owns all the wildlife in the state and therefore can condition the ownership of game taken within the state by prohibiting its removal from the state. The state's power to condition private property rights in wildlife implies, in turn, that the sale of wildlife is not commerce at all. As the Court explained in *Hughes*, Justices Field and Harlan dissented in *Geer*. "They would have affirmed the State's power to provide for the protection of wild game, but only 'so far as such protection... does not contravene the power of Congress in the regulation of interstate commerce.'" 441 U.S. at 328, quoting *Geer*, 161 U.S. at 541 (Field, J., dissenting); *id.* at 543 (Harlan, J., dissenting).

In *Hughes*, the U.S. Supreme Court effectively embraced the position of the dissenters in *Geer* and overruled that decision. However, the Court confined its holding to the commerce clause context, stating that "[w]e now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of natural resources, and therefore expressly overrule *Geer*." *Hughes*, 441 U.S. at 335. Emphasizing the narrowness of its decision, the Court stated that "the general rule we adopt in this case makes ample allowance for preserving, *in ways not inconsistent with the Commerce Clause*, the legitimate state concerns for conservation and protection of wild animals." *Id.* at 335-36 (emphasis added). *Hughes* and other related decisions leave the public ownership doctrine untouched as the basis for state regulation of wildlife, so long as the regulation does not implicate the anti-economic-protectionist goals of the federal commerce clause and the privileges and immunities clause. See *Shepherd v. State of Alaska*, 897 P.2d 33, 40 (1995) (state ownership doctrine retains full vitality absent a "conflict with paramount federal interests").

An expansive reading of *Hughes* would contradict the deference to state definitions of property interests which is at the heart of federal takings jurisprudence. Just a few months ago, the U.S. Supreme Court in *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925, 1930 (1998), reaffirmed that "the Constitution protects rather than creates property interests," and that the very "existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" See also *Lucas*, 505 U.S. at 1030 (referring to the Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments").

Whatever other differences may distinguish the U.S. Supreme Court's commerce clause and takings jurisprudence, it is clear that the takings clause, rather than trumping State definitions of property rights, depends upon and incorporates State definitions of private property rights. It would literally turn federal takings jurisprudence on its head to conclude that the takings clause could be interpreted to encourage or authorize disregard for state property norms, including the doctrine of public ownership of wildlife.

Finally, numerous state court decisions, decided since *Hughes*, have rejected the suggestion that the U.S. Supreme Court's commerce clause decisions have eliminated the public ownership doctrine as a basis for state wildlife management. For example, in *State of Montana v. Fertterer*, 841 P.2d 467, 440 (Mont. 1992), the Montana Supreme Court affirmed the convictions of several individuals for killing game without a license, rejecting the argument that *Hughes* "effectively preclude[d]" reliance on the traditional rule that wild game in Montana is public property. The court said that "*Hughes* in not controlling" in this case, because there were no claims of discrimination against non-residents based on the federal "interstate commerce, equal protection, or privileges and immunities" clauses. 841 P.2d at 470. See also *Shepherd v. State of Alaska*, *supra* (state ownership doctrine applies absent conflict with paramount federal interests).⁸

CONCLUSION

For the foregoing reasons, the Court should reject Plaintiffs' takings claim.

Respectfully submitted,

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NOTES

¹Simultaneously with the filing of this brief, the *amici* are filing a motion with the Court seeking leave to file this memorandum *amici curiae*. The interest of the *amici* in this case is set forth in the motion.

²Plaintiffs' assertion that the public trust doctrine is limited to submerged lands and public beaches misses the point made in this memorandum and by the State. See Plaintiff's

Memorandum in Support of Their Motion for Summary Judgment on Defendant's Affirmative Defenses, at 21-2. Neither the State nor its *amici* are invoking the public trust doctrine in this case. Rather, this case involves the distinct doctrine of public ownership of wildlife and the public's long standing right to protect this public property interest. As demonstrated in this memorandum, wholly apart from any support the public trust doctrine may provide for the State's position, Oregon has long acted to protect wildlife based on the doctrine of public ownership.

³The common law rule of public ownership of wildlife is one of the most venerable principles known to the law. Indeed, since at least the era of the Roman empire, the law has accorded the public unique rights in the management of wildlife. Under Roman law, wild animals were subject to common ownership, and a landowner had no ownership rights in wildlife passing over his land. See J.C. Thomas, *TEXTBOOK ON ROMAN LAW* 167 (1976). Under English common law, which built upon the Roman legal tradition, "the sovereign held an exclusive prerogative to animals" over and above the interests held by individual landowners. See 2 W. Blackstone, *COMMENTARIES* 417-18. Upon the founding of the United States, the king's sovereign rights in wildlife were transferred to the individual states, which assumed the responsibility to act "as trustee[s] to support the title [in wildlife] for the common use." *Arnold v. Mundy*, 6 N.J.L. 1, 70 (N.J. 1821). See generally Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U.L. REV. 703 (1976) (observing that, in addition to determining who could take wildlife, early American lawmakers actively managed wildlife by adopting closed seasons on certain species, providing protection during breeding periods, and restricting hunting when animals were in poor condition).

⁴Although the Oregon courts have never addressed the specific issue, some courts in other jurisdictions, disagreeing with the authorities cited above, have declared that private landowners have the right to defend their property against physical damage or the threat of physical damage by wildlife. See e.g. *Cook v. State*, *supra*. Even assuming Oregon courts were to apply this exception to the public ownership doctrine, it is irrelevant to the resolution of this case. The Seibers do not argue – nor could they plausibly argue – that the State has prevented them from protecting their property against actual physical property damage caused by the owls.

⁵Courts addressing the validity of wildlife laws and regulations sometimes appear to use language which treats the public ownership doctrine and the states' general police power as potentially interchangeable bases for regulations protecting wildlife. See, e.g., *Anthony v. Veatch*, 189 Or. at 474. For the purpose of determining whether the government has the authority to impose a regulatory restriction, there apparently is no substantive difference between these two legal theories. But for the purpose of determining whether wildlife-protection regulations effect a taking, the public ownership doctrine creates a distinct defense not necessarily available in the case of regulations supported only by the general police power. The Lucas decision highlights the importance of distinguishing between these two alternative bases for wildlife regulations for the purpose of evaluating takings claims challenging such regulations.

⁶There is no indication that OAR 629-24-809 would prevent the Seibers from conducting logging operations on the other 160 acres of their property. Indeed, the Seibers have received several permits to conduct salvage operations on their property within the last year. Because there has been no taking of the Seibers' "parcel as a whole," their taking claim must also be rejected for this independent reason. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978). See also *Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (the "relevant question... is whether the property taken is all, or only a portion of the parcel in question").

⁷Furthermore, because the State owns wildlife as a trustee, rather than in an ordinary proprietary sense, the State cannot plausibly be described as having effected a physical occupation in the sense that ordinarily gives rise to takings liability on a physical occupation theory. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (government effected a physical occupation by demanding bike path and public greenway). See also *Christy v. Hodel*, 857 F.2d at 1335 (rejecting takings

claim for damage caused by federally protected grizzly bears because the conduct of bears could not be attributed to the government). Furthermore, the presence of wildlife is almost always transitory, as in this case, and therefore the asserted occupation of private land by wild animals cannot be said to be "permanent," as the U.S. Supreme Court has required for application of the rule governing physical occupations. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The key point, however, is that, even if the Board's regulations are viewed as a type of physical occupation, a finding of a taking is precluded under the public ownership doctrine.

⁸Commentators have reached the same conclusion. As Professor Oliver Houck succinctly put it, the 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." 80 IOWA L.REV. 297, 311 n. 77. See also Carl D. Etling, *Who Owns the Wildlife?*, 3 ENVIRON-MENTAL LAW 28 (Spring 1973) (describing the "import" of the *Toomer* decision to be "that even though a state may have plenary authority over its wildlife, it cannot avoid or circumvent the command of the Commerce Clause where it permits its fish to be placed in the stream of commerce").