No. 03-5010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARSHA SEIBER and ALVIN SEIBER,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

CORRECTED BRIEF AMICUS CURIAE OF THE AUDUBON SOCIETY OF PORTLAND, INSTITUTE FOR FISHERIES RESOURCES, OREGON TROUT, INC., AND PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS

Appeal from a Judgment of The United States
Court of Federal Claims

Court of Federal Claims No. 01-432-L
The Honorable Lawrence S. Margolis, Senior Judge

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May 20, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Marsha Seiber and Alan Seiber
v.
United States

No. 03-5010

CERTIFICATE OF INTEREST

Counsel for *amici curiae* certifies the following:

1. The full name of every party or amicus represented by me is: Audubon Society of Portland, Institute for Fisheries Resources, Oregon Trout, Inc., and Pacific Coast Federation of Fishermen's Associations.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is : NONE.

3. All of the parent corporations and publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by me is: NONE.

4. The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: NONE.

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May 20, 2003

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Audubon Society of Portland, Institute for Fisheries Resources, Oregon Trout, Inc., and Pacific Coast Federation of Fishermen's Associations (the "conservation amici") respectfully submit this brief amicus curiae and urge the Court to affirm the judgment below. The parties have consented to the filing of this brief. The interests of the conservation amici, all of whom are dedicated to protecting the wildlife resources of the Pacific Northwest, are described in detail in the motion filed with the Court together with this brief.

SUMMARY OF ARGUMENT AND INTRODUCTION

The United States' brief thoroughly and ably explains why the plaintiffs' takings claims should be rejected. To avoid repetition and to provide useful assistance to the Court, this brief focuses in detail on two points discussed relatively briefly by the United States: (1) the longstanding legal doctrine of public ownership of wildlife supports rejection of these claims; and (2) plaintiffs' allegation that the actions of the U.S. Fish and Wildlife failed to substantially advance a legitimate government interest states a potential claim under the Due Process Clause, but not a claim under the Takings Clause.

In Oregon, as in each of the other fifty states, wild animals are owned by the government in its sovereign capacity as trustee for the citizens. This venerable

legal doctrine represents the foundation for state authority to manage game and all other wildlife in the state. The doctrine of public ownership of wildlife supports rejection of plaintiffs' takings claims because the doctrine represents a "background principle" of state property and nuisance law which limits plaintiffs' property interests in their land. As this Court's precedent recognizes, no land owner can claim an unconstitutional taking of private property based on government regulations designed to protect the public's wildlife from destruction. In addition, in light of the longstanding doctrine of public ownership of wildlife, plaintiffs cannot contend that the government has interfered with their reasonable investment-backed expectations in this case.

Plaintiffs claim a taking based in part on the theory that the actions of the U.S. Fish and Wildlife Service with respect to this property have failed to substantially advance a legitimate government interest. As the United States has explained, there is no factual basis for this claim. But if there were a basis, the claim should still be rejected because the plaintiffs' allegation does not state a claim under the Takings Clause. Instead, plaintiffs are advancing a possible claim under the Due Process Clause, a claim over which the Court of Federal Claims did not even have jurisdiction.

ARGUMENT

I. The Venerable Doctrine of Public Ownership of Wildlife Supports Rejection of Plaintiffs' Regulatory Takings Claims.

This case is different from ordinary takings litigation because it involves a taking claim based on the government's efforts to protect an owl, a publicly owned wildlife resource, from destruction. In Oregon, as in every other state in the nation, the public is the owner, not in a proprietary sense but in its sovereign capacity, of all the wild animals within the state's borders. An alleged impingement on private property interests based on wildlife regulation actually involves two distinct types of property interests: a firm or individual's ownership rights in the land, and the public's ownership rights in the wild animals present on the land. Based on longstanding legal precedents, including the binding precedent of this Court, the public's rights in wild animals are superior to and take precedence over private rights. The doctrine of public ownership of wildlife provides a powerful, independent basis for rejecting the regulatory takings claims in this case.

The doctrine of public ownership of wildlife helps explains why courts around the country, federal as well as state, have consistently rejected regulatory takings claims based on regulations protecting threatened and endangered species.

Indeed, the conservation amici are not aware of a single definitive ruling by any court in the country finding that federal or state regulations protecting threatened species have effected an unconstitutional taking of private property. [1] This case certainly provides no occasion for departing from this consistent line of authority.

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[1] For a sampling of decisions rejecting takings challenges to land use regulations, see, e.g., Boise Cascade v. United States, 296 F.3d 1339, 1341 (Fed. Cir. 2002) (ESA restrictions on commercial logging to protect the spotted owl); Florida Game & Fresh Water Fish Commission v. Flotilla, Inc., 636 So.2d 761 (Fla.Ct. Apps. 1994) (restriction on residential development to protect nesting bald eagles); Boise Cascade Corp. v. Oregon State Board of Forestry, 991 P.2d 563 (Or.Ct.App.1999) (state board of forestry restrictions on commercial logging to protect the spotted owl). Likewise, takings claims based on other types of government actions have been consistently rejected. See, e.g., Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1989) (imposing a fine for killing grizzly bear menacing rancher's sheep); United States v. Kepler, 531 F.2d 796 (6th Cir. 1976) (prohibiting interstate transport of parts of endangered species).

In Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001), the Court of Federal Claims ruled that a restriction on water deliveries to meet the needs of endangered species resulted in a physical- occupation taking of water rights. Significantly, this interlocutory decision, which contradicts the overwhelming weight of authority, preceded the decision in Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), in which the Court emphasized the narrowness of the physical occupation theory, stating that physical takings are "relatively rare" and "easily identified." In addition, the Court of Federal Claims very arguably erred in failing to enforce the state public trust doctrine and other "background principles" of California water law limiting private rights in water. Cf. Bishop v. United States, 126 F.Supp.449 (Ct.Cls. 1954), cert. denied, 349 U.S. 955 (1955) (rejecting regulatory takings challenge to federal wildlife regulation based on state public ownership doctrine.)

A. The Doctrine of Public Ownership of Wildlife Limits the Scope of the Property Interests At Issue in this Case.

In Oregon (as in every other state) wild animals represent "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." Fields v. Wilson, 207 P.2d 153, 156 (Or.1949). Oregon long ago incorporated the common law doctrine of public ownership of wildlife into its statutory code. See ORS 498.002(1) (wild animals are "the property of the state").

The doctrine of public ownership of wildlife is one of the most venerable principles known to the law. "The laws of practically all of our states are founded upon the common law of England by virtue of which all property rights in ferae naturae were in the sovereign." Cook v. State, 74 P.2d 199, 201-202 (Wash. 1937). See Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. 1821) (explaining how the public ownership doctrine was transmitted from Great Britain to the colonies and in turn to the states). See also 2 William Blackstone, COMMENTARIES at 417-18 (explaining application of public ownership doctrine in Great Britain).

The courts of Oregon have repeatedly recognized that the public's rights in

wildlife limit private property rights. In Fields v. Wilson, supra, the Oregon Supreme Court rejected a challenge to a state-controlled monopoly on beaver trapping, stating that

> [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... of game.

207 P.2d at 156-57 (emphases added). See also State v. Pulos, 129 P. 128 (1913) (the taking of wildlife is "not a right, but is a privilege, which may be restricted, prohibited or conditioned, as the lawmaking power sees fit").

Decisions from many other jurisdictions are in accord with these rulings. For example, in Cook v. State, supra, the Washington Supreme Court stated that "the state has an absolute right to maintain its game and wild animals upon any and all private lands, and in that act there is no element of trespass or taking." 74 P.2d at 201. See also id. ("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.") In the seminal case of Barrett v. State, 116 N.E. 99 (N.Y. 1918), the New York Court of Appeals rejected a taking claim based on property damage caused by State-protected beavers, and stated:

> The general right of the government to protect wild animals is 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. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed."

116 N.E. at 101-02. The U.S. Supreme Court's most comprehensive discussion of the public ownership doctrine appears in Geer v. Connecticut, 161 U.S. 519, 529 (1896), in which the Court stated, among other things, that wildlife is "not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection and preservation of the common good."

Historically, the doctrine of public ownership has principally been applied

in cases involving game animals. But the doctrine certainly applies, and logically should apply with even greater force, when an entire species is threatened with extinction. Thus, in State v. Sour Mountain Realty, Inc., 714 N.Y.S.2d 78 (N.Y. S.Ct., App. Div. 2000), a New York appellate court rejected a taking claim based on an agency order directing a land owner to remove a "snake proof" fence the owner installed to keep timber rattlesnakes, a "threatened" species under New York law, off the property. The court relied in part on New York Environmental Conservation Law, §11-0105 (1999), which codifies the doctrine of public ownership of wildlife, and stated 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" without triggering the Takings Clause. Id. at 84. See also decisions cited in note 1, supra.

The courts also have recognized that the public ownership doctrine applies not only to activities intentionally designed to directly kill or injure wildlife (e.g., with guns or traps) but also to activities which will indirectly lead to the same result. In Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195 (Or. 1939), the Oregon Supreme Court, relying in part on the public ownership doctrine, overturned dismissal of a suit to restrain pollution of the

Willamette and Columbia Rivers. The court affirmed that the state's authority "extends not only to the [direct] 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." 87 P.2d at 198 (emphasis added). Similarly, in Barrett v. State, supra, the New York Court of Appeals held that the public ownership doctrine justified protection not only of the beavers themselves but also supported a prohibition against the destruction of their "dams, houses, homes or abiding places of same." Cf. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) (upholding, based on the language of the statute and scientific evidence about the link between habitat destruction and species loss, an Endangered Species Act regulation defining a "take" of an endangered species as including destruction of critical habitat upon which the species depends for its survival).[2]

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[2] Plaintiffs might seek to challenge the continuing vitality of the state ownership doctrine on the basis of some language in several U.S. Supreme Court decisions holding that the states' traditional sovereign authority over wildlife does not preclude the enforcement of federal mandates which preempt state law. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 333-34 (1979). But these decisions are irrelevant to the application the state ownership doctrine in a takings case. See, e.g., Shepard v. State Dept. of Fish & Game, 897 P2d 33, 41-43 (Alaska 1995) (explaining that Hughes addresses whether wildlife represents goods in commerce, not the scope of government authority to conserve wildlife within its jurisdiction).

B. The Public Ownership Doctrine Supports Rejection of Plaintiffs' Claims.

Plaintiffs have presented various different takings theories, including a categorical regulatory taking claim under Lucas, a categorical physical-occupation claim under Loretto, and a regulatory taking claim under Penn Central. The public ownership doctrine supports rejection of all of these claims.

First, the public ownership doctrine represents a "background principle" of state "property" law, as well as a background principle of state "nuisance" law, each of which independently bars plaintiffs' takings claims. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) explained that regulatory restrictions cannot effect a taking if they "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. Background principles are largely defined by state law, in this case the law of the state of Oregon. As the Court said in Lucas, the federal courts must look to "an independent source such

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See also 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 Law Review 297 (1995) (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").

as state law to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments. Id, at 1030. Lucas makes clear that background principles can defeat not only claims of denial of all economically viable use but also claims under Penn Central as well as physical-occupation claims. See id. at 1028-29.

Courts in this Circuit have frequently relied on Lucas's "logically antecedent inquiry" to resolve regulatory takings cases. See Marks v. United States, 34 Fed.Cl. 387, 403 (1995), aff'd, 116 F.3d 1496 (Fed.Cir.1997), cert. denied, 522 U.S. 1075 (1998) (takings claim barred by navigational servitude); Rith Energy, Inc. v. United States, 44 Fed. Cl. 366 (1999), aff'd on other grounds, 247 F.3d 1355 (Fed. Cir. 2001), cert. denied, 122 S.Ct. 2660 (2002) (taking claim barred by background principles of Tennessee nuisance law). Courts in other jurisdictions have applied the background principles defense as well. See, e.g., Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa.), cert. denied, 123 S.Ct. 486 (2002) (taking claim by mining company barred based on public right under state law to unpolluted waters); Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (taking claim barred by public trust in tidelands).

The courts have specifically recognized that the doctrine of public ownership of wildlife represents a "background principle" of property law which bars a taking claim based on regulations designed to protect wildlife from harm. Thus, in Sierra Club v. Department of Forestry and Fire Protection, 26 Cal. Rptr. 338 (Cal. Ct. App. 1993) (review subsequently denied by the California Supreme Court and Court of Appeals opinion ordered depublished), which involved a similar challenge to logging restrictions designed to protect the spotted owl, the California Court of Appeals stated that federal and state courts "have generally rejected the claim that a state or federal statute enacted in the interest of protecting wildlife is unconstitutional because it curtails the uses to which real property may be put." The Court observed that takings doctrine recognizes an exception from liability for limitations consistent with "preexisitng regulation by the state's law of property," and that "wildlife regulation has been historically a part of the preexisitng law of property." See also State v. Sour Mountain Realty, Inc., supra (public ownership doctrine supported rejection of a taking claim based on agency order that owner remove fence to avoid harm to threatened snakes).

Most importantly for present purposes, the precedent of this Circuit establishes that public ownership of wildlife is a principle of property law that

bars a taking claim based on wildlife-protective regulations. In Bishop v. United States, 126 F. Supp. 449 (Ct.Cls. 1954), cert. denied, 349 U.S. 955 (1955), the former U.S. Court of Claims, the predecessor of this Court, ruled that a proclamation issued under the Migratory Bird Treaty Act barring hunting of wild geese on plaintiff's property did not effect a taking. Quoting the seminal decision in Barrett v. State, supra, the Court of Claims stated that " the general right of the government to protect wild animals is too well established to be now called in question," and "their ownership is in the state in its sovereign capacity, for the benefit of all the people." Id. at 452. Based on this principle, and specifically relying on the Supreme Court's decision in Geer v. Connecticut, supra, see id. at 451, the court rejected the claim that plaintiff had been deprived of his property rights, and stated that "[n]o citizen has a right to hunt wild game except as permitted by the State." Id. at 451. The court also rejected a taking claim based on destruction of plaintiff's crops by protected geese, stating that "[t]he measures best adapted to ... [the protection and preservation of game] are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." Id. at 452, quoting Barrett v. State, 116 N.E. at 427.

Significantly, one judge dissented in the case, stating that "if the circumstances are so extraordinary, as they are alleged to be in this case, that the accomplishment of the public purpose of protecting the wild fowl results in the destruction of a private owner's use of his land, I think the public must compensate the owner." Id. at 453 (emphasis added). However, the majority, relying on the doctrine of public ownership of wildlife, squarely rejected this position. Bishop therefore establishes a binding rule in this circuit that, even when a wildlife regulation denies an owner all economically viable use of the property, the doctrine of public ownership precludes a finding of a taking. (The decisions of the former Court of Claims represent, of course, binding precedent in this Court. See South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982)). Rejection of this taking claim, in which the plaintiffs cannot credibly claim that they have been denied all economic use of the property. follows *a fortiori* from the holding in Bishop.

For largely the same reasons, the takings claims in this case must be rejected under background principles of Oregon "nuisance" law. A public nuisance is defined as, among other things, "an invasion of a right that is common to all members of the public." See Restatement (Second) of Torts, §521B. The public rights in wildlife, held by the state in trust for the benefit of all the people, are, by

definition, rights "common to the general public." The plaintiffs' proposed logging operation threatened an active spotted owl nesting site and, therefore, represented an "unreasonable interference" with the public's rights in wildlife. Thus, the plaintiffs' taking claim is independently barred under background principles of state nuisance law.

The decision of the Pennsylvania Supreme Court in Machipongo v. Commonwealth of Pennsylvania, supra, is instructive. Owners of coal interests challenged as a taking a restriction on coal mining designed to protect streams from acid mine discharges. The state asserted a nuisance defense and, reversing the trial court, the Pennsylvania Supreme Court ruled that the state should have been permitted to stand on this defense. Relying on the Pennsylvania legal rule that "the public has a right not to suffer acid mine discharge into its public waters," id., at 773, and the Restatement (Second) of Torts, §521B, id., the court said, "if the Commonwealth is able to show that Property Owners' proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation." Id. at 774. The Court emphasized that the state, in order to take advantage of this defense, did not have to demonstrate to a complete certainty that the proposed mining would actually produce acid mine drainage. "It is enough if the Commonwealth can

prove," the Court said, "that further mining in the UFM [unsuitable for mining] area had a high potential to cause increases in [pollution]." The same reasoning supports rejection of the taking claim in this case based on background principles of nuisance law.[3]

Finally, regardless of whether public rights in wildlife represent an absolute bar to a taking claim under relevant background principles, the longstanding public rights in wildlife surely inform the reasonableness of the plaintiffs' investment expectations. The reasonableness of a claimant's investment expectations is, of course, a highly relevant factor in analyzing a claim under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Furthermore, the reasonableness of an owner's investment expectations is very arguably a relevant consideration in a Lucas case as well. See Good v. United States, 189 F.3d 1355 (Fed.Cir. 1999) (reasonableness of an owner's investment expectations is a relevant factor in a

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[3] The conservation amici recognize that in Boise Cascade Corp. v. State of Oregon, 991 P.2d 563 (Or. App.1999), the Oregon Court of Appeals rejected a "nuisance defense" in a similar case. The amici submit that the Oregon Court of Appeals' brief analysis of the issue was mistaken because, among other things, the court ignored its own precedent establishing that a violation of public rights can constitute a nuisance under the Restatement definition. See Mark v. State Department of Fish and Wildlife, 974 P.2d 716, 719 (Or.Ct. App. 1999). Significantly, the Oregon court did not address whether public rights in wildlife qualify as a background principle of state"property" law and, therefore, did not consider whether the claim might have been rejected on that basis.

Lucas case); but see Palm Beach Isles Associates v. United States, 231 F.3d 1354 (Fed. Cir. 2000) (subsequent panel decision contradicting the holding in Good). See also Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 n. 24 (2002) (observing that Justice Kennedy concurred in the judgment in Lucas "on the basis of the regulation's impact on 'reasonable, investment-backed expectations'").[4]

Treating the doctrine of public ownership of wildlife as a consideration which should, at a minimum, inform the reasonableness of a claimant's expectations, the longstanding public rights in wildlife certainly weigh against plaintiffs' claims. Cf. R.W. Docks & Slips v. State, 628 N.W.2d 781 (Wisc. 2001) (conclusion that claimant lacked reasonable investment expectations supported by fact that proposed construction would invade public trust lands). A purchaser of land in Oregon can reasonably be charged with knowledge of the pervasive, longstanding tradition of protecting wildlife from harm. In addition,

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[4] On the other hand, it can be contended that the reasonableness of an owner's investment expectations is not a relevant factor in a taking case based on physical occupation of private property. See Nollan v. California Coastal Commission, 483 U.S. 825 (1987). But see California Housing Sec. Inc. v. United States, 959 F.2d 955 (Fed.Cir. 1992) (rejecting taking claim based on physical seizure of savings and loan institution by the Resolution Trust Company, relying in part on the claimant's lack of reasonable investment expectations).

the fact that no other land owner in the United States has received compensation based on federal or state ESA regulations also suggests that plaintiffs cannot claim a reasonable expectation of being able to log their property and destroy endangered species in the process or get paid for not doing so.

II. The Alleged Failure of a Regulation to Substantially Advance a Legitimate Government Interest Does Not Support A Claim Under the Takings Clause.

The Court also should reject the contention that the ESA restrictions at issue in this case effected a taking because they allegedly "failed to substantially advance a legitimate government interest." Setting aside the factual deficiencies with the claim (addressed by the United States), the contention that a regulation fails to substantially advance a legitimate government interest raises an issue under the Due Process Clause rather than the Takings Clause. Therefore, the Court of Claims did not even have jurisdiction to entertain this claim. See Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (because the Due Process Clause is not a money-mandating provision of the Constitution, the Court of Federal Claims lacks jurisdiction to hear such claims).

A. The Substantially Advance Test is Not a Valid Takings Test.

In 1980, in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), a brief, unanimous decision rejecting a takings claim, the Supreme Court injected

considerable confusion into takings law by stating that a regulation can effect a taking on the ground that it fails to substantially advance a legitimate government interest. From the first, however, this ostensible takings test was met with skepticism, and it has had little actual influence on the law. The Supreme Court has never squarely upheld a taking claim based on this ostensible test. This Court has on various occasions mentioned the Agins test in passing, see, e.g., Whitney Benefits, Inc. v. United States, 926 F.2dd 1169 (Fed.Cir. 1991), but it too has never upheld a finding of a taking on this theory. As Judge Bruggink of the Court of Federal Claims succinctly observed in Bamber v. United States, 45 Fed Cl. 162, 165 (1999), the substantially advance takings test "has not had a fruitful life." See also Loveladies Harbor, Inc v. United States, 15 Cl. Ct. 381, 390 (1988) ("no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced").

The primary reason for the skepticism about the Agins test is that the Supreme Court simply lifted the test out of due process jurisprudence. The sole authority cited in support of the test was Nectow v. City of Cambridge, 277 U.S. 183 (1928), which involved a claim that an ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth

Amendment." Id. at 183. Furthermore, the page in the Nectow opinion to which Agins refers quotes from Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), another due process case. As numerous commentators have recognized, "The authority for the first prong of Agins is no authority at all; it was a case based solely on the due process clause." Kenneth Bley, "Substantive Due Process and Land Use: The Alternative to a Taking Claim," in Takings: Land Development Conditions and Regulatory Conditions After Dolan and Lucas, 280, 291 (1997).

In 1998, in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the Supreme Court finally resolved the confusion created by its Agins decision. The case involved the constitutionality of federal legislation imposing retroactive liability on coal mining companies to pay for health benefits for retired workers. Four Justices, led by Justice O'Connor, concluded that the legislation effected a taking and did not reach the companies' due process claims. Id. at 537-78. Justice Kennedy concurred in the judgment that the legislation was unconstitutional, but did so under due process principles, rejecting the position that the Takings Clause applied to the companies' claims. Id. at 545-47. Four justices dissented from the holding that the legislation was unconstitutional, but expressly agreed with Justice Kennedy that a takings analysis was inappropriate, and that the appropriate

framework of constitutional analysis lay under the Due Process Clause. Id. at 554-57. Thus, five justices, forming a majority of the Court, rejected the takings claim.

Justice Kennedy's concurring opinion emphasized the incongruity of hearing substantive challenges to the legitimacy of governmental actions under the Takings Clause:

> The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. See, e.g., Agins v. City of Tiburon, 447 U.S. at 260 (zoning constitutes a taking if it does not "substantially advance legitimate state interests"). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional. Given that the constitutionality [of the Coal Act] appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under the general due process principles rather than under the

Takings Clause.

524 U.S. at 545. Justice Kennedy therefore expressly concluded that the case was "controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws." Id. at 547.

Justice Breyer, writing for himself and three other justices, agreed with Justice Kennedy that

> the plurality views the case through the wrong legal lens. The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property... for public use, without just compensation." U.S. Const., Amdt 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes "private property" to serve the "public" good.

524 U.S. at 554 (second emphasis added).

The majority of the Court thus expressly held that challenges to the legitimacy of government actions properly lie under the Due Process Clause, rather than the Takings Clause. While this holding is not expressed in a single opinion for the Court, the majority's ruling is nonetheless binding precedent for the lower federal courts. As this Court recognized in its en banc decision in

Commonwealth Edison Corp. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc), cert. denied, 122 S.Ct. 2293 (2002), "we are obligated to follow the views of [the] majority" in Eastern Enterprises. To the same effect, see, e.g. Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3rd Cir.), cert. denied, 528 U.S. 963 (1999) ("We are bound to follow the five-four vote against the taking claim in Eastern.").

The Supreme Court's recent decision in Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003), rejecting a takings challenge to Washington state's Interest of Lawyers' Trust Accounts program, reinforces the conclusion that a taking claim presupposes that the government action is legitimate and, therefore, the alleged illegitimacy of the government action cannot provide the basis for a claim under the Takings Clause. The Court explained that an essential "condition" for a valid taking claim is that the government action must serve a "public use." Id. at 1417. The Court, in turn, defined an action for a "public use" as a "legitimate" government action. Id. See also id. at 1421 (referring to a "legitimate public use.").[5]

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[5] In City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), decided the year after Eastern Enterprises, the Court upheld a jury finding of a taking based upon instructions that the city's repeated rejections of a development proposal could be found to be a taking, if they failed to

A number of lower federal and state courts, in accordance with the holding in Eastern Enterprises, have rejected the ostensible substantially advance test as a general takings standard. For example, in Simi Investment Co. v. Harris County, Inc., 256 F.3d 323 (5th Cir. 2001), the Fifth Circuit, following the decision in Eastern Enterprises, and based on careful analysis of the opinions of the five-justice majority in that case, concluded that "illegitimate and arbitrary governmental abuse" of private property rights must be addressed under the Due Process Clause rather than the Takings Clause. See also Mission Springs, Inc. v. City of Spokane, 954 P.2d 250, 257-58 (Wash. 1998) (city's allegedly "arbitrary" denial of permit stated a claim under the Due Process Clause, not the Takings Clause); Brunelle v. Town of South Kingston, 700 A.2d 1075, 1083 n. 5 (R.I. 1997) (overruling trial court ruling that "a regulatory taking can be compensable if

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"substantially advance a legitimate public purpose." Id. at 700. However, the Court's ruling turned on the fact the city waived any objection to the instructions and therefore could not challenge the test applied by the lower courts before the Supreme Court. No member of the Court in Del Monte Dunes affirmatively defended the ostensible substantially advance takings test. Five of the justices (not exactly the same five justices in the five-justice majority in Eastern Enterprises) either wrote opinions, or joined in opinions indicating that the outcome in Del Monte Dunes should not be taken as an endorsement of the substantially advance test. See id. at 732 n. 2 (Scalia, J., concurring in part and concurring in the judgment); see id. at 753 n.12 (Souter, J., dissenting , joined by Justices O'Connor, Breyer, and Ginsburg).

the ordinance in question does not substantially advance any legitimate state interest," and stating that "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause").

Numerous commentators also have recognized that a substantially advance claim raises a due process issue, not a takings issue. See, e.g., S. Keith Garner, "'Novel' Constitutional Claims: Rent Control, Means Ends Tests, and the Takings Clause, 88 Cal. L. Rev. 1547 (2000); Lawrence Berger, "Public Use, Substantive Due Process and Takings – An Integration," 74 Neb. L. Rev. 843, 883 (1995).

Apart from the force of precedent, the substantially advance takings claim founders on first principles. This ostensible takings test is inconsistent with the purpose of the Takings Clause, which "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987). The fundamental inquiry in a takings case is whether the government has imposed restrictions so severe that the government can only proceed if it is willing to pay. By contrast, the substantially advance theory focuses on whether the government action is so arbitrary or otherwise illegitimate that it should not be permitted to proceed at all. "This sort of analysis is in uneasy tension with our

basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." Eastern Enterprises, 525 U.S. at 545 (Kennedy, J.)

The substantially advance test also conflicts with the language and original understanding of the Takings Clause. The drafters of the Bill of Rights intended the Takings Clause to apply, as its language suggests, only to "direct condemnations" or "physical appropriations." Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 342 (2002). The Supreme Court, reasoning by analogy, has extended the clause to regulatory restrictions which are similar in terms of economic impact to condemnations or appropriations. The substantially advance theory, by contrast, would permit a takings claimant to proceed based on a challenge to the rationality of government action, regardless of economic impact. This theory has no logical foundation in the language or original understanding of the Takings Clause.

Finally, the substantially advance test contradicts the textual requirement of the Takings Clause that a taking be for a "public use." An "otherwise proper," government action " First English, 482 U.S. at 314, is distinguishable from the "different case... where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public

use'" San Diego Gas & Electric v. City of San Diego, 450 U.S. 621, 656 n.23 (1981) (emphasis added). An action that fails to substantially advance a legitimate state interest, that is, an action which is not "otherwise proper" and therefore does not serve a "public use," falls outside the scope of the Takings Clause. See Rith Energy, Inc v. United States, 247 F.3d 1355, 1366 (Fed Cir. 2001), cert. denied, 122 S.Ct. 2660 (2002) (a taking claimant is "required to litigate its takings claim on the assumption that the administrative action was both authorized and lawful").

B. Nollan and Dolan are Distinguishable from this Case.

The Supreme Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994), are sometimes cited to support the existence of a general substantially advance takings test. These cases involved efforts by government officials to force landowners to grant public access to their property as a condition of development approvals. The argument based on Nollan and Dolan should be rejected for at least three reasons.

First, to whatever extent this argument might have had some merit in the past, the argument has been superseded by Eastern Enterprises, which clearly establishes that challenges based on the alleged arbitrariness or illegitimacy government regulation do not lie under the Takings Clause.

Second, Nollan and Dolan do not independently support the existence of a substantially advance test. The physical access conditions at issue in those cases, standing alone, unquestionably would have been per se physical-occupation takings under Loretto. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The issue in Nollan and Dolan was whether findings of a taking could be avoided because the physical-occupation requirements, rather than being imposed directly, were being imposed as conditions of permits which the owners could have refused to accept. The Court concluded that a finding of a taking should not be automatic. At the same time, recognizing the seriousness of the intrusion on private property rights involved, the Court ruled that the government could impose this type of condition only if there were an "essential nexus" between the condition and the regulatory objective the government was trying to advance, Nollan, at 837, as well as a "rough proportionality" between the burden imposed by the condition and the projected impacts of the development. Dolan, at 391.

While Nollan and Dolan quote the "substantially advance" language from Agins, these references were not central to the Court's analysis in either case. The ostensible "substantially advance" test does bear a general similarity to the "essential nexus" and "rough proportionality" tests. But those tests are actually

different from, and much narrower than, the ostensible substantially advance test. The "essential nexus" and "rough proportionality" tests rest on their own logical foundation, and can continue to apply, whether or not the substantially advance test represents a valid takings inquiry.

Finally, assuming Nollan and Dolan could be read to support a substantially advance test, even after Eastern Enterprises, they cannot be read to support the existence of such a test outside the context of the kinds of exactions at issue in those cases. See Bamber v. United States, supra (Nollan and Dolan are the only cases in which the substantially advance test has been "outcome determinative'). Whatever the possible scope of the Nollan and Dolan decisions when they were issued, the Supreme Court has subsequently instructed that these precedents should be narrowly confined. In City of Monterey v. Del Monte Dunes at Monterey Ltd., supra, the Court ruled that the analysis in Nollan and Dolan cannot be extended "beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 703. See also Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 216 F.3d 764, 772 n. 11 (9th Cir 2000), aff'd, 122 S.Ct. 1465 (2002) ("The [Supreme] Court has held that the Nollan/Dolan test is inapposite to regulatory takings cases outside the context of excessive exactions".)

Thus, whatever support Nolan and Dolan provide for a substantial advance takings test in cases involving exactions, they have no relevance in a case such as this not involving exactions.[6]

[6] If the Court were to conclude, contrary to the preceding arguments, that takings doctrine includes a general "substantially advance" test, it should at least conclude that the applicable standard of review would be the same as the rational basis standard under the Due Process Clause. Applying such a deferential standard here, as the United States has explained in its brief, this taking claim must be rejected without doubt. To the extent the Supreme Court provided guidance on the appropriate standard of review under this test (prior to repudiating the test altogether in the 1998 Eastern Enterprises case), the Court indicated that the standard of review should be the same deferential standard applied under the Due Process Clause. See Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 487 n. 16. (1987), Id. at 511 n. 3 (Rehnquist, J., dissenting). See also Del Monte Dunes, 526 U.S. at 701 ("The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective.") (emphasis added).

CONCLUSION

The conservation amici urge the Court to uphold the judgment of the Court of Federal Claims.

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PROOF OF SERVICE

I hereby certify that two true and correct copies of the foregoing brief of amici curiae Audubon Society of Portland, Institute for Fisheries Resources, Oregon Trout, Inc., and Pacific Coast Federation of Fishermen's Associations in support of defendant-appellee United States has been served by United States first-class mail, postage prepaid, upon:

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