No. 76339-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL COMMUNITY and
WASHINGTON ENVIRONMENTAL COUNCIL,

Petitioners,

vs.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON TROUT, PACIFIC COAST ASSOCIATION OF FISHERMEN'S ASSOCIATIONS, AND INSTITUTE FOR FISHERIES RESOURCES

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IDENTITY AND INTEREST OF AMICI

Washington Trout is a statewide, non-profit conservation organization dedicated to the preservation and recovery of Washington's native fish species and the ecosystems on which they depend; its approximately 2,400 individual members use and enjoy rivers and streams throughout the state, including Skagit County, for recreation, wildlife observation and study, photography, and fishing. The Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the west coast's largest commercial fishing trade association, made up of approximately 2,000 ocean commercial fishing vessel owners and operators who derive their livelihoods in whole or in part from the harvesting of west coast seafood, particularly salmon. The Institute for Fisheries Resources ("IFR") is a nonprofit, public benefit corporation formed by PCFFA in 1992 to foster protection and restoration of damaged salmon habitat; it promotes and conducts salmon habitat restoration efforts throughout the West Coast, including in Washington State.

Amici and their members are thus deeply interested in the resolution of this challenge to the adequacy of the measures adopted by Skagit County to preserve salmon habitat and protect salmon populations.

STATEMENT OF THE CASE

Amici adopt the statement of the case submitted by petitioner Swinomish Indian Tribal Community ("the Tribe").

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici seek to assist the Court by addressing the "property rights" issues tangentially raised by this case. The Tribe and Washington Environmental Council contend that Skagit County has violated the Growth Management Act, RCW 36.70A.010 *et seq.* ("GMA"), by failing to adopt a critical areas ordinance that includes buffer areas along streams designed to protect salmon from death or injury caused by habitat degradation. In response, Skagit County ("the County") and Skagit County Farm Bureau, Skagitonians to Preserve Farmland and Western Washington Agricultural Association ("Farm Interests") contend, among other things, that adoption of such regulations would violate constitutional and statutory protections for private property owners. *Amici* submit that these arguments are spurious, and should not distract the Court from focusing its attention on the important questions raised in this case regarding the validity of the County's ordinance.

The County and Farm Interests argue that all restrictions on land use, even those adopted through county-wide land use plans such as the critical areas ordinance at issue here, must be narrowly tailored to address particular problems caused by the potential use of a specific parcel of

property. They invoke the U.S. Supreme Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which establish special, unusually stringent tests for review under the Takings Clause of "exactions," *i.e.*, conditions imposed on development permits that require owners to grant the public access to their property. The County and Farm Interests contend that these special tests apply not just to exactions, but extend to ordinary restrictions on the use of land. The Farm Interests also invoke RCW 82.02.020, which establishes specialized standards to address financial obligations imposed by local governments on developers seeking approval of particular projects. They contend that this statute incorporates their extravagant reading of *Nollan* and *Dolan*, and makes it applicable to ordinary land use restrictions.

The County and Farm Interests' argument is flatly inconsistent with traditional local government land use planning and zoning authority. Zoning necessarily involves local governments assigning lands within their jurisdictions to categories and classes of use, and adopting land use regulations of general applicability within such zones, without tailoring the regulations to the specific circumstances of each particular parcel of property. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)

(upholding zoning ordinance establishing separate regulations for residential and commercial districts). As this Court has observed,

> If courts were to consider each individual lot separate and apart from every other lot in a particular use district, and try to determine whether any given structure erected or to be erected on it is dangerous or inimical to the public health, safety, morals or welfare, there could be no successful zoning ….

Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 662-63, 946 P.2d 768, 775 (1997) (quoting *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 223, 242 P.2d 505 (1952)). The County and Farm Interests' argument would thus not only invalidate a multitude of stream buffers and set-back requirements, it would effectively nullify the legislature's mandate in the GMA for "comprehensive land use planning." RCW 36.70A.010.

As *amici* demonstrate below, the County and Farm Interests' arguments are based upon gross misreadings of constitutional and statutory law. First, the adoption of general land use regulations is not subject to the tests developed by the U.S. Supreme Court for exactions in *Nollan* and *Dolan*. Second, land use regulations are not subject to the specialized standards the legislature has established in RCW 82.02.020. Finally, apart from these mistaken arguments there is no reason for this Court to be concerned that adoption of stream buffers may effect a taking of property rights. Land use regulations benefit all property owners, and in any event buffers restrict the use of only a small fraction of an owner's property. Moreover,

buffers serve the paramount sovereign interest of the State in protecting wildlife.[1]

ARGUMENT

I. *Nollan* and *Dolan* Apply Only to Government Exactions, Not Land Use Regulations

The County and Farm Interests' first error is in suggesting that the Supreme Court's decisions in *Nollan* and *Dolan* establish tests that are broadly applicable to land use regulations. *Nollan* and *Dolan* did not address regulations of general applicability, however. Both cases involved conditions requiring an individual land owner to grant the public physical access to its property as a condition of receiving government approval for development of a particular parcel. The Supreme Court held that local governments may impose such "exactions" on the development of individual parcels without compensation only if there is a "nexus" between the condition and the local government's regulatory objectives, and the burdens imposed by the condition are "roughly proportional" to the impacts of the development.

[1] The suggestion that buffers might work a taking of private property affords no basis for narrowly construing the County's regulatory power in any case. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (where compensation is available, "adoption of a narrowing construction [of a statute] does not constitute avoidance of a constitutional difficulty, it merely frustrates permissible applications of a statute or regulation"). If the County adopts a critical areas ordinance incorporating appropriate stream buffers as a consequence of this litigation, affected property owners who believe their property has been taken by the ordinance may seek just compensation. It is of course premature to consider the merits of any such claim until the terms of the actual ordinance and its effect on a particular regulated property can be determined.

The Supreme Court has expressly ruled, in direct contradiction to the County and Farm Interests' position in this case, that these tests for exactions do not apply to general land use restrictions. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court held that the Ninth Circuit erred in applying the "rough proportionality" test of *Dolan* to land use restrictions imposed by a city. The Court stated that the *Dolan* test "was not designed to address, and is not readily applicable to, the much different questions arising where … the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* at 703.

This conclusion was presaged in *Dolan* itself, which expressly distinguished between exactions and traditional "land use regulations." *Dolan*, 512 U.S at 384-385 (land use regulations are "essentially legislative determinations classifying entire areas of a city" and are "simply limitations on the use [a property owner] might make of her own parcel"; by contrast, exactions are "adjudicative decisions" made with respect to "individual parcel[s]," and require the owners to "deed portions of the property to the city"). The Court reaffirmed the limited reach of *Nollan* and *Dolan* in *Lingle v. Chevron USA, Inc.*, __ U.S. __, 125 S.Ct. 2074, 2086 (2005), stating that the specialized tests developed in those cases apply only to "adjudicative land-use exactions – specifically,

government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."

The doctrinal justification for the demanding tests in *Nollan* and *Dolan* explains the limited reach of those decisions. The starting point for the Court's analysis was that the exactions at issue in those cases would unquestionably constitute *per se* physical takings if independently imposed, raising the concern that the government's imposition of these requirements as conditions for approval of a building permit was intended to avoid the constitutional obligation of just compensation. *Lingle,* 125 S.Ct. at 2086, 2087. As the Court explained in *Lingle*:

> [T]hese cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.

125 S.Ct. at 2087 (quoting *Dolan*, 512 U.S. at 385). The "nexus" and "rough proportionality" tests in *Dolan* and *Nollan* thus reflect unique concerns about the coerced forfeiture of constitutional rights, and have no logical application outside the context of exactions. Unlike the physical occupations demanded in *Dolan* and *Nollan*, zoning and other land use regulations need not, and usually do not, rise to the level of takings, and

do not in any case compel a property owner to waive his or her right to just compensation if they should do so. Nor do zoning and other land use regulations enacted through public legislative processes pose the same risk of arbitrary action as adjudicative decisions by government officials on individual permit applications.

For these reasons, courts across the United States have held that generally applicable land use regulations, including setback and buffer requirements in particular, are not subject to the *Nollan* and *Dolan* tests. *See, e.g., Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.,* 702 N.W.2d 433 (Wis. App. June 16, 2005) (*Nollan* and *Dolan* inapplicable to building setback because setback did not afford public access, and thus was not a *per se* physical taking); *Bonnie Briar Syndicate v. Town of Mamaroneck,* 94 N.Y.2d 96, 721 N.E.2d 971, 974-75 (N.Y. 1999) (*Nollan* and *Dolan* inapplicable to general zoning regulations).

The County and Farm Interests invoke *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hgs. Bd.,* 96 Wash. App. 522, 979 P.2d 864 (1999), but that decision does not support their position. In *HEAL,* the Court of Appeals addressed the GMA's requirement that counties and cities "include the best available science" in developing policies and development regulations to protect critical areas. After reversing the trial court's application of that

requirement, the court suggested, *sua sponte*, that policies and regulations adopted under the GMA must also "comply with the nexus and rough proportionality limits the United States Supreme Court has placed on government authority to impose conditions on development applications." 979 P.2d at 871. The court acknowledged that the Supreme Court had limited application of those rules to exactions involving dedications of land, but "declined" to follow the Supreme Court's "dicta" on that point. *Id.*

For several reasons, this Court should not follow *HEAL*. First, the *HEAL* court's suggestion that the nexus and rough proportionality tests apply to policies and regulations adopted in the planning process under the GMA is mere *dictum*, as the Court of Appeals itself acknowledged. 979 P.2d at 871 (noting that the briefs of the parties did not raise any issue regarding the applicability of these tests). Second, the *HEAL* court was mistaken in saying that the Supreme Court's limitation of the *Nollan* and *Dolan* tests to exactions was itself "dicta." *Del Monte Dunes* represents a square, unambiguous holding on this point, and has subsequently been confirmed by *Lingle*. Finally, the almost off-hand extension of *Nollan* and *Dolan* beyond exactions in *HEAL* contradicts the Supreme Court's carefully articulated reasoning supporting these tests and limiting their scope. These tests apply only where a government condition threatens

forfeiture of a constitutional right, and the right in question – the right to just compensation – exists only where the government's action would, if imposed directly, necessarily effect a taking. In sum, *HEAL* does not support applying the nexus and rough proportionality tests of *Nollan* and *Dolan* outside the context of adjudicative exactions imposed on the development of particular properties that would otherwise constitute *per se* takings.[2]

II. RCW 82.02.020 Applies Only to "Taxes, Fees, or Charges" Imposed on New Development, Not to Land Use Regulations of General Applicability

The Farm Interests also contend that RCW 82.02.020 bars the County from adopting general land use regulations such as buffers. They argue that this statute incorporates the nexus and proportionality tests of *Nollan* and *Dolan*, and applies to all types of land use restrictions. Under RCW 82.02.020, the Farm Interests assert, land use regulations can address only the specific impacts caused by new development activity on a particular

[2] The Court of Appeals has extended *Nollan* and *Dolan* by ruling that the tests for exactions apply not only to conditions mandating public access to private property, but also to conditions requiring monetary payments. *See Benchmark v. City of Battle Ground*, 94 Wash.App. 537, 972 P.2d 944 (1999), *aff'd on other grounds*, 146 Wn.2d 685, 49 P.3d 860 (2002). *Benchmark* is questionable, for that decision overlooks that the nexus and proportionality tests are grounded in the unconstitutional conditions doctrine. Unlike a requirement that an owner grant the public access to private property, a requirement that a property owner expend funds is not a *per se* taking, and may well not even fall within the scope of the Takings Clause at all. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (agreement among five Justices that the Takings Clause does not apply to monetary obligations); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (holding that regulatory actions requiring the payment of money are not takings). Significantly, this Court declined to address the constitutional issue in affirming the Court of Appeals' judgment. 146 Wn.2d at 694, 49 P.3d at 864.

parcel of property, and cannot be imposed to address pre-existing problems or even anticipated future problems if there is uncertainty regarding their occurrence. Farm Int. Br. at 38-41. Significantly, Skagit County does not join the Farm Interests in making this argument.

Like their constitutional argument, the Farm Interests' statutory argument would, if accepted by the Court, lead to wholesale invalidation of land use regulations of general applicability, effectively gutting the ability of local governments to engage in comprehensive land use planning and zoning. But the contention that RCW 82.02.020 applies to land use regulations is fundamentally mistaken.

First, the Farm Interests' argument lacks any support in the text of the statute itself. RCW 82.02.020 preempts counties and other local governments from imposing "any tax, fee, or charge, either direct or indirect" on the construction of buildings or the development, subdivision, classification or reclassification of land. The statute focuses on the imposition of financial obligations – including dedications of land, payments made in lieu of such dedications, and impact assessment fees – as a condition for approval of new development. The statute does not restrict, or even refer to, the adoption of land use regulations of general applicability by local governments through normal processes of zoning or planning. The Farm Interest's suggestion that the statute somehow

"incorporates" the nexus and rough proportionality principles of *Nollan* and *Dolan* is an historic impossibility, since the restriction in RCW 82.02.020 on local government's authority to impose taxes, fees, or charges on development projects was enacted in 1982, long before either *Nollan* or *Dolan* was decided.[3] The statute thus has no application to restrictions of the *use* of land established through government regulation.

This reading of the statute is supported by the relevant case law. Washington courts have read the statute to restrict any form of financial obligation imposed on individual developers, including requirements to build streets, *see Benchmark Land Co. v. City of Battle Ground*, 94 Wash.App. 537, 972 P.2d 944 (1999), and requirements to dedicate land to a municipality's open-space network or pay an in-lieu fee, *see Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002). But no Washington court has ever extended the requirements of RCW 82.02.020 beyond the context of financial obligations imposed on land owners seeking development approvals. Nor have the courts ever held that the statute could apply to land use regulations of general

[3] In *City of Olympia v. Drebick*, 119 Wash. App. 774, 784-85, 83 P.2d 443, 448-49 (2004), the court noted that a provision added to the statute in 1990 to regulate impact assessment fees, RCW 82.02.050, was crafted in part to address *Nollan*'s requirements. *See also HEAL, supra*, 979 P.2d at 871 and n.13 (suggesting in *dicta* that the nexus and rough proportionality requirements were incorporated into RCW 82.02.*050*). The Farm Interests do not suggest that stream buffers somehow constitute impact assessment fees under that later-enacted provision, however.

applicability merely because such regulations restrict a property owner's use of her land in a manner that the owner finds economically burdensome.[4]

The Farm Interests attempt to support their reading of the statute by analogizing stream buffers to the open-space requirements on subdivisions struck down by this Court in *Isla Verde* under RCW 82.02.020. But there is a vast difference between these requirements. The open-space requirements at issue in *Isla Verde* compelled developers to dedicate land to the city's open-space network, or to pay an in-lieu fee, as a condition of development approvals. By contrast, stream buffers do not involve dedication of interests in land to the county or the payment of any sort of charge or in-lieu fee. They are simply classic land use regulations, like the mandatory setbacks of homes from lot lines required in virtually every community, and, as such, are plainly beyond the scope of RCW 82.02.020.

If anything, *Isla Verde* weighs against the Farm Interests' position. The city argued in that case that its imposition of a condition requiring dedication of thirty percent of any new subdivision to open-space (or an in-lieu payment) was a zoning ordinance authorized under state law, rather

[4] The Farm Interests invoke *HEAL*, but that decision does not address the applicability of RCW 82.02.020 to land use regulations such as critical areas ordinances. The Court in *HEAL* merely noted in passing its view that the nexus and proportionality rules of *Nollan* and *Dolan* were incorporated into the *impact fee* assessment provisions of RCW 82.02.050. 979 P.2d at 871 and n.13.

than a fee or charge upon development. *See* 146 Wn.2d at 764-765. This Court rejected the city's argument on the facts, observing that the city's open-space requirement was imposed on all new subdivisions, regardless of their zoning classification. While the Court rejected the city's attempt to avoid RCW 82.02.020, it did not dispute the premise of the city's argument that an ordinary land use regulation in the nature of a zoning ordinance would be outside the scope of the statute. That, of course, is precisely the type of regulation at issue in this case.[5]

III. There Is No Other Ground For Concern That Stream Buffers Might Violate Constitutional Protections For Private Property

The effort by the County and Farm Interests to squeeze stream buffers into the ill-fitting category of exactions is understandable (although flatly wrong as a matter of fact and law). Otherwise, there would be no basis for any particular concern that such standard land use planning mechanisms might infringe constitutional protections for private property or the property rights goal of the GMA. The courts have in fact long upheld buffers, set-back requirements, and other protective regulations adopted through comprehensive land use planning. *See, e.g., Village of Euclid, supra* (upholding use regulations on classes of property without parcel by

[5] Unlike the ordinance in *Isla Verde*, which included a provision for in-lieu payments suggesting that the purpose of the ordinance was partly to raise funds from developer, an ordinance requiring setbacks from streams is a classic zoning ordinance that regulates uses of particular categories of property, *i.e.,* lands in close proximity to aquatic habitat.

parcel consideration); *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding set-back requirements).

Land use regulations can effect a taking of private property if, in Justice Holmes's "storied but cryptic formulation," *Lingle*, 125 S.Ct. at 2081, they "go too far." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). They very rarely do so, however, for several important reasons. First, by protecting important societal interests, land use regulations of general applicability provide benefits to all property owners, including the owners of property ostensibly burdened by restrictions on permissible uses. As the Supreme Court noted in upholding a five-acre single-family zoning ordinance in *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980):

> The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. … Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market values that the appellants might suffer.

Accord, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed

on others."). Land use regulations of general applicability thus tend to secure an "average reciprocity of advantage" among property owners, *Pennsylvania Coal*, 269 U.S. at 415, and the restrictions they impose are "properly treated as part of the burden of common citizenship." *Keystone Bituminous Coal*, 480 U.S. at 491.

These considerations of mutual benefit apply fully to setbacks and buffers imposed for conservation purposes, as the Alaska Supreme Court's decision in *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289 (Alaska 2001), illustrates. Upholding a buffer around a wetlands area against a takings challenge, the Alaska court determined that the setback restriction

> should not trigger compensation because it is part of city-wide (indeed, nation-wide) wetlands preservation scheme which applies broadly to all landowners and which benefits the public generally and the landowners in particular. … In preserving the valuable functions of wetlands, regulations like [the city's] provide ecological and economic value to the landowners whose surrounding commercially-developed land is directly and especially benefitted by the functioning of Blueberry Lake.

34 P.3d at 298. *Accord, K&K Construction, Inc. v. Dep't of Environmental Quality*, 705 N.W.2d 365, 369 (Mich. App. 2005) (upholding wetlands regulations because, "like zoning regulations," they are "comprehensive, universal, and ubiquitous, and provide an 'average reciprocity of advantage' for all property owners, including plaintiffs").

Also instructive is the recent unanimous decision by the Oregon Supreme Court in *Coast Range Conifers, LLC v. State of Oregon*, 117 P.3d 990 (Or. 2005), rejecting a taking claim based on restriction on logging affecting nine acres out of a forty-acre parcel. In the course of explaining why the regulation did not amount to a taking, the Court said:

> In the area of land use, government may impose height or size restrictions on buildings, prohibit or impose limitations on industrial and commercial uses in certain areas, *or impose setback requirements that prevent property owners from building within a specified distance of their property lines*. In each of those instances, government limits in one way or another the uses to which an owner may put his or her land, and it does so to advance broader public goals.

Id. at 997 (emphasis added). Significantly, recognizing that this type of regulation can produce both burdens and countervailing benefits, the Court went on to observe: "We note that those regulations may, depending on a myriad of economic and other factors, increase or decrease the affected property's value." *Id.* at n.14.

Second, even if a land use regulation results in cognizable economic losses, the significance of such losses for constitutional purposes must be determined by reference to the remaining uses available to the owner on the property as a whole. As this Court held in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 334-35, 787 P.2d 907, 915 (1990), "[A] regulatory scheme's economic impact is to be determined by viewing the

full bundle of property rights in its entirety." *Accord, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002). Set-back and buffer restrictions by their nature attach only to small portions of particular parcels, and are unlikely to impose burdens substantial enough to be recognized as takings under the parcel-as-a-whole approach. *See Tahoe-Sierra, supra*, 535 U.S. at 327 (the parcel-as-a-whole rule "clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, …were not considered regulatory takings").

Thus, in *State v. Lake Lawrence Public Lands Protection Association*, 92 Wn.2d 656, 669, 601 P.2d 494, 500 (1979), this Court deemed the availability of development options on the remainder of a parcel of "crucial importance" in holding that a requirement for a buffer to protect bald eagle habitat did not constitute a taking. The Court noted: "Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions." *Accord, e.g., R & Y, Inc. v. Municipality of Anchorage, supra*, 34 P.3d at 294 (setback buffer

around wetland diminished value of the relevant property by only 1.5% to 2%, and thus did not amount to a compensable taking).

Finally, a third fundamental principle of property law – the State's sovereign control over fish and wildlife within its borders – broadly shields from takings claims land use regulations designed to protect fish and wildlife from injury and destruction, such as the buffers sought by the Tribe in this case. Washington, like every other state, adheres to the doctrine of state ownership of fish and wildlife. "Title to animals *ferae naturae* belongs to the state in its sovereign capacity and the state holds this title in trust for the people's use and benefit." *Citizens for Responsible Wildlife v. State of Washington*, 124 Wash. App. 566, 569, 103 P.3d 203, 205 (2004). The State's authority to regulate the taking of fish and wildlife, and to protect it from harm, has been described by this Court as "perfectly astounding," *Cook v. State*, 192 Wn. 602, 607, 74 P.2d 199 (1937), and serves as a background principle of property law that limits private property rights. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (even regulations that deprive an owner of all beneficial use of land do not require compensation where background principles of nuisance or property law prohibit the restricted uses). As this Court noted in *Cook*, the State has "the *absolute right* to maintain its game and wild animals upon any and all private lands, and *in*

that act there is no element of trespass or taking." 192 Wn. at 607 (emphases added).

Although the authority of the State to regulate the taking of fish and wildlife most obviously extends to regulations on hunting and fishing, it also supports government actions to protect fish and wildlife from harm through pollution and habitat destruction. *See, e.g., State of Washington v. Gillette*, 27 Wash. App. 815, 621 P.2d 764 (1980) (affirming an award of damages against a landowner who destroyed salmon eggs by running a tractor through a stream bed); *New York v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (N.Y. App. Div. 2000) (denying takings claim and affirming injunction requiring removal of fence blocking threatened snakes from important forage habitat); *Columbia River Fishermen's Protective Union v. City of St. Helens*, 87 P.2d 195, 198 (Or. 1939) (reinstating suit to restrain water pollution, court noted that the State's authority "extends not only to the taking of its fish, but also over the waters inhabited by the fish"); *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (1917) (public ownership doctrine justifies protection not only of beavers but of their dams and houses). The State's sovereign ownership of fish and wildlife thus empowers the State to authorize land use regulations under the GMA to protect fish and wildlife without infringing private property rights.

Conclusion

For the foregoing reasons, the Court should reject the County and Farm Interests' misguided property rights arguments.

Respectfully submitted,

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