"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause

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> 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.[1]

This Article addresses whether federal or state regulations protecting imperiled birds, fish, or other wildlife result in "takings" of private property under the Takings Clause of the Fifth Amendment. This inquiry represents a search for a rationale for a surprisingly well-established rule. Notwithstanding their occasional success in pursuing claims based on other environmental programs,[2] takings claimants have met remarkably consistent failure in cases involving wildlife regulations.[3] What accounts for the powerful immunity of laws protecting threatened and endangered species from takings claims?

In accord with the views of some courts and commentators, this Article embraces the position that the public's traditional sovereign ownership rights in wildlife preclude takings claims based on laws protecting wildlife.[4] An essential prerequisite for a takings claim is that

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1. Cook v. State, 74 P.2d 199, 201 (Wash. 1973).

2. For example, claimants have achieved some success in recent years in pursuing takings claims based on the creation of pedestrian and bicycle paths under the National Trails Act. *See, e.g.*, Preseault v. United States, 52 Fed. Cl. 667, 684 (Fed. Cl. 2002) (awarding compensation in excess of $1,000,000). Takings claims based on wetlands regulation frequently fail for a variety of different reasons, but at least some wetlands claims have succeeded. *See, e g.*, Bowles v. United States, 31 Fed. Cl. 37, 140 (Fed. Cl. 1994) (ruling that denial of permit to fill wetland lot effected a taking and awarding compensation of $55,000).

3. *See* discussion *infra* note 11.

4. *See, e.g.*, Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 886-87 (2000); Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 555-56 (2002); Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 360-74 (1996); Oliver A. 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, 317 (1995).

the owner possess a private property right to engage in the activity being regulated.[5] Under the common law public ownership doctrine, the state has a paramount right to protect wildlife. This right includes protecting wildlife present on private land from harm or destruction.[6] As a result, no property owner can claim a right, without public authorization, to engage in an activity that would result in the death or injury of wildlife. Absent a showing that a regulation restricts some private property right, takings claims based on wildlife-protection measures fail at the threshold.

This Article expands upon prior discussions of the public ownership doctrine by addressing some questions and concerns which have been raised, or which might be raised, about this apparently strong argument against takings liability. For example, even if the public ownership doctrine is rooted in venerable legal precedent, does it provide an appropriate framework for analyzing takings challenges to today's comprehensive wildlife laws? The threat of widespread species extinction and the kinds of extensive regulation necessary to counter this threat were presumably unknown to Justinian or Blackstone. In addition, do modern wildlife laws raise concerns about fairness which deserve careful, case-specific review under the Takings Clause? Rather than resolve takings claims by resorting to hoary property doctrine, it might be contended that wildlife regulations should be subject to searching, sometimes fatal, scrutiny under the Takings Clause.

Another concern is the potential scope of the argument. Assuming the public ownership idea has contemporary legitimacy, should its application be resisted because the doctrine could apply so broadly? The public ownership doctrine can presumably justify government protection for wild animals from direct threats, such as the hunter with a gun, without triggering takings liability. The more significant and difficult question, however, is how far the law should go in supporting the regulation of activities which produce the same kinds of threats indirectly. Scientific research certainly has shown that habitat-destroying activities can kill individual animals and push an entire species to the brink of extinction.[7] Should the public ownership doctrine therefore

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5. *See* discussion *infra* notes 94-95.

6. *See* discussion *infra* Part II.

7. Indeed, scientists are in general agreement that habitat loss is the primary cause of species endangerment and extinction in the United States and around the world. *See, e.g.*, COMM. ON SCI. ISSUES IN THE ENDANGERED SPECIES ACT, NAT'L RES. COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 35-37, 72 (1995); GLOBAL BIODIVERSITY ASSESSMENT 21 (V.H. Heywood ed., 1995); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 607 (1998). In *Tennessee Valley Authority (TVA) v. Hill*, 437

support restrictions on the development of potentially large areas of habitat, the destruction of which could harm threatened and endangered species?

Part I of this Article provides an overview of the issue, highlighting the philosophical gulf represented, on the one side, by the sharp rhetorical challenges to laws protecting threatened and endangered species and, on the other, by the overwhelming legal precedent rejecting takings claims based on such laws. Part II provides a thumbnail historical sketch of the public ownership doctrine and reviews its various, traditional applications to support constraints on uses of private property. Part III examines the public ownership doctrine as a bar to takings claims based on modern laws protecting threatened and endangered species, explains how the argument fits into contemporary takings jurisprudence, and describes and analyzes some of the recent cases which have discussed the argument. Part IV describes and attempts to respond to the actual or potential objections, concerns, and qualifications relating to the public ownership argument. Finally, Part V attempts to define an appropriate scope for the public ownership argument.[8]

I. A CLASH OF DISTANT ARMIES

Wildlife protection laws and takings claims present a conundrum. On the one hand, federal and state wildlife laws, the ESA in particular, are a favorite target of property rights advocates. In comparison with other land use and environmental protection rules, regulations protecting endangered species generate a disproportionately large volume of rhetorical attacks based on their supposedly oppressive impact on developers and other property owners.[9] The gray wolf, the spotted owl,

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U.S. 153, 179 (1978), the United States Supreme Court observed that Congress considered habitat loss the greatest of the threats to species' survival supporting enactment of the Endangered Species Act (ESA).

8. One explanation for at least lawyers' ignorance of the "perfectly astounding" public rights in wild animals is that *Pierson v. Post*, 2 Am. Dec. 264, 265-67 (N.Y. 1805), the most frequently studied property case in the American law school curriculum, discusses the acquisition of property interests in wild animals without explicitly describing sovereign public rights in wildlife. The reason of course is that the case deals with competing claims of private individuals to a captured fox, not with the relative rights of the public and a private landowner in a wild fox. It is interesting to speculate how political history might have differed, and how endless debates over the ESA, for example, might have been avoided, if *Pierson v. Post* had involved a different set of facts.

9. *See* John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 355 (1997) (describing various anecdotal attacks on the ESA).

and the fairy shrimp are said to exemplify how extreme the government can become in its willingness to trample on private property rights.[10]

At the same time, there is an extraordinary dearth of legal precedent supporting the vocal concerns about violations of property rights asserted as a result of wildlife regulations. So far as we know, no federal or state court has issued a final, definitive decision that a federal or state law protecting threatened or endangered wildlife has effected a compensable taking.[11] How can a program so frequently challenged as an invasion of private property rights never result in an actual finding of a constitutional taking?

Part of the answer to this conundrum is that some advocates of takings claims do not appreciate, or perhaps ignore, the narrowness of regulatory takings doctrine in general. Notwithstanding the current United States Supreme Court's relatively sympathetic stance on property rights issues, regulatory takings are still confined to "extreme circumstances."[12] The Court has not defined with precision the threshold of economic impact necessary to establish a taking, but it has suggested that, in general, a taking can be established only if the regulation eliminates all, or substantially all, of a property's hypothetical, unregulated economic value.[13]

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10. *See* Defenders of Property Rights, *at* www.yourpropertyrights.org (last visited May 7, 2003) (containing representative attacks by property rights advocates on species protection efforts).

11. Claims challenging federal and state land use restrictions to protect endangered species have been consistently rejected. *See, e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1341 (Fed. Cir. 2002) (noting ESA restrictions on commercial logging to protect the spotted owl); Seiber v. United States, 53 Fed. Cl. 570, 572 (Fed. Cl. 2002) (noting ESA restrictions on commercial logging to protect the spotted owl); Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761, 763-66 (Fla. Dist. Ct. App. 1994) (noting restriction on residential development to protect nesting bald eagles); Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 564-65 (Or. Ct. App. 1999) (indicating state board of forestry restrictions on commercial logging to protect the spotted owl). Likewise, takings claims based on other types of government actions to protect threatened and endangered species have been consistently rejected. *See, e.g.*, Christy v. Hodel, 857 F.2d 1324, 1327 (9th Cir. 1988) (imposing a fine for killing a grizzly bear menacing rancher's sheep); United States v. Kepler, 531 F.2d 796, 797 (6th Cir. 1976) (prohibiting interstate transport of parts of endangered species); United States v. Hill, 896 F. Supp. 1057, 1063 (D. Colo. 1995) (prohibiting the sale of parts of endangered species). *But see infra* note 120 (discussing several pending cases in which trial courts have found that ESA restrictions effected takings).

12. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

13. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002) (stating that a regulation effects a taking when it imposes "restrictions so severe that they are tantamount to a condemnation or appropriation"); *see also* Walcek v. United States, 49 Fed. Cl. 248, 271 (Fed. Cl. 2001), *aff'd*, 303 F.3d 1349, 1354-57 (Fed. Cir. 2002) ("With one possible exception, this court has . . . relied on diminutions well in excess of 85 percent before finding a regulatory taking."); Animas Valley Sand & Gravel, Inc v. Bd. of County Comm'rs, 38 P.3d 59, 65 (Colo. 2001) (stating that to establish a taking "the level of interference must be very

The challenge of establishing a taking is made steeper still by the Supreme Court's reaffirmation of the "parcel as a whole" rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[14] Under the parcel rule, a takings claim must be analyzed by looking, not at some subdivision of the property subject to regulation, but at the claimant's whole parcel.[15] The whole parcel is typically defined as including at least the claimant's entire contiguous property purchased or managed for a common purpose.[16] Because takings claims based on wildlife laws are often brought by owners with large land holdings, the parcel rule frequently prevents claimants from demonstrating the kind of serious economic injury necessary to support a successful takings claim.[17] Furthermore, because wildlife is typically mobile, and restrictions on the use of a particular property may be lifted as wildlife moves across the landscape, many restrictions protecting wildlife are limited in duration. The temporary nature of wildlife regulations (or, stated differently, application of the parcel as a whole rule in the temporal dimension) also undermines takings claims challenging wildlife regulations.[18]

Finally, takings claims based on wildlife regulations encounter frequent "ripeness" barriers. A takings claim is not ripe for consideration in court "unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the

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high," and the "property [must] retain[] value that is [only] slightly greater than de minimis"). Economic impact is of little importance in cases involving regulatory exactions. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). The same is true in cases in which a regulation is alleged to effect a taking on the (questionable) theory that it fails to substantially advance a legitimate government interest. *See generally* John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Government Interest Result in a Regulatory Taking?* 29 ENVTL. L. 853, 860-62 (1999).

14. 535 U.S. 302 (2002).

15. *Id.* at 327.

16. *See, e.g.*, Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 877 (D.C. Cir. 1999) (rejecting taking claim based on restriction on development of portion of larger property managed as an apartment complex); *cf.* Naegele Outdoor Adver. v. City of Durham, 803 F. Supp. 1068, 1073-74 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994) (treating billboards located throughout a metropolitan area as a single unit for the purpose of takings analysis); Ciampitti v. United States, 22 Cl. Ct. 310, 318-20 (Cl. Ct. 1991) (treating separate building lots held and managed as part of a single development scheme as a single parcel).

17. *See, e.g.*, Seiber v. United States, 53 Fed. Cl. 570, 579 (Fed. Cl. 2002) ("The alleged taking apparently did not affect plaintiffs' property as a whole, as they were able to log 15 acres and were planning before the permit requirement was lifted to log 25 more on another area of their property. Thus, even if plaintiffs were able to prove that the 40 acres were taken, it would not have been a compensable taking because plaintiffs' property interest as a whole was not impacted to the extent required.").

18. *See Tahoe-Sierra*, 535 U.S. at 327 (rejecting takings challenge to development moratorium based on parcel as a whole rule).

regulations to the property at issue."[19] To ripen a takings claim, an owner must allow government officials "the opportunity to grant any variances or waivers allowed by law."[20] Federal and state endangered species laws typically include numerous opportunities to obtain variances and waivers.[21] This is due, in part, to recent efforts by federal and state officials to respond to criticisms that environmental laws are too "inflexible" by creating more opportunities to appeal to administrators' discretion. An ironic, though likely unintended, result of creating greater administrative flexibility has been the erection of higher ripeness hurdles for takings claimants. Another consequence of administrative flexibility is that state and federal endangered species regulations often prove less onerous in practice than commonly advertised, providing yet another potential explanation for the paucity of successful takings claims.[22]

The polar positions in the debate over wildlife conservation also reflect, however, a deeper conflict. On the one hand, protections for threatened and endangered species appear appropriate for application of the principle articulated in *Armstrong v. United States* that government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[23] The benefits of wildlife protection, and of laws protecting threatened and endangered species in particular, are broadly shared. Moreover, when potential extinction is at stake, the beneficiaries of regulation include not only current members of society but future generations as well. In addition, the economic burdens associated with species conservation often fall on a limited number of landowners. The effects of wildlife laws also are unusually unpredictable; stories are legion in which

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19. Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2002) (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)).

20. *Id.* at 621.

21. For example, in 1978, in response to the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), Congress amended the ESA by creating an Endangered Species Committee authorized to grant exemptions from the requirements of section 7 of the act. *See* ESA § 7(e), 16 U.S.C. § 1536(e) (2000). In 1982, Congress authorized "takes" of endangered species otherwise prohibited by section 9 of the act if they are "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). Similar variance processes exist under state regulations. In the case of *SDS Lumber Co. v. State of Washington*, Wash. Sup. Ct., No. 93-2-00003-6, the state is contending that the taking claim is not ripe because the plaintiff pursued only one of three available regulatory pathways to obtain permission to conduct commercial logging in Washington. *See* Brief of Appellant, SDS Lumber Co. v. Washington, No. 72266-8 (on file with Georgetown Envtl. Law & Policy Inst.).

22. *See* Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 377 (1994) ("[T]he ESA is neither absolutist in the protections afforded covered species, nor, at the other extreme, sensitive to every property impact of those protections.").

23. 364 U.S. 40, 49 (1960).

landowners have been "surprised" to discover that a protected species has appeared on their land, triggering unanticipated procedural and substantive roadblocks to development.[24]

On the other hand, the case law reveals that wildlife laws, rather than being especially vulnerable to takings claims, are peculiarly immune from such claims. In practice, wildlife laws appear to have a special status under the Takings Clause. While the alleged economic burdens imposed under the ESA and state analogs are hardly inconsequential, they have proven essentially noncompensable under the Takings Clause. The best explanation for this wildlife-friendly jurisprudence apparently lies in the traditional, and still vital, doctrine of public ownership of wildlife.

While this conclusion may appear surprisingly bold, takings law recognizes a number of public ownership rules which effectively place certain regulations beyond the reach of the Takings Clause. In the landmark case of *Lucas v. South Carolina Coastal Council*, the Supreme Court recognized, for example, that the navigational servitude can serve as a so-called "background principle" of property law barring a takings claim.[25] Indeed, it is apparently a legal commonplace that so long as the government is pursuing a bona fide navigational objective, the government can block the development of lands under navigable waters without incurring takings liability.[26] Thus, the law already excludes certain categories of economic injury from consideration under the Takings Clause.

The question addressed in this Article is whether the public ownership of wildlife doctrine places a similar limitation on the exercise of private property interests affecting wildlife. As discussed below, the idea of public ownership of wildlife has a long legal history, and courts

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24. *See* Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 564-63 (Or. Ct. App. 1999).

25. 505 U.S. 1003, 1028-29 (1992).

26. *See, e.g.*, United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996) ("The Supreme Court [in *Lucas*] explicitly recognized the navigational servitude as a pre-existing limitation on riparian landowners' estates."); Applegate v. United States, 35 Fed. Cl. 406, 414-15 (Fed. Cl. 1996) ("The holdings of the Supreme Court and the Federal Circuit establish that the Government owes no compensation for injury or destruction of a claimant's rights when they lie within the scope of the navigational servitude."); *cf.* United States v. Rands, 389 U.S. 121, 126 (1967) (holding that in a federal condemnation case, the United States did not owe compensation for loss of access to a river and other values attributable to the property's proximity to the river, because "these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States"). *See generally* Glenn P. Sugameli, Lucas v. South Carolina Coastal Council*: The Categorical and Other 'Exceptions' to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule"*, 29 ENVTL. L. 939, 958-62 (1999).

have relied on this doctrine to support a variety of restrictions on private property interests. It requires little or no elaboration upon long-standing precedent to conclude that the public ownership doctrine precludes takings claims based on modern laws protecting threatened and endangered species. The more interesting and difficult question is whether the public ownership doctrine itself has continuing relevance in today's society. If it does, then this ancient rule of property should provide a powerful argument against takings claims.

II. THE TRADITIONAL DOCTRINE OF PUBLIC OWNERSHIP OF WILDLIFE

For literally thousands of years, wildlife has been "regarded as occupying a nearly unique status" in the law.[27] A thumbnail sketch of the doctrine of public ownership of wildlife, and a discussion of some of its traditional applications, will provide useful historical context.

A. Venerable History

According to received legal history, ancient Rome is the source of the doctrine of public ownership of wildlife.[28] Romans regarded wildlife, like the air and the oceans, as a public property resource.[29] Wild animals "having no owner, were considered as belonging in common to all the citizens of the State."[30]

In feudal England, the idea of public ownership was embraced and transmuted into the notion of ownership by the sovereign.[31] "These royal rights were reflected in a web of laws that assured the sovereign's control over both the game and over the lands on which the game depended."[32] In the Middle Ages, and as late as the seventeenth century, the English kings established forests and parks for wildlife, and appointed gamekeepers to police them.[33] Under English common law, private landowners were under an obligation to support wildlife by retaining adequate forage and cover and by allowing forest officials to enter their land to remove vegetation needed for wildlife.[34]

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27. MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 8 (3d ed. 1997).
28. Caspersen, *supra* note 4, at 360.
29. *Id.*
30. Geer v. Connecticut, 161 U.S. 519, 522 (1896).
31. *See* Babcock, *supra* note 4, at 881 n.133.
32. *Id.*
33. Chester Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240, 242 (1932).
34. Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 715-16 (1976).

With the establishment of the American colonies, the authority of the sovereign "to control the taking of animals *fer[a]e nature[a]e* . . . was vested in the colonial governments."[35] In practice, the colonies aggressively used this authority to protect wildlife.[36] According to legal historian John Hart, colonial governments "promoted the conservation of fish, deer, and wild fowl by imposing constraints that applied to private property," including laws "requir[ing] farmers to grow certain crops, requir[ing] farmers not to grow certain crops (or limit[ing] the amount), [and] requir[ing] landowners to eradicate certain plants from their land."[37]

Following the American Revolution, the sovereign authority over wildlife, temporarily vested in the colonies, passed to the individual states.[38] As explained in *Geer v. Connecticut*, the Supreme Court's most comprehensive exposition on the public ownership doctrine: "[T]he correct doctrine in this country [is] that the ownership of wild animals, so 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 people in common."[39] 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 or preservation of the public good.[40]

As we discuss below, although the Supreme Court subsequently overruled the specific holding of *Geer*, the court's articulation in *Geer* of the public ownership doctrine still controls. Every state apparently continues to subscribe to *Geer*'s definition of public sovereign rights in wildlife.[41]

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35. United States v. Bair, 488 F. Supp. 22, 23 (D.C. Neb. 1979).

36. *Geer*, 161 U.S. at 527-28.

37. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1294-95 (1996).

38. Cook v. State, 74 P.2d 199, 201-02 (Wash. 1937) ("[T]he 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."). The United States has not asserted an independent sovereign ownership interest in wild animals, although there is no obvious theoretical reason why it could not do so. *Cf.* Palila v. Haw. Dep't of Land & Natural Resources, 471 F. Supp. 985, 995 n.40 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (noting that "where endangered species are concerned, national interests come into play," and that "[t]he importance of preserving such a national resource may be of such magnitude as to rise to the level of a federal property interest").

39. 161 U.S. 519, 529 (1896) (quoting State v. Rodman, 59 N.W. 1098 (Minn. 1894)).

40. *Id.* (quoting *Ex parte* Maier, 37 P. 402, 404 (Cal. 1894)).

41. *See* RUTH S. MUSGRAVE & MARY ANN STEIN, STATE WILDLIFE LAWS HANDBOOK 13-20 (1993) (listing thirty-two states with statutes expressly affirming the doctrine of public ownership of wildlife).

B. Traditional Applications

As observed at the outset, the Washington Supreme Court described the breadth of public authority to protect wildlife as "perfectly astounding."[42] Examples of the use of this authority to limit private rights in land and other private property support this striking commentary.

1. Hunting and Fishing Regulations

The most traditional and familiar type of regulation under the public ownership doctrine involves restrictions on hunting and fishing on private property. In *State v. Roberts*, the New Hampshire Supreme Court rejected an owner's claim that he was entitled to fish during the "closed season" on a pond entirely within the limits of his property.[43] Because the trout that the plaintiff caught were a

> prolific source of other trout for connecting streams, their freedom of passage to and from and through the pond prevented the defendant, a riparian owner, from acquiring property in them against the right of the state to preserve them for the enjoyment of future anglers. The fact that the fish were in water surrounded by the defendant's land . . . gave him no more property in them than he would have obtained in a wild deer that came upon his land, or a wild bird that might have alighted upon it.[44]

Similarly, in *State v. Theriault*, the Vermont Supreme Court upheld a regulation barring a landowner from fishing in the stream running through his property, describing the restriction as a legitimate effort "to preserve and increase the common property, or, at least, to prevent its diminution or destruction."[45]

Belying modern arguments that laws turning private land into "wildlife sanctuaries" self-evidently infringe on private property rights, states courts have repeatedly upheld inclusion of private lands in sanctuaries in which hunting is prohibited. In *Cook v. State*, the Washington Supreme Court held that designation of plaintiff's land as a wildlife sanctuary, which barred killing or trapping of animals on the land, did not violate the owner's property rights.[46] 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."[47] Likewise, the Colorado Supreme Court, the Maine Supreme Court, and

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42. *Cook*, 74 P.2d at 201.
43. 59 N.H. 484, 484-86 (1879).
44. *Id.* at 486.
45. 70 Vt. 617, 623-24 (1898).
46. 74 P.2d at 201.
47. *Id.*

the Nebraska Supreme Court have upheld inclusion of private lands in state-designated game refuges.[48]

The federal courts have rejected similar property rights challenges to the designation of areas off-limits to hunting under the Migratory Bird Treaty Act. For example, in *Bishop v. United States*, the former United States Court of Claims ruled that a proclamation barring the hunting of wild geese within the plaintiff's private hunting reserve did not effect a taking.[49] The court rejected the claim that the 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."[50] Significantly, one judge dissented, 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 treasury must compensate the owner."[51] Despite this allegedly severe economic impact, the majority rejected the claim. The United States Courts of Appeals for the Fourth and Seventh Circuits have also rejected takings claims based on hunting bans with severe economic impacts on private property owners.[52]

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48. *See* Maitland v. People, 23 P.2d 116, 117 (Colo. 1933); Maine v. McKinnon, 133 A.2d 885, 887-88 (Me. 1957); Bauer v. Game, Forestation, & Parks Comm'n, 293 N.W. 282, 286 (Neb. 1940). *But see* Alford v. Finch, 155 So. 2d 790, 793-94 (Fla. 1963) (holding that while landowners do not have a property right in game in its wild state, a landowner does have a property "right to pursue game upon his own lands," and the state "has no constitutional authority . . . to exercise the police power to classify private property as a refuge without compensation to the owner").

49. 126 F. Supp. 449, 451 (Ct. Cl. 1954).

50. *Id.* (citing, among other authorities, Geer v. Connecticut, 161 U.S. 519 (1896), and Aleut Cmty. v. United States, 117 F. Supp. 427, 431 (Cl. Ct. 1954) (rejecting a taking claim based on limitations on traditional Indian hunting rights and stating that the public authority to regulate taking of game without compensation "has never been questioned")); *see also* Tlingit & Haida Indians v. United States, 389 F.2d 778, 785 (Ct. Cl. 1968) ("Since the primordial decision in *Geer v. Connecticut*, it has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters." (citation omitted)).

51. *Bishop*, 126 F. Supp. at 453.

52. Lansden v. Hart, 168 F.2d 409, 412 (7th Cir. 1948) (rejecting the claim that closing an area to hunting violated the constitutional rights of owners of hunting leases and operators of hunting clubs); Bailey v. Holland, 126 F.2d 317, 324 (4th Cir. 1942) (rejecting the claim that prohibition on hunting of migratory birds on plaintiff's property, which allegedly rendered the property "practically worthless," effected a compensable taking, citing *Geer*). The court in *Lansden* stated:

> No property rights of plaintiffs are involved in these proceedings inasmuch as no person has any property right in live migratory birds and the withdrawal of the privilege of hunting such birds by Federal and State Governments does not deprive anyone of a property right because no such right exists.

168 F.2d at 412.

As a logical extension of the public authority to regulate hunting and fishing, the courts have also upheld limitations on the possession and sale of wildlife. In *State v. Rodman*, the leading case on the subject, the Minnesota Supreme Court stated:

> Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and, when he acquires such right by reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose.[53]

For similar reasons, the Oregon Supreme Court upheld a law prohibiting the possession of a duck out of season,[54] and the Arkansas Supreme Court upheld a law prohibiting the selling of fish out of season, even though the fish had been raised entirely in private waters on private land.[55]

2. Public Immunity from Claims for Private Property Damage

Courts have held that the public ownership doctrine precludes holding the public liable for property damage caused by wild animals. The leading case is the Court of Appeals of New York's decision in *Barrett v. State*, in which a landowner sued the state for compensation for the value of timber destroyed by beavers released into the wild by state officials.[56] The court rejected the claim, using eloquent, often-quoted words:

> Wherever 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 confided to its discretion. It exercises a

53. 59 N.W. 1098, 1099 (Minn. 1894).

54. State v. Pulos, 129 P. 128, 130 (Or. 1913).

55. Farris v. Ark. State Game & Fish Comm'n, 310 S.W.2d 231, 237 (Ark. 1958). Courts also have routinely relied on the state ownership doctrine to uphold restrictions on gear used in fishing or hunting. In *Anthony v. Veatch*, 220 P.2d 493, 504 (Or. 1950), the Oregon Supreme Court rejected a challenge to a prohibition on the use of "fixed" fishing gear, stating that "[t]he fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity, who, through their representatives, the Legislature, have sole control thereof, and may permit or prohibit their taking." *See also* Lawton v. Steele, 152 U.S. 133, 138 (1894) (rejecting a federal due process challenge to a state ban on the use of certain fishing equipment, observing that laws "prescribing the time and manner in which fish may be caught have been repeatedly upheld by the courts"); Greer v. State, 150 S.E. 839, 840 (Ga. 1929) (affirming a misdemeanor conviction for violating state law barring use of steel traps to catch game).

56. 116 N.E. 99, 100 (N.Y. 1917).

> governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.[57]

The court thus upheld a state statute which not only prohibited direct harm to the beavers, but prohibited landowners from destroying beaver dams or lodges.[58]

Numerous courts have followed *Barrett*'s lead. For example, the federal Court of Claims rejected owners' claims for compensation for damage done to their crops by geese protected under the Migratory Bird Treaty Act, stating that "[t]he mere fact that plaintiffs' property was damaged as a result of the issuance of [the] proclamation [protecting the geese] is not sufficient to show a taking."[59] Similarly, the Colorado Supreme Court rejected the claim that destruction of crops by wild game protected under a state statute infringed on the owner's property rights, observing 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."[60] The Colorado court continued: "The power of the state to make regulations tending to conserve the game within its jurisdiction 'is based largely on the circumstances that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity.'"[61]

While public immunity from liability for property damage caused by wildlife is well established, there is more ambiguity about whether a landowner can be subjected to criminal punishment for taking steps to protect his property from harm by wildlife. For example, in *State v. Burk*, the Washington Supreme Court stated that "the appellant in this case had a constitutional right to show, if he could, that it was reasonably necessary for him to kill these elk for the protection of his property."[62] The court acknowledged that "some things announced in the [*Barrett*] opinion might, at first glance, appear to be applicable to this case, yet we

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57. *Id.*

58. *See id.* at 101.

59. Bishop v. United States, 126 F. Supp. 449, 452 (1954).

60. Maitland v. People, 23 P.2d 116, 117 (Colo. 1933).

61. *Id.*; *see also* Leger v. La. Dep't of Wildlife & Fisheries, 306 So. 2d 391, 394 (La. Ct. App. 1975) (rejecting claim for damages to crops caused by wild deer, stating, "[w]e find nothing . . . which indicates that the state has a duty to harbor wild birds or wild quadrupeds, to control their movements or to prevent them from damaging privately owned property"); Massar v. N.Y. State Thruway Auth., 228 N.Y.S.2d 777,779 (N.Y. Ct. Cl. 1962) (rejecting a claim for damages where a motorist hit a wild deer, stating that "[t]he government has the right to protect wild animals for the benefit of the public at large, and no one has the right to complain of incidental injuries which may occur as a result").

62. 195 P. 16, 18 (Wash. 1921).

must assume that the court used its language as applicable to a civil action, and not to a criminal case such as this."[63] In a similar case, the Kentucky Supreme Court articulated what is apparently the general rule in the criminal context: "[I]t is generally recognized that one has the constitutional right to defend his property against imminent and threatened injury by a protected animal even to the extent of killing the animal."[64]

The different standards in takings and criminal cases are not easily explained in terms of property law. They probably can best be explained by the different consequences of civil liability versus criminal conviction. While denial of compensation may impose an economic burden, the penalties associated with a criminal conviction, as well as the associated reputational taint, are significantly more serious for an individual. Thus, it seems reasonable to allow a property owner to rely on a defense-of-property argument in a criminal case, which a landowner could not invoke in support of a takings claim. The special rule in criminal cases does not undermine the basic rule of property law that an owner has no right to object to the sometimes damaging effects of the public's wildlife.

3. Recovery of Damages for Injury to Public Wildlife

Applying the flip side of the foregoing rule, courts have upheld the ability of states to sue private parties for money damages for unauthorized injury to the public's wildlife. For example, in *State v. Gillette*, the Court of Appeals of Washington affirmed, based on the public ownership doctrine, an award of damages to the State Department of Fisheries in a suit against a landowner who destroyed salmon eggs by running a tractor through a streambed.[65] The court stated that "the food fish of the state are the sole property of the people and that the state, acting for the people, is dealing with its own property, 'over which its

63. *Id.* at 17.

64. Commonwealth v. Masden, 175 S.W.2d 1004, 1008 (Ky. 1943); *see also* Aldrich v. Wright, 53 N.H. 398, 423 (1873) (rejecting landowner's criminal conviction for killing mink threatening his geese). Some courts have ruled that mere invocation of a property-protection defense is not sufficient to avoid criminal liability. In *State v. Rathbone*, 100 P.2d 86, 92-93 (Mont. 1940), the court ruled that a showing of substantial property damage was necessary to invoke the defense. "One who acquires property in Montana does so with notice and knowledge of the presence of wild game and presumably is cognizant of its natural habits," the court said. Therefore, "a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse." *Id.* Similarly, in *Sackman v. State Fish and Game Commission*, 438 P.2d 663, 667 (Mont. 1968), the court stated that "the injury to property by wild animals must be of considerable extent to warrant killing out of season or contrary to law; a mere trespass is insufficient."

65. 621 P.2d 764, 767-69 (Wash. Ct. App. 1980).

control is as absolute as that of any other owner over his property.'"[66] The court held that "where the violation of a statute designed to protect the state's property causes injury to that property, the state or a responsible executive agency of the state has standing to seek compensation for the injury."[67]

Similarly, in *Burgess v. M/V Tamano*, the United States District Court for the Southern District of Maine ruled that the State of Maine could proceed, relying on the public ownership doctrine, with a suit for damages based on injury to marine life caused by an accidental oil spill.[68] The court rejected the defendant's argument that the state lacked a sufficiently independent interest in its marine life to support a *parens patriae* suit for damages.[69] "It is a well settled principle of the common law," the court said, quoting the Maine Supreme Court, "that the fish in the waters of the state, including the sea within its limits as well as the game in the forests belong to the people of the State in their collective sovereign capacity."[70]

4. Restrictions on Private Property Use

Courts also have invoked the public ownership doctrine to uphold state authority to regulate uses of private property without compensation in order to protect or restore wildlife.

Given the economic importance of fisheries, and the frequent conflicts between landowner interests and the needs of fisheries, many of the early cases involve fish protection. In 1884, the Illinois Supreme Court articulated the basic principle of how the public ownership doctrine applies to this context:

> 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

66. *Id.* at 767 (quoting State *ex rel.* Bacich v. Huse, 59 P.2d 1101, 1103 (Wash. 1936)).
67. *Id.*
68. 357 F. Supp. 1097, 1102 (S.D. Me. 1973).
69. *Id.* at 1101-02.
70. *Id.* at 1101 (quoting State v. Peabody, 69 A. 273, 274 (Me. 1907)); *see also* Attorney Gen. v. Hermes, 339 N.W.2d 545, 549-50 (Mich. Ct. App. 1993) (recognizing that public ownership rights in fish support damages action for conversion brought by the State Attorney General based on harvesting of fish in violation of state fishing regulations); *cf. In re* Steuart Transp. Co., 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (rejecting the idea that the public "owns" wildlife, but recognizing the right of state (and federal) government to sue for damages to wildlife resources caused by an oil spill).

> 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.[71]

Lower federal and state courts have applied this principle in a variety of different cases. For example, courts have upheld state power to order the destruction of private dams blocking fish migration. In *Stoughton v. Baker*, the Supreme Judicial Court of Massachusetts held that it was not a taking to order the destruction of a 170-year-old private dam.[72] The court noted that an implied limitation on a landowner's operation of a dam is that "fish should not be interrupted in their passage up the river to cast their spawn . . . [and this] limitation must extend to give a right to the government to enter and remove obstructions, which, if not removed, would defeat the limitation."[73] Similarly, the Maine Supreme Court rejected a private dam owner's challenge to the right of state officials to enter his property and destroy his dam.[74] The court said state officials had the right to take such an action because "the common law rights of the riparian proprietor . . . yielded to the paramount claims of the public."[75]

The same analysis has been invoked to support orders that fishways be installed at private dams. In *In re Delaware River at Stilesville*, the New York Supreme Court, Appellate Division, rejected a dam owner's challenge to a requirement that it construct a fish ladder on the ground that the dam had been lawfully constructed without a ladder.[76] The court observed that

> [t]he people of the state have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply . . . and no riparian proprietor upon the stream has the right to obstruct the free passage of the fish up the stream to the detriment of other riparian proprietors or of the public.[77]

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71. Parker v. Illinois, 111 Ill. 581, 588-89 (1884); *see also* Commonwealth v. Essex Co., 79 Mass. 239, 249 (1859) (holding "that from the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature"); State v. Roberts, 59 N.H. 484, 486 (1879) (holding that, even where streams are nonnavigable and cross private land, the state has the right "to regulate the destruction or preservation of fish, their free passage, and the use of the water as a highway").

72. 4 Mass. 522, 529 (1808).

73. *Id.*

74. *See* Cottrill v. Myrick, 12 Me. 222, 232-34 (1835).

75. *Id.* at 229.

76. 115 N.Y.S. 745, 753-54 (N.Y. App. Div. 1909).

77. *Id.* at 750.

The court said that requiring the owner to add a fishway was not a taking of private property because "the petitioner cannot be deprived of a right which it never possessed."[78] To like effect, the Iowa Supreme Court upheld a fishway requirement at a private dam against a compensation claim on the ground that "[f]ish and game are so related to the public welfare that they have, time out of mind, been the subjects of legal control, and their preservation has been very generally a matter of legislative concern."[79]

Similarly, in *People v. Glenn-Colusa Irrigation District*, the California District Court of Appeals enjoined an irrigation district from making further water diversions from the Sacramento River until it installed screens on the water diversion structure to prevent injury to fish.[80] The court stated, "[t]he fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state."[81] The court continued:

> The right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union.[82]

The courts have also repeatedly upheld restrictions on private land-use activities that pollute rivers and streams. In *People v. Truckee Lumber Co.*, a mill owner was enjoined from dumping waste into a river "in violation of the rights of the people."[83] The court said that a private riparian owner "does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken."[84] Similarly, in *Commonwealth v. Sisson*, the Supreme Judicial Court of Massachusetts required a mill owner to install a blower to prevent sawdust from being discharged into a stream, rejecting the owner's claim that his right to operate the mill trumped public rights in the fishery.[85]

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78. *Id.* at 754.
79. State v. Beardsley, 79 N.W. 138, 139 (Iowa 1899).
80. 15 P.2d 549, 553 (Cal. Dist. Ct. App. 1932).
81. *Id.* at 551.
82. *Id.*
83. 48 P. 374, 374 (Cal. 1897).
84. *Id.* at 375.
85. 75 N.E. 619, 622 (Mass. 1905); *see also* People v. Murrison, 124 Cal. Rptr. 2d 68, 77 (Cal. Ct. App. 2002) (holding that a requirement that rancher notify the state before diverting stream flow did not constitute an impermissible infringement on rancher's water rights, given long-standing state regulatory authority based on public ownership of fish and other wildlife).

5. Ambiguous Rule on the Owner's "Right to Exclude"

The effect of the public ownership doctrine is relatively uncertain in one context: whether the government can bar an owner from excluding wildlife from his property, such as by erecting a fence. In a variety of contexts the courts have rejected property-rights based objections to requirements that fences and other obstructions be removed. For example, in *United States ex rel. Bergen v. Lawrence*, the United States Court of Appeals for the Tenth Circuit upheld an order requiring a landowner to remove a fence, constructed entirely on private land, which prevented wild elk from gaining access to winter range on public land.[86] In addition, as discussed above, courts have repeatedly required owners to remove dams, or install fishways at dams, on streams crossing private land.[87]

On the other hand, a number of decisions, often in *dictum*, suggest that private owners might have the right to fence out or otherwise exclude wildlife from their property. For example, in *Barrett*, after concluding that the state was not financially liable for the beavers' destruction of trees, the New York court offered the plaintiffs some solace by construing the statute as authorizing an owner, "finding beaver[s] destroying their property," to "drive them away."[88] Similarly, in *Mountain States Legal Foundation v. Hodel*, the Tenth Circuit rejected a claim that the federal government was liable based on property damage caused by wild burros and horses protected under the Wild Free-Roaming Horses and Burros Act, but stated that neither federal nor state law barred "fencing out wild horses and burros."[89]

One way of reconciling these apparently contradictory opinions is to focus on whether the act of excluding the wildlife is itself harmful to the individual animal or the species as a whole. In *Bergen*, in which the court ordered removal of a fence, the fence had prevented the elk from reaching their wintering ground, causing the elk to collect against the fence and starve to death.[90] In *Moerman v. State*, the California Court of Appeals recognized an owner's right to fence his property to exclude tule elk, but only so long as it could be done "without harming" the elk, implicitly suggesting that a fence causing harm to wildlife would not be

86. 848 F.2d 1502, 1505 (10th Cir. 1988).
87. *See* discussion *supra* notes 73-82.
88. Barrett v. State, 116 N.E. 99, 101 (N.Y. 1917).
89. 799 F.2d 1423, 1428 n.8 (10th Cir. 1986).
90. *See* United States *ex rel.* Berger, 848 F.2d at 1504.

allowed.[91] Likewise, the cases involving dams or fishways all involved an obstruction which was plainly harmful to fisheries.

In many cases, however, fencing property will not have any significant effect on wildlife. The beavers in the *Barrett* case, for example, were presumably relatively plentiful as well as adaptable and, therefore, could thrive even if they were excluded from the property.[92] If fencing or other methods of exclusion impose no serious harm to individual animals or the species as a whole, the wildlife-protection rationale for the mandate disappears. In that circumstance, state property law may permit exclusion of wild animals, and a taking claim might lie if the owner were compelled to remove fences and the prerequisites for a taking suit were otherwise satisfied.

III. THE PUBLIC OWNERSHIP ARGUMENT IN TAKING CASES

The foregoing litany hardly exhausts the list of applications of the "astounding" public rights in wild animals.[93] But it is sufficient to define the extensive legal backdrop against which takings challenges to contemporary endangered species regulations have to be analyzed. The next question is whether the doctrine of public ownership of wildlife can, in accordance with the Supreme Court's modern takings jurisprudence, bar takings claims based on laws protecting imperiled wildlife. Straightforward application of governing Supreme Court precedent appears to make the argument quite powerful.

A. The Antecedent Property Inquiry

Takings jurisprudence requires a two-part inquiry into, first, whether the claimant possesses "property" and, second, whether government has "taken" the property for public use. If a claimant cannot

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91. 21 Cal. Rptr. 2d 329, 334 (Cal. Dist. Ct. App. 1993).

92. *See Barrett*, 116 N.E. at 118.

93. For example, the doctrine of public ownership of wildlife also has been invoked to justify warrantless searches and seizures in conjunction with the enforcement of wildlife laws. *See, e.g.*, Betchart v. Dep't of Fish & Game, 205 Cal. Rptr. 135, 135 (Cal. Dist. Ct. App. 1984) ("The state has the duty to preserve and protect wildlife. California State Department of Fish and Game . . . agents may without warrants reasonably enter and patrol private open lands where game is present and hunting occurs to enforce the Fish and Game laws."); State v. McHugh, 630 So. 2d 1259, 1265 (La. 1994) (holding that a search was justified in part by the fact that "[u]nder the property laws of the state, wildlife is owned by the state and not subject to private appropriation except when done under regulations that protect the general interest"); State v. Tourtillott, 618 P.2d 423, 430 (Or. 1980) ("[T]he governmental interest in the enforcement of laws for the preservation of wildlife in this state is sufficiently substantial to justify the minimal intrusion upon the Fourth Amendment rights of those stopped for brief questioning and visual inspection of their vehicles.").

point to a protected property interest, the claim fails at the threshold.[94] On the other hand, a determination that a claimant possesses a property interest is the prelude to an evaluation of whether the property has been taken.[95]

The threshold property question is frequently resolved by examining whether the proposed activity is barred under background principles of state "property" or "nuisance" law. In *Lucas v. South Carolina Coastal Council*, the Supreme Court established the "categorical" rule that a regulation which denies an owner "all economically viable use" of private property will be deemed a taking.[96] At the same time, the Court said that even an alleged categorical taking, and, by logical implication, any type of alleged regulatory taking,[97] will fail 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."[98] No regulation will result in a taking if the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[99]

Following *Lucas*, federal and state courts have repeatedly invoked either state property or nuisance principles to bar takings claims. For example, a regulatory order to clean up an abandoned uranium mill tailings disposal site and a prohibition on surface coal mining have been upheld against takings claims on the ground that the proposed activities were nuisances.[100] Prohibitions on development that would impair the

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94. *See* M & J Coal Co. v. United States, 47 F.3d 1148, 1155 (Fed. Cir. 1995) (rejecting taking claim based on restriction on mining on the ground that the claimant "never acquired the right to mine in such a way as to endanger the public health and safety").

95. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that interest income generated by funds held in lawyer trust accounts is private property of client for purposes of Takings Clause and remanding the case for determination of whether interest had been taken).

96. 505 U.S. 1003, 1016-20 (1992).

97. While the *Lucas* court articulated the background nuisance and property defenses in a case involving a "total taking," the defense logically applies in any regulatory takings case, as lower federal and state courts have consistently recognized. *See, e.g.*, Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) ("The first [*Penn Central*] criterion-the character of the governmental action-examines the challenged restraint under the lens of state nuisance law. If the regulation prevents . . . a nuisance, then no taking occurred."); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 771 (Pa.), *cert. denied*, 123 S. Ct. 486 (2002) ("Subject to the issue of nuisance . . . the [lower] Court should conduct . . . the traditional [*Penn Central*] takings analysis.").

98. *Lucas*, 505 U.S. at 1027.

99. *Id.* at 1029.

100. *See* Rith Energy, Inc. v. United States, 44 Fed. Cl. 366, 366-67 (Fed. Cl. 1999), *aff'd on other grounds*, 247 F.3d 1355 (Fed. Cir. 2001), *cert. denied*, 172 S. Ct. 2660 (2002); Dep't of

public's customary right to use the ocean beach, destroy tidelands subject to the public trust doctrine, and interfere with native Hawaiian gathering rights have been upheld against takings claims on the ground that the restrictions paralleled background principles of "property" law.[101]

The antecedent property inquiry and, more specifically, the background "property" and "nuisance" concepts, provide a straightforward framework for applying the public ownership doctrine in a takings case. First, the public ownership doctrine plainly represents a rule of "property" law. As discussed in Part II, the courts recognized, pre-*Lucas*, and in a variety of factual settings, that public rights in wildlife represent an inherent limitation on private property rights. To be sure, as we discuss below, there are legitimate questions about how broadly the public ownership doctrine can and should be applied, particularly in the case of habitat protection measures. But to establish the threshold point that public ownership of wildlife establishes a "preexisting" limitation on private title within the meaning of *Lucas*, it is sufficient to refer back to the older cases recognizing that public ownership of wildlife limits the hunter's right to shoot game on her land, the farmer's right to obtain compensation for property damage caused by wildlife, or the landowner's right to maintain a dam blocking migratory fish.

Laws protecting imperiled wildlife also can be defended against takings claims on the ground that they parallel background principles of "nuisance" law. The *Restatement (Second) of Torts* defines a public nuisance to include, among other things, "an unreasonable interference with a right common to the general public."[102] The public's ownership rights in wildlife are obviously rights common to all members of the public. Therefore, an action causing the death or injury of a wild animal can be characterized, without fear of plausible contradiction, as an "unreasonable interference" of public rights.[103]

Health v. The Mill, 887 P.2d 993, 1008 (Colo. 1994); *see also Machipongo Land & Coal*, 799 A.2d at 770-75.

101. *See* Esplanade Props. LLC. v. City of Seattle, 307 F.3d 978, 985-87 (9th Cir. 2002); Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 903 P.2d 1246, 1273 (Haw. 1995); Stevens v. City of Canon Beach, 854 P.2d 449, 460 (Or. 1993).

102. RESTATEMENT (SECOND) OF TORTS § 851B (1979).

103. *See, e.g.*, Parker v. People, 111 Ill. 581, 588 (1884) ("[N]o one . . . owns the fish . . . 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."); *cf.* Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (S.D. Me. 1973) (characterizing a nuisance suit based on injuries to natural resources caused by an oil spill as an action "based upon the alleged tortious invasion of public rights which are held by the State of Maine in trust for the common benefit of all the people").

The decision of the Pennsylvania Supreme Court in *Machipongo Land & Coal Co. v. Commonwealth*, though not involving wildlife regulation, demonstrates how the public ownership doctrine can be applied under background principles of nuisance law.[104] A property owner challenged a restriction on coal mining designed to protect streams from acid mine discharges as a taking.[105] The state asserted a nuisance argument and, reversing the trial court, the Pennsylvania Supreme Court ruled that the state should have been permitted to stand on this defense.[106] The court relied on a Pennsylvania common law rule, analogous to the doctrine of public ownership of wildlife, that "the public has a right not to suffer acid mine discharge into its public waters."[107] Invoking the *Restatement (Second) of Torts*, 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."[108] The reasoning of the court in *Machipongo* supports the conclusion that an activity which invades public rights in wildlife should be regarded as a "nuisance" under *Lucas*.[109]

One procedural question is which party should bear the burden of proof on the question of whether the public ownership doctrine, and, more generally, any background principle, bars a takings claim. The existence of "property" is logically one of the essential elements of a prima facie takings case and, therefore, the burden of proof should fall on

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104. 799 A.2d at 770-75.

105. *See id.* at 757.

106. *See id.* at 756.

107. *Id.* at 773.

108. *Id.* at 774; *see also* People v. Truckee Lumber Co., 48 P. 374, 374 (Cal. 1897) ("The complaint shows that, by the repeated and continuing acts of defendant, this public property right [in fish] is being, and will continue to be, greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question.").

109. Even if public ownership of wildlife does not automatically bar a takings claim, the doctrine may be relevant in determining the reasonableness of a claimant's "investment-backed expectations." The reasonableness of an owner's investment-backed expectations is a well-recognized factor in takings analysis. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). This factor is relevant not only under the *Penn Central* analysis, but very arguably in a case analyzed under *Lucas*'s "categorical" rule as well. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (Kennedy, J., concurring); Good v. United States, 189 F.3d 1355, 1360-63 (Fed. Cir. 1999) (holding reasonableness of an owner's investment expectations is a relevant factor in deciding whether a claimant can recover under *Lucas*). The fact that a planned land-use activity would impinge on long-recognized sovereign public rights in wildlife, if it does not completely bar a taking claim, should be considered in defining the reasonableness of a claimant's investment expectations. *Cf.* R.W. Docks & Slips v. State, 628 N.W.2d 781, 790-91 (Wisc. 2001) (finding that where a proposed filling would infringe on public rights in tidelands, claimant lacked reasonable investment-backed expectations sufficient to support a taking claim).

the claimant. On the other hand, the Supreme Court in *Lucas* indicated, somewhat cryptically, that it is the government's responsibility to "identify background principles of nuisance and property law that prohibit the uses [the claimant] . . . intends in the circumstances in which the property is presently found."[110] The burden of proof issue is likely to have greatest significance, not for determining whether wild animals are present on the property, but for determining whether the owner's proposed activity will harm the public's wildlife.[111] One reasonable solution would be to assign the burden of raising the public ownership issue to the government, based on the theory that the issue will be relevant in rare cases, and to assign the ultimate burden of proof on the factual issue of whether the activity will cause harm to the claimant, in keeping with the ordinary assignment of the burden of proof in civil litigation.

B. Public Ownership vs. Public Trust

The discussion to this point has characterized the public ownership doctrine as supporting public sovereign rights in wildlife. This conception of the doctrine is sufficient to support, for example, the general rule that the public is not liable for property damage caused by wild animals or the public's right to recover damages for injuries to wildlife caused by private parties. In addition, and most significantly for the purpose of this analysis, this version of the public ownership doctrine qualifies as a background principle of state law which should generally bar takings claims based on wildlife regulations.

However, it is also possible to define the public ownership doctrine more expansively and to conclude that it imposes an affirmative legal obligation on public officials, enforceable by the public in court, to protect wildlife. In *Geer v. Connecticut*, the Supreme Court described public rights in wildlife as a public trust:

> [T]he power or control lodged in the State, resulting from this common ownership, is to be exercised . . . as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.[112]

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110. *See Lucas*, 505 U.S. at 1031.
111. *See infra* Part V.
112. 161 U.S. 519, 529 (1896).

Lower federal and state court decisions contain similarly powerful rhetoric.[113] In keeping with the leading public trust decisions involving water resources[114] or tidelands,[115] this language could be interpreted to mean that the doctrine of public ownership of wildlife supports imposing affirmative obligations on government officials to protect wildlife.[116]

But it is at least questionable whether the public rights in wildlife amount to a "public trust." The modern case law does not appear to support the conclusion that public ownership of wildlife imposes affirmative obligations on the government.[117] It is unnecessary to decide, however, whether wildlife is a public trust resource to justify the conclusion that the public ownership doctrine bars takings claims. Regardless of whether public ownership is regarded as an application of the public trust doctrine or not, the size of the government's shield against takings claims remains the same.

Adopting the narrower definition of public ownership avoids the significant controversy surrounding use of the public trust doctrine as a legal tool for natural resource protection. Advocates of the public trust doctrine describe it as a valuable device to help resolve the failings of the democratic process in addressing environmental problems.[118] On the other hand, the public trust doctrine has been described as creating an open-ended charter for judicial intervention in environmental issues properly left, for the most part, to elected representatives and their

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113. *See, e.g.*, Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) ("It is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people.'" (quoting *Geer*, 161 U.S. at 528-29)); Arnold v. Mundy, 6 N.J.L. 1, 7 (1821) (referring to "a public common piscary" vested in the sovereign "not for his own use, but for the use of the citizens").

114. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718-29 (Cal. 1983) (applying public trust doctrine to block excessive diversions from tributaries of Mono Lake).

115. *See, e.g.*, Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) (applying public trust doctrine to invalidate grant of tidelands to private party).

116. *See, e.g.*, *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) ("[U]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources.").

117. We are not aware of any decision interpreting the doctrine of public ownership of wildlife as imposing an affirmative obligation on state wildlife managers similar to the obligations imposed on state officials in *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 718-29 (Cal. 1983), or *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435 (1892). *Cf.* Cal. Trout, Inc v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 212 (Cal. Dist. Ct. App. 1989) ("[I]t does not follow from the application of the term 'public trust' to the state's interest in fisheries of non-navigable streams that all of the consequences of the public trust doctrine as applicable to navigable waters also apply to non-navigable streams.").

118. *See* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-83 (1970).

administrative appointees.[119] Whatever the merits of this debate, they are irrelevant to the conclusion that the concept of public ownership of wildlife serves as a strong argument against takings claims.

At the same time, acknowledging that the public ownership argument against takings claims does not require designation of wildlife as a public trust resource does not undermine or contradict a potential future argument that states hold wildlife in a public trust. It may be that the public ownership doctrine is not only a shield for governments sued under the Takings Clause but also a sword that citizens can use against governments. But that is an argument for another day in another context.

C. Examples of the Use of the Public Ownership Argument

As discussed, takings claims based on laws protecting endangered species have failed with a striking consistency.[120] Many of these cases

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119. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 684-88 (1986).

120. *See supra* note 11 (collecting cases). There are two pending cases in which trial courts have concluded that ESA restrictions effected a taking, but appellate review is pending or likely. In *SDS Lumber Co. v. State of Washington*, Wash. Sup. Ct., No. 93-2-00003-6, a jury on May 10, 2000, found a taking and awarded $2,250,000 to the plaintiff logging firm based on timber harvesting restrictions imposed by the Washington Department of Natural Resources to protect a pair of nesting spotted owls. After the State appealed the verdict, the Washington Court of Appeals transferred the case to the Washington Supreme Court. The plaintiff and the State subsequently entered into a settlement of the case, contingent upon a legislative appropriation of the funds necessary to finance the settlement. Given the fiscal crisis in Washington, the prospects for approval of the settlement were still uncertain as of the date of publication of this Article. In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 317 (Fed. Cl. 2001), the United States Court of Federal Claims held that a curtailment of water deliveries to irrigators to protect endangered fish in the Sacramento River effected a taking. As of the date of publication of this Article, the trial court was still considering the amount of compensation due, and the U.S. Department of Justice had not decided whether to appeal.

Another arguable exception to the pattern of government wins in takings challenges to endangered species regulations is *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 722-23 (1999), in which the Supreme Court upheld a finding of a taking based on municipal land-use regulation ostensibly designed, at least in part, to protect habitat for the endangered Smith's blue butterfly. For several reasons, this decision cannot be read to provide clear direction on the issues addressed in this Article. First, the butterfly played only a minor role in the municipality's decision making, as well as in the Court's review of the municipal action, in part because a live butterfly had never been found on the property and it was possible that the proposed development would actually enhance the value of the habitat on the property. *See id.* at 704-06. Second, insofar as the Court addressed the merits of the taking claim, the Court focused on whether the municipality's repeated imposition of increasingly more stringent land-use requirements was so arbitrary and unreasonable that it justified the conclusion that the municipality's regulatory actions were "not reasonably related to a legitimate public interest[]." *Id.* at 704. That claim arguably raised an issue that should have been addressed under the Due Process Clause, not the Takings Clause. However, in view of the city's waiver of any objections to the jury instructions, the Supreme Court did not address this issue. Thus, *Del Monte Dunes* provides no meaningful guidance on whether an economically burdensome regulation can be

have gone off on preliminary procedural issues or other points of takings law without even addressing the public ownership issue.[121] Nonetheless, the concept of public wildlife has received strong, though not unanimous, endorsement from the courts that have addressed the issue so far.

1. *Sour Mountain*

The New York Supreme Court, Appellate Division, the state's intermediate court of appeals, relied in part on the idea of public ownership of wildlife to reject a takings claim in a 2000 decision, *State v. Sour Mountain Realty, Inc.*[122] The case involved a colorful dispute between a property owner wishing to use his property for mining purposes and the New York Department of Environmental Conservation (DEC), which is responsible for implementing the state's Endangered Species Act.[123] After the plaintiff began the process of applying for a mining permit, a den of timber rattlesnakes, a threatened species under New York law, was discovered on an adjacent property a few hundred feet from the boundary of plaintiff's land.[124] Following their natural course, some of the snakes would have used portions of plaintiff's property as forage habitat.[125] The landowner reacted to the discovery by constructing a "snake proof" fence to keep the snakes off his land.[126] The DEC responded by seeking an injunction requiring removal of the fence.[127] The owner opposed the injunction, arguing, among other things, that it would result in a taking under the Fifth Amendment.[128]

The court affirmed the grant of an injunction and rejected the takings claim.[129] It stated that the plaintiff had not demonstrated the kind of serious economic impact necessary to support a finding of a taking, and also rejected the argument that, by requiring the owner to accept the presence of unwanted snakes, the state had effected a physical

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defended against a takings challenge on the ground that the government is acting to preserve public wildlife from a threat of injury.

121. *See, e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002) (finding ripeness and lack of physical occupation); Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761, 764 (Fla. Dist. Ct. App. 1994) (finding no physical occupation and no regulatory taking).

122. 714 N.Y.S.2d 78, 84 (N.Y. App. Div. 2000).

123. *See id.* at 80.

124. *See id.*

125. *See id.* at 81.

126. *See id.* at 80.

127. *See id.*

128. *See id.* at 82.

129. *See id.* at 94.

occupation of its property.[130] Beyond that, however, the court declared that

> the State, through the exercise of its police power, is safeguarding the welfare of an indigenous species that has been found to be threatened with extinction. 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.[131]

In support of this proposition, the court cited, among other things, the New York statute codifying the rule that the state owns all the wildlife in the state.[132] The court also relied on an early twentieth century decision which rejected an owner's objection to a requirement of a fishway at a private dam on the ground that "the petitioner cannot be deprived of a right [to obstruct wild fish] which it never possessed."[133]

The New York court's reliance on the public ownership doctrine is consistent with both traditional applications of the common law doctrine and modern takings jurisprudence. While the regulation, in a literal sense, caused the owner to accept the physical presence of snakes on its private property, the court had no difficulty concluding, in accordance with the older precedents dealing with fences and other efforts to exclude wildlife, that the threatened harm to the species by barring its access to essential forage habitat precluded takings liability.[134]

2. *Sierra Club*

The California District Court of Appeals in *Sierra Club v. Department of Forestry & Fire Protection*, also concluded that the public ownership argument supported rejection of a takings claim based on an endangered species regulation.[135] The case involved applications by the Pacific Lumber Company to harvest old growth timber on two parcels of its property on which several endangered species, including the marbled murrelet and the spotted owl, had been detected.[136] The timber company appealed rulings invalidating its timber harvest plans for lack of necessary wildlife mitigation measures, contending that rejection of its plans was an unconstitutional taking.[137] The court of appeals rejected the

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130. *See id.*
131. *Id.*
132. *Id.*; *see also* N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney 1997).
133. *In re* Del. River at Stilesville, 115 N.Y.S. 745, 754 (N.Y. App. Div. 1909).
134. *See Sour Mountain*, 714 N.Y.S. 2d at 83.
135. 26 Cal. Rptr. 2d 338, 345 (Cal. Dist. Ct. App. 1993) (review denied and ordered not published).
136. *Id.*
137. *Id.*

takings claim on ripeness grounds, but commented on the merits of the claim as well.[138] Surveying the extensive precedents on public ownership of wildlife, the court observed 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."[139] The court continued that a landowner whose "valuable stands of old-growth forest are infested with protected species is subject to state regulations designed for the legitimate purpose of such protection."[140] The precedents clearly indicate that "the federal and state governments may regulate and protect rare species on private lands without, ipso facto, triggering a constitutional taking of private property."[141]

The court recognized that the then recently decided *Lucas* decision generally mandated compensation for regulations that eliminate all economic use of private property.[142] However, it observed that the Supreme Court had made its "total taking" inquiry subject to an exception for limitations consistent with "preexisting regulation by the state's laws of property or nuisance," and that "wildlife regulation of some sort has been historically a part of the preexisting law of property."[143]

For the reasons discussed, the California court's conclusion that the public ownership doctrine represents a background principle precluding takings liability appears to be an entirely reasonable, indeed logically unavoidable, application of *Lucas*.

3. *Christy*

In *Christy v. Hodel*, the United States Court of Appeals for the Ninth Circuit ruled that a rancher had no right to kill an animal protected under the ESA in order to protect his property.[144] The case involved a challenge to a civil fine imposed on a rancher for shooting a grizzly bear, a listed threatened species, which was menacing his sheep.[145] The rancher, operating adjacent to Glacier National Park, had already lost twenty sheep to marauding bears.[146] The court rejected the argument that

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 346.
143. *Id.* at 347.
144. 857 F.2d 1324, 1331 (9th Cir. 1988).
145. *See id.* at 1326.
146. *See id.*

imposition of the fine deprived the rancher of his property rights.[147] After surveying the extensive law on the subject, the court stated that "[n]umerous cases have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking."[148] The court continued, "[t]he losses sustained by the plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in the public interest."[149]

The Supreme Court denied the rancher's petition for *certiorari*.[150] However, in a dissent, the late Justice Byron White indicated that he would have preferred that the Court take the case and reverse.[151] He argued that "it is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[152] The views of Justice White, who took a generally pro-property owner, but somewhat ad hoc approach to takings issues,[153] have not been taken up by subsequent courts.

The result and analysis in *Christy* are consistent with the older, voluminous case law concluding that restrictions on an owner's ability to defend his property from physical harm caused by wild animals do not constitute takings.

4. *Tulare Lake*

The United States Court of Federal Claims ruling on liability in *Tulare Lake Basin Water Storage District v. United States* offers somewhat contradictory signals on the viability of the public ownership argument.[154] The case involved takings claims by California agricultural water users based on reductions in water deliveries mandated by the ESA

147. *See id.* at 1335.
148. *Id.* at 1334.
149. *Id.* at 1335.
150. *See* Christy v. Lujan, 490 U.S. 1114 (1989).
151. *Id.* at 1114-16.
152. *Id.*
153. *See* Richard Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 709-11 (2000) (arguing, based on an analysis of his votes in prominent takings cases, that Justice White lacked any "overarching theory of the relationship of private property to environmental protection in the Fifth Amendment regulatory takings context").
154. 49 Fed. Cl. 313, 321-24 (Fed. Cl. 2001). The court issued its ruling on liability issues on April 30, 2001. As of the date of publication of this Article, the case was still pending before the United States Court of Federal Claims on the quantification of just compensation.

in order to protect fisheries.[155] In terms of takings law generally, the most significant and most controversial aspect of the case is the court's ruling that the restrictions on water deliveries effected a per se physical-occupation taking.[156] Analogizing the restrictions on claimants' water use to the airplane overflights held to be a taking in *United States v. Causby*,[157] the court ruled that "[t]o the extent . . . that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructory right to the water valueless, they [sic] have thus effected a physical taking."[158] The court's expansive physical occupation theory is novel and appears to contradict both the Supreme Court's narrow description of the physical occupation theory in *Tahoe-Sierra*[159] and United States Court of Appeals for the Federal Circuit precedent on the issue.[160]

The important aspect of the court's decision for present purposes, however, is the court's rejection of the government's "background principles" argument.[161] This ruling was in response to the U.S. contention that the claim was barred by California law recognizing that destruction of public fisheries constitutes a nuisance, as well as by the "reasonable use" and public trust doctrines applicable to California water rights.[162] On the one hand, the court accepted the idea that background principles of state water law can bar a takings claim, even one based on a per se theory of liability.[163] The court said that, "[t]here is, in the end, no dispute that . . . plaintiffs'. . . rights, are subject to the doctrines of reasonable use and public trust and to the tenets of state nuisance law."[164] On the other hand, the court rejected the background principles argument as applied in this case.[165] The court concluded that the state water board decision allocating certain amounts of water for use by plaintiffs in effect

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155. *See id.* at 314.
156. *See id.* at 318-20.
157. 328 U.S. 256, 264-65 (1946).
158. *Tulare Lake*, 49 Fed. Cl. at 319.
159. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002) ("Th[e] longstanding distinction between acquisitions of property for the public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.").
160. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352-57 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003) (rejecting a challenge to wildlife regulation based on physical occupation theory).
161. *See Tulare Lake*, 49 Fed. Cl. at 323.
162. *Id.* at 322-23.
163. *See id.*
164. *Id.* at 324.
165. *See id.*

created vested rights in the water.[166] While the court recognized that this allocation could be modified, based on background principles of California law, either by the board or the state courts, no such modification had been made as of the date of the alleged taking.[167] The court believed that a federal court, unlike a state court, lacks the power to interpret and apply background principles of California law in a way that would modify the rights conferred on the claimants by the board's allocation.[168] Thus, according to the United States Court of Federal Claims, even though a state court apparently could have rejected the claimants' takings claim based on background principles of California law, it was powerless to do so.[169]

The court's treatment of the background principles issue is problematic for several reasons. First, the court arguably misinterpreted California water law by concluding that the board's water allocation created vested property rights unless and until the allocation was modified by state court order or a subsequent decision of the board.[170] Second, and of more direct interest for the purpose of this Article, the court's novel theory that federal courts have less power than state courts to interpret and apply background principles appears to lack support in precedent or logic. The latter issue is discussed in greater detail in Part IV.

Whether the *Tulare Lake* case was correctly decided or not, the United States Court of Federal Claims' ruling is ultimately fairly narrow. The court's theory about a federal court's truncated authority to apply background principles of state law apparently applies only to takings claims filed in federal court against the United States based on federal regulation. In addition, the court recognized that when the meaning of state background principles is incontestable,[171] or when federal and state regulators are imposing the same level of restrictions, a federal court would have the power to interpret and apply state background principles on the same basis as the state courts.[172]

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166. *See id.* at 318.

167. *See id.* at 324.

168. *See id.*

169. *See id.*

170. *See* Benson, *supra* note 4, at 567-77 (discussing how the decision in *Tulare Lake* contradicts long-standing principles of California water law); Brian Gray, *Takings and Water Rights*, 49 ROCKY MTN. MIN. L. INST. 23-1 (2002) (same).

171. *See Tulare Lake*, 49 Fed. Cl. at 322-23.

172. In October 2001, irrigators in the Klamath River Basin filed a taking claim which, like the *Tulare Lake* litigation, is based on reductions in irrigation water deliveries mandated by the ESA. *See* Complaint for Just Compensation and Damages, Klamath Irr. Dist. v. United States, No. 01-591L (Fed. Cl. filed Oct. 11, 2001). The *Klamath* case is likely to raise many of

5. *Boise Cascade*

Finally, a dose of cold water has been thrown on the public ownership defense, at least insofar as it rests on background principles of "nuisance" law, by the decision of the Court of Appeals of Oregon in *Boise Cascade Corp. v. State*.[173] The case involved a challenge to a state Board of Forestry order restricting a timber company from logging most of a sixty-four-acre parcel (subdivided from the owner's original 1800-acre ownership) in order to protect nesting spotted owls on the property.[174] While the court overruled a takings judgment for the company, the court upheld the trial court's decision to strike the state's nuisance defense.[175] The court rejected the proposition that "any act taken by the state to protect *ferae naturae* on private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance."[176]

The Oregon court's disposition of the nuisance issue can charitably be described as questionable.[177] The court first cited a dearth of authority "for the [state's] position that knocking down a bird's nest on one's property has ever been considered a public nuisance."[178] This statement ignores the substantial case law in Oregon (and elsewhere) supporting the state's broad authority to protect wildlife from harm without incurring takings liability.[179] The court also distinguished an Oregon Supreme Court decision involving an effort to protect a public fishery on the

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the same issues being litigation in *Tulare Lake*. However, the United States is also in a stronger position in the *Klamath* case because the contracts for the Klamath Project expressly absolve the United States of financial liability in the event of a shortfall in deliveries. *See* Gray, *supra* note 170, at 23-39 to 23-44 (describing the Klamath Project contracts in detail).

173. 991 P.2d 563, 574 (Or. Ct. App. 1999).

174. *See id.* at 565.

175. *See id.* at 570.

176. *Id.* at 571.

177. It also was arguably *dictum*, given that the court rejected the regulatory claim on ripeness grounds and therefore had no need to address any aspect of the merits of the takings claim. *Id.* at 570.

178. *Id.*

179. *See* Fields v. Wilson, 207 P.2d 153, 156-57 (Or. 1949) (rejecting 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 the game."); State v. Pulos, 129 P. 128, 130 (Or. 1913) (indicating 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").

ground that the fishery was being threatened with "pollution."[180] But if the public's wildlife is actually being killed or injured, the invasion of the public's rights is no less objectionable because the damage is being inflicted by a chain saw rather than by pollution. Many of the older wildlife cases discussed above restricted owners' use of guns, operation of dams, or erection of fences, in order to protect the public's wildlife, even though these activities were obviously not inherently wrongful or harmful.

On the other hand, there is a good deal of Oregon law to support the nuisance argument which the court of appeals overlooked. First, while Oregon has a general "right to farm" law which bars nuisance suits based on forestry activities on certain private lands,[181] the immunity only applies if the logging is conducted in accordance "with applicable law."[182] The plaintiff in *Boise Cascade* sought to log in violation of the Board of Forestry's regulations and, therefore, was not proceeding in accordance with applicable law. Thus, general Oregon law does not appear to preclude a finding of a nuisance in the circumstances presented in *Boise Cascade*. In addition, in *Mark v. State Department of Fish and Wildlife*, the Oregon court of appeals embraced the Restatement's definition of a public nuisance as "the invasion of a right that is common to all members of the public."[183] Oregon, like all states, recognizes common public rights in wildlife, and destruction of a spotted owl nest certainly "invades" common public rights in these birds. In short, the Oregon court of appeals' analysis in *Boise Cascade* is not likely to be the last word, even in Oregon, on whether a takings claim can be barred under background "nuisance" principles.

Finally, the Oregon court simply ignored whether the restriction could be separately justified as a background principle of "property" law rather than based on nuisance principles. This omission or oversight is significant because background principles of property law appear to provide the most natural vehicle for bringing the doctrine of public ownership of wildlife to bear on a regulatory takings claim.

IV. ADDRESSING THE CRITICS OF THE PUBLIC OWNERSHIP ARGUMENT

Despite the relatively strong support for the public ownership argument, there are a number of important questions and concerns which

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180. *See* Colum. River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 198 (Or. 1939).

181. OR. REV. STAT. § 30.936 (1999).

182. *Id.* § 30.930.

183. 974 P.2d 716, 719 (Or. Ct. App. 1999).

have been or which might be raised in opposition to the argument. This Part articulates and seeks to answer these questions and concerns.

A. Public Ownership of Wildlife Is a Legal "Fiction"

The first, potentially devastating criticism of the public ownership argument is that the United States Supreme Court has repudiated the entire public ownership doctrine, dismissing it as a "fiction."[184] Several Supreme Court decisions contain sweeping language which seemingly supports this position. But, as we explain below, the holdings in these cases turn out to be quite narrow. Moreover, whatever it may have intended, the Supreme Court lacks the power to alter the substance of state property law concerning wildlife.

As discussed above, the Court gave its stamp of approval to the state ownership doctrine in its 1896 decision in *Geer v. Connecticut*.[185] In that case, the plaintiff challenged a Connecticut statute which barred the possession of game birds for the purpose of interstate shipping as inconsistent with the commerce clause. The Court rejected the claim, relying on the states' "duty," grounded in the public ownership doctrine, "to preserve for its people a valuable food supply."[186]

Over the following 100 years, the ruling in *Geer* was gradually eroded by Supreme Court decisions upholding the expanding economic regulatory authority of the federal government. The validity of *Geer*'s wildlife-based theory of state autonomy was challenged in two lines of cases, one testing Congress's power to enact legislation preempting state law and another testing the limits of state authority under the Commerce Clause and the Privileges and Immunities Clause.

The erosion of *Geer* began with *Missouri v. Holland*, in which the Court upheld the constitutionality of the Migratory Bird Treaty Act and rejected the claim that the Act invaded the states' "exclusive authority" to manage wildlife under the state ownership doctrine.[187] "No doubt it is true," the Court said, "that as between a State and its inhabitants the State

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184. Some commentators have read the Supreme Court as effectively abolishing the public ownership doctrine. *See, e g.*, JAMES A. TOBER, WHO OWNS THE WILDLIFE 164-65 (1981) ("[T]he scope of the [public ownership] doctrine has been increasingly narrowed in the twentieth century as it has become clear that the effective management of wildlife populations [by the federal government] cannot be maintained if extensive rights of ownership lie with the state."); Nicholas Olds & Harold Glassen, *Do States Still Own Their Game and Fish?*, 29 MICH. ST. B.J. 16, 23 (1951); *see also* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426-27 (10th Cir. 1986) (concluding, apparently, that the Supreme Court has completely abrogated the public ownership doctrine).

185. 161 U.S. 519, 534-35 (1896).

186. *Id.* at 535.

187. 252 U.S. 416, 434-35 (1920).

may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed."[188]

The process of erosion continued with *Toomer v. Witsell*, in which the Court struck down a South Carolina statute imposing exorbitant fees on nonresident commercial shrimp harvesters as inconsistent with the Privileges and Immunities Clause.[189] In response to the argument that economic protectionism was justified by the state's right to manage state-owned wildlife, the Court stated: "[t]he whole ownership theory . . . is now generally regarded 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."[190] Finally, in 1979 in *Hughes v. Oklahoma*, involving a statute essentially identical to the statute at issue in *Geer*, the Supreme Court expressly overruled *Geer*.[191] While recognizing "the legitimate state concerns for conservation and protection of wild animals," the Court dismissed the public ownership doctrine as a "19th-century fiction."[192]

Notwithstanding this disparaging language, it is apparent, upon analysis, that *Hughes* and the other decisions leading up to it are explained by, and logically confined to, cases in which state wildlife legislation conflicts with a federal statute or the economic integration commands of the United States Constitution. The Court's actual holding in *Hughes* was simply that the public ownership doctrine cannot, under the federal Supremacy Clause, stand in the way of federal regulation of the national economy.[193] Justices Field and Harlan dissented in *Geer*, not because they questioned the validity of the public ownership doctrine, but because they believed it could not block the exercise of conflicting federal power.[194] "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.'"[195] In *Hughes*, the Court effectively embraced the position of the dissenters in *Geer*.[196] The Court said, "We now conclude that

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188. *Id.* at 434.
189. 334 U.S. 385, 402 (1948).
190. *Id.*
191. 441 U.S. 322, 355 (1979).
192. *Id.* at 336.
193. *See id.* at 326.
194. Geer v. Connecticut, 161 U.S. 519, 541 (1896) (Field, J., dissenting).
195. *Hughes*, 441 U.S. at 328-29 (quoting *Geer*, 161 U.S. at 541 (Field, J., dissenting)); *accord Geer*, 161 U.S. at 543 (Harlan, J., dissenting).
196. *See Hughes*, 441 U.S. at 329.

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 other natural resources."[197] This clearly indicates that the public ownership doctrine was being overridden only in the event of a conflict with federal law.[198] 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."[199] Thus, the Court disavowed any intention, or even authority, *absent a conflict with federal law*, to meddle with the substance of the state ownership doctrine.

State courts, to the extent they have entertained the suggestion that *Hughes* can be read as invalidating the state ownership doctrine, have rejected the idea. For example, in *State v. Fertterer*, the Montana Supreme Court affirmed the convictions of several individuals for killing game without a license, rejecting the argument that *Hughes* "effectively preclude[d]" the state from relying on its ownership of wild game to regulate hunting.[200] The court said, "*Hughes* [was] not controlling" because there was no claim of discrimination against nonresidents based on the federal "interstate commerce, equal protection, or privileges and immunities" clauses.[201] Similarly, the Alaska Supreme Court, in *Shepherd v. State*, ruled that the state ownership doctrine retains full vitality absent a "conflict with paramount federal interests."[202] Scholars who have closely examined the issue agree: As stated by Professor Oliver Houck, the Supreme Court "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."[203]

The conclusion that the public ownership doctrine has continuing vitality under state law logically leads to the conclusion that the doctrine is alive and well for the purpose of takings analysis. The Takings Clause in the Fifth Amendment is, of course, paramount over state law for some purposes in the same fashion that other federal constitutional provisions are paramount over state law. But for the specific purpose of defining "property" within the meaning of the Takings Clause, the issue to which the "public ownership" doctrine is relevant, the substantive rule is

197. *Id.* at 335.
198. *Id.*
199. *Id.* at 335-36 (emphasis added).
200. 841 P.2d 467, 470 (Mont. 1992).
201. *Id.*
202. 897 P.2d 33, 40 (Alaska 1995).
203. *See* Houck, *supra* note 4, at 311 n.77.

actually supplied by state law. As the Supreme Court explained in *Phillips v. Washington Legal Foundation*, "the Constitution protects rather than creates property interests."[204] The threshold property issue is determined, not by reference to the Fifth Amendment itself, but by reference to some independent source such as state law.[205] Because state law typically defines the "property" for the purpose of takings analysis, no claimant challenging a wildlife regulation under the Takings Clause can prevail if, to begin with, state law bars an owner from claiming a property right to harm wildlife.

B. The Public Ownership Argument Is Contradicted by Lucas

A second potential objection to the public ownership doctrine is that it is incompatible with a major thrust of modern takings jurisprudence, most forcefully expressed in *Lucas v. South Carolina Coastal Council*, to condemn the "idling" of real property for conservation purposes.[206] The Court in *Lucas* overturned the South Carolina Supreme Court's rejection of a takings claim based on a state law barring development of two coastal building lots.[207] The Court declared, as a general rule, that regulation will result in a taking if it denies the owner "economically viable" use of his property.[208] Subsequent Supreme Court decisions have apparently reaffirmed *Lucas*, though they have emphasized the narrowness of its categorical rule, stating that it applies only to "the permanent 'obliteration of the value' of a fee simple estate."[209]

No less an advocate of public rights in nature than Professor Joseph Sax has described *Lucas* as aiming squarely at measures protecting habitat for wildlife. Sax pointed to the statement by Justice Scalia, the author of the *Lucas* opinion, that regulations which deny an owner all economically valuable use of his property "carry with them a heightened

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204. 524 U.S. 156, 163 (1998).

205. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (referring to "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").

206. *See id.*; *see also* Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 345 (Cal. Dist. Ct. App. 1993) (review denied and ordered not published) (noting the "interesting dichotomy" between the extensive precedents "which have endorsed a state's attempt to protect wildlife on private land" and "more recent intimations from federal precedents involving the takings clause of the Fifth Amendment to the U.S. Constitution," including, in particular, the *Lucas* decision).

207. *Lucas*, 505 U.S. at 1032.

208. *Id.* at 1027.

209. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002).

risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[210] Quoting Justice Brennan, Justice Scalia also said that, "'[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation.'"[211] According to Sax, Justice Scalia has "a clear message which he sought to convey: States may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem."[212] He continued, "The target of *Lucas* is broader than its immediate concern of coastal dune maintenance; . . . *Lucas* . . . anticipates cases that will be brought under section nine of the Endangered Species Act, under which private landowners may be required to leave their land undisturbed as habitat."[213]

That this reading of *Lucas* accurately reflects the inclinations of Justice Scalia, at least, is supported by his dissenting opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, dealing with the authority of the Fish and Wildlife Service to restrict commercial timber operations on private lands.[214] Without expressly raising a Fifth Amendment takings issue, Justice Scalia challenged the majority's broad interpretation of the ESA as "impos[ing] unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[215] The clear implication was that, assuming the Court's interpretation of the ESA in that case was warranted, landowners should be permitted to sue for a taking.

The short answer to this interpretation of *Lucas*, as Professor Sax himself recognized, is that even though the Court set out a relatively absolutist theory of takings liability, the Court simultaneously defined regulatory "safe harbors" grounded in state property and nuisance law.[216]

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210. *Lucas*, 505 U.S. at 1018.

211. *Id.*

212. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993).

213. *Id.* at 1439.

214. 515 U.S. 687, 714 (1995).

215. *Id.* (Scalia, J., dissenting).

216. *See* Sax, *supra* note 212, at 1437-38 ("The case is not as far reaching as its rhetoric suggests. It does not protect all who suffer a complete loss in their property's value, for the categorical 100 percent diminution rule itself is sharply limited. Regulation that would be sustained under established common law "principles" of nuisance and property law is not

For the reasons discussed, the public ownership doctrine qualifies easily as a background principle of state property law and, with a bit more effort, can be defended under state nuisance principles as well.

Under this reading, because the public ownership doctrine is unquestionably a relevant background principle, *Lucas* may effectively undo its implication that wildlife-protecting measures will result in takings. It is possible, as some have suggested, that the *Lucas* majority may not have fully appreciated the capaciousness of the state law doctrine of public ownership of wildlife.[217] But the broad defense which *Lucas* offers to state wildlife regulators is the logically unavoidable result of the "background principles" concept. Having embraced the primacy of state law for the purpose of addressing the threshold issue of the nature of private property interests in takings cases, the Supreme Court appears bound to follow where state law leads. In *Lucas*, the Supreme Court qualified its discussion of background principles by stating that their application must be supported by "an objectively reasonable application of relevant precedents."[218] Given the ancient lineage and traditionally broad scope of the public ownership doctrine, the Court would be hard pressed to reject a court's reliance on the public ownership doctrine in a wildlife case as not objectively reasonable.[219]

More fundamentally, the fact that *Lucas* seems to point in several different directions at once on wildlife conservation may be less a contradiction than a reflection of *Lucas*'s essential meaning. *Lucas* is best understood as elevating the importance of traditional concepts of title and ownership in takings analysis generally. The decision seeks to define private rights in land by referring to "traditional understandings" which leave little room for legislative redefinition or modification of private property interests. At the same time, the decision defines the

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affected. Presumably, states will have substantial latitude in determining the extent to which their existing legal principles limit property rights.").

217. *See* Babcock, *supra* note 4, at 903; *cf.* Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 347 (Cal. Dist. Ct. App. 1993) (review denied and ordered not published) (stating that, at least with respect to wildlife regulation, *Lucas* creates a "circular argument" because "wildlife regulation of some sort has been historically a part of the preexisting law of property").

218. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 n.18 (1992).

219. In *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), the Supreme Court denied a petition for *certiorari* in a case in which the Oregon Supreme Court had rejected a taking claim based a relatively novel and unique theory of customary public rights to pass along the ocean beach. *But see id.* at 1214 (Scalia, J., dissenting) (arguing that the Court should have granted *certiorari* to determine whether the Oregon court's reliance on the law of custom was "pretextual"). The doctrine of public ownership of wildlife has far deeper legal roots than the public beach access doctrine relied upon by the Oregon Supreme Court. *See* Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993).

scope and limits of public regulatory authority partly by reference to traditional "background principles" of property law. In other words, the background principle of property defense authorized by *Lucas* is not at odds with *Lucas*'s emphasis on traditional conceptions of title and ownership, but simply the other face of the same coin. Under this interpretation, judicial recognition of background principles of property law, where they apply, is consistent not only with the letter, but also the spirit, of *Lucas*.

C. The Public Ownership Argument Relies on Antiquated Property Theory

A third potential objection to the public ownership argument is that, even if it is viable under existing precedent, it should be rejected because it reflects a misguided, pre-modern emphasis on concepts of "title" and "ownership" to resolve legal disputes. In other words, even if public ownership of wildlife is a permissible argument under the *Lucas* framework, *Lucas* itself is mistaken in relying on labels which tend to obscure rather than illuminate the fundamental issues of fairness and efficiency which should be at the center of the takings inquiry.

A starting place for a response is the observation that certain types of public ownership rights already uncontroversially foreclose potential takings claims. For example, if an individual claimed a taking because she was denied the opportunity to build a home in New York's Central Park, the claim would properly be rejected out of hand on the ground that the claimant has no "right" to build in a public park. Similarly, though there is some surprising litigation over the issue, a permittee on federal public lands who violates the terms of his permit surely can be evicted from the public lands without giving rise to a viable takings claim on the theory that refusal to extend the privilege to occupy public lands violates some private property right.[220]

Under settled and equally uncontroversial precedent, public rights also can trump private claims of right where, under federal or state law, private property rights are subject to supervening public rights in the same physical area. One good example, as discussed in Part I, is the navigational servitude. While a citizen can possess private property interests in the land under a navigable stream, the federal government can bar a proposed use of the property to preserve the utility of the stream for navigation without any resulting takings liability. Public rights have been

220. *See* Hage v. United States, 51 Fed. Cl. 570, 586-88 (Fed. Cl. 2002) (ruling, in effect, that cancellation of grazing permit supported a valid taking claim).

recognized as trumping takings claims in a variety of other contexts as well, including tidal wetlands subject to the traditional public trust doctrine, coastal beaches subject to customary rights of public passage, and public waterways subject to the threat of pollution from private land-use activity.[221] While one might quibble with the definition of public rights in one or more of these categories of cases, it is surely impossible to deny that public ownership rights can trump takings claims.

The more fundamental question is what, other than the trajectory of legal history, justifies defining some interests as private and defining other interests as public? The nation's property rights system should reflect society's judgment about what allocation of property rights will best serve the public interest over the long-term. The advantages of assigning private property rights to individual citizens are well recognized and widely celebrated. Private property rights can encourage individual initiative, promote efficient trading, and advance a general sense of individual autonomy.[222] Private property rights systems also reduce the need for public management, avoiding the well-documented distortions and inefficiencies inherent in collectivist decision making.[223]

At the same time, examples of public ownership have long existed and stubbornly persist alongside private property rights in our society.[224] The vitality of the idea of publicly owned property is perhaps most clearly demonstrated by the emergence in the twentieth century of an entirely new public property right, public ownership and control of the navigable air space. At common law, a property owner could invoke the maxim, "Whoever owns the soil owns everything up to the sky and down to the depths."[225] The advent of modern aviation created, as a legal matter, the prospect of innumerable trespass actions and takings claims and, as an administrative matter, the daunting challenge of managing complex negotiations with innumerable owners. Congress responded by enacting the Air Commerce Act of 1926, establishing that the United States has "complete and exclusive national sovereignty in the air

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221. *See* Esplanade Props., LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (rejecting takings claim based on public rights in coastal tidelands); *Stevens*, 854 P.2d at 449 (rejecting takings claim based on customary public right of access to the ocean beach); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa.), *cert. denied*, 123 S. Ct. 486 (2002) (rejecting takings claim based on public right to protection of clean waters).

222. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 28-29 (2d ed. 1977).

223. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 92-120 (2d ed. 1973) (applying public choice theory to illuminate the limitations of the democratic process).

224. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711-23 (1986).

225. BLACK'S LAW DICTIONARY 1628 (7th ed. 1999).

space,"[226] and granting every "citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."[227] Congress left the exact definition of the limits of the navigable airspace to the former Civil Aeronautics Board, which subsequently defined it as the space in excess of 500 feet above ground level.

In *Causby v. United States*, the Supreme Court, with remarkably little discussion, sanctioned this enormous conversion of private property rights into public domain.[228] The case is best known for the Court's ruling that frequent airplane take-offs and landings effected a taking of the plaintiff's chicken farm a few dozen feet below the flight path.[229] But the arguably more significant part of the decision was the Court's almost offhand sanction of the redefinition of the navigable airspace as public domain. Referring to the traditional idea that property owners own "all the way to heaven," the Court stated

> that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[230]

Of course, as Justice Douglas well knew, the case did not involve any threatened "transfer into private ownership," but the reverse, a transfer of previously private property into public ownership.[231] His reference to the public's "just claim" simply expresses his approval of Congress's judgment, no doubt widely shared, that the airspace, given modern technology, can and should be redefined as public property.[232] Given that simple "common sense" can support the *transformation* of private property interests into public property, similar kinds of legal policy considerations surely must be relevant in determining whether the public should *continue* to be treated as the owner of wild animals.

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226. 49 U.S.C. § 176(a) (repealed 1958); *see id.* § 40103 (2001) (enacting the modern, slightly revised version of this statutory provision).

227. *Id.* § 403 (repealed 1958); *see id.* § 40103 (enacting the modern, slightly revised version of this statutory provision).

228. 328 U.S. 256, 266 (1946).

229. *See id.* at 264.

230. *See id.* at 261.

231. *Id.*

232. *See id.*

What, then, are the fundamental legal policy justifications, if any, for treating wildlife as a public property resource today? The first and most important justification appears to be wildlife's mobility. A bird, a deer, or even a snake may be present on a particular parcel of property for an hour, a day, a week, or even longer, but it will eventually cross property lines following its own species-dependent path.[233] The mobility of wildlife makes a system of private rights in wildlife unworkable in most circumstances. Private property rights in wildlife would not create the kinds of incentives ordinarily created by a private property regime to protect and enhance the resource, for the simple reason that the investment will be entirely lost when the animal flies, hops, or crawls across the property line. For the same reason, a property owner would have every incentive to exploit his property rights in wildlife to the maximum extent possible when the opportunity presented itself, because the mobility of wildlife means that the same opportunity will soon be presented to any of a number of different neighbors. In other words, private rights in wildlife combined with wildlife's mobility would create a special version of the "tragedy of the commons," effectively dooming most wildlife to extinction.[234] Public ownership and control, despite their own shortcomings, offer at least the possibility of coordinated collective action to conserve wildlife for the benefit of individual citizens, including landowners, as well as society as a whole.[235]

Other considerations support treatment of wildlife as a public property resource. The effects of activities by individual landowners on wildlife create important and widespread externalities. The private hunter or trapper, for example, directly and immediately affects the hunting opportunities available to other hunters or trappers. In the case of endangered species, the externalities are even more dispersed, because many of the benefits of species conservation, including, for example, preserving a species' "existence value" or maintaining a genetic reservoir

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233. As the Supreme Court eloquently put it in *Missouri v. Holland*, 252 U.S. 416, 434 (1920), "[t]he whole foundation of the State's rights [in migratory birds] is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away."

234. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-48 (1968). Granting individual landowners rights in wild animals on their land can also be seen as creating a version of the "anticommons" problem, in which the over-proliferation of private property results in under-utilization of a resource. *See* Michael Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 11 HARV. L. REV. 621 (1999).

235. Stated in the conventional terminology of economics, the mobility of wildlife means that the transaction costs of managing a system of private rights in wildlife would exceed the benefits of establishing such a property rights regime. *See* Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. 347, 350-59 (1967).

for future use, are shared by society as a whole. To be sure, these types of externalities are frequently dealt with in other contexts, not by defining the property interest as publicly owned, but by adopting regulations to control the externalities produced by the exercise of private property rights. Defining public authority to control a resource as a kind of regulatory servitude as opposed to an outright ownership interest becomes, at the margin, largely a matter of semantics. But if the mobility of wildlife justifies treating wildlife as public property, the significant externalities associated with private activities affecting wildlife provide additional support for the kind of strong public management authority implied by designating wildlife as public property.

The final justification for treating wildlife as a public property resource borrows from Professor Carol Rose's thesis that public rights in resources are explained in part by the social value of shared assets.[236] According to this view, the value of various resources, ranging from roads and waterways to recreational beaches, is enhanced by broad public participation because society needs places "to enhance the sociability of the members of an otherwise atomized society."[237] Professor Rose suggests that public hunting and fishing rights may in part be explained by the socializing function of recreational activities which are open to the public.[238] Following the same line of reasoning, endangered species conservation may serve similar socializing functions. The iconic status of salmon in the Pacific Northwest, annual gatherings on the Platte River to observe the migration of migratory cranes, and ornithologists' mad scrambles to observe the odd Siberian avian wanderer in the Chesapeake Bay all appear to reflect the socializing function served by public stewardship of rare and endangered wildlife.

The public ownership argument is analogous to the established per se rules in the Supreme Court's takings jurisprudence, with the difference that it represents a per se rule of nonliability. The Supreme Court has established two per se rules of liability: (1) when government regulation obliterates all of a property's economic value, and (2) when government has effected a permanent physical occupation of private property.[239] These rules reflect the Court's judgment that, in defined circumstances, the likelihood of a taking is so great that the Court can safely conclude that cases falling into certain categories can be defined as takings

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236. Rose, *supra* note 224, at 723.

237. *Id.*

238. *See id.* at 755-56.

239. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

without the necessity for extensive exploration of the facts of the particular case. The public ownership doctrine works the same way by identifying a set of regulatory takings claims which can reasonably be rejected by general rule.

A per se rule of nonliability can be defended, like a per se liability rule, on the ground, not that it always arrives at the correct result, but that it nearly always does so. As the Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.*, a per se rule is justified in part by the fact that it "avoids otherwise difficult line-drawing problems"[240] and presents "relatively few problems of proof."[241] So, too, in the case of wildlife protection, a general rule recognizing that wildlife laws do not result in takings avoids line-drawing problems and presents few problems of proof. Application of this per se rule may require rejection of some "hard" cases, but that is simply the cost, deemed entirely acceptable in other contexts, of any per se rule.

The narrowness of this per se nonliability rule represents a partial answer to critics of the use of formal property concepts to resolve takings cases. Wildlife restrictions affect only a small portion of the national landscape. Even if one gathers together the handful of other established public ownership defenses, including the traditional public trust in tidelands and the navigational servitude, public ownership issues only arise in a fraction of actual or potential regulatory takings cases. Thus, embracing the public ownership doctrine and these other defenses does not permit property rules to entirely dominate takings law. Nor does it obviate the need for careful examination of the actual economic impact of a regulation and the reasonableness of the claimant's investment expectations in the general run of cases.

D. Wildlife Protection Effects a Per Se Physical-Occupation Taking

Far from conceding the validity of the nonliability argument outlined above, some takings advocates have taken the opposite tack contending that wildlife protection laws should *automatically* lead to a finding of a taking.[242] Rather than representing a category of regulation peculiarly immune from taking liability, these advocates contend, wildlife laws should be especially vulnerable to takings claims, on the theory that

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240. 458 U.S. at 436.

241. *Id.* at 437.

242. *See, e.g.*, Eric Grant, Pacific Legal Foundation, Endangered Species, Habitat Preservation, And Just Compensation: Why Habitat-Preserving Regulations Are Permanent Physical Occupations of Private Property, Address at the ALI-ABA Course on Inverse Condemnation and Related Government Liability (May 3-5, 2001).

wildlife laws result in indefinite physical occupations of private property which should be treated as per se takings. This argument principally relies on the Supreme Court's decision in *Loretto* establishing that permanent physical occupations of private property caused by the government should be analyzed pursuant to a categorical takings rule.

So far, this physical-occupation argument has met with almost complete failure in the federal and state courts.[243] The judicial skepticism about this argument appears well founded, for several different reasons.

First, the physical-occupation argument is at odds with claimants' concession in some takings cases that the government can at least prohibit direct killing of wildlife on private property without incurring takings liability.[244] While the concession is no doubt offered for sensible tactical reasons, it appears to undermine the physical-occupation theory. If wildlife regulations effect a physical occupation, it is because they compel the owner to accept the presence of the animal on the property. If takings claimants are willing to concede that protecting a specific animal present on private property from direct killing does not effect a taking, then it would seem difficult if not impossible to sustain the argument that wildlife protection measures represent per se takings on a physical-occupation theory.

Second, many wildlife laws cannot plausibly be described as effecting a physical occupation within the meaning of *Loretto*. A regulation which effects a physical occupation has as its purpose authorizing the government or third parties to place people or objects on the property. Wildlife protection laws, by contrast, typically restrict possible *uses* of the property based on the presence of the animal,

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243. *See, e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352-57 (Fed. Cir. 2002) (holding regulation barring commercial logging to avoid disturbance of nesting spotted owls not a physical occupation); Southview Assocs. Ltd. v. Bongartz, 980 F.2d 84, 92-95 (2d Cir. 1992) (holding that restriction on residential development to protect deer yard not a physical occupation); Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1428-29 (10th Cir. 1986) (holding property damage caused by wild burros and horses not a physical occupation); Moerman v. State, 21 Cal. Rptr. 2d 329, 334 (Cal. Dist. Ct. App. 1993) (holding property damage cause by introduced tule elk not a physical occupation); State v. Sour Mountain Realty, Inc., 714 N.Y.S.2d 78, 84 (N.Y.S. Div. 2000) (finding that requirement to remove "snake proof" fence which prevented snake from gaining access to forage habitat not a physical occupation); Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 570 (Or. Ct. App. 1999) (holding regulation barring commercial logging to avoid disturbance of nesting spotted owls not a physical occupation). *But see* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) (holding that reduction in permitted water diversions constitutes a physical occupation of the water).

244. *See, e.g.*, Reply Brief of Appellant, in Coast Range Conifers v. State of Oregon, Oregon Court of Appeals, CA., No A117769 (filed Nov. 2002) (on file with *Georgetown Environmental Law and Policy Institute*) ("This case does not involve a claim that CRC has the right to kill wildlife.").

without actually addressing whether the owner is required to allow wild animals onto the property in the first place. As the United States Court of Appeals for the Federal Circuit recently said in rejecting a takings challenge to ESA restrictions protecting a nesting pair of spotted owls, "there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property."[245]

The attempt to characterize use restrictions to protect wildlife as physical occupations has been severely undermined by the Supreme Court's decision in *Tahoe-Sierra.* Prior to *Tahoe-Sierra*, takings advocates routinely sought to bolster regulatory takings claims by equating restrictions on the use of property with government-sanctioned physical occupations. Indeed, the supposed equivalence of regulation and occupation was a cornerstone of Professor Epstein's ambitious effort to formulate an expansive doctrine of regulatory takings.[246] In *Tahoe-Sierra*, however, the Court drew a sharp line between regulation and occupation and said that the "long-standing distinction" between the two "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[247] In addition, the Court emphasized the narrowness of the per se physical-occupation rule, stating that "physical appropriations are relatively rare [and] easily identified."[248]

Finally, and most fundamentally, even if a wildlife regulation did result in a physical occupation, the taking claim would still have to be rejected as a result of the sovereign public rights in wildlife. In *Lucas*, the Supreme Court stated that background principles of property law can bar any taking claim, including a claim based on the physical-occupation theory.

> Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved . . . —*though*

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245. *Boise Cascade Corp.*, 296 F.3d at 1354 (quoting *Boise Cascade Corp.*, 991 P.2d at 570; *see also* Seiber v. United States, 53 Fed. Cl. 570, 576 (Fed. Cl. 2002) (rejecting a takings challenge to ESA restrictions based on physical occupation theory) (appeal pending in the Federal Circuit).

246. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93-104 (1985).

247. 535 U.S. 302, 323 (2002).

248. *Id.*

> *we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title*.[249]

For an example of such a "preexisting limitation" the Court cited *Scranton v. Wheeler*, involving the navigational servitude.[250] The doctrine of public ownership of wildlife imposes the same kind of preexisting limitation on private property interests that the navigational servitude imposes on private property. As a result, assuming a wildlife regulation did effect a physical occupation, the occupation still would not be a taking because private property rights are held subject to the public's right to maintain wildlife on private land.

Thus, in *Sierra Club v. Department of Forestry & Fire Protection*, the California District Court of Appeals rejected the timber company's effort to avoid the public ownership argument by contending that the endangered birds were not simply protected by regulatory restrictions on use of the defendant's property but "actually physically occup[ied] the habitat afforded by its property."[251] The court described this argument as resting on "a distinction without a difference" because the precedent upholding wildlife protection on private property "necessarily upholds governmental protection of such species while on the land of an unconsenting landowner or leaseholder."[252] Similarly, in *Tulare Lake*, even though the court rejected the background principles argument based on the particular facts and circumstances of the case, it expressed no reservation about the general principle that state background principles can bar a taking claim based on a per se physical-occupation theory.[253]

E. Public Ownership Is Not an Argument Available to the Federal Government

One final potential objection to the public ownership argument is that, while a state court can apply the argument to a taking claim based on state regulation, a federal court may not be able to apply the argument

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249. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992) (emphasis added).

250. *See id.*; 179 U.S. 141, 143 (1900).

251. 26 Cal. Rptr. 2d 338, 345 (Cal. Dist. Ct. App. 1993) (review denied and ordered not published).

252. *Id.*

253. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318-24 (Fed. Cl. 2001). It could be contended that the public ownership doctrine actually supports a physical occupation claim, on the theory that the public's ownership of wildlife confirms that the government is legally responsible for wildlife present on private property. The answer to this potential argument is that the public does not own wildlife in a proprietary sense, but rather in its sovereign capacity, and therefore government cannot be held to be occupying private property in a physical sense.

to a claim based on federal regulation. As discussed above, this position is supported by *Tulare Lake Basin Water Storage District v. United States*.[254] In that case the Court of Federal Claims rejected the United States' argument that it was entitled to defend against a taking claim challenging a federal ESA restriction based on the public ownership doctrine and other background principles of California law.[255] However, there is substantial reason to think this novel ruling was mistaken.

First, the ruling is inconsistent with the basic methodology for evaluating regulatory takings claims under the Fifth Amendment. As discussed above, under the two-part regulatory takings analysis, the initial question is whether the claimant has a protected property interest. If the claimant lacks a protected property interest, there is no need to address whether the regulation being challenged actually results in a taking. Because the antecedent property inquiry has to be resolved prior to examining the regulation itself, there is no logical reason to suppose that the answer to the property inquiry should vary depending upon whether the restriction being enforced is state or federal.

Second, in *Lucas* the Court stated that background principles of state law should support rejection of a claim "if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[256] Background principles cannot be applied "objectively" if their meaning varies from forum to forum. Other federal courts have relied on state background principles to reject takings challenges to federal regulatory action, and they have not suggested that they have any less authority to enforce state law limitations on title than state courts.[257] These decisions, unlike the decision in *Tulare Lake*, are consistent with *Lucas*' mandate that background principles be objectively applied.

These decisions also are consistent with the general approach of federal courts when presented with state law issues. There are, to be sure, various statutory and judicially-created mechanisms for federal courts to enlist the direct help of state courts in deciding issues of state law.[258] But when federal courts do proceed to resolve state law issues, for

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254. *Id.* at 324.

255. *See id.* at 320-24.

256. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 n.18 (1992).

257. *See, e.g.*, Esplanade Props., LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (applying state public trust doctrine in tidelands to support rejection of takings claim); Bishop v. United States, 126 F. Supp. 449, 451 (Ct. Cl. 1954) (applying state public ownership doctrine to support rejection of taking claim based on hunting ban).

258. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (noting a federal court may abstain in favor of a state court in a case raising "difficult

example, in diversity cases, when exercising supplemental jurisdiction over state claims, and in a variety of other contexts, federal courts attempt to reach the same result the state courts would reach if confronted with the same issue.[259] Apparently, with the sole exception of the court in *Tulare Lake*, federal courts have assumed that the same principle should apply in cases under the Takings Clause.[260]

Finally, the idea that the public ownership argument might be available only to state regulators sued on the basis of state regulations in state court is anachronistic. It represents, in effect, a revival of the antiquated notion that the public ownership doctrine supports primary, if not exclusive, state control over natural resources. As discussed, the Supreme Court has rejected the idea that the public ownership doctrine can serve as a barrier to the exercise of federal regulatory power.[261] It would certainly contradict the spirit of those decisions to conclude that the public ownership doctrine undermines federal regulatory authority indirectly because it represents an argument available only to the states.

V. HOW FAR SHOULD THE PUBLIC OWNERSHIP ARGUMENT GO?

If the public ownership doctrine still lives and can serve as an argument against takings claims, how far does the argument go? The argument presumably must apply, at a minimum, to regulation of activities which directly kill individual animals including, for example, the use of guns or traps, or to take one step beyond the obvious, cutting down a tree containing a nesting bird. But the kinds of extensive restrictions imposed under modern wildlife laws obviously raise more complicated and difficult questions.

For example, does the argument apply to activities which indirectly harm or kill threatened or endangered species, including, for example,

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questions of state law bearing on policy problems of substantial public import"); Chevy Chase Land Co. v. United States, 158 F.3d 574, 575-76 (Fed. Cir. 1998) (certifying a state law question to the Maryland Court of Appeals, pursuant to Maryland statutory procedure, in takings suit against the United States).

259. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966); Erie v. Tompkins, 304 U.S. 64, 72-73 (1938); WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 (2d ed. 1996) ("In divining and applying the law of the forum state in diversity of citizenship cases, each federal court—whether it be a district court or an appellate court—functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court system, which includes the state appellate tribunals. In other words, the federal court must determine issues of state law as it believes the highest court of the state would determine them, not necessarily (although usually this will be the case) as they have been decided by other state courts in the past.").

260. *See* WRIGHT ET AL., *supra* note 259, § 4520 ("[S]tate law has been applied to determine the character of property . . . in federal condemnation actions.").

261. *See* discussion *supra* notes 193-199.

commercial logging, land development, or water withdrawals from rivers and streams which degrade or destroy the value of natural habitat? If habitat destruction is covered, must the habitat destruction be associated with a demonstrable effect on individual animals or the viability of the species as a whole? Must the habitat at least be occupied, or does it suffice if the habitat is suitable for a particular species and potentially useful for bringing the species back from the brink of extinction? How substantial an effect must a regulation have on individual animals or on an entire species? Finally, given the complexity of ecological relationships, what type of causal link, both in terms of immediacy and probability, must be established between the regulated activity and the harm the regulation is designed to avoid?

Older, non-ESA cases support the conclusion that the public ownership argument should cover activities which *indirectly* kill or injure wildlife. For example, in *Columbia River Fishermen's Protective Union v. City of St. Helens*, the Oregon Supreme Court upheld, based on the public ownership doctrine, a suit to restrain pollution of the Willamette and Columbia Rivers to protect public fisheries.[262] 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."[263] The state's "care of the fish would be of no avail," the court said, "if it had no power to protect the waters from pollution."[264] Similarly, in the classic case of *Barrett v. State*, the Court of Appeals of New York held that the public ownership doctrine justified not only protection for beavers but also a prohibition against the destruction of their "dams, houses, homes or abiding places of same."[265] The numerous cases involving dams obstructing fish passage demonstrate that the doctrine can support government regulations requiring landowners not to block animals from utilizing their natural habitat.[266]

While modern wildlife laws often involve more extensive restrictions on private land use than older wildlife laws, public sovereign rights should continue to be recognized. The basic nature of public rights in wild animals remains the same as in past centuries, and the doctrine

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262. 87 P.2d 195, 199 (Or. 1939).
263. *Id.* at 198.
264. *Id.*
265. 116 N.E. 99, 100 (N.Y. 1917).
266. *See* discussion *supra* notes 71-79; *see also* People v. Truckee Lumber Co., 48 P. 374, 375 (Cal. 1897) (enjoining, based on the public ownership doctrine, disposal of waste into river which led to a fish kill); People v. Glenn-Colusa Irrigation Dist., 15 P.2d 549, 550-53 (Cal. Dist. Ct. App. 1932) (enjoining, based on the public ownership doctrine, irrigation water diversions which injured fisheries).

should continue to apply with the same force even if the nature of the threats to wildlife has changed somewhat. The Supreme Court in *Lucas* famously observed that the meaning and scope of background principles must evolve as "changed circumstances or new knowledge may make what was previously permissible no longer so."[267] No extravagant extension of earlier precedent is required to apply the public ownership argument in today's circumstances. Property owners never had a protected right to destroy wildlife present on their land and modern wildlife laws simply continue the implementation of this long-standing principle.

Pre-ESA cases suggest that *de minimis* effects on wildlife would not be covered by the public ownership doctrine. In particular, as discussed above, the cases dealing with fencing suggest that owners may be able to fence their land, even if a fence excludes wildlife that would otherwise be present on the land, as long as it does not inflict direct injury. Other kinds of de minimis effects, including temporary or minor alterations of habitat, might be excluded as well. On the other hand, apparently inconsequential individual actions can sometimes have severe cumulative effects. The public's rights in wildlife should not be sacrificed through small-scale decision making.

Application of the doctrine should presumably be governed by ordinary standards of proximate causation and foreseeability. The decision of the Pennsylvania Supreme Court in *Machipongo Land & Coal Co. v. Commonwealth* is instructive on this point.[268] As discussed above, the court ruled that the state should have been permitted to defend against the takings claim on the ground that the proposed mining would violate the public's right to clean water and therefore constitute a "nuisance" under *Lucas*.[269] Recognizing the inherently conjectural nature of the background principles inquiry, the court explained that the state did not have to demonstrate to a complete certainty that the proposed mining would actually have produced acid mine drainage.[270] "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].'"[271] Likewise in the wildlife arena, a showing of a high potential for harm to individual animals or the species as a whole should be sufficient to defeat a regulatory taking claim.

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267. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).
268. 799 A.2d 751, 770-75 (Pa.), *cert. denied*, 123 S. Ct. 486 (2002).
269. *See id.* at 775.
270. *See id.*
271. *Id.*

Finally, the Supreme Court's 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* provides useful guidance.[272] The case involved a challenge to the U.S. Fish and Wildlife Service's interpretation of section nine of the ESA, which makes it unlawful for any person to "take" an endangered species.[273] The act in turn defines take to include, among other things, "harm." Regulations adopted by the Fish and Wildlife Service define "harm" to mean "an act which actually kills or injures wildlife," and state that "[s]uch 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."[274] The Court upheld the Service's definition of harm as a reasonable interpretation of the statute.[275]

The decision in *Sweet Home* is relevant to takings litigation because the wildlife-protection authority vested in the federal government by the ESA is plainly analogous to the authority vested in the states by the public ownership doctrine. In addition, the issues of causation and foreseeability with which the Court struggled are parallel to the issues which naturally arise in applying the public ownership doctrine.

The basic issue the Court addressed in *Sweet Home* was whether the term harm had to be confined to the "direct application of force" against imperiled wildlife, or whether it could be extended to modification of habitat which indirectly injures wildlife.[276] Reversing the decision of the United States Court of Appeals for the District of Columbia Circuit on this point, the Supreme Court adopted the latter view.[277] The Court reasoned that the dictionary definition of harm naturally encompassed injuries inflicted directly or indirectly, a conclusion that seems to apply logically to the definition of the scope of the public ownership doctrine as well.[278] In upholding the regulation, the Court also emphasized that the agency had limited the definition of harm to "significant effects" and said that it was governed by "ordinary requirements of proximate causation and foreseeability," limitations which, again, seem directly transferable to applications of the public ownership doctrine.[279]

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272. 515 U.S. 687, 696-704 (1995).
273. *See id.* at 690.
274. *Id.* at 691.
275. *See id.*
276. *Id.* at 697-98.
277. *See id.* at 701-03.
278. *See id.* at 697-98.
279. *Id.* at 700 n.13, 708.

Implicitly recognizing the importance of following sound scientific analysis in determining the reach of the ESA, the Court concluded by stating that the "difficult questions of proximity and degree" raised by the ESA "must be addressed in the usual course of the law, through case-by-case resolution and adjudication."[280] The same approach will no doubt be required to apply the public ownership doctrine to takings claims based on modern wildlife regulations.

VI. CONCLUSION

The public's "perfectly astounding" rights in wildlife are supported not merely by venerable precedent but by the latest Supreme Court takings decisions and persuasive legal policy reasoning. The public's sovereign rights in wildlife explain and justify the long-standing immunity of wildlife-protection measures from regulatory takings claims. Looking to the future, courts presented with takings claims based on laws protecting wildlife should explicitly articulate and enforce these long-standing public rights.

280. *Id.* at 708.