

**FILED**

APR 02 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 302881

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IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION III

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JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

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On Appeal from the Superior Court of the  
State of Washington for Columbia County

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
AND WASHINGTON FARM BUREAU  
IN SUPPORT OF RESPONDENT JOSEPH LEMIRE**

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## **INTRODUCTION**

The Department of Ecology (Ecology) ordered Lemire to permanently fence off part of his property, causing him to forfeit the use of his land and access to water, resources that are vital to the success of his ranch. Ecology's order effects a taking under Washington law, and the appropriate remedy in this case is to invalidate Ecology's order. Amici Pacific Legal Foundation (PLF) and Washington Farm Bureau (WFB) respectfully request that this Court affirm the superior court's decision holding that Ecology's order constitutes a taking.

## **STATEMENT OF THE CASE**

In 2009, Ecology issued Administrative Order No. 7178 (Order) to Lemire. Br. of Appellant at 9. The Order requires Lemire to install permanent livestock exclusion fencing around Pataha Creek where it runs through his property, for the purpose of preventing pollution allegedly resulting from Lemire's cattle. Br. of Appellant at 9-10; Br. of Resp't at 5. Lemire disputed the factual basis for the Order before the Pollution Control Hearings Board, and argued that it would cost him the use of a substantial amount of acreage, eliminate reasonable access to the fenced-off area and the creek, and render his agricultural operations infeasible. Br. of Resp't at 15. After the Board granted summary judgment to Ecology, Lemire appealed to

Columbia County Superior Court. Br. of Resp't at 16. The superior court held in September, 2011, that the Order was invalid because it was not substantiated by Ecology's observations of the property, and the Order constituted a *per se* taking. Br. of Resp't at 16.

## ARGUMENT

### I

#### WASHINGTON COURTS RECOGNIZE THAT "WHETHER A REGULATION DESTROYS A FUNDAMENTAL ATTRIBUTE OF PROPERTY OWNERSHIP" IS A FREESTANDING *PER SE* TAKINGS TEST

The superior court held that Ecology's Order constitutes a taking because it eliminates access to the land and water on which Lemire's ranch depends. Ecology disputes the court's conclusion by casting doubt on the viability of Washington's judicial test for determining whether a regulation constitutes a taking. Specifically, Ecology asserts that Washington courts have not clearly established that a *per se* taking occurs when a regulation destroys a fundamental attribute of property ownership. Br. of Appellant at 29 n.16 ("Washington courts have not been entirely clear on whether destruction of a fundamental attribute of ownership is a third type of *per se* taking or whether a *per se* takings analysis only analyzes whether

fundamental attributes of ownership are impaired through ‘physical invasions’ or ‘total takings.’”).

But the issue is not as murky as Ecology suggests. The Supreme Court of Washington recognizes that a property owner may prove a taking if he can show that a regulation destroys one or more of the fundamental rights that make up property ownership—*e.g.*, the right to possess property, exclude others, dispose of property, or make some economically viable use of property.<sup>1</sup> See *Guimont v. Clarke*, 121 Wn.2d 586, 602 (1993).

**A. The Washington Supreme Court Holds That  
“Destruction of a Fundamental Attribute of Property  
Ownership” Is a *Per Se* Takings Test**

The “fundamental attribute” test is firmly rooted in Washington Supreme Court takings jurisprudence. This was illustrated in *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wn.2d 347, 355 (2000), where the Court explained:

Under existing Washington and federal law, a police power measure can violate [the Washington Constitution’s Takings

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<sup>1</sup> This is not an exhaustive list. The Washington Supreme Court may recognize other rights, as it did when it incorporated the right to make some economically viable use of property in *Guimont*. 121 Wn.2d at 602 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-20 (1992)). Similarly, some property owners may enjoy additional rights depending on their site-specific circumstances. For example, littoral property owners may retain special rights that non-littoral property owners do not possess, because their property abuts the water. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2598 (2010).

Clause] or the Fifth Amendment of the United States Constitution and thus be subject to a categorical ‘facial’ taking challenge when: (1) a regulation effects a total taking of all economically viable use of one’s property; or (2) the regulation has resulted in an actual physical invasion upon one’s property; **or (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others and to dispose of property);** or (4) the regulations were employed to enhance the value of publicly held property.

*Id.* (citations omitted) (emphasis added).

*Manufactured Housing* affirmed the “fundamental attribute” test as a stand-alone test for proving a “categorical” taking. That case involved a challenge to the Mobile Home Parks Resident Ownership Act, which required mobile home park owners to grant their tenants a right of first refusal if the owner offered the park for sale. *Id.* at 351-52. The Court held that a right of first refusal in the hands of a property owner is a fundamental attribute of the owner’s right to freely alienate the property. *Id.* at 363-68. The Ownership Act interfered with the park owners’ ability to sell a park, thereby depriving the owners of the right of alienation. *Id.* at 368. The Court thus concluded that the Ownership Act was a taking because it fell “within the rule that would generally find a taking where a regulation deprives the owners of a fundamental attribute of property ownership.” *Id.* at 369.

*Manufactured Housing* is not the only case to recognize the “fundamental attribute” test. The Supreme Court acknowledged the test in

*Guimont*, a case involving a challenge to the Mobile Home Relocation Assistance Act, which required mobile home park owners to contribute money toward their tenants' relocation costs if the owner converted the park to a different use. 121 Wn.2d at 591. *Guimont* determined that the constitutional protection against uncompensated takings required the court to examine whether the challenged regulation deprives a takings claimant of a fundamental attribute of property ownership even if no physical invasion or total taking could be found. *Id.* at 603. The Court further explained that the "fundamental attribute" test is an alternative basis for finding a taking because, in addition to *Guimont*'s claim that the Relocation Act deprived him of all use, *Guimont* could have shown a *per se* taking had the Act separately deprived him of a fundamental attribute of ownership. *Id.* at 605 n.7.

**B. Every Division of the Court of Appeals Has Applied the "Fundamental Attribute" Test**

Like the Washington Supreme Court, every Division of the Court of Appeals has applied the "fundamental attribute" test. In *Schreiner Farms*, this Court applied the "fundamental attribute" test to a state regulation making it unlawful to sell elk. *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 29-30 (1997). *Schreiner Farms*, which raised elk, alleged that the regulation effected a taking. *Id.* at 30. In analyzing the takings claim, this Court stated that "the court first asks whether the regulation destroys or

derogates any fundamental attribute of property ownership, including the right to possess, exclude others, [dispose of the property, or make some economically viable use of the property].” *Id.* at 33. The Court set out three alternative grounds for finding a *per se* taking: (1) a physical invasion; (2) a total taking; or (3) a regulation that implicates a fundamental attribute of property ownership. *Id.* at 34. The Court then analyzed whether the regulation deprived Schreiner Farms of the ability to possess, exclude others, and dispose of the elk, independent of the questions of whether the regulation constituted a physical invasion or total taking. *Id.* at 35.

Like this Court, Division I recognizes the “fundamental attribute” test as a stand-alone method for proving a taking. In *City of Des Moines v. Gray Businesses, LLC*, the owner of a mobile home park (Gray) sued for a taking after Des Moines enforced an ordinance that had the effect of preventing Gray from leasing spaces to new tenants. 130 Wn. App. 600 (2005). Gray claimed that by eliminating its right to lease spaces, the city had destroyed a fundamental attribute of its property ownership. *Id.* at 607. In determining whether a taking had occurred, the court recited the test from the Supreme Court’s decision in *Guimont*: “First, the court asks whether the regulation destroys or derogates a fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to

make some economically viable use of the property. If so, there is a *per se* taking. Similarly, there is a *per se* taking if the plaintiff proves a ‘physical invasion’ or ‘total taking’ of its property.” *Id.* at 611-12. The court in *Gray* carefully set forth the “fundamental attribute” test as a separate inquiry from the “physical invasion” and “total takings” tests.

Division I applied the same rule in *Guimont v. City of Seattle*, a lawsuit alleging that Seattle’s ordinance prohibiting the placement of RV’s on mobile home lots constituted a taking. 77 Wn. App. 74 (1995). In setting out the *per se* takings tests, the court identified three categories of *per se* takings, including the “fundamental attribute” test: “A *per se* violation of the taking clause occurs when the regulation constitutes either a ‘total taking’ or a ‘physical invasion’ of the property or destroys a fundamental attribute of ownership.” *Id.* at 80. The court expressly acknowledged the independence of the “fundamental attribute” test, remarking on the necessity of analyzing a “fundamental attribute” claim where no physical invasion or total taking was manifest. *Id.* at 85 n.9; *see also Borden v. City of Olympia*, 113 Wn. App. 359, 374 (2002) (applying “fundamental attribute” test in context of flooding); *Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 841 (1999) (same in context of subdivision); *Ventures Nw. Ltd. P’ship v. State*,

81 Wn. App. 353, 363 (1996) (same in context of wetlands); *Jones v. King County*, 74 Wn. App. 467, 478 (1994) (same in context of rezone).

These cases demonstrate that the Washington Supreme Court and the Court of Appeals acknowledge the legitimacy of the “fundamental attribute” test as a freestanding *per se* takings test. The “fundamental attribute” test is a widely applied takings test protecting property owners’ most valuable rights of ownership.

**C. The “Fundamental Attribute” Test Protects Important Property Rights**

The “fundamental attribute” test protects Lemire from regulations that destroy his right to occupy and use his ranch land, and deny him access to water for stock watering. *See* Br. of Resp’t at 44-45. The right to use and occupy land for ranching derives from two general attributes of property ownership consistently protected by Washington courts—the right to possess property, and the right to make some economically viable use of property. These are superlative rights for farmers and ranchers. Successful agriculture depends on the availability of land and water. When the government prohibits the use of land and blocks access to water, farmers and ranchers like Lemire are forced to make do with less, and may suffer substantial losses. *See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 425-26 (2007) (recognizing that agricultural land is an

economic resource because farmers depend on it for their livelihoods). There is no question that Ecology's Order requiring Lemire to fence out a portion of his property derogates fundamental attributes of his ownership.

Furthermore, the right to access water is a historic right belonging to riparian property owners, such as Lemire. See James H. Davenport & Craig Bell, *Governmental Interference With the Use of Water: When Do Unconstitutional Takings Occur?*, 9 U. Denv. Water L. Rev. 1, 69 (2005) ("Water rights typically include a right to reasonable access[.]"). Washington courts attach great importance to the right to access water. In *Strom v. Sheldon*, 12 Wn. App. 66, 69 (1974), the Court of Appeals stated that, "[t]he law zealously guards the right of a riparian owner to have access to the stream upon which his land is situated." This is because "[c]ourts have long recognized that access to water . . . may well be the most valuable feature of [riparian] property." *Id.* And in *Hudson House, Inc. v. Rozman*, 82 Wn.2d 178, 184 (1973), the supreme court held that "the owner of waterfront property should be protected in the maintenance of access to the water. That is often, in fact generally, the greatest value of the property."

Use of water for stock watering, moreover, enjoys legal protection. See *Elko Cnty. Bd. of Supervisors v. Glickman*, 909 F. Supp. 759, 764 n.7 (D. Nev. 1995) (noting stock watering rights are accorded a special place in the

law and are not lightly disturbed). In *In re Stranger Creek*, for example, the Washington Supreme Court remarked that stock watering is the most beneficial use of water in arid regions. 77 Wn.2d 649, 657 (1970); see *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 138 n.5 (2001) (citing RCW 90.54.020(1) to show that stock watering is a “beneficial use” of water resources protected by state law).

The importance of protecting stock watering rights is exhibited by *Estate of Hage v. United States*, 82 Fed. Cl. 202 (2008),<sup>2</sup> in which the U.S. Court of Federal Claims found that the federal government’s interference with stock water constituted a regulatory taking. The Hage family owns a ranch that has been used primarily for grazing cattle since 1865. *Id.* at 205. To support the cattle, the Hages use legally established ditch rights-of-way on federal land to transport water for stock watering. *Id.* The U.S. Forest Service insisted that the Hages maintain the ditches with nothing but hand tools, an impossible task, since keeping the ditches clear of overgrowth requires heavy machinery to be effective. *Id.* at 206. The Forest Service also constructed fences to prevent the Hages’ cattle from accessing water. *Id.* Vegetation proliferated as a result of the Forest Service’s actions, clogging

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<sup>2</sup> *Hage* is currently pending on appeal at the U.S. Court of Appeals for the Federal Circuit, Nos. 2011-5001, -5013.

the waterways and impeding flow. The Hages sued for a taking after experiencing a significant reduction in water supply. *Id.*

The court recognized that the Hages retained the right to divert water to serve their agricultural and ranching uses. *Id.* at 205. The court therefore concluded that the government's construction of fences around the streams amounted to a taking because it prevented the Hages from exercising that right. *Id.* The court further found that the government's actions in allowing the waterways to grow thick with vegetation upstream constituted a taking by interfering with the Hages' ability to maintain a steady flow of water to their ranching operations. *Id.* at 212.

Like the Hages, Lemire enjoys a full assortment of property rights relating to Pataha Creek, including a traditionally protected right to stock water. Ecology's interference with Lemire's fundamental attributes of property ownership creates a cognizable takings claim. The superior court correctly concluded that Ecology's Order resulted in an unconstitutional *per se* taking of Lemire's property.

## II

### **INVALIDATION IS THE APPROPRIATE REMEDY WHEN AN ADMINISTRATIVE ORDER EFFECTS A TAKING**

Ecology takes issue with the superior court's decision to invalidate the Order, arguing that the only remedy for a taking is payment of just compensation. Br. of Appellant at 31-32. But Ecology's position is untenable for two reasons. First, Lemire's challenge arises under the Administrative Procedure Act (APA), and the APA authorizes invalidation as a remedy. Second, Ecology overlooks decisions from the U.S. Supreme Court and Washington Supreme Court invalidating regulations that violate the Takings Clause.

#### **A. The APA Provides for Invalidation of Regulations That Violate the Takings Clause**

The remedy in this case is controlled by the APA, the statutory mechanism for judicial review of agency orders, such as the Pollution Control Hearings Board's decision granting summary judgment to Ecology below. *See* RCW 34.05.570. The APA provides that courts may invalidate agency action that violates the Constitution. *Id.*; RCW 34.05.574. Notably, the APA does not authorize damages. RCW 34.05.574(3). Where the court finds that the Board upheld an Ecology Order that violates a constitutional principle, invalidation is the appropriate remedy.

Ecology cites three cases in support of its “compensation only” theory—*Orion Corp. v. State*, 109 Wn.2d 621 (1987); *Presbytery of Seattle v. King County*, 114 Wn.2d 320 (1990); and *Peste v. Mason County*, 133 Wn. App. 456 (2006)—but none of those cases apply here because none of them involved judicial review of an agency decision under the APA. *Orion* arose as an inverse condemnation claim involving several takings theories, and included a federal civil rights claim under 42 U.S.C. § 1983. 109 Wn.2d at 630. *Presbytery* was an inverse condemnation case as well. 114 Wn.2d at 323. *Peste* involved a challenge to a county’s decision to deny a rezone request. 133 Wn. App. at 462-63. *Peste* brought her claim pursuant to the Land Use Petition Act, which governs judicial review of local land use decisions. *Id.*; RCW 36.70C.020.

**B. Invalidation Is a Judicially Recognized Remedy for a Taking**

The U.S. Supreme Court and the Washington Supreme Court hold that takings claimants may be entitled to invalidation of regulations in lieu of just compensation. In his opinion concurring in part and dissenting in part in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), Justice Stevens noted that a “regulation that goes so ‘far’ that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle.” 533 U.S. at 639 n.1.

Justice Stevens based this statement on the Court's seminal takings case *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), in which the Court ruled that a statute taking private property without just compensation "cannot be sustained." 533 U.S. at 639 n.1; see *Lucas*, 505 U.S. at 1070 n.6 (1992) (Stevens, J., dissenting).

The U.S. Supreme Court invalidated a regulation that effected a taking in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). In that case, the Court examined the constitutionality of a California Coastal Commission decision requiring the Nollans to dedicate a public easement over their beachfront property as a condition for receiving approval to rebuild their house. *Id.* at 827. The Court held that enforcement of the condition effected a taking, and invalidated the condition, reversing a lower court decision which had allowed the condition to stand. *Id.* at 841-42.

The Washington Supreme Court also has invalidated government acts that constitute takings. In *Manufactured Housing*, the Court invalidated the Ownership Act upon concluding that the Act was a taking, in lieu of holding that just compensation must be provided. 142 Wn.2d at 354, 374-75.

## **CONCLUSION**

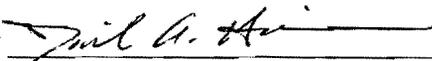
Ecology's Order effects an unconstitutional taking because it destroys fundamental attributes of Lemire's property ownership. Land and water are

the lifeblood of Lemire's ranch, yet Ecology's Order eliminated Lemire's access to both. This Court should therefore affirm the superior court's decision invalidating Ecology's Order pursuant to review under the APA.

DATED: March 28, 2012.

Respectfully submitted,

BRIAN T. HODGES  
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By   
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**CERTIFICATE OF SERVICE**

I, Daniel A. Himebaugh, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33<sup>rd</sup> Place, Suite 210, Bellevue, Washington.

On March 28 2012 true copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND WASHINGTON FARM BUREAU IN SUPPORT OF RESPONDENT JOSEPH LEMIRE were placed in envelopes addressed to:

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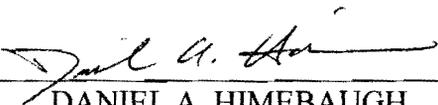
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28<sup>th</sup> day of March, 2012, at Bellevue, Washington.

  
\_\_\_\_\_  
DANIEL A. HIMEBAUGH