IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. LAWRENCE BEN ALLEN DICKERSON, Defendant-Appellant, Petitioner on Review.	Deschutes County Circuit Court Case No. MI092911 Court of Appeals No. A147467 Supreme Court No. S062108

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Deschutes County
Honorable Barbara A. Haslinger, Judge

Opinion Filed: December 18, 2013
Author of Opinion: Duncan, Judge
Concurring Judges: Schuman, Presiding Judge, and Nakamoto, Judge

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STATEMENT OF THE CASE

Nature of the Proceeding

Defendant and his son were hunting and saw what they thought was a deer. Defendant aided and abetted his son, who shot what turned out to be a decoy set up by the Oregon State Police.

The state charged defendant with several wildlife violations for illegal hunting, and a count of second-degree criminal mischief. Defendant moved for judgment of acquittal on the criminal mischief charge. He argued that he could not have intended to damage the property of another because he intended to take a deer, and a deer is not "property of another."

The trial court denied the motion, and the Court of Appeals affirmed, concluding that the state has a legal interest in deer and all wildlife, and thus, a deer is "property of another." *State v. Dickerson*, 260 Or App 80, 317 P3d 902 (2013). This court allowed defendant's petition for review which raised that single issue.

Question Presented and Proposed Rule of Law

A person commits criminal mischief by intentionally damaging the property of another. Is a wild deer in its natural setting the "property of another"?

No. The state has sovereign authority over wildlife, including deer. That authority is inherent to the state's sovereignty. The wildlife code's description of animals *ferae naturae* (of a wild nature or disposition) as "property of the state" means the historical notion that the state's sovereign interest is a "regulatory interest," not a proprietary, possessory, legal, equitable, or other similar "property" interest.

Summary of Argument

Criminal mischief prohibits damaging the "property of another." "Property of another" is a statutory term of art that refers to a "legal or equitable interest" in property. ORS 164.305(2). The wildlife code provides that "wildlife is property of the state." ORS 498.002(1).

The wildlife code's description of wildlife as "property of the state" hearkens to the feudal era, when the law combined concepts of sovereignty and property. The King held animals *ferae naturae* by virtue of his sovereign prerogative to manage all natural resources for the common good. As the law disentangled sovereign power from property, the common law came to understand wildlife as being just a subject of the King's regulation. The terminology remained.

After the American Revolution, sovereign authority over wildlife transferred to people of the individual states. Over time, courts began to

question the continued use of property terms to describe the state's authority over wildlife. That culminated with the United States Supreme Court overruling previous case law that relied on proprietary theories to exempt wildlife from the Interstate Commerce Clause.

Meanwhile, Oregon courts followed the common law. Cases predating any statutory analog to ORS 498.002(1) (defining wildlife as "property of the state") held that the state held title to wild animals to regulate their use and disposition. Thus, in Oregon, the state's sovereignty over wildlife inheres in sovereignty itself. It is not a statutory grant.

In 1913, the legislature passed its first statute that described wildlife as property of the state. The legislature enacted ORS 498.002 as part of the wildlife code of 1973. It did not intend to substantively change the preexisting statute. The legislative history shows that the legislature sought only to create a simpler, more cohesive code to regulate wildlife.

When the legislature enacted the criminal code in 1971, it did not intend ORS 164.305(2) (defining "property of another") to apply to animals *ferae naturae*. The legal dictionary definition of a "legal interest" is an **"**interest that has its origin in the principles, standards, and rules developed by courts of law as opposed to courts of chancery" or "an interest recognized by law, such as legal title." The legal dictionary definition of an "equitable interest" is an interest claimed "by virtue of an equitable title or claimed on equitable grounds,

such as the interest held by a trust beneficiary." Legal and equitable interests in property are common types of property interests that can be held by anyone, including the state. Those definitions are inapposite to a state's sovereign interest in animals. A sovereign interest is not a property interest drawn from law or equity but a power drawn from sovereignty. While the state can hold property interests—even in wildlife, if reduced to possession—the state does not hold a property interest in wild animals in their natural setting. Rather, it exercises a regulatory authority over them.

This understanding is consistent with legislative history. The legislature originally enacted ORS 164.305(2) with the Oregon Criminal Code. It defined "property of another" as a "possessory or proprietary" interest. Shortly thereafter, state fire agencies sought to amend the definition of property of another due to a rise in arsons in which people were burning their own property to commit fraud. The legislature amended the definition of "property of another" to refer to "property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property." It intended to expand the definition to apply to mortgagors and secured creditors. It did not intend to expand the definition beyond common types of property to include wildlife.

Instead, the legislature intended wildlife violations to proceed under the wildlife code. The wildlife code is a comprehensive scheme that covers nearly every aspect of interaction between humans and wildlife. It has its own violations, offenses, and procedure. It is a separate field from property crimes of general applicability.

Property offenses in Oregon follow common law in that they concern domesticated animals, but not wild ones. At common law, only an animal reduced to possession could become the subject of theft. As other jurisdictions have held, general property crimes like theft and criminal mischief do not apply to wildlife because wild animals cannot be property subject to theft unless reduced to possession.

Finally, ORS 164.305 provides the definition of property of another "unless context requires otherwise." When a statute uses that phrase, this court will modify the definition of the pertinent terms to best carry out the legislature's intent and avoid bringing a statute into conflict with other aspects of the statutory scheme. Here, the legislative text, context, and history demonstrate that the legislature intended "property of another" to refer to common types of property interests that anyone may hold, not *sui generis* sovereign interests held by the state by virtue of its sovereignty. Applying property crimes of general application to wildlife offenses conflicts with the

comprehensive nature of the wildlife code. Accordingly, even if this court concludes that the term "property of another" is broad enough to encompass wildlife, context requires interpreting the term more narrowly.

Statement of Historical and Procedural Facts

The Oregon State Police conduct deer decoy operations to test compliance with state wildlife laws. Tr 38. After sunset, on October 7, 2011, when it was no longer legal to hunt deer, Troopers Darin Bean and James Hayes set up two deer decoys off a road near Fall River, Oregon. Tr 38. Bean stayed near the decoys and observed while Hayes sat in a truck in a concealed location some distance away. Tr 42, 58. It was completely dark. Tr 43. At 7:45 p.m., Bean heard a vehicle approach. Tr 43. Defendant was the driver and his son, the side passenger. Tr 59. Bean saw the vehicle quickly stop, and then turn slightly to illuminate the decoys. Tr 43. He saw the front passenger's door open and get out. Tr 43. He then heard a gunshot, and shortly thereafter, a second gunshot from a different caliber gun, also from the passenger's side. Tr 43-44. Defendant revved the car's engine. Tr 44. Bean shined his flashlight at them and commanded them to stop. Tr 44. Defendant and his son looked at Bean and sped away. Tr 44. Bean radioed to Hayes that the passenger fired two shots. Tr 63. Hayes chased after them in his car. Tr 45.

After a mile, Hayes overtook defendant's vehicle and defendant stopped. Tr 59. Hayes found two rifles in the car. Tr 58. said that he shot them both. Tr 59. Both rifles smelled like they had been fired recently. Tr 61. Defendant showed Hayes his deer tags, and told him that he did not shoot, but that the rifles belonged to him. Tr 62. Defendant acknowledged his conduct and that he "had done something in violation of the wildlife laws." Tr 62. Bean determined that both decoys had been shot and damaged. Tr 47.

The state initially charged defendant with spotlighting from a motor vehicle, ORS 498.146 (Count 1), attempting to take a wildlife decoy, ORS 496.996 (Count 2), and unlawful hunting/fishing methods, ORS 498.002 (Count 3). In an amended information, it added a charge of second-degree criminal mischief, ORS 164.354 (Count 4). The state then dismissed Count 1 and renumbered the counts to reflect that change.

After the state amended the terms of the charging instrument at trial, amended Count 3 provided the following:

> "That the said defendant, on or about the 7th day of October 2009, in Deschutes County, Oregon, did unlawfully and intentionally damage ~~a wildlife decoy the~~ property of The State of Oregon, ~~by shooting the decoy in the head,~~ the said defendant having no right to do so nor reasonable grounds to believe that the defendant has such right."

App Br at ER-2.

The state proceeded under an aid and abet theory of liability. Tr 83. At trial, defendant moved for a judgment of acquittal on Count 3. He contended, *inter alia*, that because defendant and his son intended to shoot a deer, defendant could not have intended to aid and abet damage to the property of another because deer do not become property of the state until they are reduced to possession. Tr 103.

The court denied defendant's motion, ruling that if defendant aided and abetted an attempt to take the animal, he aided and abetted the damage to the decoy, and thus, "the State can proceed on the criminal mischief[.]" Tr 117. The parties' discussion of the issue continued through the court's ruling. The court asked. "[i]f it was a live deer, and the same thing happened, and they didn't shoot at a decoy, they shot at a live deer, could he be convicted of criminal mischief on an aid and abet theory? That's really the question[.]" Tr 119. Defendant responded that he could not, and, in response to the court's discussion of the state's ownership of wildlife, defendant contended that the state did not own wild animals unless the state reduced them to possession. Tr 121. After even more discussion, the court ruled that it would "deny all motions. Tr 142.

A jury convicted defendant of all three counts.

On appeal, defendant assigned error to the trial court denial of defendant's motion for judgment of acquittal on Count 3. The Court of Appeals affirmed in a written opinion. *Dickerson*, 260 Or App 80. ER-1.

Argument

A person commits second-degree criminal mischief when "[h]aving no right to do so nor reasonable ground to believe that the person has such right, the person intentionally damages property of another." ORS 164.354(1)(b). Because the state tried defendant as an accomplice, the state needed to prove that defendant had the specific intent "to promote or facilitate the commission of *the* crime'" committed by the principal. *State v. Lopez-Minjarez*, 350 Or 576, 583, 260 P3d 439 (2011) (quoting ORS 161.155) (emphasis in *Lopez-Minjarez*). Thus, the state needed to prove that when defendant aided and abetted his son in shooting the decoy, he did so with the intent that his son damage the "property of another."

The state's theory was that when defendant and his son shot at the decoy, they intended to shoot a live deer. If shooting—and damaging—a wild deer is not criminal mischief, defendant could not have intended to facilitate that offense. Accordingly, the question on review is whether wild deer are "property of another."

"Property of another" is a statutory term of art with the following meaning:

> "As used in ORS 164.305 to 164.377 [defining the crimes of arson, criminal mischief, tampering with cable television equipment, and computer crime], *except as the context requires otherwise*:
>
> "* * * * *
>
> "(2) 'Property of another' means *property in which anyone other than the actor has a legal or equitable interest* that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property."

(Emphasis added.)

Whether wild deer are "property in which anyone other than the actor has a legal or equitable interest" and, if so, whether "the context requires otherwise," is a matter of statutory interpretation. This court interprets a statute by examining its text, context, and relevant legislative history to ascertain the legislature's intended meaning. *State v. Gaines*, 346 Or 160, 166, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993).

I. Wild deer are "property of the state" by virtue of the state's historical sovereign authority over wild things within its territorial domain. That sovereign authority is unlike a modern concept of property, but akin to a regulatory authority.

Deer are wildlife. *See* ORS 496.004(19) (defining wildlife as including "wild mammals as defined by commission rule"); OAR 635-057-0000 (defining

wild mammals as "all mammals" and not listing deer among the rule's 21 excepted species of domesticated mammals).

> "Wildlife is the property of the state. No person shall angle for, take, hunt, trap or possess, or assist another in angling for, taking, hunting, trapping or possessing any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto."

ORS 498.002(1).

"Property" has many meanings. In the "strict legal sense," it is the "aggregate of rights which are guaranteed and protected by the government." *Black's Law Dictionary*, 1382 (3rd Ed 1951). It "is said to extend to every species of valuable right or interest," or, "more specifically, ownership." *Id*. It "is the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it." *Id*. It is the "dominion or indefinite right of use or disposition which one may exercise over particular things or subjects." *Id*. It also describes "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal." *Id*.

The nature of the state's relationship to wildlife is, as then-Presiding Judge Landau explained, "rich, extensive, and not quite as simple as the dictionary might otherwise suggest." *State v. Couch*, 196 Or App 665, 673, 103 P3d 671 (2004), *aff'd on other grounds*, 341 Or 610 (2006). This court must examine the origins and history of the state's sovereign authority over animals

to resolve this case. *See Denton and Denton*, 326 Or 236, 241, 951 P2d 693 (1998) ("Context includes related statutes as well as 'the preexisting common law and the statutory framework within which the law was enacted.'" (quoting *State v. Dahl*, 336 Or 481, 487, 87 P3d 650 (2004)). The following section examines that history, and concludes that ORS 498.002 does not vest the state with a property interest or legal authority. Rather, ORS 498.002(2) simply acknowledges what the state already has by virtue of its sovereignty: the unique and specific authority to regulate free-roaming wildlife within its territorial domain.

A. From the commons to the sovereign: the medieval entanglement of property and sovereignty.

The common law of things which are *ferae naturae*—"[o]f a wild nature or disposition"—traces its roots to medieval England. Before the Norman Conquest of 1066, Anglo-Saxon Kings "had only a limited responsibility for resolving larger-scale disputes and preserving the King's peace." Dale D. Goble and Eric T. Freyfogle, *Wildlife Law*, ch 2, § 1.a, 98 (2002). Communities had complex customary systems for managing natural resources. Dale D. Goble, *Three Cases/Four Tales*: *Commons, Capture, the Public Trust, and Property in Land*, 35 Envtl Law 807 821 (2005). A modern idea of "property" did not exist: "possession, not ownership was, is the leading conception."

Pollack and F. Maitland, 1 *The History of English Law Before the Time of Edward I*, 34 (1895).

The Norman Conquest of 1066 led to a "mix of Anglo-Saxon and feudal ideas [that] became the tenurial system that evolved into the common law of property." Goble, 35 Envtl Law at 821. Under the feudal system, lords permitted their direct vassals to use land and obtain servitudes (obligations for service) in exchange for that vassal's performance of obligations. *Id*. The conditions of tenure were based on, and subordinate to, the personal status of the tenant. Pollack and Maitland, 1 *History of English Law*, 17-19. Feudal lords resolved tenancy disputes in their own courts. *Id*. at 6.

Through the establishment of the Exchequer and the royal courts, the Norman Kings created a more centralized government. Goble and Freyfogle, *Wildlife Law*, at 99. Around 1166, Henry II required parties to buy writs to resolve land disputes in royal courts. Pollack and Maitland, 1 *History of English Law* at 125-26. Those writs required the King to a resolve a claim of wrongful deprivation of a tenancy or servitude, and in so doing, created the basis for resolving future claims to property. *Id*. That eventually transformed the medieval understanding of property and sovereignty. The local courts of the feudal lords no longer resolved tenurial disputes. *Id.* at 17. Rather, parties had a rigid mechanism by which they could obtain enforcement of property rights from the King. *Id.* at 125-129.

Modern distinctions between property and sovereignty were unknown in an era in which one's feudal superior controlled the land and the government. Gobleand Freyfogle, *Wildlife Law* at 203. What we would now consider exercises of state regulatory power—such as natural resource law—were the King's reified property interests:

> "What we now conceive as 'sovereignty'—governmental and regulatory power—generally began as property-like tenures. The lord of the manor, for example, was the chief landholder, the head of the local government, and the representative of the distant king. The king himself was, after all, only a manorial lord writ large; and the 'kingly power * * * a mode of dominium; the ownership of a chattel.' One of the great themes of medieval English legal history, the English legal historian Frederic Maitland has noted, is the "struggle of ownership and rulership to free themselves from each other.' In such a system, the power to hold court or to hang a criminal was based on personal relations between ruler and ruled, relationships that were slowly being transformed into property.
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> "In wildlife law, for example, the power to regulate taking of wildlife or habitat modification has one of its founts in the prerogative of the English kings to declare land to be a 'forest,' an area where the king had a right to hunt the 'beasts of the forest' such as the king's deer. In such a universe, the right to hunt was property-like. In trying to rationalize this untidy, ongoing evolution of the common law, Bracton concluded that the king was the 'owner' of animals *ferae naturae*: 'wild beasts, birds and fish * * * are * * * the property of the prince by the *jus gentium*. * * *.' Bracton was not alone."

Goble, 35 Envtl L at 822-24 (quoting 3 Henry de Bracton, *On the Laws and Customs of England* 41 (Samuel Thorne trans, 1997)) (other citations omitted) (first three omissions in original).

Jus gentium, the principle by which Bracton believed that wild animals were property of the King, meant "law which men of all nations use, which falls short of natural law[1] since that is common to all animate things born on the earth in the sea or in the air." 2 Bracton 27. It should not be confused with international law. *Black's Law Dictionary*, 997 (3rd Ed 1951). Rather, *jus gentium* refers to law that is "intrinsically consonant to right reasons and fundamentally valid and just," such as laws of marriage, child-rearing, and self-defense. *Id*. at 27.

Thus, the medieval understanding of the King's ownership of animals *ferae naturae* was that, like all things, rights, and privilege, they were property of the King. However, unlike a modern sovereign, the medieval English King did not interact with his subjects through regulatory authority, but through his feudal intermediaries and royal writs obtained through his courts.

B. Under the British common law, wild animals were property of the King by his "prerogative," that is, his sovereign power to exercise control over resources for the common good.

The leading common-law wildlife case is *The Case of the Swans*, 77 Eng Rep 435 (KB 1592). There, the Exchequer issued a writ to a sheriff of Dorset County to seize all unmarked swans. *Id.* at 435-36. Lady Joan Young and

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[1] Bracton believed that natural law (*jus naturale*) referred to the "impulse" (*i.e.* instinct) that "God himself, taught all living things." 2 Bracton 26.

Thomas Saunger filed a writ contending that when King Henry VIII confiscated the land—a former abbey—from the Catholic Church and deeded it to Young and Saunger's predecessors in interest, they acquired the right to hunt swans in the surrounding areas as had been done since "time out of mind." *Id*. at 436.

The court rejected their claim. It concluded that "all white swans not marked, which having gained their natural liberty, and are swimming in an open and common river, might be seised to the King's use by his prerogative, because * * * a swan is a Royal fowl, and all those, the property whereof is not known, do belong to the King by his *prerogative*." *Id*. at 436 (emphasis added).

The court's reference to swans belonging to the King's "prerogative" is significant, as that term was later used by Blackstone to describe the King's sovereign interest in wild animals. *Goble* and *Freypogle* at 206. A King's "prerogative" referred to three types of sovereign property. First, there were things that the King could not transfer because they were part of the *fisc*, the public treasury. *Id.* at 206. Those things "constitute the crown itself and concern the common welfare, as peace and justice, which have many forms[.]" 2 Bracton at 58. The second type referred to things that belong to the King "because of the king's privilege but do not so touch the common welfare that they may not be given and transferred to another, for if they are that will be to the damage of no one except the king." *Id*. (quoted in *Goble and Freypogle* at

206). Such property include treasure troves, whales, sturgeon and "other great fish," to which the King could grant a person a "special warrant" to take, but otherwise belong to the King by *jus gentium*. *Id*. Finally, there were things that the sovereign owned in a manner similar to any other kind of ownership: "things which belong to the crown and are not so sacred that they cannot be transferred, as estates, lands, tenements and the like, by which the crown of the king is strengthened; with respect to such time runs against the king as against any private person." 2 Bracton at 58. Swans, by their regal nature, belonged to the second class of sovereign property. 77 at 436-37; *Gable and Freypogle* at 207.

While we would use different concepts and terminology, aspects of these distinctions exist today. The administration of justice and the power of law are not "property" but powers of sovereignty. Nonetheless, like Bracton, we would consider this aspect of sovereignty to be inalienable. Likewise, we also recognize that the state must control distribution of some resources because of their nature or importance. Like a "special warrant," the state issues licenses for liquor sales, guns, gaming, broadcasting, hunting, and so on. Finally, the state may own some property in the same manner as an ordinary citizen.

The Case of the Swans is also significant for its explanation of the property rights a person may have in animals. A person could not own animals *ferae naturae* as absolute property, only animals *domite naturae* (things of a

domesticated nature).[2] The most a person could hold in animals *ferae naturae* were "qualified" or "possessory" property interests. *Id.* A person could acquire a qualified interest in wild animals through industry (by taming or capturing them), but that person would lose that interest if the animal returned to its wild state. *Id*. A person could acquire a possessory interest in otherwise wild animals that were unable to leave, such as young animals or birds that were unable to fly away. *Id.* at 438. Finally, a person could acquire possessory interest in wild animals if the King had granted that person a park or warren with the privilege to hunt. *Id*. However, that person "[had] no property" in those animals. *Id* Rather, he held them by privilege ("*ratione privilegii*") from the King "for his game and pleasure, so long as they remain in the privileged place." *Id*. Furthermore, so long as they were in an untamed state, no felony could be committed against them. *Id*.

In *Bowlston v. Hardy*, 78 Eng Rep 794, 794 (KB 1597) the court extended the reasoning of the *The Case of the Swans* to non-regal animals. There, Hardy had raised conies (rabbits) in a warren, and those conies damaged Bowlston's corn. *Id*. Bowlston brought an action for damage to his property.

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[2] The law of *ferae naturae* applied only to living animals. A person could acquire absolute title in a dead wild animal. Goble and Freyfogle, *Wildlife Law* at 105 (citing *Usher v. Bushnel*, 83 Eng Rep 9 (KB 1673).

Id. The court rejected Bowlston's argument. It concluded that due to the nature of wild animals, a person cannot own them in their wild state:

> "The action lies not; for although one hath conies in his land, he hath not any property in them, because they be *ferae naturae*. * * * For the property of the conies is not in any, nor can any man so keep them, but that they will break out of themselves; which is reason that none can have them in his own land, unless by grant from the King, or by prescription[.]"[3]

Id.

By Blackstone's time, in the 18th Century, the common law was moving past the feudalistic confusion of sovereignty and property toward a more modern concept of limited sovereign powers. The King's "prerogatives" were "necessary for the support of society" and limited by social contract not to "intrench [*sic*] any further on our natural liberties, than is expedient for the maintenance of our civil." I William Blackstone, *Commentaries on the Laws of England*, Ch 7, 230 (1765-69).

A "prerogative" was a "singular and eccentrical" power that by its very nature, only the King could enjoy:

> "By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*) something that is required or demanded before, or in

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[3] Prescription, the predecessor to adverse possession, was a method of proving an express grant when the owner lacked written documentation to support it. Goble and Freyfogle, *Wildlife Law* at 103.

> preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer."

Id. at 232.

Prerogatives could be direct, such as the power to appoint officers or declare war, or incidental, such as sovereign immunity, freedom from taxation, or other instances in which normal rules did not apply to the King. *Id*. at 233. In both of these cases, prerogatives represented the interests of the King as an eternal sovereign instead of a mortal man: "The king never dies. Henry, Edward, or George may die; but the king survives them all." *Id*. at 242.

Certain animals *ferae naturae* such as swans and royal fish were subject to the King's prerogative of revenue and his ownership of unowned things. 2 *Commentaries* at 410. The King held them "to preserve the peace of the public in trust to employ them for the safety and ornament of the commonwealth." *Id*.

The King's ownership of other animals *ferae naturae* derived from a different prerogative. *Id*. at 410. By law of nature, animals *ferae naturae* are unowned and belong to whomever first captures them, and beyond that, to whomever owns the land upon which wild animals may roam. *Id*. at 411. However, that natural right was subsumed by the sovereign's need to regulate

natural resources to encourage agriculture, preserve species, encourage employment, and disarm the public. *Id*. at 411-12.

Blackstone recognized that the idea that wildlife was property of the King conflicted with possessory concepts of property, especially the rule of capture. *Id*. at 411-15. Blackstone attributed this incongruity to the feudal understanding of sovereignty, where the "king [was] the ultimate proprietor of all the lands in the kingdom." *Id*. at 417. Wild animals, "having no other owner," belong to the king by his prerogative. *Id*. Blackstone acknowledged that while this idea seemed "novel," it was the product of historical accident "little known or considered" in an age when hunting was regulated by statue. *Id*. at 417-18.

The feudal doctrine that the sovereign held free-roaming wildlife as "property" was becoming anachronistic. Private property had become widespread, and those rights could limit sovereign power. That tension between property rights and sovereign authority helped disentangle "property" from "sovereignty." Goble and Freyfogle, *Wildlife Law*, at 382. Despite the law's use of the term "property" to describe the King's sovereign authority in wildlife, the law had come to recognize that the King did not hold wildlife as property; he had the authority to regulate them.

C. When the common law crossed the Atlantic, the states gained sovereign prerogative power over wildlife.

The American Revolution transferred the powers of sovereignty from the British Crown to the people of the individual states. *Martin v. Waddell's Lessee,* 41 US 367, 410, 10 L Ed 997 (1842). Individual states assumed the formerly royal prerogative to hold resources and common property for the public good, subject to federal power under the Supremacy Clause.[4] *Id.* Under Article IV, Section 3, Clause 1 of the Constitution,[5] new states have been admitted to the United States on "equal footing" to preexisting states. *Pollard v. Hagan,* 44 US 212, 222-23, 11 L Ed 565 (1845).

That transfer of sovereignty initially led the Court to conclude that the Dormant Commerce Clause did not apply to otherwise impermissible state

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[4] Article VI, Clause 2, of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

[5] Article IV, Section 3, Clause 1, of the Constitution provides:

> "New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress".

restrictions on the interstate transport of wildlife. *Geer v. Connecticut*, 161 US 519, 529-30, 16 S Ct 600 (1896). In *Geer*, the defendant demurred to a wildlife violation that prohibited the possession of game birds with the intent to distribute them out-of-state. *Id*. at 521. The Court rejected the demurrer as an unlawful restraint on interstate commerce. The Court reasoned that the state owned wildlife "not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of the people in common." *Id.* 529 (quoting *State v. Rodman*, 58 Minn 393, 51 NW 1098 (1894)). Despite the Court's understanding that a state lacked a proprietary interest in wildlife, the court held that "[t]he common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." *Id*. at 530.

The Court soon questioned its reasoning. In *Missouri v. Holland*, 252 US 416, 424, 40 S Ct 382, 64 L Ed 641 (1920), Missouri attempted to defeat the Migratory Bird Treaty Act of July 3, 1918, as an "unconstitutional interference with rights reserved to the states," specifically, its ownership of wild birds. Justice Holmes rejected the argument, concluding that the state could not claim to own birds that it did not even possess:

> "The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, *an assertion that is embodied in statute*. No doubt it is true that as between a State and its inhabitants the State 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. *Wild birds are not in the possession of anyone; and possession is the beginning of ownership.* The whole foundation of the State's rights 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."

Id. at 434 (Emphasis added.)[6]

The Court further undermined *Geer* in *Toomer v. Witsell*, 334 US 385, 68 S Ct 1156, 92 L Ed 1460 (1948). There the court rejected South Carolina's claim that its "ownership" of shrimp permitted it to discriminate against out-of-state fisherman. *Id*. at 402. The Court reasoned that the state's "property interest" in wildlife was "legal shorthand" for the state's "power to regulate an important resource":

> "The whole ownership theory, in fact, 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. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States."

The Court reiterated this theme in *Douglas v. Seacoast Products, Inc*.,

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[6] Justice Holmes's opinion reflects a practical basis for why wilds animals at large are not considered "property": their mobility. For that reason, some courts have not followed the doctrine of animals *ferae naturae* when addressing the legal status of naturally-occurring sedentary shellfish, such as mussels. *See, e.g.*, *McKee v. Gratz*, 260 US 127, 135, 43 S Ct 16, 67 L Ed 167 (1922) (so holding).

431 US 265, 286-87, 97 S Ct 1740, 52 L Ed 2d 304 (1977), where it invalidated a Virginia restriction on out-of-state fisherman. The Court held that state "ownership" of wildlife was an incorrect, vestigial "legal fiction" to which modern courts should not adhere:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution."

Id. at 284-85 (quoting *Toomer*, 334 US at 402).

The Court finally delivered the death blow to *Geer* in *Hughes v. Oklahoma*, 441 US 322, 334-35, 99 S Ct 1727, 1735, 60 L Ed 2d 250 (1979). At issue was whether an Oklahoma law that prohibited exporting minnows unconstitutionally restricted interstate commerce. *Id*. at 323-24. The court concluded that it did, for the reasons discussed in *Douglas*, above. *Id*. at 334-35.

Hughes did not call into question a state's sovereign interest in protecting wildlife. It just replaced the "obsolete" terminology of ownership with that of regulation: "To be sure, a State's power to preserve and regulate wildlife within

its borders is not absolute. But the State is accorded wide latitude in fashioning regulations appropriate for protection of its wildlife." *Id*. at 341-42.

In overruling *Geer*, *Hughes* brought wildlife law into the modern age. It placed wildlife regulation on the same footing as other "[state] interests in protecting the health and safety of their citizens." 441 US at 335-36. In so doing, it dismantled a chain of title that stretched from the Norman kings to the present-day. Regardless of how a state chooses to style its dominion over wild animals in their natural setting, it does not have a property interest. It has a sovereign interest: the power to regulate the access to or use of wildlife.

D. Oregon's sovereign interest in wild animals is a regulatory interest inherent to Oregon's sovereign power to manage natural resources.

Oregon enacted its first wildlife laws in 1872. *See* General Laws of Oregon, Crim Code, ch VIII, §§ 692 - 700 *et seq*, p 440-42 (Deady & Lane 1843-1872). Those laws did not assert any property interests in wild animals. *Id*. Instead they regulated the ways in which citizens could interact with wildlife. *See*, *e.g.*, *id.* at § 692 (providing for fines if a person takes a deer outside of specified months).

Thus, this court did not have statutory support when it first cited the rule that "[t]he State of Oregon, in its sovereign capacity and as the representative of its people, is the owner of, and under its police power can protect its food fishes." *State v. Schuman*, 36 Or 16, 58 P 661 (1899) (citing *Geer*, 161 US

519). In *Schuman*, the defendant was a fish monger who had sold trout that he had imported from Washington. *Id*. at 17. He challenged his conviction for violating a wildlife law that prohibited the sale of trout. *Id*. He contended that it was an unconstitutional taking and an unlawful exercise of state police power. *Id*. at 24-25.

This court upheld the law. It concluded that the law did not constitute a taking because it only restricted his right to sell trout, he could still use them for any other purpose. *Id*. This court held that the law was a valid exercise of police power because, although the trout "were undoubtedly wholesome food * * * the state in its sovereign capacity, for the best interest of its citizens, may prohibit the taking or sale of fish within its borders." *Id*. at 25. When trout are imported into Oregon, they "mingle[] with and become part of the mass of the property of the state, [and] they become subject to the laws thereof[.]" *Id*.

Schuman illustrates three important points: first, Oregon's authority over wildlife is drawn from sovereignty, not statute. Second, Oregon followed the common law of wildlife. And third, the early decisions on this topic viewed the sovereign relationship to wildlife as an exercise of "police power." That said, *Schuman* is not particularly helpful in explaining the nature of the state's relationship to wildlife. *Schuman* concerned the disposition of lawfully-captured trout and it is unclear whether this court's description of the "mass of the property of the state" referred to actual property of the state, or the

aggregation of private property within the state, which is also subject to state regulation. *Id*. The court declined to address, on preservation grounds, whether the statute unlawfully interfered with the defendant's "unqualified title" to an article of interstate commerce. *Id*. at 22.[7]

The leading early case applying the common law in Oregon was *State v. Hume*, 52 Or 1, 7, 95 P 808 (1908). In *Hume* the defendant demurred to a charge of canning salmon without a license. *Id*. at 2. He contended that it unlawfully restrained his fundamental right to pursue a common calling. *Id.* at 3. The court began its analysis by concluding that the licensing scheme would be unlawful unless it concerned an occupation "the pursuit of which may be prohibited by the state, as an exercise of police power[.]" *Id.* at 5. It concluded that the canning license was a lawful exercise of state police power. Under the common law doctrine of animals *ferae naturae*, sovereignty gave the state an "assumed ownership" of animals:

> "[Fish and game] are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted

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[7] It is unclear what role the fact of the trout having been lawfully captured played in *Schuman*. The court probably viewed the anti-sale law as a state regulation against the taking of fish out of season. That was the purpose of laws that restricted the possession of otherwise lawfully acquired fish. *State v. Fisher*, 53 Or 38, 98 P 713 (1908); *State v. McGuire*, 24 Or 366, 376-77, 33 P 666 (1893). *Fisher* and *McGuire* concerned prosecutions for possessing fish out of season. Despite statutory text suggesting the contrary, the court concluded that the defendants could raise a complete defense that they acquired the fish in season. 53 Or at 45; 24 Or at 379-80.

> before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens; and as an incident of the assumed ownership, the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture."

Id. at 5-6.

The state's "police power," which it exercises over wildlife, meant

> "the power to restrain common rights of liberty or property. When it is sought to exercise rights which are not common or fundamental, still more when special privileges are asked, the state may grant the required permit or license upon such conditions as it pleases, without observing the limitations which otherwise hedge about the exercise of the police power."

Id. at 6-7 (quoting Freund, *Police Power*, § 24); *see also Union Fishermen's Co-operative Packing Co. v. Shoemaker*, 98 Or 659, 674, 193 P 476, 481 (1920), *reh'g denied*, 98 Or 659 (1921) ("The police power embraces the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of society.").

We would now refer to a "police power" as a regulatory interest: the authority of the state to govern industries and other subjects of public welfare though licensing schemes, regulations, and the like. That is certainly consistent with *Hume*, which compared the state's police power over fish to its licensing of liquor sales. *Id*. at 6.

By the mid-20th Century, *Hume*'s description of the state's sovereign interest in animals *ferae naturae* had become well-established in Oregon. *See Anthony et al. v. Veatch et al*, 189 Or 462, 487, 220 P2d 493, *reh'g denied*, 189 Or 462 (1950) (applying rule); *Fields v. Wilson*, 186 Or 491, 498, 207 P2d 153, 156 (1949) (same); *State v. Lessard*, 146 Or 9, 11, 29 P2d 509 (1934) (same); *Monroe v. Withycombe*, 84 Or 328, 334-35, 165 P 227, 229 (1917) (same); *State v. Pulos*, 64 Or 92, 95, 129 P 128, 130 (1913) (same); *State v. Nielson*, 51 Or 588, 594-95, 95 P 720 (1908), *rev'd on other grounds*, 212 US 315, (1909) (same).

However, this court also understood that although cases about *ferae naturae* used terms like "title" and "property," the state did not have a proprietary interest in animals, but a regulatory one. *Monroe* is illustrative:

> "Fish are classified as *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common.
>
> "Upon its admission to the Union Oregon was vested with the title to land under the navigable waters within the state, subject to the public right of navigation and to the common right of the citizens of this state to fish.
>
> "* * * * *
>
> "In the exercise of its police power and for the welfare of all its citizens the state can regulate or even prohibit the catching of fish."

84 Or at 334-35.

Similarly, in *Anthony*, this court reviewed a restriction on the types of nets that a person could use to fish for salmon. 189 Or at 469-70. The plaintiff argued that a Washington opinion on the matter was not persuasive because unlike Oregon, Washington courts had held that wild fish within its waters "can be said to be the subject of ownership, as being a right of proprietorship, a *jus privatum*[8] rather than *jus publicum*,[9] the latter being a right a sovereignty." *Id*. at 487. This court rejected that argument, concluding that the Washington courts had correctly concluded that the state had title to fish in its "sovereign capacity." *Id*.

The foregoing demonstrates that when the legislature enacted ORS 498.002 in 1973, it did not start with a blank slate. Rather, it was building on common law begun nearly a millennium earlier. And it used the phrases, if not all of the concepts, of previous centuries. When the legislature used the term "property of the state," in ORS 498.002, it used the nomenclature of the ancient common law to describe what was simply a regulatory authority.

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[8] "*Jus privatum*" means "[p]rivate law; the law regulating the rights, conduct and affair of individuals as distinguished from "public law", which relates to the constitution and functions of government and the administration of criminal justice," *Black's* (4th Ed) at 998.

[9] "*Jus publicum*" means "[p]ublic law, or the law relating to the constitution and functions of government and its officers and the administration of criminal justice. Also public ownership, or the paramount or sovereign territorial right or title of the state or government." *Id*. at 999.

E. The legislature intended ORS 498.002(1) to codify the common-law understanding of the state's sovereign regulatory authority over wildlife.

The context of a statue includes its previous statutory iterations and related case law. *State ex rel. Penn v. Norblad*, 323 Or 464, 467, 918 P2d 426, 427 (1996). The legislature first codified the state's sovereign interest in wildlife in Senate Bill (SB) 145 (1913). It provided:

> *"[N]o person shall at any time or in any manner acquire property in, or subject to his dominion or control, any of the wild game animals*, fur-bearing animals, game birds, nongame birds or game fish, or any part thereof, of the state of Oregon, *but they shall always and under all circumstances be and remain the property of the state*, except that by killing, catching or taking the same in the manner and for the purpose herein authorized and during the period not herein prohibited, the same may be used by any person at the time, and in the manner, and for the purpose herein expressly provided. Any person hunting or trapping for or having in possession any game animals, fur-bearing animals, game birds, nongame birds, or game fish, at any time in any manner shall be deemed to consent that the title shall be and remain in the state for the purpose of regulating the use and disposition of the same, and such possession shall be deemed the consent of such person aforesaid, whether said animals, birds or fish were taken within or without the state."

General Laws of Oregon, ch 232, § 1 (1913) (emphasis added). SB 145 was codified as Oregon Laws, title XIX, ch X, § 2268 (1920).

Unfortunately, there is no legislative history about § 2268. On its face, it appears to have codified the common law. It described wildlife as property of the state, and authorized the taking of animals according to the manners and purposes provided by law.

While there were some minor, irrelevant changes, § 2268 (*renumbered as* ORS 498.005 in 1953), remained the law until the legislature enacted ORS 498.002 in 1973. ORS 498.002 was enacted by House Bill (HB) 2010. It was a product of the 1971-72 Interim Committee on Natural Resources, which had spent the previous two years barnstorming around the state gathering input for a comprehensive natural resource and wildlife code.

The purpose of the 1971-72 revisions was to conduct a "major housekeeping job." Statement on House Bill 2010, 1 (Feb 1, 1973) (Oregon State Game Commission). It involved "the simplification and clarification of existing language, elimination of conflicting material, repeal of unnecessary and archaic statutes, combination and grouping of laws into natural subject areas, modification of definitions and the addition of new law." *Id*.

The Interim Committee viewed its changes to the section that would become ORS 498.002 as achieving its purpose to "simplify the language and consolidate the duplicative." Tape Recording, Interim Committee on Natural Resources, Aug. 31, 1972, Tape 21, Side A (statement of Deputy Legislative Counsel Chuck Wilson). It believed that it made "no substantive changes." Minutes, 1971-72 Interim Commission on Natural Resources, April 21, 1972. ORS 498.002(1), which not only provides that wildlife is property of the state but also prohibits unlawful taking of wildlife, would "be one of those basic provisions of the wildlife code that the enforcement people will rely on."

Minutes, 1971-72 Interim Commission on Natural Resources, 12 (Aug 31, 1972). In other words, the legislature intended that ORS 498.002 serve as a comprehensive basis for regulatory enforcement of the wildlife code.

II. Wildlife is not "property of another" because a sovereign interest is not a legal or equitable interest in property.

ORS 164.305(2) defines "property of another" as "*property* in which anyone other than the actor has a *legal or equitable interest* that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property."

ORS 164.305(2) does not define "property" or "legal or equitable interest." The text does not explain whether the legislature intended sovereign interests to fall within the ambit of the statute. Ordinarily, this court looks to a legal dictionary to discern the plain meaning of legal terms. *Atkinson v. Board of Parole*, 341 Or 382, 387, 143 P3d 538 (2006). Therefore, this section begins by examining the plain meaning of ORS 164.305, before addressing its context and legislative history as it applies to the state's interest in wildlife.

A. The plain legal meaning of "property of another" is inapposite to the state's sovereign authority.

Notwithstanding the phrasing of ORS 498.002(1), the state does not have a proprietary interest in animals. *Monroe*, 84 Or at 334-35. Cases and statutes that discuss the state "owning" wildlife used "legal shorthand" for the state's regulatory authority over animals. *Toomer*, 431 US at 286.

Black's defines an "interest" in property as the following:

> "[T]he most general term that can be employed to denote a property in land or chattels. In its application to lands or things real, it is frequently used in connection with the terms 'estate,' right,' and 'title,' and, according to Lord Coke, it properly includes them all.
>
> More particularly it means a right to have the advantage accruing from anything; any right in the nature of property; but less than title; a partial or undivided right; a title to a share."

Black's Law Dictionary, 950 (4th Ed 1968).

There are immediate problems with applying the definition of "property interest" to the state's sovereign interest in wildlife. Wild animnals are not property in land. And "chattels" refers to "[a]n article of personal property; any species of property not amounting to a freehold or fee in land." *Id.* at 299. Wild animals are not property until reduced to possession. As *Douglas* explained, it is "pure fantasy" to think of anyone, including a government, as owning animals in their natural setting. 431 US at 284-85.

The definition of "legal interest" is:

> "**1.** An interest that has its origin in the principles, standards, and rules developed by courts of law as opposed to courts of chancery. **2.** An interest recognized by law, such as legal title."

Black's Law Dictionary 829 (8th Ed 2004).

Here, the Court of Appeals held that the state has a legal interest in wildlife because the state has traditionally enforced its authority over wildlife in courts of law according to principles developed therein. *Dickerson*, 260 Or

App at 86. The problem with that conclusion is that while the contours of the state's sovereign authority developed in courts of law, it did not arise from writs available in legal courts. It is inherent to the sovereign. It arose from feudal understandings of sovereign prerogatives. When the state passed its first wildlife regulations in 1872, it did not have, and did not need, court authorization. Sovereign authority gives the state its police power. *Hume*, 52 Or at 5. The state uses that power to regulate wildlife and many other subjects. Sovereign power is better described as the source of law than a creation of it.

Finally, "an equitable interest" has the following definition:

> "An interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary."

Black's (8th Ed) at 829.

This, too, does not capture the state's sovereign authority with wildlife. "Equitable title" refers to "[a] right in the party to whom it belongs to have the legal title transferred to him; or the beneficial interest of one person whom equity regards as the real owner, although the legal title is vested in another." *Black's* (4th Ed) at 1656. Granted, some cases have referred to the state's sovereign authority as a trust. For example *Hume* described the state as having "title" that it holds "in its sovereign capacity in trust for all its citizens." 52 Or at 5-6. Similarly, *Monroe* held that the state owned animals "not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its

people in common." 84 Or 334-35. However, the history of the doctrine of *ferae natuae* amply demonstrates that the sovereign's power over animals is inherent to its sovereignty. Neither the King nor the state have drawn on equity to enact a game regulation.

In sum, none of the dictionary definitions of "legal or equitable interests" in property accurately capture the sovereign's relationship to wildlife. The reason is that the term "property," as it relates to wildlife, is a vestigial concept that hearkens to the feudal combination of property and sovereignty. Whereas Bracton or even Blackstone might have characterized the power to regulate animals as being "property" of the sovereign by prerogative, that concept has no place in modern law. A "sovereign interest" is *sui generis*, completely beyond the meaning of legal or equitable interests in property.

B. The 1971 Criminal Code intended "property of another" to apply to property in which a person had a possessory or proprietary interest.

The legislature enacted ORS 164.305(2) in the Oregon Criminal Code of 1971. It provided that "'property of another' means property in which anyone other than the actor has a possessory or proprietary interest. ORS 164.305(2) (1971). Like today, it applied to arson as well as criminal mischief. ORS 164.305 (1971). The Criminal Law Revision Commission intended that it would protect "the person who may be the lawful occupant of the property, notwithstanding that the actor might have title or vice versa." Commentary to

the Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 141, 148 (July 1970).

If the 1971 Criminal Code's version of "property of another" was solely at issue, this court would have little trouble concluding that wild animals were not property of another. As discussed, it is well-established that under Oregon law, the state does not have a proprietary or possessory interest in wildlife in its natural setting. It has a sovereign, or regulatory, interest. Thus, the remaining question is whether the legislature intended to expand the scope of "property of another" to include wildlife when it amended ORS 164.305.

C. The legislature did not intend to include sovereign interests within its definition of "property of another."

In the Commentary to the 1971 Criminal Code, the Commission explained that arson did not include "destroying property with the intent to defraud the insurer," as that would constitute theft by deception. *Id*. at § 144, 148. The Commission did not want to impose the "relatively severe penalties for arson" for defendants who damaged only their own property in an effort to defraud an insurer. *Id*. However, a person could commit arson if "anyone other than the actor had a possessory or proprietary interest in the property." *Id*.

Five years later, the legislature reversed course and passed HB 2384 (1977), which enacted the present version of ORS 164.305(2). HB 2384 was advanced by the Oregon Fire Chiefs, Oregon Fire Marshalls, and the Portland

Fire Bureau as a response to an increase in arson, especially to automobiles, as part of insurance fraud. Minutes, House Committee on the Judiciary, March 15, 1977, 2. The fire department had no way to secure prosecution. *Id.* The problem was three-fold. Under the law at that time, district attorneys would not prosecute a mortgagee who burned his property because the mortgagor was not considered an owner of property until the mortgagee breached their agreement. *Id*. Another problem was that if a person had absolute title to burned it, filed a claim, and the insurance company denied it, there was no victim who suffered property damage. *Id*. Because insurance companies are reluctant to pay claims for suspected arson, the highest conviction the state could obtain was an attempted theft, which district attorneys did not prosecute because it was "not worth their time." Minutes, House Committee on the Judiciary, March 31, 1977, 5.

After contemplating several proposed statutory changes, including creating a new crime of theft by arson, the legislature amended only the definition of property of another. It is unclear why it did so, it might have stemmed from concern about creating an elevated offense when a defendant damaged only his own property and that conduct already constituted theft by deception. Minutes, House Committee on the Judiciary, May 23, 1977, 20-21, 23. When the bill reached the senate, it protected mortgagors, secured parties, and joint owners in equity, such as spouses. Minutes, Senate Committee on the

Judiciary, June 20, 1977, 10-11. Throughout deliberations, the legislature described criminal mischief as pertaining to "personal property." *See, e.g.*, Minutes, House Committee on the Judiciary, May 23, 1977, 19 (Rep Gardner discussing the difference between criminal mischief and arson and the fact that historically, the destruction of personal property did not present as much danger as arson).

The legislative history does not reflect a legislative intent to expand the scope of "property to another" to include sovereign interests. The legislature was concerned with defendants' destruction of their own property and ordinary property interests that could be held by any victim, not just state actors. It did not believe it was creating problems with other substantive sections of law. *Id.* at 18. The legislature did not intend to impact *sui generis* sovereign interests that inhere to the state.

D. The comprehensive nature of the wildlife code demonstrates that the legislature intended wildlife violations to proceed under the wildlife code, not under criminal laws of general application.

The context of ORS 498.002(1) confirms what the legislative history suggests: the wildlife code comprehensively and completely regulates the interactions between Oregon's occupants and its wildlife.

The wildlife code spans three chapters and regulates diverse topics from the administrative authorization for the State Department of Fish and Wildlife,

ORS 496.080, to the possession of walking catfish, ORS 498.242. The policy of the wildlife code is that the State Fish and Wildlife Commission (FWC) should "represent the public interest of the State of Oregon" to promote the state's policy goals:

> "It is the policy of the State of Oregon that wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state. In furtherance of this policy, the State Fish and Wildlife Commission shall represent the public interest of the State of Oregon and implement the following coequal goals of wildlife management:
>
> "(1) To maintain all species of wildlife at optimum levels.
>
> "(2) To develop and manage the lands and waters of this state in a manner that will enhance the production and public enjoyment of wildlife.
>
> "(3) To permit an orderly and equitable utilization of available wildlife.
>
> "(4) To develop and maintain public access to the lands and waters of the state and the wildlife resources thereon.
>
> "(5) To regulate wildlife populations and the public enjoyment of wildlife in a manner that is compatible with primary uses of the lands and waters of the state.
>
> "(6) To provide optimum recreational benefits.
>
> "(7) To make decisions that affect wildlife resources of the state for the benefit of the wildlife resources and to make decisions that allow for the best social, economic and recreational utilization of wildlife resources by all user groups."

ORS 496.012.

The administrative delegation described by ORS 496.012 is a modern act of sovereign authority. Nonetheless, it would not look completely out of place in Blackstone's description of the King's prerogative power over wildlife. ORS 496.012 directs the FWC to "provide the optimum recreational and aesthetic benefits for present and future generations" and to "make decisions that affect wildlife resources of the state * * *." That is exactly the type of state police power, or regulatory authority, discussed in the cases interpreting the authority of the state over animals *ferae naturae*.

The extensive delegation of sovereign authority given to the FWC leaves little room for district attorneys to use criminal laws of general applicability, such as property crimes, as a means of implementing and interpreting the wildlife code. The wildlife code provides what the legislature has determined to be appropriate penalties for wildlife code violations. *See* ORS 496.992 (providing penalties). Crimes committed without a culpable mental state are varying levels of violations depending on the type of animal. ORS 496.992(2)-(8). Crimes committed with a culpable mental state are Class A misdemeanors. ORS 496.992(1). A second or subsequent taking of certain prize animals within a 10-year period is a Class C felony if committed with a culpable mental state. ORS 496.992(9). The wildlife code also provides statutory civil damages for the unlawful taking wildlife "as provided by [that] section." ORS 496.705(5).

Amounts vary depending on the type of animal, from $20 for a silver gray squirrel to $25,000 for a moose with antlers. ORS 496.705(2).

The wildlife code covers nearly every imaginable interaction a person might have with wildlife. Indeed, there is even a statute that regulates the circumstances of the instant case:

> "(1) A person commits the crime of unlawful taking of wildlife if:
>
> "(a) The person discharges a firearm or other hunting device, traps, or acts toward a wildlife decoy in any manner consistent with an unlawful taking of wildlife; and
>
> "(b) The wildlife decoy is under the control of law enforcement officials.
>
> "(2) As used in this section, "wildlife decoy" means any simulation or replication of wildlife, in whole or in part, used by law enforcement officials for purposes of enforcing state wildlife laws."

ORS 496.996. The existence of ORS 496.996 is direct evidence that the legislature contemplated the type of conduct at issue in this case and intended that it be treated as a wildlife violation.

Even though the legislature enacted the wildlife code alongside the criminal procedure code in 1973, it did not leave criminal enforcement of wildlife violations to the general criminal law. The wildlife code details procedures for arrests (with a separate provision for Sundays); citations; the role of police; search warrants; warrantless seizures; forfeitures; and investigations.

See ORS 496.605 to 496.700 *et seq*. (so providing). Those provisions evidence a legislative intent to separate violations of wildlife code from general criminal prosecutions.

Finally, as if wildlife code were not detailed enough, the administrative rules propagated by the Department of Fish and Wildlife, OAR chapter 635, fill in any gaps. Those 85 divisions of rules extensively detail the requirements for various kinds of wildlife licenses, hunting and fishing specifications for various geographical locales, regulations for commercial fisheries, permits for holding animals in captivity, establishing hunting reserves, and so on.

The extensive scope and detail of the wildlife code give proof to the intention of the 1970-71 Interim Natural Resources Committee to establish a complete administrative regime to regulate interactions between humans and wildlife. Yet the code does not contemplate prosecuting wildlife violations as general property crimes. It is hard to imagine that the legislature intended the property crime definition of "property of others" to interfere with its use of the term "property" in the wildlife code.

E. Context and related case law demonstrates that the legislature did not intend that general property crimes apply to violations of the wildlife code.

This court presumes that the legislature enacts statutes in light of preexisting law. *Weber and Weber*, 337 Or 55, 67-68, 91 P3d 706 (2004). Thus, when the legislature drafted the statutes at issue here, presumably it was

aware that the rule at common law was that a person could not commit theft of property in which "no man hath any determinate property." Sir Matthew Hale, I *Pleas of the Crown* 510 (1736). Likewise, no one could steal animals *ferae naturae*; they were not property until they had been reduced to possession:

> "Larceny cannot be committed of things, that are *ferae naturae*, unreclaimed, and *nullius in bonis* [no one's property], as of deer or conies, tho in a park or warren, fish in a river or pond, wild-fowl, wild swans, pheasants.
>
> "But if any of these are kild, larceny may be committed of their flesh or skins, because now they are under propriety.
>
> "Of domestic cattle, as sheep, oxen, horses, etc * * * larceny may be committed, for they are under propriety, and serve for food.
>
> "Of those beast or birds, that are *ferae naturae*, but reclaimed and made tame or domestic, and serve for food, larceny may be committed, as deer, conies, pheasants, partridges, but then it must be, when he, that steals them, knows them to be tame[.]"

Id. at 511. *See also* Blackstone, 3 *Commentaries* at 235 (Larceny "cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *ferae naturae*, and unreclaimed * * * [b]ut if they are reclaimed or confined * * * larceny may be committed."); Wayne R. LaFave, 3 *Substantive Criminal Law* § 19.4(c), 84, 84 n 39 (2003) ("For larceny the property must be "of another," for this reason wild animals, even though on

another's land, cannot be the subject of larceny[.]" (citing *People v. Hutchinson*, 169 Misc 724, 9 NYS 2d 656 (1938)).

Oregon's property crimes follow these common-law distinctions exactly. A person can commit theft of livestock, a companion animal, or a "wild animal removed from habitat or born of a wild animal removed from habitat." ORS 164.055. Similarly, a person commits first-degree criminal mischief if the person damages "property of another * * * which is a "livestock animal." ORS 164.365(1)(a)(D). Even the offense of "unlawful transport of meat animal carcasses" limits the definition of "meat animals" to "any live cattle, equines, sheep, goat, or swine," *i.e.*, animals *domite naturae*. ORS 164.863(3)(c); *see also* ORS 164.887 (limiting offense of interference with agricultural operations "domestic farm animals" and livestock); ORS 164.889 (applying offense of interference with agricultural research to animals at "an agricultural research facility").

When the legislature intends a property offense to overlap with the wildlife code, it knows how to say so. The offense of "placing offensive substances in waters" applies to persons who discard "any dead animal carcass" into a water source. ORS 164.785(1)(a). However, it is a defense to that statute that the carcass is a fish carcass, that the person returned the fish to the water from which they caught it, and that the person retained proof of compliance with FWC angling provisions (*i.e.*, the person had a fishing license).

The foregoing demonstrates a harmonious relationship between property crimes and the wildlife code, with each regulating separate interests. The fact that Oregon's property crimes follow common law is especially salient because the state's claim to wildlife as property is also rooted in the common law.

State v. Bartee, 894 SW2d 34 (1995) is instructive. There, the state indicted the defendants for theft of white-tailed deer and white-tailed deer antlers, and criminal mischief. *Id.* at 37-38. The defendant's moved to quash the indictment on the grounds that white-tailed deer could not be the subject of theft or criminal mischief. *Id*. at 38. The trial court granted the motion and the state appealed. *Id*.

In Texas, as in Oregon, deer are wildlife, and wildlife is, per statute and by common-law doctrine, "property of the people of the state." *Id*. at 41-42. The Texas statute at issue defined property as "tangible or intangible personal property including anything severed from land[.]" *Id*. at 40 (citing *former* Tex Penal Code § 28.01(3) (1985)).

After initially concluding that "nothing in the Penal Code itself * * * exclude[d] white-tailed deer," the court "flip[ed] through the pages of time," tracing the history of the law of animals *ferae naturae* from being the property of the King through his personal prerogative, to the development of the modern regulatory theory that "the ownership of wild animals, as far as they are capable

of ownership, is in the state not as proprietor, but in its collective sovereign capacity." *Id*. at 41 (citing *State v. Ward*, 328 Mo 658, 40 SW 2d 1074 (1931)). It also acknowledged the common-law rule that "'[w]ild animals are not subject to theft until they become the property of an owner. This they do upon being reduced to possession.'" *Id.* at 42 (quoting *Runnels v. State*, 152 Tex Crim 268, 213 SW2d 545 (1948) ("This seem to be the settled law in all jurisdictions.")).

Turning to the statute defining wildlife as "property of the state," the court concluded that although the legislature declared wildlife to be property of the state, it also created a comprehensive regulatory scheme and a Parks and Wildlife Department. Through those regulations and that agency, the state represented the common ownership animals and exercised its police power. *Id*. Thus, the court concluded, "[a] white-tailed deer in its natural state of liberty cannot be the subject of the theft and criminal mischief statutes." *Id* at 43.[10] *See also State v. Longshore*, 141 Wash 2d 414, 426, 5 P3d 1256 (2000) (holding that naturally occurring clams are not *ferae naturae*, and thus, are "property of another" for the purposes of theft)*; United States v. Long Cove Seafood*, 582 F2d 159, 165 (2d Cir 1978) (upholding dismissal of charges of

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[10] *Bartee* upheld the indictment because the state's evidence could ultimately show that the state had reduced the deer to possession before the defendant killed it. 894 SW2d at at 43. However, the rarity with which those "limited and circumscribed situations" could occur was "undoubtedly one of the reasons why we have been unable to find a single reported case in Texas involving the theft of deer from the State." *Id.*

trafficking stolen clams under the theory that, by statute, New York "owns all * * * shellfish" because statute was intended to "regulate" the use of wildlife).

Defendant has only found one case in which a court has upheld a property crime conviction in which the subject of the crime was wildlife. *State v. Fertterer*, 255 Mont 73, 841 P2d 467 (1992), *overruled on other grounds by State v. Gatts*, 279 Mont 42, 51-52, 928 P2d 114 (1996).[11] There, the defendants were convicted of criminal mischief, which includes damage to "public property." *Id*. at 77. After concluding that *Hughes* did not apply beyond the context of the Dormant Commerce Clause, the court followed *Geer* and concluded that because the state had "an ownership interest in wild game held by it in its sovereign capacity," wild animals were "public property."

This court should give little credence to *Fertterer*. Although *Fertterer* purported to be based in common law, it ignored common-law distinctions between the sovereign interest in wild animals at large, and captured animals. Perhaps more importantly, *Fertterer* missed the bigger difference between sovereign interests and public property. A police car is public property. For the

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[11] *Gatts* concluded that *Fetterer* was "manifestly wrong" in concluding that Montana's wildlife laws did not provide the exclusive remedy for wildlife violation. 279 Mont at 51-52. It concluded that, "faced with such a comprehensive body of law on fish and game matters, and such clear legislative intent to limit felony charges for fish and game-related conduct to those expressly set forth in [the wildlife code]" it could not interpret the wildlife code as permitting additional or different criminal charges." *Id*. at 48.

most part, the state owns the car just as a private citizen would. The state may buy it from or sell it to anyone. If someone steals a police car, that person commits theft. If someone damages the car, the person commits criminal mischief. The *authority* of the police car is not public property. It represents a sovereign interest in public safety. The state cannot alienate its *authority* to enforce laws and punish criminals, because those are inherent to the state. Wildlife is similar. While in its natural setting, the state has a sovereign interest in it by virtue of its sovereignty over its territorial domain. But it is not public property, like a police car, unless reduced to possession. This reflects the practical reality that police cars, like all other public property, cannot motor off on their own accord over state lines and belong to a new sovereign authority. *Fertterer* was wrongly decided.

III. Even if this court were to define "legal or equitable" interests broadly enough to encompass sovereign interests, context requires excluding wildlife from criminal property crimes of general application.

The text of ORS 164.305 shows that the legislature was concerned about applying the definition of "property of another" too broadly. It provides that its definitions apply "*except as the context requires otherwise.*" That phrase means that, "in some cases, the circumstances of a case may require the application of a modified definition of the pertinent statutory terms to carry out the legislature's intent regarding the statutory scheme." *Necanicum Inv. Co. v.*

Employment Dep't, 345 Or 138, 142-43, 190 P3d 368 (2008). However, even then, this court uses its statutory interpretive methodology to determine whether "the context—including the structure and purpose of the statutory scheme as a whole—demonstrates that the use of that given definition would be inappropriate, because the result of such use would conflict with one or more aspects of the structure or purpose of the statutory scheme." *Astleford v. SAIF*, 319 Or 225, 233, 874 P2d 1329 (1994) (cited in *Necanicum*, 345 Or at 143).

The text and history of ORS 164.305(2) suggest that the legislature intended the phrases "property of another" and "legal and equitable interests" to refer to common property interests, not sovereign interests. The text of ORS 164.305(2) provides that "property of another' means property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair, *even though the actor may also have such an interest in the property*." That reveals two things: first, that the legislature intended "property of another" to refer to "property," and second, that the legislature intended "property" to refer to things in which the defendant could also have had "such an interest." The very nature of a sovereign interest is that no one may also have such an interest *vis-à-vis* the state. *See Fields*, 186 Or at 499 ("The right to kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, and is not a right inhering in any individual.") (quoting Am Jur, 24 *Game and Game Laws*, 382, § 10)).

As discussed, the history and context of the ORS 164.305 reflects that when the legislature first enacted that statute, it intended it to protect possessory or proprietary interests. Those common types of interests are not exclusive to the state by virtue of its sovereignty. Moreover, the legislature enacted ORS 164.305 against the backdrop of the common law, which recognized that animals *ferae naturae* could not be the subjects of property crime. The legislature amended ORS 164.305(2) in 1977 to include crimes in which the victim was a mortgagor, secured creditor, or a joint owner in equity. Those interests are not sovereign interests: anyone may hold them. The legislature did not intend to expand the concept of property to include wildlife. In fact, most of the legislative history concerned defendants damaging their own property.

The context of the wildlife code also requires interpreting "property of another" to exclude wildlife. The legislature intended the wildlife code to be a comprehensive scheme apart from property crimes of general applicability. It governs nearly every way in which people interact with wildlife, and has its own procedures to prosecute and punish wildlife violations.

Interpreting "property of another" to include wildlife blurs the lines that the legislature drew between offenses *malum prohibitum* under the wildlife code and offenses *malum in se* under the criminal code.

For example, if wildlife constitutes "property of another" for criminal mischief, it would constitute "property" subject to theft.[12] Thus, any intentional taking of an animal worth $1,000 or more would constitute first-degree theft or first-degree criminal mischief, both Class C felonies. ORS 164.055(1)(a), (3); ORS 164.365(1)(a), (3). Any intentional taking of animal worth $10,000 or more would be aggravated theft, a Class B felony. ORS 164.057. For a first-time offender under the under the wildlife code, those violations would be misdemeanors. ORS 496.992(1).[13] So, for example, if a person knowingly violated a wildlife regulation in taking a mountain goat, the person would be facing a Class B felony. *See* ORS 496.705 (providing that the civil damages for taking a mountain goat are $10,000). The same conduct is a misdemeanor under the wildlife code.

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[12] ORS 164.005(5) defines "property" for the purposes of theft as "any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract."

[13] ORS 496.992(9) provides that

> "[t]he second and each subsequent conviction within a 10-year period for the taking of a raptor or the taking of game fish with a total value of $200 or more or the taking of antelope, black bear, cougar, deer, elk, moose, mountain goat or mountain sheep in violation of any provision of the wildlife laws, or any rule adopted pursuant thereto, which occurs more than one hour prior to or more than one hour subsequent to a season established for the lawful taking of such game mammals or game fish is a Class C felony if the offense is committed with a culpable mental state."

Examples abound. A person who, with criminal negligence and on separate occasions, fished for trout in the wrong section of a stream or with the wrong kind of tackle, would not only be guilty of theft or criminal mischief, but could expose himself to an enhanced repeat property offender sentence. *See* ORS 137.717 (providing qualifying offenses and presumptive sentences for repeat property offenders). Or, as in this case, a person could be separately convicted of separate wildlife and property crimes.

Beyond wildlife violations, a broad definition of "property of another" implicates any regulatory interest developed in courts of law or equity. The state, through its sovereign authority, has regulatory interests in nearly every aspect of modern life, from childhood education to public utilities. A person commits third-degree criminal mischief by "tampering or interfering with" the property of another. ORS 164.345(1). If people stage a protest in front of a nuclear power plant, have they committed criminal mischief by interfering with the state's sovereign interest in delivering power?

It conflicts with the statutory structure and legislature's intent to interpret "property of another" to include wildlife. The legislature chiefly intended criminal mischief to protect proprietary and possessory rights in personal property, but expanded the law to include mortgagors and secured creditors. It did not intend to encroach upon its comprehensive wildlife code.

CONCLUSION

This case exemplifies Justice Holmes's famous phrase: "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, *The Common Law*, 1 (1881). Interpreting "property of another" to include wildlife is a triumph of formalism that frustrates the legislature's purposes. It ignores the fact that "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." *Id*.

For the foregoing reasons, this court should reverse the Court of Appeals and reverse defendant's conviction for criminal mischief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,653 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on July 31, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

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