

Verified Correct Copy of Original 9/6/2023.

1 to enter its property as to eight of the ten categories of entries requested. *Id.*, pp. 1-2.
2 Respondents do not object to Petitioner entering their property for the land survey and
3 an appraisal field visit. *Id.* p. 8. Respondents also request an award of their attorney fees
4 and expenses. *Id.* p. 1.

5 The parties asked the court to take judicial notice of the transcript of the
6 proceedings in *Idaho Power v. 516 Ranch Partnership*, Case No. 21CV47273 held on
7 April 8, 2022, and April 14, 2022. The court agreed and took judicial notice of the
8 transcript of this earlier hearing as it involved the same parties and the same property.
9 All references to the transcript are from this earlier hearing. *Id.*

10 **FACTS**

11 Petitioner is a public utility. ORS 772.205(2). It is building a 500-kilovolt
12 transmission line that will span approximately 293 miles. The line will transfer
13 electricity generated in Boardman, Oregon to Idaho Power's Hemingway substation in
14 Owyhee County, Idaho. This is known as the Boardman to Hemingway Transmission
15 Line (B2H) project. Petitioner initiated the project in 2007 by filing an application for a
16 right of way to cross federal lands administered by the U.S. Bureau of Land
17 Management (BLM). In March 2008, Petitioner filed an application to cross federal
18 lands administered by the Forest Service. And in August 2008, Petitioner submitted a
19 notice of intent to submit an application for a site certificate from the Oregon Energy
20 Facility Siting Council (EFSC). EFSC is responsible for overseeing the development of
21 high voltage transmission lines in Oregon. In 2013, Petitioner submitted its preliminary
22 application for a site certificate (ASC) to the Oregon Department of Energy (ODOE). The
23 ASC was approved on September 27, 2022. On March 9, 2023, the Oregon Supreme
24 Court affirmed the final order of EFSC in *Stop B2H Coalition v. Oregon Department of*
25 *Energy*, 370 Or 792 (2023).

26 Respondents own approximately 12,000 acres of ranch and timber land in Union
27 County, Oregon (the property). This property lies on the proposed path of the B2H
28 project. On this property, Respondent raises cattle, harvests timber, and allows hunting

1 for a fee. This property has retained the environmental characteristics that are unique to
2 northeastern Oregon, such as open grass land and forested ridges and ravines. The
3 property is home to many native plant and animal species and significant cultural and
4 archeological sites.

5 A utility corridor already crosses the property. The Confederated Tribes of the
6 Umatilla Indian Reservation, the Oregon Water Resource Department, and several
7 utility companies use this corridor. *Tr.* 39, 42, 122-23. These entities have negotiated
8 easements with Respondents to enter on and cross Respondents' property to reach and
9 work within the corridor. Testimony revealed that these repeated entries divert
10 Respondents' time away from performing the many tasks necessary to operate the
11 ranch. *Tr.* 41, 46, 78-81, 130-131. Naturally this costs Respondents time and money; how
12 much time and money is difficult to discern. *Id.* Some of the easement holders help pay
13 for the cost of road and bridge improvements to allow them to access their easements.
14 For example, Respondents were forced to abandon a road used to access the utility
15 corridor in 2011. *Tr.* 39-41. Respondents then built a new road and bridge at significant
16 expense. *Id.* After construction, Respondent asked the utility easement holders to help
17 pay the cost for the new road and bridge. Several did pay. *Id.*

18 Construction on the B2H project is scheduled to start this year. Petitioner must
19 ensure that the project's path complies with permitting and siting requirements,
20 including that it does not conflict with any protected resources. To ensure compliance,
21 Petitioner must conduct surveys, tests, and samples on Respondents' property. These
22 include three-toed woodpecker and northern goshawk surveys, rare plant inspection,
23 gray owl and flammulated owl surveys, wetlands inspection, terrestrial visual encounter
24 surveys, noxious weeds surveys, cultural resource surveys, enhanced archeological
25 surveys, and historic properties management plan surveys, geotechnical drilling, land
26 surveys, and an appraisal field visit. These various surveys and tests are delineated on
27 *Exhibit 2*, which is attached to Order to Show Cause.

1 Although Petitioner cannot say with certainty how many entries will be required
2 for it to accomplish these various surveys, tests and samplings (*Tr.* 136-160), all totaled,
3 it appears they may amount to as many as thirty-two visits onto the property. *Exhibit 2.*
4 The visits will primarily involve driving pick-up trucks and sometimes a trailer onto the
5 property with crews of anywhere from one to five persons. *Id.* Four of the entries will
6 involve some ground disturbance. *Id.* Two to five entries would be with “pickup trucks
7 and trailer” *Tr.* 147. The geotechnical drilling will involve a “small track vehicle.” *Id.* The
8 “small track vehicle” is “probably larger than a F-350, but it’s not quite as big as a large
9 excavator.” *Id.* The geotechnical drilling involves a “drilling crew” drilling “boreholes”
10 approximately 6 to 8 inches in diameter. *Exhibit 2*, p. 4. The holes will be backfilled. *Id.*
11 Petitioner acknowledges each entry will cause some interruption to the landowner. *Tr.*
12 155-56.

13 Petitioner sent letters to Respondents requesting access to the property to
14 conduct pre-condemnation surveys, testing and sampling and studies. Respondents
15 have refused to allow Petitioner to enter their property. There was a previous show
16 cause action with the same parties in *Idaho Power v. 516 Ranch Partnership*, Case No.
17 21CV47273. That case was dismissed without prejudice prior to a decision on the merits.

18 **DISCUSSION**

19 Respondents raise two issues. The first is whether they are entitled to
20 compensation in advance of Petitioner’s entry, pursuant to ORS 35.220(3). The second
21 is whether a pre-condemnation entry is a “taking” under the Oregon and/or United
22 States Constitutions.

23 This case involves a statutory construction of ORS 35.220. I first begin with the
24 text and context of the statute. *State v. Chakerian*, 325 Or 370, 376-80 (1997). In doing
25 so, I give words of common usage “their plain, natural and ordinary meaning.” *PGE v.*
26 *Bureau of Labor and Industries*, 317 Or 606, 610-12. This first level of analysis also calls
27 upon the court to look at prior case law interpreting the statute. *State v. Toevs*, 327 Or
28

1 525, 532 (1998). If the legislative intent is clear from that analysis, the court’s inquiry is
2 over. *PGE*, 317 Or at 611.

3 ORS 35.220 provides the statutory authority for a condemner, such as Petitioner,
4 to “examine, survey, conduct tests upon and take samples from any real property that is
5 subject to condemnation by the condemner.” ORS 35.220(1) allows that “[a] condemner
6 may conduct tests upon or take samples from real property only with the consent of the
7 owner or pursuant to an order entered under subsection (2) of this section.” Here, the
8 owner, Respondents, objected. Now the condemner, Petitioner, seeks an order from the
9 court allowing it to enter Respondents’ property to conduct various surveys, tests, and
10 samples.

11 As Respondents objected to the entry, we move on to subsection (2). Subsection
12 (2) provides that if the owner objects “the condemner may file a petition with the court
13 seeking an order providing for entry upon the property and allowing such examination,
14 survey, testing or sampling as may be requested by the condemner.” ORS 35.220(2).
15 The court may then “enter an order establishing reasonable terms and conditions for
16 entry and for any examination, survey, testing or sampling of the property requested by
17 the condemner.” *Id.* The statute also allows for “reasonable compensation” to the owner.
18 *Id.* “Reasonable compensation for damage or interference under subsection (3) of this
19 section may be established in the proceeding either before or after entry is made upon
20 the property by the condemner.” *Id.*

21 Subsection (3) discusses when the owner is “entitled to reasonable
22 compensation.” ORS 35.220(3)(a)(b). “An owner is entitled to reasonable compensation
23 for: (a) Any *physical damage* caused to the property by the entry upon or examination,
24 survey, testing or sampling of the property, . . .” (emphasis added). An owner is also
25 “entitled to reasonable compensation for: . . . (b) Any *substantial interference* with the
26 property’s possession or use caused by the entry upon or examination, survey, testing or
27 sampling of the property.” *Id.* (emphasis added).
28

1 The next step is to determine the meaning of the terms “physical damage” and
 2 “substantial interference” in their statutory context. The statute does not define
 3 “physical damage,” or “substantial interference.” Under *PGE*, 317 Or at 611, I must then
 4 give words of common usage their plain, natural, and ordinary meaning. I look to the
 5 dictionary to determine the meaning of terms not defined by the statute. *State v.*
 6 *Ausmus*, 336 Or 493, 504 (2003). The relevant dictionary definition of “physical” is “2 .
 7 .b: of or related to natural or material things as opposed to things of mental, moral,
 8 spiritual, or imaginary ***.” *Webster’s Third New Int’l Dictionary* 1706 (unabridged ed
 9 2002). “Damage” is defined as “ . . . loss due to injury: injury or harm to person,
 10 property, or reputation.” *Id.* at 571. Therefore, in order to recover reasonable
 11 compensation under the physical damage scenario, found in subsection (3)(a), the pre-
 12 condemnation entry must cause actual harm to the land, crops or structures.

13 The statute also does not define “substantial interference.” Thus, I again look to
 14 the dictionary. In considering its statutory context, the relevant definition of
 15 “substantial” is “c: considerable in amount, value or worth ***.” *Webster’s Third New*
 16 *Int’l Dictionary* 2280 (unabridged ed 2002). In considering its statutory context, the
 17 most applicable definition of “interference” is “2: the act of meddling in or hampering an
 18 activity or process ***.” *Id.* at 1178. Therefore, in order for the property owner to recover
 19 reasonable compensation under the “substantial interference” scenario found in
 20 subsection (3)(b) there would have to be evidence of a considerable hampering of their
 21 quiet enjoyment of their property and/or their ability to produce an income from their
 22 property.

23 There is case law interpreting the meaning of “substantial interference.” Oregon
 24 courts have wrestled with the definition of “substantial interference” when trying to
 25 determine what constitutes a “taking” under Article I, section 18 of the Oregon
 26 constitution. *Hawkins v. City of La Grande*, 315 Or 57, 68 (1992). “Most cases boil the
 27 definition down to a test [of a taking] of whether there has been a ‘substantial’
 28 interference with property rights.” *Id.* The *Hawkins* court concluded that a “flooding

1 that destroys or materially decreases the value of private property” amounts to a
2 “substantial interference.” *Id.* A “substantial interference with the property’s possession
3 or use” (ORS 35.220(3)(b)) under the *Hawkins* test would “involve ‘substantial taking
4 or destroying,’ or deprivation of ‘a substantial part’ of property.” *Id.*

5 The first question raised by Respondents is whether ORS 35.220 entitles them to
6 compensation in advance of Petitioner’s entry. The statute allows that “[r]easonable
7 compensation for damage or interference under subsection (3) . . . may be established in
8 the proceeding either before or after entry is made upon the property by the
9 condemner.” ORS 35.220(2). But to be entitled to reasonable compensation there must
10 be evidence of “physical damage” or “substantial interference.” ORS 35.220(3)(a)(b).
11 This is a high bar. With the pre-condemnation entries contemplated here it would be
12 very difficult to prove before the entry how the property would be physically damaged.

13 There is evidence that Respondents’ “possession or use” of their property will be
14 interfered with by Petitioner’s pre-condemnation entries. However, it will be very
15 difficult to determine beforehand whether Petitioners’ entries onto the property would
16 rise to the level of “substantial interference.” This is especially so considering the
17 definition of “substantial interference” adopted by Oregon precedent. In Oregon,
18 “substantial interference” essentially amounts to a “taking.” *Hawkins*, 315 Or at 68.
19 Indeed, a “substantial interference with the property’s possession or use” under
20 Oregon’s precedent would involve “substantial taking or destroying,” or deprivation of
21 “a substantial part” of property.” *Id. quoting Moeller v. Multnomah County*, 218 Or 413,
22 427 (1959). This is all to say that the legislature has set a nearly insurmountable burden
23 for the property owner to prove they are due compensation before entry. Here,
24 Respondents were unable to mount enough proof to establish a “substantial interference
25 with the property’s possession or use caused by the entry upon or examination, survey,
26 testing or sampling of the property.” ORS 35.220(3). Based on the evidence submitted at
27 the hearing, ORS 35.220(3) does not allow Respondents to recover reasonable
28 compensation before entry.

1 That does not end the inquiry, however. The second question is whether the pre-
 2 condemnation entries amount to a “taking” under the Oregon and/or United States
 3 Constitutions for which “just compensation” is required. I first look to the Oregon
 4 Constitution. *Lenrich Associates v. Heyda*, 264 Or 122, 126-127 (1972). Article I, section
 5 18, of the Oregon Constitution provides that: “Private property shall not be taken for
 6 public use *** without just compensation; nor except in the case of the state, without
 7 such compensation first assessed and tendered; . . .” Oregon’s “takings” clause (Article I,
 8 section 18) is generally the same as the “takings” clause of the Fifth Amendment to the
 9 Federal Constitution. *Seuss Builders v. City of Beaverton*, 294 Or 254, 259 n 5 (1982).
 10 However, the “criteria for an unconstitutional taking are not necessarily identical under
 11 both state and federal constitutional provisions, . . .” *Ferguson v. City of Mill City*, 120
 12 Or App 210, 213 (1993). When the entry involves a “permanent physical occupation . . .
 13 the rule is the same: Government action that effects a permanent physical occupation of
 14 private property is a taking.” *Id. citing Lucas v. So. Carolina Coastal Council*, 112 S Ct
 15 2886 (1992); *Tomasek v. Oregon Highway Com’n*, 196 Or 120, 151 (1952); *Morrison v.*
 16 *Clackamas County*, 141 Or 564, 568 (1933).

17 In the case at bar, we are not confronted with a permanent physical occupation.
 18 The Petitioner seeks a series of temporary entries to conduct examinations, surveys,
 19 tests, and samples. *Exhibit 2*. The question comes down to whether Respondents have a
 20 right to exclude Petitioner from their property without “just compensation.”

21 The right to exclude others from one’s property is one of the central tenants of
 22 American property law and has been adopted by Oregon courts. “As a general rule, one
 23 of the incidents of property ownership is the right to invite other persons to use property
 24 or, conversely, to exclude them from doing so.” *State v. Hall*, 181 Or App 536, 540
 25 (2002), *citing* Robert A. Cunningham et al., *The Law of Property* § 7.1, 411 (1984) (right
 26 to invite or to exclude “is the most nearly absolute of the many property rights that flow
 27 from the ownership or other rightful possession of land”). “Implicit in the concept of
 28 ownership of property is the right to exclude others; that is, a true owner of land

1 exercises full dominion and control over it and possesses the right to expel intruders.”
 2 63C *Am Jur 2d, Property* § 27. The first edition of the American Law Institute’s
 3 *Restatement of the Law of Property* announced that: “A possessory interest in land
 4 exists in a person who has a physical relation to the land of a kind which gives a certain
 5 degree of physical control over the land, and an intent so to exercise such control as to
 6 exclude other members of society in general from any present occupation of the land.”
 7 *Restatement of Property*, § 7 (1936). Justice Brandeis put it this way: “An essential
 8 element of individual property is the legal right to exclude others from enjoying it.”
 9 *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J.,
 10 dissenting). Professor Jan Laitos described the right to exclude as one of those “rights
 11 valued so highly, that the abolishment will result in the offending law being declared
 12 unconstitutional.” Jan Laitos, *Law of Property Protection*, § 5.03[a](1999).

13 Oregon courts have long held that “any destruction, restriction or interruption of
 14 the common and necessary use and enjoyment of the property of a person for public
 15 purpose constitutes a ‘taking’ thereof.” *Morrison v. Clackamas County*, 141 Or 564, 568
 16 (1933). To the extent that ORS 35.220 allows a condemner to enter onto one’s property
 17 to conduct examinations, surveys, tests, and samples of the property without the
 18 consent of the owner and without just compensation, it is unconstitutional. Such action
 19 amounts to a taking, under Article I, section 18 of the Oregon Constitution. This is
 20 because it deprives the property owner of that most essential property right: the right to
 21 exclude others from one’s property. In order to comply with the Oregon Constitution,
 22 the condemner must pay “just compensation” before the pre-condemnation entry onto
 23 private property.

24 It is true that ORS 35.220(3)(a)(b) allows the property owner to recover
 25 “reasonable compensation” for pre-condemnation entry if the entry causes “physical
 26 damage” or “substantial interference.” However, the Oregon Constitution does not set
 27 such a high bar before the property owner may receive “just compensation.” Under the
 28 Oregon Constitution “[p]rivate property shall not be taken for public use *** without

1 just compensation.” The statute, ORS 35.220, takes from the property owner one of the
2 most essential rights of property ownership: the right to exclude others from one’s
3 property.

4 This is not to say that all forms of entry amount to a taking that trigger the “just
5 compensation” requirement of Oregon’s takings clause. “[M]any government-authorized
6 physical invasions will not amount to takings because they are consistent with
7 longstanding background restrictions on property rights.” *Cedar Point Nursery v.*
8 *Hassid*, 141 S.Ct. 2063, 2079 (2021) (interpreting whether a taking has occurred under
9 the Fifth Amendment of the United States Constitution). There are “traditional common
10 law privileges to access private property” which do not amount to a “taking.” *Id.* For
11 example, Respondents agree that “Petitioner’s request for entry to conduct a land survey
12 and an appraisal field visit within the scope of ORS 35.220, ORS 772.210 are consistent
13 with ‘longstanding background restrictions on property rights.’” *Respondent’s Hearing*
14 *Memorandum*, p. 3. However, the remaining thirteen entries delineated on Exhibit 2, in
15 the aggregate, amount to a taking and require “just compensation.” Oregon
16 Constitution, Article I, section 18.

17 The next step is to consider whether the pre-condemnation entries contemplated
18 by ORS 35.220 violate the takings clause of the Fifth Amendment to the United States’
19 Constitution. They do. The United States Supreme Court holding in *Cedar Point*
20 *Nursery v. Hassid*, 141 S. Ct. 2063 (2021) is dispositive. In *Cedar Point Nursery*, the
21 Supreme Court considered whether a California regulation that granted labor
22 organizations a “right to take access” to an agricultural employer’s property in order to
23 solicit for union support constituted a *per se* physical taking under the Fifth and
24 Fourteenth Amendments. *Id.* at 2069.

25 The Takings clause of the Fifth Amendment is applicable to the States through
26 the Fourteenth Amendment. *Id.* at 2071. The takings clause of the Fifth Amendment
27 provides “nor shall private property be taken for public use, without just compensation.”
28 The Supreme Court has long recognized that protection of property rights is “necessary

1 to preserve freedom” and “empowers persons to shape and to plan their own destiny in a
2 world where governments are always eager to do so for them. *Id.* quoting *Murr v.*
3 *Wisconsin*, 137 S.Ct 1933 (2017). It is true, that “property may be regulated to a certain
4 extent, [but] if regulation goes too far it will be recognized as a taking.” *Cedar Point*
5 *Nursery*, 141 S.Ct. at 2072, quoting *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158
6 (1922).

7 The case at bar involves an access regulation not unlike the one which concerned
8 the Supreme Court in *Cedar Point Nursery*. In *Cedar Point Nursery* the access
9 regulation appropriated “a right to invade the growers’ property and therefore
10 constitute[d] a *per se* physical taking.” *Id.* The regulation at issue in *Cedar Point*
11 *Nursery* granted “union organizers a right to physically enter and occupy the growers
12 land for three hours per day, 120 days per year.” *Id.* Although the regulation did not
13 restrain “the growers’ use of their own property, the regulation appropriate[d] for the
14 enjoyment of third parties the owners’ right to exclude.” *Id.*

15 This is no small matter. “The right to exclude is ‘one of the most treasured’ rights
16 of property ownership.” *Id.* quoting *Loretto v. Teleprompter Manhattan CATV Corp.*,
17 102 S.Ct. 3164 (1982). The Supreme Court has stressed that the right to exclude others
18 from one’s property is “universally held to be a fundamental element of the property
19 right,” and is “one of the most essential sticks in the bundle of rights that are commonly
20 characterized as property.” *Cedar Point Nursery*, 141 S.Ct. at 2072, quoting *Kaiser*
21 *Aetna v. United States*, 100 S.Ct. 383 (1979). Indeed, the right to exclude has been
22 referred to as the “*sine qua non*” of property. *Cedar Point Nursery*, 141 S.Ct. at 2073,
23 citing *Merrill, Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).

24 To paraphrase *Cedar Point Nursery*, the effect of the line of Supreme Court
25 precedent on this question is that statutory authorized invasions of property, whether by
26 plane, boat, cable, beachcomber, or union organizer are physical takings requiring “just
27 compensation.” *Cedar Point Nursery*, 141 S.Ct. at 2074; *United States v. Causby*, 66
28 S.Ct. 1062 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164

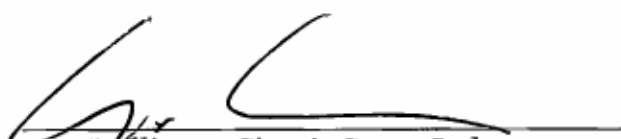
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(1982); *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987). Here, ORS 35.220 *et seq* has appropriated a right of access to the Respondents' property. By doing so the statute allows the condemner (Petitioner) to enter Respondents' property, without Respondents' consent, to examine, survey, test, and sample Respondents' property. The statute appropriates a right to physically invade the Respondents' property to conduct the various examinations, surveys, tests, and samples. Under Supreme Court precedent, this is a *per se* physical taking, which under the Fifth Amendment requires "just compensation." *Cedar Point Nursery*, 141 S.Ct. at 2074. In conclusion, Petitioner may not enter Respondents' property to conduct the surveys, tests and samples without paying "just compensation."

The question remains, though, what is "just compensation" for the entries. The Petitioner shall first "attempt to agree with [Respondents] with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof." ORS 35.235. If no agreement is reached "then an action to condemn the property may be commenced." ORS 35.245.

Mr. Smith shall draft the limited judgment consistent with this opinion and may submit a petition for costs and disbursements.

DATED THIS 6th day of September, 2023


Wes Williams, Circuit Court Judge