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Regulatory Takings and Resources: What Are
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Regulatory Takings and Resources: What Are the Constitutional Limits?

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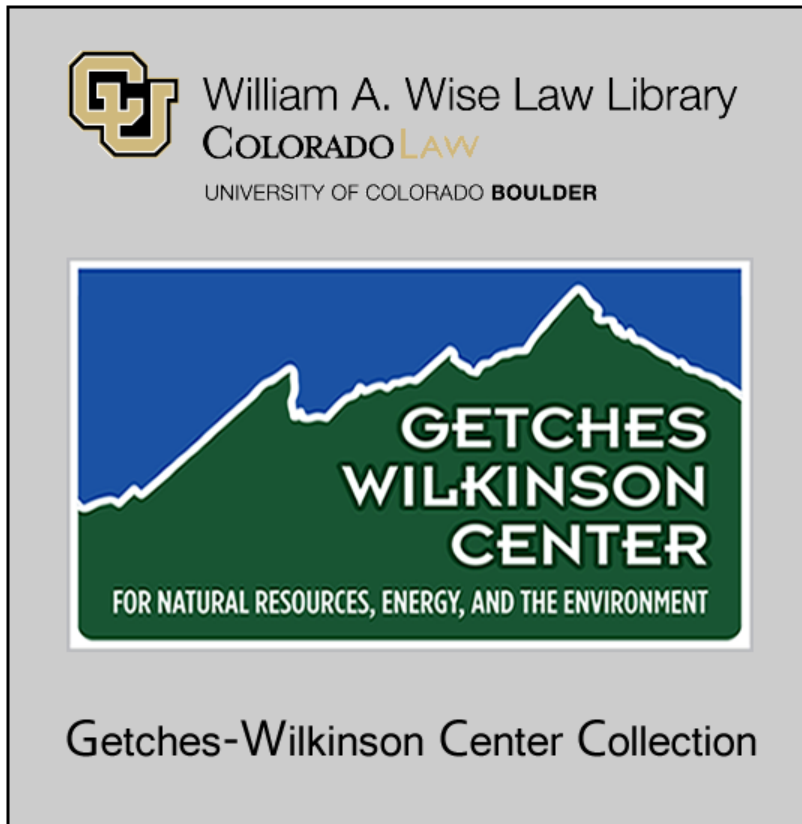
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**REGULATORY TAKINGS AND RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?**

**John D. Echeverria
General Counsel
National Audubon Society
Washington, DC**

**REGULATORY TAKINGS & RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?**

**Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado**

June 13-15, 1994



**Regulatory Takings and Resources:
What Are the Constitutional Limits?**

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Outline

- Takings legislation: Regulatory gridlock and subsidies for special interests masquerading as the defense of individual liberties.
- The Fifth Amendment turned on its head: Why are legislators debating constitutional rights?
- Developments in Congress: The takings amendment to the Safe Drinking Water Act
- Developments in the States.
- The Reagan Revolution and the Clinton/Gore Administration

Attachments

- Examples of Takings Proposals in Congress
- State "takings" bills

Examples of Takings Proposals in Congress

Takings Amendment to Safe Drinking Water Act. On May 18, the Senate adopted takings language as an amendment to Safe Drinking Water Act legislation. The amendment directs federal agencies to interpret and administer their existing authorities so as to avoid, to the extent practicable, constitutional takings. The amendment also establishes a takings assessment process for any policy or regulatory action "likely" to effect a taking. The amendment provides for judicial enforcement, subject to a six year statute of limitations.

HR 3875, Rep. (Billy) Tauzin (D-LA), "Private Property Owners Bills of Rights," would require agencies to provide landowners "compensation" if a regulatory action under the Endangered Species Act or section 404 of the Clean Water Act reduces the fair market value of property by 50% or more, and would prohibit a federal agency from collecting information on private property without written consent from the owner.

S 1915, Sen. Richard Shelby (D-AL), "Private Property Owners Bill of Rights," Senate companion to HR 3875.

HR 385, Rep. Gerald Solomon (R-NY), "Private Property Rights Act of 1993," would prohibit federal agencies from issuing any regulation unless and until the attorney general has certified that the agency is in compliance with EO 12630.

S 177, Senate Minority Leader Robert Dole (R-KS), "Private Property Rights Act of 1993," Senate companion to HR 385.

HR 561, Rep. Gary Condit, (D-CA), "Private Property Protection Act of 1993," similar to HR 385, S 177. Would prohibit any agency from issuing a regulation until it receives certification from the attorney general that the agency is in compliance with EO 12630 on takings or other similar procedures.

S 2006, Senate Minority Leader Robert Dole (R-KS), "Private Property Rights Act of 1994," similar to original version of Dole amendment to Safe Drinking Water Act in Senate.

HR 1330, Rep. James Hayes (D-LA), "Comprehensive Wetlands conservation and Management Act of 1993," contains a provision requiring federal government to buy out owners of high-value wetlands regulated under section 404 of the Clean Water Act.



MEMORANDUM

TO: Interested Persons
FROM: Susan A. Murray
DATE: May 18, 1994
RE: State "takings" bills

Most state legislatures are adjourning, making this a good time to review the final status of the state takings bills introduced this year. All told, there were 86 bills in 33 states, showing us that the orchestrated effort upon the part of special interest groups to enact detrimental takings legislation continues.

This year, Idaho, Mississippi, Tennessee and West Virginia adopted takings laws and joined the five other states -- Utah, Indiana, Washington, Delaware and Arizona -- that already had adopted takings laws. Eight of these nine bills were "assessment-type" takings bills which would either (i) require state agencies to prepare extensive reviews of proposed laws and regulations, ostensibly to avoid potential takings, or (ii) require the state attorney general to establish a process to evaluate proposed regulations for takings implications.

West Virginia's measure only applies to the Department of Environmental Protection. Utah's legislature extended the takings assessment burden to local governments (last year's bill applied the assessment process solely at the state level). Arizona passed two unique takings measures. One creates a "property rights ombudsman," and the other permits the county board of supervisors to compensate property owners for possible reductions in property values as a result of a county regulation. Mississippi also passed a measure related to landowner payment for regulations which allows landowners of forested areas to seek compensation from state or local governments for rules that may impinge on forestry operations and cause losses in value of over 40%.

Arizona's takings assessment bill is pending on a citizens' referendum and will be on the November 1994 ballot. The Missouri Governor is currently considering the takings assessment bills that passed the Missouri legislature. Legislative success in these states will rest on the continued perseverance of citizen activists.

We have had several significant victories. The Kansas Governor, citing cost estimates of over \$1 million, vetoed the takings bill that reached her desk. Several states, including Maine, Maryland, New Mexico and Wyoming, which debated takings proposals in past years, did not even consider the issue. These and other legislative victories -- in Alabama, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, and New Hampshire and Virginia -- are due to the tireless efforts of citizen activists like Ann Tate, Carmi McLean, Jo Evans, Larry Means, Cindy Hildebrand, and Patty Field, just to name a few.

For more state information and copies of state takings laws contact me at the letterhead address.

TAKINGS STATE LEGISLATIVE UPDATE FOR 1994 SESSION

STATE	# OF BILLS	STATUS
ALABAMA	2	Died in committee.
ARIZONA	5	Referendum pending; 2 other bills died.
CALIFORNIA	6	1 passed General Assembly; 4 died.
COLORADO	2	Died in committee.
DELAWARE	2	1 Passed Senate and was tabled; 1 died.
FLORIDA	5	Died in committee.
GEORGIA	2	Died in committee.
HAWAII	5	Died in committee.
IDAHO	1	1 signed into law.
IOWA	4	Died in committee.
KANSAS	1	Passed legislature and vetoed by Governor.
KENTUCKY	1	Died in committee.
MASSACHUSETTS	2	1 died in committee; other pending.
MINNESOTA	2	Died in committee.
MISSISSIPPI	4	1 signed into law; 2 passed Senate and died.
MISSOURI	3	2 passed and awaiting Gov's signature.
NEBRASKA	1	Died in committee.
NEW HAMPSHIRE	2	Killed on House floor.
NEW YORK	2	Pending in committee.
OKLAHOMA	2	1 passed House & died; other died in cmte.
OREGON		Initiative pending.
PENNSYLVANIA	2	Pending in committee.
RHODE ISLAND	4	One passed House; study commission.
SOUTH CAROLINA	2	Pending in committee.
SOUTH DAKOTA	1	Died in committee.
TENNESSEE	4	1 signed into law; 3 died.
UTAH	1	Signed into law.
VERMONT	3	Pending and unlikely to pass.
VIRGINIA		Study committee extended.
WASHINGTON	9	Initiative pending; 9 bills died.
WEST VIRGINIA	3	1 signed into law; 2 died.
WISCONSIN	2	Died in committee.
WYOMING	1	Failed introduction in the Senate.

ALABAMA

H.B. 413

- Sponsored by R. Lindsey
- COMPENSATION
- This bill died in the House. The Attorney General and several agencies held a joint press conference vigorously opposing this bill.

S.B. 349

- P. Lindsey
- COMPENSATION
- S.B. 349 passed out of the Agriculture, Conservation & Forestry Committees after a hearing, and died on the Senate floor.

ALASKA

- No takings bill has been introduced.

ARIZONA

S.B. 1053 [1992] PENDING ON REFERENDUM

- Sponsored by the majority of the Natural Resources and Agriculture Committee.
- ASSESSMENT
- After the Governor signed S.B. 1053 in 1992, public interest groups circulated a petition and gathered enough signatures for a voter referendum to repeal the law. The law will go before the voters in the November 8, 1994 general election. Until then the law will not go into effect. Governor Symington has addressed the Arizona Farm Bureau and People for the West in support of the law. The Governor said if he had to choose between protecting the environment and protecting private property rights, he is "no longer an environmentalist."

Takings opponents are waging a campaign supporting the referendum under the banner of Arizona Community Protection Alliance.

H.B. 2405

- Bowers, Edens, Groscost, Lynch, McGibbon, Overton, Preble, Schottel

- COMPENSATION FOR WILDLIFE DEPRADATIONS
- Died in Natural Resources Committee.

H.B. 2408

- Bowers, Edens, Groscost, McGibbon, Overton, Preble, Schottel
- COMPENSATION FOR RESTRICTED USE OF PROPERTY DUE TO THE PRESENCE OF ENDANGERED SPECIES
- This bill died in the Rules and Natural Resources, Agriculture & Rural Development Committees.

H.B. 2428/S.B. 1555

- McGibbon, Johnson and thirteen co-sponsors
- COMPENSATION
- This bill, which was signed into law, will allow the board of supervisors to establish procedures for compensating property owners for any reduction in value of property as a result of a county ordinance, regulation or other activity. The original bill, H.B. 2428, failed passage, and was passed as the renumbered S.B. 1555.

H.B. 2589

- Killian and nine co-sponsors
- CREATES PROPERTY RIGHTS OMBUDSMAN; STATE CLAIMS TO STREAM BEDS
- This bill attempts to resolve streambed ownership disputes by creating a "property rights ombudsman" who will hear any "takings" disputes over regulations. After passing out of the House Natural Resources and the Appropriations Committees, the bill passed the legislature and was signed into law as Chapter 277.

ARKANSAS

There is no legislative session until 1995.

CALIFORNIA

A.B. 145

- Richter
- ASSESSMENT
- The bill passed out of the General Assembly (43-16 vote) and was assigned to the Senate Judiciary Committee. A hearing in that committee was postponed on March 17, 1994 and rescheduled for **June 14, 1994**. If passed, A.B. 145 will codify Governor Deukmejian's Executive Order D-78-89 (Dec. 20, 1989).

A.B. 2629

- Haynes
 - COMPENSATION
 - This bill, which passed the Assembly Judiciary Committee on a 9-3 vote, is scheduled to be voted on by the General Assembly.
- Four other takings bills died in committee.

COLORADO

S.B. 194

- Rizzuto, Johnson, Ament, Schauer
- COMPENSATION
- For the third time in as many years, lawmakers have killed takings legislation in Colorado. The bill, which received cost estimates ranging from \$2 to \$26 million, was killed in the House Appropriations Committee after passing the Senate 21-12.

Opponents held a press conference and received coverage by the Denver Post; counties including Denver and Boulder opposed the bill; labor interests and the Governor also opposed the bill.

Please thank the following legislators for their efforts to kill this proposal: Senators Linda Powers, Jana Mendez, Paul Weissmann, Bill Thiebaut, Steve Ruddick, Gloria Tanner, and Mike Feeley.

S.B. 165

- Rizzuto, Johnson, Ament
- ASSESSMENT
- Remains unheard in the Senate.

CONNECTICUT

- No takings bill has been introduced.

DELAWARE

S.B. 56

- Still
- COMPENSATION (when property is reduced to less than 50% of its fair market value).

- This carry-over bill remains in the Community and County Affairs Committee, where it has been for a year.

S.B. 49

- Venables
- COMPENSATION (when property is reduced to less than 50% of its fair market value).
- This bill was passed by the full Senate (12-9 vote) and was assigned to the Transportation and Infrastructure Committee, where it was tabled.

FLORIDA

STUDY COMMISSION ESTABLISHED BY EXECUTIVE ORDER

- COMMISSION REPORT ESTABLISHES A NON-JUDICIAL PROCESS FOR SETTLING DISPUTES

The Governor's commission issued a report which calls for court appointed intermediaries to settle disputes between landowners and state regulators. For copies of the report write or call: David Maloney Executive Director, Private Property Commission,
 Division of Administrative Hearings
 The DeSoto Building, 1230 Apalachee Parkway
 Tallahassee, FL 32399-1550
 (904-488-9675, 904-921-3079 fax)

H.B. 1967/H.B. 485

- Saunders (a member of the Governor's commission)
- INTERVENOR, HEARINGS AND COMPENSATION
- This bill was ostensibly based on the Governor's commission proposal, but would have eviscerated the Florida's Community Trust, a state fund for preservation, in order to pay for regulations. The bill died in the House Judiciary Committee on the last day of the legislative session.

H.B. 485

- Harris and Fifty-four co-sponsors.
- COMPENSATION
- This bill died on the House floor after passing the Judiciary Committee. A coalition of growth management groups estimates the bill would cost \$16.7 billion a year. Supporters of the bill included the Florida Farm Bureau, Florida Cattleman, Florida Forestry and Florida Citrus Mutual.

S.B. 630

- Myers, McKay, Foley
- COMPENSATION
- This companion bill to H.B. 485 was referred to the Community Affairs, Finance, Tax & Claims, and Appropriations Committees, where it died.

H.B. 1953

- Harris
- COMPENSATION
- This bill died in the Judiciary Committee.

GEORGIA

H.B. 1343

- Crawford, Reaves, Smith
- COMPENSATION
- This bill died in the House Judiciary Committee. The Atlanta Constitution published an editorial opposing the bill entitled, "A Strip Joint Next Door?" and the Columbus Ledger-Enquirer's editorial was entitled, "Welfare for the Well-heeled."

H.B. 1706

- Crawford
- COMPENSATION
- H.B. 1706 died in the Judiciary Committee.

HAWAII

H.B. 3542

- Ige
- Related to the harvesting of trees.
- Died in the Judiciary Committee after compensation language was deleted by the Agriculture Committee. Sierra Club and Hawaii's Thousand Friends delivered opposing testimony.

H.B. 2128

- Peters
- ASSESSMENT
- This carry-over bill died in the Judiciary and Consumer Protection & Commerce Committees.

S.B. 1645

- Salliang, Aki, Reed
- ASSESSMENT

- This carry-over bill died in the Planning, Land and Water Use Management and Judiciary Committees.

H.B. 1724

- Peters
- ASSESSMENT
- This carry-over bill died in the Judiciary Committee.

S.B. 3123

- Matsunaga
- ASSESSMENT
- Referred to Judiciary and Ways & Means, where it died.

IDAHO

H.B. 659

- ASSESSMENT; AG provides a checklist for state agencies.
- This "compromise" takings bill, modeled after Washington State's 1991 assessment law, was signed into law.

ILLINOIS

- No takings bill has been introduced.

INDIANA

- Since passing an assessment bill which was signed into law last year, the legislature has not considered any further takings legislation.

IOWA

H.B. 350

- Mertz, Eddie
- ASSESSMENT
- The House Subcommittee on Agriculture did not act on this bill and it is now dead.

S.B. 2148

- Senate Agriculture Committee
- ASSESSMENT
- This bill passed out of the Agriculture Committee by a unanimous vote and was scheduled to be voted on by the full Senate. The bill was not acted on and is now dead.

H.B. 2399

- House Agriculture Committee
- COMPENSATION

- Passed out of House Agriculture and died before being voted on by the full House.

H.B. 2166

- Mertz
- COMPENSATION
- Died in the House Agriculture Committee.

KANSAS

S.B. 293

- Sponsored by the Senate Judiciary Committee.
- ASSESSMENT
- The Governor vetoed the bill because of fiscal objections and the Senate sustained that veto (25-14 vote).

PLEASE CONTACT THE GOVERNOR AND THANK HER FOR VETOING THIS BILL

Governor Joan Finney

Governor of Kansas

State House

Topeka, KS 66612

913-296-3232, 1-800-432-2487

KENTUCKY

H.B. 821

- Farrow
- COMPENSATION
- Died in the Judiciary Committee.

LOUISIANA

- No takings bill has been filed. The legislature reconvenes on June 8.

MAINE

- No takings bill has been introduced this session.
- The Maine Conservation Rice Institute (MECRI) held a panel discussion on takings and property rights which included David Lucas and a representative from the Pacific Legal Foundation. The discussion focused on the

potential listing of the Atlantic salmon and the Northern Forest hearings.

Maine activists met with editorial boards and press prior to the MECRI meeting and Northern Forest hearings, and successfully debunked the wise use "horror stories."

MARYLAND

- No takings bill has been introduced this session.

MASSACHUSETTS

S.B. 1212

- Antonioni
- ASSESSMENT
- The bill died in the Senate Ways & Means Committee.

H.B. 3851

- Constantino
- COMPENSATION
- Pending in the House Ways & Means Committee.

MICHIGAN

- No takings bill has been introduced this session.

MINNESOTA

H.B. 2335

- Mosel
- ASSESSMENT
- Died in the House Environment & Natural Resources Committee.

S.B. 2677

- Sams
- ASSESSMENT
- Died in the Senate Judiciary Committee.

MISSISSIPPI

S.B. 2464

- Holland
- COMPENSATION

- This measure, which allows foresters to seek compensation from state or local agencies for rules that cause losses of over 40%, was signed into law.

H.B. 1099

- Mills, Holland, Waldrop, McBride and 48 co-sponsors
- ASSESSMENT
- This Mississippi Farm Bureau supported bill passed the Judiciary Committee, but failed passage in the full House and is now dead.

S.B. 2426

- Harvey and twenty-one co-sponsors
- COMPENSATION
- After the "Mississippi Forest Activity Act" passed the full Senate, it was killed on the House floor. The bill would have defined wildlife as forest products and required compensation for regulations designed to protect wildlife.

S.B. 2005

- Bean
- COMPENSATION
- This bill, which was pushed by the Farm Bureau, passed the full Senate, but died on the House floor.

MISSOURI

S.B. 558

- Johnson
- ASSESSMENT
- This bill passed the legislature, and has been sent to the Governor for his signature or veto. The Governor must act on the measure by mid-July.

H.B. 1585

- Hegeman
- ASSESSMENT
- This bill died in the Judiciary and Ethics Committee.

H.B. 1099

- Smith
- ASSESSMENT
- This bill passed the legislature and is awaiting the Governor's signature. The House passed the bill on a 118-33 vote and the Senate vote was 31-1.

MONTANA

- The legislature does not reconvene until 1995.

NEBRASKA

L.B. 1100

- Jones, Bohlke, Bromm, Coordsen, Cudaback, Dierks, and seven co-sponsors
- ASSESSMENT (Similar to the bill passed by Indiana)
- This Farm Bureau-supported bill passed out of the Government Affairs Committee with a substitute. However, LB 1100 was not acted on and died.

NEVADA

- The legislature does not reconvene until 1995.

NEW HAMPSHIRE

H.B. 1486

- Daniels, Kurk, Lawton, Poldes, Lovejoy, Wheeler
- ASSESSMENT
- The Judiciary Committee issued an unfavorable report on this bill and sent it to the full House where it was killed. The Attorney General, several state agencies, and conservationists testified against this bill, and the New Hampshire Landowners Alliance, Farm Bureau, and Realtors Association testified in support of the measure.

H.B. 1200

- Johnson
- COMPENSATION
- This bill was not acted on by the Judiciary Committee and is considered dead for this year.

NEW JERSEY

- No takings bill has been introduced.

NEW MEXICO

- No takings bill has been introduced. The 30-day session was devoted to budgetary matters.

NEW YORK

S.B. 2832

- Cook
- COMPENSATION (50%)
- This carry-over bill is pending in the Judiciary Committee. No hearing is scheduled.

A.B. 5641

- Straniere, Ortloff, King, and Calhoun.
- COMPENSATION
- This carry-over bill is pending in the Judiciary Committee. No hearing is scheduled.

NORTH CAROLINA

- The legislature reconvenes on May 24, 1994.

NORTH DAKOTA

- The legislature does not reconvene until 1995.

OHIO

- No takings bill has been introduced.

OKLAHOMA

H.B. 2506

- Graves
- ASSESSMENT
- The bill died in the Judiciary Committee.

HB 1812

- Reese, Long, Mickle
- ASSESSMENT
- This carry-over bill passed the full House and died in the Senate Judiciary Committee.

OREGON

- The legislature does not reconvene until January, 1995.

INITIATIVE PENDING/ #32

- This initiative petition filed on July 13, 1993, by the wise use group Oregonians in Action, would amend the state constitution to require compensation to land owners for wildlife protections. State law requires that 89,000 signatures be gathered by July 8, 1994. However, prior

to circulation of the petition, the cover and signature sheet must be submitted and approved by the Secretary of State. No such approval has yet been granted.

PENNSYLVANIA

H.B. 803

- Saurman, Brown, Taylor, Preston, Clark, Fargo, Hennessey
- COMPENSATION (50%)
- This carry-over bill is pending in the Local Government Committee, where no action has been taken. However, this status could change if any members ask the chair of the committee to bring it up for a vote.

H.B. 1890

- Steighner
- ASSESSMENT
- This bill has been in the Local Government Committee for a year.

RHODE ISLAND

STUDY COMMISSION ESTABLISHED BY RESOLUTION

H.B. 7698/Resolution 16

- Archetto
- Last year the legislature passed a resolution creating a 13-member study commission to "study the use of private lands for public purpose." The commission's recommendations were due January 12, 1994. Resolution 16, which extends the commission's reporting date to January 12, 1995, passed.

H.B. 8396

- Salisbury, Montanaro, Ginolfi
- ASSESSMENT
- This bill passed the full House and is pending in the Senate Judiciary Committee.

S.B. 928

- Flynn
- ASSESSMENT
- This carry-over bill was left pending in the Senate Judiciary Committee. This bill is dead unless the sponsor requests that it be reconsidered.

S.B. 2793

- Gorham
- ASSESSMENT

- This bill died in the Senate Judiciary Committee.

SOUTH CAROLINA

S.B. 125

- Rose
- COMPENSATION (50%)
- The bill was amended by the Judiciary Committee last year to provide for appointment of a subcommittee to study the issue. Senators Saleeby, Rose and Stilwell were appointed to the subcommittee on February 1993, and have not yet reported their findings to the full committee.

S.B. 816

- Elliott
- COMPENSATION
- This carry-over bill is pending in the Senate Judiciary Committee where it has been for over a year. This bill is unlikely to pass.

SOUTH DAKOTA

H.B. 1263

- McNenny, Cerny, Cutler and nineteen co-sponsors.
- ASSESSMENT
- Died in the House Agriculture & Natural Resources Committee.

TENNESSEE

S.B. 1699/H.B. 1364

- Burks
- COMPENSATION FOR WETLAND DESIGNATION
- This bill gives "landowners of areas declared wetland the option to require the state to acquire their land at fair market value, or have the property assigned 'zero value' for property taxes purposes." This bill died in the Senate Finance and Ways & Means Committees.

SB 2643/H.B. 2647

- Wilder, O'Brien, Rochelle, McKnight, Burks, Hamilton
- ASSESSMENT
- This bill, which passed the legislature by unanimous vote, was signed into law by the Governor as Public Chapter 924.

TEXAS

- The legislature does not reconvene until 1995.

UTAH

H.B. 163

- Olsen
- ASSESSMENT
- Despite strong testimony from the League of Cities & Towns and Association of Counties opposing this measure, the bill passed the legislature, and was signed into law. This bill applies the provisions of the Private Property Act, an assessment bill signed into law last year, to local governments.

VERMONT

S.B. 110/160

- Illuzzi
- ASSESSMENT
- These carry-over bills are in the Judiciary Committee and are unlikely to pass.

H.B. 421

- Towne
- ASSESSMENT
- This carry-over bill is pending in the Government Operations Committee. This bill is unlikely to pass.

VIRGINIA

HJR 74 PRIVATE PROPERTY RIGHTS STUDY COMMITTEE

- This resolution which continues the study committee passed. The committee is to make recommendations about the potential need for "takings" legislation in Virginia. The study committee recommended against a takings bill and drafted an economic impact bill instead. This bill, H.B. 273, was signed into law.

WASHINGTON

INITIATIVE 626

- The Washington Private Property Protection Coalition, which sponsored this initiative, has until July 8, 1994 to

gather the 181,667 signatures required to place this on the November general election ballot. Call 206-753-7121 for more information.

H.B. 2500

- Grant, Tate, Dyer, Basich and 33 co-sponsors
- COMPENSATION
- Since passing an assessment bill in 1991 (H.B. 1025), the legislature has considered several compensation models. The Judiciary Committee did not act on this bill and it is now dead.

S.B. 6167

- Snyder, Anderson, Hargrove, Amondson and 28 co-sponsors.
- COMPENSATION
- After the Natural Resources Committee held a hearing on this companion bill to H.B. 2500, and passed it out favorably, the bill landed in the Senate Ways and Means Committee. Thanks to the opposition of the chair of that committee, S.B. 6167 is dead.

- Seven other takings bills died this session.

WEST VIRGINIA

H.B. 4065

- Michael, Martin, Rowe
- ASSESSMENT/Reorganization of the Department of Environmental Protection
- The takings provisions of this bill, which was signed into law, requires the Department of Environmental Protection to conduct a takings impact assessment of certain actions. The bill provides financial penalties if the state wrongly concludes its action will not result in a taking. Groups testifying against the measure include: WV Environmental Council, Sierra Club, Trout Unlimited, state employers union, AFL-CIO, and the League of Women Voters. The WV Farm Bureau testified in support of the measure.

H.B. 4165/S.B. 249

- Michael, Martin, Rowe, Mezzatesta, Beach, Willison, Manchin, Schoonover, Sharpe, Minard
- ASSESSMENT
- These identical bills died in the Judiciary Committees.

WISCONSIN

A.B. 1185

- Albers, Harsdorf, Welch
- This bill died in committee. The Department of Agriculture, Trade and Consumer Protection estimated the annual costs of the bill to be \$8,573,760.

S.B. 757

- This bill died in the Senate State Government Operations and Corrections Committee.

WYOMING

S.B. 60

- Geringer
- ASSESSMENT
- Thanks to activists who cited to legislators the example of a mining company's recently filed \$40 million takings suit against the state for lost revenue, this bill failed introduction on a 11-19 vote. In an effort to counter this bill, Rep. Baker introduced H.B. 80, entitled "Regulatory Benefits-Private Reimbursement" which would require agencies to calculate the public benefits of regulations. The bill was withdrawn after the takings bill failed introduction.

to 15. Unfortunately, the House has failed to pass a counterpart bill, so we have not been able to go to conference. My hope is that by attaching this amendment to Safe Drinking Water Act reauthorization, we will be able to conference a bill and enact it this year.

I would note that this amendment incorporates S. 171 as passed and amended, so it includes all amendments, except one, that were offered and agreed to last year—amendments from Members from both sides of the aisle. The only difference between this amendment and S. 171 as passed is that I have dropped Section 123—the Johnston risk assessment provision. I have dropped this provision because a Johnston-Baucus compromise on risk assessment has already been debated and adopted as a separate amendment to Safe Drinking Water Act reauthorization.

The PRESIDING OFFICER. Is there further debate on the amendment? If not, the question is on agreeing to the amendment of the Senator from Ohio.

The amendment (No. 1731) was agreed to.

Mr. GLENN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. GLENN. I thank my distinguished colleague from Arkansas very much.

Mr. BUMPERS. Mr. President, I see the Senator from Kansas on the floor. I wonder if we could enter into a time agreement on this amendment.

Mr. DOLE. I am certainly willing to. I would like to have the vote tomorrow morning, if that is satisfactory with the majority leader.

Mr. MITCHELL. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BUMPERS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1735 TO AMENDMENT NO. 1729

Mr. BUMPERS. Mr. President, what is the pending question?

The PRESIDING OFFICER. The pending question is amendment No. 1735 offered by the Senator from Arkansas.

Mr. BUMPERS. Mr. President, I will be as brief as I can.

What the Senator from Kansas has done under his amendment is to say that any Federal policy, regulation, or proposed law that could diminish or have the effect of not only taking someone's property but diminishing the value of their property would require an agency analysis.

I will give you a classic case in point. This is my substitute amendment to the Dole amendment. Today, if the Secretary of Agriculture were to pro-

pose to the President of the United States that he limit durum wheat imports from Canada into the United States, under my amendment that would not constitute a taking of anybody's property nor would it constitute a diminution in the value of anybody's property, and, therefore, the Department of Agriculture would not do, essentially, an impact analysis.

Today, the Department of Agriculture does an analysis if it is likely to lead to a taking. That is essentially the difference in mine and Senator DOLE's amendments. He says the Department of Agriculture must do an analysis if it diminishes anybody's property value.

Let us assume that I am a pasta manufacturer, that I make pasta. Let us assume, further, that, by limiting durum wheat imports from Canada, durum wheat prices are going to go up and, therefore, the cost of my product is going to go up, and it could go up to the point that it diminishes the value of my pasta manufacturing facility, indeed to the point that I might lose my business. Under the Dole amendment, if it diminishes the value of my property by one penny—one penny—I have the right to demand that the Department of Agriculture do an impact analysis.

Mr. President, along with my staff, we did a study of all the possible scenarios we could think of. I want to applaud the Senator from Kansas for offering an amendment on an issue that is going to have to be dealt with. It is a very important issue. When we consider the clean water bill here, we are going to get back on this issue, I promise you, because if the Corps of Engineers says that your land is now wetlands and you were planning to build a home on it, obviously there has been a serious diminution in the value of your property, at least for the purposes for which you bought it. That would trigger an analysis under the Dole amendment.

As I said, under my amendment, which essentially codifies the existing law on it, the analysis would only be done if a Federal action was likely to lead to a taking—likely to lead to a taking.

Mr. President, I am not going to belabor this. I hope that every Senator, when they come onto the floor, will understand this. I think we are going to voice vote this, and we will not have a rollcall vote.

The other problem with the Dole amendment is that it does not exempt anybody. You could tie up emergency aid for the Midwest during the floods; you could tie up emergency aid for the Los Angeles earthquake for years if our efforts there to assist all of those people had the effect of diminishing the value of anybody's property, say in Los Angeles, by one penny. Nobody intends that.

We have always—even the Reagan order, I forget the number of it—the executive order of Ronald Reagan ex-

empts law enforcement, exempts the military, exempts foreign policy issues and initiatives. The Dole amendment exempts nothing.

So, Mr. President, while I applaud the Senator from Kansas for legitimately bringing to this body an issue that is going to have to be dealt with, in my opinion it would bring Government to an absolute standstill in this country. I cannot overemphasize the staggering, unbelievable, effect it would have.

Having said all of that, Mr. President, we are not going to have an extended debate on this. I think the amendment is going to be accepted, so I will yield the floor.

The PRESIDING OFFICER. Is there further debate on the pending amendment?

Mr. BAUCUS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1735, AS MODIFIED

Mr. DOLE. Mr. President, I ask unanimous consent that I may modify the pending amendment, and I send a modification to the desk.

The PRESIDING OFFICER. Without objection, the amendment is so modified.

The amendment (No. 1735), as modified, reads as follows:

Strike all after the first section heading and insert the following:

(a) **SHORT TITLE.**—This section may be cited as the "Private Property Rights Act of 1994".

(b) **FINDINGS.**—The Congress finds that—
(1) the protection of private property from a taking by the Government without just compensation is an integral protection for private citizens incorporated into the Constitution by the Fifth Amendment and made applicable to the States by the Fourteenth Amendment; and

(2) Federal agencies should take into consideration the impact of Governmental actions on the use and ownership of private property.

(c) **PURPOSE.**—The Congress, recognizing the important role that the use and ownership of private property plays in ensuring the economic and social well being of the Nation, declares that the Federal Government should protect the health, safety, and welfare of the public and, in doing so, to the extent practicable, avoid takings of private property.

(d) **DEFINITIONS.**—For purposes of this section—

(1) the term "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and—

(A) includes the United States Postal Service; and

(B) does not include the General Accounting Office; and

(2) the term "taking of private property" means any action whereby private property is taken in such a way as to require compensation under the Fifth Amendment to the United States Constitution.

(e) PRIVATE PROPERTY TAKING IMPACT ANALYSIS.—

(1) IN GENERAL.—The Congress authorizes and directs that, to the fullest extent possible—

(A) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies under this section; and

(B) all agencies of the Federal Government shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property, except that—

(i) this subparagraph shall not apply to—

(I) an action in which the power of eminent domain is formally exercised;

(II) an action taken—

(aa) with respect to property held in trust by the United States; or

(bb) in preparation for, or in connection with, treaty negotiations with foreign nations;

(III) a law enforcement action, including seizure, for a violation of law, of property for forfeiture or as evidence in a criminal proceeding;

(IV) a study or similar effort or planning activity;

(V) a communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property, regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;

(VI) the placement of a military facility or a military activity involving the use of solely Federal property; and

(VII) any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers; and

(i) in a case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response or the issuance of a regulation pursuant to section 553(b)(B) of title 5, United States Code, the taking impact analysis may be completed after the emergency action is carried out or the regulation is published.

(2) CONTENT OF ANALYSIS.—A private property taking impact analysis shall be a written statement that includes—

(A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;

(B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;

(C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;

(D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur; and

(E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.

(3) SUBMISSION TO OMB.—Each agency shall provide an analysis required by this section as part of any submission otherwise required to be made to the Office of Management and

Budget in conjunction with the proposed regulation.

(f) GUIDANCE AND REPORTING REQUIREMENTS.—

(1) GUIDANCE.—The Attorney General shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.

(2) REPORTING.—Not later than 1 year after the date of enactment of this Act and at the end of each 1-year period thereafter, each agency shall provide a report to the Director of the Office of Management and Budget and the Attorney General identifying each agency action that has resulted in the preparation of a taking impact analysis, the filing of a taking claim, or an award of compensation pursuant to the Just Compensation Clause of the Fifth Amendment to the Constitution. The Director of the Office of Management and Budget and the Attorney General shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies made pursuant to this paragraph.

(g) RULES OF CONSTRUCTION.—Nothing in this section shall be construed to—

(1) limit any right or remedy, or bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or

(2) constitute a conclusive determination of the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages.

(g) STATUTE OF LIMITATIONS.—No action may be filed in a court of the United States to enforce the provisions of this section on or after the date occurring 6 years after the date of the submission of the certification of the applicable private property taking impact analysis with the Attorney General.

Mr. DOLE. Mr. President, I might just say a word before we adopt the amendment.

I thank the Senator from Arkansas. I think, as he properly indicated, this is a matter that is going to be before the Senate. We have not had the last word on it, but I think we have made some improvements.

I thank not only the Senator from Arkansas, but the managers of the bill and others on both sides who have an interest in this particular legislation.

I think we should go ahead and act on the amendment, and then I would like to make a further statement before we go out.

The PRESIDING OFFICER. For clarification, the modification by the Republican leader is to the second degree amendment.

Mr. CHAFEE. Mr. President, I am not in favor of either of these amendments.

Mr. MURKOWSKI. Mr. President, I rise today to lend the strongest possible support to the amendment offered by the minority leader, Senator DOLE.

There is no quarreling with the clear words of the fifth amendment to the Constitution: "Nor shall private property be taken for public use without just compensation." The debate has been over precisely when a property has been taken, and thus when to provide just compensation.

It is one thing to recognize when the Federal Government takes a property by appropriation or physical posses-

sion. If what a Government policy, regulation, proposal, recommendation, or other agency action does is to restrict one's use of property, there is a real possibility of a taking by regulation. This, it is quite another thing to recognize when there has been a regulatory taking.

Since 1922 the courts have been struggling with the concept of regulatory taking. In the scattering of cases over the last 50 years, the standards for a regulatory taking have always been ad hoc.

Since the 1970s, one decision after another has come from the courts on this issue, creating an historic legal framework for the courts to decide future cases within. But what is missing is participation by the agencies in evaluating just when they have effected a taking, and how much it will cost.

The National Park Service of the United States is the envy of the world. It is widely emulated in other countries. What we don't talk about very much, and what we don't want the rest of the world to emulate is the way we deal with private property contained as inholdings within the parks.

Over the years we have encumbered millions of acres of private property within the designated units of the National Park Service.

The record is replete with anecdotal stories of the heavy handed actions taken by the Government as they constrain and control the otherwise lawful actions of the private property owners that have through no fault of their own become included within park service units.

This country is founded on the premise that private property rights are valuable, and should be respected. Yet what we have witnessed in the last few years is the tyranny of the Federal Government against the private property owner in the name of wetlands rules, endangered species act regulations, and dozens of other Federal policies, proposals, recommendations, and other agency actions.

Over the past years thousands upon thousands of individuals—private property owners—have had their rights diminished by well-intentioned bureaucrats who have had no idea of what wrath their rules have wrought. Nor did they have any concept, idea, or thought about the cost of the unfunded liability the private property would need to bear.

It is time for a little truth in advertising Mr. President—people need to know how our laws and subsequent rules and regulations are going to impact their basic constitutional rights.

Under this amendment, the Federal Government would be required to analyze the impact of their programs on private property rights. Then, Mr. President, we will have a measure of the effect of agency actions on the use and value of private property. The people will know, and we will have a clear statement of whether the owner is entitled to compensation.