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Management Approaches to Addressing Takings Issues: Endangered Species Protection

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**MANAGEMENT APPROACHES TO ADDRESSING TAKINGS ISSUES:
ENDANGERED SPECIES PROTECTION**

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Management Approaches to Addressing Takings Issues

**Natural Resources Law Center
University of Colorado School of Law
June 13-15, 1994**

MANAGEMENT APPROACHES TO ADDRESSING TAKINGS ISSUES: ENDANGERED SPECIES PROTECTION

I. Michael Heyman

A. A Reprise on the Endangered Species Act

The ESA focuses on the listing of individual species. I think that it would be wiser to focus instead on habitat supporting many species. This latter approach would facilitate advanced land use planning rather than crisis management and would help determine which species upon which to concentrate attention. It would also create an opportunity to balance conservation and development in a more sensible way than presently occurs. The present legal environment can make it exceedingly difficult to take those actions that avoid serious equity impacts on private land owners and people who rely on the resources of the public lands for their jobs and lifestyles. Moreover, it would facilitate avoidance of taking claims.

A glance at the core process of the ESA illustrates that it calls for crisis management. Most listings proceed from petitions filed with the Fish and Wildlife Service of the Department of the Interior by individuals and organizations. The Service carries on a biological investigation if a prima facie case seems evident on the basis of information proffered by the applicant and it concludes whether the species is on its last legs (endangered) or on its way there (threatened). If it concludes that either is true, it is a Federal crime to "take" any of the species unless an exemption is granted. "Take" is much broader than kill -- it includes many acts detrimental to the species although there is judicial conflict as to whether it precludes destruction of critical habitat on private lands.

Ideally, as the Act is constructed, there would be prompt investigation on every qualifying petition. Realistically, however, investigations can be costly and time consuming and Fish and Wildlife's budget is inadequate. At any time, therefore,

there are hundreds or perhaps thousands of candidate species awaiting processing depending on how energized are petitioners. Undoubtedly, some species fail during the wait. The Act provides no criteria for scheduling investigations and the Service's attempts to construct priority criteria have been less than satisfying and have differed in various regions of the country.

Putting aside scheduling problems, in general the Act only comes into play when a species is on the way out. The characteristic processes of the Act do not anticipate potential troubles in the future. The Act does not seek to preserve ecosystems important to the sustenance of many species in order to prevent them from becoming endangered or threatened. The bite of the Act comes later. Thus, a crisis is at hand when the process begins.

There are two provisions in the ESA which seek to ameliorate collisions. One involves public lands [section 7] where Federal land agencies (and private applicants for permits on the public lands) can avoid criminal and civil penalties for "take" by consulting with the Fish and Wildlife Service where actions might jeopardize the continued existence of endangered or threatened species or destroy habitat critical to their survival.¹ If a project is contemplated, the proponent agency (or applicant) does a biological assessment (a part of an environmental impact analysis). If in the Service's opinion the action or project can go forward as planned, or under added terms and conditions, without jeopardizing the species' survival, the action goes forward. This is the usual result.

This public agency process helps moderate confrontations by formalizing a reviewing process before the Agency makes irreversible or irretrievable commitments of resources.

¹ 16 U.S.C. §1536.

The reviewing process, however, even if well followed, is largely an exercise of due diligence. It prevents inadvertent destruction of species. But it does not provide direction well in advance of the intended action and hence does not articulate a planning basis for land management. Moreover, even a good investigation does not provide complete assurance for species not picked up in the assessment that might still frustrate aspects of the desired project. This is less a problem in a legal sense on public land than private, except where a permit holder's investment is jeopardized.

The second process for ameliorating collisions is designed for the private land owner. It is the conservation plan (usually dealing with habitat) that specifies how the landowner plans to assure that contemplated development will not unduly impinge on listed species. This might be by so designing the project that critical habitat is preserved. This was the outcome in the first use of the process on San Bruno Mountain in San Mateo County in California, which provided for the maintenance of patches of habitat necessary for the survival of the Blue Mission butterfly. If the Fish and Wildlife Service is satisfied, after public hearings, that any destruction of species pursuant to the plan will not appreciably reduce the likelihood of the survival and recovery of the species, the plan is approved and the applicant is exempted from liability for incidental takes of the species.

The process is designed for large land developers -- ones who likely have enough land to devote to habitat protection, as well as development, and have the funds necessary to carry on the required biological and planning studies and to pay holding costs. Each conservation plan is specially sculpted. It is not a process that is well adapted for the use of owners of small parcels.

B. The Present ESA Processes and Property Rights

Before I explore what to me is a more ideal system for species protection -- one built on early planning -- I would like to take note of the property rights taking

arguments, many of which have been explored previously in this program, that have been raised in the context of the Act.

The most extreme argument suggests that any meaningful diminution in land value must be compensated. I cannot imagine that proponents of this position believe it premised on a constitutional imperative. But it reflects a viewpoint of a number gathered under the banner of "Wise Use" movement. They echo arguments made during the post Civil War 19th Century and early 20th Century where any impediment to market outcomes was viewed by some as constitutionally prohibited by the Due Process and Contract clauses. Interestingly, while these views frustrated such matters as child labor laws, they found no expression in cases involving laws that affected land values by prohibiting particular uses. Prior to 1922, no Supreme Court case found a taking of property rights in land by the exercise of regulatory power. Physical invasion or acquisition of title were necessary. Typical of the period was the First Justice Harlan's rejection of claims in Mugler v. Kansas² where State enacted prohibition rendered valueless building and machinery used to produce spirits. His grounds were broad:

A prohibition simply upon the use of property for purposes that are declared . . . to be injurious to the health, morals, and safety of the community, cannot . . . be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes . . . but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests."³

² 123 U.S. 623 (1887).

³ 123 U.S. 623, 668-69 (1887).

These outcomes in both English and American Courts reflected a long history of common law nuisance principles -- both private and public -- which recognized the innerconnectedness of land use and the propriety of judicial or legislative intervention in protecting private parties and the public interest.

Two well known cases in the 1920's provide today's background for evaluating the Wise Use argument. First was the Supreme Court decision in Euclid v. Ambler Realty Co.⁴ in 1926, (nearly 70 years ago) upholding a comprehensive zoning ordinance against the attack that it improperly deprived landowners of substantial value by prohibiting particular uses in particular zones. Since Euclid it is well accepted that Americans who live in urban areas are permissibly subject to a broad range of land use restrictions designed to protect and enhance the common good.

There is no easily discernible reason why rural Americans are not similarly vulnerable to regulations which reasonably restrain landowner discretion in order to protect species of fish and wildlife. These arguably are simply rural manifestations of the generally urban phenomena of zoning. I suspect that part of the problem is that folk who live outside the exurban ring have considerably less familiarity with the phenomena of zoning, and in any event are contemptuous of restraints on individualism long ago accepted where populations are more dense and thus conflicting.

The second case of importance was Pennsylvania Coal Company v. Mahon⁵ which held, contrary to the prior cases, that regulation which deprived a landowner of too much value would be viewed as a taking of property rights and thus impermissible. This limitation, as spelled out in the recent case of Lucas v. South

⁴ 272 U.S. 365 (1926).

⁵ 260 U.S. 393 (1922).

Carolina Coastal Council,⁶ provides the most meaningful context for evaluating the property taking issue under the ESA.

Mahon has been read by some to suggest other analytical obstacles. Prominently it has been argued that regulation characterized as exacting benefits are different than those preventing harm. Thus, for instance, regulation for the protection of species, it is argued, is different than regulation fashioned to prevent inconsistent uses such as a shopping center in a residential neighborhood; that the latter prevents harmful use while the former -- species protection -- exacts a benefit. This has been one of the argued formulas to distinguish permissible regulation from unconstitutional taking based in part on Mahon. The distinction, however, has rarely proved decisive. The problem is, as stated by Justice Scalia in the Lucas case, that harm and benefit are simply opposite sides of the same coin and defy rational analytic differentiation. Thus regulation requiring the use of land within a zone only for industrial purposes can be viewed either as preventing harms to industrial users created by proximate location of residences peopled by those who might object to noise and congestion, or a required dedication to a particular use because the city wants to attract revenues and jobs. The same analysis, and confusion, attends exclusive agricultural zoning. Most pertinently, wetlands regulation could be viewed as exacting a contribution of desirable habitat for public purposes or as a means of prohibiting a landowner from harming a vital ecosystem resource.

One of the most definitive rejections of harm-benefit distinctions arose in Penn Central Transportation Co. v. City of New York⁷ where the Court upheld landmark regulation which prohibited owners of buildings classified as landmarks from changing exteriors so long as the buildings produced a reasonable return in their limited configuration. The argument was that such owners were being required to

⁶ 112 S. Ct. 2886 (1992).

⁷ 438 U.S. 104 (1978).

forego economic opportunities afforded others in their area (e.g., greater height and densities) simply to benefit the citizens of New York and that the latter might pay for this benefit. The argument was rejected.

Property taking doctrine relevant to us is best expressed in the Lucas case. As many of you know, Lucas involved the validity of South Carolina legislation hypothesized for purposes of the decision to prohibit all uses of the complainant's parcel located on a barrier island. Justice Scalia for the Court said that such a regulation amounted to a taking if it prohibited all reasonably productive uses, unless all such prospective uses could be viewed as common law nuisances. The gravamen of the decision, however, was not forced dedication of the parcel to public benefit, but rather a pronouncement that regulation which sterilized land values by prohibiting all "reasonable" economic uses was invalid, even if, to the chagrin of a number of us, the reasonable economic uses were ecologically harmful. (Scalia refused to view ecological harm as a common law nuisance.) The bottom line is that ecological protection is a legitimate objective, but the regulation better leave the landowner with some reasonable economic use. Reasonable is nowhere defined, but prior cases suggest that devaluation can be substantial, but not close to total.

There is one problem suggested in cases prior to Lucas that still leaves prediction uncertain. This is how to identify the property the value of which is impacted. If I own one hundred acres and am asked to forego development of five acres important as butterfly habitat, does a court focus on the five or the one hundred in determining total deprivation? The distinction is crucial. In one analysis, I lose 5 percent of the value of 100 acres; in the latter 100 percent of the five acres. Most cases suggest that the base for the calculation will be 100 acres. Otherwise, for instance, conventional setback requirements would be constitutionally suspect.

The foregoing suggests the format for dealing with property taking claims under the present case-by-case approach of the Endangered Species Act.

Larger developers should normally pose few problems. In most instances, such developers can internalize the costs of creating and implementing conservation plans and still have considerable value left. Either habitat can be set aside or developers can mitigate by providing habitat elsewhere. So long as the Service avoids undue delay, successful attack is doubtful.

That taking claims can be avoided, of course, does not assure developer cooperation. Perhaps the most vexing problem involves certainty. Expensive dedication or mitigation in return for a permit does not protect against the listing of another species that will start the process all over again unless there has been total buildout. In modern days of staged development, the risk can be significant.

Successful taking claims involving smaller land owners are more probable. It is more likely, for instance, that all or a very large proportion of a small land owner's property will consist of critical habitat. Under the ESA, the Service can take into account the economic impact of critical habitat designation on a landowner if exclusion from critical habitat designation will not lead to the extinction of the species in question. There is thus the possibility of an exemption (much like a zoning variance) in many cases, but of course this does not shield the owner from liability for "taking" the species.

Other ameliorating schemes are not feasible, however, under a case-by-case approach. Considerable thought is being given these days to devices that spread out burden and benefit of regulation to assure more equitable distribution of costs, even if not required by the Fifth Amendment. One device, used successfully in the New Jersey Pinelands, is transferable development rights. Unfortunately, however, the case-by-case approach of the ESA, makes it impossible to use such an approach.

In the absence of a spread-out technique, and where "variances" are impossible, it will probably be necessary to acquire the parcels of smaller owners.

Finding a source of funds is difficult and it is improbable that local levies will be devoted to effectuate a purely Federal program. It is possible, of course, to liberalize land exchange opportunities. Under present limitations, however, exchanges will rarely be available. This will result in liberal use of exemptions and, where possible, heavy reliance on public lands to carry the critical habitat burden and such a result might be unwise as a matter of both biology and economics.

C. Planning and Regulating in Advance: Management Techniques to Avoid Taking

Advance multispecies planning, as a substitute or compliment to the species by species approach, solves a multitude of policy, planning, and legal problems inherent in the ESA. An easy way to envisage how this would work is to imagine a county or city general plan with a conservation element (perhaps combined with the open space element) that identifies critical habitat for numbers of species. Imagine further that the important habitat is defined on a regional ecosystem basis by a regional or State agency under relevant statutory and regulatory guidelines. Further imagine an implementation strategy for protecting the lands so identified in a systematic way. Development would be permitted under rules that protect needed habitat or prohibited completely in some areas. Finally, imagine review by the Federal Fish and Wildlife Service which would be empowered to exempt the whole of the cooperating political jurisdictions from species "taking" limitations for ten years or more, if it was satisfied that the multispecies plan adequately protected presently listed species and nonlisted candidate species waiting in the wings. Presume that the exemption could be ended for substantial departures from the plan thus leaving the Service as a monitor, but not a direct regulator.

Note how many problems of the Act are addressed by this approach. First the approach ameliorates the problem of total species coverage by choosing out habitat protection as the organizing principle for the application of regulation. Thus priority is determined on the basis of "rich" habitat, the sustenance of which will seek to assure survival of species before they need to be listed as well as listed ones. Of

course, some species will be lost by reliance on this process. But they are being lost now because energy and money are limited and they are never reached under the case-by-case approach.

Secondly, the approach also moderates the balancing problem by integrating habitat conservation into a process where other needs are also portrayed. The likelihood of making better accommodations between conservation and development where all is being planned together is much greater than where species preservation is a last-minute add on.

Finally, the approach also addresses notable legal and planning problems. It creates geographic and temporal zones of relative certainty. If the conservation element permits development in particular places, developers, local officials and environmentalists know where these are. If the element prohibits development, or conditions it under performance standards, another kind of certainty is created and the market can adjust itself to the reality. Moreover, the very act of designation focuses argument on the important values at stake and minimizes the probability of future destructive change in the regulations. Advance planning helps avoid the collisions of crisis management.

Advance designation also aids in the assessment of the costs of critical habitat conservation and suggests means to minimize the need to acquire property into public ownership. Also, by identifying properties which probably must be acquired, it arms local conservancies with important information to guide their acquisition programs. Additionally, "zoning" of this sort permits the designation of transfer zones for purposes of establishing a market for development rights which will tend to minimize acquisition requirements. Finally, advance designation gives time to organize those institutions necessary to manage habitat and to determine the means for raising funds to operate them.

There is a serious limitation, as well as a heady opportunity, offered by the multispecies planing approach. The limitation is that the Federal Government, alone, cannot conceivably create and administer a land planning and regulation system on private lands within the States. Even if constitutionally permissible, pervasive Federal land planning and zoning is a political impossibility. The opportunity, however, is that fashioning such a system would stimulate a creative federalism with States and local governments playing a major role in both planning and management and with the Federal role -- with respect to private land -- limited to setting standards and monitoring performance. This is a much more salubrious role for Federal officials than to be the equivalent of zoning administrators.

D. A Test of the Approach -- in California

A major experiment towards these ends is occurring in Southern California in a joint operation between State and Federal officials. The State mechanism is the Natural Communities Conservation Planning Act which provides for regional planning at an ecosystem level guided by the California Department of Fish and Game. NCCP works in concert with the California Endangered Species Act -- an Act quite similar to the Federal version.

Under the NCCP, the State Department of Fish and Game enters into agreements with local governments and private landowners for the preparation of plans for management and conservation of multiple species, including ones in jeopardy of extinction. The plans must be consistent with State guidelines and must be approved by Fish and Game to be effective. Essentially they identify habitat important to the sustenance of multiple species and establish rules designed to assure continued sustenance. These might include limitations on development and actions necessary to improve habitat. The plans cover public and private lands within cooperating local jurisdictions, if the owners agree to such coverage. The inducement for agreement is the State's willingness to waive prohibitions against takings of protected species on land covered by enforceable plans. The beauties of the approach

are twofold. First, the studies and planning ideally occur before particular development is proposed. The approach is thus proactive, not reactive -- much like advance urban planning and zoning. Second, the approach is habitat oriented, protects a multiplicity of species (including endangered ones), and reduces the numbers of species that will become vulnerable to extinction thus minimizing conflicts.

The California approach is being tested for the first time in Orange, Riverside, and San Diego Counties. The Federal Government is an active participant in two regards. It has joined the California effort by agreeing to permit incidental taking of a threatened species under the Federal law -- the gnatcatcher -- on lands for which NCCP plans have been approved. It has also provided appropriations to help fund the scientific efforts that underlie the preparation of the plans.

The California approach addresses the three important needs I previously identified: (1) It protects species before they are on their last legs. (2) Ideally, it acts in advance of conflict and produces relative certainty as to what lands are and are not sensitive for species protection, thus letting the market absorb the information and act consistently. (3) It provides a rich opportunity for State/Federal interaction with local folks doing land planning and regulation and Federal officials exercising oversight to assure that these will protect endangered species. Moreover, it provides a good model for national adoption which could be stimulated by modest amendments to the Federal ESA.

This combined Federal/State approach is exactly what my boss -- Bruce Babbitt -- applauds. In his words:

"The only effective way to protect endangered species is to plan ahead to conserve the ecosystems upon which they depend. I applaud the cooperative effort here to protect the gnatcatcher. This may become an example of what must be done across the country if we are to avoid the environmental and economic train wrecks we've seen in the last decade."

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

(ii) 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.