BACKGROUND PAPER 91-1

TAKINGS

Dana R. Bennett, Senior Research Analyst
Research Division
Legislative Counsel Bureau
# Takings

## Table of Contents

<table>
<thead>
<tr>
<th>I. Introduction</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. Federal Activity</td>
<td>1</td>
</tr>
<tr>
<td>A. Supreme Court Cases</td>
<td>2</td>
</tr>
<tr>
<td>B. Federal Executive Order No. 12630</td>
<td>4</td>
</tr>
<tr>
<td>1. Scope of the E.O.</td>
<td>4</td>
</tr>
<tr>
<td>2. Requirements of the E.O. and Guidelines</td>
<td>5</td>
</tr>
<tr>
<td>3. Objectives of the E.O. and Guidelines</td>
<td>5</td>
</tr>
<tr>
<td>4. Implementation of the E.O. and Guidelines</td>
<td>5</td>
</tr>
<tr>
<td>III. Actions By Other States</td>
<td>6</td>
</tr>
<tr>
<td>IV. The Subcommittee To Study Takings</td>
<td>6</td>
</tr>
<tr>
<td>A. Composition And Funding Of The Subcommittee</td>
<td>6</td>
</tr>
<tr>
<td>B. Activities Of The Takings Subcommittee</td>
<td>7</td>
</tr>
<tr>
<td>1. Survey</td>
<td>7</td>
</tr>
<tr>
<td>2. Educational Forums</td>
<td>7</td>
</tr>
<tr>
<td>3. Meetings of the Subcommittee</td>
<td>8</td>
</tr>
<tr>
<td>Appendix</td>
<td>Description</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>A</td>
<td>Amendment V of the Constitution of the United States and Article I, Section 8, of the Nevada Constitution</td>
</tr>
<tr>
<td>B</td>
<td>Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, March 15, 1988</td>
</tr>
<tr>
<td>C</td>
<td>Executive Order D-78-79, State of California, and Executive Order regarding the Protection of Private Property Rights, State of Colorado</td>
</tr>
<tr>
<td>D</td>
<td>Senate Bill No. 6253, State of Washington, March 2, 1990, and Washington Initiative Measure No. 123</td>
</tr>
<tr>
<td>E</td>
<td>Contributors to the Takings Study</td>
</tr>
<tr>
<td>F</td>
<td>Letter to Nevada Agency Heads from Committee on Public Lands, dated November 20, 1989</td>
</tr>
<tr>
<td>G</td>
<td>Memorandum to Subcommittee to Study Takings from Dana R. Bennett, Senior Research Analyst, dated February 8, 1990</td>
</tr>
<tr>
<td>H</td>
<td>Bill Draft Request (BDR) 18-260</td>
</tr>
</tbody>
</table>
TAKINGS

I. INTRODUCTION

The word "takings" is shorthand for the legal issues originating from a clause in the Fifth Amendment of the United States Constitution that says:

Nor shall private property be taken for public use, without just compensation.

Article I, Section 8, of the Nevada Constitution contains similar language. Copies of these clauses are attached as Appendix A. However, the interpretation of these clauses has been debated in the courts for many years, and no specific definition has yet been accepted.

A turning point in the debate occurred in 1987 when the United States Supreme Court decided three important takings cases in favor of private property interests. These decisions prompted President Ronald W. Reagan to sign Executive Order (E.O.) No. 12630, titled Governmental Actions and Interference with Constitutionally Protected Property Rights, on March 15, 1988, a copy of which is attached as Appendix B. The order requires Federal agencies to consider whether their regulatory, budgetary, or legislative actions have fiscal implications under the United States Constitution's just compensation clause.

As a result of the activity on the Federal level, the Nevada Legislature's Committee on Public Lands (Nevada Revised Statutes 218.536, et seq.) determined that the issue merited investigation and formed a Subcommittee to Study Takings. This paper provides background information on the issue of takings and on the activities of the subcommittee.

II. FEDERAL ACTIVITY

The Fifth Amendment to the U.S. Constitution provides that private property not be taken for public use without just compensation. This clause is a limitation on the power of eminent domain which is the power of government to acquire private property for legitimate governmental functions. The protection extends to all types of property and is applied whenever the government physically invades or occupies property or takes title to property. Not until 1922, however, in Pennsylvania Coal Company v. Mahon, 260 U.S. 383 (1922),
did the U.S. Supreme Court clarify that governmental regulations could cause a compensable taking of property.

Most of the discussion about takings has occurred in the court system. Historically, the takings clause has been interpreted and clarified primarily by the U.S. Supreme Court.

A. Supreme Court Cases

Until the 1987 term of the U.S. Supreme Court, decisions from the Court appeared to be contradictory and did not assist private property owners in understanding their rights under the Fifth Amendment. Three major cases in 1987 clarified the interpretation of the clause. These cases also increased the risk to government of being required to pay a large award if poorly tailored regulations result in a taking of property.


This case reaffirmed the general rules developed in earlier cases for determining whether or not a taking has occurred. First, the Court will review the regulations to determine if they are rationally related to a legitimate public purpose. If a legislature states a public purpose for the regulations, the Court will defer to the legislature’s determination.

The Court will also look at the economic impact of the government action in determining whether a taking has occurred. It will consider the following factors in making this determination:

- The remainder of any viable economic use;
- The interference with reasonable investment-backed expectations; and
- The character of the government action.


In this case, the court held that invalidation of the offending regulation is not an adequate remedy for a regulatory taking of property. Only an award of money damages will suffice when a temporary taking is found to have occurred.
The Supreme Court was asked to decide the remedy for regulations that deny the owner all use of his or her property, not whether a taking had occurred in this particular situation. Consequently, the Court indicated that invalidation of a regulation denying a property owner all use of his or her property is an inadequate constitutional remedy. While an aggrieved landowner is not entitled to receive the full fair market value of the property as the measure of damages, compensation must be paid for the value of the land's use for the period that the regulation was in place.

Importantly, the Court limited its holding to the facts presented and stated that:

Quite different questions would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like *


Of the three cases decided in 1987, Nollan appears to be the most significant. The case established new standards to be applied in regulatory takings cases.

The Court declared that to build on one's property is a right, not a governmental benefit to be granted or withheld with whatever conditions the government wishes to impose. It required a connection between the condition on use and the burden that use imposes on the public (the "nexus"). It also required that any condition imposed to alleviate that burden actually substantially advance that purpose. The court indicated that the owner must be allowed economically viable use of his or her property.

The case also raised the question of proportionality; that is, the degree to which government can require one person, or a small number of persons, to bear the burden of solving a problem caused by many. In other words, even if a property owner's proposed use of property contributes to a specific problem, he or she cannot be required to bear a disproportionately greater share of the burden of providing the solution.
B. Federal Executive Order No. 12630

After the decisions in these cases were announced, President Reagan issued E.O. 12630 upon the recommendation of the Vice President's Task Force on Regulatory Relief of the Domestic Policy Council, headed by then-Vice President George Bush.

The order directs Federal agencies to produce a "Takings Impact Assessment" (TIA) before taking any action or implementing any policy that might have takings implications. The E.O. also requires the U.S. Attorney General to produce "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" (a copy of these guidelines is available in the Research Division of the Legislative Counsel Bureau) for agencies to follow in evaluating actions affected by the E.O. The Attorney General is further directed to assist each agency in producing supplemental guidelines that are specific to the agency.

Although the E.O. does not stop Federal agencies from taking private property for a public benefit, the order requires agency decisionmakers to consider the implications of their actions on private property rights. Then, if the Federal agency determines that it remains in society's best interest to take private property, the owner must be compensated for his or her losses under the Fifth and Fourteenth Amendments to the U.S. Constitution.

1. Scope of the E.O.

The scope of the E.O. is quite broad. It affects all:

- Regulatory activities;
- Legislative proposals from the executive branch;
- Executive policies; and
- Permitting processes.

The E.O. applies to real property, personal property such as licenses and permits which are pertinent to real property contracts with the Federal Government, and intellectual property.

It does not impact the actions of independent agencies which operate as quasi-regulatory agencies outside of the executive department. It also does not affect any regulations in existence or proposed prior to July 1, 1988.
2. **Requirements of the E.O. and Guidelines**

The order and guidelines require governmental decisionmakers to:

- Consider the potential impact of proposed governmental actions on the use or value of private property;
- Evaluate those proposed actions for their potential to cause a taking; and
- Tailor those actions in a manner least intrusive upon private property interests to the extent permitted by law.

Budgetary tracking measures are also included to ensure that the potential costs of regulatory action are anticipated.

3. **Objectives of the E.O. and Guidelines**

The order and guidelines have two major goals. The first and principal goal is a good government objective: to ensure fiscally sound and cost-effective government. The second objective is to increase the sensitivity of government regulators to the civil rights that individuals have in their property.

However, the E.O. and its guidelines do not:

- Create a private right of action to sue the government; or
- Demand a particular result other than that the agency involved achieve a legitimate objective with the least impact on property owners.

Inherent in the order and guidelines is a recognition that government has the power to take property to meet important public goals. At the same time, the order and guidelines recognize the obligation to do so fairly and honestly and to minimize the cost to taxpayers.

4. **Implementation of the E.O. and Guidelines**

The writing of supplemental guidelines has been a slow process. As of March 1990, four Federal agencies had completed their guidelines, four were in progress and 14 were remaining. However, indications are that the E.O. is accomplishing its purpose of publicizing the issue of maintaining the balance between public will and private rights, which is the basic concept of the takings issue.
The E.O. is applicable only as an internal administrative branch management tool, and its implementation has not been costly to taxpayers. The obligation to prepare a TIA does not create an unreasonable financial burden on the agencies. The process is streamlined to be cost effective and may realize a savings over time. The TIAs are short—normally 1 1/2 to 2 pages—because of the concern that the obligation to produce such a document would create another level of governmental bureaucracy.

III. ACTIONS BY OTHER STATES

After the signing of the Federal Executive Order, other states became interested in the issue. In late 1989, the governors of California and Colorado issued similar executive orders requiring agencies in their states to consider takings issues. Copies of these state E.O.s are attached as Appendix C.

Legislation was also considered by several states in 1989. Bills concerning takings were introduced in Arizona, Oregon, Vermont, and Washington. Washington had the most successful bill which passed the Legislature with a majority of the votes, but was vetoed by the Governor. However, the measure’s supporters are currently circulating an initiative petition to reintroduce the bill during the Legislature’s 1991 session. Copies of the vetoed Washington bill and the language of the initiative are attached as Appendix D. The bills in the other states failed to pass in the legislatures.

IV. THE SUBCOMMITTEE TO STUDY TAKINGS

The Subcommittee to Study Takings was formed by the Nevada Legislature’s Committee on Public Lands in September 1989 to evaluate the need for possible legislation requiring Nevada agencies to consider takings implications whenever they are involved in actions affecting private property rights.

A. Composition And Funding Of The Subcommittee

The subcommittee consisted of Senator Dean A. Rhoads, Chairman; Assemblyman Matthew Q. Callister; Assemblyman John W. Marvel; and Clark County Commissioner Karen W. Hayes. Senator Virgil M. Getto and Assemblyman James A. Gibbons were also involved in the subcommittee’s discussions.

The activities of the subcommittee were funded by contributions from several groups; the amount raised
exceeded $12,000. A copy of the list of sponsors is attached as Appendix E.

B. Activities Of The Takings Subcommittee

The subcommittee conducted a survey of Nevada agencies, attended educational forums and held five public meetings.

1. Survey

In November 1989, a letter was sent to certain state agencies requesting information on the agencies' assessments of their actions which may result in the taking of private property without just compensation. Copies of this letter and a list of the agencies to whom it was sent are attached as Appendix F.

Of the 40 agencies questioned, 33 responded. The major findings of the survey are summarized below:

- Over two-thirds of the responding agencies indicated that they do not take actions which may result in a "taking."

- Nine agencies indicated that they may take actions which may result in a "taking." These agencies indicated that they have formal or informal guidelines to assess whether certain actions involve taking private property without just compensation.

A copy of the memorandum summarizing these responses is attached as Appendix G.

2. Educational Forums

In October 1990, members of the Public Lands Committee and staff met in Washington, D.C., with James Brookshire for an initial discussion of E.O. 12630 and the subsequent guidelines. Mr. Brookshire, Deputy Chief for General Litigation in the Lands and Natural Resources Division of the U.S. Department of Justice, is the Federal official responsible for implementing the E.O. 12630. His office also assists agencies with the writing of their supplemental guidelines.

In January 1990, staff assigned to the subcommittee attended a Lincoln Institute seminar in Orlando, Florida, titled "Land Use and the Constitution: The New Realities." The seminar was a workshop on takings issues. The speakers were involved in arguing major takings cases before the U.S. Supreme Court and are active land use policy attorneys on both private and public sides.
In March 1990, in Reno, Nevada, the chairman and staff of the subcommittee met again with Mr. Brookshire. He provided information on the implementation of the E.O. and the writing of supplemental guidelines.

In May 1990, members of the subcommittee and the Public Lands Committee and staff met in Washington, D.C., with Marty Suuberg, Associate Solicitor in the U.S. Department of Interior. Mr. Suuberg provided information on the implementation of the E.O. by the Department of Interior.

In June 1990, members of the subcommittee and staff attended the Bicentennial Takings Clause Conference at Montpelier, Virginia. The conference provided historical background on developments in the takings issue area.

3. Meetings of the Subcommittee

The subcommittee met five times in 1990: once each in Carson City and Las Vegas, and three times in Reno. Following are highlights of these meetings:

- An extensive explanation of takings cases and issues was provided by two attorneys who worked in the U.S. Department of Justice and assisted in the drafting of the Federal E.O.

- Support for the study was expressed by Nevada’s Office of the Attorney General and several representatives of private industry.

- Local governments and state agencies provided their perspectives on the issue.

- Marlyta Deck, lobbyist for the Washington Cattlemen’s Association, reported on that state’s legislation concerning takings.

- A considerable amount of discussion was devoted to the contents and merits of a possible bill draft request (BDR).

The subcommittee took final action on the BDR at its meeting on December 7, 1990, in preparation for its report to the full Committee on Public Lands later in the day on December 7, 1990.
V. CONCLUDING REMARKS

As was noted earlier in the report, the committee received extensive testimony on the proposed BDR. Supporters of the BDR stressed the merits of the Federal Executive Order and the need to protect Nevada from paying large awards resulting from takings decisions. Opponents indicated that the bill is unnecessary. They noted that the State has not yet been subject to large adverse takings decisions and that state agencies have indicated that they are already sensitive to the issue.

At the final meeting of the Subcommittee to Study Takings, the subcommittee voted to recommend that the Committee on Public Lands request a bill draft on takings. Following that recommendation, the committee voted to sponsor BDR No. 18-260. A copy of the BDR is attached as Appendix H.

This BDR requires the Executive Branch of state government to prepare an assessment of takings implications on private property for certain governmental actions. The bill is modeled after E.O. 12630. Both documents rely on and incorporate current takings jurisprudence.

The subcommittee expects that the passage of this bill would provide an internal management tool for Nevada agencies and would sensitize them to the issue of balancing public mandates with private property rights. It anticipates that the implementation of this bill would be inexpensive to the agencies, yet valuable to private property owners in Nevada.
VI. SELECTED REFERENCES


## VII. APPENDICES

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix A</td>
<td>Amendment V of the Constitution of the United States and Article I, Section 8, of the Nevada Constitution</td>
<td>15</td>
</tr>
<tr>
<td>Appendix B</td>
<td>Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, March 15, 1988</td>
<td>21</td>
</tr>
<tr>
<td>Appendix C</td>
<td>Executive Order D-78-79, State Of California, and Executive Order regarding the Protection of Private Property Rights, State of Colorado</td>
<td>29</td>
</tr>
<tr>
<td>Appendix E</td>
<td>Contributors to the Takings Study</td>
<td>43</td>
</tr>
<tr>
<td>Appendix F</td>
<td>Letter to Nevada Agency Heads from Committee on Public Lands, dated November 20, 1989</td>
<td>47</td>
</tr>
<tr>
<td>Appendix G</td>
<td>Memorandum to Subcommittee to Study Takings from Dana R. Bennett, Senior Research Analyst, dated February 8, 1990</td>
<td>59</td>
</tr>
<tr>
<td>Appendix H</td>
<td>Bill Draft Request (BDR) 18-260</td>
<td>63</td>
</tr>
</tbody>
</table>
APPENDIX A

Amendment V of the Constitution of the United States and Article I, Section 8, of the Nevada Constitution
AMENDMENT IV  

[Searches and Seizures]

Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Proposed in 1789; adopted in 1791.]

AMENDMENT V  

[Rights of Persons]

Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Proposed in 1789; adopted in 1791.]

AMENDMENT VI  

[Rights of Accused in Criminal Prosecutions]

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[Proposed in 1789; adopted in 1791.]

AMENDMENT VII  

[Civil Trials]

Trial by jury in civil cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be
eral Union, or forcibly resist the Execution of its laws, the Federal Government may, by warrant of the Constitution, employ armed force in compelling obedience to its Authority.

Sec: 3. Trial by jury; waiver in civil cases. The right of trial by jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

Sec: 4. Liberty of conscience. The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

Sec: 5. Suspension of habeas corpus. The privilege of the writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion the public safety may require its suspension.

Sec: 6. Excessive bail and fines; cruel or unusual punishments; detention of witnesses. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Sec. 7. Bail; exception for capital offenses and certain murders. All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.

[Amended in 1980. Proposed and passed by the 1977 legislature; agreed to and passed by the 1979 legislature; and approved and ratified by the people at the 1980 general election. See: Statutes of Nevada 1977, p. 1697; Statutes of Nevada 1979, p. 1941.]

Section 8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain. No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial,
in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

[Amended in 1912. Proposed and passed by the 1909 legislature; agreed to and passed by the 1911 legislature; and approved and ratified by the people at the 1912 general election. See: Statutes of Nevada 1909, p. 346; Statutes of Nevada 1911, p. 454.]

Sec: 9. Liberty of speech and the press. Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated.

Sec: 10. Right to assemble and to petition. The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives and to petition the Legislature for redress of Grievances.

Sec. 11. Right to keep and bear arms; civil power supreme.
1. Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.
2. The military shall be subordinate to the civil power; No standing army shall be maintained by this State in time of peace, and in time of War, no appropriation for a standing army shall be for a longer time than two years.


Sec: 12. Quartering soldier in private house. No soldier shall, in time of Peace be quartered in any house without the consent of the owner, nor in time of War, except in the manner to be prescribed by law.

Sec: 13. Representation apportioned according to population. Representation shall be apportioned according to population.

Sec: 14. Exemption of property from execution; imprisonment for debt. The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property
APPENDIX B

Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, March 15, 1988
EO 12628

Title 3—The President

Sec. 2. This Order shall be effective immediately.

THE WHITE HOUSE.

Executive Order 12629 of March 9, 1988

Nuclear Cooperation With EURATOM

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 126a(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2155(a)(2)), and having determined that, upon the expiration of the period specified in the first proviso to Section 126a(2) of such Act and extended for 12-month periods by Executive Orders Nos. 12193, 12295, 12351, 12409, 12463, 12506, 12554, and 12587, failure to continue peaceful nuclear cooperation with the European Atomic Energy Community would be seriously prejudicial to the achievement of U.S. non-proliferation objectives and would otherwise jeopardize the common defense and security of the United States, and having notified the Congress of this determination, I hereby extend the duration of that period to March 10, 1989. Executive Order No. 12587 shall be superseded on the effective date of this Executive Order.

THE WHITE HOUSE.

Executive Order 12630 of March 15, 1988

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection
Executive Orders EO 12630

of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

1. Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

2. Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

3. Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

4. Studies or similar efforts or planning activities;

5. Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such commu-
EO 12630  Title 3—The President

Communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority:

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use
Executive Orders EO 12630

or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

1. Serve the same purpose that would have been served by a prohibition of the use or action; and

2. Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:
(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government if the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.
Executive Orders
EO 12631

Section 1. In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE.

Executive Order 12631 of March 18, 1988

Working Group on Financial Markets

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish a Working Group on Financial Markets, it is hereby ordered as follows:

Section 1. Establishment. [a] There is hereby established a Working Group on Financial Markets (Working Group). The Working Group shall be composed of:

(1) the Secretary of the Treasury, or his designee;
(2) the Chairman of the Board of Governors of the Federal Reserve System, or his designee;
(3) the Chairman of the Securities and Exchange Commission, or his designee; and
(4) the Chairman of the Commodity Futures Trading Commission, or her designee.

(b) The Secretary of the Treasury, or his designee, shall be the Chairman of the Working Group.

Sec. 2. Purposes and Functions. [a] Recognizing the goals of enhancing the integrity, efficiency, orderliness, and competitiveness of our Nation's financial markets and maintaining investor confidence, the Working Group shall identify and consider:

(1) the major issues raised by the numerous studies on the events in the financial markets surrounding October 19, 1987, and any of those recommendations that have the potential to achieve the goals noted above; and
(2) the actions, including governmental actions under existing laws and regulations (such as policy coordination and contingency planning), that are appropriate to carry out these recommendations.
APPENDIX C

Executive Order D-78-79,
State of California, and the
Executive Order regarding
Protected Property Rights,
State of Colorado
WHEREAS, the Fifth Amendment to the United States Constitution, applicable to the State of California by the Fourteenth Amendment, and Article I, Section 19, of the California Constitution, guarantees that private property shall not be taken for public use without just compensation; and

WHEREAS, recent United States Supreme Court decisions in Nollan v. California Coastal Commission, 483 U.S. 825 and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 492 U.S. 304, have affirmed that state governmental actions, including regulations, that do not formally invoke the condemnation power may result in a taking of private property, even temporarily, for which just compensation is required; and

WHEREAS, responsible fiscal management and fundamental principles of good government require that government decision makers evaluate carefully the effect of their regulatory actions on constitutionally protected private property rights; and

WHEREAS, the executive branch of the State of California is comprised of numerous agencies, departments, boards and commissions whose decisions may potentially affect private property interests; and

WHEREAS, state government should be a leader in demonstrating sensitive consideration of protected private property rights and in avoiding unintended and undue financial burdens on the state budget, while state agencies fulfill their statutory duties;

NOW, THEREFORE, I, George Deukmejian, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

1. All agencies, departments, boards, and commissions shall:
   a. Consistent with fulfilling their statutory duties, evaluate their proposed regulatory actions in light of guidance provided in the aforementioned Supreme Court decisions and other relevant judicial authority in order to ensure the appropriate protection of private property rights consistent with the provisions of the United States and California Constitutions.
   b. Assure that their actions are properly supported by the administrative record, by statutory and other legal authority, and fully comply with the guidance set forth by the United States Supreme Court, including consideration of the following principles:
      (1) Governmental actions resulting in a physical invasion, or physical damage to private property may constitute a taking.
(ii) Governmental actions which interfere with the use and enjoyment of, or access to and from private property may constitute a taking.

(iii) For governmental actions which amount to a taking the actions result in a "temporary" taking.

2. The legal staff of the Department of General Services may be requested to provide guidance and technical assistance to any departments seeking to evaluate the potential private property impacts of agency proposals.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 26th day of December 1989.

[Signature]
Governor of California

ATTEST:

[Signature]
Secretary of State
EXECUTIVE ORDER

REGARDING THE PROTECTION OF PRIVATE PROPERTY RIGHTS

WHEREAS, the ability of Americans to own private property, and to be secure in that ownership, is one of our most basic rights; and

WHEREAS, private property is central to our economic success and an underpinning of our democratic freedoms; and

WHEREAS, state government must have the highest respect for private property, and government agencies and officials are obligated to ensure that respect for private property is reflected in their decisions and actions; and

WHEREAS, both the U.S and Colorado constitutions guarantee due process and just compensation when government takes actions affecting private property which a court determines is a taking of property; and

WHEREAS, the Colorado General Assembly passed House Joint Resolution 1011 calling for an executive order reaffirming the importance of protection of private property rights.

WHEREFORE, I Roy Romer, Governor of Colorado, by virtue of the authority vested in me under the laws of Colorado, DO HEREBY ORDER THAT:

1. It is the declared policy of state government that government actions shall not unduly infringe private property rights.

2. Each executive agency of state government, before condemning private property for a public purpose, shall undertake appropriate review to ensure that the condemnation is essential to advance the particular public purpose involved.

3. Each executive agency shall undertake to eliminate undue or inadvertent burdens on the exercise of private property rights resulting from government actions taken for the purpose of protecting public health and safety.
4. Nothing in this executive order is intended to abrogate or conflict with judicial decisions defining what constitutes a taking for purposes of the constitutional just compensation requirement.

Given under my hand and the Executive Seal of the State of Colorado this 8th day of November, 1989.

Roy Romer
Governor
APPENDIX D

Senate Bill No. 6253,
State of Washington, March 2, 1990, and
Washington Initiative Measure No. 123
CERTIFICATION OF ENROLLED ENACTMENT

SENATE BILL NO. 6253

CHAPTER NO. ____________________

Passed the Senate, February 7, 1990
Yea 67 Nays 0

Passed the House, March 2, 1990
As Amended
Yea 92 Nays 5

3/6/90 - Senate refused to concur in the House amendments and asked the House to recede.
3/7/90 - House refused to recede, insists on its position and asked the Senate to concur.
3/8/90 - Senate concurred in the House amendments and passed the bill as amended by the House.
YEAS 43 NAYS 0

CERTIFICATE

I, Gordon A. Golob, Secretary of the Senate of the State of Washington do hereby certify that the attached is enrolled Senate Bill No. 6253 as passed by the Senate and the House of Representatives on the dates hereof.

Secretary of the Senate
AN ACT Relating to the regulatory taking of private property by state government; and adding a new chapter to Title 8 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. The purpose of this chapter is to establish an orderly process that better enables state decision makers to evaluate whether proposed state regulatory or administrative actions may result in a taking of property that may require compensation. It is not the purpose of this chapter to expand or reduce the protection of private property owners from regulatory takings as provided by the state and federal Constitutions.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Policies that have taking implications" means state regulations, proposed state regulations, or proposed state legislation, that, if implemented or enacted, could effect a taking. "Policies that have taking implications" does not include:

(a) Actions in which the power of eminent domain is formally exercised.

(b) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property.

(c) Law enforcement actions involving seizure, for violations of law, of property for forfeiture, or as evidence in criminal proceedings.

(2) "Private property" means all property protected by Amendments V and XIV of the Constitution of the United States or Article I,
Sec. 2

section 16 of the state Constitution.

(3) "Taking" means an uncompensated damaging or deprivation of private property in violation of Amendment V or XIV of the Constitution of the United States or Article I, section 16 of the state Constitution.

(4) "State agency" means any state board, commission, department, or officer except legislative and judicial branches.

NEW SECTION. Sec. 3. The attorney general shall develop a checklist and guidelines for the evaluation of risk and avoidance of unanticipated takings pursuant to this chapter to assist departments and agencies in the identification and evaluation of governmental policies that have taking implications.

The guidelines and checklist are to be completed by July 1, 1990.

The attorney general shall review and update the checklist and guidelines at least on an annual basis to maintain consistency with court rulings.

NEW SECTION. Sec. 4. (1) Commencing October 1, 1990, each state agency or department proposing policies that have taking implications shall designate a person or persons in the agency who will be responsible for ensuring compliance with the provisions of this chapter. Each agency policy that has a taking implication shall submit the proposed agency action to the designated person for review.

(2) Using the checklist and guidelines for the evaluation of risk and avoidance of unanticipated takings prepared pursuant to section 3 of this act, the designee shall determine the need for preparing a "taking implications assessment." The "taking implications assessment" shall include an analysis of at least the following elements:

(a) The likelihood that the proposed action could result in a taking, including a description of how the taking affects private property rights.

(b) Alternatives to the proposed action that would fulfill the government's legal obligation but that would reduce the impact on the private property owner and thus the taking risk.

SB 6253
(c) An estimate of a financial cost to the government for compensation and source of payment within the agency's budget.

(3) Prior to implementing the policies that have taken implications, a copy of the "taking implications assessment" shall be submitted to the agency director and to the office of financial management.

(4) Nothing in this act grants a private party the right to seek judicial relief requiring compliance with the provisions of this act.

NEW SECTION. Sec. 5. Sections 1 through 4 of this act shall constitute a new chapter in Title 8 RCW.

Passed the Senate March 8, 1990.

President of the Senate.

Passed the House March 2, 1990.

Speaker of the House.
AN ACT Relating to regulatory takings and other unconstitutional interferences with the use of private property by governmental bodies, and adding a new chapter to Title 64 RCW.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. Article I, sections 3 and 16 of the Constitution of the state of Washington and Amendments V and XIV of the Constitution of the United States provide that no person shall be deprived of property without due process of law and no private property shall be taken or damaged for public use without just compensation having first been made. Recent decisions by the United States Supreme Court and the supreme court of the state of Washington have established the criteria and tests to be used for determining when a taking of private property or violation of due process has occurred.

These criteria should be carefully evaluated by governmental bodies whose actions affect private property so as to assure proper protection of constitutionally guaranteed property rights and reduce the burdens and uncertainties forced upon citizens, local governments, and the state by lengthy and costly litigation over these private property issues through the judicial process.

The purpose of this chapter is to establish an orderly, consistent process that better enables governmental bodies to evaluate whether proposed regulatory or administrative actions may result in a taking of private property or violation of due process. It is not the purpose of this chapter to expand or reduce the scope of private property protections provided in the state and federal Constitutions.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Private property" means all property protected by Amendments V and XIV of the Constitution of the United States or Article I, sections 3 and 16 of the Constitution of the state of Washington.

(2) "Government agency" means the state of Washington and any officer, agency, board, commission, department, or similar body of the executive branch of state government and any of the political subdivisions of the state including any cities, towns, counties, or other public bodies exercising regulatory authority or control over the use of private property in the state.

(3) "Taking" means an uncompensated damaging or deprivation of private property in violation of the state or federal Constitution.

(4) "Policies that have constitutional implications" means current or proposed regulations, ordinances, or resolutions; proposed state legislation; or other government agency policy statements that, if implemented or enacted, could effect a taking or deprive a person of property without due process or law, such as policies, regulations, orders, or agreements that propose or implement licensing, permitting, or condition requirements or limitations on private property use, or that require dedications or easements from owners of private property. "Policies that have constitutional implications" does not include actions in which the power of eminent domain is formally exercised, or law enforcement actions involving seizure of property for forfeiture or as evidence in criminal proceedings.

NEW SECTION. Sec. 3. The attorney general shall develop a checklist and guidelines by October 1, 1991, to assist government agencies in the identification and evaluation of policies that have constitutional implications including policies that may result in a taking. The attorney general shall review and update the checklist and guidelines at least on an annual basis to maintain consistency with changes in the law.

NEW SECTION. Sec. 4 (commencing January 1, 1992). Each government agency proposing or implementing policies that have constitutional implications shall designate a person or persons in the agency who will be responsible for ensuring compliance with the provisions of this chapter. Each agency policy that has constitutional implications shall be submitted to the designated person for review.

Using the checklist and guidelines prepared pursuant to section 3 of this act, the designated person shall prepare a constitutional impact assessment which includes an analysis of at least the following elements:

(1) A description of how the policy affects private property including the likelihood that the policy could result in a taking or deprive a person of property without due process of law.

(2) A description of the policy that would fulfill the government agency's legal obligation but that would reduce the impact on the private property owner and the risk of a taking.

(3) An estimate of the financial cost to the government agency for compensation and a source of payment within the agency's budget.

Prior to implementing policies that have constitutional implications, a copy of the constitutional impact assessment shall be submitted to the agency director and appropriate financial management authority.

Any award made to an owner of private property from a government agency for a taking or other unconstitutional interference with the use of private property, including any award of reasonable costs and attorneys' fees, shall come from the agency's existing budget unless the agency had previously disclosed an estimate of such costs to the appropriate financial management authority and funds were included in the budget for that purpose.

NEW SECTION. Sec. 5. Owners of a property interest, who successfully establish that a policy that has constitutional implications is an unconstitutional taking or violation of due process, shall be awarded reasonable costs and attorneys' fees incurred in establishing their claim. The remedies provided by this chapter are in addition to any other remedies provided by law.

NEW SECTION. Sec. 6. The effect of policies that have constitutional implications on the fair market value of affected property shall be reflected in the assessed valuation of that property for taxes, levies, and similar purposes.

NEW SECTION. Sec. 7. This chapter may be referred to as the property rights protection act.

NEW SECTION. Sec. 8. Sections 1 through 7 of this act shall constitute a new chapter in Title 64 RCW.
APPENDIX E

Contributors to the Takings Study
Contributors to the Takings Study

John Madole, Manager
Association General Contractors of America
P.O. Box 40697
Reno, NV 89504

Lands of Sierra, Inc.
(A Sierra Pacific Resources Company)
Valley Bank Plaza
50 West Liberty Street,
Suite 720
Reno, NV 89501

Patsy S. Redmond
Executive Vice President
Nevada Association of Realtors
760 Margrave Drive, Suite 200
P.O. Box 7338
Reno, NV 89510-7338

Nevada Bell
P.O. Box 11010
Reno, NV 89520

Vickie Turner/James E. Connelly
Nevada Cattlemen's Association
419 Railroad Street
Elko, NV 89801

Nevada Farm Bureau
1300 Marietta Way
Sparks, NV 89431

Nevada Manufactured Housing
Educational Trust
4055 S. Spencer, Suite 107
Las Vegas, NV 89119

Nevada Mining Association
Air Center Village
3940 Spring Drive, Suite 11
Reno, NV 89502
Keith Ashworth  
Manager, Community Affairs  
Nevada Power Company  
P.O. Box 230  
Las Vegas, NV  89151

Nevada Taxpayers Association  
310 N. Stewart  
Carson City, NV  89701  
(Carole Vilardo)

George G. Byers  
Director-Public Affairs  
Santa Fe Mining, Inc.  
Box 27019  
Albuquerque, NM  89125

Ted Fitzpatrick  
Santa Fe Pacific Realty Corp.  
250 South Rock Blvd., Suite 100  
Reno, NV  89502

Southwest Gas Corporation  
P.O. Box 98510  
Las Vegas, NV  89193-8510

Central Committee of Nevada  
State Grazing Boards  
530 Idaho Street  
Elko, NV  89801

Joyce Hall, Executive Director  
Utility Shareholders Association of Nevada, Inc.  
P.O. Box 1823  
Carson City, NV  89702
APPENDIX F

Letter to Nevada Agency Heads
from Committee on Public Lands,
dated November 20, 1989
November 20, 1989

<name>
<title>
<agency>
<address>
<city>, <state> <zip>

Dear <dear>:

On March 15, 1988, President Ronald Reagan signed Executive Order No. 12630. This Executive Order summarized inverse condemnation "takings law" under the Fifth Amendment to the United States Constitution as the law existed on that date. As a result of the U.S. Supreme Court's decision in two Fifth Amendment takings cases, Nollan v. California Coastal Commission and First Evangelical Lutheran Church v. City of Los Angeles, regulatory takings were found to exist in more broadly expanded factual situations.

On September 26, 1989, the Nevada Legislature's Committee on Public Lands (Nevada Revised Statutes 218.536, et seq.) formed a subcommittee to undertake a takings study as proposed in Senate Concurrent Resolution No. 57 which the 1989 Nevada Legislature did not adopt. Copies of S.C.R. 57 and Executive Order No. 12630 are enclosed.

The Committee finds the issue to be of prime importance and requests your assistance in determining compliance with the requirements of Article I, Section 8 of the Constitution of Nevada and the Fifth Amendment as applied to the states through the Fourteenth Amendment of the U.S. Constitution.

Therefore, please respond in writing to the following questions on or before December 15, 1989:

1. Does your department/agency assess whether its actions involve the taking of private property without just compensation? Actions in this context mean any proposed rules
or regulations, proposals for legislative action, communications to other departments and state governments that recommend governmental actions, proposed litigation, issuance or denial of permits or licenses and general interactions with the public.

2. If your agency presently assesses whether its actions involve the taking of private property without just compensation, please indicate the method of assessment used and whether specific guidance to the field is provided on how to conduct the assessment.

3. If you do not now assess whether your actions involve the taking of private property without just compensation, indicate the reasons why not.

4. If you do not now assess whether your actions involve the taking of private property without just compensation, would you recommend that such an assessment be made and, if so, how would you implement that recommendation?

5. Are there any alternatives to a legislative requirement that would compel you to assess the implications of your actions with regard to the taking of private property?

6. Please list actions and programs within your agency that may be affected by the takings issue.

7. Please provide the name of a contact person in your agency with whom the subcommittee can communicate on this takings study.

Please send your responses to:

Nevada Legislature's Committee on Public Lands
Subcommittee to Study Takings
Attn: Dana R. Bennett, Research Division
Legislative Building
Carson City, Nevada 89710

Thank you very much for your cooperation in this endeavor.

Very truly yours,

Dean A. Rhoads
Nevada State Senator
Chairman, Nevada Legislature's Committee on Public Lands

DAR/1lp:Land,Ll-1.2
Encs.
cc: C. Joseph Guild, III of Guild & Hagen, Ltd.
Ron Angelone  
Director  
Department of Prisons  
P.O. Box 7011  
Carson City, NV 89702

Thomas W. Ballow  
Director  
State Dept. of Agriculture  
P.O. Box 11100  
Reno, NV 89510

William A. Bible  
Chairman, State Gaming Control Board  
1500 East William Street  
Carson City, NV 89710

Robert A. Cavakis  
Administrator  
Youth Services Division  
505 E. King St., Room 606  
Carson City, NV 89710

Drennan A. Clark, Major General  
The Adjutant General of Nevada  
Dept. of the Military  
2525 South Carson Street  
Carson City, NV 89701

John P. Comeaux  
Executive Director  
Department of Taxation  
1340 South Curry Street  
Carson City, NV 89710
Don Cummings
Chairman, Comstock Historic District Commission
P.O. Box 128
Virginia City, NV 89440

Mark Dawson
Chancellor
University of Nevada System
2601 Enterprise Rd.
Reno, NV 89512

Lewis H. Dodgion
Administrator, Div. of Environmental Protection
201 South Fall St., Suite 221
Carson City, NV 89710

Garth F. Dull
Director
Department of Transportation
1263 South Stewart Street
Carson City, NV 89712

Robert G. Ferrari
Secretary-Manager
State Public Works Board
505 E. King St., Room 301
Carson City, NV 89710

Russ Fields
Executive Director
Department of Minerals
400 W. King Street, Suite 106
Carson City, NV 89710
Myla C. Florence
Administrator
Health Division
505 East King Street
Carson City, NV 89710

Jerome F. Griepentrog
Director
Dept. of Human Resources
505 East King, Room 600
Carson City, NV 89710

Andrew P. Grose
Executive Director
Div. of Economic Development
5151 South Carson Street
Carson City, NV 89710

Pat Hardy, M.D.
Director, Rural Clinics
Waters Bldg.
1001 North Mountain, Suite 2A
Carson City, NV 89710

Ronald M. James
Administrator, Div. of Historic
Preservation & Archeology
201 South Fall St., Rm. 106
Carson City, NV 89710

Terri Jay, Executive Director
Commission on the Preservation of
Wild Horses
Stewart Facility, Bldg. No. 6
Mark Twain
Carson City, NV 89710
Brian Lahren, Ph.D.  
Administrator, Mental Hygiene & Mental Retardation Division  
505 E. King St., Rm. 403  
Carson City, NV  89710

Robert R. Loux  
Executive Director  
Agency for Nuclear Projects  
1802 N. Carson St., Suite 252  
Carson City, NV  89710

Robert G. Mayhew, Commissioner  
Office of the Nev. Commissioner for Veterans Affairs  
1201 Terminal Way, No. 108  
Reno, NV  89520

Lawrence O. McCracken  
Administrator  
Dept. of Industrial Relations  
1390 S. Curry Street  
Carson City, NV  89710

Brian McKay  
Attorney General  
Heroes Memorial Building  
198 South Carson Street  
Carson City, NV  89710

Mike Meizel  
Supervisor  
Buildings & Grounds Division  
406 East Second Street  
Carson City, NV  89710
J. Scott Miller
Administrator, Department of
Museums & History
600 N. Carson Street
Carson City, NV 89710

William A. Molini
Director
Department of Wildlife
1100 Valley Road
Reno, NV 89512

Peter G. Morros, State Engineer
Division of Water Planning
Nye Bldg., 201 S. Fall Street
Carson City, NV 89710

John O’Reilly
Chairman
Nevada Gaming Commission
1150 East William Street
Carson City, NV 89710

Eugene T. Paslov, Ed.D.
Supt. of Public Instruction
State Dept. of Education
400 West King Street
Carson City, NV 89710

Norton Pickett
Administrator
Division of Mine Inspection
1380 South Curry Street
Carson City, NV 89710
John Richardson  
Administrator  
Division of State Parks  
201 S. Fall St., Rm. 119  
Carson City, NV 89710

Lowell V. Smith  
State Forester-Firewarden  
Division of Forestry  
201 S. Fall Street, Rm. 330  
Carson City, NV 89710

Thomas E. Stephens  
Chairman, Public Service  
Commission of Nevada  
727 Fairview Drive  
Carson City, NV 89710

Larry Struve  
Director  
Department of Commerce  
Nye Bldg., Room 321  
Carson City, NV 89710

Terry D. Sullivan  
Director  
Dept. of General Services  
505 E. King St., Room 400  
Carson City, NV 89710

Robert T. Sullivan  
Executive Director  
Nevada Rural Housing Authority  
2100 California Street  
Carson City, NV 89710
Michael Tyler
Administrator, Division of
Occupational Safety & Health
1370 South Curry Street
Carson City, NV 89710

Roland D. Westergard
Director, State Dept. of
Conservation & Natural Resources
201 South Fall St., Rm. 214
Carson City, NV 89710

Pamela B. Wilcox, Administrator
and State Land Registrar
Division of State Lands
505 E. King St., Room 300
Carson City, NV 89710

David Ziegler
Executive Director
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448-1038
APPENDIX G

Memorandum to Subcommittee to Study Takings from Dana R. Bennett, Senior Research Analyst dated February 8, 1990
February 8, 1990

MEMORANDUM

TO: Chairman and Members, Subcommittee to Study Takings
   Nevada Legislature's Committee on Public Lands
   (Nevada Revised Statutes 218.536, et seq.)

FROM: Dana R. Bennett, Senior Research Analyst

SUBJECT: Responses from State Agencies on Takings Issue

This memorandum summarizes the responses received from certain state agencies on the takings issue.

On November 20, 1989, the Committee on Public Lands sent a letter to certain state agencies requesting information on the agencies' assessments of their actions which may result in the taking of private property without just compensation. A copy of the letter and a list of the agencies to whom the letter was sent is attached.

Of the 40 agencies questioned, 33 responded. Only seven agencies have not answered the letter. Copies of the letters received are attached. The major findings of the survey are summarized below:

- Over two-thirds of the responding agencies indicated that they do not take actions which may result in a "taking."

- The following nine agencies indicated that they may take actions which may result in a "taking":

  Department of the Military
  Department of Transportation
  Department of Minerals
  Department of Industrial Relations
  Department of Wildlife
Division of Financial Institutions, Department of Commerce
State Fire Marshal Division, Department of Commerce
Department of Conservation and Natural Resources
Tahoe Regional Planning Agency

- All nine organizations indicated that they have formal or informal guidelines to assess whether certain actions involve taking private property without just compensation.

Following are the suggestions provided in some of the letters for methods of compelling state agencies to assess the implications of agency actions with regard to the taking of private property without just compensation:

- Issuance of an order from the Governor's office to the various executive agencies.

- Adoption of formal policy by the commission or board governing an agency.

- Legislatively require the prompt review by hearing of an agency's action to allow a person an opportunity to show that an agency's action was based upon legal or factual error (including constitutional questions of taking) prior to the final action by the agency which results in the actual taking.

No agency supported the passage of a legislative requirement for state agencies to assess takings implications. In fact, some respondents suggested that case law adequately protects citizens' rights in this issue and that state legislative action would be redundant.

DRB/gj: Public-T,M-2
Enclosure
APPENDIX H

Bill Draft Request 18-260
SUMMARY--Requires executive branch of state government to prepare assessment of takings implications on private property for certain governmental actions. (BDR 18-260)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State or on Industrial Insurance: Yes.

AN ACT relating to the state executive department; requiring the departments of the executive branch of state government to prepare an assessment of the takings implications on private property for certain governmental actions; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Title 18 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth as sections 2 to 16, inclusive, of this act.

Sec. 2. As used in this chapter, unless the context otherwise requires, the words and terms defined in sections 3 to 7, inclusive, of this act, have the meanings ascribed to them in those sections.
Sec. 3. "Department" means an agency, bureau, board, commission, division, officer or employee of the executive branch of state government. The term includes, without limitation, the Nevada Tahoe regional planning agency.

Sec. 4. "Governmental action" means:

1. A regulation proposed by a department.
2. Legislation proposed by a department.
3. Comments of a department on a proposed state or federal regulation or proposed legislation.
4. The application of a state regulation or legislation to private property, which may cause, among other things:
   (a) The physical invasion or occupancy of private property.
   (b) The physical damaging of private property.
   (c) Interference with the use and enjoyment of private property.
   (d) Interference with access to private property.
   (e) Interference with or acquisition of title to or an interest in private property.
5. Any statement of policy or a proceeding concerning the regulation, acquisition, physical invasion or occupancy of private property by the state.

Sec. 5. "Private property" means all property protected by Amendments V and XIV of the Constitution of the United States or section 8 of article 1 of the constitution of the State of Nevada.

Sec. 6. "Taking" means any uncompensated damaging or deprivation of private property in violation of Amendment V or XIV of the Constitution of
the United States or section 8 of article 1 of the constitution of the State of Nevada.

Sec. 7. "Takings implications" means the possibility that a governmental action, if implemented or enacted, could effect a taking, such as regulations that propose or implement licensing, permitting or other requirements on the use of private property or that require a dedication or an exaction from an owner of private property.

Sec. 8. The provisions of this chapter do not apply to:

1. Governmental action that modifies a regulation in a manner that lessens interference with the use of private property, abolishes a regulation, discontinues a governmental program or discontinues the use of a facility; or

2. Action by a law enforcement agency that involves the seizure of property for forfeiture or evidence in criminal proceedings.

Sec. 9. The attorney general shall:

1. After consultation with the various departments, adopt regulations for the evaluation of the risk and avoidance of unanticipated takings. The regulations must:

   (a) Require each department to prepare a written assessment of the takings implications of its governmental actions; and

   (b) Specify the information that must be included in the assessment, including, without limitation:

       (1) An estimate of the probability that the governmental action will result in a taking of private property; and
(2) If the estimate prepared pursuant to subparagraph (1) indicates that any probability of a taking exists:

(I) The potential fiscal impact on the department if the governmental action is found to result in a taking of private property; and

(II) Alternatives to the governmental action that would accomplish the purposes of the governmental action without resulting in a taking of private property.

2. Modify the regulations after changes occur in state and federal law concerning takings.

3. Send the regulations and any modifications to the departments.

Sec. 10. 1. The departments shall cooperate and consult with the attorney general to formulate the regulations pursuant to section 9 of this act.

2. Each department:

(a) Shall comply with the regulations adopted by the attorney general in proceeding with a governmental action.

(b) May adopt such additional regulations concerning takings as may be appropriate for the department after approval by the attorney general.

3. The head of each department shall designate an officer who will be responsible for ensuring compliance by the department with the provisions of this chapter.

Sec. 11. 1. Upon completion of an assessment prepared in compliance with the regulations adopted pursuant to section 9 of this act, the department shall publish a notice stating that the assessment was performed. The notice must
include a list of the property for which takings implications were identified, if any.

2. The contents of the assessment, other than the information contained in the notice, are a confidential work product of the department. The officers and employees of the department shall not disclose the contents of the assessment unless ordered to do so by a court of competent jurisdiction.

Sec. 12. The assessment of a department prepared in compliance with the regulations adopted pursuant to section 9 of this act must not be admitted as evidence in any proceeding brought by the owner of an interest in private property against the department seeking compensation for an unauthorized taking of private property or as evidence by the department in such an action.

Sec. 13. The attorney general and the departments shall consider the following standards when adopting regulations pursuant to section 9 of this act and when the departments identify and evaluate governmental actions for takings implications pursuant to those regulations:

1. A taking may result from governmental action that:

   (a) Causes a physical invasion or occupancy of or damage to private property.

   (b) Causes interference with the use and enjoyment of or access to private property.

   (c) Causes interference with or acquisition of title to or an interest in private property.
(d) Regulates the use of private property when the actions substantially affect the value of property or its use or unduly interfere with reasonable expectations concerning investment.

(e) Is temporary or does not result in complete deprivation of all use or value or of all of the separate interests in the private property.

(f) Regulates the use of private property and fails to advance legitimate governmental objectives substantially.

(g) Is an arbitrary and capricious abridgment of the right to make reasonable use of private property.

(h) Causes undue delay in making a decision if that delay interferes with use of private property.

2. If a proposed governmental action places conditions on the use of private property, the conditions must:

   (a) Serve the same legitimate objective that would have been served by a lawful prohibition of the proposed use;

   (b) Substantially advance the objective; and

   (c) Not be disproportionate to the extent to which the proposed use contributes to the problem that the conditions propose to redress.

3. If a proposed governmental action involves a study, or a planning or other process that will interfere with or prohibit the use of private property pending the completion of the process, the length of the process must be kept to the minimum necessary.

Sec. 14. 1. Each officer designated pursuant to section 10 of this act shall:
(a) Identify any regulation of the department against which a claim based on a taking is pending; and

(b) Compile and send an itemized list of any award or claim based on a taking for each fiscal year to the chief of the budget division of the department of administration at the end of the fiscal year.

2. For the purposes of this section, an award or a claim is based on a taking if it is made or brought to compensate a person for damage to or deprivation of private property which is taken for public use without just compensation pursuant to Amendment V or XIV of the Constitution of the United States or section 8 of article 1 of the constitution of the State of Nevada.

Sec. 15. The chief of the budget division of the department of administration shall, to the extent permitted by law, ensure that any award levied against a department based on a taking is considered in the budget submitted by that department.

Sec. 16. The director of the department of administration shall, to the extent permitted by law, ensure that the policies and regulations of each department are consistent with the provisions of this chapter.

Sec. 17. 1. The attorney general shall adopt regulations pursuant to section 9 of this act on or before June 1, 1992.

2. The attorney general shall send the regulations to each department on or before August 1, 1992.

3. Each department shall submit the list of awards pursuant to paragraph (b) of subsection 1 of section 14 of this act to the chief of the budget division