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Private Property Rights Protection Legislation Across the Nation

Nancie G. Marzulla

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PRIVATE PROPERTY RIGHTS PROTECTION LEGISLATION ACROSS THE NATION

Nancie G. Marzulla
President and Chief Legal Counsel
Defenders of Property Rights

Regulatory Takings and Resources:
What are the Constitutional Limits?

Natural Resources Law Center
University of Colorado School of Law
June 13-15, 1994
PRIVATE PROPERTY RIGHTS PROTECTION LEGISLATION
ACROSS THE NATION

Nancie G. Marzulla

I. INTRODUCTION
An excellent measure of the political power of the property rights movement is the amount of legislation that has been introduced at the state level. Since the beginning of 1993, nearly 100 bills have been introduced in over 40 states to protect private property from government actions. Eleven bills have been signed into law in nine states.

II. THE NEED FOR LEGISLATION
Despite the fact that property owners are finding relief from the unconstitutional taking of their property in the courts, litigation is a practical remedy only for the most dedicated and well-financed property owner. There are many procedural pitfalls, and the substantive issues are not well fleshed out. Legislation is a way to resolve the litigation burden for both the property owner and the government (i.e., the taxpayer). It can also provide the government with guidance to determine which actions may result in a taking so that litigation may be avoided. The absence of clearly defined public policy that could be established by legislation was best illustrated by Chief Judge Loren Smith of the U.S. Court of Federal Claims in a recent wetlands regulation takings case:

This case represents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. They can only interpret the rather precise language of the fifth amendment of our Constitution in very specific factual circumstances. To the extent that the constitutional protections of the fifth amendment are a bulwark of liberty, they should also be understood to be a social mechanism of last, not first, resort. Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best, courts sketch the outlines of individual rights; they cannot hope to fill in the portrait of wise and just social and economic policy. Bowles v. United States, No. 303-88L (Ct. Cl. March 24, 1994)

III. TYPES OF PRIVATE PROPERTY PROTECTION LEGISLATION
A. Planning Bills
   1. The genesis of the planning bills was Executive Order 12,630, an order signed into law by President Reagan shortly before leaving office. E.O. 12,630 requires federal agencies to review their actions to prevent unnecessary takings and to budget for those actions that necessarily involve takings. State planning bills, generally speaking, require state agencies to "look before they leap" and assess proposed regulations for any constitutional takings implications. Typically, the state attorney general is required to adopt guidelines to assist state agencies in the identification of actions that could result in a taking. Usually, an agency must prepare a takings impact analysis ("TIA") on a proposed action which includes information on: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. The bills usually require agencies, before taking an action that restricts property use for the protection of public health or safety, to: (1) clearly identify the risk created
by the property use; (2) establish that the action substantially advances the purpose of protecting the public health and safety against the specifically identified risk; and (3) establish that the restrictions imposed are proportionate to the extent that the use of the property contributes to the overall risk. The action must be no greater than necessary to achieve the health and safety purpose.

2. Planning bills can also be described as "property impact" bills, similar in nature to the National Environmental Policy Act. Planning bills are designed to require agencies to assess their actions and thus reduce the risk of violating the Constitution and incurring a large adverse takings judgment. See e.g. Resolution Trust Corp. v. Town of Highland Beach, 1994 WL 109230 (11th Cir. April 19, 1994)(a $31 million taking award was made against the town for the reinterpretation of a zoning ordinance to reflect termination of a residential unit development plan for property at an earlier date than was previously represented).

B. Compensation Bills

1. Compensation bills provide private property owners with the right to automatic full compensation if a government action results in the diminution in value of the property by a certain trigger point, usually 50% or more of the fair market value. The owner may bring suit under these laws to require the government to either purchase the property or pay compensation for the full value of the property. By establishing a trigger point, the bills enable owners to seek full compensation without many procedural hurdles. Usually, an agency's only defense under these bills once the diminution in property value passes the trigger point is a showing that the owner's use of the property was a public nuisance. An agency may avoid having to pay compensation under these bills by rolling back the regulation that affects the property in question to the level of regulation prior to the unconstitutional taking.

2. These laws do not prevent owners from seeking compensation for unconstitutional takings if the diminution in value is less than the trigger point.
EXECUTIVE SUMMARY ON STATE PRIVATE PROPERTY RIGHTS LEGISLATION
DURING THE 1993-94 LEGISLATIVE SESSIONS
(May 10, 1994)

- Over 70 bills are currently under consideration in 28 states.
- Eleven bills have been signed into law, eight since the beginning of 1993.

STATES WITH ENACTED PRIVATE PROPERTY RIGHTS LAW

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<tr>
<th>State</th>
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STATES IN WHICH LEGISLATION IS CURRENTLY UNDER CONSIDERATION

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STATES WHERE CURRENT LEGISLATION HAS PASSED ONE HOUSE

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<td>Rhode Island</td>
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</table>

1 These laws, except for the Mississippi law and the 1994 Arizona law, are all planning laws. Italic type indicates that new legislation is currently under consideration to supplement existing private property rights law.

2 Opposition circulated and successfully gathered signatures for a referendum to repeal the 1992 law. A vote will occur in the 1994 General Election in November. The law does not go into effect unless it is approved in the referendum. The 1994 law is a compensation law directed at municipalities.

3 Property rights legislation was part of the 1993 Administrative Rules Oversight Act.

4 Compensation act that applies only to private forest land.

5 The 1993 act applies to state agencies. The 1994 act applies to local governments.

6 Study bill—A joint subcommittee was established to study state governmental actions which may result in a taking of private property and to see if changes in current laws are needed.

7 Property rights legislation was added as an amendment to the 1991 Growth Amendment Act.

8 Regular type signifies where planning bills have been introduced. Bold type indicates where compensation legislation has been introduced. Both planning and compensation legislation have been introduced in California, New Hampshire, Rhode Island, and Washington.
<table>
<thead>
<tr>
<th>STATE</th>
<th>BILL NO.</th>
<th>YEAR</th>
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<td>California</td>
<td>A. 145</td>
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<td>Planning</td>
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<td>A. 2629</td>
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<td>Assembly Cmte on Judiciary (2/10/94)</td>
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<td>Colorado</td>
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<td>Planning</td>
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<td>S. 194</td>
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<td>Planning</td>
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<td>Planning</td>
<td>House Cmte on Judiciary, and House Cmte on Consumer Protection and Commerce (1/29/93)</td>
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<td>House Cmte on Judiciary, and House Cmte on Finance (1/28/94)</td>
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<td>S. 1645</td>
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<td>Senate Cmte on Govt. Operations and Corrections (2/24/94)</td>
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<td>Wyoming</td>
<td>S. 60</td>
<td>1994</td>
<td>Planning</td>
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**GLOSSARY OF TYPES OF BILLS**

**Compensation:** Provides a private property owner with the right to invoke inverse condemnation once the threshold reduction in market value (usually 50%) due to a government action has been reached. The owner, in other words, may require the government agency to either purchase the property or pay compensation for the full value of the property. These laws do not prevent an owner from seeking compensation for a reduction in value lower than the threshold.

**Condemnation procedure:** Mandates specific procedures for the condemnation of private property for public use.

**Notice:** Requires local governments to give notice to private property owners of any proposed actions that will affect their property.

**Permit:** Provides damages to private property owners who are unlawfully denied a permit that is required for a use of their property.

**Planning:** Requires government agencies to analyze proposed rules or regulations for any takings implications. These laws are a means of preventing takings.

**Wetlands:** Prevents wetland designation from reducing the value of private property.
ENACTED STATE PRIVATE PROPERTY RIGHTS LAWS
(May 10, 1994)

ARIZONA (1992)1--
Requires that the attorney general to adopt guidelines to assist state agencies in the identification of actions that have constitutional taking implications. Each agency shall prepare an assessment of taking implications that shall include: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. A government action may amount to a taking even if the action constitutes less than a complete derivation of all use or value, or even if the action is only temporary in nature. If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued.

Before taking an action restricting private property use for the protection of public health or safety, an agency shall: (1) clearly identify the risk created by the private property use; (2) establish that the action substantially advance the purpose of protecting public health and safety against the specifically identified risk; (3) establish that the restrictions imposed are proportionate to the extent that the use of the property contributes to the overall risk; and (4) estimate the cost of compensation of a court determines that the action constitutes a taking. The mere assertion of a public health and safety purpose is insufficient to avoid a taking. The action shall be no greater than necessary to achieve the health and safety purpose. If there is an immediate threat to health and safety that constitutes an emergency and requires an immediate response, the analysis required above may be made when the response is completed.

Before an agency implements an action that has taking implications, the agency shall submit a copy of the assessment to the Governor and the Joint Legislative Budget Committee.

Authorizes a municipality to acquire by purchase or condemnation private property for the removal of nonconforming uses and structures. The elimination of such nonconforming uses and structures in a zoned district is for a public purpose. Nothing in an ordinance or regulation authorized by this act shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purposes. A municipality or county may not require as a condition for a permit a waiver by the owner of the property of the right to continue an existing nonconforming outdoor advertising use or structure without acquiring the use or structure by purchase or condemnation.

Requires that no rule or regulation by any state agency become effective until the Attorney General has reviewed to determine the potential of takings implications. Judicial review of actions pursuant to this act shall be limited to whether the attorney general has completed the review.

IDAHO (1994)—Idaho Code § 67-8003
Requires the attorney general to establish a process and a checklist to better enable state agencies to evaluate regulatory actions to assure that such actions do not result in a taking. Local governments are encouraged to utilize this process.

1Opposition circulated and successfully gathered signatures for a referendum to repeal the law. A vote will occur in the 1994 General Election in November. The law does not go into effect unless it is approved in the referendum.
INDIANA (1993)—Ind. Code § 4-22-2-32
Requires the attorney general to consider whether a proposed agency rule constitutes a taking. If the rule is determined to be a taking, the attorney general shall advise the Governor and the agency head.

MISSISSIPPI (1994)—(to be codified as a separate chapter in the Mississippi Code)
Provides that an owner of private forest land may bring suit against a government agency if an action by that agency results in a diminution in value of the property of 40% or more of the fair market value. Government agencies shall not make waiver of this condition a condition for the approval or issuance of a permit or other entitlement. Government agencies shall not make waiver of this condition a condition for the approval or issuance of a permit or other entitlement. Nothing in this act shall be construed to preclude property owners from challenging regulatory programs where the diminution is less than 40% of the fair market value of the property. No compensation is required if the regulatory action is an exercise of police power to prevent uses noxious in fact or demonstrable harm to the health and safety of the public. Public and safety actions prohibiting or severely restricting forestry operations shall be: (1) taken only in response to real and substantial threats to public health or safety; (2) designated to significantly advance the health or safety purpose; and (3) no greater than necessary to achieve that purpose. An agency sued in any inverse condemnation action shall have the right to repeal the action complained of in the suit. The statute of limitations shall begin to run upon the final administrative decision implementing the regulatory program affecting the plaintiff's property.

TENNESSEE (1994)—(to be codified as a separate chapter in the Tennessee Code)
Requires that the attorney general to adopt guidelines to assist state agencies in the identification of actions that have constitutional taking implications. Each agency shall prepare an assessment of taking implications that shall include: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. If there is an immediate threat to public health and safety that requires an immediate response by the agency, the assessment may be made after the emergency ceases to exist. Provides that an owner of private property who successfully establishes that an action is a taking requiring just compensation may be awarded reasonable attorney's fees and other costs incurred in establishing the claim.

UTAH (1993)—Utah Code Ann. § 78-34a-1 to 78-34a-4
(Same as Arizona law)
Before an state agency implements an action that has taking implications, the agency shall submit a copy of the assessment to the Governor and the Legislative Management Committee.

1994—Utah Code Ann. § 63-90a-1 to 63-90a-4
Requires each political subdivision (county, municipality, special district, school district, or other local government entity) to enact an ordinance establishing guidelines to assist them in identifying actions involving takings implications; and to enact an ordinance that establishes procedures for review of actions that may have takings issues.

2Property rights legislation was part of the 1993 Administrative Rules Oversight Act.

3Applies to private forest land only.
VIRGINIA (1993)—Joint Resolution
Established a joint subcommittee to study government actions affecting private property rights and the need for legislation to implement changes to current takings law. Takings incidental to highway or public transportation construction shall not be included in the study. The subcommittee shall submit its findings and recommendations to the Governor and the 1994 Session of the General Assembly. (A bill is currently before the legislature to continue the subcommittee into the 1995 session.)

Requires the attorney general to establish a checklist that enables state agencies and local governments to evaluate proposed regulatory or administrative actions to ensure that such actions do not result in a taking of private property. This process shall be protected by attorney-client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section.

The attorney general, in consultation with the Washington state bar association, shall develop a continuing education course to implement this section.

4Property rights legislation was added as an amendment to the 1991 Growth Amendment Act.
CURRENT STATE PROPERTY RIGHTS LEGISLATION
(May 10, 1994)

ALABAMA

S. 349—Regulatory Impact Act Lindsey
Provides that an owner of private property may bring suit against a government agency if an action by that agency results in a diminution in value of the property of 50% or more of the fair market value. No recovery is allowed if the use of the property amounts to a public nuisance. Requires all governmental units (state, county, and municipal) to adopt guidelines to assist them in identifying governmental action that could result in a taking of private property. An assessment will be made of a proposed action by the responsible agency and shall include an analysis of: (1) the likely costs of the action; and (2) alternatives to the proposed action that will reduce the impact on private property.
Status:
1/18/94—Introduced to Senate Committee on Agriculture, Conservation, and Forestry.

ARIZONA

H. 2460 McGibbon
Requires that before a city, county or other political subdivision acquires or condemns private land to be used commercially, the action must be unanimously approved by the political subdivision's governing body and approved by voters in the next general election.
Status:
1/17/94—Introduced to House Committee on Ways and Means and House Committee on Rules.

CALIFORNIA

A. 145—Private Property Rights Protection Act Richter
Requires each state agency to evaluate its proposed regulatory actions for compliance with the U.S. Supreme Court and the California Supreme Court as well as other relevant judicial authority in order to ensure the appropriate protection of private property rights. These measures shall include consideration of the following principles: (1) Actions resulting in a physical invasion of, or physical damage to, private property may constitute a taking that requires just compensation; (2) Actions that interfere with the use and enjoyment or, or access to and from, private property may constitute a taking; and (3) Actions that amount to a taking of all uses of the property will be considered a taking even if the action is only temporary. Actions affecting private property must be supported by administrative record and existing statutory and other legal authority.
Status:
1/31/94—Passed Assembly.
2/09/94—To Senate Committee on Judiciary.

A. 2629—Inverse Condemnation Act Haynes
Provides that the award to the plaintiff in any inverse condemnation proceeding brought for the damaging or taking of any interest in real or personal property shall include reimbursement for costs incurred because of the proceeding, such as attorney, appraisal, and engineering costs.
Status:
2/10/94—Introduced to Assembly Committee on Judiciary.
3/08/94—From Assembly Committee on Judiciary with author's amendments. Read second time and amended; re-referred to Committee.
4/11/94—From Assembly Committee on Judiciary with author's amendments. Read second time and amended; re-referred to Committee.
COLORADO

S. 165--Private Property Protection Act

Before an agency implements an action that has takings implications, a copy of the assessment of the action must be submitted to the Governor, the Joint Budget Committee, and the Committee on Legal Services.

Status:
1/29/94—Introduced to Senate Committee on State, Veterans, and Military Affairs.
5/03/94—From Senate Committee on State, Veterans, and Military Affairs: Postponed indefinitely.

S. 194--Private Property Protection Act

Prohibits any action by a government agency that may result in a taking unless such an action is authorized by the general assembly acting by bill, accompanied by sufficient appropriation of other financial mechanism to provide just compensation for the taking. Directs all agencies to anticipate and account for obligations related to the taking of property. Any action to protect the public health and safety shall be: (1) taken only in response to real and substantial threats to public health and safety; (2) designed to significantly advance such a health and safety purpose; and (3) no greater than necessary to achieve such a purpose. During such an action, every effort will be made to preserve private property rights.

Before an agency implements any action that has takings implications, the agency shall submit an assessment of the implications to the Governor, Joint Budget Committee, and Committee on Legal Services (bill does not mandate the specific matters which must be covered by an assessment).

Status:
4/20/94—Passed Senate; to House.
4/20/94—To House Committee on Agriculture, Livestock and Natural Resources.
5/02/94—From House Committee on Agriculture, Livestock and Natural Resources: Reported favorably with amendment; to House Committee on Appropriations.
5/03/94—From House Committee on Appropriations: Postponed indefinitely.

DELAWARE

S. 49--Private Property Protection Act

Requires compensation to owners of private property which is reduced in fair market value by more than 50% due to a government action. Regulatory programs affected by this act include, but are not limited to, land use planning and zoning programs. Owners of private property affected by the action shall have a cause of action for compensation. Government agencies shall not make waiver of this condition a condition for the approval or issuance of a permit or other entitlement. Nothing in this act shall be construed to preclude property owners from challenging regulatory programs where the diminution is less than 50% of the fair market value of the property. No compensation is required if the regulatory action is an exercise of police power to prevent uses noxious in fact or demonstrable harm to the health and safety of the public. An agency's determination that a use is noxious in fact or poses a demonstrable harm to public health or safety is not binding upon a court of law, and judicial review of the action shall be de novo. If the agency is unwilling or unable to pay the costs awarded, it may instead relax the land use planning, zoning, or other regulatory program as it affects the plaintiff's land.

The statute of limitations shall begin to run upon the final administrative decision implementing the regulatory program affecting the plaintiff's property.
Status:
5/11/93—From Senate Committee on Small Business: Reported without recommendation.
5/19/93—Amended on Senate floor.
3/24/94—Passed Senate; to House.
3/29/94—To House Committee on Small Business.
3/29/94—Re-referred to House Committee on Transportation and Infrastructure.

S. 56--Private Property Protection Act  Still
(Same as S. 49)
Status:
3/18/93—Introduced to Senate Committee on Community and County Affairs.

FLORIDA

S. 630--Private Property Rights Act  Myers
(same as Delaware S. 49 except that this bill provides for compensation to owners of property is reduced in market value by more than 40%, instead of 50%, due to a government action)
Status:
2/08/94--Introduced to Senate Committee on Community Affairs.

GEORGIA

H. 1343  Crawford
(same as Delaware S. 49)
Status:
1/14/94--Introduced to House Committee on Judiciary.

H. 1706  Crawford
Provides that no government agency or private entity may condemn property in the absence of a showing that the property is needed for a specific purpose. In the event such a showing is made, the owner will be compensated for the loss in the value of the property.
Status:
2/08/94--Introduced to House Committee on Judiciary.

HAWAII

H. 1724  Peters
Requires that any statement of legislative findings in a bill which would affect private property rights be supported by citations to objective third-party studies.
Status:
1/28/93--Introduced to House Committee on Judiciary.

H. 2128  Peters
(same as Arizona law)
Before an agency implements an action that has takings implications, a copy of the action assessment shall be submitted to the Governor, and, in the case of a county agency, to the mayor of the county.
Status:
1/29/93--Introduced to House Committee on Judiciary, and to House Committee on Consumer Protection and Commerce.
H. 3349
(same as H. 2128)
Kanoho
Status:
1/28/94—Introduced to House Committee on Judiciary and House Committee on Finance.

S. 1645
(same as Arizona law)
Fernandez
Before a state agency implements an action that has takings implications, a copy of the action assessment shall be submitted to the Governor and the joint legislative budget committee.
Status:
1/29/93—Introduced to Senate Committee on Planning, Land and Water Use Management, and Senate Committee on Judiciary.

S. 3123
(same as H. 2128)
Matsunaga
Status:
1/27/94—Introduced to Senate Committee on Judiciary, and Senate Committee on Ways and Means.

IOWA

H. 350
(same as Arizona law except that assessments do not have to be submitted to the Governor or state legislature)
Mertz
Status:
3/02/93—Introduced to House Committee on Agriculture.
3/18/93—From House Committee on Agriculture: Do pass.
4/12/93—Rereferred to House Committee on Agriculture.

H. 2166
Mertz
Provides that any person having or claiming an interest in affected property may bring an action to recover just compensation for an inverse condemnation. A regulatory taking is defined as a government action that reduces the fair market value of the property by more than fifty percent. The action shall be brought in the county where the affected property is located. Reasonable attorney values shall be awarded to any party successfully establishing an inverse condemnation.
Status:
2/10/94—Introduced to House Committee on Judiciary and Law Enforcement.
2/15/94—Referred to House Committee on Agriculture.

S. 2148
(same as H. 2166)
Comm. on Agriculture
Status:
3/23/94—Introduced to Senate Committee on Judiciary.
3/28/94—Referred to Senate Committee on Agriculture.

KENTUCKY

H. 821
Farrow
Provides for compensation to owners of agricultural real property reduced in market value by a government action. Compensation shall be equal to the diminution in the value of the property, or for the full fair market value and title of their property. "Diminution of value" means a five
percent (5%) reduction in the fair market value of agricultural property due to a government action. The compensation award shall include reasonable attorney's fees and other litigation costs. If the government agency reverses its action prior to final judgment, the owner shall be awarded reasonable attorney's fees and other litigation costs along with compensation for any economic losses sustained as a result of the government action. The owner will not receive damages if the use of the property is a public nuisance.

**Status:**
3/01/94—Introduced to House Committee on Judiciary.
3/17/94—From House Committee on Judiciary: Reported with substitute.
3/22/94—Rereferred to House Committee on Judiciary.

**MASSACHUSETTS**

**H. 3851**

Requires the attorney general to develop a checklist and guidelines to assist agencies in the identification and evaluation of policies that could result in a taking of private property. Each agency shall designate an official who shall be responsible for ensuring compliance with the guidelines by preparing a constitutional impact assessment on proposed policies. An assessment shall include: (1) a description of how the policy affects private property; (2) alternatives to the proposed policy that would reduce the impact on private property; and (3) an estimate of the financial cost to the state for compensation. Prior to the implementation of the action, a copy of the assessment shall be prepared for review by the Secretary of Administration and Finance and by the Committees on Ways and Means of the Senate and the House of Representatives. An award made to an owner of private property from the state for a taking shall include an attorney's fees and other costs incurred in establishing the claim.

**Status:**
2/08/94—Introduced to Joint Committee on State Administration.
4/21/94—From Joint Committee on State Administration: Ought to pass; to House Committee on Ways and Means.

**MINNESOTA**

**H. 2335—Property Rights Preservation Act**

Requires that the attorney general to adopt guidelines to assist state agencies in the identification of actions that have constitutional taking implications. Each agency shall prepare an assessment of taking implications that shall include: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. A government action may amount to a taking even if the action constitutes less than a complete derivation of all use or value, or even if the action is only temporary in nature. If there is an immediate threat to public health and safety that constitutes an emergency and requires an immediate response, the assessment may be made when the response is completed.

**Status:**
3/03/94—Introduced to House Committee on Environment and Natural Resources.

**S. 2677—Property Rights Preservation Act**

(same as H. 2335)

**Status:**
3/18/94—Introduced to Senate Committee on Judiciary
MISSOURI

H. 1099
Requires a takings analysis to be completed before a proposed rule or regulation is transmitted to the secretary of state. The agency shall certify in the transmittal letter that the analysis has occurred. An analysis shall not be necessary when the rule or regulation is being promulgated on an emergency basis, or where the rule or regulation is mandated by federal or state law.

Status:
3/24/94--Passed House; to Senate.
3/31/94--To Senate Committee on Agriculture and Rural Business and Development.
4/21/94--From Senate Committee on Agriculture, Conservation and Parks: Do pass.
5/02/94--Amended on Senate Floor; passed Senate; to House for concurrence.
5/03/94--House refused to concur with Senate amendments; to Conference Committee.

H. 1585
Requires that the attorney general to adopt guidelines to assist state agencies in the identification of actions that have constitutional taking implications. Each agency shall prepare an assessment of taking implications that shall include: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. A government action may amount to a taking even if the action constitutes less than a complete derivation of all use or value, or even if the action is only temporary in nature. No governmental action involving a takings analysis shall proceed until a final determination has been made by the attorney general and reported to the Governor and the budget chairmen of both the House and the Senate. If the attorney general determines that an action has taking implications, attorney general shall notify the Governor and the budget chairmen of both the House and the Senate of the decision concerning the action.

If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued.

S. 558
Provides that no agency shall transmit a proposed rule or regulation to the Secretary of State until the completion of a takings analysis, which shall be an evaluation of whether the action constitutes a taking. An analysis shall not be necessary if the rule or regulation is being promulgated on an emergency basis, if it is federally mandated, or if it substantially codifies existing federal or state law.

Status:
3/01/94--Passed Senate.
3/09/94--To House Committee on Agriculture.

NEBRASKA

L. 1100
Requires that any rule or regulation adopted under the Administrative Procedure Act by submitted to the attorney general for determination of whether the action constitutes a taking. If the action is determined to be a taking, the attorney general shall advise the Governor and the director of the agency on the state's potential liability.
Status:
1/13/94--Introduced
1/19/94--To Legislative Committee on Government, Military and Veterans' Affairs.
3/02/94--From Legislative Committee on Government, Military and Veterans' Affairs:
   Placed on General File as amended.

NEW HAMPSHIRE

H. 1200   B. Johnson
Requires the state to pay the owner of property that has been condemned at least the original
purchase price of the property.
Status:
1/05/94--Introduced to House Committee on Judiciary.

H. 1486--Private Property Rights Preservation Act    Daniels
(same as Arizona law)
Before an agency implements an action that has takings implications, a copy of the assessment
shall be submitted to the Governor and the joint legislative fiscal committee.
Status:
1/05/94--Introduced to House Committee on Judiciary.
3/04/94--From House Committee on Judiciary; re-referred to Committee.

NEW YORK

A. 5641--Private Property Protection Act    Straniere
(Same as Delaware S. 49)
Status:
3/02/93--Introduced to the Assembly Committee on Judiciary.

S. 2832--Private Property Protection Act    Cook
(Same as Delaware S. 49)
Status:
3/02/93--Introduced to Senate Committee on Judiciary.
7/05/93--From Senate Committee on Judiciary.
1/05/94--Returned to Senate Committee on Judiciary.

NORTH CAROLINA

H. 954   G. Miller
Provides that no municipality, county government, or other political subdivision shall alter,
remove, or cause to be altered or removed, any lawfully established use or structure of private
property without payment of just compensation.
Status:
4/15/93--Introduced to House Committee on Judiciary.

S. 1227   Ballance
(same as H. 954)
Status:
6/09/93--Introduced to Senate Committee on Local Government and Regional Affairs.
OKLAHOMA

H. 1812—Private Property Protection Act
Reese
Requires the attorney general to formulate guidelines to assist state agencies in the identification of actions that have takings implications. In formulating the guidelines, the attorney general shall consider the following principles: (1) State agencies shall be sensitive to private property rights and shall avoid imposing undue burdens on the public treasury caused by the need of compensation due to takings in the implementation of government actions; and (2) an action may be considered a taking even if it results in less than a complete deprivation of all use or value of the affected property and even if the action is only temporary in nature. Public and safety actions restricting the use of private property shall be: (1) taken only in response to real and substantial threats to public health or safety; (2) designated to significantly advance the health or safety purpose; and (3) no greater than necessary to achieve that purpose. The mere assertion of a public health and safety purpose is insufficient to avoid a taking.

Status:
3/15/93—To Senate Committee on Judiciary.

PENNSYLVANIA

H. 803—Private Property Protection Act
Saurman
(Same as Delaware S. 49)

Status:
3/17/93—Introduced.
3/22/93—To House Committee on Local Government.

H. 1890
Steighner
Requires, in the determination of the fair market value of property after a partial taking, that consideration be given to the use to which the condemned property is to be put and to the damages or benefits to the remaining property resulting from this use.

Status:
6/23/93—Introduced to House Committee on Local Government.

RHODE ISLAND

H. 6204
Burlingame
Provides that compensation to owners or private property condemned for public highway use may include reasonable costs incurred during the proceeding, including, but not limited to, appraisal and attorney's fees.

Status:
2/23/93—Introduced to House Committee on Finance.

H. 8396—Private Property Rights Act
Salisbury
(same as Arizona law except there is no requirement to submit a taking assessment to the Governor or the legislature)

Status:
2/10/94—Introduced to House Committee on Judiciary.
4/12/94—From House Committee on Judiciary: Recommended as substituted.
4/26/94—Passed House; to Senate Committee on Judiciary.
S. 928
Flynn
(same as Arizona law except there is no requirement to submit a taking assessment to the Governor or the legislature)
Status:
2/11/93—Introduced to Senate Committee on Judiciary.

S. 2744—Private Property Protection Act
Sullivan
(same as Arizona law except that individual state agencies, rather than the attorney general, are responsible for formulating guidelines)
Before any agency implements an action that has takings implications, the agency shall submit a copy of the assessment to the Governor and the general assembly.
Status:
2/16/94—Introduced to Senate Committee on Judiciary.

S. 2793—Private Property Rights Act
Gorham
(same as Arizona law except that there is no requirement to submit a takings assessment to the Governor or the state legislature; instead, an assistant attorney general shall review actions having takings implications)
Status:
2/17/94—Introduced to Senate Committee on Judiciary.

S. 3219
Lynch
Creates a special legislative commission to study the feasibility of compensation to be paid to owners of wetland property with respect to rules and regulations governing the hearings on wetlands.
Status:
3/17/94—Introduced to Senate Committee on Judiciary.

SOUTH CAROLINA

H. 3785—Eminent Domain Procedure Act
Baxley
Provides that a condemnor may institute an action for the acquisition of an interest in real property necessary and reasonable for the public purpose to be served by the property to be altered or destroyed. The condemnor has the burden of proof. This act constitutes the exclusive procedure under which condemnation may be undertaken.
Status:
3/30/93—Introduced to House Committee on Judiciary.

S. 125—Private Property Protection Act
Rose
(same as Delaware S.49)
Status:
1/12/93—Introduced to Senate Committee on Judiciary.

S. 385—Eminent Domain Procedure Act
McConnell
(same as H. 3785)
Status:
2/09/93—Introduced to Senate Committee on Judiciary.

S. 816—Private Property Protection Act
Elliott
(same as Arizona law except that the responsibility of adopting guidelines lies with each individual agency rather than the attorney general)
Before a state agency implements an action that has takings implications, a copy of the assessment must be submitted to the State Budget and Control Board.
SOUTH DAKOTA

H. 1263

McNenny

Requires that a takings assessment be submitted with any proposed rule to the departmental secretary, bureau commissioner, or constitutional officer of the department. The assessment shall include: (1) whom the proposed rule will impact; (2) the general economic impact of the rule; and (3) a determination of whether the rule will have a disproportionate impact on a limited number of people; and (4) a cost-benefit analysis to determine whether the benefit of the rule is greater than the cost of the rule to those impacted by the rule. The agency shall afford all interested persons reasonable opportunity to submit data, opinions, or arguments, either orally or in writing or both, at a hearing held for that purpose. After the hearing, the agency shall fully consider all written and oral submissions regarding the proposed rule.

SOUTH DAKOTA

Status:
6/01/93--Introduced to Senate Committee on Judiciary.

TENNESSEE

H. 1364

Shirley

Provides that, if lands are determined to be wetlands by any state agency, the owner of the land may require the state to acquire the wetlands at fair market value, or the owner may elect to retain the land, in which case the land shall have a zero value for all state and local property taxes.

Status:
2/22/93--Introduced.

VERMONT

H. 421

Towne

(same as Arizona law)
Before a state agency may implement an action that has takings implications, the agency shall submit a copy of the assessment to the Governor and the joint fiscal committee.

Status:
2/25/93--Introduced to House Committee on Government Operations.

S. 110--Private Property Rights Protection Act

Illuzzi

(same as H. 421)

Status:
2/11/93--Introduced to Senate Committee on Judiciary.
VIRGINIA

H.J.R. 74 Croshaw
Continues a Joint Subcommittee established in 1993 to study government actions affecting private property rights (see H.J.R. 624 in Enacted State Property Rights Laws). Study is to be completed during the 1995 session of the General Assembly.

Status:
2/11/94--Passed House.
2/15/94--To Senate Committee on Rules.

H. 2369 Wilkins
Requires agencies to perform a comparison of a regulation's relative merits in protecting health, safety and general welfare versus the general impact on the use and value of private property and the costs to the person being regulated. A summary and statement of the basis, purpose, substance, issues and estimated impact shall be published in the state Register of Regulations, together with the notice of public hearing on the proposed regulations.

Status:
1/28/93--Introduced to House Committee on General Laws.

WASHINGTON

H. 1381 Rayburn
Provides private property owners who have filed an application for a permit with a cause of action for damages or any other action to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed authority. The prevailing party that has commenced an action pursuant to this act may be entitled to reasonable costs, expenses of litigation, and attorney's fees.

Status:
1/27/93--Introduced to House Committee on Judiciary.

H. 1487 Sheahan
Requires that, prior to the adoption of regulations to protect wetlands, cities and counties develop an inventory of the land that would be subject to those regulations, and notify owners of the land at least fifteen working days prior to the first public hearing on the proposed regulations.

Status:
1/29/93--Introduced to House Committee on Natural Resources and Parks.

H. 1843--Private Property Protection Act Morris
(same as Delaware S. 49)
In addition, if an owner is deprived of the use of property by an exigent natural condition and mitigating action is the responsibility of a state or local agency, the owner may be compensated if the agency response is too slow to prevent substantial damage that a reasonably timely response would have prevented.

Status:
2/10/93--Introduced to House Committee on Judiciary.
3/08/93--From House Committee on Judiciary: Do pass.

H. 1848--Private Property Protection Act Sheahan
(same as H. 1843)

Status:
1/29/93--Introduced to House Committee on Judiciary.
H. 1932 Stevens
Requires that every county, city and town submit a property owner impact statement and hold a public hearing for any action that will have a potential impact on the ability of property owners to use, develop, and sell their property. The impact statement shall include the economic consequences resulting from the action.

Status:
2/17/93--Introduced to House Committee on Judiciary.

H. 1933 Stevens
Requires local governments (cities and counties) to notify, in clear language that is understandable to the average reader, private property owners of proposed land use actions. The notices shall describe the potential impact of specific property taxes and overall tax revenues on local governments, and the impact that regulations will have on the affordability of local housing. The notices will also include: (1) a clear statement of standing; (2) an explanation of the effect on the property owner of having or not having standing; and (3) what the property owner must do to have standing. Government actions subject to this act shall include, but are not limited to, the adoption or amendment of comprehensive plans or building codes, zoning actions, designations of open space or wetlands, and environmental determinations.

Status:
2/17/93--Introduced to House Committee on Judiciary.

H. 1934 Stevens
Requires that full compensation be paid to owners by the designating agency or jurisdiction whenever private land is designated as wetland, open space, or other public benefit which prohibits or restricts the use of property by the owner. Compensation must be paid to the owner simultaneously with the enactment of the designation regulations; otherwise, the restrictions may not be imposed. An agency may not deflate the value of property by suggesting or threatening a designation in order to avoid full compensation to the owner. The value of the wetland prior to designation is the value of the property that would exist if there were no restrictions placed on its use by a government body.

Status:
2/17/93--Introduced to House Committee on Judiciary.

H. 2379 Appelwich
(same as H. 1381)

Status:
1/14/94--Introduced to House Committee on Judiciary.

H. 2470 Roland
(same as H. 1933)

Status:
1/14/94--Introduced to House Committee on Judiciary.

H. 2500 Grant
Provides that the regulation of private property or a requirement or restraint of land use by a governmental entity is prohibited unless: (1) the specific property or properties to be regulated are identified by the entity proposing the regulation; (2) the owner is provided with notification of the proposed regulation, which must include the economic and environmental impacts of the regulation on the property; (3) the owner is notified at least ten days before adoption of the regulation on how to give testimony or submit written statements to the body proposing the regulation; and (4) a full analysis of the economic impact is completed and published at least ten days prior to the adoption of the regulation. The regulation must have the least possible impact and be the least burdensome means of accomplishing the public purpose of the action.

Requires that full compensation be paid to owners by the designating agency or jurisdiction
whenever private land is designated as wetland, open space, or other public benefit which prohibits or restricts the use of property by the owner. Compensation must be paid to the owner within three months of the enactment of the designation regulations; otherwise, the restrictions may not be imposed. An agency may not deflate the value of property by suggesting or threatening a designation in order to avoid full compensation to the owner. The value of the wetland prior to designation is the value of the property that would exist if there were no restrictions placed on its use by a government body. The state is responsible for the compensation liability resulting from any county, city, or other political subdivision that is mandated by state law.

Status:
1/17/94--Introduced to House Committee on Judiciary.

S. 5081
Skratek
Requires that counties and cities proposing the designation of an area as a wetland notify owners of land covered by the proposed designation and owners of land that is contiguous to the proposed wetland. The notification shall be by first class mail, return receipt requested. No final determination regarding a wetland designation may be made less than sixty days after mailing of the notices. Failure to provide notice may be considered in any action brought in which the existence, character or nature of a wetland is an issue but will not be the sole basis for a determination that land has been erroneously designated as a wetland.

Status:
1/13/93--Introduced to Senate Committee on Governmental Operations.

S. 5369
Haugen
Requires that a property owner intending to bring a takings suit give written notice to the regulating agency at least 45 days before filing suit. Within 45 days after receiving notice, the agency may notify the complainant that it: (1) has reversed the action affecting the complainant's property; (2) will consider reversing the action within 15 days after the complainant provides specified information or an explanation of why specified information cannot be provided at a reasonable cost; or (3) offers an alternative solution to the impasse. If the agency determines that the complainant has not exhausted all available administrative remedies, it shall notify the complainant of the additional available administrative remedies within 45 days of receiving notice of the complainant's intent to sue. In response to a takings suit, an agency may: (1) await the court's decision; (2) elect to acquire the property by eminent domain and pay just compensation; or (3) record a declaration of partial taking. If an agency fails to exercise one of these options, the court may award whatever form of relief it finds appropriate.

If a political subdivision receives a notice seeking relief from an action that is the result of a state mandate, it may notify the attorney general and the complainant that it believes the action was necessary to comply with state law. If the state determines that the political subdivision's action was not required by state law, the state shall notify the subdivision and the complainant within 90 days of receiving notice from the subdivision. Otherwise, the state will assume full responsibility, or reimburse the political subdivision, for costs reasonably incurred to defend the regulatory action.

Status:
1/26/93--Introduced to Senate Committee on Governmental Operations.

S. 5431--Private Property Protection Act
Snyder
Provides that, when a parcel of real property has been taken for public use, compensation shall be paid to the owner for the full amount of the decrease in assessed value. An agency may not make waiver of the provisions of this act a condition for approval of the use of property or the issuance of a permit. No compensation is required if the scheme regulating the land is an exercise of police power solely to prevent or abate a public nuisance. The statute of limitations begins to run upon the enactment of the scheme regulating the property.

Provides that, if a natural event or condition threatens to deprive an owner of land or of use of the
land or to cause serious damage, and immediate corrective action is required to prevent this deprivation or damage, but this action will violate a state or local law, the owner may apply to the agency charged with enforcing the regulation to take, or to permit the owner to take, the corrective action. If the agency wrongfully denies permission or fails to take reasonably timely action, the agency shall be liable for the diminution in the fair market value. The owner also has the alternative option of, without notifying the agency, taking such corrective action as is reasonably necessary to prevent the threatened deprivation or damage. However, the owner shall notify the agency of the corrective action within five days after commencing the action. In a legal action brought by the agency, the owner shall be liable for violation of the regulation if the court determines that there was a violation and that the owner would not have qualified for any available waiver or exemption.

**Status:**
1/27/93—Introduced to Senate Committee on Natural Resources.
3/03/93—From Senate Committee on Natural Resources: Do pass as substituted.
3/03/93--To Senate Committee on Ways and Means.

S. 5475--Private Property Protection Act
Amondson
(same as S. 5431)

**Status:**
1/29/93--Introduced to Senate Committee on Natural Resources.

S. 6167
Snyder
(same as H. 2500)

**Status:**
1/14/94--Introduced to Senate Committee on Natural Resources.

**WEST VIRGINIA**

H. 4165--Private Property Protection Act
Martin
(same as Arizona law except that each state agency, instead of the attorney general, is responsible for adopting its own guidelines)

Before a state agency may implement an action that has takings implications, the agency shall submit a copy of the assessment to the secretary of the department of which the agency is a part, or, if the agency chief administrator reports directly to the Governor, to the Governor.

**Status:**
1/26/94--Introduced to House Committee on Government Organization.
2/28/94--From House Committee on Government Organization: Do pass with substitute.
2/28/94--To House Committee on Judiciary.

S. 249--Private Property Protection Act
Minard
(same as H. 4165)

**Status:**
2/02/94--Introduced to Senate Committee on Judiciary.

**WISCONSIN**

A. 1185
Albers
(same as Arizona law with two exceptions: (1) a newly-created council on takings of private property in the department of administration, instead of the attorney general, shall be responsible for formulating guidelines to assist state agencies in identifying actions with takings implications; and (2) the secretary of administration shall appoint an attorney to act as a property rights specialist whose responsibility is to intervene in any proceeding relating to a
taking and seek to reduce the number of takings.)

**Status:**
3/01/94—Introduced to Assembly Committee on Elections and Constitutional Laws.

**S. 757**
(same as A. 1185)

**Status:**
2/24/94—Introduced to Senate Committee on Government Operations and Corrections.

**WYOMING**

**S. 60—Regulatory Takings Act**

Requires that the attorney general to adopt guidelines to assist state agencies in the identification of actions that have constitutional taking implications. Each agency shall prepare an assessment of taking implications that shall include: (1) the likelihood of a taking; (2) alternatives to the proposed action; and (3) an estimate of the financial cost to the state for compensation. Before an agency implements an action with takings implications, a copy of the assessment shall be submitted to the agency director and the appropriate financial management authority.

Provides that any property owner who successfully establishes that an action has takings implications may be awarded attorney's fees and other reasonable costs incurred in establishing the claim.

**Status:**
2/24/94—Introduced.
State-by-State Legislative Update

Almost a hundred property rights bills have been introduced in 37 states in 1993-94 updated 5/12/94

Planning and compensation bill introduced

Planning bill introduced

Compensation bill introduced

States that have already enacted property rights legislation

Arizona 2 Delaware Idaho Indiana
Mississippi 3 Tennessee Utah Virginia 4

Washington

1) All passed legislation are planning bills, except for Mississippi and the 1994 Arizona bill.
2) A bill passed in 1992 will not go into effect unless a referendum on bill is approved by voters in November, 1994. The bill passed in 1994 is a compensation law directed at municipalities.
3) This compensation bill applies only to private forest land.
4) This is a study bill that created a joint subcommittee to study if current laws are adequate

Bills that have already passed one house

California Colorado Delaware Missouri
Oklahoma Rhode Island

For more information and to receive a copy of model property rights legislation, please contact:

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