

MEASURE 37: REGULATORY TAKINGS COMPENSATION
IMPACT ON LAND USE PROTECTIONS IN OREGON

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ABSTRACT

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In November 2004, a super majority, 61%, of Oregon voters supported ballot measure 37 stating governments must pay fair market value or waive regulations when certain land use restrictions reduce property values. This victory was a milestone in the campaign to protect private property rights and could have disastrous consequences for the land Oregon has spent over thirty years working to protect. The campaigns were built upon the basics of American property rights and focused on personal stories of land use, vested interests, and the conflict between environmental regulation and private land uses. With Measure 37 in place, Oregon residents file claims for compensation or waiver of regulation related to a handful of state and local environmental regulations primarily focused on protection of resource lands and farmland. A review of county approved budgets for Baker, Deschutes, and Polk counties and Measure 37 claims filed to date demonstrates that local governments will not be able to pay for compensation for lands claimed to have been taken by environmental regulations.

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Introduction

In 2004, the residents of Oregon were presented with campaigns for and against an upcoming citizen initiative, Measure 37, providing a framework for regulatory compensation when property value is lost. Will local governments be able to support the decision of Oregon's voters and compensate for the regulated land or will the cost of compensation be too great for local budgets to bear, forcing regulations to be waived or altered?

To build a foundation upon which to evaluate the potential impacts of Measure 37, it is necessary to review the Constitutional basis for "takings" and the United States Supreme Court interpretations of the Fifth Amendment. Understanding how the "Yes" and "No" campaigns were presented to the public and the adoption of the measure demonstrates that many in Oregon have interest in the future of land use and environmental regulations in the state. A majority of the compensation claims have been filed against Exclusive Farm Use (EFU) zoning regulations. Compiling EFU claims data from Baker, Deschutes and Polk counties, a "worst case scenario" for monetary compensation looks at how much it would cost these county governments to pay landowners for regulated lands. The constitutional framework along with data collected from claims and the unforeseen impacts of Measure 37 will help Oregon shape the future of environmental and land use regulations.

In November 2004, a super majority, 61%, of Oregon voters supported ballot measure 37 stating governments must pay fair market value or waive regulations when certain land use restrictions reduce property values. This victory

was a milestone in the campaign to protect private property rights. Requiring local governments to compensate landowners for environmental regulatory impacts could have disastrous consequences for the land Oregon has spent over thirty years working to protect.

Regulatory or partial takings are a growing extension of the Fifth Amendment to the United States Constitution. The United States Supreme Court has established a series of case law to help state and local governments decide when regulatory impact becomes a partial taking, vastly different from full takings or powers of eminent domain. The case law establishes guidelines and regulatory precedents enabling states to more effectively protect public goods (land, water, farms) without overstepping their authority and unjustly influencing the value of privately owned land. The case law has created a toolbox for states to evaluate the impacts of environmental regulations on landowners. For example, utilizing Fair Market Value tools, governments are able to assign values to land parcels as well as define the possible economic impact a regulation may impose. The Supreme Court decisions allow the states to enact a regulation with justified partial takings and can prevent the approval of regulation exercising the power of eminent domain. Utilizing case law and other available resources, states may choose to mitigate partial takings with voluntary regulatory programs or tax incentives aimed at compensating private landowners impacted by new or updated regulations.

Establishing the value of an environmental regulation is important to the campaign for regulatory takings compensation. For many landowners, the

environmental protections afforded by regulatory efforts may not be justified by the potential loss in land value resulting from the regulation. Also, landowners may feel the government is unfairly taking a portion of their land for a public good without fair compensation. This issue of government fairness is one of many fueling the campaign for regulatory compensation.

A group of citizens in Oregon was able to harness the “government fairness” fuel and present the voters with a citizen initiative, Measure 37, to force local governments to compensate for regulations influencing the use and value of private lands. The success of Measure 37 is especially important due to Oregon’s strict and progressive land use policies. Oregon adopted a Comprehensive Land Use Policy in 1973—including growth management statutes, zoning and permit requirements as well as coastal lands protection. Local governments have adopted these policies, along with regulations meeting local needs, in order to preserve the integrity of the land now and in the future.

The overwhelming approval of Measure 37 stands to threaten everything Oregon has worked towards in land use protection. Modification of regulations will lead to heavily fragmented lands, habitats and resources. Irresponsible development and resource extraction could lead to degraded water quality, inefficient land use, increased urban and suburban sprawl and a higher dependence on out-of-state resources.

As of August 2006, Oregonians had filed over 2500 compensation claims in accordance with Measure 37. These claims represent the interest of private citizens as well as corporate and industrial needs. The average cost for

compensation for each claim was over two million dollars—all of which would come from local government budgets. The Measure failed to incorporate a means to raise compensation monies, therefore most would come from already strained budgets, possibly compromising the ability of local governments to invest more in public services such as schools, clinics and public transportation.

This paper will provide closer examination of claims filed in Baker, Deschutes and Polk Counties that illustrate a situation where local governments are unable to afford the cost of compensation claims. Focusing on Exclusive Farm Use (EFU) designated parcels in these counties, the claims filed would require local governments to pay out many times their annual approved budgets. EFU designation is a component of the Farmland Protection Program approved by the Oregon legislature in the late 1970s to preserve and promote the use of land for agricultural purposes. These EFU designation claims account for almost half of all the claims filed with the state and local governments. Compensation for EFU landowners has the potential to bankrupt local governments as well as the state. Working with landowners to permit rezoning or approval for non-farm uses may help to eliminate future compensation claims and alleviate the current demand for just compensation.

There are alternatives to regulatory compensation, currently utilized in many communities nationwide. Flexible zoning, compensatory regulations and transfer of developmental rights are a few of the more popular and practical options for maintaining a strong degree of environmental protections while meeting the demands of private property owners. Alternatives, when feasible,

should be integrated into the current regulatory system to ensure the adoption of new environmental regulations with widespread support. A stronger understanding of the need to protect the land and natural resources is a critical step in slowing the growth of the private property rights movement and ease much of the resistance to environmental regulations.

Chapter 1: Regulatory Takings

The discipline of Regulatory, or Partial, Takings is an extension of the Fifth Amendment to the United States Constitution and governmental powers of eminent domain. The final statement, also known as the “taking clause,” in the Fifth Amendment states: “...*nor shall private property be taken for public use without just compensation*” (State of Washington, 1997). The drafters of the Bill of Rights in 1789 included this clause to protect private property owners from the burden of public land uses. This protection requires the public as a whole to transfer resources and funds to compensate the landowner’s loss of property rights for a legitimate public use. The modern application of the “takings clause” occurs when a government acquires the land title through condemnation of the property under eminent domain power. Takings can occur for a variety of reasons, as long as the taking is for public purpose, as stated in the Fifth Amendment (Fellows, 1996).

Legal Framework of Regulatory Takings

The legal framework for regulatory takings is an important piece of the property rights movement. Advocates of property rights have looked to the United States Supreme Court for favorable rulings and guidance on how to interpret the Fifth Amendment to the Constitution.

The Federal government defines regulatory takings as:

Takings arise from the consequences of government regulatory actions that affect private property. In these cases, the government does not take action to condemn the property or offer compensation. Instead, the government effectively takes the property by denying or limiting the owner’s planned use of the property (United States General Accounting Office, 2003).

Regulatory, or partial, takings consist of a separate body of literature that has been challenged and defined by United States Supreme Court cases over the last century. The Supreme Court has written decisions favoring governments and private property owners in five main cases defining regulatory takings. These cases include:

Pennsylvania Coal Company v. Mahon (1922)
Nollan v. California Coastal Commission (1987)
Agins v. City of Tiburon (1988)
Lucas v. South Carolina Coastal Council (1992)
Dolan v. City of Tigard (1994)

Each of these cases has provided governments with a better understanding of when a partial taking occurs and a “burden of proof” protocol to protect its regulations and property owners.

Pennsylvania Coal Company v. Mahon

This 1922 decision setup the foundation for common law regarding regulatory takings and governmental power. Mahon was the owner of property sitting above a sub-surface mining operation owned by Pennsylvania Coal Company. The sub-surface structure was at risk of subsiding, but Mahon purchased the property knowing of the operation and accepting the risks associated. In 1921, Pennsylvania passes the Kohler Act, forbidding the mining of coal if the risk of subsidence of “human habitation” is involved, unless the structure and the coal underneath were property of one owner or the structure was more than 150 feet from the coal operation. Unable to mine the coal beneath Mahon’s property, the Pennsylvania Coal Company filed suit against Mahon

asking for compensation of lost property. The case was heard by the Supreme Court and the ruling against compensation was upheld. Judge Oliver Wendell Holmes wrote in the opinion:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

While this ruling provides a “rule of thumb” for deciding if an action is a taking, the phrase “too far” has yet to be defined and is left to the discretion of current justices.

Nollan v. California Coastal Commission

This case provided a turning point for court decisions regarding regulatory takings. In the decades after the *Pennsylvania Coal Company v. Mahon* decision, most cases were decided in favor of government regulations, until 1987 when the courts began to favor the property owners.

The Nollan’s were oceanfront property owners and requested a permit to build a residence on their land from the California Coast Commission. The Commission offered to grant the permit if it could be conditioned to include an easement requiring the Nollan’s to provide public access to the beach through the property without financial compensation. After much litigation, Justice Anton Scalia wrote an opinion in favor of the Nollan’s, requiring the Commission to pay fair market value for the public access easement. The courts failed to recognize the inclusion of public access on the property as legitimate state purpose, therefore requiring compensation for the permit condition (Fellows, 1996).

Agins v. City of Tiburon

Just a year after the *Nollan* decision, the Supreme Court issued another opinion furthering the structure of regulatory takings. The case involved an open-space zoning ordinance limiting the number of residences that could be developed on the tract. Justice Lewis Powell wrote the decision favoring the zoning ordinance as well as establishing the “Agins Test.” This legally sanctioned two-part test works to determine if a regulatory has indeed occurred in a dispute between property owners and governments. The “Agins Test” indicates the occurrence of a regulatory taking if the government’s regulation or action either (Fellows, 1996):

(1) Exhibits an “impermissible use” of the government’s police power, or

(2) Denies the property owner “economically viable use” of the property

This test was not fully developed in the *Agins* ruling because governments will usually prove their case under the first condition, leaving the second condition as an undefined back up. The task of defining and answering logistical questions about the phrase “economically viable use” was left untouched until the Supreme Court ruled on *Lucas v. South Carolina Coastal Council*.

Lucas v. South Carolina Coastal Council

This case provided the Supreme Court the opportunity to clarify questions regarding the “Agins Test” and build upon the regulatory takings case law. David Lucas is a property developer and purchased two beachfront parcels with the intent to build residential homes. Two years after the parcel purchase, South

Carolina enacted the Beachfront Management Act to preserve the fragile coastline. This act prohibited the development of any structures along the coastline, essentially rendering Lucas' property economically worthless. Suits were filed and the Supreme Court narrowly ruled in favor of Lucas. Justice Anton Scalia wrote for the majority stating:

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

The ruling reinforces the notion that if government regulations revoke the land of all, not just partial, economic value, the landowner must be compensated. This implies that all valued uses must be denied, not just the highest and best uses (Fellows, 1996).

This ruling addressed the "economically viable uses" clause in the "Agins Test" and created a framework for recognizing the loss of all uses, not just the highest and best. This ruling also considered the value of land outside of development and its intrinsic role in regulatory takings.

Dolan v. City of Tigard

This case further challenges and reaffirms the "Agins Test" and was a crucial victory for property owners. Florence Dolan owned a store outside of Portland, Oregon and applied to the city for a permit to redevelop the site for store expansion. The store is located on the floodplain (a designated environmentally sensitive area) and the city conditioned her permit to dedicate land for a public

greenway to reduce flooding as a result of additional development as well as the dedication of land for a pedestrian/bicycle path to relieve traffic congestion caused by additional traffic to her store. The City offered no compensation for either of these easements. Dolan was not opposed to the conditions of the permit, but she challenged the requirement to dedicate her property to the public commons without compensation. In applying the "Agins Test," the court determined the state was acting within legitimate interests, but questioned whether or not the interests were warranted by the property owner's permit request. The Court failed to see a necessary connection between the easements and the development, ruling in favor of Dolan and revisiting part one of the "Agins Test" (Fellows, 1996).

The Court strengthened part one by shifting the burden of proof on the government to prove that no regulatory taking occurred. When development permits are conditioned, there must be a direct, strong and justifiable relationship between the burden placed on the property owner and the property owner's request for a permit. The Court also revisited the second part of the "Agins Test" creating a more defined interpretation of "economically viable uses." The test now "requires that either all, or a significant part, of the taxpayer's economic use of the property be denied before compensation is warranted" (Fellows, 1996).

When Does a Regulatory Taking Occur?

One of the ambiguities in the debate is the definition of "regulatory taking" or a "partial taking." Many proponents of compensation for regulatory takings define the act in a constitutional frame as a seizure of property in order to

comply with government statutes. While the Fifth Amendment requires compensation for seizure of property for public use (eminent domain), regulatory takings are not a seizure of property. In general, only a portion of the property value is diminished even though the regulations pertain to the entire tract. In real estate, as with any investment, there are risks involved and a number of things, including government regulation, can influence changes in market value (Fellows, 1996).

Property rights are often considered to represent a set of rules that do not change and if changes do occur, property owners should receive compensation for their loss. Yet individuals are able to control and own property only with the implicit consent of all in the society (Bromley, 1997). In general, land use protections and regulation are adopted through a public political process, through either direct vote or elected government officials. These regulations, for the most part, reflect the environmental concerns and desires of the governed community. Given the opportunity to influence and participate in adoption of new or updated regulations, how can a landowner challenge the government to compensate for losses accrued through regulatory changes that are intended to protect society and the land as a whole? The rule has consistently been interpreted that a reduction in value alone is not sufficient to consider regulatory impact a taking, except with the rare circumstance when a regulation results in a total loss of property value and the intended use does not violate nuisance laws. Rarely do the courts decide that a regulatory impact constitutes a taking (Moulton, 1995).

In order to evaluate a potential regulatory taking, the courts prefer to look at how regulations affect a particular property instead of looking at the regulation in isolation when it was issued. Reviewing the impacts from implementation of a regulation at a specific site allows the courts to more accurately evaluate these three factors (Emerson and Wise, 1997):

- (1) The character of the governmental action
- (2) The economic impact of the regulation
- (3) The interference of the regulation with distinct investment-back expectations

Looking at how these three factors relate, the courts can determine if, in fact, a regulatory taking has occurred and make a judgment on how the jurisdictional government should compensate the landowner.

On the other hand, there is a faction of landowners and property rights advocates that view all government influence on land as partial takings. For example, if a government action impacts the use of a tract of land by regulation, covenant, lien or tax, it is, by nature, a partial taking of property. By this argument, “*all* regulations, *all* taxes, and *all* modifications of liability rules” constitute a partial taking and should be compensated by governments (Epstein, 1985). This pro-property rights perspective challenges governmental authority to regulate without compensation and seeks to protect the Libertarian ideals of private property set forth by John Locke.

Legislative Influence on Property Rights

Many of the rules and provisions regarding regulatory takings are vague and rely on the interpretation of the courts, yet in recent years, a growing faction

in support of strong property rights has looked to state legislation to promote their values. The power of land rights lobbyist battling with the pressures for environmental protections has left many state legislatures at the mercy of their constituents. At the moment, many states have adopted four approaches to legislation: preliminary measures, procedural changes, assessment provisions and compensation measures (Emerson and Wise, 1997).

Preliminary measures have been used to create symbolic statements regarding the importance of property rights as well as establish joint commissions to study and prepare for future legislation all in efforts to provide a response to constituents wanting legislative actions on property rights. Procedural modifications have included changes to administrative procedures with greater consideration of property rights, when appropriate, as well as rule-making changes to limit state liability under certain conditions. These modifications have been focused on specific agencies and regulatory actions, but are broad in scope and do not address specifics about potential property rights legislation (Emerson and Wise, 1997).

Assessment provisions, the legislative precautionary option, have provided state legislatures the duty to value the federal and state constitutional protections of property rights, along with the responsibility to ensure that agencies do not undertake programs without planning for the potential impacts and costs. These provisions are generally of two styles. One style gives an outside official, usually the attorney general, the role of reviewing actions, rules, and regulations. The

other style gives the agency the responsibility of reviewing rules and regulations under the direction of the attorney general (Emerson and Wise, 1997).

Compensation measures, notions that governments can be held categorically responsible for reduction of property value, are a more recent addition to the legislative framework. The intention of these measures is to create a delineation of when a regulatory taking occurs and how a government can be held responsible. A handful of states, including Mississippi, Texas and Oregon, have adopted statutes to compensate landowners when regulations diminish property values (Emerson and Wise, 1997).

The United States is seeing rapid growth in the property rights faction as well as growing concern for environmental protections, but only time will tell how these two groups will reconcile differences and negotiate legal methods of protecting the land while honoring the tradition of private property. There will be strong regulatory victories for each faction, but based on recent federal legislative activity, it is unlikely a single camp will win the struggle, though there will be victories at the state and local level. Balance of these priorities and compromise will be essential to the future of land use protection in order to honor the desire for growth and development while protecting valuable environmental resources.

Chapter 2: Property Rights and Compensation

For John Locke, land was the essential element from which individual liberty could be attained. Locke believed humans, endowed with *natural rights*, mixed labor with land, converting the commons into private property. Locke's ideas about private property are embraced in the United States due to their appeal to individualism, ambivalence about government and the absence of a competing theory (Bromley, 1997).

Property laws in the United States are an extension of English common law, especially nuisance law and principles of sovereignty, to fit the needs of a vast and differing landscape. For the protection of society as a whole, federal, state and local governments have a long history of regulating the use and development of land. The idea of property regulation is essential to the ideology of private property and is an element of the social contract creating the option of private ownership of land.

Local governments, with authority granted by federal and state legislation, act most frequently and pervasively to influence the use and development of private property. These governments, through regulation, are active in the planning and management of property. These regulations have a visible, immediate impact on communities, often benefiting some and harming others (Strong and Mandelker, 1996). As a result of a growing movement for property rights and the increasing need for environmental regulations, local governments have had to justify land use decisions under great scrutiny and with more precision than in previous years (Crowell, 1995).

In the mid-1980s, the movement to protect property rights began as a modest, grass-roots coalition in response to a shift towards regulation in environmental policy. Twenty years later, the movement has become a fierce and powerful group comprised of industry giants (including agriculture, development, logging, mining, petroleum, etc.), think tanks, special interest groups and individuals. Looking at land ownership in the United States indicates that the movement represents the more powerful, wealthier segments of society, according to John Echeverria, counsel for the National Audubon Society in Washington, D.C. Investigations at Cornell University demonstrate that 5% of landowners, including corporations, in the United States hold title to almost 75% of the privately owned land (Carpenter, 1994).

The property rights struggle can be summed up in one simple, but powerful phrase: *"The government should compensate landowners any time green regulations lower the value of property"* (Carpenter, 1994). This credo for the property rights movement is an interpretation of the "takings clause" in the Fifth Amendment of the Constitution of the United States. Property rights advocates support the notion that when governments deny land development applications for any reason, including protection of endangered species or habitat, the landowner should be compensated (Baker, 1998). Those involved in the movement to protect private property often forget that property rights cannot exist independent of property obligations (Strong and Mandelker, 1996). These obligations may not rule out the need for compensation, but should be identified in the evaluation of the property and regulations.

Eminent Domain and Protection of the Commons

Influenced by English common law, early American government takings mainly consisted of undeveloped, but often private lands that they wanted to improve with roads and bridges to enhance communities, trade and travel. This changed during the American Revolution, when the government found it acceptable to take the property of colonists loyal to Great Britain and obtain goods for military use. The government rarely provided compensation to owners of taken lands because the sacrifice was considered a duty of every colonist (West's Encyclopedia of American Law, n.d.).

Many colonists voiced opposition to the taking of their private property for the good of society and felt the colonial legislatures were abusing the power of eminent domain. This vocal opposition was the seed to draft the "takings clause" in the Fifth Amendment of the newly written Constitution (West's Encyclopedia of American Law, n.d). Now the governments could legally take private property, but the owner would be entitled to just compensation. In recent decades, the takings clause has been challenged in many Supreme Court cases, but justices have always upheld the constitutionality of the clause all the while setting partial, or regulatory, takings precedents.

Most "takings" disputes challenge the question of how to balance private rights with the public good. The United States not only takes great pride in individual liberty and freedom, but also is quick to react when these privileges are threatened. Those most involved in the property rights movement in the United States often fail to recognize the differences between institutions that change

often and unpredictably, such as local and state regulations and institutions that change in response to new social norms and circumstances, such as a state or federal constitution (Bromley, 1997). Campaigning for compensation or reduced regulatory burden at the local level can provide relief for individual landowners within a community, but working towards amendment to a constitution will provide a more permanent framework for property rights and will influence regulatory development within other levels of government.

Government Protection of Land

The original purpose of the “takings clause” was to ensure owners would be paid when their land was seized. The individual protections afforded by this clause are equal to the protections afforded to the whole society. The clause will protect individual owners and communities regardless of location, property size, or economic value of property. It is the nature of a regulation or government action, not the number (one or many) of actions, which determines whether a taking of private property has occurred (Epstein, 1985). In the twentieth century, the “takings clause” has been used in state and federal courts to protect communities from unbalanced or overzealous zoning regulations that would diminish the full value of property, such as designating zoning for an entire rural landscape as one unit to forty acres or prohibiting *all* development in critical areas such as wetlands. These examples illustrate regulations that would render an entire category of land unusable for a landowner under any circumstance even if there are viable land use options or mitigation standards in place to compensate for impacts to natural resources. Many rural communities strive to maintain a mix

of zoning densities to provide for rural residential, agricultural, and forestry uses. Some of these existing uses would not be available with a 1:40 zoning density and may it may impact expansion of some preferred uses such as farming and forestry. Prohibiting all development in a critical resource such as wetlands may also cause some difficulty for landowners. Wetlands are an important resource requiring protection, but there may be instances when development within a wetland may be necessary, such as infrastructure improvements or recreational uses. There are established federal regulations on mitigation for impacts to wetlands providing an alternative to an outright prohibition on development within the resource.

Land use policies in the United States are considered to be among the freest in the world, but private property rights have never been absolute (Carpenter, 1994). Land symbolizes ideas of freedom and liberty and, based upon the influence of English nuisance law, there is a fundamental understanding that owners cannot use their land in any way that harms any part of the community (Bromley, 1997). Outside of common understandings, property rights are often seen as a set of unchanging rules and many have challenged the idea of compensation when the rules change (Bromley, 1997). Several landmark United States Supreme Court cases (as mentioned in Chapter 1) have determined that reasonable regulation of land use is constitutional and compensation is not necessary each time regulations lower land values (Carpenter, 1994). The courts have yet to define when a regulation has gone “too far,” providing opportunity for property rights advocates to continue challenging all levels of government.

Yet when these rules and regulations change, small landowners are often hit hardest due to their high proportion of income dedicated to real estate. Fair distribution of the burdens and benefits of programs undertaken by governments for a public purpose is necessary to protect all landowners from unnecessary harm. The understanding that things change does not give rise to a takings claim, but when a change in policy, knowledge or facts results in restrictive regulations and unanticipated by a rational landowner, reasonable provisions, such as phased implementation or grandfathering, should be made available, when appropriate, to protect the owner (Strong and Mandelker, 1996).

The purchase of property always involves certain risks, including that of future government action or regulation. Many scholars have suggested that buyers who accept the risk of future regulation at the time of purchase should be ineligible for compensation, essentially making the takings clause void. This creates a larger debate on the risk of new regulations and the possibility of a stricter renewal or rewrite of a regulation that a landowner may not have anticipated (Hunt and Vandenberg, 1998). Even with some knowledge of the possibility of regulations on a piece of land in the future, purchasers cannot predict the strictness of a regulation or the exact level of impact. Evaluating the expectations of a parcel of land is difficult, but should be considered in the purchase of land and the evaluation for regulatory compensation.

Market Value and Just Compensation

A compounding element of the debate is the ability for the governments to justly compensate landowners for the devaluing of the property. To aid in the

evaluation of land values and the impacts of regulations on these values, one must rely on the market value to determine compensation value. There is no standard procedure to determine the fair market value of land parcels. As with any investment, the real estate market varies and the value this quarter may be more or less than the value last quarter or the next quarter. There are other economic tensions involved in determining the fair value of a parcel of land, including the overall economic impact of the regulation on the state, the future valuation of the land, as well as the impact zoning has on property value (Fellows, 1996). With all of these factors to consider, how can governments make a fair judgment on the value of a parcel of land?

The current proposal of estimating compensation for landowners is adopting a "Reduction-in-value" threshold. Most proposals are comparing the value of a parcel just before and directly after a government regulation is imposed. Changes in property value can be used as an indicator of regulation severity, compensation eligibility and a measure of compensation. With this proposal, actions that reduce a property's fair market value (see Appendix I) by more than established percentage would trigger an obligation to compensate the owner. Currently threshold reductions are proposed between ten and fifty percent of the property's initial value (Hunt and VandenBerg, 1998).

Utilizing such a proposal brings up many questions. Most importantly, how to determine the relevant property whose value has been reduced by regulation(s). Most proposals use only that part of the property that is directly impacted by the restriction (Hunt and VandenBerg, 1998). This also brings into

question how to deal with property that is impacted at different points in time. How can a local government compensate owners when different regulations apply at different times? Currently, regulatory takings claims are honored and reviewed right after the regulation has been enacted. Filing claims in a timely fashion is important to gauge the impact of the regulation, but many property owners want to file before a restriction is put into place to offset the initial impact of property value reduction. Difficulties arise in accurately estimating the value reduction and pre-regulation appraisal of market values to validate these claims (Hunt and Vandenberg, 1998). Calculating a reduction in property value because of regulation requires knowing how a property would be used if the regulation was applied as well as if it was not applied. In order to recognize these uses, they must be verified as physically and economically feasible and that these uses would comply with any other federal, state and local regulations and laws applicable to the land. If a government rejects a proposed use of land, it does not necessarily imply it will reject all other proposed uses. The key is making the comparison with uses the government would permit (Hunt and Vandenberg, 1998). Undeveloped land is also a challenge to market value compensation because prices are hard to observe, properties are varied and sell infrequently.

Once uses for the property are established, an estimation of property value change must be calculated. Currently there are two commonly used methods: comparable sales and income capitalization. The comparable sales method is highly reliable when properties are physically similar, in close proximity and sell

frequently in well-informed markets. This is most often the case for establishing current market values for many residential properties.

Unfortunately, most takings claims involve undeveloped lands and a market with few participants, diverse property and less frequent sales. In such cases, the income capitalization method is more reliable. This approach assumes the fair market value of property to equal the discount value of the income the property could produce. A reliable estimate of income and an appropriate discount rate for the risk of proposed development is required in this approach to valuation (Hunt and Vandenberg, 1998). For most situations involving taking compensation claims, the best use of undeveloped property usually is some type of development.

Determined property values can then be used as a comparison to the reduction in value threshold and provide an estimate of the severity of a regulation on developed and undeveloped land. Local governments are then able to decide if claims are valid and are entitled to just compensation.

Because property values fluctuate due to market influences as well as government actions, many landowners are concerned with fairness in compensation. In some cases, owners selling property before a regulation is enacted are under compensated for an unrealized loss in property value; whereas the current owners of these properties are overcompensated. One way to balance the claims is to consider the regulations that landowners should reasonably expect when purchasing the land. In *Lucas v. South Carolina Coastal Council*, the Supreme Court argued that property rights are dependent upon “the understanding

of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property" (Hunt and VandenBerg, 1998). In other words, landowners should not be compensated for losses of property right not in the "bundle" when the title was transferred.

A legitimate takings claim should require a reasonable investment-backed expectation of exercising that right which has been revoked, and without acknowledgement of expectation, owners will not possess the rights they are claiming to have lost. A landowner cannot claim a reduction in land value or a lost development opportunity if there is no written evidence (for example a plat, deed, permit, notice of intent) of future investments in the land. Considering these expectations, will, in the end, make it more difficult to assess one's eligibility for compensation is property values are reduced.

Chapter 3: Oregon: Land Use and Measure 37

A Brief Legislative History of Land Use

Historically, Oregon has led the nation with the most stringent, as well as the most progressive land use policies. It all began in 1969, when Oregon adopted Senate Bill 10, a weak, but momentous law requiring cities and counties to develop land-use plans that met the statewide standards. Unfortunately, there was no enforcement mechanism or technical support, so counties and cities did not comply with the legislation. With the stage set, in 1973, after much campaigning and negotiating, Oregon's legislature passed Senate Bill 100 (SB 100), establishing the Department of Land Conservation and Development (DLCD) and the Land Conservation and Development Commission (LCDC). SB 100 also included the development of fourteen statewide planning goals as well as provisions for widespread citizen involvement in the statewide and local planning processes. The original fourteen goals (Oregon Department of Land Conservation and Development, 1973), as developed by the DLCD are:

1. Citizen Involvement
2. Land Use Planning
3. Agricultural Lands
4. Forest Lands
5. Natural Resources, Scenic and Historic Areas, Open Spaces
6. Air, Water, and Land Resources Quality
7. Areas Subject to Natural Disasters and Hazards
8. Recreational Needs
9. Economic Development
10. Housing
11. Public Facilities and Services
12. Transportation
13. Energy Conservation
14. Urbanization

On the heels of SB 100, Senate Bill 101 was adopted, creating statewide protections for farmlands. The Commission adopted a fifteenth goal in 1975, the Willamette Greenway River Goal (see Appendix II).

As soon as the state developed large scale planning goals, the opposition was preparing to weaken or repeal SB 100. An initiative to repeal SB 100 was defeated in 1976; while the state was adopting four new planning goals to protect coastal resources (see Appendix II). Another initiative to destroy state oversight of local planning was defeated in 1978. Despite the negative campaigns to reduce statewide planning policies, in 1979 Portland area voters created Metro, the first elective metropolitan council in the United States.

The 1980s brought more challenges to SB 100 as well as more progressive policy landmarks. In 1982, a third effort to repeal the legislation was defeated, and a year later, the Legislature developed a protocol for the periodic update and review of local land use plans. The final local government plans were approved in 1986 completing the process for statewide comprehensive land planning.

The Legislature continued to be active in meeting statewide planning goals. In 1991, the DLCDC adopted a new rule to integrate land use and transportation planning in cities. House bill 3661, a controversial and complex piece of legislation, was passed 1993 to protect farm and forestlands. This decade also saw many challenges to SB 100, but of the 70 bills introduced, most were defeated and then Governor John Kitzhaber vetoed the rest. The 25th anniversary of SB 100 was celebrated in 1998 with Governor Kitzhaber declaring May as "Land Use Planning Month" (Oregon Blue Book, n.d.).

Opponents to Oregon's land use planning policies were repeatedly defeated, and in 2000, decided to take a different approach: writing citizen initiatives to gain compensation for land lost by land use regulations.

History of Measure 37

Oregon State Constitution:

Article I, Section 18. Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use (Oregon Blue Book, n.d.).

In 2000, an initiative, Measure 7, was brought forth to be voted on in the general election. Measure 7 proposed to amend the state constitution requiring payment to landowners if government regulations reduced property value. At that time, governments were not required to compensate landowners for a mere reduction in property value due to regulatory takings (Oregon Secretary of State, 2000). The Measure was supported by 54% of the November vote, but a month later, Marion County Circuit Court issued a preliminary injunction preventing the implementation of the Measure. It was thought the Measure would eventually be ruled unconstitutional for violating the Oregon Constitution's "separate vote" rule¹ (Charles, 2001). The fear became a reality when, on October 1, 2002, the

¹ "Separate vote" rule: Plaintiffs allege that the measure violated the requirement because it contained two or more changes in the constitution and that each of those changes should be presented to voters separately.

Oregon Supreme Court ruled Measure 7 void based on Article XVII, section 1 of the State Constitution, the “separate vote” rule (Gelineau et al, 2006).

After the Court ruling on Measure 7, Oregonians in Action (OIA), a non-profit lobbying organization, stated they would sponsor an initiative petition to get a takings compensation measure on the 2004 ballot. OIA was determined and enough signatures were collected to put Measure 37 on the ballot.

The ballot measure was titled: GOVERNMENTS MUST PAY OWNERS, OR FORGO ENFORCEMENT, WHEN CERTAIN LAND USE RESTRICTIONS REDUCE PROPERTY VALUES (Oregon Secretary of State, 2004). In short, the new initiative sought to provide private real property owners with “just compensation” when government regulations limit the use of the property or reduces the property’s real market value. If property is impacted by regulation, the local government responsible will have to compensate the owner with (a) monetary compensation for the loss in value or (b) modify or forgo enforcement of the restricting regulation (Oregon Secretary of State, 2004).

SUMMARY OF THE MEASURE (Oregon Secretary of State, 2004):

Measure 37 enacts a statute requiring that when a state, city, county, or metropolitan service district enacts or enforces a land use regulation that restricts use of private real property or interest thereon, the government must pay the owner reduction in fair market value of affected property interest, or forgo enforcement. Governments may repeal, change, or not apply restrictions in lieu of payment; if compensation is not timely, the owner is not subject to restrictions. Applies to restrictions enacted after "family member" (defined) acquired property.

Measure creates “civil right of action” including attorney fees. The measure provides no new revenue source for payments. Certain exceptions and other provisions are written in the body of the measure.

ESTIMATE OF FINANCIAL IMPACT (Oregon Secretary of State, 2004):

The measure would require state administrative expenditures to respond to claims compensation of between \$18 million and \$44 million per year. The measure may require compensation to landowners, yet the amount of state expenditures needed to pay claims for compensation cannot be determined.

The measure would require local government administrative expenditures to respond for compensation of between \$46 million and \$300 million per year. The initial analysis states there will be “no financial effect on state revenues.”

THE CAMPAIGNS

Measure 37 sought to be added as a new statute to Oregon Revised Statutes Chapter 197: Comprehensive Land Use Planning. The new statute would require governments to provide just compensation or forgo enforcement of the regulation resulting in limited use and/or reduced market value of property. The Measure was primarily sponsored by Oregonians for Action and its supporters while it was chiefly opposed by members and supporters of 1000 Friends of Oregon.

THE “YES ON 37” CAMPAIGN (Day, 2006)

Oregonians in Action (OIA), a non-profit lobbying group, spearheaded the “Yes on 37!” campaign in 2004. OIA believed Oregon needed a measure to

protect private property rights. After constructing the language, getting citizen signatures and securing a spot on the November 2004 ballot, the campaign for votes began. OIA worked to create a coalition of property owners and property rights advocates to carry out the successful campaign. The coalition tried to convince land owners that Measure 37 would protect property from unexpected changes land-use regulations, compensate owners for lost land value, and would create a streamlined, user-friendly process that eliminates nearly all of the procedural barriers that state and local regulators use to avoid legitimate claims under the existing compensation law. Measure 37 would also alter the relationship between property owners and government by requiring government to consider the economic impacts of its property laws and regulations before they are imposed.

Oregonians in Action utilized television, radio, billboards, letters to the editor, canvassing and a variety of other campaign techniques to get the word out about Measure 37. Utilizing personal stories from landowners really sold the campaign to the masses. Creating a scenario of retirement and passing land on to future generations provided a story many Oregonians could relate to and sympathize with. The strong media campaign was successful in getting the vote to pass Measure 37.

THE “NO ON 37” CAMPAIGN (1000 Friends of Oregon, 2006c)

1000 Friends of Oregon, a non-profit organization focused on responsible land use planning, supported the “No on 37” campaign. After pulling together a broad based coalition of environmental, faith-based, and other concerned groups and

citizens, 1000 Friends of Oregon created a campaign to support a fair land use system that strengthens the small town feel of Oregon's communities and the integrity of Oregon's scenic landscapes and family farms. The campaign also supported an adequately funded system of compensation for property owners who have experienced individual hardship in the application of our state's land use regulations.

Focusing on the weaknesses of the text of Measure 37, the "NO" coalition worked to show the citizens of Oregon the several provisions that are inherently unfair and toxic to the democratic process. The coalition felt Measure 37 was an unfunded mandate with one clear objective: to rollback Oregon's land use protections. They also demonstrated that the measure is inherently unfair by authorizing government to issue waivers arbitrarily for select property owners and in the absence of adequate funding, the effect of Measure 37 is to force government to issue such waivers. The coalition also put forth that Measure 37 eliminates all normal notice and public hearing requirements so that affected neighbors and Oregon taxpayers remain in the dark and vulnerable to back room deal making.

The "No on 37" coalition and campaign worked hard to convince the Oregonian voters of the negative effects of the measure and worked through the same media outlets as Oregonians in Action to spread the message to the public. The "NO" campaign was reactive, focusing primarily on the text and impacts of the measure itself and did not reach into the realm of "government fairness" or present sound-byte stories of retirees and grandchildren.

THE OUTCOME

Oregon's Measure 37 is large step forward in the Property Rights Movement building in the United States. Oregon has long been praised for its progressive land protections and the success of Measure 37 at the polls opened the door for property rights advocates in other states, including Washington, looking to relax land regulations and strengthen private property rights.

Oregon's adoption of Measure 37 was an act of the voters. With extensive campaigns and months of signature collection, 61% of Oregon's 2004 voters decided to approve the measure and change Oregon's Land Use Planning statutes. This election was a great example of the power of popular vote. It was only a matter of time before the Measure went before the courts for an official ruling.

In order for the state governments to address this issue, the measure had to be taken to the Marion County Circuit Court to determine to the constitutionality of the statute. On October 14, 2005, the court ruled Measure 37 unconstitutional with a focus on the unfairness of the statute. The Circuit Court ruling has been appealed to the Oregon Supreme Court and was scheduled for oral arguments in January 2006. The Supreme Court has denied a motion for stay pending appeal, meaning the Circuit Court opinion and order remain in effect until the Supreme Court ruling. The stay specifically ordered the state and four counties involved in the case to stop accepting and ruling on claims immediately (1000 Friends of Oregon, 2006b).

On February 21, 2006, the Oregon Supreme Court issued an opinion in favor of reinstating Measure 37 and upholding the measure as constitutional

(Oregon Judicial Department, 2006). The decision became effective March 12, 2006. After this date, new claims will be accepted and local governments will act upon those claims put on hold. The growing number of compensation claims will continue to put pressure on the state and local governments to respond to current landowner for less land use restriction.

Chapter 4: Impact of Measure 37 on Oregon's Land Use Policies

When Measure 37 was approved by the votes in November 2004, a new Administrative Rule had to be written to accompany the claims to be filed for compensation. Oregon Administrative Rule (OAR) 125-140 was created to provide requirements and formal process for the filing of compensation claims under the authority of Measure 37. This rule clearly delineates the information required to file a complete and legitimate claim (OAR 125-140-030, 040). The rule also provided a legal mechanism for dealing with falsified claims (OAR 125-140-040(10a)).

For a claim to be complete and legitimate, the claimant must provide:

- the location of the property,
- documentation of all property owners,
- descriptions of interests in the property for every owner,
- evidence of recorded or unrecorded encroachments, easements, covenants, zoning, Land Use regulations or other restrictions against the property imposed by local, state or federal government,
- explanation, with reference to specific regulations, codes, of impact to property
- amount of the reduction in fair market value for the property as a result of each restriction
- written permission for formal appraisal of land
- a signed statement that claim is legitimate

Once the claim is received by the Oregon Department of Administrative Services or other regulating entity, the review process begins and select information is

entered into a claims Registry database managed by the Department of Administrative Service. The public database includes the following information as it becomes available (Oregon Department of Administrative Services, 2006):

- Name of claimant(s)
- Location of property
- Fair market value reduction of property
- List of regulations impacting the property
- Date claim was filed
- Status of claim (approved, denied) and whether compensation was awarded or the regulation was modified, altered or not applied

The database is a public tool helpful in determining which areas are hit hardest by regulations and could be used as early indicator of future changes in land use. If the database is maintained and updated on a regular basis, planners, developers and policy makers can utilize the information to create regulations and rules that accommodate both the demands and needs of the people as well as the ability to responsibly develop and protect the land.

As of August 2006, over 2,900 compensation claims had been entered into the state registry and were under review by the appropriate regulatory authority. Claims had been filed from almost every county in Oregon² for compensation from various regulations, zoning codes and planning goals.

Looking deeper into the registered claims, a random sample of 500 claims was pulled to get a more precise view of which regulations property owners were most impacted by and to gain an estimate of how much monetary compensation

² As of May 12, 2006, Gilliam County, Harney County, Lake County, Morrow County, Sherman County, and Wheeler County have yet to see any claims filed under the authority of Measure 37.

would cost the state of Oregon. The claims were chosen systematically: the registry is arranged alphabetically by claimant's last name; therefore, the first 550 claims were selected in hopes of providing a statewide perspective on the claims filed. It turned out, the selected claims did indeed proportionally represent counties with claims filed, along with representing the main regulations in question. A large portion of the claims filed have been put forth by residential owners, but there is a small, influential portion filed by developers, industry and other commercial interests. Property owners in Clackamas County (21.2%), Washington County (11.5%), Yamhill County (9.1%) and Marion County (7.0%) have filed the majority of the claims (see Appendix III). The direct goals of the claims cannot be derived from the information provided, but looking at the regulations cited on claim forms can provide a strong insight into the regulatory challenges Oregon will face in the future.

The most important piece of information provided by the Claims Registry is the list of regulations, restrictions and land use policies from which property owners are seeking compensation due to impact. The claims sampled from the Registry have provided a strong sample of these "troublesome" regulations. According to the 550 claims sampled, the main impacting regulations include, but are not limited to:

- Oregon Administrative Rule (OAR) 660
- Oregon Revised Statute (ORS) 197
- Oregon Revised Statute (ORS) 215
- Exclusive Farm Use Statutes (EFU)
- County and Local Zoning Rules

Most of the regulations in question were created to protect Oregon's land and resources all the while providing guidance for responsible development of the state, especially in times of increased growth.

Oregon Administrative Rule 660 was listed on almost 38% of the Measure 27 claims sampled. This rule gives authority to the Land Conservation and Development Department to manage and regulate growth in the state of Oregon (Oregon Department of Land Conservation and Development, 2005b). OAR 660 contains all rules filed relating to land uses, land divisions, facility siting, metropolitan housing, transportation, growth boundaries, state and local parks, as well as rules related to federal consistency, review and application of planning goals, and state agency coordination. OAR 660 is the heart of Oregon's land use planning system and remains one of the most aggressive sets of planning rules in the United States.

Chapter 197 of Oregon Revised Statute, entitled Comprehensive Land Use Planning Coordination manages the coordination of local, regional and state planning goals. The Chapter created the planning advisory committee, a protocol for compliance and enforcement of Comprehensive Planning Goals. ORS 197 also encompasses the development of urban housing, the uses of federal lands, the protection of critical areas, speedway development, siting of resorts, mobile and manufactured home locations as well as recreational vehicle parks. The statute also provides rules for economic development outside of the urban growth boundaries along with the conversion of abandoned industrial site to more economically viable industries (Oregon State Legislature, 2006a). Of the claims

sampled, 16% listed ORS 197 in combination with other restrictive regulations. The regulation of economic development outside of the urban growth boundary along with the protection of critical areas may be the main complaint against the statute. The use of buffers to protect critical areas is often an issue of contention with property owners, especially in terms of single-family residence development.

Oregon Revised Statute, Chapter 215 covers County planning, zoning and housing codes. These statutes provide more locally focused land use regulations to protect and provide for agricultural lands, farm lands, forest lands along with wildlife conservation lands. ORS 215 also creates a structure for general county planning, planning and zoning review, along with agency coordination (Oregon State Legislature, 2006b). Over 36% of the sample claims listed ORS 215 as economically impacting the property. This comes as no surprise because some property owners will always challenge the authority of local governments to regulate land uses, especially in terms of zoning, housing density and agricultural lands.

Wrapped into ORS 215 is the “Exclusive Farm Use Zones” statute (EFU). The EFU provides legal definition of farm uses and agricultural uses, land divisions, prohibition of restrictive local ordinances, utility facility sites, farm worker housing, conversion to non-farm uses and a handful of other rules related to farm and agricultural lands (Oregon State Legislature, 2006d). EFU statutes were a part of almost half of the sample claims filed. Many of the EFU claims listed other statutes and regulations as unfair impact. This combination of complaints could be attributed to the desire to convert lands previously used for

farm or agricultural purposes into residential, commercial or industrial uses. An effort to convert land is a result of the natural growth of the state as well as the gradual influx of new residents. Some of these farm use properties may also be family farms that are no longer in production and owners would like to put the land to a more meaningful use. The EFU statutes protect the integrity of the farm and agricultural lands, and with the assistance of urban growth boundaries, limit the extent of urban and suburban sprawl to rural lands.

The Oregon Statewide Planning Program, as a whole, was also listed as a restrictive regulation on about 5% of the sampled claims. This comprehensive plan, enacted in the early 1970s, was a landmark in United States land use planning, and will remain the benchmark regardless of the impact of Measure 37 in Oregon. A handful of claimants did go the extra step and identify which goals were affecting their property. Of the nineteen goals, only Goals 2 thru 14 were listed at least once, indicating property owners in Oregon are in support of, or not impacted by, citizen involvement (Goal 1), the Willamette River Greenway (Goal 15) and the conservation of Oregon's coastlands (Goals 16,17,18,19). Goal 3, Protection of Agricultural Lands, was the most independently cited goal, listed in over 5% of sampled claims. The purpose of Goal 3 is to protect farmland from development, protect the agricultural communities of Oregon and maintain the aesthetics of Oregon's rural lands and open space (Oregon Department of Land Conservation and Development, 1973).

Oregon's legislature has developed a strong portfolio of land use planning statutes over the last thirty years in order to protect the land from irresponsible

development, over extraction of resources and rapid urban and suburban sprawl. A roll back of regulations could lead to extreme fragmentation of land, resources and the destruction of critical areas (wetlands, aquifer recharge areas, etc.) and rural lands.

The intense changes that could be made to Oregon's landscape as a result of waived regulation enforcement could be eased if

County	Average Fair Market Value
Baker	\$798,216.21
Benton	\$2,039,384.22
Clackamas	\$2,219,016.02
Clatsop	\$1,705,454.86
Columbia	\$1,058,300.00
Coos	\$537,966.67
Crook	\$3,159,474.33
Curry	\$4,063,675.00
Deschutes	\$2,325,117.31
Douglas	\$317,333.33
Grant	\$451,865.00
Hood River	\$5,384,035.05
Jackson	\$3,534,782.56
Jefferson	\$1,408,391.50
Josephine	\$1,365,045.71
Klamath	\$5,290,584.44
Lane	\$2,282,332.89
Lincoln	\$774,747.45
Linn	\$655,622.86
Malheur	\$219,000.00
Marion	\$1,440,997.03
Multnomah	\$747,983.93
Polk	\$608,884.65
Tillamook	\$261,838.00
Umatilla	\$111,785,000.00
Union	\$992,888.50
Wasco	\$80,000.00
Washington	\$3,493,967.17
Yamhill	\$1,384,099.59

claimants were to be provided monetary compensation for the regulatory impact. Providing fair market value, as established in Chapter 2, for economic loss on property due to regulatory action could enable Oregon to maintain strong land use policies and honor Measure 37.

To get an idea of how much compliance with Measure 37 would cost the state of Oregon, an average of the Fair Market Value (see Appendix 1) submitted with each of the claims sampled was obtained. Overall, each claim in would cost the state \$2,712,330.97, on average. Isolating the 550 claims sampled, the total

cost to Oregon taxpayers would be over 1.4 trillion dollars if Measure 37 was honored with compensation and not regulatory alteration.

The catch is that Measure 37 did not include a strategy to collect or set aside money for compensation of claimed regulatory impact (Oregon Department of Land Conservation and Development, 2005a). Monetary compensation would be the responsibility of the local governments and monies would most likely be diverted from other social programs or result in higher local taxes to cover the costs. The estimated cost of each claim does not include the funds need to support administrative staff to collect, process and review each claim. These additional positions would add stress to state and local budgets as well.

In either scenario, regulatory alteration or monetary compensation, Oregon taxpayers will face a dramatic change in local government. If localities choose to support regulatory alteration, the result could be fragmented lands, irresponsible development and a huge strain on public utilities and social programs. Monetary compensation may prove to protect the local lands, but will stress the economic structure of the community with higher property, utility and other local taxes as well as reduce the level of social programs available to the residents.

A Closer Look

To understand the potential widespread impacts of Measure 37, claims against Exclusive Farm Use (EFU) zoning in three counties were pulled and evaluated. Baker, Deschutes and Polk counties were chosen to represent the majority of EFU claims based on geographic location, topography, land values

and the percentage of EFU claims filed in the county. These three counties are able to represent the different landscapes, land use demands, diverse populations and varied political climates to provide a strong indication of the potential economic impact from Measure 37.

For over twenty years, Oregon has worked to protect rural and farmlands through the Farmland Protection Program mandated by legislation in 1973 (Oregon State Legislature, 2006c). The Farmland Protection Program preserves agricultural land in four ways: inventory of agricultural lands, designation of lands in comprehensive plan, adoption of protective policies and exclusive farm use zoning. Oregon's Farmland Program places great emphasis on protecting commercial agriculture.

Exclusive farm use zoning (EFU) has been adopted by all thirty-six counties in Oregon. This zoning program limits land development that may negatively impact farming and protects farmland from being subdivided into parcels too small for commercial agricultural practices. As long as the land is being farms, parcels in these zoning areas are automatically eligible for lower property taxes (Oregon Department of Land Conservation and Development, n.d.). There are four general categories of EFU zoning: EFU without specified acreage, EFU-40 requiring parcels no less than 40 acres, EFU-80 requiring parcels no less than 80 acres, and EFU Homestead Agriculture (Richey and Duclos, n.d.).

Oregon has 15.5 million acres zoned EFU, accounting for over 55% of private lands. With such a large percentage of Oregon's land zoned for farm uses,

the state has provided opportunities for landowners to develop land for non-farm uses. The state maintains a list of approved non-farm uses, including churches, schools, wineries, public utility facilities, parks, museums, fairgrounds, dwellings and many others (1000 Friends of Oregon, 2006a). Consistent population growth and increasing demand for land and development has presented challenges to the Farm Protection Program and EFU zoning. Measure 37 is providing an outlet for landowners to gain exemption from EFU zoning and subdivide parcels to a non-farm use size, say five or one acre parcels. As of August 2006, over 1200 claims had been filed against EFU zoning in Oregon, accounting for almost half of the claims submitted to the state.

Baker County

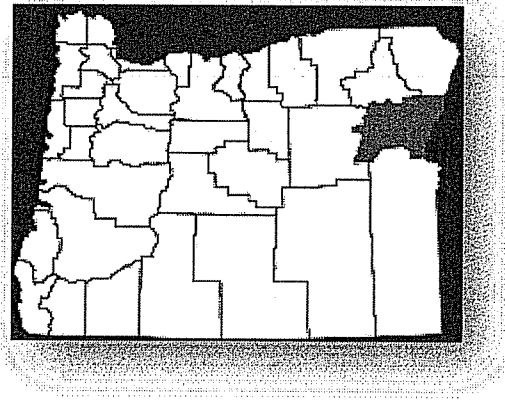


Figure 1: Image from http://en.wikipedia.org/Baker_County,_Oregon

Baker County, located on the eastern border of Oregon is a rural community dependent on the land. The County's principal industries are agriculture, secondary wood products, tourism and recreation. The main

agricultural products are cattle, dairy products and field crops. Baker County is also home to Hell's Canyon Overlook, the National Oregon Trail Interpretive Center as well as scenic byways, parks and other recreational facilities (Economic and Community Development Department, 2006a).

The land area of Baker County is 1,976,960 acres (3,089 square miles). As of 2001, this land was home to almost 17,000 residents with an average per capita income of \$21,424. Baker School District, USDA Forest Service and Baker County are among the top employers of the county.

As with many rural communities, growth is often promoted as a way to increase services, industry and economic inputs to local government without much personal sacrifice. As of August 2006, forty-seven landowners had filed claims (Measure 37 Database, 2006) with Baker County to gain compensation for the inability to develop on parcels under EFU zoning. These claims represent over 10,000 acres (15.64 square miles) of Baker County's 1,285,120 acres (2,008 square feet) of EFU land. On average, these compensation claims are asking for \$2,702 per acre for a total of \$27,043,532 if the county rules to pay these landowners. To see the total potential economic impact of Measure 37 on Baker County, if all the county's EFU landowners filed claims, the county would be asked to pay out \$3,472,294,240—over 500 times the 2005-2006 Baker County General Fund Budget of \$6.9 million (Baker County Budget Process, 2005)!

Deschutes County

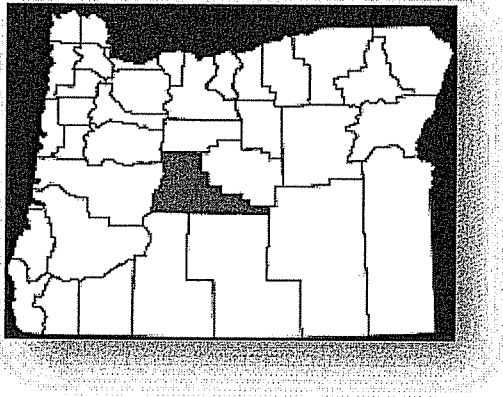


Figure 2: Image from http://en.wikipedia.org/wiki/Deschutes_County%2C_Oregon

Deschutes County is located in central Oregon between the Cascade Mountains to the west and the High Desert to the east. The scenic county houses Mt. Bachelor, Smith Rock State Park, Newberry Crater as well as numerous parks, scenic highways and golf courses (Deschutes County Government, 2006). The main industries in the county are lumber, agriculture and tourism. The primary agricultural products include cattle, hay and forage, and specialty products (Economic and Community Development Department, 2006c).

About the same size as Baker County, Deschutes County has an area of 1,955,200 acres (3,055 square miles) with 60,758 acres (94.93 square miles) designated EFU in the county's Comprehensive Plan. With a population of 122,050 residents earning, on average, \$28,193 in annual income, the density of Deschutes County is almost eight times that of Baker County (Economic and Community Development Department, 2006c).

With three metropolitan areas in the County, growth is essential to maintaining and building residential communities, industrial interests and

economic opportunity. As a result of the demand for growth, 70 claims have been filed (Measure 37 Database, 2006) as of August 2006 to provide compensation for EFU designation. A total of 5,259 acres (9.15 square miles) are encompassed in these claims, costing the County, on average, \$26,620 per acre. Existing metropolitan areas, a strong industrial presence and a diverse landscape allow landowners to put a higher price on land values, therefore requesting more compensation for “lost development.” These 70 claims could cost the state \$140,005,912 in paid compensation.

Deschutes County has designated 60,758 acres (94.93 square miles) Exclusive Farm Use. If all EFU landowners filed claims against the county seeking compensation, the local governments would have to provide \$1,617,377,960 in compensation. This one-time cost to landowners is over seventy-two times the 2004-2005 budget, \$22,279,260 (Deschutes County, et al., 2004), of Deschutes County!

Polk County

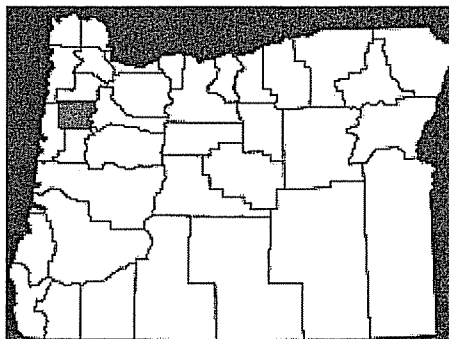


Figure 3: Image from http://en.wikipedia.org/wiki/Polk_County%2C_Oregon

Located in the northern portion of the Willamette Valley, Polk County has a colorful history and diverse landscape. The county is home is numerous parks

and trails, the Baskett Slough National Wildlife refuge, local wineries and the Spirit Mountain Casino. Agriculture, forest products, manufacturing and education are the primary industries in Polk County. The agricultural industry primarily produces grass and legume seed, dairy and specialty products (Economic and Community Development Department, 2006d).

Polk County encompasses 476,800 acres (745 square miles) and has a population of 63,450 residents. At about half the size of Baker and Deschutes Counties, Polk County residents live in a comparatively higher density community and earn a comparable per capita income of \$25,241.

Recent years have seen growth in population and industry for Polk County, as with most of Oregon. The pressure for commercial and residential development is creating a demand to subdivide and sell large parcels of land. In August 2006, 43 claims had been filed (Measure 37 Database, 2006) with the county seeking compensation for the inability to utilize EFU land for non-approved uses. Of Polk County's 180,000 of EFU designated lands, 3,377 acres are covered by Measure 37 claims. For an average claim cost of \$12,528 per acre, the county would have to pay out \$42,306,802 to satisfy the current claims. If the development trends continue and landowners file additional claims against the county for EFU designated parcels, Polk County would have to pay out \$2,255,040,000 to compensate for all 180,000 acres, almost forty times Polk's 2004-2005 budget of \$57,975,975 (Polk County Community Development Department, 2004).

These counties represent the varied landscapes and communities found throughout Oregon. Baker County's rural landscape and emphasis on agriculture explains the lower cost per acre of compensation, but this cost of compensation may increase as development and population pressures move east. Deschutes County provides a mix of rural and urban lands. The picturesque landscape and metropolitan communities enable landowners to put a higher cost per acre on Measure 37 claims. These lands are in high demand and are highly valued. Polk County gives the perspective of small cities, agriculture and industry. With over a quarter of the County designated as EFU land, the price per acre is hefty, but may continue to increase with the growing demand on the land.

Exclusive Farm Use Designation

Oregon, as a whole, has 15.5 million acres of land designated for Exclusive Farm Use. As of August 2006, 1,240 claims had been filed (Measure 37 Database, 2006) statewide for compensation from EFU designation. With a state compensation average of \$23,705 per acre, local governments statewide would be responsible for providing over two trillion dollars to land owners. The approved all funds budget for 2005-2007 is \$91,962.0 million (Oregon Budget and Management Division, 2006). If all the landowners in the state filed claims for compensation of EFU designation, local governments would have to provide over four times Oregon's 2005-2007 budget—over \$367 trillion dollars!

Exclusive Farm Use designation compensation claims account for almost half of all the claims filed in Oregon. Oregonians understand the importance of protecting farm and agricultural land, yet many also understand the importance of

community growth and development. Creating a balance between farmland protection and responsible growth for these communities is essential to meet the demands of the people and the potential of the land. When communities are unable to monetarily compensate landowners for EFU parcels, the designation is often waived, resulting in subdivided parcels too small for farming, but a perfect size for residential or commercial development—often creating a matrix of farm, commercial and residential lots.

Chapter 5: Future of Regulatory Takings

One of the greatest risks in adopting Measure 37 is the rollback of environmental protections that have been in place for over thirty years. When property owners file claims and governments are unable to provide monetary compensation, regulations, under Measure 37, will have to be modified, amended or waived to comply with the statute. When regulations are weakened one parcel at a time, the entire system of environmental protections will become fragmented, vulnerable and eventually ineffective. A mounting challenge in protecting the land and validating landowner concerns is balancing the public and private needs. Measure 37 focuses heavily on the private landowner's needs in the "here and now" and pays little attention to the future integrity of the land and the regional impact of regulatory changes on single properties.

Looking at the Exclusive Farm Use Zoning claims filed in Deschutes, Polk and Baker County one can understand the magnitude of possible impact from the adoption of Measure 37. With monetary compensation magnitudes greater than local budgets, waiving or altering environmental regulations is the only viable option for local governments. The case may not be that all impacted landowners file claims, but even a small percentage of those affected by EFU zoning could bankrupt a county.

In order for Oregon to maintain or write new protective land use regulations, a thorough economic analysis will have to consider potential claims and how regulatory waivers on specific properties will influence implementation and enforcement. Updating previous regulations and zoning to meet current land

use demands may also open the door to reduce the amount of protection provided by current regulations and zoning. The development of strong, protective environmental regulations may be weakened by the additional analysis required by Measure 37 to ensure minimal reduction of property values.

This issue is not limited to state governments, but extends back to the federal government and the United States Constitution. The Fourteenth Amendment allows the states to control and regulate their land with the guidance of federal statutes. When state initiatives, such as Measure 37, are passed, every level of government is influenced.

The movement for property rights protection is growing rapidly nationwide. The past fifteen years have demonstrated this growth through the attention given to property rights legislation at the federal and state level. In 1994, the 104th Congress saw over one hundred bills introduced related to private property rights. The efforts to reform the status quo, the House pass H.R. 9, combining regulatory reform and analysis with provisions for compensation, along with two Senate bills, S. 605 focused on takings and S. 343 focused on regulatory reform and economic analysis (Goldstein and Watson, 1997). These federal efforts were viewed by some as a means to disrupt the regulatory process and provide relief to landowners, regardless of the regulatory intent (Goldstein and Watson, 1997). In defense of the legislation, others viewed the bills, as well as the resulting compensation, as method to ensure agencies do not regulate beyond the efficient level (Goldstein and Watson, 1997). In 1995, federal property rights legislation, H.R. 925, was passed through the House but not by the

Senate. Even though the bills were unable to pass through both houses of Congress, private property rights advocates were not deterred. The momentum was carried forward to state legislatures, and by 1996, twenty-five states had addressed private property rights in legislature.

These legislative actions came in the form of preliminary measures (joint resolutions, legislative studies), procedural modifications, assessment provisions (review of regulations) or compensation measures (Goldstein and Watson, 1997). By the end of 1996, only six states had adopted compensation measures: Florida (1995), Louisiana (1995), Mississippi (1994, 1995), North Carolina (1993), Texas (1995), and Washington (1995) (Goldstein and Watson, 1997). Shortly afterwards, Washington repealed the compensation measure.³

A new wave of private property rights activism has taken hold in recent years. Oregon's Measure 37 was a huge success for the nationwide movement. The campaign strategies, public messages and political know-how have become the inspiration for the development of regulatory takings legislative campaigns and citizen initiatives all over the country. The success of Measure 37, with the voters and the courts, has opened the door for similar legislation to be introduced to a handful of mid-western and southern states in the coming years. Future compensation legislation will be measured against the applied success of Measure 37. A lot can be learned from the adoption of such an intense compensation rule in a state with the most stringent land use policies. The measure can be used as a tool to fragment regulatory policies as well as the structure of local governments.

³ As of early 2006, Washington may be faced with a citizen initiative on the November 2006 ballot to revive regulatory takings compensation along the lines of Oregon's Measure 37.

States wanting to protect land use policies and promote responsible development should keep an eye on the implementation of Measure 37 and prepare a strong, sensible response to constituents wanting similar compensation rules.

For states choosing not to adopt potentially destructive and irresponsible regulatory compensation legislation there are alternative tools to protect the land and protect the landowner. One strong tool is flexible zoning. Localities should be able to flex zoning regulations to make the land more developable when appropriate and protect lands when needed without resulting in a decline of property value (Strong and Mandelker, 1996). Transferable Development Rights (TDRs) are another viable alternative for states. Allowing landowners to sell “development rights” to developers will enable for compensation on severely restricted land, promote high-density development in urban areas as well as provide environmental protection to the area (Strong and Mandelker, 1996). TDRs are gaining popularity in urban and suburban areas experiencing rapid growth. TDR programs enable the locality to grow without a high level of sprawl. These creative planning alternatives provide state and local governments with options to meet the demands of growing communities, private landowners and environmental concerns.

Developing local, creative planning alternatives to a strict regulatory regime is an important pro-active step in protecting the environment and private property investments. Without regional or local solutions, the voice of private property rights advocates is amplified to the state and federal level. Reworking environmental legislation at higher levels will lead to a watered-down version

implemented at the local level. These advocates may demand the repeal of many regulations and the re-writing of environmental legislation.

Would re-writing the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) or the Clean Water Act (CWA) benefit the nation as a whole? The loss of these influential and essential pieces of legislation would be devastating. The country is dependent on clean water and healthy farms, without which the economy could fail and our status as the most powerful nation would disappear. Oregon, alone, is looking at over \$300 million dollars to administer, review and consider compensation regarding Measure 37 (Oregon Secretary of State, 2004). If all fifty states implemented a version of Measure 37, the cost to tax payers would be astronomical. Monies would be diverted from other social programs—education, health care, transportation—to enable the implementation of taking compensation rules. On the other hand, could takings legislation be counted by “giving” legislation, where landowners have to return a portion of property value gained by regulatory impact?

With a growing number of states facing similar citizen initiative or legislative bills, further research into the potential and actual impacts of Measure 37 is in order. Oregon has always been in the forefront of land use policy and after thirty years, the state's strong protective regulations are being challenged on a large scale. With claims still being submitted, the impacts, direct and indirect, of Measure 37 are yet to be seen. Future investigations could include how fragmentation of regulations affected implementation and enforcement and if fragmentation of landscapes, habitats and critical resources resulted from adoption

of Measure 37. With growing demands on land, including industrial, commercial and residential needs, how will zoning regulations be maintained and re-written in the coming years.

Measure 37 opened the door for property rights and land use regulations to compete for resources and alternatives in the state's regulatory framework. The alternatives to compensation are unlimited and decision makers, administrators and private landowners need to be flexible and open. Land ownership and environmental stewardship should be respected and supported through social conduct and legislative rules. Protection of environmental legislation at every level is essential to the economic, social and political well-being of the United States.

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Appendix I

What is the “Fair Market Value” of a Property?

The *Uniform Standards of Professional Appraisal Practice* defines “fair market value” as follows (Tosh and Rayburn, 1996):

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed and well advised, and acting in what they consider their best interests;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Appendix II

Oregon Statewide Planning Goals

1. Citizen Involvement

Local citizens should be involved; citizen involvement programs must include an official committee to represent diverse geography, interest; publicity; opportunities for communication; easy to understand technical information; citizen involvement in policy process and funding.

2. Land Use Planning

Localities required to develop "Comprehensive Plan" to address local concerns and meet statewide goals. Scheduled reviews of plans to meet changing concerns.

3. Agricultural Lands

Keeping productive farmland in large-scale production, limiting residential development

4. Forest Lands

Limiting use of forest land to forestry activities; soil, water, air protection; fish, wildlife conservation; recreation; agriculture. Also limits residential development to single homes on large parcels.

5. Natural Resources, Scenic and Historic Areas, Open Spaces

Preparation of resource inventories, including wetlands, riparian zones, wildlife habitat. Determine how which resources are significant and how to protect them

6. Air, Water, and Land Resources Quality

Local and regional consistency with state and federal environmental laws.

7. Areas Subject to Natural Disasters and Hazards

Community planning for disaster-prone regions (ex. floods, landslides)

8. Recreational Needs

Statewide coordination of communities to provide recreational facilities as well and the infrastructure for communities to meet public service demands

9. Economic Development

Ensuring land is available to sustain a healthy local economy.

10. Housing

Plan for a variety of housing locations, types and densities. Must keep suitable land available for residential uses.

11. Public Facilities and Services

Development of efficient and capable public systems, especially sewer and water.

12. Transportation

Creation of transportation system plans to reduce congestion, delays, noise, air pollution, gas waste, etc.

13. Energy Conservation

Management and control of local land uses to conserve and re-use energy wherever possible (ex. high density land uses along major roads improves efficiency of public transportation)

14. Urbanization

Development of growth boundaries to reduce sprawl and protect farm, forest land.

15. Willamette River Greenway

Protection of the Willamette River banks, restriction of development, providing recreational access

16. Estuarine Resources

Localities must inventory and provide detail on wildlife, economic uses, and physical qualities of estuaries

17. Coastal Shorelands

Requires localities to identify shorelands, specify how to protect certain lands and resources, protection of wildlife habitat, and reserve suitable lands for "water-dependent uses (ex. port facilities)

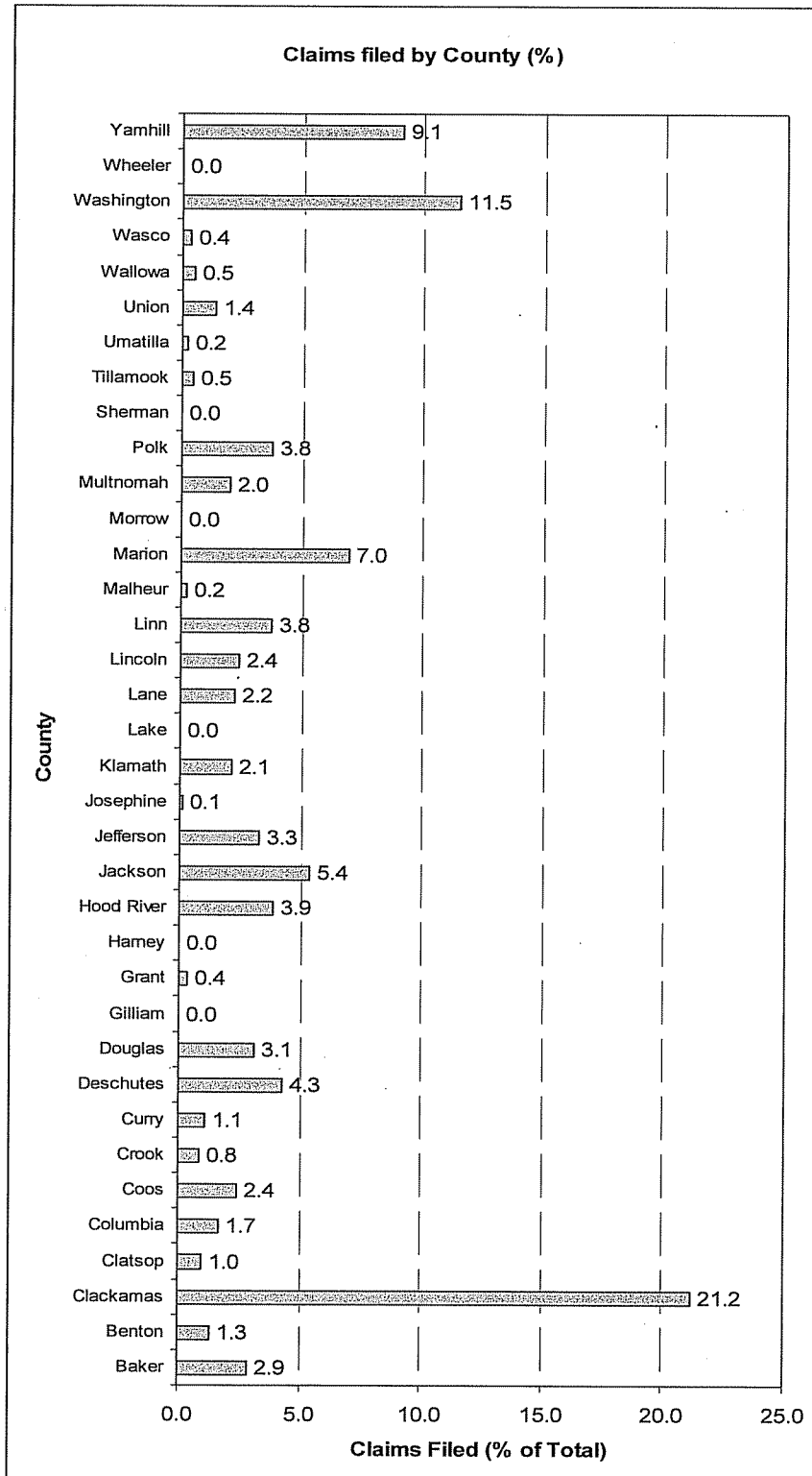
18. Beaches and Dunes

Upholding no development along beaches, promoting responsible recreation and protecting natural habitat

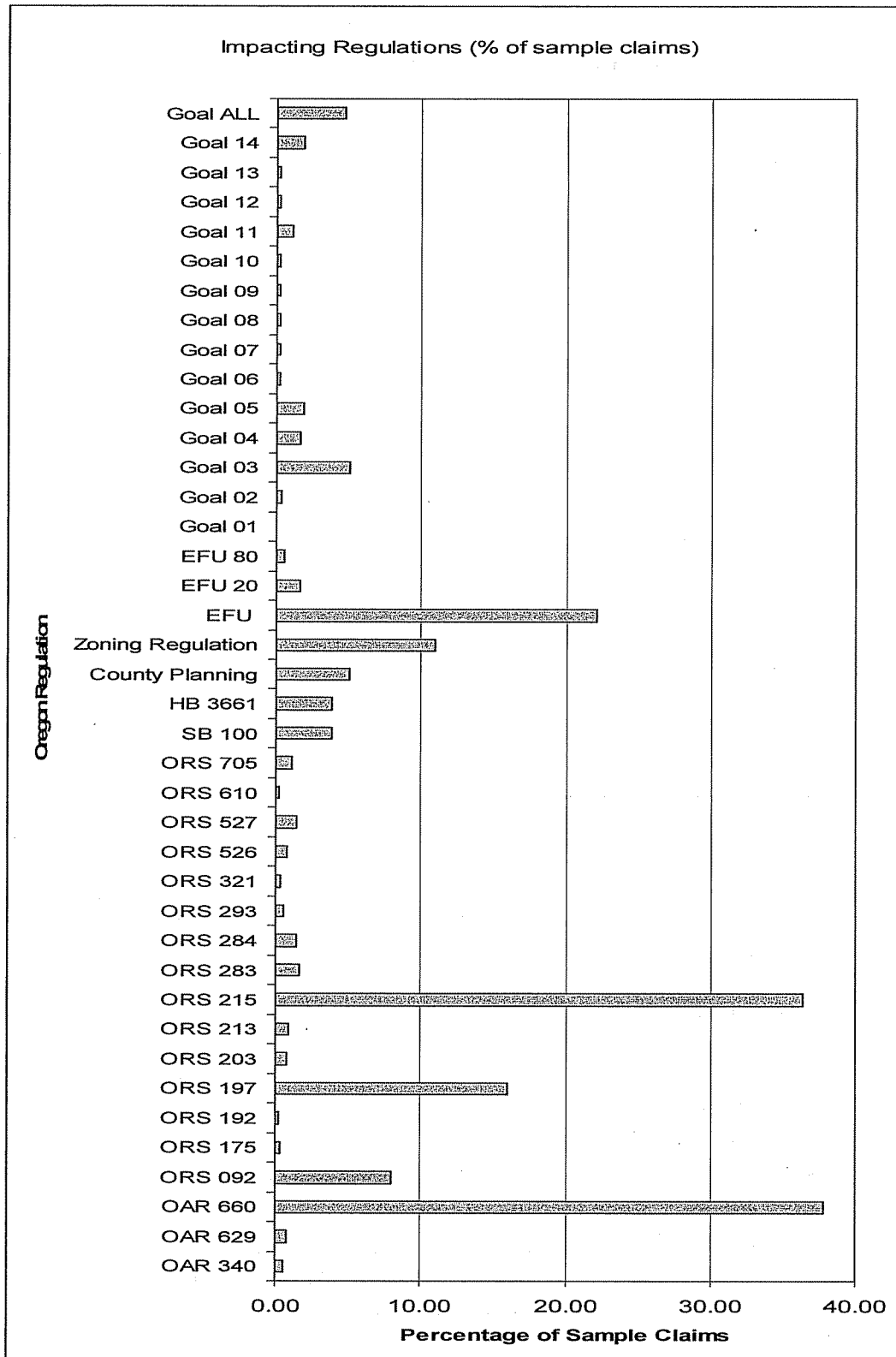
19. Ocean Resources

Call for close cooperation between state and federal agencies to deal with matters such as offshore oil drilling, dumping dredges materials, and discharging waste along with other shore activities of concern.

Appendix III



Appendix IV



Appendix V

