

Oregon's Property Rights Initiative, Measure 37: A Taste of Things to Come?

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I. Introduction

On Election Day in November 2004, Oregon voters passed a far-reaching ballot initiative, Measure 37, requiring that state and local government in Oregon "pay owners or forgo enforcement when certain land use restrictions reduce property value."¹ This "pay or waive" initiative went further than any other state property rights compensation law,² and has led to a number of implementation issues and lawsuits. In January of this year, a somewhat similar initiative was filed with the Washington State Secretary of State, Initiative 933, sponsored by the Washington Farm Bureau Federation. I-933 has already spawned litigation—a ballot title challenge. This article provides an overview of the status of Oregon's Measure 37 and of I-933 in Washington.

II. Oregon Measure 37

A. Background Leading to Passage of Measure 37

For over three decades, the state of Oregon has had a statewide land use system, similar to the subsequent Growth Management Act ("GMA") in Washington. In 1973, the Oregon Legislature created a new state agency, the Land Conservation and Development Commission ("LCDC"), and authorized it to develop statewide planning goals.³ There are currently 19 goals that, like Washington's GMA goals, include the establishment of urban growth boundaries, preservation of agricultural and forest lands, protection of natural resources, and conservation of scenic and historic areas and open space.⁴ The goals are intended, among other things, to concentrate development and growth in urban areas and to restrict growth and protect uses such as agriculture and forestry in rural areas. Local governments are required to adopt comprehensive land use plans and ordinances that meet certain statutory requirements and are consistent with the statewide goals.⁵ LCDC reviews these actions for consistency, and officially approves or "acknowledges" them if they comply with the goals.⁶ Oregon's system has been recognized as a national model for effectively controlling growth and urban sprawl, while protecting the state's farmland.⁷

Over the years, however, some property owners have grown dissatisfied with Oregon's land use system.⁸ Measure 37 is not the first time Oregon voters have expressed their discontent at the ballot box. After three unsuccessful initiatives seeking to repeal the system, Oregon voters passed Ballot Measure 7 in 2000.⁹ That initiative was similar to Measure 37, requiring compensation when regula-

tions reduced property values, except that it amended the state constitution.¹⁰ However, the Oregon Supreme Court struck down Measure 7 because it amended two constitutional provisions, in violation of Oregon's requirement that each constitutional amendment be voted on separately.¹¹

Undaunted, the drafters of Measure 7 alleged that the Supreme Court had subverted the will of the people, and in 2004 proposed Measure 37 ("the Measure").¹² The Measure's supporters focused on the negative effects of land use regulations on individual property owners as their primary support for the initiative. Advocates drew on significant anecdotal evidence, typically focusing on stories of government depriving farmers, the elderly, and small business owners of the fruits of their life's labors by significantly reducing the uses and value of their property. The example regulations ranged from buffers that could eat up half or more of an owner's acreage, to increased minimum lot sizes preventing greater subdivision, to allowing only farm or forestry uses on a piece of property.¹³ A consistent theme was "fairness" and the need to streamline the lengthy, burdensome process landowners face to prevent the government from "taking" without paying.¹⁴

Opponents, on the other hand, criticized the Measure on the basis that it would cost an extraordinary amount of money, was unfunded, and would result in significant litigation and red tape. The Oregon Secretary of State estimated the administrative cost of simply responding to claims under Measure 37, not including compensation to landowners, would be \$18 to \$44 million a year for the state government and \$46 to \$300 million a year for local governments. The amount needed to pay for compensation was unknown.¹⁵ Because the Measure was unfunded, opponents argued that its real source of impact would be the waiver provisions (applying the regulations in effect when the owner acquired the property). They argued that the waiver would eliminate needed protections for farmers and farmland as well as for the environment, result in uncertainty for businesses, and devalue neighbors' property. It would create a hodgepodge of land use, undermining Oregon's concept of land use planning.¹⁶

Despite the fact that Measure opponents outspent proponents two to one,¹⁷ Measure 37 passed with 61 percent of the vote¹⁸ and took effect on December 2, 2004.

B. Measure 37's Provisions

Measure 37's primary operative provision requires that state and local governments pay "just compensation"

if the government enacts or enforces a land use regulation “that restricts the use of private real property ... and has the effect of reducing the fair market value of the property.”¹⁹ In other words, *any* reduction in fair market value as a result of the regulation is compensable. If compensation is paid, the amount due is the amount of reduction in fair market value as a result of enactment or enforcement of the regulation as of the date the landowner makes written demand.²⁰

“Land use regulation” is defined expansively in Measure 37:

- (B) “Land use regulation” shall include:
- (i) Any statute regulating the use of land or any interest therein;
 - (ii) Administrative rules and goals of the Land Conservation and Development Commission;
 - (iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;
 - (iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and
 - (v) Statutes and administrative rules regulating farming and forest practices.²¹

The compensation requirement applies only to land use regulations that took effect after the current owner or a family member of the owner (going back to grandparents)²² first acquired the property in question.²³ Measure 37 allows governments, in lieu of compensation, to “modify, remove, or not to [*sic*] apply” the land use regulation, and instead allow the property owner to use the property for whatever uses were permitted at the time the owner acquired the land.²⁴ This is the “waiver” provision. Unlike the compensation requirement, which can reach back several generations, the waiver provision only rolls back the laws to those in effect when the *current* owner acquired the property. These provisions require the government to identify the current owner and family members, and determine when the property was acquired and what laws were in effect at the relevant dates of acquisition. In an effort to assist in this daunting task, the state Department of Land Conservation and Development (“DLCD”) created a webpage of prior land use statutes, statewide planning goals, and administrative rules.²⁵ Some counties have done the same.²⁶

There are several other exceptions to the compensation requirement. Compensation is not required for land use regulations that (1) regulate public nuisances; (2) protect public health and safety (but not welfare), “such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations”; (3) are required to comply with federal

law; or (4) restrict use of property for the purpose of selling pornography or performing nude dancing.²⁷

Measure 37 also provides a number of parameters concerning the administration of claims. First, just compensation becomes due 180 days after the owner has made a written demand, if the regulation continues to be applied to the subject property.²⁸ After 180 days have expired, the owner has a cause of action for compensation in court and can collect attorney’s fees, expenses, and costs reasonably incurred in collecting the compensation.²⁹

The various public entities subject to Measure 37 claims are authorized to create procedures for processing claims, but the measure states that these procedures cannot be a prerequisite to filing a court claim under the act.³⁰ In addition, failure to file a permit application cannot “serve as grounds for dismissal, abatement, or delay of a compensation claim.”³¹ If a claim is not paid within two years from the date it “accrues” (which is undefined), that, in essence, acts as a waiver and allows the owner to use the property as permitted by the land use regulations in existence at the time the owner acquired the property.³²

C. Constitutional Challenge

Not surprisingly, given Measure 37’s controversial nature, opponents of the Measure immediately challenged its constitutionality. In January 2005, a broad coalition of plaintiffs filed suit against the state and various other agencies charged with implementing Measure 37. The plaintiffs included a residential landowner and several owners of farms and nurseries, all of whom owned property near Measure 37 claimants; local farm bureaus; and 1000 Friends of Oregon.

The plaintiffs claimed that Measure 37, on its face, violated the Oregon and United States Constitutions. They asserted six primary bases in support of their claim: (1) impairment of the plenary power to legislate; (2) violation of equal privileges and immunities guarantees; (3) improper suspension of laws; (4) violation of separation of powers principles; (5) unlawful waiver of sovereign immunity; and (6) violation of procedural and substantive due process guarantees.³³ On cross-motions for summary judgment, the Marion County Circuit Court (hereinafter trial court) ruled in favor of the plaintiffs on all claims except sovereign immunity and one aspect of the separation of powers claim, and struck down Measure 37 as unconstitutional.³⁴

The Oregon Supreme Court accepted direct review and issued a decision in February 2006. *MacPherson v. Department of Administrative Services*, 340 Or. 117, 130 P.3d 308 (2006). The unanimous Supreme Court reversed the trial court and held that Measure 37 did not violate any of the state or federal constitutional provisions asserted by plaintiffs.³⁵

1. Impairment of the Legislative Plenary Power³⁶

Plaintiffs claimed the Oregon Constitution contains an implied limit on the authority of the legislature (or in this case, the citizens acting through the initiative process) to restrict the legislative body's ability to exercise plenary police power to protect public health, safety, and welfare. The trial court agreed, stating that "a government cannot be forced to choose between exercising its plenary power to regulate for public welfare, health, or safety, or paying private parties to comply with the law."³⁷ The court relied on United States Supreme Court cases that have held that a legislative body may not, by way of contract, limit its ability to enact future legislation.³⁸

The Supreme Court reversed the trial court's decision. The Court found no provision in the Oregon Constitution that expressly or impliedly limits the power of the Legislative Assembly or the people when exercising their initiative power to require state and local governments to either pay compensation or waive land use regulations.³⁹ Measure 37 was not, in the Court's view, a restriction on the legislature's exercise of police power, but an exercise of that power.⁴⁰ The Supreme Court found the cases prohibiting governments from contracting away policy power to be inapposite, as Measure 37 did not contract away the legislature's authority to enact legislation.⁴¹

2. Equal Privileges and Immunities

Plaintiffs also alleged that Measure 37 violates Article I, Section 20 of the Oregon Constitution, which prohibits passing laws "granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." They argued that Measure 37 impermissibly grants to a class of property owners who acquired property prior to enactment of any land use regulation subject to the Measure a privilege (compensation) or an immunity (waiver) not available to those who acquired property after enactment of that regulation.

Under Oregon law, to come within Article I, Section 20's protection, the characteristics of the class must exist apart from the challenged legislation. In other words, the legislation cannot, itself, have created the class.⁴² The Supreme Court found that the distinction between those who acquired property before a land use regulation was enacted and those who acquired after its enactment was one created by Measure 37. It had no significance apart from the measure. Therefore, the class was not prohibited by Article I, Section 20.⁴³

3. Suspension of Laws

Article I, Section 22 of the Oregon Constitution states that "The operation of the laws shall never be suspended, except by the authority of the Legislative Assembly." Plaintiffs asserted the waiver provision in Measure 37 was, in effect, a limited suspension of land use regulations that applied to a select class of people, and that Oregon's

Constitution only authorized a general suspension that must apply to all. Relying on dictionary definitions, the Supreme Court summarily held that Measure 37 does not "suspend" any laws because it did not "'cause to cease for a time,' 'delay,' or 'interrupt' any land use regulation. Instead, it authorizes a governing body to 'modify, remove, or not ... apply' certain such regulations in specific situations."⁴⁴ In the Court's view, this was simply an "amendment" of the land use regulations as to a specific situation, not a suspension.⁴⁵

4. Separation of Powers

Plaintiffs unsuccessfully alleged several violations of the separation of powers doctrine embodied in Article III, Section 1 of the Oregon Constitution. They claimed Measure 37's waiver provision allows local legislative bodies to decide whether to enforce a law, and thus impermissibly intruded on the executive branch's enforcement powers. The waiver provision directs "the governing body responsible for enacting the land use regulation" to decide whether to compensate or waive the provision.⁴⁶ The Court noted this included state agencies, that are part of the executive branch, and that local government bodies were not solely legislative in nature, but also performed executive and judicial functions. Thus, there was no impermissible intrusion by the legislative branch on executive branch powers.⁴⁷

Plaintiffs also claimed that the Measure delegates legislative authority without sufficient safeguards to protect against arbitrary application of the waiver provision, to the possible detriment of nearby non-claimant property owners. Measure 37 expressly provides a cause of action for claimants seeking compensation.⁴⁸ In addition, the Court noted there were avenues for both claimants and interested third parties to obtain judicial review of government decisions under the measure.⁴⁹ The Court held these judicial review provisions were adequate safeguards sufficient to prevent violation of separation of powers principles.⁵⁰

5. Waiver of Sovereign Immunity

The Supreme Court affirmed the trial court's conclusion that Article IV, Section 24 of the Oregon Constitution allows the State to waive sovereign immunity for "all" liabilities. The Court thus rejected the plaintiffs' argument that the power to waive sovereign immunity does not extend to liabilities for economic consequences of regulation, and upheld the constitutionality of ORS 197.352(6), which authorizes suits for compensation.⁵¹

6. Due Process

Finally, plaintiffs alleged violations of both the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These were the plaintiffs' sole federal constitutional claims. As to procedural due process, the trial court held that Measure 37 was unconstitutional because it

failed to provide notice and a predeprivation hearing to non-claimants who own property near or adjacent to a claimant's property, and whose property interests may be injured by a waiver of existing land use laws. Because development can begin as soon as the government decides to waive the regulations, the trial court found that neighbors' property rights may be irreparably harmed before they could obtain judicial review under the Oregon Administrative Procedures Act; thus a postdeprivation hearing alone was "too little, too late."⁵²

Once again, the Supreme Court disagreed. Since plaintiffs brought a facial challenge, they had the burden to show that the statute could not be constitutionally applied under *any* circumstance. Measure 37 does not preclude state or local governments from adopting predeprivation procedures. The Court noted that, in fact, the State had already adopted predeprivation notice and comment procedures for third parties,⁵³ and that local governments were free to do the same.⁵⁴ (Although not noted by the Court, several local governments have adopted such procedures.)⁵⁵ Assuming predeprivation procedures were constitutionally required (an issue the Court did not decide), since there were many conceivable circumstances under which Measure 37 could be constitutionally applied, the Supreme Court ruled the Measure was not unconstitutional on its face.⁵⁶

The Supreme Court also held Measure 37 does not violate substantive due process protections because the plaintiffs had failed to meet their burden of showing the measure had "no reasonable relation to a legitimate state interest."⁵⁷ Plaintiffs argued requiring government to pay compensation in order to enforce laws that did not rise to the level of a taking and were enacted for the public good was "reverse extortion" and contrary to promotion of the public welfare. The Court, in a fairly cursory manner, held that the people, through enactment of Measure 37, were free to further the policy objectives of compensating landowners for diminution in property values and relieving them from financial burdens of certain land use regulations. The Court held "[n]either policy is irrational; no one seriously can assert that Measure 37 is not reasonably related to those policy objectives."⁵⁸

The Court made clear it was not evaluating the wisdom of the people's policy choices: "Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview."⁵⁹

As of April 17, 2006, no party had sought review of the Court's rulings on the federal constitutional due process claims, but the deadline for seeking review had not yet passed as of that date.⁶⁰ Therefore, it is unknown at this time whether *MacPherson* will be the final word on the due process issues raised by the plaintiffs.

D. Implementation and Effect of Measure 37

State and local governments began implementing Measure 37 immediately after it took effect. The State

Department of Administrative Services which is the repository for claims filed with the State, adopted emergency and then permanent rules establishing procedures for filing claims with the State.⁶¹ Many local governments have also adopted ordinances establishing claim filing procedures.⁶²

DLCD reports that as of October 25, 2005 (the date the Marion County Circuit Court declared the Measure unconstitutional and directed DLCD and other government defendants to stop accepting and processing claims), a total of 1,255 claims had been filed with the State.⁶³ This number will continue to increase, as the State resumed processing claims on March 13, 2006, following the Supreme Court's decision upholding Measure 37.⁶⁴ The total number of claims filed with local governments is unknown, since there is no central repository for these claims. However, as of mid-April, Clackamas, Linn, and Multnomah Counties reported receiving almost 600 claims collectively.⁶⁵

Since Measure 37 was not funded, it comes as no surprise that Measure opponents' predictions about reliance on the waiver provision have proven true. No compensation has been awarded on any claim filed with the State or local governments.⁶⁶ Of claims filed with the State, ten percent have been denied and the other 90 percent have resulted in waivers.⁶⁷ The 1,065 claims that have been sent to DLCD request at least \$2.2 billion in compensation, and involve at least 66,000 acres of land.⁶⁸ Clackamas County also reports the amounts demanded for some of its claims. The total requested for 75 percent of its claims (265) is over \$497 million.⁶⁹

Fears that Measure 37 would result in a patchwork of incompatible land uses (e.g. residential subdivisions next to working farms), undermine the preservation of farm and forest lands, and encourage urban sprawl appear to have been realized.⁷⁰ The vast majority of claims filed with the state, 89 percent, involve resource land. Seventy-five percent involve land zoned for exclusive farm use and 12 percent are located in the forest zone.⁷¹ Claims pending as of January 2006 involved at least 4,700 acres of forest land.⁷² Most of the claimants are not seeking to build single-family homes, but want to subdivide farm or forest land outside the Urban Growth Boundaries. Of the 1,065 claims received by DLCD, only 13 percent (134) seek to build a single-family dwelling. Eighty-six percent of the claimants want to divide the land and site multiple dwellings.⁷³

This type of development will undoubtedly present a number of challenges for the government and for developers, such as how to provide the necessary infrastructure (transportation, water, sewer) and government services for these unplanned subdivisions. Property owners may have to obtain permits for septic systems and water wells—likely to be health and safety requirements that are exempt from Measure 37.⁷⁴ It will also likely lead to disputes between neighbors—for example, residential homeowners who object to the dust, chemicals, odors, or other impacts

from an adjacent farming operation.⁷⁵ Several lawsuits have already been filed by neighbors of claimants challenging waiver decisions.⁷⁶

In addition, the many ambiguities in interpretation and proper implementation of Measure 37 continue to provide uncertainty for Oregon citizens and governments as to the true impact of the Measure. Prior to its passage, the Oregon Attorney General warned that the initiative was full of uncertainty and involved areas of significant dispute.⁷⁷ That has proven to be true.⁷⁸ There are currently 31 court cases involving various aspects of implementation or interpretation of the Measure, with more sure to come.⁷⁹ Some of these cases were stayed pending the Supreme Court's decision on the constitutionality of Measure 37, but will now proceed.⁸⁰

One of the more significant issues concerns whether waivers are transferable. If an owner receives a waiver, but wants to sell the property before the new use authorized by the waiver is established, does the waiver run with the land? In February 2005, the Oregon Department of Justice opined that a waiver is personal to the owner who received it, and does not run with the land.⁸¹ That issue is now being litigated.⁸² This is a critical issue for the residential subdivisions being developed. If a waiver is not transferable, the most a new owner would receive is a nonconforming use. That will likely make it difficult to sell or obtain financing.⁸³

Since Measure 37 applies to "land use" regulations, another issue being litigated concerns whether division of land is a "use."⁸⁴ If it is not, then subdivision regulations are not subject to Measure 37. Other issues involve when both state and local governments must act on claims; whether state agencies have authority to waive state statutes or whether that must be done by the Legislature; and whether the Columbia River Gorge National Scenic Area is a "federal law" exempt from Measure 37 under ORS 197.352(3)(C).⁸⁵

It is uncertain whether the Oregon Legislature will step in to resolve some or all of these issues. In its last session, no less than twenty-three bills were introduced in response to Measure 37. These covered a wide variety of issues from repealing Measure 37, to allowing waivers to be transferred by sale, to allowing private claims for diminution of property value against successful Measure 37 claimants.⁸⁶ Other bills simply looked to provide an orderly process for reviewing claims, including requirements for public entities to hold hearings.⁸⁷ None of these bills passed, and few made it beyond introduction. Oregon's Legislature only meets biennially, so barring extraordinary efforts, no legislative action will be seen until at least January 2007.

However, the Legislature did enact SB 82, which provides for a ten-member task force to conduct a sweeping review of Oregon's land use planning program.⁸⁸ Although established nine months after the voters approved Measure 37, the stated mission of this new task force is to look at the big picture, not act as a Measure 37 fix.⁸⁹

III. Washington's Initiative 933

Having watched the successful passage of Measure 37, the Washington Farm Bureau filed a somewhat similar initiative in January 2006, Initiative 933, entitled the "Property Fairness Initiative."⁹⁰ I-933's sponsors have started the petition process, and must obtain 224,880 signatures by July 7, 2006, to place the initiative on the November 2006 ballot.

Although I-933 is similar in many respects to Measure 37, there are significant differences. In these authors' view, one thing the two initiatives have in common is that they contain a number of ambiguities. If I-933 is voted on and passed, it is certain to spawn a substantial amount of litigation, just like its Oregon counterpart.

A. I-933's Provisions

1. Compensation

a. Scope of Laws Requiring Compensation

The primary element of I-933 is a compensation requirement similar to Measure 37. An "agency"⁹¹ that seeks to enforce or apply any ordinance, regulation, or rule that would result in "damaging the use or value of private property" must first pay compensation to the property owner.⁹² Unlike Measure 37, I-933 is not limited to land use regulations, but applies to all government regulations that damage the use or value of property, including *personal* property.⁹³ This was confirmed by the sponsor of the initiative, the Washington State Farm Bureau, in documents filed as part of a recent lawsuit challenging the ballot title (discussed below).⁹⁴ The breadth of I-933's scope is also apparent from the fact that the list of regulations exempt from compensation under I-933 includes worker health and safety laws and wage and hour laws.⁹⁵ Obviously there would be no need to exempt those laws were they not otherwise subject to I-933.

I-933 includes a definition of "damaging the use or value," which in essence defines the types of government regulations that would trigger compensation.⁹⁶ The definition begins with a narrative, followed by a specific list of regulations. The narrative definition states that "[d]amaging the use or value" means to prohibit or restrict the use of private property to obtain benefit to the public the cost of which in all fairness and justice should be borne by the public as a whole, and includes *but is not limited to* the specific list of laws that follows.⁹⁷ This is off-quoted language from United States Supreme Court takings jurisprudence, which the Supreme Court has recognized is not subject to formulaic application and requires ad hoc, factual inquiries.⁹⁸ This leaves the door open for property owners to argue that regulations in addition to those specifically listed also require compensation.

The first category of laws specifically mentioned is regulations that prohibit or restrict "any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996."⁹⁹ In contrast to Measure 37, this language

purports to tie the compensation requirement for this category of regulations to those passed in the last 10 years rather than laws passed after the owner's acquisition. However, because of the narrative definition discussed above, property owners may also claim that regulations enacted prior to 1996 require compensation or waiver.

In addition, there are a number of other laws listed that are specifically not limited to a 10-year period, and would require compensation if the government applied or enforced them, regardless of how long ago they were enacted. To paraphrase, they include regulations:

- prohibiting the continued operation, maintenance, or replacement of tidegates, bulkheads or other infrastructure reasonably necessary for protecting the use or value of property;
- prohibiting or restricting the operation and maintenance of structures necessary for irrigation facilities;
- prohibiting actions reasonably necessary to prevent or mitigate harm from fire, flooding, erosion, or other natural disasters or conditions that would impair the property's use or value;
- requiring a portion of the property to be left in its natural state or without beneficial use to the owner, unless necessary to prevent immediate harm to health or safety; and
- prohibiting the maintenance or removal of trees or other vegetation.¹⁰⁰

Many of these contain terms subject to varying interpretations, and their scope will likely have to be resolved through litigation, if I-933 passes.

b. Laws Exempted from Compensation Requirement

I-933 exempts from the compensation requirement restrictions that "apply equally to all property subject to the agency's jurisdiction," including a specified list.¹⁰¹ Use of the term "including" suggests that this is not an exclusive list, but that any law that "applies equally" is exempt from I-933's compensation requirement. However, it is not clear what the equal application requirement was intended to mean. Many land use or environmental laws, by their nature, do not apply exactly in the same manner to all property within an agency's jurisdiction. Zoning laws often apply restrictions to property in one zone (e.g., residential) that do not apply to property in another zone (e.g., industrial). Stream or wetland buffer requirements only apply to property on which streams or wetlands exist. Perhaps the drafters meant that similarly situated property must be treated equally. But what would "similarly situated" mean? Many laws contain provisions that allow the government to treat some property differently in order to prevent hardship to the owner. If such provisions constitute "unequal treatment," then many land use and environmental laws will not qualify for an exemption. Perhaps

the drafters meant this language to be similar to the rational basis test used to determine the constitutionality of regulations—and only regulations that failed that test would not be exempt. Unfortunately, the language is not clear and we are left to guess. The scope of laws exempted from I-933 is obviously a critical issue, which lawyers and courts will be debating for some time if I-933 is voted on and passes.

The following categories of laws are specifically listed in the exemption provision of I-933:

- restrictions necessary to prevent an immediate threat to health and safety;
- structural standards in building or fire codes to prevent harm from natural disasters;
- restrictions on siting or operation of sex offender housing or adult entertainment;
- requiring adherence to "chemical use restrictions" adopted by EPA;
- worker health and safety laws;
- wage and hour laws;
- dairy nutrient management regulations under RCW 90.64; and
- ordinances establishing setbacks prior to January 1, 1996.¹⁰²

It is not clear whether these regulations must also "apply equally" to all property subject to an agency's jurisdiction. If so, many of them may not qualify, depending on how "apply equally" is interpreted.

In addition, this list differs from Measure 37's in several ways. It does not include an exception for nuisances, and the health and safety exception is for "immediate" threats. Although unclear, that may limit governments' ability to regulate potential, or longer-term, health and safety threats, such as requirements for septic systems and drinking water safety, landfill siting and operation requirements, pollution prevention laws, and restrictions on development in potential slide-prone areas or flood plains. It also does not include an exemption for requirements of federal law, except for chemical use restrictions adopted by EPA. State agencies, such as the Department of Ecology and the Department of Health, have been delegated authority by the federal government to administer portions of federal laws such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act. If I-933 is enacted, these agencies will need to evaluate whether they could continue to implement those programs, or whether the programs would revert to EPA.

c. Waivers

If a regulation is not exempt and triggers compensation, agencies have the option of waiving application of the regulation.¹⁰³ However, the language is ambiguous as to

whether I-933 itself authorizes waiver, or whether it simply acknowledges that an agency may already have waiver authority in the laws it administers. Section 3 of I-933 states:

This section shall not be construed to limit agencies' ability to waive, or issue variances from, other legal requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this section.

The Washington Farm Bureau has taken the position this language "recognizes that there may be some pre-existing or independent authority for agencies to grant variances, exemptions, or waivers, but the text of the measure does not provide any."¹⁰⁴ The Farm Bureau acknowledges that I-933 differs in this respect from Measure 37, but indicates this approach was chosen in order to avoid an argument that I-933 would violate Article II, Section 37 of the Washington Constitution.¹⁰⁵ If I-933 does not authorize agencies to waive restrictions, then agencies that do not have separate authority to do so (e.g., they are implementing a restriction that is required by state statute) may have no choice but to pay compensation. This is a *significant* difference between Measure 37 and I-933. The more likely scenario, however, given lack of funds, is that agencies would seek amendments to the laws they implement (e.g. the Growth Management Act, the Shoreline Management Act, and other state environmental laws) to authorize them to waive those laws in order to avoid compensation.

d. Amount of Compensation

If compensation is paid, the amount due is the "amount the fair market value of the affected property has been decreased" by the application or enforcement of the regulation.¹⁰⁶ Significantly, I-933 requires compensation if any portion of the property is required to be left in a natural state or without beneficial use by its owner. The amount of the compensation is the fair market value of that portion left in a natural state.¹⁰⁷ In other words, if a landowner is required to provide a buffer along a wetland or stream, the owner is entitled to compensation, even if the owner is otherwise able to fulfill his or her objectives for use of the property.

2. Restriction on GMA Development Regulations

I-933 also prohibits the adoption of any new development regulations under GMA that would prohibit legally existing uses on any parcel prior to the adoption of the regulations.¹⁰⁸ This appears to freeze current GMA development regulations, and would prevent local governments from adopting any new regulations that prohibit uses that had been allowed at any time in the past. This restriction is not limited to just uses authorized in the last ten years. It also is not subject to the pay or waive provisions—but is a strict prohibition.

3. Study Requirements

Prior to adopting any new ordinance or rule that may damage the use or value of private property, an agency is required to consider and document a number of factors, including (1) the existence of a legitimate governmental purpose; (2) the nexus between the government interest and the action; (3) proportionality of impacts; (4) deprivation of economically viable uses or fundamental attributes of ownership; (5) whether the action enhances a publicly owned right; (6) estimated compensation that would be required under I-933; and (7) any less restrictive alternatives, including voluntary or nonregulatory programs. The genesis for these requirements, according to the Washington Farm Bureau, is that they are standards that exist under current takings jurisprudence, or are otherwise factors one would reasonably assume the government is already considering.¹⁰⁹

The GMA currently requires jurisdictions planning under the GMA and state agencies to evaluate whether their actions will result in an unconstitutional taking, through use of a process developed by the State Attorney General.¹¹⁰ However, the GMA specifies that this process is protected by the attorney-client privilege, presumably to encourage frank discussions between governments and their legal counsel, and is not subject to judicial enforcement.¹¹¹ I-933 does not contain those protections.

B. Ballot Title Challenge

I-933 has already been the subject of litigation—a challenge to the ballot title. The Attorney General proposed that the subject and essential content of I-933 be described on the ballot as follows (the "ballot title"):

Initiative Measure No. 933 concerns government regulation of private property. This measure would require compensation when any government regulation damages the use or value of private property, forbid regulations that prohibit existing legal uses of private property, and provide for exceptions and conditions. Should this measure be enacted into law? Yes[] No[]

Several parties, including the League of Women Voters of Washington and two private citizens, filed a challenge to that ballot title's wording in Thurston County Superior Court.¹¹² They argued that it focused on repeating the (popular) constitutional requirement for compensation when government regulation damages property instead of concisely describing for voters the essential contents of the initiative's changes to Washington law—namely, the initiative's new pre-action study requirements, the option of waiving a regulation with respect to an objecting property owner in lieu of payment, and the broad scope of laws to which the initiative applies.¹¹³ Those petitioners accordingly proposed that the ballot title should read:

Initiative Measure No. 933 concerns government regulation of private property. This measure would require government studies before adopting restrictions on property use, exempt or pay property owners who object to certain zoning, environmental, and other laws, and prevent regulations prohibiting existing legal uses. Should this measure be enacted into law? Yes [] No []

The judge did not find the ballot title to be misleading, affirmed the Attorney General's proposal to not include such matters in the ballot title, and ordered the use of a ballot title that made only minor changes to the Attorney General's proposal.¹¹⁴ The petitioners sought review by the Washington Supreme Court, but were summarily denied.¹¹⁵ This ended the ballot title challenge and allowed the Farm Bureau to begin collecting signatures to put I-933 on the ballot for a vote in November.

IV. Conclusion

Regardless of whether one thinks that I-933 is good or bad policy, one thing many people should agree on is that, as with Measure 37, the true effect of I-933 may not be known for years to come. Unfortunately, I-933 is ambiguous on many critical issues, such as the scope of the laws covered, what laws are exempt, and the scope of agencies' waiver authority. If I-933 is placed on the ballot, it will be difficult for voters to know the impact of what they are being asked to decide. In the end, if I-933 passes, it may not be the voters making the critical choices about when government should compensate a landowner or waive the application of a law, but rather the courts.

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- 2 See Sarah C. Galvan, "Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use," 23 *Yale L. & Pol'y Rev.* 587 n.4 (2005).
- 3 S.B. 100 (Or. 1973), 1973 Or. Laws 127, ch. 80 (codified at OR. REV. STAT. §§ 197.005-197.430 (2005)) (OR. REV. STAT. is hereinafter ORS).
- 4 Oregon Land Conservation and Development Commission, *Oregon's Statewide Planning Goals*, at <http://egov.oregon.gov/LCD/goals.shtml>; see OR. ADMIN. R. 660-15-0000 *et seq.* (OR. ADMIN. R. is hereinafter OAR).
- 5 ORS 197.175; see generally ORS Chapters 197, 215, and 227.
- 6 ORS 197.040; see generally ORS Chapter 197.
- 7 See DLCD Honors and Awards at http://www.oregon.gov/LCD/history.shtml#Honors_and_Awards.
- 8 See Galvan, 23 *Yale L. & Pol'y Rev.* 587, 591-95 (attributing landowner frustration to failure of system to provide meaningful judicial remedies, and inconsistent and harsh application of takings law); Edward J. Sullivan, "Oregon's Measure 37: Crisis and Opportunity for Planning," 57 *Plan. & Envtl. L. No.* 3, 3 (2005).
- 9 Sullivan, *supra* note 8 at 3.
- 10 See *League of Oregon Cities v. State*, 334 Or. 645, 665-67, 56 P.3d 892 (2002) (quoting text of Measure 7).
- 11 *Id.* at 663-675.
- 12 Galvan, *supra* note 2 at 596.
- 13 "Arguments in Favor" of Measure 37 provided in the 2004 Voters' Guide, available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html.
- 14 *Id.*
- 15 See Measure 37 Ballot Title, 2004 Voters' Guide, available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_bt.html.
- 16 "Arguments in Opposition" of Measure 37, provided in the 2004 Voters' Guide, available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_opp.html.
- 17 Sullivan, *supra* note 8 at 3.
- 18 *Initiative, Referendum and Recall 2000-2004*, The Oregon Blue Book (Or. Sec'y of State 2005), available at <http://bluebook.state.or.us/state/elections/elections22a.htm> (1,054,589 votes for and 685,079 votes against).
- 19 ORS 197.352(1). Measure 37 has been codified at ORS 197.352.
- 20 ORS 197.352(2).
- 21 ORS 197.352(11)(B).
- 22 Family member is broadly defined: "'Family member' shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property." ORS 197.352(11)(A).
- 23 ORS 197.352(3)(E).
- 24 ORS 197.352(8).
- 25 See DLCD, *History of Statutes, Goals & Rules*, at http://www.oregon.gov/LCD/history_statutes_goals_rules.shtml.
- 26 See, e.g., Multnomah County, *Historical Information Database*, at http://www2.co.multnomah.or.us/aspnet/lup_historical_maps/historicalmaps.asp.
- 27 ORS 197.352(3)(A)-(D).
- 28 ORS 197.352(4).
- 29 ORS 197.352(6).
- 30 ORS 197.352(7).
- 31 *Id.*
- 32 ORS 197.352(10).
- 33 *MacPherson v. Dep't of Admin. Servs.*, Case No. 05C10444 (Marion County Circuit Court 2005) (First Amended Complaint).
- 34 *MacPherson v. Dep't of Admin. Servs.*, Case No. 05C10444 (Marion County Circuit Court 2005) (Opinion and Order on Motions for Summary Judgment, Oct. 2005) (hereinafter "CC Order"). Plaintiffs also alleged freedom of speech violations and improper compensation to religious institutions. The Circuit Court held the freedom of speech claim was not justiciable and ruled against plaintiffs on the religious institutions claim. *Id.* at 17, 18. Those claims were not addressed by the Oregon Supreme Court.
- 35 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. 117, 130 P.3d 308 (2006). In addition to the parties who participated before the trial court, a number of *amici curiae* participated before the Supreme Court. They included the Property Rights Alliance, Oregon State Grange, Oregon League of Cities, and National/Oregon Home Builders Association.
- 36 In addition to constitutional issues, the Supreme Court ruled on defendants' claims of lack of standing and ripeness. One individual plaintiff owned land next to a Measure 37 claimant who sought to subdivide his property for residential construction. The State Department of Land Conservation and

1 Measure 37 Ballot Title, 2004 Voters' Guide, available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_bt.html. (All Internet sites cited in this article were last visited on April 21, 2006.)

- Development had chosen to waive the land use regulations that would otherwise have prohibited the subdivision. The plaintiff alleged he would suffer harm from his neighbor's subdivision, including reduced water quantity and quality, increased traffic, increased taxes due to increased enrollment in local schools, and increased pollution. The Court found these allegations sufficient to support standing. *Id.*, 340 Or. at 123-24. These facts also defeated defendants' claim that the case was not ripe. *Id.*, 340 Or. at 124-25.
- 37 *MacPherson v. Dep't of Admin. Servs.*, Case No. 05C10444 (Marion County Circuit Court 2005) (CC Order at 11).
- 38 *Id.*
- 39 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 126-28.
- 40 *Id.*, 340 Or. at 128.
- 41 *Id.*, 340 Or. at 128, n.8.
- 42 *Id.*, 340 Or. at 129-30.
- 43 *Id.*, 340 Or. at 130-31. Because the Supreme Court held the class was not subject to Article I, Section 20, it did not address the trial court's reasoning that the class failed to withstand rational basis review. The trial court had held that the compensation requirement in Measure 37 did not further a legitimate state interest because (as the court had previously ruled) it impeded the legislative plenary power. Further, the trial court concluded that even if the state's interest in "just compensation" was legitimate, the means chosen to determine the amount of compensation was not reasonably related to that interest because it essentially over compensated landowners and resulted in a windfall. *MacPherson v. Dep't of Admin. Servs.*, Case No. 05C10444 (Marion County Circuit Court 2005) (CC Order at 13, 14).
- 44 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 131-33.
- 45 *Id.*
- 46 ORS 197.352(8) (emphasis added).
- 47 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 134-35.
- 48 ORS 197.352(6).
- 49 The Court did not specify what those avenues are, and they are not spelled out in Measure 37. Presumably they include (among possibly others) the Oregon Administrative Procedures Act, ORS 183.310, *et. seq.*
- 50 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 135-36. Plaintiffs' third separation of powers claim, that Measure 37 improperly delegated to public entities a limit on the legislature's plenary power, also failed, for the reasons discussed in section D.1 above. *Id.* at 133.
- 51 *Id.*, 340 Or. at 136-38.
- 52 *MacPherson v. Dep't of Admin. Servs.*, Case No. 05C10444 (Marion County Circuit Court 2005) (CC Order at 20, 21).
- 53 See OAR 125-145-0080.
- 54 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 138-139.
- 55 See, e.g., Clackamas County Code Chapter 2.08; Linn County Code Chapter 225; Multnomah County Code §7.50.
- 56 *MacPherson v. Dep't of Admin. Servs.*, 340 Or. at 138-39.
- 57 *Id.*, 340 Or. at 139-41.
- 58 *Id.*, 340 Or. 117 at 141.
- 59 *Id.*
- 60 U.S. Sup. Ct. R. 13 (Parties have 90 days from the entry of final judgment to petition for a writ of certiorari). The Oregon Supreme Court's decision in *MacPherson* became effective on March 13, 2006. See DLCD, Measure 37 Information, at <http://www.oregon.gov/LCD/measure37.shtml>.
- 61 OAR 125-145-0010 to -0105.
- 62 See, e.g., Oregonians In Action, Measure 37 Website, at http://measure37.com/measure%2037/local_ordinances.htm (partial list of jurisdictions implementing Measure 37 claims procedures with hyperlinks).
- 63 DLCD, Measure 37 Information, at <http://www.lcd.state.or.us/LCD/measure37.shtml>
- 64 *Id.*
- 65 Clackamas County, Measure 37 Information, at <http://www.co.clackamas.or.us/dtd/zoning/37/>; Linn County, Measure 37 Claims Filed with Linn County, at <http://www.co.linn.or.us/Planning/permits/M37%20case%20list.htm>; Multnomah County, Measure 37 Claim Information for Unincorporated Multnomah County, at <http://www2.co.multnomah.or.us/jsp/Public/EntryPoint?ch=ad4a86d085517010VgnVCM100003bc614acRCD>.
- 66 Martin & Shriver, *infra* note 70.
- 67 See DLCD, Measure 37 Information, at <http://www.lcd.state.or.us/LCD/measure37.shtml>.
- 68 *Id.*
- 69 Clackamas County, Measure 37 Information, at <http://www.co.clackamas.or.us/dtd/zoning/37/>.
- 70 The Institute of Portland Metropolitan Studies at Portland State University conducted a study of the impacts of Measure 37. They studied 10 geographically diverse claims, and concluded that Measure 37 interfered with a number of Oregon's statewide planning goals, including citizen involvement; land use planning; preserving farm and forest lands; and protecting the quality of air, water and land resources. Sheila A. Martin & Katie Shriver, Portland State Univ., *Documenting the Impact of Measure 37: Selected Case Studies* (January 2006), available at http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf.
- 71 DLCD, Measure 37 Information, at <http://www.lcd.state.or.us/LCD/measure37.shtml>.
- 72 Martin & Shriver, *supra* note 70, at 5.
- 73 DLCD, Measure 37 Information, at <http://www.lcd.state.or.us/LCD/measure37.shtml>.
- 74 See Steve Law, "Measure 37 Legal Interpretations Remain Unresolved," *Statesman Journal* (Salem, Or.), February 22, 2006 (Measure 37 claim approved 6,000 square foot rural lots, too small for a septic system and well).
- 75 See, e.g., Letter to the Editor, *The Oregonian* (Portland), March 25, 2006, at B5 (neighbors dismayed at siting of gravel mine next to their home).
- 76 DLCD, Measure 37 Information, *supra* note 65.
- 77 See Gov. Ted Kulongoski and Victor Atiyeh, Argument in Opposition to Measure 37, at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_opp.html (quoting July 19, 2004 Department of Justice Memorandum. Victor Atiyeh is a former Oregon Governor.).
- 78 Not long after Measure 37 took effect, the Governor's Office issued an "Initial Questions & Answers" document answering some of the many questions raised. Or. Office of the Governor, "Initial Questions and Answers" (Feb. 28, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37qanda.pdf>. See also Sullivan, *supra* note 8 at 5, 6 (discussing ambiguities in Measure 37).
- 79 DLCD, Measure 37 Information, at <http://www.oregon.gov/LCD/measure37.shtml>.
- 80 Peter Wong, "High Court Upholds Measure 37," *Statesman Journal* (Salem, OR), February 22, 2006 (discussing next steps following the Oregon Supreme Court's decision).
- 81 Or. Att'y Gen., Letter to DLCD (February 24, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37dojadvic.pdf>. The Oregon Department of Justice also concluded that local governments could not provide "blanket waivers" by repealing laws, as some wished to do.
- 82 *Crook County v. All Electors*, Case No. 05CV0015 (Crook County Circuit Court 2005).
- 83 See Martin & Shriver, *supra* note 70, at 20. A related waiver issue being litigated is whether a waiver only rolls back land use regulations to the time the current owner acquired the property, or whether it reaches back to when any family member of the owner first acquired the property. *Cobos v. Marion County*, Case No. 05C16640 (Marion County Circuit Court 2005).
- 84 *Multnomah County v. State*, Case No. 051213144 (Multnomah County Circuit Court 2005).
- 85 *Columbia River Gorge Comm'n v. Hood River County*, Case No. CA A129652 (Or. Ct. App.); League of Or. Cities, State of Or., and Ass'n of Or. Counties, Joint Press Release (March 8, 2006), at <http://www.oregon.gov/LCD/docs/measure37/m37jointpressrelease031306.pdf>.
- 86 See, e.g., S.B. 308, S.B. 663, Engrossed S.B. 1037 (All 73rd Or. Legis. Assemb. - 2005 Regular Session).
- 87 See, e.g., H.R.B. 2931 (73rd Or. Legis. Assemb. - 2005 Regular Session).
- 88 S.B. 82 (73rd Or. Legis. Assemb. - 2005 Regular Session) (enacting "The Oregon Task Force on Land Use Planning").
- 89 Laura Oppenheimer, "Task Force Starts Work to Recraft Planning," *The Oregonian* (Portland), March 4, 2006, at E1 (discussing Governor's directives to land use task force).
- 90 A copy of I-933 is available at <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.
- 91 The compensation provision in Section 3 of I-933 would be codified in RCW 64.40. That chapter broadly defines "agency" as "the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state." RCW 64.40.010(1).
- 92 I-933, § 3.
- 93 "'Private property' includes all real and personal property interests protected by the fifth amendment to the United States Constitution or Article I, Section 16 of the state Constitution owned by a nongovernmental entity, including, but not limited to, any interest in land, buildings, crops, livestock, and mineral and water rights." I-933, § 2(a) (emphasis added).
- 94 See *In Re: Ballot Title for Initiative 933*, Case No. 06-2-00366-4 (Thurston County Super. Ct. 2006) (Sponsor's Opposition to Ballot Title Changes Proposed by League of Women Voters, et al. at 9) (arguing I-933 is broader than "zoning" and "environmental" laws, but also does not include all zoning and environmental laws (because some may be exempt)).

- 95 I-933, § (2)(c)(v), (vi).
- 96 I-933, § (2)(b).
- 97 *Id.* (emphasis added).
- 98 *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”).
- 99 I-933, § (2)(b)(i).
- 100 I-933, § (2)(b)(ii) – (vi).
- 101 I-933, § 2(c).
- 102 *Id.*
- 103 I-933, § 3.
- 104 *In Re: Ballot Title for Initiative 933*, Case No. 06-2-00366-4 (Thurston County Super. Ct. 2006) (Sponsor’s Opposition to Ballot Title Changes Proposed by League of Women Voters, et al., at 9).
- 105 *Id.*; *In Re: Ballot Title for Initiative 933*, No. 78456-6 (Wash. Sup. Ct. 2006) (Washington State Farm Bureau Federation’s Motion to Dismiss and Brief in Opposition to Petition, at 33-35). Article II, § 37 of the Washington Constitution prohibits amendment of laws without setting forth the text of the amendment in full. Had the Farm Bureau followed Oregon’s approach, this may have required the Farm Bureau to include in I-933, the text of all of the laws that could be “waived.”
- 106 I-933, § (2)(d).
- 107 *Id.*
- 108 I-933, § 5.
- 109 *In Re: Ballot Title For Initiative 933*, No. 78456-6 (Wash. Sup. Ct. 2006) (Washington State Farm Bureau Federation’s Motion to Dismiss and Brief in Opposition to Petition).
- 110 RCW 36.70A.370(2). Wash. Att’y Gen., Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property (Dec. 2003), at <http://www.atg.wa.gov/environment/takings.shtml>.
- 111 RCW 36.70A.370(4).
- 112 *In Re: Ballot Title for Initiative No. 933*, No. 06-2-00392-3 (Thurston County Super. Ct. 2006).
- 113 *In Re: Ballot Title for Initiative No. 933*, No. 06-2-00392-3 (Thurston County Super. Ct. 2006) (Petitioner’s Brief in Support of Requested Ballot Title Review).
- 114 *In Re: Ballot Title for Initiative No. 933*, No. 06-2-00392-3 (Thurston County Super. Ct. 2006) (Order Granting Washington State Farm Bureau Federation’s Appeal of Ballot Title) (striking the word “any” before “government regulation”, adding “would” before “forbid” and “provide”, and changing the ending “and conditions” to “or payments”).
- 115 *In Re Ballot Title for Initiative 933*, No. 78456-6 (Wash. Sup. Ct. 2006) (Order).

New Approach to Water Resource Management in the Columbia River Basin

By Kathleen Callison

I. Introduction

During the 2006 session, the Washington State Legislature passed the Columbia River Basin Water Resources Management bill, Engrossed Second Substitute House Bill 2860 (“E2SHB 2860”). The bill authorizes development and implementation of a program for the comprehensive management of water resources on the mainstem of the Columbia River. The mainstem of the river is defined as “all the water in the Columbia River within the ordinary high water mark of the main channel of the Columbia River between the border of the United States and Canada and the Bonneville Dam and all groundwater within one mile of the high water mark.” E2SHB 2860, §4. The bill also covers the Lower Snake River from the head of the Ice Harbor pool to the confluence of the Snake and Columbia Rivers.

The bill passed the Legislature with strong bipartisan support during the short legislative session, after years of uncertainty and litigation relating to Columbia River water resources. Funding was authorized for implementation of programs authorized under the bill as part of the 2006 capital budget and funding bill, Engrossed Substitute Senate Bill 6384 (“ESSB 6384”), which passed on the last day of the legislative session.

Building on the Columbia River Initiative originally launched by Governor Locke, Governor Gregoire during her first year in office created the Columbia River Task Force and charged it with identifying creative solutions to address the long history of conflict over Columbia River water resource problems. The Governor actively promoted development and passage of a bill encompassing the recommendations of the Task Force. The bill enjoyed broad support in the Legislature not only because of the Governor’s leadership but also because a broad group of stakeholders was consulted and participated in developing the elements of the program. It was apparent that the growing population and commercial development in Central and Eastern Washington required movement towards solutions.

This article provides a brief overview of the history of water resource management on the Columbia River, a summary of the program elements and priority actions authorized by the Columbia River bill as passed in the Legislature, remaining questions, and effects on landowners, developers, and the environment.