

GAO

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REGULATORY TAKINGS

Agency Compliance with Executive Order on Government Actions Affecting Private Property Use

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Highlights of [GAO-04-120T](#), a testimony before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

Each year federal agencies issue numerous proposed or final rules or take other regulatory actions that may potentially affect the use of private property. Some of these actions may result in the property owner being owed just compensation under the Fifth Amendment. In 1988 the President issued Executive Order 12630 on property rights to ensure that government actions affecting the use of private property are undertaken on a well-reasoned basis with due regard for the potential financial impacts imposed on the government.

This testimony is based on our recent report on the compliance of the Department of Justice and four agencies—the Department of Agriculture, the Army Corps of Engineers, the Environmental Protection Agency, and the Department of the Interior—with the executive order. (*Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015, Sept. 19, 2003).

Specifically, GAO examined the extent to which (1) Justice has updated its guidelines for the order to reflect changes in case law and issued supplemental guidelines for the four agencies, (2) the four agencies have complied with the specific provisions of the executive order, and (3) just compensation awards have been assessed against the four agencies in recent years.

www.gao.gov/cgi-bin/getrpt?GAO-04-120T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov.

REGULATORY TAKINGS

Agency Compliance with Executive Order on Government Actions Affecting Private Property Use

What GAO Found

Justice has not updated the guidelines that it issued in 1988 pursuant to the executive order, but has issued supplemental guidelines for three of the four agencies. The executive order provides that Justice should update the guidelines, as necessary, to reflect fundamental changes in takings case law resulting from Supreme Court decisions. While Justice and some other agency officials said that the changes in the case law since 1988 have not been significant enough to warrant a revision, other agency officials and some legal experts said that significant changes have occurred and that it would be helpful if a case law summary in an appendix to the guidelines was updated. Justice issued supplemental guidelines for three agencies, but not for Agriculture because the two agencies were unable to resolve issues such as how to assess the takings implications of denying or limiting permits that allow ranchers to graze livestock on federal lands managed by Agriculture.

Although the executive order's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of these requirements has changed over time as a result of subsequent guidance provided by the Office of Management and Budget (OMB). For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB issued guidance in 1994 advising agencies that this information was no longer required. According to OMB, this information is not needed because the number and amount of these awards are small and the awards are paid from the Department of the Treasury's Judgment Fund, rather than from the agencies' appropriations. Regarding other requirements, agency officials said that they fully consider the potential takings implications of their regulatory actions, but provided us with limited documentary evidence to support this claim. The agencies provided us with a few examples of takings implications assessments stating that such assessments were not always documented in writing or retained on file. In addition, our review of the agencies' rulemakings for selected years that made reference to the executive order revealed that relatively few specified that an assessment was done and few anticipated significant takings implications.

According to Justice, property owners or others brought 44 regulatory takings lawsuits against the four agencies that were concluded during fiscal years 2000 through 2002, and of these, 14 cases resulted in just compensation awards or settlement payments totaling about \$36.5 million. The executive order's requirement for assessing the takings implications of planned actions applied to only three of these cases. The actions associated with the other 11 cases either predated the order's issuance or were otherwise excluded from the order's provisions. The relevant agency assessed the takings potential of its action in only one of the three cases subject to the order's requirements. According to Justice, at the end of fiscal year 2002, 54 additional lawsuits involving the four agencies were pending resolution.

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the measures taken by the Department of Justice (Justice) to implement certain provisions of Executive Order 12630 (EO) and the efforts of four agencies—the Department of Agriculture, the U.S. Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), and the Department of the Interior¹—to comply with the EO’s requirements. Our testimony is based on work included in a report recently released by this subcommittee.²

Each year federal agencies issue numerous proposed or final rules or take other regulatory actions that may potentially affect the use of private property. Agencies take these actions to meet a variety of societal goals, such as protecting the environment, promoting public health and safety, conserving natural resources, and preserving historic sites. At the same time, these actions may place restrictions on the use of private property, such as limiting the development of land that includes critical wildlife habitat or wetlands needed for flood control, thereby potentially depriving the landowner of the use or economic value of the property.

Any landowner believing that a government regulatory action has resulted in a taking of his or her private property may file a lawsuit seeking just compensation under the Fifth Amendment to the U.S. Constitution. In general, these suits must be brought in the United States Court of Federal Claims; Justice is responsible for litigating these cases on behalf of the government. Such cases, many of which may take years to resolve, may result in a dismissal, a decision in favor of the government, a settlement payment made to the landowner, or an award of just compensation. In general, such awards and settlements are paid from the Department of the Treasury’s Judgment Fund.

In 1988 the President issued Executive Order 12630,³ “Governmental Actions and Interference with Constitutionally Protected Property Rights,” to ensure that government actions are undertaken on a well reasoned basis with due regard for the potential financial impacts imposed on the

¹We refer to these agencies as the “four agencies” in subsequent references.

²See U.S. General Accounting Office, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, [GAO-03-1015](#) (Washington, D.C., Sept. 19, 2003).

³53 *Fed. Reg.* 8859 (Mar. 18, 1988).

government by the Just Compensation Clause of the Fifth Amendment. Specifically, the EO requires executive branch agencies, among other things, to (1) prepare annual compilations of awards of just compensation resulting from landowner lawsuits alleging takings, (2) account for takings awards levied against them in their annual budget submissions, (3) designate an agency official responsible for implementing the order, and (4) consider the potential takings implications of their proposed actions and document significant takings implications in notices of proposed rulemaking. The EO also requires Justice, specifically the U.S. Attorney General, to issue general guidelines to provide agencies with a uniform framework for implementing the EO and to issue supplemental guidelines for each agency, as appropriate, that reflect that agency's unique responsibilities. In addition, the EO requires the Attorney General to update the general guidelines, as necessary, to reflect fundamental changes in takings case law resulting from U.S. Supreme Court decisions. Furthermore, the EO requires the Office of Management and Budget (OMB) to ensure that the policies of executive branch agencies are consistent with the EO's requirements and that just compensation awards made against the agencies are included in agencies' budget submissions.

Our testimony discusses the extent to which (1) Justice has updated its guidelines to reflect changes in case law and issued supplemental guidelines for the four agencies, (2) the four agencies have complied with the specific provisions of the EO, and (3) awards of just compensation have been assessed by the courts against the four agencies in recent years and whether in these cases, the agencies had assessed the potential takings implications of their actions before implementing them.

In summary, we found the following:

- Justice has not updated the general guidelines that it issued pursuant to the EO in June 1988, but has issued supplemental guidelines for three of the four agencies. Officials at Justice, the Corps and EPA expressed the general view that changes in takings case law related to Supreme Court decisions since 1988 had not been significant enough to warrant a revision of the guidelines. Justice officials also noted that the guidelines were intended to provide a general framework for agencies to follow in implementing the EO, and thus did not require frequent revision. However, Interior and Agriculture officials said that it would be helpful if Justice updated a summary of the key aspects of relevant case law contained in an appendix to the guidelines to reflect significant developments over the past 15 years. Similarly, representatives of property rights groups and law professors stated

that the guidelines should be updated, noting that the body of relevant case law has evolved significantly over the past 15 years. Justice has issued supplemental guidelines for all of the individual agencies except Agriculture.

- The four agencies' implementation of some of the EO's key provisions has changed over time in response to subsequent OMB guidance. The agencies have not prepared annual compilations of just compensation awards or accounted for these awards in their budget documents since OMB issued guidance in 1994 advising agencies that this information is no longer required. Regarding the EO requirement for designating an official responsible for ensuring the agency's compliance with the EO, the four agencies have each designated such an official—typically the chief counsel, general counsel, or solicitor. Finally, the four agencies told us that they fully consider the potential takings implications of their planned regulatory actions, but they provided us with limited documentary evidence to support this claim. Specifically, agency officials told us that takings implication assessments are not always documented in writing, and with the passage of time any assessments that were documented may no longer be on file with the agency.
- According to Justice data, property owners or other parties brought 44 regulatory takings cases against the four agencies that were concluded during fiscal years 2000 through 2002. Of these, the courts decided in favor of the plaintiff in 2 cases, resulting in awards of just compensation totaling about \$4.2 million. The Justice Department settled in 12 other cases, providing total payments of about \$32.3 million. The EO's requirements for assessing the takings implications of planned regulatory actions applied to only 3 of these 14 cases. For the other 11 cases, the associated regulatory action either predated the EO's issuance or the matter at hand was otherwise excluded from the EO's provisions. Based on the evidence made available to us, the relevant agency assessed the takings potential of its action in only one of the three cases subject to the EO's requirements. As of the end of fiscal year 2002, Justice reported that 54 additional regulatory takings cases involving the four agencies were pending resolution.

Background

The just compensation clause of the Fifth Amendment provides that the government may not take private property for public use without just compensation. Initially, this clause applied to the government's exercise of its power of eminent domain. In eminent domain cases, the government invokes its eminent domain power by filing a condemnation action in court against a property owner to establish that the taking is for a public use or purpose, such as the construction of a road or school, and to allow

the court to determine the amount of just compensation due the property owner. In such cases, the government takes title to the property, providing the owner just compensation based on the fair market value of the property at the time of the taking. Supreme Court decisions later established that regulatory takings are also subject to the just compensation clause. In contrast to the direct taking associated with eminent domain, regulatory 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, but rather effectively takes the property by denying or limiting the owner's planned use of the property, referred to as an inverse taking.⁴ An owner claiming that a government action has effected a taking and that compensation is owed must initiate suit against the government to obtain any compensation due.⁵ The court awards just compensation to the owner upon concluding that a taking has occurred.

In 1987, concerned with the number of pending regulatory takings lawsuits and with court decisions seen as increasing the exposure of the federal government to liability for such takings, the President's Task Force on Regulatory Relief began drafting an executive order to direct executive branch agencies to more carefully consider the takings implications of their proposed regulations or other actions. The President issued this EO on March 15, 1988.

According to the EO, actions subject to its provisions include regulations, proposed regulations, proposed legislation, comments on proposed legislation, or other policy statements that, if implemented or enacted, could cause a taking of private property. Such actions may include rules and regulations that propose or implement licensing, permitting, or other conditions, requirements or limitations on private property use. The EO also enumerates agency actions that are not subject to the order, including the exercise of the power of eminent domain and law enforcement actions involving seizure, for violations of law, of property for forfeiture, or as evidence in criminal proceedings.

⁴In general, an inverse taking has the effect of an affirmative exercise of the power of eminent domain. An inverse taking is also referred to as inverse condemnation.

⁵Takings of property effected by government actions may occur in a number of ways, including: (1) a government regulation restricting development, (2) a government requirement that a landowner provide the public access to private property (such as by providing access to a private beachfront), and (3) an agency's denial of a mineral drilling permit.

The EO also requires the U.S. Attorney General to issue general guidelines to help agencies evaluate the takings implications of their proposed actions, and, as necessary, update these guidelines to reflect fundamental changes in takings case law resulting from Supreme Court decisions.

The guidelines provide that agencies should assess takings implications of their proposed actions to determine their potential for a compensable taking and that decision makers should consider other viable alternatives, when available, to meet statutorily required objectives while minimizing the potential impact on the public treasury. In cases where alternatives are not available, the potential takings implications are to be noted, such as in a notice of proposed rulemaking. The guidelines also include an appendix that provides detailed information regarding some of the case law surrounding considerations of whether a taking has occurred and the extent of any potential just compensation claim. For example, the appendix discusses the Penn Central Transportation Co. v. City of New York⁶ case in which the Supreme Court set out a list of three “influential factors” for determining whether an alleged regulatory taking should be compensated: (1) the economic impact of the government action, (2) the extent to which the government action interfered with reasonable investment-backed expectations, and (3) the “character” of the government action. However, the appendix provides a caveat that it is not intended to be an exhaustive account of relevant case law, adding that the consideration of the potential takings of an action as well as the applicable case law will normally require close consultation between agency program personnel and agency counsel.

Justice Has Not Updated Its 1988 Guidelines, but Has Issued Supplemental Guidelines for Three of Four Agencies

Agency officials and other experts differ on the need to update the Attorney General’s guidelines to reflect changes in regulatory takings case law since 1988. Justice officials said that the guidelines had not been updated since 1988 because there had been no fundamental changes in regulatory takings case law, which is the EO’s criterion for an update. They said that the guidelines, as written, are still sufficient to determine the risk of a regulatory taking and that subsequent Supreme Court decisions have not substantially changed this analysis. For example, officials said the three-factor test outlined in the 1978 Penn Central case remains the most important guidance for analyzing the potential for a taking that is subject to just compensation. Justice officials also emphasized that the guidelines address only a general framework for

⁶438 U.S. 104 (1978).

agencies' evaluations of the takings implications of their proposed actions and thus are not intended to be an up-to-date, comprehensive primer on all possible considerations. The guidelines state that the individual agencies must still conduct their own evaluations, including necessary legal research, when assessing the takings potential of a proposed regulation or action.

The four agencies were divided on the need to update the guidelines. Corps and EPA officials supported Justice's position that the guidelines do not need to be updated. Corps staff indicated that, based on their review of relevant Supreme Court decisions since 1988, no fundamental change in the criteria for assessing potential takings had occurred and thus no update to the Attorney General's guidelines was necessary. Similarly, EPA staff said that some of the takings cases decided since 1988 gave the appearance that the Court was changing the three-pronged test set out in the Penn Central decision. However, these officials noted that more recent cases have returned to the Penn Central test, thereby removing the need for updating the Attorney General's guidelines. In contrast, officials at Interior and Agriculture said that it would be helpful if Justice updated the summary of key takings cases contained in an appendix to the guidelines to reflect significant developments in this case law over the past 15 years.

Other legal experts said that the Attorney General's guidelines should be updated, noting that regulatory takings case law had not remained static over the past 15 years. For example, legal experts concerned with the protection of private property rights said that there had been significant developments in regulatory takings case law since 1988. These experts said that the mere passage of time and the sheer number of regulatory takings cases concluded since 1988 argued for updating the guidelines. In another case, a law professor, who has written and lectured on the issue of regulatory takings, said that the level of specificity with which Justice prepared the original guidelines sets a precedent that calls for updating these guidelines to reflect the many important changes in regulatory takings case law since 1988.

The Attorney General has issued supplemental guidelines required by the EO for three of the four agencies—the Corps, EPA, and Interior.⁷ The EO

⁷Justice issued supplemental guidelines for the Corps on January 23, 1989; for Interior on March 29, 1989; and for EPA on January 14, 1993. According to Justice and agency officials, these guidelines have not been updated since their original issuance.

directed the Attorney General, in consultation with each executive branch agency, to issue supplemental guidelines for each agency as appropriate to the specific obligations of that agency. The Attorney General's guidelines state that the supplement should prescribe implementing procedures that will aid the agency in administering its specific programs under the analytical and procedural framework presented in the EO and the Attorney General's guidelines, including the preparation of takings implication assessments. In general, the three agencies' supplemental guidelines include specific categorical exclusions from the EO's provisions for certain agency actions.

The Attorney General has not issued supplemental guidelines for Agriculture because Justice and Agriculture could not agree on how to assess the potential takings implications of the latter agency's actions related to grazing and special use permits covering applicants' use of public lands.⁸ Agriculture argued that such permit actions should be exempt from the EO's requirements or, if not, that the agency should be allowed to do a generic takings implication assessment that would apply to multiple permits. Agriculture officials indicated that Justice officials did not agree with these suggestions, and the matter was never resolved. While lacking supplemental guidelines, Agriculture officials said that their implementation of the EO and the Attorney General's guidelines has not been encumbered. Justice officials agreed with this assessment.

Implementation of Key Provisions by the Four Agencies Has Changed Over the Life of the Executive Order

Although the EO's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of its key provisions has changed over time in response to subsequent OMB guidance. For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB guidance issued in 1994 advised agencies that such information was no longer required.⁹ According to OMB, this information is not needed because the number and amount of these awards are small and the awards were not paid from the agencies' appropriations but are paid from the Department of the Treasury's Judgment Fund. In addition, because the

⁸A grazing permit provides official written permission to a rancher to graze a specific number, kind, and class of livestock for a specified time period on defined federal rangeland. A special use permit is a written instrument that grants rights or privileges of occupancy and use, such as for recreational and commercial purposes, subject to specified terms and conditions.

⁹The agencies had difficulty documenting their submission of compilations reports for the period 1989 through 1993 because the passage of time made documents less accessible.

number and dollar amounts of just compensation awards and settlements paid by the federal government annually are relatively small, OMB officials said the overall budget implications for the government are small. Hence, in their view, information on just compensation awards in agency annual budget submissions was also unnecessary.

OMB and Justice officials said that the relative lack of regulatory takings cases and associated just compensation awards each year is an indication that the EO has succeeded in raising agencies' awareness of the need to carefully consider the potential takings implications of their actions.

Although OMB no longer requires agencies to comply with these EO provisions, the provisions remain in the EO. However, OMB and Justice officials noted that because executive orders are not the equivalent of statutory requirements, non-compliance with these provisions does not have the same implications. Instead, executive orders are policy tools for the executive branch and are subject to changing interpretation and emphasis with each new administration.

Other provisions of the EO have been implemented. For example, each of the four agencies has designated an official to be responsible for ensuring that the agency's actions comply with the EO's requirements. In general, the responsible official at each agency is the agency's senior legal official.¹⁰ EPA's and Interior's supplemental guidelines specifically identify the designated official by title. Agency officials could not provide us with any documentary evidence of this designation for Agriculture and the Corps, but agency officials assured us that their senior legal official fulfilled this role.

Officials at each of the four agencies said that they fully consider the potential takings implications of their planned regulatory actions, but again provided us with limited documentary evidence to support this claim. Agencies provided us a few written examples of takings implication assessments. Agency officials said that these assessments are not always documented in writing, and, with the passage of time, any assessments that were put in writing may no longer be on file. They also noted that these assessments are internal, predecisional documents that generally are not subject to the Freedom of Information Act or judicial review. As a

¹⁰At Agriculture and EPA, the designated official is the General Counsel. At the Corps, this official is the Chief Counsel. At Interior, the designated official is the Solicitor.

result, they said, the assessments are not typically retained in a central file for a rulemaking or other decision, and therefore difficult to locate. For example, the Corps internal guidance states that takings implication assessments should be removed from the related administrative file once the agency has concluded a decision on a permit. In addition, agency officials also noted that they do not maintain a master file of all takings implication assessments. In many cases, attorneys assigned to field offices conduct these assessments. In these cases, agency officials said that headquarters staff might not have copies. Nevertheless, with the exception of EPA, each agency provided us with some examples of written takings implication assessments.¹¹ These assessments varied in form and the level of detail included.

To determine if and how the four agencies documented their compliance with the EO when issuing regulatory actions, we reviewed information contained in Federal Register notices on takings implication assessments related to their proposed and final rulemakings, but had limited success. Specifically, 375 notices mentioned the EO in 1989, 1997, and 2002, but relatively few provided an indication as to whether a takings implication assessment was done. Most of these rules included only a simple statement that the EO was considered and, in general, that there were no significant takings implications. In contrast, 50 specified that an assessment of the rule's potential for takings implications was prepared, and of these, 10 noted that the rule had the potential for "significant" takings implications. Given the limited amount of information available from the agencies or available in the Federal Register notices that we reviewed, we could not fully assess the extent to which agencies considered the EO's requirements.

¹¹EPA officials indicated that they did not have any written examples of takings implication assessments prepared by the agency largely because the agency's actions are generally excluded from the EO's requirements.

Few Awards of Just Compensation Were Made Against the Four Agencies for Takings Cases Concluded during Fiscal Years 2000 through 2002

According to Justice data, 44 regulatory takings cases against the four agencies were concluded during fiscal years 2000 through 2002.¹² Fourteen of these 44 cases resulted in government payments. In 2 of these 14 cases, the U.S. Court of Federal Claims decided in favor of the plaintiff, resulting in awards of just compensation totaling about \$4.2 million. The Justice Department settled in 12 other cases providing total payments of about \$32.3 million.¹³ Of these combined 14 cases with awards or settlement payments, 10 related to actions of Interior, 3 to actions of the Corps, and 1 to an action of Agriculture.

In general, the settled cases were concluded with compromise agreements, including stipulated dismissals or settlement agreements, reached among the litigants and approved by the applicable court. In these cases, the document usually stated that the parties had agreed to end the case with a payment to the plaintiff, but no finding that a taking occurred. For example, in one case concluded in 2001 that alleged a taking of an oil and gas lease on federal land managed by Interior's Bureau of Land Management, the litigants negotiated a stipulated dismissal that provided that a payment of \$3 million be made to the plaintiffs to cover all claims. However, the stipulated dismissal also provided that the final outcome should not be construed as an admission of liability by the United States government for a regulatory taking. In addition, the dismissal required that the plaintiffs surrender their interests in a portion of the lease. In the two cases with award payments, the court concluded that a taking had occurred and thus it awarded just compensation.

Of the 14 cases with awards or settlement payments, the 10 Interior cases generally dealt with permits related to mining claims on federal lands managed by that agency or matters related to granting access on public lands. For example, one case involving mining claims resulted in the plaintiff receiving a settlement of almost \$4 million. In another case,

¹²The data provided by Justice referred to these 44 cases as regulatory takings cases. According to information provided by Interior, at least 9 of the 44 cases, including 4 with award or settlement payments, were alleged by the property owner to be "legislative" takings. In legislative takings cases, the potential taking results directly from an act of Congress. One of these nine cases (*Board of County Supervisors of Prince William County, Virginia v. United States*) involved the government's taking title to property by exercising its power of eminent domain.

¹³In addition to the financial remuneration made to the plaintiff, the award and settlement payment totals may include compensation for attorney fees, interest, and other litigation costs.

involving the denial of preferred access to a lake on land managed by the agency, the plaintiff received a settlement of \$100,000. The Corps' three cases generally related to a denial or issuance, with conditions, of wetlands permits for private property. One of these cases, concerning the filling of a wetland in Florida, resulted in a settlement payment of \$21 million, accounting for more than half of the total compensation awards and settlement payments related to the 14 cases. The Agriculture case concerned the title to mineral rights in a national forest managed by the agency. The plaintiff received an award of \$353,000 in this case. (Appendix I provides further information on just compensation awards or settlement payments, by agency, for cases concluded during fiscal years 2000 through 2002.)

In addition to the cases concluded during fiscal years 2000 through 2002, Justice reported that an additional 54 regulatory takings cases involving the four agencies were still pending resolution at the end of fiscal year 2002. Of the 54 pending cases, 30 involved Interior, 14 involved the Corps, 7 involved Agriculture, and 3 involved EPA.

The EO's requirements for assessing the takings implications of planned regulatory actions applied to only 3 of these 14 cases. For the other 11 cases, the associated regulatory action either predated the EO's issuance or the matter at hand was otherwise excluded from the EO's provisions.

Based on evidence made available to us, the relevant agency assessed the takings potential of its action in only one of the three cases subject to the EO's requirements. In that case, the Corps denied a wetlands permit sought by the plaintiff to fill wetlands on the plaintiff's property in order to develop a commercial medical center. The plaintiff brought suit against the agency alleging a compensable taking had occurred. In its takings implication assessment, the Corps had concluded that the permit denial did not constitute a taking because the applicant was still free to use the property for other purposes that did not involve filling the wetland. Therefore, the Corps concluded that the permit denial did not deprive the plaintiff of all viable economic use of the property. However, the case ended with a stipulated dismissal and a payment of \$880,000 to the plaintiff.¹⁴

¹⁴*James Koconis & Ted G. Koconis v. United States.*

In the two other cases, based on information Interior provided to us, it appears that the EO would apply. Interior stated that, in hindsight, it appears that the EO may have applied in the first case involving a denial of applications to drill for oil and gas on federal land. Although a formal takings implication assessment was not prepared in this case, Interior stated there was a “good faith” discussion of its takings implications within the department. The case concluded with settlement of \$380,000 to the plaintiff for attorney fees.¹⁵ In the second case, concerning anticipated and actual denial of oil and gas drilling permits for federal land, Interior was not certain whether the EO actually applied to the case in the first place, but believed that a takings assessment had been done and documented in a related environmental impact statement. However, Interior was unable to provide us a copy of this document. We believe that the EO applied and, lacking documentation, that no formal assessment was done. This case concluded with a settlement of \$3 million for the plaintiff.¹⁶

Mr. Chairman, this completes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have at this time.

GAO Contacts and Staff Acknowledgment

For further information about this testimony, please contact me at (202) 512-3841. Doreen Feldman, Jim Jones, Ken McDowell, Jonathan McMurray, and John Scott, made key contributions to this statement.

¹⁵*Devon Energy Corporation, et al. v. United States.*

¹⁶*W.A. Moncrief, Jr. et al. v. United States.*

Appendix I: Awards of Just Compensation or Settlement Payments for Concluded Regulatory Takings Cases, for Four Agencies, Fiscal years 2000 through 2002

(Dollars in thousands)

Agency	Number of Concluded Cases	Number of Cases with Payments	Just Compensation Awards	Settlements	Total
Agriculture	1	1	\$353	\$0	\$353
Corps	15	3	0	22,085	22,085
EPA	2	0	0	0	0
Interior	26	10	3,851	10,216	14,067
Total	44	14	4,204	\$32,301	\$36,505

Source: GAO.

Note: GAO analysis of data provided by the Department of Justice's Environment and Natural Resources Division

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