



October 24, 2005

The Honorable Richard Pombo
Chairman
House Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

The Honorable Nick Rahall
Ranking Minority Member
House Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

The Honorable James Inhofe
Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable James Jeffords
Ranking Minority Member
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Gentlemen:

On behalf of the more than 25,000 members of our professional appraisal organizations, we commend the sponsors of the House-passed Threatened and Endangered Species Recovery Act of 2005 (H.R. 3824). This legislation provides fresh and innovative ideas on updating and improving the Endangered Species Act.

One issue raised in the legislation is the concept of just compensation of landowners. Our organizations wish to provide feedback on how this provision can be improved to ensure that landowners are compensated fairly.

Specifically, Section 13 of H.R. 3824, entitled "Private Property Conservation," provides aid to landowners whose land values are reduced by the Act. Generally speaking, the public policy in this area of private property takings is well settled and does not recognize compensation for profits that might occur in a development yet to be built. For instance, a landowner of vacant land is not compensated for the speculative profit of a proposed development in a condemnation action taken by a government entity. Instead, the property owner is compensated for the market value of the land in its current state. This is done because the improvements do not exist on the property, and the entrepreneurial effort required to

bring the improvements into existence has not been expended. Also, the projected value from the project may never materialize or it may be unsuccessful.

The compensation provision in H.R. 3824 as it currently reads would seem to allow such "speculative profit" to be introduced, in that it allows for aid to be awarded based on the market value of the use that was proposed by the property owner. This would be tantamount to an unjustified financial windfall for some landowners at the expense of the tax-paying public.

We have provided suggested changes below that would incorporate generally accepted valuation principles, such as the concept of "highest and best use" into the compensation provision. We believe that recognition of these legally recognized valuation principles will align H.R. 3824 with the regulatory takings public policy, helping to ensure just compensation is awarded to private landowners and that taxpayer expenditures are well spent.

PRIVATE PROPERTY CONSERVATION (changes in underline)

SEC. 13. (a) In General- The Secretary may provide conservation grants (in this section referred to as 'grants') to promote the voluntary conservation of endangered species and threatened species by owners of private property and shall provide financial conservation aid (in this section referred to as 'aid') to alleviate the burden of conservation measures imposed upon private property owners by this Act. The Secretary may provide technical assistance when requested to enhance the conservation effects of grants or aid.

(b) Awarding of Grants and Aid- Grants to promote conservation of endangered species and threatened species on private property--

(1) may not be used to fund litigation, general education, general outreach, lobbying, or solicitation;

(2) may not be used to acquire leases or easements of more than 50 years duration or fee title to private property;

(3) must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species' numbers or distribution; and

(4) must be supported by any private property owners on whose property any grant funded activities are carried out.

(c) Priority- Priority shall be accorded among grant requests in the following order:

(1) Grants that promote conservation of endangered species or threatened species on private property while making economically beneficial and productive use of the private property on which the conservation activities are conducted.

(2) Grants that develop, promote, or use techniques to increase the distribution or population of an endangered species or threatened species on private property.

(3) Other grants that promote voluntary conservation of endangered species or threatened species on private property.

(d) Eligibility for Aid- (1) The Secretary shall award aid to private property owners who--

- `(A) received a written determination under section 10(k) finding that the proposed use of private property would not comply with section 9(a); or
- `(B) receive notice under section 10(k)(10) that a written determination has been withdrawn.

`(2) Aid shall be the difference between the market value of a property at its highest and best use without regard to the impact of this Act, and the market value of the same property at its highest and best use as affected by this Act¹, in an amount no less than the fair market value of the use that was proposed by the property owner if--

- ~~`(A) the owner has foregone the proposed use;~~
- ~~`(B) the owner has requested financial aid--~~
 - ~~`(i) within 180 days of the Secretary's issuance of a written determination that the proposed use would not comply with section 9(a); or~~
 - ~~`(ii) within 180 days after the property owner is notified of a withdrawal under section 10(k)(10); and~~
- ~~`(C) the foregone use would be lawful under State and local law and the property owner has demonstrated that the property owner has the means to undertake the proposed use.~~

`(e) Distribution of Grants and Aid- (1) The Secretary shall pay eligible aid--

- `(A) within 270 days after receipt of a request for aid unless there are unresolved questions regarding the fair market value; or
- `(B) at the resolution of any questions concerning the fair market value established under subsection (g).

`(2) All grants provided under this section shall be paid on the last day of the fiscal year. Aid shall be paid based on the date of the initial request.

`(f) Documentation of the Foregone Use- Within 30 days of the request for aid, the Secretary shall enter into negotiations with the property owner regarding the documentation of the foregone proposed use through such mechanisms that would benefit the species such as contract terms, lease terms, deed restrictions, easement terms, or transfer of title. If the Secretary and the property owner are unable to reach an agreement, then, within 60 days of the request for aid, the Secretary shall determine how the property owner's foregone use shall be documented to benefit the species with the least impact on the ownership interests of the property owner necessary to document the foregone use, which shall not include transfer of title.

`(g) Fair² Market Value- For purposes of this section, the market value of the highest and best use of the affected portion of the private property is as defined in the Uniform Appraisal

¹ "Highest and best use" is defined by *The Dictionary of Real Estate Appraisal*, 4th edition (2002: Appraisal Institute), as: "The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility and maximum productivity."

² The term "fair market value" has generally been replaced by the term "market value." There are a number of definitions of "market value" in the United States and in other countries. Although the wording differs, most definitions of market value are similar in concept.

Standards for Federal Land Acquisitions³. Market value shall be analyzed in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions and shall take into account the likelihood that the foregone use would be approved under State and local law. ~~the fair market value of the foregone use of the affected portion of the private property, including business losses, is what a willing buyer would pay to a willing seller in an open market. Fair market value shall take into account the likelihood that the foregone use would be approved under State and local law. The fair market value shall be determined within 180 days of the documentation of the foregone use. The fair market value shall be determined jointly by two professionally designated independent appraisers who, if required by applicable state law, shall also be generally certified. One appraiser shall be selected by the Secretary and one selected by the property owner. 2 licensed independent appraisers, one selected by the Secretary and one selected by the property owner.~~ If the two appraisers fail to agree on fair market value, the Secretary and the property owner shall jointly select a third professionally designated ~~licensed~~ appraiser whose appraisal within an additional 90 days shall be the best and final offer by the Secretary. Within one year after the date of enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall promulgate regulations regarding selection of the jointly selected appraisers under this subsection.

`(h) Limitation on Aid Availability- Any person receiving aid under this section may not receive additional aid under this section for essentially the same foregone use of the same property and for the same period of time.

`(i) Annual Reporting- The Secretary shall by January 15 of each year provide a report of all aid and grants awarded under this section to the Committee on Resources of the House of Representatives and the Environment and Public Works Committee of the Senate and make such report electronically available to the general public on the website required under section 14.'

We would be happy to speak with you about these recommendations. Our staff will follow up with you in the coming weeks to discuss these recommendations.

Sincerely,

Appraisal Institute
American Society of Appraisers
American Society of Farm Managers and Rural Appraisers

³ The Uniform Appraisal Standards for Federal Land Acquisitions defines market value as "the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal."