F I S C A L I M P A C T R E P O R T

SPONSOR Irwin **DATE TYPED** 3/4/05 **HB** 1090

SHORT TITLE Private Property Protection Act **SB**

ANALYST Wilson

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			$0.1Very Significant	Recurring	General Fund

Conflicts with HB 889

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Department of Transportation (DOT)
Energy, Minerals & Natural Resources Department (EMNRD)
Environment Department (ED)

SUMMARY

Synopsis of Bill

House Bill 1090 enacts the Private Property Protection Act (PPPA) which will provide a cause of action to real property owners against state executive branch agencies and state political subdivisions for any decrease in property market value as a result of any regulatory program. Regulatory programs include actions taken by a governmental entity, including land use and zoning actions, but do not include military base or government facility closures.

The bill provides that when property incurs a reduction in market value for the uses permitted at the time the owner acquired a title interest, the property is deemed to have been taken for the use of the public. The bill allows an action for inverse condemnation or compensation for the reduction in value.

The bill enacts statute of limitations provisions, which are the same as those brought for injuries to real property which is currently four years.

The bill requires binding arbitration upon written demand of the property owner.

The AGO notes the bill appears to require compensation for any actual deprivation of use of property, or for any reduction in market value of the property for the uses permitted at the time the owner acquired a title interest.

The ED provided the following:

The legislative branch of government creates regulatory programs in large part because some facet of the public health and welfare are not protected without it. These programs exist so that private interests do not unreasonably interfere with the general well-being of the citizenry. When the two interests – public and private – conflict, our laws almost always fall on the side of protecting the public welfare. This doctrine has protected our citizenry from unbridled avarice since statehood.

This bill subordinates the public good to the interests of private property by requiring government units of the state to remunerate property owners if implementation of a regulatory program diminishes the market value of the property. The remuneration is in the form of condemnation and just compensation, or compensation for the reduction in value. In the alternative, government units may rescind the action that caused the diminution of property value, but even then must reimburse the owner for its costs of the action and any economic losses the owner may have experienced during the time the action was in effect.

This bill allows owners to enforce the act by filing a complaint and demanding binding arbitration, the costs of which are shared by the parties. Such arbitration has been interpreted as unconstitutional, as the state subjecting itself to binding arbitration cedes executive authority vested in the constitution.

There are several exceptions to the compensation provisions in the bill. If federal or state agencies or laws mandate the program that caused the loss, and enforcement action under the Act brought by an owner will be dismissed as a matter of law. Many of ED's regulatory programs fall into this category. Another exception is provided if the regulatory program prohibits a use of the property that is potentially injurious to the public health and safety, provided potential injury can be proven. Of course no potential injury can be proven until it actually happens, so the public welfare will be damaged, perhaps irreparably, should agencies hesitate because of the potential liability created to the state to take steps to protect the public welfare. Also, the exception does not apply to injury to the environment, thus subordinating environmental protection to private property interests.

Finally, in the event the arbitration panel finds that a property's value was reduced as a result of a regulatory action, this bill allows property owners to choose whether or not any permit or authorization granted under a regulatory program prior to the subject action will remain in effect. This provision will essentially limit executive agencies by allowing the regulated community to choose whether or not they wish to be regulated.

The AGO indicated the following:

This bill enacts "takings" legislation. It has been introduced several times in past legislative sessions. Takings law is concerned with governmental actions, either by regulation or by physical

action, which are deemed to take private property. The fifth amendment of the United States constitution provides that "private property [shall not] be taken for public use, without just compensation." The fourteenth amendment of the United State constitution guarantees that no individual shall be deprived of property without due process of law. The legal notion that governmental restrictions of land use could go too far and be an unconstitutional regulatory taking originated in a supreme court decision authored by Justice Oliver Wendell Holmes that held that a land use regulation can be unconstitutional under the taking clause of the U.S. constitution.

Proponents of takings legislation argue that it will provide relief to small property owners who, they say, are increasingly restricted by wetlands ordinances, growth management laws, and other environmental statutes. Proponents also believe that eminent domain statutes and judicial remedies are insufficient to protect against the harm they believe is caused by government regulation impacting real property.

Opponents argue that the “takings” agenda undermines environmental legislation, land use laws, and rules and regulations designed to protect public health. Opponents also argue that existing remedies are adequate and that the taxpayers ultimately bear the burden of “takings” legislation.

Issues noted with respect to this bill include:

- The bill does not require exhaustion of administrative remedies before a property owner may bring an action for compensation, inverse condemnation, or arbitration.
- Subjecting state and local governments to mandatory binding arbitration may result in damage awards against those governments by arbitrators which exceed those allowed by the Tort Claims Act.
- The statute of limitations contained in this bill differs from those currently in effect which apply to the state and local governments. For example, NMSA Section 37-1-24 provides a three year limitation period against cities, towns, or villages for appropriation of real property. This bill will appear to extend that period to four years.
- The limitations periods in this bill are inconsistent. Section 5A provides that the limitations period begins to run “upon the final administrative decision implementing the regulatory program affecting the owner's private property.” However, Section 5B then describes when a regulatory program is considered to be implemented, and describes a “date of enactment”. Section 5B does not refer to the “final administrative decision” in Section 5A. The limitations period will therefore begin to run either upon the final administrative decision as specified in Section 5A, or upon the application or enactment of the program stated in Section 5B.

EMNRD offered the following:

Although the bill contains a broadly worded exception for a regulatory action that prohibits a use of private property that is injurious or potentially injurious to the public health and safety or is a public nuisance, there are several difficulties with the application of this exception.
The bill states that the exception does not apply if the prohibited use is an unproven potentially injurious use, but includes no standards for determining what is an unproven potentially injurious use. The bill does not state whether the exception applies to a rule that prohibits a use that is injurious to public health or safety only because of other uses in the vicinity.

Nothing in the bill indicates that any deference will be accorded to an agency's good faith deter-

mination that the exception applies. The determination of whether the prohibited use is injurious to public health or safety will be made after the fact by judges, jurors or arbitrators in the landowner's suit for compensation. Thus there exists a probably chilling affect upon regulators even when contemplating action they believe will come within the exception provided in the bill.

This bill will significantly impair the ability of the EMNRD, and particularly of the Oil Conservation Division (OCD), to perform its statutory mandates. OCD is directed by statute to regulate the oil and gas industry in order to prevent waste and protect correlative rights. It is also directed to protect fresh water and the environment. To accomplish these ends, OCD has adopted rules, limiting the number and density of oil and gas wells, limiting the gas oil ratio at which fields may be produced, requiring disposal of produced water in lined pits or deep injection wells, and requiring surface remediation of oil and gas well sites. Any change in any of OCD's existing rules in any of these or other areas might increase the cost of oil and gas operations, and therefore, to some extent, decrease the potential value of oil and gas properties. Accordingly any such change will entail a risk of state liability that OCD will have to weigh against the purposes it sought to accomplish.

Where the purpose of a new rule is to prevent waste of oil or gas, to protect surface property from deterioration or to protect water suitable for uses other than human consumption from further deterioration, the bill will rather clearly impose liability on the state to the extent that the value of any oil and gas property was reduced, since these concerns are not directly related to public health and safety. Even if the objective of a rule change were directly related to protection of public health or safety, as where the purpose was to protect water supplies used for human consumption, OCD will be limited in its ability to adopt prophylactic measures, since a court or arbitrator might determine that the potential for injury to public health was unproven.

The DOT indicated as follows:

When the DOT changes the access to a state road or designates a highway as being access controlled, the current law is that the State is not a guarantor of traffic to a business or residence. Court decisions uniformly hold that the right of direct access to the highway is subject to reasonable traffic regulations. As long as there is access to the highway system, although involving circuitry of travel, no damage results. As long as a property is left with reasonable access a landowner is not entitled to damages for changing access. Paying damages to businesses and residential landowners for changes to the road will greatly increase the costs of projects. This act will potentially change the pre-existing law and will require payment of damages for any change in traffic patterns or road access.

When the DOT constructs road projects it is fairly common that businesses may be temporarily adversely affected by the project. Currently, a business owner may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction was unduly long or the conduct of the condemner causing the loss was unreasonable, arbitrary or capricious. This bill will potentially change this situation resulting in the DOT facing countless lawsuits from impacted businesses.

In addition, the act requires the use of fully accredited commercial appraisers despite failing to define what constitutes a commercial appraiser. Currently, only real estate appraisers need be licensed or certified. In New Mexico there are no fully accredited commercial appraisers. In

addition, as the act is applicable to homeowners a commercial appraiser will not properly address the valuation of loss of fair market value in that situation. The bill does not define the accreditation process.

FISCAL IMPLICATIONS

ED states the fiscal implications this bill are staggering. For example, if ED were to revoke a permit for a landfill due to noncompliance that results in gross contamination, the property could no longer be used as a landfill. Under the bill, the state will be forced to pay the owner for the reduction in value, in essence, pay the owner for polluting his or her own land, or rescind the action that revoked the permit making the taxpayers clean up the contamination later. As the life of a landfill is on the order of decades, this single action will cost the state tens of millions of dollars.

As another example, if an owner sought to develop a property later found to have unfavorable geologic conditions such as a fault or unstable subsurface, the regulatory agency might deny the necessary permits to develop the property. The state will have to pay the developer the difference in property values before and after such conditions were disclosed.

ED believes this bill could potentially cost the state hundreds of millions of dollars each year

The AGO states the fiscal impact on state and local government finances will be significant. The bill will impose liability on the state for any change in state rules or in the application of state rules that adversely affected the value of private property unless one of the exceptions applied. EMNRD states no estimate of the magnitude of this liability is possible, but it will almost certainly be substantial. Furthermore the state will incur additional costs defend suits and arbitration proceedings brought under the act.

ADMINISTRATIVE IMPLICATIONS

The AGO states the State executive branch agencies and state political subdivisions will have to consider this act when implementing regulatory programs.

The bill will require administrators to change their approach to most regulatory problems, giving paramount importance to the effect of their actions on the value of private property.

CONFLICT

ED notes HB 1090 conflicts with HB 889 which provides for restrictions on use of contaminated property based on the level of environmental remediation. Under HB1090, an alarming but likely manifestation will be that an owner that has an environmental covenant placed on the property could seek monetary compensation from the ED, as the agency's acceptance of an instrument that prohibits the use of a property could diminish the market value of the property. Not only will the polluter benefit by avoiding the costs of cleaning up pollution, they will also be able to recover costs associated with the diminished property value. Meanwhile, the owner is able to redevelop the property and collect the concomitant revenues.

TECHNICAL ISSUES

The AGO notes section 3C of the bill provides in part compensations shall not be limited to the amount by which the decrease in market value exceeds twenty-five percent of value as calculated pursuant to subsection A of this section. However, there is no such calculation contained in subsection A of section 3C, or anywhere else in the bill.

OTHER SUBSTANTIVE ISSUES

HB1090 provides a disincentive to government in rulemaking, because the financial and administrative burden of dealing with complaints under the PPPA is unduly burdensome. HB1090 could discourage agencies from establishing regulatory programs that protect and benefit the citizens of New Mexico and by doing so discourage economic development in their communities.

NMED administers many federally mandated programs, such as the regional haze program, that are not directly related to protecting public health and safety, but rather more to increasing the quality of life and preserving aesthetic values in the state. The implementation of these programs could result in what some private property owners will consider to be a reduction in market value.

DW/yr