

GAO

Report to the Chairman, Subcommittee
on the Constitution, Committee on the
Judiciary, House of Representatives

September 2003

REGULATORY TAKINGS

Implementation of Executive Order on Government Actions Affecting Private Property Use



G A O

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Highlights of [GAO-03-1015](#), a report to Chairman, 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.

GAO was asked to provide information 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. 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.

We provided the agencies with a draft of this report for comment. They provided technical and editorial suggestions that we incorporated as appropriate.

www.gao.gov/cgi-bin/getrpt?GAO-03-1015.

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.

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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 fundamental changes have occurred and that the guidelines should be updated. Justice issued supplemental guidelines for three agencies, but not for Agriculture because of unresolved 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. For example, the agencies provided us with a few examples of takings implications assessments because, agency officials said, these assessments are 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 a takings implication assessment was done and few anticipated significant takings implications.

According to Justice, 44 regulatory takings lawsuits brought against the four agencies by property owners 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, as of the end of fiscal year 2002, 54 additional regulatory takings lawsuits involving the four agencies were pending resolution.

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Abbreviations

EO	Executive Order 12630
EPA	U.S. Environmental Protection Agency
GAO	General Accounting Office
OMB	Office of Management and Budget

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United States General Accounting Office
Washington, D.C. 20548

September 19, 2003

The Honorable Steve Chabot
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

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. In such cases, the property owner may be owed just compensation under the Fifth Amendment to the Constitution.

In 1988 the President issued Executive Order 12630 (EO),¹ “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 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 the Department of Justice (Justice), specifically the U.S. Attorney General, to issue general guidelines to provide agencies with a uniform framework for their implementation of the EO and to issue supplemental guidelines for each agency, as appropriate, that reflect that agency’s unique responsibilities. In addition, the EO

¹53 *Fed. Reg.* 8859 (Mar. 18, 1988).

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.

If a landowner believes that a government regulatory action has resulted in a taking of his or her private property, that landowner may file a lawsuit seeking just compensation under the Fifth Amendment. In general, these suits must be brought in the United States Court of Federal Claims.² Justice is generally responsible for litigating these cases on behalf of the government.³ 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, these awards and settlements are paid from the Department of the Treasury's Judgment Fund.⁴ Relative to the thousands of regulatory actions taken by federal agencies each year, the number of lawsuits seeking just compensation related to these actions is small.⁵

²Lawsuits seeking just compensation of \$10,000 or less may be brought in a U.S. District Court.

³The Department of Justice represents the U.S. government in litigation, unless otherwise authorized by law. 28 U.S.C. § 516.

⁴The Judgment Fund, administered by the Department of the Treasury, is a permanent, indefinite appropriation. The Fund is available for payment of final judgments, awards, or settlements related to litigation involving federal agencies, where payment is not otherwise provided for. 31 U.S.C. § 1304. Because agency appropriations generally are not available for payments of just compensation awards and settlements, these payments generally are made from the Judgment Fund.

⁵Regarding the small number of regulatory takings lawsuits filed relative to the many regulatory actions taken by agencies each year, the experience of the Corps of Engineers is illustrative. Specifically, this agency reported that it approved 99.98 percent of the 264,447 permit applications submitted to it by landowners during fiscal years 2000 through 2002. Of the 41 permits denied with prejudice (meaning the applicant could not resubmit) during these years, only a fraction resulted in regulatory takings lawsuits. In general, these permit applications were made under §10 of the Rivers and Harbors Act or §404 of the Clean Water Act. The applications generally related to landowners' plans to develop or alter a wetland or engage in other activities that may affect the waters of the United States.

You asked us to provide information on measures taken by Justice to implement certain provisions of the EO and the efforts of four agencies—the Department of Agriculture, the U.S. Army Corps of Engineers, the Environmental Protection Agency (EPA), and the Department of the Interior⁶—to comply with the EO’s requirements. Specifically, we examined 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, in these cases, whether the agencies assessed the potential takings implications of their actions before implementing them.

To report on the extent to which Justice has updated its guidelines and issued supplemental guidance for the four agencies, we obtained copies of these documents and interviewed knowledgeable agency officials. We also conducted legal research and sought the opinions and reviewed the publications of other relevant individuals, including representatives of private property rights and environmental groups and law school professors, as to whether changes in takings case law since 1988 warranted revisions to the guidelines. To determine the extent of the four agencies’ compliance with specific provisions of the EO, we interviewed knowledgeable agency officials and reviewed the documents they provided. We also interviewed OMB and Justice officials regarding the agencies’ compliance with specific provisions, as appropriate. In addition, we reviewed 375 *Federal Register* notices published in 1989, 1997, and 2002 relating to regulatory actions of the four agencies and referencing the EO. These years were selected judgmentally: 1989 represents the first full year under the EO, 1997 represents an intermediate year, and 2002 represents the most recent full year. In addition, these years provide 1 year’s experience under each of the past three presidential administrations. We undertook this analysis to determine if and how the agencies documented their compliance with the EO. Finally, regarding awards of just compensation made against the agencies and, in these cases, whether the agencies had assessed the takings potential of their actions, we obtained from Justice a list of all regulatory takings cases related to the four agencies that were concluded during fiscal years 2000 through 2002. We initially sought this type of data for the full 15-year period since the EO’s issuance, but Justice officials indicated that the full set of data was not

⁶We refer to these agencies as the “four agencies” in subsequent references.

readily available. We then discussed these cases with relevant officials at the four agencies and analyzed documents they provided. We also discussed these cases with the Clerk of the U.S. Court of Federal Claims and officials responsible for administering the Department of the Treasury's Judgment Fund and reviewed documents they provided.

Results in Brief

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 and two of the four agencies generally expressed the view that changes in takings case law related to U.S. Supreme Court decisions since 1988 have not been significant enough to warrant a revision of the guidelines. Justice officials also noted that the guidelines are intended to provide a general framework for agencies to follow in implementing the EO, and thus do not require frequent revision. However, Interior and Agriculture officials said that it would be helpful to their staff 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, some representatives of property rights groups and law school professors stated that the guidelines should be updated. In general, they noted that the body of relevant case law has evolved significantly over the past 15 years. For example, one law professor, noting the detailed manner in which Justice discussed takings cases in the original guidelines, said that case law covering the past 15 years should be thoroughly discussed in the guidelines as well. Regarding the supplemental guidelines for individual agencies, although Justice issued final guidelines for three of the four agencies, it has not issued guidelines for the Department of Agriculture. According to Justice and Agriculture officials, Agriculture's guidelines were never completed because the two agencies disagreed on issues such as how to assess the takings implications of agency actions related to grazing and special use permits. However, both Justice and Agriculture officials told us that Agriculture's compliance with the EO has not been encumbered by the lack of supplemental guidelines.

Although the executive order's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of its key provisions has changed over time because of subsequent guidance provided by 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 is no longer required. According to OMB,

this information is not needed because the number and amount of these awards is small, and the awards are paid from the Department of the Treasury's Judgment Fund, rather than from the agencies' appropriations. Regarding the EO requirement for a designated official, the four agencies have each designated an official—typically the chief counsel, general counsel, or solicitor—to be responsible for ensuring the agency's compliance with the EO. Finally, although the four agencies told us that they fully consider the potential takings implications of their planned regulatory actions, 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, because of the passage of time, those assessments that were documented may no longer be on file with the agency. Similarly, our independent review of 375 *Federal Register* notices published in 1989, 1997, and 2002 relating to regulatory actions of the four agencies and referencing the EO revealed that 50 of the notices specified that a takings implication assessment was done, and of these, 10 indicated that the agency anticipated significant takings. Given the limited nature of the available information, we could not fully assess the extent to which the EO's requirements for assessing potential takings were fully considered by the agencies.

According to Justice data, 44 regulatory takings cases brought against the four agencies 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. Of the 14 cases resulting in award or settlement payments, 10 related to actions of Interior, 3 related to actions of the Corps of Engineers, and 1 related to an action of Agriculture. The EO's requirements for assessing the takings implications of planned regulatory actions applied to only 3 of the 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 available evidence, we found that 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 states “nor shall private property be taken 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 have the amount of just compensation due the property owner determined by the court.⁷ 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 taking. In later years, Supreme Court decisions established that regulatory takings are subject to the just compensation clause as well. 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. Instead, the government effectively takes the property by denying or limiting the owner’s planned use of the property, referred to as an inverse taking.⁸ 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.⁹ 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. According to a former Assistant Attorney General, this order was needed to protect public funds by

⁷The use of “condemnation” in this case does not mean the property is unfit for use. Instead, it refers to the government’s action to declare the property convertible to public use through the exercise of its power of eminent domain.

⁸In 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.

⁹Takings of property effected by government actions may occur in a number of ways. Examples of such actions include: (1) a government regulation restricting development, (2) a government requirement that a landowner provide the public access to private property (such as by providing public access to a private beachfront), and (3) an agency’s denial of a mineral drilling permit.

minimizing government intrusion upon private property rights and to budget for the payment of just compensation when such intrusions were inevitable. The President issued this order, EO 12630, 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.

Among other things, the EO requires the U.S. Attorney General to issue guidelines to help agencies evaluate the takings implications of their proposed actions, and, as necessary, to update these guidelines to reflect fundamental changes in takings case law resulting from U.S. Supreme Court decisions. The Attorney General issued these guidelines on June 30, 1988, to establish a basic, uniform framework for federal agencies to use in their internal evaluations of the takings implications of administrative, regulatory, and legislative policies and actions.¹⁰ In addition, the guidelines discuss agency responsibilities for implementing the EO and the process for preparing agency-specific supplemental guidelines.

The Attorney General's guidelines provide that agencies should assess the 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 state that takings implication assessments are internal, predecisional management aids and that they are not subject to judicial review. In addition, the form and manner of these assessments are left up to each agency.

¹⁰Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, June 30, 1988.

The guidelines also include an appendix that provides detailed information regarding some of the case law surrounding consideration 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 York*¹¹ 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.

In addition to requiring guidelines, the EO requires OMB to ensure that the policies of executive branch agencies are consistent with the EO’s principles, criteria, and requirements. For example, for proposed regulatory actions subject to OMB review, agencies are required to include a discussion summarizing the potential takings implications of these actions in their submissions to OMB. The EO also requires OMB to ensure that all takings awards levied against the agencies are properly accounted for in agencies’ budget submissions.

Despite the existence of the EO, some Members of Congress hold the view that the enforcement of the just compensation clause with respect to regulatory takings is inadequate and that statutory measures are needed to reduce the infringement on private property rights resulting from government regulation and to ensure compensation in the event of such infringement. For example, a variety of legislation has been proposed in Congress over the past 10 years to achieve those goals. In general, according to a study prepared by the Congressional Budget Office, these bills included measures that would (1) increase the requirements for analysis and reporting that federal agencies must meet before making decisions that could restrict the uses of private property, (2) relax the procedural requirements that must be satisfied before a federal court will hear the merits of a takings claim, and (3) require that the budget of an

¹¹438 U.S. 104 (1978).

agency whose action triggers a regulatory compensation claim be the source of any compensation awarded.¹² Although property rights advocates have supported these legislative initiatives, others, including some environmental groups, have questioned the need for legislation and voiced the view that the consideration of the takings potential of an agency action should not impede the government's ability to protect the environment or provide other societal benefits.

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

Justice has not updated the general guidelines that it issued pursuant to the EO in June 1988 for evaluating the risk of and avoiding regulatory takings, but it has issued supplemental guidelines for three of the four agencies. Officials at Justice and two of the four agencies said that changes in takings case law related to Supreme Court decisions made since 1988 have not been significant enough to warrant a revision of the general guidelines. Justice officials also noted that because the guidelines provide a general framework for agencies to follow in implementing the EO, they do not require frequent revision. However, Interior and Agriculture officials said that it would be helpful to their staffs if Justice updated a summary of the key aspects of relevant case law contained in an appendix to the guidelines to reflect significant developments in the past 15 years. Similarly, some law professors and representatives of property rights groups noted that the body of relevant case law has evolved significantly over the past 15 years, requiring an update to the guidelines. Regarding supplemental guidelines, Justice has issued these guidelines for three of the four agencies, but has not done so for Agriculture. According to Justice and Agriculture officials, Agriculture's supplemental guidelines went through several drafts in the early 1990s, but were never completed because the two agencies disagreed on issues such as how to assess the takings implications of changes in

¹²*Regulatory Takings And Proposals for Change*, Congressional Budget Office, December 1998.

grazing and special use permits.¹³ However, Justice and Agriculture officials told us that Agriculture's compliance with the EO has not been encumbered by the agency's lack of supplemental guidelines.

Agency Officials and Other Experts Differ on the Need to Update the Guidelines to Reflect Changes in Takings Case Law

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 the guidelines have not been updated since 1988 because there have been no fundamental changes in regulatory takings case law, the EO's criterion for an update. They said that the guidelines, as written, still cover the main issues in determining the risk of a regulatory taking and that subsequent Supreme Court decisions have not substantially changed this analysis. For example, these 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 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.

Two of the four agencies supported Justice's position that the guidelines do not need to be updated. Officials at the other two agencies expressed the view that an appendix to the guidelines that summarizes key regulatory takings case law should be updated. Regarding agencies that supported Justice's position, Corps of Engineers staff indicated that based on their review of relevant Supreme Court decisions since 1988, there has been no fundamental change in the criteria for assessing potential takings and thus no update to the Attorney General's guidelines is necessary. Similarly, EPA staff said that some of the takings cases decided since 1988 gave the

¹³A grazing permit provides official written permission to a farmer or rancher to graze a specific number, kind, and class of livestock for a specified time period on defined federal rangeland, such as rangelands managed by Agriculture's Forest Service. A special use permit is a written instrument that grants rights or privileges of occupancy and use subject to specified terms and conditions on National Forest land. These permits are granted for a variety of recreational and commercial purposes. Recreational purposes include hunting, fishing, rafting, lodging services, the use of lots for vacation houses, and a variety of special group events. Commercial purposes include ski area concessions, the use of mountaintops for radio and TV broadcasting, rights-of-way for pipelines and power lines, and industrial activities, such as timber processing or mineral exploration.

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 case law over the past 15 years.

Other legal experts also said that the Attorney General's guidelines should be updated, noting that regulatory takings case law has not remained static over the past 15 years. For example, a Congressional Research Service attorney who has written extensively on the issue of regulatory takings said that the guidelines should be updated to reflect more recent Supreme Court decisions. This attorney noted that while the EO does not define a "fundamental" change regarding the need for an update, a number of important cases have been decided since the guidelines were issued. For example, the attorney pointed to the *Lucas v. South Carolina Coastal Council*¹⁴ decision of 1992 concerning a state ban on the development of beachfront property. This attorney noted that this case laid out a categorical exception to the *Penn Central* test for regulations that deny a property owner all economically viable use of the owner's lands. The attorney stated that *Lucas* made new law in clarifying when, notwithstanding a denial of all economically viable use, there is no taking.

Similarly, other legal experts concerned with the protection of private property rights said that there have been significant developments in regulatory takings case law since 1988. These experts also cited *Lucas* and other cases and said that these cases further develop and/or limit the application of the three-pronged test outlined in the *Penn Central* case. These experts said that the mere passage of time and the sheer number of regulatory takings cases concluded since 1988 argue for updating the guidelines.

In addition, one of these experts, 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. This expert explained that there have been many important changes in regulatory takings case law since 1988 and that the guidelines should be

¹⁴505 U.S. 1003 (1992).

updated to reflect these changes given the detailed manner in which the original guidelines were prepared.

At the same time, another legal expert, an attorney from an environmental research group, indicated that the guidelines might not require updating. In general, this attorney said that regulatory takings cases concluded since 1988 reaffirm the three-pronged test in the *Penn Central* case. According to this attorney, the *Lucas* case was initially thought to be more significant, but more recently it has been read and interpreted more narrowly by the courts and therefore does not constitute a fundamental change in the law.¹⁵

Appendix II provides a summary of Supreme Court regulatory takings cases decided since 1988 that were cited as being important by officials we contacted or in the relevant literature and that may be appropriate for inclusion in the guidelines.

Justice Has Issued Supplemental Guidelines for Three of the Four Agencies

The Attorney General has issued supplemental guidelines required by the EO for three of the four agencies—the Corps of Engineers, EPA, and Interior.¹⁶ Although several attempts were made to draft supplemental guidelines for Agriculture in the early 1990s, the Attorney General did not finalize and issue these guidelines because of unresolved issues.¹⁷ However, Justice and Agriculture officials indicated that the latter agency's lack of supplemental guidelines has not hindered its compliance with the EO.

The EO 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

¹⁵See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

¹⁶Justice issued supplemental guidelines for the Corps of Engineers 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.

¹⁷An Agriculture official indicated that negotiations with Justice on a draft of their guidelines were never concluded after the change in administrations in 1993.

presented in the EO and the Attorney General's guidelines, including the preparation of takings implication assessments.

In general, for certain agency actions, the three agencies' supplemental guidelines include specific categorical exclusions from the EO's provisions. For example, Interior's guidelines exclude its nonlegislative actions to which the affected property owners have consented; regulations or permits authorizing the taking, possession, transportation, or use of migratory birds or wildlife; biological opinions issued pursuant to the Endangered Species Act under certain conditions; listings of certain species under the Endangered Species Act; and denial of permits to import species into or export species from the United States. Similarly, the Corps of Engineers' guidelines exclude its denials "without prejudice" (i.e., the applicant can apply again) of Clean Water Act section 404 permits, because these denials are not considered substantive decisions. In addition, EPA's guidelines exclude its actions related to the transportation, storage, disposal, registration, distribution, and use of pesticides; protection of public water systems and underground sources of drinking water; control of emissions of air pollutants; disposal of hazardous, solid, and medical waste; and control of actual or threatened releases of hazardous substances or pollutants or contaminants.

The Attorney General has not issued supplemental guidelines for Agriculture because Justice and Agriculture could not reach agreement 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.¹⁸ In this regard, Agriculture officials said that because the agency issues, modifies, or denies literally thousands of grazing and special use permits every year, the agency was concerned about the resource implications of having to do a takings implication assessment in each case. In addition, in Agriculture's view, the granting of a permit for the use of public lands does not convey "property rights" to the permit recipient, and thus agency actions to condition or deny such a permit do not constitute a potential taking. Accordingly, Agriculture argued that these permit actions should be excluded from the EO's requirements or, if not, that the agency be allowed to do a generic takings implication assessment that would apply to multiple permits. Agriculture officials indicated that Justice officials did

¹⁸Justice and Agriculture officials also indicated that other issues may have been unresolved, but because of the passage of time (nearly 10 years) and the purging of older files, they could not identify other possible reasons why Agriculture's guidelines were not completed.

not agree with these suggestions, and the matter was never resolved. According to Agriculture officials, this lack of resolution resulted, in part, because of ongoing litigation against Agriculture alleging a taking related to the agency's denial of a grazing permit¹⁹ and changing priorities related to the arrival of a new administration in 1993. Despite Agriculture's lack of supplemental guidelines, agency 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 because of subsequent guidance provided by 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 is no longer required. According to OMB, this information is not needed because the number and amount of these awards is small and the awards are paid from the Department of the Treasury's Judgment Fund, rather than from the agencies' appropriations. Each of the four agencies has designated an official—typically the chief counsel, general counsel, or solicitor—to be responsible for ensuring the agency's compliance with the EO. Finally, the four agencies told us that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim.

¹⁹See *Hage v. United States*, 51 Fed. Cl. 570 (2002). In *Hage*, ranch owners brought suit against the United States, alleging that the suspension and cancellation of their permits to graze livestock on federal land constituted a taking of their property interests, including grazing rights and water usage rights, without just compensation. The court held that the plaintiffs did not have property rights in the grazing permits, stating that grazing permits are licenses, rather than rights. However, the court also stated that, if by revoking the grazing permits, Interior's Bureau of Land Management and Agriculture's Forest Service prevented the plaintiffs from accessing and using their water rights, the agencies may have taken these rights. The court has not yet resolved the issue of whether the water rights were taken by the government.

Agencies No Longer Prepare and Report Annual Compilations of Just Compensation Awards or Include Information on These Awards in Their Annual Budget Submissions

The EO requires each executive branch agency to submit annually to OMB and Justice an itemized compilation report of all just compensation awards entered against the United States for regulatory takings related to the agencies' activities. The EO also requires that agencies include information on these awards in their annual budget submissions. However, at present, the agencies are not complying with these provisions because of guidance provided by OMB.

Regarding annual compilations of just compensation awards, OMB first provided guidance on the form and content of compilations in its Circular A-11, issued in June 1988.²⁰ However, in a subsequent version of this circular issued in July 1994, OMB advised agencies that the submission of this information is no longer necessary.²¹ According to OMB officials, this information is not needed because just compensation awards or settlements related to regulatory takings cases do not affect agency budgets but are paid from the Department of the Treasury's Judgment Fund. Furthermore, OMB and Justice officials said that because the number of just compensation awards and settlements paid by the federal government annually and the total dollar amount of these payments are relatively small, the overall budget implications for the government are small. Hence, these officials said the annual reporting of just compensation awards was unnecessary. OMB officials offered similar reasons for not requiring agencies to include information on just compensation awards in their annual budget documents.

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 the provisions of executive orders are not the

²⁰*Circular No. A-11: Preparation and Submission of Budget Estimates*, issued by the Director, Office of Management and Budget, June 17, 1988. This circular, updated annually, provides executive branch agencies with guidance on the preparation of their budgets and related justifications.

²¹In general, the agencies had difficulty in documenting their submission of compilations reports for the period 1989 through 1993 because of the passage of time. For example, Agriculture was able to provide its report for fiscal year 1990 only, and Interior was able to provide reports for fiscal years 1989, 1990, and 1992. EPA and the Corps of Engineers were not able to provide copies of any of their reports. EPA officials recalled submitting the reports for the first few years after the EO was implemented. Corps officials could not determine if reports had been done for years in which just compensation awards were made. In addition, OMB and Justice, the recipients of these reports, indicated that they had not retained copies.

equivalent of statutory requirements, not complying 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. Furthermore, these 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, even if subsequent OMB guidance has excused the agencies from some of the EO's provisions.

The Four Agencies Have Designated Officials to Ensure the Agencies' Implementation of the EO

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.²² EPA's and Interior's supplemental guidelines specifically identify the designated official by title. Concerning Agriculture and the Corps of Engineers, we did not find written evidence of this designation, although agency officials assured us that their senior legal official fulfilled this role. Justice officials indicated that the designated official at each of the four agencies is effectively performing the compliance assurance and liaison functions required by the EO. However, as a practical matter, staff attorneys, in consultation with relevant program officials, determine the potential takings implications of an agency's planned actions.

Agencies Report That They Fully Consider the Takings Implications of Their Planned Actions but Provided Little Evidence to Support This Claim

The four agencies said that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim. Officials at each of the four agencies indicated that the requirements of the EO and the provisions of the Attorney General's guidelines primarily guide their consideration of the takings potential of agency actions. Officials at the Corps of Engineers, EPA, and Interior also cited the Attorney General's supplemental guidelines for each agency as being important, particularly for identifying agency-specific exclusions to the EO's provisions. For example, EPA officials indicated that their agency performs relatively few takings implication assessments because most of its actions are excluded from the provisions of the EO, as enumerated in its guidelines. These

²²At Agriculture and EPA, the designated official is the General Counsel. At the Corps of Engineers, this official is the Chief Counsel. At Interior, the designated official is the Solicitor.

officials explained that EPA's program responsibilities generally do not include land management, and in past lawsuits alleging regulatory takings that involved EPA, another federal agency usually took the action giving rise to the takings claim, and EPA typically served as an advisor or consultant to that agency.

Officials at three of the agencies—Agriculture, the Corps of Engineers, and Interior—also said that their agency has provided relevant internal guidance. For example, an Agriculture internal regulation on rulemaking requires implementation of the EO, including the preparation of takings implication assessments, as appropriate.²³ Similarly, the Corps' Chief Counsel issued internal guidance in a memo that addresses legal analyses and takings implication assessments related to wetland and other permit decisions. For Interior, the agency's departmental manual requires that it assess the potential takings implications of planned rulemakings before they are published in the *Federal Register*.²⁴

Agencies provided us a few written examples of takings implication assessments. Agency officials said that these assessments are not always documented in writing, and, because of the passage of time, those 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; thus they are not typically retained in a central file for a rulemaking or other decision, and therefore they are difficult to locate. For example, the Corps of Engineer's internal guidance memo states that takings implication assessments should be removed from the related administrative file once the agency has concluded a decision on a permit.

²³*Regulatory Decisionmaking Requirements*, Departmental Regulation 1512-1, U.S. Department of Agriculture, Mar. 14, 1997.

²⁴*Departmental Manual, Part 318, Federal Register Documents*, U.S. Department of the Interior, May 14, 1998.

In addition, agency officials also noted that they do not maintain a master file of all takings implication assessments. For example, in many cases, attorneys assigned to field offices conduct these assessments. In these cases, agency officials said that headquarters staff may not have copies. Nevertheless, with the exception of EPA, each agency provided us with some examples of written takings implication assessments.²⁵ These assessments varied in form and the level of detail included.²⁶

We also had difficulty independently verifying the four agencies' preparation of takings implication assessments from the information contained in *Federal Register* notices related to their proposed and final rulemakings. 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.²⁷ Table 1 summarizes this information. In addition, appendix III provides more detailed information on these rules.

²⁵EPA 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. Interior officials indicated that they probably could have provided more examples of written takings implication assessments, but finding them would have required a significant investment of their resources and time. For example, they said they would have had to search files in a number of headquarters and field offices. In addition, Corps officials emphasized that they prepare very few takings implication assessments because these assessments are only needed in cases where the agency plans to deny a permit application, and, in general, the Corps denies very few of these applications.

²⁶Although takings implication assessments are typically considered internal documents, Interior has chosen to publish some of its written assessments in the *Federal Register* or make others publicly available. For example, its takings implication assessments of regulatory actions related to use of valid existing rights to conduct surface coal mining can be found in a proposed rule at 62 *Fed. Reg.* 4836 (Jan. 31, 1997) and a final rule at 64 *Fed. Reg.* 70765 (Dec. 17, 1999). In addition, instructions for obtaining the takings implication assessments related to designation of critical habitat can be found in proposed rules at 67 *Fed. Reg.* 39206 (June 6, 2002) and 67 *Fed. Reg.* 55064 (Aug. 27, 2002).

²⁷According to the Attorney General's guidelines, a significant takings implication exists when the decision maker concludes that the proposed action poses a "substantial risk" that a taking of private property may result or insufficient information is available to assess whether the action has significant takings consequences. In publishing a rule, the agency is to state the conclusions of its takings assessment if any significant implications are anticipated.

Table 1: Number of Proposed and Final Rules Addressing the EO for Four Agencies, Calendar Years 1989, 1997, and 2002

	Agriculture	Corps	EPA	Interior	Total
Rules that reference the EO	8	3	92	272	375
Number of these rules that specify that a takings implication assessment was prepared	1	0	0	49	50
Number of the assessments that found significant takings implications	0	0	0	10	10

Source: GAO.

Note: GAO's analysis of relevant *Federal Register* notices.

Given the limited amount of information available from the agencies or available from the *Federal Register* notices we reviewed, we could not fully assess the extent to which the EO's requirements were fully considered by the agencies.

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 brought against the four agencies were concluded during fiscal years 2000 through 2002.²⁸ Of these cases, 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. Of these 14 cases with awards or settlements payments, 10 related to actions of Interior, 3 to actions of the Corps of Engineers, and 1 to an action of Agriculture. However, 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 available evidence, we found that the relevant agency assessed the takings potential of its action in only 1 of the 3 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.

Fourteen Takings Cases Concluded during Fiscal Years 2000 through 2002 Ended with Awards of Just Compensation or Settlement Payments

Fourteen of 44 regulatory takings cases involving the four agencies and concluded during fiscal years 2000 through 2002 resulted in government payments, according to Justice data. The U.S. Court of Federal Claims awarded payment of just compensation in 2 cases for a sum totaling about \$4.2 million. Justice settled the remaining 12 cases, for a sum totaling about \$32.3 million.²⁹ In general, the cases settled 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 agreement usually provides that the parties have 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

²⁸The data provided by Justice referred to these 44 cases as regulatory takings cases. According to information provided by Interior, at least 9 of the 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 9 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.

²⁹In 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.

of Land Management, the litigants negotiated a stipulated dismissal that provided that a payment of \$3 million be made to the plaintiffs. This payment was to cover all claims made by the plaintiffs in the case. 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 2 cases with award payments, the court concluded that a taking had occurred and thus it awarded just compensation.

Of these 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, involving the denial of preferred access to a lake on land managed by the agency, the plaintiff received a settlement of \$100,000. The three Corps' cases generally related to its 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 single 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. Table 2 provides a breakout by agency on the number of cases and the amount of the award or settlement involved. In addition, appendix IV provides detailed descriptions of the particulars for each case.

Table 2: Awards of Just Compensation or Settlement Payments for Concluded Regulatory Takings Cases for the 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's analysis of data provided by the Department of Justice's Environment and Natural Resources Division.

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 2002.³⁰

Only Three of the Takings Cases Concluded with Awards of Just Compensation or Settlement Payments Were Subject to the EO

Based on information provided by the four agencies, only 3 of the 14 cases with payments were subject to the EO's requirement to conduct a regulatory takings implication assessment. For the other 11 cases, the agency action involved either predated the EO's issuance or was otherwise excluded from the EO's requirements.

³⁰Of the 54 pending cases, 30 involved Interior, 14 involved the Corps of Engineers, 7 involved Agriculture, and 3 involved EPA.

Of the three cases subject to the EO's requirements, we found evidence that a regulatory takings implication assessment had been done in only one instance.³¹ In that case, the Corps of Engineers 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 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.

Agency Comments and Our Evaluation

We provided a draft of this report to Agriculture, the Corps of Engineers, EPA, Interior, Justice, and OMB for review and comment. With the exception of OMB, the agencies provided us with technical corrections and editorial comments that we have incorporated as appropriate. OMB indicated that it did not have any comments on the draft. In addition, two of the agencies, Agriculture and EPA, provided an overall reaction to the report. Agriculture indicated that the report provides a thorough and reasonable review of the issues regarding the EO's implementation and that the agency does not disagree with the information presented. Similarly, EPA indicated that it generally agreed with the information provided in the report.

³¹Two of these three cases related to Interior's actions. In providing us written information on one of these cases, Interior initially indicated that the EO did not apply to the case (*Devon Energy Corporation, et al. v. United States*) because the agency did not "reasonably anticipate" that its action would result in takings. As a result, Interior did not perform a takings implication assessment. In commenting on a draft of this report, Interior stated that, in hindsight, it appears that the EO may have applied to this action. While 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. Accordingly, we have included this case among those subject to the EO's requirements. In the other case (*W.A. Moncrief, Jr. et al. v. United States*), although Interior initially said that the EO's requirements applied, it was unable to provide evidence that a takings implication assessment was done. However, Interior officials noted that the record of decision for the related environmental impact statement discussed the legislative requirements for negotiating takings compensation for the complete or partial cancellation of a federal mineral lease with the leaseholder. In addition, in commenting on a draft of this report, Interior stated that since Interior's current management did not make the decision on whether the action was subject to the EO, the agency was unable to unequivocally state that the EO applied.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. We will send copies of this report to the Attorney General; the Secretary of Agriculture; the Secretary of the Army; the Administrator, Environmental Protection Agency; the Secretary of the Interior; the Director, Office of Management and Budget; and interested congressional committees. We will make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions concerning this report, I can be reached at 202-512-3841 or mittala@gao.gov. Major contributors to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in black ink that reads "Anu K. Mittal". The signature is written in a cursive, flowing style.

Anu K. Mittal
Acting Director, Natural Resources
and Environment

Objectives, Scope, and Methodology

The Chairman of the House Subcommittee on the Constitution, Committee on the Judiciary, asked us to provide information on measures taken by the Department of Justice to implement certain provisions of Executive Order 12630 (EO) regarding regulatory takings of private property and the efforts of four agencies—the Department of Agriculture, U.S. Army Corps of Engineers, Environmental Protection Agency, and the Department of the Interior¹—to comply with the requirements of the EO. Specifically, the Chairman asked us to examine the extent to which (1) Justice has updated its guidelines to implement the EO 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 against the four agencies by the courts for regulatory takings in recent years and, in these cases, whether the agencies assessed the potential takings implications of their actions before implementing them.

To report on the extent to which Justice has updated its guidelines and issued supplemental guidance for the four agencies, we obtained copies of these documents and interviewed knowledgeable agency officials. At Justice, these officials included attorneys in the agency's Environment and Natural Resources Division. At the four agencies, these officials included attorneys in each agency's legal office (i.e., Office of the Chief Counsel, General Counsel, or Solicitor). We also discussed these matters with officials of the Office and Management and Budget's Office of Information and Regulatory Affairs. In addition, we conducted legal research and sought the opinions and reviewed the publications of other relevant individuals at the Congressional Research Service; private property rights groups, including the Defenders of Property Rights; environmental groups, including the Georgetown Environmental Law and Policy Institute; and law schools, as to whether changes in takings case law since 1988 warrant revisions to the guidelines. In the course of this work, we identified and summarized key regulatory takings cases heard before the Supreme Court that have been concluded since 1988. Our work may not have identified all such cases. Furthermore, we do not take a position as to whether these cases, individually or collectively, constitute a fundamental change in the body of regulatory takings case law that would trigger the need to update Justice's guidelines.

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

To determine the extent of the four agencies' compliance with specific provisions of the EO, we interviewed knowledgeable officials in the legal offices of these agencies and reviewed the documents they provided. These documents included written takings implication assessments of the takings potential of proposed regulatory actions. At each agency we requested examples of these assessments, although we did not ask the agencies to conduct an exhaustive search of their records for these assessments because the agencies generally expressed concerns about the time and resources such a search could require. In addition, the agencies indicated that assessments are not always written or, if written, are not always retained in official files. During the course of our work, we also asked for copies of written assessments associated with specific regulatory takings cases that were concluded with either a settlement or just compensation payment. In addition, we obtained copies of some additional takings implication assessments from *Federal Register* notices.

Furthermore, regarding the agencies' compliance with specific provisions of the EO, we interviewed Justice and OMB Officials, as appropriate. We also reviewed OMB's Circular A-11, *Preparation and Submission of Budget Estimates*, and discussed with OMB officials how the guidance in that circular has changed over time and affected the four agencies' compliance with the EO. In addition, we reviewed 375 *Federal Register* notices of proposed and final regulatory actions published in 1989, 1997, and 2002 relating to the four agencies and referencing the EO to determine if and how the agencies documented their compliance with the EO. These years were selected judgmentally: 1989 represents the first full year under the EO, 1997 represents an intermediate year, and 2002 represents the most recent full year. These years also provide 1 year's experience under each of the past three presidential administrations.

Finally, regarding awards of just compensation made against the agencies and, in these cases, whether the agencies had assessed the takings potential of their actions, we obtained from Justice a list of all takings cases related to the four agencies that were concluded during fiscal years 2000 through 2002. We initially sought this type of data for the full 15-year period since the EO's issuance, but Justice officials indicated that the full set of data was not readily available and would be very labor intensive to provide. We then discussed these cases with relevant officials at the four agencies and analyzed documents they provided. In particular, we focused on cases in which just compensation awards or settlement payments were made, and, for these cases, whether the agencies had assessed the potential takings implications of their actions before implementing them. We also

discussed the cases with the Clerk of the U.S. Court of Federal Claims and officials responsible for administering the Department of the Treasury's Judgment Fund and reviewed documents they provided, in part, to verify the information on the cases with just compensation awards or settlement payments.

We conducted our work between October 2002 and September 2003 in accordance with generally accepted government auditing standards.

Summary of Significant Supreme Court Regulatory Takings Cases

This appendix summarizes regulatory takings cases decided by the U.S. Supreme Court since 1988, the year the EO was issued and the Attorney General promulgated guidelines related to the EO. These cases were cited as being important to the body of relevant case law by legal experts in our interviews with them or in various written products they prepared, including books, law review articles, reports, papers, speeches, or testimonies. The cases discussed are not intended to be an exhaustive list of all such cases. In addition, the appendix discusses certain cases that were decided prior to 1988 because they are referenced in some of the more recent cases discussed below or are cited elsewhere in this report.

Cases Decided After 1988

***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)**

Issue: Were two moratoria imposed by the Lake Tahoe Regional Planning Agency compensable takings?

Background: The Tahoe Regional Planning Agency issued two ordinances prohibiting all development on vacant lots within residential subdivisions in the Lake Tahoe Basin for a period of 32 months. A group of about 400 individual owners brought suit contending that the ordinances constituted compensable takings. (Subsequent to the landowners bringing suit in 1984, development moratoria continued to prohibit use of many of the parcels; however, the Supreme Court was only asked to address the 32-month moratoria.)

Decision: The Supreme Court held that the temporary moratorium on development was not a *per se* or categorical taking. Instead, the question of whether the Takings Clause of the Fifth Amendment requires compensation when the government enacts a temporary regulation denying a property owner any economic use of his property is to be decided by applying the factors of *Penn Central* rather than any categorical rule. The Court also stated that *First English Evangelical Lutheran Church v. County of Los Angeles* (discussed below) concerned the question of whether compensation is an appropriate remedy for a temporary taking, not whether or when such a taking has occurred.

***Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)**

Issue: Did state denials rejecting developer's proposals to fill in or build on all or most of a lot, principally consisting of wetlands, cause a taking?

Background: A landowner made several applications to the state for a permit to fill 11 acres of wetlands, build 74 houses, or construct a private beach club. The state denied these applications, but informed him that he would be allowed to build at least one house on the property. The landowner estimated that the limitations imposed by the state equated to a 94 percent diminution in value of the property and brought suit, arguing for an extension of the *Lucas v. South Carolina Coastal Council (Lucas)* test (discussed below) to his situation.

Decision: The Supreme Court rejected extending *Lucas* to a situation where there had been less than a complete denial of the economically viable use of the property. The Court noted that the ability to build a house on the property was of significant worth. The Court remanded the case back to state court for evaluation under the *Penn Central* test. The Court also ruled that the acquisition of title after the effective date of the regulation that was the basis for the regulatory takings claim did not bar the claim.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)

Issues: Was it proper to submit the determination of a city's liability for a regulatory taking to a jury and did the rough-proportionality standard of *Dolan v. City of Tigard (Dolan)* (discussed below) apply to challenges based on denial of development?

Background: Del Monte Dunes and its predecessor landowner sought to develop an oceanfront parcel of land within the jurisdiction of the city of Monterey. The city, in a series of repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers. The property owner brought a civil rights suit against the city alleging, among other things, that the rejections had effected a regulatory taking. The case was tried before a jury, which ruled in favor of Del Monte Dunes.

Decision: The Supreme Court ruled that the issues of whether the city's repeated rejections of the property owner's development proposals deprived the owner of all economically viable use of the owner's property and whether the city's decision to reject Del Monte Dunes' development plan was reasonably related to a legitimate public purpose were factual questions for a jury to resolve. The Court also stated that the "rough proportionality" standard of *Dolan* did not apply. *Dolan* dealt with

situations in which land-use decisions condition approval of development on the dedication of property to public use. The Court held that *Dolan* did not apply to the present case in which the landowner's challenge was based on denial of development.

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)

Issue: Was a landowner's regulatory taking claim ripe for adjudication?

Background: A landowner claimed that the Tahoe Regional Planning Agency committed a regulatory taking when it determined that the landowner's undeveloped residential lot near Lake Tahoe was ineligible for development. However, the planning agency had indicated that the landowner was entitled to receive certain "Transferable Development Rights" that she could sell to other landowners with the agency's approval. The landowner did not seek those rights but instead brought an action for just compensation for the agency's alleged taking of her property. In response, the planning agency claimed that the landowner's takings claim was not ripe because she failed to apply to transfer her development rights, and thus, the amount of her takings claim could not be determined.

Decision: The Supreme Court ruled that the planning agency had made a final decision in determining that the landowner's property was ineligible for development, and thus, her claim was ripe for adjudication. The Court reasoned that the valuation of the landowner's transfer rights is simply an issue of fact about possible market prices and went to the issue of how much just compensation was owed, not whether there had been a taking. The Court discussed *Agins v. City of Tiburon* (discussed below), in which it held that because the owners who were challenging ordinances restricting the number of houses they could build on their property had not submitted a plan for development of their property, there was no concrete controversy regarding the application of the specific zoning provisions.

Dolan v. City of Tigard, 512 U.S. 374 (1994)

Issue: The Court stated that it granted *certiorari* to resolve a question left open by its decision in *Nollan v. California Coastal Commission* (discussed below): What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development?

Background: A landowner applied to the city of Tigard for a permit to redevelop her plumbing and electrical supply store site. As a condition of granting the landowner's permit application, the city required the landowner to dedicate a portion of her property as a public greenway to minimize flooding and to dedicate an additional portion of her land as a pedestrian/bicycle pathway to reduce traffic congestion, in accordance with the city's land use plan. The landowner challenged the dedication requirements on the grounds that they were not related to the proposed development and, therefore, constituted an uncompensated taking of her property under the Fifth Amendment.

Decision: The Supreme Court found that preventing flooding and reducing traffic congestion were legitimate public purposes and that there was a nexus between the conditions imposed by the city and these purposes. The Supreme Court then applied a "rough proportionality" test, stating that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the conditions in question were proportional to the stated purposes. The Court ruled that the city's dedication requirements constituted an uncompensated taking of the landowner's property because the city had failed to show either the need for a public, as opposed to a private, greenway or that the additional number of vehicle and bicycle trips generated by the proposed development was reasonably related to the city's requirement for a dedicated pedestrian/bicycle path.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

Issue: Is a government regulation of land that completely eliminates its economic use a compensable taking?

Background: A landowner bought two residential lots on a South Carolina barrier island, intending to build single-family homes. Subsequently, the state enacted a statute that barred him from erecting permanent habitable structures on the land. The landowner filed suit in state court, claiming that the law caused a taking of his property without just compensation. The South Carolina trial court found that the statute rendered the landowner's parcel valueless, and awarded compensation. The South Carolina Supreme Court reversed the award of compensation, holding that, under previous U.S. Supreme Court cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation was due the landowner, regardless of the regulation's effect on the property's value.

Decision: The Court reversed the South Carolina Supreme Court’s decision, ruling that the state court erred in applying the “harmful or noxious” uses principle to decide this case. The Court stated that regulations that deny the property owner all “economically viable uses of his land” constitutes a *per se*, or categorical, regulatory taking that requires compensation, without inquiring into the public interest advanced in support of the restraint. However, the Court also noted that no taking has occurred if the state law simply makes explicit the limitations on land ownership already existing as a result of the background principles of a state’s law of property and nuisance. The Supreme Court remanded the case for the South Carolina court to determine whether these principles would have prohibited the landowner from building on his property.

Cases Decided Before 1988

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

Issue: Was there a nexus between the condition on the requested permit and a legitimate state government purpose of protecting the public view of a beach?

Background: The California Coastal Commission demanded a lateral public easement across the Nollans’ beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. The public easement was designed to connect two public beaches that were separated by the Nollan property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the “blockage of the view of the ocean” caused by construction of the larger house.

Decision: The Court found that there had been a taking, as it found no “essential nexus” between the government’s purpose and its condition on construction that required the property owners to grant an easement allowing the public access to their beachfront. The Court ruled that while the Coastal Commission could have required that the Nollans provide a viewing spot on their property for passersby, there was no nexus between visual access to the ocean and a permit condition requiring lateral public access along the Nollans’ beachfront lot.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)

Issue: Did an interim ordinance prohibiting construction of any structures in a flood zone cause a temporary taking of property requiring compensation?

Background: A church purchased a 21-acre parcel of land located in a canyon along the banks of a river that is a natural drainage channel for a watershed area. The church operated a campground on the site. Flooding destroyed the campground and its buildings. In response to the flooding of the canyon, the County of Los Angeles adopted an interim ordinance that prohibited construction in an interim flood protection area, including the site on which the campground had stood. The church filed suit, seeking just compensation for loss of the use of the campground.

Decision: The Court ruled that even if a regulation that has been found to result in a taking is repealed or invalidated the government must pay just compensation for the interim period that the regulation was in effect.

Agin v. City of Tiburon, 447 U.S. 255 (1980)

Issue: Did a zoning ordinance limiting the number of houses that landowners could build on their property cause a taking?

Background: The landowners acquired 5 acres of unimproved land for residential development in Tiburon, California. Subsequently, the city adopted two ordinances that modified existing zoning requirements. The density restrictions under the ordinances permitted the landowners to build between one and five single-family residences on their 5-acre tract. The landowners did not seek approval to develop their land, and instead brought suit for just compensation. The complaint alleged that their land had greater value than other suburban property in California due to the scenic views, and that the ordinances destroyed the value of their property.

Decision: The Court held that the zoning ordinance on its face did not cause a taking. The court stated that the ordinance was rationally related to the legitimate public goal of open-space preservation, the ordinance benefits property owners as well as the public, and the landowners may still be able to build up to five houses on a lot. The Court also found that because the landowners had not submitted a plan for development of their

property, there was no concrete controversy regarding the application of the specific zoning provisions.

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)

Issue: Did the city’s use of a historic preservation ordinance to block construction of an office tower atop a designated historic landmark cause a taking?

Background: The Landmark Preservation Commission denied Penn Central permission to build a multistory office building above Grand Central Station in New York City. Penn Central alleged the regulation took its property.

Decision: The Court ruled that there had been no taking of property. In evaluating the case, the Court set forth a three-pronged test for determining whether a government regulation has resulted in a taking: (1) the character of the governmental actions; (2) the economic impact of the action on the property owner; and (3) the extent to which the regulation has interfered with the distinct, investment-backed expectations of the owner.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

Issue: Did a state law barring coal mining that might cause subsidence of overlying land result in a taking of private property in a case where the mineral estate owner is different from the surface estate owner?

Background: A coal company conveyed the surface ownership of its property and retained the right to remove coal from the subsurface. Subsequently, a state law was enacted, forbidding the mining of coal in such a way as to cause the subsidence of housing in situations where the surface and subsurface ownership belong to different parties. As a result, the coal company was unable to exercise its right to remove the coal.

Decision: The Court held that a taking occurred. The Court stated “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” The Court reasoned that the extent of the taking under the state law—abolishing the right to mine coal, which it deemed “a very valuable estate”—was great. Moreover, because the state law applied only where surface and subsurface land is in different

Appendix II
Summary of Significant Supreme Court
Regulatory Takings Cases

ownership, it benefits a narrow private interest rather than a broad public one.

Proposed and Final Rules That Address the EO, for the Four Agencies, Calendar Years 1989, 1997, and 2002

Table 3: Proposed and Final Rules That Address the EO, for the Four Agencies, Calendar Years 1989, 1997, and 2002

Agency	Year	Rules that reference the EO	Number of these rules that specify a takings implication assessment was prepared	Number of the assessments that found significant takings potential
Agriculture	1989	1	0	0
	1997	5	1	0
	2002	2	0	0
Subtotal		8	1	0
Corps	1989	1	0	0
	1997	2	0	0
	2002	0	0	0
Subtotal		3	0	0
EPA	1989	0	0	0
	1997	0	0	0
	2002	92	0	0
Subtotal		92	0	0
Interior	1989	15	0	0
	1997	62	2	1
	2002	195	47	9
Subtotal		272	49	10
Total	1989	17	0	0
	1997	69	3	1
	2002	289	47	9
	Total	375	50	10

Source: GAO.

Notes: GAO's analysis of related *Federal Register* notices.

Regarding EPA rules mentioning the EO in 2002, EPA officials attributed the significant increase seen that year to the widespread use of a template that was developed for use in applicable notices of proposed and final rulemakings. This template states that EPA had complied with the EO and the Attorney General's supplemental guidelines. Interior officials were unable to explain the significant increase in the number of Interior rules mentioning the EO in 2002.

Regulatory Takings Cases Concluded during Fiscal Years 2000 through 2002 Related to Actions of the Four Agencies

Table 4: Regulatory Takings Cases Concluded with Payments, for the Four Agencies, Fiscal Years 2000 through 2002

Fiscal year and case names	Court name and case number	Agency	Payment type and amounts	Agency action related to the alleged taking	Was the action subject to the Executive Order 12630?	Was a takings implication assessment done by agency?
2000						
<i>James Koconis & Ted G. Koconis v. United States</i>	Court of Federal Claims 94-517L	Corps of Engineers	Settlement \$880,000	Decision on a wetlands permit under § 404 of the Clean Water Act	Yes	Yes
<i>Speerex Ltd., et al. v. United States</i>	Court of Federal Claims 97-351L	Interior	Settlement \$110,000	Anticipated rejection of drilling permits on oil and gas leases	No—plaintiff made claim before agency action	No
<i>W.C. Bell and Davis O. Heniford v. United States</i>	Court of Federal Claims 97-857L	Corps of Engineers	Settlement \$205,000	Decision on a wetlands permit under § 404 of the Clean Water Act	No—excluded under supplemental guidelines	No
<i>Lake Pleasant Group v. United States</i>	Court of Federal Claims 92-848L Court of Appeals, Federal Circuit 95-5061	Interior	Settlement \$100,000	Denial of plaintiff's preferred access to lake	No—predated EO	No
2001						
<i>Del-Rio Drilling Programs, Inc., et al. v. United States</i>	Court of Federal Claims 569-86L (37 Fed. Cl. 157) <i>rev'd</i> , Court of Appeals, Federal Circuit 97-5055 (146 F.3d 1358)	Interior	Settlement \$300,000 Litigation Costs \$591	Bureau of Indian Affairs' failure to grant surface use for oil and gas leases on Indian lands due to the tribe's lack of consent	No—predated EO	No
<i>Arnold E. Howard, et al. v. United States</i>	U.S. District Court, District of Alaska F98-0006CV (JKS)	Interior	Settlement \$838,000	(1) Legislative taking of mining claims under § 120 of Pub. L. No. 105-83 or alternatively (2) taking under implementation of Mining in the Parks Act	Either (1) No, legislative taking not covered by EO or (2) No, plaintiff made claim before final agency action	No
<i>Devon Energy Corporation, et al. v. United States</i>	Court of Federal Claims 98-665L	Interior	Attorney fees \$380,000	Denial of applications to permit drilling	Yes ^a	No
<i>Florida Rock Industries, Inc. v. United States</i>	Court of Federal Claims 266-82L	Corps of Engineers	Settlement \$21,000,000	Decision on a wetlands permit under § 404 of the Clean Water Act	No—predated EO	No

**Appendix IV
Regulatory Takings Cases Concluded during
Fiscal Years 2000 through 2002 Related to
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(Continued From Previous Page)

Fiscal year and case names	Court name and case number	Agency	Payment type and amounts	Agency action related to the alleged taking	Was the action subject to the Executive Order 12630?	Was a takings implication assessment done by agency?
<i>Shirl Petro v. United States</i>	Court of Federal Claims 96-651L (47 Fed. Cl. 136)	Agriculture	Court Order of Just Compensation \$74,479 Attorney fees \$250,294 Litigation costs \$28,217	Temporary denial of access to minerals from national forest due to dispute over title to mineral rights	No—legal action not within the scope of the EO	No
<i>W.A. Moncrief, Jr. et al. v. United States</i>	Court of Federal Claims 97-565L	Interior	Settlement \$3,000,000	Anticipated and actual denial of drilling permits to protect Lechuguilla Cave	Yes	No
2002						
<i>Kantishna Mining Company, et al. v. Bruce Babbitt, et al.</i>	U.S. District Court, District of Alaska 98-00007CV (JKS) Court of Appeals, Ninth Circuit, 01-35201, 01-35248	Interior	Settlement \$872,000 Interest \$528,000	(1) Legislative taking of mining claims under § 120 of Pub. L. No. 105-83 or alternatively (2) taking under implementation of Mining in the Parks Act	Either (1) No, legislative taking not covered by EO or (2) No, plaintiff made claim before final agency action	No
<i>John W. Taylor v. United States</i>	Court of Federal Claims 99-131L	Interior	Settlement \$175,000	Delay in issuing an incidental take permit under § 10 of the Endangered Species Act	No—excluded under supplemental guidelines ^b	No
<i>Board of County Supervisors of Prince William County, Virginia v. United States</i>	Court of Federal Claims 90-364L (47 Fed. Cl. 714) <i>aff'd</i> , Court of Appeals, Federal Circuit (276 F.3d 1359)	Interior	Court Order of Just Compensation \$1,153,578 Interest \$2,697,534	Legislative taking of land under Pub. L. No. 100-647 to add land to the Manassas National Battlefield Park	No—excluded for eminent domain	No
<i>Richard P. Cook, et al. v. United States</i>	Court of Federal Claims 94-344L	Interior	Settlement \$3,911,838	Legislative taking of rights to a patent for mining claims with the establishment of the Jemez National Recreation Area by 16 U.S.C. § 460jjj	No—legislative taking not covered by EO	No
Total	14 Cases		\$36,504,531			

Source: GAO.

Note: GAO analysis of data provided by the Department of Justice's Environment and Natural Resources Division, counsel or solicitor staff at the four agencies and from court documents.

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^aWhile Interior initially reported the EO did not apply to this case, further examination revealed that the action neither predated nor was excluded from the EO. Interior commented that while a formal takings implication assessment was not prepared in this case, there was a “good faith” discussion of its takings implications within the department.

^bWhile the supplemental guidelines for Interior provide an exclusion for the issuance of the permit, the EO provides that the duration of the process shall be “kept to the minimum necessary.” GAO makes no judgment on whether there was undue delay in this case.

Table 5: Regulatory Takings Cases Concluded Without Payments, for the Four Agencies, Fiscal Years 2000 through 2002

Fiscal year and case names	Court name and case number	Agency	Agency action related to the alleged taking
2000			
<i>Northwest Explorations Joint Venture v. Bruce Babbitt</i>	U.S. District Court, District of Alaska 99-0643CV	Interior	Taking of mining claims under Mining in the Parks Act
<i>Boise Cascade Corporation v. United States</i>	Court of Federal Claims 98-634L	Interior	District Court injunction against logging spotted owl habitat without an Endangered Species Act permit
<i>Ned Majors v. Dial Companies, Inc.</i>	Court of Federal Claims 98-0873	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>David Clark, et al. v. United States</i>	U.S. District Court, District of Alaska F-99-0045CV	Interior	(1) Legislative taking of mining claims under § 120 of Pub. L. No. 105-83 or alternatively (2) taking under implementation of Mining in the Parks Act
<i>Shickrey Anton v. United States</i>	Court of Federal Claims 93-447	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>Lloyd A. Good Jr. v. United States</i>	Court of Federal Claims 94-442L (39 Fed. Cl. 81) <i>aff'd</i> , Court of Appeals, Federal Circuit 97-5138 (189 F.3d 1355) <i>cert. denied</i> , U.S. Supreme Court 99-881 (529 U.S. 1053)	Corps of Engineers	Decision on permits under § 10 of the Rivers and Harbors Act and § 404 of the Clean Water Act
<i>Broadwater Farms Joint Venture v. United States</i>	Court of Federal Claims 94-1041L (45 Fed. Cl. 154)	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>Lakewood Associates v. United States</i>	Court of Federal Claims 97-303L (45 Fed. Cl. 320)	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>R & Y Inc. and Josef Ressel v. United States</i>	Court of Federal Claims 97-484L	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>Forest Properties, Inc. v. United States</i>	Court of Federal Claims 92-851L	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>William J. Smereka, et al. v. Lt. Colonel Thomas C. Haid</i>	U.S. District Court, Eastern District of Michigan 97-070151	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>S&S Development, et al. v. Army Corps of Engineers</i>	U.S. District Court, District of Alaska 98-006	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act

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Fiscal year and case names	Court name and case number	Agency	Agency action related to the alleged taking
2001			
<i>Kenneth Battley v. United States</i>	U.S. District Court, District of Alaska A-99-636CV	Interior	(1) Legislative taking of mining claims under § 120 of Pub. L. No. 105-83 or alternatively (2) taking under implementation of Mining in the Parks Act
<i>James C. Pendleton, et al. v. United States</i>	Court of Federal Claims 98-161L (1 Fed. Cl. 480)	Interior	Action by the Office of Surface Mining, pursuant to the Surface Mining Control and Reclamation Act of 1977
<i>James S. Sette v. United States</i>	Court of Federal Claims 98-157C	Interior	Unspecified agency action caused taking of seven unpatented mining claims
<i>Ultimate Sportsbar, Inc. v. United States</i>	Court of Federal Claims 98-0160L	EPA	EPA's action to clean up hazardous materials under Comprehensive Environmental Response, Compensation and Liability Act and Toxic Substances Control Act caused the plaintiff to lose its lease
<i>Barry Bradshaw, et al. v. United States</i>	Court of Federal Claims 98-0708	Interior	Cancellation and/or termination of Bureau of Land Management and Forest Service grazing permits
<i>M. Alfieri Co., Inc. v. United States</i>	Court of Federal Claims 99-0759	EPA	State of New Jersey's denial of a permit under § 404 of the Clean Water Act pursuant to the delegation of regulatory authority by EPA to the state
<i>Michael F. Beirne, et al. v. United States</i>	Court of Federal Claims 00-353	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>Joseph M. Foley, et al. v. United States</i>	Court of Federal Claims 00-553C	Interior	Bureau of Land Management invalidated six unpatented mining claims
<i>Eldridge C. Daniel v. United States</i>	Court of Federal Claims 97-0397	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act
<i>Karuk Tribe of California v. United States^a</i>	Court of Federal Claims 90-3993 (41 Fed. Cl. 468) <i>aff'd</i> , Court of Appeals, Federal Circuit (209 F.3d 1366) <i>cert. denied</i> , U.S. Supreme Court (532 U.S. 941)	Interior	Legislation caused taking of reservation lands
<i>Gregory T. Banner, et al. v. United States</i>	Court of Federal Claims 96-708L <i>aff'd</i> , Court of Appeals, Federal Circuit 00-5006 (238 F.3d 1348)	Interior	Legislation, the Seneca Nation Land Claims Settlement Act, 25 U.S.C. § 1774, prevented renewal of their lease and caused a taking
2002			
<i>Larry D. Compton v. Bruce Babbitt</i>	U.S. District Court, District of Alaska A-99-637CV	Interior	(1) Legislative taking of mining claims under § 120 of Pub. L. No. 105-83 or alternatively (2) taking under implementation of Mining in the Parks Act
<i>Northwest Exploration, Inc. v. United States</i>	U.S. District Court, District of Alaska A-99-654CV	Interior	Taking of mining claims by Mining in the Parks Act
<i>Pax Christi Memorial Gardens, et al. v. United States</i>	Court of Federal Claims 00-717	Corps of Engineers	Decision on a wetlands permit under § 404 of the Clean Water Act

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Fiscal year and case names	Court name and case number	Agency	Agency action related to the alleged taking
<i>Last Chance Mining Co., Inc. v. United States</i>	Court of Federal Claims 94-402L	Interior	Application of federal mining laws allegedly caused taking of 300 unpatented mining claims
<i>Kingman Reef Atoll Investments L.L.C., et al. v. United States</i>	Court of Federal Claims 02-140L	Interior	The designation of Kingman Reef as a national wildlife refuge after transfer from the U.S. Navy
<i>Rith Energy, Inc. v. United States</i>	Court of Federal Claims 92-480L (44 Fed. Cl. 108) <i>aff'd</i> , Court of Appeals, Federal Circuit (247 F.3d 1355) <i>cert. denied</i> , U.S. Supreme Court (536 U.S. 958)	Interior	Suspension of mining permit and denial of a permit revision under the Surface Mining Control and Reclamation Act of 1977
<i>Eastern Minerals International Inc., et al. v. United States</i>	Court of Federal Claims 94-1098 <i>rev'd</i> , Court of Appeals, Federal Circuit (271 F.3d 1090) <i>cert. denied</i> , U.S. Supreme Court (535 U.S. 1077)	Interior	Delay in processing a coal mining permit application under the Surface Mining Control and Reclamation Act of 1977

Source: GAO.

Note: GAO's presentation of data provided by the Department of Justice's Environment and Natural Resources Division, by counsel or solicitor staff at the agencies, and from court documents.

^aIn this case, litigation costs of \$10,169 were awarded to the United States.

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