

Sample Request for Completion of a
Takings Implications Assessment

Date

Federal Agency
Address

Re: Formal Request for Completion of a Taking Implications Assessment
Under Presidential Executive Order 12630

Dear _____:

The purpose of this letter is to formally request that the _____ (name of federal agency) complete a takings implications assessment to assess the economic effect or potential effect that the _____ (name or type of federal decision) will have on the private property, private property rights and investment backed expectations of _____ (name of project or person whose rights are effected).

I. Background

On March 22, 1988, President Reagan signed into law Presidential Executive Order 12630 (E.O. 12630). That Executive Order, which has not been altered or reversed, required all federal agencies to analyze the effects or potential effects of their actions, decisions or regulations on the economic value or use of private property through the completion of a takings implications assessment (TIA). Note that although the Executive Order does not stop federal agencies from taking or diminishing the value or use of private property for a public benefit, E.O. 12630 does require that agency decision makers consider the takings implications of their actions on private property, private property rights and investment backed expectations prior to that potential taking through the completion of a TIA. Then, if it remains in the public's interest to "take" private property for a public benefit, the private property owners must be justly compensated for their losses under the Fifth Amendment to the U.S. Constitution.

As stated by Executive Order 12630:

The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on Constitutionally protected private property rights, have also reaffirmed that governmental actions that do not formally

invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

E.O. 12630. (Emphasis added). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2387 (1987) (Reaffirming the Constitutional right granting compensation to a private property owner for a governmental regulation that deprived that owner of the reasonable economic use of his property, even though the deprivation or taking was only temporary), and *Nolan v. California Coastal Commission*, 107 S.Ct. 3141 (1987) (Requiring that governmental land use decisions or regulations be narrowly focused on the public benefit as compared to the necessity of the taking of private property).

In order to assist the federal agencies in the implementation of the President's Executive Order, the U.S. Attorney General has promulgated "Guidelines for Evaluation of Risk and Avoidance of Unanticipated Takings," issued June 30, 1988 (Attorney General Guidelines). Additionally, the Department of the Interior also issued guidelines implementing the Executive Order entitled "Attorney General's Supplemental Guidelines to Evaluate Risk and Avoid Unanticipated Takings for the U.S. Department of the Interior," issued March 29, 1989 (Interior Department Guidelines).

The purposes of these guidelines are two fold. First, they define the administrative, regulatory and legislative policies and actions that are subject to evaluation through a TIA. Second, these guidelines provide a basic, uniform framework for federal agencies to use in their internal evaluations of the takings implications of agency actions. In other words, these duly promulgated agency regulations mandate the steps that federal agencies must follow in the completion of their TIAs.

II. Necessity of Completion of a Takings Implications Assessment

Under E.O. 12630 and implementing guidelines, the _____ (name of federal agency) must complete a TIA which will analyze the effects that _____ (describe the federal agency decision) will have on _____ (describe the private property; private property right or investment backed expectations that are effected). Under authority of the Executive Order and implementing guidelines, a TIA must be completed if the following conditions are met:

1. That the federal agency's decision is included is included within the President's Executive Order.

Under the Attorney General Guidelines, any proposed actions, decision, program or regulation that does not fall within one of the exceptions named in the Guidelines, must be accompanied by a TIA. These exceptions include, in general, (1) programs that reduce federal restrictions on the use of private property, (2) trust property and treaty negotiations, (3) seizures of property connected with federal civil or

military law enforcement, (4) preliminary plans and studies which neither physically occupy nor invade private property, nor purpose to regulate private property, (5) consultation programs with state government on state land use activity, (6) policies or actions regarding military property being taken by eminent domain (7) formal exercise of the power of eminent domain, (8) military and foreign activities, and (9) activities connected with pending, imminent or completed litigation. Attorney General Guidelines, II.B. All other federal proposed actions, decisions, programs or regulations, including temporary decisions, are included in the President's Executive Order.

The same mandate for the completion of a TIA for all actions that may effect the value of private property is found in the Interior Department Guidelines. The only exceptions to this rule are, in general: (1) governmental actions to which the private property owners have consented, but only to the extent of that consent, (2) regulations or permits authorizing the possession, transportation or use of migratory birds or wildlife, (3) the listing of threatened or endangered species or the issuance of biological opinions pursuant to the Endangered Species Act but only in cases where the listing or opinion either governs the use of federal lands only, or proposes alternatives that have been accepted by the private property owner, and (4) the denial of permits to import or export species. Interior Department Guidelines, Appendix IV. Again, all other federal actions, decisions and regulations require the completion of a TIA.

Because this decision does not fit within any of these exceptions, a TIA must be completed for _____ (describe the federal decision, action or regulation).

2. That the federal administrative agency making the decisions is included in the Executive Order.

E.O. 12630 applies to all agencies and departments within the Executive Branch of government. Because the _____ (name of federal agency) is a department within the Executive Branch, it is included in the Executive Order.

3. That the private property, private property rights and investment backed expectations are protected by the Fifth Amendment to the U.S. Constitution.

There are several types of private property protected by the U.S. Constitution and included in E.O. 12630. Private land held in fee simple ownership is private property. Physical improvements to both private property and leased land are private property. In addition, federal leases

and permits are equivalent to private property in those cases where the value of the lease or permit is so closely tied to the value of the private property that any reduction in the value of that lease does, in fact, reduce the value of the associated private base property.

Private property can also include private property rights. For example, the right to the full and uninhibited use of private property is a property right. The right of maintaining the full economic value of private property is a property right. The right to free and unencumbered transferability of private property is a property right.

Additionally, the Executive Order and implementing guidelines provide protection for “investment backed expectations.” The Attorney General Guidelines state:

To the extent reasonably possible, an agency should examine the degree to which the proposed policy or action will interfere with reasonable investment-backed expectations of those private property owners affected by the proposed action, even if such expectations are not formally recognized as property interests under the generally applicable law.

Attorney General Guidelines § V.D.2.c.

Under these Guidelines, therefore, the private property, private property rights and investment backed expectations including _____ (describe private property, private property rights and investment backed expectations being effected) are being effected by this decision.

4. That private property, private property rights and investment backed expectations are being taken.

There are three types of final decisions, regulations or actions, covered by the Executive Order that can effect the value of private property, private property rights and investment backed expectations. These include decisions or actions allowing physical occupancy of the property, physical invasion of the property, and/or regulatory takings.

Physical occupancy or physical invasion means just that, the physical use of private property. On the other hand, regulatory takings are defined as regulations which will or may affect the value, use, or transferability of private property, private property rights and investment backed expectations.

Because this federal agency is effecting private property, private property rights and investment backed expectations _____ (describe how the federal action is effecting your rights) a TIA must be completed.

Several additional facts about E.O. 12630 must also be noted. First, Presidential Executive Order 12630 requires that a takings implications assessment be completed for all regulations that will or may effect the value of private property. The exact effects of the federal decision do not have to be proven in order for a private party to request the completion of a TIA.

Second, the Executive Order and related Supreme Court cases also apply to situations where the taking is only temporary. Therefore, the fact that the takings is not permanent or that it only occurs at certain times of the year does not effect the fact that a TIA must be completed.

Third, one of the values of the TIA is to report to federal decision makers the takings implications of their actions prior to the making of the final decision. This is important in assuring that these decision makers have all the facts before a decision is rendered. Therefore, a TIA describing the economic effects the private property, private property rights and investment backed expectations must be completed before a final decision can be reached.

In conclusion, although Executive Order 12630 does not stop federal agencies from taking private property, E.O. 12630 does require that agency decision makers consider the takings implications of their actions on private property rights and place a monetary value on those implications. If the federal decision remains unchanged and private property rights are taken by federal agency action, decision, or regulation, the property owner must be justly compensated for his losses as mandated by the Fifth Amendment to the U.S. Constitution.

Sincerely,

Name
Address

For further information, please contact: Karen Budd-Falen, Budd-Falen Law Offices, L.L.C. Post Office Box 346, Cheyenne, Wyoming 82003 (307) 632-5105.