

**A WHITE PAPER**

**RMAP'S QUESTIONABLE LEGALITY UNDER THE  
STATE AND FEDERAL CONSTITUTIONS**

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Prepared for:  
Washington State Farm Bureau

## ISSUE

*Whether RMAP which mandates that owners of “forest” land maintain and upgrade private roads on their private property can be challenged as violating legal rights, including the right to substantive due process and the right to just compensation for takings of private property as required by the Fifth and Fourteenth Amendments to the United States Constitution?*

### **Short Answer:**

Yes, RMAP is vulnerable to a challenge under the Fifth Amendment to the U.S. Constitution and Article I, Section 16 of the Washington Constitution, depending on individual application of the new rules. The success of a takings claim or substantive due process claim would be affected by the ultimate limitations imposed by RMAP on the use of the property and its economic impact on the landowner’s agricultural practices.

## BACKGROUND

The Washington State legislature passed HB 2091 in 1999 strongly encouraging the Department of Natural Resources to follow the recommendations of the Forests and Fish Report published on April 29, 1999. The Forests and Fish Report was the product of negotiations with federal and state agencies, the Governor’s Office, tribes, environmentalists, the Washington Association of Counties, and the timber industry. The Farm Bureau was not involved in these negotiations.

The negotiations leading to the creation of the Forest and Fish Report were conducted in anticipation of the salmon listings under the Endangered Species Act. It sought to identify forest management practices that contribute to the loss of habitat for threatened or endangered fish. One claimed threat to habitat that was identified in the Report was forest roads. The Report claimed these roads caused sediment to flow into fish-bearing streams, thereby adversely affecting fish habitat.

One of the recommendations from the Report was to mandate road maintenance and abandonment plans for all private and state forest lands. DNR adopted rules implementing the statute in May 2001. Under the new rules, all forest owners have an obligation to submit road maintenance and abandonment plans (RMAP) to DNR by 2005. The roads must be improved and brought into compliance with the new standards within 15 years.

## DISCUSSION

Historically, forest landowners have constructed and maintained their forest roads in accordance with state forest practice rules. These rules changed with the adoption of new regulations last summer. Under the new rules, all forest landowners in Washington State are required by law (WAC 222-24) to submit a RMAP to the Department of Natural

Resources for all forest roads on their land. Plans must be developed by 2005 and implemented by 2015 if the roads are not abandoned.

“Forest land” means all land which is capable of supporting a merchantable stand of timber and is not actively being used for a use that is incompatible with timber growing. WAC 22-16-010. “Forest road” means ways, lanes, roads or driveways on forest land used since 1974 for forest practices or forest management activities such as fire control. WAC 22-16-010.

The rules have two schedules depending on whether a landowner owns more or less than 500 acres of forest land within the state. Landowners with 500 or more acres are required to submit annual maintenance plans to DNR, addressing 20% of the land each year until the entire property is under a RMAP. Landowners with less than 500 acres must submit their first maintenance plan when they seek to log the property or before December 31, 2005, whichever occurs first. RMAPs can also become due at any time through the following exception: “If a landowner is notified by the department that their road(s) has the potential to damage public resources, the landowner, must within 90 days, submit to the department for review and approval a plan or plans for those drainages or road systems within the area identified by the department.”

DNR will review the RMAP with the Department of Ecology, the Department of Fish and Wildlife, affected tribes and interested parties. DNR will also review the plan with the landowner to see if the plan is being implemented as approved. If a plan is denied, DNR’s concerns must be addressed within 45 days of the plans submittal. If a landowner is out of compliance with the work schedule and DNR determines that it is necessary to prevent potential or actual damage to public resources, DNR will issue an order to comply or a stop work order.

## **LEGAL ISSUES ARISING FROM THE RMAP PROGRAM**

### **A. Procedural Issues**

#### **1. Article II, Section 37 of the Washington Constitution**

The statute directing DNR to adopt rules consistent with the Forest and Fish Report is HB 2091. Article II, Section 37 of the Washington Constitution creates a procedural limitation on the adoption of legislative acts. That provision reads as follows:

No act shall be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

Art. II, Section 37.

This provision was recently applied by the Supreme Court in the I-695 litigation,

*Amalgamated Transit Union v. State*, 142 Wn.2d 183, 11 P.3d 762, 27 P.3d 608 (2000). There, the Court strictly interpreted this section. Here, HB 2091 made explicit changes to the Administrative Procedures Act (APA), Chapter 34.05 RCW, and to the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, without setting forth at full length the preexisting provisions in those statutes which were being amended.

The purpose of this section of the Constitution is to ensure that legislators and the public understood from reading the bill what changes were being made to these other laws. While one reading HB 2091 would understand that the bill made changes to the APA and SEPA, the effect of those changes was not disclosed in the bill because the existing sections of those acts being amended were not “set forth at full length” as the Constitution requires.

## **2. Article II, Section 19**

This provision is often known as the single subject rule for legislative enactments. It too was an issue in *Amalgamated Transit Union*. The provision reads as follows:

No bill shall embrace more than one subject, and that shall be expressed in the title.

Courts have viewed the question as to whether a bill embraces more than one subject by looking at the breadth of the title of the bill. HB 2091 states as its title “An act relating to forest practices as they affect the recovery of salmon and other aquatic resources...” A strong argument can be made that this bill affects more than forest practices. While the bill seeks to implement the Forests and Fish Report, the recommendations and the rules apply to forest roads even though no existing or future forest practices are contemplated. One must comply with the RMAP if the road was ever used for forest practices as far back as 1974. Therefore, the rules do not affect any existing or future forest practices, but rather farming practices which may be using a former forest road.

By the bill’s scope into a subject beyond the narrow subject in the title, an argument can be presented to the courts that HB 2091 violates Article II, Section 19.

## **3. The APA**

There are potential challenges to the rules adopted by DNR as being out of compliance with rule making requirements of the APA. However, in order to determine whether DNR has complied with the APA, there must first be a thorough review of DNR’s rulemaking file. Since that review has not been completed, this paper does not address the viability of challenges to the RMAP rules under the APA.

## **4. Enforcement Issues**

The RMAP program also raises several constitutional issues in regard to the method of enforcing the rules. These issues are beyond the scope of this paper.

## **B. Constitutional Implications of RMAP**

### **1. Takings without Payment of Just Compensation**

Article I, section 16 of the Washington Constitution provides, in pertinent part: “No private property shall be taken or damaged for public or private use without just compensation having been first made ...” Wash. Const. art. I, § 16. The Fifth Amendment to the U.S. Constitution provides: “Nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The Fifth Amendment is applicable to the State of Washington through the Fourteenth Amendment. The purpose of the Fifth Amendment is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

In Washington, courts employ a threshold question which immunizes some government action from potential liability for causing a taking without just compensation. That question is whether the challenged regulation safeguards the public interest in health, safety, the environment, or fiscal integrity or whether it destroys a fundamental attribute of property ownership. *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990). If the regulation does not destroy a fundamental attribute of ownership and does no more than protect the public health, safety, and welfare, then the regulation is not subject to a taking challenge under Washington law. Under the threshold test, a regulation may be a taking if it “goes beyond preventing a public harm [to] actually enhance [ ] a publicly owned right in the property.” *Presbytery*, 114 Wn.2d at 329. Courts have held that land use regulation in the nature of restricting nuisances is permissible without payment of just compensation, but regulations which enhance public interests, and go beyond preventing harmful activity, may constitute a taking. *Sintra Inc. v. City of Seattle*, 119 Wn.2d 1, 15, 829 P.2d 765 (1992).

Critically, the federal Constitution does not recognize this threshold question which immunizes government from liability for takings simply because the regulation protects the public health, safety and welfare. The question remains whether the Washington Supreme Court will continue to employ this threshold determination at all.

Under federal law, a “per se” or categorical taking can occur in certain circumstances. For example, a categorical taking can occur when a regulation authorizes an actual physical invasion or occupation upon one’s property. *Loretto v. Teleprompter Mahattan CATV Corp.*, 485 U.S. 419 (1982). A categorical taking also exists where a regulation denies all economically viable use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

Even if a regulation does not amount to a categorical taking, it may nonetheless result in a taking if the government’s action is too intrusive and the effect on the owner is

too onerous. A taking occurs when a regulation fails to substantially advance a legitimate state interest. *Id.* DNR will argue that the statute and rules were enacted to protect the public interest, specifically protection of water quality and fish from forest practices impacts. The problem is that the RMAP program was designed with forest management practices in mind, not farming, so a challenge could be made that regulating farm roads generally or in the context of minor tree cutting on farm property will not substantially advance the stated public interest in regulating true forest practices.

If neither of the categorical tests results in a taking, and the regulation substantially advances a legitimate government interest, the court next performs an ad hoc factual inquiry into whether the regulation unfairly shifts public burdens onto private owners. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123-24 (1978). Types of factors considered in this analysis include the extent of economic impact, the character of the government action, whether the regulation interferes with investment backed expectations, and any other facts which tend to show that in fairness and justice the landowner should not bear the burden of the regulation. Such an analysis would likely be very fact specific to individual application of the new rules.

The burden to private property owners appears to be quite heavy and one which should not have been anticipated by farmers whose property may have been logged twenty five years ago. A strong argument can be made that when one invests in property which may be logged so long ago there is a reasonable expectation that all requirements applicable to that forest practice are completed. Fairness and justice require that the landowner not bear the burden in such cases.

Washington Courts have also recognized that takings which require compensation can occur when the government takes a distinct interest in land, even though not taking all of the land. For instance, in *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347, 13 P.3d 183 (2000), the Court reviewed a state statute, Chapter 59.23 RCW, which required the owners of mobile home parks to give a right of first refusal to the owners of the mobile homes who rent space in the mobile home parks. RCW 59.23.025. The Court held that a right of first refusal was a distinct interest in land and that this statute essentially forced the park owners to give that particular interest in land to the owners of the mobile homes. *Id.* at 361. The Court held that the statute violated article I, Section 16 of the Washington Constitution because it caused a taking of that interest without payment of just compensation. *Id.* at 362.

Here, the RMAP program essentially imposes an easement for road maintenance or a restrictive covenant on land for the maintenance of roads. Both easements and restrictive covenants have long been recognized as distinct interests in land. *Chase v. City of Tacoma*, 23 Wn. App. 12, 594 P.2d 942 (1979) and *State v. Human Relations Research Found.*, 64 Wn.2d 262, 267, 391 P.2d 513 (1964). By taking from the property owners an easement or restrictive covenant, the RMAP program takes such a distinct interest in land without compensation. As in *Manufactured Housing*, this taking is unconstitutional because it is accomplished without payment of just compensation.

The United States Supreme Court has also looked at takings which require a private party to provide a public benefit at the private party's expense. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), four members of the Court held that a federal statute requiring a coal mining company to pay workers health benefits was unconstitutional because it caused a taking of private property. A fifth justice, Justice Kennedy, agreed that the statute was unconstitutional, but on substantive due process grounds and not on takings jurisprudence.

Ironically, this federal statute was the result of a supposed agreement between labor unions and mining companies in the 1940s. The Court also relied on the statements of United States Senators which sound as if they could have been made about RMAP. Senator Durenberger described

the issue as involving “a whole bunch of promises made to whole lot of people back in the 1940s and 1950s when the cost consequences of those problems were totally unknown.”

*Id.* at 513.

The four member plurality of the Court found a taking in this purely economic regulation.

It is against all reason and justice to presume that the legislature has been entrusted with the power to enact a law that takes property from A and gives it to B”). ... “[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

*Id.* at 523 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

RMAP is claimed to be based on a desire to achieve a *public* benefit. WAC 222-24-050. The government's desire to achieve these public benefits should be paid by the public—through the payment of just compensation as both the state and federal constitutions require.

## **2. Substantive Due Process**

The Fourteenth Amendment provides: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.” The Washington Supreme Court has explained that “[t]his clause is a limit on a state's ability to pass unreasonable or irrational laws which deprive individuals of property rights.” *Sintra*, 119 Wn.2d at 21. The inquiry here is distinct from the takings analysis and has a different standard. A substantive due process claim need not show that no viable use of the property remains, but rather than any interference with property rights was irrational or arbitrary. *Sintra*,

119 Wn.2d at 21. Here, the landowners have a property right which is implicated—all their interests in the land over which a “forest road” lies. The question is whether the RMAP is a permissible regulation of that property.

#### **a. The Three Point Test**

To determine if a regulation results in a denial of due process, the court engages in the following test: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. *Presbytery*, 114 Wn.2d at 330; *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). If the regulation fails to meet any of the three prongs of the substantive due process analysis, then it is invalid under the substantive due process clause. *Robinson v. City of Seattle*, 119 Wn.2d 34, 52, 830 P.2d 318 (1992).

Under the first part of the test, DNR will argue that RMAP achieves a legitimate public purpose: protect water quality and fish from adverse impacts caused by forestry practices. However, the Forests and Fish Report focused on forest practices, not farming. Additionally, it is obvious that the Forest and Fish Report was focused on compliance with the Endangered Species Act and protect salmon that had been listed as threatened. Now that it appears that salmon will be delisted, the entire premise for the report and legislation has disappeared.

Under the second prong of the test, farmers can argue that the means chosen, strict regulation of roads used for primarily farm purposes, fail to achieve a public purpose related to forest roads.

The third part of the test is extremely suspect in this case. In *Presbytery*, the court listed several nonexclusive factors which should be considered in determining if a regulation is unduly oppressive, such as the nature of the harm, the availability and effectiveness of less drastic measures, and the economic loss suffered by the property owner. *Presbytery*, 114 Wn.2d at 331. Additional factors involve consideration of both the public’s interests and those of the regulated landowner, and include:

On the public side, the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner’s side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

*Id.* at 331.

DNR has itself conceded that the rules are burdensome even to forest landowners. In fact, it states why the rules are problematic:

Forest landowners are faced with privately financing improvements to their forest roads even though the improvements only benefit public resources, such as clean water and fish habitat. Despite this cash outlay, private landowners cannot expect any financial return on their investment.

“Improving Family Forest Roads for Public Benefit”, DNR 3/22/02.

Under the third substantive due process prong, the new rules are problematic because certain landowners are singled out to solve a public problem: water quality and protection of fish habitat. A strong argument can be made that these are public problems that should be funded by the public at large. The entire burden of the regulation falls on landowners with roads on their property. It is estimated that the economic impact of the new rules will be enormous. In *Sintra*, the Supreme Court held that a regulation with such an unbalanced impact goes beyond the City’s police power. In that case, a developer was forced to replace the low income housing or pay money into a housing replacement fund if they wanted to alter the use of their property. The Court reached this conclusion because the burden was unfairly allocated to individual property owners, rather than equally distributed among all citizens. The Court reasoned this went beyond preventing a public harm and violated substantive due process. *Id.* at 16.

Furthermore, RMAP applies without a requirement that DNR show that a particular landowner is contributing to the problem. The assumption is that the owners of roads are guilty until they are proven innocent. The entire burden is on a property owner to show that they are not negatively impacting public resources. In addition, certain landowners must expend significant amounts of money for problems they may not be responsible for. Historically, property owners have used these roads to get around on their property and for purposes unrelated to forest practices. DNR is now requiring that these landowners upgrade roads to newly adopted requirements or abandon them when these private roads may only be rarely used and may not actually be harming water quality or fish. The entire burden of the regulation is on the landowner to investigate the impact of the roads on fish habitat. Basically, the program requires landowners to do DNR’s work for the agency. RMAP’s viability under the substantive due process protections of the Constitution is extremely suspect.

### **b. Retroactivity**

One special category of due process violations involve the retroactivity of government regulation. Here, the RMAP program imposes substantially new requirements for existing roads. The program essentially concludes that existing roads are illegal unless the owner applies for permission to use or to abandon them. This is

analogous to requiring someone who owns a residence for several decades either to reapply for a new building permit or apply for a demolition permit.

The retroactive nature of RMAP is especially clear since the definition of “forest roads” includes roads and even driveways on forest land “used since 1974 for forest practices or forest management activities, such as fire control.” WAC 222-16-010. Therefore, someone who used a road for forest practices in 1975 and complied with all regulations now finds that there are new regulations that apply 27 years later. This makes the statute retroactive.

The Washington Supreme court has tied the prohibition on retroactivity to due process.

“Due process is violated if the retroactive application of a statute deprives an individual of a vested right.” *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) (citing *Lynch v. United States*, 292 U.S. 571, 576-80, 54 S.Ct. 840, 842-844, 78 L.Ed. 1434 (1934)). *See also* Laurence Tribe, *American Constitutional Law* 587 (2d ed 1988) (“We deal here with the idea that government must respect ‘vested rights’ in property and contract-- that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation.”)

*Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 869 P.2d 28 (1994). Here, vested rights exist because the RMAP program applies to roads used for forest practices which were completely lawful and in complete compliance with all regulations when the forest practice occurred. The right to create the road vested when it was created in compliance with all laws in effect at the time.

As discussed above, Justice Kennedy found a substantive due process violation, rather than a taking, in *Eastern Enterprises*. His substantive due process analysis relied heavily on the retroactive nature of the statute which required mining companies to pay for health benefits for workers years ago.

“A retroactive statute would partake in its character of the mischiefs of an ex post facto law ...; and in every other case relating to contracts or property, it would be against every sound principle.” 1 J. Kent, *Commentaries on American Law*; see also *id* (rule against retroactive application of statutes to be “founded not only in English law, but on the principles of general jurisprudence”) Justice Story reached a similar conclusion: “Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the

fundamental principles of the social compact.” 2 J. Story, Commentaries on the Constitution § 1398(5<sup>th</sup> ed. 1891).

*Eastern Enterprises*, 524 U.S. at 547 (Kennedy, J., concurring).

If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectation now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process protection against severe retroactive legislation.

*Id.* at 548-49.

Here, RMAP does change the legal consequences of transactions long closed. People who used their roads for forest practice in 1974 in compliance with all regulations at that time are now told they must comply with new regulations, not as a condition to some new use, but as mitigation of a former use several decades old.

One would expect that one could continue to use a lawful road or driveway across one’s property without having to file for permission to continue to use it. For instance, once a building receives a certificate of occupancy, no one would expect that years later they need to apply for permission to continue to reside in their home. The RMAP program destroys the certainty and security one expects in driving across one’s property and creates due process problems with retroactivity.

### **c. Void for Vagueness**

Another type of due process violation is based on the void for vagueness doctrine. *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986). The law on vagueness requires that the code be clear enough for the lay person to understand what is required.

A citizen should be able to determine the law by reading the published code. A citizen should not be subjected to *ad hoc* interpretations of the law by county officials.

*Id.* at 872. The same is true with DNR. The rules must be clear enough for a citizen to understand the requirements of the rules without having to rely on DNR staff interpretations.

There are many aspects of the RMAP rules which are not clear, but employ vague standards. For instance, WAC 222-24-050 requires the work to be performed evenly toward the priority of “achieving the most benefit to public resources early in the period.” This sounds remarkably similar to the vague standard rejected by the Court in *Carlson v. Town of Beaux Arts Village*, 41 Wn.App. 402, 704 P.2d 663 (1985) (vague standards of “best interests of the citizens” prevents certainty).

A thorough review of the RMAP rules should be completed to determine which provisions are impermissibly vague.

### **3. Search and Seizure and Invasion of Privacy**

The Fourth Amendment prohibits unreasonable searches. A search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. *See Stoner v. State of California*, 376 U.S. 483 (1964). Washington’s Constitution provides broader protection against unreasonable search and seizure than the Fourth Amendment. *See State v. Ladson*, 138 Wn.2d 343, 347-348, 979 P.2d 833 (1999). In this state, there is no authority for civil enforcement search warrants. *McCready v. City of Seattle*, 123 Wn.2d 260, 272-76 877 P.2d 686 (1994). Instead, a crime must be alleged in order to obtain a warrant.

The RMAP program’s requirement that landowners submit information about their property is obviously an attempt by the government to obtain information without having to obtain a search warrant. By requiring landowners to make disclosures, DNR is essentially conducting a search of private properties and using the landowners to accomplish the search.

The United States Supreme Court has recognized that the protection of individuals from searches conducted without a warrant apply to business properties and personal property. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978). Courts have held that under the Fourth Amendment the government could not demand compliance with business records without a warrant. *Brock v. Emerson Electric Co.*, 834 F.2d 994 (1987); *see also De La Cruz v. Quackenbush*, 80 Cal.App.4th 775, 96 Cal.Rptr.2d 92 (2000) (Fourth amendment warrant requirement applies to records required by law).

The RMAP program goes far beyond requiring the disclosure of business records without a warrant. It requires the property owner to search, assemble and create information to be disclosed to the government. It clearly implicates the federal and state constitution’s protections from unreasonable searches of property and seizures of information.

### **B. National Environmental Policy Act**

Although not a constitutional issue, the RMAP program should be evaluated for compliance with the National Environmental Policy Act (NEPA). NEPA requires that federal government decisions are made only after appropriate environmental review is

complete. *Defenders of Wildlife, et. al., v. Andrus*, 627 F.2d 1238, 1243 (D.C.Cir.1980). Specifically NEPA requires federal agencies to provide detailed environmental impact statements on “major Federal actions significantly affecting the quality of the human environment.” *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327 (9<sup>th</sup> Cir.1975). If the agency action is a major federal action that significantly affects the human environment, then NEPA compliance is mandatory. *Calvert Cliffs’ Coordinating Committee, Inc., v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C.Cir.1971). Once it is determined that NEPA applies, then the Federal agencies involved must begin a lengthy and detailed process that allows for significant public input.

The RMAP rules affect the quality of the human environment. The primary question, however, is whether the state rules constitute major federal action. The determination whether an action is a major federal action is not always an easy question. A federal action can exist even when the primary actors are not federal agencies, but rather the state. *State of Alaska v. Andrus*, 591 F.2d 537, 540 (9<sup>th</sup> Cir.1971). State action may constitute a major federal action if the federal agency has the authority to influence the state action. *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10<sup>th</sup> Cir.1988).

Federal involvement in the RMAP program was substantial. Federal agencies were involved in the negotiation and drafting which led to the Forest and Fish Report. Additionally, the Forest and Fish Report makes clear that the authors were attempting to obtain federal assurances of compliance with the Endangered Species Act and the Clean Water Act. HB 2091 also recognizes the federal involvement. Obviously, the federal government had the ability influence the Report and the state statute. In fact, the federal government will be involved in monitoring compliance with the rules. NEPA required that the federal government not exert that influence until the environmental affects could be analyzed.

## CONCLUSION

The RMAP rules create numerous problems affecting several constitutional rights of the farmers who are regulated by them. This program places an unprecedented burden on farmers which should not be ignored. A close review of specific constitutional rights in the context of specific examples of the enforcement of this program should be conducted so that the rights of farmers impacted by this program can be protected in the courts.