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September 24, 1999

VIA FACSIMILE

The Honorable Henry Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

The Honorable John Conyers, Jr.
Ranking Minority Member, Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, D.C. 20515-6216

RE: H.R. 2372, the Private Property Rights Implementation Act of 1999

Dear Chairman Hyde and Representative Conyers:

We, the undersigned state Attorneys General, write to express our strong opposition to H.R. 2372. This bill is substantially the same as H.R. 1534, which many state Attorneys General opposed in a September 24, 1997 letter to you.

Like its predecessor, H.R. 2372 represents an unwarranted federal intrusion into state land use regulation. It permits landowners to sue local governments for regulatory takings before the regulatory process is complete and before they have had a sufficient opportunity to render a final decision on a proposed project. H.R. 2372 also allows landowners to sue local governments directly in federal courts, without first complying with state procedures for obtaining just compensation. Because H.R. 2372 accomplishes its objectives by modifying the Supreme Court's interpretation of a constitutional doctrine, there are serious questions about whether the bill is a permissible exercise of Congressional authority.

The primary purpose of H.R. 2372 is to alter the requirements developed by the federal courts to determine whether a taking claim is ripe for adjudication. Under existing taking doctrine, a landowner in federal court must show that (1) the government agency has issued a final and authoritative decision regarding the application of its regulations to the proposed use of the landowner's property and (2) the landowner has requested and been denied compensation

through the procedures provided by the State. *Williamson County Regional Planning Com.* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985); see *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). H.R. 2372 seeks to modify the ripeness doctrine in two significant ways.

First, H.R. 2372 defines "final decision" in a manner that relaxes the judicially-imposed requirements for demonstrating that a landowner has obtained an agency's final and authoritative decision on the use of the landowner's property. H.R. 2372's broad definition of "final decision" is unwise. Agencies often are forced to deny projects that are harmful to the public, even though they might have approved a more thoughtful proposal. Noting that "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," the Supreme Court has held that refinement of a project and additional applications are often necessary to determine an agency's definitive position. *MacDonald, Sommer and Frates, supra*, 477 U.S. at 351, 353 fn.9. By arbitrarily limiting the number of applications that a landowner must make to demonstrate a ripe taking claim, H.R. 2372 forces local government to defend itself from taking claims on an incomplete record and before the regulatory process is truly over.

Second, H.R. 2372 proposes to eliminate the second prong of *Williamson County* by declaring that "a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State . . . ." By providing landowners the opportunity to bypass state courts, H.R. 2372 invites forum shopping and may have the unintended effect of inducing local governments into approving potentially harmful development out of fear of protracted federal litigation. This extraordinary federal intervention into the States' administration of their real property and land use laws is all the more puzzling because there is no evidence that state courts have been unwilling or unable to protect private landowners with meritorious claims.

Policy considerations aside, this effort to eliminate the second prong of *Williamson County* may be unconstitutional. Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until a landowner has unsuccessfully attempted to obtain compensation through the procedures provided by the State. *Williamson County*, 473 U.S. at 195. It is doubtful whether Congress may modify substantive aspects of the taking doctrine without encroaching upon the judiciary's responsibility to interpret the Constitution.

In summary, H.R. 2372 interferes with the relationship between local and federal governments, creates a substantial new workload for overburdened federal judges and elevates the rights of landowners above other civil rights claimants. It is not surprising that last year's version (H.R. 1534) of this bill was opposed by virtually every major membership organization representing state and local government and state and local courts, as well as numerous environmental, planning, religious, labor and historic preservation organizations. . We share the

view expressed by the National Governors' Association, the National League of Cities and the U.S. Conference of Mayors in their letter to you of October 21, 1997 in opposition to H.R. 1534:

> "[T]he Founding Fathers never intended the federal courts as the first resort in resolving community disputes among private property owners. Rather, these problems should be settled as close to the affected community as possible. By removing local disputes from the state and local to the federal level, H.R. 1534 violates this principle and undermines basic concepts of federalism."

We respectfully request that the Committee not approve H.R. 2732.

Sincerely,

Bill Pryor
Attorney General of Alabama

Bruce M. Botelho
Attorney General of Alaska

Janet Napolitano
Attorney General of Arizona

Bill Lockyer
Attorney General of California

cc: Congressman Canady, Chair of the Subcommittee on the Constitution
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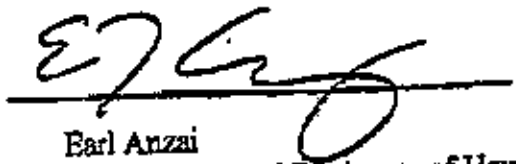

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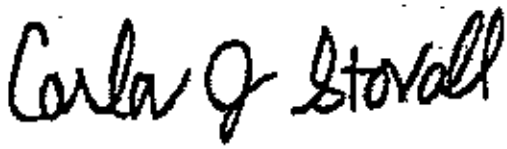

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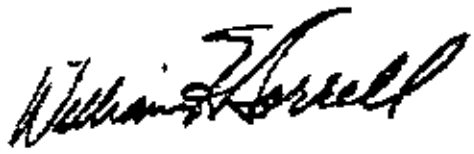

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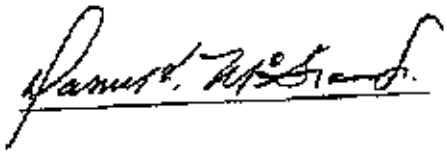

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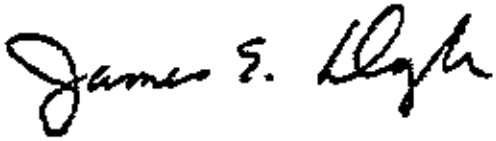

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