



## APPLICATION OF I-933 TO PERSONAL PROPERTY

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This report analyzes one category of legal issues that was not evaluated in the “Legal Analysis of Initiative 933” section of the September 26, 2006 report: *The Impacts of Proposed Initiative 933 on Real Property and Land Use in Washington State*. That study was prepared for the Northwest Center for Livable Communities at the University of Washington (the “I-933 Impacts Study”).

This evaluation focuses on another set of consequences that were possibly unintended by those who wrote I-933: the application of the initiative to personal property, including intangible property. **I-933 expressly applies to “all real and personal property interests.”** As discussed below, if enacted, I-933 would lead to lengthy (and presumably expensive) litigation by individuals and businesses who object to State and local regulations that have long been in effect—in some instances for nearly a century.

**Claims for public compensation would likely include demands for payments as a result of:**

- **Regulations governing the insurance, securities and health care industries;**
- **Regulations governing professions (such as plumbing, cosmetology, and physical therapy);**
- **Rules controlling who is qualified to carry out other tasks that require specialized training and experience, such as installing fire sprinkler systems or operating sex offender treatment facilities; and**
- **Regulations governing wild and domestic animals, livestock, food crops, fertilizers, pesticides, drugs and motor vehicles.**

I-933 has the potential to significantly restrict the state and local governments’ ability to continue regulating professions, products and businesses for the protection of consumers and of human health and safety, or to make that regulatory activity more costly. The measure would likely lead to claims and litigation for compensation for those regulations, producing significant costs to the general public whether or not the claims are successful. I-933’s broad definition of “private property” is so broad, and the

scope of the measure is potential so sweeping, that its application to both tangible and intangible personal property could lead to many unforeseen (and potentially expensive) consequences.

This report is meant to apply the same even-handed approach that we used in the “Legal Analysis” section of the I-933 Impacts Study. It does not attempt to estimate the size of financial exposure to the public from the application of I-933 to personal property interests. Both litigation costs and ultimate payouts by the public could be substantial. However, as we noted in the main study, many of these issues would ultimately be decided by the courts, so we are “predicting consequences without a crystal ball.”<sup>1</sup>

### **What Personal Property is Within the Scope of I-933?**

Initiative 933 applies not only to real property, but also to personal property. I-933 defines “private property” as “all real and personal property interests protected by the fifth amendment to the United States Constitution or Article I, section 16 of the state Constitution owned by a nongovernmental entity. . . .”<sup>2</sup> In determining what property interests are protected by the takings clause of the federal constitution, federal courts look to state law.<sup>3</sup> Therefore, anything that is recognized as “property” in state law is protected by the constitution and would presumably fall within the scope of I-933.

Washington courts have defined “property” very broadly to include everything that has exchangeable value.<sup>4</sup> Personal property includes:

- **Tangible property**, which has a physical existence, such as goods, inventory, equipment, motor vehicles, boats, or animals; and
- **Intangible property**, which has a legal but not physical existence, such as bank accounts, stocks, bonds, contract rights, or intellectual property (copyrights and trademarks).<sup>5</sup> Outside of the takings context, Washington courts have found property rights in intangibles such as stock options<sup>6</sup> permits to haul freight<sup>7</sup>,

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<sup>1</sup> I-933 Impacts Study, p. 8.

<sup>2</sup> I-933, § 2(2)(b) (emphasis added).

<sup>3</sup> *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980).

<sup>4</sup> “‘Property’ is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition.” *In re Marriage of Langham*, 153 Wn.2d 553, 106 P.3d 212, 218 (2005) (citations omitted).

<sup>5</sup> *Black’s Law Dictionary* 1253, 1254 (8<sup>th</sup> ed. 2004); WAC 458-12-005 (defining personal property for purposes of tax code to include tangible and intangible property).

<sup>6</sup> *In re Marriage of Langham*, *supra*.

<sup>7</sup> *State ex rel. Arrow Transp. Co. of Del. v. Wash. Util. and Transp. Comm’n.*, 60 Wn.2d 825, 830, 376 P.2d 433, 436 (1963).

driver's licenses<sup>8</sup>, the right to employment or a trade or profession<sup>9</sup>, and the right to operate a lawful business.<sup>10</sup>

The federal takings clause has also been applied to both tangible personal property<sup>11</sup>, and to intangible personal property such as trade secrets<sup>12</sup>, rights of action<sup>13</sup>, real property liens<sup>14</sup>, contract rights<sup>15</sup>, and the right to earn interest on a deposit<sup>16</sup>. I-933's "pay or waive" and "study" requirements are triggered by the application of state or local government ordinances or rules that "damage the use or value" of private property. This includes, but is not limited to, laws that prohibit or restrict "any size, scope, or intensity of any use legally existing or permitted as of January 1, 1996".<sup>17</sup> Therefore, ordinances or rules that place restrictions on use of personal property adopted in the last ten years may be subject to the pay or waive and study requirements, unless they are exempt.<sup>18</sup> There are a number of state and local regulations that limit the use of personal property—both tangible and intangible.<sup>19</sup>

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<sup>8</sup> *State v. Scheffel*, 82 Wn.2d 872, 876, 514 P.2d 1052, 1055 (1973).

<sup>9</sup> *Jones v. Leslie*, 61 Wash. 107, 110, 112 P. 81, 82 (1910).

<sup>10</sup> *Lee & Eastes, Inc. v. Public Service Comm'n*, 52 Wn.2d 701, 705, 328 P.2d 700, 704 (1958); *Sandona v. City of Cle Elum*, 37 Wn.2d 831, 836, 226 P.2d 889, 892 (1951); *United Union Brewing Co. v. Beck*, 200 Wash. 474, 493, 93 P.2d 772, 781 (1939).

<sup>11</sup> Takings claims concerning personal property most frequently arise when the government restricts the right to sell a particular product. *See, e.g., Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (prohibition on sale of turkey eggs was a taking under the facts presented); *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers not a taking under the facts presented); *Schriener Farms, Inc. v. Smith*, 87 Wn. App. 27, 940 P.2d 274 (1997) (prohibition on sale of elk not a taking under the facts presented).

<sup>12</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984) (trade secrets are property for purposes of the Fifth Amendment).

<sup>13</sup> *Armstrong v. United States*, 364 U.S. 40, 44, 46, 80 S.Ct. 1563, 1566, 1567, 4 L.Ed.2d 1554 (1960) (materialman's lien action is protected property under the Fifth Amendment).

<sup>14</sup> *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602, 55 S.Ct. 854, 866-869, 79 L.Ed. 1593 (1935) (real estate liens are protected property under the Fifth Amendment).

<sup>15</sup> *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (valid contracts are protected property under the Fifth Amendment).

<sup>16</sup> *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (interest earned on IOLTA accounts is protected property under the Fifth Amendment).

<sup>17</sup> I-933, § 2(2)(b)(i).

<sup>18</sup> I-933 contains a narrative definition of "damaging the use or value" of property, which includes rules or ordinances that "prohibit or restrict the use of private property to obtain benefit to the public the cost of which in all fairness and justice should be borne by the public as a whole. . . ." I-933, § 2(2)(b). Therefore, rules or ordinances passed prior to January 1, 1996 may be subject to I-933 if the courts find that they meet this definition.

<sup>19</sup> It is unclear whether I-933 applies directly to statutes adopted by the legislature. The answer to that question depends on whether the legislature is an "agency" as defined in I-933 and whether the legislature adopts "ordinances, regulations, or rules." In any event, most regulatory schemes adopted by the legislature are implemented, at least in part, through state or local agency regulations, which are clearly subject to I-933. This paper only discusses state agency or local government regulations, and not state statutes.

I-933 would have possible effects on state and local regulations affecting many forms of property, including:

- Professions that are regulated to protect the general public
- Dangerous animals
- Livestock
- Food
- Fertilizers
- Pharmaceuticals
- Pesticides
- Motor Vehicles
- Boats
- Insurance companies
- Health care providers
- Banks and other financial institutions

Whether a court would give “personal property” such a broad meaning in the context of I-933 is unknown, but the language of I-933 is quite expansive. If the courts follow that broad wording, the reach of I-933 could be sweeping. It appears the drafters intended I-933 to have wide coverage, because they expressly exempted worker health and safety laws and wage and hour laws,<sup>20</sup> thereby indicating those types of laws would otherwise be subject to I-933. Consequently, if I-933 were enacted, application of the initiative to various forms of personal property could have substantial consequences.

As the I-933 Impacts Study demonstrates in detail, the “waiver” provisions of the measure would be ineffective in many circumstances as a mechanism to limit the financial effects of the measure, because the initiative does not repeal the large number of existing statutes that mandate that the State agencies and local governments regulate a broad range of activities that legislators have determined would potentially harm the public without some public oversight.

The evaluation below discusses the potential impacts of I-933 on both tangible and intangible personal property, recognizing that the scope of the measure’s impact will depend on how broadly Washington courts interpret “property” for purposes of the initiative.

### **Tangible Personal Property**

State and local agencies regulate the “size, scope, or intensity” of use of *tangible* personal property in many ways. Here are some examples:

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<sup>20</sup> I-933 § 2(2)(c)(v), (vi).

**Animals/Livestock:** For public safety and public health reasons, many local governments have adopted animal control regulations that limit where and under what conditions certain dangerous animals (e.g. certain types of dogs) may be kept or allowed in public, and regulations that bar ownership of exotic animals.<sup>21</sup> State agencies also impose a number of restrictions on domestic animals, livestock, and certain exotic wildlife for health and safety reasons such as prevention of disease to humans or other animals. Examples include limits on importing, moving within the state, possessing, and selling certain animals.<sup>22</sup> Unless these are determined to be necessary to prevent an “immediate” threat to human health or safety, restrictions adopted in the last ten years could be subject to the pay or waive requirements.<sup>23</sup> For example, in *Rhoades v. Battle Ground*, the plaintiffs asserted that a City ordinance restricting possession of two cougars, a caiman and a serval cat was a compensable “taking.” The Washington State Court of Appeals ruled that it was not a taking because the regulations were meant to protect the public and the animals rather than benefiting the public.<sup>24</sup> But I-933 might allow the same plaintiffs to assert a claim that Battle Ground’s regulation damaged the “use or value” of their animals. Similarly, in *Schreiner Farms, Inc. v. Smitch*, the Court of Appeals ruled that regulations tightly restricting the possession, transfer or release of elk was not a “taking” that required compensation from the State Department of Wildlife. But the courts might require payments under I-933 if similar regulations were not found necessary to prevent an *immediate* threat to *human* health and safety.<sup>25</sup>

**Food/Crops/Fertilizers/Drugs:** There are also a number of state regulations of food and drugs designed to protect the public. The Department of Health has adopted regulations placing restrictions on the storage, handling, and sale of pharmaceutical drugs, including when drugs must be destroyed, timelines for when they must be sold, and restrictions on who may sell prescription drugs and to whom.<sup>26</sup> The Department of Agriculture has adopted numerous regulations to ensure the safety of food products such as milk, eggs, and perishable packaged food goods, as well as commercial feed. As with drugs, these include requirements for labeling, handling, storage, and pull dates beyond which the food may not be sold.<sup>27</sup> Regulations also exist limiting the areas from

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<sup>21</sup> See, e.g., *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 63 P.3d 142 (2002) (ordinance prohibiting ownership of exotic animals in city limits did not effect an unconstitutional “taking” of such animals).

<sup>22</sup> See, e.g., chapters 16-54 and 16-59 WAC; chapter 232-12 WAC.

<sup>23</sup> Compare *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 940 P.2d 274 (1997) (regulation prohibiting possession, sale, transfer or release of elk, to protect the health of native wildlife, did not constitute a taking of elk rancher’s property).

<sup>24</sup> 115 Wn. App. at 772.

<sup>25</sup> The regulations that were the subject of the *Schreiner* case were adopted to protect wild elk populations from diseases rather than to protect *human* health. The potential dangers to wildlife in these circumstances was highlighted in recent newspaper reports. “Elk That Escaped From Game Farm Are Seen as Threat to Wild Herds”, *New York Times*, October 7, 2006, p. A7.

<sup>26</sup> See, e.g., chapters 246-877, 879, 883 WAC.

<sup>27</sup> See, e.g., chapters 16-101, 101X, 142, and 250 WAC.

which commercial shellfish may be harvested, restricting movement of shellfish from one area to another, regulating how commercial shellfish must be handled, and limiting their sale or disposition.<sup>28</sup> There are also restrictions on the use of fertilizers and pesticides, such as limits on whether, where and in what amounts they can be used; who can sell and apply them; and how they must be stored and handled.<sup>29</sup> Stiffer State regulations governing fertilizers and pesticides could lead to claims for compensation from agriculturists or agricultural supply companies. I-933 does provide an exclusion for “chemical use restrictions” adopted by the federal Environmental Protection Administration, as well as worker health and safety laws. But many state fertilizer and pesticide rules do not fit within those categories.

**Vehicles:** Motor vehicles are tangible personal property. The Washington State Patrol has adopted restrictions for commercial motor vehicles, such as requirements for parts and accessories, repair and maintenance requirements, and driving and parking rules.<sup>30</sup> The Utilities and Transportation Commission also places limits on equipment and time of operation for certain motor carriers.<sup>31</sup> In addition, the state regulates motor vehicles through its emissions control program. The state requires emissions testing in selected counties. A vehicle cannot be relicensed if it fails to take and pass a required emissions test.<sup>32</sup> Arguably these restrictions could limit the size, scope, or intensity of use of the motor vehicles, and lead to claims for compensation from the State.

**Boats:** The State also regulates recreational boats as well as larger cargo, fishing and passenger vessels. For example, the Parks and Recreation Commission has adopted rules establishing equipment, speed, and other safety requirements for recreational boats.<sup>33</sup> The Department of Labor and Industries also has rules establishing safety requirements for charter boats, including minimum structural standards.<sup>34</sup> Unless these restrictions are found to prevent an “immediate” threat to human health and safety, they would be subject to I-933’s pay or waive provision.

## **Intangible Personal Property**

***Regulation of professions that involve potential dangers to the public.*** A person’s profession or trade is not commonly thought of as a form of “property,” but the courts have held that the ability to pursue one’s occupation is property that is subject to various protections. For example, in *Jones v. Leslie*, the Washington Supreme Court in

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<sup>28</sup> Chapter 246-282 WAC.

<sup>29</sup> *See, e.g.*, chapters 16-200, 228, and 230-232 WAC.

<sup>30</sup> Chapter 446-65 WAC.

<sup>31</sup> *See, e.g.*, chapter 480-14 WAC.

<sup>32</sup> Chapter 173-422 WAC.

<sup>33</sup> Chapter 352-60 WAC.

<sup>34</sup> Chapter 296-115 WAC; WAC 296-115-040.

1910 held that interference with the plaintiff's right of employment was an interference with a property right. Justice Dunbar wrote:<sup>35</sup>

It would be well to remember in the beginning that it is fundamental that a man has a right to be protected in his property.... Is, then, the right of employment in a laboring man property? That it is we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood....

There are a large number of specialized occupations that have been regulated for many years in order to protect the public from potential dangers inherent in those trades or professions being carried out by unqualified persons. Title 18 of the Revised Code of Washington includes 78 separate chapters concerning business activities from Accountancy to Water Well Construction. These statutes include legislation enacted over the past century to provide basic regulation of professions that require a requisite level of skill in order to protect the public from injury from unqualified practitioners. Among the regulated professions are accountants, architects, chiropractors, cosmetologists, dieticians, fire sprinkler systems contractors, midwives, nurses, pharmacists, physicians, physical therapists, plumbers, veterinarians and water well contractors. Most of those chapters require various State agencies and boards to establish basic qualifications and examination requirements for those who would enter those professions. Waivers of the requirements are permitted in only narrow circumstances.

If I-933 were enacted, each time a State agency or professional board were to tighten a regulation or impose a new requirement to respond to documented problems or potential threats to public safety, the regulated practitioners would have an opportunity to demand compensation from the State on the grounds that the new regulation would restrict the "size, scope or intensity" of use of their property<sup>36</sup>—their trade or profession, or "prohibit or restrict the use of private property to obtain benefit to the public"<sup>37</sup> and that the impact of the new regulation on the professional should "in all fairness and justice...be borne by the public as a whole."<sup>38</sup> Disgruntled physicians or plumbers could assert that stiffer regulations or professional requirements reduce the value of their business—for example, by imposing time-consuming procedures or continuing education requirements, or by requiring higher documented skills to perform certain procedures that they had performed in the past. Not only could new regulations be

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<sup>35</sup> 61 Wash. 107, 110 (1910)

<sup>36</sup> I-933 § 2(2)(b)(i).

<sup>37</sup> I-933 § 2(2)(b).

<sup>38</sup> Id.

challenged, but regulations already in existence at the time I-933 is enacted would be subject to “pay or waive” claims if agencies attempted to enforce or apply them.

The exclusions from I-933’s sweeping scope are quite limited, and most are very specific.<sup>39</sup> A basic principle of statutory construction is that when a law lists express exclusions or exemptions, circumstances *not* included within such a list are presumed to come under that law’s requirements. As we observed in the I-933 Impacts Study,<sup>40</sup> I-933 includes an exemption for regulations necessary to prevent immediate harm to human health and safety, but “the distinction between an ‘immediate threat’ and a cumulative or general threat to public health and safety would likely require clarification in the courts.”<sup>41</sup>

Certainly in many circumstances the courts would hold that the costs of complying with the regulations were appropriately allocated to the practitioners. But there is no reason to think that would uniformly be the case. As in the instance of local government and State agency regulations affecting real property, State oversight of the professions would also become a highly uncertain regulatory environment, and there would likely be many unforeseen or unintended consequences from I-933’s very broad scope.

**Regulation of businesses:** Several Washington decisions have recognized the right to operate a lawful business as a property right.<sup>42</sup> There are innumerable state regulations that place restrictions on the operation of businesses and business practices, primarily to protect consumers. Examples of heavily regulated businesses include insurance companies<sup>43</sup>, health care providers<sup>44</sup>, and banks or other financial institutions<sup>45</sup>. The insurance commissioner, for example, may determine that an insurer is in a financial condition hazardous to policyholders or the public, and may require the insurer to reduce or suspend the volume of business being accepted, limit dividends paid to stockholders, or withdraw from certain investments.<sup>46</sup> The Department of Health exercises significant regulatory control over the development of health care facilities such as hospitals, nursing homes, and adult care facilities. For example, state regulations require certain health care providers to obtain state approval before offering new or expanded services, such as significantly remodeling a nursing home, or adding

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<sup>39</sup> I-933 § 2(2)(c).

<sup>40</sup> I-933 Impacts Study at 55.

<sup>41</sup> *Id.* It should be noted, however, that Washington’s Supreme Court has found that it was reasonable for the Legislature to conclude that a statute to help prevent the loss of the Mariner’s baseball team constituted a law “necessary for the immediate preservation of the public peace, health or safety.” *Clean v. State*, 130 Wn.2d 782, 803-13 (1991996). On that basis, many regulations promulgated to prevent possible future hazards might be held to be exempt from the compensation provisions of I-933.

<sup>42</sup> See cases cited at note 10.

<sup>43</sup> See Title 284 WAC.

<sup>44</sup> See WAC 246-305 – 491

<sup>45</sup> See Title 208 WAC

<sup>46</sup> WAC 284-16-320

a burn unit or neonatal intensive care nursery to a hospital.<sup>47</sup> The Department of Financial Institutions has promulgated a number of regulations that restrict how banks, credit unions, or other financial institutions may operate, including restrictions on certain loans or investment securities.<sup>48</sup>

Many of these regulations may be viewed as restricting the size, scope, or intensity of use of various businesses, and could be subject to I-933 if adopted in the last ten years. One could argue that the courts have only recognized the right to operate a *lawful* business, and a business must comply with all state or local regulations to be lawful; in other words, there is no property right to operate a business free from regulation. On the other hand, the drafters of I-933 felt the need to exempt worker health and safety laws and wage and hour laws from I-933, implying that those types of regulations of ongoing businesses would otherwise be within the scope of I-933.

**Rights of Access:** Property owners whose land abuts a public right of way possess a property right in their access to that thoroughfare. Restrictions on rights of access to public streets illustrate a common category of regulations on intangible property rights which may be called into question by I-933. Such regulations often include limitations on on-street parking in front of private businesses, placement of traffic barriers and curbs, and location of cross-walks or pedestrian thoroughfares.<sup>49</sup>

These are but a few examples of the types of regulations affecting the use of personal property that could come within the ambit of I-933. Many of these regulations may be required by state statute. Therefore, agencies would not be able to “waive” them without acting outside of their statutory authority.

### **How Does I-933 Differ from Takings Law?**

Although the constitutional prohibition on taking without just compensation already applies to personal property, I-933’s compensation requirements go much further than takings law would require. Under a takings analysis, a court evaluates several factors, such as the extent of the economic impact on the property owner, the purpose of the regulation, and the means chosen to achieve it.<sup>50</sup> I-933, on the other hand, requires payment (or waiver of the regulation) for laws that restrict “*any* size, scope or intensity of use,” regardless of how severe the economic impact or how important the purpose of the regulation.

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<sup>47</sup> Chapter 246-310 WAC

<sup>48</sup> See, e.g., chapters 208-460, 512 WAC

<sup>49</sup> See, e.g., *Banning v. King County*, 2000 WL 141283 (Wash. App. 2000) (unpublished opinion); *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

<sup>50</sup> See Attorney General’s Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property (2003), available at <http://www.atg.wa.gov/environment/Takings.shtml>.

## Limitations on I-933's Effect on Personal Property

Despite I-933's seemingly broad coverage, there are several provisions that may limit its application to personal property—both tangible and intangible. The pay or waive requirement will not apply to regulations that “apply equally to all property subject to the agency’s jurisdiction”.<sup>51</sup> Although some regulations concerning personal property may include variances, that is more commonly the case with real property. It may be more likely that regulations concerning personal property will apply equally, depending on how the equal application provision is interpreted.

Second, if the pay or waive provision is triggered (and assuming that a waiver is not granted or that a waiver is not legally possible), the compensation owed is the reduction in fair market value of the personal property due to application of the regulation.<sup>52</sup> It may be more difficult to show a reduction in fair market value due to some regulation of personal property. For example, a restriction by the Utilities and Transportation Commission on the number of consecutive hours that the driver of a motor vehicle may drive is arguably a restriction on the “intensity” of use of a motor vehicle. But it may be difficult to show that the regulation reduced the fair market value of the vehicle.

## Conclusion

It is difficult to determine the precise effect that I-933 will have on personal property, given the uncertainty surrounding the types of personal property interests a court may recognize and the vast number of regulatory schemes that may affect use of that property. Nevertheless, it is fair to say that I-933 has the potential to significantly restrict the state and local governments’ ability to continue regulating professions, products and businesses for the protection of consumers and of human health and safety. The measure would likely lead to claims and litigation for compensation for those regulations, producing significant costs to the general public whether or not the claims are successful. I-933’s broad definition of “private property” is so broad, and the scope of the measure is potential so sweeping, that its application to both tangible and intangible personal property could lead to many unforeseen (and potentially expensive) consequences.

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<sup>51</sup> I-933 § 2(2)(c).

<sup>52</sup> I-933 § 2(2)(d).