



Issue Brief

Initiative 933: A Disaster in the Making

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Our legal system protects private property rights through the state constitution, state statutes, law enforcement, and the courts. The legal system also helps ensure the value of property through environmental laws and land use and zoning regulations. Initiative 933 undermines these foundations for property ownership and individual and mutual prosperity by creating financial incentives for self-selected developers, corporations, and individuals to ignore land use law and regulations or get paid to abide by these regulations.

The public, through our governments, would have to pay these property owners to gain their adherence to our statutes and regulations. If Initiative 933 is passed, the bill to maintain current environmental protection regulations will run into the billions of dollars. These dollars could go to public education, environmental recovery, pollution reduction, transportation infrastructure, or health coverage. Instead, they will be transferred to out-of-state and in-state developers, corporations and individuals.

If Initiative 933 passes and the public decides it cannot afford to pay the complainants to abide by our regulations and statutes, then land use regulations will be waived for this small group of property owners. As a result our efforts to clean up Puget Sound, preserve agricultural land, and even enforce family-friendly zoning in urban areas will be stymied and compromised.

Property owners who claim waivers under Initiative 933 will be exempted from the costs of environmental damage that their own activities and management of their properties may cause on these properties and on other private and public lands. The cost of this damage to our land, our waters, and our resources will be borne by the public.

1. What is Initiative 933?

Initiative 933 (I-933) is an initiative to the people that is on the November 2006 ballot. If passed, it will prevent the current enforcement of statutes and regulations that may impinge on any use or value of private property.¹ The only way that the public will have to enforce these statutes, when challenged, is to pay off the property owner, after developing an estimate of the difference between the property's market value and the value of the property as it is managed under current regulations. If governments opt to pay off property owners, the potential bill is unlimited, with conservative cost estimates of \$7.8 billion within the next six years.

- I-933 will enable private property owners to request waivers from any laws or regulations enacted since January 1st, 1996 that may impinge upon the value of their individual property parcels.
- If a waiver is not granted, then the state or local governments (or both, in some cases) must pay the property owner the estimated difference between the property's market value and its value under current regulations.
- These two legal pathways create I-933's "pay-or-waive" system for the usage and management of private property.
- Under I-933, these pay-or-waive provisions may also apply to laws and regulation enacted since 1889, the year that Washington gained statehood.²
- A conservative estimate of the cost to the public of these pay-offs and waivers runs between \$6.8 and \$7.8 billion, just for the next six years.
- I-933 also mandates new (and often redundant) public review and analysis of the impact of land use regulations on individual property owners. An estimate of the cost to the taxpayers for this review and analysis alone is between \$132 million and \$163 million, just for the next six years.
- I-933 also requires the public to finance the costs for claims processing and litigation, including those costs for the private grievant, even if the claim is found without merit. The bill to the taxpayers for those claim processing and litigation costs is conservatively estimated between \$463 million and \$1.05 billion, just for the next six years.
- I-933 has very broad applicability to local, state, and federal law. Many state and local laws and rules exist in order to comply with federal law, such as the Clean Water Act and the Endangered Species Act. Local governments may not be able to waive provisions of a local regulation that has been put into place to comply with federal law. As a result much of current law pre-empts the waiver provisions of I-933, thereby putting into place the compensation provisions of I-933.³ These provisions can be considered confiscatory transfers from the taxpayers to individual grievants.

2. Applicability of Initiative 933

Initiative 933 applies to sub-parcels within land parcels. For example, some private lands border on rivers. Landowners may build a house on their land, while preserving a buffer zone next to the river. A landowner may have no intention or desire to build on the land immediately next to the river.⁴ But under Initiative 933, this same landowner would be able to request and receive public compensation to not develop this buffer zone, regardless of his intention not to develop it in the first place! Plus, the land owner is given a huge incentive to pursue compensation, since Initiative 933 requires governments to pay for all the costs of litigation and analysis that are triggered by this pay-or-waive request, even including the attorney costs for the private party that requests compensation, and even if the request is found without merit.

Initiative 933 applies not only to real property (land and buildings) in sensitive environmental areas, but also

¹ Initiative 933, Section 3... "An agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation as defined in section 2 of this act.... This section shall not be construed to limit agencies' ability to waive, or issue variances from, other legal requirements."

² http://www.sightline.org/daily_score/archive/2006/05/25/measure-37-on-steroids "Most analysts believe that I-933 restricts claims to regulations enacted post-January 1, 1996... But I-933 is deceptively written. That date appears twice. Once it refers specifically to local setback ordinances, not other forms of regulation. And once it appears under a heading of "...includes, but is not limited to..." leaving open the possibility that claims may not be limited to laws passed since 1996."

³ See http://www.sightline.org/daily_score/archive/2006/05/05/property-rights

⁴ In fact, they are shortsighted if they do. Regardless of environmental regulations, in doing so they are putting their own property at risk of flooding.

to real property within urban city limits. Therefore, if a city has established new zoning regulations since 1996, these regulations, as they impose restrictions on development (such as height restrictions, single family zoning, adult entertainment, and gambling) can lead to individual property owners demanding waivers from these regulations or receiving windfall compensation from the local government for the alleged decrease in fair market value caused by these regulations.

Initiative 933 applies not only to real property, but also to all private property, including automobiles, boats, recreational vehicles, stocks, bonds and money. Let's say you have a cigarette boat that can go sixty miles per hour, and a county enacts a noise level restriction that prevents you from achieving this maximum speed. You have been thereby disallowed from realizing the whole value of your boat. Under Initiative 933 you could either get this restriction waived or receive compensation from the public for the perceived reduction in the value of this boat. Similarly, if a county enacts a new speed limit in one area to enhance pedestrian and automobile safety, it is also imposing on the value of an automobile, as that automobile could go much faster than the speed limit. Under Initiative 933, an automobile driver could sue for either payment for the reduction in the use value of his car, or have the speed limit waived. In both cases the interest of one individual overrides the interest of all other individuals and the public at large.⁵

3. Courting cumulative disaster

While one waiver may not change salmon habitat or access to clean drinking water, or increase run-off of toxic chemicals and animal waste into streams and Puget Sound, the cumulative result of waiver after waiver after waiver does endanger our quality of life and especially the quality of life that our children and our grandchildren can expect. In our lifetimes we have witnessed the destruction of truck farming in the Duwamish River valley, the elimination of the vast majority of old growth forests in the Cascades and the Olympics, the unplanned suburban sprawl in the Seattle-Bellevue-Everett-Tacoma area, and the development of dead zones in Puget Sound. Initiative 933 asks a simple question: Do we want more of this environmental degradation or do we want to preserve environmental quality? If we want more degradation, then a "yes" vote is in order.

Once one person gains a waiver to develop his land, the rational neighbor next door will begin thinking, if him, why not me? So he may apply for a waiver to put up several homes on prime agricultural land. If this neighbor does, why not the next? The rational owner would be foolish not to. And it would make sense to be the first or second or third, rather than the fiftieth to seek a waiver, because the windfall between what is the "fair" market value and the value restricted by regulation diminishes as more land is exempted from regulation. The result is a cascading stampede to convert land from agriculture to housing.

4. How wide open are Initiative 933's property waivers and giveaways?

Oregon passed a similar, albeit less far-reaching and damaging, initiative in 2004. This Measure 37 provides a good baseline for estimating the impacts of I-933. However, Initiative 933 is far more far-reaching than Measure 37 in determining which property owners would qualify for waivers or compensation, years of applicability, allowance for enforcement of federal laws like the Clean Water Act and Endangered Species Act, and the inclusion of all private property. For example, Oregon property owners were given two years if they make claims against an existing law and one hundred and eighty days for claims against a new regulation. In Washington, the clock never runs out, giving land speculators and developers every opportunity to time their claims for big wins.⁶

⁵ For more discussion of this issue, see Stelle, William W., Jr., Partner, Preston, Gates, and Ellis, LLP, August 2, 2006, "I-933: The Property Fairness Initiative: A Preliminary Analysis of its Scope and Reach", especially section V.b. and section VI.

⁶ http://www.sightline.org/daily_score/archive/2006/05/25/measure-37-on-steroids

- Under I-933, Washington property owners can get waivers and jeopardize health and safety, so long as the threat is not “immediate.”⁷
- I-933 not only guarantees property owners that they'll be paid to obey the law (or have the law waived), it also saddles state and local agencies with costly and onerous paperwork, analysis, options, and review requirements.
- I-933 may allow claims against century-old laws.⁸
- I-933 is written so that it's possible for an out-of-state corporation to buy a regulated piece of property and then turn around and demand compensation for the regulation (or else have the regulation waived).
- I-933 doesn't make allowances for public nuisances and it may not allow communities to regulate the placement of porn shops, sex offender housing, or strip clubs.⁹

5. Building heights, billboards, flood plains, and land conservancy

Initiative 933 disables the ability of cities to place limitations on building heights, and enables property owners to claim payment for loss of use value caused by building restrictions put in place in the past decade. If Initiative 933 passes, the height and footprints of buildings in commercial, industrial, and multi-family zones will be determined by the individual choice of developers and property owners, regardless of the impact of these choices on neighboring properties. Similarly, under Initiative 933, city governments could become liable to pay tax dollars to billboard owners if the city restricts the size and placement of these billboards.¹⁰

Initiative 933 makes no exemption for property requirements and restrictions in flood plains. These requirements are necessary to maintain eligibility for federal flood insurance. Without these requirements, our cities and counties could be denied participation in the federal flood insurance program. Flood plain property owners would not be compensated for flood damages and federally-insured loans would not be available for properties in flood plains, greatly diminishing their value.¹¹ This omission opens up an avenue for litigation by the roughly 175,000 households in flood plains¹² against the state for a diminution of the value of their property due to the passage of Initiative 933, adding unanticipated administrative, litigation and compensation costs to the public taxpayers, costs which have not yet been considered or estimated.

The Cascade Land Conservancy is a unique partnership that has conserved 140,000 acres in the Central Puget Sound region in the past fifteen years, paying fair market value for land. The Conservancy is currently negotiating to protect over 200,000 additional acres. This effort will be turned upside down by Initiative 933, because the initiative will retroactively change land use rules, creating legal entanglements for decades, running up costs to taxpayers and property owners, and embedding uncertainty and inconsistency in how land is valued. I-933 undermines the fundamental rules that govern the sale of land and puts at peril future efforts for land conservancy in our state.¹³

6. How much would Initiative 933 cost Washington taxpayers?

The financial costs of Measure 37 enable us to estimate the minimum feasible costs of I-933. Since December 2004, 2970 claims for waivers or payment have been filed under Measure 37 with the state of Oregon, with a value of \$4 billion.¹⁴ These claimants account for eight hundredths of one percent of Oregon's population. The average claim size is \$1.6 million.

⁷ Initiative 933, Section 2.2.c, “Damaging the use or value” does not include restrictions that apply equally to all property subject to the agency's jurisdiction, including: (i) Restricting the use of property when necessary to prevent an **immediate** threat to human health and safety...”

⁸ See footnote 2 above.

⁹ http://www.sightline.org/daily_score/archive/2006/05/25/measure-37-on-steroids, “Although I-933 appears to make an exemption, limiting sex commerce (and of-fender housing) is allowed only if the restriction applies equally to all property across the community's entire jurisdiction. But sex commerce is precisely the sort of thing that's never regulated equally across a whole community.”

¹⁰ American Planning Association, Washington State Chapter, “ Initiative 933: Analysis, Consequences and Costs for Washington”

¹¹ Ibid.

¹² Washington State Department of Ecology, “Analysis of Initiative 933,” June 30, 2006, p. 19. Similar litigation would be understandable by property owners whose property is threatened by erosion and mudslides resulting from I-933 waivers of zoning and land-use restrictions.

¹³ See <http://www.cascadeland.org/conservation-program> and Letter from the Cascade Land Conservancy, October 2, 2006

¹⁴ http://www.pdx.edu/media/i/m/ims_m37pptAug06.pdf

This amounts to a transfer of value of \$1,090 from each and every citizen of Oregon, through the waiver system of Measure 37, to this small number of corporations and individuals. Because Initiative 933 is much more open-ended than Measure 37, we could assume a much greater transfer of value from the citizens to claimants for waivers or compensation.

I-933 is broadly-intentioned and poorly worded, with contradictory time-period applicability embedded in the language. The initiative sponsors do not make a cost estimate. However, the Office of Financial Management (OFM) for the State of Washington¹⁵ has conducted a study to estimate the public costs of Initiative 933, as has the Northwest Center for Livable Communities at the University of Washington,¹⁶ and the Association of Washington Cities.¹⁷

These cost estimates break down into two categories: mandated administrative costs and compensation costs.

- Administrative costs are significant because Initiative 933 requires state and local governments to document the potential impact of new ordinances, regulations, and rules, prior to their implementation, and to consider other alternatives as well. The Office of Financial Management estimates that this requirement by itself will cost the public between \$132 and \$163 million in six years.
- Initiative 933 also requires that the public pay for all costs of the claims process. This includes mandated analysis for those corporations and individuals filing for waivers or compensation, and the attorney costs of the claimants, even if their claims are found invalid. This adds up to between \$462 million and \$1.054 billion over six years.
- Finally, projected compensation costs will total between \$6.8 billion and \$7.8 billion over six years.

All in all, the annual bill to the public for Initiative 933 will run between \$1.2 billion and \$1.5 billion, just for the next six years.

Office of Financial Management Estimates	Cost to State	Cost to Counties	Cost to Cities	Total Costs
	(millions of dollars)			
Administration: low estimate	\$24	\$28	\$80	\$132
Administration: high estimate	\$24	\$36	\$103	\$163
Claims process: low estimate	\$115	\$13	\$130	\$258
Claims process: high estimate	\$115	\$66	\$556	\$737
Litigation: low estimate	\$41	\$36	\$126	\$203
Litigation: high estimate	\$110	\$46	\$161	\$317
Compensation: low estimate	\$1,890	\$1,400	\$3,500	\$6,790
Compensation: high estimate	\$1,900	\$1,400	\$4,500	\$7,800
Total: low estimate	\$2,070	\$1,477	\$3,836	\$7,383
Total: high estimate	\$2,149	\$1,548	\$5,320	\$9,017

It should be noted that OFM's estimate is a conservative estimate. It does not consider the cost for challenges to pre-1996 regulations, does not project costs for claims beyond 2012, and does not consider analysis and compensation for regulations and rules applying to other private property, such as automobiles and boats.

15 <http://www.ofm.wa.gov/initiatives/933.asp>

16 <http://www.i933study.washington.edu/>

17 <http://www.awcnet.org/portal/studionew.asp?Mode=b1&WebID=1&UID=&MenuActionTypeID=80&MenuActionParm=127&OriginPage=/portal/studionew.asp&EDate=&ChannelLinkID=6576>

Even this conservative estimate amounts to a transfer of value or actual cash of between \$1,158 and \$1,414 from every single person in the state of Washington to the forecasted 35,520 grievants filing for compensation over six years. All told, these grievants will make up one-half of one percent of the state's population.¹⁸

7. How does this compare to other public expenditures?

For the vast majority of the state's citizens, Initiative 933 is a lose-lose proposition. Waivers to current zoning and land use regulations will damage our quality of life, threaten our health and safety, and degrade our environment. Paying compensation to property-owners so that they abide by public regulations will run into the billions of dollars. And even if no compensation is paid out, the administrative costs of Initiative 933 will also run into the billions of dollars.

How would these expenditures compare with other public purposes?

- The Washington State Health Care Authority manages Basic Health (BHP) coverage for 100,000 Washington residents. Currently there are 593,000 people in our state who lack health insurance.¹⁹ Health coverage for these people (through the BHP in which the state splits the cost of coverage with each individual) would cost the public \$1.14 billion a year.²⁰
- Almost half of our tenth grade students have been stymied by the WASL tests.²¹ Their ability to pass these tests is essential for their progress into the workforce and higher education. The state has put together a crash program to enable 10th graders to learn the skills to pass the WASL and has invested \$26 million for this fiscal year in the program. This "Promoting Academic Success" (PAS) program will provide intensive instruction including: summer school; Saturday or extended day programs; skill seminars; test preparation seminars; and in-school or out-of-school tutoring.²² The program could easily be expanded four-fold (and will have to be to meet its goal) to a \$100 million annual program serving 75,000 ninth and tenth graders at a cost of \$1,300 each.
- Academic success is based in large part on a student's foundation for learning. But Washington state does not currently fund full-day kindergarten, thus impairing a child's ability to learn the essential intellectual and social skills needed to advance. An investment by the state in full-day kindergarten for all children would cost between \$180 million and \$200 million a year.²³
- State expenditures for natural resources total \$1.3 billion every two years. The budget and compensation complications of Initiative 933 would overwhelm this funding for environmental protection.²⁴
- The two-year budget for our community college system is \$2.1 billion. This is \$300 million to \$700 million less than the anticipated costs of Initiative 933 to taxpayers.
- The combined state-funded two-year budgets for Eastern Washington, Western Washington and Central Washington Universities, and Evergreen State College total \$793 million. These investments are dwarfed by the projected costs of Initiative 933.

18 Based upon OFM projections, <http://www.ofm.wa.gov/initiatives/933.asp>, p. 3 and on Oregon's experience with Initiative 37, in which slightly fewer than 3000 claims had been filed as of August 2006.

19 Washington State Office of Financial Management, 2006 Washington State Population Survey, Research Brief No. 39, October 2006, "The Uninsured Population in Washington State".

20 See <http://leap.leg.wa.gov/leap/budget/lbns/2006oh.pdf>

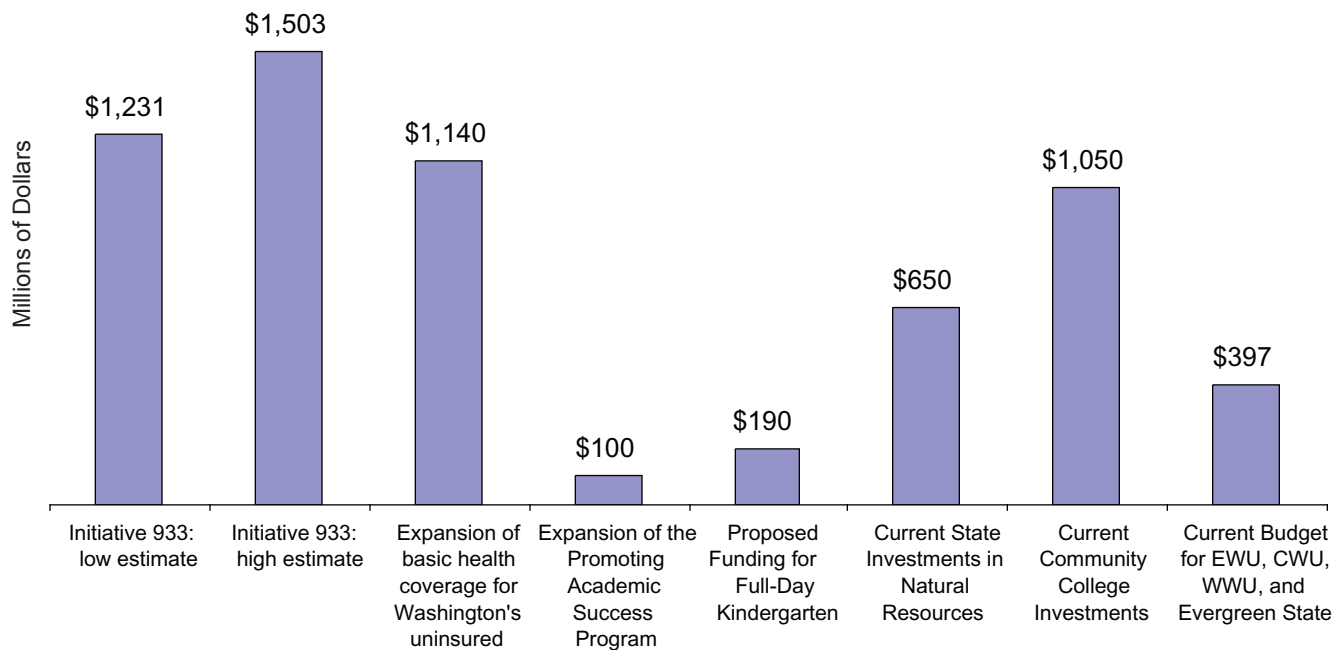
21 <http://reportcard.ospi.k12.wa.us/>

22 See <http://leap.leg.wa.gov/leap/budget/lbns/2006oh.pdf>

23 See House Bill 1919, <http://apps.leg.wa.gov/billinfo/Summary.aspx?bill=1919&year=2005>

24 <http://leap.leg.wa.gov/leap/Oversight/histotot.pdf>

Estimated Annual Initiative 933 Expenditures compared to Public Investments



These are some of the comparisons and real choices that will have to be made to balance the fiscal impacts on public agencies of Initiative 933. These choices become more harsh and draconian in recessions, when public revenues are depressed and public needs are heightened.

8. What about compliance with federal laws?

Initiative 933 ignores the duty of the state to comply with federal laws, such as the Clean Water Act and the Clean Air Act. Under these laws, the state regulates permits for sources of pollution and develops implementation plans for meeting federal standards. Under Initiative 933, if compensation for regulation is not financially feasible for city, county, and state governments, then these bodies would be unable to implement the protections of these laws. The federal Environmental Protection Agency would assume regulatory responsibilities and remove our state's authority to develop implementation plans in an iterative process with local property owners.²⁵

9. How real is the claimed difference between fair market value and the value of property restricted by environmental regulations?

The proponents of Initiative 933 like to claim that regulations diminish the market and use value of their property. In doing so, they ignore the value that may have accrued to their property because of regulations. Thanks to a comprehensive land-use system, the scarcity value of these properties has been enhanced.^{26 27}

Similarly, proponents have benefited from the agricultural designation of their lands in reduced taxation. If they are enabled to violate this designation and, for example, subdivide and convert their land from agricultural usage to housing, they will realize a windfall profit, thanks in part to the fact that their neighbors are abiding by the very same agricultural zoning designation and maintaining a pastoral environment.

²⁵ Washington Environmental Council and Futurewise, "Section by Section Summary of I-933 & Analysis of Effects", June 1, 2006

²⁶ See Sightline Institute, The Daily Score, 8/17/2006 http://www.sightline.org/daily_score/archive/2006/08/17/givings_protecting_land

²⁷ See Plantigna, Andrew J. "Measuring Compensation under Measure 37: An Economist's Perspective," Oregon State University, December 2004, and Martin, Sheila and Shriver, Katie, Institute of Portland Metropolitan Studies, Portland State University, "Documenting the Impact of Measure 37: Selected Case Studies", January 2006

Initiative 933 makes no attempt to address the negative impact that a waiver of usage would have on the value of private property adjacent to a property that has violated zoning standards. For example, if a junkyard is established within a residential zone (as is possible under I-933), this will undoubtedly depress the value of the homes and properties adjacent to the junkyard. The authors of Initiative 933 do not acknowledge this loss of value and have made no effort to enable the impacted home owners a method for mediation and/or recovery of their lost value.²⁸

10. Who is financing Initiative 933?

The largest contributor is an organization based in Chicago called “Americans for Limited Government”. Thus far, this organization has donated \$260,000 to the campaign in support of Initiative 933.²⁹ The chairman and major funder for Americans for Limited Government is Howard Rich, a New York real estate magnate. Among his main interests are to reduce the size and scope of government, and privatize Social Security.³⁰ Organizations associated with Rich have funneled nearly \$7 million into 2006 state initiatives aiming to limit government in 12 states.³¹ Rich’s support for Initiative 933 belies its effort to be accepted as a “homegrown” initiative.

Many farmers oppose Initiative 933, because they understand that the initiative’s pay-or-waive system will imperil their agricultural land and livelihoods as farmers. There are other farmers who support Initiative 933 and have contributed to its campaign. Ironically, several of these contributors are also beneficiaries of the federal farm subsidy program. Twenty of the farmers and farm corporations that have given \$250 or more to the Initiative 933 campaign have received over \$2.3 million from the federal government in the farm subsidy program.³² One contributor, Roger Miller of Colfax, received \$564,165.37 from 1995 through 2004 in federal crop subsidies.³³ These farmers don’t argue about government hand-outs when they come their way. But now they want to cash in these federal government subsidies to gain windfall compensation through Initiative 933.

Conclusion

Initiative 933 claims it will rectify inequities in determining property values and uses. However, it really is greed masquerading as justice. If passed, it will result in either multi-billion dollar giveaways to developers, businesses, and individuals from the taxpayers of Washington, or a dismantlement by waiver of the regulations and planning that have protected our quality of life and will continue to do so in the future. For our children and grandchildren, we cannot afford to pass an initiative which gives a select few corporations and people the added privilege of being paid to obey the law.

28 By enabling waivers for individual property owners, Initiative 933 triggers a devaluation of surrounding properties. Who compensates the surrounding land owners for this devaluation? One interpretation of Initiative 933 would be that the taxpayers, that is, public agencies, would be on the hook for compensatory costs, because the Initiative states that “(a)n agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation....” Granting a waiver to a grievant would result in damaging the use or value of surrounding private property. So before agreeing to the waiver, the state, county, or city would have to pay for the damage to this property of the non-grieving property owners. Obviously, this creates circular and expensive regulatory chaos, and exponentially increasing public financial burdens.

29 See the Washington State Public Disclosure Commission, <http://www.pdc.wa.gov>

30 http://www.stealthpacs.org/agent.cfm?agent_id=445

31 <http://www.pbs.org/now/shows/238/index.html>

32 See Environmental Working Group Farm Subsidy Database, <http://www.ewg.org/farm.region.php?fips=53000> as well as Washington State Public Disclosure Commission, <http://www.pdc.wa.gov>

33 Ibid.