

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 1915

To require certain Federal agencies to protect the right of private property owners.

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## IN THE SENATE OF THE UNITED STATES

MARCH 9 (legislative day, FEBRUARY 22), 1994

Mr. SHELBY (for himself, Mr. NICKLES, Mr. PRESSLER, Mr. GORTON, Mr. BURNS, Mr. MURKOWSKI, Mr. FAIRCLOTH, Mr. PACKWOOD, Mr. HATCH, Mr. HEFLIN, and Mr. LOTT) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To require certain Federal agencies to protect the right of private property owners.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

3        **SECTION 1. SHORT TITLE.**

4        This Act may be cited as the “Private Property  
5        Owners Bill of Rights”.

6        **SEC. 2. FINDINGS AND PURPOSE.**

7        (a) FINDINGS.—The Congress finds the following:

8                (1) Our democracy was founded on principles of  
9        ownership, use, and control of private property.

★(Star Print)

1 These principles are embodied in the fifth amend-  
2 ment to the Constitution prohibiting the taking of  
3 private property without the payment of just com-  
4 pensation.

5 (2) A number of Federal Environmental pro-  
6 grams, specifically the Endangered Species Act of  
7 1973 (16 U.S.C. 1531 et seq.) and section 404 of  
8 the Federal Water Pollution Control Act (33 U.S.C.  
9 1344) have been implemented by employees, agents,  
10 and representatives of the Federal Government in a  
11 manner that deprives private property owners of the  
12 use and control of their property.

13 (3) As new Federal programs are proposed that  
14 would limit and restrict the use of private property  
15 to provide habitat for plant and animal species, the  
16 rights of private property owners must be recognized  
17 and respected.

18 (4) Private property owners are being forced by  
19 Federal policy to resort to extensive, lengthy, and  
20 expensive litigation to protect certain basic civil  
21 rights guaranteed by the Constitution.

22 (5) Since many private property owners do not  
23 have the financial resources or the extensive commit-  
24 ment of time to proceed in litigation against the  
25 Federal Government, a clear Federal policy is need-

1 ed to guide and direct Federal agencies with respect  
2 to their implementation of environmental laws that  
3 directly impact private property.

4 (6) While all private property owners should  
5 and must abide by current nuisance laws and should  
6 not use their property in a manner that harms their  
7 neighbors, these laws have traditionally been en-  
8 acted, implemented, and enforced at the State and  
9 local level where they are best able to protect the  
10 rights of all private property owners and local  
11 citizens.

12 (7) While traditional pollution control laws are  
13 intended to protect the general public's health and  
14 physical welfare, current habitat protection pro-  
15 grams are intended to protect the welfare of plant  
16 and animal species, while allowing the recreational  
17 and esthetic opportunities for the public.

18 (b) PURPOSES.—It is the purpose of this Act to pro-  
19 vide a consistent Federal policy to encourage, support, and  
20 promote the private ownership of property and to ensure  
21 that the constitutional and legal rights of private property  
22 owners are protected by the Federal Government, its em-  
23 ployees, agents and representatives.

1 **SEC. 3. PROTECTION OF PRIVATE PROPERTY RIGHTS.**

2 (a) In implementing and enforcing the Acts, each  
3 agency head shall comply with applicable State and tribal  
4 government laws, including laws relating to private prop-  
5 erty rights and privacy; and shall administer and imple-  
6 ment the Acts in a manner that has the least impact on  
7 private property owners' constitutional and other legal  
8 rights.

9 (b) Each agency head shall develop and implement  
10 rules and regulations for ensuring that the constitutional  
11 and other legal rights of private property owners are pro-  
12 tected when the agency head makes, or participates with  
13 other agencies in the making of, any final decision that  
14 restricts the use of private property.

15 **SEC. 4. PROPERTY OWNER CONSENT FOR ENTRY.**

16 (a) An agency head may not enter privately-owned  
17 property to collect information regarding the property, un-  
18 less the private property owner has—

- 19 (1) consented in writing to that entry;
- 20 (2) after providing that consent, been provided  
21 notice of that entry; and
- 22 (3) been notified that any raw data collected  
23 from the property must be made available at no  
24 cost, if requested by the private property owner.

1 (b) Subsection (a) does not prohibit entry onto prop-  
2 erty for the purpose of obtaining consent or providing no-  
3 tice required under subsection (a).

4 **SEC. 5. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED**  
5 **FROM PRIVATE PROPERTY.**

6 An agency head may not use data that is collected  
7 on privately-owned property to implement or enforce any  
8 of the Acts, unless—

9 (1) the agency head has provided to the private  
10 property owner—

11 (A) access to the information;

12 (B) a detailed description of the manner in  
13 which the information was collected; and

14 (C) an opportunity to dispute the accuracy  
15 of the information; and

16 (2) the agency head has determined that the in-  
17 formation is accurate, if the private property owner  
18 disputes the information pursuant to subparagraph  
19 (C).

20 **SEC. 6. RIGHT TO AN ADMINISTRATIVE APPEAL OF WET-**  
21 **LANDS DECISIONS.**

22 Section 404 of the Federal Water Pollution Control  
23 Act (33 U.S.C. 1344) is amended by adding at the end  
24 the following new subsection:

25 “(u) ADMINISTRATIVE APPEALS.—

1           “(1) The Secretary or Administrator shall, after  
2 notice and opportunity for public comment, issue  
3 rules to establish procedures to allow private prop-  
4 erty owners or their authorized representatives an  
5 opportunity for an administrative appeal of the fol-  
6 lowing actions under this section:

7                   “(A) A determination of regulatory jurisdic-  
8 tion over a particular parcel of property.

9                   “(B) The denial of a permit.

10                  “(C) The terms and conditions of a permit.

11                  “(D) The imposition of an administrative  
12 penalty.

13                  “(E) The imposition of an order requiring  
14 the private property owner to restore or other-  
15 wise alter the property.

16           “(2) Rules issued under paragraph (1) shall  
17 provide that any administrative appeal of an action  
18 described in paragraph (1) shall be heard and de-  
19 cided by an official other than the official who took  
20 the action, and shall be conducted at a location  
21 which is in the vicinity of the property involved in  
22 the action.”.

1 **SEC. 7. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE**  
2 **ENDANGERED SPECIES ACT OF 1973.**

3 Section 11 of the Endangered Species Act of 1973  
4 (16 U.S.C. 1540) is amended by adding at the end the  
5 following new subsection:

6 “(i) ADMINISTRATIVE APPEALS.—

7 “(1) The Secretary shall, after notice and op-  
8 portunity for public comment, issue rules to estab-  
9 lish procedures to allow private property owners or  
10 their authorized representatives an opportunity for  
11 an administrative appeal of the following actions  
12 under this section:

13 “(A) A determination that a particular  
14 parcel of property is critical habitat of a listed  
15 species.

16 “(B) The denial of a permit for an inciden-  
17 tal take.

18 “(C) The terms and conditions of an inci-  
19 dental take permit.

20 “(D) The imposition of an administrative  
21 penalty.

22 “(E) The imposition of an order prohibit-  
23 ing or substantially limiting the use of the prop-  
24 erty.

25 “(2) Rules issued under paragraph (1) shall  
26 provide that any administrative appeal of an action

1 described in paragraph (1) shall be heard and de-  
 2 cided by an official other than the official who took  
 3 the action, and shall be conducted at a location  
 4 which is in the vicinity of the parcel of property in-  
 5 volved in the action.”.

6 **SEC. 8. COMPENSATION FOR TAKING OF PRIVATE PROP-**  
 7 **ERTY.**

8 (a) **ELIGIBILITY.**—A private property owner that, as  
 9 a consequence of a final qualified agency action of an  
 10 agency head, is deprived of 50 percent or more of the fair  
 11 market value, or the economically viable use, of the af-  
 12 fected portion of the property, as determined by a quali-  
 13 fied appraisal expert, is entitled to receive compensation  
 14 in accordance with this section.

15 (b) **DEADLINE.**—Within 90 days after receipt of a  
 16 final decision of an agency head that deprives a private  
 17 property owner of fair market value or viable use of prop-  
 18 erty for which compensation is required under subsection  
 19 (a), the private property owner may submit in writing a  
 20 request to the agency head for compensation in accordance  
 21 with subsection (c).

22 (c) **AGENCY HEAD’S OFFER.**—The agency head,  
 23 within 180 days after the receipt of a request for com-  
 24 pensation, shall stay the decision and shall provide to the  
 25 private property owner—



1           (1) an offer to purchase the affected property  
2           of the private property owner at a fair market value  
3           assuming no use restrictions under the Acts; and

4           (2) an offer to compensate the private property  
5           owner for the difference between the fair market  
6           value of the property without those restrictions and  
7           the fair market value of the property with those re-  
8           strictions.

9           (d) PRIVATE PROPERTY OWNER'S RESPONSE.—A  
10 private property owner shall have 60 days after the date  
11 of receipt of the agency head's offers under subsection (c)  
12 (1) and (2) to accept one of the offers or to reject both  
13 offers. If the private property owner rejects both offers,  
14 the private property owner may submit the matter for ar-  
15 bitration to an arbitrator appointed by the agency head  
16 from a list of arbitrators submitted to the agency head  
17 by the American Arbitration Association. The arbitration  
18 shall be conducted in accordance with the real estate valu-  
19 ation arbitration rules of that association. For purposes  
20 of this section, an arbitration is binding on the agency  
21 head and a private property owner as to the amount, if  
22 any, of compensation owed to the private property owner  
23 and whether for purposes of this section the private prop-  
24 erty owner has been deprived of fair market value or viable

1 use of property for which compensation is required under  
2 subsection (a).

3 (e) JUDGMENT.—A qualified agency action of an  
4 agency head that deprives a private property owner of  
5 property as described in subsection (a), is deemed, at the  
6 option of the private property owner to be a taking under  
7 the Constitution of the United States and a judgment  
8 against the United States if the private property owner—

9 (1) accepts the agency head’s offer under sub-  
10 section (c); or

11 (2) submits to arbitration under subsection (d).

12 (f) PAYMENT.—An agency head shall pay a private  
13 property owner any compensation required under the  
14 terms of an offer of the agency head that is accepted by  
15 the private property owner in accordance with subsection  
16 (d), or under a decision of an arbiter under that sub-  
17 section, by not later than 60 days after the date of the  
18 acceptance or the date of the issuance of the decision,  
19 respectively.

20 (g) FORM OF PAYMENT.—Payment under this sec-  
21 tion, as that form is agreed to by the agency head and  
22 the private property owner, may be in the form of—

23 (1) payment of an amount equal to the fair  
24 market value of the property on the day before the

1 date of the final qualified agency action with respect  
2 to which the property or interest is acquired;

3 (2) a payment of an amount equal to the reduc-  
4 tion in value; or

5 (3) conveyance of real property or an interest in  
6 real property having a fair market value equal to  
7 that amount.

8 (h) OTHER RIGHTS PRESERVED.—This section does  
9 not preempt, alter, or limit the availability of any remedy  
10 for the taking of property or an interest in property that  
11 is available under the Constitution or any other law.

12 (i) FINAL JUDGMENTS.—When a private property  
13 owner unsuccessfully seeks compensation under this sec-  
14 tion and thereafter files a claim for compensation under  
15 the fifth amendment to the Constitution and is successful  
16 in obtaining a final judgment ordering compensation from  
17 the claims court for that claim, the agency head making  
18 the final agency decision resulting in the taking shall reim-  
19 burse the judgment fund for the amount of the judgment  
20 against the United States from funds appropriated to the  
21 agency for the 2 fiscal years following payment.

22 **SEC. 9. DEFINITIONS.**

23 For the purpose of this Act the following definitions  
24 apply:

1           (1) “The Acts” means the Endangered Species  
2 Act of 1973 (16 U.S.C. 1531 et seq.) and the sec-  
3 tion 404 of the Federal Water Pollution Control Act  
4 (33 U.S.C. 1344).

5           (2) “Agency head” means the Secretary or Ad-  
6 ministrator with jurisdiction or authority to take a  
7 final agency action under the Endangered Species  
8 Act of 1973 (16 U.S.C. 1531 et seq.) or section 404  
9 of the Federal Water Pollution Control Act (33  
10 U.S.C. 1344).

11           (3) “Non-Federal person” means a person  
12 other than an officer, employee, agent, department,  
13 or instrumentality of—

14                   (A) the Federal Government; or

15                   (B) a foreign government.

16           (4) “Private property owner” means a non-Fed-  
17 eral person (other than an officer, employee, agent,  
18 department, or instrumentality of a State, munici-  
19 pality, or political subdivision of a State, or a State,  
20 municipality, or subdivision of a State) that—

21                   (A) owns property referred to in paragraph

22                   (5) (A) or (B); or

23                   (B) holds property referred to in para-  
24 graph (5)(C).

25           (5) “Property” means—

- 1 (A) land;  
2 (B) any interest in land; and  
3 (C) any proprietary water right.

4 (6) “Qualified agency action” means an agency  
5 action (as that term is defined in section 551(13) of  
6 title 5, United States Code) that is—

7 (A) under section 404 of the Federal  
8 Water Pollution Control Act (33 U.S.C. 1344);  
9 or

10 (B) under the Endangered Species Act of  
11 1973 (16 U.S.C. 1531 et seq.).

12 **SEC. 10. PRIVATE PROPERTY OWNER PARTICIPATION IN**  
13 **COOPERATIVE AGREEMENTS.**

14 Section 6 of the Endangered Species Act of 1973 (16  
15 U.S.C. 1535) is amended by adding at the end the follow-  
16 ing new subsection:

17 “(j) Notwithstanding any other provision of this sec-  
18 tion, when the Secretary enters into a management agree-  
19 ment under subsection (b) with any non-Federal person  
20 that establishes restrictions on the use of property, the  
21 Secretary shall notify all private property owners or les-  
22 sees of the property that is subject to the management  
23 agreement and shall provide an opportunity for each pri-  
24 vate property owner or lessee to participate in the manage-  
25 ment agreement.”.

