

104TH CONGRESS  
1ST SESSION

# S. 135

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

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IN THE SENATE OF THE UNITED STATES

JANUARY 4, 1995

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

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 “Property Rights Liti-  
5       gation Relief Act of 1995”.

6       **SEC. 2. FINDINGS.**

7       The Congress finds that—

8               (1) the private ownership of property is essen-  
9       tial to a free society and is an integral part of the

1 American tradition of liberty and limited govern-  
2 ment;

3 (2) the framers of the United States Constitu-  
4 tion, in order to protect private property and liberty,  
5 devised a framework of Government designed to dif-  
6 fuse power and limit Government;

7 (3) to further ensure the protection of private  
8 property, the fifth amendment to the United States  
9 Constitution was ratified to prevent the taking of  
10 private property by the Federal Government, except  
11 for public use and with just compensation;

12 (4) the purpose of the takings clause of the  
13 fifth amendment of the United States Constitution,  
14 as the Supreme Court stated in *Armstrong v. United*  
15 *States*, 364 U.S. 40, 49 (1960), is “to bar Govern-  
16 ment from forcing some people alone to bear public  
17 burdens, which in all fairness and justice, should be  
18 borne by the public as a whole”;

19 (5) the Federal Government, in its haste to  
20 ameliorate public harms and environmental abuse,  
21 has singled out property holders to shoulder the cost  
22 that should be borne by the public, in violation of  
23 the just compensation requirement of the takings  
24 clause of the fifth amendment of the United States  
25 Constitution;

1           (6) there is a need to both restrain the Federal  
2           Government in its overzealous regulation of the pri-  
3           vate sector and to protect private property, which is  
4           a fundamental right of the American people;

5           (7) the incremental, fact-specific approach that  
6           courts now are required to employ in the absence of  
7           adequate statutory language to vindicate property  
8           rights under the fifth amendment of the United  
9           States Constitution has been ineffective and costly  
10          and there is a need for Congress to clarify the law  
11          and provide an effective remedy;

12          (8) certain provisions of sections 1346 and  
13          1402 and chapter 91 of title 28, United States Code  
14          (commonly known as the Tucker Act), that delin-  
15          eates the jurisdiction of courts hearing property  
16          rights claims, complicates the ability of a property  
17          owner to vindicate a property owner's right to just  
18          compensation for a governmental action that has  
19          caused a physical or regulatory taking;

20          (9) current law—

21                (A) forces a property owner to elect be-  
22                tween equitable relief in the district court and  
23                monetary relief (the value of the property  
24                taken) in the United States Court of Federal  
25                Claims;

1 (B) is used to urge dismissal in the district  
2 court on the ground that the plaintiff should  
3 seek just compensation in the Court of Federal  
4 Claims; and

5 (C) is used to urge dismissal in the Court  
6 of Federal Claims on the ground that plaintiff  
7 should seek equitable relief in district court;

8 (10) property owners cannot fully vindicate  
9 property rights in one court;

10 (11) property owners should be able to fully re-  
11 cover for a taking of their private property in one  
12 court;

13 (12) certain provisions of section 1346 and  
14 1402 and chapter 91 of title 28, United States Code  
15 (commonly known as the Tucker Act) should be  
16 amended, giving both the district courts of the  
17 United States and the Court of Federal Claims ju-  
18 risdiction to hear all claims relating to property  
19 rights; and

20 (13) section 1500 of title 28, United States  
21 Code, which denies the Court of Federal Claims ju-  
22 risdiction to entertain a suit which is pending in an-  
23 other court and made by the same plaintiff, should  
24 be repealed.

1 **SEC. 3. PURPOSE.**

2 The purpose of this Act is to—

3 (1) encourage, support, and promote the private  
4 ownership of property by ensuring the constitutional  
5 and legal protection of private property by the Unit-  
6 ed States Government;

7 (2) establish a clear, uniform, and efficient ju-  
8 dicial process whereby aggrieved property owners  
9 can obtain vindication of property rights guaranteed  
10 by the fifth amendment to the United States Con-  
11 stitution and this Act;

12 (3) amend certain provisions of the Tucker Act,  
13 including the repeal of section 1500 of title 28,  
14 United States Code;

15 (4) rectify the constitutional imbalance between  
16 the Federal Government and the States; and

17 (5) require the Federal Government to com-  
18 pensate property owners for the deprivation of prop-  
19 erty rights that result from State agencies' enforce-  
20 ment of federally mandated programs.

21 **SEC. 4. DEFINITIONS.**

22 For purposes of this Act the term—

23 (1) “agency” means a department, agency,  
24 independent agency, or instrumentality of the United  
25 States, including any military department, Govern-  
26 ment corporation, Government-controlled corpora-

1       tion, or other establishment in the executive branch  
2       of the United States Government;

3           (2) “agency action” means any action or deci-  
4       sion taken by an agency that—

5           (A) takes a property right; or

6           (B) unreasonably impedes the use of prop-  
7       erty or the exercise of property interests or sig-  
8       nificantly interferes with investment-backed ex-  
9       pectations;

10          (3) “just compensation”—

11          (A) means compensation equal to the full  
12       extent of a property owner’s loss, including the  
13       fair market value of the private property taken  
14       and business losses arising from a taking,  
15       whether the taking is by physical occupation or  
16       through regulation, exaction, or other means;  
17       and

18          (B) shall include compounded interest cal-  
19       culated from the date of the taking until the  
20       date the United States tenders payment;

21          (4) “owner” means the owner or possessor of  
22       property or rights in property at the time the taking  
23       occurs, including when—

1 (A) the statute, regulation, rule, order,  
2 guideline, policy, or action is passed or promul-  
3 gated; or

4 (B) the permit, license, authorization, or  
5 governmental permission is denied or sus-  
6 pended;

7 (5) “private property” or “property” means all  
8 property protected under the fifth amendment to the  
9 Constitution of the United States, any applicable  
10 Federal or State law, or this Act, and includes—

11 (A) real property, whether vested or  
12 unvested, including—

13 (i) estates in fee, life estates, estates  
14 for years, or otherwise;

15 (ii) inchoate interests in real property  
16 such as remainders and future interests;

17 (iii) personalty that is affixed to or  
18 appurtenant to real property;

19 (iv) easements;

20 (v) leaseholds;

21 (vi) recorded liens; and

22 (vii) contracts or other security inter-  
23 ests in, or related to, real property;

1 (B) the right to use water or the right to  
2 receive water, including any recorded lines on  
3 such water right;

4 (C) rents, issues, and profits of land, in-  
5 cluding minerals, timber, fodder, crops, oil and  
6 gas, coal, or geothermal energy;

7 (D) property rights provided by, or memo-  
8 rialized in, a contract, except that such rights  
9 shall not be construed under this title to pre-  
10 vent the United States from prohibiting the for-  
11 mation of contracts deemed to harm the public  
12 welfare or to prevent the execution of contracts  
13 for—

14 (i) national security reasons; or

15 (ii) exigencies that present immediate  
16 or reasonably foreseeable threats or inju-  
17 ries to life or property;

18 (E) any interest defined as property under  
19 State law; or

20 (F) any interest understood to be property  
21 based on custom, usage, common law, or mutu-  
22 ally reinforcing understandings sufficiently well-  
23 grounded in law to back a claim of interest;

1           (6) “State agency” means any State depart-  
2           ment, agency, political subdivision, or instrumental-  
3           ity that—

4                   (A) carries out or enforces a regulatory  
5                   program required under Federal law;

6                   (B) is delegated administrative or sub-  
7                   stantive responsibility under a Federal regu-  
8                   latory program; or

9                   (C) receives Federal funds in connection  
10                  with a regulatory program established by a  
11                  State,

12           if the State enforcement of the regulatory program,  
13           or the receipt of Federal funds in connection with a  
14           regulatory program established by a state, is directly  
15           related to the taking of private property seeking to  
16           be vindicated under this Act; and

17           (7) “taking of private property”—

18                   (A) means any action whereby private  
19                   property is directly taken as to require com-  
20                   pensation under the fifth amendment to the  
21                   United States Constitution or under this Act,  
22                   including by physical invasion, regulation, exac-  
23                   tion, condition, or other means; and

24                   (B) shall not include—

- 1 (i) a condemnation action filed by the  
2 United States in an applicable court; or  
3 (ii) an action filed by the United  
4 States relating to criminal forfeiture.

5 **SEC. 5. COMPENSATION FOR TAKEN PROPERTY.**

6 (a) IN GENERAL.—No agency or State agency shall  
7 take private property except for public purpose and with  
8 just compensation to the property owner. A property  
9 owner shall receive just compensation if—

10 (1) as a consequence of a decision of any agen-  
11 cy, or State agency, private property (whether all or  
12 in part) has been physically invaded or taken for  
13 public use without the consent of the owner; and

14 (2)(A) such action does not substantially ad-  
15 vance the stated governmental interest to be  
16 achieved by the legislation or regulation on which  
17 the action is based;

18 (B) such action exacts the owner's constitu-  
19 tional or otherwise lawful right to use the property  
20 or a portion of such property as a condition for the  
21 granting of a permit, license, variance, or any other  
22 agency action without a rough proportionality be-  
23 tween the stated need for the required dedication  
24 and the impact of the proposed use of the property;

1 (C) such action results in the property owner  
2 being deprived, either temporarily or permanently, of  
3 all or substantially all economically beneficial or pro-  
4 ductive use of the property or that part of the prop-  
5 erty affected by the action without a showing that  
6 such deprivation inheres in the title itself;

7 (D) such action diminishes the fair market  
8 value of the affected portion of the property which  
9 is the subject of the action by the lesser of—

10 (i) 20 percent or more with respect to the  
11 value immediately prior to the governmental ac-  
12 tion; or

13 (ii) \$10,000, or more with respect to the  
14 value immediately prior to the governmental ac-  
15 tion; or

16 (E) under any other circumstance where a tak-  
17 ing has occurred within the meaning of the fifth  
18 amendment of the United States Constitution.

19 (b) BURDEN OF PROOF.—(1) The Government shall  
20 bear the burden of proof in any action described under—

21 (A) subsection (a)(2)(A), with regard to show-  
22 ing the nexus between the stated governmental pur-  
23 pose of the governmental interest and the impact on  
24 the proposed use of private property;

1 (B) subsection (a)(2)(B), with regard to show-  
2 ing the proportionality between the exaction and the  
3 impact of the proposed use of the property; and

4 (C) subsection (a)(2)(C), with regard to show-  
5 ing that such deprivation of value inheres in the title  
6 to the property.

7 (2) The property owner shall have the burden of  
8 proof in any action described under subsection (a)(2)(D),  
9 with regard to establishing the diminution of value of  
10 property.

11 (c) COMPENSATION AND NUISANCE EXCEPTION TO  
12 PAYMENT OF JUST COMPENSATION.—(1) No compensa-  
13 tion shall be required by this Act if the owner's use or  
14 proposed use of the property is a nuisance as commonly  
15 understood and defined by background principles of nui-  
16 sance and property law, as understood within the State  
17 in which the property is situated, and to bar an award  
18 of damages under this Act, the United States shall have  
19 the burden of proof to establish that the use or proposed  
20 use of the property is a nuisance.

21 (2) Subject to paragraph (1), if an agency action di-  
22 rectly takes property or a portion of property under sub-  
23 section (a), compensation to the owner of the property  
24 that is affected by the action shall be either the greater  
25 of an amount equal to—

1 (A) the difference between—

2 (i) the fair market value of the property or  
3 portion of the property affected by agency ac-  
4 tion before such property became the subject of  
5 the specific government regulation; and

6 (ii) the fair market value of the property  
7 or portion of the property when such property  
8 becomes subject to the agency action; or

9 (B) business losses.

10 (d) TRANSFER OF PROPERTY INTEREST.—The  
11 United States shall take title to the property interest for  
12 which the United States pays a claim under this Act.

13 (e) SOURCE OF COMPENSATION.—The compensation  
14 referred to in this section shall be paid out of funds made  
15 available to the Federal agency or department by appro-  
16 priation for the fiscal year in which the property depriva-  
17 tion referred to in this section occurred. If no such funds  
18 have been made available to the agency, such payment  
19 shall be made from the Judgment Fund.

20 **SEC. 6. JURISDICTION AND JUDICIAL REVIEW.**

21 (a) IN GENERAL.—A property owner may file a civil  
22 action under this Act to challenge the validity of any agen-  
23 cy action that adversely affects the owner's interest in pri-  
24 vate property in either the United States District Court  
25 or the United States Court of Federal Claims. This section

1 constitutes express waiver of the sovereign immunity of  
2 the United States. Notwithstanding any other provision of  
3 law and notwithstanding the issues involved, the relief  
4 sought, or the amount in controversy, each court shall  
5 have concurrent jurisdiction over both claims for monetary  
6 relief and claims seeking invalidation of any Act of Con-  
7 gress or any regulation of an agency as defined under this  
8 Act affecting private property rights. The plaintiff shall  
9 have the election of the court in which to file a claim for  
10 relief.

11 (b) STANDING.—Persons adversely affected by an  
12 agency action taken under this Act shall have standing  
13 to challenge and seek judicial review of that action.

14 (c) AMENDMENTS TO TITLE 28, UNITED STATES  
15 CODE.—(1) Section 1491(a) of title 28, United States  
16 Code, is amended—

17 (A) in paragraph (1) by amending the first sen-  
18 tence to read as follows: “The United States Court  
19 of Federal Claims shall have jurisdiction to render  
20 judgment upon any claim against the United States  
21 for monetary relief founded either upon the Con-  
22 stitution or any Act of Congress or any regulation  
23 of an executive department, or upon any expressed  
24 or implied contract with the United States, in cases  
25 not sounding in tort, or for invalidation of any Act

1 of Congress or any regulation of an executive de-  
2 partment that adversely affects private property  
3 rights in violation of the fifth amendment of the  
4 United States Constitution”;

5 (B) in paragraph (2) by inserting before the  
6 first sentence the following: “In any case within its  
7 jurisdiction, the Court of Federal Claims shall have  
8 the power to grant injunctive and declaratory relief  
9 when appropriate.”; and

10 (C) by adding at the end thereof the following  
11 new paragraphs:

12 “(4) In cases otherwise within its jurisdiction,  
13 the Court of Federal Claims shall also have ancillary  
14 jurisdiction, concurrent with the courts designated in  
15 section 1346(b) of this title, to render judgment  
16 upon any related tort claim authorized under section  
17 2674 of this title.

18 “(5) In proceedings within the jurisdiction of  
19 the Court of Federal Claims which constitute judi-  
20 cial review of agency action (rather than de novo  
21 proceedings), the provisions of section 706 of title 5  
22 shall apply.”.

23 (2)(A) Section 1500 of title 28, United States Code,  
24 is repealed.

1 (B) The table of sections for chapter 91 of title 28,  
2 United States Code, is amended by striking out the item  
3 relating to section 1500.

4 **SEC. 7. STATUTE OF LIMITATIONS.**

5 The statute of limitations for actions brought under  
6 this title shall be 6 years from the date of the taking of  
7 property.

8 **SEC. 8. ATTORNEYS' FEES AND COSTS.**

9 The court, in issuing any final order in any action  
10 brought under this Act, shall award costs of litigation (in-  
11 cluding reasonable attorney and expert witness fees) to  
12 any prevailing plaintiff.

13 **SEC. 9. ALTERNATIVE DISPUTE RESOLUTION.**

14 (a) IN GENERAL.—Either party to a dispute over a  
15 taking of property as defined under this Act or litigation  
16 commenced under this Act may elect to resolve the dispute  
17 through settlement or arbitration. In the administration  
18 of this section—

19 (1) such alternative dispute resolution may only  
20 be effectuated by the consent of all parties;

21 (2) arbitration procedures shall be in accord-  
22 ance with the alternative dispute resolution proce-  
23 dures established by the American Arbitration Asso-  
24 ciation; and

1           (3) in no event shall arbitration be a condition  
2       precedent or an administrative procedure to be ex-  
3       hausted before the filing of a civil action under this  
4       Act.

5       (b) COMPENSATION AS A RESULT OF NEGOTIATED  
6       SETTLEMENTS OR ARBITRATION.—The funds used for  
7       compensation to the owner (as determined by the appro-  
8       priate official of the Federal agency or department) shall  
9       be taken from the responsible agency's budget for that fis-  
10      cal year or transferred to the agency from the Judgment  
11      Fund for payment to the owner.

12      (c) REVIEW OF ARBITRATION.—Appeal from arbitra-  
13      tion decisions shall be to the United States District Court  
14      or the United States Court of Federal Claims in the man-  
15      ner prescribed by law for the claim under this Act.

16      (d) PAYMENT OF CERTAIN COMPENSATION.—In any  
17      appeal under subsection (c) in which the court does not  
18      rule for the Federal agency or department, the amount  
19      of the award of compensation determined by the arbitrator  
20      shall be paid from funds made available to the Federal  
21      agency or department by appropriation in lieu of being  
22      paid from the Judgment Fund, except that if no such  
23      funds have been made available to the agency or depart-  
24      ment such payment shall be made from the Judgment  
25      Fund.

1 **SEC. 10. RULES OF CONSTRUCTION.**

2 Nothing in this Act shall be construed to interfere  
3 with the authority of any State to create additional prop-  
4 erty rights.

5 **SEC. 11. SEVERABILITY.**

6 If any provision of this Act, an amendment made by  
7 this Act, or the application of such provision or amend-  
8 ment to any person or circumstance is held to be unconsti-  
9 tutional, the remainder of this Act, the amendments made  
10 by this Act, and the application of the provisions of such  
11 to any person or circumstance shall not be affected there-  
12 by.

13 **SEC. 12. EFFECTIVE DATE.**

14 The provisions of this Act and amendments made by  
15 this Act shall take effect on January 1, 1995 and shall  
16 apply to any agency action that occurs on or after such  
17 date.

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