

104TH CONGRESS
1ST SESSION

S. 605

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

IN THE SENATE OF THE UNITED STATES

MARCH 23, 1995

Mr. DOLE (for himself, Mr. HATCH, Mr. HEFLIN, Mr. LOTT, Mr. GRAMM, Mr. BROWN, Mr. CRAIG, Mr. SHELBY, Mr. NICKLES, Mr. KYL, Mr. ABRAHAM, Mr. THURMOND, Mr. INHOFE, Mr. PACKWOOD, Mr. WARNER, Mr. COATS, Mr. BURNS, Mr. THOMAS, Mr. PRESSLER, Mrs. HUTCHISON, Mr. HATFIELD, Mr. GRAMS, Mr. FRIST, Mr. McCONNELL, Mr. ASHCROFT, Mr. MACK, Mr. MURKOWSKI, Mr. BENNETT, Mr. KEMPTHORNE, Mr. GRASSLEY, Mr. BOND, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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 “Omnibus Property
5 Rights Act of 1995”.

1 **TITLE I—FINDINGS AND PURPOSES**

2 **SEC. 101. FINDINGS.**

3 The Congress finds that—

4 (1) the private ownership of property is essen-
5 tial to a free society and is an integral part of the
6 American tradition of liberty and limited govern-
7 ment;

8 (2) the framers of the United States Constitu-
9 tion, in order to protect private property and liberty,
10 devised a framework of Government designed to dif-
11 fuse power and limit Government;

12 (3) to further ensure the protection of private
13 property, the fifth amendment to the United States
14 Constitution was ratified to prevent the taking of
15 private property by the Federal Government, except
16 for public use and with just compensation;

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

24 (5) the Federal Government has singled out
25 property holders to shoulder the cost that should be

1 borne by the public, in violation of the just com-
2 pensation requirement of the takings clause of the
3 fifth amendment of the United States Constitution;

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

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

15 **SEC. 102. PURPOSE.**

16 The purpose of this Act is to encourage, support, and
17 promote the private ownership of property by ensuring the
18 constitutional and legal protection of private property by
19 the United States Government by—

20 (1) the establishment of a new Federal judicial
21 claim in which to vindicate and protect property
22 rights;

23 (2) the simplification and clarification of court
24 jurisdiction over property right claims;

1 (3) the establishment of an administrative pro-
2 cedure that requires the Federal Government to as-
3 sess the impact of government action on holders of
4 private property;

5 (4) the minimization, to the greatest extent pos-
6 sible, of the taking of private property by the Fed-
7 eral Government and to ensure that just compensa-
8 tion is paid by the Government for any taking; and

9 (5) the establishment of administrative com-
10 pensation procedures involving the enforcement of
11 the Endangered Species Act of 1973 and section
12 404 of the Federal Water Pollution Control Act.

13 **TITLE II—PROPERTY RIGHTS LITIGATION**
14 **RELIEF**

15 **SEC. 201. FINDINGS.**

16 The Congress finds that—

17 (1) property rights have been abrogated by the
18 application of laws, regulations, and other actions by
19 the Federal Government that adversely affect the
20 value of private property;

21 (2) certain provisions of sections 1346 and
22 1402 and chapter 91 of title 28, United States Code
23 (commonly known as the Tucker Act), that delineate
24 the jurisdiction of courts hearing property rights
25 claims, complicates the ability of a property owner to

1 vindicate a property owner's right to just compensa-
2 tion for a governmental action that has caused a
3 physical or regulatory taking;

4 (3) current law—

5 (A) forces a property owner to elect be-
6 tween equitable relief in the district court and
7 monetary relief (the value of the property
8 taken) in the United States Court of Federal
9 Claims;

10 (B) is used to urge dismissal in the district
11 court on the ground that the plaintiff should
12 seek just compensation in the Court of Federal
13 Claims; and

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

17 (4) property owners cannot fully vindicate prop-
18 erty rights in one court;

19 (5) property owners should be able to fully re-
20 cover for a taking of their private property in one
21 court;

22 (6) certain provisions of section 1346 and 1402
23 and chapter 91 of title 28, United States Code (com-
24 monly known as the Tucker Act) should be amend-
25 ed, giving both the district courts of the United

1 States and the Court of Federal Claims jurisdiction
2 to hear all claims relating to property rights; and

3 (7) section 1500 of title 28, United States
4 Code, which denies the Court of Federal Claims ju-
5 risdiction to entertain a suit which is pending in an-
6 other court and made by the same plaintiff, should
7 be repealed.

8 **SEC. 202. PURPOSES.**

9 The purposes of this title are to—

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

15 (2) amend the Tucker Act, including the repeal
16 of section 1500 of title 28, United States Code;

17 (3) rectify the constitutional imbalance between
18 the Federal Government and the States; and

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

23 **SEC. 203. DEFINITIONS.**

24 For purposes of this title the term—

1 (1) “agency” means a department, agency,
2 independent agency, or instrumentality of the United
3 States, including any military department, Govern-
4 ment corporation, Government-controlled corpora-
5 tion, or other establishment in the executive branch
6 of the United States Government;

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

9 (A) takes a property right; or

10 (B) unreasonably impedes the use of prop-
11 erty or the exercise of property interests;

12 (3) “just compensation”—

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

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

23 (4) “owner” means the owner or possessor of
24 property or rights in property at the time the taking
25 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 di-
15 rectly related to the taking of private property seek-
16 ing to be vindicated under this Act; and

17 (7) “taking of private property”, “taking”, or
18 “take”—

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

25 (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. 204. COMPENSATION FOR TAKEN PROPERTY.**

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

10 (1) as a consequence of an action 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 33 percent or more
10 with respect to the value immediately prior to the
11 governmental action; or

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

15 (b) NO CLAIM AGAINST STATE OR STATE INSTRU-
16 MENTALITY.—No action may be filed under this section
17 against a State agency for carrying out the functions de-
18 scribed under section 203(6).

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

13 (f) SOURCE OF COMPENSATION.—Awards of com-
14 pensation referred to in this section, whether by judgment,
15 settlement, or administrative action, shall be promptly
16 paid by the agency out of currently available appropria-
17 tions supporting the activities giving rise to the claims for
18 compensation. If insufficient funds are available to the
19 agency in the fiscal year in which the award becomes final,
20 the agency shall either pay the award from appropriations
21 available in the next fiscal year or promptly seek addi-
22 tional appropriations for such purpose.

23 **SEC. 205. JURISDICTION AND JUDICIAL REVIEW.**

24 (a) IN GENERAL.—A property owner may file a civil
25 action under this Act to challenge the validity of any agen-

1 cy action that adversely affects the owner's interest in pri-
2 vate property in either the United States District Court
3 or the United States Court of Federal Claims. This section
4 constitutes express waiver of the sovereign immunity of
5 the United States. Notwithstanding any other provision of
6 law and notwithstanding the issues involved, the relief
7 sought, or the amount in controversy, each court shall
8 have concurrent jurisdiction over both claims for monetary
9 relief and claims seeking invalidation of any Act of Con-
10 gress or any regulation of an agency as defined under this
11 Act affecting private property rights. The plaintiff shall
12 have the election of the court in which to file a claim for
13 relief.

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

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

20 (A) in paragraph (1) by amending the first sen-
21 tence to read as follows: “The United States Court
22 of Federal Claims shall have jurisdiction to render
23 judgment upon any claim against the United States
24 for monetary relief founded either upon the Con-
25 stitution or any Act of Congress or any regulation

1 of an executive department, or upon any express or
2 implied contract with the United States, in cases not
3 sounding in tort, or for invalidation of any Act of
4 Congress or any regulation of an executive depart-
5 ment that adversely affects private property rights
6 in violation of the fifth amendment of the United
7 States Constitution”;

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

13 (C) by adding at the end thereof the following
14 new paragraphs:

15 “(4) In cases otherwise within its jurisdiction,
16 the Court of Federal Claims shall also have ancillary
17 jurisdiction, concurrent with the courts designated in
18 section 1346(b) of this title, to render judgment
19 upon any related tort claim authorized under section
20 2674 of this title.

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

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

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

6 **SEC. 206. STATUTE OF LIMITATIONS.**

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

10 **SEC. 207. ATTORNEYS' FEES AND COSTS.**

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

15 **SEC. 208. RULES OF CONSTRUCTION.**

16 Nothing in this title shall be construed to interfere
17 with the authority of any State to create additional prop-
18 erty rights.

19 **SEC. 209. EFFECTIVE DATE.**

20 The provisions of this title and amendments made by
21 this title shall take effect on the date of the enactment
22 of this Act and shall apply to any agency action that oc-
23 curs after such date.

1 **TITLE III—ALTERNATIVE DISPUTE**
2 **RESOLUTION**

3 **SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.**

4 (a) IN GENERAL.—Either party to a dispute over a
5 taking of private property as defined under this Act or
6 litigation commenced under title II of this Act may elect
7 to resolve the dispute through settlement or arbitration.
8 In the administration of this section—

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

11 (2) arbitration procedures shall be in accord-
12 ance with the alternative dispute resolution proce-
13 dures established by the American Arbitration Asso-
14 ciation; and

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

19 (b) COMPENSATION AS A RESULT OF ARBITRA-
20 TION.—The amount of arbitration awards shall be paid
21 from the responsible agency's currently available appro-
22 priations supporting the agency's activities giving rise to
23 the claim for compensation. If insufficient funds are avail-
24 able to the agency in the fiscal year in which the award
25 becomes final, the agency shall either pay the award from

1 appropriations available in the next fiscal year or promptly
2 seek additional appropriations for such purpose.

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

7 (d) PAYMENT OF CERTAIN COMPENSATION.—In any
8 appeal under subsection (c), the amount of the award of
9 compensation shall be promptly paid by the agency from
10 appropriations supporting the activities giving rise to the
11 claim for compensation currently available at the time of
12 final action on the appeal. If insufficient funds are avail-
13 able to the agency in the fiscal year in which the award
14 becomes final, the agency shall either pay the award from
15 appropriations available in the next fiscal year or promptly
16 seek additional appropriations for such purpose.

17 **TITLE IV—PRIVATE PROPERTY TAKING**
18 **IMPACT ANALYSIS**

19 **SEC. 401. FINDINGS AND PURPOSE.**

20 The Congress finds that—

- 21 (1) the Federal Government should protect the
22 health, safety, welfare, and rights of the public; and
23 (2) to the extent practicable, avoid takings of
24 private property by assessing the effect of govern-
25 ment action on private property rights.

1 **SEC. 402. DEFINITIONS.**

2 For purposes of this title the term—

3 (1) “agency” means an agency as defined under
4 section 203 of this Act, but shall not include the
5 General Accounting Office;

6 (2) “rule” has the same meaning as such term
7 is defined under section 551(4) of title 5, United
8 States Code; and

9 (3) “taking of private property” has the same
10 meaning as such term is defined under section 203
11 of this Act.

12 **SEC. 403. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.**

13 (a) IN GENERAL.—(1) The Congress authorizes and
14 directs that, to the fullest extent possible—

15 (A) the policies, regulations, and public laws of
16 the United States shall be interpreted and adminis-
17 tered in accordance with the policies under this title;
18 and

19 (B) subject to paragraph (2), all agencies of the
20 Federal Government shall complete a private prop-
21 erty taking impact analysis before issuing or promul-
22 gating any policy, regulation, proposed legislation, or
23 related agency action which is likely to result in a
24 taking of private property.

25 (2) The provisions of paragraph (1)(B) shall not
26 apply to—

1 (A) an action in which the power of eminent do-
2 main is formally exercised;

3 (B) an action taken—

4 (i) with respect to property held in trust by
5 the United States; or

6 (ii) in preparation for, or in connection
7 with, treaty negotiations with foreign nations;

8 (C) a law enforcement action, including seizure,
9 for a violation of law, of property for forfeiture or
10 as evidence in a criminal proceeding;

11 (D) a study or similar effort or planning activ-
12 ity;

13 (E) a communication between an agency and a
14 State or local land-use planning agency concerning
15 a planned or proposed State or local activity that
16 regulates private property, regardless of whether the
17 communication is initiated by an agency or is under-
18 taken in response to an invitation by the State or
19 local authority;

20 (F) the placement of a military facility or a
21 military activity involving the use of solely Federal
22 property;

23 (G) any military or foreign affairs function (in-
24 cluding a procurement function under a military or

1 foreign affairs function), but not including the civil
2 works program of the Army Corps of Engineers; and

3 (H) any case in which there is an immediate
4 threat to health or safety that constitutes an emer-
5 gency requiring immediate response or the issuance
6 of a regulation under section 553(b)(B) of title 5,
7 United States Code, if the taking impact analysis is
8 completed after the emergency action is carried out
9 or the regulation is published.

10 (3) A private property taking impact analysis shall
11 be a written statement that includes—

12 (A) the specific purpose of the policy, regula-
13 tion, proposal, recommendation, or related agency
14 action;

15 (B) an assessment of the likelihood that a tak-
16 ing of private property will occur under such policy,
17 regulation, proposal, recommendation, or related
18 agency action;

19 (C) an evaluation of whether such policy, regu-
20 lation, proposal, recommendation, or related agency
21 action is likely to require compensation to private
22 property owners;

23 (D) alternatives to the policy, regulation, pro-
24 posal, recommendation, or related agency action that
25 would achieve the intended purposes of the agency

1 action and lessen the likelihood that a taking of pri-
2 vate property will occur; and

3 (E) an estimate of the potential liability of the
4 Federal Government if the Government is required
5 to compensate a private property owner.

6 (4) Each agency shall provide an analysis required
7 under this section as part of any submission otherwise re-
8 quired to be made to the Office of Management and Budg-
9 et in conjunction with a proposed regulation.

10 (b) GUIDANCE AND REPORTING REQUIREMENTS.—

11 (1) The Attorney General of the United States
12 shall provide legal guidance in a timely manner, in
13 response to a request by an agency, to assist the
14 agency in complying with this section.

15 (2) No later than 1 year after the date of en-
16 actment of this Act and at the end of each 1-year
17 period thereafter, each agency shall submit a report
18 to the Director of the Office of Management and
19 Budget and the Attorney General of the United
20 States identifying each agency action that has re-
21 sulted in the preparation of a taking impact analy-
22 sis, the filing of a taking claim, or an award of com-
23 pensation under the just compensation clause of the
24 fifth amendment of the United States Constitution.
25 The Director of the Office of Management and

1 Budget and the Attorney General of the United
2 States shall publish in the Federal Register, on an
3 annual basis, a compilation of the reports of all
4 agencies submitted under this paragraph.

5 (c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency
6 shall—

7 (1) make each private property taking impact
8 analysis available to the public; and

9 (2) to the greatest extent practicable, transmit
10 a copy of such analysis to the owner or any other
11 person with a property right or interest in the af-
12 fected property.

13 (d) PRESUMPTIONS IN PROCEEDINGS.—For the pur-
14 pose of any agency action or administrative or judicial pro-
15 ceeding, there shall be a rebuttable presumption that the
16 costs, values, and estimates in any private property
17 takings impact analysis shall be outdated and inaccurate,
18 if—

19 (1) such analysis was completed 5 years or
20 more before the date of such action or proceeding;
21 and

22 (2) such costs, values, or estimates have not
23 been modified within the 5-year period preceding the
24 date of such action or proceeding.

1 **SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLI-**
2 **ANCE.**

3 (a) IN GENERAL.—No final rule shall be promulgated
4 if enforcement of the rule could reasonably be construed
5 to require an uncompensated taking of private property
6 as defined by this Act.

7 (b) COMPLIANCE.—In order to meet the purposes of
8 this Act as expressed in section 401 of this title, all agen-
9 cies shall—

10 (1) review, and where appropriate, re-promul-
11 gate all regulations that result in takings of private
12 property under this Act, and reduce such takings of
13 private property to the maximum extent possible
14 within existing statutory requirements;

15 (2) prepare and submit their budget requests
16 consistent with the purposes of this Act as expressed
17 in section 401 of this title for fiscal year 1997 and
18 all fiscal years thereafter; and

19 (3) within 120 days of the effective date of this
20 section, submit to the appropriate authorizing and
21 appropriating committees of the Congress a detailed
22 list of statutory changes that are necessary to meet
23 fully the purposes of section 401 of this title, along
24 with a statement prioritizing such amendments and
25 an explanation of the agency's reasons for such
26 prioritization.

1 **SEC. 405. RULES OF CONSTRUCTION.**

2 Nothing in this title shall be construed to—

3 (1) limit any right or remedy, constitute a con-
4 dition precedent or a requirement to exhaust admin-
5 istrative remedies, or bar any claim of any person
6 relating to such person's property under any other
7 law, including claims made under this Act, section
8 1346 or 1402 of title 28, United States Code, or
9 chapter 91 of title 28, United States Code; or

10 (2) constitute a conclusive determination of—

11 (A) the value of any property for purposes
12 of an appraisal for the acquisition of property,
13 or for the determination of damages; or

14 (B) any other material issue.

15 **SEC. 406. STATUTE OF LIMITATIONS.**

16 No action may be filed in a court of the United States
17 to enforce the provisions of this title on or after the date
18 occurring 6 years after the date of the submission of the
19 applicable private property taking impact analysis to the
20 Office of Management and Budget.

21 **TITLE V—PRIVATE PROPERTY OWNERS**
22 **ADMINISTRATIVE BILL OF RIGHTS**

23 **SEC. 501. FINDINGS AND PURPOSE.**

24 (a) FINDINGS.—The Congress finds that—

25 (1) a number of Federal environmental pro-
26 grams, specifically programs administered under the

1 Endangered Species Act of 1973 (16 U.S.C. 1531 et
2 seq.) and section 404 of the Federal Water Pollution
3 Control Act (33 U.S.C. 1344), have been imple-
4 mented by employees, agents, and representatives of
5 the Federal Government in a manner that deprives
6 private property owners of the use and control of
7 property;

8 (2) as Federal programs are proposed that
9 would limit and restrict the use of private property
10 to provide habitat for plant and animal species, the
11 rights of private property owners must be recognized
12 and respected;

13 (3) private property owners are being forced by
14 Federal policy to resort to extensive, lengthy, and
15 expensive litigation to protect certain basic civil
16 rights guaranteed by the United States Constitution;

17 (4) many private property owners do not have
18 the financial resources or the extensive commitment
19 of time to proceed in litigation against the Federal
20 Government;

21 (5) a clear Federal policy is needed to guide
22 and direct Federal agencies with respect to the im-
23 plementation of environmental laws that directly im-
24 pact private property;

1 (6) all private property owners should and are
2 required to comply with current nuisance laws and
3 should not use property in a manner that harms
4 their neighbors;

5 (7) nuisance laws have traditionally been en-
6 acted, implemented, and enforced at the State and
7 local level where such laws are best able to protect
8 the rights of all private property owners and local
9 citizens; and

10 (8) traditional pollution control laws are in-
11 tended to protect the general public's health and
12 physical welfare, and current habitat protection pro-
13 grams are intended to protect the welfare of plant
14 and animal species.

15 (b) PURPOSES.—The purposes of this title are to—

16 (1) provide a consistent Federal policy to en-
17 courage, support, and promote the private ownership
18 of property; and

19 (2) to establish an administrative process and
20 remedy to ensure that the constitutional and legal
21 rights of private property owners are protected by
22 the Federal Government and Federal employees,
23 agents, and representatives.

24 **SEC. 502. DEFINITIONS.**

25 For purposes of this title the term—

1 (1) “the Acts” means the Endangered Species
2 Act of 1973 (16 U.S.C. 1531 et seq.) and section
3 404 of the Federal Water Pollution Control Act (33
4 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 other
12 than an officer, employee, agent, department, or in-
13 strumentality 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, acting in
20 an official capacity or a State, municipality, or sub-
21 division of a State) that—

22 (A) owns property referred to under para-
23 graph (5) (A) or (B); or

24 (B) holds property referred to under para-
25 graph (5)(C);

1 (5) “property” means—

2 (A) land;

3 (B) any interest in land; and

4 (C) the right to use or the right to receive
5 water; and

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

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

12 (B) under the Endangered Species Act of
13 1973 (16 U.S.C. 1531 et seq.).

14 **SEC. 503. PROTECTION OF PRIVATE PROPERTY RIGHTS.**

15 (a) IN GENERAL.—In implementing and enforcing
16 the Acts, each agency head shall—

17 (1) comply with applicable State and tribal gov-
18 ernment laws, including laws relating to private
19 property rights and privacy; and

20 (2) administer and implement the Acts in a
21 manner that has the least impact on private prop-
22 erty owners’ constitutional and other legal rights.

23 (b) FINAL DECISIONS.—Each agency head shall de-
24 velop and implement rules and regulations for ensuring
25 that the constitutional and other legal rights of private

1 property owners are protected when the agency head
2 makes, or participates with other agencies in the making
3 of, any final decision that restricts the use of private prop-
4 erty in administering and implementing this Act.

5 **SEC. 504. PROPERTY OWNER CONSENT FOR ENTRY.**

6 (a) IN GENERAL.—An agency head may not enter
7 privately owned property to collect information regarding
8 the property, unless the private property owner has—

9 (1) consented in writing to that entry;

10 (2) after providing that consent, been provided
11 notice of that entry; and

12 (3) been notified that any raw data collected
13 from the property shall be made available at no cost,
14 if requested by the private property owner.

15 (b) NONAPPLICATION.—Subsection (a) does not pro-
16 hibit entry onto property for the purpose of obtaining con-
17 sent or providing notice required under subsection (a).

18 **SEC. 505. RIGHT TO REVIEW AND DISPUTE DATA COL-**
19 **LECTED FROM PRIVATE PROPERTY.**

20 An agency head may not use data that is collected
21 on privately owned property to implement or enforce the
22 Acts, unless—

23 (1) the agency head has provided to the private
24 property owner—

25 (A) access to the information;

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

3 (C) an opportunity to dispute the accuracy
 4 of the information; and

5 (2) the agency head has determined that the in-
 6 formation is accurate, if the private property owner
 7 disputes the accuracy of the information under para-
 8 graph (1)(C).

9 **SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WET-**
 10 **LANDS DECISIONS.**

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

14 “(u) ADMINISTRATIVE APPEALS.—

15 “(1) The Secretary or Administrator shall, after
 16 notice and opportunity for public comment, issue
 17 rules to establish procedures to allow private prop-
 18 erty owners or their authorized representatives an
 19 opportunity for an administrative appeal of the fol-
 20 lowing actions under this section:

21 “(A) A determination of regulatory juris-
 22 diction over a particular parcel of property.

23 “(B) The denial of a permit.

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

1 “(D) The imposition of an administrative
2 penalty.

3 “(E) The imposition of an order requiring
4 the private property owner to restore or other-
5 wise alter the property.

6 “(2) Rules issued under paragraph (1) shall
7 provide that any administrative appeal of an action
8 described in paragraph (1) shall be heard and de-
9 cided by an official other than the official who took
10 the action, and shall be conducted at a location
11 which is in the vicinity of the property involved in
12 the action.

13 “(3) An owner of private property may receive
14 compensation, if appropriate, subject to the provi-
15 sions of section 508 of the Emergency Property
16 Owners Relief Act of 1995.”.

17 **SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE**
18 **ENDANGERED SPECIES ACT OF 1973.**

19 Section 11 of the Endangered Species Act of 1973
20 (16 U.S.C. 1540) is amended by adding at the end the
21 following new subsection:

22 “(i) ADMINISTRATIVE APPEALS.—

23 “(1) The Secretary shall, after notice and op-
24 portunity for public comment, issue rules to estab-
25 lish procedures to allow private property owners or

1 their authorized representatives an opportunity for
2 an administrative appeal of the following actions:

3 “(A) A determination that a particular
4 parcel of property is critical habitat of a listed
5 species.

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

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

10 “(D) The finding of jeopardy in any con-
11 sultation on an agency action affecting a par-
12 ticular parcel of property under section 7(a)(2)
13 or any reasonable and prudent alternative re-
14 sulting from such finding.

15 “(E) Any incidental ‘take’ statement, and
16 any reasonable and prudent measures included
17 therein, issued in any consultation affecting a
18 particular parcel of property under section
19 7(a)(2).

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

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

1 “(2) Rules issued under paragraph (1) shall
 2 provide that any administrative appeal of an action
 3 described in paragraph (1) shall be heard and de-
 4 cided by an official other than the official who took
 5 the action, and shall be conducted at a location
 6 which is in the vicinity of the parcel of property in-
 7 volved in the action.

8 “(3) An owner of private property may receive
 9 compensation, if appropriate, subject to the provi-
 10 sions of section 508 of the Emergency Property
 11 Owners Relief Act of 1995.”.

12 **SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROP-**
 13 **ERTY.**

14 (a) **ELIGIBILITY.**—A private property owner that, as
 15 a consequence of a final qualified agency action of an
 16 agency head, is deprived of 33 percent or more of the fair
 17 market value, or the economically viable use, of the af-
 18 fected portion of the property as determined by a qualified
 19 appraisal expert, is entitled to receive compensation in ac-
 20 cordance with the standards set forth in section 204 of
 21 this Act.

22 (b) **TIME LIMITATION FOR COMPENSATION RE-**
 23 **QUEST.**—No later than 90 days after receipt of a final
 24 decision of an agency head that deprives a private prop-
 25 erty owner of fair market value or viable use of property

1 for which compensation is required under subsection (a),
2 the private property owner may submit in writing a re-
3 quest to the agency head for compensation in accordance
4 with subsection (c).

5 (c) OFFER OF AGENCY HEAD.—No later than 180
6 days after the receipt of a request for compensation, the
7 agency head shall stay the decision and shall provide to
8 the private property owner—

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

12 (2) an offer to compensate the private property
13 owner for the difference between the fair market
14 value of the property without those restrictions and
15 the fair market value of the property with those re-
16 strictions.

17 (d) PRIVATE PROPERTY OWNER'S RESPONSE.—(1)
18 No later than 60 days after the date of receipt of the agen-
19 cy head's offers under subsection (c) (1) and (2) the pri-
20 vate property owner shall accept one of the offers or reject
21 both offers.

22 (2) If the private property owner rejects both offers,
23 the private property owner may submit the matter for ar-
24 bitration to an arbitrator appointed by the agency head
25 from a list of arbitrators submitted to the agency head

1 by the American Arbitration Association. The arbitration
2 shall be conducted in accordance with the real estate valu-
3 ation arbitration rules of that association. For purposes
4 of this section, an arbitration is binding on—

5 (A) the agency head and a private property
6 owner as to the amount, if any, of compensation
7 owed to the private property owner; and

8 (B) whether the private property owner has
9 been deprived of fair market value or viable use of
10 property for which compensation is required under
11 subsection (a).

12 (e) JUDGMENT.—A qualified agency action of an
13 agency head that deprives a private property owner of
14 property as described under subsection (a), is deemed, at
15 the option of the private property owner, to be a taking
16 under the United States Constitution and a judgment
17 against the United States if the private property owner—

18 (1) accepts the agency head's offer under sub-
19 section (c); or

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

21 (f) PAYMENT.—An agency head shall pay a private
22 property owner any compensation required under the
23 terms of an offer of the agency head that is accepted by
24 the private property owner in accordance with subsection
25 (d), or under a decision of an arbitrator under that sub-

1 section, out of currently available appropriations support-
 2 ing the activities giving rise to the claim for compensation.
 3 The agency head shall pay to the extent of available funds
 4 any compensation under this section not later than 60
 5 days after the date of the acceptance or the date of the
 6 issuance of the decision, respectively. If insufficient funds
 7 are available to the agency in the fiscal year in which the
 8 award becomes final, the agency shall either pay the award
 9 from appropriations available in the next fiscal year or
 10 promptly seek additional appropriations for such purpose.

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

14 (1) payment of an amount equal to the fair
 15 market value of the property on the day before the
 16 date of the final qualified agency action with respect
 17 to which the property or interest is acquired; or

18 (2) a payment of an amount equal to the reduc-
 19 tion in value.

20 **SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN**
 21 **COOPERATIVE AGREEMENTS.**

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

1 “(j) Notwithstanding any other provision of this sec-
 2 tion, when the Secretary enters into a management agree-
 3 ment under subsection (b) with any non-Federal person
 4 that establishes restrictions on the use of property, the
 5 Secretary shall notify all private property owners or les-
 6 sees of the property that is subject to the management
 7 agreement and shall provide an opportunity for each pri-
 8 vate property owner or lessee to participate in the manage-
 9 ment agreement.”.

10 **SEC. 510. ELECTION OF REMEDIES.**

11 Nothing in this title shall be construed to—

12 (1) deny any person the right, as a condition
 13 precedent or as a requirement to exhaust adminis-
 14 trative remedies, to proceed under title II or III of
 15 this Act;

16 (2) bar any claim of any person relating to such
 17 person’s property under any other law, including
 18 claims made under section 1346 or 1402 of title 28,
 19 United States Code, or chapter 91 of title 28, Unit-
 20 ed States Code; or

21 (3) constitute a conclusive determination of—

22 (A) the value of property for purposes of
 23 an appraisal for the acquisition of property, or
 24 for the determination of damages; or

25 (B) any other material issue.

1 **TITLE VI—MISCELLANEOUS**

2 **SEC. 601. SEVERABILITY.**

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

10 **SEC. 602. EFFECTIVE DATE.**

11 Except as otherwise provided in this Act, the provi-
12 sions of this Act shall take effect on the date of enactment
13 and shall apply to any agency action of the United States
14 Government after such date.

○

S 605 IS—2

S 605 IS—3