

**Calendar No. 459**105<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION**S. 2271**

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

---

**IN THE SENATE OF THE UNITED STATES**

JULY 7, 1998

Mr. SESSIONS (for Mr. HATCH) introduced the following bill; which was read the first time

JULY 8, 1998

Read the second time and placed on the calendar

---

**A BILL**

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Property Rights Imple-  
3 mentation Act of 1998”.

4 **SEC. 2. FINDINGS.**

5 Congress finds that—

6 (1) property rights have been abrogated by the  
7 application of laws, regulations, and other actions by  
8 all levels of government that adversely affect the  
9 value and the ability to make reasonable use of pri-  
10 vate property;

11 (2) certain provisions of sections 1346 and  
12 1402 and chapter 91 of title 28, United States Code  
13 (commonly known as the Tucker Act), that delineate  
14 the jurisdiction of courts hearing property rights  
15 claims, frustrate the ability of a property owner to  
16 obtain full relief for violation founded upon the fifth  
17 and fourteenth amendments of the United States  
18 Constitution;

19 (3) current law—

20 (A) has no sound basis for splitting juris-  
21 diction between two courts in cases where con-  
22 stitutionally protected property rights are at  
23 stake;

24 (B) adds to the complexity and cost of  
25 takings and litigation, adversely affecting tax-  
26 payers and property owners;

1 (C) forces a property owner, who seeks  
2 just compensation from the Federal Govern-  
3 ment, to elect between equitable relief in the  
4 district court and monetary relief (the value of  
5 the property taken) in the United States Court  
6 of Federal Claims;

7 (D) is used to urge dismissal in the district  
8 court in complaints against the Federal Govern-  
9 ment, on the ground that the plaintiff should  
10 seek just compensation in the Court of Federal  
11 Claims;

12 (E) is used to urge dismissal in the Court  
13 of Federal Claims in complaints against the  
14 Federal Government, on the ground that the  
15 plaintiff should seek equitable relief in district  
16 court; and

17 (F) forces a property owner to first pay to  
18 litigate an action in a State court, before a  
19 Federal judge can decide whether local govern-  
20 ment has denied property rights safeguarded by  
21 the United States Constitution;

22 (4) property owners cannot fully vindicate prop-  
23 erty rights in one lawsuit and their claims may be  
24 time barred in a subsequent action;

1           (5) property owners should be able to fully re-  
2           cover for a taking of their private property in one  
3           court;

4           (6) certain provisions of section 1346 and 1402  
5           and chapter 91 of title 28, United States Code (com-  
6           monly known as the Tucker Act) should be amend-  
7           ed, giving both the district courts of the United  
8           States and the Court of Federal Claims jurisdiction  
9           to hear all claims relating to property rights in com-  
10          plaints against the Federal Government;

11          (7) section 1500 of title 28, United States  
12          Code, which denies the Court of Federal Claims ju-  
13          risdiction to entertain a suit which is pending in an-  
14          other court and made by the same plaintiff, should  
15          be repealed;

16          (8) Federal and local authorities, through com-  
17          plex, costly, repetitive and unconstitutional permit-  
18          ting, variance, and licensing procedures, have denied  
19          property owners their fifth and fourteenth amend-  
20          ment rights under the United States Constitution to  
21          the use, enjoyment, and disposition of, and exclusion  
22          of others from, their property, and to safeguard  
23          those rights, there is a need to determine what con-  
24          stitutes a final decision of an agency in order to

1 allow claimants the ability to protect their property  
2 rights in a court of law;

3 (9) a Federal judge should decide the merits of  
4 cases where a property owner seeks redress solely for  
5 infringements of rights safeguarded by the United  
6 States Constitution, and where no claim of a viola-  
7 tion of State law is alleged; and

8 (10) certain provisions of sections 1343, 1346,  
9 and 1491 of title 28, United States Code, should be  
10 amended to clarify when a claim for redress of con-  
11 stitutionally protected property rights is sufficiently  
12 ripe so a Federal judge may decide the merits of the  
13 allegations.

14 **SEC. 3. PURPOSES.**

15 The purposes of this Act are to—

16 (1) establish a clear, uniform, and efficient ju-  
17 dicial process whereby aggrieved property owners  
18 can obtain vindication of property rights guaranteed  
19 by the fifth and fourteenth amendments to the  
20 United States Constitution and this Act;

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

23 (3) rectify the unduly onerous and expensive re-  
24 quirement that an owner of real property, seeking  
25 redress under section 1979 of the Revised Statutes

1 of the United States (42 U.S.C. 1983) for the in-  
2 fringement of property rights protected by the fifth  
3 and fourteenth amendments of the United States  
4 Constitution, is required to first litigate Federal con-  
5 stitutional issues in a State court before obtaining  
6 access to the Federal courts;

7 (4) provide for uniformity in the application of  
8 the ripeness doctrine in cases where constitutional  
9 rights to use and enjoy real property are allegedly  
10 infringed, by providing that a final agency decision  
11 may be adjudicated by a Federal court on the merits  
12 after—

13 (A) the pertinent government body denies  
14 a meaningful application to develop the land in  
15 question; and

16 (B)(i) the property owner seeks a waiver  
17 by or brings an appeal to an administrative  
18 agency from such denial; and

19 (ii) such waiver or appeal is not approved;  
20 and

21 (5) confirm the proper role of a State or terri-  
22 tory to prevent land uses that are a nuisance under  
23 applicable law.

24 **SEC. 4. DEFINITIONS.**

25 In this Act, the term—

1           (1) “agency action” means any action, inaction,  
2           or decision taken by a Federal agency or other gov-  
3           ernment agency that at the time of such action, in-  
4           action, or decision adversely affects private property  
5           rights;

6           (2) “district court”—

7           (A) means a district court of the United  
8           States with appropriate jurisdiction; and

9           (B) includes the United States District  
10          Court of Guam, the United States District  
11          Court of the Virgin Islands, or the District  
12          Court for the Northern Mariana Islands;

13          (3) “Federal agency” means a department,  
14          agency, independent agency, or instrumentality of  
15          the United States, including any military depart-  
16          ment, Government corporation, Government-con-  
17          trolled corporation, or other establishment in the ex-  
18          ecutive branch of the United States Government;

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

22                (A) the statute, regulation, rule, order,  
23                guideline, policy, or action is passed or promul-  
24                gated; or

1 (B) the permit, license, authorization, or  
2 governmental permission is denied or sus-  
3 pended;

4 (5) “private property” or “property” means all  
5 interests constituting property, as defined by Fed-  
6 eral or State law, protected under the fifth and four-  
7 teenth amendments to the United States Constitu-  
8 tion; and

9 (6) “taking of private property”, “taking”, or  
10 “take” means any action whereby restricting the  
11 ownership, alienability, possession, or use of private  
12 property is an object of that action and is taken so  
13 as to require compensation under the fifth amend-  
14 ment to the United States Constitution, including by  
15 physical invasion, regulation, exaction, condition, or  
16 other means.

17 **SEC. 5. PRIVATE PROPERTY ACTIONS.**

18 (a) IN GENERAL.—An owner may file a civil action  
19 under this section to challenge the validity of any Federal  
20 agency action as a violation of the fifth amendment to the  
21 United States Constitution in a district court or the  
22 United States Court of Federal Claims.

23 (b) CONCURRENT JURISDICTION.—Notwithstanding  
24 any other provision of law and notwithstanding the issues  
25 involved, the relief sought, or the amount in controversy,

1 the district court and the United States Court of Federal  
2 Claims shall each have concurrent jurisdiction over both  
3 claims for monetary relief and claims seeking invalidation  
4 of any Act of Congress or any regulation of a Federal  
5 agency affecting private property rights.

6 (c) ELECTION.—The plaintiff may elect to file an ac-  
7 tion under this section in a district court or the United  
8 States Court of Federal Claims.

9 (d) WAIVER OF SOVEREIGN IMMUNITY.—This section  
10 constitutes express waiver of the sovereign immunity of  
11 the United States with respect to an action filed under  
12 this section.

13 (e) APPEALS.—The United States Court of Appeals  
14 for the Federal Circuit shall have exclusive jurisdiction of  
15 any action filed under this section, regardless of whether  
16 the jurisdiction of such action is based in whole or part  
17 under this section.

18 (f) STATUTE OF LIMITATIONS.—The statute of limi-  
19 tations for any action filed under this section shall be 6  
20 years after the date of the taking of private property.

21 (g) ATTORNEYS' FEES AND COSTS.—In issuing any  
22 final order in any action filed under this section, the court  
23 may award costs of litigation (including reasonable attor-  
24 neys' fees) to any prevailing plaintiff.

1 **SEC. 6. JURISDICTION OF UNITED STATES COURT OF FED-**  
2 **ERAL CLAIMS AND UNITED STATES DISTRICT**  
3 **COURTS.**

4 (a) UNITED STATES COURT OF FEDERAL CLAIMS.—

5 (1) JURISDICTION.—Section 1491(a) of title  
6 28, United States Code, is amended—

7 (A) in paragraph (1) by amending the first  
8 sentence to read as follows: “The United States  
9 Court of Federal Claims shall have jurisdiction  
10 to render judgment upon any claim against the  
11 United States for monetary relief founded ei-  
12 ther upon the Constitution or any Act of Con-  
13 gress or any regulation of an executive depart-  
14 ment or upon any express or implied contract  
15 with the United States, in cases not sounding  
16 in tort, or for invalidation of any Act of Con-  
17 gress or any regulation of an executive depart-  
18 ment under section 5 of the Citizens Access to  
19 Justice Act of 1998.”;

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

25 (C) by adding at the end the following new  
26 paragraphs:

1           “(3) In cases otherwise within its jurisdiction,  
2           the Court of Federal Claims shall also have supple-  
3           mental jurisdiction, concurrent with the courts des-  
4           ignated under section 1346(b), to render judgment  
5           upon any related tort claim authorized under section  
6           2674.

7           “(4) In proceedings within the jurisdiction of  
8           the Court of Federal Claims which constitute judi-  
9           cial review of agency action (rather than de novo  
10          proceedings), the provisions of section 706 of title 5  
11          shall apply.

12          “(5)(A) Any claim brought under this sub-  
13          section founded upon a constitutional right to use  
14          and enjoy real property, but allegedly infringed or  
15          taken by the United States, shall be ripe for adju-  
16          dication upon a final decision rendered by the  
17          United States, that causes actual and concrete in-  
18          jury to the party seeking redress.

19          “(B) For purposes of this paragraph, a final  
20          decision exists if—

21                  “(i) the United States makes a definitive  
22                  decision regarding the extent of permissible  
23                  uses on real property that has been allegedly in-  
24                  fringed or taken; and

1           “(ii) one meaningful application to use the  
2           property has been submitted but has not been  
3           approved within a reasonable time, and the  
4           party seeking redress has applied for one appeal  
5           or waiver which has not been approved within  
6           a reasonable time, where the applicable law of  
7           the United States provides a mechanism for ap-  
8           peal or waiver.

9           “(C)(i) The party seeking redress shall not be  
10          required to submit any application or reapplication,  
11          or apply for any appeal or waiver required under  
12          this section, if the district court determines that  
13          such action would be futile.

14          “(ii) In this subparagraph, the term ‘futile’  
15          means the inability of an owner of real property to  
16          seek or obtain approvals to use such real property,  
17          and the hardship endured by such inability, as de-  
18          fined under applicable land use and environmental  
19          law.

20          “(D) Nothing in this paragraph alters the sub-  
21          stantive law of takings of property, including the  
22          burden of proof borne by the plaintiff.”.

23                 (2) PENDING OF CLAIMS IN OTHER  
24                 COURTS.—

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

3 (B) TECHNICAL AND CONFORMING AMEND-  
4 MENT.—The table of sections for chapter 91 of  
5 title 28, United States Code, is amended by  
6 striking out the item relating to section 1500.

7 (b) DISTRICT COURT JURISDICTION.—

8 (1) CITIZEN ACCESS TO JUSTICE ACTION.—Sec-  
9 tion 1346(a) of title 28, United States Code, is  
10 amended by adding after paragraph (2) the follow-  
11 ing:

12 “(3) Any civil action filed under section 5 of the  
13 Citizens Access to Justice Act of 1998.”.

14 (2) UNITED STATES AS DEFENDANT.—Section  
15 1346 of title 28, United States Code, is amended by  
16 adding at the end the following:

17 “(h)(1) Any claim brought under subsection (a) that  
18 is founded upon a property right or privilege secured by  
19 the Constitution, but was allegedly infringed or taken by  
20 the United States, shall be ripe for adjudication upon a  
21 final decision rendered by the United States, that causes  
22 actual and concrete injury to the party seeking redress.

23 “(2)(A) For purposes of this subsection, a final deci-  
24 sion exists if—

1           “(i) the United States makes a definitive deci-  
2           sion regarding the extent of permissible uses on the  
3           property that has been allegedly infringed or taken;  
4           and

5           “(ii) one meaningful application to use the  
6           property has been submitted but has not been ap-  
7           proved within a reasonable time, and the party seek-  
8           ing redress has applied for one appeal or waiver  
9           which has not been approved within a reasonable  
10          time, where the applicable law of the United States  
11          provides a mechanism for appeal to or waiver by an  
12          administrative agency.

13          “(B)(i) The party seeking redress shall not be re-  
14          quired to submit any application or reapplication, or apply  
15          for any appeal or waiver required under this section, if  
16          the district court determines that such action would be  
17          futile.

18          “(ii) In this subparagraph, the term ‘futile’ means  
19          the inability of an owner of real property to seek or obtain  
20          approvals to use such real property, and the hardship en-  
21          dured by such inability, as defined under applicable land  
22          use and environmental law.

23          “(3) Nothing in this subsection alters the substantive  
24          law of takings of property, including the burden of proof  
25          borne by the plaintiff.”.

1 (c) DISTRICT COURT CIVIL RIGHTS JURISDICTION;  
2 ABSTENTION.—Section 1343 of title 28, United States  
3 Code, is amending by adding at the end the following:

4 “(c) Whenever a district court exercises jurisdiction  
5 under subsection (a), the court shall not abstain from or  
6 relinquish jurisdiction to a State court because the party  
7 seeking redress—

8 “(1) brings a prior or concurrent proceeding be-  
9 fore a State, territory, or local tribunal as required  
10 under subsection (e)(3);

11 “(2) asserts claims under State or local law  
12 pendent to and arising from the same core of opera-  
13 tive facts as a claim for the taking of real property;  
14 or

15 “(3) asserts a claim for the taking of real prop-  
16 erty that requires interpretation of State, territory,  
17 or local laws.

18 “(d) A district court that exercises jurisdiction under  
19 subsection (a) in an action in which the operative facts  
20 concern the uses of real property may abstain where the  
21 party seeking redress—

22 “(1) has not submitted a meaningful applica-  
23 tion, as defined by the locality concerned within that  
24 State or territory, to use such real property; and

1           “(2) challenges whether an action of the appli-  
2           cable locality exceeds the authority conferred upon  
3           the locality under the applicable zoning or planning  
4           enabling statute of the State or territory.

5           “(e)(1) Where the district court has jurisdiction over  
6           an action under subsection (a) in which the operative facts  
7           concern the uses of real property and which cannot be de-  
8           cided without resolution of an unsettled question of State  
9           law, the district court may certify the question of State  
10          law to the highest appellate court of that State. After the  
11          State appellate court resolves the question certified to it,  
12          the district court shall proceed with resolving the merits.

13          “(2) In making a decision whether to certify a ques-  
14          tion of State law under this subsection, the district court  
15          may consider whether the question of State law—

16                 “(A) will significantly affect the merits of the  
17                 injured party’s Federal claim; and

18                 “(B) is patently unclear.

19          “(f)(1) Any claim or action brought under section  
20          1979 of the Revised Statutes of the United States (42  
21          U.S.C. 1983) to redress the deprivation of a right or privi-  
22          lege to use and enjoy real property as secured by the Con-  
23          stitution shall be ripe for adjudication by the district  
24          courts upon a final decision rendered by any person acting  
25          under color of any statute, ordinance, regulation, custom,

1 or usage, of any State or territory of the United States,  
2 that causes actual and concrete injury to the party seeking  
3 redress.

4 “(2)(A) For purposes of this subsection, a final deci-  
5 sion exists if—

6 “(i) any person acting under color of any stat-  
7 ute, ordinance, regulation, custom, or usage, of any  
8 State or territory of the United States, makes a de-  
9 finitive decision regarding the extent of permissible  
10 uses on the property that has been allegedly in-  
11 fringed or taken;

12 “(ii)(I) one meaningful application, as defined  
13 by applicable law concerned within that State or ter-  
14 ritory, to use the property has been submitted but  
15 has not been approved within a reasonable time, and  
16 the party seeking redress has applied for one appeal  
17 or waiver which has not been approved within a rea-  
18 sonable time, where the applicable statute, ordi-  
19 nance, custom, or usage provides a mechanism for  
20 appeal to or waiver by an administrative agency; or

21 “(II) one meaningful application, as defined by  
22 the locality concerned within that State or territory,  
23 to use the property has been submitted but has not  
24 been approved within a reasonable time, and the dis-  
25 approval at a minimum specifies in writing the

1 range of use, density, or intensity of development of  
2 the property that would be approved, with any con-  
3 ditions therefor, and the party seeking redress has  
4 resubmitted another meaningful application taking  
5 into account the terms of the disapproval, except  
6 that—

7 “(aa) if no such reapplication is submitted,  
8 then a final decision shall not have been  
9 reached for purposes of this subsection, except  
10 as provided in subparagraph (B); and

11 “(bb) if the reapplication is not approved  
12 within a reasonable time, or if the reapplication  
13 is not required under subparagraph (B), then a  
14 final decision exists for purposes of this sub-  
15 section if the party seeking redress has applied  
16 for one appeal or waiver with respect to the dis-  
17 approval, which has not been approved within a  
18 reasonable time, where the applicable statute,  
19 ordinance, custom, or usage provides a mecha-  
20 nism of appeal or waiver by an administrative  
21 agency; and

22 “(iii) in a case involving the uses of real prop-  
23 erty, where the applicable statute or ordinance pro-  
24 vides for review of the case by elected officials, the

1 party seeking redress has applied for but is denied  
2 such review.

3 “(B)(i) The party seeking redress shall not be re-  
4 quired to submit any application or reapplication, or apply  
5 for any appeal or waiver as required under this subsection,  
6 upon determination by the district court that such action  
7 would be futile.

8 “(ii) In this subparagraph, the term ‘futile’ means  
9 the inability of an owner of real property to seek or obtain  
10 approvals to use such real property, and the hardship en-  
11 dured by such inability, as defined under applicable land  
12 use and environmental law.

13 “(3) For purposes of this subsection, a final decision  
14 shall not require the party seeking redress to exhaust judi-  
15 cial remedies provided by any State or territory of the  
16 United States.

17 “(g) Nothing in subsection (c), (d), (e), or (f) alters  
18 the substantive law of takings of property, including the  
19 burden of proof borne by the plaintiff.”.

20 **SEC. 7. ATTORNEYS FEES FOR LOCALITIES.**

21 Section 722(b) of the Revised Statutes (42 U.S.C.  
22 1988(b)) is amended—

23 (1) by striking “In any action” and inserting  
24 “(1) Subject to paragraphs (2) and (3), in any ac-  
25 tion”; and

1           (2) by adding at the end the following:

2           “(2) In an action arising under section 1979 of  
3           the Revised Statutes (42 U.S.C. 1983), where the  
4           taking of real property is alleged, a district court, in  
5           its discretion, may hold the party seeking redress  
6           liable for a reasonable attorney’s fee and costs where  
7           the takings claim is not substantially justified, un-  
8           less special circumstances make an award of such  
9           fees unjust. Whether or not the position of the party  
10          seeking redress was substantially justified shall be  
11          determined on the basis of any administrative and  
12          judicial record, as a whole, which is made in the dis-  
13          trict court adjudication for which fees and other ex-  
14          penses are sought.

15          “(3) In an action arising under section 1979 of  
16          the Revised Statutes (42 U.S.C. 1983) where the  
17          taking of real property is alleged, the district court  
18          shall decide any motion to dismiss such claim on an  
19          expedited basis. Where such a motion is granted and  
20          the takings claim is dismissed with prejudice, the  
21          non-moving party may be liable for a reasonable at-  
22          torney’s fee and costs at the discretion of the district  
23          court, unless special circumstances make an award  
24          of such fees unjust.”.

1 **SEC. 8. DUTY OF NOTICE TO DEFENDANTS.**

2 Section 1979 of the Revised Statutes (42 U.S.C.  
3 1983) is amended—

4 (1) by inserting “(a)” before “Every person”;

5 and

6 (2) by adding at the end the following:

7 “(b) A party seeking redress under this section for  
8 a taking of real property without the payment of com-  
9 pensation shall not commence an action in district court  
10 before 60 days after the date on which written notice has  
11 been given to any potential defendant.”.

12 **SEC. 9. DUTY OF NOTICE TO OWNERS.**

13 Whenever a Federal agency takes an agency action  
14 limiting the use of private property that may be affected  
15 by this Act (including the amendments made by this Act),  
16 the agency shall give notice to the owners of that property  
17 explaining their rights under this Act and the procedures  
18 for obtaining any compensation that may be due to them  
19 under this Act.

20 **SEC. 10. RULES OF CONSTRUCTION.**

21 Nothing in this Act shall be construed to interfere  
22 with the authority of any State to create additional prop-  
23 erty rights.

1 **SEC. 11. EFFECTIVE DATE.**

2       This Act shall take effect on the date of enactment  
3 of this Act and shall apply to any agency action that oc-  
4 curs on or after such date.



Calendar No. 459

105<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION  
**S. 2271**

---

## **A BILL**

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

---

JULY 8, 1998

Read the second time and placed on the calendar