

Calendar No. 498

104<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION  
**S. 1954**

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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.

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JULY 17, 1996

Read the second time and placed on the calendar

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## IN THE SENATE OF THE UNITED STATES

JULY 16, 1996

Mr. HATCH (for himself, Mr. LOTT, Mr. HEFLIN, Mr. ABRAHAM, Mr. ASHCROFT, Mr. BURNS, Mr. CRAIG, Mr. FAIRCLOTH, Mr. GRAMS, Mr. KEMPTHORNE, Mr. MACK, Mr. MCCONNELL, Mr. BENNETT, Mr. BOND, Mr. BROWN, Mr. GRASSLEY, Mr. NICKLES, Mr. SIMPSON, Mr. STEVENS, Mr. THURMOND, Mr. PRESSLER, Mr. SHELBY, Mr. COCHRAN, Mr. WARNER, Mr. THOMAS, and Mr. MURKOWSKI) introduced the following bill; which was read the first time

JULY 17, 1996

Read the second time and placed on the calendar

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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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Omnibus Property  
3 Rights Act of 1996”.

4 **TITLE I—FINDINGS AND**  
5 **PURPOSES**

6 **SEC. 101. 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  
10 American tradition of liberty and limited govern-  
11 ment;

12 (2) the framers of the United States Constitu-  
13 tion, in order to protect private property and liberty,  
14 devised a framework of Government designed to dif-  
15 fuse power and limit Government;

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

21 (4) the purpose of the takings clause of the  
22 fifth amendment of the United States Constitution,  
23 as the Supreme Court stated in *Armstrong v. United*  
24 *States*, 364 U.S. 40, 49 (1960), is “to bar Govern-  
25 ment from forcing some people alone to bear public

1 burdens, which in all fairness and justice, should be  
2 borne by the public as a whole”;

3 (5) the Federal Government has singled out  
4 property holders to shoulder the cost that should be  
5 borne by the public, in violation of the just com-  
6 pensation requirement of the takings clause of the  
7 fifth amendment of the United States Constitution;

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

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

19 **SEC. 102. PURPOSE.**

20 The purpose of this Act is to encourage, support, and  
21 promote the private ownership of property by ensuring the  
22 constitutional and legal protection of private property by  
23 the United States Government by—

1 (1) the establishment of a new Federal judicial  
2 claim through which to vindicate and protect prop-  
3 erty rights;

4 (2) the simplification and clarification of court  
5 jurisdiction over property right claims;

6 (3) the establishment of an administrative pro-  
7 cedure that requires the Federal Government to as-  
8 sess the impact of government action on holders of  
9 private property;

10 (4) the minimization, to the greatest extent pos-  
11 sible, of the taking of private property by the Fed-  
12 eral Government and to ensure that just compensa-  
13 tion is paid by the Government for any taking; and

14 (5) the establishment of administrative com-  
15 pensation procedures involving the enforcement of  
16 the Endangered Species Act of 1973 and section  
17 404 of the Federal Water Pollution Control Act.

## 18 **TITLE II—PROPERTY RIGHTS**

### 19 **LITIGATION RELIEF**

#### 20 **SEC. 201. FINDINGS.**

21 The Congress finds that—

22 (1) property rights have been abrogated by the  
23 application of laws, regulations, and other actions by  
24 the Federal Government that adversely affect the  
25 value of private property;

1           (2) certain provisions of sections 1346 and  
2           1402 and chapter 91 of title 28, United States Code  
3           (commonly known as the Tucker Act), that delineate  
4           the jurisdiction of courts hearing property rights  
5           claims, complicates the ability of a property owner to  
6           vindicate a property owner's right to just compensa-  
7           tion for a governmental action that has caused a  
8           physical or regulatory taking;

9           (3) current law—

10           (A) forces a property owner to elect be-  
11           tween equitable relief in the district court and  
12           monetary relief (the value of the property  
13           taken) in the United States Court of Federal  
14           Claims;

15           (B) is used to urge dismissal in the district  
16           court on the ground that the plaintiff should  
17           seek just compensation in the Court of Federal  
18           Claims; and

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

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

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; and

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

15 **SEC. 202. PURPOSES.**

16 The purposes of this title are to—

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

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

24 (3) rectify the constitutional imbalance between  
25 the Federal Government and the States; and

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

5 **SEC. 203. DEFINITIONS.**

6           For purposes of this title the term—

7           (1) “agency” means a department, agency,  
8           independent agency, or instrumentality of the United  
9           States, including any military department, Govern-  
10          ment corporation, Government-controlled corpora-  
11          tion, or other establishment in the executive branch  
12          of the United States Government;

13          (2) “agency action” means any action, inaction,  
14          or decision taken by an agency or State agency that  
15          at the time of such action, inaction, or decision ad-  
16          versely affects private property rights;

17          (3) “just compensation”—

18                 (A) means compensation equal to the full  
19                 extent of a property owner's loss, including the  
20                 fair market value of the private property taken,  
21                 whether the taking is by physical occupation or  
22                 through regulation, exaction, or other means;  
23                 and

1 (B) shall include compounded interest cal-  
2 culated from the date of the taking until the  
3 date the United States tenders payment;

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

7 (A) the statute, regulation, rule, order,  
8 guideline, policy, or action is passed or promul-  
9 gated; or

10 (B) the permit, license, authorization, or  
11 governmental permission is denied or sus-  
12 pended;

13 (5) “private property” or “property” means all  
14 interests constituting real property, as defined by  
15 Federal or State law, protected under the fifth  
16 amendment to the United States Constitution, any  
17 applicable Federal or State law, or this Act, and  
18 more specifically constituting—

19 (A) real property, whether vested or  
20 unvested, including—

21 (i) estates in fee, life estates, estates  
22 for years, or otherwise;

23 (ii) inchoate interests in real property  
24 such as remainders and future interests;

1 (iii) personalty that is affixed to or  
2 appurtenant to real property;

3 (iv) easements;

4 (v) leaseholds;

5 (vi) recorded liens; and

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

8 (B) the right to use water or the right to  
9 receive water, including any recorded liens on  
10 such water right; or

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

14 (6) “State agency” means any State depart-  
15 ment, agency, political subdivision, or instrumental-  
16 ity that—

17 (A) carries out or enforces a regulatory  
18 program required under Federal law;

19 (B) is delegated administrative or sub-  
20 stantive responsibility under a Federal regu-  
21 latory program; or

22 (C) receives Federal funds in connection  
23 with a regulatory program established by a  
24 State,

1 if the State enforcement of the regulatory program,  
2 or the receipt of Federal funds in connection with a  
3 regulatory program established by a State, is di-  
4 rectly related to the taking of private property seek-  
5 ing to be vindicated under this Act; and

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

8 (A) means any action whereby restricting  
9 the ownership, alienability, or use of private  
10 property is an object of that action and is taken  
11 so as to require compensation under the fifth  
12 amendment to the United States Constitution  
13 or under this Act, including by physical inva-  
14 sion, regulation, exaction, condition, or other  
15 means; and

16 (B) shall not include—

17 (i) a condemnation action filed by the  
18 United States in an applicable court; or

19 (ii) an action filed by the United  
20 States relating to criminal forfeiture.

21 **SEC. 204. COMPENSATION FOR TAKEN PROPERTY.**

22 (a) IN GENERAL.—No agency or State agency, shall  
23 take private property except for public use and with just  
24 compensation to the property owner. A property owner  
25 shall receive just compensation if—

1           (1) as a consequence of an action of any agen-  
2           cy, or State agency, private property (whether all or  
3           in part) has been physically invaded or otherwise  
4           taken without the consent of the owner; and

5           (2)(A) such action does not substantially ad-  
6           vance the stated governmental interest to be  
7           achieved by the legislation or regulation on which  
8           the action is based;

9           (B) such action exacts or affects the owner's  
10          constitutional or otherwise lawful right to use the  
11          property or a portion of such property as a condition  
12          for the granting of a permit, license, variance, or  
13          any other agency action without a rough proportion-  
14          ality between the stated need for the required dedi-  
15          cation and the impact of the proposed use of the  
16          property;

17          (C) such action results in the property owner  
18          being deprived, either temporarily or permanently, of  
19          all or substantially all economically beneficial or pro-  
20          ductive use of the property or that part of the prop-  
21          erty affected by the action without a showing that  
22          such deprivation inheres in the title itself;

23          (D) such action results in the property owner  
24          being deprived, either temporarily or permanently of  
25          50 percent or more of the value of the property or

1 the value of that part of the property affected by the  
2 action without a showing that such deprivation in-  
3 heres in the title itself; or

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

7 (b) NO CLAIM AGAINST STATE OR STATE INSTRU-  
8 MENTALITY.—No action may be filed under this section  
9 against a State agency for carrying out the functions de-  
10 scribed under section 203(6). Claims arising from the ac-  
11 tion, inaction, or decision of a State agency are properly  
12 filed against the Federal agency which administers the rel-  
13 evant Federal program.

14 (c) BURDEN OF PROOF.—(1) The Government shall  
15 bear the burden of proof in any action described under—

16 (A) subsection (a)(2)(A), with regard to show-  
17 ing the nexus between the stated governmental pur-  
18 pose of the governmental interest and the impact on  
19 the proposed use of private property;

20 (B) subsection (a)(2)(B), with regard to show-  
21 ing the proportionality between the exaction or af-  
22 fect and the impact of the proposed use of the prop-  
23 erty; and

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

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

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

18 (2)(A) Subject to paragraph (1), if an agency action  
19 directly takes property or a portion of property under sub-  
20 section (a), compensation to the owner of the property  
21 that is affected by the action shall be either the greater  
22 of an amount equal to the difference between—

23 (i) the fair market value of the property or the  
24 affected portion of the property before such property

1 or the affected portion of such property became the  
2 object of the agency action; and

3 (ii) the fair market value of the property or the  
4 affected portion of the property when such property  
5 or the affected portion of such property becomes  
6 subject to the agency action.

7 (B) Where appropriate, the calculation of fair market  
8 value shall include business losses.

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

12 (f) SOURCE OF COMPENSATION.—Awards of com-  
13 pensation referred to in this section, whether by judgment,  
14 settlement, or administrative action, shall be promptly  
15 paid by the agency out of currently available appropria-  
16 tions supporting the activities giving rise to the claims for  
17 compensation. If the agency action resulted from a re-  
18 quirement imposed by another agency, the agency making  
19 the payment or satisfying the judgment may seek partial  
20 or complete reimbursement from the appropriated funds  
21 of the other agency. If insufficient funds are available to  
22 the agency in the fiscal year in which the award becomes  
23 final, the agency shall either pay the award from appro-  
24 priations available in the next fiscal year or promptly seek  
25 additional appropriations for such purpose.

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

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

17 (b) APPEALS.—In any appeal resulting from a claim  
18 under this section, the United States Court of Appeals for  
19 the Federal Circuit shall have exclusive jurisdiction of—

20 (1) an appeal from a final decision of a district  
21 court of the United States, the United States Dis-  
22 trict Court of Guam, the United States District  
23 Court of the Virgin Islands, or the District Court for  
24 the Northern Mariana Islands, if the jurisdiction of  
25 that court was based, in whole or in part, on sub-  
26 section (a); and

1           (2) an appeal from a final decision of the Unit-  
2           ed States Court of Federal Claims if that jurisdic-  
3           tion was based, in whole or in part, on subsection  
4           (a).

5           (c) STANDING.—Persons adversely affected by an  
6           agency action taken under this Act shall have standing  
7           to challenge and seek judicial review of that action.

8           (d) AMENDMENTS TO TITLE 28, UNITED STATES  
9           CODE.—(1) Section 1491(a) of title 28, United States  
10          Code, is amended—

11           (A) in paragraph (1) by amending the first sen-  
12           tence to read as follows: “The United States Court  
13           of Federal Claims shall have jurisdiction to render  
14           judgment upon any claim against the United States  
15           for monetary relief founded either upon the Con-  
16           stitution or any Act of Congress or any regulation  
17           of an executive department, or upon any express or  
18           implied contract with the United States, in cases not  
19           sounding in tort, or for invalidation of any Act of  
20           Congress or any regulation of an executive depart-  
21           ment that adversely affects private property rights  
22           in violation of the fifth amendment of the United  
23           States Constitution”;

24           (B) in paragraph (2) by inserting before the  
25           first sentence the following: “In any case within its

1 jurisdiction, the Court of Federal Claims shall have  
2 the power to grant injunctive and declaratory relief  
3 when appropriate.”; and

4 (C) by adding at the end thereof the following  
5 new paragraphs:

6 “(4) In cases otherwise within its jurisdiction, the  
7 Court of Federal Claims shall also have supplemental ju-  
8 risdiction, concurrent with the courts designated in section  
9 1346(b) of this title, to render judgment upon any related  
10 tort claim authorized under section 2674 of this title.

11 “(5) In proceedings within the jurisdiction of the  
12 Court of Federal Claims which constitute judicial review  
13 of agency action (rather than de novo proceedings), the  
14 provisions of section 706 of title 5 shall apply.”.

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

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

20 **SEC. 206. STATUTE OF LIMITATIONS.**

21 The statute of limitations for actions brought under  
22 this title shall be 6 years from the date of the taking of  
23 private property.

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

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

6 **SEC. 208. RULES OF CONSTRUCTION.**

7 Nothing in this title shall be construed to interfere  
8 with the authority of any State to create additional prop-  
9 erty rights.

10 **SEC. 209. EFFECTIVE DATE.**

11 The provisions of this title and amendments made by  
12 this title shall take effect on the date of the enactment  
13 of this Act and shall apply to any agency action that oc-  
14 curs after such date.

15 **TITLE III—ALTERNATIVE**  
16 **DISPUTE RESOLUTION**

17 **SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.**

18 (a) IN GENERAL.—Either party to a dispute over a  
19 taking of private property as defined under title II of this  
20 Act or litigation commenced under such title may elect to  
21 resolve the dispute through settlement or arbitration. In  
22 the administration of this section—

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

25 (2) arbitration procedures shall be in accord-  
26 ance with the alternative dispute resolution proce-

1       dures established by the American Arbitration Asso-  
2       ciation; and

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

7       (b) COMPENSATION AS A RESULT OF ARBITRA-  
8       TION.—The amount of arbitration awards shall be paid  
9       from the responsible agency's currently available appro-  
10      priations supporting the agency's activities giving rise to  
11      the claim for compensation. If insufficient funds are avail-  
12      able to the agency in the fiscal year in which the award  
13      becomes final, the agency shall either pay the award from  
14      appropriations available in the next fiscal year or promptly  
15      seek additional appropriations for such purpose.

16      (c) REVIEW OF ARBITRATION.—(1) Appeal from ar-  
17      bitration decisions shall be to the United States District  
18      Court or the United States Court of Federal Claims in  
19      the manner prescribed by law for the claim under this Act.

20      (2) The provisions of title 9, United States Code (re-  
21      lating to arbitration), shall apply to enforcement of awards  
22      rendered under this section.

23      (d) PAYMENT OF CERTAIN COMPENSATION.—In any  
24      appeal under subsection (c), the amount of the award of  
25      compensation shall be promptly paid by the agency from

1 appropriations supporting the activities giving rise to the  
2 claim for compensation currently available at the time of  
3 final action on the appeal. If insufficient funds are avail-  
4 able to the agency in the fiscal year in which the award  
5 becomes final, the agency shall either pay the award from  
6 appropriations available in the next fiscal year or promptly  
7 seek additional appropriations for such purpose.

8 **TITLE IV—PRIVATE PROPERTY**  
9 **TAKING IMPACT ANALYSIS**

10 **SEC. 401. PURPOSES.**

11 The purposes of this title are—

12 (1) to protect the health, safety, welfare, and  
13 rights of the public; and

14 (2) to the extent practicable, avoid takings of  
15 private property by assessing the effect of govern-  
16 ment action on private property rights.

17 **SEC. 402. DEFINITIONS.**

18 For purposes of this title the term—

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

22 (2) “rule” has the same meaning as such term  
23 is defined under section 551(4) of title 5, United  
24 States Code;

1           (3) “property or private property” refers to all  
2 property protected by the takings clause of the fifth  
3 amendment of the United States Constitution; and

4           (4) “taking of private property” has the same  
5 meaning as such term is defined under section 203  
6 of this Act.

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

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

10           (A) the policies, regulations, and public laws of  
11 the United States shall be interpreted and adminis-  
12 tered in accordance with the policies under this title;  
13 and

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

20           (2) The provisions of paragraph (1)(B) shall not  
21 apply to—

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

24           (B) an action taken—

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

3 (ii) in preparation for, or in connection  
4 with, treaty negotiations with foreign nations;

5 (C) a law enforcement action, including seizure,  
6 for a violation of law, of property for forfeiture, or  
7 as evidence in a criminal proceeding;

8 (D) a study or similar effort or planning activ-  
9 ity;

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

17 (F) the placement of a military facility or a  
18 military activity involving the use of solely Federal  
19 property;

20 (G) any military or foreign affairs function (in-  
21 cluding a procurement function under a military or  
22 foreign affairs function), but not including the civil  
23 works program of the Army Corps of Engineers; and

24 (H) any case in which there is an immediate  
25 threat to health or safety that constitutes an emer-

1 agency requiring immediate response or the issuance  
2 of a regulation under section 553(b)(B) of title 5,  
3 United States Code, if the taking impact analysis is  
4 completed after the emergency action is carried out  
5 or the regulation is published.

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

8 (A) the specific purpose of the policy, regula-  
9 tion, proposal, recommendation, or related agency  
10 action;

11 (B) an assessment of the likelihood that a tak-  
12 ing of private property will occur under such policy,  
13 regulation, proposal, recommendation, or related  
14 agency action;

15 (C) an evaluation of whether such policy, regu-  
16 lation, proposal, recommendation, or related agency  
17 action is likely to require compensation to private  
18 property owners;

19 (D) alternatives to the policy, regulation, pro-  
20 posal, recommendation, or related agency action that  
21 would achieve the intended purposes of the agency  
22 action and lessen the likelihood that a taking of pri-  
23 vate property will occur; and

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

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

8 (b) GUIDANCE AND REPORTING REQUIREMENTS.—

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

13 (2) No later than 1 year after the date of enactment  
14 of this Act and at the end of each 1-year period thereafter,  
15 each agency shall submit a report to the Director of the  
16 Office of Management and Budget and the Attorney Gen-  
17 eral of the United States identifying each agency action  
18 that has resulted in the preparation of a taking impact  
19 analysis, the filing of a taking claim, or an award of com-  
20 pensation under the just compensation clause of the fifth  
21 amendment of the United States Constitution. The Direc-  
22 tor of the Office of Management and Budget and the At-  
23 torney General of the United States shall publish in the  
24 Federal Register, on an annual basis, a compilation of the  
25 reports of all agencies submitted under this paragraph.

1 (c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency  
2 shall—

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

5 (2) to the greatest extent practicable, transmit  
6 a copy of such analysis to the owner or any other  
7 person with a property right or interest in the af-  
8 fected property.

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

15 (1) such analysis was completed 5 years or  
16 more before the date of such action or proceeding;  
17 and

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

21 **SEC. 404. RULES OF CONSTRUCTION.**

22 Nothing in this title shall be construed to—

23 (1) limit any right or remedy, constitute a con-  
24 dition precedent or a requirement to exhaust admin-  
25 istrative remedies, or bar any claim of any person

1 relating to such person's property under any other  
2 law, including claims made under this Act, section  
3 1346 or 1402 of title 28, United States Code, or  
4 chapter 91 of title 28, United States Code; or

5 (2) constitute a conclusive determination of—

6 (A) the value of any property for purposes  
7 of an appraisal for the acquisition of property,  
8 or for the determination of damages; or

9 (B) any other material issue.

10 **SEC. 405. STATUTE OF LIMITATIONS.**

11 No action may be filed in a court of the United States  
12 to enforce the provisions of this title on or after the date  
13 occurring 6 years after the date of the submission of the  
14 applicable private property taking impact analysis to the  
15 Office of Management and Budget.

16 **TITLE V—PRIVATE PROPERTY**  
17 **OWNERS ADMINISTRATIVE**  
18 **BILL OF RIGHTS**

19 **SEC. 501. FINDINGS AND PURPOSE.**

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

21 (1) a number of Federal environmental pro-  
22 grams, specifically programs administered under the  
23 Endangered Species Act of 1973 (16 U.S.C. 1531 et  
24 seq.) and section 404 of the Federal Water Pollution  
25 Control Act (33 U.S.C. 1344), have been imple-

1       mented by employees, agents, and representatives of  
2       the Federal Government in a manner that deprives  
3       private property owners of the use and control of  
4       property;

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

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

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

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

22          (6) all private property owners should and are  
23       required to comply with current nuisance laws and  
24       should not use property in a manner that harms  
25       their neighbors;

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

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

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

12           (1) provide a consistent Federal policy to en-  
13 courage, support, and promote the private ownership  
14 of property; and

15           (2) establish an administrative process and  
16 remedy to ensure that the constitutional and legal  
17 rights of private property owners are protected by  
18 the Federal Government and Federal employees,  
19 agents, and representatives.

20 **SEC. 502. DEFINITIONS.**

21 For purposes of this title the term—

22           (1) “the Acts” means the Endangered Species  
23 Act of 1973 (16 U.S.C. 1531 et seq.) and section  
24 404 of the Federal Water Pollution Control Act (33  
25 U.S.C. 1344);

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

7           (3) “non-Federal person” means a person other  
8           than an officer, employee, agent, department, or in-  
9           strumentality of—

10                   (A) the Federal Government; or

11                   (B) a foreign government;

12           (4) “private property owner” means a non-Fed-  
13           eral person (other than an officer, employee, agent,  
14           department, or instrumentality of a State, munici-  
15           pality, or political subdivision of a State, acting in  
16           an official capacity or a State, municipality, or sub-  
17           division of a State) who owns property;

18           (5) “private property” or “property” has the  
19           same meaning as such term is defined under section  
20           203(5) of this Act; and

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

1 (A) under section 404 of the Federal  
2 Water Pollution Control Act (33 U.S.C. 1344);  
3 or

4 (B) under the Endangered Species Act of  
5 1973 (16 U.S.C. 1531 et seq.).

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

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

9 (1) comply with applicable State and tribal gov-  
10 ernment laws, including laws relating to private  
11 property rights and privacy; and

12 (2) administer and implement the Acts in a  
13 manner that has the least impact on private prop-  
14 erty owners' constitutional and other legal rights.

15 (b) FINAL DECISIONS.—Each agency head shall de-  
16 velop and implement rules and regulations for ensuring  
17 that the constitutional and other legal rights of private  
18 property owners are protected when the agency head  
19 makes, or participates with other agencies in the making  
20 of, any final decision that restricts the use of private prop-  
21 erty in administering and implementing this Act.

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

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

1 (1) consented in writing to that entry;

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

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

7 (b) NONAPPLICATION.—(1) Subsection (a) does not  
8 prohibit entry onto property for the purpose of obtaining  
9 consent or providing notice required under subsection (a).

10 (2) Subsection (a) shall not apply to an entry on  
11 property that is—

12 (A) necessary because of an imminent threat to  
13 health or safety or other emergency; or

14 (B) necessary for the enforcement of criminal  
15 laws.

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

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

21 (1) the agency head has provided to the private  
22 property owner—

23 (A) access to the information;

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

1 (C) an opportunity to dispute the accuracy  
2 of the information; and

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

7 **SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WET-**  
8 **LANDS DECISIONS.**

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

12 “(u) ADMINISTRATIVE APPEALS.—

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

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

21 “(B) The denial of a permit.

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

23 “(D) The imposition of an administrative  
24 penalty.

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

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

11          “(3) An owner of private property may receive  
12          compensation, if appropriate, subject to the provi-  
13          sions of section 508 of the Omnibus Property Rights  
14          Act of 1996.”.

15 **SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE**  
16 **ENDANGERED SPECIES ACT OF 1973.**

17          Section 11 of the Endangered Species Act of 1973  
18          (16 U.S.C. 1540) is amended by adding at the end the  
19          following new subsection:

20          “(i) ADMINISTRATIVE APPEALS.—

21                 “(1) The Secretary shall, after notice and op-  
22                 portunity for public comment, issue rules to estab-  
23                 lish procedures to allow private property owners or  
24                 their authorized representatives an opportunity for  
25                 an administrative appeal of the following actions:

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

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

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

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

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

18           “(F) The imposition of an administrative  
19 penalty.

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

23           “(2) Rules issued under paragraph (1) shall  
24 provide that any administrative appeal of an action  
25 described in paragraph (1) shall be heard and de-

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

5 “(3) An owner of private property may receive  
6 compensation, if appropriate, subject to the provi-  
7 sions of section 508 of the Omnibus Property Rights  
8 Act of 1996.”.

9 **SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROP-**  
10 **ERTY.**

11 (a) **ELIGIBILITY.**—A private property owner that, as  
12 a consequence of a final qualified agency action of an  
13 agency head, is deprived of 50 percent or more of the fair  
14 market value of the affected portion of the property as  
15 determined by a qualified appraisal expert, is entitled to  
16 receive compensation in accordance with the standards set  
17 forth in section 204 of this Act.

18 (b) **TIME LIMITATION FOR COMPENSATION RE-**  
19 **QUEST.**—No later than 90 days after receipt of a final  
20 decision of an agency head that deprives a private prop-  
21 erty owner of fair market value or viable use of property  
22 for which compensation is required under subsection (a),  
23 the private property owner may submit in writing a re-  
24 quest to the agency head for compensation in accordance  
25 with subsection (c).

1 (c) OFFER OF AGENCY HEAD.—No later than 180  
2 days after the receipt of a request for compensation, the  
3 agency head shall provide to the private property owner,  
4 where appropriate under the standards of this Act—

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

8 (2) an offer to compensate the private property  
9 owner for the difference between the fair market  
10 value of the property without those restrictions and  
11 the fair market value of the property with those re-  
12 strictions.

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

18 (2) If the private property owner rejects both offers,  
19 the private property owner may submit the matter for ar-  
20 bitration to an arbitrator appointed by the agency head  
21 from a list of arbitrators submitted to the agency head  
22 by the American Arbitration Association. The arbitration  
23 shall be conducted in accordance with the real estate valu-  
24 ation arbitration rules of that association. For purposes  
25 of this section, an arbitration is binding on—

1 (A) the agency head and a private property  
2 owner as to the amount, if any, of compensation  
3 owed to the private property owner; and

4 (B) whether the private property owner has  
5 been deprived of fair market value or viable use of  
6 property for which compensation is required under  
7 subsection (a).

8 (e) PAYMENT.—An agency head shall pay a private  
9 property owner any compensation required under the  
10 terms of an offer of the agency head that is accepted by  
11 the private property owner in accordance with subsection  
12 (d), or under a decision of an arbitrator under that sub-  
13 section, out of currently available appropriations support-  
14 ing the activities giving rise to the claim for compensation.  
15 The agency head shall pay to the extent of available funds  
16 any compensation under this section no later than 60 days  
17 after the date of the acceptance or the date of the issuance  
18 of the decision, respectively. If insufficient funds are avail-  
19 able to the agency in the fiscal year in which the award  
20 becomes final, the agency shall either pay the award from  
21 appropriations available in the next fiscal year or promptly  
22 seek additional appropriations for such purpose.

23 (f) TYPE OF PAYMENT.—At the election of the prop-  
24 erty owner, payment under this section shall be provided  
25 for in accordance with the standard set forth in section

1 204(d)(2) or in the amount equal to the fair market value  
2 of the property before the date of the final qualified agen-  
3 cy action with respect to which the property or interest  
4 is acquired.

5 **SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN**  
6 **COOPERATIVE AGREEMENTS.**

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

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

19 **SEC. 510. ELECTION OF REMEDIES.**

20 Nothing in this title shall be construed to—

21 (1) deny any person the right, as a condition  
22 precedent or as a requirement to exhaust adminis-  
23 trative remedies, to proceed under title II or III of  
24 this Act;

1           (2) bar any claim of any person relating to such  
2           person's property under any other law, including  
3           claims made under section 1346 or 1402 of title 28,  
4           United States Code, or chapter 91 of title 28, United  
5           States Code; or

6           (3) constitute a conclusive determination of—

7                   (A) the value of property for purposes of  
8                   an appraisal for the acquisition of property, or  
9                   for the determination of damages; or

10                   (B) any other material issue.

## 11           **TITLE VI—MISCELLANEOUS**

### 12           **SEC. 601. SEVERABILITY.**

13           If any provision of this Act, an amendment made by  
14           this Act, or the application of such provision or amend-  
15           ment to any person or circumstance is held to be unconsti-  
16           tutional, the remainder of this Act, the amendments made  
17           by this Act, and the application of the provisions of such  
18           to any person or circumstance shall not be affected there-  
19           by.

### 20           **SEC. 602. RULE OF CONSTRUCTION RELATING TO CIVIL** 21                   **RIGHTS LAWS.**

22           This Act shall not be construed to apply to any Fed-  
23           eral law that prohibits discrimination on the basis of race,  
24           color, religion, sex, national origin, age, or disability.

1 **SEC. 603. EFFECTIVE DATE.**

2       Except as otherwise provided in this Act, the provi-  
3 sions of this Act shall take effect on the date of enactment  
4 and shall apply to any agency action of the United States  
5 Government after such date.