

106TH CONGRESS  
1ST SESSION

# H. R. 1142

To ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1999

Mr. YOUNG of Alaska (for himself, Mr. TAUZIN, Mr. POMBO, Mr. PETERSON of Pennsylvania, Mr. DOOLITTLE, Mrs. CHENOWETH, Mr. RADANOVICH, Mr. CANNON, Mr. SHADEGG, Mr. SCHAFFER, Mr. WALDEN of Oregon, Mr. HASTINGS of Washington, Mr. SIMPSON, Mr. HANSEN, Mr. MCKEON, Mr. HERGER, Mr. HILL of Montana, Mr. GALLEGLY, Mr. DELAY, Mr. THOMAS, Mr. BAKER, Mr. SKEEN, Mr. THORNBERRY, Mrs. CUBIN, Mr. CALVERT, and Mr. BONILLA) introduced the following bill; which was referred to the Committee on Resources

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## A BILL

To ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used.

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 “Landowners Equal  
5 Treatment Act of 1999”.

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 (a) FINDINGS.—The Congress finds and declares the  
3 following:

4 (1) The Secretary of the Interior, through the  
5 United States Fish and Wildlife Service, recently de-  
6 manded and received compensation for the loss of  
7 use of federally owned property resulting from con-  
8 structive use of the property for other public pur-  
9 poses, in an amount of approximately \$26,000,000.

10 (2) The Secretary of Transportation has pro-  
11 mulgated a regulation allowing for compensation of  
12 Federal agencies for the lost use of agency property  
13 for public purposes, through a definition of the term  
14 “constructive use” that includes off-site impacts of  
15 Federal agency actions on federally owned property.

16 (3) The Federal Government enjoys no right  
17 under the Constitution to compensation for use of  
18 Federal agency property for other public purposes,  
19 while the rights of private persons to be com-  
20 pensated for the taking of their property by the Gov-  
21 ernment for a public purpose is a fundamental right  
22 protected by the Fifth and Fourteenth Amendments  
23 to the Constitution.

24 (4) Private property owners should be com-  
25 pensated in a manner that is at least as equitable  
26 as the compensation afforded to Federal agencies

1 when their property is used or constructively used  
2 for other public purposes.

3 (5) Fair and equitable treatment of private  
4 property owners will increase the willingness of pri-  
5 vate property owners to provide habitat for wildlife  
6 and plants protected under the Endangered Species  
7 Act of 1973 (16 U.S.C. 1531 et seq.).

8 (b) PURPOSE.—The purpose of this Act is to increase  
9 the efforts of private property owners to protect and re-  
10 store habitat for wildlife, by ensuring that their constitu-  
11 tional and legal property rights will be honored, respected,  
12 and protected in the implementation of the Endangered  
13 Species Act of 1973.

14 **SEC. 3. MINIMIZING IMPACTS ON PRIVATE PROPERTY.**

15 The Endangered Species Act of 1973 (16 U.S.C.  
16 1531 et seq.) is amended by adding at the end the fol-  
17 lowing new section:

18 “MINIMIZING IMPACTS ON PRIVATE PROPERTY

19 “SEC. 19. (a) IN GENERAL.—In implementing this  
20 Act, the head of an agency shall make every possible effort  
21 to avoid, minimize, or mitigate impacts on non-Federal  
22 property that result in Federal use of the property as a  
23 direct result of the action of the agency head under this  
24 Act or in furtherance of the purposes of this Act. An agen-  
25 cy shall not take action that results in a Federal use of  
26 non-Federal property under this Act unless the agency—

1           “(1) obtains the written permission of its  
2 owner;

3           “(2) negotiates a voluntary agreement author-  
4 izing that use; or

5           “(3) pays compensation in accordance with this  
6 section.

7           “(b) COMPENSATION FOR FEDERAL USE OF NON-  
8 FEDERAL PROPERTY.—An agency that takes action under  
9 this Act or in furtherance of the purposes of this Act that  
10 results in a Federal use of non-Federal property or any  
11 portion of non-Federal property without the written con-  
12 sent of the owner of the property shall compensate the  
13 owner for the fair market value of the Federal use of the  
14 property or portion. Compensation paid shall reflect the  
15 duration of the Federal use as necessary to achieve the  
16 purposes of this Act.

17           “(c) REQUEST OF OWNER.—An owner of non-Fed-  
18 eral property seeking compensation under this section  
19 shall make a written request for compensation to the agen-  
20 cy implementing the agency action resulting in the Federal  
21 use of property. The request shall, at a minimum, identify  
22 the affected portion of the property, the nature of the Fed-  
23 eral use of non-Federal property for which the compensa-  
24 tion is sought, and the amount of compensation sought.

1       “(d) NEGOTIATIONS.—The agency may negotiate  
2 with the owner to reach agreement on the amount of the  
3 compensation under this section, the terms of any agree-  
4 ment for payment, and the terms of any Federal use of  
5 non-Federal property for which compensation is paid. If  
6 such an agreement is reached, the agency shall within 6  
7 months pay the owner the amount agreed upon. An agree-  
8 ment under this section may include a transfer of title or  
9 an agreement to limit the period of time of the Federal  
10 use of non-Federal property.

11       “(e) CHOICE OF REMEDIES.—If, not later than 180  
12 days after the written request is made, the parties have  
13 not reached an agreement on compensation, the owner of  
14 the property may elect binding arbitration or seek com-  
15 pensation due under this section in a civil action.

16       “(f) ARBITRATION.—The procedures that govern the  
17 arbitration shall, as nearly as practicable, be those estab-  
18 lished under title 9, United States Code, for arbitration  
19 proceedings to which that title applies. An award made  
20 in such arbitration shall include a reasonable attorney’s  
21 fee and other arbitration costs, including appraisal fees.  
22 The agency shall promptly pay any award made to the  
23 owner.

24       “(g) CIVIL ACTIONS.—A civil action to enforce this  
25 section may be filed under section 11(g). An owner who

1 prevails in a civil action against the agency pursuant to  
2 this section shall be entitled to, and the agency shall be  
3 liable for, the amount of compensation awarded plus rea-  
4 sonable attorney's fees and other litigation costs, including  
5 appraisal fees. The court shall award interest on the  
6 amount of any compensation from the time of the Federal  
7 use of non-Federal property.

8       “(h) SOURCE OF PAYMENTS.—Any payment made  
9 under this section to an owner of property and any judg-  
10 ment obtained by an owner of property in a civil action  
11 under this section shall, notwithstanding any other provi-  
12 sion of law, be made from the annual appropriation of the  
13 agency that took the agency action giving rise to the pay-  
14 ment or civil action. If the agency action resulted from  
15 a requirement imposed by another agency, then the agency  
16 making the payment or satisfying the judgment may seek  
17 partial or complete reimbursement from the appropriated  
18 funds of the other agency. For this purpose, the head of  
19 the agency concerned may transfer or reprogram any ap-  
20 propriated funds available to the agency. If insufficient  
21 funds exist for the payment or to satisfy the judgment,  
22 it shall be the duty of the head of the agency to seek the  
23 appropriation of such funds for the next fiscal year.

24       “(i) AVAILABILITY OF APPROPRIATIONS.—Notwith-  
25 standing any other provision of law, any obligation of the

1 United States to make any payment under this section  
2 shall be subject to the availability of appropriations.

3 “(j) DUTY OF NOTICE TO OWNERS.—An agency may  
4 not take any action that is a Federal use of non-Federal  
5 property unless the agency has given 30 days notice to  
6 each owner of the property directly affected explaining  
7 their rights under this section and either obtaining their  
8 permission for the Federal use or providing the procedures  
9 for obtaining any compensation that may be available  
10 under this section.

11 “(k) RULES OF CONSTRUCTION.—The following rules  
12 of construction shall apply to this Act:

13 “(1) OTHER RIGHTS PRESERVED.—Nothing in  
14 this Act shall be construed to limit any right to com-  
15 pensation that exists under the Constitution or  
16 under other laws.

17 “(2) EXTENT OF FEDERAL AUTHORITY.—Pay-  
18 ment of compensation under this section (other than  
19 when property is bought by the Federal Government  
20 at the option of the owner) shall not confer any  
21 rights on the Federal Government other than the  
22 Federal use of non-Federal property agreed to so  
23 that the agency action may achieve the species con-  
24 servation purposes of this Act.

25 “(l) DEFINITIONS.—For the purposes of this section:

1           “(1) AGENCY.—The term ‘agency’ has the  
2 meaning given that term in section 551 of title 5,  
3 United States Code.

4           “(2) FEDERAL USE.—(A) The term ‘Federal  
5 use’ means—

6                   “(i) any action under this Act to—

7                           “(I) permanently incorporate non-  
8 Federal property into a Federal facility;

9                           “(II) place non-Federal property  
10 under the control of the Secretary; or

11                           “(III) temporarily occupy non-Federal  
12 property in a manner that is adverse to the  
13 constitutional right of the owner of the  
14 property against taking of the property by  
15 the Federal Government; and

16                   “(ii) any constructive use of non-Federal  
17 property.

18           “(B) In this paragraph the term ‘constructive  
19 use’ means any action described in subparagraph  
20 (C) taken under this Act that results in—

21                   “(i) substantial diminution in the normal  
22 or reasonably expected uses of non-Federal  
23 property;

1           “(ii) a reduction in the fair market value  
2 of non-Federal property of 25 percent or more;  
3 or

4           “(iii) in the case of the right to receive  
5 water, any diminution in the quantity of water  
6 received or available for use.

7           “(C) The actions referred to in subparagraph  
8 (B) are the following:

9           “(i) The imposition or enforcement of a  
10 prohibition of use of non-Federal property the  
11 purpose of which is to provide or retain habitat  
12 for any species of wildlife or plant determined  
13 to be an endangered species or threatened spe-  
14 cies.

15           “(ii) A designation of non-Federal property  
16 as critical habitat under this Act.

17           “(iii) The denial of a permit under section  
18 10 that results in the loss of the ability to use  
19 non-Federal property in order to provide habi-  
20 tat for wildlife or plants.

21           “(iv) An agency action pursuant to a rea-  
22 sonable and prudent alternative suggested by  
23 the Secretary under section 7, that would cause  
24 an agency to restrict the use of non-Federal  
25 property.

1           “(v) The imposition by any governmental  
2           entity of a limitation or restriction on an other-  
3           wise permissible use of non-Federal property by  
4           the owner of the property, as a condition of a  
5           Federal agency providing any land, money, per-  
6           mit, or other benefit to the governmental entity,  
7           if imposition of the limitation or restriction by  
8           the agency directly would constitute a Federal  
9           use of non-Federal property under the other  
10          provisions of this paragraph, unless the govern-  
11          mental entity has some other legal basis for im-  
12          posing the limitation or restriction.

13          “(3) FAIR MARKET VALUE.—The term ‘fair  
14          market value’ means the most probable price at  
15          which property or a right to use property would  
16          change hands, in a competitive and open market  
17          under all conditions requisite to fair sale, between a  
18          willing buyer and willing seller, neither being under  
19          any compulsion to buy or sell and both having rea-  
20          sonable knowledge of relevant facts, and without re-  
21          gard to the presence of any species protected under  
22          this Act. With respect to a right to use property,  
23          fair market value shall be determined on or imme-  
24          diately before the exercise of the right.

1           “(4) LAW OF THE STATE.—The term ‘law of  
2 the State’ includes the law of a political subdivision  
3 of a State.

4           “(5) NON-FEDERAL PROPERTY.—The term  
5 ‘non-Federal property’ means property which is  
6 owned by a person other than any Federal entity of  
7 government.

8           “(6) PROPERTY.—The term ‘property’ means  
9 land, an interest in land, the right to use or receive  
10 water, and any personal property, as defined under  
11 the law of the State.”.

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