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Takings (95) [6]

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LEGISLATIVE REFERRAL MEMORANDUM

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SUBJECT: JUSTICE Proposed Testimony RE: S605, Omnibus Property Rights Act

**DEADLINE: 10:00 A.M., Wednesday, April 05, 1995**

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## I. INTRODUCTION

Mr. Chairman, and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding S. 605, the "Omnibus Property Rights Act of 1995," and similar bills that seek to expand the traditional concept of "takings."

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration supports, as do all Americans, the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his government.

To the extent government regulation imposes unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate undue burdens on property owners, and we are developing additional ways to improve federal programs to eliminate adverse effects, particularly on small landowners. I will describe some of these reforms in greater detail later in this testimony, and they are further described in Appendix A.

Mr. Chairman: No one could disagree with the concerns that underlie S. 605. All citizens should be protected from unreasonable regulatory restrictions on their property. But S. 605, and H.R. 925 passed by the House of Representatives, will do little or nothing either to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that these proposals to require compensation to property owners for government action that reduces property value are a direct threat to the vast majority of American homeowners.

Passage of these compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to take for granted. The cost of these protections and programs after passage of such legislation would be much too high. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode. The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through their property and our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws. That is, we would be forced to pay large landowners and

corporations to follow the law. In the process, we would, of course, end any hope of ever balancing the budget.

No matter what avenue we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their hard-earned wages are collected by the government as taxes are paid out to corporations and large landowners as compensation. The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. That is why we strongly oppose S. 605 and similar bills.

II. THE COMPENSATION SCHEMES IN TITLES II AND V WOULD HARM THE OVERWHELMING MAJORITY OF PROPERTY OWNERS, COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS, CREATE HUGE NEW BUREAUCRACIES AND A LITIGATION EXPLOSION, AND UNDERMINE VITAL PROTECTIONS

A. The Fifth Amendment to the U.S. Constitution

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Before we consider proposals to alter those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation is a

compensable taking, the Constitution requires the government, and if necessary the courts, to consider the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. On the other hand, when government regulation "goes too far" in the words of Justice Holmes, and imposes an unfair burden on an individual property owner that constitutes a taking, compensation must be paid.

This constitutional tradition has been carefully developed by the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

It goes without saying that economic impact of regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking -- Pennsylvania Coal Co. v. Mahon (1922) -- the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely -- within the bounds we set through our communities and elected representatives. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising our rights in ways that harm others.

As we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. However, usually the issue of whether government action constitutes a compensable taking simply does not arise. In the vast majority of cases, we acknowledge the need for a taking and we pay for it. If you consider the huge number of government decisions made each year, only a relatively

minuscule number give rise to the cases that comprise the Justice Department's regulatory takings docket. To cite but one example, of the 48,000 landowners who applied for a development permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The Compensation Schemes in S. 605

A Radical Departure from Constitutional Tradition: The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. They ignore the wisdom of the Supreme Court and would wipe out many vital protections.

S. 605 would require the federal government to pay a property owner when federal agency action reduces the value of the affected portion of the property by 33 percent or more. The compensation requirement also applies to a wide range of state and local actions under federally funded, delegated, or required

programs. The single exception to the compensation requirement is in the relatively rare instance in which the agency action does nothing more than restrict property use that is already prohibited by applicable state nuisance law. (Even this narrow exception is inapplicable to the compensation scheme for federal programs covered by compensation scheme in Title V of the bill.)

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court -- including all eight Republican appointees -- joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as "long established" in the case law, a principle developed and accepted by jurists and scholars throughout our Nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors -- such as the landowner's legitimate expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public -- must be considered in deciding whether compensation would be fair and just. Because S. 605 precludes consideration of these

factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.<sup>1</sup>

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses exclusively on the affected portion of the property. The courts have made clear that fairness and justice require an examination of the regulation's impact on the parcel as a whole. E.g., Concrete Pipe, 113 S. Ct. at 2290; Penn Central Transp. Co. v. New York City, 438 U.S. 124, 130-31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel. Moreover, under S. 605 a landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case.

Sections 204(a)(2)(A) through (D) would freeze into law several additional compensation standards that appear to be loosely based on various Supreme Court cases under the Just Compensation Clause. In our view, these standards in the bill reflect overly broad readings of the applicable case law and

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<sup>1</sup> By allowing a property owner to "deem" a 33 percent loss in value to constitute a constitutional taking, section 508(e) defines a Fifth Amendment taking in a manner at odds with the Supreme Court's jurisprudence. It thus contravenes the cardinal principle of constitutional law that the Supreme Court possesses the ultimate authority to define the meaning of the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

would deprive these areas of takings law the benefit of further refinement through the case-by-case adjudication that has characterized and improved takings jurisprudence for more than 200 years.

The overall breadth of the bill's compensation requirement is staggering. It includes extremely broad definitions of "property," "just compensation," "agency action," and other key terms, some of which conflict with their accepted meaning as used in the Constitution. It applies without regard to the nature of the activity the agency seeks to prohibit. In many cases, large corporations would be free to use their property in whatever reckless manner they desire without regard to the impact their activities have on their neighbors and the community at large.

Think of the consequences of this requirement for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied for whatever reason, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

Because S. 605 goes beyond mere land-use restrictions and applies to all manner of agency actions, it is likely to have many unintended consequences that we cannot even begin to

anticipate. The bill's confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: for example, compensation for restaurants and small businesses whose values are diminished by military base closings; compensation for a bank where the Comptroller of the Currency determines that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where the Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that addresses the complex water rights controversies in the West; and so forth. The examples are virtually endless.

A Threat to Property Rights: Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a recent survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live -- ahead of

schools, low taxes, and health care. By undercutting environmental and other protections, compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans -- their homes -- would inevitably erode.

An Untenable Fiscal Impact: Because these bills are so broad and inflexible, the potential budgetary impacts are almost unlimited. Even if new regulatory protections were scaled back, these bills would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The Administration agrees with the assessment made earlier this year by Senator Richard L. Russman, a Republican State Senator from New Hampshire, who testified before the House Judiciary Subcommittee on the Constitution on behalf of the National Conference of State Legislatures. He stated:

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with the requirements designed to protect all property values, and the health and safety of average Americans.

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. One proponent of these bills testified that, with respect to the Americans with Disabilities Act alone, potential liability would make

administration of the Act prohibitively expensive. The Department of the Interior has estimated that for just one of its many regulatory programs -- protections regarding surface coal mining -- potential liability could be billions of dollars under H.R. 925 [Interior Dept to confirm]. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands would cost taxpayers \$10-15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these three examples. As I mentioned earlier, because S. 605 goes beyond mere land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. But it is crucial to remember that these bills are based on a principle that has never been part of our law or tradition: that a property owner has the absolute right to the greatest possible profit from the property, regardless of the consequences of the proposed property use on others. The potential costs of the bill are so high, not because landowners are unreasonably shouldering these costs now, but because the bill would require compensation in many cases where compensation would be unfair and unjust -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, or where other uses would

yield a reasonable return on investment without harming neighboring landowners or the public.

S. 605 also requires the federal government to pay compensation for many State and local actions law even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property, and would thereby further expand potential federal expenditures under the bill.

In addition to the compensation costs, S. 605 would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses.

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. S. 605 attempts to avoid the "budget-buster" label

by providing that compensation is to be paid out of agency appropriations. In my view, it is hardly a mark of moderation to provide that we will stop compensating once we bankrupt our regulatory agencies. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

Huge New Bureaucracies and Countless Lawsuits: S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to litigate claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to

expect and demand. If S. 605 were to become law, these vital protections would simply become too costly to pursue.

S. 605 evidently attempts to address this concern in a small way by providing an exception to the compensation requirement in Title II where the property use at issue would constitute a nuisance under applicable state law. The compensation scheme in Title V for the programs that protect wetlands and endangered species contains no such exception.

We do not believe this complex and narrow nuisance-law exception would adequately allow for effective protection of human health, public safety, and other vital interests that benefit every American citizen. For example, the nuisance exception would not cover many protections designed to address long-term health and safety risks. The discharge of pollution into our Nation's air, land, and waterways often poses long-term health risks that would not be covered by the exception. Nor does the nuisance exception address cumulative threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction, discharges of toxic pollutants to air and water, improper mining, or other property use by an individual property owner might not constitute a nuisance by itself. However, in conjunction with similar use by nearby property owners, they can seriously affect the health or safety of a neighborhood. In many cases, state nuisance law

would apply to serious risks until those risks can be conclusively established, forcing ordinary Americans to bear the risk of scientific uncertainty. Moreover, in some states, special interest groups have lobbied state legislatures for exceptions to the nuisance laws that allow huge commercial enterprises to operate noxious facilities in family-farm communities and residential neighborhoods.

Furthermore, there are certain critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims.

Nor does the nuisance exception address uniquely federal concerns, such as national defense and foreign relations. Had S. 605 been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have resulted in numerous statutory compensation claims.

The nuisance exception also fails to recognize that there are many important public interests that are not related to health and safety and not addressed by state nuisance law. For example, these bills threaten civil rights protection, worker safety rules, and many other vital protections. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated under the Constitution simply because they were required to integrate. The Supreme Court rejected this argument,

finding the Constitution flexible enough to allow us to protect basic human dignity, even if that protection restricts property use to some extent. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards.

Professor William Prosser has described nuisance law by stating that "there is perhaps no more impenetrable jungle in the entire law." Current takings jurisprudence requires an examination of state nuisance law only in the relatively rare instance in which regulation completely deprives the landowner of all economically viable use of the land. In contrast, S. 605 would require an examination of this "impenetrable jungle" of law in virtually every lawsuit under Title II. Subjecting a crippling compensation requirement to the vagaries of the law in all 50 States would "balkanize" every federal program that affects private property.

"Horror Stories": Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made great strides in reducing unreasonable and unfair burdens on middle-class landowners, and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the Interior Department required the mining company to reduce the amount of coal it was mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under this bill.
- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant)

and thus diminished the value of the affected property, he probably would be entitled to compensation.

- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his inventory, he could seek compensation under the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the difficult burden of showing that the development would constitute a nuisance under applicable state law, compensation could be required.

These are just a few examples of the problems the "one-size-fits-all" approach of these compensation proposals raises. It is worth noting that all these examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived

from the government action, concluded that there had been no taking of property. If S. 605 becomes law, a different outcome in each case may well be the result.

Opposition to Compensation Bills: It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, many of the organizations that support compensation bills like S. 605 -- the National Association of Manufacturers, the American Petroleum Institute, the International Council of Shopping Centers, the American Forest and Paper Institute -- do not purport to represent the interests of American homeowners.

Activity in the States is particularly instructive. More than 20 state legislatures have considered and declined to adopt takings bills. Just a few months ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills. States are concerned that compensation bills would cost taxpayers

dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget and curtail vital protections. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

Conclusion: The Administration supports and values the private property rights of all property owners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on the middle class, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety, and other values important to the American people. Accordingly, we strongly oppose the compensation requirements proposed in S. 605 or in other pending legislation. Those bills are a blunderbuss approach that would provide unjust windfalls to wealthy corporations at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

### III. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answers to the horror stories that I know all of you have heard and may well hear from other panelists later today. Rather, we believe the answer lies in crafting specific solutions to specific problems. If federal programs are treating some individuals unfairly, we should fix those programs.

As part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Some of these reforms are described in greater detail in Appendix A, and I will only briefly outline them here. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and

faster. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. Thus, under most circumstances, these tracts would be exempted from ESA regulation for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the Endangered Species Act associated with the Northern Spotted owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-

consuming to litigate a constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department has also been active in working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

IV. THE PROVISIONS GRANTING THE COURT OF FEDERAL CLAIMS  
EQUITABLE POWERS AND REPEALING 28 U.S.C. 1500 ARE  
UNNECESSARY AND UNWISE.

S. 605 includes a number of provisions expanding the jurisdiction of the United States Court of Federal Claims (CFC) and the federal district courts. Our preliminary analysis of the bill is that some of these proposals raise serious constitutional problems, and others may be unworkable.

The bill would allow a property owner to file suit under the bill in either U.S. District Court or the CFC to challenge the validity of any agency action that adversely affects the owner's interest in private property. Each court would have concurrent jurisdiction over claims for monetary relief and claims seeking invalidation of the statute or rule at issue. The bill would also confer ancillary jurisdiction to the CFC over any related tort claim. Further, the bill would repeal 28 U.S.C. 1500, which

v. United States, 113 S.Ct. 2035 (1993), the Federal Circuit reversed itself last May in Loveladies Harbor v. United States, 27 F.3d 1545. Thus, the Federal Circuit has deemed section 1500 not to preclude a district court from granting equitable relief not available in the CFC.

To the extent that section 1500 still has any impact on property owners, section 205 of the bill eliminates that impact by permitting either a district court or the CFC to hear all related claims together. If section 205 were enacted generally, the repeal of section 1500 in section 205(c)(2)(A) & (B) would be unnecessary to protect the interest asserted.

A broad repeal of section 1500 clearly would have negative effects. It would enable a plaintiff to begin litigating in district court, and then simultaneously to litigate in the CFC. While the government presumably would have the right to transfer and consolidate in one forum, as a practical matter this might not happen so readily. Due to the minimal requirements of notice pleading under the Federal Rules of Civil Procedure, the government might not learn until well into the litigation that a complaint filed in a district court involved the same dispute as a complaint filed in the CFC. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation against the United States.

We therefore oppose this effort to repeal 28 U.S.C. 1500.

IV. THE TAKING IMPACT ANALYSIS REQUIREMENT IN TITLE IV WOULD  
CREATE MASSIVE AND COSTLY BUREAUCRATIC RED TAPE.

Section 403(a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in paralysis by analysis and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By

appropriate agency head has given the owner: access to the information; a detailed description of the manner in which it was collected; and an opportunity to dispute the accuracy of the information. If the owner disputes the accuracy, section 505(2) would require the agency to specifically determine that the information is accurate prior to using it to implement or enforce the ESA or the 404 program.

Unlike most provisions of Title V, which focus on the ESA and the 404 program, the consent-for-entry requirement in section 504 applies to any "agency head," a term defined in section 502(2) as the Secretary or Administrator with jurisdiction or authority to take a final action under the ESA or the 404 program. These "agency heads" include the Secretary of the Army and the EPA Administrator (for the 404 program), as well as the Secretaries of the Interior, Commerce, and Agriculture (for the ESA). As drafted, section 504 would apply to the entry of property under any program administered by these agency heads, not just the ESA and the 404 program. It is unclear whether this broad effect is intended, but it would have potentially devastating consequences.

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) -- more commonly known as the Superfund program -- authorizes EPA to enter property to conduct remedial actions when EPA determines that there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant, or contaminant. EPA

is not required to obtain the owner's permission before entering the property under this authority. These response actions often involve emergency measures, including removal of hazardous substances; measures to prevent or limit the release of hazardous substances into soil, surface water, and groundwater; sampling to determine whether hazardous substances are present; and the installation of security to ensure that the general public does not come into contact with the hazardous substances. Where the owner of the property denies access to EPA, EPA needs unequivocal authority to obtain access to address these risks to human health and the environment. Section 504 of S. 605 would severely undercut EPA's authority to implement these important protections.

The basic federal hazardous waste law, the Resource Conservation and Recovery Act of 1976, authorizes EPA to inspect hazardous waste management facilities at reasonable times. EPA's ability to ensure that hazardous waste is being properly managed would be compromised if its ability to enter and inspect facilities were limited only to instances in which the owner consents.

Deputy Attorney General Jamie Gorelick described the deficiencies of a similar requirement in her testimony on Title VIII of H.R. 9, the so-called "Citizens" Regulatory Bill of Rights," which required notification of targets of investigation. As she pointed out, such prior notification would render useless any investigatory tool that depends on the target not knowing

orders under the 404 program require a property owner to restore or otherwise alter the property. Under current law, an administrative compliance order under the 404 program is not subject to judicial review unless and until the property owner refuses to comply with the order, at which point the Justice Department decides whether to attempt to enforce the order in federal court. This system often results in prompt compliance and remediation, but allows for judicial review if the owner believes that the order is improper. An administrative appeal, as required by section 506, would create an unneeded and burdensome bureaucratic review that would disrupt this streamlined process, have a chilling effect on prompt compliance, and preclude a quick enforcement response to threats to human health and the environment.

Administrative appeals for critical habitat determinations are similarly unwise and unnecessary. These determinations are made through an informal rulemaking process. All interested parties, including landowners, may submit comments and request and participate in a hearing. A critical habitat designation which encompasses private property does not, by itself, create any obligations or impose any prohibitions on a property owner. An administrative appeal regarding a portion of critical habitat is not in keeping with the nature and processes of identification and designation of such areas for the protection of listed species.

## CONCLUSION

The Administration strongly supports private property rights. S. 605, however, represents a radical departure from our constitutional traditions and our civic responsibilities. It would impose an incalculable fiscal burden on the American taxpayer, - create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, it would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. S. 605, however, is a ham-fisted, scattershot approach that would provide unjust windfalls to wealthy corporations and large landowners at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

## Comments on the Summary of

### The Private Property and Community Protection Act of 1995

The Summary of the Private Property and Community Protection Act of 1995 defines in broad terms a proposal to address concerns about "takings" of private property. The proposal focuses on process issues rather than defining a compensation standard different from the requirements of the Fifth Amendment. While detailed legislative language is not available, the approach encompassed in the proposal is far preferable to S. 605 or other compensation proposals. We offer the following specific comments:

Sec. 4: Definition of "Community Organization": There does not appear to be a need to define this term because it is not used elsewhere in the proposal.

Sec. 4: Definition of "Impact": The inclusion of "indirect" impacts in the definition leaves the definition open-ended and could increase the number of claims, complicated the analytical process and provide additional litigation opportunities. Claimants would be tempted to ascribe diminutions of value that relate to other causes to a Federal action, thereby increasing claims and litigation costs.

Sec. 4: Definition of "Small Property Owner": Extreme care should be used in defining small farm property owner and small business property owner because these definitions could be grafted on to other more damaging proposals. Because we believe the risk is significant that proponents of more harmful proposals, such as those involving compensation, may later seek to limit their proposals to "small" entities, we do not want to offer a "small property owner" definition in this proposal that we cannot later oppose in a different context. The definitions that the drafter appears to be contemplating are broad, encompassing farms and business that may own a significant amount of property.

Accordingly, rather than defining "small property owner," we suggest two alternatives. First, the proposal could be crafted to apply only to residential property owners (the short title would become "The Homeowner Property and Community Protection Act of 1995"). Alternatively, if narrowly drawn, the proposal could apply to all private property owners without attempting to distinguish between small and other property owners.

#### Section 5: Agency Procedures:

a. Impact Analysis Provisions - It is not clear at what point in the process a "timely request" may be made to undertake an impact analysis. The proposed bill should be drafted to provide that the request come early in the process as

the agency is developing its proposal rather than after the proposal is final. For example, if an advanced notice of proposed rulemaking is published, it should be required during the comment period on the ANPR. The proposal should also limit the types of proceedings in which such a request may be made (e.g., rulemaking proceedings). It should not allow such requests for individual permitting processes where it could disrupt ongoing regulation.

b. **Condemnation Procedures** - It is unclear from the proposal in what forum a takings claim must be filed to trigger the condemnation procedures. Presumably, it is in a court proceeding since there are no provisions in the proposal for administrative proceedings.

It also is unclear how this process would work. If the United States concludes that the federal action "is likely" to result in a taking, there are two choices - either the agency may modify the action, or at the election of the property owner, a declaration to condemn the land or an interest therein is filed. What happens if the agency does not modify the action and the landowner does not want the property condemned - does the litigation proceed? May compensation be paid without the government taking an interest in the land? What if the government agrees that there is a taking but there is a disagreement over the compensation to be paid - is the amount to be litigated or can it be resolved through ADR? Certainly, ADR should be encouraged in such a circumstance.

The alternative options should be triggered by a standard more rigorous than "is likely to result in a taking." The standard should be "will result in a taking."

It is unclear how 40 USC 258a will apply. That section presumes that an action has been instituted "by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use." Under this proposal, however, the claim would have been filed by the property owner. By indicating that the declaration under 40 USC 258a would be filed "at the election of the property owner," presumably the condemnation provisions would apply when the landowner requests the government to employ them. At that juncture, the government would apparently have no choice but to comply. The government should have the option to pay compensation without taking an interest in the property or even offering a land swap.

The condemnation procedures apply only "to the extent of available funds." 40 USC 258a does not have such a limitation and the provision is silent about the source of funds. Is this language intended to limit the general application of 40 USC 258a condemnation procedures? Are the funds to come from a source

other than the judgement fund? Do they come from the agency? What happens if there are no funds in the agency program?

c. **Alternative Dispute Resolution** - It is unclear whether ADR is being mandated or simply being made available to the parties. Under Claims Court Order No. 13, use of ADR is voluntary with the parties and we recommend that this not be altered by the legislation. Also, some takings claims currently are brought in District Court rather than the Claims Court. We recommend a reference to ADR generally rather than to a specific Claims Court order. This also is prudent because the Claims Court may want to amend its ADR procedures in the future.

Another approach that the sponsors may want to consider to address arguments that obtaining redress is cumbersome or burdensome is to make the District Courts more accessible for takings claims by raising the jurisdictional amount.

Section 6: Private Property Owner and Community Assistance Programs: We recommend that the legislation require the establishment of a program rather than an office. Agencies should be given the flexibility to achieve the purposes of the legislation without necessarily incurring the additional administrative expenses associated with creating an office.

These sections should be carefully drafted to avoid making one office of an agency an advisor to a party that is suing the agency. While the program should assist small property owners in advising generally about bringing claims against the government, the office should not become an advocate for claimants or an advisor on the merits of specific claims.

Section 7: Requirement of Written Permission to Enter Private Property

We commend the drafters for recognizing the importance of having these provisions not apply to investigations conducted pursuant to federal law or enforcement of federal law.



# United States Department of the Interior

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Mike -

Per our discussion.

Ed.

## A BRIEF GUIDE TO S.605, THE OMNIBUS PROPERTY RIGHTS ACT OF 1995

James M. McElfish, Jr.  
Environmental Law Institute<sup>1</sup>

S. 605 was introduced by Senator Dole with 31 co-sponsors on March 23, 1995. It is an amalgamation of several property rights bills previously offered in the Senate with some provisions drawn from the original Contract with America property rights legislation in the House. It does not closely resemble H.R. 9 as passed by the House on March 3, although some features of the bill are consistent with the House-passed bill.

This guide is not a complete summary of the bill, but rather highlights features of particular significance.

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**Title 1** sets out findings and purposes, but does not contain language that is particularly likely to affect judicial construction of the bill's substantive provisions.

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**Title 2** of the bill establishes a new statutory compensation right for any agency action affecting private property. **Section 203(2)** defines "agency action" as any action or decision by a federal agency (including government corporations and government-controlled corporations) that "takes a property right" or "unreasonably impedes the use of property or the exercise of property interests." Both halves of the definition extend beyond the Fifth Amendment, which requires compensation for taking of "private property for public use."

**Section 203(4)** defines "owner" as "the owner or possessor of property or rights in property," thus extending compensation to non-owner tenants, users, squatters and others without a legal interest.

**Section 203(5)** provides a broad definition of property, most of which is not unusual except for the addition of "property rights provided by, or memorialized in, a contract." This provision is evidently intended to reverse both Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993) where the Supreme Court found no taking despite the existence of a contract setting out the claimant's interest; and Omnia Co v. United States, 261 U.S. 502 (1922) (the frustration of a contract right, as opposed to governmental appropriation of a contract right, is not a compensable taking) a unanimous decision rendered by the court the same year as Pennsylvania Coal Co. v. Mahon, 260 U.S.

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<sup>1</sup> This analysis is provided for informational purposes only and does not represent a position of the Environmental Law Institute on the legislation.

393 (1922).

**Section 204(a)** of the bill specifically bars uncompensated takings by federal and state agencies (when the state agency or instrumentality is one that carries out or enforces a federal regulatory program, is delegated responsibility under a federal program, or receives federal funds in connection with a state regulatory program – see §203(6)).

**Section 204(a)** provides that compensation must be paid if (1) private property (whether all or in part) is physically invaded, or taken for public use, by a federal or state agency, and (2) such action does not substantially advance the governmental purpose, it exacts the owner's right to use the property as a condition for a permit without "rough proportionality" to the impact of the proposed use, it results in temporary or permanent deprivation of all or substantially all economically beneficial or productive use of the affected portion of the property without showing that the deprivation inheres in the title itself, it diminishes the fair market value of the affected portion by 33 percent or more, or it "under any other circumstance" constitutes a taking under the Fifth Amendment. **Section 204(d)** provides that no compensation is required if the use or proposed use is "a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated."

Although §204 attempts to codify various Supreme Court and Court of Federal Claims and Federal Circuit decisions into statutory law, it has several anomalies. For example:

**Section 204(a)(1)** would require more than physical invasion to find a taking, by also requiring a showing under (a)(2). Thus, with respect to physical invasion the bill is less protective of private property than the 5th Amendment (unless it can be saved by a tautological reading of the "any other circumstance where a taking has occurred" clause, subsection (a)(2)(E).)

**Sections 204(a)(1), (2)(C) and (2)(D)** would require segmentation of property for compensation purposes. They award compensation if any "*affected portion*" of property loses either "all or substantially all" economically beneficial or productive use, or 33 percent or more of its fair market value, substituting a partial takings doctrine for the Constitutional test of parcel as a whole. The Supreme Court has never recognized partial takings except in cases of physical invasion.

Limitations that "inhere in the title itself" would excuse the government from paying compensation only where the owner claims that all or substantially all economic use has been lost. **§204(a)(2)(C)**. However, if the claimant only asserts a 33 percent loss under **§204(a)(2)(D)**, this defense is unavailable to the government - a clearly inconsistent result. (The bill's separate nuisance exception, which does apply to all categories of claims, **§204(d)**, does not also exempt non-nuisance limitations that inhere in the title itself, even though Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), established both defenses).

**Section 204(a)(2)(B)** would apply the rough proportionality standard to any permit condition, or condition for "any other agency action," although Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) said that this test applies to a dedication of a property interest. The bill is decidedly ambiguous on this point because it switches terms from "condition" in the first half of the sentence, to "required dedication" in the second.

**Section 204(b)** provides that "no action may be filed under this section against a state agency for carrying out the functions [that define it as a state agency]" -- that is, the administration of a delegated or federally supported program. Coupled with § 204(a), this provision appears to mean either that the federal government will pay (although the bill is silent on this point, or that states are prohibited from certain actions by federal law but that no one can sue to make them comply. Either construction is highly anomalous, particularly subjecting the federal treasury to the decisions of states

**Section 204(d)(2)** defines the measure of compensation in cases where an agency action "directly takes property or a portion of property under subsection (a)." The term "directly" is not defined. It may imply that there are other ways of "taking" property under subsection (a). ["Agency action" includes "unreasonably imped[ing]...the exercise of property interests." §203(2)]. This remains extremely ambiguous. The measure of damages for such "direct" takings is the diminution in fair market value or "business losses," whichever is greater. The latter term is not defined

**Section 204(e)** provides that the United States will take title to the property interest for which compensation is paid.

**Section 204(f)** provides that awards must be promptly paid out of agency appropriations; if insufficient funds are available, the agency must pay the award from funds available in the next fiscal year or seek additional appropriations.

**Section 205(a) and (c)** deviate from 140 years of prior practice by conferring on the Court of Federal Claims jurisdiction to invalidate acts of Congress and regulations on constitutional grounds. Since 1855, that court and its predecessors have had "jurisdiction only to award damages, not specific relief." Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The Court of Federal Claims is currently an Article I court under the Constitution of the United States. 28 U.S.C. §171. The ability of a non-Article III court to strike down acts of Congress and federal regulations is highly questionable, given the separation of powers set out in the Constitution. Thus, §205 may be unconstitutional in its current form.

**Section 205** also gives concurrent jurisdiction to the Court of Federal Claims and the federal district courts and eliminates the provision that prohibits pursuing the same claim in both courts. 28 U.S.C. §1500. It is evident that the bill intends to allow litigants to challenge federal regulations in the Court of Federal Claims under the Administrative Procedures Act (APA), thus creating a choice of forum other than the U.S. Courts of Appeals generally vested with jurisdiction under Title 28 and substantive statutes. §205(c). Given the Courts of

Appeals' lack of original jurisdiction over financial claims and certain other claims, it is likely that most APA review of regulations will occur in the Court of Federal Claims if this section is enacted, because only that court would have jurisdiction to hear the whole array of related claims. This is particularly likely given the breadth of takings claims created by §204 and §203(2)(B), which would appear to allow most rulemakings to be challenged on statutory takings grounds; whether or not the claims ultimately have merit, only the Court of Federal Claims would have jurisdiction to resolve both these claims and the APA claims.

Section 206 provides a 6-year statute of limitations for actions brought under the title. The fact that Section 203 requires compound interest to be paid from the date of the taking raises a significant concern that the government may be exposed to substantial liability by the strategic behavior of a litigant who waits until near the end of the 6-year period.

The provisions of §204 and §205, coupled with the definition of "agency action" in §203(2), suggest that substantial additional judicial resources will be needed by the Court of Federal Claims, and potentially by the federal district courts.

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Title 3 provides for arbitration of disputes over "a taking of private property as defined under this Act" or litigation under Title 2. Consent of both parties would be required for the arbitration. Appeals from arbitration decisions would lie in either the U.S. district courts or the Court of Federal Claims.

\*\*\*\*\*

Title 4 is the Private Property Takings Impact Analysis. It resembles both S.22 (the Dole bill) and the amendment to the Safe Drinking Water Act passed by the Senate during the 103rd Congress. It also resembles E.O. 12630, but without the attempt to define what constitutes a "taking" that led to so much controversy about the Order. New or significant features of this title include:

A requirement, §403(c), that each takings impact analysis must be made publicly available, and "to the greatest extent practicable" be transmitted to "the owner or any other person with a property right or interest in the affected property. This provision reverses the approach taken in the E.O. and the usual practice with regard to assessments which attempts to treat them as confidential deliberative documents. It also may require substantial identification, property title record searches, and mass mailing efforts in the case of regulations of general applicability.

A prohibition, §404(a) against promulgating any final rule "if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this Act." It is unclear what this means, since the Act itself provides a right to compensation.

A requirement, §404(b) that all agencies "review, and where appropriate, re-promulgate all regulations that result in takings of private property under this Act" and reduce such takings "to the maximum extent possible within existing statutory requirements." Agencies must also submit within 120 days of the act a list of proposed statutory changes.

Like the bill to amend the Safe Drinking Water Act last year, this title includes a statute of limitations on judicial review, but does not expressly provide for judicial review. Section 406 provides a 6-year statute of limitations for an action "to enforce the provisions of this title," implying a right of judicial review.

\*\*\*\*\*

Title 5 is aimed at providing particular rights to private property owners affected by wetlands regulation under §404 of the Clean Water Act and endangered species act (ESA) regulation.

Section 502(4) and (3) together define "private property owner" for purposes of Title 5. A private property owner must be a "non-Federal person" and not a state or local official "acting in an official capacity." A non-federal person must be someone "other than an officer, employee, agent, department, or instrumentality of the Federal Government or a foreign government." The definition excludes federal employees, even in their non-official capacities (as landowners), from the benefits of Title 5.

Section 503 has two provisions that significantly alter the authority of the agency heads responsible for §404 and ESA:

Section 503(a)(1) requires the agency heads in implementing and enforcing the Acts to "comply with applicable state and tribal government laws, including laws relating to private property rights and privacy." This provision, which is not limited to trespass or other common law provision, is evidently intended to allow state and tribal governments to regulate federal conduct; it would apparently have the effect of ratifying the "Catron County ordinances" now popular in parts of the West, that are intended to declare state control over federal land management or to prohibit federal agents from carrying out functions required by federal law.

Section 503(a)(2) establishes a substantive standard requiring that the Acts be administered and implemented "in a manner that has the least impact on private property owners' constitutional and other legal rights." It does not appear to allow any balancing of impacts, or consideration of reciprocity of advantage, even with respect to the "other legal rights," which may not even be of constitutional dimension. Thus, such rights may trump rights of non-property owners.

Section 504 requires written consent of the owner to entry, notice of entry, and provision of data collected by the federal agency to the owner. It does not provide for a law enforcement

exception -- even with a search warrant. Thus, a landowner could illegally fill wetlands or shoot bald eagles and federal agencies would be unable to enter the property even with probable cause.

**Section 505** requires agencies to allow owners an opportunity to dispute information before it may be used to implement or enforce the Acts.

**Sections 506 and 507** provide for administrative appeals of §404 and ESA decisions.

**Section 508** provides detailed compensation provisions and procedures, some of which were drawn from H.R. 9 as originally introduced (such as the offer and arbitration provisions) but that were not enacted by the House. It entitles a property owner to compensation (under the standards set forth in §204) if an action under §404 or ESA deprives the owner of "33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property." It provides that within 90 days of a final decision by an agency, the owner may submit a written request for compensation. The agency head must stay the action and within 180 days make two offers -- to purchase the property, or to compensate for the diminution in value. The agency must make both offers. It cannot make only one, nor may it decline to make any offer. The owner may accept one of the offers or reject both. If the owner rejects both, the owner may request binding arbitration under the rules of the American Arbitration Association. The arbitration award appears to be unreviewable; section 508(e) says that agency action is "deemed" a taking, at the option of the owner if the owner submits the dispute to arbitration. Section 508(f) requires the agency to pay any award. As under §204(f), offers or awards must be promptly paid out of agency appropriations; if insufficient funds are available, the agency must pay the award from funds available in the next fiscal year or seek additional appropriations.

**Section 510** makes the remedies in Title 5 cumulative to any under any other section of the bill or arising under any other law or the Constitution.

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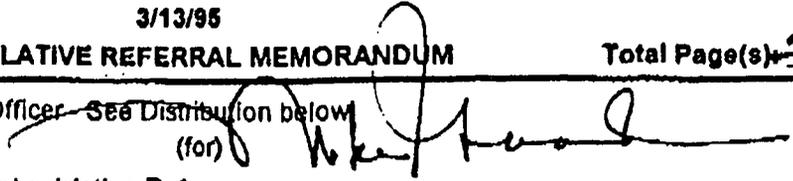
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LEGISLATIVE REFERRAL MEMORANDUM

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Legislative Assistant's line (for simple responses): 395-6194

SUBJECT: Council on Environmental Quality Talking Points on "Private Property Rights Act"

**DEADLINE: 3:00 P.M., TODAY, Monday, March 13, 1995**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: In addition to the talking points, the Administration has prepared three (3) substitute amendments that are based on congressional bills or amendments. Please review these documents and respond with comments by the deadline noted above; if you do not respond by the deadline, we will assume that your agency has no comment.

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207-EDUCATION - John Kristy - (202) 401-8313  
209-ENERGY - Bob Rabben - (202) 566-6718  
327-Federal Emergency Management Agency - John P. Carey - (202) 646-4105  
328-HEALTH AND HUMAN SERVICES - Frances White - (202) 690-7760  
215-HOUSING AND URBAN DEVELOPMENT - Edward J. Murphy, Jr. - (202) 708-1793  
329-INTERIOR - Jane Lyder - (202) 208-6706  
217-JUSTICE - Kent Markus - (202) 514-2141  
330-LABOR - Robert A. Shapiro - (202) 219-8201  
429-National Economic Council - Sonyia Matthews - (202) 456-2174  
315-Small Business Administration - Kris Swedin - (202) 205-6702  
226-TRANSPORTATION - Tom Herlihy - (202) 366-4687

**EOP:**

C. Dennis  
J. McDivitt  
C. Desimone  
M. Weatherly  
A. Stigile  
A. Kolalan  
R. Rettman  
P. Weinstein  
B. Burke  
T. Thornton  
J. Murguia  
S. Katzen  
G. Rowe  
M. Towman  
C. Cerda  
C. Konigsberg  
L. Muniz

**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 648  
FILE NO: 456**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

**TO: Mike GOAD 395-7301  
Office of Management and Budget  
Fax Number: 395-5891  
Branch-Wide Line (to reach legislative assistant): 395-6194**

**FROM:** \_\_\_\_\_ (Date)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ (Telephone)

**SUBJECT: Council on Environmental Quality Talking Points on "Private Property Rights Act"**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

## Regulatory Takings: What We're Doing and What We'd Support

### **1. The Administration is providing wide scale relief to landowners now.**

The Army Corps of Engineers and EPA are amending wetlands regulations to provide for administrative appeals and other measures to make the wetlands regulatory process more user-friendly. The Department of the Interior has announced a package of major reforms to make endangered species regulation more flexible. Those agencies are reviewing and are prepared to support an array of potential legislative reforms.

### **2. The Administration would support requiring agencies to analyze the takings impact of regulations.**

The Administration would support legislation requiring each agency of the federal government to consider the likelihood that a proposed rule would result in a taking requiring compensation under the United States Constitution. This "look before you leap" requirement is intended to assure that the agency considers the impact on private property before it takes action, and to forestall agency actions that would unnecessarily or inadvertently burden private property.

### **3. The Administration would support establishment of landowner assistance programs.**

The Administration would support legislation requiring agencies to work with homeowners, small businesses, and farmers in advance of permit applications to help frame workable proposals and otherwise head off potential problems. Each agency could be required to establish a small landowner assistance program, or separate entities could create joint assistance programs.

### **4. The Administration would support landowner petitions.**

A landowner should have an opportunity to ask an agency to consider alternative proposals to meet statutory criteria while minimizing unnecessary burdens on private property. The Administration would support legislation requiring that such an opportunity be provided in the permit process.

### **5. The Administration would support broadening access to federal courts.**

The Administration would support legislation increasing the number of takings claims that can be heard in federal district courts and courts of appeals, rather than the Court of Federal

**Claims.** This change would permit small claims to be brought locally, providing more convenience and reducing expenses to plaintiffs.

**6. The Administration will not support changing the Constitutional standard for a taking.**

The Administration is strongly opposed to measures such as H.R. 925 as passed by the House and other measures under discussion in the Senate that would:

- impair the ability of Federal, State, and local governments to protect the health and safety of our citizens and our natural environment;
- result in more bureaucracy, more red tape, and dramatically increased government expenditures; or
- reverse traditional principles of responsible citizenship and require the public to pay individuals NOT to pollute or otherwise damage the environment and public welfare that depends on healthy natural systems.

**7. The Administration will not support opening takings impact analyses to judicial review.**

The Administration wants agencies to prepare careful, accurate, and searching analyses of the potential impacts on private property rights that may result from agency actions. Without protection from judicial review of such analyses, agencies will inevitably prepare analyses that are aimed at defending the agency in case of litigation. This would not serve the purpose of shaping and reforming agency actions to provide more protection for private property.

**Draft Regulatory Takings Bill**  
**(Based on Senator Bumpers' S. 2019)**

**Sec. 1 -- PRIVATE PROPERTY RIGHTS**

- (a) **SHORT TITLE.** -- This section may be cited as the "Private Property Rights Act of 1995".
- (b) **FINDINGS.** -- The Congress finds that--
  - (1) the protection of private property from a taking by the Government without just compensation is an integral protection for private citizens incorporated into the Constitution by the Fifth Amendment and made applicable to the States by the Fourteenth Amendment; and
  - (2) Federal agencies should take into consideration the impact of Governmental actions on the use and ownership of private property.
- (c) **PURPOSE.** -- The Congress, recognizing the important role that the use and ownership of private property plays in ensuring the economic and social well-being of the Nation, declares that the Federal Government should protect the health, safety and welfare of the public and, in doing so, to the extent practicable, avoid takings of private property.
- (d) **DEFINITIONS.** -- For purposes of this section --
  - (1) the term "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and --
    - (A) includes the United States Postal Service; and
    - (B) does not include the General Accounting Office; and
  - (2) the term "taking of private property" means any action whereby private property is taken in such a way as to require compensation under the Fifth Amendment to the United States Constitution.
- (e) **PRIVATE PROPERTY TAKING ANALYSIS.** --
  - (1) **IN GENERAL.** -- The Congress authorizes and directs that, to the fullest extent possible --

- (A) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies under this section; and
- (B) all agencies of the Federal Government shall complete a private property taking analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action issued after the effective date of this section which the agency determines, in its sole and unreviewable discretion, is likely to result in a taking of private property, except that --
  - (i) this subparagraph shall not apply to --
    - (I) an action in which the power of eminent domain is formally exercised;
    - (II) an action taken --
      - (aa) with respect to property held in trust by the United States; or
      - (bb) in preparation for, or in connection with, treaty negotiations with foreign nations;
    - (III) a law enforcement action, including seizure, for a violation of law, of property for forfeiture or as evidence in a criminal proceeding;
    - (IV) a study or similar effort or planning activity;
    - (V) a communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property, regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;
    - (VI) the placement of a military facility or a military activity involving the use of solely Federal property; and
    - (VII) any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers; and

Based on  
Bumpers

- (ii) in a case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response or the issuance of a regulation pursuant to section 553(b)(B) of title 5, United States Code, the taking analysis may be completed after the emergency action is carried out or the regulation is published.
- (2) **CONTENT OF ANALYSIS.** -- A private property taking analysis shall be a written statement that includes --
  - (A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;
  - (B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;
  - (C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;
  - (D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of Private property will occur; and
  - (E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.
- (3) **SUBMISSION TO OMB.** -- Each agency shall provide an analysis required by this section as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with the proposed regulation.
- (4) **PUBLIC AVAILABILITY** -- Any taking analysis required by this section shall be used exclusively for internal deliberations and shall not be made available for public disclosure under the Freedom of Information Act, 5 U.S.C 552, or any other federal law.
- (f) **GUIDANCE AND REPORTING REQUIREMENTS.** --
  - (1) **GUIDANCE.** -- The Attorney General shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.

- (2) **REPORTING.** -- Not later than 1 year after the date of enactment of this Act and at the end of each 1-year period thereafter, each agency shall provide a report to the Director of the Office of Management and Budget and the Attorney General identifying each agency action that has resulted in the preparation of a taking analysis, the filing of a taking claim, or a final judgment by a court of competent jurisdiction resulting in an award and payment of compensation pursuant to the Just Compensation Clause of the Fifth Amendment to the Constitution. The Director of the Office of Management and Budget and the Attorney General shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies made pursuant to this paragraph.
- (g) **RULES OF CONSTRUCTION.** -- Nothing in this section shall be construed to --
- (1) limit any right or remedy, or bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or
- (2) constitute a conclusive determination of whether an agency action constitutes or will result in a taking of private property under the Fifth Amendment to the United States Constitution, the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages.
- (h) **JUDICIAL REVIEW.** -- This section is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.
- (i) **EFFECTIVE DATE.** -- The provisions of this section shall take effect 180 days after the date of the enactment of this Act.

## Sec. 2. Improving Access to Just Compensation

- (a) **JURISDICTION OF DISTRICT COURTS.** -- Section 1346(a)(2) of title 18, United States Code, is amended by inserting "(and not exceeding \$100,000 in amount, in the case of a claim for just compensation under the fifth article of amendment to the Constitution of the United States)" after "\$10,000 in amount" and by adding at the end of the section, "Claims for just compensation shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts."
- (b) **COURT OF FEDERAL CLAIMS.** -- The Chief Judge of the United States Court of Federal Claims shall develop a process to streamline and facilitate expeditious



## **Description of Draft Takings Bill--"Private Property Rights Act of 1995"**

- 1. This bill is based on S. 2019, Senator Bumpers' legislation.**
- 2. The Senate passed a similar version as an amendment to the Safe Drinking Water Act in the 103rd Congress.**
- 3. This bill includes the following provisions:**
  - a. Findings that emphasize the value of private property to the Nation's well-being;**
  - b. A declaration of purpose that the government should avoid takings of private property where practicable;**
  - c. A definition of "takings" that is consistent with the Fifth Amendment and established constitutional law;**
  - d. A requirement that agencies conduct "private property taking analysis" before issuing or promulgating any policy, regulation, proposed legislation, or related agency action that is likely to effect a taking;**
  - e. A requirement that each agency annually report to OMB and the Department of Justice on actions under this Act and, particularly, any actions that have resulted in payment of compensation for a takings;**
  - f. An expansion of federal district court jurisdiction to hear takings claims; and,**
  - g. An exemption of takings impact analyses from judicial review.**

**Draft Regulatory Takings Bill**  
**(Based on Senator Dole's S. 22)**

**SEC. 1 -- PRIVATE PROPERTY PROTECTION.**

- (a) **SHORT TITLE.** -- This Act may be cited as the "Private Property Protection Act of 1995."
- (b) **FINDINGS.** -- The Congress finds that--
- (1) the protection of private property from a taking by the Government without just compensation is an integral protection for private citizens incorporated into the United States Constitution by the fifth amendment and made applicable to the States by the fourteenth amendment; and
  - (2) Federal agencies should take into consideration the impact of governmental actions on the use and ownership of private property.
- (c) **PURPOSE.** -- The Congress, recognizing the important role that the use and ownership of private property plays in ensuring the economic and social well-being of the Nation, declares that the Federal Government should protect the health, safety, and welfare of the public and, in doing so, to the extent practicable, avoid inadvertent takings of private property.
- (d) **DEFINITIONS.** -- For purposes of this section--
- (1) the term "agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government; and
  - (2) the term "taking of private property" means any action whereby real property is taken in such a way as to require compensation under the fifth amendment to the United States Constitution.
- (e) **PRIVATE PROPERTY TAKING IMPACT ANALYSIS.** --
- (1) **In general.**--The Congress authorizes and directs that, to the fullest extent possible--
    - (A) subject to paragraph (2), all agencies of the Federal Government shall complete a private property taking impact analysis before issuing or promulgating any regulation, or proposed legislation issued after the effective date of this section which the agency determines, in its sole and unreviewable discretion, is likely to result in a taking of private property.

- (2) **Nonapplication.**--The provisions of paragraph (1) shall not apply to--
- (A) an action in which the power of eminent domain is formally exercised;
  - (B) an action taken--
    - (i) with respect to property held in trust by the United States; or
    - (ii) in preparation for, or in connection with, treaty negotiations with foreign nations;
  - (C) a law enforcement action, including seizure, for a violation of law, of property for forfeiture or as evidence in a criminal proceeding;
  - (D) a communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property, regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;
  - (E) the placement of a military facility or a military activity involving the use of solely Federal property;
  - (F) any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers;
  - (G) any matter in which there is a threat to health or safety that requires immediate response or the issuance of a regulation under section 553(b)(B) of title 5, United States Code, if the taking impact analysis is completed after the emergency action is carried out or the regulation is published; and
  - (H) any action taken pursuant to the Federal navigational servitude.
- (3) **Content of analysis.**--A private property taking impact analysis shall be a written statement that includes--
- (A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;
  - (B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;

- (C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;
- (D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur; and
- (E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.

(4) **Public availability** -- Any taking impact analysis required by this section shall be used exclusively for internal agency deliberations and shall not be made available for public disclosure under the Freedom of Information Act, 5 U.S.C 552, or any other federal law.

(f) **GUIDANCE AND REPORTING REQUIREMENTS.** --

- (1) **Guidance.**--The Attorney General shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.
- (2) **Reporting.**--Not later than 1 year after the date of enactment of this Act and at the end of each 1-year period thereafter, each agency shall provide a report to the Director of the Office of Management and Budget and the Attorney General identifying each agency action that has resulted in the filing of a taking claim or a final judgment by a court of competent jurisdiction resulting in an award and payment of compensation pursuant to the Just Compensation Clause of the Fifth Amendment to the Constitution. The Director of the Office of Management and Budget and the Attorney General shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies made pursuant to this paragraph.

(g) **PRESUMPTIONS IN PROCEEDINGS.** -- For the purpose of any action requiring an analysis under subsection (e), there shall be a rebuttable presumption that the costs, values, and estimates in any private property takings impact analysis shall be outdated and inaccurate, if--

- (1) such analysis was completed 5 years or more before the date of such action or proceeding; and
- (2) such costs, values, or estimates have not been modified within the 5-year period preceding the date of such action or proceeding.

*Based on  
C 7*

(h) **RULES OF CONSTRUCTION.** -- Nothing in this Act shall be construed to--

- (1) limit any right or remedy, constitute a condition precedent or a requirement to exhaust administrative remedies, or bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or
- (2) constitute a conclusive determination of--
  - (A) the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or
  - (B) any other material issue.
    - (i) **Effective Date.** -- The provisions of this Act shall take effect 120 days after the date of the enactment of this Act.
    - (j) **Judicial review.** -- Any analysis prepared under this Act and the compliance or noncompliance of an agency with provisions of this Act shall not be subject to judicial review. This Act is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

**Subtitle II: Improving Access to Just Compensation**

1. (a) **JURISDICTION OF DISTRICT COURTS.** -- Section 1346(a)(2) of title 18, United States Code, is amended by inserting "(and not exceeding \$100,000 in amount, in the case of a claim for just compensation under the fifth article of amendment to the Constitution of the United States)" after "\$10,000 in amount" and by adding at the end of the section, "Claims for just compensation shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts."
- (b) **COURT OF FEDERAL CLAIMS.** -- The Chief Judge of the United States Court of Federal Claims shall develop a process to streamline and facilitate expeditious resolution of litigation involving claims not exceeding \$100,000 in amount, and report to Congress not later than regarding that process.
- (c) **APPELLATE JURISDICTION.** -- Section 1295(a)(2) of title 28, United States Code, is amended by inserting "upon the requirement of just compensation under the fifth article of amendment to the Constitution of the United States or" before "upon an Act of Congress".

**Description of Draft Takings Bill--"Private Property Protection Act of 1995"**

1. **This bill is based on S. 22, Senator Dole's legislation.**
2. **This bill includes the following provisions:**
  - a. **Findings that emphasize both the value of private property to the Nation's well-being and the high degree of deference that government should show to private property interests;**
  - b. **A declaration of purpose that the government should avoid unnecessary *of* inadvertent takings of private property;**
  - c. **A definition of "takings" that is consistent with the Fifth Amendment and established constitutional law;**
  - d. **A requirement that agencies conduct "private property taking analysis" before issuing or promulgating any regulation or proposed legislation likely to effect a taking;**
  - e. **A requirement that each agency annually report to OMB and the Department of Justice on actions under this Act and, particularly, any actions that have resulted in payment of compensation for a takings;**
  - f. **An expansion of federal district court jurisdiction to hear takings claims; and,**
  - g. **An exemption of takings impact analyses from judicial review.**

**Draft Regulatory Takings Bill**  
**(Based on Porter/Farr Amendment)**

**SEC. 1. PRIVATE PROPERTY PROTECTION.**

(a) **Short Title.**--This Act may be cited as the "Regulatory Takings Reform Act of 1995."

**SEC. 2. TAKINGS IMPACT ANALYSIS.**

- (a) **IN GENERAL** -- Except as otherwise provided in this section, each agency shall complete a private property taking impact analysis before issuing any regulation after the date this section takes effect, if the agency, in its discretion determines such regulations is likely to result in the taking of private property.
- (b) **EXCEPTIONS** -- Subsection (a) does not apply to a regulation
- (1) to carry out any military or foreign affairs function (including procurement in connection with such a function), except the civil works program of the Army Corps of Engineers;
  - (2) issued with respect to a threat to health or safety requiring immediate response or under section 553(b)(3)(B) of title 5, United States Code; or
  - (3) made pursuant to the Federal navigational servitude.
- (c) **CONTENT** -- A private property taking impact analysis shall be a written statement that includes.
- (1) the specific purpose of the regulation;
  - (2) an assessment of the likelihood that a taking of private property will occur under such regulation;
  - (3) an evaluation whether such regulation is likely to require compensation to private property owners;
  - (4) alternatives to the regulation that would achieve the intended purpose and lessen the likelihood that a taking of private property will occur; and
  - (5) an estimate of the potential liability of the Federal Government if the Government is required to compensate private property owners.
- (d) **ANALYSIS NOT TO BE MADE PUBLIC** -- A private property taking impact analysis made under this section shall not be made available for public disclosure

under section 552 of title 5, United States Code, [or any other Federal law]. No part of any private property impact analysis prepared by the agency shall be admitted as evidence, or used for any other purpose, in any suit or action seeking damages, just compensation, or other relief as a result of the agency action.

- (e) **PRECLUSION OF JUDICIAL REVIEW** -- A private property taking impact analysis made under this section is not subject to judicial review.
- (f) **EFFECTIVE DATE** -- This section takes effect on the 120th day after the date of the enactment of this Act.

### **SEC. 3. PREVENTION OF UNNECESSARY BURDENS TO SMALL LANDOWNERS.**

Each agency shall, where appropriate --

- (1) consider and identify means of reducing unnecessary regulatory burdens on small landowners; and
- (2) incorporate such means into rules made after the date of the enactment of this Act.

### **SEC. 4. LANDOWNER AND COMMUNITY ASSISTANCE PROGRAM.**

- (a) **IDENTIFICATION OF PROGRAMS**. -- The Office of Management and Budget shall identify each Federal agency program that imposes limitations on the use of real property and poses a substantial risk of significant adverse impacts on private property.
- (b) **DUTY OF HEADS OF AGENCIES**. -- The head of the Federal agency administering each program shall establish an outreach and education program within the agency or in cooperation with any other State or Federal agency --
  - (1) to provide the general public and the regulated public with information on the agency program, including permitting requirements, agency procedures, and publicly available technical information;
  - (2) to provide technical assistance to small landowners affected by the program, including assistance in identifying whether property is subject to permitting or other regulatory requirements, preparing permit applications, and avoiding and mitigating adverse impacts to the environment;
  - (3) to serve as an additional focal point for the receipt of suggestions from affected persons concerning implementation and enforcement of agency programs and means of providing better customer service;

- (4) to make recommendations, as appropriate, for changes in policies and activities within the agency to provide better customer service, to simplify agency procedures and forms, and to avoid undue hardship in implementation of agency programs; and
- (5) consistent with statute, to work with other agency personnel to avoid inadvertent and unnecessary burdens on private property and minimizing burdens on small landowners.

#### SEC. 5. REFORMING EXISTING PROGRAMS.

- (a) **IN GENERAL.** -- Not later than one year after the date of the enactment of this Act the head of each agency with a program identified in section 3 shall report to the Office of Management and Budget with respect to that program --
  - (1) any existing procedural or substantive mechanisms to identify and avoid inadvertent burdens on or takings of private property;
  - (2) workable opportunities for the agency to develop mechanisms, within a reasonable amount of time and consistent with its statutory authority, to reduce such burdens and takings; and
  - (3) a timetable for that development.
- (b) **REPORT.** -- Not later than 90 days after the year period referred to in subsection (a) has ended, the Office of Management and Budget shall submit to Congress a report consolidating the information contained in the reports submitted to that Office under subsection (a).

#### SEC. 6. IMPROVING ACCESS TO JUST COMPENSATION.

- (a) **JURISDICTION OF DISTRICT COURTS.** -- Section 1346(a)(2) of title 18, United States Code, is amended by inserting "(and not exceeding \$100,000 in amount, in the case of a claim for just compensation under the fifth article of amendment to the Constitution of the United States)" after "\$10,000 in amount" and by adding at the end of the section, "Claims for just compensation shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts."
- (b) **COURT OF FEDERAL CLAIMS.** -- The Chief Judge of the United States Court of Federal Claims shall develop a process to streamline and facilitate expeditious resolution of litigation involving claims not exceeding \$100,000 in amount, and report to Congress not later than \_\_\_\_\_ regarding that process.

- (c) **APPELLATE JURISDICTION.** -- Section 1295(a)(2) of title 28, United States Code, is amended by inserting "upon the requirement of just compensation under the fifth article of amendment to the Constitution of the United States or" before "upon an Act of Congress".

**SEC. 7. DEFINITIONS.**

As used in this Act --

- (1) the term "agency" has the meaning given such term in section 551 of title 5, United States Code; and
- (2) the term "taking of private property" means an action whereby real property is taken in such a way as to require compensation under the 5th article of amendment to the Constitution of the United States.

**Description of Draft Takings Bill--"Regulatory Takings Reform Act of 1995"**

1. **This bill is based on the Porter-Farr Amendment to H.R. 925.**
2. **This bill includes the following provisions:**
  - a. **A definition of "takings" that is consistent with the Fifth Amendment and established constitutional law;**
  - b. **A requirement that agencies establish landowner and community assistance programs;**
  - c. **A requirement that agencies conduct "private property taking analysis" before issuing or promulgating any regulation or proposed legislation likely to result in a taking;**
  - d. **A requirement that each agency annually report to OMB and the Department of Justice on actions under this Act and, particularly, any actions that have resulted in payment of compensation for a takings;**
  - e. **An expansion of federal district court jurisdiction to hear takings claims; and,**
  - f. **An exemption of takings impact analyses from judicial review.**

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 899

FILE NO: 456

4/3/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 39

TO: Legislative Liaison Officer - See Distribution below:  
FROM: Ron PETERSON (for)  
Assistant Director for Legislative Reference  
OMB CONTACT: Mike GOAD 395-7301  
Legislative Assistant's line (for simple responses): 395-6194  
SUBJECT: JUSTICE Proposed Testimony RE: S605, Omnibus Property Rights Act

*Ron Peterson*

*PART II - 21pp*

**DEADLINE: 10:00 A.M., Wednesday, April 05, 1995**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: If you do not respond by the deadline, we may assume that your agency has no comment.

**LEGISLATIVE REFERRAL MEMORANDUM**  
**Distribution List**

**LRM NO: 899**

**FILE NO: 456**

**AGENCIES:**

264-Advisory Council on Historic Preservation - Dr. Robert D. Bush - (202) 606-8503  
230-AGRICULTURE, CONG AFFAIRS - Vince Ancell (all testimony) - (202) 720-7095  
239-Army Corps of Engineers (DOD) - Susan Bond - (202) 272-0030  
324-COMMERCE - Michael A. Levitt - (202) 482-3151  
325-DEFENSE - Samuel T. Brick, Jr. - (703) 697-1305  
207-EDUCATION - John Kristy - (202) 401-8313  
209-ENERGY - Bob Rabben - (202) 586-6718  
326-Environmental Protection Agency - Chris Hoff - (202) 260-5414  
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K. Schwartz  
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**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

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**LRM NO: 899  
FILE NO: 456**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

**TO: Mike GOAD 395-7301  
Office of Management and Budget  
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**SUBJECT: JUSTICE Proposed Testimony RE: S605, Omnibus Property Rights Act**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

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## I. INTRODUCTION

Mr. Chairman, and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding S. 605, the "Omnibus Property Rights Act of 1995," and similar bills that seek to expand the traditional concept of "takings."

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration supports, as do all Americans, the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his government.

To the extent government regulation imposes unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate undue burdens on property owners, and we are developing additional ways to improve federal programs to eliminate adverse effects, particularly on small landowners. I will describe some of these reforms in greater detail later in this testimony, and they are further described in Appendix A.

Mr. Chairman: No one could disagree with the concerns that underlie S. 605. All citizens should be protected from unreasonable regulatory restrictions on their property. But S. 605, and H.R. 925 passed by the House of Representatives, will do little or nothing either to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that these proposals to require compensation to property owners for government action that reduces property value are a direct threat to the vast majority of American homeowners.

Passage of these compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to take for granted. The cost of these protections and programs after passage of such legislation would be much too high. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode. The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through their property and our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws. That is, we would be forced to pay large landowners and

corporations to follow the law. In the process, we would, of course, end any hope of ever balancing the budget.

No matter what avenue we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their hard-earned wages are collected by the government as taxes are paid out to corporations and large landowners as compensation. The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. That is why we strongly oppose S. 605 and similar bills.

II. THE COMPENSATION SCHEMES IN TITLES II AND V WOULD HARM THE OVERWHELMING MAJORITY OF PROPERTY OWNERS, COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS, CREATE HUGE NEW BUREAUCRACIES AND A LITIGATION EXPLOSION, AND UNDERMINE VITAL PROTECTIONS

A. The Fifth Amendment to the U.S. Constitution

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Before we consider proposals to alter those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation is a

compensable taking, the Constitution requires the government, and if necessary the courts, to consider the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. On the other hand, when government regulation "goes too far" in the words of Justice Holmes, and imposes an unfair burden on an individual property owner that constitutes a taking, compensation must be paid.

This constitutional tradition has been carefully developed by the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

It goes without saying that economic impact of regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking -- Pennsylvania Coal Co. v. Mahon (1922) -- the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely -- within the bounds we set through our communities and elected representatives. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising our rights in ways that harm others.

As we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. However, usually the issue of whether government action constitutes a compensable taking simply does not arise. In the vast majority of cases, we acknowledge the need for a taking and we pay for it. If you consider the huge number of government decisions made each year, only a relatively

minuscule number give rise to the cases that comprise the Justice Department's regulatory takings docket. To cite but one example, of the 48,000 landowners who applied for a development permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The Compensation Schemes in S. 605

A Radical Departure from Constitutional Tradition: The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. They ignore the wisdom of the Supreme Court and would wipe out many vital protections.

S. 605 would require the federal government to pay a property owner when federal agency action reduces the value of the affected portion of the property by 33 percent or more. The compensation requirement also applies to a wide range of state and local actions under federally funded, delegated, or required

programs. The single exception to the compensation requirement is in the relatively rare instance in which the agency action does nothing more than restrict property use that is already prohibited by applicable state nuisance law. (Even this narrow exception is inapplicable to the compensation scheme for federal programs covered by compensation scheme in Title V of the bill.)

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court -- including all eight Republican appointees -- joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as "long established" in the case law, a principle developed and accepted by jurists and scholars throughout our Nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors -- such as the landowner's legitimate expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public -- must be considered in deciding whether compensation would be fair and just. Because S. 605 precludes consideration of these

factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.<sup>1</sup>

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses exclusively on the affected portion of the property. The courts have made clear that fairness and justice require an examination of the regulation's impact on the parcel as a whole. E.g., Concrete Pipe, 113 S. Ct. at 2290; Penn Central Transp. Co. v. New York City, 438 U.S. 124, 130-31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel. Moreover, under S. 605 a landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case.

Sections 204(a)(2)(A) through (D) would freeze into law several additional compensation standards that appear to be loosely based on various Supreme Court cases under the Just Compensation Clause. In our view, these standards in the bill reflect overly broad readings of the applicable case law and

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<sup>1</sup> By allowing a property owner to "deem" a 33 percent loss in value to constitute a constitutional taking, section 508(e) defines a Fifth Amendment taking in a manner at odds with the Supreme Court's jurisprudence. It thus contravenes the cardinal principle of constitutional law that the Supreme Court possesses the ultimate authority to define the meaning of the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

would deprive these areas of takings law the benefit of further refinement through the case-by-case adjudication that has characterized and improved takings jurisprudence for more than 200 years.

The overall breadth of the bill's compensation requirement is staggering. It includes extremely broad definitions of "property," "just compensation," "agency action," and other key terms, some of which conflict with their accepted meaning as used in the Constitution. It applies without regard to the nature of the activity the agency seeks to prohibit. In many cases, large corporations would be free to use their property in whatever reckless manner they desire without regard to the impact their activities have on their neighbors and the community at large.

Think of the consequences of this requirement for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied for whatever reason, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

Because S. 605 goes beyond mere land-use restrictions and applies to all manner of agency actions, it is likely to have many unintended consequences that we cannot even begin to

anticipate. The bill's confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: for example, compensation for restaurants and small businesses whose values are diminished by military base closings; compensation for a bank where the Comptroller of the Currency determines that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where the Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that addresses the complex water rights controversies in the West; and so forth. The examples are virtually endless.

A Threat to Property Rights: Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a recent survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live -- ahead of

schools, low taxes, and health care. By undercutting environmental and other protections, compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans -- their homes -- would inevitably erode.

An Untenable Fiscal Impact: Because these bills are so broad and inflexible, the potential budgetary impacts are almost unlimited. Even if new regulatory protections were scaled back, these bills would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The Administration agrees with the assessment made earlier this year by Senator Richard L. Russman, a Republican State Senator from New Hampshire, who testified before the House Judiciary Subcommittee on the Constitution on behalf of the National Conference of State Legislatures. He stated:

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with the requirements designed to protect all property values, and the health and safety of average Americans.

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. One proponent of these bills testified that, with respect to the Americans with Disabilities Act alone, potential liability would make

administration of the Act prohibitively expensive. The Department of the Interior has estimated that for just one of its many regulatory programs -- protections regarding surface coal mining -- potential liability could be billions of dollars under H.R. 925 [Interior Dept to confirm]. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands would cost taxpayers \$10-15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these three examples. As I mentioned earlier, because S. 605 goes beyond mere land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. But it is crucial to remember that these bills are based on a principle that has never been part of our law or tradition: that a property owner has the absolute right to the greatest possible profit from the property, regardless of the consequences of the proposed property use on others. The potential costs of the bill are so high, not because landowners are unreasonably shouldering these costs now, but because the bill would require compensation in many cases where compensation would be unfair and unjust -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, or where other uses would

yield a reasonable return on investment without harming neighboring landowners or the public.

S. 605 also requires the federal government to pay compensation for many State and local actions law even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property, and would thereby further expand potential federal expenditures under the bill.

In addition to the compensation costs, S. 605 would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses.

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. S. 605 attempts to avoid the "budget-buster" label

by providing that compensation is to be paid out of agency appropriations. In my view, it is hardly a mark of moderation to provide that we will stop compensating once we bankrupt our regulatory agencies. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

Huge New Bureaucracies and Countless Lawsuits: S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to litigate claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to

expect and demand. If S. 605 were to become law, these vital protections would simply become too costly to pursue.

S. 605 evidently attempts to address this concern in a small way by providing an exception to the compensation requirement in Title II where the property use at issue would constitute a nuisance under applicable state law. The compensation scheme in Title V for the programs that protect wetlands and endangered species contains no such exception.

We do not believe this complex and narrow nuisance-law exception would adequately allow for effective protection of human health, public safety, and other vital interests that benefit every American citizen. For example, the nuisance exception would not cover many protections designed to address long-term health and safety risks. The discharge of pollution into our Nation's air, land, and waterways often poses long-term health risks that would not be covered by the exception. Nor does the nuisance exception address cumulative threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction, discharges of toxic pollutants to air and water, improper mining, or other property use by an individual property owner might not constitute a nuisance by itself. However, in conjunction with similar use by nearby property owners, they can seriously affect the health or safety of a neighborhood. In many cases, state nuisance law

would <sup>NOT ? ✓</sup> apply to serious risks until those risks can be conclusively established, forcing ordinary Americans to bear the risk of scientific uncertainty. Moreover, in some states, special interest groups have lobbied state legislatures for exceptions to the nuisance laws that allow huge commercial enterprises to operate noxious facilities in family-farm communities and residential neighborhoods.

Furthermore, there are certain critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims.

Nor does the nuisance exception address uniquely federal concerns, such as national defense and foreign relations. Had S. 605 been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have resulted in numerous statutory compensation claims.

The nuisance exception also fails to recognize that there are many important public interests that are not related to health and safety and not addressed by state nuisance law. For example, these bills threaten civil rights protection, worker safety rules, and many other vital protections. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated under the Constitution simply because they were required to integrate. The Supreme Court rejected this argument,

finding the Constitution flexible enough to allow us to protect basic human dignity, even if that protection restricts property use to some extent. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards.

Professor William Prosser has described nuisance law by stating that "there is perhaps no more impenetrable jungle in the entire law." Current takings jurisprudence requires an examination of state nuisance law only in the relatively rare instance in which regulation completely deprives the landowner of all economically viable use of the land. In contrast, S. 605 would require an examination of this "impenetrable jungle" of law in virtually every lawsuit under Title II. Subjecting a crippling compensation requirement to the vagaries of the law in all 50 States would "balkanize" every federal program that affects private property.

"Horror Stories": Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made great strides in reducing unreasonable and unfair burdens on middle-class landowners, and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the Interior Department required the mining company to reduce the amount of coal it was mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under this bill.
- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant)

and thus diminished the value of the affected property, he probably would be entitled to compensation.

- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his inventory, he could seek compensation under the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the difficult burden of showing that the development would constitute a nuisance under applicable state law, compensation could be required.

These are just a few examples of the problems the "one-size-fits-all" approach of these compensation proposals raises. It is worth noting that all these examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived

from the government action, concluded that there had been no taking of property. If S. 605 becomes law, a different outcome in each case may well be the result.

Opposition to Compensation Bills: It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, many of the organizations that support compensation bills like S. 605 -- the National Association of Manufacturers, the American Petroleum Institute, the International Council of Shopping Centers, the American Forest and Paper Institute -- do not purport to represent the interests of American homeowners.

Activity in the States is particularly instructive. More than 20 state legislatures have considered and declined to adopt takings bills. Just a few months ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills. States are concerned that compensation bills would cost taxpayers

dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget and curtail vital protections. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

Conclusion: The Administration supports and values the private property rights of all property owners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on the middle class, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety, and other values important to the American people. Accordingly, we strongly oppose the compensation requirements proposed in S. 605 or in other pending legislation. Those bills are a blunderbuss approach that would provide unjust windfalls to wealthy corporations at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

### III. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answers to the horror stories that I know all of you have heard and may well hear from other panelists later today. Rather, we believe the answer lies in crafting specific solutions to specific problems. If federal programs are treating some individuals unfairly, we should fix those programs.

As part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Some of these reforms are described in greater detail in Appendix A, and I will only briefly outline them here. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and

faster. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. Thus, under most circumstances, these tracts would be exempted from ESA regulation for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the Endangered Species Act associated with the Northern Spotted owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-

consuming to litigate a constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department has also been active in working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

IV. THE PROVISIONS GRANTING THE COURT OF FEDERAL CLAIMS  
EQUITABLE POWERS AND REPEALING 28 U.S.C. 1500 ARE  
UNNECESSARY AND UNWISE.

S. 605 includes a number of provisions expanding the jurisdiction of the United States Court of Federal Claims (CFC) and the federal district courts. Our preliminary analysis of the bill is that some of these proposals raise serious constitutional problems, and others may be unworkable.

The bill would allow a property owner to file suit under the bill in either U.S. District Court or the CFC to challenge the validity of any agency action that adversely affects the owner's interest in private property. Each court would have concurrent jurisdiction over claims for monetary relief and claims seeking invalidation of the statute or rule at issue. The bill would also confer ancillary jurisdiction to the CFC over any related tort claim. Further, the bill would repeal 28 U.S.C. 1500, which

basically provides that the CFC shall not have jurisdiction over any claim for which the plaintiff has pending any suit against the United States in any other court.

We question the permissibility of granting a traditional Article III power -- invalidation -- to an Article I tribunal like the CFC. S. 605 would expand the injunctive and declaratory relief powers of the CFC -- in contrast to a long tradition in that court against those remedies, except in very limited and specific circumstances. The proposed expansion of the CFC's remedial powers would fundamentally change the nature of the court.

We are also concerned about the grant of ancillary jurisdiction to the CFC over related torts claims. The CFC has never had such jurisdiction and a separate statutory structure, the Federal Tort Claims Act, exists to deal with such cases.

Also of concern is the broad proposal to repeal 28 U.S.C. 1500. The rationale set forth at the beginning of the bill appears to be based, at least in part, on a failure to read the most current interpretation of section 1500 by the Federal Circuit, sitting in banc. In section 201(3), there is a finding that "current law -- (A) forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims." While that was true for a brief period following the Federal Circuit's 1992 in banc decision in UNR v. United States, 962 F.2d 1013, aff'd on different grounds, Keene

v. United States, 113 S.Ct. 2035 (1993), the Federal Circuit reversed itself last May in Loveladies Harbor v. United States, 27 F.3d 1545. Thus, the Federal Circuit has deemed section 1500 not to preclude a district court from granting equitable relief not available in the CFC.

To the extent that section 1500 still has any impact on property owners, section 205 of the bill eliminates that impact by permitting either a district court or the CFC to hear all related claims together. If section 205 were enacted generally, the repeal of section 1500 in section 205(c)(2)(A) & (B) would be unnecessary to protect the interest asserted.

A broad repeal of section 1500 clearly would have negative effects. It would enable a plaintiff to begin litigating in district court, and then simultaneously to litigate in the CFC. While the government presumably would have the right to transfer and consolidate in one forum, as a practical matter this might not happen so readily. Due to the minimal requirements of notice pleading under the Federal Rules of Civil Procedure, the government might not learn until well into the litigation that a complaint filed in a district court involved the same dispute as a complaint filed in the CFC. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation against the United States.

We therefore oppose this effort to repeal 28 U.S.C. 1500.

IV. THE TAKING IMPACT ANALYSIS REQUIREMENT IN TITLE IV WOULD CREATE MASSIVE AND COSTLY BUREAUCRATIC RED TAPE.

Section 403(a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in paralysis by analysis and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By

elevating property impact above all other legitimate goals and objectives, section 404 would inevitably lead to less effective implementation of any federal protections that affect property rights.

The bill's enforcement mechanisms are unclear, but section 406 of the bill suggests that actions could be filed in federal courts to enforce the TIA requirement. Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the courts' already overburdened docket.

V. TITLE V WOULD HAMSTRING ESSENTIAL ENFORCEMENT EFFORTS AND CREATE UNNECESSARY BUREAUCRACIES.

A. The Consent-for-Entry Provisions and the Restrictions on Use of Collected Data

Section 504 would prohibit specified agency heads from entering privately-owned property to collect information about the property unless the owner: has consented to the entry in writing; has been provided notice of the entry after consent; and has been notified that any raw data collected from the property must be made available to the owner upon request at no cost.

Section 505 would prohibit the use of data collected on privately owned property to implement or enforce the Endangered Species Act (ESA) and section 404 of the Clean Water Act unless the

appropriate agency head has given the owner: access to the information; a detailed description of the manner in which it was collected; and an opportunity to dispute the accuracy of the information. If the owner disputes the accuracy, section 505(2) would require the agency to specifically determine that the information is accurate prior to using it to implement or enforce the ESA or the 404 program.

Unlike most provisions of Title V, which focus on the ESA and the 404 program, the consent-for-entry requirement in section 504 applies to any "agency head," a term defined in section 502(2) as the Secretary or Administrator with jurisdiction or authority to take a final action under the ESA or the 404 program. These "agency heads" include the Secretary of the Army and the EPA Administrator (for the 404 program), as well as the Secretaries of the Interior, Commerce, and Agriculture (for the ESA). As drafted, section 504 would apply to the entry of property under any program administered by these agency heads, not just the ESA and the 404 program. It is unclear whether this broad effect is intended, but it would have potentially devastating consequences.

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) -- more commonly known as the Superfund program -- authorizes EPA to enter property to conduct remedial actions when EPA determines that there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant, or contaminant. EPA

is not required to obtain the owner's permission before entering the property under this authority. These response actions often involve emergency measures, including removal of hazardous substances; measures to prevent or limit the release of hazardous substances into soil, surface water, and groundwater; sampling to determine whether hazardous substances are present; and the installation of security to ensure that the general public does not come into contact with the hazardous substances. Where the owner of the property denies access to EPA, EPA needs unequivocal authority to obtain access to address these risks to human health and the environment. Section 504 of S. 605 would severely undercut EPA's authority to implement these important protections.

The basic federal hazardous waste law, the Resource Conservation and Recovery Act of 1976, authorizes EPA to inspect hazardous waste management facilities at reasonable times. EPA's ability to ensure that hazardous waste is being properly managed would be compromised if its ability to enter and inspect facilities were limited only to instances in which the owner consents.

Deputy Attorney General Jamie Gorelick described the deficiencies of a similar requirement in her testimony on Title VIII of H.R. 9, the so-called "Citizens' Regulatory Bill of Rights," which required notification of targets of investigation. As she pointed out, such prior notification would render useless any investigatory tool that depends on the target not knowing

that the investigation is being conducted. It would also endanger the lives of whistleblowers and cooperating citizen witnesses. A consent-for-entry requirement could be even more damaging than the notification requirement in H.R. 9. Search warrants -- the bread and butter of any enforcement activity -- would be rendered useless. Even where consent is ultimately granted, the prior notification required to obtain consent would serve as an invitation to remove or destroy evidence, or to threaten or bribe witnesses. The requirement that raw data collected on the property be provided to the owner would result in the owner knowing the precise contours of the investigation.

Even if section 504 were revised to make clear that it applies only to the ESA and the 404 program, the Department believes that it would still be an unnecessary legislative intrusion into legitimate law enforcement and information gathering activities. The Fourth Amendment to the Constitution already protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Section 504 would render unlawful any non-consensual entry onto private property even if the entry occurred under the authority of a search warrant. As the courts have recognized in interpreting the Fourth Amendment, there are many instances in which legitimate law enforcement activity necessitates entry onto private property without the owner's consent, and such entry may be made without violating the owner's constitutional rights. While aerial photographs or other

mechanisms can sometimes provide evidence of violations, entry onto property is a necessary part of environmental enforcement, and an absolute requirement to obtain consent prior to entry could bring legitimate law enforcement efforts under the ESA and 404 programs to a halt.

With respect to section 505 of the bill, the Due Process Clause of the Fifth Amendment, the ESA, the Clean Water Act, the regulations under these statutes, and the Administrative Procedure Act already afford property owners fully adequate opportunities to challenge agency determinations under the ESA and the 404 program. We are unaware of any need to supplement existing protections with additional constraints on the use of data.

B. The Administrative Appeal Provisions

Sections 506 and 507 of the bill would require the issuance of rules to establish administrative appeals for various regulatory actions under the ESA and 404 programs. The Administration has already decided to provide administrative appeals for a number of these actions, including ESA permit denials for incidental takes, the terms and conditions of an ESA incidental take permit, ESA administrative penalties, 404 jurisdictional determinations, 404 permit denials, and 404 administrative penalties.

We believe, however, that it is ill-advised to require administrative appeals for certain actions specified in the bill. For example, "cease and desist" orders and other compliance

orders under the 404 program require a property owner to restore or otherwise alter the property. Under current law, an administrative compliance order under the 404 program is not subject to judicial review unless and until the property owner refuses to comply with the order, at which point the Justice Department decides whether to attempt to enforce the order in federal court. This system often results in prompt compliance and remediation, but allows for judicial review if the owner believes that the order is improper. An administrative appeal, as required by section 506, would create an unneeded and burdensome bureaucratic review that would disrupt this streamlined process, have a chilling effect on prompt compliance, and preclude a quick enforcement response to threats to human health and the environment.

Administrative appeals for critical habitat determinations are similarly unwise and unnecessary. These determinations are made through an informal rulemaking process. All interested parties, including landowners, may submit comments and request and participate in a hearing. A critical habitat designation which encompasses private property does not, by itself, create any obligations or impose any prohibitions on a property owner. An administrative appeal regarding a portion of critical habitat is not in keeping with the nature and processes of identification and designation of such areas for the protection of listed species.

## CONCLUSION

The Administration strongly supports private property rights. S. 605, however, represents a radical departure from our constitutional traditions and our civic responsibilities. It would impose an incalculable fiscal burden on the American taxpayer, create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, it would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. S. 605, however, is a ham-fisted, scattershot approach that would provide unjust windfalls to wealthy corporations and large landowners at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans.

## APPENDIX A

CLINTON ADMINISTRATION REFORMS TO PROGRAMS  
THAT PROTECT WETLANDS AND ENDANGERED SPECIES  
[attached Corps/Interior press releases]



White House Takings Team

Eric Olson, Department of Agriculture

Michael Davis, Corps of Engineers  
Lance Wood, Corps of Engineers

Steve Cary, Department of Defense

Monica Sussman, Department of Housing and Urban Affairs  
Dave Engel, Department of Housing and Urban Affairs  
Mike Moran, Department of Housing and Urban Affairs

Joe Sax, Department of the Interior  
Kevin Sweeney, Department of the Interior  
Ed Cohen, Department of the Interior  
Kevin Sweeney, Department of the Interior

Norm Gleichman, Department of Labor  
Robert Rodriguez, Department of Labor

Jill Gibson, Department of Justice  
Jim Simon, Department of Justice  
Peter Coppleman, Department of Justice  
Elizabeth Osenbaugh, Department of Justice

Gary Guzy, Environmental Protection Agency  
Jean Nelson, Environmental Protection Agency

Mike Hirsch, Federal Emergency Management Agency

5-14-15  
Tom Hirsch

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104TH CONGRESS  
1ST SESSION

S. \_\_\_\_\_

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IN THE SENATE OF THE UNITED STATES

\_\_\_\_\_ introduced the following bill; which was read twice  
and referred to the Committee on \_\_\_\_\_

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**A BILL**

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Omnibus Property  
5 Rights Act of 1995".

6 **TITLE I—FINDINGS AND**  
7 **PURPOSES**

8 **SEC. 101. FINDINGS.**

9 The Congress finds that—

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

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

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

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

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

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

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

12 **SEC. 102. PURPOSE.**

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

17 (1) the establishment of a new Federal judicial  
18 claim in which to vindicate and protect property  
19 rights;

20 (2) the simplification and clarification of court  
21 jurisdiction over property right claims;

22 (3) the establishment of an administrative pro-  
23 cedure that requires the Federal Government to as-  
24 sess the impact of government action on holders of  
25 private property;

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1 (4) the minimization, to the greatest extent possible,  
2 sible, of the taking of private property by the Federal  
3 Government and to ensure that just compensation  
4 is paid by the Government for any taking; and

5 (5) the establishment of administrative compensation  
6 procedures involving the enforcement of  
7 the Endangered Species Act of 1973 and section  
8 404 of the Federal Water Pollution Control Act.

9 **TITLE II—PROPERTY RIGHTS**  
10 **LITIGATION RELIEF**

11 **SEC. 201. FINDINGS.**

12 The Congress finds that—

13 (1) property rights have been abrogated by the  
14 application of laws, regulations, and other actions by  
15 the Federal Government that adversely affect the  
16 value of private property;

17 (2) certain provisions of sections 1346 and  
18 1402 and chapter 91 of title 28, United States Code  
19 (commonly known as the Tucker Act), that delineate  
20 the jurisdiction of courts hearing property rights  
21 claims, complicates the ability of a property owner to  
22 vindicate a property owner's right to just compensation  
23 for a governmental action that has caused a  
24 physical or regulatory taking;

25 (3) current law—

1 (A) forces a property owner to elect be-  
2 tween equitable relief in the district court and  
3 monetary relief (the value of the property  
4 taken) in the United States Court of Federal  
5 Claims;

6 (B) is used to urge dismissal in the district  
7 court on the ground that the plaintiff should  
8 seek just compensation in the Court of Federal  
9 Claims; and

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

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

15 (5) property owners should be able to fully re-  
16 cover for a taking of their private property in one  
17 court;

18 (6) certain provisions of section 1346 and 1402  
19 and chapter 91 of title 28, United States Code (com-  
20 monly known as the Tucker Act) should be amend-  
21 ed, giving both the district courts of the United  
22 States and the Court of Federal Claims jurisdiction  
23 to hear all claims relating to property rights; and

24 (7) section 1500 of title 28, United States  
25 Code, which denies the Court of Federal Claims ju-

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1 jurisdiction to entertain a suit which is pending in an-  
2 other court and made by the same plaintiff, should  
3 be repealed.

4 **SEC. 202. PURPOSES.**

5 The purposes of this title are to—

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

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

13 (3) rectify the constitutional imbalance between  
14 the Federal Government and the States; and

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

19 **SEC. 203. DEFINITIONS.**

20 For purposes of this title the term—

21 (1) "agency" means a department, agency,  
22 independent agency, or instrumentality of the United  
23 States, including any military department, Govern-  
24 ment corporation, Government-controlled corpora-

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

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

5 (A) takes a property right; or

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

8 (3) "just compensation"—

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

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

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

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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 property protected under the fifth amendment to the  
6 Constitution of the United States, any applicable  
7 Federal or State law, or this Act, and includes—

8 (A) real property, whether vested or  
9 unvested, including—

10 (i) estates in fee, life estates, estates  
11 for years, or otherwise;

12 (ii) inchoate interests in real property  
13 such as remainders and future interests;

14 (iii) personalty that is affixed to or  
15 appurtenant to real property;

16 (iv) easements;

17 (v) leaseholds;

18 (vi) recorded liens; and

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

21 (B) the right to use water or the right to  
22 receive water, including any recorded lines on  
23 such water right;

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

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

11 (i) national security reasons; or

12 (ii) exigencies that present immediate  
13 or reasonably foreseeable threats or inju-  
14 ries to life or property;

15 (E) any interest defined as property under  
16 State law; or

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

21 (6) "State agency" means any State depart-  
22 ment, agency, political subdivision, or instrumental-  
23 ity that—

24 (A) carries out or enforces a regulatory  
25 program required under Federal law;

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1 (B) is delegated administrative or sub-  
2 stantive responsibility under a Federal regu-  
3 latory program; or

4 (C) receives Federal funds in connection  
5 with a regulatory program established by a  
6 State,

7 if the State enforcement of the regulatory program,  
8 or the receipt of Federal funds in connection with a  
9 regulatory program established by a State, is di-  
10 rectly related to the taking of private property seek-  
11 ing to be vindicated under this Act; and

12 (7) "taking of private property", "taking", or  
13 "take"—

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

20 (B) shall not include—

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

23 (ii) an action filed by the United  
24 States relating to criminal forfeiture.

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

2 (a) IN GENERAL.—No agency or State agency, shall  
3 take private property except for public use and with just  
4 compensation to the property owner. A property owner  
5 shall receive just compensation if—

6 (1) as a consequence of an action of any agen-  
7 cy, or State agency, private property (whether all or  
8 in part) has been physically invaded or taken for  
9 public use without the consent of the owner; and

10 (2)(A) such action does not substantially ad-  
11 vance the stated governmental interest to be  
12 achieved by the legislation or regulation on which  
13 the action is based;

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

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

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1 (D) such action diminishes the fair market  
2 value of the affected portion of the property which  
3 is the subject of the action by 33 percent or more  
4 with respect to the value immediately prior to the  
5 governmental action; or

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

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

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

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

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

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

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

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

15 (2) Subject to paragraph (1), if an agency action di-  
16 rectly takes property or a portion of property under sub-  
17 section (a), compensation to the owner of the property  
18 that is affected by the action shall be either the greater  
19 of an amount equal to—

20 (A) the difference between—

21 (i) the fair market value of the property or  
22 portion of the property affected by agency ac-  
23 tion before such property became the subject of  
24 the specific government regulation; and

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1 (ii) the fair market value of the property  
2 or portion of the property when such property  
3 becomes subject to the agency action; or

4 (B) business losses.

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

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

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

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

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

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

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

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

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1 in violation of the fifth amendment of the United  
2 States Constitution”;

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

8 (C) by adding at the end thereof the following  
9 new paragraphs:

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

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

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

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

1 **SEC. 206. STATUTE OF LIMITATIONS.**

2 The statute of limitations for actions brought under  
3 this title shall be 6 years from the date of the taking of  
4 private property:

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

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

10 **SEC. 208. RULES OF CONSTRUCTION.**

11 Nothing in this title shall be construed to interfere  
12 with the authority of any State to create additional prop-  
13 erty rights.

14 **SEC. 209. EFFECTIVE DATE.**

15 The provisions of this title and amendments made by  
16 this title shall take effect on the date of the enactment  
17 of this Act and shall apply to any agency action that oc-  
18 curs after such date.

19 **TITLE III—ALTERNATIVE**  
20 **DISPUTE RESOLUTION**

21 **SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.**

22 (a) **IN GENERAL.**—Either party to a dispute over a  
23 taking of private property as defined under this Act or  
24 litigation commenced under title II of this Act may elect  
25 to resolve the dispute through settlement or arbitration.  
26 In the administration of this section—

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

3 (2) arbitration procedures shall be in accord-  
4 ance with the alternative dispute resolution proce-  
5 dures established by the American Arbitration Asso-  
6 ciation; and

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

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

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

24 (d) PAYMENT OF CERTAIN COMPENSATION.—In any  
25 appeal under subsection (c), the amount of the award of

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

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

11 **SEC. 401. FINDINGS AND PURPOSE.**

12 The Congress finds that—

13 (1) the Federal Government should protect the  
14 health, safety, welfare, and rights of the public; and

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

18 **SEC. 402. DEFINITIONS.**

19 For purposes of this title the term—

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

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

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1 (3) "taking of private property" has the same  
2 meaning as such term is defined under section 203  
3 of this Act.

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

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

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

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

17 (2) The provisions of paragraph (1)(B) shall not  
18 apply to—

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

21 (B) an action taken—

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

24 (ii) in preparation for, or in connection  
25 with, treaty negotiations with foreign nations;

1 (C) a law enforcement action, including seizure,  
2 for a violation of law, of property for forfeiture or  
3 as evidence in a criminal proceeding;

4 (D) a study or similar effort or planning activ-  
5 ity;

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

13 (F) the placement of a military facility or a  
14 military activity involving the use of solely Federal  
15 property;

16 (G) any military or foreign affairs function (in-  
17 cluding a procurement function under a military or  
18 foreign affairs function), but not including the civil  
19 works program of the Army Corps of Engineers; and

20 (H) any case in which there is an immediate  
21 threat to health or safety that constitutes an emer-  
22 gency requiring immediate response or the issuance  
23 of a regulation under section 553(b)(B) of title 5,  
24 United States Code, if the taking impact analysis is

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1 completed after the emergency action is carried out  
2 or the regulation is published.

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

5 (A) the specific purpose of the policy, regula-  
6 tion, proposal, recommendation, or related agency  
7 action;

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

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

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

21 (E) an estimate of the potential liability of the  
22 Federal Government if the Government is required  
23 to compensate a private property owner.

24 (4) Each agency shall provide an analysis required  
25 under this section as part of any submission otherwise re-

1 quired to be made to the Office of Management and Budg-  
2 et in conjunction with a proposed regulation.

3 (b) GUIDANCE AND REPORTING REQUIREMENTS.—

4 (1) The Attorney General of the United States  
5 shall provide legal guidance in a timely manner, in  
6 response to a request by an agency, to assist the  
7 agency in complying with this section.

8 (2) No later than 1 year after the date of en-  
9 actment of this Act and at the end of each 1-year  
10 period thereafter, each agency shall submit a report  
11 to the Director of the Office of Management and  
12 Budget and the Attorney General of the United  
13 States identifying each agency action that has re-  
14 sulted in the preparation of a taking impact analy-  
15 sis, the filing of a taking claim, or an award of com-  
16 pensation under the just compensation clause of the  
17 fifth amendment of the United States Constitution.  
18 The Director of the Office of Management and  
19 Budget and the Attorney General of the United  
20 States shall publish in the Federal Register, on an  
21 annual basis, a compilation of the reports of all  
22 agencies submitted under this paragraph.

23 (c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency  
24 shall—

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

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

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

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

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

19 **SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLI-**  
20 **ANCE.**

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

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

4 (1) review, and where appropriate, re-promul-  
5 gate all regulations that result in takings of private  
6 property under this Act, and reduce such takings of  
7 private property to the maximum extent possible  
8 within existing statutory requirements;

9 (2) prepare and submit their budget requests  
10 consistent with the purposes of this Act as expressed  
11 in section 401 of this title for fiscal year 1997 and  
12 all fiscal years thereafter; and

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

21 **SEC. 405. 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

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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. 406. 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;

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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) to 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) that—

18 (A) owns property referred to under para-  
19 graph (5) (A) or (B); or

20 (B) holds property referred to under para-  
21 graph (5)(C);

22 (5) "property" means—

23 (A) land;

24 (B) any interest in land; and

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1 (C) the right to use or the right to receive  
2 water; and

3 (6) "qualified agency action" means an agency  
4 action (as that term is defined in section 551(13) of  
5 title 5, United States Code) that is taken—

6 (A) under section 404 of the Federal  
7 Water Pollution Control Act (33 U.S.C. 1344);  
8 or

9 (B) under the Endangered Species Act of  
10 1973 (16 U.S.C. 1531 et seq.).

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

12 (a) **IN GENERAL.**—In implementing and enforcing  
13 the Acts, each agency head shall—

14 (1) comply with applicable State and tribal gov-  
15 ernment laws, including laws relating to private  
16 property rights and privacy; and

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

20 (b) **FINAL DECISIONS.**—Each agency head shall de-  
21 velop and implement rules and regulations for ensuring  
22 that the constitutional and other legal rights of private  
23 property owners are protected when the agency head  
24 makes, or participates with other agencies in the making

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1 of, any final decision that restricts the use of private prop-  
2 erty in administering and implementing this Act.

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

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

7 (1) consented in writing to that entry;

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

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

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

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

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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 Emergency Property  
14          Owners Relief Act of 1995.”.

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(16  
18 U.S.C. 1540) is amended by adding at the end the follow-  
19 ing 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-

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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 Emergency Property  
8 Owners Relief Act of 1995.”.

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 33 percent or more of the fair  
14 market value, or the economically viable use, of the af-  
15 fected portion of the property as determined by a qualified  
16 appraisal expert, is entitled to receive compensation in ac-  
17 cordance with the standards set forth in section 204 of  
18 this Act.

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

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1 quest to the agency head for compensation in accordance  
2 with subsection (c).

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

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

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

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

20 (2) If the private property owner rejects both offers,  
21 the private property owner may submit the matter for ar-  
22 bitration to an arbitrator appointed by the agency head  
23 from a list of arbitrators submitted to the agency head  
24 by the American Arbitration Association. The arbitration  
25 shall be conducted in accordance with the real estate valu-

1 ation arbitration rules of that association. For purposes  
2 of this section, an arbitration is binding on—

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

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

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

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

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

19 (f) PAYMENT.—An agency head shall pay a private  
20 property owner any compensation required under the  
21 terms of an offer of the agency head that is accepted by  
22 the private property owner in accordance with subsection  
23 (d), or under a decision of an arbitrator under that sub-  
24 section, out of currently available appropriations support-  
25 ing the activities giving rise to the claim for compensation.

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

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

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

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

18 **SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN**  
19 **COOPERATIVE AGREEMENTS.**

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

23 “(j) Notwithstanding any other provision of this sec-  
24 tion, when the Secretary enters into a management agree-  
25 ment under subsection (b) with any non-Federal person

1 that establishes restrictions on the use of property, the  
2 Secretary shall notify all private property owners or les-  
3 sees of the property that is subject to the management  
4 agreement and shall provide an opportunity for each pri-  
5 vate property owner or lessee to participate in the manage-  
6 ment agreement.”.

7 **SEC. 510. ELECTION OF REMEDIES.**

8 Nothing in this title shall be construed to—

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

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

18 (3) constitute a conclusive determination of—

19 (A) the value of property for purposes of  
20 an appraisal for the acquisition of property, or  
21 for the determination of damages; or

22 (B) any other material issue.

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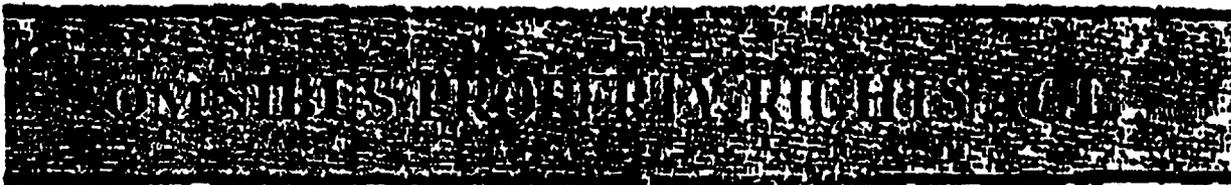
1 **TITLE VI—MISCELLANEOUS**

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.



(Attached to "Dear Colleague" in the Senate 3/16/95)

section 1 Short title.  
Omnibus Property Rights Act of 1995

## TITLE I -- FINDINGS AND PURPOSES

section 101 Findings.  
section 102 Purpose.

## TITLE II-- PROPERTY RIGHTS LITIGATION RELIEF

section 201 Findings.  
section 202 Purposes.  
section 203 Definitions.

- "Property" and "private property" means real property; the right to use and receive water; rents, issues, and profits from land; property rights defined by contract; and any interest understood to be property under common law.
- "Taking" does not include condemnation or criminal forfeiture.

section 204 Compensation for private property.

- A property owner shall receive compensation if: private property has been physically taken for public use; the rights of the owner are abridged in order to obtain a permit for use of the property; the owner is deprived of all or substantially all of the economic benefit of the land; the affected property is diminished in value by 33%; and any other circumstance considered taking within the meaning of the Fifth Amendment to the Constitution of the United States.
- The property owner has the burden of proving the diminution of value of the property.
- Where required, the government has the burden of proving that:
  - its action substantially advances the state's purpose.
  - its conditions on granting a permit are roughly proportional to the impact of the proposed use of the property.
  - the prohibited use is a nuisance.
- The government is not required to pay compensation in cases when the property is a nuisance.
- Owners shall be compensated the difference between fair market value of the affected property before the agency action and its value after the agency action.
- Compensation for a taking shall be paid out of the budget of the agency responsible for the taking.

- section 205** **Jurisdiction and judicial review.**  
Affected property owners can choose to file claims against offending federal agencies in either the United States District Court or United States Court of Federal Claims.
- section 206** **Statute of limitations.**  
A property owner has six years to make a claim against an offending agency.
- section 207** **Attorney's fees and costs.**  
~~Attorney's fees and costs shall be awarded to prevailing plaintiffs.~~
- section 208** **Rules of construction.**  
Nothing in this title shall infringe upon the authority of state governments to create new property rights.
- section 209** **Effective Date.**  
This title shall take effect the day it is signed into law and applies to any agency actions occurring after that date.

**TITLE III -- ALTERNATIVE DISPUTE RESOLUTION**

- section 301** **Alternative dispute resolution.**
- Alternative dispute resolution is not mandatory and must be approved by both parties.
  - Appeals of arbitration decisions may be made to the District or Claims Courts.
  - Arbitration awards are made from the budget of the offending party.

**TITLE IV -- PRIVATE PROPERTY TAKING IMPACT ANALYSIS**

- section 401** **Findings and purpose.**
- section 402** **Definitions.**
- section 403** **Private property taking impact analysis (TIA).**
- Prior to issuing any regulation likely to result in taking, a federal agency must submit a report of the Office of Management and Budget stating: the specific purpose of the action, the likelihood that the action would provoke a taking of private property, alternatives to the proposed regulation that would ease the impact of the taking, and estimate of the cost of compensating affected property owners. No TIA need be prepared for actions connected with: condemnation proceedings, trust properties and treaty negotiations, criminal forfeiture, planning activity, communications regarding state or local regulation of property, military activity on federal property, immediate threat to health or safety if a TIA is later completed.
  - Agencies must submit to OMB annually a list of actions requiring a TIA or resulting in a taking for publication in the Federal Register.
  - The TIA is to be made public, and given to owners of affected property.
  - TIA estimates are presumed inaccurate if completed five years or more before the agency action.
- section 404** **Decisional criteria and agency compliance.**
- An agency shall not issue rules that require uncompensated takings.
  - Agencies must review all existing regulations, re-issuing them if necessary to carry out the purpose of the act within 120 days.

Taking  
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**section 405 Rules of construction.**

This bill does not limit any other available remedies, nor act as conclusive determination of property values for appraisal purposes.

**section 406 Statute of limitations.**

~~Such suit shall be filed within six years after submission of the title~~

**TITLE V - PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL, OF RIGHTS.****section 501 Findings and purpose.****section 502 Definitions.**

- "Property" means interest in land and the right to use and receive water.
- "Agency action" means action taken under section 404 of the Clean Water Act or Endangered Species Act of 1973.

inconsistent  
w/ § 10

**section 503 Protection of private property rights.**

- Agency head shall minimize impacts on private property.
- Agency shall develop rules to ensure the protection of property rights.

**section 504 Property owners consent for entry.**

- Agencies may not enter private property without the consent of the owner, prior notice of a visit, and the sharing of any data collected on the property.
- An agency is not barred from entering property to obtain such permission.

**section 505 Right to review and dispute data collected from private property.**

An agency may not use data it has collected unless the property owner has been given access to the data, a description of the manner in which it was collected, and the owner has been allowed to dispute the accuracy of the collected information.

**section 506 Right to an administrative appeal of wetlands decisions.**

- Amends section 404 of the Federal Water Pollution Control Act to create an administrative appeal of regulatory jurisdiction, permit denials, terms and conditions of permits, penalties, and orders to restore wetlands.
- The appeal will be heard by an official other than the official who took the action.

**section 507 Right to administrative appeal under the Endangered Species Act of 1973.**

- Amends section 11 of the Endangered Species Act of 1973 to create an administrative appeal on designation of critical habitat, permit denial, terms and conditions of permits, finding of jeopardy, incidental take statements, penalties, and limitations a property use.
- The appeal will be heard by an official other than the official who took the action.

Admin  
Appeal

**section 508 Compensation for taking of private property**

- A property owner whose regulated property is devalued by 33% or who is denied the economically viable use of the regulated property is entitled to compensation.
- An owner has 90 days to file a claim after final agency action.
- The agency head has 180 days to offer to compensate or purchase the property.
- The property owner has 60 days to accept or reject any offer made.

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- The property owner may reject any offer made, and submit to binding arbitration the issues of amount of compensation owed and whether compensation is required.

- Payment shall come from the budget of the agency promulgating the action.

**section 509**

Private property owner participation in cooperative agreement.

Amends the Endangered Species Act of 1973 to require the Secretary to inform owners or lessees if their property is subject to an ESA management agreement, and allow them to participate in the management agreement.

7 § 611

**section 510**

Election of remedies.

Property owners retain the right to preserve all other remedies.

**TITLE VI -- MISCELLANEOUS**

**section 601**

Severability.

**section 602**

Effective date.

Takes effect the day it is signed into law.