

106TH CONGRESS
1ST SESSION

S. 246

To protect private property rights guaranteed by the fifth amendment to the Constitution by requiring Federal agencies to prepare private property taking impact analyses and by allowing expanded access to Federal courts.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. HAGEL introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To protect private property rights guaranteed by the fifth amendment to the Constitution by requiring Federal agencies to prepare private property taking impact analyses and by allowing expanded access to Federal courts.

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 “Private Property
5 Rights Act of 1999”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

1 (1) the ownership of private property plays an
2 important role in the economic and social well-being
3 of the Nation;

4 (2) the protection of private property from a
5 taking by the Government without just compensation
6 is an integral protection for private citizens incor-
7 porated into the United States Constitution by the
8 fifth amendment and made applicable to the States
9 by the fourteenth amendment;

10 (3) Federal agency actions that restrict the use
11 of private property and result in a significant dimi-
12 nution in value of such property constitute a taking
13 of that property and should be properly com-
14 pensated;

15 (4) Federal agencies should consider the impact
16 of agency actions, including regulations, on the use
17 and ownership of private property; and

18 (5) owners of private property that is taken by
19 a Federal agency action should be permitted to seek
20 relief in Federal district court.

21 **SEC. 3. STATEMENT OF POLICY.**

22 The policy of the Federal Government is to protect
23 the health, safety, and general welfare of the public in a
24 manner that, to the extent practicable, avoids takings of
25 private property.

1 **SEC. 4. DEFINITIONS.**

2 For purposes of this Act—

3 (1) the term “agency” means a department,
4 agency, independent agency, or instrumentality of
5 the United States, including any military depart-
6 ment, Government corporation, Government-con-
7 trolled corporation, or other establishment in the ex-
8 ecutive branch of the United States Government;

9 (2) the term “agency action” means any action,
10 inaction, or decision taken by an agency and in-
11 cludes such an action, inaction, or decision taken by,
12 or pursuant to—

13 (A) a statute, rule, regulation, order,
14 guideline, or policy; or

15 (B) the issuance, denial, or suspension of
16 any permit, license, or authorization;

17 (3) the term “owner” means the person with
18 title, possession, or other property rights in property
19 affected by any taking of such property; and

20 (4) the term “taking of private property”
21 means any action whereby private property is taken
22 in such a way as to require compensation under the
23 fifth amendment to the United States Constitution.

24 **SEC. 5. REQUIREMENT FOR PRIVATE PROPERTY TAKING**
25 **IMPACT ANALYSIS.**

26 (a) IN GENERAL.—To the fullest extent possible—

1 (1) the policies, regulations, and public laws of
2 the United States shall be interpreted and adminis-
3 tered in accordance with the policies under this Act;
4 and

5 (2) subject to subsection (b), each agency shall
6 complete a private property taking impact analysis
7 before taking any agency action (including the pro-
8 mulgation of a regulation) which is likely to result
9 in a taking of private property.

10 (b) NONAPPLICATION.—Subsection (a)(2) shall not
11 apply to—

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

14 (2) an action taken—

15 (A) with respect to property held in trust
16 by the United States; or

17 (B) in preparation for, or in connection
18 with, treaty negotiations with foreign nations;

19 (3) a law enforcement action, including seizure,
20 for a violation of law, of property for forfeiture or
21 as evidence in a criminal proceeding;

22 (4) a communication between an agency and a
23 State or local land-use planning agency concerning
24 a planned or proposed State or local activity that
25 regulates private property, regardless of whether the

1 communication is initiated by an agency or is under-
2 taken in response to an invitation by the State or
3 local authority;

4 (5) the placement of a military facility or a
5 military activity involving the use of solely Federal
6 property;

7 (6) any military or foreign affairs function (in-
8 cluding a procurement function under a military or
9 foreign affairs function), but not including the civil
10 works program of the Army Corps of Engineers; and

11 (7) any case in which there is an immediate
12 threat to health or safety that constitutes an emer-
13 gency requiring immediate response or the issuance
14 of a regulation under section 553(b)(B) of title 5,
15 United States Code, if the taking impact analysis is
16 completed after the emergency action is carried out
17 or the regulation is published.

18 (c) CONTENT OF ANALYSIS.—A private property tak-
19 ing impact analysis shall be a written statement that
20 includes—

21 (1) the specific purpose of the agency action;

22 (2) an assessment of the likelihood that a tak-
23 ing of private property will occur under such agency
24 action;

1 (3) an evaluation of whether such agency action
2 is likely to require compensation to private property
3 owners;

4 (4) alternatives to the agency action that
5 would—

6 (A) achieve the intended purposes of the
7 agency action; and

8 (B) lessen the likelihood that a taking of
9 private property will occur; and

10 (5) an estimate of the potential liability of the
11 Federal Government if the Government is required
12 to compensate a private property owner as a result
13 of the agency action.

14 (d) SUBMISSION TO OMB.—Each agency shall pro-
15 vide the analysis required under this section as part of
16 any submission otherwise required to be made to the Of-
17 fice of Management and Budget relating to an agency ac-
18 tion.

19 (e) PUBLIC AVAILABILITY OF ANALYSIS.—An agency
20 shall—

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

23 (2) to the greatest extent practicable, transmit
24 a copy of such analysis to the owner and any other

1 person with a property right or interest in the af-
2 fected property.

3 **SEC. 6. ALTERNATIVES TO TAKING OF PRIVATE PROPERTY.**

4 Before taking any final agency action, the agency
5 shall fully consider alternatives described in section
6 5(c)(4) and shall, to the maximum extent practicable, alter
7 the action to avoid or minimize the taking of private prop-
8 erty.

9 **SEC. 7. CIVIL ACTION.**

10 (a) **STANDING.**—If an agency action results in the
11 taking of private property, the owner of such property may
12 obtain appropriate relief in a civil action against the agen-
13 cy that has caused the taking to occur.

14 (b) **JURISDICTION.**—Notwithstanding sections 1346
15 or 1491 of title 28, United States Code—

16 (1) a civil action against the agency may be
17 brought in either the United States District Court in
18 which the property at issue is located or in the
19 United States Court of Federal Claims, regardless of
20 the amount in controversy; and

21 (2) if property is located in more than 1 judicial
22 district, the claim for relief may be brought in any
23 district in which any part of the property is located.

1 **SEC. 8. GUIDANCE AND REPORTING REQUIREMENTS.**

2 (a) GUIDANCE.—The Attorney General shall provide
3 legal guidance in a timely manner, in response to a request
4 by an agency, to assist the agency in complying with this
5 Act.

6 (b) REPORTS.—

7 (1) IN GENERAL.—Not later than 1 year after
8 the date of enactment of this Act and at the end of
9 each 1-year period thereafter, each agency shall sub-
10 mit a report to the Director of the Office of Manage-
11 ment and Budget and the Attorney General that
12 identifies—

13 (A) each agency action that has resulted in
14 the preparation of a taking impact analysis;

15 (B) the filing of a taking claim; and

16 (C) any award of compensation pursuant
17 to the just compensation clause of the fifth
18 amendment to the Constitution.

19 (2) PUBLICATION OF REPORTS.—The Director
20 of the Office of Management and Budget and the
21 Attorney General shall publish in the Federal Reg-
22 ister, on an annual basis, a compilation of the re-
23 ports of all agencies made under this paragraph.

24 **SEC. 9. PRESUMPTIONS IN PROCEEDINGS.**

25 For the purpose of any agency action or administra-
26 tive or judicial proceeding, there shall be a rebuttable pre-

1 sumption that the costs, values, and estimates in any pri-
2 vate property takings impact analysis shall be outdated
3 and inaccurate, if—

4 (1) such analysis was completed 5 years or
5 more before the date of such action or proceeding;
6 and

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

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

11 Nothing in this Act shall be construed to—

12 (1) limit any right or remedy, constitute a con-
13 dition precedent or a requirement to exhaust admin-
14 istrative remedies, or bar any claim of any person
15 relating to such person's property under any other
16 law, including claims made under this Act, section
17 1346 or 1402 of title 28, United States Code, or
18 chapter 91 of title 28, United States Code; or

19 (2) constitute a conclusive determination of—

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

23 (B) any other material issue.

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

2 This Act shall take effect 120 days after the date of
3 enactment of this Act.

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