

APPROVED  
by the Board of Directors of  
The Metropolitan Water District  
of Southern California  
at its meeting held

JUL 11 1995

*[Signature]*  
EXECUTIVE SECRETARY



**MWD**  
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

June 20, 1995

**To:** Board of Directors (Committee on Legislation – Action)  
**From:** General Counsel  
**Subject:** S. 605 (Dole-R-KS) and H.R. 925 (Canady-R-FL) Federal Compensation for Reduction in Property Value

**RECOMMENDATION:**

There are three possible positions which Metropolitan may take with respect to S. 605 and H.R. 925:

1. Express unqualified opposition to S. 605 and H.R. 925.
2. Express opposition to S. 605 and H.R. 925 unless amended to remove references to compensation for water.
3. Take no position on S. 605 and H.R. 925.

Staff recommends that the Board of Directors express its unqualified opposition to S. 605 and H.R. 925.

*[Signature]*  
N. Gregory Taylor  
General Counsel

**EXECUTIVE SUMMARY:**

S. 605 (Dole-R-KS) and H.R. 925 (Canady-R-FL) require compensation to be paid to owners of property which is diminished value by 20%, 33% or greater due to regulatory actions under federal law. The compensable "rights" are defined to include the right to use or receive water. The proposed legislation would have significant adverse impacts on water management in the western United States, and upset hard-won compromises on environmental policy and regulation.

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2. Express opposition to S. 605 and H.R. 925 unless amended to remove references to compensation for water.
3. Take no position on S. 605 and H.R. 925.

Staff recommends that the Board of Directors express its unqualified opposition to S. 605 and H.R. 925.

**DETAILED REPORT:**

Congress is considering several bills to curb the effects of regulatory excess on private property rights. Some of the bills limit the scope of legislation which creates regulatory powers and some limits the authority of regulatory agencies to exercise their powers. Congress is also considering an approach which requires payment of compensation to the owners of private property which is reduced in value due to regulatory actions. These bills would generally expand the current law of condemnation to provide for compensating property owners whose property diminishes in value by 20% or more.

The scope of condemnation law has recently evolved with a series of United States Supreme Court decisions addressing the issue of regulatory takings. These cases have established that a government agency will be liable for a "taking" of property if it deprives the owner of "all economically beneficial or productive use of land." Government regulations which restrict, but do not completely eliminate, all uses of the property may constitute a "taking" if there is not a nexus between the regulations and a legitimate government interest or the restrictions are not roughly proportional to the impact the property use has on the public.

Two bills under consideration in Congress, S. 605 (Dole-R-KS) and H.R. 925 (Canady-R-FL), would require compensation whenever federal action diminishes the fair market value of property, or a portion thereof, including the right to use or receive water, by at least thirty-three percent in the case of S. 605 or twenty percent in the case of H.R. 925. S. 605 applies to federal actions under any federal law. H.R. 925 is limited to federal agency action taken under a "specified regulatory law"; however, this includes the Federal Reclamation Laws, the Endangered Species Act and section 404 of the Clean Water Act.

S. 605 is also more inclusive than H.R. 925 since it requires that there be compensation for state agency actions that carry out, or are funded by, or are a delegated responsibility under, a federal regulatory program. S. 605 further requires compensation in the amount of the diminution in fair market value or in the amount of business losses, whichever is greater, while H.R. 925 only requires compensation for diminution in fair market value as a result of actions taken or directed by federal agencies. Both bills contain a "nuisance" exception.

Hearings on S. 605 have been recessed by the Senate Committee on the Judiciary subject to the call of the committee chair. H.R. 925, which has been incorporated into H.R. 9, has passed the House and has been referred to the Senate Committee on Environment and Public Works where no committee action has been scheduled.

Both bills have come under criticism from several sources including an April 11, 1995 memorandum prepared by the Congressional Research Service; an April 21, 1995 analysis by the Otay Water District; and a May 1, 1995 analysis by the Office of the Solicitor with the U.S. Department of Interior. The major concerns about the bills fall into several areas.

1. Definitional Problems - Both bills have definitional problems in that they define property to include both the "right" to "use" and "receive" water. Traditional water rights are to use water, not to receive it. Hence, both bills could be interpreted as adding a new body of federal water law. Moreover, not all rights to use water are considered property rights under state or federal law; however, the bills could be read to give them a right to compensation for interference with their use. Federal reclamation project purposes can include flood control, municipal, industrial and irrigation use, hydropower production, fish and wildlife mitigation and satisfaction of Indian water rights. Anyone affected by a change in a reclamation project operation with respect to any of these purposes could assert a claim for compensation under these bills.

2. Limitations on Water Management Improvements - The Solicitor points out that under both bills such compensation requirements could prevent federal action under reclamation law to reduce or eliminate water subsidies or promote transfers in a market-oriented approach to water management in the West and that any steps by the Department of Interior to implement provisions of the Central Valley Project Improvement Act for environmentally sensitive management could result in demands for compensation by CVP contractors.

The Solicitor and Otay Water District analyses point out that the 33% and the 20% diminution in value standards of the bills are probably illusory since they apply to any affected portion of the property. Hence, even if a farmer receiving subsidized federal reclamation water could produce his crops with less water, that farmer could still claim his right to receive water under the reclamation program ought to be segmented into such small portions as to qualify for compensation if any part of the formerly available water is withheld.

3. The Nuisance Defense - The Solicitor's analysis points out that the nuisance defense to compensation available under both bills would result in laborious and inefficient case-by-case litigation in federal court. Under S. 605 the Federal Government has the burden of proving that the regulated property use constitutes a nuisance. If the government could not establish that wasteful irrigation practices causing excessive runoff and resulting water pollution constituted a nuisance, both bills could be interpreted to obligate the

Federal Government to pay a farmer the fair market value of the water rather than just reimbursing the farmer's cost of buying the water. This would allow the reclamation farmers to receive a windfall, namely, the difference between what they paid for the water and the fair market value of that water.

4. Federal Court Take-Over of State Water Law - The Solicitor's analysis suggests that complex, prolonged federal court review of a federal reclamation water project contract would be required to determine whether the beneficiary's contractual rights constitute a right to use or receive project water so as to trigger compensation under the bills. The Solicitor surmises that the bills could be interpreted as a Congressional admission or acceptance of monetary liability for water restrictions regardless of what Federal Reclamation Project contracts or the law previously provided. The Solicitor also notes that in awarding compensation pursuant to these bills, the Federal Courts could develop their own body of water rights law which could fundamentally disrupt the system which has governed water use in the Western states for most of the Twentieth Century.

5. Bay-Delta Accord - The Solicitor points out that the December 15, 1994 Bay-Delta Accord arguably modifies the rights to "use" or "receive" water. Since the Bay-Delta Accord requires the Bureau of Reclamation to act in some circumstances to restrict the amount of water delivered to its contractors or to others receiving water from the Central Valley Project, these bills, if enacted would result in lawsuits seeking compensation by those whose water uses are affected by the Accord. Any Federal Court ruling that a right to receive water had been denied would require payment of compensation and the Bay-Delta Accord would be scuttled, throwing California Water Management into chaos, chilling investment in water dependent economic activities, dooming endangered species and threatening the entire Bay-Delta ecosystem.

6. Interstate Allocation Implications - The Solicitor suggests the bills would also affect interstate water allocations such as the allocation of water among the upper and lower basin states brought about by the 1922 Colorado River Compact and the 1928 Boulder Canyon Project Act. Under S.605 and H.R. 925 every river management action by the Secretary of Interior could trigger a claim for compensation. The Solicitor's analysis states that even if the Secretary defended such actions as being required by "the Law of the River", adversely affected parties could argue their "right" to "use" or "receive" water under these bills was paramount and compensable.

As stated by the Otay Water District analysis, S. 605 and H.R. 925 constitute a one-sided approach to a complicated problem. Instead of striking a reasonable balance between the competing interests affected by development, they would make it prohibitively expensive to consider any interest other than the developer's interest in maximizing profits from the development of his land. Instead of attacking the real problem, i.e. environmental extremism and regulatory abuses, through setting a reasonable balance between environmental concerns and development rights, S. 605 and H.R. 925 seek legislation which is one-sided in the extreme. Finally, these two bills also are contrary to the adopted Metropolitan Federal Endangered Species Act Policy Principle that Metropolitan continue to support a moderate approach to amending the ESA that improves its workability and ability to meet goals.

Some of the above stated concerns arguably could be cured by amendments which delete the right to "receive" water from the definition of compensable property rights,

and which apply the 33% and 20% standards to only the entire property right rather than a portion thereof. However, even with these amendments, S. 605 and H.R. 925 could create a new system of compensable federal water rights and place the federal courts in the lead role of defining those rights through expensive and protracted litigation.

There are three possible positions which Metropolitan may take with respect to S. 605 and H.R. 925:

1. Express unqualified opposition to S. 605 and H.R. 925.
2. Express opposition to S. 605 and H.R. 925 unless amended to remove references to compensation for water.
3. Take no position on S. 605 and H.R. 925.

Based on the foregoing discussion, staff recommends that the Board of Directors express its unqualified opposition to S. 605 and H.R. 925.



taking of private property by the Federal Government, except for public use and with just compensation;

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

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

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

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

#### SEC. 102. PURPOSE.

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

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

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

(3) the establishment of an administrative procedure that requires the Federal Government to assess the impact of government action on holders of private property;

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

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

#### TITLE II--PROPERTY RIGHTS LITIGATION RELIEF

#### SEC. 201. FINDINGS.

The Congress finds that--

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

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

(3) 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;

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

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

court;

(4) property owners cannot fully vindicate property rights in one court;

(5) property owners should be able to fully recover for a taking of their private property in one court;

(6) certain provisions of section 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights; and

(7) section 1500 of title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed.

#### SEC. 202. PURPOSES.

The purposes of this title are to--

(1) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act;

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

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

(4) require the Federal Government to compensate property owners for the deprivation of property rights that result from State agencies' enforcement of federally mandated programs.

#### SEC. 203. DEFINITIONS.

For purposes of this title the term--

(1) "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;

(2) "agency action" means any action or decision taken by an agency that--

(A) takes a property right; or

(B) unreasonably impedes the use of property or the exercise of property interests;

(3) "just compensation"--

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

(B) shall include compounded interest calculated from the date of the taking until the date the United States tenders payment;

(4) "owner" means the owner or possessor of property or rights in property at the time the taking occurs, including when--

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) "private property" or "property" means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes--

(A) real property, whether vested or unvested, including--

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

(ii) inchoate interests in real property such as remainders

and future interests;

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

(iv) easements;

(v) leaseholds;

(vi) recorded liens; and

(vii) contracts or other security interests in, or related to, real property;

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

(C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for--

(i) national security reasons; or

(ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;

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

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

(6) "State agency" means any State department, agency, political subdivision, or instrumentality that--

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

(B) is delegated administrative or substantive responsibility under a Federal regulatory program; or

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

if the State enforcement of the regulatory program, or the receipt of Federal funds in connection with a regulatory program established by a State, is directly related to the taking of private property seeking to be vindicated under this Act; and

(7) "taking of private property", "taking", or "take"--

(A) means any action whereby private property is directly taken as to require compensation under the fifth amendment to the United States Constitution or under this Act, including by physical invasion, regulation, exaction, condition, or other means; and

(B) shall not include--

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

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

#### SEC. 204. COMPENSATION FOR TAKEN PROPERTY.

(a) In General.--No agency or State agency, shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if--

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

(2) (A) such action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based;

(B) such action exacts the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency

action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property;

(C) such action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself;

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

(E) under any other circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution.

(b) No Claim Against State or State Instrumentality.--No action may be filed under this section against a State agency for carrying out the functions described under section 203(6).

(c) Burden of Proof.--(1) The Government shall bear the burden of proof in any action described under--

(A) subsection (a)(2)(A), with regard to showing the nexus between the stated governmental purpose of the governmental interest and the impact on the proposed use of private property;

(B) subsection (a)(2)(B), with regard to showing the proportionality between the exaction and the impact of the proposed use of the property; and

(C) subsection (a)(2)(C), with regard to showing that such deprivation of value inheres in the title to the property.

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

(d) Compensation and Nuisance Exception to Payment of Just Compensation.--(1) No compensation shall be required by this Act if the owner's use or proposed use of the property 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, and to bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

(2) Subject to paragraph (1), if an agency action directly takes property or a portion of property under subsection (a), compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to--

(A) the difference between--

(i) the fair market value of the property or portion of the property affected by agency action before such property became the subject of the specific government regulation; and

(ii) the fair market value of the property or portion of the property when such property becomes subject to the agency action; or  
(B) business losses.

(e) Transfer of Property Interest.--The United States shall take title to the property interest for which the United States pays a claim under this Act.

(f) Source of Compensation.--Awards of compensation referred to in this section, whether by judgment, settlement, or administrative action, shall be promptly paid by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

SEC. 205. JURISDICTION AND JUDICIAL REVIEW.

(a) In General.--A property owner may file a civil action under this Act to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States District Court or the United States Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States.

Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined under this Act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

(b) Standing.--Persons adversely affected by an agency action taken under this Act shall have standing to challenge and seek judicial review of that action.

(c) Amendments to Title 28, United States Code.--(1) Section 1491(a) of title 28, United States Code, is amended--

(A) in paragraph (1) by amending the first sentence to read as follows: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution";

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

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

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

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

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

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

SEC. 206. STATUTE OF LIMITATIONS.

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

SEC. 207. ATTORNEYS' FEES AND COSTS.

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

SEC. 208. RULES OF CONSTRUCTION.

Nothing in this title shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 209. EFFECTIVE DATE.

The provisions of this title and amendments made by this title shall take effect on the date of the enactment of this Act and shall apply to any agency action that occurs after such date.

## TITLE III--ALTERNATIVE DISPUTE RESOLUTION

### SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.

(a) In General.--Either party to a dispute over a taking of private property as defined under this Act or litigation commenced under title II of this Act may elect to resolve the dispute through settlement or arbitration. In the administration of this section--

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

(2) arbitration procedures shall be in accordance with the alternative dispute resolution procedures established by the American Arbitration Association; and

(3) in no event shall arbitration be a condition precedent or an administrative procedure to be exhausted before the filing of a civil action under this Act.

(b) Compensation as a Result of Arbitration.--The amount of arbitration awards shall be paid from the responsible agency's currently available appropriations supporting the agency's activities giving rise to the claim for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(c) Review of Arbitration.--Appeal from arbitration decisions shall be to the United States District Court or the United States Court of Federal Claims in the manner prescribed by law for the claim under this Act.

(d) Payment of Certain Compensation.--In any appeal under subsection (c), the amount of the award of compensation shall be promptly paid by the agency from appropriations supporting the activities giving rise to the claim for compensation currently available at the time of final action on the appeal. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

## TITLE IV--PRIVATE PROPERTY TAKING IMPACT ANALYSIS

### SEC. 401. FINDINGS AND PURPOSE.

The Congress finds that--

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

(2) to the extent practicable, avoid takings of private property by assessing the effect of government action on private property rights.

### SEC. 402. DEFINITIONS.

For purposes of this title the term--

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

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

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

### SEC. 403. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.

(a) In General.--(1) 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 title; and

(B) subject to paragraph (2), all agencies of the Federal Government

shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property.

(2) The provisions of paragraph (1)(B) 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 study or similar effort or planning activity;

(E) 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;

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

(G) 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

(H) any 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 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.

(3) 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) Each agency shall provide an analysis required under this section as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with a proposed regulation.

(b) Guidance and Reporting Requirements.--

(1) The Attorney General of the United States 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) No 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 submit a report to the Director of the Office of Management and Budget and the Attorney General of the United States identifying each agency action that has resulted in the preparation of a taking impact analysis, the filing of a taking claim, or an award of compensation under the just compensation clause of the fifth amendment of the United States Constitution. The Director of the Office of Management and Budget and the

Attorney General of the United States shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies submitted under this paragraph.

(c) Public Availability of Analysis.--An agency shall--

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

(2) to the greatest extent practicable, transmit a copy of such analysis to the owner or any other person with a property right or interest in the affected property.

(d) Presumptions in Proceedings.--For the purpose of any agency action or administrative or judicial proceeding, 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.

#### SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLIANCE.

(a) In General.--No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this Act.

(b) Compliance.--In order to meet the purposes of this Act as expressed in section 401 of this title, all agencies shall--

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

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

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

#### SEC. 405. RULES OF CONSTRUCTION.

Nothing in this title 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 this Act, 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.

#### SEC. 406. STATUTE OF LIMITATIONS.

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

### TITLE V--PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

#### SEC. 501. FINDINGS AND PURPOSE.

(a) Findings.--The Congress finds that--

(1) a number of Federal environmental programs, specifically programs administered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), have been implemented by employees, agents, and representatives of the Federal Government in a manner that deprives private property owners of the use and control of property;

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

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

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

(5) a clear Federal policy is needed to guide and direct Federal agencies with respect to the implementation of environmental laws that directly impact private property;

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

(7) nuisance laws have traditionally been enacted, implemented, and enforced at the State and local level where such laws are best able to protect the rights of all private property owners and local citizens; and

(8) traditional pollution control laws are intended to protect the general public's health and physical welfare, and current habitat protection programs are intended to protect the welfare of plant and animal species.

(b) Purposes.--The purposes of this title are to--

(1) provide a consistent Federal policy to encourage, support, and promote the private ownership of property; and

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

## SEC. 502. DEFINITIONS.

For purposes of this title the term--

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

(2) "agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(3) "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of--

(A) the Federal Government; or

(B) a foreign government;

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, acting in an official capacity or a State, municipality, or subdivision of a State) that--

(A) owns property referred to under paragraph (5) (A) or (B); or

(B) holds property referred to under paragraph (5) (C);

(5) "property" means--

(A) land;

(B) any interest in land; and

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

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

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

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

#### SEC. 503. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) In General.--In implementing and enforcing the Acts, each agency head shall--

(1) comply with applicable State and tribal government laws, including laws relating to private property rights and privacy; and

(2) administer and implement the Acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(b) Final Decisions.--Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making of, any final decision that restricts the use of private property in administering and implementing this Act.

#### SEC. 504. PROPERTY OWNER CONSENT FOR ENTRY.

(a) In General.--An agency head may not enter privately owned property to collect information regarding the property, unless the private property owner has--

(1) consented in writing to that entry;

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

and

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

(b) Nonapplication.--Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

#### SEC. 505. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

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

(1) the agency head has provided to the private property owner--

(A) access to the information;

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

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

and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the accuracy of the information under paragraph (1)(C).

#### SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

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

"(u) Administrative Appeals.--

"(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

"(A) A determination of regulatory jurisdiction over a particular parcel of property.

"(B) The denial of a permit.

"(C) The terms and conditions of a permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Emergency Property Owners Relief Act of 1995."

#### SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE ENDANGERED SPECIES ACT OF 1973.

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

"(i) Administrative Appeals.--

"(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions:

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) The denial of a permit for an incidental take.

"(C) The terms and conditions of an incidental take permit.

"(D) The finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.

"(E) Any incidental 'take' statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).

"(F) The imposition of an administrative penalty.

"(G) The imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Emergency Property Owners Relief Act of 1995."

#### SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) Eligibility.--A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this Act.

(b) Time Limitation for Compensation Request.--No later than 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(c) Offer of Agency Head.--No later than 180 days after the receipt of a request for compensation, the agency head shall stay the decision and shall

provide to the private property owner--

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

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(d) Private Property Owner's Response.--(1) No later than 60 days after the date of receipt of the agency head's offers under subsection (c) (1) and (2) the private property owner shall accept one of the offers or reject both offers.

(2) If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on--

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

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

(e) Judgment.--A qualified agency action of an agency head that deprives a private property owner of property as described under subsection (a), is deemed, at the option of the private property owner, to be a taking under the United States Constitution and a judgment against the United States if the private property owner--

(1) accepts the agency head's offer under subsection (c); or

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

(f) Payment.--An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbitrator under that subsection, out of currently available appropriations supporting the activities giving rise to the claim for compensation. The agency head shall pay to the extent of available funds any compensation under this section not later than 60 days after the date of the acceptance or the date of the issuance of the decision, respectively. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(g) Form of Payment.--Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of--

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

(2) a payment of an amount equal to the reduction in value.

#### SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement."

SEC. 510. ELECTION OF REMEDIES.

Nothing in this title shall be construed to--

(1) deny any person the right, as a condition precedent or as a requirement to exhaust administrative remedies, to proceed under title II or III of this Act;

(2) 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

(3) constitute a conclusive determination of--

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

(B) any other material issue.

TITLE VI--MISCELLANEOUS

SEC. 601. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 602. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of enactment and shall apply to any agency action of the United States Government after such date.

R. 925 QUICK BILL  
R. 925, As referred to committee in the Senate  
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IIA

104th CONGRESS  
1st Session

H. R. 925

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IN THE SENATE OF THE UNITED STATES  
March 7 (legislative day, March 6), 1995

Received; read twice and referred to the Committee on Environment and Public Works

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AN ACT

To compensate owners of private property for the effect of certain regulatory restrictions.

-----  
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Protection Act of 1995".

SEC. 2. FEDERAL POLICY AND DIRECTION.

(a) General Policy.--It is the policy of the Federal Government that no law or agency action should limit the use of privately owned property so as to diminish its value.

(b) Application to Federal Agency Action.--Each Federal agency, officer, and employee should exercise Federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value.

SEC. 3. RIGHT TO COMPENSATION.

(a) In General.--The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion of the property for its fair market value.

(b) Duration of Limitation on Use.--Property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action

is later rescinded or otherwise vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.

#### SEC. 4. EFFECT OF STATE LAW.

If a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this Act with respect to a limitation on that use.

#### SEC. 5. EXCEPTIONS.

(a) Prevention of Hazard to Health or Safety or Damage to Specific Property.--No compensation shall be made under this Act with respect to an agency action the primary purpose of which is to prevent an identifiable--

(1) hazard to public health or safety; or

(2) damage to specific property other than the property whose use is limited.

(b) Navigation Servitude.--No compensation shall be made under this Act with respect to an agency action pursuant to the Federal navigation servitude, as defined by the courts of the United States, except to the extent such servitude is interpreted to apply to wetlands.

#### SEC. 6. PROCEDURE.

(a) Request of Owner.--An owner seeking compensation under this Act shall make a written request for compensation to the agency whose agency action resulted in the limitation. No such request may be made later than 180 days after the owner receives actual notice of that agency action.

(b) Negotiations.--The agency may bargain with that owner to establish the amount of the compensation. If the agency and the owner agree to such an amount, the agency shall promptly pay the owner the amount agreed upon.

(c) Choice of Remedies.--If, not later than 180 days after the written request is made, the parties do not come to an agreement as to the right to and amount of compensation, the owner may choose to take the matter to binding arbitration or seek compensation in a civil action.

(d) Arbitration.--The procedures that govern the arbitration shall, as nearly as practicable, be those established under title 9, United States Code, for arbitration proceedings to which that title applies. An award made in such arbitration shall include a reasonable attorney's fee and other arbitration costs (including appraisal fees). The agency shall promptly pay any award made to the owner.

(e) Civil Action.--An owner who does not choose arbitration, or who does not receive prompt payment when required by this section, may obtain appropriate relief in a civil action against the agency. An owner who prevails in a civil action under this section shall be entitled to, and the agency shall be liable for, a reasonable attorney's fee and other litigation costs (including appraisal fees). The court shall award interest on the amount of any compensation from the time of the limitation.

(f) Source of Payments.--Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency whose action occasioned the payment or judgment. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

SEC. 7. LIMITATION.

Notwithstanding any other provision of law, any obligation of the United States to make any payment under this Act shall be subject to the availability of appropriations.

SEC. 8. DUTY OF NOTICE TO OWNERS.

Whenever an agency takes an agency action limiting the use of private property, the agency shall give appropriate notice to the owners of that property directly affected explaining their rights under this Act and the procedures for obtaining any compensation that may be due to them under this Act.

SEC. 9. RULES OF CONSTRUCTION.

(a) Effect on Constitutional Right to Compensation.--Nothing in this Act shall be construed to limit any right to compensation that exists under the Constitution or under other laws of the United States.

(b) Effect of Payment.--Payment of compensation under this Act (other than when the property is bought by the Federal Government at the option of the owner) shall not confer any rights on the Federal Government other than the limitation on use resulting from the agency action.

SEC. 10. DEFINITIONS.

For the purposes of this Act--

(1) the term "property" means land and includes the right to use or receive water;

(2) a use of property is limited by an agency action if a particular legal right to use that property no longer exists because of the action;

(3) the term "agency action" has the meaning given that term in section 551 of title 5, United States Code, but also includes the making of a grant to a public authority conditioned upon an action by the recipient that would constitute a limitation if done directly by the agency;

(4) the term "agency" has the meaning given that term in section 551 of title 5, United States Code;

(5) the term "specified regulatory law" means--

(A) section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(B) the Endangered Species Act of 1979 (16 U.S.C. 1531 et seq.);

(C) title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.); or

(D) with respect to an owner's right to use or receive water only--

(i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the "Reclamation Acts" (43 U.S.C. 371 et seq.);

(ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or

(iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);

(6) the term "fair market value" means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, at the time the agency action occurs;

(7) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States; and

(8) the term "law of the State" includes the law of a political subdivision of a State.

Passed the House of Representatives March 3, 1995.

Attest:  
ROBIN H. CARLE,  
Clerk.

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