

104TH CONGRESS  
1ST SESSION

# S. 239

To require certain Federal agencies to protect the right of private property owners, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 18 (legislative day, JANUARY 10), 1995

Mr. SHELBY (for himself, Mr. NICKLES, Mr. BURNS, Mrs. HUTCHISON, Mr. LOTT, Mr. PACKWOOD, Mr. PRESSLER, Mr. INHOFE, Mr. THOMAS, and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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## A BILL

To require certain Federal agencies to protect the right of private property owners, and for other purposes.

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 Own-  
5 ers Bill of Rights”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

8 (1) Our democracy was founded on principles of  
9 ownership, use, and control of private property.

1 These principles are embodied in the fifth amend-  
2 ment to the Constitution, which prohibits the taking  
3 of private property without the payment of just com-  
4 pensation.

5 (2) A number of Federal environmental pro-  
6 grams, specifically the Endangered Species Act of  
7 1973 (16 U.S.C. 1531 et seq.) and section 404 of  
8 the Federal Water Pollution Control Act (33 U.S.C.  
9 1344), have been implemented by employees, agents,  
10 and representatives of the Federal Government in a  
11 manner that deprives private property owners of the  
12 use and control of their property.

13 (3) As new Federal programs are proposed that  
14 would limit and restrict the use of private property  
15 to provide habitat for plant and animal species, the  
16 rights of private property owners must be recognized  
17 and respected.

18 (4) Private property owners are being forced by  
19 Federal policy to resort to extensive, lengthy, and  
20 expensive litigation to protect certain basic civil  
21 rights guaranteed by the Constitution.

22 (5) Since many private property owners do not  
23 have the financial resources or the extensive commit-  
24 ment of time to proceed in litigation against the  
25 Federal Government, a clear Federal policy is need-

1 ed to guide and direct Federal agencies with respect  
2 to the implementation by the agencies of environ-  
3 mental laws that directly impact private property.

4 (6) While all private property owners should  
5 and must abide by nuisance laws and should not use  
6 their property in a manner that harms their neigh-  
7 bors, these laws have traditionally been enacted, im-  
8 plemented, and enforced at the State and local levels  
9 where the laws are best able to protect the rights of  
10 all private property owners and local citizens.

11 (7) While traditional pollution control laws are  
12 intended to protect the health and physical welfare  
13 of the general public, habitat protection programs in  
14 effect on the date of enactment of this Act are in-  
15 tended to protect the welfare of plant and animal  
16 species, while allowing recreational and aesthetic op-  
17 portunities for the public.

18 (b) PURPOSE.—The purpose of this Act is to provide  
19 a consistent Federal policy to—

20 (1) encourage, support, and promote the private  
21 ownership of property; and

22 (2) ensure that the constitutional and legal  
23 rights of private property owners are protected by  
24 the Federal Government and employees, agents, and  
25 representatives of the Federal Government.

1 **SEC. 3. DEFINITIONS.**

2 In this Act:

3 (1) AGENCY HEAD.—The term “agency head”  
4 means the Secretary or Administrator with jurisdic-  
5 tion or authority to take a final agency action under  
6 1 or more of the applicable provisions of law.

7 (2) APPLICABLE PROVISIONS OF LAW.—The  
8 term “applicable provisions of law” means the En-  
9 dangered Species Act of 1973 (16 U.S.C. 1531 et  
10 seq.) and section 404 of the Federal Water Pollution  
11 Control Act (33 U.S.C. 1344).

12 (3) NON-FEDERAL PERSON.—The term “non-  
13 Federal person” means a person other than an offi-  
14 cer, employee, agent, department, or instrumentality  
15 of—

16 (A) the Federal Government; or

17 (B) a foreign government.

18 (4) PRIVATE PROPERTY OWNER.—The term  
19 “private property owner” means a non-Federal per-  
20 son (other than an officer, employee, agent, depart-  
21 ment, or instrumentality of a State, municipality, or  
22 political subdivision of a State, or a State, munici-  
23 pality, or political subdivision of a State) that—

24 (A) owns property referred to in subpara-  
25 graph (A) or (B) of paragraph (5); or

1 (B) holds property referred to in para-  
2 graph (5)(C).

3 (5) PROPERTY.—The term “property” means—

4 (A) land;

5 (B) any interest in land; and

6 (C) any proprietary water right.

7 (6) QUALIFIED AGENCY ACTION.—The term  
8 “qualified agency action” means an agency action  
9 (as defined in section 551(13) of title 5, United  
10 States Code) that is taken under 1 or more of the  
11 applicable provisions of law.

12 **SEC. 4. PROTECTION OF PRIVATE PROPERTY RIGHTS.**

13 (a) IN GENERAL.—In implementing and enforcing  
14 the applicable provisions of law, each agency head shall—

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

18 (2) implement and enforce the applicable provi-  
19 sions of law in a manner that has the least impact  
20 on the constitutional and other legal rights of pri-  
21 vate property owners.

22 (b) REGULATIONS.—Each agency head shall develop  
23 and implement regulations for ensuring that the constitu-  
24 tional and other legal rights of private property owners  
25 are protected in any case in which the agency head makes,

1 or participates with other agencies in the making of, any  
2 final decision that restricts the use of private property.

3 **SEC. 5. PROPERTY OWNER CONSENT FOR ENTRY.**

4 (a) IN GENERAL.—Subject to subsection (b), an  
5 agency head may not enter privately owned property to  
6 collect information regarding the property, unless the pri-  
7 vate property owner has—

8 (1) consented in writing to the entry;

9 (2) after providing the consent, been provided  
10 notice of the entry; and

11 (3) been notified that any raw data collected  
12 from the property must be made available to the pri-  
13 vate property owner at no cost, if requested by the  
14 private property owner.

15 (b) ENTRY FOR CONSENT OR NOTICE.—Subsection  
16 (a) shall not prohibit entry onto property for the purpose  
17 of obtaining consent or providing notice required under  
18 subsection (a).

19 **SEC. 6. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED**  
20 **FROM PRIVATE PROPERTY.**

21 An agency head may not use data that is collected  
22 from privately owned property to implement or enforce  
23 any of the applicable provisions of law, unless the agency  
24 head has—

25 (1) provided to the private property owner—

1 (A) access to the information;

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

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

6 (2) determined that the information is accurate,  
7 if the private property owner disputes the accuracy  
8 of the information pursuant to paragraph (1)(C).

9 **SEC. 7. RIGHT TO AN ADMINISTRATIVE APPEAL OF WET-**  
10 **LANDS DECISIONS.**

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

14 “(u) ADMINISTRATIVE APPEALS.—

15 “(1) IN GENERAL.—The Secretary or the Ad-  
16 ministrator, after notice and opportunity for public  
17 comment, shall issue rules to establish procedures to  
18 provide private property owners, or authorized rep-  
19 resentatives of the owners, an opportunity for an ad-  
20 ministrative appeal of the following actions under  
21 this section:

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

24 “(B) The denial of a permit.

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

1           “(D) The imposition of an administrative  
2 penalty.

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

6           “(2) DECISION.—The rules issued under para-  
7 graph (1) shall provide that any administrative ap-  
8 peal of an action described in paragraph (1) shall be  
9 heard and decided by an official other than the offi-  
10 cial who took the action, and shall be conducted at  
11 a location that is in the vicinity of the property in-  
12 volved in the action.

13           “(3) DEFINITIONS.—In this subsection:

14           “(A) NON-FEDERAL PERSON.—The term  
15 ‘non-Federal person’ means a person other than  
16 an officer, employee, agent, department, or in-  
17 strumentality of—

18                   “(i) the Federal Government; or

19                   “(ii) a foreign government.

20           “(B) PRIVATE PROPERTY OWNER.—The  
21 term ‘private property owner’ means a non-Fed-  
22 eral person (other than an officer, employee,  
23 agent, department, or instrumentality of a  
24 State, municipality, or political subdivision of a

1 State, or a State, municipality, or political sub-  
 2 division of a State) that—

3 “(i) owns property referred to in  
 4 clause (i) or (ii) of subparagraph (C); or

5 “(ii) holds property referred to in sub-  
 6 paragraph (C)(iii).

7 “(C) PROPERTY.—The term ‘property’  
 8 means—

9 “(i) land;

10 “(ii) any interest in land; and

11 “(iii) any proprietary water right.”.

12 **SEC. 8. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE**  
 13 **ENDANGERED SPECIES ACT OF 1973.**

14 Section 11 of the Endangered Species Act of 1973  
 15 (16 U.S.C. 1540) is amended by adding at the end the  
 16 following:

17 “(i) ADMINISTRATIVE APPEALS.—

18 “(1) IN GENERAL.—The Secretary, after notice  
 19 and opportunity for public comment, shall issue  
 20 rules to establish procedures to provide private prop-  
 21 erty owners, or authorized representatives of the  
 22 owners, an opportunity for an administrative appeal  
 23 of the following actions under this Act:

1           “(A) A determination that a particular  
2 parcel of property is critical habitat of a species  
3 listed under section 4.

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

6           “(C) The terms and conditions of a permit  
7 for an incidental take.

8           “(D) The imposition of an administrative  
9 penalty.

10           “(E) The imposition of an order prohibit-  
11 ing or substantially limiting the use of the prop-  
12 erty.

13           “(2) DECISION.—The rules issued under para-  
14 graph (1) shall provide that any administrative ap-  
15 peal of an action described in paragraph (1) shall be  
16 heard and decided by an official other than the offi-  
17 cial who took the action, and shall be conducted at  
18 a location that is in the vicinity of the parcel of  
19 property involved in the action.

20           “(3) DEFINITIONS.—In this subsection:

21           “(A) NON-FEDERAL PERSON.—The term  
22 ‘non-Federal person’ means a person other than  
23 an officer, employee, agent, department, or in-  
24 strumentality of—

25                   “(i) the Federal Government; or

1 “(ii) a foreign government.

2 “(B) PRIVATE PROPERTY OWNER.—The  
3 term ‘private property owner’ means a non-Fed-  
4 eral person (other than an officer, employee,  
5 agent, department, or instrumentality of a  
6 State, municipality, or political subdivision of a  
7 State, or a State, municipality, or political sub-  
8 division of a State) that—

9 “(i) owns property referred to in  
10 clause (i) or (ii) of subparagraph (C); or

11 “(ii) holds property referred to in sub-  
12 paragraph (C)(iii).

13 “(C) PROPERTY.—The term ‘property’  
14 means—

15 “(i) land;

16 “(ii) any interest in land; and

17 “(iii) any proprietary water right.”.

18 **SEC. 9. COMPENSATION FOR TAKING OF PRIVATE PROP-**  
19 **ERTY.**

20 (a) ELIGIBILITY.—A private property owner that, as  
21 a consequence of a final qualified agency action of an  
22 agency head, is deprived of \$10,000, or 20 percent or  
23 more, of the fair market value of the affected portion of  
24 the property of the owner, as determined by a qualified

1 appraisal expert, shall be entitled to receive compensation  
2 in accordance with this section.

3 (b) DEADLINE.—Not later than 90 days after receipt  
4 of a final decision of an agency head that deprives a pri-  
5 vate property owner of the fair market value or viable use  
6 of property for which compensation is required under sub-  
7 section (a), the private property owner may submit in writ-  
8 ing a request to the agency head for compensation in ac-  
9 cordance with subsection (c).

10 (c) AGENCY HEAD'S OFFER.—Not later than 180  
11 days after the receipt of a request for compensation under  
12 subsection (b), the agency head shall stay the decision and  
13 provide to the private property owner—

14 (1) an offer to purchase the affected property  
15 of the private property owner at the fair market  
16 value that would apply if there were no use restric-  
17 tions under the applicable provisions of law; and

18 (2) an offer to compensate the private property  
19 owner for the difference between the fair market  
20 value of the property without the restrictions and  
21 the fair market value of the property with the re-  
22 strictions.

23 (d) PRIVATE PROPERTY OWNER'S RESPONSE.—

24 (1) IN GENERAL.—A private property owner  
25 shall have 60 days after the date of receipt of the

1 offers of the agency head under subsection (c) to ac-  
2 cept 1 of the offers or to reject both offers.

3 (2) SUBMISSION TO ARBITRATION.—If the pri-  
4 vate property owner rejects both offers, the private  
5 property owner may submit the matter for arbitra-  
6 tion to an arbitrator appointed by the agency head  
7 from a list of arbitrators submitted to the agency  
8 head by the American Arbitration Association. The  
9 arbitration shall be conducted in accordance with the  
10 real estate valuation arbitration rules of the associa-  
11 tion. For the purposes of this section, an arbitration  
12 shall be binding on the agency head and a private  
13 property owner as to the amount, if any, of com-  
14 pensation owed to the private property owner and  
15 whether for the purposes of this section the private  
16 property owner has been deprived of the fair market  
17 value or viable use of property for which compensa-  
18 tion is required under subsection (a).

19 (e) JUDGMENT.—A qualified agency action of an  
20 agency head that deprives a private property owner of  
21 property as described in subsection (a), shall be deemed,  
22 at the option of the private property owner, to be a taking  
23 under the Constitution and a judgment against the United  
24 States if the private property owner—

1           (1) accepts an offer of the agency head under  
2           subsection (c); or

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

4           (f) PAYMENT.—An agency head shall pay a private  
5           property owner any compensation required under the  
6           terms of an offer of the agency head that is accepted by  
7           the private property owner in accordance with subsection  
8           (d), or under a decision of an arbitrator under that sub-  
9           section, by not later than 60 days after the date of the  
10          acceptance or the date of the issuance of the decision, re-  
11          spectively.

12          (g) FORM OF PAYMENT.—Payment under this sec-  
13          tion shall be in a form agreed to by the agency head and  
14          the private property owner and may be in the form of—

15                (1) payment of an amount that is equal to the  
16                fair market value of the property on the day before  
17                the date of the final qualified agency action with re-  
18                spect to which the property or interest is acquired;

19                (2) payment of an amount that is equal to the  
20                reduction in value of the property; or

21                (3) conveyance of real property or an interest in  
22                real property that has a fair market value equal to  
23                the amount referred to in paragraph (1) or (2).

24          (h) OTHER RIGHTS PRESERVED.—This section shall  
25          not preempt, alter, or limit the availability of any remedy

1 for the taking of property or an interest in property that  
2 is available under the Constitution or any other law.

3 (i) FINAL JUDGMENTS.—If a private property owner  
4 unsuccessfully seeks compensation under this section and  
5 thereafter files a claim for compensation under the fifth  
6 amendment to the Constitution and is successful in ob-  
7 taining a final judgment ordering compensation from the  
8 United States Court of Federal Claims for the claim, the  
9 agency head who made the final agency decision that re-  
10 sults in the taking shall reimburse, from funds appro-  
11 priated to the agency for the 2 fiscal years following pay-  
12 ment of the compensation, the Treasury of the United  
13 States for amounts appropriated under section 1304 of  
14 title 31, United States Code, to pay the judgment against  
15 the United States.

16 **SEC. 10. PRIVATE PROPERTY OWNER PARTICIPATION IN**  
17 **COOPERATIVE AGREEMENTS.**

18 Section 6(b) of the Endangered Species Act of 1973  
19 (16 U.S.C. 1535(b)) is amended—

20 (1) by striking “The Secretary” and inserting  
21 the following:

22 “(1) IN GENERAL.—The Secretary”; and

23 (2) by adding at the end the following:

24 “(2) PARTICIPATION BY PRIVATE PROPERTY  
25 OWNERS.—

1           “(A) IN GENERAL.—Notwithstanding any  
2 other provision of this section, in any case in  
3 which the Secretary enters into a management  
4 agreement under paragraph (1) that establishes  
5 restrictions on the use of property, the Sec-  
6 retary shall notify all private property owners  
7 or lessees of the property that is subject to the  
8 management agreement and shall provide an  
9 opportunity for each private property owner or  
10 lessee to participate in the management agree-  
11 ment.

12           “(B) DEFINITIONS.—In this paragraph:

13           “(i) NON-FEDERAL PERSON.—The  
14 term ‘non-Federal person’ means a person  
15 other than an officer, employee, agent, de-  
16 partment, or instrumentality of—

17                   “(I) the Federal Government; or

18                   “(II) a foreign government.

19           “(ii) PRIVATE PROPERTY OWNER.—  
20 The term ‘private property owner’ means a  
21 non-Federal person (other than an officer,  
22 employee, agent, department, or instru-  
23 mentality of a State, municipality, or polit-  
24 ical subdivision of a State, or a State, mu-

1                    municipality, or political subdivision of a  
2                    State) that—

3                    “(I) owns property referred to in  
4                    subclause (I) or (II) of clause (iii); or

5                    “(II) holds property referred to  
6                    in clause (iii)(III).

7                    “(iii) PROPERTY.—The term ‘prop-  
8                    erty’ means—

9                    “(I) land;

10                    “(II) any interest in land; and

11                    “(III) any proprietary water  
12                    right.”.

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