

105TH CONGRESS  
1ST SESSION

# S. 709

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.

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## IN THE SENATE OF THE UNITED STATES

MAY 7, 1997

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

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## 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 1997”.

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 in-  
20 cludes—

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 Unit-  
19 ed States Court of Federal Claims, regardless of the  
20 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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