

106TH CONGRESS
1ST SESSION

S. 1028

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 13, 1999

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, 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 “Citizens Access to Jus-
5 tice Act of 1999”.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) property rights have been abrogated by the
4 application of laws, regulations, and other actions by
5 all levels of government that adversely affect the
6 value and the ability to make reasonable use of pri-
7 vate property;

8 (2) certain provisions of sections 1346 and
9 1402 and chapter 91 of title 28, United States Code
10 (commonly known as the Tucker Act), that delineate
11 the jurisdiction of courts hearing property rights
12 claims, frustrate the ability of a property owner to
13 obtain full relief for violation founded upon the fifth
14 and fourteenth amendments of the United States
15 Constitution;

16 (3) current law—

17 (A) has no sound basis for splitting juris-
18 diction between two courts in cases where con-
19 stitutionally protected property rights are at
20 stake;

21 (B) adds to the complexity and cost of
22 takings and litigation, adversely affecting tax-
23 payers and property owners;

24 (C) forces a property owner, who seeks
25 just compensation from the Federal Govern-
26 ment, to elect between equitable relief in the

1 district court and monetary relief (the value of
2 the property taken) in the United States Court
3 of Federal Claims;

4 (D) is used to urge dismissal in the district
5 court in complaints against the Federal Govern-
6 ment, on the ground that the plaintiff should
7 seek just compensation in the Court of Federal
8 Claims;

9 (E) is used to urge dismissal in the Court
10 of Federal Claims in complaints against the
11 Federal Government, on the ground that the
12 plaintiff should seek equitable relief in district
13 court; and

14 (F) forces a property owner to first pay to
15 litigate an action in a State court, before a
16 Federal judge can decide whether local govern-
17 ment has denied property rights safeguarded by
18 the United States Constitution;

19 (4) property owners cannot fully vindicate prop-
20 erty rights in one lawsuit and their claims may be
21 time barred in a subsequent action;

22 (5) property owners should be able to fully re-
23 cover for a taking of their private property in one
24 court;

1 (6) certain provisions of section 1346 and 1402
2 and chapter 91 of title 28, United States Code (com-
3 monly known as the Tucker Act) should be amend-
4 ed, giving both the district courts of the United
5 States and the Court of Federal Claims jurisdiction
6 to hear all claims relating to property rights in com-
7 plaints against the Federal Government;

8 (7) section 1500 of title 28, United States
9 Code, which denies the Court of Federal Claims ju-
10 risdiction to entertain a suit which is pending in an-
11 other court and made by the same plaintiff, should
12 be repealed;

13 (8) Federal and local authorities, through com-
14 plex, costly, repetitive and unconstitutional permit-
15 ting, variance, and licensing procedures, have denied
16 property owners their fifth and fourteenth amend-
17 ment rights under the United States Constitution to
18 the use, enjoyment, and disposition of, and exclusion
19 of others from, their property, and to safeguard
20 those rights, there is a need to determine what con-
21 stitutes a final decision of an agency in order to
22 allow claimants the ability to protect their property
23 rights in a court of law;

24 (9) a Federal judge should decide the merits of
25 cases where a property owner seeks redress solely for

1 infringements of rights safeguarded by the United
2 States Constitution, and where no claim of a viola-
3 tion of State law is alleged; and

4 (10) certain provisions of sections 1343, 1346,
5 and 1491 of title 28, United States Code, should be
6 amended to clarify when a claim for redress of con-
7 stitutionally protected property rights is sufficiently
8 ripe so a Federal judge may decide the merits of the
9 allegations.

10 **SEC. 3. PURPOSES.**

11 The purposes of this Act are to—

12 (1) establish a clear, uniform, and efficient ju-
13 dicial process whereby aggrieved property owners
14 can obtain vindication of property rights guaranteed
15 by the fifth and fourteenth amendments to the
16 United States Constitution and this Act;

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

19 (3) rectify the unduly onerous and expensive re-
20 quirement that an owner of real property, seeking
21 redress under section 1979 of the Revised Statutes
22 of the United States (42 U.S.C. 1983) for the in-
23 fringement of property rights protected by the fifth
24 and fourteenth amendments of the United States
25 Constitution, is required to first litigate Federal con-

stitutional issues in a State court before obtaining
access to the Federal courts;

(4) provide for uniformity in the application of
the ripeness doctrine in cases where constitutional
rights to use and enjoy real property are allegedly
infringed, by providing that a final agency decision
may be adjudicated by a Federal court on the merits
after—

(A) the pertinent government body denies
a meaningful application to develop the land in
question; and

(B)(i) the property owner seeks available
waivers and administrative appeals from such
denial; and

(ii) such waiver or appeal is not approved;
and

(5) confirm the proper role of a State or terri-
tory to prevent land uses that are a nuisance under
applicable law.

SEC. 4. DEFINITIONS.

In this Act, the term—

(1) “agency action” means any action, inaction,
or decision taken by a Federal agency or other gov-
ernment agency that at the time of such action, in-

1 action, or decision adversely affects private property
2 rights;

3 (2) “district court”—

4 (A) means a district court of the United
5 States with appropriate jurisdiction; and

6 (B) includes the United States District
7 Court of Guam, the United States District
8 Court of the Virgin Islands, or the District
9 Court for the Northern Mariana Islands;

10 (3) “Federal agency” means a department,
11 agency, independent agency, or instrumentality of
12 the United States, including any military depart-
13 ment, Government corporation, Government-con-
14 trolled corporation, or other establishment in the ex-
15 ecutive branch of the United States Government;

16 (4) “owner” means the owner or possessor of
17 property or rights in property at the time the taking
18 occurs, including when—

19 (A) the statute, regulation, rule, order,
20 guideline, policy, or action is passed or promul-
21 gated; or

22 (B) the permit, license, authorization, or
23 governmental permission is denied or sus-
24 pended;

1 (5) “private property” or “property” means all
 2 interests constituting property, as defined by Fed-
 3 eral or State law, protected under the fifth and four-
 4 teenth amendments to the United States Constitu-
 5 tion; and

6 (6) “taking of private property”, “taking”, or
 7 “take” means any action whereby restricting the
 8 ownership, alienability, possession, or use of private
 9 property is an object of that action and is taken so
 10 as to require compensation under the fifth amend-
 11 ment to the United States Constitution, including by
 12 physical invasion, regulation, exaction, condition, or
 13 other means.

14 **SEC. 5. PRIVATE PROPERTY ACTIONS.**

15 (a) IN GENERAL.—An owner may file a civil action
 16 under this section to challenge the validity of any Federal
 17 agency action as a violation of the fifth amendment to the
 18 United States Constitution in a district court or the
 19 United States Court of Federal Claims.

20 (b) CONCURRENT JURISDICTION.—Notwithstanding
 21 any other provision of law and notwithstanding the issues
 22 involved, the relief sought, or the amount in controversy,
 23 the district court and the United States Court of Federal
 24 Claims shall each have concurrent jurisdiction over both
 25 claims for monetary relief and claims seeking invalidation

1 of any Act of Congress or any regulation of a Federal
2 agency affecting private property rights.

3 (c) ELECTION.—The plaintiff may elect to file an ac-
4 tion under this section in a district court or the United
5 States Court of Federal Claims.

6 (d) WAIVER OF SOVEREIGN IMMUNITY.—This section
7 constitutes express waiver of the sovereign immunity of
8 the United States with respect to an action filed under
9 this section.

10 (e) APPEALS.—The United States Court of Appeals
11 for the Federal Circuit shall have exclusive jurisdiction of
12 any action filed under this section, regardless of whether
13 the jurisdiction of such action is based in whole or part
14 under this section.

15 (f) STATUTE OF LIMITATIONS.—The statute of limi-
16 tations for any action filed under this section shall be 6
17 years after the date of the taking of private property.

18 (g) ATTORNEYS' FEES AND COSTS.—In issuing any
19 final order in any action filed under this section, the court
20 may award costs of litigation (including reasonable attor-
21 neys' fees) to any prevailing plaintiff.

22 **SEC. 6. JURISDICTION OF UNITED STATES COURT OF FED-**
23 **ERAL CLAIMS AND UNITED STATES DISTRICT**
24 **COURTS.**

25 (a) UNITED STATES COURT OF FEDERAL CLAIMS.—

1 (1) JURISDICTION.—Section 1491(a) of title
2 28, United States Code, is amended—

3 (A) in paragraph (1) by amending the first
4 sentence to read as follows: “The United States
5 Court of Federal Claims shall have jurisdiction
6 to render judgment upon any claim against the
7 United States for monetary relief founded ei-
8 ther upon the Constitution or any Act of Con-
9 gress or any regulation of an executive depart-
10 ment or upon any express or implied contract
11 with the United States, in cases not sounding
12 in tort, or for invalidation of any Act of Con-
13 gress or any regulation of an executive depart-
14 ment under section 5 of the Citizens Access to
15 Justice Act of 1999.”;

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

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

23 “(3) In cases otherwise within its jurisdiction,
24 the Court of Federal Claims shall also have supple-
25 mental jurisdiction, concurrent with the courts des-

1 ignated under section 1346(b), to render judgment
2 upon any related tort claim authorized under section
3 2674.

4 “(4) In proceedings within the jurisdiction of
5 the Court of Federal Claims which constitute judi-
6 cial review of agency action (rather than de novo
7 proceedings), the provisions of section 706 of title 5
8 shall apply.

9 “(5)(A) Any claim brought under this sub-
10 section to redress the deprivation of a right or privi-
11 lege to use and enjoy real property as secured by the
12 Constitution, shall be ripe for adjudication upon a
13 final decision rendered by the United States, that
14 causes actual and concrete injury to the party seek-
15 ing redress.

16 “(B) For purposes of this paragraph, a final
17 decision exists if—

18 “(i) the United States makes a definitive
19 decision regarding the extent of permissible
20 uses on real property that has been allegedly in-
21 fringed or taken; and

22 “(ii) one meaningful application as defined
23 by applicable law to use the property has been
24 submitted but has not been approved within a
25 reasonable time, and the party seeking redress

1 has applied for one appeal and one waiver
 2 which has not been approved within a reason-
 3 able time, where the applicable law of the
 4 United States provides a mechanism for appeal
 5 to or waiver by an administrative agency.

6 “(C)(i) The party seeking redress shall not be
 7 required to submit any application or apply for any
 8 appeal or waiver required under this section, if the
 9 district court determines that such action would be
 10 futile.

11 “(ii) In this subparagraph, the term ‘futile’
 12 means the inability of an owner of real property to
 13 seek or obtain approvals to use such real property,
 14 and the hardship endured by such inability, as de-
 15 fined under applicable land use, zoning, and plan-
 16 ning law.

17 “(D) Nothing in this paragraph alters the sub-
 18 stantive law of takings of property, including the
 19 burden of proof borne by the plaintiff.”.

20 (2) PENDENCY OF CLAIMS IN OTHER
 21 COURTS.—

22 (A) IN GENERAL.—Section 1500 of title
 23 28, United States Code is repealed.

24 (B) TECHNICAL AND CONFORMING AMEND-
 25 MENT.—The table of sections for chapter 91 of

1 title 28, United States Code, is amended by
2 striking out the item relating to section 1500.

3 (b) DISTRICT COURT JURISDICTION.—

4 (1) CITIZEN ACCESS TO JUSTICE ACTION.—Sec-
5 tion 1346(a) of title 28, United States Code, is
6 amended by adding after paragraph (2) the fol-
7 lowing:

8 “(3) Any civil action filed under section 5 of the
9 Citizens Access to Justice Act of 1999.”.

10 (2) UNITED STATES AS DEFENDANT.—Section
11 1346 of title 28, United States Code, is amended by
12 adding at the end the following:

13 “(h)(1) Any claim brought under subsection (a) to
14 redress the deprivation of a right or privilege to use and
15 enjoy real property as secured by the Constitution shall
16 be ripe for adjudication upon a final decision rendered by
17 the United States, that causes actual and concrete injury
18 to the party seeking redress.

19 “(2)(A) For purposes of this subsection, a final deci-
20 sion exists if—

21 “(i) the United States makes a definitive deci-
22 sion regarding the extent of permissible uses on the
23 property that has been allegedly infringed or taken;
24 and

1 “(ii) one meaningful application as defined by
 2 applicable law to use the property has been sub-
 3 mitted but has not been approved within a reason-
 4 able time, and the party seeking redress has applied
 5 for one appeal and one waiver which has not been
 6 approved within a reasonable time, where the appli-
 7 cable law of the United States provides a mechanism
 8 for appeal to or waiver by an administrative agency.

9 “(B)(i) The party seeking redress shall not be re-
 10 quired to submit any application or apply for any appeal
 11 or waiver required under this section, if the district court
 12 determines that such action would be futile.

13 “(ii) In this subparagraph, the term ‘futile’ means
 14 the inability of an owner of real property to seek or obtain
 15 approvals to use such real property, and the hardship en-
 16 dured by such inability, as defined under applicable land
 17 use, zoning, and planning law.

18 “(3) Nothing in this subsection alters the substantive
 19 law of takings of property, including the burden of proof
 20 borne by the plaintiff.”.

21 (c) DISTRICT COURT CIVIL RIGHTS JURISDICTION;
 22 ABSTENTION.—Section 1343 of title 28, United States
 23 Code, is amending by adding at the end the following:

1 “(c) Whenever a district court exercises jurisdiction
2 under subsection (a), the court shall not abstain from or
3 relinquish jurisdiction to a State court in an action if—

4 “(1) no claim of a violation of a State law or
5 privilege is alleged; and

6 “(2) a parallel proceeding in State court arising
7 out of the same core of operative facts as the district
8 court proceeding is not pending.

9 “(d) A district court that exercises jurisdiction under
10 subsection (a) in an action in which the operative facts
11 concern the uses of real property may abstain where the
12 party seeking redress—

13 “(1) has not submitted a meaningful applica-
14 tion, as defined by applicable law, to use such real
15 property; and

16 “(2) challenges whether an action of the appli-
17 cable locality exceeds the authority conferred upon
18 the locality under the applicable zoning or planning
19 enabling statute of the State or territory.

20 “(e)(1) Where the district court has jurisdiction over
21 an action under subsection (a) in which the operative facts
22 concern the uses of real property and which cannot be de-
23 cided without resolution of an unsettled question of State
24 law, the district court may certify the question of State
25 law to the highest appellate court of that State. After the

1 State appellate court resolves the question certified to it,
 2 the district court shall proceed with resolving the merits.

3 “(2) In making a decision whether to certify a ques-
 4 tion of State law under this subsection, the district court
 5 may consider whether the question of State law—

6 “(A) will significantly affect the merits of the
 7 injured party’s Federal claim; and

8 “(B) is patently unclear.

9 “(f)(1) Any claim or action brought under section
 10 1979 of the Revised Statutes of the United States (42
 11 U.S.C. 1983) to redress the deprivation of a right or privi-
 12 lege to use and enjoy real property as secured by the Con-
 13 stitution shall be ripe for adjudication by the district
 14 courts upon a final decision rendered by any person acting
 15 under color of any statute, ordinance, regulation, custom,
 16 or usage, of any State or territory of the United States,
 17 that causes actual and concrete injury to the party seeking
 18 redress.

19 “(2)(A) For purposes of this subsection, a final deci-
 20 sion exists if—

21 “(i) any person acting under color of any stat-
 22 ute, ordinance, regulation, custom, or usage, of any
 23 State or territory of the United States, makes a de-
 24 finitive decision regarding the extent of permissible

1 uses on the property that has been allegedly in-
2 fringed or taken;

3 “(ii)(I) one meaningful application, as defined
4 by applicable law to use the property has been sub-
5 mitted but has not been approved within a reason-
6 able time, and the party seeking redress has applied
7 for one appeal or waiver which has not been ap-
8 proved within a reasonable time, where the applica-
9 ble statute, ordinance, custom, or usage provides a
10 mechanism for appeal to or waiver by an administra-
11 tive agency; or

12 “(II) one meaningful application, as defined by
13 applicable law, to use the property has been sub-
14 mitted but has not been approved within a reason-
15 able time, and the disapproval at a minimum speci-
16 fies in writing the range of use, density, or intensity
17 of development of the property that would be ap-
18 proved, with any conditions therefor, and the party
19 seeking redress has resubmitted another meaningful
20 application taking into account the terms of the dis-
21 approval, except that—

22 “(aa) if no such reapplication is submitted,
23 then a final decision shall not have been
24 reached for purposes of this subsection, except
25 as provided in subparagraph (B); and

1 “(bb) if the reapplication is not approved
2 within a reasonable time, or if the reapplication
3 is not required under subparagraph (B), then a
4 final decision exists for purposes of this sub-
5 section if the party seeking redress has applied
6 for one appeal or waiver with respect to the dis-
7 approval, which has not been approved within a
8 reasonable time, where the applicable statute,
9 ordinance, custom, or usage provides a mecha-
10 nism of appeal or waiver by an administrative
11 agency; and

12 “(iii) in a case involving the uses of real prop-
13 erty, where the applicable statute or ordinance pro-
14 vides for review of the case by elected officials, the
15 party seeking redress has applied for but is denied
16 such review.

17 “(B)(i) The party seeking redress shall not be re-
18 quired to submit any application or reapplication, or apply
19 for any appeal or waiver as required under this subsection,
20 upon determination by the district court that such action
21 would be futile.

22 “(ii) In this subparagraph, the term ‘futile’ means
23 the inability of an owner of real property to seek or obtain
24 approvals to use such real property, and the hardship en-

1 dured by such inability, as defined under applicable land
 2 use, zoning, and planning law.

3 “(3) For purposes of this subsection, a final decision
 4 shall not require the party seeking redress to exhaust judi-
 5 cial remedies provided by any State or territory of the
 6 United States.

7 “(g) Nothing in subsection (c), (d), (e), or (f) alters
 8 the substantive law of takings of property, including the
 9 burden of proof borne by the plaintiff.”.

10 **SEC. 7. ATTORNEYS FEES FOR LOCALITIES.**

11 Section 722(b) of the Revised Statutes (42 U.S.C.
 12 1988(b)) is amended—

13 (1) by striking “In any action” and inserting
 14 “(1) Subject to paragraphs (2) and (3), in any ac-
 15 tion”; and

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

17 “(2) In an action arising under section 1979 of
 18 the Revised Statutes (42 U.S.C. 1983), where the
 19 taking of real property is alleged, a district court, in
 20 its discretion, may hold the party seeking redress
 21 liable for a reasonable attorney’s fee and costs where
 22 the takings claim is not substantially justified, un-
 23 less special circumstances make an award of such
 24 fees unjust. Whether or not the position of the party
 25 seeking redress was substantially justified shall be

1 determined on the basis of any administrative and
2 judicial record, as a whole, which is made in the dis-
3 trict court adjudication for which fees and other ex-
4 penses are sought.

5 “(3) In an action arising under section 1979 of
6 the Revised Statutes (42 U.S.C. 1983) where the
7 taking of real property is alleged, the district court
8 shall decide any motion to dismiss such claim on an
9 expedited basis. Where such a motion is granted and
10 the takings claim is dismissed with prejudice, the
11 non-moving party may be liable for a reasonable at-
12 torney’s fee and costs at the discretion of the district
13 court, unless special circumstances make an award
14 of such fees unjust.”.

15 **SEC. 8. DUTY OF NOTICE TO DEFENDANTS.**

16 Section 1979 of the Revised Statutes (42 U.S.C.
17 1983) is amended—

18 (1) by inserting “(a)” before “Every person”;

19 and

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

21 “(b) A party seeking redress under this section for
22 a taking of real property without the payment of com-
23 pensation shall not commence an action in district court
24 before 60 days after the date on which written notice has
25 been given to any potential defendant.”.

1 **SEC. 9. DUTY OF NOTICE TO OWNERS.**

2 Whenever a Federal agency takes an agency action
3 limiting the use of private property that may be affected
4 by this Act (including the amendments made by this Act),
5 the agency shall give notice to the owners of that property
6 explaining their rights under this Act and the procedures
7 for obtaining any compensation that may be due to them
8 under this Act.

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

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

13 **SEC. 11. EFFECTIVE DATE.**

14 This Act shall take effect on the date of enactment
15 of this Act and shall apply to any agency action that oc-
16 curs on or after such date.

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