

115TH CONGRESS
2D SESSION

H. R. 7178

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 27, 2018

Mr. REED (for himself, Mr. GOSAR, Mr. BRAT, and Mr. KING of Iowa) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

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 “Defense of Property
5 Rights Act”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

8 (1) the private ownership of property is essen-
9 tial to a free society and is an integral part of the

1 American tradition of liberty and limited govern-
2 ment;

3 (2) the framers of the United States Constitu-
4 tion, in order to protect private property and liberty,
5 devised a framework of Government designed to dif-
6 fuse power and limit Government;

7 (3) to further ensure the protection of private
8 property, the fifth amendment to the United States
9 Constitution was ratified to prevent the taking of
10 private property by the Federal Government, except
11 for public use and with just compensation;

12 (4) the purpose of the takings clause of the
13 fifth amendment of the United States Constitution,
14 as the Supreme Court stated in *Armstrong v. United*
15 *States*, 364 U.S. 40, 49 (1960), is “to bar Govern-
16 ment from forcing some people alone to bear public
17 burdens, which in all fairness and justice, should be
18 borne by the public as a whole”;

19 (5) the agencies, in their efforts to ameliorate
20 public harms and environmental abuse, have singled
21 out property holders to shoulder the cost that should
22 be borne by the public, in violation of the just com-
23 pensation requirement of the takings clause of the
24 fifth amendment of the United States Constitution;

1 (6) there is a need to both restrain the agencies
2 in their overzealous regulation of the private sector
3 and to protect private property, which is a funda-
4 mental right of the American people;

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

12 (8) certain provisions of sections 1346 and
13 1402 and chapter 91 of title 28, United States Code
14 (commonly known as the Tucker Act), that delin-
15 eates the jurisdiction of courts hearing property
16 rights claims, complicates the ability of a property
17 owner to vindicate a property owner's right to just
18 compensation for a governmental action that has
19 caused a physical or regulatory taking;

20 (9) current law—

21 (A) forces a property owner to elect be-
22 tween equitable relief in the district court and
23 monetary relief (the value of the property
24 taken) in the United States Court of Federal
25 Claims;

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

5 (C) is used to urge dismissal in the Court
6 of Federal Claims on the ground that the plain-
7 tiff should seek equitable relief in district court;

8 (10) property owners cannot fully vindicate
9 property rights in one court;

10 (11) property owners should be able to fully re-
11 cover for a taking of their private property in one
12 court;

13 (12) certain provisions of sections 1346 and
14 1402 and chapter 91 of title 28, United States Code
15 (commonly known as the Tucker Act) should be
16 amended, giving both the district courts of the
17 United States and the Court of Federal Claims ju-
18 risdiction to hear all claims relating to property
19 rights; and

20 (13) section 1500 of title 28, United States
21 Code, which denies the Court of Federal Claims ju-
22 risdiction to entertain a suit which is pending in an-
23 other court and made by the same plaintiff, should
24 be repealed.

1 **SEC. 3. PURPOSE.**

2 The purpose of this Act is to—

3 (1) encourage, support, and promote the private
4 ownership of property by ensuring the constitutional
5 and legal protection of private property by the
6 United States Government;

7 (2) establish a clear, uniform, and efficient ju-
8 dicial process whereby aggrieved property owners
9 can obtain vindication of property rights guaranteed
10 by the fifth amendment to the United States Con-
11 stitution and this Act;

12 (3) amend certain provisions of the Tucker Act,
13 including the repeal of section 1500 of title 28,
14 United States Code;

15 (4) rectify the constitutional imbalance between
16 the Federal Government and the States; and

17 (5) require the Federal Government and States
18 to compensate property owners for the deprivation of
19 property rights.

20 **SEC. 4. DEFINITIONS.**

21 For purposes of this Act the term—

22 (1) “agency” means a department, agency,
23 independent agency, or instrumentality of the United
24 States or an individual State, including any military
25 department, Government corporation, Government-
26 controlled corporation, or other establishment in the

1 executive branch of the United States Government
2 or an individual State;

3 (2) “agency action” means any action or deci-
4 sion taken, permanently or temporarily, by an agen-
5 cy that—

6 (A) takes a property right; or

7 (B) unreasonably impedes the use of prop-
8 erty or the exercise of property interests or sig-
9 nificantly interferes with investment-backed ex-
10 pectations;

11 (3) “just compensation”—

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

19 (B) shall include compounded interest cal-
20 culated from the date of the taking until the
21 date the agency tenders payment;

22 (4) “owner” means the owner or possessor of
23 property or rights in property at the time the taking
24 occurs, including when—

1 (A) the statute, regulation, rule, order,
2 guideline, policy, or action is passed or promul-
3 gated; or

4 (B) the permit, license, authorization, or
5 governmental permission is denied or sus-
6 pended;

7 (5) “private property” or “property” means all
8 property protected under the fifth amendment to the
9 Constitution of the United States, any applicable
10 Federal or State law, or this Act, and includes—

11 (A) real property, whether vested or
12 unvested, including—

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

15 (ii) inchoate interests in real property
16 such as remainders and future interests;

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

19 (iv) easements;

20 (v) leaseholds;

21 (vi) recorded liens; and

22 (vii) contracts or other security inter-
23 ests in, or related to, real property;

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

4 (C) rents, issues, and profits of land, in-
5 cluding minerals, timber, fodder, crops, oil and
6 gas, coal, or geothermal energy;

7 (D) property rights provided by, or memo-
8 rialized in, a contract, except that such rights
9 shall not be construed under this title to pre-
10 vent the United States from prohibiting the for-
11 mation of contracts deemed to harm the public
12 welfare or to prevent the execution of contracts
13 for—

14 (i) national security reasons; or

15 (ii) exigencies that present immediate
16 or reasonably foreseeable threats or inju-
17 ries to life or property;

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

20 (F) any interest understood to be property
21 based on custom, usage, common law, or mutu-
22 ally reinforcing understandings sufficiently well-
23 grounded in law to back a claim of interest; and

24 (6) “taking of private property”—

(A) means any action whereby private property is directly taken in part or in whole 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. 5. COMPENSATION FOR TAKEN PROPERTY.

(a) IN GENERAL.—No agency shall take private property in part or in whole except for public purpose and with just compensation to the property owner. A property owner shall receive just compensation if—

(1) as a consequence of a decision of any agency private property (in part or in whole) has been physically invaded or taken 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;

1 (B) such action exacts the owner's constitu-
2 tional or otherwise lawful right to use the property
3 or a portion of such property as a condition for the
4 granting of a permit, license, variance, or any other
5 agency action without a rough proportionality be-
6 tween the stated need for the required dedication
7 and the impact of the proposed use of the property;

8 (C) such action results in the property owner
9 being deprived, either temporarily or permanently, of
10 all or substantially all economically beneficial or pro-
11 ductive use of the property or that part of the prop-
12 erty affected by the action without a showing that
13 such deprivation inheres in the title itself;

14 (D) such action diminishes the fair market
15 value of the property which is the subject of the ac-
16 tion by the lesser of—

17 (i) 20 percent or more with respect to the
18 value immediately prior to the governmental ac-
19 tion; or

20 (ii) \$20,000, or more with respect to the
21 value immediately prior to the governmental ac-
22 tion; or

23 (E) under any other circumstance where a tak-
24 ing has occurred within the meaning of the fifth
25 amendment of the United States Constitution.

1 (b) BURDEN OF PROOF.—(1) The agency shall bear
2 the burden of proof in any action described under—

3 (A) subsection (a)(2)(A), with regard to show-
4 ing the nexus between the stated governmental pur-
5 pose of the governmental interest and the impact on
6 the proposed use of private property;

7 (B) subsection (a)(2)(B), with regard to show-
8 ing the proportionality between the exaction and the
9 impact of the proposed use of the property; and

10 (C) subsection (a)(2)(C), with regard to show-
11 ing that such deprivation of value inheres in the title
12 to the property.

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

17 **SEC. 6. JURISDICTION AND JUDICIAL REVIEW.**

18 (a) IN GENERAL.—A property owner may file a civil
19 action under this Act to challenge the validity of any agen-
20 cy action that adversely affects the owner's interest in pri-
21 vate property in either the United States District Court
22 or the United States Court of Federal Claims. This section
23 constitutes express waiver of the sovereign immunity of
24 the United States. Notwithstanding any other provision of
25 law and notwithstanding the issues involved, the relief

1 sought, or the amount in controversy, each court shall
2 have concurrent jurisdiction over both claims for monetary
3 relief and claims seeking invalidation of any Act of Con-
4 gress or any agency action defined under this Act affecting
5 private property rights. The plaintiff shall have the elec-
6 tion of the court in which to file a claim for relief.

7 (b) STANDING.—Persons adversely affected by an
8 agency action taken under this Act shall have standing
9 to challenge and seek judicial review of that action.

10 (c) AMENDMENTS TO TITLE 28, UNITED STATES
11 CODE.—(1) Section 1491(a) of title 28, United States
12 Code, is amended—

13 (A) in paragraph (1) by amending the first sen-
14 tence to read as follows: “The United States Court
15 of Federal Claims shall have jurisdiction to render
16 judgment upon any claim against an agency for
17 monetary relief founded either upon the Constitution
18 or any Act of Congress or any regulation of an exec-
19 utive department, or upon any express or implied
20 contract with an agency, in cases not sounding in
21 tort, or for invalidation of any Act of Congress or
22 any regulation of an executive department that ad-
23 versely affects private property rights in violation of
24 the fifth amendment of the United States Constitu-
25 tion”;

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

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

8 “(4) In cases otherwise within its jurisdiction,
9 the Court of Federal Claims shall also have ancillary
10 jurisdiction, concurrent with the courts designated in
11 section 1346(b) of this title, to render judgment
12 upon any related tort claim authorized under section
13 2674 of this title.

14 “(5) In proceedings within the jurisdiction of
15 the Court of Federal Claims which constitute judi-
16 cial review of agency action (rather than de novo
17 proceedings), the provisions of section 706 of title 5
18 shall apply.”.

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

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

1 **SEC. 7. STATUTE OF LIMITATIONS.**

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

5 **SEC. 8. ATTORNEYS' FEES AND COSTS.**

6 The court, in issuing any final order in any action
7 brought under this Act, shall award costs of litigation (in-
8 cluding reasonable attorney and expert witness fees) to
9 any prevailing plaintiff.

10 **SEC. 9. ALTERNATIVE DISPUTE RESOLUTION.**

11 (a) IN GENERAL.—Either party to a dispute over a
12 taking of property as defined under this Act or litigation
13 commenced under this Act may elect to resolve the dispute
14 through settlement or arbitration. In the administration
15 of this section—

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

18 (2) arbitration procedures shall be in accord-
19 ance with the alternative dispute resolution proce-
20 dures established by the American Arbitration Asso-
21 ciation; and

22 (3) in no event shall arbitration be a condition
23 precedent or an administrative procedure to be ex-
24 hausted before the filing of a civil action under this
25 Act.

1 (b) REVIEW OF ARBITRATION.—Appeal from arbitra-
2 tion decisions shall be to the United States District Court
3 or the United States Court of Federal Claims in the man-
4 ner prescribed by law for the claim under this Act.

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

6 Nothing in this Act shall be construed to interfere
7 with the authority of any State to create additional prop-
8 erty rights.

9 **SEC. 11. SEVERABILITY.**

10 If any provision of this Act, an amendment made by
11 this Act, or the application of such provision or amend-
12 ment to any person or circumstance is held to be unconsti-
13 tutional, the remainder of this Act, the amendments made
14 by this Act, and the application of the provisions of such
15 to any person or circumstance shall not be affected there-
16 by.

17 **SEC. 12. EFFECTIVE DATE.**

18 The provisions of this Act shall apply to actions com-
19 menced on or after the date of the enactment of this Act.

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