106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
106–1011

LANDOWNERS EQUAL TREATMENT ACT OF 1999

OCTOBER 26, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1142]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 1142) to ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 1142 is to ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used.

BACKGROUND AND NEED FOR LEGISLATION

In September 1998, the U.S. Fish and Wildlife Service (FWS) and the Minneapolis-St. Paul Airport Commission signed an agreement under which FWS would receive $26 million in compensation for the use of National Wildlife Refuge lands by the Airport Commission. The Minneapolis-St. Paul Airport proposed to expand a runway very near the Minnesota Valley National Wildlife Refuge, which is administered by the FWS. The new runway was expected to result in 5,620 monthly overflights over a portion of the Refuge between 500 and 2,000 feet above ground level. The FWS concluded that these overflights were a "use" of Refuge lands and therefore, triggered the provisions of Section 4(f) of the Department of Trans-

portation Act of 1966 (49 U.S.C. 303). This law provides that the Secretary of Transportation may not approve a project that requires the use of any publicly owned land (such as a public park, recreation area, wildlife and waterfowl refuge or historic site of national, state, or local significance) unless there are no feasible and prudent alternatives to the use of such land and unless the project includes all possible planning to minimize harm resulting from the use.

After conducting a Section 4(f) evaluation, as well as an environmental impact analysis under National Environmental Policy Act (NEPA), the Federal Aviation Administration (FAA) determined that "the MSP (Minneapolis-St. Paul) Airport expansion will require the . . . constructive use of land from a wildlife refuge". According to the FAA, "A 'constructive use' can occur when proximity effects, such as noise, adversely affect the normal activity or aesthetic value of an eligible Section 4(f) property even though there may be no direct physical effect involving construction of transportation facilities." According to FAA regulations, "Substantial impairment would occur only when the protected activities, features or attributes of the resource are substantially diminished." 23 CFR 771.135 (p)(2), 56 Federal Register 13273. Apparently, the FAA's finding of a "constructive use" led to the conclusion that the FWS was entitled to compensation or mitigation for that use although there was never any physical invasion of the property.

Section 4(f) is a statement of policy to avoid unnecessary impacts on important public lands providing wildlife, recreation, and historic benefits. As noted earlier, the Secretary of Transportation shall only authorize such projects if "(1) there is no prudent and feasible alternative to using that land and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." The statute does not require payment of compensation.

However, the requirement for compensation for private property taken for a public use is enshrined in the U.S. Constitution in the Fifth Amendment, and according to the United States Supreme Court is a fundamental constitutional and civil right that protects each and every American citizen. Therefore, unlike the guarantee to private landowners, the compensation provided for the "use" of the Minnesota Valley National Wildlife Refuge was the result of negotiation and agreement, and not based on the Constitution, a statutory mandate, a regulation, or case law.

The Fifth Amendment of the United States Constitution, often referred to as the "takings" clause, provides "Nor shall private property be taken for public use, without just compensation". This constitutional protection for the private property rights of citizens has been made applicable to the states through the Fourteenth Amendment to the Constitution. In addition, many states have an identical or similar state "takings" clause in their state constitutions. The Fifth Amendment is a floor, not a ceiling, in its protection of property rights.

Not every action by government affecting private property results in a "taking" under the Fifth Amendment. However, Congress may and has provided by statute for compensation when property must

be used by the government, even in some areas that might not rise to the level of a Constitutionally defined "taking".

One of the principal purposes of the Fifth Amendment 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." *Armstrong* v. *United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

However, some legal scholars have noted the confused and paradoxical condition of current takings" case law. Law Professor Jeb Rubenfeld stated at the outset in his 1993 Yale Law Review Article entitled "Usings" (102Yale L.J. 1077), "For a long time, there has been no Just Compensation Clause in constitutional law. Three words, 'for public use', have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a Taking Clause engulfed in confusion and a Public Use Clause of nearly complete insignificance." Professor Rubenfeld's solution to the lack of coherent case law is a Fifth Amendment jurisprudence based on whether there is a "using" rather than a taking.

This legislation would provide for a statutory right of compensation under the Endangered Species Act (ESA) when property is used by the public for the protection of publicly-owned wildlife. The Endangered Species Act is a federal law that has frequently resulted in the use of privately-owned property for the purpose of providing habitat for publicly-owned wildlife. This is a concept propounded by the government itself when its property is used, and therefore, is an appropriate concept for application to Constitutionally-protected rights guaranteed to private citizens.

The ESA uses private property to "protect" the habitat of endangered or threatened species. Most of this habitat is privately-owned property. The ESA prohibits the "take" of a member of any species which is listed under the ESA as endangered or threatened. The word "take" is further defined in Section 9 of the ESA to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." FWS regulations further interpret the term "harm" to include the modification of "habitat" (land or water) that impairs breeding, feeding, and sheltering. It should be noted that the ESA does not define the term "habitat" and therefore, this applies to any area where the species might be found, including privately-owned property. The Supreme Court in *Sweethome* v. *Babbitt,* 115 S.Ct. 2407 (1995), upheld the FWS interpretation of the term "take" to include the authority to control the use of private land that might provide habitat for endangered or threatened species.

Violation of the ESA, including the "take" prohibition, may result in both civil and criminal penalties. Section 11 of the ESA establishes penalties and enforcement procedures. Civil penalties can range from $500 to $25,000. Criminal fines can range from $25,000 to $50,000 and prison sentences can range between six months to one year. In addition, any equipment, tools, or property used in violating the ESA may be seized by the federal government and forfeited.

Ordinarily the federal government brings suit or presses charges against citizens who violate the ESA. However, the ESA also authorizes private citizens to sue to enforce the provisions of the ESA

through the use of citizen suits. "Any citizen" may sue the government and other private citizens, including private property owners, whom they believe to be in violation of the ESA. The court may award the citizen bringing the suit the costs of litigation, including reasonable attorney and expert witness fees, when the judge determines the award to be appropriate. If the suit is against a private property owner, the private owner must pay for attorneys fees and court costs of the suing party.

Congress may enact laws to require the further protection of private property over and above the minimal standards created in the U.S. Constitution. H.R. 1142 does not purport to define the term "take" as provided in the Fifth Amendment. It does, however, require the same standard of care that the FWS requires when its property is impacted by decisions of other federal agencies. It first requires the effort to avoid impacts and minimize impacts on private property, and then to compensate for impacts created pursuant to implementing the ESA. It is unfortunate that the courts have not thus far been able to devise adequate remedies for the protection of private property rights. However, that is the appropriate role of Congress.

H.R. 1142 will insure that the basic Constitutional rights of private property owners are protected, while encouraging the federal government to continue efforts to work cooperatively with landowners to provide habitat for wildlife. It will give private landowners the same protections as were enjoyed by the federal government in the case involving the Minnesota Valley National Wildlife Refuge.

COMMITTEE ACTION

H.R. 1142 was introduced on March 17, 1999, by Congressman Don Young (R–AK). The bill was referred to the Committee on Resources. On April 14, 1999, the Committee held a hearing on the bill. On June 21, 2000, the Full Committee met to mark up the bill. No amendments were offered and the bill was then ordered favorably reported to the House of Representatives by a vote of 27 to 11, as follows:

Committee on Resources
U.S. House of Representatives
106th Congress

Full Committee

Date 6-21-00

Roll No. 1

Bill No. HR 1142 Short Title Landowners Equal Treatment Act

Amendment or matter voted on: FINAL PASSAGE

Member	Yea	Nay	Pass	Member	Yea	Nay	Pass
Mr. Young (Chairman)	X			*Mr. Miller*		X	
Mr. Tauzin	X			*Mr. Rahall*			
Mr. Hansen	X			*Mr. Vento*			
Mr. Saxton				*Mr. Kildee*		X	
Mr. Gallegly	X			*Mr. DeFazio*			
Mr. Duncan	X			*Mr. Faleomavaega*			
Mr. Hefley				*Mr. Abercrombie*			
Mr. Doolittle	X			*Mr. Ortiz*	X		
Mr. Gilchrest		X		*Mr. Pickett*			
Mr. Calvert	X			*Mr. Pallone*		X	
Mr. Pombo	X			*Mr. Dooley*	X		
Mrs. Cubin	X			*Mr. Romero-Barcelo*	X		
Mrs. Chenoweth-Hage	X			*Mr. Underwood*			
Mr. Radanovich	X			*Mr. Kennedy*			
Mr. Jones	X			*Mr. Smith*			
Mr. Thornberry	X			*Mr. John*			
Mr. Cannon	X			*Mrs. Christensen*			
Mr. Brady	X			*Mr. Kind*		X	
Mr. Peterson	X			*Mr. Inslee*		X	
Mr. Hill	X			*Mrs. Napolitano*		X	
Mr. Schaffer	X			*Mr. Tom Udall*		X	
Mr. Gibbons	X			*Mr. Mark Udall*		X	
Mr. Souder	X			*Mr. Crowley*		X	
Mr. Walden	X			*Mr. Holt*		X	
Mr. Sherwood							
Mr. Hayes	X						
Mr. Simpson	X						
Mr. Tancredo	X			**TOTAL**	27	11	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 sets forth the short title of the bill as the "Landowners Equal Treatment Act of 1999".

Section 2. Findings and purpose

Section 2 sets forth the findings and purposes of the bill, explaining that it is patterned after the proposal by the FWS for compensation for the loss of use of FWS property resulting from "constructive use" of the property. The definition of "use", developed by the U.S. Department of Transportation, is applied to use of private property, as are the examples of what would constitute a constructive use.

Section 3. Minimizing impacts on private property

This section adds a new section 19 to the ESA, but makes no other amendments to the existing law.

Section 3 sets forth the general principle that in implementing the ESA, agencies shall make every effort to avoid, minimize, or mitigate impacts on private property that result in federal use of the property as a result of the agency action. An agency shall not take action that results in a federal use of private property under the ESA unless the agency: (1) obtains the written permission of the private property owner; (2) negotiates a voluntary agreement authorizing the proposed use; or (3) pays compensation in accordance with this new section. Thereafter, if the use cannot be avoided and the owner does not consent, the owner is to be paid the fair market value of the portion of the property affected by the use for the duration of the use. A property owner is required to make a written request for compensation to the agency implementing the agency action. An agreement may be negotiated which may be for transfer of title or an agreement to limit the time of the federal use. If an agreement cannot be reached, the property owner may elect binding arbitration (under the Federal Arbitration Act) or seek compensation through a lawsuit. A lawsuit could be brought under the ESA citizen suit section, which allows for attorneys fees and costs. Payment of compensation would come from federal appropriation for the agency which took the action resulting in the use of the private property.

Agencies are required to give notice to property owners of their rights under this section to seek compensation. This new section is not intended to preclude any other cause of action a property owner might have under any other applicable law nor would it allow an activity that is prohibited by some other law.

The section contains the following definitions:

"Federal use" of private property means any action under the ESA to (1) permanently incorporate private property into a federal facility; (2) place private property under the control of the Secretary of the Interior or the Secretary of Commerce (who implement the ESA); or (3) temporarily occupy private property in a manner that is adverse to the constitutional right of the owner of the property against taking of the property by the federal government;

In addition, "Federal use" includes any "constructive use" of non-Federal property. The term "constructive use" means any action under the ESA that results in: (1) substantial diminution in the normal or reasonably expected uses of private property; (2) a reduction in the fair market value of private property of 25 percent or more; or (3) in the case of the right to receive water, any diminution in the quantity of water received or available for use.

Certain actions taken under the ESA meet the criteria for a "federal use", including: (1) prohibiting private property owners from using their property in order to use the property as habitat for an endangered species or threatened species; (2) a designation of non-federal property as critical habitat without the permission of the private property owner; (3) the denial of a permit that results in the loss of the ability to use private property in order to provide habitat for listed wildlife or plants; (4) an ESA section 7 consultation that would result in restriction on the use of private property; and (5) the imposition by a third party governmental entity of a restriction as a condition of some benefit that, if taken directly by the federal agency, would constitute a federal use of private property, unless the governmental entity has some other legal basis for imposing the limitation or restriction. This last action could include, for example, forcing states and local governments to restrict property as a condition of a state grant or other authorization.

"Fair market value" is the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to fair sale.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. Government Reform Oversight Findings. Under clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and rec-

ommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 12, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1142, the Landowners Equal Treatment Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 1142—Landowners Equal Treatment Act of 1999

Summary: H.R. 1142 would address the protection of property rights that may be affected by federal actions taken under the Endangered Species Act (ESA). Specifically, the bill would require the government to compensate property owners whose use of any portion of their land or water rights has been limited by regulatory actions to implement the ESA. The bill would require that any compensation owed to a property owner as a result of enacting this legislation must be paid from funds appropriated to the agency that caused the limitation to property owners.

Implementing H.R. 1142 would involve both administrative expenses and compensation payments, both of which would be spent primarily by the U.S. Fish and Wildlife Service (USFWS), which is the primary agency charged with carrying out the ESA.

CBO estimates that in the first few years following enactment, the USFWS would spend $5 million to $10 million annually to develop and implement the administrative procedures necessary to carry out the bill's compensation provisions. We expect that administrative costs would fall to $2 million or $3 million a year thereafter.

We estimate that the USFWS also would make some payments of compensation, but this cost is highly uncertain and would depend on how property owners and the agency would react to the legislation and how the legislation would be interpreted by the Administration and the courts. While CBO is not able to provide any precise estimate of compensation costs, we expect that aggregate payments of compensation would be less than the administrative costs in the first few years after enactment, because (1) The bill's requirement that the USFWS pay compensation from its own appropriations would probably reduce the number of agency actions that affect property values, (2) many initial claims would probably

be ineligible for compensation, and (3) those initial claims that are paid are likely to be small.

In any case, both administrative expenses and compensation costs to implement this legislation would depend on the appropriation of the necessary amount. Enactment of the bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

H.R. 1142 contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Major Provisions: H.R. 1142 would direct federal agencies that carry out the ESA to avoid, minimize, or mitigate the impacts that their actions have on nonfederal property (that is, any property not owned by the federal government, which would include state and local holdings). Under H.R. 1142, an agency could not implement the ESA in such a way that would result in a federal use of nonfederal property unless the agency obtains written permission from the landowner, negotiates an agreement authorizing the use, or pays compensation.

The bill defines federal use of property to include both direct actions (such as incorporating nonfederal property into a federal facility) and indirect actions (such as declaring private property to be critical habitat for a species or denying a federal permit necessary for certain uses of private land). Indirect use, which is referred to by the bill as "constructive use," would have to be paid for by the federal government if it would result in a substantial diminution in the normal use of property, a loss in property value of 25 percent or more, or any reduction in the quantity of water available (in cases involving water rights).

The procedure for requesting compensation for the federal use of private property under the ESA is set out generally in section 3 of the legislation. A property owner seeking compensation would first make a written request to the agency. If the agency and the property owner can agree on compensation, the agency would pay the negotiated amount. If, after 180 days, the parties cannot agree on compensation, the owner may seek resolution through binding arbitration or a civil suit. Awards resulting from arbitration or litigation would include attorneys' fees and related costs such as appraisal expenses. Court awards would include interest calculated from the beginning of the federal action.

Estimated Cost to the Federal Government: CBO estimates that the USFWS would spend $5 million to $10 million annually to develop and implement the administrative procedures necessary to carry out the bill's compensation provisions. We expect that administrative costs would fall to $2 million or $3 million a year thereafter. CBO cannot estimate the amount of compensation that the agency may have to pay to property owners under this bill, but we expect that such payments would be less than the administrative costs in the first few years after enactment. Both administrative expenses and the payment of compensation to property owners would be subject to the appropriation of the necessary amounts.

Basis of Estimate: CBO expects that enacting H.R. 1142 would result in a great number of requests for compensation by property owners, particularly those affected by previous USFWS regulatory actions. CBO believes that the majority of such claims would stem

from the creation of an administrative forum, which would provide most property owners with a cost-effective way to seek compensation. We expect that the vast majority of claims made under H.R. 1142 would begin and end administratively, and that relatively few claims would be pursued further.

Civil court suits for compensation brought against the United States might also increase—especially since so few are made under existing law—but we expect that any increase in litigation would be small and would involve large monetary claims that might have been brought anyway under existing law.

Responding to the new requests for compensation would involve two types of federal expenditures: administrative expenses incurred by the USFWS to process claims and permit requests, and the payments themselves.

Administrative Expenses: Assuming appropriation of the necessary amounts, CBO estimates that the USFWS would spend $5 million to $10 million a year over the next two or three years to implement an administrative program to process compensation requests related to previous agency actions. After this period, ongoing administrative expenses would probably fall to $2 million or $3 million a year to consider compensation related to new agency actions.

Previous Agency Actions: CBO expects that property owners affected by past USFWS actions including previous designations of critical habitat, would apply for compensation even though they would probably not receive notification of the bill's compensation provisions from the agency (the notifications required under the bill would apparently not apply to past agency actions, but we expect that would stop landowners from seeking compensation). What would happen after such applications are made is uncertain. Although we expect the USFWS to reject such claims (because they involve actions taken before enactment), each would still require some minimal expense to process.

Once the claims relating to previous USFWS actions have been processed and rejected, we expect some landowners would probably apply for incidental take permits (which are permits to develop any land subject to ESA regulations) to receive a rejection that could then form the basis of another request for compensation. CBO expects that relatively few landowners would employ this strategy, however, because incidental take permits are expensive and time consuming for the average small landowner to pursue.

Depending on how quickly claims and permit applications arrive and what priority the USFWS gives them, processing requests related to previous actions under the ESA would add $3 million to $7 million annually to the cost of the endangered species program over the next few years.

New Agency Actions: CBO expects that the USFWS would take steps to mitigate the effects of its actions to implement the ESA on property owners, as mandated by the bill. Nevertheless, we expect that the agency would continue to receive a number of claims each year, particularly claims involving losses due to designation of critical habitat. Whether those claims result in the payment of compensation or not, we estimate that processing such requests would cost $2 million or $3 million annually.

Payments of Compensation: H.R. 1142 would establish a new cause of action in the ESA for property owners whose property is affected by federal regulatory actions. Instead of asserting that their property has been taken in violation of the fifth amendment of the Constitution (as they must under current law), property owners could seek compensation for federal use of their property under this new statutory process.

In addition to this fundamental change, the provisions of the bill would change current law in two important ways that could affect how property owners seek, and how federal agencies pay, compensation. First, the bill would provide an administrative forum for seeking compensation as an alternative to litigation. Second, the bill would delineate specific standards and definitions to be used in determining when and what the government owes when its actions affect the use of nonfederal property.

Compensation under Current Law: Under existing law, persons who wish to seek compensation for property that they believe has been adversely affected by a government action usually must do so through litigation—generally in the United States Court of Claims.

The process is time-consuming and expensive. Property owners who bring suit in the Claims Court typically wait at least two years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds required before the courts will award compensation. Property owners who pursue such cases can expect the government to appeal unfavorable decisions, which often adds years to the process. Because the costs of waging a protracted court battle are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the last decade). Those cases that are brought typically involve relatively large claims ($100,000 to more than $100 million) and are usually brought by corporations or other large property owners. Such claims can require more than a decade to resolve. As a result, the few awards that are paid often include more for interest and the reimbursement of litigation costs than for compensation.

Compensation under H.R. 1142: The most immediate effects of the legislation would stem from the creation of an administrative forum for property owners to seek compensation. This provision would make it much easier for private property owners to seek compensation. Typically, persons affected by endangered species regulations are small landowners who often cannot afford to sue the federal government or who would not expect to receive enough compensation to justify the substantial expense of attorneys and experts. Thus, without the administrative claims process created by the bill, most of these people would not be able to take advantage of the 25-percent loss threshold or other standards established by the bill that might increase a landowner's chance of prevailing against the government.

Creating an administrative forum would affect primarily small claims. Although the number of administrative claims could be quite large at first, CBO expects that relatively few would result in payment because:

- The USFWS would probably reject a large portion of early claims (such as those involving agency actions prior to the bill's enactment) by deeming them to be outside the scope of the bill;
- The agency would probably argue that some actions, such as designations of critical habitat, are not imposed on specific properties and therefore do not cause any real restrictions on the ability to use individual parcels. To seek compensation for such actions, a property owner would then either have to file for an incidental take permit and receive a rejection or sue the USFWS for compensation;
- Many typical USFWS actions, such as regulating the use of pesticides, might not substantially diminish the normal or reasonably expected uses of the property or reduce its value by 25 percent or more, or
- The requirements that compensation payments be made from agency appropriations would cause the USFWS to try to resolve as many claims as possible without having to pay any compensation—for example, by reversing or modifying permit decisions or enforcement actions, by processing permit applications more quickly, and by working more closely with landowners to negotiate permit conditions.

Further, we estimate that any compensation payments eventually made through the administrative process would involve relatively small amounts (often as little as a few thousand dollars), largely because the vast majority of claims would likely involve small parcels of land or some minor fraction ("affected portion") of larger tracts. In addition, under the bill the government would only be responsible for paying the diminution of value, which would most often involve very minor amounts, rather than the value of the entire affected property (as is usually the case under current law).

CBO expects that enacting H.R. 1142 also would result in an increase in civil litigation, at least in the short run, because the new 25-percent loss threshold and other provisions would almost certainly induce more property owners to seek compensation. Because property owners would first have to overcome the costly administrative hurdle of seeking and being denied an incidental take permit, most such lawsuits would involve larger, more complicated claims (those over $1 million). Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 2001–2005 period because claims would take several years to resolve. Large claims brought under the bill would still involve many of the same factors that prolong litigation under existing law, including a lengthy discovery period, court delays, and valuation disputes. Moreover, in the early years many new claims would likely involve conflicting interpretations of the statute that could take a number of years to resolve through the judicial process.

The effect of H.R. 1142 on federal compensation costs in later years would depend on the outcome of this process and is very difficult to predict. On the one hand, it is likely that the legislation would cause property owners to bring—and possibly win—more suits than in the past. On the other hand, while we expect the USFWS to deny most claims, we cannot predict the response of property owners or the courts. Neither can we predict how the

courts will resolve some of the more complicated issues such as those related to the determination of critical habitat, diminution in "normal use," or valuation. Moreover, the requirement that agencies pay all compensation awards, including interest and reimbursement of costs, from their operating budgets could have the effect of limiting potential costs under this legislation because this requirement would encourage the USFWS to avoid actions that would cause property owners to seek compensation.

Pay-as-You-Go Considerations: None.

Intergovernmental and Private-Sector Impact: H.R. 1142 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate Prepared by: Federal Costs: Deborah Reis. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Natalie Tawil.

Estimate Approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 19 OF THE ENDANGERED SPECIES ACT OF 1973

MINIMIZING IMPACTS ON PRIVATE PROPERTY

SEC. 19. (a) IN GENERAL.—In implementing this Act, the head of an agency shall make every possible effort to avoid, minimize, or mitigate impacts on non-Federal property that result in Federal use of the property as a direct result of the action of the agency head under this Act or in furtherance of the purposes of this Act. An agency shall not take action that results in a Federal use of non-Federal property under this Act unless the agency—

(1) obtains the written permission of its owner;

(2) negotiates a voluntary agreement authorizing that use; or

(3) pays compensation in accordance with this section.

(b) COMPENSATION FOR FEDERAL USE OF NON-FEDERAL PROPERTY.—An agency that takes action under this Act or in furtherance of the purposes of this Act that results in a Federal use of non-Federal property or any portion of non-Federal property without the written consent of the owner of the property shall compensate the owner for the fair market value of the Federal use of the property or portion. Compensation paid shall reflect the duration of the Federal use as necessary to achieve the purposes of this Act.

(c) REQUEST OF OWNER.—An owner of non-Federal property seeking compensation under this section shall make a written request for compensation to the agency implementing the agency action resulting in the Federal use of property. The request shall, at a minimum, identify the affected portion of the property, the nature of the Federal use of non-Federal property for which the compensation is sought, and the amount of compensation sought.

(d) NEGOTIATIONS.—The agency may negotiate with the owner to reach agreement on the amount of the compensation under this section, the terms of any agreement for payment, and the terms of any Federal use of non-Federal property for which compensation is paid. If such an agreement is reached, the agency shall within 6 months pay the owner the amount agreed upon. An agreement under this section may include a transfer of title or an agreement to limit the period of time of the Federal use of non-Federal property.

(e) CHOICE OF REMEDIES.—If, not later than 180 days after the written request is made, the parties have not reached an agreement on compensation, the owner of the property may elect binding arbitration or seek compensation due under this section in a civil action.

(f) 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.

(g) CIVIL ACTIONS.—A civil action to enforce this section may be filed under section 11(g). An owner who prevails in a civil action against the agency pursuant to this section shall be entitled to, and the agency shall be liable for, the amount of compensation awarded plus reasonable attorney's fees and other litigation costs, including appraisal fees. The court shall award interest on the amount of any compensation from the time of the Federal use of non-Federal property.

(h) SOURCE OF PAYMENTS.—Any payment made under this section to an owner of property and any judgment obtained by an owner of property in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency that took the agency action giving rise to the payment or civil action. 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.

(i) AVAILABILITY OF APPROPRIATIONS.—Notwithstanding any other provision of law, any obligation of the United States to make any payment under this section shall be subject to the availability of appropriations.

(j) DUTY OF NOTICE TO OWNERS.—An agency may not take any action that is a Federal use of non-Federal property unless the agency has given 30 days notice to each owner of the property directly affected explaining their rights under this section and either obtain-

ing their permission for the Federal use or providing the procedures for obtaining any compensation that may be available under this section.

(k) RULES OF CONSTRUCTION.—The following rules of construction shall apply to this Act:

(1) OTHER RIGHTS PRESERVED.—Nothing in this Act shall be construed to limit any right to compensation that exists under the Constitution or under other laws.

(2) EXTENT OF FEDERAL AUTHORITY.—Payment of compensation under this section (other than when 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 Federal use of non-Federal property agreed to so that the agency action may achieve the species conservation purposes of this Act.

(l) DEFINITIONS.—For the purposes of this section:

(1) AGENCY.—The term "agency" has the meaning given that term in section 551 of title 5, United States Code.

(2) FEDERAL USE.—(A) The term "Federal use" means—

(i) any action under this Act to—

(I) permanently incorporate non-Federal property into a Federal facility;

(II) place non-Federal property under the control of the Secretary; or

(III) temporarily occupy non-Federal property in a manner that is adverse to the constitutional right of the owner of the property against taking of the property by the Federal Government; and

(ii) any constructive use of non-Federal property.

(B) In this paragraph the term "constructive use" means any action described in subparagraph (C) taken under this Act that results in—

(i) substantial diminution in the normal or reasonably expected uses of non-Federal property;

(ii) a reduction in the fair market value of non-Federal property of 25 percent or more; or

(iii) in the case of the right to receive water, any diminution in the quantity of water received or available for use.

(C) The actions referred to in subparagraph (B) are the following:

(i) The imposition or enforcement of a prohibition of use of non-Federal property the purpose of which is to provide or retain habitat for any species of wildlife or plant determined to be an endangered species or threatened species.

(ii) A designation of non-Federal property as critical habitat under this Act.

(iii) The denial of a permit under section 10 that results in the loss of the ability to use non-Federal property in order to provide habitat for wildlife or plants.

(iv) An agency action pursuant to a reasonable and prudent alternative suggested by the Secretary under section 7, that would cause an agency to restrict the use of non-Federal property.

(v) The imposition by any governmental entity of a limitation or restriction on an otherwise permissible use of non-

Federal property by the owner of the property, as a condition of a Federal agency providing any land, money, permit, or other benefit to the governmental entity, if imposition of the limitation or restriction by the agency directly would constitute a Federal use of non-Federal property under the other provisions of this paragraph, unless the governmental entity has some other legal basis for imposing the limitation or restriction.

(3) FAIR MARKET VALUE.—The term "fair market value" means the most probable price at which property or a right to use property would change hands, in a competitive and open market under all conditions requisite to fair sale, between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, and without regard to the presence of any species protected under this Act. With respect to a right to use property, fair market value shall be determined on or immediately before the exercise of the right.

(4) LAW OF THE STATE.—The term "law of the State" includes the law of a political subdivision of a State.

(5) NON-FEDERAL PROPERTY.—The term "non-Federal property" means property which is owned by a person other than any Federal entity of government.

(6) PROPERTY.—The term "property" means land, an interest in land, the right to use or receive water, and any personal property, as defined under the law of the State.

DISSENTING VIEWS

This is a bill promoted by special interests engaged in a backdoor attack on the Endangered Species Act (ESA), and who want to rewrite the 5th Amendment to the Constitution to require that government pay people to comply with environmental laws.

The bill amends the ESA to require compensation for the "federal or constructive use" of non-federal property in furtherance of the requirements of the Act. The legislation claims to establish a requirement to compensate private property owners when the use of their land is restricted by the Endangered Species Act that is as "equitable as the compensation afforded to Federal agencies" when their land is subject to constructive use under Section 4(f) of the Department of Transportation Act (DOT) of 1966. In reality, this is not the case, as Section 4(f) is not a compensation law. Moreover, according to the Department of Justice, while this legislation is characterized as a protection of basic constitutional property rights under the 5th Amendment, it actually establishes a new entitlement program for property owners that ignores long-established jurisprudence under the 5th Amendment and replaces it with an inflexible compensation scheme (see attached letter from the Department of Justice for more details).

H.R. 1142: In an effort to appear similar to Section 4(f), the bill requires any federal agency that is implementing provisions of the ESA to avoid, minimize, or mitigate impacts on non-federal property that result in Federal use of the property as a direct result of the "action" of the agency under the ESA or in furtherance of the purposes of the ESA. This is where the similarity ends, however, as the bill then mandates that an agency shall "not take an action that results in a Federal use of non-Federal property" under the ESA without the voluntary agreement and written permission of the property owner or unless the agency pays compensation for the fair market value of the "Federal use of the property or portion". Section 4(f) contains no such mandate.

Federal use of property is defined as any action to permanently incorporate non-Federal property into a Federal facility; place non-Federal property under the control of the Secretary; or temporarily occupy non-Federal property in a manner that is adverse to the constitutional right of the owner against taking of property by the federal government; and finally any "constructive use" of non-Federal property.

Constructive use is defined as "actions" taken by a Federal agency on non-Federal property under the ESA to protect species, including the imposition or enforcement of a prohibition of use of property, the designation of property as critical habitat, the denial of an incidental take permit (Section 10 permit) to that results in the loss of use of property, any agency action under Section 7 (interagency consultation section) that causes the agency to restrict

the use of property, when the action results in substantial diminution in the normal or reasonably expected uses of non-Federal property; a reduction in the fair market values of non-Federal property of 25% or more; or in the case of the right to receive water, any diminution in the quantity of water received or available for use.

Section 4(f) vs. 1142: Section 4(f) of the DOT Act of 1966 (49 U.S.C. Sec. 303) provides special protection for publicly owned parks, recreations areas, wildlife and waterfowl refuges, and significant historic sites from the development of transportation projects. Under Section 4(f), DOT may approve the use of the protected resources for a transportation project only if there is no feasible and prudent alternative available to the use of the land, and the transportation project includes all possible planning to minimize harm resulting from the use. Implementation of 4(f) has been interpreted in their regulations to apply not only to the acquisition of an interest in land, but also to situations where serious impacts result in "constructive use" of land when a transportation project is constructed near, but not actually on Section 4(f) lands and the proximity of the project may impact the land sufficiently to constitute a substantial impairment of the activities, features, or attributes of the resource.

In the case of the Minneapolis-St. Paul airport expansion, which the majority uses as an example of why this bill is warranted, it was found that the expansion of a runway would constitute a "constructive use" of an adjoining National Wildlife Refuge and that some form of mitigation was required pursuant to Section 4(f). However, while a monetary compensation agreement was reached in the airport case to fund the required mitigation, Section 4(f) does not require, nor does it generally provide, monetary compensation in case where constructive or other uses are found. H.R. 1142, on the other hand, mandates the compensation of private property owners for any requirements to protect species under the ESA. In addition, the statutory threshold for compensation established in the bill is independent of, and contradictory to, the Constitution.

Constitutional Rights vs. H.R. 1142: H.R. 1142 asserts, correctly, that the Federal Government enjoys no right under the Constitution, as private property owners do, to compensation for use of Federal agency property for other federal purposes. In fact, Congress may have afforded some measure of protection to certain federal lands under Section 4(f) because they are not protected by the 5th Amendment, and this is the point. The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without compensation.

In the 25 year history of the ESA, however, courts have decided only four Fifth Amendment "takings" cases on the merits, all of which found that the ESA did not take private property. Moreover, recent Supreme Court decisions have established that mere diminution in the value of property (such as the 25% threshold set in the bill) resulting from regulation, however serious, is insufficient to demonstrate a taking. (Concrete Pipe, 508 U.S. at 645). In another unanimous ruling, the Court held that "the requirement of a permit before engaging in certain uses of his or her property does not itself "take" the property in any sense. * * * Moreover, even if the permit is denied, there may be other viable uses." (*U.S.* v.

Riverside Bayview Homes, 474 U.S. 121, 126–127 (1985)). H.R. 1142, however, would mandate compensation for landowners who are denied a Section 10 incidental take permit for a specific use of property under the ESA regardless of the reason that the permit is denied and despite the fact that other uses of the property may be available.

In addition, recent Supreme Court rulings that have found, for the purposes of analyzing whether a taking has occurred, the property must be viewed as a whole. Moreover, the Supreme Court has not said that the 25% diminution in value (as specified in the bill) is the threshold limit to establish a taking.

In fact, rulings such as *Lucas* v. *South Carolina Coastal Council* (112 S. Ct. 2886 (1992)) would seem to indicate that the threshold is much higher (The Court found that "where regulation denies all economically beneficial or productive use of land" a taking has occurred.) Yet, the bill does not establish that the whole property must be looked at to determine if a diminution in value has occurred. Nor does it specify who determines what the loss of value actually is.

Impacts on agency activities: H.R. 1142 requires that the compensation required to be paid to private property owners must come from the funds appropriated to the agency. Compensation must also be paid before any agency action can go forward which contradicts the Supreme Court ruling which found that the 5th Amendment does not require compensation be paid in advance or even contemporaneously with a taking (*Presault* v. *I.C.C.,* 110 S. Ct. 914 (1990)).

Given that the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are the agencies with primary responsibility for implementing the Act, and given that this legislation is so broad in scope that virtually any regulation they impose with respect to the ESA would require compensation, the majority of payments would come from, and cripple, their appropriated budgets.

Two outcomes are possible. One, the FWS and NMFS will spend so much of their appropriated funds compensating property owners that they will not have sufficient funds to implement the ESA or any of their other mandated responsibilities. While this may be the intent of the bill, it could have the unintended consequence of penalizing property owners that wish to move forward with projects on their land in compliance with the law. If no monies are available for consultations or granting of Section 10 permits, but they are still required by the law, then activities that are conducted without them will be in violation of the ESA and subject to civil or criminal penalties. Moreover,the Agencies will be unable to fulfill their responsibilities related to refuge and fisheries management as well as a whole host of other responsibilities.

The other possibility that was proposed by compensation proponents during the debate over S. 605 and other similar taking compensation bills in the 104th Congress, is that the agencies will simply limit the number of regulations and requirements that they promulgate and enforce that would necessitate compensation, thereby limiting the amount of appropriated funds that will have to be spent for this purpose. In other words, the threat of requiring

compensation will cause agencies to change their behavior. The ability to alter agency behavior, however, is dependent upon the flexibility of the law, in this case the ESA and the interpretation of that law by the courts.

With respect to the ESA, the requirements for listings, consultations, permits, habitat designations, and other restrictions are fairly detailed in the law itself, however, so the agencies will be required to carry out these measures despite the potential for compensation claims that will occur as a result of this legislation. In fact, in many cases where the FWS has delayed listings, or the designation of critical habitat for example, Courts have ruled that the listings and designations must go forward when the science dictates their necessity. It is unlikely a new requirement for compensation is going to alter the Court's interpretation of the requirement of the law, or that agencies will be able to significantly alter their implementation of the law in such a way as to minimize compensation claims.

Compensation Formula: Finally, the requirement that the bill compensate private property owners regardless of their investment backed expectations and based on a fair market value price that cannot take into account the existence of endangered species on the property, contradicts Supreme Court Rulings (*Penn Central Transportation Co.* v. *NYC,* 438 US 104 (1978)) and could likely result in windfall profits at the expense of the taxpayer. Under this bill, an individual could purchase property, knowing it had endangered species on it and that it may have restrictions on development, and pay the price set by the market that took into consideration the existence of such species. Then, the property owner could seek a permit to develop the property, and when such permit was denied, exact compensation despite his investment backed expectation. Moreover, the "fair market" value price that the government would be required to pay would be calculated as if no species occurred on the property, despite the fact that the price paid took this into consideration.

In short, this legislation, is not intended to protecting property owners' constitutional rights, nor is it about providing compensation that is "as equitable as the compensation afforded to Federal agencies" under Section 4(f) as the bill claims. Instead, the bill establishes new rights and a new basis for compensation that have no relationship to the requirements of Section 4(f); rights and compensation that are above and beyond what the Supreme Court has ruled are warranted under the Constitution; and rights that are not enjoyed by private property owners regulated under any other law.

Clearly, the goal of this bill is to tie the hands of the Fish and Wildlife Service and other agencies responsible for implementing the ESA and ensure they will be unable to do so. While responsible ESA reform legislation could and should be brought before the House, the Majority has chosen not to do so. Instead of developing ESA amendments on which a bipartisan consensus could be formed, they have insisted on moving divisive, expensive, and controversial bills, such as this one, which may score ideological points with a handful of extreme constituencies, but will not become law.

GEORGE MILLER.

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