

HOUSE BILL 570

Introduced by Grinde, et al.

2/10	Introduced
2/10	Referred to Judiciary
2/10	First Reading
2/11	Fiscal Note Requested
2/15	Hearing
2/17	Fiscal Note Received
2/18	Fiscal Note Printed
2/20	Committee Report--Bill Passed as Amended
2/22	2nd Reading Passed as Amended
3/22	Taken from Engrossing and Rereferred to Appropriations
3/09	Revised Fiscal Note Requested
3/16	Revised Fiscal Note Received
2/17	Revised Fiscal Note Printed
3/17	Revised Fiscal Note Requested
3/19	Committee Report--Bill Passed as Amended
3/20	Revised Fiscal Note Received
3/20	Revised Fiscal Note Printed
3/23	2nd Reading Passed
3/24	3rd Reading Passed
	Transmitted to Senate
3/26	First Reading
3/26	Referred to Judiciary
4/06	Hearing
4/13	Tabled in Committee
4/14	Motion Failed to Take From Committee and Place on 2nd Reading

House BILL NO. 570

INTRODUCED BY Larry Hal Givoe — *Rep. Simpson*

*TASK Force* NATHE *Wasson* *Left* *Wells* *Hand*

*L. Nielson* *Juan Anderson* *Schmitt* *Beckine* *Rea*

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN ASSESSMENT

OF GOVERNMENTAL ACTIONS THAT AFFECT THE USE OF PRIVATE

PROPERTY; REQUIRING AN ASSESSMENT OF THE CONSTITUTIONAL

IMPLICATIONS OF GOVERNMENT ACTIONS; REQUIRING PRIVATE

PROPERTY ASSESSMENTS TO BE SUBMITTED TO THE GOVERNOR AND THE

LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 6] may be cited as the "Montana Private Property Assessment Act".

NEW SECTION. Section 2. Policy -- purpose. (1) It is the policy of this state that a person may not be deprived of the use of private property without due process of law and that private property may not be taken by governmental action without just compensation being made. The legislature intends that [sections 1 through 6] implement Article II, section 29, of the Montana constitution in a manner that protects private property owners, the interests of the general public, and the fiscal health of the state.

(2) The purposes of [sections 1 through 6] are to require the assessment of governmental actions that affect

the use and value of private property, to require an assessment of the effect of governmental actions on constitutionally protected private property interests, and to avoid any unnecessary burdens on the public treasury. It is not the purpose of [sections 1 through 6] to reduce the scope of private property protections provided in the United States constitution or the Montana constitution. [Sections 1 through 6] do not preclude private property owners from challenging governmental actions in a court of competent jurisdiction or from seeking compensation or other available relief from governmental actions that affect private property rights.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 6], the following definitions apply:

(1) "Damaging" means depriving a property owner of a portion of the property or a portion of the economic value of the property.

(2) (a) "Governmental action" or "action" means a statute, rule, regulation, licensing requirement, or permitting requirement that if imposed by a government entity, will or may result in a taking or damaging of private property.

(b) The term does not include:

(i) the formal exercise of the power of eminent domain in accordance with law;

1 (ii) the discontinuance of governmental programs other  
2 than law enforcement protection;

3 (iii) the reduction of governmental interference with  
4 the use of private property by the repeal or amendment of  
5 rules or statutes;

6 (iv) the seizure or forfeiture of private property for a  
7 violation of criminal law or as evidence in a criminal  
8 proceeding, as provided by statute;

9 (v) actions that abate a nuisance to the extent that  
10 the restricted conduct constitutes a nuisance under the law  
11 in effect on July 1, 1993; or

12 (vi) county, city, or town variances or processes for  
13 variances concerning local regulations, ordinances, or  
14 zoning.

15 (3) (a) "Government entity" means the legislature or an  
16 officer or agency of the state that is authorized by law to  
17 adopt rules. The term includes political subdivisions of the  
18 state.

19 (b) The term does not include the judicial branch of  
20 state government.

21 (4) "Private property" means any property interest in  
22 this state that is protected by either:

23 (a) the fifth amendment to the United States  
24 constitution; or

25 (b) Article II, section 29, of the Montana

1 constitution.

2 (5) "Property owner" means a nongovernment entity  
3 owning an interest in property.

4 (6) "State agency" means an officer or agency of the  
5 executive branch of state government.

6 (7) "Taking" means a governmental action depriving a  
7 property owner of either ownership of the private property  
8 or a portion of or all of the economic value of the private  
9 property that is compensable under the fifth amendment to  
10 the United States constitution and under Article II, section  
11 29, of the Montana constitution.

12 NEW SECTION. Section 4. Assessment of impact on  
13 private property -- general directions. (1) Before taking a  
14 governmental action, a government entity shall prepare a  
15 written assessment that includes an analysis of at least the  
16 following elements:

17 (a) a description of the governmental action, its  
18 purpose, and a plan for implementation of the action,  
19 including any specific public health or safety risk the  
20 action is designed to prevent, mitigate, or remedy;

21 (b) the impact that the governmental action has on  
22 private property rights, including a description of how the  
23 action affects the use or value of private property and  
24 whether a taking will result;

25 (c) an identification of private property interests

1 affected or potentially affected by the governmental action;

2 (d) alternatives to the proposed governmental action  
3 that may:

4 (i) fulfill a government entity's legal obligations;

5 (ii) reduce the effect on the private property owner;  
6 and

7 (iii) reduce the risk of a taking of private property;

8 (e) an estimate of financial cost to the government  
9 entity for compensation and the source of payment within the  
10 government entity's budget if a constitutional taking would  
11 result; and

12 (f) an evaluation of the extent to which the proposed  
13 action imposes costs on property owners not borne by other  
14 citizens of the state or locality.

15 (2) For legislation introduced before the legislature,  
16 the agency responsible for doing an analysis for a fiscal  
17 note for the legislation shall prepare the assessment  
18 required by subsection (1).

19 NEW SECTION. Section 5. Governmental actions -- state  
20 agency procedure. (1) In addition to the assessment required  
21 in [section 4], a state agency shall adhere to the following  
22 criteria in implementing or enforcing governmental actions:

23 (a) When a governmental action requires a permit or  
24 other permission for a specific use of private property, any  
25 conditions imposed on the issuance of the permit or

1 authorization must substantially further the purposes that  
2 the permitting or permission process was designed to achieve  
3 and must be expressly authorized by law.

4 (b) The state agency shall ensure that restrictions  
5 imposed on the use of private property are proportionate to  
6 the extent the use contributes to any harm the restriction  
7 is designed to prevent, mitigate, or remedy.

8 (c) The state agency shall estimate, to the extent  
9 possible, the potential cost to the state if a court  
10 determines that the governmental action constitutes a  
11 taking.

12 (2) If there is an immediate threat to public health or  
13 safety that requires an immediate response by a state  
14 agency, the criteria required by subsection (1) may be met  
15 when the response is completed.

16 (3) The state agency shall ensure a diligent and speedy  
17 resolution of any procedures that are part of a process of  
18 seeking a permit or other permission to use private  
19 property.

20 (4) Before a state agency implements a governmental  
21 action that has an impact on the use or value of private  
22 property, the state agency shall submit a copy of the  
23 assessment required by [section 4] to the governor, the  
24 private property owner, and:

25 (a) if the legislature is in session, to the senate

1 finance and claims committee and the house appropriations  
2 committee; or

3 (b) if the legislature is not in session, to the  
4 legislative finance committee.

5 NEW SECTION. Section 6. Cause of action. (1) An  
6 aggrieved property owner has a cause of action against a  
7 government entity that acts in violation of [sections 1  
8 through 6]. A property owner who proves that the property  
9 owner has been damaged by a violation of [sections 1 through  
10 6] is entitled to compensatory damages, a writ of mandamus  
11 or prohibition, or any other appropriate legal or equitable  
12 relief.

13 (2) The government entity has the burden of proof on  
14 any affirmative defense it may raise, including the defense  
15 that the action complained of is not a governmental action.

16 (3) [Sections 1 through 6] may not be construed to  
17 infringe or impair a property owner's right to proceed  
18 judicially under eminent domain or inverse condemnation  
19 laws.

20 NEW SECTION. Section 7. Effective date. [This act] is  
21 effective July 1, 1993.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0570, as introduced.

**DESCRIPTION OF PROPOSED LEGISLATION:** An act requiring an assessment of governmental actions that affect the use of private property; requiring an assessment of the constitutional implications of government actions; and requiring private property assessments to be submitted to the governor and the legislature.

**ASSUMPTIONS:**

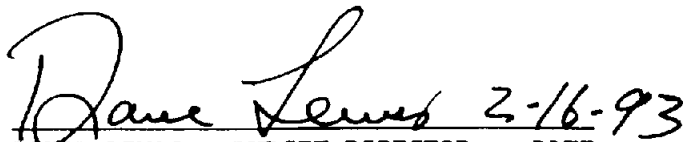
**Department of Fish, Wildlife and Parks (FWP):**

1. Existing legislation will not be affected by this bill.
2. Additional assessments will need to be made before any rule making can be finalized. This will require additional staff time. The additional work will be absorbed by current budgets.
3. FWP will receive 2 challenges per year. Preparation to defend against these challenges will require 0.10 FTE per challenge and \$1,000 in operating costs.
4. FWP will prevail in any litigation brought against it due to this bill.

**Department of Health and Environmental Sciences (DHES):**

5. DHES averages 25 sets of new rules per year. The number of permits or licenses issued number in the tens of thousands. The relative economic burdens or off-setting beneficial economic impacts associated with issuing DHES licenses, permits, or rules is perhaps incalculable.
6. DHES does not have economists, lawyers and support staff to assess economic or legal impacts of "governmental actions" defined in the bill. The preparation of the assessments required under this bill would require economists, lawyers, appraisers, budget specialists, researchers and clerical support. Estimating very conservatively, the average assessment would probably take on the average about two (2) weeks to prepare (depending on the scope of the governmental action), using a team of a lawyer, appraiser, economist, researcher, and clerical staff.
7. DHES does not have time within the time constraints existing for preparation of this fiscal note to count all of the licenses, permits, and rules it issues which contain conditions that could be construed as depriving an entity of all or some portion of the economic value of the private property affected. Therefore, even estimating the number of required hours and the combined rate for the FTE or contracted services used, the overall number of "governmental actions" cannot be calculated and therefore the overall cost cannot be calculated.
8. Assuming implementation of the bill, transaction costs of litigation to the agency over issues such as constitutionality of the bill, deviance of the bill from legally established standards for a "taking" under the United States or Montana Constitution, and of litigating the amount of compensation owed for each "taking" is incalculable.

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DAVID LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

  
LARRY HAL GRINDE, PRIMARY SPONSOR      DATE

Fiscal Note for HB0570, as introduced

**HB570**

**Department of State Lands (DSL):**

9. DSL does not have the existing staff or budget to complete these assessments.
10. Pursuant to section 4, programmatic assessments will need to be prepared for the adoption of a new statute or administrative rule.
11. Pursuant to section 5, DSL estimates that approximately 2000 actions per year will require an assessment/estimate. These 2000 include actions from Land Administration, Forestry, and Reclamation Divisions.
12. These assessments/estimates will need to be performed by individuals with expertise in appraising/economics.
13. Each appraiser/economist position can perform 200 assessments per year. Therefore 10 appraiser/economist positions will be required (2000/200 assessment = 10 FTE).
14. Administrative support for the 10 FTE appraiser/economist positions will require 2.0 FTE.
15. The resolution of any lawsuits that result from section 6 would be the responsibility of the Risk Management and Tort Defense Division of the Department of Administration.
16. Any additional unanticipated costs to DSL will need to be addressed through a budget amendment.

**Department of Natural Resources and Conservation (DNRC):**

17. Virtually every action taken by DNRC in the ordinary course of business could qualify as a governmental action under HB0570, and, therefore, an assessment of impact would be required on all DNRC activities. The DNRC is unaware of any federal, state or local government entity that is implementing the program mandated by this bill. This means there are no experience factors to rely on; consequently, there is virtually no way to accurately determine the fiscal impacts associated with the bill.

**FISCAL IMPACT:**

**Department of Fish, Wildlife and Parks:**

<u>Expenditures:</u>	<u>FY94</u>	<u>FY95</u>
Personal Services (0.20 grade 17 attorney)	7,900	7,900
Operating Expenses	<u>2,000</u>	<u>2,000</u>
	9,900	9,900

**Net Impact:** Additional costs to the Department of Fish, Wildlife and Parks of \$9,900 per year.

**Department of Health and Environmental Sciences:** Incalculable at this time.

**Department of State Lands:**

**Expenditures:**

10 FTE (Appraiser/economists) X \$43,000 (salaries, benefits, operating expenses)	=	430,000/Year
2 FTE (Administrative support) X \$25,000	=	<u>50,000/year</u>
		480,000/year

**Net Impact:** Projected DSL annual expenditures of \$480,000 will require a general fund appropriation.

Department of Natural Resources and Conservation: Significant fiscal impact not calculable.

Department of Commerce: No fiscal impact.

Environmental Quality Council: Impacts could range from none to extensive costs.

Department of Justice: Cannot be readily estimated.

Department of Transportation: None.

Department of Administration: No fiscal impact.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

Local government rules and regulations and any local actions taken under these rules and regulations (such as issuing a permit) would be subject to HB0570. For example, business permits, subdivision permits, municipal ordinances, zoning permits (except for variances), and other local government rules, regulations, permits and licenses would be subject to HB0570.

The definition of "governmental entities" which would be affected by this proposed law includes "political subdivisions of the state." Those "political subdivisions" affected would include, but may not be limited to, municipalities, counties, county water districts, county sewer districts, conservation districts and other special local governmental districts which have rules and regulations or take actions which may have an impact on private property.

HB0570 could increase local government expenditures due to the need for local governments to prepare the required impact statements (section 4 of the bill) and the need to pay costs, including legal costs, of the "compensatory damages, writ of mandamus or prohibition, or any other appropriate legal or equitable relief" (section 6 of the bill). Due to the comprehensive scope of local rules and regulations which would be affected and the different types of "political subdivisions" which would be affected, it is not possible to quantify these costs on a statewide basis.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION: It is anticipated that the above outlined expenditures for the departments will continue on an annual basis.

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TECHNICAL NOTES:

1. The requirement in section 4 (2) may not be practicable, depending on the time-frame intended. It reads:  
"For legislation introduced before the legislature, the agency responsible for doing an analysis for a fiscal note for the legislation shall prepare the assessment required by subsection (1)."  
  
The time-frame of this requirement is not clear. The referenced subsection (1) talks about doing the assessment "before taking a governmental action", which by definition may include statute or rule. If the intent is to complete the assessment in the same time-frame as a fiscal note, then it is definitely infeasible. Even if it means to complete the assessment prior to passage of the introduced legislation, it may still not be feasible. The time-frame for the requirement in Section 4 (2) should be clarified.
2. Since section 3(6) of HB0570 does not exempt property tax recovery actions, the proposed bill could complicate the tax deed and personal property tax seizure and sale process.

HB 570

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0570, third reading.

**DESCRIPTION OF PROPOSED LEGISLATION:** An act requiring an assessment of governmental actions that affect the use of private property; requiring an assessment of the constitutional implications of government actions; and requiring private property assessments to be submitted to the governor and the legislature.

**ASSUMPTIONS:**

**Department of Fish, Wildlife and Parks (FWP):**

1. Existing legislation will not be affected by this bill.
2. Additional assessments will need to be made before any rule making can be finalized. This will require additional staff time. The additional work will be absorbed by current budgets.
3. FWP will receive 2 challenges per year. Preparation to defend against these challenges will require 0.10 FTE per challenge and \$1,000 in operating costs.
4. FWP will prevail in any litigation brought against it due to this bill.

**Department of Health and Environmental Sciences (DHES):**

5. This bill would apply to ongoing formulation of regulations and agency action implementing state regulations or statutes such as permitting, licensing or plan review.
6. DHES conducts approximately 26 rulemakings per year involving amendments to existing rules or new rules.
7. DHES conducts several thousand plan reviews, subdivision approvals and issues several thousand permits or licenses per year which could be argued to fit within the new statutory definition of damaging or taking. The definitions of damaging and taking contain court established standards and a new statutory definition which goes beyond the court established standards.
8. The definition of damaging or taking must be applied when interpreting the definition of "governmental action".
9. DHES would be required to analyze most if not all of its permitting, licensing, plan review, and rulemaking actions to know whether these actions fall within the definition of "governmental action" or whether the actions would be exempted. The clarification of real property does not substantially change the breadth of application of the bill.
10. There are no universal criteria to apply to determine whether actions are a taking or damaging and therefore "governmental action"; the criteria for a taking or damaging established by the courts are in flux. Interpretation of the application of the bill would involve case by case analysis. An attorney would be needed for this analysis.
11. DHES would need to collect information to determine loss of use of property as a result of governmental action and the value of remaining unaffected property. A researcher would be needed for this activity.
12. The bill would give rise to new challenges to agency actions on procedural and substantive grounds. Litigation over statutory and constitutional standards would occur.

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 3-15-93

DAVID LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

3-17-93  
LARRY HAL GRINDE, PRIMARY SPONSOR      DATE

Fiscal Note for HB0570, third reading

HB 570 #2

13. It is not possible to calculate the number of assessments that would have to be conducted. It is unclear whether an assessment under Section 4 would be done prior to, or after, a conclusion that an agency action is a "governmental action". The agency would perhaps conduct 100 assessments per year because of the unclarity of existing law, the relationship of this bill to existing law, and in order to avoid litigation.
14. Each assessment would take 2-8 days depending on complexity. Assessments would be conducted by an attorney, a researcher or contracted help such as an appraisal on an as-needed basis. On a straight hourly basis two attorneys could be involved in conducting assessments full-time.
15. DHES does not have present legal or technical staff available to conduct the work required in this bill.
16. At a minimum and on a trial basis, the agency would hire two attorneys who would be needed to conduct assessments, to determine applicability of the bill to agency actions and to engage in litigation relating to takings and damaging concerning the agency.
17. One researcher and one clerical person would be needed to gather, analyze information, process and maintain information.
18. Each attorney would be a mid-level grade 17, Attorney Specialist II. The personal services costs would be \$15.185 per hour x 2088 hours = \$31,706.28 x 2 (attorneys) = \$63,412.56 x \$1.23 (benefits) = \$77,997.
19. The research specialist would be a grade 14. The personal services costs would be \$11.68/hour x 2,088 hours = \$24,387.84 x \$1.23 (benefits) = \$29,997.
20. The administrative support person would be a Grade 10. The personal services costs would be \$8.37/hour x 2,088 hours = \$17,491.18 x \$1.23 (benefits) = \$21,514.
21. Total costs personal services would be \$129,508 x 11.18% (overhead costs) = Total cost \$143,987.
22. The cost of contracted services are estimated to be \$90,000 per year. (30 reviews per year at a cost of \$3,000 each)
23. The cost of phone and rent would be \$8,104 in FY94 and \$7,704 for the 4.00 FTE's.

**Department of State Lands (DSL):**

24. The assessments and criteria of sections 4 and 5 are required only for actions taken under the police power that affect the use of private real property. These requirements do not apply to actions taken in the use, management, or development of real property owned by the State of Montana.
25. The Reclamation Division of DSL does not have the existing staff to complete these assessments.
26. Programmatic assessments will need to be prepared for the adoption of a new rule as required by section 4.
27. In section 4(5) "an estimate of the extent to which the proposed action imposes a cost . . ." means a financial cost estimate. These estimates will need to be performed by individuals with expertise in appraising/economics.
28. Section 4 does not apply to existing administrative rules and new or existing permits.
29. Pursuant to section 5(4) the submission of an assessment is only required if an assessment prepared pursuant to section 4.
30. Pursuant to section 5, the Reclamation Division will need to make a written finding that any conditions imposed on the issuance of the permit or authorization must substantially further the purpose of permitting or permission process was designed to achieve and must be expressly authorized by law. Pursuant to section 5, DSL estimates that approximately 750 actions per year will require a written finding of compliance.
31. Each appraiser/economist position can perform 375 assessments per year and can collectively perform the estimates required by section 4(5). Therefore, 2 appraiser/economist positions will be required (750 assessments/375 = 2 FTE).
32. Any unanticipated costs to DSL will need to be addressed through a budget amendment.

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**Department of Natural Resources and Conservation (DNRC):**

33. Virtually every action taken by the Department of Natural Resources and Conservation in the ordinary course of business could qualify as a governmental action under HB0570, and, therefore, an assessment of impact may be required on many department activities.
34. DNRC currently conducts assessments of one kind or another on most actions it takes. The property rights assessment could be rolled into these other assessments in most instances.
35. Performing property rights assessments in conjunction with other assessments may cause some delay and, thus, some increased cost.
36. Initial guidelines for property rights assessments would need to be developed at either the departmental or state level.

**Department of Justice:**

37. Other state government agencies will be consulting with the Attorney General's Office in seeking guidelines in establishing this bill. It is assumed that the current staff will handle these new duties.
38. State agencies will experience increased litigation as a result of this bill, which will require an additional attorney position in the Agency Legal Services Bureau, a proprietary funded entity.

**Department of Transportation:**

39. That "governmental action as defined in section 3, means a statute, rule, regulation, licensing requirement, or permitting requirement that if imposed by a government entity will result in a constitutional taking or damaging of private property.
40. That a "constitutional" taking or damaging is one which obligates the government to pay just compensation.
41. That the assessment required by section 4 is only required when a governmental action is proposed which will result in a "constitutional" taking or damaging of real property.

**FISCAL IMPACT:**

**Department of Fish, Wildlife and Parks:**

<u>Expenditures:</u>	<u>FY94</u>	<u>FY95</u>
Personal Services (0.20 grade 17 attorney)	7,900	7,900
Operating Expenses	<u>2,000</u>	<u>2,000</u>
	9,900	9,900

**Net Impact:** Additional costs to the Department of Fish, Wildlife and Parks of \$9,900 per year.

Department of Health and Environmental Sciences:

	FY '94			FY '95		
	Current Law	Proposed Law	Difference	Current Law	Proposed Law	Difference
<u>Expenditures:</u>						
FTE	0	4.00	4.00	0	4.00	4.00
Personnel Services	0	129,508	129,508	0	129,508	129,508
Operating Expenses	<u>0</u>	<u>113,386</u>	<u>113,386</u>	<u>0</u>	<u>112,986</u>	<u>112,986</u>
Total	0	242,894	242,894	0	242,494	242,494

Impact: Projected DHES of \$242,894 in FY94 and \$242,494 in FY95 will require a general fund appropriation.

Department of State Lands:

Expenditures:

Approximately 2 FTE X \$43,000 = \$ 86,000/Year  
(salaries, benefits, operating expenses)

0.5 FTE X \$25,000 = \$ 12,500/year  
\$ 98,500/year

Impact: The expenditures will continue on an annual basis requiring general funding.

**Department of Natural Resources and Conservation:** Many actions the department currently takes already require some type of technical assessment, property rights assessments could be included in these minimizing the need for additional FTEs. Combining the assessments would create additional workload for existing staff.

Due to the necessity to draft initial guidelines and the overall additional workload, an additional 0.5 to 1.0 FTE may be necessary at DNRC.

**Department of Commerce:** No fiscal impact.

**Environmental Quality Council:** Impacts could range from none to extensive costs.

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**Department of Justice:**

	FY '94			FY '95		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<b><u>Expenditures:</u></b>						
FTE	12.5	1.0	13.5	12.5	1.0	13.5
Personal Services	488,900	529,100	40,200	490,200	530,400	40,200
Operating	76,900	79,900	3,000	78,300	81,300	3,000
Equipment	<u>7,000</u>	<u>12,000</u>	<u>5,000</u>	<u>7,000</u>	<u>7,000</u>	<u>0</u>
Total	572,800	621,000	48,200	575,500	618,700	43,200
<b><u>Revenue:</u></b> Proprietary	572,800	621,000	48,200	575,500	618,700	43,200
<b><u>Net Impact:</u></b>	0	0	0	0	0	0

Department of Transportation: None.

Department of Administration: No fiscal impact.

**EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:**

The amendments placed on the bill removed any fiscal impact on local governments.

**LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:** It is anticipated that the above outlined expenditures for the departments will continue on an annual basis.

**TECHNICAL NOTES:**

1. The present language (3rd reading as amended) does not effectively exclude from the scope of the bill actions taken on state-owned land. See State Dept. of Highways v. Feenan, 231 Mont. 255, 752 P2d 912 (1988); McCone County v. James 198 Mont 430, 646 P2d 1209 (1982).
2. Section 4(5) is difficult to interpret. It is not clear whether this estimate is to be in terms of a dollar figure or only a narrative describing the nature and magnitude of economic impacts on property owners resulting from a proposed action.
3. Section 5(1) is not consistent with language used by the supreme court of Montana and the United States and appears to expand the law relating to taking of private property. The words "substantially further" should be amended to read "substantially relates to" in McElwain v. County of Flathead 248 Mont 232 at 235, 811 P2d 1267 (1990).
4. Section 5(1) could be read to prohibit imposition of permit conditions to implement recommendations contained in environmental impact statements (EIS).

HB570

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0570, third reading with HAC Amendments

**DESCRIPTION OF PROPOSED LEGISLATION:** An act requiring an assessment of governmental actions that affect the use of private property; requiring an assessment of the constitutional implications of government actions; requiring private property assessments to be submitted to the governor and the legislature.

**ASSUMPTIONS:**

**Legislative Council:**

1. The Office of Budget and Program Planning would establish a system for receiving, assigning, and tracking requests for private property impact assessments on legislative bills.
2. The Legislative Council bill drafting process would incorporate a system to identify which bills might require private property impact assessments on bills.
3. All work done on private property impact assessments for legislative bills would be absorbed within current operations by displacement of other work.
4. Costs for printing copies of assessments cannot be estimated, but is not anticipated to be extensive.

**Department of Fish, Wildlife and Parks:**

5. Existing legislation will not be affected by this bill.
6. Additional assessments will need to be made before any rule making can be finalized. This will require additional staff time. The additional work will be absorbed by current budgets.

**Department of Health and Environmental Sciences (DHES):**

7. HB0570 as amended on March 16, 1993, applies to rulemaking.
8. DHES issues an average of 26 rule sets per year.
9. The number of assessments needed, i.e., in those cases where a governmental entity will be undertaking a governmental action would be limited.
10. No legal or technical staff is available in the DHES to conduct an assessment. To conduct the periodic legal research that would be needed and to handle litigation matters that might arise, a 0.50 FTE attorney would be used. Approximately 0.50 FTE research person would be needed to gather information to conduct assessments and to maintain information.
11. The attorney 0.50 FTE would be a mid-level, grade 17. The personal services costs would be \$15.185 per hour x 1044 hours = \$16,547.40 x 1.23 (benefits) = \$20,353.
12. The researcher 0.50 FTE would be a grade 14. The personal services costs would be \$11.68 per hour x 1,044 hours = \$12,194 x 1.23 (benefits) = \$14,999.
13. The cost of telephone and miscellaneous operations would be \$1,500 in FY94 and FY95 and indirect costs would be \$3,599 in both FY94 and FY95.

(continued on next page)

David Lewis 3-20-93

DAVID LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

Larry Hal Grinde 3-20-93  
LARRY HAL GRINDE, PRIMARY SPONSOR DATE

Fiscal Note for HB0570, third reading amended

**HB 570-#3**

**Department of Transportation (DOT):**

- 14. That "governmental action" is defined as "The enactment of a statute or the adoption of a rule by a government entity that has a reasonable possibility of resulting in a constitutional taking of private property".
- 15. DOT will not be adopting a rule if the rule has the "reasonable possibility of resulting in a constitutional taking of private property".
- 16. Section 4 only requires an assessment to be prepared if there is a governmental action as defined in #1 above.

**Department of State Lands (DSL):**

- 17. The assessments and criteria of section 4 is required only for actions taken under the police power that affect the use of private real property. These requirements do not apply to actions taken in the use, management, or development of real property owned by the State of Montana.
- 18. The Reclamation Division, Department of State Lands, does not have the existing staff to complete these assessments.
- 19. Programmatic assessments will need to be prepared for the adoption of a new rules as required by section 4.
- 20. Section 4 does not apply to existing administrative rules.
- 21. The Reclamation Division has approximately two rulemaking exercises per year.
- 22. The analyses required could be completed by existing staff.
- 23. Any unanticipated costs to DSL will need to be addressed through a budget amendment.

**Department of Natural Resources and Conservation (DNRC):**

- 24. DNRC legal staff would be required to draft initial guidelines for assessments of the impact of rules adoption and review private property assessments prepared by staff members.
- 25. The process for preparing assessments of the private property impacts of proposed legislation would be similar to the current process for preparation of fiscal notes.

**FISCAL IMPACT:**

**Legislative Council:** Cannot readily be estimated.

**Department of Fish, Wildlife and Parks:** No fiscal impact.

**Department of Administration:** No fiscal impact.

**Department of Justice:** No fiscal impact.

(continued on next page)

HB 570 - #3



Department of Health and Environmental Sciences:

	<u>FY '94</u>			<u>FY '95</u>		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<u>Expenditures:</u>						
FTE	0	1.00	1.00	0	1.00	1.00
Personnel Services	0	35,352	35,352	0	35,352	35,352
Operating Expenses	<u>0</u>	<u>5,099</u>	<u>5,099</u>	<u>0</u>	<u>5,099</u>	<u>5,099</u>
Total	0	40,451	40,451	0	40,451	40,451
<u>Funding:</u>						
General Fund	0	40,451	40,451	0	40,451	40,451

Net Impact: General fund expenditures of \$40,451 in each year of the biennium.

Department of Transportation: No fiscal impact.

Department of State Lands: No fiscal impact.

Department of Natural Resources and Conservation:

Because many actions DNRC currently takes already require some type of technical assessment, property rights assessments could be included in these minimizing the need for additional FTE. Combining the assessments would create additional workload for existing staff.

Due to the necessity to draft initial guidelines and the overall additional workload, an additional 0.25 FTE may be necessary at DNRC.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

The proposed House Appropriation Committee amendments dated March 16, 1993, appear to diminish or delete the applicability of HB570 to local governments.

TECHNICAL NOTES:

1. Legislative rules will need to be adopted to implement internal assessment processes.
2. If internal rules require actions by legislative staff that are not anticipated and cannot be absorbed within current operations, including hiring additional staff, a supplemental appropriation will be recommended.

HB 570-#3

## HOUSE BILL NO. 570

INTRODUCED BY GRINDE, BECK, SWYSGOOD, TASH, GRIMES, NATHE,  
MESAROS, HOCKETT, HERTEL, J. RICE, CLARK, L. NELSON, LARSON,  
ANDERSON, SCHWINDEN, BACHINI, REA, GROSFIELD, MERCER,  
BIRD, REHBEIN

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN ASSESSMENT  
OF GOVERNMENTAL ACTIONS THAT AFFECT THE USE OF PRIVATE  
PROPERTY; REQUIRING AN ASSESSMENT OF THE CONSTITUTIONAL  
IMPLICATIONS OF GOVERNMENT ACTIONS; REQUIRING PRIVATE  
PROPERTY ASSESSMENTS TO BE SUBMITTED TO THE GOVERNOR AND THE  
LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE."

STATEMENT OF INTENT

IT IS THE INTENT OF THE LEGISLATURE THAT GOVERNMENT  
ENTITIES PREPARE ASSESSMENTS OF GOVERNMENT ACTIONS THAT  
AFFECT PRIVATE PROPERTY INTERESTS. THE ASSESSMENTS MUST USE  
TESTS AND GUIDELINES ESTABLISHED BY THE SUPREME COURT OF THE  
UNITED STATES AND THE SUPREME COURT OF THE STATE OF MONTANA  
WHEN THE ASSESSMENTS ANALYZE CONSTITUTIONAL PRINCIPLES.

IT IS NOT THE INTENT OF THE LEGISLATURE TO EXPAND THE  
LAW RELATING TO THE TAKING OR-DAMAGING OF PRIVATE PROPERTY,  
AS CONTAINED IN OPINIONS OF THE SUPREME COURT OF THE UNITED  
STATES AND THE SUPREME COURT OF THE STATE OF MONTANA, BY THE  
STATE OR-A-LOCAL-GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1  
through 6 5] may be cited as the "Montana Private Property  
Assessment Act".

NEW SECTION. Section 2. Policy -- purpose. (1) It is  
the policy of this state that a person may not be deprived  
of the use of private property without due process of law  
and that private property may not be taken by governmental  
action without just compensation being made. The legislature  
intends that [sections 1 through 6 5] implement Article II,  
section 29, of the Montana constitution in a manner that  
protects private property owners, the interests of the  
general public, and the fiscal health of the state.

(2) The purposes of [sections 1 through 6 5] are to  
require the assessment of governmental actions that affect  
the use and value of private property, to require an  
assessment of the effect of governmental actions on  
constitutionally protected private property interests, and  
to avoid any unnecessary burdens on the public treasury. It  
is not the purpose of [sections 1 through 6 5] to reduce the  
scope of private property protections provided in the United  
States constitution or the Montana constitution. [Sections 1  
through 6 5] do not preclude private property owners from  
challenging governmental actions in a court of competent

jurisdiction or from seeking compensation or other available relief from governmental actions that affect private property rights. NOTHING IN [SECTIONS 1 THROUGH 5] MAY BE CONSTRUED TO IMPAIR A PROPERTY OWNER'S RIGHT TO APPEAR IN COURT ON AN EMINENT DOMAIN OR INVERSE CONDEMNATION CLAIM.

**NEW SECTION. Section 3. Definitions.** As used in [sections 1 through 6 5], the following definitions apply:

~~{1}--"Damaging"--means-depriving-a-property-owner--of--a portion--of--the-property-or-a-portion-of-the-economic-value of-the-property. DAMAGING-IS-FURTHER-ESTABLISHED-THROUGH-THE INTERPRETATIONS-OF-THE-SUPREME-COURT-OF-MONTANA.~~

~~{2}{1}~~ (a) "Governmental action" or "action" means ENACTMENT OF a statute, OR ADOPTION OF A rule, regulation, licensing requirement, or permitting requirement--that--if imposed by a government entity, will or may result THAT HAS A REASONABLE POSSIBILITY OF RESULTING in a CONSTITUTIONAL taking or damaging of private property.

(b) The term does not include:

(i) the formal exercise of the power of eminent domain in accordance with law;

(ii) the discontinuance of governmental programs other than law enforcement protection;

(iii) the reduction of governmental interference with the use of private property by the repeal or amendment of rules or statutes;

(iv) the seizure or forfeiture of private property for a violation of criminal law or as evidence in a criminal proceeding, as provided by statute;

(v) actions that abate a nuisance to the extent that the restricted conduct constitutes a nuisance under the law ~~in-effect-on-July-1, 1993; or~~

~~{vi}--county, city, or town variances--or--processes--for variances--concerning--local--regulations, ordinances, or zoning;~~

~~{vii}{VI}~~ STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO BUILDING CONSTRUCTION STANDARDS, FIRE SAFETY STANDARDS, AND LIFE SAFETY STANDARDS;

~~{viii}{VII}~~ PROFESSIONAL AND OCCUPATIONAL LICENSE REQUIREMENTS, GAMBLING LICENSES, AND LIQUOR LICENSES;

~~{ix}{VIII}~~ STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO DRIVER'S LICENSES, MOTOR VEHICLE REGISTRATIONS, AND DEALER LICENSES UNDER TITLE 61, CHAPTER 4; OR

~~{x}{IX}~~ ACTIONS BY THE DEPARTMENT OF PUBLIC SERVICE REGULATION IN THE EXERCISE OF ITS REGULATORY AUTHORITY OVER RATES AND CHARGES OF RAILROADS, MOTOR CARRIERS, AND PUBLIC UTILITIES.

~~{3}{2}~~ (a) "Government entity" means the legislature or an officer or agency of the state that is authorized by law

to adopt rules. The term DOES NOT includes INCLUDE political subdivisions of the state.

(b) The term does not include the judicial branch of state government.

{4}{3} "Private property" means any REAL property interest in this state that is protected by either:

(a) the fifth amendment to the United States constitution; or

(b) Article II, section 29, of the Montana constitution.

{5}{4} "Property owner" means a nongovernment entity owning an interest in PRIVATE property.

{6}{5} "State agency" means an officer or agency of the executive branch of state government.

{7}{6} "Taking" means ~~a-governmental-action~~ depriving a property owner of either ownership of the private property or a portion of or all of the economic value of the private property that is compensable under the fifth amendment to the United States constitution and under Article II, section 29, of the Montana constitution. TAKING IS FURTHER ESTABLISHED THROUGH THE INTERPRETATIONS OF THE SUPREME COURT OF THE UNITED STATES AND THE SUPREME COURT OF MONTANA.

NEW SECTION. Section 4. Assessment of impact on private property -- general directions. {1} THE ASSESSMENT DESCRIBED IN THIS SECTION MAY BE PREPARED FOR THE ENACTMENT

OF A STATUTE ONLY AFTER A REQUEST BY THE PRESIDING OFFICER OF THE HOUSE IN WHICH THE LEGISLATION IS INTRODUCED. THE PRESIDING OFFICER MAY DETERMINE THE NEED FOR THE ASSESSMENT BASED UPON A RECOMMENDATION BY LEGISLATIVE STAFF INDICATING WHETHER AN ASSESSMENT APPEARS TO BE REQUIRED. THE ASSESSMENT MUST BE PREPARED BY THE APPROPRIATE STATE AGENCY. Before taking a governmental action, a government entity shall prepare a written assessment that includes an analysis of at least the following elements:

{a}{1} a description of the governmental action, its purpose, and ~~a-plan-for-implementation-of-the-action,~~ including any specific public health or safety risk the action is designed to prevent, mitigate, or remedy;

{b}{2} the impact that the governmental action has on private property rights, including a description of how the action affects the use ~~or-value~~ of private property and ~~whether-a-taking-OR-DAMAGING-will-result;~~

{c}{3} an identification of private property interests affected ~~or-potentially-affected~~ by the governmental action;

{d}{4} alternatives to the proposed governmental action that may:

{i}{A} fulfill a government entity's legal obligations;

{ii}{B} reduce the effect on the private property owner; and

{iii}{C} reduce the risk of a CONSTITUTIONAL taking OR

DAMAGING of private property; AND

{e}{5}--an estimate of financial cost to the government entity for compensation and the source of payment within the government entity's budget if a constitutional taking OR DAMAGING would result; and

{f}{6}{5} an evaluation ESTIMATE of the extent to which the proposed action imposes costs on property owners not borne by other citizens of the state or locality WHETHER A GOVERNMENTAL ACTION HAS A REASONABLE POSSIBILITY OF RESULTING IN A CONSTITUTIONAL TAKING OF PRIVATE PROPERTY BASED ON TESTS AND PRINCIPLES ESTABLISHED BY THE UNITED STATES SUPREME COURT AND THE MONTANA SUPREME COURT.

{2}--For legislation introduced before the legislature, the agency responsible for doing an analysis for a fiscal note for the legislation shall prepare the assessment required by subsection {1}.

NEW SECTION. Section 5. Governmental actions -- state agency procedure. {1}--In addition to the assessment required in {section 4}, a state agency shall adhere to the following criteria in implementing or enforcing governmental actions:

{a}--When a governmental action requires a permit or other permission for a specific use of private property, any conditions imposed on the issuance of the permit or authorization must substantially further the purposes that the permitting or permission process was designed to achieve

and must be expressly authorized by law.

{b}--The state agency shall ensure that restrictions imposed on the use of private property are proportionate to the extent the use contributes to any harm the restriction is designed to prevent, mitigate, or remedy.

{c}{B}--The state agency shall estimate, to the extent possible, the potential cost to the state if a court determines that the governmental action constitutes a taking OR DAMAGING.

{2}{1} If there is an immediate threat to public health or safety that requires an immediate response by a state agency GOVERNMENT ENTITY, the criteria ASSESSMENT required by subsection {1} [SECTIONS 1 THROUGH 4 AND THIS SECTION], IF APPLICABLE, may be met when the response is completed.

{3}--The state agency shall ensure a diligent and speedy resolution of any procedures that are part of a process of seeking a permit or other permission to use private property.

{4}{2} Before a state agency implements a governmental action that has an impact on the use or value of private property, the state agency shall submit a copy of the assessment required by {section 4} [SECTIONS 1 THROUGH 4 AND THIS SECTION] to the governor, the private property owner, IF IDENTIFIABLE, and:

{a} if the legislature is in session, to the senate

1 finance and claims committee and the house appropriations  
2 committee; or

3 (b) if the legislature is not in session, to the  
4 legislative finance committee.

5 ~~NEW SECTION. Section 6. Cause of action. (1) An~~  
6 ~~aggrieved property owner has a cause of action against a~~  
7 ~~government entity that acts in violation of sections 1~~  
8 ~~through 6. A property owner who proves that the property~~  
9 ~~owner has been damaged by a violation of sections 1 through~~  
10 ~~6 is entitled to compensatory damages, a writ of mandamus~~  
11 ~~or prohibition, or any other appropriate legal or equitable~~  
12 ~~relief.~~

13 ~~(2) The government entity has the burden of proof on~~  
14 ~~any affirmative defense it may raise, including the defense~~  
15 ~~that the action complained of is not a governmental action.~~

16 ~~(3) Sections 1 through 6 may not be construed to~~  
17 ~~infringe or impair a property owner's right to proceed~~  
18 ~~judicially under eminent domain or inverse condemnation~~  
19 ~~laws.~~

20 NEW SECTION. Section 6. Effective date. [This act] is  
21 effective July 1, 1993.

-End-

APPROVED BY COMMITTEE  
ON JUDICIARY

## HOUSE BILL NO. 570

INTRODUCED BY GRINDE, BECK, SWYSGOOD, TASH, GRIMES, NATHE,  
MESAROS, HOCKETT, HERTEL, J. RICE, CLARK, L. NELSON, LARSON,  
ANDERSON, SCHWINDEN, BACHINI, REA, GROSFIELD, MERCER,  
BIRD, REHBEIN

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN ASSESSMENT  
OF GOVERNMENTAL ACTIONS THAT AFFECT THE USE OF PRIVATE  
PROPERTY; REQUIRING AN ASSESSMENT OF THE CONSTITUTIONAL  
IMPLICATIONS OF GOVERNMENT ACTIONS; REQUIRING PRIVATE  
PROPERTY ASSESSMENTS TO BE SUBMITTED TO THE GOVERNOR AND THE  
LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE."

STATEMENT OF INTENT

IT IS THE INTENT OF THE LEGISLATURE THAT GOVERNMENT  
ENTITIES PREPARE ASSESSMENTS OF GOVERNMENT ACTIONS THAT  
AFFECT PRIVATE PROPERTY INTERESTS. THE ASSESSMENTS MUST USE  
TESTS AND GUIDELINES ESTABLISHED BY THE SUPREME COURT OF THE  
UNITED STATES AND THE SUPREME COURT OF THE STATE OF MONTANA  
WHEN THE ASSESSMENTS ANALYZE CONSTITUTIONAL PRINCIPLES.

IT IS NOT THE INTENT OF THE LEGISLATURE TO EXPAND THE  
LAW RELATING TO THE TAKING OR DAMAGING OF PRIVATE PROPERTY,  
AS CONTAINED IN OPINIONS OF THE SUPREME COURT OF THE UNITED  
STATES AND THE SUPREME COURT OF THE STATE OF MONTANA, BY THE  
STATE OR A LOCAL GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1  
through 6 5] may be cited as the "Montana Private Property  
Assessment Act".

NEW SECTION. Section 2. Policy -- purpose. (1) It is  
the policy of this state that a person may not be deprived  
of the use of private property without due process of law  
and that private property may not be taken by governmental  
action without just compensation being made. The legislature  
intends that [sections 1 through 6 5] implement Article II,  
section 29, of the Montana constitution in a manner that  
protects private property owners, the interests of the  
general public, and the fiscal health of the state.

(2) The purposes of [sections 1 through 6 5] are to  
require the assessment of governmental actions that affect  
the use and value of private property, to require an  
assessment of the effect of governmental actions on  
constitutionally protected private property interests, and  
to avoid any unnecessary burdens on the public treasury. It  
is not the purpose of [sections 1 through 6 5] to reduce the  
scope of private property protections provided in the United  
States constitution or the Montana constitution. [Sections 1  
through 6 5] do not preclude private property owners from  
challenging governmental actions in a court of competent

jurisdiction or from seeking compensation or other available relief from governmental actions that affect private property rights. NOTHING IN [SECTIONS 1 THROUGH 5] MAY BE CONSTRUED TO IMPAIR A PROPERTY OWNER'S RIGHT TO APPEAR IN COURT ON AN EMINENT DOMAIN OR INVERSE CONDEMNATION CLAIM.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 6 5], the following definitions apply:

(1) "Damaging" means depriving a property owner of a portion of the property or a portion of the economic value of the property.

(2) (a) "Governmental action" or "action" means a statute, rule, regulation, licensing requirement, or permitting requirement that if imposed by a government entity, will or--may result in a taking or damaging of private property.

(b) The term does not include:

(i) the formal exercise of the power of eminent domain in accordance with law;

(ii) the discontinuance of governmental programs other than law enforcement protection;

(iii) the reduction of governmental interference with the use of private property by the repeal or amendment of rules or statutes;

(iv) the seizure or forfeiture of private property for a violation of criminal law or as evidence in a criminal

proceeding, as provided by statute;

(v) actions that abate a nuisance to the extent that the restricted conduct constitutes a nuisance under the law in effect on July 1, 1993; or

(vi) county, city, or town variances or processes for variances concerning local regulations, ordinances, or zoning;

(VII) STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO BUILDING CONSTRUCTION STANDARDS, FIRE SAFETY STANDARDS, AND LIFE SAFETY STANDARDS;

(VIII) PROFESSIONAL AND OCCUPATIONAL LICENSE REQUIREMENTS, GAMBLING LICENSES, AND LIQUOR LICENSES;

(IX) STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO DRIVER'S LICENSES, MOTOR VEHICLE REGISTRATIONS, AND DEALER LICENSES UNDER TITLE 61, CHAPTER 4; OR

(X) ACTIONS BY THE DEPARTMENT OF PUBLIC SERVICE REGULATION IN THE EXERCISE OF ITS REGULATORY AUTHORITY OVER RATES AND CHARGES OF RAILROADS, MOTOR CARRIERS, AND PUBLIC UTILITIES.

(3) (a) "Government entity" means the legislature or an officer or agency of the state that is authorized by law to adopt rules. The term includes political subdivisions of the state.



(b) The term does not include the judicial branch of state government.

(4) "Private property" means any property interest in this state that is protected by either:

(a) the fifth amendment to the United States constitution; or

(b) Article II, section 29, of the Montana constitution.

(5) "Property owner" means a nongovernment entity owning an interest in property.

(6) "State agency" means an officer or agency of the executive branch of state government.

(7) "Taking" means a governmental action depriving a property owner of either ownership of the private property or a portion of or all of the economic value of the private property that is compensable under the fifth amendment to the United States constitution and under Article II, section 29, of the Montana constitution.

**NEW SECTION. Section 4. Assessment of impact on private property -- general directions.** (1) Before taking a governmental action, a government entity shall prepare a written assessment that includes an analysis of at least the following elements:

(a)(1) a description of the governmental action, its purpose, and a plan for implementation of the action,

including any specific public health or safety risk the action is designed to prevent, mitigate, or remedy;

(b)(2) the impact that the governmental action has on private property rights, including a description of how the action affects the use or--value of private property and whether a taking OR DAMAGING will result;

(c)(3) an identification of private property interests affected or--potentially--affected by the governmental action;

(d)(4) alternatives to the proposed governmental action that may:

(i)(A) fulfill a government entity's legal obligations;

(i)(B) reduce the effect on the private property owner; and

(i)(C) reduce the risk of a taking OR DAMAGING of private property;

(e)(5) an estimate of financial cost to the government entity for compensation and the source of payment within the government entity's budget if a constitutional taking OR DAMAGING would result; and

(f)(6) an evaluation ESTIMATE of the extent to which the proposed action imposes costs on property owners not borne by other citizens of the state or locality.

(2)--For--legislation--introduced--before--the--legislature, the--agency--responsible--for--doing--an--analysis--for--a--fiscal note--for--the--legislation--shall--prepare--the--assessment

required-by-subsection-~~{1}~~;

**NEW SECTION. Section 5.** Governmental actions -- state agency procedure. (1) In addition to the assessment required in [section 4], a state agency shall adhere to the following criteria in implementing or enforcing governmental actions:

(a) When a governmental action requires a permit or other permission for a specific use of private property, any conditions imposed on the issuance of the permit or authorization must substantially further the purposes that the permitting or permission process was designed to achieve and must be expressly authorized by law.

~~{b}~~--The--state--agency--shall--ensure--that--restrictions imposed-on-the-use-of-private-property-are-proportionate--to the--extent--the-use-contributes-to-any-harm-the-restriction is-designed-to-prevent, mitigate, or remedy;

~~{c}~~(B) The state agency shall estimate, to the extent possible, the potential cost to the state if a court determines that the governmental action constitutes a taking **OR DAMAGING.**

(2) If there is an immediate threat to public health or safety that requires an immediate response by a state agency, the criteria required by subsection (1) may be met when the response is completed.

(3) The state agency shall ensure a diligent and speedy resolution of any procedures that are part of a process of

seeking a permit or other permission to use private property.

(4) Before a state agency implements a governmental action that has an impact on the use or value of private property, the state agency shall submit a copy of the assessment required by [section 4] to the governor, the private property owner, IF IDENTIFIABLE, and:

(a) if the legislature is in session, to the senate finance and claims committee and the house appropriations committee; or

(b) if the legislature is not in session, to the legislative finance committee.

**NEW SECTION--Section 6--Cause--of--action--{1}--An--aggrieved-property-owner-has-a-cause--of--action--against--a government--entity--that--acts--in--violation-of--{sections-1 through-6}--A-property-owner-who-proves--that--the--property owner-has-been-damaged-by-a-violation-of--{sections-1-through 6}--is--entitled-to-compensatory-damages, a writ-of-mandamus or-prohibition, or-any-other-appropriate-legal-or--equitable relief;**

~~{2}~~--The--government--entity--has-the-burden-of-proof-on any-affirmative-defense-it-may-raise, including-the--defense that-the-action-complained-of-is-not-a-governmental-action;

~~{3}~~--{Sections-1--through--6}--may--not-be-construed-to infringe-or-impair--a--property--owner's--right--to--proceed

1    ~~judicially--under--eminent--domain--or--inverse-condemnation~~  
2    ~~laws.~~

3        NEW SECTION.    **Section 6.**    Effective date. [This act] is  
4    effective July 1, 1993.

-End-

## 1 HOUSE BILL NO. 570

2 INTRODUCED BY GRINDE, BECK, SWYSGOOD, TASH, GRIMES, NATHE,  
3 MESAROS, HOCKETT, HERTEL, J. RICE, CLARK, L. NELSON, LARSON,  
4 ANDERSON, SCHWINDEN, BACHINI, REA, GROSFIELD, MERCER,  
5 BIRD, REHBEIN

6  
7 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN ASSESSMENT  
8 OF GOVERNMENTAL ACTIONS THAT AFFECT THE USE OF PRIVATE  
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12 LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE."

13  
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15 IT IS THE INTENT OF THE LEGISLATURE THAT GOVERNMENT  
16 ENTITIES PREPARE ASSESSMENTS OF GOVERNMENT ACTIONS THAT  
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6 NEW SECTION. Section 2. Policy -- purpose. (1) It is  
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8 of the use of private property without due process of law  
9 and that private property may not be taken by governmental  
10 action without just compensation being made. The legislature  
11 intends that [sections 1 through 6 5] implement Article II,  
12 section 29, of the Montana constitution in a manner that  
13 protects private property owners, the interests of the  
14 general public, and the fiscal health of the state.

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jurisdiction or from seeking compensation or other available relief from governmental actions that affect private property rights. NOTHING IN [SECTIONS 1 THROUGH 5] MAY BE CONSTRUED TO IMPAIR A PROPERTY OWNER'S RIGHT TO APPEAR IN COURT ON AN EMINENT DOMAIN OR INVERSE CONDEMNATION CLAIM.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 6 5], the following definitions apply:

(1) "Damaging" means depriving a property owner of a portion of the property or a portion of the economic value of the property. DAMAGING IS FURTHER ESTABLISHED THROUGH THE INTERPRETATIONS OF THE SUPREME COURT OF MONTANA.

(2) (a) "Governmental action" or "action" means a statute, rule, regulation, licensing requirement, or permitting requirement that if imposed by a government entity, will ~~or--may~~ result in a CONSTITUTIONAL taking or damaging of private property.

(b) The term does not include:

(i) the formal exercise of the power of eminent domain in accordance with law;

(ii) the discontinuance of governmental programs other than law enforcement protection;

(iii) the reduction of governmental interference with the use of private property by the repeal or amendment of rules or statutes;

(iv) the seizure or forfeiture of private property for a

violation of criminal law or as evidence in a criminal proceeding, as provided by statute;

(v) actions that abate a nuisance to the extent that the restricted conduct constitutes a nuisance under the law in effect on July 1, 1993; or

(vi) county, city, or town variances or processes for variances concerning local regulations, ordinances, or zoning;

(VII) STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO BUILDING CONSTRUCTION STANDARDS, FIRE SAFETY STANDARDS, AND LIFE SAFETY STANDARDS;

(VIII) PROFESSIONAL AND OCCUPATIONAL LICENSE REQUIREMENTS, GAMBLING LICENSES, AND LIQUOR LICENSES;

(IX) STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO DRIVER'S LICENSES, MOTOR VEHICLE REGISTRATIONS, AND DEALER LICENSES UNDER TITLE 61, CHAPTER 4; OR

(X) ACTIONS BY THE DEPARTMENT OF PUBLIC SERVICE REGULATION IN THE EXERCISE OF ITS REGULATORY AUTHORITY OVER RATES AND CHARGES OF RAILROADS, MOTOR CARRIERS, AND PUBLIC UTILITIES.

(3) (a) "Government entity" means the legislature or an officer or agency of the state that is authorized by law to adopt rules. The term DOES NOT ~~includes~~ INCLUDE political

subdivisions of the state.

(b) The term does not include the judicial branch of state government.

(4) "Private property" means any REAL property interest in this state that is protected by either:

(a) the fifth amendment to the United States constitution; or

(b) Article II, section 29, of the Montana constitution.

(5) "Property owner" means a nongovernment entity owning an interest in property.

(6) "State agency" means an officer or agency of the executive branch of state government.

(7) "Taking" means a governmental action depriving a property owner of either ownership of the private property or a portion of or all of the economic value of the private property that is compensable under the fifth amendment to the United States constitution and under Article II, section 29, of the Montana constitution. TAKING IS FURTHER ESTABLISHED THROUGH THE INTERPRETATIONS OF THE SUPREME COURT OF THE UNITED STATES AND THE SUPREME COURT OF MONTANA.

NEW SECTION. Section 4. Assessment of impact on private property -- general directions. (1) Before taking a governmental action, a government entity shall prepare a written assessment that includes an analysis of at least the

following elements:

(1) a description of the governmental action, its purpose, and a plan for implementation of the action, including any specific public health or safety risk the action is designed to prevent, mitigate, or remedy;

(2) the impact that the governmental action has on private property rights, including a description of how the action affects the use or--value of private property and whether-a-taking-OR-DAMAGING-will-result;

(3) an identification of private property interests affected or-potentially-affected by the governmental action;

(4) alternatives to the proposed governmental action that may:

(A) fulfill a government entity's legal obligations;

(B) reduce the effect on the private property owner; and

(C) reduce the risk of a CONSTITUTIONAL taking OR DAMAGING of private property; AND

(5)--an--estimate-of-financial-cost-to-the-government entity-for-compensation-and-the-source-of-payment-within-the government-entity's-budget-if--a--constitutional--taking--OR DAMAGING-would-result;-and

(6)(5) an evaluation ESTIMATE of the extent to which the proposed action imposes costs on property owners not borne by other citizens of the state or locality.

~~{2}--Per legislation introduced before the legislature, the agency responsible for doing an analysis for a fiscal note for the legislature shall prepare the assessment required by subsection {1}.~~

**NEW SECTION. Section 5.** Governmental actions -- state agency procedure. (1) In addition to the assessment required in [section 4], a state agency shall adhere to the following criteria in implementing or enforcing governmental actions:

{a} When a governmental action requires a permit or other permission for a specific use of private property, any conditions imposed on the issuance of the permit or authorization must substantially further the purposes that the permitting or permission process was designed to achieve and must be expressly authorized by law.

~~{b}--The state agency shall ensure that restrictions imposed on the use of private property are proportionate to the extent the use contributes to any harm the restriction is designed to prevent, mitigate, or remedy.~~

~~{c}{B}--The state agency shall estimate, to the extent possible, the potential cost to the state if a court determines that the governmental action constitutes a taking OR DAMAGING.~~

(2) If there is an immediate threat to public health or safety that requires an immediate response by a state agency, the criteria required by subsection (1) may be met

when the response is completed.

(3) The state agency shall ensure a diligent and speedy resolution of any procedures that are part of a process of seeking a permit or other permission to use private property.

(4) Before a state agency implements a governmental action that has an impact on the use or value of private property, the state agency shall submit a copy of the assessment required by [section 4] to the governor, the private property owner, IF IDENTIFIABLE, and:

(a) if the legislature is in session, to the senate finance and claims committee and the house appropriations committee; or

(b) if the legislature is not in session, to the legislative finance committee.

**NEW SECTION. Section 6.** Cause of action. {1} An aggrieved property owner has a cause of action against a government entity that acts in violation of {sections 1 through 6}. A property owner who proves that the property owner has been damaged by a violation of {sections 1 through 6} is entitled to compensatory damages, a writ of mandamus or prohibition, or any other appropriate legal or equitable relief.

{2}--The government entity has the burden of proof on any affirmative defense it may raise, including the defense

1   ~~that the action complained of is not a governmental action;~~  
2       ~~{3}--{Sections 1 through 6}--may--not--be--construed--to~~  
3   ~~infringe--or--impair--a--property--owner's--right--to--proceed~~  
4   ~~judicially under eminent domain or inverse condemnation~~  
5   ~~laws;~~  
6       NEW SECTION.   **Section 6.**   Effective date. [This act] is  
7   effective July 1, 1993.

-End-



## HOUSE BILL NO. 570

INTRODUCED BY GRINDE, BECK, SWYSGOOD, TASH, GRIMES, NATHE,  
MESAROS, HOCKETT, HERTEL, J. RICE, CLARK, L. NELSON, LARSON,  
ANDERSON, SCHWINDEN, BACHINI, REA, GROSFIELD, MERCER,  
BIRD, REHBEIN

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN ASSESSMENT  
OF GOVERNMENTAL ACTIONS THAT AFFECT THE USE OF PRIVATE  
PROPERTY; REQUIRING AN ASSESSMENT OF THE CONSTITUTIONAL  
IMPLICATIONS OF GOVERNMENT ACTIONS; REQUIRING PRIVATE  
PROPERTY ASSESSMENTS TO BE SUBMITTED TO THE GOVERNOR AND THE  
LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE."

STATEMENT OF INTENT

IT IS THE INTENT OF THE LEGISLATURE THAT GOVERNMENT  
ENTITIES PREPARE ASSESSMENTS OF GOVERNMENT ACTIONS THAT  
AFFECT PRIVATE PROPERTY INTERESTS. THE ASSESSMENTS MUST USE  
TESTS AND GUIDELINES ESTABLISHED BY THE SUPREME COURT OF THE  
UNITED STATES AND THE SUPREME COURT OF THE STATE OF MONTANA  
WHEN THE ASSESSMENTS ANALYZE CONSTITUTIONAL PRINCIPLES.

IT IS NOT THE INTENT OF THE LEGISLATURE TO EXPAND THE  
LAW RELATING TO THE TAKING OR-DAMAGING OF PRIVATE PROPERTY,  
AS CONTAINED IN OPINIONS OF THE SUPREME COURT OF THE UNITED  
STATES AND THE SUPREME COURT OF THE STATE OF MONTANA, BY THE  
STATE OR-A-LOCAL-GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1  
through 6 5] may be cited as the "Montana Private Property  
Assessment Act".

NEW SECTION. Section 2. Policy -- purpose. (1) It is  
the policy of this state that a person may not be deprived  
of the use of private property without due process of law  
and that private property may not be taken by governmental  
action without just compensation being made. The legislature  
intends that [sections 1 through 6 5] implement Article II,  
section 29, of the Montana constitution in a manner that  
protects private property owners, the interests of the  
general public, and the fiscal health of the state.

(2) The purposes of [sections 1 through 6 5] are to  
require the assessment of governmental actions that affect  
the use and value of private property, to require an  
assessment of the effect of governmental actions on  
constitutionally protected private property interests, and  
to avoid any unnecessary burdens on the public treasury. It  
is not the purpose of [sections 1 through 6 5] to reduce the  
scope of private property protections provided in the United  
States constitution or the Montana constitution. [Sections 1  
through 6 5] do not preclude private property owners from  
challenging governmental actions in a court of competent

jurisdiction or from seeking compensation or other available relief from governmental actions that affect private property rights. NOTHING IN [SECTIONS 1 THROUGH 5] MAY BE CONSTRUED TO IMPAIR A PROPERTY OWNER'S RIGHT TO APPEAR IN COURT ON AN EMINENT DOMAIN OR INVERSE CONDEMNATION CLAIM.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 6 5], the following definitions apply:

~~{1}--"Damaging"--means-depriving-a-property-owner--of--a portion--of--the-property-or-a-portion-of-the-economic-value of-the-property; DAMAGING-IS-FURTHER-ESTABLISHED-THROUGH-THE INTERPRETATIONS-OF-THE-SUPREME-COURT-OF-MONTANA;~~

~~{2}{1}~~ (a) "Governmental action" or "action" means ENACTMENT OF a statute, OR ADOPTION OF A rule, regulation, licensing requirement, or permitting requirement that if imposed by a government entity, will or may result THAT HAS A REASONABLE POSSIBILITY OF RESULTING in a CONSTITUTIONAL taking or damaging of private property.

(b) The term does not include:

(i) the formal exercise of the power of eminent domain in accordance with law;

(ii) the discontinuance of governmental programs other than law enforcement protection;

(iii) the reduction of governmental interference with the use of private property by the repeal or amendment of rules or statutes;

(iv) the seizure or forfeiture of private property for a violation of criminal law or as evidence in a criminal proceeding, as provided by statute;

(v) actions that abate a nuisance to the extent that the restricted conduct constitutes a nuisance under the law in-effect-on-July-17-1993; or

~~{vi}-county,-city,-or-town-variances--or--processes--for variances---concerning--local--regulations,-ordinances,-or zoning;~~

~~{vii}{VI}~~ STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO BUILDING CONSTRUCTION STANDARDS, FIRE SAFETY STANDARDS, AND LIFE SAFETY STANDARDS;

~~{viii}{VII}~~ PROFESSIONAL AND OCCUPATIONAL LICENSE REQUIREMENTS, GAMBLING LICENSES, AND LIQUOR LICENSES;

~~{ix}{VIII}~~ STATUTES, RULES, REGULATIONS, LICENSE REQUIREMENTS, AND PERMIT REQUIREMENTS RELATING TO DRIVER'S LICENSES, MOTOR VEHICLE REGISTRATIONS, AND DEALER LICENSES UNDER TITLE 61, CHAPTER 4; OR

~~{x}{IX}~~ ACTIONS BY THE DEPARTMENT OF PUBLIC SERVICE REGULATION IN THE EXERCISE OF ITS REGULATORY AUTHORITY OVER RATES AND CHARGES OF RAILROADS, MOTOR CARRIERS, AND PUBLIC UTILITIES.

~~{3}{2}~~ (a) "Government entity" means the legislature or an officer or agency of the state that is authorized by law

to adopt rules. The term DOES NOT includes INCLUDE political subdivisions of the state.

(b) The term does not include the judicial branch of state government.

{4}{3} "Private property" means any REAL property interest in this state that is protected by either:

(a) the fifth amendment to the United States constitution; or

(b) Article II, section 29, of the Montana constitution.

{5}{4} "Property owner" means a nongovernment entity owning an interest in PRIVATE property.

{6}{5} "State agency" means an officer or agency of the executive branch of state government.

{7}{6} "Taking" means ~~a governmental action~~ depriving a property owner of either ownership of the private property or a portion of or all of the economic value of the private property that is compensable under the fifth amendment to the United States constitution and under Article II, section 29, of the Montana constitution. TAKING IS FURTHER ESTABLISHED THROUGH THE INTERPRETATIONS OF THE SUPREME COURT OF THE UNITED STATES AND THE SUPREME COURT OF MONTANA.

NEW SECTION. Section 4. Assessment of impact on private property -- general directions. {1} THE ASSESSMENT DESCRIBED IN THIS SECTION MAY BE PREPARED FOR THE ENACTMENT

OF A STATUTE ONLY AFTER A REQUEST BY THE PRESIDING OFFICER OF THE HOUSE IN WHICH THE LEGISLATION IS INTRODUCED. THE PRESIDING OFFICER MAY DETERMINE THE NEED FOR THE ASSESSMENT BASED UPON A RECOMMENDATION BY LEGISLATIVE STAFF INDICATING WHETHER AN ASSESSMENT APPEARS TO BE REQUIRED. THE ASSESSMENT MUST BE PREPARED BY THE APPROPRIATE STATE AGENCY. Before taking a governmental action, a government entity shall prepare a written assessment that includes an analysis of at least the following elements:

{a}{1} a description of the governmental action, its purpose, and ~~a plan for implementation of the action,~~ including any specific public health or safety risk the action is designed to prevent, mitigate, or remedy;

{b}{2} the impact that the governmental action has on private property rights, including a description of how the action affects the use ~~or value~~ of private property and ~~whether a taking or damaging will result;~~

{c}{3} an identification of private property interests affected ~~or potentially affected~~ by the governmental action;

{d}{4} alternatives to the proposed governmental action that may:

{i}{A} fulfill a government entity's legal obligations;

{i}{B} reduce the effect on the private property owner; and

{i}{C} reduce the risk of a CONSTITUTIONAL taking OR

1 DAMAGING of private property; AND

2 {e}{5}--an estimate of financial cost to the government  
3 entity for compensation and the source of payment within the  
4 government--entity's--budget--if--a constitutional taking OR  
5 DAMAGING would result; and

6 {f}{6}{5} an evaluation ESTIMATE of the extent to which  
7 the proposed action imposes costs on property owners not  
8 borne by other citizens of the state or locality WHETHER A  
9 GOVERNMENTAL ACTION HAS A REASONABLE POSSIBILITY OF  
10 RESULTING IN A CONSTITUTIONAL TAKING OF PRIVATE PROPERTY  
11 BASED ON TESTS AND PRINCIPLES ESTABLISHED BY THE UNITED  
12 STATES SUPREME COURT AND THE MONTANA SUPREME COURT.

13 {2}--For--legislation introduced before the legislature,  
14 the agency responsible for doing an analysis for a fiscal  
15 note for the legislation shall prepare the assessment  
16 required by subsection {1}.

17 NEW SECTION. Section 5. Governmental actions -- state  
18 agency procedure. {1} In addition to the assessment required  
19 in {section 4}, a state agency shall adhere to the following  
20 criteria in implementing or enforcing governmental actions:

21 {a}--When a governmental action requires a permit or  
22 other permission for a specific use of private property, any  
23 conditions imposed on the issuance of the permit or  
24 authorization must substantially further the purposes that  
25 the permitting or permission process was designed to achieve

1 and must be expressly authorized by law.

2 {b}--The state agency shall ensure that restrictions  
3 imposed on the use of private property are proportionate to  
4 the extent the use contributes to any harm the restriction  
5 is designed to prevent, mitigate or remedy.

6 {c}{B}--The state agency shall estimate, to the extent  
7 possible, the potential cost to the state if a court  
8 determines that the governmental action constitutes a taking  
9 OR DAMAGING.

10 {2}{1} If there is an immediate threat to public health  
11 or safety that requires an immediate response by a state  
12 agency GOVERNMENT ENTITY, the criteria ASSESSMENT required  
13 by subsection {1} [SECTIONS 1 THROUGH 4 AND THIS SECTION],  
14 IF APPLICABLE, may be met when the response is completed.

15 {3}--The state agency shall ensure a diligent and speedy  
16 resolution of any procedures that are part of a process of  
17 seeking a permit or other permission to use private  
18 property.

19 {4}{2} Before a state agency implements a governmental  
20 action that has an impact on the use or value of private  
21 property, the state agency shall submit a copy of the  
22 assessment required by {section 4} [SECTIONS 1 THROUGH 4 AND  
23 THIS SECTION] to the governor, the private property owner,  
24 IF IDENTIFIABLE, and:

25 {a} if the legislature is in session, to the senate

finance and claims committee and the house appropriations committee; or

(b) if the legislature is not in session, to the legislative finance committee.

~~NEW SECTION. Section 6. Cause of action. (1) An aggrieved property owner has a cause of action against a government entity that acts in violation of {sections 1 through 6}. A property owner who proves that the property owner has been damaged by a violation of {sections 1 through 6} is entitled to compensatory damages, a writ of mandamus or prohibition, or any other appropriate legal or equitable relief.~~

~~(2) The government entity has the burden of proof on any affirmative defense it may raise, including the defense that the action complained of is not a governmental action.~~

~~(3) {Sections 1 through 6} may not be construed to infringe or impair a property owner's right to proceed judicially under eminent domain or inverse condemnation laws.~~

NEW SECTION. Section 6. Effective date. [This act] is effective July 1, 1993.

-End-