

Bernard
Murdock

Brad Mohner ^{Miller} Fuchs Slitz ^{Bar} Emerson
INTRODUCED BY GRINOE ^{K. K. Layne} ^{Burnett} ^{Hugron}
House BILL NO. 311

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A REVIEW AND ASSESSMENT OF PROPOSED
STATE GOVERNMENT EXECUTIVE BRANCH ACTIONS THAT MIGHT RESULT IN DEPRIVING A PROPERTY
OWNER OF ALL OR PART OF THE USE OR ECONOMIC VALUE OF PRIVATE PROPERTY IN A MANNER
REQUIRING COMPENSATION UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES
CONSTITUTION OR ARTICLE II, SECTION 29, OF THE MONTANA CONSTITUTION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
NEW SECTION. Section 1. Short title. [Sections 1 through 5] may be cited as the "Private
Property Assessment Act".

NEW SECTION. Section 2. Purpose. 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 a state agency without prior just compensation to the owner. An assessment of each state
agency action with taking implications is needed to avoid imposing expensive litigation burdens on citizens
and to minimize the risk of unanticipated demands on the state's fiscal resources. The purpose of [sections
1 through 5] is to establish an orderly and consistent process that better enables state agencies to evaluate
whether an action with taking implications might result in the taking of private property. It is not the
purpose of [sections 1 through 5] to expand or diminish the private property protections provided in the
federal and state constitutions.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 5], the following definitions
apply:
(1) "Action with taking implications" means a proposed state agency administrative rule, policy,
license or permit condition or denial, or dedication or exaction that a state or federal court might hold to
be a taking of private property. It does not include:
(a) proposed eminent domain proceedings;

1 (b) a proposed seizure of property by law enforcement officials as evidence or under a state
2 forfeiture statute;

3 (c) a proposed forfeiture of property during or as a result of criminal proceedings; or

4 (d) a proposal to repeal a rule, discontinue a government program, or implement a proposed change
5 that has the effect of reducing regulation of private property.

6 (2) "Private property" means all real and personal property.

7 (3) "State agency" means an officer, board, commission, department, or other entity within the
8 executive branch of state government.

9 (4) "Taking" means depriving a property owner of all or part of the use or economic value of
10 private property in a manner requiring compensation under the 5th and 14th amendments to the
11 constitution of the United States or Article II, section 29, of the Montana constitution.

12
13 **NEW SECTION. Section 4. Guidelines for actions with taking implications.** (1) Each state agency
14 shall develop and adopt guidelines, including a checklist, to assist it in identifying and evaluating agency
15 actions with taking implications. Each state agency shall at least annually review its guidelines and modify
16 them as necessary to comply with changes in statutes and court decisions.

17 (2) In developing guidelines, a state agency shall take into account the following requirements and
18 considerations:

19 (a) The state agency shall anticipate, must be sensitive to, and shall follow obligations imposed
20 by the 5th and 14th amendments to the constitution of the United States and Article II, section 29, of the
21 Montana constitution when considering and implementing an action with taking implications, in order to
22 avoid unanticipated and undue burdens on the state treasury.

23 (b) The following state agency actions with taking implications have the highest risk of taking
24 private property:

25 (i) an action that results in a physical invasion or occupancy of private property; and

26 (ii) an action that affects the use or value of private property.

27 (c) A state agency action with taking implications may result in less than complete deprivation of
28 all use or value or of all separate and distinct interests in private property, or be only temporary, and still
29 constitute a taking.

30 (d) The mere assertion of a public health or safety purpose is insufficient to justify a taking. At

1 a minimum, a state agency should consider whether an action with taking implications that is based on
2 protecting public health or safety is:

- 3 (i) in response to one or more real and substantial threats to public health or safety;
- 4 (ii) designed to significantly advance the asserted public health or safety purpose; and
- 5 (iii) no greater than necessary to achieve the asserted public health or safety purpose.

6
7 **NEW SECTION. Section 5. Impact assessment.** (1) Each state agency shall give a qualified person
8 or persons in the state agency the duty and authority to ensure that the state agency complies with
9 [sections 1 through 5]. Each state agency action with taking implications must be submitted to that person
10 or persons for review and completion of an impact assessment. The state agency may not take the action
11 unless the review and impact assessment have been completed, except that the action with taking
12 implications may be taken before the review and impact assessment are completed if necessary to avoid
13 a threat to public health or safety.

14 (2) Using the state agency's guidelines and checklist, the person shall prepare a taking impact
15 assessment for each state agency action with taking implications that includes an analysis of at least the
16 following:

- 17 (a) the likelihood that a state or federal court would hold that the action is a taking;
- 18 (b) alternatives to the action that would fulfill the agency's statutory obligations and at the same
19 time reduce the risk for a taking; and
- 20 (c) the estimated cost of any financial compensation by the state agency to one or more persons
21 that might be caused by the action and the source for payment of the compensation.

22 (3) A copy of the impact assessment must be given to the senate finance and claims committee
23 and house appropriations committee if the legislature is in session, to the legislative finance committee if
24 the legislature is not in session, and to the governor before the action with taking implications may be
25 taken, except that an action taken before the impact assessment is completed to avoid a threat to public
26 health or safety may be reported to the committees and governor after the action is taken.

27 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0311, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act providing for a review and assessment of proposed state government executive branch actions that might result in depriving a property owner of all or part of the use or economic value of private property.

ASSUMPTIONS:

1. The bill is concerned only with the policies of the executive branch of state government adopted on or after October 1, 1995.
2. No state agency will make payments in the 1997 biennium as a result of takings litigation.
3. The bill does not apply to the garnishment of wages for the payment of state debts.
4. The Department of Justice (DOJ) will hire sufficient FTEs to: 1) assist all state agencies in identifying and adopting guidelines, including a checklist, to evaluate agency actions with taking implications, 2) assist agencies with preparing assessments and provide a legal review, when required, 3) provide periodic education to all state agencies, and 4) assist agencies in annual guideline reviews. With these FTEs, it is assumed that other state agencies will be able to absorb the impact of this bill in their recommended present law base budgets.
5. DOJ will need 4 FTEs: 1 attorney (grade 18); 2 paralegals (grade 14); and 1 administrative assistant (grade 10) at a total cost of \$140,200 in FY96 and \$155,500 in FY97. The attorney will be hired 7/1/95; the other FTEs will be hired 10/1/95. Operating costs approximate 10% of personal services, plus independent contractor fees for an economist/appraiser at 500 hours at \$25 an hour. Equipment is for the basic office equipment and PC, estimated at \$3,000 per FTE, or \$12,000 in FY96.

FISCAL IMPACT:

Department of Justice:

Expenditures:

	<u>FY96</u>	<u>FY97</u>
	<u>Difference</u>	<u>Difference</u>
FTEs	3.25	4.00
Personal services	108,000	130,000
Operating expenses	20,200	25,500
Equipment	<u>12,000</u>	<u>0</u>
Total	140,200	155,500

Funding:

General fund (01)	140,200	155,500
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(continued)

Dave Lewis 1-28-95
 DAVE LEWIS, BUDGET DIRECTOR DATE
 Office of Budget and Program Planning

Larry Grinde
 LARRY GRINDE, PRIMARY SPONSOR DATE

Fiscal Note for HB0311, as introduced

HB 311

TECHNICAL NOTES:

Section 4 of this bill requires agencies to adopt guidelines to evaluate actions which may have takings implications. Requirements and considerations taken into account by an agency in developing such guidelines may be construed to establish takings standards more stringent than those now existing under the 5th and 14th amendments to the U.S. Constitution, and thus may result in takings litigation which otherwise would not occur. Aside from the possibility of Section 4 being construed as a source of substantive rights, which may impose a just compensation obligation, such litigation can be anticipated to have substantial costs.

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0311, 2nd reading, as amended

DESCRIPTION OF PROPOSED LEGISLATION:

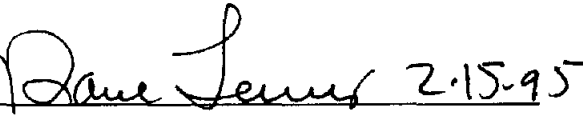
An act providing for a review and assessment of proposed state government executive branch actions that might result in depriving a property owner of all or part of the use or economic value of private property.


ASSUMPTIONS:

1. The Department of Justice, Agency Legal Services Bureau (ALSB) will perform the legal work required of the Attorney General under Section 4 of the bill. The "public process" referenced in the Statement of Intent will include, at a minimum, distribution of drafts to agencies and interested parties, and receipt and evaluation of comments. It is anticipated that 500 hours of legal services will be required for the development of the guidelines and checklist at a total cost of \$26,500 (500 hours x \$53).
2. The Attorney General's office will not participate in the preparation of impact assessments by state agencies under Section 5 of the bill, unless contracted with the ALSB.
3. The Attorney General's office will not handle any litigation arising under the bill.
4. The annual update guidelines and checklist will be completed by existing staff of the Attorney General with no additional costs.

FISCAL IMPACT:

	<u>FY96</u>	<u>FY97</u>
Department of Justice:	<u>Difference</u>	<u>Difference</u>
<u>Expenditures:</u>		
Operating expenses	26,500	0
<u>Funding:</u>		
General fund (01)	26,500	0


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


LARRY GRINDE, PRIMARY SPONSOR DATE

Fiscal Note for HB0311, 2nd reading, as amended

HB 311 # 2

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17 STATEMENT OF INTENT

18 A STATEMENT OF INTENT IS REQUIRED FOR THIS BILL BECAUSE IT GRANTS THE ATTORNEY
 19 GENERAL AUTHORITY TO DEVELOP GUIDELINES FOR STATE AGENCIES TO FOLLOW IN IDENTIFYING
 20 AND EVALUATING AGENCY ACTIONS WITH TAKING IMPLICATIONS. THE ATTORNEY GENERAL, USING
 21 A PUBLIC PROCESS, SHOULD DEVELOP AN ORDERLY, CONSISTENT, INTERNAL MANAGEMENT
 22 PROCESS FOR STATE AGENCIES TO EVALUATE THE EFFECTS OF PROPOSED ACTIONS ON PRIVATE
 23 PROPERTY. CONSISTENT WITH THE MONTANA AND UNITED STATES CONSTITUTIONS, THE ATTORNEY
 24 GENERAL SHOULD CONSIDER THE FOLLOWING ISSUES IN DEVELOPING GUIDELINES:

25 (1) WHETHER THERE IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT THAT WILL BE
 26 AFFECTED;

27 (2) WHETHER THE PROPOSED ACTION WOULD SUBSTANTIALLY ADVANCE A LEGITIMATE
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 3 OF THE PROPERTY TO A PUBLIC USE OR TO GRANT AN EASEMENT; AND

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 5 PRIVATE PROPERTY. IN ADDITION, THE ATTORNEY GENERAL MAY CONSIDER ANY OTHER FACTORS
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 17 WITH THE MEANING ASCRIBED TO THESE CONCEPTS BY THE UNITED STATES SUPREME COURT AND
 18 THE MONTANA SUPREME COURT. An assessment of each state agency action with taking OR
 19 DAMAGING implications is needed to avoid imposing expensive litigation burdens on citizens and to
 20 minimize the risk of unanticipated demands on the state's fiscal resources. The purpose of [sections 1
 21 through 5] is to establish an orderly and consistent process that better enables state agencies to evaluate
 22 whether an action with taking OR DAMAGING implications might result in the taking OR DAMAGING of
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 24 protections provided in the federal and state constitutions.

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 27 apply:

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 29 rule, policy, ~~license~~ or permit condition or denial, ~~or dedication or exaction that a state or federal court~~
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1 SOME OTHER ENVIRONMENTAL MATTER THAT IF ADOPTED AND ENFORCED WOULD CONSTITUTE A
 2 DEPRIVATION OF PRIVATE PROPERTY IN VIOLATION OF THE UNITED STATES OR MONTANA
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4 (a) proposed eminent domain proceedings;

5 (b) a proposed seizure of property by law enforcement officials as evidence or under a state
 6 forfeiture statute;

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 20 a checklist, to assist ~~the~~ THE AGENCIES in identifying and evaluating agency actions with taking OR
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 28 ~~avoid unanticipated and undue burdens on the state treasury.~~

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 30 ~~private property:~~

1 ~~(i) an action that results in a physical invasion or occupancy of private property; and~~

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9 ~~(i) in response to one or more real and substantial threats to public health or safety;~~

10 ~~(ii) designed to significantly advance the asserted public health or safety purpose; and~~

11 ~~(iii) no greater than necessary to achieve the asserted public health or safety purpose. THE~~

12 ~~ATTORNEY GENERAL SHALL INCLUDE A PROVISION THAT STATE AGENCIES SHOULD CONSIDER AND~~

13 ~~FOLLOW OBLIGATIONS IMPOSED BY THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF~~

14 ~~THE UNITED STATES AND ARTICLE II, SECTION 29, OF THE MONTANA CONSTITUTION, AS CONSTRUED~~

15 ~~BY THE UNITED STATES SUPREME COURT AND THE MONTANA SUPREME COURT, WHEN CONSIDERING~~

16 ~~AND IMPLEMENTING AN ACTION WITH TAKING OR DAMAGING IMPLICATIONS IN ORDER TO AVOID~~

17 ~~UNANTICIPATED AND UNDUE BURDENS ON THE STATE TREASURY.~~

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20 or persons in the state agency the duty and authority to ensure that the state agency complies with
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22 submitted to that person or persons for review and completion of an impact assessment. The state agency
23 may not take the action unless the review and impact assessment have been completed, except that the
24 action with taking OR DAMAGING implications may be taken before the review and impact assessment are
25 completed if necessary to avoid a AN IMMEDIATE threat to public health or safety.

26 (2) Using the ~~state agency's~~ ATTORNEY GENERAL'S guidelines and checklist, the person shall
27 prepare a taking OR DAMAGING impact assessment for each state agency action with taking OR
28 DAMAGING implications that includes an analysis of at least the following:

29 (a) the likelihood that a state or federal court would hold that the action is a taking OR DAMAGING;

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1 time reduce the risk for a taking OR DAMAGING; and

2 (c) the estimated cost of any financial compensation by the state agency to one or more persons
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4 (3) A copy of the impact assessment ~~must be given to the senate finance and claims committee~~
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8 ~~health or safety may be reported to the committees and governor after the action is taken. FOR A~~
9 PROPOSED ACTION WITH TAKING OR DAMAGING IMPLICATIONS MUST BE GIVEN TO THE GOVERNOR
10 BEFORE THE ACTION IS TAKEN, EXCEPT THAT AN ACTION TO AVOID AN IMMEDIATE THREAT TO
11 PUBLIC HEALTH OR SAFETY MAY BE TAKEN BEFORE THE IMPACT ASSESSMENT IS COMPLETED AND
12 THE ASSESSMENT MAY BE REPORTED TO THE GOVERNOR AFTER THE ACTION IS TAKEN.

13

-END-

HOUSE BILL NO. 311

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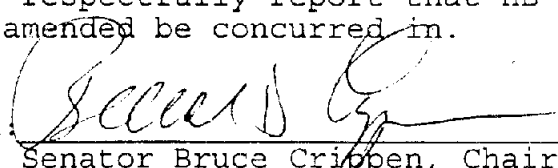
THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 13, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 311 (third reading copy -- blue), respectfully report that HB 311 be amended as follows and as so amended be concurred in.

Signed: 


Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 22.
Following: "PROPOSED"
Insert: "state"

2. Page 4, line 19.
Following: "shall"
Strike: "give"
Insert: "assign"

-END-


Amd. Coord.
Sec. of Senate


Senator Carrying Bill

HB311
SENATE
581414SC.SRF

HOUSE BILL NO. 311

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 11 WATER RIGHTS.

12 (3) "State agency" means an officer, board, commission, department, or other entity within the
 13 executive branch of state government.

14 (4) "Taking OR DAMAGING" means depriving a property owner ~~of all or part of the use or~~
 15 ~~economic value~~ of private property in a manner requiring compensation under the 5th and 14th
 16 amendments to the constitution of the United States or Article II, section 29, of the Montana constitution.

17
 18 NEW SECTION. Section 4. Guidelines for actions with taking implications. (1) ~~Each state agency~~
 19 THE ATTORNEY GENERAL shall develop and ~~adopt~~ PROVIDE TO STATE AGENCIES guidelines, including
 20 a checklist, to assist ~~the~~ THE AGENCIES in identifying and evaluating agency actions with taking OR
 21 DAMAGING implications. ~~Each state agency~~ THE ATTORNEY GENERAL shall at least annually review its
 22 THE guidelines and modify them as necessary to comply with changes in statutes and court decisions.

23 (2) In developing guidelines, ~~a state agency shall take into account the following requirements and~~
 24 ~~considerations:~~

25 (a) ~~The state agency shall anticipate, must be sensitive to, and shall follow obligations imposed~~
 26 ~~by the 5th and 14th amendments to the constitution of the United States and Article II, section 29, of the~~
 27 ~~Montana constitution when considering and implementing an action with taking implications, in order to~~
 28 ~~avoid unanticipated and undue burdens on the state treasury.~~

29 (b) ~~The following state agency actions with taking implications have the highest risk of taking~~
 30 ~~private property:~~

1 ~~(i) an action that results in a physical invasion or occupancy of private property; and~~

2 ~~(ii) an action that affects the use or value of private property.~~

3 ~~(c) A state agency action with taking implications may result in less than complete deprivation of~~
 4 ~~all use or value or of all separate and distinct interests in private property, or be only temporary, and still~~
 5 ~~constitute a taking.~~

6 ~~(d) The mere assertion of a public health or safety purpose is insufficient to justify a taking. At~~
 7 ~~a minimum, a state agency should consider whether an action with taking implications that is based on~~
 8 ~~protecting public health or safety is:~~

9 ~~(i) in response to one or more real and substantial threats to public health or safety;~~

10 ~~(ii) designed to significantly advance the asserted public health or safety purpose; and~~

11 ~~(iii) no greater than necessary to achieve the asserted public health or safety purpose. THE~~

12 ~~ATTORNEY GENERAL SHALL INCLUDE A PROVISION THAT STATE AGENCIES SHOULD CONSIDER AND~~

13 ~~FOLLOW OBLIGATIONS IMPOSED BY THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF~~

14 ~~THE UNITED STATES AND ARTICLE II, SECTION 29, OF THE MONTANA CONSTITUTION, AS CONSTRUED~~

15 ~~BY THE UNITED STATES SUPREME COURT AND THE MONTANA SUPREME COURT, WHEN CONSIDERING~~

16 ~~AND IMPLEMENTING AN ACTION WITH TAKING OR DAMAGING IMPLICATIONS IN ORDER TO AVOID~~

17 ~~UNANTICIPATED AND UNDUE BURDENS ON THE STATE TREASURY.~~

18

19 NEW SECTION. Section 5. Impact assessment. (1) Each state agency shall ~~give~~ ASSIGN a
 20 qualified person or persons in the state agency the duty and authority to ensure that the state agency
 21 complies with [sections 1 through 5]. Each state agency action with taking OR DAMAGING implications
 22 must be submitted to that person or persons for review and completion of an impact assessment. The state
 23 agency may not take the action unless the review and impact assessment have been completed, except
 24 that the action with taking OR DAMAGING implications may be taken before the review and impact
 25 assessment are completed if necessary to avoid a AN IMMEDIATE threat to public health or safety.

26 (2) Using the ~~state agency's~~ ATTORNEY GENERAL'S guidelines and checklist, the person shall
 27 prepare a taking OR DAMAGING impact assessment for each state agency action with taking OR
 28 DAMAGING implications that includes an analysis of at least the following:

29 (a) the likelihood that a state or federal court would hold that the action is a taking OR DAMAGING;

30 (b) alternatives to the action that would fulfill the agency's statutory obligations and at the same

1 time reduce the risk for a taking OR DAMAGING; and

2 (c) the estimated cost of any financial compensation by the state agency to one or more persons
3 that might be caused by the action and the source for payment of the compensation.

4 (3) A copy of the impact assessment ~~must be given to the senate finance and claims committee~~
5 ~~and house appropriations committee if the legislature is in session, to the legislative finance committee if~~
6 ~~the legislature is not in session, and to the governor before the action with taking implications may be~~
7 ~~taken, except that an action taken before the impact assessment is completed to avoid a threat to public~~
8 ~~health or safety may be reported to the committees and governor after the action is taken.~~ FOR A
9 PROPOSED ACTION WITH TAKING OR DAMAGING IMPLICATIONS MUST BE GIVEN TO THE GOVERNOR
10 BEFORE THE ACTION IS TAKEN, EXCEPT THAT AN ACTION TO AVOID AN IMMEDIATE THREAT TO
11 PUBLIC HEALTH OR SAFETY MAY BE TAKEN BEFORE THE IMPACT ASSESSMENT IS COMPLETED AND
12 THE ASSESSMENT MAY BE REPORTED TO THE GOVERNOR AFTER THE ACTION IS TAKEN.

13 -END-