

MINUTES

**MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 24, 1997,
at 10:03 a.m., in the Senate Judiciary Chambers (Room 325)
of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 306, posted March 17, 1997
Executive Action: None

HEARING ON HB 306

Sponsor: REP. AUBYN CURTISS, HD 81, Fortine

Proponents: Hertha Lund, Attorney, Montana Farm Bureau
Federation
Lorna Frank-Karn, Montana Farm Bureau
Riley Johnson, National Federation of Independent
Business

Opponents: Jim Richard, Montana Association of Planners and
Montana Wildlife Association
Beth Baker, Department of Justice

Don MacIntyre, Department of Natural Resources,
and Office of the Governor
Sharon Hoff, Montana Catholic Conference
Peter Funk, Montana Trout Unlimited
Alec Hanson, Montana League of Cities and Towns
Verne Bertelsen, self
Don Spivey, Whitefish, self
Debbie Smith, Montana Chapter Sierra Club
Gloria Paladichuk, Richland Development
Janet Ellis, Montana Audubon Society
Florence Ore, Pony, Northern Plains Resource
Council
Russell Hill, Montana Trial Lawyers Association
(MTLA)
Mike Melesy, Montana Association of Conservation
Districts
Jim Kembel, City of Billings
Anne Hedges, Montana Environmental Information
Center
Don Judge, Montana AFL-CIO

Opening Statement by Sponsor: REP. AUBYN CURTISS, HD 81, Fortine. This is a fairness to landowners act to prevent special interests from getting a free ride, and addresses the regulation process concerning mandatory takings by the State. I have amendments proposed by Hertha Lund, hb030601.avl (**EXHIBIT #1**).

Proponents' Testimony: Hertha Lund, Attorney, Datsopolous, McDonald and Lund, for Montana Farm Bureau Federation, read from her bill summary and fact sheet (**EXHIBITS #2 and #3**). Section 3 addresses taking of property and reduction of fair market value; Section 6 addresses exemptions. The amendments attempt to help crystalize and clarify the bill. Amendment 1 restores public nuisance; amendment 4 modifies the clause concerning local land use and zoning as contained in Article II, Section 29 of the Montana Constitution; amendment 7 substantially narrows who can bring a cause of action. I will be available for questions.

Lorna Frank-Karn, Montana Farm Bureau, read from prepared testimony in support of the bill (**EXHIBIT #4**). The Governor supports the concept of fairness to property owners, so we don't see why the cities and towns oppose it. We're willing to refine the bill so all are winners.

{Tape: 1; Side: A; Approx. Time Count: #12.0; Comments: 10:15 a.m.}

Riley Johnson, National Federation of Independent Business. We believe in fairness and ask you to support this bill.

Opponents' Testimony: Jim Richard, Montana Association of Planners and Montana Wildlife Association (**EXHIBIT #5**). The threshold in other states is 30-50 percent. Five percent in the bill is beyond the margin of error for appraisers, so I call this

a radical takings bill. HB 306 makes no mention of the U.S. Constitution, and it is unclear as to whether the bill applies to zoning. It is also unclear whether it applies to existing rule. Does the term "land use planning" affect such things as flood regulation? We see other problems such as specific county road widths, and the 310 permitting systems.

{Tape: 1; Side: A; Approx. Time Count: #18.0; Comments: None}

Beth Baker, Department of Justice (EXHIBIT #6). HB 311 was passed in 1995 for state agency guidelines and set principles for takings law under the Constitution. This bill has new standards without case law, and it seems it requires state agencies to compensate people beyond what the Constitution requires.

The Courts would consider rules and restrictions in effect at the time of the taking, but HB 306 rests almost entirely on economic impact, and the five percent is almost guaranteed to generate litigation. Nuisance law is described as an impenetrable jungle. As its defined, public nuisance interferes with public rights rather than property rights. As stated in the bill, it could make application very narrow, rather than broadening it as the bill intends. The numerous provisions of HB 306 tinker with established legal principles. We also oppose the amendments.

{Tape: 1; Side: A; Approx. Time Count: #20.0; Comments: None}

Don MacIntyre, Department of Natural Resources, and Office of the Governor (EXHIBIT #7), read from prepared testimony in opposition to the bill. The U.S. and Montana Constitutions both say the government can't take property without paying for it. The Governor is comfortable with this, and doesn't oppose fairness in taking, but rather the great injuries being placed upon the people of Montana. We support a balance, and believe that this legislation is not necessary at this time in history. It is a black and white issue, and case law needs to be allowed to develop.

Sharon Hoff, Montana Catholic Conference, read from prepared testimony (EXHIBIT #8). We are not opposed to fairness in regulations intended to protect and foster common good. The takings issue raises questions about how to balance the moral issues. This can damage local communities. We urge you to oppose this bill.

Peter Funk, Montana Trout Unlimited. We are asking you to look at the list of functions in the fiscal note. We strongly oppose the bill, and its extreme difference from current law. In Montana there is a fairly substantial body of case law concerning takings, addressing a broad range of issues, from eminent domain to inverse condemnation. We must recognize the spectrum of causes of action in takings. There is analysis of facts and balance in takings, as mentioned by Beth Baker. On page 2, the disproportionate reduction could even go to less than a one

percent reduction, and still be compensated. We oppose the type of mechanism application, and urge you to leave this bill in committee.

{Tape: 1; Side: A; Approx. Time Count: #37.5; Comments: None}

Alec Hanson, Montana League of Cities and Towns. We strongly oppose this bill. I'm not sure what we have in the bill now, and I believe the House amendments create inconsistencies which are incongruous. The bill needs clarity, but even then it opens the door to lawsuits between landowners and cities and towns. An estimate of the cost of compliance of a proposed initiative in Washington state was \$11 billion. Even at a fraction of this amount, it would still be terrible for Montana cities and towns, and the dollars would come directly from the pockets of the taxpayers.

{Tape: 1; Side: A; Approx. Time Count: #40.4; Comments: 10:43 a.m.}

Verne Bertelsen, self. I am asking that you to not put us in courts without a fair chance of winning. We need to continue what is a workable and fair established balance. This proposed solution is extreme, and I ask that you table this bill.

{Tape: 1; Side: B; Approx. Time Count: #00.; Comments: 10:45 a.m.}

It is a very, very bad piece of legislation, and will involve state, county and city governments in a constant stream of litigation. We owe something to the people we live with. We maintain it for a short time, and than it goes to our heirs. I ask you to consider this bill as ridiculous.

{Tape: 1; Side: B; Approx. Time Count: #2.8; Comments: None}

Don Spivey, Whitefish, self (EXHIBIT #9). I moved to Montana seven years ago, and have become involved in land use issues in the Flathead area. We all share certain kinds of responsibilities with our neighbors. I'm subject to 310 regulations, flood plan regulations, streamside protection act and others, because of where my property is. We have 200 years of rules that I believe are manageable.

I believe the House amendments are contradictory. I'd counsel my own college-age grandchildren to get a law degree and specialize in takings if this bill passes. I have moved five times in 34-35 years with IBM. I've had three property tax appraisals done within a two-week period, and they were usually 15-20 percent apart, so I believe 5 percent is not administrable, and will be at the expense of the taxpayers. I urge you to set this legislation aside.

Debbie Smith, Montana Chapter Sierra Club. The exceptions are no exception at all - especially public nuisance, the definition of which is one affecting an entire community or a number of persons. It must also affect an individual specifically, so this would be very difficult to bring. County attorneys can bring criminal nuisance, but it is not easy for them either.

The Montana Supreme Court sets standards as a "great emergency" which has greatly frustrated judges. Nuisance law is based on medieval law which prohibited a neighbor from interfering with a landowner enjoying his property. We disagree with the exceptions on page 2, line 16-19. Lines 23-28 on page 3 eviscerate existing environmental planning and land use law. It is an attempt by a small but powerful and vocal group of landowners, and is a radical reconstruction of takings, a black and white issue.

Gloria Paladichuk, Richland Development, read from prepared testimony. We believe payments would come mainly from farmers and ranchers and local businesses, and not from the oil and gas industry. We ask that you do not pass this bill, and we believe a study is in order.

Janet Ellis, Montana Audubon Society (EXHIBIT #10), referred to Department of Revenue rules on that last page, and said classes 3, 4, 5, 11 and 12 would probably be affected by this bill. "Existing" on page 2, line 9 has been stricken, but is still on page 3, line 4, and in the title. This is disturbing because on page 2, lines 16-17, Section 4 is retroactive. Is the entire rule or just the amended rule effective?

On page 2, lines 22-23 deal with implementation of federal statute in takings. For example, Montana's air quality law for sulfur dioxide, carbon dioxide, fluorides, lead and others is stronger than federal standards. Does this mean these would be rolled back? I urge you not to pass this bill.

{Tape: 1; Side: B; Approx. Time Count: #20.6; Comments: 11:05 a.m.}

Florence Ore, Pony, Northern Plains Resource Council, read from prepared testimony. I am a bookstore owner in Three Forks. We particularly oppose Section 6 of the bill. In Pony a Chicago-based mining company came in and escaped all laws except some water regulations. They left after two years when the state revoked their permit. They polluted land and water, left chemicals around, and filed bankruptcy. The state spent \$100,000 to clean up the site, and it's still not done.

Russell Hill, Montana Trial Lawyers Association (MTLA). There is an exemption on page 3, line 23. This legislature can't exempt some citizens on the basis of ownership of their property, as this has the potential to create two classes of citizens.

{Tape: 1; Side: B; Approx. Time Count: #24.0; Comments: None}

Mike Melesy, Montana Association of Conservation Districts. We believe the 310 program is extremely successful, and that the Association has done a good job with it. The Association is a regulatory agency, but tends not to be very regulatory. It doesn't have the money to defend its decisions. Who wants to face the personal liability of defending their decision? They're not well-paid, and it tends to be a thankless job.

Jim Kembel, City of Billings. We could be impacted daily by this bill, and urge you to oppose it.

Anne Hedges, Montana Environmental Information Center. On page 1 of the bill, under findings and declarations it imposes a duty on local governments to establish guidelines, so this will create additional costs for them.

Don Judge, Montana AFL-CIO. For all of the reasons previously stated, we ask that you kill this bill. A constitutional amendment to the voters would kill government entirely, and that's what we also believe this bill would do.

Letter from Anne Cossitt (EXHIBIT #11).

Questions From Committee Members and Responses: SEN. REINY JABS. What was the motivation for this bill? **REP. CURTISS.** Some people have been injured by this type of action.

SEN. JABS. Are people not being properly reimbursed for takings? **REP. CURTISS.** I'm not sure that anyone has been reimbursed, to my knowledge, anyway.

SEN. JABS. What about people reimbursing the government if the value of their property increases as a result of an action, rather than decreasing? **REP. CURTISS.** There was an attempt to amend this language into the bill in the House. That's something the Committee may want to look at.

SEN. STEVE DOHERTY. In looking at the fiscal impact of the bill to local governments, is there money in the Governor's budget to make local governments whole if this bill were to pass? **Don MacIntyre.** I am not clear as to what some of the fiscal impact might be, and am unaware of any money in the government for such compensation should this bill pass.

SEN. DOHERTY. In your discussion of nuisance law, I'm trying to figure out of this bill, in any way, would impact the doctrine of private nuisance. In Great Falls there are stock car races which bother many of the people in my district. Does this bill affect these doctrines? **Debbie Smith.** The bill makes no exception for private nuisance, and that is the majority of nuisance cases in which there is a prevailing plaintiff.

SEN. DOHERTY. If I own property in a residential area and my neighbor wants to put in a pig farm, would this bill affect my

rights to contest his nuisance, in my view of my private property rights being diminished? **Debbie Smith.** Pre-existing agricultural operations are already exempt, but a private landowner could still sue for nuisance on a new operation. If the government were to prohibit the siting of such a nuisance, resulting in a regulatory taking, that would probably not fall within the exception. This means the government would have to pay the landowner for not being able to start a new operation for as little as a five percent diminution in value, under the bill. Nothing in the bill allows a property owner or the government to know before hand whether something is a nuisance. It's got to go before the Court and a judge has to decide.

SEN. SHARON ESTRADA. Did you have this much opposition to the bill in the House? **REP. CURTISS.** Yes, but more has been generated since.

SEN. ESTRADA. What is a fraction of the \$11 billion estimate of the proposed initiative in Washington state? **Alec Hanson.** Even at one-tenth of that amount the bill's cost could be close to \$1 billion to Montana.

SEN. MIKE HALLIGAN. Why should the legal standard be changed? **Hertha Lund.** Similar legislation has been passed in Florida and Texas, and this is being looked at on the federal level, as well. I don't think the \$11 billion estimate is correct. There are clients, primarily in agriculture, who feel their problems are not being addressed. Private citizens in Montana are bearing this cost now, and they want all Montanans to bear in these costs. It's a question of who pays.

SEN. HALLIGAN. The nuisance standard appears to be a little bit broad in its application. **Hertha Lund.** This simply tracks the latest Supreme Court case, Lucas in which Judge Scalia said a legislator is limited to the ability to regulate property based on the background principles of state nuisance. So we already have to deal with it because of what the high court has held.

SEN. HALLIGAN. In family law I've seen varied appraisals, on the same proposal, so why the five percent figure? **Hertha Lund.** Where else do we put a percent on someone's liberty? The Montana Supreme Court has held as low as 30 percent. The Montana Farm Bureau did not write this bill.

SEN. RIC HOLDEN. I am a young rancher with a \$200,000 mortgage on a secluded area of the Yellowstone River. I want an example of how my family stake can be devalued. **Hertha Lund.** Recently, the city of Livingston tried to pass an ordinance so people could not build within a certain number of feet of the Yellowstone River. If you couldn't run your cows in a certain area, you'd be compensated.

SEN. HOLDEN. Same question to Mr. Richards. **Jim Richards.** For example, if a state agency passes a regulation to prohibit you

from logging within a certain distance of the river, we would see that as reasonable rule to protect public interest, but you'd still have a tremendous amount of interest in that property, and so you wouldn't want to be deprived of enjoyment or equal opportunity.

CHAIRMAN BRUCE CRIPPEN. If the five percent changed to ten percent would you accept it? **Jim Richland.** No, as I'm opposed to the whole concept of takings.

{Tape: 2; Side: A; Approx. Time Count: #12.1; Comments: 11:33 a.m.}

CHAIRMAN CRIPPEN. Suppose the county wants to put a wider road in a subdivision. Would that be an example of a taking? **Jim Richards.** When a county puts in an improvement, it usually increases the value of property, but if a wider road makes it less desirable to you, I could see this as a decrease in value. But, I don't believe I should be compensated, as that traffic would have to go somewhere.

{Tape: 2; Side: A; Approx. Time Count: #15.7; Comments: None}

CHAIRMAN CRIPPEN. Would this bother you, as a landowner? **Jim Richards.** Yes, but it is not good public policy to compensate land owners every time this takes place. **CHAIRMAN CRIPPEN.** I just wanted to get that on record.

CHAIRMAN CRIPPEN. Regarding you comment that public interest should prevail, would you say, in the case I presented to Jim Richards, that public interest is met, and that the land owner ought not to be compensated? **Beth Baker.** In the first issue, if you were buying property to build a \$1 million house, and the county had a 100' right of way, you don't have a reasonable expectation of entitlement to compensation, but if it were only a 30' county easement, that would probably be seen differently.

Adams v Department of Highways (1992), addresses a case in Missoula which involved increasing levels of dust and noise and runoff, and the Montana Supreme Court ruled that the people were entitled to a hearing.

CHAIRMAN CRIPPEN. Let's change the example. With a standard 2-lane of 30', curb and gutter, could they limit right of way to exactly 30'? **Beth Baker.** If the county wants to widen my road beyond 30' they'll have to pay me.

CHAIRMAN CRIPPEN. My point is, how many buy land knowing the potential possibilities of a three or four lane road near their land? **Beth Baker.** The buyer must be smart, and look at all aspect, including easements, and future prospects. I would assume a real estate agent would have advised me.

CHAIRMAN CRIPPEN. Will this bill, if passed at a 20 percent threshold, preclude local government from taking property if you go into court? **Beth Baker.** No. They just have to pay for it.

SEN. DOHERTY. Hertha Lund said this bill merely tracks the language of the Lucas decision. Do you agree? **Beth Baker.** I disagree. Also, Florida and Texas statute are quite different from this one. **Don MacIntyre.** I agree with Ms. Baker, and believe this bill goes a step beyond the Lucas decision and steps afforded by current law.

{Tape: 2; Side: A; Approx. Time Count: #30.1; Comments: 11:50 a.m.}

I attended a meeting with **REP. COBB**, the Governor and his staff, Department of Environmental Quality attorney John North, and Tim Reardon, last Friday at 4 p.m. My purpose was concerning testimony for today's hearing. This is a huge policy-making bill.

CHAIRMAN CRIPPEN. Was Mary Jo Fox there? **Don MacIntyre.** For part of the meeting.

CHAIRMAN CRIPPEN. Was there any mention of further discussion of our concerns? **Don MacIntyre.** The Governor said he's consider them and get back to us.

CHAIRMAN CRIPPEN. Was there any discussion about meeting at any other time? **Mary Jo Fox.** Yes, with **REPRESENTATIVES CURTISS** and **GRINDE.** Apparently he did contact them on Saturday.

CHAIRMAN CRIPPEN. Did anyone else object to the bill at that meeting except Mr. MacIntyre? **Mary Jo Fox.** No.

CHAIRMAN CRIPPEN. Say you own land adjacent to a pond, and Public Health decides to use it for a sewage lagoon. Would you consider that a taking? **Peter Funk.** I'd consider whether it were a reduction of value in my property and, if so, then I would consider taking action.

CHAIRMAN CRIPPEN. What if you're retirement age, and have owned the property a long time, and can't get good sale value because of the lagoon? **Peter Funk.** That depends on all kinds of variables. No doubt value has been diminished, but I question if I'd consider this a government taking - that is a whole different situation. I'd think about whether it was a taking.

{Tape: 2; Side: A; Approx. Time Count: #39.7; Comments: 12 noon.}

CHAIRMAN CRIPPEN. Same example of Alec Hansen. If the sewage plant goes in because of a public health problem, would that be a taking? **Alec Hanson.** The mayor would make the decision. It's local politics, so I can't make a hypothetical, but generally mayors listen and don't steal people's property. They have to

balance all the interests, or be willing to pay the costs, and determine who's going to pay them.

VICE CHAIRMAN LORENTS GROSFIELD. On page 2, line 21, what is a "use permit"? **Hertha Lund.** It is a broad attempt to exempt out all permits.

VICE CHAIRMAN GROSFIELD. Why limit just compensation? On line 26, there is a definition of substantial reduction and then one for disproportionate reduction. Are you saying it must be substantial and disproportionate? That would make it seem that only one property owner would have the ability to be compensated. **Hertha Lund.** I'm not sure why it was drafted this way, but I don't see it the same as you do. It could be a cluster of owners who are disproportionately burdened. I would be glad to work on clarifying this language.

VICE CHAIRMAN GROSFIELD. This is a fairness issue? **Hertha Lund.** Right, the bill is much too narrow.

VICE CHAIRMAN GROSFIELD. If an agency adopts a specific rule that we require, under Section 6 they don't have to do it if they don't have the money. Is this good public policy? **Hertha Lund.** Not in that example. It was put in to give local governments a cushion, a way out of an ordinance.

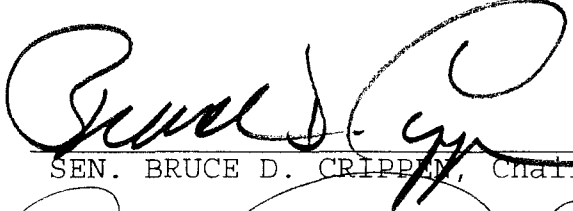
VICE CHAIRMAN GROSFIELD. What if local governments pay off one or two and more come in and are denied? Is there an equal protection provision? **Hertha Lund.** They would have remedies under other bodies of law.

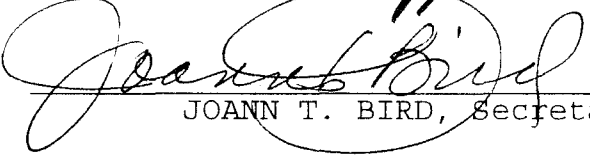
{Tape: 2; Side: B; Approx. Time Count: #8.5; Comments: 12:10 p.m.}

Closing by Sponsor: REP. CURTISS. The question is who pays for public good, the private citizen or everyone? This is an ALEC (American Legislative Council) model bill. The opponents haven't made amendments to the five percent threshold. I'm asking you to consider the Farm Bureau amendments, and urge you to concur in this bill.

ADJOURNMENT

Adjournment: 12:12 p.m.


SEN. BRUCE D. CRIPPEN, Chairman


JOANN T. BIRD, Secretary

BDC/JTB