

EXHIBIT 1  
DATE 4/1/09  
SB 402

Senate Bill 402  
April 1, 2009  
Presented by Bob Lane  
House Judiciary Committee

Mr. Chairman, members of the Committee, I am Bob Lane, Chief Legal Counsel of the Montana Department of Fish, Wildlife & Parks (FWP). FWP opposes SB 402.

The intent of this bill is to reverse the recent Montana Supreme Court decisions that held the I-143's (November, 2000) prohibitions on paid captive elk "hunts" and prohibitions on the transfer of alternative livestock (game farm) licenses were not taking of private property without compensation.

There are two specific points that FWP will emphasize about this bill. First, the key language on page 2, lines 9 through 12 essentially could establish that any statute or regulation that impacts, apparently in any way, a business or property would require the state or local government to compensate for the restrictions on the operation of the business or the use of property. This would have a dramatic and chilling impact on the ability of the legislature, counties, and cities to regulate the conduct of businesses and set community or state standards of conduct. The new subsections (2)(a) and (2)(b) to MCA 70-1-104 are so open-ended that the cost of regulations impacting business would simply be enormous.

The second point is that SB 402 is intended to change the constitutional analysis of regulatory takings in a completely one-sided approach. Under present law, as affirmed by the Montana Supreme Court in the Kafka and Buhmann cases, there is a balancing test to determine when a regulatory taking has occurred that requires compensation. Under the Penn Central analysis of whether there is regulatory taking, a court is to balance the economic impact of a regulation on a property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, the character of the governmental action, and whether the regulation has an unduly harsh impact on the owner's use of the property. The Montana Supreme Court in Kafka and Buhmann determined there was not a regulatory taking based on the Court's analysis of the above factors.

The amendments in the Senate, for the most part, do not change the character of this legislation. For example, the term remaining, "value of a lawful business," includes all of the amended-out terms that redundantly described the "value" of a business. These terms were "the goodwill and ongoing concern," "the right to carry on lawful business, the value of a business and the economic benefits derived from a business," and "intangible business interests." Therefore, the "value of a lawful business" that must be compensated for if the business is economically impacted remains the same after the amendments as it did before the amendments.

Amending out Section 4, the retroactive applicability section, does not change the bill's application to game farms affected by the I-143 citizen initiative. The game farm taking litigation is not yet concluded, and there is a class action takings claim on behalf of the game farms still alive in state district court.

The amendment adding new Section 4 does limit somewhat the bill's reach. For example, zoning subdivision, and land use regulations are exempted but only if they are "required by law." This means that discretionary planning decisions are not exempted from payment of compensation for a takings. Also, enforcement of the terms of a license is exempted but not the requirement of a license or new or additional requirements to be licensed for a professional business. In other words, the new Section 4 is loaded with qualifications and limitations.

SB 402 would replace a balancing analysis with a single test. If there is an economic impact, then the legislature or county or city must compensate the affected businesses for any and all impacts to all aspects of a business including loss of future profits.

The result is easy to understand. Most government regulation, no matter its purpose or benefits to society as a whole, would come up with a potentially enormous economic price tag.

If the law on regulatory takings is to be codified, the limited approach of SB 402 does not do the job because it completely ignores all the other critical factors necessary to balance the value of laws and regulations with impacts on private businesses.

## SB 402 Issues

### FWP Rules and Regulations

Several regulations established by the Fish, Wildlife and Parks Commission or the Department could be interpreted under SB 402 as taking or damaging. The Department and Commission develop these rules to preserve and protect Montana's unique natural resources.

**River Recreational Management-** any changes to these rules that would limit the season or permits (e.g. Smith River, Beaverhead/Big Hole) could be interpreted as a taking or damaging to outfitter and guides for business revenue lost due to the restrictions.

**Emergency Fire Closures of Water/Drought Closures of Water-** when the Department and Commission implements these temporary rules to protect human safety (fire closure) and protect the resources (drought closure) outfitter, guides, and touring operations could claim a taking due to business revenue lost because the business could not be conducted or would be restricted to the time they can operate.

**Exotic Species ARM-** these rules are revised to add species that are prohibited or restricted in the state of Montana. Pet stores and private breeders could claim damage or taking because they can no longer sell certain species of animals. SB 402 has no general public health, safety or welfare exception.

**Private Fish Ponds/Fish Hatchery-** if the Department applies more restrictions to private fish ponds such as restricting the sale or distribution of fish, a private fish pond/hatchery owner may claim damage or taking for business loss.

**Game Farms-** I-143 taking claims have not yet been decided and if SB 402 becomes law, it could be applied to those unresolved cases. It is expected that the game farm takings cases will be appealed to the U.S. Supreme Court asking that the decision of the Montana Supreme Court be reviewed. Also all the game farms (79) have a pending takings claim in state District Court. Amending out the retroactive applicability section does affect these pending cases and SB 402 would apply to them.

**Hunting Seasons-** any restrictions applied to the hunting season by the Commission and Department may be claimed as taking or damage by landowners, outfitters, guides, and other local businesses that would receive business from hunters. For example, if the Commission, to protect the resource and provide for a quality hunting experience, decided hunters would have to draw for permits, this would limit outfitter clients because not all of their clients would be able to draw permits. This would be in contrast to a general season where licenses are available to everyone. This already occurs and the Commission must balance all interests; however, with SB 402 there would be compensable taking so the Commission could not afford to adopt this kind of a regulation.

**Commercial Fishing Regulations**-regulating commercial fishing is a responsibility of the Commission and could have an impact on commercial fishing business.

#### **Other Actions That May Be Considered as Taking or Damage Under SB 402**

**Montana Clean Air Act**- Bars and casinos that had restaurants in them could claim taking or damage with the passage of the Montana Clean Air Act because they had to become smoke free because children would be allowed into the restaurant portion. These bars and casinos could claim that they lost business because smokers were taking their business to bars and casinos that had exceptions to the Montana Clean Air Act.

**Prohibition on Abortion**- If Montana enacts a prohibition on abortion, doctors and clinics that provide abortions could file for a taking or damage.

**Restrictions on Gambling**- Gambling provides many businesses with revenue not only from the gambling itself but from other purchases made while gambling occurs and if restrictions are placed on gambling, the businesses would lose that revenue.

**Board Certification of Physicians**- If the Board of Medical Examiners determines that physicians must meet new standards to protect the public's health and safety for board certification, then physicians unwilling or unable to meet the new standards would have a valid taking claim.

#### **Bills This Session That Would Be Affected Under SB 402**

**HB 191**- would have regulated pit bulls in Montana. This could have created a damage or taking claim by breeders, trainers, and handlers of pit bulls.

**HB 396**- would have limited the interest rate on deferred deposit loans and title loans. This would have created a damage or taking claim by businesses that provide those loans because it would have limited what interest rate they could charge their customers.

**HB 69**- would have prohibited modification of mufflers to increase noise emitted from exhaust systems. This would have created a damage or taking claim by businesses that modify exhaust systems and businesses that make the products used to modify exhaust systems.

#### **Summary**

The Governor, legislature, agencies, and local governments enact restrictions and prohibitions for the general welfare of the citizens and resources of Montana while taking into the consideration the impacts the decisions will make on the businesses of Montana.

If SB 402 passes, the Governor, legislature, and agencies will be held accountable in a court of law for compensating the businesses for any losses accrued by these actions. Not only would it become a financial burden to state and local governments to be forced to compensate businesses but also in defending all actions brought forth in a court of law. The court system of Montana could become overwhelmed with cases filed under SB 402.