



GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2017 Biennium

Bill #	SB0286
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Title:	Limit agency rule making if it burdens property rights
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Primary Sponsor:	Smith, Cary
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Status:	As Introduced
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|---|---|--|
| <input type="checkbox"/> Significant Local Gov Impact | <input type="checkbox"/> Needs to be included in HB 2 | <input checked="" type="checkbox"/> Technical Concerns |
| <input type="checkbox"/> Included in the Executive Budget | <input checked="" type="checkbox"/> Significant Long-Term Impacts | <input type="checkbox"/> Dedicated Revenue Form Attached |

	<u>FY 2016 Difference</u>	<u>FY 2017 Difference</u>	<u>FY 2018 Difference</u>	<u>FY 2019 Difference</u>
Expenditures:				
General Fund		----- Unknown -----		
State Special Revenue		----- Unknown -----		
Federal Special Revenue		----- Unknown -----		
Revenue:				
General Fund		----- Unknown -----		
State Special Revenue		----- Unknown -----		
Federal Special Revenue		----- Unknown -----		
Net Impact-General Fund Balance:	=====	=====	=====	=====

Description of fiscal impact: SB 286 prohibits the adoption, repeal or amendment of any administrative rule that burden's a person's ability to enjoy the person's property rights or to engage in a lawful business or occupation. The term "property right" is undefined and therefore the prohibition is broad.

The Department of Transportation (MDOT) receives a significant portion of its budget from the federal government, and that receipt is conditioned on the department's compliance with federal laws and regulations, many of which involve property rights or impact businesses or occupations. If the department is unable to adopt, amend or repeal administrative rules required by federal law or regulations because the rule impacts property rights or business or occupational rights created by the bill, the department risks the loss of federal funding.

FISCAL ANALYSIS

Assumptions:

1. Because the bill only impacts future rule-making, it not impossible to estimate a fiscal impact.

2. Because the bill does not provide a definition of the terms “property” or “burden”, a determination of fiscal impact cannot be determined.
3. Subsection 2 of the bill provides that an agency may adopt an otherwise prohibited rule if: “the rule is part of a comprehensive scheme to reduce existing burdens on a person’s ability to enjoy the person’s property rights or engage in a lawful business or occupation; or the agency exercises only a definite, nondiscretionary, and ministerial duty that is imposed by law in implementing standards prescribed by the legislature.”

Department of Agriculture (DOA)

4. Property rights extend to money, land, and land use. The Department of Agriculture has rulemaking authority that would impact these and other property rights through a potential expansion or decrease of an existing right or privilege.
5. It is impossible to determine if a rule proposed by the Department of Agriculture would result in a lawsuit by a person claiming that the rule has burdened their ability to enjoy their property rights.

Montana Department of Labor & Industry (MDLI)

6. The following areas of the Montana Department of Labor & Industry, Employment Relations Division, may be affected by this legislation depending on the interpretation of “property rights” and “burden”. The fiscal impact in each area is unknown at this time.
 - a. Establishing Prevailing Wage (PW) rates.
 - i. The prevailing wage rates for occupations working on public works contracts are established by Administrative Rule (ARM 24.17.119-24.17.122).
 - b. Assessing Penalties in Wage & Hour (W&H) cases.
 - i. Administrative Rules define the breakout and application of penalties (ARM 24.16.7556-27.16.7569).
 - c. Workers’ Compensation Medical Fee Schedules.
 - i. Administrative Rule defines and outlines all medical equipment and supply fee schedules, prescription drug free schedules, facility fee schedules, professional fee schedules and other fees (ARM 24.29.1401-24.29.2003).
 - d. Workers’ Compensation Attorney Fee Regulation
 - i. Administrative rule defines the percentage of attorney fees for workers’ compensation claims (ARM 24.29.3802).
 - e. Workers’ Compensation Examiner Certification, Examination, Renewal and Course Submission
 - i. Administrative Rule lists the fees for workers’ compensation examiner certification, exams, renewals and course application (ARM 24.29.847).
 - f. Independent Contractor Exemption Certificate (ICEC) application rate.
 - i. Administrative Rule states the cost of the ICEC (ARM 24.35.121).
 - g. Workers’ Compensation Uninsured Employer Fund (UEF) Penalties
 - i. UEF penalties are expanded upon in Administrative Rule (ARM 24.29.2831).
 - h. UEF Medical Benefit limits
 - i. Administrative Rule defines the maximum aggregate expenditures for medical benefits per claim payable by UEF (ARM 24.29.2851).
 - i. Workers’ Compensation Plan 2 Security Deposits
 - i. Administrative Rule defines the maximum and minimum security deposit requirement for Plan 2 Workers’ Compensation carriers, and directs the percentage to be collected from each carrier (ARM 24.29.709).
 - j. Managed Care Organization (MCO) Application Fee
 - i. Administrative Rule defines the preliminary application fee for MCO’s (ARM 24.29.2321).

Department of Public Health and Human Services (DPHHS)

7. There are approximately 1,000 licensed assisted living facilities, mental health group homes, family and group day care providers, adult day care homes, adult foster care homes, and youth care facilities in

Montana. These facilities and homes are subject to rules which may place burdens on the occupants that affect their ability to enjoy personal property or engage in a lawful business or occupation.

8. Some of these facilities or homes could initiate a claim of burden against their property. The fiscal impact in such claims is unknown at this time.

Department of Natural Resources and Conservation (DNRC)

9. Under SB 286, DNRC is open to lawsuits being brought on behalf of a property owner for the perceived diminution of property value resulting from DNRC rules burdening the ability of someone to develop their land, mine property, etc. It is not possible for DNRC to determine specifically what rule or action would violate the terms of SB 286.
10. The Trust Land Management Division (TLMD) of the DNRC manages 5.2 million acres of surface and 6.2 million acres of state school trust lands on behalf of the trust beneficiaries. The trust beneficiaries are the common schools (K-12), the university system (Montana State University, University of Montana, State Normal School [Eastern and Western], Montana Tech), Public Buildings, School for the Deaf and Blind, and the State Reform School – Pine Hills. DNRC generates revenue for these trust beneficiaries through the issuance and management of approximately 15,000 leases, licenses and permits. Leases, licenses and permits define and convey property rights to their holder. Any action DNRC takes in the management of state lands affects the property rights of the lessee, licensee, or permittee.
 - a. TLMD has fiduciary management obligations to the trust beneficiaries and SB 286 will hinder that responsibility by exposing DNRC to claims that its actions burden the enjoyment of a property right.
 - b. In addition, TLMD may be unable to require enforcement actions designed to preserve and enhance the condition of the state trust lands under its care.
 - c. TLMD manages state school trust lands under the direction of the Board of Land Commissioners (Land Board). The Land Board is a constitutionally created body consisting of the Governor, Attorney General, Superintendent of Public Instruction, Secretary of State, and Commissioner of Insurance and Investments. Trust land management rules are approved and adopted by the Land Board. It is not possible to determine to what extent application of SB 286 prohibitions may conflict with the Land Board's constitutional authority.
 - d. SB 286 has the potential to reduce revenues for the trust beneficiaries, but the extent of the revenue reduction is not possible to estimate at this time.
11. It is assumed all actions taken, or rules developed by DNRC for wildfire protection to protect public life and property would be unenforceable under this bill (see Technical Note 14).
12. The Water Resources Division (WRD) Water Rights Bureau (WRB) administers the permitting of new uses of water and authorizes changes for the existing uses of water. DNRC duties are dictated by the Water Use Act, of which one of the primary tenants is protection of existing water rights. The Water Use Act relies upon DNRC adopting rules in order to engage the public in how to most efficiently and effectively carry out those duties. A water right is a property right.
 - a. If an existing water right holder would like to change a water right, along with other criteria an applicant is required to prove by a preponderance of the evidence lack of adverse effect to existing water rights (85-2-402, MCA; ARM 36.12.1903). Similarly, a person applying for a new use of water must also prove lack of adverse effect to existing water right holders (85-2-311, MCA; ARM 36.12.1706) in addition to other criteria. The burden of proving the statutory criteria is placed on the applicant. In this process, the existing water users' property right is being protected against the change of use of another person's property right or the new use of water on their property.
 - b. SB 286 would prevent DNRC from adopting rules under the change provisions of Title 85, Chapter 2, MCA, because any rules related to changes could be construed as a burden on a person's ability to enjoy a water right. Similarly, any rules related to the permit criteria, basin closures, controlled groundwater area determinations, or conditions on permits under Title 85, Chapter 2, MCA could burden a person's ability to engage in a business or occupation by limiting how or if water can be used at or on their property even though the rules would protect existing water right holders from

having either water right adversely effected. WRD anticipates legal challenges would result from the proposed bill not just against new rules but also challenging existing rules.

- c. Any new administrative rules to administer the licensing and disciplinary actions of the Board of Water Well Contractors, permitting construction and rehabilitation of high hazard dams, and the designation of floodplains or floodway or updates to existing floodplain designations would likely be prohibited under the proposed law of SB 286. Even after rule adoption, legal challenges are likely. Existing rules that are obsolete or out of date would not likely be changed and the continued use of obsolete rules may cause health and safety impacts, waste, abuse, and unfairness to those affected.

Legislative Branch

13. As provided in 5-5-215, MCA, and 5-11-112, MCA, statute requires legislative interim committees to review administrative rules within its jurisdiction. Administrative rule review committees are required to review all proposed rules filed with the secretary of state, pursuant to 2-4-402, MCA.
14. The requirements of SB 286 could affect the Legislative Services Division’s responsibility for agency rule review. It is unknown whether the requirements of this bill will have a significant impact on the Legislative Services Division or on interim committees. For the purposes of this fiscal note, it assumed that any additional work that may be required will be performed using existing resources.
15. SB 286 is one of several bills seeking to add to the duties of interim and administrative committees. The fiscal note for each bill is prepared based on the effect of the individual bill. However, when viewed as a package, the cumulative effect of passage or more than one bill will require additional analysis and may require additional resources.

Department of Transportation (MDOT)

16. The MDOT receives a significant portion of its budget from the federal government, and that receipt is conditioned on the department’s compliance with federal laws and regulations, many of which involve property rights or impact businesses or occupations. If the department is unable to adopt, amend or repeal administrative rules required by federal law or regulations because the rule impacts property rights or business or occupational rights created by the bill, the department risks the loss of federal funding. The total impact to the department cannot be determined.

Montana State Fund (MSF)

17. The bill will prohibit adoption of most rules affecting businesses, as the bill provides that "an agency may not adopt a rule that will burden a person's ability to (a) enjoy a person's private property rights; or (2) engage in a lawful business or occupation."
18. MSF has adopted the administrative rules that govern the process for determining dividends and rates.
19. MSF’s currently established administrative rules would not be impacted. New administrative rules or changes to existing rules may be interpreted as a ‘burden’ on business.
20. The fiscal impact to MSF cannot quantify the potential fiscal impact.

Department of Environmental Quality (DEQ)

21. SB 286 applies to all DEQ regulatory programs, including those under which DEQ has primacy to regulate in lieu of the Environmental Protection Agency (EPA) or the Office of Surface Mining Control and Reclamation Enforcement (OSM).
22. SB 286 prohibits DEQ from increasing the stringency of limitations on the use of private property after September 30, 2015, unless the legislature passes a bill directing the agency to adopt the rule with such specific language that adoption of the rule becomes a ministerial act.
23. EPA and OSM will adopt regulations imposing more stringent limitations on the use of private property after September 30, 2015.
24. It is impossible to determine whether the legislature would pass a bill directing adoption of rules equivalent to federal regulations described in assumption #22.
25. If the legislature does not pass a bill imposing the limitations referenced in assumption #3, EPA and OSM would withdraw primacy and impose their own regulatory programs.

26. Withdrawal of primacy would occur on a program-by-program basis over a period of years, and it is not possible to predict with certainty when withdrawal would occur for any program.
27. EPA and OSM would not withdraw primacy for any program during the 2017 biennium.
28. If primacy is withdrawn by OSM, DEQ would be preempted by federal law from regulating coal mining and would be prohibited from receiving federal abandoned mine reclamation funds from the federal government.
29. If primacy is withdrawn for a program by EPA, DEQ would not be preempted by federal law and would continue to regulate under rules in place on September 30, 2015.
30. When EPA withdraws primacy for a program, it will also withdraw federal funding for the program and any associated grants including infrastructure loan programs (SRF for drinking water and waste water).
31. SB 286 does not prohibit DEQ from increasing fees in fee-based regulatory programs in order to adequately fund the programs.
32. For programs for which there is no equivalent federal regulatory program (junk vehicles, major facility siting, hard rock mining, open-cut mining, subdivisions), SB 286 would have no fiscal impact

Technical Notes:

Department of Transportation (MDOT)

1. Section 4 allows “rules adopted solely under constitutionally mandated rulemaking authority.” There is no such authority.
2. The bill conflicts and/or potentially may conflict with a number of statutory rule-making requirements or grants of rule-making authority to the Department of Transportation, including but not limited to 15-70-104, 15-70-115, 60-2-201(4), 60-2-602, 60-3-101, 60-5-503, 61-10-129, 60-10-130, 60-10-154, 60-10-155, 75-15-121.
3. The bill does not contain an exemption for rules which must be adopted, amended, or repealed pursuant to an order of a court.

Department of Revenue (DOR)

4. Taxpayers could attempt to prohibit department appraisers from inspecting their properties or using GIS mapping as this would arguably "burden" enjoyment of their property rights, effectively preventing the department from completing statewide property reappraisals. As these are complete defenses against litigation, this proposed legislation could significantly impede the department's ability to administer its statutory duties.

Office of Public Defender

5. If this legislation passes it could limit OPD’s ability to address client eligibility through administrative rule as allowed under 47-1-111, M.C.A.

Department of Public Health and Human Services

6. The bill would significantly impact the department’s statutorily-mandated compliance and enforcement efforts for the programs it oversees, and conflicts with certain portions of the Montana Administrative Procedure Act (MAPA). Examples include
 - a. Title 2-4-102 (MCA) defines licensing as the process “...respecting the grant denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.” The bill would prohibit the departments licensing bureau from promulgating health care or child care facility rules because they would place burdens on, or have potentially adverse effects to, license holders or applications.
 - b. Child Support Enforcement Division (CSED) and the Program Compliance Bureau within the Quality Assurance Division (QAD) both have statutorily-mandated laws and regulations that intentionally burden a person’s ability to enjoy their property rights because enforcement may involve placement and execution of liens, judgments, etc. This bill would impair CSED’s and

QAD’s ability to perform its duties, potentially contrary to state and federal law, because necessary rulemaking could not be implemented.

- 7. The defense provisions described in section 1 are contrary to administrative remedies provided in MAPA and could subject an agency to potentially costly litigation in defense of perceived violations of the Act created under this bill.

DNRC

- 8. SB 286 could prevent new rules consistent with law from being enforced where the law might impose a condition or restriction that could be considered a "burden" under this bill. That could include rules regarding health and safety.

Department of Livestock (MDOL)

- 9. It is not clear what section 1 (2) (b) means: “the agency exercises only a definite nondiscretionary, and ministerial duty imposed by law in implementing standards prescribed by the legislature.” Technically MDOL is concerned whether the brucellosis “Designated Surveillance Area” (DSA) is considered a definite, nondiscretionary, and ministerial duty. If it is not, the lack of a DSA in Montana would result in a federal brucellosis class free status downgrade. The loss of brucellosis free status to the State of Montana has been estimated by the USDA to be in the range of \$5.9 to \$11.9 million per year.

Fish, Wildlife and Parks (FWP)

- 10. As written, SB 286 appears to contradict with current statutory duties and responsibilities of FWP in managing wildlife populations in the implementation of 87-1-301, MCA. Enforcement of the laws by FWP could likely always be interpreted as having an effect on a lawful business or occupation.
- 11. The department’s ability to set quotas, manage the Endangered Species Act (87-1-201(9), MCA, and regulate harvest are just a few examples where this bill will affect FWP statutory duties.

Sponsor’s Initials

Date

Budget Director’s Initials

Date