

1 SENATE BILL NO. 191

2 INTRODUCED BY S. FITZPATRICK

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING PRELIMINARY INJUNCTION AND TEMPORARY
5 RESTRAINING ORDER LAWS; INCORPORATING THE FEDERAL STANDARD FOR A PRELIMINARY
6 INJUNCTION INTO MONTANA LAW AS THE GENERAL STANDARD FOR A PRELIMINARY INJUNCTION
7 OR TEMPORARY RESTRAINING ORDER; REQUIRING THE APPLICANT FOR A PRELIMINARY
8 INJUNCTION OR TEMPORARY RESTRAINING ORDER TO SHOW WHY AN INJUNCTION OR
9 TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED; PROVIDING A DECLARATION OF
10 LEGISLATIVE INTENT; ~~AND~~ AMENDING SECTIONS 27-19-201, 27-19-301, 27-19-315, AND 75-1-201, MCA;
11 AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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15 Section 1. Section 27-19-201, MCA, is amended to read:

16 "27-19-201. When preliminary injunction may be granted -- legislative intent. An injunction order
17 may be granted in the following cases:

18 ~~(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of~~
19 ~~the relief consists in restraining the commission or continuance of the act complained of, either for a limited~~
20 ~~period or perpetually;~~

21 ~~(2) when it appears that the commission or continuance of some act during the litigation would~~
22 ~~produce a great or irreparable injury to the applicant;~~

23 ~~(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do~~
24 ~~or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of~~
25 ~~the action, and tending to render the judgment ineffectual;~~

26 (1) A preliminary injunction order or temporary restraining order may be granted when the
27 applicant establishes that:

28 (a) the applicant is likely to succeed on the merits;

1 **(b)** the applicant is likely to suffer irreparable harm in the absence of preliminary relief;

2 **(c)** the balance of equities tips in the applicant's favor; and

3 **(d)** the order is in the public interest.

4 **(2)** An injunction order may be granted in either of the following cases between persons, not
5 including a person being sued in that person's official capacity:

6 **(4)(a)** when it appears that the adverse party, ~~during the pendency of~~ while the action is pending,
7 threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant,
8 in which case an injunction order may be granted to restrain the removal or disposition; or

9 **(5)(b)** when it appears that the applicant has applied for an order under the provisions of 40-4-121 or
10 an order of protection under Title 40, chapter 15.

11 **(3)** The applicant for an injunction provided for in this section bears the burden of demonstrating
12 the need for an injunction order.

13 **(4)** It is the intent of the legislature that the language in subsection (1) mirror the federal
14 preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United
15 States supreme court case law."

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17 **Section 2.** Section 27-19-301, MCA, is amended to read:

18 **"27-19-301. Notice of application -- hearing.** (1) No preliminary injunction order may be issued
19 without reasonable notice to the adverse party of the time and place of the making of the application therefor
20 that application for the injunction order was made.

21 **(2)** Before granting an injunction order, the court or judge shall make an order requiring cause to
22 be shown, at a specified time and place, why the injunction should not be granted, and the adverse party may
23 in the meantime be restrained as provided in 27-19-314."

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25 **Section 3.** Section 27-19-315, MCA, is amended to read:

26 **"27-19-315. When restraining order may be granted without notice.** A temporary restraining order
27 may be granted without written or oral notice to the adverse party or the party's attorney only if:

28 **(1)** ~~it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay~~

1 ~~would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney~~
2 ~~could be heard in opposition~~ the applicant or the applicant's attorney makes a showing that the requirements of
3 27-19-201(1) are met; and

4 (2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that
5 have been made to give notice and the reasons supporting the applicant's claim that notice should not be
6 required; and

7 (3) the state or the state's departments, agencies, or officers being sued in their official capacities
8 are not the adverse party."

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10 **Section 4.** Section 75-1-201, MCA, is amended to read:

11 **"75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes
12 and directs that, to the fullest extent possible:

13 (a) the policies, regulations, and laws of the state must be interpreted and administered in
14 accordance with the policies set forth in parts 1 through 3;

15 (b) under this part, all agencies of the state, except the legislature and except as provided in
16 subsections (2) and (3), shall:

17 (i) use a systematic, interdisciplinary approach that will ensure:

18 (A) the integrated use of the natural and social sciences and the environmental design arts in
19 planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana human
20 environment by projects in Montana; and

21 (B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency
22 considers alternatives, the alternative analysis will be in compliance with the provisions of subsections
23 (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(II) and, if requested by the project sponsor or if determined by the agency to be
24 necessary, subsection (1)(b)(iv)(C)(III);

25 (ii) identify and develop methods and procedures that will ensure that presently unquantified
26 environmental amenities and values may be given appropriate consideration in decisionmaking for state-
27 sponsored projects, along with economic and technical considerations;

28 (iii) identify and develop methods and procedures that will ensure that state government actions

1 that may impact the human environment in Montana are evaluated for regulatory restrictions on private
2 property, as provided in subsection (1)(b)(iv)(D);

3 (iv) include in each recommendation or report on proposals for projects, programs, and other major
4 actions of state government significantly affecting the quality of the human environment in Montana a detailed
5 statement on:

6 (A) the environmental impact of the proposed action;

7 (B) any adverse effects on Montana's environment that cannot be avoided if the proposal is
8 implemented;

9 (C) alternatives to the proposed action. An analysis of any alternative included in the environmental
10 review must comply with the following criteria:

11 (I) any alternative proposed must be reasonable, in that the alternative must be achievable under
12 current technology and the alternative must be economically feasible as determined solely by the economic
13 viability for similar projects having similar conditions and physical locations and determined without regard to
14 the economic strength of the specific project sponsor;

15 (II) the agency proposing the alternative shall consult with the project sponsor regarding any
16 proposed alternative, and the agency shall give due weight and consideration to the project sponsor's
17 comments regarding the proposed alternative;

18 (III) the agency shall complete a meaningful no-action alternative analysis. The no-action
19 alternative analysis must include the projected beneficial and adverse environmental, social, and economic
20 impact of the project's noncompletion.

21 (D) any regulatory impacts on private property rights, including whether alternatives that reduce,
22 minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this
23 subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private
24 property.

25 (E) the relationship between local short-term uses of the Montana human environment and the
26 maintenance and enhancement of long-term productivity;

27 (F) any irreversible and irretrievable commitments of resources that would be involved in the
28 proposed action if it is implemented;

- 1 (G) the customer fiscal impact analysis, if required by 69-2-216; and
- 2 (H) the details of the beneficial aspects of the proposed project, both short-term and long-term, and
- 3 the economic advantages and disadvantages of the proposal;
- 4 (v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe
- 5 appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts
- 6 concerning alternative uses of available resources. If the alternatives analysis is conducted for a project that is
- 7 not a state-sponsored project and alternatives are recommended, the project sponsor may volunteer to
- 8 implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project
- 9 sponsor to take a recommended course of action, but the project sponsor may agree pursuant to subsection
- 10 (4)(b) to a specific course of action.
- 11 (vi) recognize the potential long-range character of environmental impacts in Montana and, when
- 12 consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs
- 13 designed to maximize cooperation in anticipating and preventing a decline in the quality of Montana's
- 14 environment;
- 15 (vii) make available to counties, municipalities, institutions, and individuals advice and information
- 16 useful in restoring, maintaining, and enhancing the quality of Montana's environment;
- 17 (viii) initiate and use ecological information in the planning and development of resource-oriented
- 18 projects; and
- 19 (ix) assist the legislature and the environmental quality council established by 5-16-101;
- 20 (c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible
- 21 state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or
- 22 special expertise with respect to any environmental impact involved in Montana and with any Montana local
- 23 government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state
- 24 official shall also consult with and obtain comments from any state agency in Montana with respect to any
- 25 regulation of private property involved. Copies of the statement and the comments and views of the appropriate
- 26 state, federal, and local agencies that are authorized to develop and enforce environmental standards must be
- 27 made available to the governor, the environmental quality council, and the public and must accompany the
- 28 proposal through the existing agency review processes.

1 (d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for
2 use or permission to act by an agency, either singly or in combination with other state agencies, does not
3 trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the
4 entitlement or unless otherwise provided by law.

5 (2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to
6 subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not
7 include actual or potential impacts that are regional, national, or global in nature.

8 (b) An environmental review conducted pursuant to subsection (1) may include a review of actual
9 or potential impacts beyond Montana's borders if it is conducted by:

10 (i) the department of fish, wildlife, and parks for the management of wildlife and fish;

11 (ii) an agency reviewing an application for a project that is not a state-sponsored project to the
12 extent that the review is required by law, rule, or regulation; or

13 (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

14 (3) The department of public service regulation, in the exercise of its regulatory authority over rates
15 and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

16 (4) (a) The agency may not withhold, deny, or impose conditions on any permit or other authority
17 to act based on parts 1 through 3 of this chapter.

18 (b) Nothing in this subsection (4) prevents a project sponsor and an agency from mutually
19 developing measures that may, at the request of a project sponsor, be incorporated into a permit or other
20 authority to act.

21 (c) Parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor
22 to modify a proposed project or action.

23 (5) (a) (i) A challenge to an agency action under this part may only be brought against a final
24 agency action and may only be brought in district court or in federal court, whichever is appropriate.

25 (ii) Any action or proceeding challenging a final agency action alleging failure to comply with or
26 inadequate compliance with a requirement under this part must be brought within 60 days of the action that is
27 the subject of the challenge.

28 (iii) For an action taken by the board of land commissioners or the department of natural resources

1 and conservation under Title 77, "final agency action" means the date that the board of land commissioners or
2 the department of natural resources and conservation issues a final environmental review document under this
3 part or the date that the board approves the action that is subject to this part, whichever is later.

4 (b) Any action or proceeding under subsection (5)(a)(ii) must take precedence over other cases or
5 matters in the district court unless otherwise provided by law.

6 (c) Any judicial action or proceeding brought in district court under subsection (5)(a) involving an
7 equine slaughter or processing facility must comply with 81-9-240 and 81-9-241.

8 (6) (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of
9 parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or
10 a claim that the environmental review is inadequate, the agency shall compile and submit to the court the
11 certified record of its decision at issue, and except as provided in subsection (6)(b), the person challenging the
12 decision has the burden of proving the claim by clear and convincing evidence contained in the record.

13 (ii) Except as provided in subsection (6)(b), in a challenge to the agency's decision or the
14 adequacy of an environmental review, a court may not consider any information, including but not limited to an
15 issue, comment, argument, proposed alternative, analysis, or evidence, that was not first presented to the
16 agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to
17 be submitted.

18 (iii) Except as provided in subsection (6)(b), the court shall confine its review to the record certified
19 by the agency. The court shall affirm the agency's decision or the environmental review unless the court
20 specifically finds that the agency's decision was arbitrary and capricious or was otherwise not in accordance
21 with law.

22 (iv) A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal
23 impact analysis is inadequate may not be used as the basis of an action challenging or seeking review of the
24 agency's decision.

25 (b) (i) When a party challenging the decision or the adequacy of the environmental review or
26 decision presents information not in the record certified by the agency, the challenging party shall certify under
27 oath in an affidavit that the information is new, material, and significant evidence that was not publicly available
28 before the agency's decision and that is relevant to the decision or the adequacy of the agency's environmental

1 review.

2 (ii) If upon reviewing the affidavit the court finds that the proffered information is new, material, and
3 significant evidence that was not publicly available before the agency's decision and that is relevant to the
4 decision or to the adequacy of the agency's environmental review, the court shall remand the new evidence to
5 the agency for the agency's consideration and an opportunity to modify its decision or environmental review
6 before the court considers the evidence as a part of the administrative record under review.

7 (iii) If the court finds that the information in the affidavit does not meet the requirements of
8 subsection (6)(b)(i), the court may not remand the matter to the agency or consider the proffered information in
9 making its decision.

10 (c) (i) The remedies provided in this section for successful challenges to a decision of the agency
11 or the adequacy of the statement are exclusive.

12 (ii) Notwithstanding the provisions of 27-19-201 and 27-19-314, a court having considered the
13 pleadings of parties and intervenors who are requesting a temporary restraining order or preliminary injunction
14 or who are opposing a request for a temporary restraining order, preliminary injunction, permanent injunction, or
15 other equitable relief may not enjoin the issuance or effectiveness of a license or permit or a part of a license or
16 permit issued pursuant to Title 75 or Title 82 unless the court specifically finds that the party requesting the
17 relief is more likely than not to prevail on the merits of its complaint given the uncontroverted facts in the record
18 and applicable law and, in the absence of a temporary restraining order, a preliminary injunction, a permanent
19 injunction, or other equitable relief, that the:

20 (A) party requesting the relief will suffer irreparable harm in the absence of the relief;

21 (B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in
22 the public interest, a court:

23 (I) may not consider the legal nature or character of any party; and

24 (II) shall consider the implications of the relief on the local and state economy and make written
25 findings with respect to both.

26 (C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and
27 the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the
28 extent possible, that the project or as much of the project as possible can go forward while also providing the

1 relief to which the applicant has been determined to be entitled.

2 (d) The court may issue a temporary restraining order, preliminary injunction, permanent
3 injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court
4 in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any
5 party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial
6 decision in the case. If the party seeking an injunction or a temporary restraining order objects to the amount of
7 the written undertaking for any reason, including but not limited to its asserted inability to pay, that party shall
8 file an affidavit with the court that states the party's income, assets, and liabilities in order to facilitate the court's
9 consideration of the amount of the written undertaking that is required. The affidavit must be served on the
10 party enjoined.

11 (e) An individual or entity seeking a lease, permit, license, certificate, or other entitlement or
12 authority to act may intervene in a lawsuit in court challenging a decision or statement by a department or
13 agency of the state as a matter of right if the individual or entity has not been named as a defendant.

14 (f) Attorney fees or costs may not be awarded to the prevailing party in an action alleging
15 noncompliance or inadequate compliance with a requirement of parts 1 through 3.

16 (7) For purposes of judicial review, to the extent that the requirements of this section are
17 inconsistent with the provisions of the National Environmental Policy Act, the requirements of this section apply
18 to an environmental review or any severable portion of an environmental review within the state's jurisdiction
19 that is being prepared by a state agency pursuant to this part in conjunction with a federal agency proceeding
20 pursuant to the National Environmental Policy Act.

21 (8) The director of the agency responsible for the determination or recommendation shall endorse
22 in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a
23 determination of significance be made.

24 (9) A project sponsor may request a review of the significance determination or recommendation
25 made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit
26 an advisory recommendation to the agency regarding the issue. The period of time between the request for a
27 review and completion of a review under this subsection may not be included for the purposes of determining
28 compliance with the time limits established for environmental review in 75-1-208."

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NEW SECTION. Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

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AMENDED