



Montana Department of Justice
ATTORNEY GENERAL'S GUIDELINES
Revised January 2011

INTRODUCTION

The 54th Legislature enacted the Private Property Assessment Act, Chapter 462, Laws of Montana (1995), which is in Title 2, Chapter 10, Part 1 of the Montana Code Annotated. The law required the Attorney General to develop guidelines, including a checklist, to assist state agencies in identifying and evaluating proposed agency actions that may result in the taking or damaging of private property. The intent was to establish an orderly and consistent internal management process for state agencies to evaluate their proposed actions under the "Takings Clauses" of the United States and Montana Constitutions, as those clauses are interpreted and applied by the United States and Montana Supreme Courts. In addition to these Guidelines with checklist questions, there are three related documents: Takings—Selected Supreme Court Opinions, Private Property Assessment Act Checklist, and Checklist Flowchart.

The Attorney General's Guidelines and Checklist were issued in September, 1995. In the years since then, numerous opinions of the United States Supreme Court and the Montana Supreme Court have analyzed takings issues. This revision of the Guidelines and Checklist is intended to be in compliance with the principles discussed in the Court decisions, and to be of assistance to state agencies in determining when a proposed action may have takings implications.

The Private Property Assessment Act applies to proposed agency actions, (such as an administrative rule, policy, or permit condition or denial), pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitutions. The Act defines "private property" to mean real property, including water rights. The term "private property" does not mean personal property, contract rights, government grants, loans or guarantees, business expectations, or an interest in a license. The Act does not apply to proposed eminent domain proceedings. The Act does not apply to a broad range of state regulation of commercial activities including banking, insurance and securities, utilities regulation, occupational licensing rules, and industrial safety standards. The Act did not expand or diminish the constitutional provisions nor create any right, claim, or cause of action.



Montana Department of Justice TAKINGS – SELECTED SUPREME COURT OPINIONS

UNITED STATES SUPREME COURT:

Andrus v. Allard, 444 U.S. 51 (1979) (prohibition of the sale of lawfully acquired property is not a taking).

Dolan v. City of Tigard, 512 U.S. 374 (1994) (conditioning approval of building permit on the dedication of a portion of private land to public access is a taking unless there is rough proportionality between the exaction and the impact of the proposed development).

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (the Takings Clause requires compensation for the period of time that the government denies the owner all use of the property, even if the taking is not permanent).

Hodel v. Irving, 481 U.S. 704 (1987) (abolition of the right to pass one's property to one's heirs is a taking).

Kelo v. City of New London, 545 U.S. 469 (2005) (condemnation case discussing the meaning of "public use").

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) (restriction on amount of coal that may be mined in order to prevent surface subsidence was proper exercise of police powers to guard health, safety, and general welfare of the public and did not make profitable mining impossible).

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (whether a law substantially advances legitimate governmental interests is a due process test, not a takings test).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (minor but permanent physical occupation of private property is a taking).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (restriction that denies property owner all economically viable use of land is a taking).

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (conditioning building permit on granting of public access across the property does not serve public purposes related to the building permit requirement and is a taking).

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (case describing significant factors for analysis of regulatory takings).

MONTANA SUPREME COURT:

Adams v. Department of Highways, 230 Mont. 393, 753 P.2d 846 (1988) (in the absence of a physical taking, landowners along a street were not entitled to compensation after the doubling of traffic with an increase in noise, fumes, and dust because of road improvements; residential value of property had decreased but commercial value had increased).

Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (requirement that subdivision dedicate land for public parks and playgrounds was valid). The United States Supreme Court has criticized this case for stating a standard that is too lax to protect adequately private property rights. Dolan v. City of Tigard, 512 U.S. 374, 389 (1994).

Buhmann v. State, 2008 MT 465, 348 Mont. 205, 201 P.3d 70 (takings clauses of United States and Montana Constitutions are coextensive; “or damaging” language of Montana’s takings clause applies to consequential damages of a physical condemnation).

Germann v. Stephens, 2006 MT 130, 332 Mont. 303, 137 P.3d 545 (takings claim failed because owner of motel did not have a protected property interest in operating a bar or casino).

In re Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992). (water rights and other property rights are subject to the reasonable exercise of the police power of the state to regulate for the health, safety, and general welfare of the public).

Kafka v. Montana Department of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (passage of Initiative barring fee-shooting of game farm animals was not a taking).

Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982) (property owners may recover in inverse condemnation suit where property across the street was taken by condemnation to enlarge existing street, which greatly increased traffic, noise, and dirt and reduced value of residential property 20-30 percent).

Knight v. City of Missoula, 252 Mont. 232, 827 P.2d 1270 (1992) (property owners may recover in inverse condemnation suit where actual physical damage is caused to their properties by a new public road).

Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993) (annexation of real property may have diminished its value but did not require compensation).

Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903) (owner entitled to compensation because adjacent street was excavated to a depth of 7 feet, impairing his access).

Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098 (suit challenging denial of application to build recreational vehicle park did not state an inverse condemnation claim because the owner had not alleged denial of all economically beneficial use of the property).

McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991) (owner was not entitled to compensation after adoption of more stringent septic regulations reduced the value of owner's riverfront property by 2/3's; the new rules did not deprive the owner of economically viable use for residential development).

Rausser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632 (1977) (property owner may recover in inverse condemnation suit where construction of irrigation project flooded owner's land).

Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009 (passage of Initiative prohibiting cyanide leaching in mines that were not yet operating was not a compensable taking of property rights).

Western Energy Co. v. Genie Land Co., 227 Mont. 74, 737 P.2d 478 (1987) (unexpired leasehold interest in mineral estate is property interest; statute requiring

consent of surface owner to strip mine coal effectively deprived owner of coal of the right to mine).

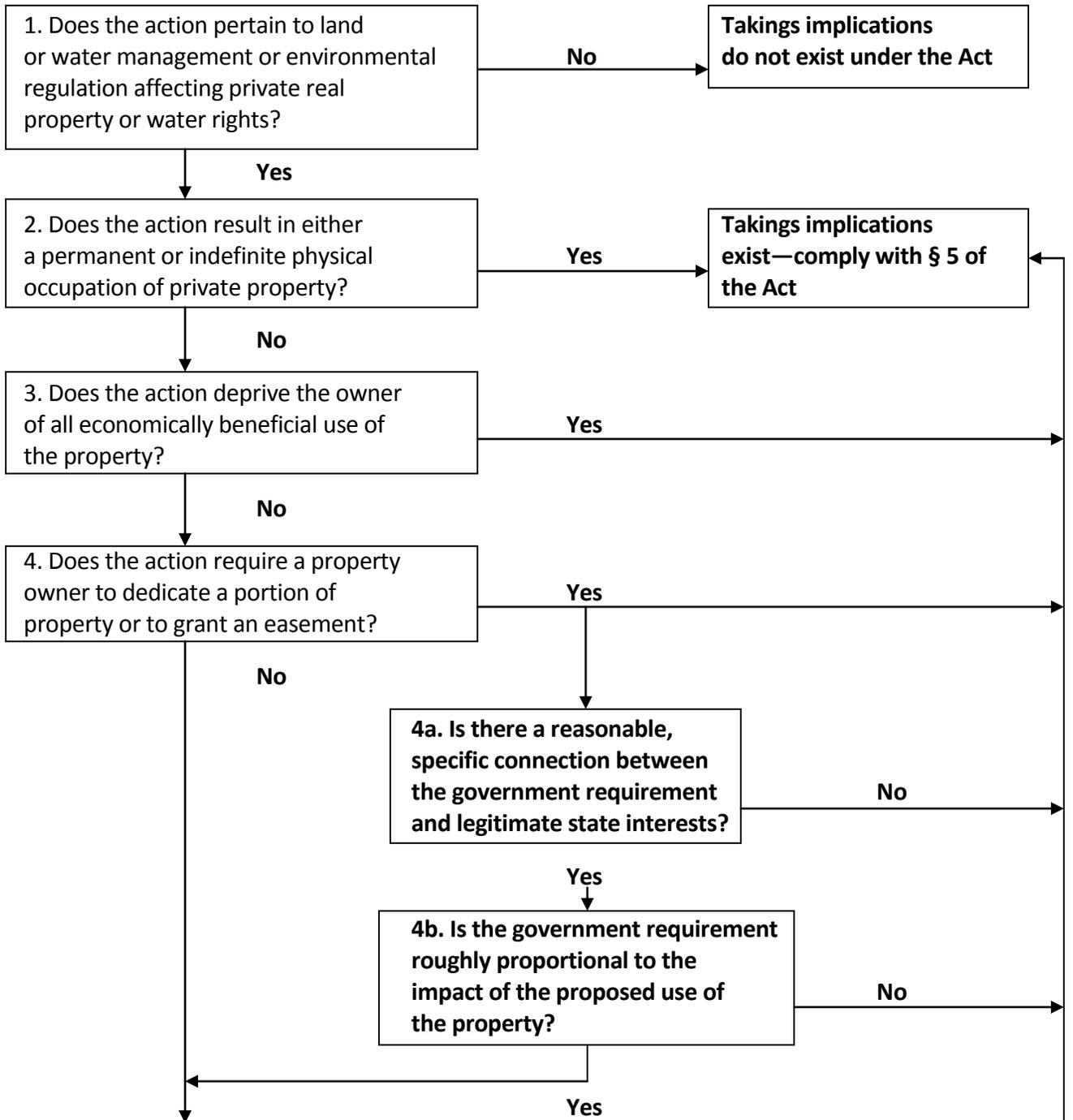
Yellowstone Valley Electric Cooperative, Inc. v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980) (acts conducted in the reasonable exercise of the police power for the public's health, safety, and general welfare do not constitute a taking unless there is an appropriation of property).

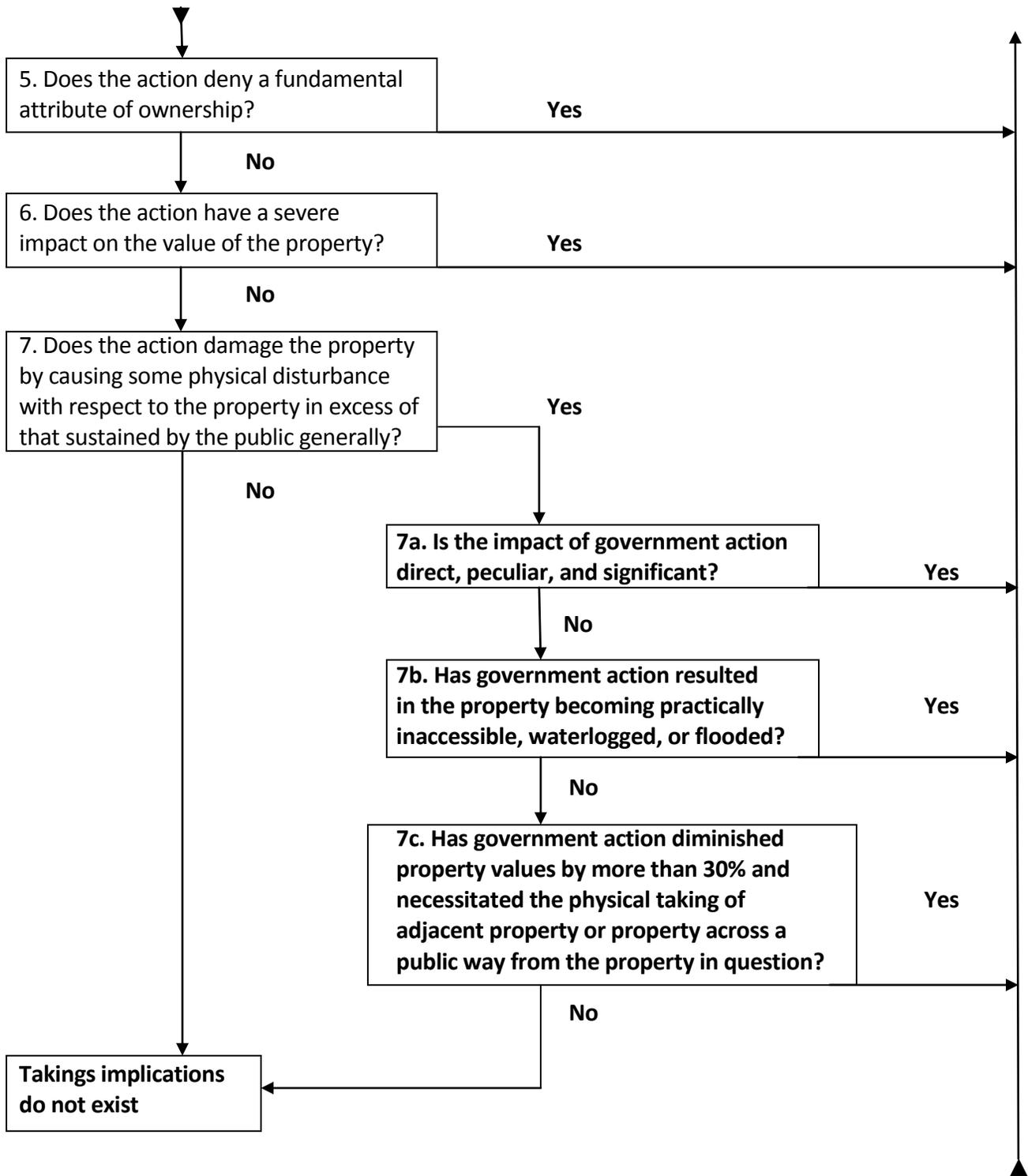


Montana Department of Justice CHECKLIST FLOWCHART

Does the proposed agency action have takings implications under the Private Property Assessment Act?

START HERE:







Montana Department of Justice
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

**DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE
PRIVATE PROPERTY ASSESSMENT ACT?**

YES

NO

1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?

2. Does the action result in either a permanent or indefinite physical occupation of private property?

3. Does the action deprive the owner of all economically beneficial use of the property?

4. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is **NO**, skip questions 4a and 4b and continue with question 5.]

4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?

4b. Is the government requirement roughly proportional to the impact of the proposed use of the property?

5. Does the action deny a fundamental attribute of ownership?

6. Does the action have a severe impact on the value of the property?

7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally?

[If the answer is **NO**, do not answer questions 7a-7c.]

- _____ _____ 7a. Is the impact of government action direct, peculiar, and significant?
- _____ _____ 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
- _____ _____ 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implications exist if **YES** is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 5, 6, 7a, 7b, 7c; or if **NO** is checked in response to questions 4a or 4b.

If taking or damaging implications exist, the agency must comply with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

I. GENERAL GUIDELINES

A. Overview

The Takings Clause of the Fifth Amendment of the United States Constitution provides: “nor shall private property be taken for public use, without just compensation.” Under the Fourteenth Amendment this limitation upon the power of the federal government is applied to the states. Similarly, Article II, Section 29, of the Montana Constitution provides: “Private property shall not be taken or damaged for public use without just compensation” Although the Montana Constitution contains the “or damaged” language that is absent from the Fifth Amendment, the Montana Supreme Court has ruled that the protections of the two clauses are coextensive. The Takings Clauses do not prohibit the taking of private property, but they do place a condition on the exercise of the power of the government by requiring compensation.

The Takings Clauses are intended to bar the government from forcing some people (whose property is taken) to bear burdens that, in fairness and justice, should be borne by the public as a whole (whose taxes would be used to pay just compensation). However, no single formula exists for determining whether economic injuries caused by government action constitute a taking of private property.

Under Montana's Private Property Assessment Act, state agencies should consider and follow obligations imposed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article II, Section 29, of the Montana Constitution, as construed by the United States Supreme Court and the Montana Supreme Court, when considering and implementing an action with taking or damaging implications in order to avoid unanticipated and undue burdens on the state treasury. Mont. Code Ann. § 2-10-104(2).

Court decisions interpreting and applying the Takings Clauses of the United States and Montana Constitutions to specific factual situations provide guidance for evaluating whether a proposed government agency action may involve a taking of private property requiring the payment of just compensation. Although the language of the Montana Constitution is broader than the federal language, the Montana Supreme Court usually looks to the decisions of federal courts for guidance in considering takings claims. The courts have yet to answer many questions concerning the law of takings. The questions they have answered do not always provide a clear, consistent framework for analyzing takings issues that may arise. Each case must be examined on its own facts in light of the standards that have been developed by the courts. The purpose of these guidelines is to identify those legal standards and to provide state agencies with a framework for analyzing their actions on a case-by-case basis.

Adding to the difficulty involved in analyzing the question, “Is there a taking of property?” is the concept of “property.” The constitutions of the United States and of the State of Montana do not define what is meant by the term “property.” Besides the physical dimension of property (its

size, shape, and location), property has a functional dimension (the owner's use and disposition of the property), and a temporal dimension (the duration of the owner's interest in the property or of the government's interference with it). Many courts have described "property" as a "bundle" of expectations or rights, such as the rights to possess, exclude others, use, derive income from, and dispose of the property. Government actions may adversely affect one or more "strands" in the "bundle" of rights without there being a taking requiring the payment of compensation.

The rights associated with the concept of property are not absolute. Various laws limit property rights. For example, sometimes a use of property that endangers public health, morals, or safety is considered a nuisance under state law. The government may prohibit a use of property that is a nuisance without paying compensation, because the "right" to create a nuisance is not a component part of the "bundle of rights" that an owner of property enjoys.

When the government obtains title to land, the requirement for the government to pay compensation is clear. The law is firmly established that when the government seeks to use private property for a government building, a highway, or some other public purpose, it may acquire the property by use of its power of eminent domain. The process whereby the government acquires the property and the owner is paid compensation is often called condemnation.

The law is also clear that when the government physically occupies private land on a permanent basis, it is liable to pay just compensation to the owner. Sometimes this occurs because of a mistake, such as when a public road is built on private land as a result of a surveying error. Inverse condemnation is the process by which a landowner recovers just compensation for property that the government has taken without first instituting condemnation proceedings. The Private Property Assessment Act does not apply to condemnation and inverse condemnation proceedings, which obviously involve a taking. Instead, the Act pertains to regulatory actions by state agencies that might result in the taking of private real property, including water rights.

The government has the authority and responsibility to protect the public health, safety, and welfare. Often this is referred to as the "police power" of the state. Pursuant to this power, the government may regulate the use of private property for the public good. Normally, land use regulations such as zoning ordinances, setback requirements, building codes, sanitary requirements, and other environmental regulations substantially advance legitimate public interests and do not deprive owners of all beneficial use of their property. Such regulations are applicable to all similarly situated property and produce a widespread public benefit in which the property regulated also participates. The government may also establish conditions or requirements that must be satisfied in return for government permission to use private property in certain ways. Commonly required conditions include the payment of fees and the obtaining of permits.

To require compensation for all government actions that adversely affect property rights and values would effectively compel the government to regulate by purchase. The courts have not interpreted the Takings Clauses of the United States and Montana Constitutions to require compensation because of the effect on private property of typical land use regulations. Nevertheless, at some point the government regulations attempting to adjust private rights and public benefits may go too far and constitute a taking of private property.

B. Two Categorical Rules

The courts have identified two categories of government action that will be deemed takings. The right to the exclusive possession of property is one of the most fundamental property interests. Thus, government action that requires an owner to allow another to occupy any part of an owner's private property is a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (law requiring apartment building owners to allow installation of cable TV equipment was a taking). Even small physical takings are covered. In Loretto the cable TV equipment occupied only about 1½ cubic feet of the owner's property. 458 U.S. at 438 n.16. This categorical rule also applies to government action creating a public easement. A permanent physical occupation has occurred where individuals are given a permanent and continuous right to pass to and fro, so that the real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises. Nollan v. California Coastal Commission, 483 U.S. 825, 832 (1987).

The second categorical rule is that government action that deprives the owners of all economically feasible use of their real property is a taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In Lucas the owner had paid nearly one million dollars for two residential lots in a beachfront community on an island, intending to build single family homes. Two years later the state adopted an act that barred the owner from building any permanent structures on the land. The state trial court had found that the state law in question had deprived the owner of the lots "of any reasonable economic use of the lots." The Supreme Court found that the owner had suffered a taking. The Court referred to the denial of "all economically beneficial or productive use of land" (505 U.S. at 1015), the denial of "economically viable use" (505 U.S. at 1016), and "deprivation of all economically feasible use" (505 U.S. at 1016 n.7). Typically, this situation may arise when the government action requires a parcel of land to be left substantially in its natural condition, or prohibits development for a temporary but indefinite period. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). By comparison, a government action that deprives property of its most beneficial use, but not other uses, is not necessarily a taking. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

In Goldblatt a company had mined sand and gravel on its 38-acre tract in the town for more than 30 years, creating a 20-acre lake with an average depth of 25 feet. Meanwhile, the town had grown around the site and become densely populated. As a safety measure, the town prohibited the excavation of sand and gravel below the groundwater level. The Court ruled this was a valid exercise of the town's police powers, even though the practical effect was to make further mining on the site impossible. The record before the Court did not show that the town's ordinance had destroyed all the value of the land.

Unfortunately, the United States Supreme Court has not explained what the property interest is against which the loss of value is to be measured. In some cases the Court evaluated the economic impact of a regulation with respect to the property as a whole. Since economically viable use of the property remained available, even though it was not the owner's desired use, there was no taking. Cf. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) (owner of subsurface coal required to leave some coal in the ground to prevent surface subsidence); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (denial of permission to build skyscraper above owner's existing train station). In another opinion the Court noted the existence of uncertainty concerning the calculation of the loss of value. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

C. Land-Use Exaction

An exception to the two categorical rules is a land-use exaction—a government demand that a landowner grant an easement allowing public use of a portion of the property as a condition of obtaining a development permit. Such exactions are allowed where the benefit conferred by the government is sufficiently related to the property and roughly proportional to the impact of the proposed development. For example, as a condition for permission to develop a subdivision the government may require easements for public roads and bike trails and the dedication of undeveloped land for parks and open spaces. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); but see Dolan v. City of Tigard, 512 U.S. 374, 389 (1994) (criticizing Billings Properties for stating a standard that is too lax to protect adequately private property rights).

The owner of a house on waterfront property may not be required to grant a public easement across his property as a condition to replacing an existing house with a new dwelling, because the connection between the permit to build and the government interest in access to the beach is insufficient. However, the owner could be required to observe certain size and height restrictions so that the new construction would not block the public's view of the water. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). Similarly, it is lawful to require a property owner who applies for a permit to expand the size of a store and parking lot to leave undeveloped a vegetated strip in a flood plain. There is a connection between the proposed development and the government interest in flood control. But the government goes too far if it also requires the vegetated strip in the flood plain to be open to the public. Dolan v. City of Tigard, 512 U.S. 374 (1994).

D. Fact-Specific Balancing

When the regulation does not involve a permanent physical invasion of the property or the destruction of all economically beneficial use or a land-use exaction, the courts engage in an ad hoc, fact-specific balancing of the public interest and private loss to assess whether the regulation forces some property owners to bear burdens that should, in fairness and justice, be borne by the public as a whole. Although there is no set formula, the courts often examine the following factors to assess the severity of the burden imposed by the government: (1) the character of the government action, (2) the extent to which the action has interfered with reasonable investment-backed expectations of the owner; and (3) the magnitude of the economic impact of the regulation on the owner.

1. Character Of Government Action

The character of the government action focuses on the severity of the burden the government imposes on property rights. At one extreme, if the government action involves a permanent physical occupation of the property or the denial of all economically viable use of the land, there is a taking and further analysis is unnecessary. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). If a regulation abolishes one or more “strands” composing the “bundle” of rights embodied in the concept of “property,” a taking may have occurred, but further analysis is usually required. However, barring the inheritance of certain interests in land was a taking. Hodel v. Irving, 481 U.S. 704 (1987). In contrast, a law barring the sale of eagle feathers did not amount to a taking. Andrus v. Allard, 444 U.S. 51 (1979). Similarly, a law barring the shooting of game farm animals was not a taking. Kafka v. Montana Department of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8. At the other extreme, if the government action involves the traditional exercise of police powers to promote the public health, safety, and welfare, it is unlikely that the regulation has taken private property. Similarly, if the government regulation simply enforces established principles of nuisance law, there is no taking.

2. Reasonable Investment-Backed Expectations

The extent to which the regulation has interfered with the reasonable investment-backed expectations of the property owner is an objective test. For example, if the owner purchased land in order to subdivide it and after the property was being developed new government regulations barred further development, then the impact of the government action on the investment-backed expectations of the owner would be obvious. In contrast, if existing government regulations restrict land uses and the owner purchased the property with the intention of developing it in a manner already limited by the government, the owner’s expectations would not be reasonable. For highly regulated activities, such as mining, the owner of mineral rights does not have a reasonable expectation that a mine can be developed without compliance with government regulations. Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

3. Economic Impact

The magnitude of the economic impact on the value of the property reflects the severity of the burden imposed on private property rights by the government regulation. The economic impact is measured by the change in the fair market value of the property caused by the government regulation. This compares the value that was taken from the property with the value that remains in the property. The focus is on the owner's loss, not the government's gain. However, a substantial reduction in the value of a property or a denial of its most profitable use is not necessarily a taking requiring compensation.

II. CHECKLIST QUESTIONS

Agency staff should use the following questions, and the checklist and flowchart in assessing the impact of a proposed agency action on private property as required by Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105. A thorough assessment requires a careful review of all of the issues identified in these materials. Court decisions concerning takings questions arise in the context of specific facts. Although these materials are based upon court decisions, slight differences in the facts may lead to different conclusions regarding whether a taking is involved. If the application of the checklist to a particular proposed agency action is not clear, agency legal staff should be consulted.

1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?

The Private Property Assessment Act does not apply to the great number and variety of state agency actions outside of this context, such as personal property, worker safety regulations, workers' compensation, or insurance and securities regulation.

2. Does the action result in either a permanent or indefinite physical occupation of private property?

Regulation that results in a permanent or indefinite physical occupation of all or a portion of private real property will constitute a taking.

3. Does the action deprive the owner of all economically beneficial use of the property?

Regulation that requires a parcel of private land to be kept in its natural state may constitute a taking.

- 4. In the case of a land-use exaction, does the action require a property owner to dedicate a portion of property or to grant an easement? If so, there is a taking unless both of the following questions are answered affirmatively: (a) is there a reasonable, specific connection between the government requirement and legitimate state interests and, (b) is the government requirement roughly proportional to the impact of the proposed use of the property?**

Sometimes the developer of property is required, as a condition to obtaining permits, to set aside a portion of the land for such public uses as roads, utilities, and recreation. When the government requires that property be made available for certain purposes, there must be a reasonable, specific connection to legitimate state interests. In addition, the nature and extent of the government's requirements must be roughly proportional to the impact of the proposed development and specifically designed to prevent or compensate for adverse effects of the proposed development. A precise mathematical calculation is not required. Nevertheless, the agency must make an individualized determination that the requirements imposed by the government are related in both nature and extent to the impact of the proposed use of the property. Regulations such as those requiring subdivision developers to dedicate a certain percentage of areas to public streets and open spaces are normally allowed because there is a specific connection between the requirements and the legitimate public interest in the prevention of excessive congestion and because such requirements are roughly proportional to the impact of the development. Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994).

- 5. Does the action deny a fundamental attribute of ownership?**

This question is related to the metaphor that conceives of property as consisting of a "bundle" of rights. Among the fundamental attributes of ownership are the rights to possession, to exclude others, to use, and to dispose of, the property. The denial of a single strand in the bundle does not always amount to a taking of property for which compensation is required. In the interest of flood control, government may prohibit a property owner from developing land in a flood plain, but government may not require the owner, without compensation, to grant the public access to the flood plain. Dolan v. City of Tigard, 512 U.S. 374 (1994).

- 6. Does the action have a severe impact on the value of the property?**

The purpose of this question is to evaluate whether the proposed government action goes too far in the regulation of the use of property so that a taking requiring compensation has occurred. Although a reduction in property value alone is not a taking, a severe reduction in value may indicate that, in fairness, the economic injuries caused by the government action should be compensated by the government. No clear, concise test exists to separate a compensable regulatory taking from those government actions that do not constitute compensable takings. Nevertheless, the Courts have identified three

factors of particular significance: (1) the character of the government action; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations of the owner; and (3) the magnitude of the economic impact of the regulation on the property owner. Applying these factors, government action prohibiting the erection of a skyscraper over a historic building was not a taking. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Although the enactment of septic regulations diminished the value of certain property, there was no taking because the regulation was substantially related to the legitimate government interest of protecting the health, safety, and general welfare of the public and did not deny owners economically viable use of their land. McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991).

The annexation of land to a municipality was allowed without compensation as a legitimate exercise of government powers, even though the value of the property was diminished. Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993).

7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally?

The Takings Clause of the Montana Constitution contains “or damaged” language that applies to consequential damages to property affected by condemnation or inverse condemnation. The “or damaged” language does not apply to regulatory takings. Buhmann v. State, 2008 MT 465, ¶¶ 60-74, 348 Mont. 205, 201 P.3d 70. However, where the government action results in a permanent or indefinite physical occupation of all or a portion of private real property or deprives the owner of all economically beneficial use of the property, the “or damaged” language should be considered. To constitute damage, the impact of government action on property must be direct, peculiar, and significant. Thus, land that becomes waterlogged because of the effect of an adjacent government irrigation project on the ground water table is damaged and compensation is required. Rausser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632 (1977). Construction that lowers the grade of a city street by seven feet, thus denying homeowners fronting the street with easy access to the street, damages their property. Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903). In contrast, landowners on a street subjected to increased traffic because of bridge construction have not suffered damage under the takings clause of the Montana Constitution. Although the value of the property for residential use has decreased, the value for commercial use has increased. Adams v. Department of Highways, 230 Mont. 393, 753 P.2d 846 (1988). However, if government road construction requires the physical taking of some property and other property adjacent to the road is diminished in value for its permitted use by 30% or more because of increased traffic or drainage problems, the remaining homeowners may be entitled to compensation for damage. Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982).

CONCLUSION

If the use of the guidelines, questions, checklist, and flowchart indicates that a proposed agency action has taking or damaging implications, the agency must prepare an impact assessment in accordance with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105. Agencies should develop internal procedures to ensure that agency legal staff are consulted during this process.