

LEGAL REVIEW NOTE

LC#: LC0801, Redo Legal Review Copy, as of February 13, 2015

Short Title: Revise laws related to property right sales

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Date: February 14, 2015

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0801, as drafted, requires that the sale or transfer of surface rights, mineral rights, or water rights located in Montana to the federal government, another state, or a foreign government must be ratified by a majority vote of each house of the Legislature. Section 2.

LC0801 may raise potential constitutional conformity issues with respect to Article II, section 3, of the Montana Constitution, which addresses inalienable rights. Article II, section 3, of the Montana Constitution provides as follows:

Section 3. Inalienable rights. All persons are born free and have certain

inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property**, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (Emphasis added).

Pursuant to Article II, section 3, of the Montana Constitution, a potential constitutional conformity issue may arise as to whether LC0801 may impair the right of a private property interest owner to sell or transfer their property by requiring a majority vote of each house of the Montana Legislature in order to approve the sale or transfer. Private property ownership is considered by the courts to be a fundamental right, and a court must strictly construe a statute that may impair that right. *City of Bozeman v. Vaniman*, 264 Mont. 76, 79 (1994). The Montana Supreme Court has held that the right to acquire, possess, and protect property in all lawful ways cannot be invaded, unless the public health, morals, or safety or the general welfare requires interference. *Iverson v. Dilno*, 44 Mont. 270, 119 P. 719 (1911); see also *W. Energy Co. v. Genie Land Co.*, 227 Mont. 74, 737 P.2d 478 (1987).

LC0801 may also raise potential constitutional conformity issues with respect to the Property Clause of the U.S. Constitution, which provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. U.S. Const., Art. IV, sec. 3, cl. 2.

Pursuant to the Property Clause, Congress has enacted laws that authorize and direct the purchase of particular lands for the Fish and Wildlife Service, the U.S. Forest Service, and the Bureau of Land Management.

The United States Supreme Court has concluded that the federal power under the Property Clause "is without limitations." See *Kleppe v. New Mexico*, 426 U.S. 529, at 539 (1976) and *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

The United States Supreme Court has also repeatedly held, under the Property Clause and the Supremacy Clause of the United States Constitution, that absent federal legislation to the contrary, state consent is not required or necessary for the federal government to be able to acquire lands within the states. See *Fort Leavenworth R. Co. v. Lowe, Sheriff, etc.*, 114 U.S. 525 (1885); *Mayo v. United States*, 319 U.S. 441 (1943); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *North Dakota v. United States*, 460 U.S. 300 (1983); and see also *United States v. Parker*, 2014 U.S. Dist. LEXIS 105452, 38-39 (W.D.N.C. Aug. 1, 2014).

Consequently, LC801 as drafted may also raise potential constitutional conformity issues with the Property Clause and the Supremacy Clause of the U.S. Constitution.

Requester Comments: See attached response by Rep. Harris.

An enactment of the legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. Alexander v. Bozeman Motors Inc, Ekland v. Wheatland County, St. v Pyette, and Elliot v Dept of Revenue

HB 341 only presents transparency of certain sales or transfers of surface rights mineral rights or water rights.

With or without HB 341, Montana citizens have the authority to accept or reject sales or transfers to foreign entities through their legislative voice.

HB 341 will cause these sales or

transfers to be brought to the attention
of the peoples legislature, giving them
the opportunity to accept or reject them.