

LEGAL REVIEW NOTE

LC#: LC1749, To Legal Review Copy, as of
January 19, 2015

Short Title: Prevent the federal government from
selling public lands in Montana

Attorney Reviewer: Todd Everts

Date: January 30, 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:

LC1749, as drafted, prohibits land in the state of Montana that is owned or controlled by an agency of the United States government from being sold. Section 1. Therefore, LC1749 may 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 disposal of particular lands for the Fish and Wildlife Service, the U.S. Forest Service, and the Bureau of Land Management.¹

The United States Supreme Court has concluded repeatedly 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 in *Kleppe* further stated:

But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. *Mason Co. v. Tax Comm'n of Washington*, 302 U. S. 186, 197 (1937); *Utah Power & Light Co. v. United States*, 243 U. S., at 403-405; *Ohio v. Thomas*, 173 U. S. 276, 283 (1899). And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U. S. Const., Art. VI, cl. 2. See *Hunt v. United States*, 278 U. S., at 100; *McKelvey v. United States*, 260 U. S. 353, 359 (1922). As we said in *Camfield v. United States*, 167 U. S., at 526, in response to a somewhat different claim: "A different rule would place the public domain of the United States completely at the mercy of state legislation."

As noted by the United States Supreme Court in *Kleppe*, LC1749 as drafted may also raise potential constitutional conformity issues with respect to the Supremacy Clause of the U.S. Constitution, which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. U.S. Const., Art. VI, cl. 2.

The Supremacy Clause provides that if a conflict between state and federal law exists, federal law controls and state law is preempted. The U.S. Supreme Court has held that "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. National Solid Wastes Mang. Assoc.*, 505 U.S. 88, 108 (1992). In addition, the U.S. Supreme Court has held that states must "enact, enforce, and interpret state law in such

¹For the Fish and Wildlife Service, see 16 U.S.C. 668dd(a)(5) and (6) and (b)(3) and 43 U.S.C. 1714(j); for the U.S. Forest Service, see 16 U.S.C. 473, 16 U.S.C. 1609, 16 U.S.C. 519, 7 U.S.C. 1010-1012, 16 U.S.C. 478a, 16 U.S.C. 521d, e, and f; and 16 U.S.C. 479a; for the Bureau of Land Management, see 43 U.S.C. 1715-1716, 43 U.S.C. 1713(a), 43 U.S.C. 641, 43 U.S.C. 321, and 43 U.S.C. 869.

fashion as not to obstruct the operation of federal law . . .” *Printz v. U.S.*, 521 U.S. 898, 913 (1997).

Consequently, LC1749 as drafted may prohibit land in the state of Montana that is owned or controlled by an agency of the United States government from being sold. That prohibition may raise potential constitutional conformity issues with the Property Clause and the Supremacy Clause of the U.S. Constitution.

Requester Comments: See attached requestor comments.

LC 1749 LEGAL NOTE - REQUESTOR COMMENTS: by Sen J. Fielder

Regarding the Supremacy Clause, legislative legal staff should note, above all other notes, that when considering whether a federal law pre-empts a state law, Article VI clause 2, (commonly referred as the supremacy clause) must be read in full its full context, and it must be remembered that the supremacy of federal laws over state laws has limitations.

The language in the Supremacy Clause states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land.” Inclusion of the phrase “in Pursuance thereof” must not be overlooked because it specifically requires that laws enacted by Congress must be in accomplishing, or carrying out the United States Constitution. Therefore the supremacy of federal laws over state laws has limitations. To state otherwise is incorrect and a disservice to the legislators and the state.

Therefore, staff’s opinion is in error when unequivocally stating as fact in a legal note: “The Supremacy Clause provides that if a conflict between state and federal law exists, federal law controls and state law is pre-empted.” The Constitution does not say this and courts have repeatedly held that any federal law that is repugnant to the U.S. Constitution is invalid, and hence not supreme to a state law which is not repugnant to the U.S. Constitution even if it is in conflict with a federal law.

RELEVANT DEFINITIONS:

Pursuance: A following; prosecution, process or continued exertion to reach or accomplish something; as in pursuance of the main design. -American Dictionary of the English Language, Noah Webster 1828.

Pursuant: A following after or following out. To execute or carry out in accordance with or by reason of something. “Pursuant to” means “in the course of carrying out: in conformance to or agreement with: according to” and, when used in statute is a restrictive term. - Black’s Law Dictionary, Sixth Edition 1990.

Regarding the Property Clause, staff incorrectly cited this portion of the clause, and failed to cite the remainder. They inserted a period where a semicolon exists, and excluded the remainder of the sentence which is critical to the state’s purview, “and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

What is a claim of a particular state? Should this provision in the Constitution be ignored?

In regards to federal control of public lands, both the U.S. Congress and the Supreme Court have affirmed, “The right of every new State to exercise all powers of government which belongs to and may be exercised by the original States of the Union must be admitted and remain unquestioned except so far as they are temporarily deprived of control over the public lands.” - *Pollard v. Hagan* 44 U.S. 212 (1845) 44 U.S. 212 (How.); *See also Permoli v. Municipality No 1 of New Orleans*, 3 How. 589, 609 [1845]; *Coyle v Smith*, 221 U.S. 559 [1911]; *McCabe v Atchison, T. & S.F.R. Co.* 235 U.S. 151 [1914]; *Illinois Central R. Co. v Illinois*, 146 U.S. 387, 434 [1892]; *Knight v United Land Asso.* 142 U.S. 161, 183 [1891]; *Escanaba & I.M. Transp. Co. v. Chicago*, 107 U.S. 678, 688 [1883]; *Weber v. State Harbor Commrs.* 18 Wall. 57, 65 [1873]; *Texas v. White*, 7 Wall. 700, 722 [1869]; *Hawkins v Bleakley*, 243 U.S. 210, 210, 217 [1917]. *The Constitution of the United States of America (annotated), Annotations of cases*

decided by the supreme court of the United States to Jan 1, 1938, 74th Congress 2d Session, SENATE Document No. 222, Page 539 - Article IV – STATES RELATIONS Sec 3. – New States and Territories, Cl 1. – Admission, Effect of Admission, SOVEREIGNTY IN GENERAL.

Given the definition of the word “temporarily” as defined in Black’s Law Dictionary and the 1828 American Dictionary of the English Language, the above affirmation from the United States Congress and numerous Supreme Court Rulings, it cannot be reasonably construed that federal control over the public lands in Montana, for the entire duration of 126 years since Montana became a State and/or forever into the future, can be construed as “temporarily” depriving the state of control over the public lands.

RELEVANT DEFINITIONS:

Temporarily: For a time only; not perpetually. --American Dictionary of the English Language, Noah Webster 1828.

Temporarily: Lasting for a time only, existing or continuing for a limited time, not of long duration, not permanent, transitory, changing, but a short time.-- Black’s Law Dictionary, Sixth Edition 1990.

For example the high court made the following citations in ruling against the federal government in favor of the state in *Shelby County v Holder* (2013):

- “Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of equal sovereignty” among the States.” --Northwest Austin, supra, at 203 (citing *United States v. Louisiana*, 363 U. S. 1, 16 (1960); *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845); and *Texas v. White*, 7 Wall. 700, 725–726 (1869); emphasis added).
- “Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.”” -- *Coyle v. Smith*, 221 U. S. 559, 567 (1911).
- “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” -- *Id.*, at 580.
- “Coyle concerned the admission of new States, and Katzenbach rejected the notion that the principle operated as a bar on differential treatment outside that context.” 383 U. S., at 328–329.
- “At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.” 557 U. S., at 203.

There are many examples. The point is that rather than solely citing federal positions on matters of constitutional accordance, legislative legal staff who work for the State of Montana should also research, find, and provide relevant case law and facts of law which defend or affirm the sovereignty of the states in the face of federal blandishments.