

LEGAL REVIEW NOTE

Bill No.: HB 554

LC#: LC 2972, To Legal Review copy, as
of February 17, 2021

Short Title: Require legislative approval of
national heritage areas, historic trails

Attorney Reviewer: Todd Everts
Cori Hach

Date: February 20, 2021

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

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.

*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).*

Legal Reviewer Comments:

HB 554 provides that "[a]ny designation by the United States national park service of a national heritage area or national historic trail, pursuant to 54 U.S.C. 300101 et seq., that extends beyond federal land requires the approval of the legislature." As drafted, this provision may raise

potential constitutional conformity issues with respect to the Supremacy Clause and the Property Clause of the United States Constitution.

The Supremacy Clause of the United States Constitution provides as follows:

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, any Thing 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 United States Supreme Court has held that "under 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 Mgmt. Assoc.*, 505 U.S. 88, 108 (1992). In addition, the United States Supreme Court has held that states must "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law . . ." *Printz v. U.S.*, 521 U.S. 898, 913 (1997).

National Heritage Areas and National Historic Trail designations are each accomplished by enabling legislation that does not require state consent to be effective. 54 U.S.C. 300101, 16 U.S.C. 1244. Enabling legislation for National Heritage Areas typically contains extensive protections for state and private property owners,¹ and that a National Historic Trail designation by default applies only on federal land; relevant state, local government, or private interests must apply to have those lands included.² The addition of a state approval process for a designation to be effective where no such approval process exists in federal law could possibly be interpreted as

¹ See P.L. 116-9, Sec. 6001, "Nothing in this [designation of new National Heritage Areas]—(1) abridges the rights of any property owner (whether public or private), including the right to refrain from participating in any plan, project, program, or activity conducted within a National Heritage Area designated by subsection (a); (2) requires any property owner—(A) to permit public access (including access by Federal, State, or local agencies) to the property of the property owner; or (B) to modify public access or use of property of the property owner under any other Federal, State, or local law; (3) alters any duly adopted land use regulation, approved land use plan, or other regulatory authority of any Federal, State, Tribal, or local agency; (4) conveys any land use or other regulatory authority to the local coordinating entity; (5) authorizes or implies the reservation or appropriation of water or water rights; (6) enlarges or diminishes the treaty rights of any Indian Tribe within the National Heritage Area; (7) diminishes—(A) the authority of the State to manage fish and wildlife, including the regulation of fishing and hunting within a National Heritage Area designated by subsection (a); or (B) the authority of Indian Tribes to regulate members of Indian Tribes with respect to fishing, hunting, and gathering in the exercise of treaty rights; or (8) creates any liability, or affects any liability under any other law, of any private property owner with respect to any person injured on the private property."

² See 16 U.S.C. 1242, "Only those selected land and water based components of an historic trail which are on federally owned lands and which meet the national historic trail criteria established in this chapter are included as Federal protection components of a national historic trail. The appropriate Secretary may certify other lands as protected segments of an historic trail upon application from State or local governmental agencies or private interests involved if such segments meet the national historic trail criteria established in this chapter and such criteria supplementary thereto as the appropriate Secretary may prescribe, and are administered by such agencies or interests without expense to the United States."

a provision "which interferes with or is contrary to federal law" in violation of the Supremacy Clause.

The Property Clause of the United States Constitution may also be relevant to the extent that HB 554 could be interpreted to prevent a designation encompassing state or private lands from going into effect even with respect to the federal property portion of the designation. The Property Clause provides as follows:

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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. U.S. Const, Art. IV, sec. 3, cl 2.

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 further stated in *Kleppe*:

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." *Kleppe*, 426 U.S. at 542-43.

HB 554, as drafted, may be interpreted to add requirements for designating National Heritage Areas and National Historic Trails that conflict with the requirements contained in federal law, raising potential constitutional conformity issues with the Supremacy Clause of the United States Constitution. HB 554, as drafted, may also be interpreted to prevent the federal government from enacting any designation that includes state or private lands, raising potential constitutional conformity issues with the Property Clause of the United States Constitution.

Requester Comments: