LEGAL REVIEW NOTE

Bill No.: SB 210

LC#: LC3172, To Legal Review Copy, as of January 6, 2021

Short Title: Generally revise certain labeling laws

Attorney Reviewer: Todd Everts
Jameson Walker

Date: January 6, 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:

SB 210, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, which provides that the Constitution, federal laws passed pursuant to the Constitution, and treaties made under the Constitution's authority constitute the supreme law of the land. Under the Supremacy Clause, if a conflict between state law and federal law exists, federal law prevails. California v. ARC America Corp., 490 U.S. 93 (1989), and Jones v. Rath Packing, 430 U.S. 519 (1977).

In 2005, Montana passed House Bill 406 (Chapter 279, 2005 Laws of Montana), the "Country of Origin Placarding Act", requiring a placard be conspicuously placed in grocery stores indicating that the meat products were produced in Montana. House Bill 406 (2005) was never implemented. House Bill 406 (2005) included a contingent voidness section (Section 8, Ch. 279, L. 2005) that voided the Act "upon the funding and full implementation of federal mandatory country of origin labeling, adopted as part of the 2002 federal farm bill". Pursuant to the final rule that was adopted by the federal Department of Agriculture and that became effective on March 16, 2009, as found on page 2658, Volume 74, of the Federal Register, mandatory country of origin labeling was implemented at the federal level and House Bill 406 (2005) was voided. During the 2005 Legislative Session, potential constitutional preemption conformity issues were raised during both the legislative legal review process and the Senate and House committee hearings on House Bill 406 (2005) (House Bill 406 (2005) hearing minutes for the Senate (March 25, 2005) and House (February 15, 2005)).

Country of Origin Labeling (COOL) is a federal consumer labeling law (2002 and 2008 federal farm bills and 2016 Consolidated Appropriations Act amended the Agricultural Marketing Act of 1946) that requires retailers to identify the country of origin on certain foods. The 2016 Consolidated Appropriations Act removed muscle cut beef and pork and ground beef and pork from the COOL federal requirements in order to bring the United States into compliance with a ruling by the World Trade Organization that COOL at the national level violates trade treaty obligations. On March 2, 2016, the U.S. Department of Agriculture (USDA) through rule, removed the muscle cut beef and pork and ground beef and pork from the mandatory COOL requirements.

In June 2016, cattle producers in Washington state filed suit alleging that USDA was unlawfully allowing imported beef to be sold to consumers without a country of origin label and that country of origin labeling on beef and pork products should be reinstated. The U.S. District Court judge dismissed the lawsuit, ruling that the statute of limitations prohibited the producer's challenge and that Congress clearly intended to have the COOL labeling end. Ranchers-Cattlemen Action Legal Fund v. USDA, 2018 U.S. Dist. LEXIS 94527.

In addition to the federal COOL requirements regarding labeling, Congress through the passage of the Federal Meat Inspection Act (FMIA) of 1906 extensively regulates the labeling of meat products and Section 678 of FMIA expressly preempt state laws regarding marketing, labeling, packaging ingredient requirements. FMIA's preemption clause provides:

> Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded . . . . (Section 678, FMIA)

Numerous federal court decisions have upheld FIMA's preemption of state law: Natl. Meat Assn. v. Harris, 132 S. Ct. 965, 968 (2012); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008); Bates v. Dow Agrosciences, 544 U.S. 431 (2005), Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)); Jones v. Rath Packing, 430 U.S. 519 (1977); Holk v. Snapple Bev. Corp., 575 F.3d 329 (3d Cir. 2009); Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237 (3d Cir. 2008); and Sanderson Farms, Inc. v. Tyson Foods, Inc., 549 F. Supp. 2d 708, 719 (D. Md. 2008).

SB 210, as drafted, takes a different approach than the provisions of House Bill 406 (2005) regarding country of origin placarding of beef and poultry products. Specifically, the bill requires a retailer who sells beef, pork, to make an effort to display a placard, label, or identifying mark that is clearly visible and readily viewable by the public. The placard must designate whether the product is derived exclusively from animals born, raised, and slaughtered in the United States or whether it is of imported origin. The placard, label, or identifying mark must be placed in the immediate vicinity of the beef or pork and readily viewable by the public.

It is unclear whether a court would weigh the distinctions between SB 210 and House Bill 406 (2005) heavily. While not requiring the labeling of beef or pork directly, SB 210 nevertheless requires retailers to display the country or origin relating to the beef and pork.

SB 210, as drafted, may raise potential constitutional conformity issues with respect to the Supremacy Clause pursuant to the United States Supreme Court holdings and the federal circuit and district court holdings noted in this legal review note.

Requester Comments:

Before getting to the legal response to the legal note it needs to be clarified that HB 406 (2005) was Montana law (2007 MCA 30-12-701) https://leg.mt.gov/bills/2007/mca_toc/30_12_7.htm and enforced until Federal COOL rules were enforced March 16, 2009.

HB 406 (2005) MCA 30-12-701 was never challenged in court.

The Legal Review Note for HB 324 warns this bill may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution. A closer examination of the Supremacy Clause in relation with HB 324 and the federal legislation cited in the Legal Review Note casts doubt on these concerns.

I. ISSUE

Does Montana HB 324 run afoul of the Supremacy Clause under the U.S. Constitution because of Congressional preemption via the Federal Meat Inspection Act, or the Agricultural Marketing Act?

No, the proposed HB 324 language is not expressly or impliedly preempted by Congress in the text of the 1906 Federal Meat Inspection Act (FMIA), or the 1946 Agricultural Marketing Act

(AMA). This memo outlines the doctrine of preemption under the Supremacy Clause, examines the text of the AMA and FMIA, and argues HB 324 does not create an actionable preemption issue. First, however, it's important to understand how courts find that state laws conflict with federal laws.

II. RULE

Under the Constitution, valid Federal Law may supersede state law via the Supremacy Clause either through express or implied preemption.

As the note informs, the second clause of Article VI of the United States Constitution provides that all valid federal laws and treaties are the supreme law of the land. Moreover, if state laws conflict with valid federal regulation, the federal law may preempt the state rules. However, it's often not clear what counts as preempted activity when Congress and the states occupy the same regulatory space. Thus, the courts developed a multi-pronged test to discern what overlaps trigger the Supremacy Clause, and which ones are just cases of sound federalism. This is well established law, and the note rightly cites, among others, Jones v. Rath Packing, 430 U.S. 519 (1977).

In Rath Packing, the Court considers the difference between federal and California state labeling rules as they pertain to the reported net weight of bacon and flour. In that case, California ventured to draft weight labeling requirements that differed from the federal weight labeling rules. To consider whether or not California's rules were pro se invalid under the Supremacy Clause, the Court turned to the preemption test.

Express Preemption

That test first asks if Congress has expressly reserved power directly over the issue at hand. It's as straightforward as constitutional law comes. "It is well established that within the Constitutional limits, Congress may preempt state authority by so stating it in express terms." See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development 461 U.S. 190 (1983).

Implied Preemption

Absent explicit preemptive language, Congress' intent to supersede state law may be implied in one of two ways: conflict preemption, and field preemption.

Implied field preemption occurs when:

2. "a scheme of federal regulation . . .

4. (is) so pervasive as to make reasonable the inference

6. that Congress left no room for the States to supplement it,' because

2. 'the Act of Congress may touch a field in which the federal interest is so dominant that

the federal system will be assumed to preclude enforcement of state laws on the same subject,'

4. Or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Id quoting Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U. S. 141, 458 U. S. 153 (1982), quoting Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 331 U. S. 230 (1947).

Implied conflict preemption can occur in either of two ways:

1. When compliance with both federal and state law is impossible. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 373 U. S. 142-143 (1963)

2. Or, when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. See Hines v. Davidowitz, 312 U. S. 52, 312 U. S. 67 (1941) We address the elements of these rules in turn, and in light of the FMIA and AMA cited by the note.

VII. ANALYSIS

Montana SB 210 does not trigger preemption under the Supremacy Clause because Congress has not expressly, or impliedly preempted this type of regulation.

Neither the FMIA, nor the AMA explicitly preempt Montana from passing the country of origin placarding requirements proposed in SB 210. Moreover, reading the whole text of each of those acts does not imply Congressional intent to completely occupy the field of origin placarding, nor is there an implied conflict between the federal rules and the Montana proposal under SB 210. In fact, quite the contrary. Both acts can be read as explicit approval of — if not an invitation for — states to lend their aid on these issues. Our analysis begins with the text of the FMIA and the AMA in search of a nonexistent express preemption.

Express preemption analysis of the AMA

The note correctly cites the AMA as one of two relevant sources of federal regulatory structure regarding federal consumer labeling (the other being the FMIA). What the note does not do, however, is point to any specific provision in the AMA that expressly preempts Montana from passing a country of origin placarding law. This comes in spite of several other specific, expressed preemptions in the AMA.

The first AMA preemption covers livestock price reporting, not country of origin placarding, under 7 U.S.C. §1636h, which commands that:

"In order to achieve the goals, purposes, and objectives of this chapter on a nationwide basis and to avoid potentially conflicting State laws that could impede the goals, purposes, or objectives of this chapter, no State or political subdivision of a State may impose a requirement that is in addition to, or inconsistent with, any requirement of this subchapter with respect to the submission or reporting of information, or the publication

of such information, on the prices and quantities of livestock or livestock products." (emphasis added).

The second express preemption under the AMA covers labeling of genetically engineered food. See 7 U.S.C. §1639i(b) (2018), but again falls silent on anything related to country of origin labeling or placarding. It is thus reasonable to conclude that Congress did not expressly preempt Montana from passing provisions found in SB 206. Express preemption analysis of the FMIA Congress has not expressly prohibited states from regulating under the FMIA. The note cites 21 U.S.C. §678 (2014) as potential conflicting authority, but the note only quotes part of the law in that provision. There is a clause prohibiting some forms of state regulation, and a clause expressly inviting others. The relevant text reads:

> "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter ... (emphasis added) This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." (emphasis added)

Note that the statute does not expressly prohibit state country of origin labeling or placarding standards. Moreover, the labeling requirements alluded to in §678 show up in §607. Those requirements cover:

> (a) Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors.
>
> (b) Information on articles or containers; legible form.
>
> (c) Labeling: type styles and sizes; definitions and standards of identity or composition; standards of fill of container; consistency of Federal and Federal-State standards.
>
> (d) Sales under false or misleading name, other marking or labeling or in containers of misleading form or size; trade names, and other marking, labeling, and containers approved by Secretary.
>
> (e) Use withholding directive respecting false or misleading marking, labeling, or container; modification of false or misleading matter; hearing; withholding use pending proceedings; finality of Secretary's action; judicial review; application of section 194 of title 7.
>
> (f) Lamb and mutton

Because §607 does not mention country of origin labeling requirements, and because §607 is the only place where labeling requirements are considered by §678, one cannot read the two provisions together as an express and clear declaration by Congress to preempt state authority on country of origin labeling for beef and pork; much less read such a preemption out of either

section in their own right. Thus, it's unreasonable to conclude there's an express preemption here, especially when §678 spells out a preservation of state rights on the issue.

Implied conflict preemption of the AMA and the FMIA

As the note details, there currently exists no country of origin labeling regulation on beef and pork in the AMA or the FMIA. There also exists no prohibition on country of origin labeling for these meats in either statute. Ergo, complying with a Montana COOL regulation would not make it impossible to comply with either the AMA or the FMIA.

Moreover, this reality also means SB 210 provides no obstacle to the accomplishment and execution of the full purpose and objective of Congress under the AMA or the FMIA. In fact, quite the contrary. The purpose of the AMA as stated in 7 U.S.C. §1635 is:

> "to establish a program of information regarding the marketing of cattle, swine, lambs, and products of such livestock that—
>
> (1) provides information that can be readily understood by producers, packers, and other market participants, including information with respect to the pricing, contracting for purchase, and supply and demand conditions for livestock, livestock production, and livestock products; …
>
> (3) encourages competition in the marketplace for livestock and livestock products." (emphasis added)

Alternatively, the FMIA finds under 21 U.S.C. §602 that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." (emphasis added). Surely, even a critical reading of SB 210 must concede that it represents the same driving values of the AMA and FMIA, let alone provide obstacle to their purpose.

Implied Field Preemption

Congress has not created a regulatory scheme under the FMIA so pervasive that it's reasonable to conclude any addition of state regulation is crowded out here. To the contrary, as quoted earlier, 21 U.S.C. §678 acknowledges the role of states in "making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter."

One simply cannot reason that Congress has completely filled the regulatory void on an issue when Congress explicitly acknowledges, in statute, that it has not. To do so would be to give meaning to a law in direct opposition to clear Congressional intent.

Moreover, the doctrine of implied field preemption demands Congress act "so unequivocally as to make clear that it intends no regulation except its own." See Rice v. Santa Fe Grain Elevator Corp., 331 U.S. 218, 331 (1947). Such unequivocal action isn't present in the

AMA. Rather, 7 U.S.C. §1621 calls for cooperation between the federal government, states and producers:

> "[i]n order to attain these objectives, it is the intent of Congress to provide for ... (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and marketing programs."

Additionally, the AMA speaks to Congress' intent in what it does not say. For example, the act enumerates two narrow, specific preemptions — one for reporting livestock prices and quantities, and one for genetically engineered labelling. Taken with the "intent" language in §1621, one can infer Congress envisioned a cooperative regulatory scheme as it drafted the AMA — or alternatively, it did not unequivocally express intent for an exclusive one.

VII. CONCLUSION

The Legal Review Note does a good job at raising a cursory examination of potential Supremacy Clause issues that could hypothetically be attached to SB 210. However, deeper analysis into the Supremacy Clause and preemption doctrine, argue Montana is within its right, and is not preempted by federal action, to pass, for a second time, a country of origin placarding or labeling law.

Analysis of the AMA and the FMIA cited in the note uncover zero instances where Congress expressly preempt Montana SB 210. Further, analysis holds there is no implied conflict preemption issue — because, as the note informs, there is no federal country of origin labeling law on beef or pork to conflict with. Finally, Congressional purpose statements in the FMIA and the AMA cut against an assumption of implied field preemption, because they envise regulatory schemes where states have a role to play. Alternatively, these intent statements deflate an argument that Congress has unequivocally expressed intent to exclusively regulate the issue.