LEGAL REVIEW NOTE

Bill No.: SB 390

LC#: LC0711, To Legal Review Copy, as of March 16, 2021

Short Title: Establish the Water Severance Beneficial Use Act

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Date: March 25, 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 390, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under Article VI, clause 2, of the United States Constitution. The Supremacy Clause provides that the United States Constitution and federal law "made in pursuance thereof" is the "supreme law of the land." According to the United States Supreme Court, the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal

law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). The United States Supreme Court has further held that "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) (citations omitted).

In 1976, the United States Congress enacted a provision that is codified in 15 U.S.C. § 391, which provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

In *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143-47 (1979), the United States Supreme Court reviewed an issue regarding whether a New Mexico state tax on electricity, which in effect applied only to electricity generated in New Mexico and sold out of state, violated 15 U.S.C. § 391 by imposing a discriminatory against out-of-state consumers. The state argued that an examination of New Mexico's entire tax structure was required to determine whether or not the electricity tax violated the federal statute. *Id.* at 149. The Supreme Court rejected this argument, reasoning the federal statutory provision was directed specifically at a state tax "on or with respect to the generation or transmission of electricity," not to the entire tax structure of the State. The Court stated that to "look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." *Id.* at 149-50. Because the electrical energy tax itself indirectly discriminated against electricity sold outside New Mexico, it violated 15 U.S.C. § 391 and likewise, the Supremacy Clause. *See also State v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984).

SB 390 as drafted provides for findings and a purpose to justify a fee on hydroelectric generation that does not provide a beneficial use to the people of the state. The fee must be imposed as a beneficial use fee, regardless of whether the electricity is generated by an agency of the federal government or a private producer that does not sell significant electricity to Montanans. The reasoning for the fee is to reimburse the people of the state for the beneficial use of the state's water. The statement of purpose provides the people of the state that receive electricity from hydroelectric generation in the state receive a corresponding benefit, and therefore a fee should not be imposed on this electricity.

Given that SB 390 as drafted imposes a fee on electricity that is generated and transmitted but exempts most electricity generated and transmitted in the state pursuant to section 4(3), it may raise potential constitutional conformity issues with the Supremacy Clause under Article VI, clause 2, of the United States Constitution. This legal note does not analyze the Commerce Clause of the United State Constitution which generally prohibits states from using their

regulatory power to discriminate in favor of in-state producers at the expense of those out-of-state, given that Congress exercised power to regulate commerce when it enacted 15 U.S.C. § 391.

Requester Comments: