

LEGAL REVIEW NOTE

Bill No.: HB 737

LC#: LC 4300, To Legal Review Copy, as
of February 16, 2023

Short Title: Revise laws related to coal
fired generating unit remediation

Attorney Reviewer: Todd Everts

Date: February 22, 2023

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:

As drafted, Section 1 of HB 737 requires that:

(1) A city or town where a coal-fired generating unit is located shall secure appropriate water rights and necessary real and personal property in accordance with Title 7, chapter 13, part 44, and this section to ensure an

adequate water supply is available if a coal-fired generating unit closes or retires, potentially jeopardizing access to a water supply.

(2) If the operator of a coal-fired generating unit owns, operates, or both owns and operates a conveyance necessary to maintain a public water supply system, as defined in 75-6-102, or owns the water rights necessary to supply a city or town with water, that operator shall provide perpetual operation of the conveyance and access to the necessary water rights. Operation and access include the cost of:

(a) electricity necessary to pump water over the lifetime of the conveyance to supply the necessary water supply; and

(b) maintenance of the conveyance to supply the necessary water supply, including replacement. (emphasis added)

Section 7-13-4405, MCA imposes specific requirements on a city or town's acquisition:

7-13-4405. Acquisition of water rights and other necessary property.

For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure appropriate water rights and the necessary real and personal property to make an adequate water supply available. The water rights and property may be acquired by purchase, appropriation, location, condemnation pursuant to Title 70, chapter 30, or in any other legal manner. (emphasis added)

Pursuant to 7-13-4404, MCA, if an agreement is not reached for the acquisition of a private water supply system, the city or town is required to use its eminent domain powers to acquire a water supply system, including water rights. The Montana Supreme Court has stated that

"*Mont. Code Ann. § 7-13-4404* provides that a city shall proceed to acquire the plant or water supply under the laws relating to the taking of private property for public use. *Mont. Code Ann. § 70-30-111* sets forth the standard of proof and the facts which must be found before private property may be taken for a public use and provides that before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings: (1) that the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary to such use; (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use; and (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected"

Missoula v. Mountain Water Co., 228 Mont. 404, 743 P.2d 590 (1987).

HB 737 may raise potential constitutional issues associated with Article II, section 29, of the Montana Constitution and the Fifth Amendment to the U.S. Constitution. Article II, section 29, provides in part: "Private property shall not be taken or damaged for public use without just

compensation to the full extent of the loss having been first made to or paid into court for the owner.” The Fifth Amendment provides that property shall not “be taken for public use without just compensation.” The Fifth Amendment to the U.S. Constitution applies to the states through the Fourteenth Amendment to the U.S. Constitution.

Article II, section 29, and the Fifth Amendment do not prohibit the government from interfering with private property. Rather, these provisions restrict the government’s power to physically appropriate or condemn private property. The U.S. Supreme Court has stated that the takings clause is “designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563 (1960).

The courts have established several rules for determining whether an interference with property constitutes a taking. For example, the U.S. Supreme Court has held that a permanent physical occupation of property by a government constitutes a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982). In addition, a governmental regulation that deprives a property owner of all economically beneficial use of the property also constitutes a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). Outside of these categorical rules, courts will apply a case-specific analysis to determine whether a taking has occurred. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). Recently, the U.S. Supreme Court ruled that a temporary physical invasion may constitute a taking for purposes of the Fifth Amendment. *See Arkansas Game and Fish Comm. v. United States*, 133 S. Ct. 511, 518 (2012).

Pursuant to Article IX, section 3, of the Montana Constitution, title to the water always remains with the state of Montana, but all existing rights to use any water for any useful or beneficial use are constitutionally recognized and confirmed and the use of state waters not previously claimed may be established and appropriated through the permitting process provided for in Title 85, chapter 2, MCA.

It is well settled that water rights are legally protected property rights. As the Montana Supreme Court explained in 1936, when a right has been fully perfected by diverting the water and applying it to a beneficial purpose, the right becomes a property right that can "only be divested in some legal manner". *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 294, 62 P.2d 206, 210 (1936).

The recognition that a water right is a form of real property came early in Montana’s history. For example, in *Sain v. Montana Power*, 20 F. Supp. 843 (D. Mont. 1937), the Court found that water rights were a form of real property and, further, that suits to adjudicate the extent and priority of water rights were similar to quiet title actions. This principle was also recognized in a 1924 decision from the Montana Supreme Court, in which the Court stated that "[a]n action to ascertain, determine and decree the extent and priority of the right to use of water partakes of the nature of an action to quiet title to real estate." *See Verwolf v. Low Line Irrigation Co.*, 70 Mont. 570, 227 P. 68 (1924).

The substantive nature of a water right as a form of real property is also illustrated by the

Montana Supreme Court's recognition that water rights may be acquired through adverse possession or prescription. Adverse possession is a method of acquisition of title to property by possession for a statutory period under certain conditions. A claim for adverse possession requires proof of open, notorious, exclusive, adverse, and continuous possession or use of the property for the statutory period of 5 years. *See Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986).

As drafted, HB 737 requires that an operator of a coal-fired generating unit shall provide perpetual operation of the conveyance and access to the necessary water rights to a city or town without the city or town purchasing or condemning the water rights. Section 7-13-4405, MCA requires that for the purposes of providing a city or town with an adequate water supply, water rights and property may be acquired by purchase, appropriation, location, condemnation pursuant to Title 70, chapter 30, or in any other legal manner.

The government requiring an owner of water rights to provide perpetual operation and conveyance and access to the owner's water rights without compensation by the government or the government condemning those water rights and providing compensation, may raise potential constitutional conformity issues associated with Article II, section 29, of the Montana Constitution and the Fifth Amendment to the U.S. Constitution.

Requester Comments: