

## LEGAL REVIEW NOTE

**Bill No.:** SB 466

**LC#:** LC3894, To Legal Review Copy, as of  
February 7, 2021

**Short Title:** Declare authority over intrastate coal

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**Date:** February 23, 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, SB 466 generally provides that the Montana Department of Environmental Quality has authority over coal mining and coal products within the state of Montana. Specifically, the draft provides that "[e]nvironmental regulation in Montana for all purposes of regulating business activity performed in Montana, when the products of such business activities are held, maintained, or retained within the borders of Montana, is the principal responsibility of the department." The draft further provides that the Department shall issue a permit to "operate any

Montana coal mine producing coal that is used commercially or privately in Montana and that is consumed or otherwise remains within the borders of Montana [...]." The draft additionally provides that certain activities relating to coal are "intrastate commerce and may not be subject to federal law or federal regulation under the authority of the United States congress to regulate interstate commerce." Finally, the draft provides that the "United States environmental protection agency, acting under the authority of the United States congress, lacks the authority to deny permits of operation to such coal mines and facilities as the products of these mines and facilities have not traveled in interstate commerce."

### Supremacy Clause

The federal Surface Mining Control and Reclamation Act of 1977 primarily regulates the effects of coal mining in the United States. The act generally requires standards, permitting, bonding, inspections and enforcement and restrictions relating to mines. In addition to the various requirements under the act, Section 506G, codified in 30 U.S.C. 1254(g), provides a specific preemption of state programs:

Whenever a Federal program is promulgated for a State pursuant to this Act, any statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations subject to this Act shall, insofar as they interfere with the achievement of the purposes and the requirements of this Act and the Federal program, be preempted and superseded by the Federal program. The Secretary shall set forth any State law or regulation which is preempted and superseded by the Federal program.

Thus, the act provides that the federal program supersedes state regulation.

The Supremacy Clause under the United States Constitution, Art. VI, cl. 2. This clause 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).

As drafted, SB 466 may raise potential federal constitutional issues related to the Supremacy Clause in that it proposes to supersede federal law relating to coal mines and coal production relating to mine permitting and enforcement.

### Commerce Clause

The Commerce clause under the United States Constitution, Art. I, Section 8, cl. 3, broadly gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The U.S. Supreme Court has consistently held that the Commerce Clause is a grant of plenary authority to Congress, meaning it is a power which is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981).

The U.S. Supreme Court has held that the Commerce Clause's power to regulate interstate commerce extends to "the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce or persons or things in commerce." *Id.* [internal citations omitted]. The Court has clarified that, due to the broad scope of the Commerce Clause, "even activity that is purely intrastate in character may be regulated by Congress, where the activity [...] affects commerce among the States." *Id.* at 277.

As drafted SB 466 may potentially implicate the Commerce Clause and U.S. Supreme Court precedent. The Court has consistently held that the broad scope of the Commerce Clause extends to intrastate activities. Although SB 466 declares certain coal mining and usage to be intrastate, the Court has consistently held that this activity constitutes "activities affecting commerce" for which the federal Constitution governs.

**Requestor comments:**