Legality of Pipeline Cleanup Funding Mechanism

South Dakota Underground Pipeline Task Force

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Interstate Commerce - Dormant Commerce Clause:

The "Dormant" Commerce Clause, also known as the "Negative" Commerce Clause, is a legal doctrine that courts in the United States have inferred from the Commerce Clause of the United States Constitution. The Commerce Clause expressly grants Congress the power to enact legislation that affects interstate commerce. The idea behind the Dormant Commerce Clause is that this grant of power implies a negative converse — a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. The restriction is self-executing and applies even in the absence of a conflicting federal statute.

The premise of the doctrine is that the U.S. Constitution reserves for the United States Congress at least some degree of exclusive power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, § 8).

Does it discriminate against interstate commerce on it its face?

Even if it does not, does it have the effect of treating interstate commerce differently from similar intrastate activities?

If the perceived gap in adequacy relates solely to the coverage of the federal Oil Spill Liability Trust Fund and interstate facilities, that correction is under the jurisdiction of Congress. That is likely true, even if our state Legislature would enact an assessment and cleanup fund mechanism that is non-discriminatory on its face, but in effect covers only facilities engaged in interstate commerce.

Federal Preemption

In the legal system of the United States, **preemption** generally refers to the displacing effect that federal law will have on a conflicting or inconsistent state law.

Express preemption occurs where Congress says within the statute 'we hereby preempt' or uses words of similar import. Here, federal laws are explicitly precluding state and local regulations.

Implied preemption has, within itself, three sub-categories: conflicts preemption, preemption because state law impedes the achievement of a federal objective, and preemption because federal law occupies the field.

For instance - under implied preemption, the US Supreme Court held that a NJ statute creating a spill compensation cleanup fund was preempted by CERCLA (Superfund) for sites on the Superfund National Priorities List (NPL) (Exxon Corp. v. Hunt - 1986)

The federal Oil Spill Liability Trust Fund is preemptive on its face (express preemption) as it relates to safety standards (See 49 USC section 60104(c))

The federal Oil Spill Liability Trust Fund is silent on whether it preempts other state laws relating to interstate pipelines - whether such state enactments would not be barred based upon implied preemption is an open question

State Enactments Effecting Interstate Commerce - Surviving the Dormant Commerce Clause

Evenhanded

Impacting similarly situated intrastate and interstate activities in the same manner

Legitimate state interest

Reasonably related to a risk of harm in which the state has a legitimate interest at stake

Rational Approach

The protective state law is rationally related to a reasonable and quantifiable risk of harm - not punitive or arbitrary