



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 3, 2006

The Honorable Bruce Newcomb
Speaker of the House
State Capitol Building
P.O. Box 83720
Boise, Idaho 83720-0038

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Speaker Newcomb:

This letter is in response to your request for a response from the Office of Attorney General to the analysis of House Bill (H.B.) 721 conveyed to you by Roy L. Eiguren of the Givens Pursley law firm with his letter of February 28, 2006 (Givens Pursley Analysis). H.B. 721 proposes to amend Idaho Code § 42-108 to provide for legislative approval of certain water right transfers that are to be used "in conjunction with the coal fired generation of electricity other than integrated gasification combined cycle technology where coal is not burned but oxidized as a power source . . ." The Givens Pursley analysis of H.B. 721 suggests that enactment of H.B. 721 in its present form likely would violate the Equal Protection Clause of the Idaho and Federal Constitutions.

QUESTION PRESENTED

Does the Equal Protection Clause bar the State from regulating water right transfers as contemplated in House Bill 721?

CONCLUSION

Our reading of House Bill 721 and its Statement of Purpose leads us to conclude that the amendment proposed to Idaho Code § 42-108 by the Bill is rationally related to the State's duty to protect its water resources and likely would withstand a court challenge alleging violation of the Equal Protection Clause of the Idaho Constitution.

ANALYSIS

Article I, § 2 of the Idaho Constitution states in part: "Government is instituted for their [the people's] equal protection and benefit. . . ." Amendment 14, § 1 of the United States Constitution states that no state shall deny "to any person within its jurisdiction the equal protection of the laws."¹

"It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Meisner v. Potlatch Corp.*, 131 Idaho 258, 261, 954 P.2d 676, 679 (1998). If, however, persons in like circumstances are not receiving the same benefits and burdens under the law, the legislation may violate the Equal Protection Clause. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). Where the government is alleged to have violated the Equal Protection Clause, Idaho courts employ a three-step analysis: 1) identification of the classification under attack; 2) the standard under which the classification will be reviewed; and 3) determination of whether the standard has been satisfied. *State v. Hart*, 135 Idaho 827, 830, 25 P.2d 850, 853 (2001). For analyses made under the Idaho Constitution, the strict scrutiny standard applies to "fundamental rights" or "suspect classes[.]" *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 68, 28 P.3d 1006, 1011 (2001); the means-focus scrutiny standard applies "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of lack of relationship between the classification and the declared purpose of the statute," *State v. Mowry*, 134 Idaho 751, 754-55, 9 P.3d 1217, 1220-21 (2000); and, finally, the rational basis scrutiny standard applies to all other challenges, *Hart*, 135 Idaho at 830, 25 P.2d at 853.

In this case, the classification under attack is the State's regulation of water right transfers that are to be used "in conjunction with the coal fired generation of electricity other than integrated gasification combined cycle technology where coal is not burned but oxidized as a power source" H.B. 721. According to H.B. 721's statement of purpose, "This bill ensures that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." The Givens Pursley Analysis states, however, that

¹ "[T]he differences between the standard applied under Idaho's equal protection clause and the federal clause are negligible; accordingly, we will not undertake a separate analysis. . . ." *Rudeen v. Cenarrusa*, 136 Idaho 560, 569, 38 P.3d 598, 607 (2001).

"H.R. 721 singles out a particular type of coal-fired power generation technology for special treatment under Idaho water law, despite the fact that this technology consumes no more water than other technologies. It therefore raises serious constitutional issues." *Givens Pursley Analysis* at page 1.

Despite argument to the contrary, it is unlikely that the strict scrutiny standard of review would apply to the classification in H.B. 721. See *Givens Pursley Analysis* at page 2, footnote 1. "Strict scrutiny requires the state to prove a compelling need for the goal of the challenged statute and that there is no less discriminatory method available to achieve that goal. Low level review, conversely, places the burden on the challenging party to prove that the state's goal is not legitimate and that the challenged law is not rationally related to the legitimate government purpose and if there is any conceivable state of facts which will support it." *Rudeen v. Cenarrusa*, 136 Idaho 560, 569, 38 P.3d 598, 607 (2001) (internal citation omitted).

While the *Givens Pursley Analysis* is correct that Article 15, § 3 of the Idaho Constitution states that the right to appropriate water to a beneficial use shall never be denied, the use of water is subject to regulation and control by the State. Article 15, § 3 specifically provides that, "the state may regulate and limit the use [of water] for power purposes." Because the State is empowered to regulate the use of water, it is unlikely that a reviewing court would apply a strict scrutiny standard of review to legislation that does not involve a fundamental right or suspect class. Furthermore, no reported decisions in the state of Idaho have applied a strict scrutiny standard of review to the State's regulation of water rights.

The *Givens Pursley Analysis* also argues that it is possible that a reviewing court would apply the means-focus scrutiny standard of review to the classification in H.B. 721. See *Givens Pursley Analysis* at page 2, footnote 1. Means-focus scrutiny applies "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of lack of relationship between the classification and the declared purpose of the statute." *State v. Mowry*, 134 Idaho at 754-55, 9 P.3d at 1220-21. Before the means-focus test will be used, the classification must be "obviously invidiously discriminatory" and must distinguish between groups either "odiously or on some other basis calculated to excite animosity or ill will." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999). "Under this intermediate standard of judicial scrutiny, the right to equal protection of laws is not violated if the classification 'substantially furthers some specifically identifiable legislative end.'" *Miles v. Idaho Power Co.*, 116 Idaho 635, 645, 778 P.2d 757, 767 (1989) citing *Jones v. State Bd. of Medicine*, 97 Idaho 859, 867, 555 P.2d 399, 407 (1976).

House Bill 721 classifies power plants that use coal differently than power plants that do not. House Bill 721 further refines that classification by treating traditional coal fired power plants differently from coal fired power plants that use "integrated gasification combined cycle technology where coal is not burned but oxidized as a power source. . . ." Therefore, on its face, H.B. 721 distinguishes between types of coal fired power plants. In order to violate the Equal Protection Clause, however, the classification must "clearly bear[] no relationship to the statute's

declared purpose." *Aeschliman v. State*, 132 Idaho, 397, 401, 973 P.2d 749, 752 (Ct. App. 1999).

House Bill 721's statement of purpose states that it is necessary to treat traditional coal fired power plants differently from coal fired power plants that use "integrated gasification combine cycle technology" to "ensure[] that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." As evidenced by testimony and academic study, legislative evaluation of traditional coal fired power plants is necessary because those types of plants, as opposed to coal fired plants that use "integrated gasification combined cycle technology[,] " threaten the State's water resources by producing increased emissions.

On August 8, 2005, the Idaho Legislature's Energy, Environment and Technology Interim Committee (Committee) met to discuss, among other topics, the development of a "clean coal project at the Old FMC site in Power County." *Energy, Environment and Technology Interim Committee, Minutes*, pages 13-18 (August 8, 2005). It was explained to the Committee that oxidizing coal in a pressurized chamber, instead of burning it, results in

a synthetic gas that allows the company to clean the gas prior to emission. They can strip out the sulfur, capture mercury in a carbon bed, capture part of the carbon dioxide (CO₂) prior to combustion The key component of this is the sulfur and CO₂ capture. Emissions are captured prior to combustion.

Capturing emissions out of the stack is much more challenging. The reason this new technology has not been used in the past is because of cost. It is currently about 20% higher than a traditional polarized coal plant. With the energy bill incentives, it will be close to the same cost. Mr. Raman said this is a technology breakthrough. There have not been a lot of vendors in the past willing to provide a total package facility although the process is commercially proven.

Senator Werk asked about the term "clean coal" and removing emissions. Mr. Raman said coal is still a fossil fuel. He explained that there are still stack emissions from this process but that these emissions are similar to what a natural gas facility would emit. Senator Werk asked about other impacts that result from this process. Mr. Raman said "clean coal" means cleaner coal or a cleaner fossil fuel. There are CO₂ emissions, Nitrogen Oxides (NO_x) emissions, trace Sulfur very similar to a natural gas plant. This is different compared to a traditional coal plant in that the volume of SO₂, mercury, CO₂, and NO_x emissions are much lower from the stack.

....

Representative Smylie said that there are several proposals in Idaho for coal fired plants. He said he was aware that the Sempra plant that is proposed in Jerome

County will use pulverized coal and will be similar in size [to the proposed project at the old FMC site in Power County].

Id. at 14-15, 17.

In an article published in the *Environmental Law Review*, it is noted that clean coal power plants reduce emissions of pollutants:

Because pollutants are removed from a highly concentrated steam prior to combustion, I[n]tegrated G[asification] C[ombined] C[ycle] is the lowest emitting among all coal production processes as to N[at]ional A[m]bient A[ir] Q[uality] S[tandard] pollutants. For the same reason, IGCC used in conjunction with available control technologies also provides vastly superior performance and dramatically lower cost in removing mercury and other toxic metals as compared to pulverized coal boilers. The IGCC technology is also substantially more thermally efficient--by 10% or more, according to the U.S. Department of Energy (DOE)--than other available technologies. This thermal advantage reduces total emissions of all pollutants, including CO₂, by a corresponding amount. . . . Finally, IGCC is unique among available technologies in its ability to economically capture the CO₂ emissions from coal combustion, making the CO₂ available for storage rather than being vented to the atmosphere as a greenhouse gas.

Gregory B. Foote, *Considering Alternatives: The Case for Limiting CO₂ Emissions from New Power Plants Through New Source Review*, 34 *Environmental Law Review* 10642, 10660 (July 2004).

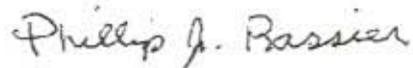
Therefore, even though H.B. 721 differentiates between types of coal fired power plants, the differentiation "substantially furthers[.]" *Idaho Power*, 116 Idaho at 645, 778 P.2d 767, the Bill's stated purpose of allowing legislative review of certain water right transfers that involve traditional coal fired power plants in an effort to "evaluate the effect of such coal-fired generation on the water resources of the State of Idaho."

While it is likely that H.B. 721 would survive even a means-focused scrutiny standard of review, it is most likely that a reviewing court would apply the less rigorous rational basis standard of review because the classification is not "obviously invidiously discriminatory" and does not distinguish between groups either "odiously or on some other basis calculated to excite animosity or ill will." *Coghlan*, 133 Idaho at 396, 987 P.2d at 308. "Under the 'rational basis' test, equal protection is offended only if the classifications 'are based solely on reasons *totally unrelated to the pursuit of the State's goals and only if no ground can be conceived to justify them.*'" *City of Lewiston v. Knieriem*, 107 Idaho 80, 85, 685, P.2d 821, 826 (1984) (emphasis added).

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The decision to treat traditional coal fired power plants differently from coal fired power plants that use "integrated gasification combined cycle technology" is based on the legislation's stated purpose to "ensure[] that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." The legislation is therefore consistent with the State's obligation to protect health, safety, and welfare of its citizens. "Under the broad authority of the police power, a state legislature may enact laws concerning the health, safety, and welfare of the people so long as the regulations are not arbitrary or unreasonable." *State v. Wilder*, 138 Idaho 644, 646, 67 P.3d 839, 841 (Ct. App. 2003). Because the Bill is rationally related to the State's duty to protect its water resources, it likely would withstand a court challenge alleging violation of the Equal Protection Clause of the Idaho Constitution.

Sincerely,



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February 28, 2006

Honorable Bert Stevenson
Idaho House of Representatives
Idaho State Legislature
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Boise Idaho 83720-0038

Dear Representative Stevenson:

Enclosed is a copy of the legal analysis prepared by our firm's water attorneys on HB721. We would be pleased to respond to any questions you may have regarding this analysis.

With best regards,



Roy L. Eiguren

RLE/ehk
Enclosure

cc: Resource Committee, Attention: Mona Spaulding (w/encl.)
Representative Bruce Newcomb (w/encl.)
Representative Sharon Block (w/encl.)
Deputy Attorney General Clive Strong (w/encl.)

H.R. 721 Violates The Equal Protection Clause of The Idaho and Federal Constitutions

The Fourteenth Amendment of the Constitution bars states from enacting legislation that denies any person the equal protection of the laws. U.S. Const., Amend XIV § 1. Similar protection is embodied in Idaho's constitution. Idaho Const., art. I, § 2. These equal protection provisions apply to corporations as well as to natural persons. *In re Case*, 20 Idaho 128, 132-33, 116 P. 1037, 1038 (1911).

In essence, the equal protection provisions prohibit the government from singling out certain individuals or classes of persons for special treatment. While some classification is inherent in all legislation, the Equal Protection Clause prohibits laws that are in reality "a subterfuge to shield one class or unduly burden another." 16B Am. Jur. 2d., Constitutional Law § 808 (1998). Thus, where legislation classifies persons without any rational basis, treating some better than others, it is unconstitutional.

H.R. 721 singles out a particular type of coal-fired power generation technology for special treatment under Idaho water law, despite the fact that this technology consumes no more water than other technologies. It therefore raises serious constitutional issues.

Of course, some legislative classifications are appropriate. For instance, the Idaho Supreme Court upheld a statute providing special treatment of irrigation systems covering over 25,000 acres, noting that the classification was legitimate because it did not bear on the nature of the corporation, but instead "its classification relates solely to size." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403, 263 P. 45, 53 (1927). It is another matter, however, where the legislation singles out a particular corporate entity whose impact on the water resource is no greater than any other industry.

A good example of an unconstitutional differentiation is found in *Crom v. Frahm*, 33 Idaho 314, 193 P. 1013. In that case, the Idaho Supreme Court struck down a law that singled out Carey Act irrigation companies, allowing them to modify their boards more easily than other Idaho corporations. The Court declared that such special treatment of one type of water user "is not founded on a difference either natural, or intrinsic, or reasonable." 33 Idaho at 319, 123 P. at 1014.

To survive scrutiny, the classification based on the type of entity must be reasonably related to the articulated legislative purpose. By way of example, it is reasonable and proper to implement different maximum fee schedules for ophthalmologists and optometrists. *Posner v. Rockefeller*, 31 A.D.2d 352 (N.Y. 1969). In such a case, the purpose of the legislation (to implement Medicare requirements) is rationally related to the distinction drawn between doctors and non-doctors. The situation would be entirely different if instead the Legislature declared that ophthalmologists may freely appropriate water while optometrists must secure legislative approval. Plainly, such a classification would be unrelated to their respective ability to put water to beneficial use without injury. Consequently, such a law would violate the Equal Protection Clause.

In sum, the Equal Protection Clause "does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on

the basis of criteria wholly unrelated to the purpose of the legislation.” 16B Am. Jur. 2d., Constitutional Law § 793 (1998).

Our Supreme Court has summed up the law concisely: “The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and, within the sphere of its operation, the statute must affect all persons similarly situated.” *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403-04, 263 P. 45, 53 (1927).

H.B. No. 721 violates this constitutional principle. The bill’s legislative purpose states that it is intended to provide an opportunity for the Legislature to “evaluate the effects of such coal-fired generation on the water resources of the State of Idaho.” Yet there is no plausible basis for the Legislature to determine that the diversion of a relatively modest quantity of water (2 cfs or more) for this particular coal-fired power technology has any different impact on the water resource than would similar modestly-sized diversions by other industrial users. Under existing law, Sempra, just like any other water user, will be required to provide 100 percent mitigation its water use. The simple fact is that water consumed to extinction by Sempra is no different from water consumed to extinction by a microchip manufacturer, a dairy, or any other industrial user.

Indeed, the legislation’s blatant discriminatory intent is evident on its face in its exclusion of coal gasification plants from the special scrutiny, despite the fact that the coal gasification technology will consume as much or more water as the technology employed by Sempra’s project. The legislation is a transparent effort to single out a particular water user for additional burdens that have nothing whatsoever to do with protection the water resource. Consequently, it is unconstitutional.

It bears emphasis that the discussion above is based on application of the most deferential test, the so-called “rational basis” test, which applies where no suspect classification or fundamental rights are involved. H.B. 721, however, would likely be scrutinized under either the intermediate “means-focus” test or even the “strict scrutiny” test. Accordingly, H.B. 721 is at even greater risk.¹

¹ The strict scrutiny test may well apply, because the legislation limits a “fundamental right” under Idaho’s Constitution, namely the right to appropriate water to beneficial use. Although this right is not found in the U.S. Constitution and therefore does not implicate the federal Equal Protection Clause, the Idaho Supreme Court could recognize the right to transfer a water right as a fundamental right under Idaho’s Constitution, and therefore protected by the Equal Protection Clause of the Idaho Constitution. If the strict scrutiny test applies, H.B. 721 would be struck down unless shown to be “narrowly tailored to serve a compelling governmental interest.” *State v. Breed*, 111 Idaho 497, 500, 725 P.2d 202, 205 (Idaho App. 1986). The bill’s sweeping prohibition on water transfers cannot meet this test.

Even if this were not the case, the Court might appropriately declare the legislation subject to intermediate “means-focus” review on the basis that “especially important” (though not “fundamental”) interests are at stake. *State v. Breed*, 111 Idaho 497, 500, 725 P.2d 202, 205 (Idaho App. 1986). Under either test, the State’s ability to defend the legislation is further diminished. Even if these tests were not applied, however, H.B. 721 cannot survive scrutiny under the more lenient “rational basis” test. As the U.S. Supreme Court has said, this standard is “not a toothless one” and requires the classification to rationally advance a reasonable and identifiable government objective.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982) (striking down requirement for differing appeal bonds for differing appellants).