by Richard Lorenz

What's going on in Idaho?

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The Idaho Supreme Court appears to have checked out for the summer. Gone fishin' it seems. And for bait it has opened up a colossal can of worms.

On July 8, 2010, the court issued its now infamous decision in *The City of Idaho Falls v. Jared Fuhriman*. The court determined that the City of Idaho Falls' 2011 power purchase agreement (2011 PPA) with the Bonneville Power Administration (BPA) violates Article VIII, §3 of the Idaho Constitution. This provision prohibits Idaho cities from incurring any liability exceeding in that year the revenue provided for such year without first obtaining approval from two-thirds of the city's voting population. This prohibition does not apply, however, to any "ordinary and necessary expense authorized by the general laws of the state."

To make a long story short, the Idaho Supreme Court decided that a multi-year power purchase agreement is not an "ordinary and necessary" expense of a municipal utility. From a policy standpoint, the decision is a disaster. But courts do not make policy, they interpret the law. Thus, the court's decision should be analyzed from a legal standpoint. Viewed in this context, the court's interpretation of law in *Fuhriman* is curious, at best:

(1) The court expressly held that the words "ordinary and necessary" require expenses to also be "urgent." This is contrary to the plain reading of the words used in the Idaho Constitution, and therefore violates the cardinal rule of legal interpretation.

(2) The court indicated that the legal principle of *stare decisis* (translated loosely as "let the decision stand") compelled it to insert the word "urgent" into the Constitution because the Court had recently done so in another case, *City of Boise v. Frazier*. But the Frazier case itself violates the principle of *stare decisis* by applying a novel legal standard to these Constitutional provisions.

(3) The court also ignored its own reasoning in *Asson v. City of Burley*, in which it explained that true power purchase contracts, as distinguished from capital construction projects, would be "ordinary and necessary" municipal expense for purposes of Article VIII, §3.

(4) The court also misapprehends the nature of the 2011 PPA. The city's payment obligation under the 2011 PPA remains contingent upon receipt of some power. The court basically treats the 2011 PPA as an energy *pre*-purchase agreement in which the whole of the city's obligations for the term of the agreement are frontloaded into the first year.

(5) Even using the more stringent standard of "urgency" adopted by the court, the 2011 PPA still should have been found to be valid. The unprecedented market price spikes, rolling blackouts, and utility bankruptcies caused by the California Energy Crisis should have taught us all that any forced reliance on short-term, market purchases makes utilities exceptionally vulnerable to price volatility. If this is not "urgent," nothing is.

The most direct consequence of the *Fuhriman* decision is that the 2011 PPA is invalid. It may also be argued that the current 2001 BPA power purchase agreements also are invalid to the extent that they were not approved by a popular vote. Taking it one step further, any other (non-BPA) current power purchase agreement that extends beyond the fiscal year in which it was executed may also be invalid. Finally, if *Frazier* and *Furhiman* really do heighten the standard to comply with Article VIII, §3 by inserting the word "urgent," then many other types of municipal contracts previously believed to be valid may no longer pass muster. This potentially includes any other commodity supply agreements, employment contracts, and construction contracts.

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a statute, it was interpreting a provision of the state Constitution. What is required is an amendment to the Idaho Constitution. Such amendment must be proposed by act of the Idaho legislature and then approved by a statewide popular vote. Putting this particular question to a popular vote is not without risk, as it may be viewed by some as an unwelcome liberalization of government spending procedures. Furthermore, it is not clear that even a successful amendment to the Constitution would retroactively apply to existing agreements that were arguably *ultra vires* when executed.

Unless and until the Constitution is amended, Idaho municipalities and their contract counterparties may take other steps to ensure the enforceability of agreements that may be subject to *Frazier/Fuhriman*. New contracts extending beyond one fiscal year may simply be approved by a two-thirds vote. Alternatively, the parties may include a savings clause that specifically states that the municipality shall have no liability under the agreement that would exceed Article VIII, §3. While this approach might render the city an unattractive business partner, it should produce a more enforceable agreement.

Another question is what, if anything, cities and their counterparties can do with existing contracts. One option is to have existing contracts ratified by election. The contracting parties may also choose to enter into a new contract, or a novation of the existing contract, and then have the new contract affirmed by a vote. Alternatively, the parties could amend the existing contract so as to expressly state that the municipality shall have no liability under the agreement that would violate Article VIII, §3. The problem is that a novation or amendment of an existing agreement requires the consent of both parties, which consent may or may not be forthcoming.

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