



Economic Affairs Interim Committee

61st Montana Legislature

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February 10, 2010

TO: Economic Affairs Interim Committee

FROM: Bart Campbell, LSD Legal Staff

RE: Requested Information from Staff on the Theories of Unfunded Mandates and Equal Protection as They May Apply to the Department of Livestock's Designated Surveillance Area for Brucellosis Official Order

FIRST ISSUE: UNFUNDED MANDATES

The general statute dealing with unfunded mandates is 1-2-112, MCA. Subsection (1) states: "As provided in subsection (3), a law enacted by the legislature that requires a local government unit to perform an activity or provide a service or facility that requires the direct expenditure of additional funds and that is not expected of local governments in the scope of their usual operations must provide a specific means to finance the activity, service, or facility other than a mill levy. Any law that fails to provide a specific means to finance any activity, service, or facility is not effective until specific means of financing are provided by the legislature from state or federal funds." In addition, 1-2-116, MCA, prohibits state agencies from shifting costs to local governments.

Conclusion: The prohibition against unfunded mandates only applies to mandates placed upon local governments by the legislature or by state agencies through cost shifting. The theory of unfunded mandates does not apply to the order issued by the Department of Livestock.

SECOND ISSUE: EQUAL PROTECTION

The Economic Affairs Interim Committee requested an analysis of the application of the theory of equal protection to the order issued by the Department of Livestock in that the result of the order was that certain livestock growers in an area around Yellowstone National Park would be

subjected to burdens that livestock growers outside of the area would not.

Discussion: Legislation frequently involves making classifications that either advantage or disadvantage one group of persons but not another. States allow 16-year olds to drive but not 12-year olds. Indigent single parents receive government aid that is denied to millionaires. It is clear that the Equal Protection Clause does not mean that the government is obligated to treat all persons exactly the same.

Over recent decades the U.S. Supreme Court has developed a three-tiered approach to analysis under the Equal Protection Clause. The first tier is known as strict scrutiny and under strict scrutiny a court will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Strict scrutiny is applied to legislation involving suspect classifications and fundamental rights. The Court will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Strict scrutiny is applied to legislation involving suspect classifications and fundamental rights such as freedom of speech.. Most legislation reviewed by the Supreme Court under the strict scrutiny standard has been invalidated, because very few classifications are found to be supported by a compelling government interest.

The second tier of scrutiny used by a court to review legislative classifications is known as heightened, or intermediate, scrutiny. Legislation will not survive heightened scrutiny unless the government can demonstrate that the classification is substantially related to an important societal interest. Gender classifications are examined under this middle level of review, as are classifications that burden extramarital children.

The third tier of scrutiny involves the least amount of judicial scrutiny and is known as the rational relationship test. A court will approve legislation under this standard so long as the classification is reasonably related to a legitimate government interest. The rational relationship test permits the legislature to employ any classification that is conceivably or arguably related to a government interest that does not infringe upon a specific constitutional right. An overwhelming majority of social and economic laws are reviewed and upheld by courts using this minimal level of scrutiny.

The actions of the Department of Livestock fall under the third tier of scrutiny. Courts continue to apply an extremely lax standard to most legislative classifications. In Federal Communications v. Beach (1993), the U.S. Supreme Court went so far as to say that economic regulations satisfy the equal protection requirement if "there is any conceivable state of facts that could provide a rational basis for the classification". Justice Stevens in his concurring opinion objected to the Court's test arguing that it was "tantamount to no review at all".

The third-tier test is often called the rational basis test. A person challenging a law on equal protection grounds has a very difficult task. The Supreme Court has used the rational basis standard to practice judicial restraint and to limit its ability to overturn legislation. In areas of social and economic policy, where constitutionally suspect classifications (race, religion,

alienage, or national origin) are not at issue, nor are any fundamental constitutional rights at stake, a law must be upheld if there is any "reasonably conceivable state of facts that could provide a rational basis for the classification" (*United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368 [1980]).

In addition, the Court does not require a legislature to articulate its reasons for enacting a statute, holding that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" (*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 [1993]). Thus, the Court stated, a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" (*FCC v. Beach Communications*). This means that a court is permitted to find a rational basis for a law, even if it is one that was not articulated by the legislature.

Because of these factors, application of the rational basis test usually results in the upholding of the law. Nevertheless, it remains the primary test for determining the constitutionality of classifications that encroach on economic interests.

Conclusion: The action of the Department of Livestock in issuing the brucellosis order is an action that is subject to third-tier scrutiny using the rational basis test with respect to a violation of the Equal Protection Clause. The burden on the department to justify its action is minimal under the rational basis test.