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April 26, 1985

The Honorable Jim Stoicheff  
Representative, District One  
615 Lakeview  
Sandpoint, Idaho 83864

The Honorable Kermit V. Kiebert  
Senator, District One  
P. O. Box 187  
Hope, Idaho 83836

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Proposed Kootenai County Watercraft Licensing Ordinance

Dear Representative Stoicheff and Senator Kiebert:

We have received a number of inquiries in addition to yours concerning a watercraft licensing ordinance proposed by the Kootenai County Commissioners. We will use this guideline to respond to all the inquiries we have received to date concerning this important matter.

The concerns expressed by all correspondents may be generally summarized in two questions:

(1) Is the proposed ordinance in conflict with or preempted by state law which governs boat safety and licensing; and

(2) Is a greater license fee for non-residents than residents of the state a denial of equal protection of the law?

Short Answer

(1) The proposed ordinance would not be in conflict with state law so long as it is reasonably related to the protection of the public health, safety and general welfare or amounts to a rental of county property.

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(2) Although differential licensing fees which discriminate between residents and non-residents have been upheld, we believe a single fee chargeable to all is more defensible.

### Analysis

We have been provided several different drafts of an ordinance which has been proposed by the Kootenai County Commissioners. Although each is distinct, all are identical in their most important provisions.

Those provisions, if adopted, would require that all owners of vessels which use Kootenai County "boater facilities" pay an annual "boater service fee" for that privilege. A greater fee would be charged of non-residents, although the proposed ordinance states no reason for this disparity. Use of the "boater facilities" without the appropriate sticker would be punishable as a misdemeanor. The proposal cites no purposes other than the "cost of providing services to the boaters within Kootenai County" as a basis for the proposed fee.

For the purposes of this guideline, we assume that the term "Kootenai County boater facilities" refers only to those owned by the county and no others. If the county attempted to charge a fee to use state or privately owned property, it would of course be unlawful. We also note that the rental of county property may be subject to any federal or state grant restrictions if granted money was used to build or improve county facilities. For instance, recreational improvements such as boat docks have often been built with federal funds which are frequently given with "strings attached."

The questions posed by all correspondents in one form or another are whether the county may enact such an ordinance in light of state law in this area, particularly the Idaho Safe Boating Act, Idaho Code §§ 49-3201, et seq., and whether a greater fee may be charged to non-residents. We shall answer each question in turn.

### Is County Regulation Preempted or Prohibited by State Law

#### Preemption

The doctrine of preemption provides that, just as federal law is superior to state law, so are state statutes superior to county ordinances. Preemption may be found where local regulations conflict with state law, where the matters are of state-wide rather than local concern, where the state has completely occupied the field of regulation so as to exclude any local action, or where state law specifically prohibits

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local enactments on the same subject. Rhyne, The Law of Local Government Operations, § 19.11. Preemption generally will not be found where local law is consistent with state law or where local regulation is specifically authorized. Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976).

In discussing preemption, much is made of the nature or kind of regulation involved. The Idaho courts give greater deference to local ordinances which are an exercise of the police power. This view is predicated upon the constitutional grant of the police power to local governments found in art. 12, § 2, Idaho Const. It provides that, "[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Thus, any exercise of the police power which does not conflict with state law will generally be upheld unless specifically prohibited. Hobbs v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983); Benewah County Cattlemen's Ass'n. v. Bd. of County Comm'rs, 105 Idaho 209, 668 P.2d 85 (1983); Voyles v. City of Nampa, supra; Taggart v. Latah County, 78 Idaho 99, 298 P.2d 979 (1956); Clyde Hess Distrib. Co. v. Bannock County, 69 Idaho 505, 110 P.2d 798 (1949); Clark v. Alloway, 67 Idaho 32, 170 P.2d 425 (1946); State v. Quong, 8 Idaho 191, 67 P. 491 (1902); State v. Preston, 4 Idaho 220, 38 P. 694 (1894).

A most recent example of this proposition is the Benewah County case, supra. There, the county enacted an ordinance prohibiting livestock from running at large. The plaintiffs alleged that such an ordinance was in direct conflict with the Herd District Law, Idaho Code §§ 25-2401 to 25-2409, either because the state had preempted the field or because such an enactment was in conflict with the general laws. The Supreme Court held that the legislature had not preempted and that:

[E]ven assuming some legislative exercise of livestock control, we hold that extension or amplification of that control by county ordinance is not prohibited in the absence of constitutional or statutory provisions clearly evidencing intent [on the part of the state to occupy the field]." (Emphasis added.)

Thus, absent a clearly stated intent in the state law to preempt, the county is free to exercise its constitutional police power to regulate the conduct in question.

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The regulation and licensing of watercraft is provided for in the Idaho Safe Boating Act, chap. 32, title 49, Idaho Code. Of particular interest is § 49-3229, which states in part that:

\* \* \*

(2) The provisions of this chapter shall govern the operation, equipment, numbering and all other matters relating thereto whenever any vessel shall be operated on the waters of this state or when any activity regulated by this chapter shall take place thereon; provided however, that nothing in this chapter shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels, so long as such ordinances are not in conflict with the provisions of this chapter.

(3) Any political subdivision of the state of Idaho may at any time, but only after sufficient public notice is given, adopt local ordinances with reference to the operation of vessels on any waters within its territorial limits or with reference to swimming within areas of intense or hazardous vessel traffic, provided such ordinances are intended to promote or protect the health, safety and general welfare of its citizenry. (emphasis added)

The language clearly contemplates local regulation not in conflict with general law. Thus, it is our opinion that local ordinances on this subject are not preempted by state law. In fact, they appear to be specifically authorized.

Since the proposed ordinance does not attempt to alter or prohibit state regulation, it is probably lawful, if it is found to be an exercise of the police power. However, it is difficult to ascertain whether the proposed ordinance is such an exercise since it only purports to "shift the costs of providing services to boaters." We suggest that a careful re-drafting of the proposal is in order if it is intended to protect and promote the public health, safety and general welfare.

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### Revenue vs. Regulation

Some concern may be raised as to whether the proposed ordinance is truly a regulatory measure under the police power, or merely a disguised revenue measure. In either case, the ordinance could be lawful if properly drafted.

Generally, the cost of regulating conduct may be charged to those whose conduct is being regulated. Foster's, Inc. v. Boise City, 63 Idaho 201, 118 P.2d 728 (1941). If the proposed ordinance is an exercise of the police power, i.e., regulatory, then the fee must be reasonably related to the cost of enforcement. Otherwise it may be a tax. Foster's, Inc., supra; State v. Nelson, 36 Idaho 713, 213 P. 358 (1923). Graduated fees have often been held to be taxes rather than regulatory fees. Chapman v. Ada County, 48 Idaho 632, 284 P. 259 (1930); 71 Am.Jur.2d, State & Local Taxes § 18, pp.353-4.

However, even if the fee is a tax, it may still be valid if it provides services which were formerly provided by ad valorem taxation. Idaho Code § 31-870. Such a determination is factual in nature and beyond the reach of this guideline. If such is the case, the ordinance should be drafted in a manner which states with some specificity exactly what services were funded by ad valorem taxes and are now being replaced by a fee.

### Are Differential Fees Unlawful

Questions of different treatment under the law based upon status generally fall within the constitutional guarantees of equal protection of the laws. Article 1, § 13, Idaho Const. Simply stated, the law requires that all persons be treated the same unless there is some very good reason not to. Thus, the question is whether there is any valid reason to charge non-residents a greater fee than residents for the same service.

Some familiar examples of this practice are resident vs. nonresident fish and game license fees, in-state vs. out-of-state tuition for college and university students, and different rates for the use of state parks. The same practice also occurs in-state for residents and nonresidents of junior college districts, school districts, and other services.

The basic premise underlying all of these differential fees is that since a substantial portion of the cost of the services provided is funded by ad valorem taxes, and since nonresidents do not pay these taxes, they should pay a greater fee in order to equalize the differential. However, the difference must be reasonably related to the actual cost of the service. 16 Am.Jur.2d, Const. Law § 773; 35 Am.Jur.2d, Fish & Game §§ 34 and 35.

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A fairly good summary of the cases in this area may be found at 57 A.L.R.3d 998, Fees Charged Nonresidents. However, the cases therein go both ways. In addition, the lead case, Neptune City v. Avon by the Sea, 61 N.J. 296, 294 A.2d 47, 57 A.L.R.3d, 983 (1972), holds that differentials are unconstitutional.

While a differential fee is defensible if it is properly based, it will undoubtedly be challenged as discriminatory. A flat rate would be less likely to be overturned and thus avoid possible litigation and later refunding of previously collected fees. In addition, as previously stated, a graduated or differential fee is more indicative of a tax rather than a regulatory fee. Thus, we would recommend a flat fee for residents and nonresidents alike.

#### Conclusion

County regulation of boat use and safety is authorized by Idaho law. The costs of regulation are generally chargeable to those who are regulated. However, regulatory fees which go beyond the costs of regulation may amount to revenue measures and must comport with state law in regard to taxation.

The county has the power to charge fees for the use of county property, but not state or private property. State property includes the beds and banks of navigable waters. In addition, rental fees may be subject to grant restrictions if the property was built or improved with grant monies.

Finally, although differential fees have been upheld, they are generally found to be revenue rather than regulatory measures. A flat rate fee is more defensible.

If we may provide further assistance upon this matter, please contact us.

Sincerely,

Robie G. Russell  
Deputy Attorney General  
Chief, Local Government Division

RGR/cjm

cc: Senator Vern T. Lannen  
Kootenai County Commissioners  
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