

October 19, 1993

Mr. Scott B. McDonald
Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

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

Dear Mr. McDonald:

On October 1, 1993, you requested an opinion from the Attorney General on behalf of members of the Association of Idaho Cities concerning the legality of the drinking water fees established in the *Idaho Rules for Public Drinking Water Systems*. This letter responds to the questions raised in your October 1, 1993, letter.

BACKGROUND

On September 7, 1993, the Board of Health and Welfare, in Docket No. 0108-9301, promulgated the *Idaho Rules for Public Drinking Water Systems*, IDAPA §§ 16.01.08000 through 16.01.08999 (hereinafter referred to as "the rules").

The rules were promulgated by the board to meet minimum federal standards required under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11, as interpreted by the United States Environmental Protection Agency and to ensure continued state primacy by the Idaho Department of Health and Welfare to administer and enforce federally mandated drinking water standards. The rules require public water systems¹ to initiate monitoring and testing of drinking water for various contaminants, treatment of drinking water, establishment of maximum contaminant levels for drinking water, and establishment of maximum level guidelines to be achieved in the future. The rules also provide for a mechanism by which the department can waive the potentially costly monitoring requirements for public water systems. IDAPA § 16.01.08100.07.

¹ A public water system is defined as "a system for the provision to the public of piped water for human consumption, if such system has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year." IDAPA § 16.01.08003.35. Public water systems further are either "community water systems" or "noncommunity water systems." *Id.* Noncommunity water systems are further identified as either "nontransient" (serving at least twenty-five (25) of the same persons over six (6) months per year), IDAPA § 16.01.08003.28, or "transient" (a system which does not serve at least twenty-five (25) of the same persons over six (6) months per year), IDAPA § 16.01.08003.42.

In administering the rules and the drinking water program in general, the department provides a variety of services to public water systems. For example, the department works with public water systems to ensure compliance with minimum requirements, conducts sampling surveys and on-site visits to prevent public health problems, reviews water system plans and specifications, conducts training sessions, holds public information meetings, loans specialized monitoring equipment, publishes a coordinated training calendar and informational bulletins and issues monitoring waivers.

In order to pay for the cost of the services rendered by the department to public water systems, the board adopted a fee schedule under the rules. IDAPA § 16.01.08010.² The fee structure requires each public water system to pay an annual fee based upon the number of connections within the drinking water system. *Id.* The number of connections within each drinking water system determines the amount of fee per connection. *Id.* Public water systems (community and nontransient noncommunity) with 1 to 20 connections pay a flat fee of \$100.00; public water systems with 21 to 184 connections pay an annual \$5.00 per connection fee; public water systems with 185 to 3,663 connections pay an annual \$4.00 per connection fee; and public water systems with greater than 3,663 connections pay an annual \$3.00 connection fee. The justification for reducing the fees per connection as the system increases in size was that smaller community and nontransient public water systems generally require more department services to remain in compliance with the minimum requirements under the rules. Transient public water systems pay an annual \$25.00 fee because such systems are subject to less stringent monitoring requirements and therefore require less department services. In light of this background, I can now address the questions raised in your letter.

Question No. 1:

Is it legal for Idaho cities to collect a flat rate fee or are these fees really a tax?

Response:

A. It is Legal for Municipalities to Charge Users of Public Water Systems the Cost Incurred by the Municipalities in Paying the Fees

The rules do not require Idaho cities or private operators of public water systems to collect a flat rate fee or, indeed, any fee at all. The rules assess the fee against the

² In prior years, the department's cost of providing services under the drinking water program was funded from the Water Pollution Control Account. In 1993, the legislature authorized the department to expend revenues generated from fees to fund these services.

public water systems, but are silent as to how the public water system will finance payment of the fee. The Idaho Revenue Bond Act, Idaho Code §§ 50-1027 *et seq.*, permits municipalities that operate water systems for domestic use or purposes to charge "reasonable rates, fees, tolls or charges" to remain "self-supporting." Idaho Code § 50-1032. The rates, fees, tolls or charges must produce revenue sufficient "to pay when due all bonds and interest thereon" and to provide "for all expenses of operation and maintenance" of public water systems. *Id.* The fees assessed by the department against operators of public water systems, including municipalities, are lawfully imposed pursuant to state law. As such, the cost incurred by the municipal public water system in paying the fees is a legitimate and lawful "operation and maintenance" expense to the public water system pursuant to Idaho Code § 50-1032. Therefore, municipalities that operate public water systems may pass through the cost of payment of the fees to users of the systems in the form of "reasonable rates, fees, tolls or charges." *Id.*

B. If Municipalities Comply with the Idaho Revenue Bond Act in Passing Through the Costs of Paying the Department Fees, it Will not be Considered a Tax

The assessment of reasonable rates, fees, tolls or charges by municipalities pursuant to the Idaho Revenue Bond Act has been consistently upheld by the Idaho Supreme Court as appropriate and not a prohibited tax. See Schmidt v. Village of Kimberly, 74 Idaho 48, 256 P.2d 515 (1953); Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298 (1990); Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991). In Schmidt, the court upheld the validity of provisions of the Idaho Revenue Bond Act permitting municipalities to charge reasonable rates, fees, tolls and charges for operation of public works, including public water systems. The court concluded that the disconnection and reconnection fees assessed by the municipality were lawful under the Idaho Revenue Bond Act and not a tax, since such fees were calculated to cover only the costs of the service rendered and were not used as a source of general revenue for the municipality. 74 Idaho at 64.

In Alpert, the court addressed the issue of whether a public utility's attempt to pass through a validly assessed franchise fee by a municipality, to users of the public water system, was a tax or a fee. The court held that such a franchise fee was a proper "cost of business that is then passed on to consumers of the utility." 118 Idaho at 145. Since the fee was passed through to consumers of the public service and was not a forced contribution by the public at large, it was not a tax but a proper fee.

In Loomis, the court upheld the validity of a \$1,800 water connection fee assessed by the city of Hailey to new users of the system as a proper fee under the Idaho Revenue Bond Act, and not a tax. Specifically, the court stated:

Thus, when the rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act . . . the charges are not construed as taxes. . . . However, if the rates, fees and charges are imposed primarily for revenue raising purposes, they are in essence disguised taxes and subject to legislative approval and authority.

119 Idaho at 438 (citations omitted); *see also Snake River Homebuilders Ass'n v. City of Caldwell*, 101 Idaho 47, 607 P.2d 1321 (1980) (where fee assessed by city was for the purpose of recovering costs to the system, the fee was a proper exercise of the city's police power and not considered a tax).

Thus, Schmidt, Alpert and Loomis stand for the proposition that a municipality may properly assess fees, charges, rates or tolls for purposes of collecting an expense to the public water system pursuant to the Idaho Revenue Bond Act without the risk of having such a fee or charge being considered a tax. Accordingly, so long as a municipality complies with the Idaho Revenue Bond Act in passing through the department fees, such an effort will not be considered a tax.

Any concern with the legality of the department-assessed fee in light of Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988), is misplaced. In Brewster, there was no statutory authorization for the city to assess the fees in question and the fees were for the purpose of raising revenue for the city. Here, the department is statutorily authorized to assess fees. *See* Idaho Code § 39-119. Further, municipalities are themselves statutorily authorized to assess fees, charges, reasonable rates or tolls for the purpose of paying for the expense of operating a public water system. *See* Idaho Code § 50-1032. Finally, the municipalities' efforts to collect the cost of the department fees are not for the purpose of raising revenues for the municipalities. Clearly, the assessment of the fees or charges to users of public water systems to cover the costs of the department-imposed fees cannot be construed as revenue raising devices, since municipalities are simply passing the fee through to the department.

Question No. 2:

Do the provisions of Idaho Code, title 37, chapter 21, and title 39, chapters 1 and 18, grant specific authority to the DEQ to require the cities to collect the fees in the manner contemplated by the DEQ regulation?

Response:

The rules do not require or contemplate that municipalities or private operators of public water systems collect fees in any particular manner. The rules only require that operators of public water systems pay a fee to the department. The manner in which the operator funds the payment is within the discretion of the operator.

Question No. 3:

Does the three-tiered fee structure established by DEQ meet the requirements of Idaho Code § 39-119 governing Health and Welfare's authority to collect fees?

Response:

The Idaho Legislature has specifically authorized the department to collect reasonable fees for any services rendered by the department. Specifically, Idaho Code § 39-119 provides:

The department of health and welfare is hereby authorized to charge and collect reasonable fees, established by standards formulated by the board of health and welfare, for any service rendered by the department. The fee may be determined by a sliding scale according to income or available assets. The department is hereby authorized to require information concerning the total income and assets of each person receiving services in order to determine the amount of fee to be charged.

Under Idaho Code § 39-119, the department may collect fees from any "person" receiving services. The definition of "person" under Idaho Code § 39-103(13) clearly includes municipalities.

The fees to support the drinking water program are generally split into two main categories, transient public water systems and all other public water systems (community and nontransient noncommunity). Transient public water systems need not be monitored as frequently nor for as many contaminants as the community and nontransient noncommunity public water systems. Accordingly, the services provided by the department to transient public water systems are relatively minimal, thereby justifying an annual fee per system of \$25.00. Community and nontransient noncommunity public water systems must be monitored frequently for the full range of contaminants, which requires the department to provide more services to such public water systems. Accordingly, fees are assessed against community and nontransient noncommunity public water systems based upon the number of connections within each system. The fees per connection per year are reduced as public water systems increase in size.

The legislature, under its police powers, may mandate that citizens must accept certain services and then require a fee for receipt of those services. Kootenai County Property Ass'n v. Kootenai County, 115 Idaho 676, 679, 769 P.2d 553 (1989); Schmidt v. Village of Kimberly, 74 Idaho 48, 256 P.2d 515. As noted, the legislature has authorized the department to collect fees for services rendered by the department. See Idaho Code § 39-119. A fee structure need only be reasonably related to the benefits conveyed. Kootenai County Property Ass'n v. Kootenai County, 115 Idaho at 680; City of Glendale v. Trondsen, 48 Cal. 2d 93, 308 P.2d 1 (1957). Under the reasonable relation test adopted by the court in Kootenai County Property Ass'n v. Kootenai County, the department's fee structure is valid. The board's rule approximates the amount of services the department would render to different classes of public water systems based upon the size of the system. As noted, the larger the system, the less the amount of services per each connection.

It is not necessary for the department's fee to exactly approximate the costs of services provided to each public water system; all that is required is reasonable approximation. 115 Idaho at 679. While a fee schedule could conceivably be created to assess each public water system for the precise cost of services rendered by the department, such a fee schedule is not mandated. As noted by the court in Kootenai County Property Ass'n v. Kootenai County:

A fee system whereby every member of the general public would be charged only for his exact contribution of waste presumably could be established, but the system would be cumbersome and perhaps prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed.

115 Idaho at 680.

Since the fees assessed by the department are reasonably related to the services rendered, the fee structure set forth in the rules is lawful and may be properly assessed against municipalities that operate public water systems.

Question No. 4:

Does the legislature or any administrative agency of the state have the authority to require a municipality to levy and collect a tax for the purposes of the state?

Response:

The question does not pertain to the facts of this case. As noted above, the assessment of a fee by the department against operators of public water systems pursuant to the rules is lawful under Idaho Code § 39-119. The collection of that fee by municipalities from users of the public water system in accordance with the Idaho Revenue Bond Act will not be considered a tax.

If you have any questions or comments, please feel free to contact me.

Sincerely,

JOHN J. MCMAHON
Chief Deputy Attorney General