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Between a Rock and a Hard Place: Legal and Practical Issues Regarding Municipal Power to Address Federal Mandates

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BETWEEN A ROCK AND A HARD PLACE: LEGAL AND PRACTICAL ISSUES REGARDING MUNICIPAL POWER TO ADDRESS FEDERAL MANDATES

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I. INTRODUCTION

Municipal governments stand in a difficult position. Municipalities are ultimately subservient to the greater powers of the state government and the federal government.[1] At the same time, municipalities arguably have a more immediate and compelling impact on the day-to-day lives of their local residents than any other government.[2] A local government is considered a creature of the state that created it and is deemed to be carrying out the functions of the state in a local setting.[3] A local government exercises power only to the extent that its creating state allows.[4] Local governments then seem to stand in a strange middle ground where all are expected to use powers to take care of the locality but are still subject to greater powers.[5]

A particularly difficult situation is where one greater power requires action from a local government while another binds its hands.[6] This sometimes is the case when it comes to federal mandates. The federal government can impose mandates on local governments, which usually require the local government to take additional actions and find funding, and at the same time, because municipalities are creatures of state, municipalities are limited by what actions each entity can take to comply with federal mandates.[7] Many issues arise from this situation. In particular, when a federal mandate requires a local government to take on additional expenses to maintain compliance, a municipality can come under serious financial strain if they are not given the power to address the costs through taxes, fees, or other means.[8]

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1. *See infra* Part III.B.

2. *See generally* James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: Time for Change*, 46 IDAHO L. REV. 587 (2010).

3. Michael A. Lawrence, *Do 'Creatures of the State' Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 96 (2002).

4. *See, e.g.*, Idaho Const. art. VII, § 6.

5.. Macdonald, *supra* note 2, at 610–11.

6. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007).

7. *Id.*

8. Thomas Atwood, *Home Rule: How States Are Fighting Unfunded Federal Mandates*, THE HERITAGE FOUNDATION (Dec. 28, 1994), http://www.heritage.org/research/reports/1994/12/bg1011nbsp-home-rule-how-states.

The economic downturn of the last five years has led to financial strain across the nation.[9] Cities have not been immune from the effects of this downturn, and many cities have been suffering from financial strain for many years.[10] The City of Detroit recently filed bankruptcy and other municipalities have also resorted to bankruptcy.[11] More financial strain imposed by federal mandates on financially weak cities could be the proverbial straw that breaks the camel's back. An understanding of what the political pressures are, how they affect municipalities, and the obstacles to overcoming them can lead to greater efficiency and reduce the strain on local governments.

In addressing the financial strain placed on local governments by federal mandates, local leaders will have to take an "all-available-methods"[12] approach, assessing each municipality's own particular needs and implementing solutions in the face of both federal mandates and state restrictions on municipal authority. This article attempts to set out an example of the relationship between local, state, and federal power and through this example create a framework for local governments to address the strain of federal mandates in the face of state restrictions. I will begin with a case study from a recent Idaho Supreme Court case, analyzing the background and issues of the case and its ultimate outcome. From this case study I will identify a typical situation where a city is placed under the strain of federal power while being restrained by state power and offer some criticism of the Court's holding. I will then identify and discuss the obstacles facing municipalities in addressing federal mandates and possible solutions to these obstacles, focusing on the criticisms of the case study. These discussions on obstacles and solutions will include both legal and practical aspects. I will then conclude by suggesting an approach that a municipality or other form of local government[13] might take in addressing a similar issue in their area. The main framework I will be working under in this article is a situation where a city is dealing with a federal environmental mandate, the Clean Water Act (CWA), but this article should be helpful in addressing any situation where a city faces federal mandates and state restrictions.

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9. Peter Ferrara, *The Worst Five Years Since the Great Depression*, FORBES (Feb. 7, 2013, 10:02 PM), http://www.forbes.com/sites/peterferrara/2013/02/07/the-worst-five-years-since-the-great-depression/.

10. Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U.L. REV. 633, 633–34 (2008).

11. Ryan Holeywell, *Detroit Files for Chapter 9 Bankruptcy*, GOVERNING VIEW (July 18, 2013), http://www.governing.com/blogs/view/Detroit-Bankruptcy.html.

12. ENVTL. PROT. AGENCY, CLEAN WATERSHEDS NEEDS SURVEY 2008: REPORT TO CONGRESS 3–7 (2008) [hereinafter EPA].

13. I use the words "city" and "local government" interchangeably with the word "municipality." While the focus of this article is municipalities, all governments created by the state, whether county, city, or otherwise, are local governments. However, generally the use of any of these words in this article refer to municipalities.

II. CASE STUDY: CITY OF LEWISTON STORMWATER ORDINANCE

A recent case from the Idaho Supreme Court, *Lewiston Independent School District. Number 1 v. City of Lewiston* illustrates the fundamental difficulty of unfunded and underfunded federal mandates.[14] This case presents a helpful framework to explain a typical situation where a city in Idaho may try to generate revenue to create or free up funds needed for compliance with federal environmental mandates. Again, broader application to other federal mandates is encouraged, but this case gives context for this article.

A. Case Background

The City of Lewiston (Lewiston) is required by the CWA to obtain a National Pollutant Discharge Elimination System (NPDES) permit to discharge stormwater into receiving waters of the United States.[15] NPDES permits require that cities implement required technologies to reduce pollutant loads and ensures that pollutant levels meet federal CWA standards.[16]

Lewiston enacted Ordinance No. 4512 to create a stormwater utility and a stormwater fee in order to comply with these federal mandates.[17] The fee was the particularly controversial part of the ordinance that eventually brought the ordinance in front of the state Supreme Court.[18] The stormwater fee was assessed on all property owners according to the amount of impervious surface on their properties.[19] The plaintiffs, a number of government entities that were subject to the fee, challenged the fee on the grounds that it was actually a disguised tax and therefore invalid because there existed no legislative authority to impose the tax.[20] Legislative authority to tax is vested in the state legislature, and any taxing done by a municipality must be authorized by the legislature.[21] Furthermore, the Idaho Constitution disallows municipalities from taxing other governmental units.[22] On this basis, the govern-

14. *See generally* Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 151 Idaho 800 (2011).

15. 33 U.S.C. § 1342(p) (2008).

16. OFFICE OF WASTEWATER MGMT., WATER PERMITTING 101 (2012).

17. *Lewiston*, 264 P.3d at 909, 151 Idaho at 802.

18.. *Id.* at 911, 151 Idaho at 804.

19. *Id.* at 909, 151 Idaho at 802 ("the only exemptions from the stormwater fee are if the property is less than 2000 square feet as identified in the Nez Perce County property database, the property is classified as undeveloped, or the owner qualifies for 'circuit breaker' status").

20. *Id.* at 908, 151 Idaho at 801.

21. IDAHO CONST. art. VII, § 6 ("The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.").

22. IDAHO CONST. art. VII, § 4 ("The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villag-

mental units in Lewiston subject to the ordinance filed suit seeking a declaratory judgment that the city had acted outside of its authority.[23]

B. Case Analysis

The Court analyzed this case around the legal distinction between a tax and a fee.[24] The fundamental difference between a tax and a fee is that a tax is created to raise revenue to pay for a service what benefits the public at large while a fee is a payment made by an individual or entity that is for specific services rendered to them.[25] A fee is the application of a rate to the base of usage or service rendered.[26] A tax is applicable to all qualifying members of the public regardless of their use of the systems that the tax goes to pay for.[27] In other words:

> Any payment exacted by the State or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance are merged in the general benefit, is a tax. A "fee" is a charge for a direct public service rendered to the particular consumer while a "tax" is a forced contribution by the public at large to meet public needs; a fee's purpose is regulation while taxes are primarily revenue raising measures. Unlike taxes, fees are charged in exchange for a particular governmental service that benefits the party paying the fee in a manner not shared by other members of society. Fees, unlike taxes, are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. In distinguishing fees from taxes, fees are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.[28]

In sum, the distinction between a tax and a fee is in the definition of the benefit, whether the benefit is to the general public or for a specific service rendered.

Idaho case law approaches the distinction between a tax and a fee by asking whether a fee is really a disguised tax.[29] The Court applied

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es, school districts, and other municipal corporations and public libraries shall be exempt from taxation . . . .").

23. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 908, 151 Idaho 800, 801 (2011).

24. *Id.* at 912, 151 Idaho at 805.

25. *See* 84 C.J.S. Taxation § 3 (2012).

26. *See id.*

27. *Id.*

28. 71 AM. JUR. 2D *State and Local Taxation* § 12 (2012) (citations omitted).

29. *See* Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 912, 151 Idaho 800, 805 (2011).

the two-part test in *Loomis* to determine whether a fee imposed by a municipal corporation is a disguised tax.[30] In *Loomis* the Court said that a court applying the test must, "[f]irst . . . determine whether the . . . fee constitutes an impermissible tax. Secondly, [the court] must determine whether the . . . fee is appropriately and reasonably assessed."[31] Essentially, any purported fee must pass two tests.[32] The first test might be considered a smell test or a type of "first glance" test. A court applying the test will first determine if the fee is actually a tax by looking to the purpose and effect of the fee.[33] If a fee passes the first test and is determined to be a fee rather than a tax, it must pass the second test of being appropriately and reasonably assessed.[34] The *Loomis* test follows the reasoning articulated in an earlier Idaho case that required all fees imposed by a municipal corporation to be "reasonably related to a regulatory purpose."[35] This reasoning led to the nexus or relationship requirement as described in *Lewiston Independent School District*.[36] Essentially, if the fee really is a fee, it might still be considered a tax if there is not a close enough nexus between the fee and the regulatory purpose it asserts to be related to.

The Court applied the above analysis and found that the fee in Ordinance 4512 did not pass the initial test of being a fee rather than a tax.[37] The fee in its purpose and effect seemed to the Court to have all the badges of being a tax.[38]

The Court first looked to the language of the ordinance to determine the purpose of the fee.[39] Ordinance 4512 states in the explanatory paragraphs before the text of the ordinance that establishing the stormwater utility and collecting the taxes is a way to, "provide[] the funding necessary to enable on-going maintenance, operation, regulation, water quality management and improvement of the system…."[40]

Furthermore, the circumstances surrounding the enforcement and explanation of the fee persuaded the Court that the only concern of those who made the ordinance was to generate revenue and free up general funds for the city.[41] The Court noted that the Stormwater Program Coordinator said that the fee was "like 'police services' in that it 'bene-

30. *Id.* at 912, 151 Idaho at 805 (citing Loomis v. City of Hailey, 807 P.2d 1272, 1275, 119 Idaho 434, 437 (1991)).

31. *Loomis*, 807 P.2d at 1275, 119 Idaho at 437

32.. *See id.* at 1275, 119 Idaho at 437.

33. *See Lewiston*, 264 P.3d at 912–13, 151 Idaho at 805–06.

34. *See Loomis*, 807 P.2d at 1275, 119 Idaho at 437.

35. *Lewiston*, 264 P.3d at 912, 151 Idaho at 805 (citing Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988)).

36. *See Lewiston*, 264 P.3d at 912, 151 Idaho at 805.

37. *Id.* at 912–14, 151 Idaho at 805–07.

38. *Id.* at 912–14, 151 Idaho at 805–07.

39. *Id.* at 912, 151 Idaho 805.

40. Lewiston, ID, Ordinance 4512 (2008).

41. *Lewiston*, 264 P.3d at 912–13, 151 Idaho at 805–06.

fits the public generally.'"[42] Also, literature created to help explain the fee to the public explains that the reason all landowners must pay the fee, even if they do not contribute any stormwater, is because it is part of the price that they all pay for living in a community.[43] The Court stated that, "[t]his benefit is no different from the privilege shared by the general public, much like the public's use of city streets or police and firefighter services."[44]

Analyzing the way the rate structure of the fee was set up further supports this idea.[45] Because the fee each property owner was to pay was determined by the number of ERUs (equivalent residential units) on the property, and there was no actual knowledge of how much stormwater each particular property contributes to the overall stormwater flow, the Court found that there was no evidence that the fee was based on the direct service provided by the stormwater utility.[46] The Court concluded that these characteristics of the ordinance made it plain that the fee was really a tax.[47]

The Court did not find Lewiston's arguments persuasive.[48] Lewiston cited to authority for the ordinance, but the Court held that in citing to authority, but never really arguing the authority, the city waived the issue on appeal.[49] Lewiston argued police powers as a source of authority and some other sources of authority, but the Court did not see how they could be argued at that stage.[50]

The fee could not pass the first step of the *Loomis* test in the eyes of the Court, and ultimately, citing to authority, the Court could only see the fee as a tax.[51]

C. Case Commentary

This case shows how powerless Idaho cities sometimes are when it comes to raising revenue to pay for local needs. But when the court restricts its analysis to the narrow legal distinction between a tax and a fee, there is little room to justify the ordinance. If the Court in *Lewiston Independent School District* could have analyzed the situation on the ground, if it understood the realities of stormwater management, the likelihood that it would have come to the same conclusion would have been reduced. There are three reasons the Court in *Lewiston Independ-*

42. *Id.* at 913, 151 Idaho at 806.
43. *Id.* at 913, 151 Idaho at 806.
44. *Id.* at 913, 151 Idaho at 806.
45. *Id.* at 913–14, 151 Idaho at 806–07.
46. *Lewiston*, 264 P.3d at 914, 151 Idaho at 807.
47. *Id.* at 914, 151 Idaho at 807.
48. *Id.* at 914–15, 151 Idaho at 807–08.
49. *Id.* at 915, 151 Idaho at 808.
50. *Id.* at 915, 151 Idaho at 808.
51. *Lewiston*, 264 P.3d at 915, 151 Idaho at 808.

ent School District came to the wrong conclusion regarding the municipal stormwater fee: the tax/fee issue was too narrow and formalistic to base a decision on in the case, the Court misunderstood the science behind stormwater, and the Court failed to recognize the legal regime of the CWA.

1. The tax/fee issue is too narrow and formalistic to base a decision on in this case

The first reason the Court came to the wrong conclusion is because it based its decision on the overly simplistic and formalistic distinction between a tax and a fee. In a way, the Court treated the analysis like the famous duck test: if it looks like a duck, and swims like a duck, and quacks like a duck, it is a duck. In other words, if something called a fee has tax characteristics, it is a tax. Idaho is not the only state where the courts have decided similar cases based on the tax-fee distinction.[52] In *Bolt v. City of Lansing* the City of Lansing, Michigan enacted an almost identical city ordinance to pay for CWA and NPDES requirements, specifically related to stormwater and sewage overflow.[53] The city created a fee for EHA (equivalent hydraulic area), which calculated the impervious and permeable surfaces on a property.[54] The Court ultimately held that the fee was a tax rather than a valid user fee.[55] The Court stated that to hold otherwise would allow a municipality to redefine almost any government activity as a service and charge fees for those services.[56]

The problem with this reasoning is that it ignores the true nature of stormwater. Stormwater is not just a concept that humans have made up to talk about what happens when it rains on a city street.[57] Stormwater is, "an environmental process, joining the atmosphere, the soil, vegetation, land use, and streams, and sustaining landscapes."[58] The Court in *Lewiston Independent School District* took the stance that stormwater is something that either a property produces or does not produce.[59] This is because the City of Lewiston conceded that there were properties being charged the stormwater fee that had their own stormwater systems or were not connected to the stormwater system of the city.[60] If stormwater is looked at from a different viewpoint—the viewpoint that stormwater is something that all properties in a watershed create—there would probably be a stronger argument to be made for assessing stormwater fees on all property owners. This kind of reason-

52. *E.g.*, Bolt v. City of Lansing, 587 N.W.2d 264 (Mich. 1998).
53. *Id.* at 266–67.
54. *Id.* at 267
55. *Id.* at 272–73.
56. *Id.* at 273.
57. *See* BRUCE K. FERGUSON, INTRODUCTION TO STORMWATER 1 (1998).
58. *Id.*
59. *See Lewiston*, 264 P.3d at 914, 151 Idaho at 807.
60. *Id.* at 914, 151 Idaho at 807.

ing would be analogous to why garbage fees can be assessed on all households based on the presumption that all households create waste.

To expand on this analogy, one must first understand the policy behind why garbage fees in Idaho can be assessed on all households. A perfect example of this comes from an Idaho Supreme Court decision distinguishing between a tax and a fee.[61] The Idaho Supreme Court articulated in that case how the Idaho Legislature both empowered and mandated county commissioners to find landfill sites and implement solid waste disposal systems.[62] The policy behind the granted authority was articulated in the Idaho Code as being:

> [F]or the purpose of maintaining the natural and esthetic setting of our land, water and air resources; for the purpose of providing a means for reclamation of otherwise unusable land areas; and for the purposes of such other cultural, social, economic and sanitation reasons as may be necessary from time to time.[63]

The Court went on to justify the city's solid waste disposal system:

> We now come to the association's first issue: whether a residence dweller can opt out by not requesting the service. The association argues that not all residential property owners use the system or benefit from it, and therefore the mandatory $54 charge on all habitable residences is unreasonable due to the use variance among residences.

Under the ordinance, none can opt out. When the commissioners imposed the $54 charge, they were treating owners of habitable residential dwellings as "users of the [system]." Their basic premise was that all humans live in residences and create solid waste, and whether they put it in their own trash cans or someone else's, or on the street, the refuse ultimately ends up in the same place, an authorized county waste disposal site (landfill).

No one suggests that each and every residence generates the same amount of solid waste. Presumably, the precise annual cubic yardage of solid waste from each residence could be painstakingly monitored and determined for each residence by county employees. However, all users would have to pay substantially more to cover the additional salaries of trash monitors. A solid waste disposal system is comparable to a sewer system. Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to

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61. *See* Kootenai Cnty. Prop. Ass'n v. Kootenai County., 769 P.2d 553, 557, 115 Idaho 676, 680 (1989).

62. *Id.* at 555, 115 Idaho at 678 (citing IDAHO CODE ANN. § 31-4403 (2006)).

63. IDAHO CODE ANN. § 31-4401 (2006).

house. The legislature has not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary.[64]

The comparison between solid waste and stormwater is easily made. All property creates stormwater just like all residences create solid waste.[65] Naturally, water flows downhill in predictable patterns according to physics and, according to watershed science, ends up in the same place just like all refuse ends up in the same place.[66]

The reason for this comparison is to show that Idaho courts are able to do this kind of analysis and are not constricted to determining the stormwater fee issue in *Lewiston Independent School District* simply based on the distinction between a fee and a tax. When courts understand the science of stormwater and the legal regime of the CWA, courts should be able to come to the conclusion that municipalities have the power to impose stormwater fees.

2. The Court misunderstands the science behind stormwater

In light of the first criticism, the second reason the Court came to the wrong conclusion was its fundamental misunderstanding of stormwater science and the problem of stormwater. The basic presumption that the Court should have used in its decision is that all property creates stormwater. The reason the Court should have used this presumption is because the basic academic understanding of hydrology has long recognized that stormwater is a process that occurs naturally, and humans merely interact with that process.[67] Stormwater is a function of multiple factors including rainfall intensity, catchment size, rate of runoff, and time.[68] When people use land or urbanize within a watershed, the result is that the factors of the stormwater equation may be changed,[69] but the process is still one that naturally exists.[70] Basically, water precipitates, lands on the ground, and must run downhill; stormwater is not just something that exists because we build roads and

64. *Kootenai Cnty Prop. Ass'n.*, 769 P.2d at 555–56, 115 Idaho at 678–79 (citations omitted).

65. *See infra* Part II.C.2.

66. *See infra* Part II.C.2.

67. FERGUSON, *supra* note 57, at 1.

68. PETE KOLSKY, STORM DRAINAGE: AN ENGINEERING GUIDE TO THE LOW-COST EVALUATION OF SYSTEM PERFORMANCE 5–7 (1998).

69. Many scholars see urbanization as the main human factor contributing to the stormwater problem. *See* FERGUSON, *supra* note 57, at 3–4; COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 13 (2009)[hereinafter NAT'L RESEARCH COUNCIL]. Particularly, the steady increase in impervious surfaces in urban areas due to the need to accommodate the automobiles has increased the rate of flow of stormwater. *See* FERGUSON, *supra* note 57, at 3–4. This increase in stormwater flow combined with higher level of pollutants from urban development has increased the amount of pollutants discharged into the nation's waters. *Id.* at 6–7.

70. *Id.* at 1.

streets and have a city.[71] A second basic understanding in hydrology science is the existence of naturally occurring watersheds.[72] Water that falls on a large area will flow in predictable patterns based on physics, following the path of least resistance, and will eventually discharge into larger bodies of water.[73] Every bit of land on this earth is part of a watershed and wherever a city is built, it was built on a watershed.[74]

The understanding of these two concepts—that stormwater is a naturally occurring process and that all cities are built on preexisting watersheds—leads to an understanding of the problem of stormwater for cities. When rain falls on a city, the water that falls on various properties in the city will become part of the stormwater process and will eventually flow through the watershed and be discharged.[75] The Court's reasoning that the stormwater fee was actually a tax because it was imposed on those who did not directly benefit, or at least that the benefit was no different than that of the general public,[76] is not sound when stormwater science shows that all properties within a city contribute to and receive a general and specific benefit from a stormwater management system. The general benefit that the Court, in a way, recognizes is that all people in a watershed benefit from reducing pollutant levels discharged into nearby waters.[77] The particular benefit that the Court does not recognize is that every property has a stormwater discharge that it contributes to the stormwater problem, and a stormwater system reduces the impact each individual property has on the environment.

Furthermore, the Court errs when it reasons that because some property owners could conceivably contain all of their stormwater on site and therefore would not benefit from the stormwater system, they are paying for a service that they do not use and are being taxed.[78] There are two reasons for this error. First, in relation to the idea that all properties create stormwater, it would be a very rare circumstance that

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71. *See id.*

72. *Id.* at 2.

73. *Id.* at 49–50.

74. *See Watersheds and Drainage* Basing, U.S. GEOLOGICAL SURV. (May 23, 2013, 2:09 PM), http://ga.water.usgs.gov/edu/watershed.html.

75. *See* FERGUSON, *supra* note 57, at 2.

76. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 913, 151 Idaho 800, 806 (2011).

77. The Court in *Lewiston Independent School District* recognizes that everyone benefits from stormwater management in reducing the pollutant discharge from the city. *See id.* at 913, 151 Idaho at 806. However, this benefit is only one of many that the public gains from stormwater management. The water quality impairment of the nation's waters is only one stormwater problem; there are other impairments such as fundamental changes in flow regime, energy inputs into water bodies, and alteration of aquatic habitats. *See* NAT'L RESEARCH COUNCIL, *supra* note 69, at 22. Arguably, reduction of these other stormwater problems is also a benefit to the public that live in a watershed.

78. *Lewiston*, 264 P.3d at 914, 151 Idaho at 807.

a property could contain all of its stormwater on site.[79] The common forms of on-site retention, such as retention basins, merely slow the rate of flow; they do not reduce the volume of flow.[80] This is one reason why individual stormwater control measures are seen as less favorable compared to comprehensive stormwater management covering an entire watershed.[81] Second, in the rare case that someone could actually retain all stormwater on site, this would be so out of the ordinary that the Court should not invalidate the fee on that basis. As was already said in *Kootenai County*, while it is possible that a residence might not produce any solid waste, it is not reasonable to invalidate the fee on this basis.[82]

3. The Court failed to recognize the legal regime of the CWA

If the Court had recognized the legal regime of the CWA, it would likely have helped the Court find the stormwater fee valid. The CWA begins addressing the issue of pollution by making any discharge of pollution illegal.[83] It then sets out a number of exceptions, such as the NPDES-permitting statute, which allows discharge of highly restricted levels of pollutants.[84] It is only after one receives a permit that they are allowed to discharge *any* pollutants, including stormwater.[85]

This structure set forth in the CWA likely gives the City of Lewiston the power to enforce a stormwater fee on all property owners. Hypothetically, if Lewiston had no stormwater system in place, each individual landowner would have to comply with the CWA on their own, cleaning and discharging their stormwater in compliance with the CWA. If the city then built a stormwater system and charged any landowner a fee for utilizing the city's system rather than their own, the Court would be more likely to find the fee valid. The city stormwater system should not be viewed as a general service to the public, but the alternative to each individual landowner dealing with the problem of their individual stormwater discharge. Indeed, the Court says that a fee for use of a system is a valid act for a city, especially in relation to police powers.[86] The police powers have been recognized in Idaho as bearing on public health, safety, morals, and general welfare.[87] Because the CWA is essentially a health and public welfare statute,[88] and managing stormwater is com-

79. *See* FERGUSON, *supra* note 57, at 164.
80. *Id.*
81. NAT'L RESEARCH COUNCIL, *supra* note 69, at 457.
82. Kootenai Cnty. Prop. Ass'n v. Kootenai County., 769 P.2d 553, 556, 115 Idaho 676, 679 (1989).
83. 33 U.S.C. § 1311 (2006).
84. 33 U.S.C. § 1342 (2006).
85. *Id.*
86. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 911–912, 151 Idaho 800, 804–805 (2011).
87. Ciszek v. Kootenai Cnty. Bd. of Comm'rs, 254 P.3d 24, 33, 151 Idaho 123, 132 (2011).
88. 33 U.S.C. § 1251 (2006).

monly seen as a public health and safety concern,[89] a fee imposed for the use of a stormwater system only makes sense.

It also makes sense, in light of stormwater science, to impose the fee on all property owners unless they can prove that they really contain all of their stormwater on-site. Because it is almost a certainty that every property will discharge stormwater,[90] it was unwise for the Court to invalidate a fee for use of a stormwater system based on the rare case of a property owner actually being able to contain all of her stormwater.[91] Admittedly, the City seemed to concede the idea that some people in the city did not use the stormwater system, which likely led the Court in the wrong direction.[92]

Overall, if the situation in *Lewiston Independent School District* had been presented to the Court in different packaging, the Court could have come to a better-reasoned conclusion. The City of Lewiston should have presented the structure of the stormwater permitting system of the CWA and the real science behind the problem of stormwater, so the Court could have understood the situation on the ground in Lewiston. Instead, the issue presented was the difference between a tax and a fee, which ultimately was not the issue the Court should have been concerned with.[93]

III. OBSTACLES TO PAYING FOR FEDERALLY MANDATED SYSTEMS

Understanding the obstacles that local governments face in paying for federally mandated systems goes beyond just understanding the legal obstacles. This section will discuss several obstacles, both legal and practical, and will lead into the next section that gives solutions to these interrelated problems.

89. *See* NAT'L RESEARCH COUNCIL *supra* note 69, at 21–25.

90. *See* FERGUSON, *supra* note 57.

91. This opinion seems to be supported by the Idaho Supreme Court's own decision in Kootenai Cnty. Prop. Ass'n v. Kootenai Cnty., 769 P.2d 553, 556, 115 Idaho 676, 679 (1989) (holding that a "solid waste disposal 'fee' for residential dwellings is reasonably related to the services rendered by the county in acquiring, establishing, maintaining and operating its solid waste disposal system.").

92. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 914, 151 Idaho 800, 807 (2011).

93. *See generally* Kootenai Cnty. Prop. Ass'n v. Kootenai Cnty., 115 Idaho 676, 677, 769 P.2d 553, 554 (1989) (holding that the "solid waste disposal charge . . . is a reasonable 'fee' for services as authorized by I.C. § 31–4404, and is not an invalid 'tax' within the meaning of Article 7, § 5, of the Idaho Constitution.").

A. Cost

1. The financial situation of municipalities nationwide

Federal mandates in particular seem to hold a special place of general dislike for many U.S. cities when it comes to budgetary concerns.[94] But the source of financial stress for each city in America can vary greatly, and there are competing theories as to what is the most significant source of financial stress.

Some scholars have theorized that the major reason cities experience financial crises is because of outside pressures, including socioeconomic forces such as the national economy, suburbanization, population changes, and intergovernmental policies.[95] This lends to the idea that at least some of the financial strain put on municipalities is due to federal policies and mandates that put costly requirements on local governments.

Another school of thought believes that local political and financial management are the causes of municipal financial troubles.[96] This theory does not ignore outside political influence, but would say, rather, that the major reason for financial instability in cities is due to local officials' decision-making and the political climate of a city.[97] Essentially, the incompetence of officials, the competition of many different interest groups within a city, and the decentralization of budget-making decisions are the main causes of municipal financial woes.[98]

While the competing theories seem to suggest a large number of issues that can potentially contribute to municipal fiscal strain, neither theory denies the potential of federal mandates to put a burden, whether large or small, on municipalities.[99] In any case, as has been already mentioned, the impact of federal mandates on U.S. cities is a concern for local governments in a cash-strapped economy.[100]

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94. *See* Michael Lamendola, *Federal Sign Mandates Have Many Towns Seeing Red*, N. JERSEY (Mar. 24, 2011), http://www.northjersey.com/news/118557284_Towns_are_seeing_red_over_sign_mandates.html; Jenifer Mattos, *Unfunded Federal Mandates Put Squeeze on Local Government Mount Airy Mayor, Bartlett Are Among Those Worried*, THE BALTIMORE SUN, Oct. 29, 1993 http://articles.baltimoresun.com/1993-10-29/news/1993302080_1_unfunded-mandates-unfunded-federal-federal-mandates; Bradford L. Miner, *Quabbin Towns Blast Unfunded Mandates' Harm*, NEWS TELEGRAM (July 27, 2012), http://www.telegram.com/article/20120727/NEWS/107279658/0.

95. Kimhi, *supra* note 11, at 639–42.

96. *Id.* at 642–43.

97. *Id.* at 643–47.

98. *Id.* at 642–47.

99. *Id.* at 642, 647.

100. *See* Lamendola, *supra* note 94.

2. The history of federal mandates

The role of the federal government in shaping and implementing national public policy cannot be overstated. During the last half of the twentieth century, the federal government increased its role in regulating the states through federal legislation.[101] In many cases, the means of implementing national policy were federal mandates.[102]

The rise of federal mandates is generally viewed to have grown out of the era of the Great Depression and The New Deal when there was an increase in joint federal and state programs implemented to address the fiscal crisis gripping the nation at the time.[103] At that time, there was little opposition to the increase in federal regulation and widespread support of the programs by the public.[104] By the late 1970s, there were rumblings about the burden of federal mandates on state and local governments.[105] However, Congress's first major response to its own seemingly unfettered ability to impose federal mandates came much later, in the form of the Unfunded Mandates Reform Act of 1995.[106]

The Unfunded Mandates Reform Act (UMRA) was passed in an effort, "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."[107] This step toward curbing the power of the federal government to impose unfunded mandates on local governments seems to have, at least in the beginning, had the desired effect.[108] Between 1996 and 1999, only twenty-nine bills were introduced in the Legislature with intergovernmental mandates included in them, and of those, only two were enacted.[109] However, over

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101. Susan E. Leckrone, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 IND. L.J. 1029, 1036 (1996).

102. *Id.*

103. *See generally* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1145–46 (1997) ("From the New Deal through the Great Society, Congress enlisted states and cities in joint programs to address diverse social and economic issues, usually fueled by federal funding.").

104. *Id.*

105. *Id.* at 1146.

106. *Id.* at 1151–54.

107. 2 U.S.C. § 1501(2) (2012).

108. *See Unfunded Mandates—A Five-Year Review and Recommendations for Change: J. Hearing Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform and the Subcommittee on Technology and the House of the Committee on Rules House of Representatives*, 107th Cong. 10–11 (May 24, 2001), *available at* http://www.docstoc.com/docs/12492909/UNFUNDED-MANDATES-A-FIVE-YEAR-REVIEW-AND-RECOMMENDATIONS-FOR (statement of Rep. Doug Ose, Chairman, Gov't Reform Subcomm. on Energy Policy, Natural Res. and Regulatory Affairs).

109. *Id.* at 11.

time it has become clear that exemptions to the UMRA and the limited role of judicial review in the Act have taken some of the Act's original power from it.[110] This weakness was apparent from the outset because a clear reading of the law shows that UMRA was not really a prohibition from enacting federal mandates, but rather a set of roadblocks that can be overcome in enacting federal mandates.[111]

3. Quantifying the cost of federal mandates

Following our Lewiston example, a 2008 report to Congress by the EPA on stormwater and wastewater funding needs showed that there exists a nationwide funding gap for capital infrastructure projects in wastewater and stormwater systems.[112] Another source states, "[w]ithout a doubt, the biggest challenge for states, regions, and municipalities is having adequate fiscal resources dedicated to implement the stormwater program."[113] While this seems to give at least a taste of how federal mandates create costs nationwide, scholars differ widely on how the cost of federal mandates should be calculated. While some try to add up the costs in a dollars-out approach, others balance the values of benefits and costs.[114]

To begin examining federal mandates, it is important to understand that not every federal mandate is created equal. Some federal mandates are considered unfunded while others are partially funded or, sometimes, fully funded.[115]

Even though the idea of varying funding levels of federal mandates seems like a fairly sound idea to stand on, the issue is not so simple. Defining a mandate as unfunded, partially funded, or fully funded is not enough for some scholars. While it may seem obvious that a mandate either has federal funding or it does not, another school of thought believes the funding of a mandate should be viewed holistically.[116] This view proposes taking into account the costs of federal mandates and all other costs of entitlement programs and services for state and municipal residents and setting off those costs by all federal benefits paid to or taken in tax benefits by states, municipalities, and individual resi-

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110. *See generally* John C. Eastman, *Re-entering the Arena: Restoring and Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J.L. & PUB. POL'Y 931 (2002) (giving a number of critiques of the Uniform Mandates Reform Act of 1995 and generally proposing changes that would make the act again a formidable foe to enacting legislation that could impose intergovernmental costs on local governments).

111. Makram B. Jaber, *Unfunded Federal Mandates: An Issue of Federalism or a "Brilliant Sound Bite"?* 45 EMORY L.J. 281, 282 (1996); *see also* Adler, *supra* note 103.

112. *U.S. Experiencing Stormwater, Wastewater Funding Gap, According to EPA Report to Congress*, 19 No. 12 STORMWATER PERMIT MANUAL NEWSL. 5 (2010).

113. NAT'L RESEARCH COUNCIL, *supra* note 69, at 110.

114. *See generally* NAT'L RESEARCH COUNCIL, *supra* note 69, at 111, 113.

115. Adler, *supra* note 103, at 1177.

116. *Id.* at 1187–1192.

dents.[117] From this viewpoint, states and municipalities are net beneficiaries of federal funds and tax breaks.[118]

On the other side of the argument, some scholars see the total cost of federal mandates as being undervalued because certain hidden costs are not taken into account.[119] These costs include forgone opportunity costs and regulatory uncertainty costs.[120] Essentially, the cost of federal mandates includes both the actual out-of-pocket compliance costs and the costs that are incurred any time compliance with federal law might create inefficiency.[121] The difficulty here, again, is that when the costs and benefits are less tangible, such as the cost of a city trying to implement a federal system that it does not understand or the benefit of reduced pollution,[122] the understanding of whether a federal mandate really burdens a city can become mired in competing arguments.

This article argues that the better approach is to focus on the quantifiable cost of compliance for a municipality. The reason for this is practical in nature. Trying to adjust the cost of federal mandates according to factors that are unidentifiable or difficult to place a value on gets away from the reality that cities are required to implement federally mandated systems and they then have to allocate funds to pay for these systems. The net benefit that might come from federal funds or environmental services, while valid, does not change the fiscal reality that cities have difficulty balancing their budgets to pay for regular municipal services, let alone federal mandates.

B. State and Local Power Conflict

As was stated in the introduction, municipalities in Idaho find themselves under both federal pressures and state restrictions.[123] The history in Idaho has shown a push toward more local power, but for the

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117. *Id.*

118. *Id.*

119. Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1614–15 (2012).

120. *Id.*

121. *Id.*

122. Finding the economic value of having a healthy ecosystem has been the subject of many scholarly studies. Assigning value to marketed goods coming from the environment is a relatively straightforward analysis because a market exists for those goods. It becomes much more difficult when one tries to place a value, monetary or otherwise, on the naturally occurring environmental services of a healthy ecosystem such as, "watershed protection, recreation, habitat for food species, and absorption of wastes emitted into air and water." Joy E. Hecht, *Accounting for the Environment: New Directions for the United States?*, 14 NAT'L RES. & ENV'T. 179, 182 (2000). Some scholars will value these services by equating the service provided by the environment with what it would cost to provide the same service artificially. *Id.* at 180. Overall, the methods of valuing environmental services are not consistent and therefore the job of valuing the benefit of environmental mandates meant to improve ecosystem health is still a difficult one. *Id.* at 183.

123. *See supra* Part I.

most part, state courts have strictly limited the power of local governments.[124] The traditional view of municipalities, the view that asserts that municipalities are merely appendages to the state, is recognized in Idaho history.[125] A 1940 commentary on government in Idaho states that:

> The State is the sovereign people acting in a governmental capacity. To fulfill many of the functions of the State, some of which are purely local in their applications, the Constitution and the laws set up numerous self-governing smaller units for special purposes; these units, however, are purely creatures of the State, subordinate to it.[126]

The essential problem regarding state and local power is that, at least in Idaho, municipalities are only allowed to act in areas where they have been given authority, as opposed to other states that allow a municipality to act in any arena not prohibited by statute.[127] This is the distinction between a Dillon's Rule state and a Home Rule state.[128] Obviously, in any case where a municipality is seeking to have the power to accomplish something, it is more likely to find that power in a state that interprets municipal power as anything not prohibited rather than only specifically enumerated powers.

C. Knowledge and Means to Reduce Cost

A common call to action in any organization that is trying to be successful is this: costs must be reduced and efficiency increased. Sometimes increasing efficiency can be enough to bring an organization out of financial stress and more drastic measures can be avoided. Often, the only obstacle in the way of reducing costs and increasing efficiency is knowledge.

Idaho cities can potentially reduce the cost of environmental protection systems by increasing the system's efficiency and decreasing the load put on it from the community.[129] These cities may or may not have the power to reduce these costs or change rate structures to incentivize the public to reduce service loads, but increased efficiency does have the potential to change the landscape of funding issues for federal environmental systems.

IV. SOLUTIONS

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124. *See infra* Part IV.

125. HORATIO HAMILTON MILLER, DEMOCRACY IN IDAHO: A STUDY OF STATE GOVERNMENTAL PROBLEMS 108 (1940).

126. *Id.*

127. JAMES B. WEATHERBY & RANDY STAPILUS, GOVERNING IDAHO: POLITICS, PEOPLE AND POWER 163–164 (2005).

128. *See infra* Part IV.D.

129. EPA, *supra* note 13, at 3–7.

The solutions to funding federal environmental mandates are varied, and each solution has its advantages and disadvantages. The thrust of this article is that these solutions can be applied individually or in concert with each other as a comprehensive way of addressing the needs of individual municipalities.

This article first proposes that local lawmakers can potentially craft an ordinance that comports with *Lewiston Independent School District* when the criticisms of the case are taken into account.[130] This approach gives the city a stronger place to begin writing an ordinance and a stronger position to defend the ordinance if it is challenged on impermissible tax grounds.

At a conference in Boise, Idaho, in July of 2012, a number of solutions were proposed that addressed specifically raising funds for stormwater management, the very issue presented in *Lewiston Independent School District*.[131] These solutions can be applied to municipal stormwater funding in Idaho, but some concepts discussed could be applied generally to municipal funding for mandates in general. I will address first the solutions addressed at the conference and then others that have been proposed before. The conference proposed four solutions: do nothing, create a local ordinance that can comport with *Lewiston* (which has already been mentioned), seek statutory authority from the state legislature to levy taxes, and seek a constitutional amendment granting more authority.[132]

A. Do Nothing

What exactly does "do nothing" mean? Do nothing means what it expressly says: do nothing. The basic question that backs up this approach is, "what bad would really come if we just went along with this Idaho Supreme Court decision and left cities in the position they are already in?" The answer given during the conference in Boise is that this approach is not economically viable.[133] If nothing is done, the financial burdens some cities are under will not go away. In the most recent report to Congress by the EPA regarding clean watershed needs, the EPA reported that the nation is experiencing a capital funding gap for wastewater and stormwater management infrastructure needs.[134] This is just one example of the nationwide strain being put on states and es-

130. *See supra* Part II.C.

131. Region X Envtl. Fin. Ctr.., *Complying with NPDES: How to Pay for Stormwater Systems in Idaho*, BOISE STATE UNIV. 1, 2 (2012), https://www.idahocities.org/DocumentCenter/Home/View/624.

132. *Id.* at 2–4.

133. *Id.* at 2.

134. *U.S. Experiencing Stormwater, Wastewater Funding Gap, According to EPA Report to Congress*, supra note 112.

pecially municipalities by unfunded and underfunded federal mandates. Federal mandates can put strains on cities in many realms from the environment to education to employment, and cities are feeling the strain.[135] Barring unforeseen improvements in the status quo regarding municipal funding of federal mandates and the state restrictions on municipal actions, there does not seem to be an end to the financial stresses for cities imposed by federal mandates.

B. Create a Local Ordinance that Can Comport with *Lewiston Independent School District*

In light of the criticism already mentioned of the decision in *Lewiston Independent School District*, there exists an opportunity for municipalities to create local ordinances that can comport with the requirements laid out in the case.[136] The safest way to create an ordinance that comports with the *Loomis* test would be to take each part of the *Loomis* test separately and make sure both are met.[137] The way the test is structured, a fee will be deemed impermissible by the court without much difficulty if it is structured like a tax.[138] If the court decides it is not a tax, it still must pass the test of being reasonably related to a regulatory purpose.[139] Thus, the approach this paper presents will suggest first, how to avoid the tax/fee issue, and second, how to make sure the ordinance has the required nexus between the fee and regulatory purposes.

1. Avoiding the tax/fee issue

To avoid the tax/fee issue, a city drafting an ordinance to pay for federally mandated systems will have to be aware of how the courts in Idaho have distinguished between the two. There are two fundamental characteristics of a tax that, if present in a purported fee, have led courts to find the fee to be a tax.[140] These two main characteristics are (1) the fee's major purpose is to generate revenue and (2) the fee is imposed on those who do not directly benefit from the service, or in other words, the benefit is to the public generally and not to the fee payers for a specific good or service.[141] These two characteristics are basically two sides to the same coin. However, a court might look at either characteristic, determine it is present, and then infer that the other side of the coin also exists. The case law does not restrict a court in how it deter-

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135. Miner, *supra* note 94 (It is interesting to note that these cities in Massachusetts describe essentially the same issue that Idaho cities face: being low on funds to pay for federal mandates but also being subject to the state restrictions that make it difficult for cities to address funding gaps).

136. *See supra* Part II.C.

137. *See* State and Local Taxation, *supra* note 28.

138. *See id.*

139. *See id.*

140. 84 C.J.S. *Taxation* § 3 (2010).

141. *Id.*

mines a fee is a tax. However, generally the courts will argue that if one characteristic exists, it is enough to say that the other also exists, and therefore the fee is a tax.[142] As has been already stated, the courts treat the analysis like a duck test: if it looks like a duck, and swims like a duck, and quacks like a duck, it is a duck. If something called a fee has tax characteristics, it is a tax.[143]

Now it is helpful to examine Idaho cases that have analyzed the tax/fee issue. In the foundational case of *Brewster v. City of Pocatello*,[144] the Court took up the issue of a street fee for property owners based on the amount of traffic a certain property was estimated to generate. Essential to the Court's reasoning was to determine what was the privilege or benefit to payers of the fee.[145] The Court said that the privilege was having a public street abut their property.[146] This privilege, the Court said, was, "in no respect different from the privilege shared by the general public in the usage of public streets."[147] The Court pointed out the difference between a tax and a fee was that a fee is for a direct public service and a tax is a forced contribution by the public at large to meet public needs.[148] The Court found that it was clear in this case that the "ordinance in question is not designed for the regulation of traffic under the police power, but rather clearly a revenue raising measure."[149] It seems that the Court here first determined that the privilege provided was a general privilege and then, seeing that there was no other regulatory purpose for the fee, determined that it could only be a revenue generating tax. This is the Court looking at the second characteristic of a hidden tax, that the fee is providing a benefit to the payer that is no different than a benefit to the general public. Then after determining that the fee has the second characteristic, the Court logically concludes that the fee has the first characteristic of being primarily concerned with raising revenue.

Courts have made essentially the same determination in the reverse order. The Court went through this type of reasoning in *Lewiston Independent School District*. The Court cited to evidence in the ordinance, literature on the ordinance, and testimony on the ordinance that

142. *E.g.*, Saturn Corp. v. Johnson, 236 S.W.3d 156 (Tenn. Ct. App. 2007).

143. *See supra* Part II.C.

144. Brewster v. City of Pocatello, 768 P.2d 765, 765, 115 Idaho 502, 502 (1988). It is interesting to note that *Brewster* is a case that stemmed from the debate over what kind of powers local governments had and whether Idaho was a Dillon's Rule state or a Home Rule state. *See* WEATHERBY, *supra* note 127, at 163–164.

145. *Brewster*, 768 P.2d at 767, 115 Idaho at 504.

146. *Id.* at 767, 115 Idaho at 504.

147. *Id.*

148. *Id.* at 768, 115 Idaho at 505.

149. *Id.*

stated that the major purpose of the fee was to raise revenue.[150] After giving all the examples of how the ordinance was primarily concerned with raising revenue, the Court determined that the revenues raised had no relation to a specific service or commodity provided to the payer that was different than the rest of the community.[151] Examples of other Idaho cases that deal with the first step of the *Loomis* test have similar analyses.[152]

2. Fulfilling the nexus requirement

The case law seems to show that if a fee can pass the test of being a regulatory fee rather than a tax, the court is likely to find that the fee passes the second part of the *Loomis* test. However, there must be a requisite nexus between the fee and the regulation.[153] The nexus requirement identifies two main characteristics of a valid fee: first, that the fee has a regulatory purpose; and second, that the fee is reasonably and rationally related to the regulatory purpose.[154] Generally, cities will rely (successfully or unsuccessfully) on police powers as the authority to collect a fee related to regulatory power granted by the police power.[155] Idaho courts have not sufficiently explored the validity of other municipal fees based on different legislation sufficiently to make any real comment on this situation, but theoretically the same nexus would have to be found between the fee and the regulatory purpose in those cases as well. The reasonableness and rationality of a fee is a matter for the court to decide, but courts will not overturn a municipal ordinance made pursuant to legislation regarding local health and welfare unless it is shown to be "clearly unreasonable or arbitrary."[156]

Despite the ability of the courts to use various methods to find a fee to be a hidden tax, therefore avoiding the nexus analysis, there are Idaho cases that examine the nexus requirement. In *Kootenai County Property Association v. Kootenai County*, the Court analyzed a county ordinance that collected garbage disposal fees.[157] The fee in this case

150. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 913, 151 Idaho 800, 806 (2011).

151. *Id.* at 913, 151 Idaho at 806.

152. *See, e.g.*, Idaho Bldg. Contactors Ass'n v. City of Coeur d'Alene, 890 P.2d 326, 126 Idaho 740 (1995) (The City of Coeur d'Alene imposed impact fees on all new construction. A contractor's association brought suit challenging the city ordinance. Because the fees were collected to be used to benefit building projects at large, and not for the benefit of those seeking the building permits, the fee was really a tax. Despite the city's claim that the fee was authorized by statute, the court found no basis for the fee or tax in the purported statute.).

153. Potts Constr. Co. v. N. Kootenai Water Dist., 116 P.3d 8, 11–12, 141 Idaho 678, 681–82 (2005).

154. *Id.*

155. *E.g.*, *Brewster*, 768 P.2d at 767, 115 Idaho at 504; *Lewiston*, 264 P.3d at 909, 151 Idaho at 802; *Kootenai Cnty Prop. Ass'n.*, 769 P.2d at 556, 115 Idaho at 679.

156. Sanchez v. City of Caldwell, 20 P.3d 1, 4, 135 Idaho 465, 468 (2001).

157. *Kootenai Cnty. Prop. Ass'n*, 769 P.2d at 553, 115 Idaho at 676 (1989).

was authorized by statute.[158] The county imposed the fee on all property owners whether they used the county garbage disposal or not.[159] While the plaintiffs in this case argued that this characteristic of charging those who did not receive a direct service made the fee a tax, the Court pointed out that all residences in the county create waste and that whether they use the county disposal system or some other system, the waste ends up in the county landfill.[160] Because the county was empowered by a state statute to acquire and maintain landfill sites and do all other functions necessary to maintain a solid waste disposal system, each residence has a specific benefit from the county regulation.[161] The Court goes on to point out how the fee is charged differently for households of elderly or poor people because studies show that they generate less waste.[162] This made the fees proportionate to the cost of regulating a system required by the legislature. Ultimately, the plaintiffs' arguments failed because the fee seemed to comport with the legislation and was not so unreasonable and arbitrary to warrant any deeper scrutiny.[163]

In *Loomis*, the city based its water and sewer hook-up fee on its police powers and the Idaho Revenue Bond Act.[164] The Court in *Loomis* found that the fees, which were for a connection to a sewer and water system, were not taxes and were based on the city's police powers and in accord with the Revenue Bond Act.[165] Furthermore, the rate for the fees was based on an "equity buy-in" structure that comported with the Revenue Bond Act.[166] By virtue of the equity buy-in structure, the fees for hook up were reasonably related to the total cost of the system.[167] The Court found cost to be reasonable by saying that the fees collected were kept separate from general funds and were not used for anything other than the cost of the system.[168] Essentially, the fees paid for the regulation and nothing else. If the fees would have raised funds for other pur-

158. *See* IDAHO CODE ANN. § 31-4404 (2006).
159. *Kootenai Cnty. Prop. Ass'n*, 769 P.2d at 555, 115 Idaho at 678.
160. *Id.* at 555, 115 Idaho at 678.
161. *Id.*
162. *Id.* at 556, 115 Idaho at 679.
163. *Id.*
164. *See* IDAHO CONST. art. XII, § 2; IDAHO CODE ANN. § 50-1027 (2009).
165. Loomis v. City of Hailey, 807 P.2d 1272, 1279, 119 Idaho 434, 441 (1991).
166. *Id.* at 1274, 119 Idaho at 436. An equity buy-in structure as described in this case bases the fee off the "replacement value minus the remaining bond principal and cumulative unfunded depreciation." *Id.* Essentially, the formula attempts to determine the present value of the system and then gives a share of that value to each user who connects. This rate structure was approved by the court because the Revenue Bond Act allowed the fee to provide for replacement and depreciation of public works. *Id.* The equity buy-in structure made the fee charged reasonably match the cost of the system, which the court found important when deciding that the fee was reasonable. *Id.*
167. *Id.* 807 P.2d at 1279, 119 Idaho at 441.
168. *Loomis,* at 1278, 119 Idaho at 440.

poses, the Court would have likely determined that it was a tax and would not have needed to determine the nexus requirement. Here, however, the Court found both characteristics of the nexus test. The fee was authorized by statute and the fee structure was reasonably related to the regulatory purpose of the statute because the cost was based on the cost of the system.[169]

3. Proposed approach to local ordinance drafting

In any case, where cities in Idaho want to assess fees to pay for the costs of federally mandated systems, they will have to satisfy the requirements of the *Loomis* test. Remembering *Lewiston Independent School District,* and the way the issue was framed as a tax/fee issue, is key to knowing how to draft an ordinance that can comport with the test. The key problem with the ordinance in *Lewiston* was that it was presented to the Court solely as the issue of whether the fee was a tax. Because the city gave no context to the Court of the science and problem behind stormwater, it could not present to the Court the reason it could assess the fees on all property owners regardless of their actual contribution to the stormwater system. This article suggests that if cities are in a position that they want to or have to raise revenue to pay for federal mandates, they will be safest following these steps.

First, look to the Idaho statutes and see what kind of power has been given to cities to raise revenue in relation to a regulatory activity. Starting out with a statute or constitutional provision that grants municipal authority is basically a given in local lawmaking in Idaho.[170] A city will then have to decide how to draft an ordinance that passes the *Loomis* test. The structure of the fee must avoid the characteristics of a tax and have the required nexus between the fee and the regulatory activity. While this may seem to be a straight forward process, we see in Idaho's history the same pattern repeated of cities trying to impose a fee and being rejected by the courts.

Avoiding the tax/fee distinction and finding the required nexus is likely to be found in reviewing the criticisms of the *Lewiston Independent School District* decision in this article.[171] Essentially, packaging the fee in a way that shows the court how there is authority and reason to impose the fee is what must be done and what the city failed to do in *Lewiston Independent School District*. Comparing the different outcomes in *Lewiston Independent School District* and *Kootenai County* helps show how a city would present a fee more effectively. The key difference between why Lewiston's stormwater fee was invalid and Kootenai County's solid waste fee was valid is the presumption made in *Kootenai County* that all residences create waste. If the city of Lewiston

169. *Id.* at 1280, 119 Idaho at 442.

170. Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 264 P.3d 907, 914, 151 Idaho 800, 807 (2011).

171. *See supra* Part II.C.

could have presented the Court with the argument that all property creates stormwater, it would have had a better chance of having its fee upheld. Again, this is done in the stormwater context through the explanation of stormwater science and study of the legal regime of the CWA.

It is important to note here that any local ordinance written, whether according to this proposed approach or any other approach, is still vulnerable to attack by those opposing the ordinance. No matter how well drafted an ordinance is, every theoretical ordinance could fail the *Loomis* test, and a local government takes the risk in drafting an ordinance that assesses a fee that the fee will be found a tax. Until local ordinances assessing fees in particular areas—such as stormwater—begin to garner support by the courts, the likelihood of an ordinance being found valid is difficult to predict.

C. Statutory Authority to Levy Taxes and Impose Fees

Garnering the statutory authority to levy taxes is one route, albeit a more difficult route in all likelihood, for cities to address their need to fund federally mandated systems. As was made clear in *Lewiston Independent School District*, the authority to levy taxes in Idaho is held by the state legislature, and any power for a municipality to impose a tax must be first approved by the same.[172] In Idaho, there are two constitutionally accepted ways of taking legislative action: the traditional legislative process and the initiative process. Each is a possible way for cities to find the authority needed to impose taxes for the federally mandated systems. However, each path can be a difficult one to walk.

1. The traditional legislative process

In general, the legislative process in Idaho does not greatly differ from the traditional approach used in almost every state legislature and in Congress. Idaho has a bicameral legislature "with a senate composed of thirty-five members and a house of representatives composed of seventy members."[173] The Legislature meets in annual sessions with sessions lasting about three months—a relatively short session compared to other states.[174]

The process of proposed legislation becoming state law is also not uncommon. Bills are introduced in both the House and Senate at a reading.[175] From there, bills are sent to committees to be considered, changes are proposed and made, the bills are re-read in front of the Legislature

172. *See Lewiston*, 264 P.3d at 912, 151 Idaho at 805; *see also* IDAHO CONST. art. VII, § 6.

173. WEATHERBY & STAPILUS, *supra* note 127, at 95.

174. *Id.*

175. *See id.* at 100–03.

as a whole, and then the bills are voted on.[176] Lastly, the governor holds the power to veto laws passed by the Legislature.[177]

Little more needs to be said about the legislative process in Idaho for the purposes of this article. However, perhaps more important than the process of legislation are the people involved in legislation, because any hope of using the traditional legislative approach to gain statutory authority to levy taxes and address federal mandates is dependent on gaining the ear of the legislators. Idaho is known as a state with a smaller legislature, made up of part-time senators and representatives who are closer to the people and represent smaller districts.[178] Both senators and representatives serve two-year terms rather than staggering the terms.[179] This potentially means that the needs of local governments and local needs in general will receive more attention from the Idaho Legislature, a legislature closer to the people.

2. Initiative lawmaking

In Idaho, the process of presenting initiatives for a public vote has the power to implement laws that have the force of laws made through the legislative process, but none of the restrictions of the legislative process.[180] The process is part of the Idaho Constitution.[181] The people have reserved it to themselves and it is becoming a more popular way of expressing the people's intent nationwide.[182] Although the constitutional amendment authorizing the initiative and referendum were adopted in 1912, the laws giving the structure of the process were not enacted until the 1933 Legislature.[183] Despite the increased popularity of the initiative lawmaking process, Idaho has only seen thirty-five such instances of attempted popular lawmaking since the first referendum in 1936.[184] Of those thirty-five instances, seven were referenda from the Legislature to the people and the rest were public initiatives.[185] Of all thirty-five proposed laws, the enactment rate has been about half, with sixteen laws being approved by the public.[186] A brief look at the proposed legislation shows a wide variety of issues addressed including sales and

176. *Id.* at 103–06.

177. *Id.* at 106.

178. *Id.* For a complete list of senators and representatives in the state of Idaho, including the listed occupation of each, visit the Idaho State Legislature website. IDAHO LEGISLATURE, http://www.legislature.idaho.gov/ (last visited April 8, 2014).

179. WEATHERBY & STAPILUS, *supra* note 127, at 95.

180. Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 2 (1996).

181. *See* IDAHO CONST. art. III, § 1.

182. Silak, *supra* note 180, at 38–39.

183. *Idaho Initiative History,* IDAHO SECRETARY OF STATE ELECTION DIVISION, http://www.sos.idaho.gov/elect/inits/inithist.htm (last visited April 8, 2014) [hereinafter *Idaho Initiative History*].

184. *See id.*

185. *See id.*

186. *See id.*

property tax, liquor, gambling, nuclear energy, hunting, same sex marriage, eminent domain restrictions, and, from the most recent voting cycle, education.[187]

Legislation by the voice of the people is a curious area of the law. One main question is how the courts in Idaho will treat any possible public initiative regarding taxes for federally mandated systems. There seems to be no obvious evidence that Idaho courts interpret initiatives differently than other legislation, but there are arguments that because initiatives do not undergo the rigorous process of traditional legislation—with extensive drafting changes, committee meetings to discuss the law, and all other legislative processes that are considered refining safeguards—they should be interpreted differently by courts.[188] Normally, the actual text is the starting point of interpretation in most cases, but some scholars suggest that voter intent should be more heavily scrutinized than the actual language of an initiative because very specific support groups generally draft initiatives.[189] This is significant because any initiative passed by the people that would give cities more local power to fund federally mandated systems could come under judicial scrutiny. The drafting of such an initiative, along with voters' pamphlets and other information that would prove voter intent all need to be done in such a way that the law could not be interpreted by the court to be ineffective in what the law is trying to do.

3. Imposing taxes and fees and public reaction

An important factor to consider when raising taxes or imposing fees is how the public will react to the increased costs.[190] This is because public support of a tax or fee is important not only in the realm of future compliance with the tax, but also in the realm of gaining public support

187. *See id.*

188. There are a number of arguments both in support of and opposition to initiative lawmaking. One notable legal scholar finds initiative lawmaking to be both undesirable for legal and practical reasons, and violative of the Republican Form of Government Clause and Equal Protection Clause of the Constitution. *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 301–05 (2007). The main opposition to initiative lawmaking is based on the idea that it lacks the legitimacy of representative lawmaking. *See, e.g.*, Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259 (2008). Proponents of initiative lawmaking seem to take an apologetic stance in supporting initiative lawmaking, stating that there is no guarantee that initiative lawmaking is less likely to accomplish democratic goals. *See, e.g.*, Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317 (2004); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

189. Silak, *supra* note 180, at 39.

190.. *See* Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 Va. Tax Rev. 155, 157–58 (1996).

to give cities the power to impose taxes through the initiative process.[191] Therefore, determining the subject matter of the tax or fee, and also the likelihood the public will support the increased cost, is important to consider in crafting the law before presenting it to the public.

Public reaction to tax increases is almost universally negative.[192] Even when a tax is not likely to affect an individual, he or she is likely to oppose tax increases.[193] "As Pavlov's dogs were conditioned to salivate at the sound of the bell, we have been conditioned to feel angry at the sound of the word 'tax.'"[194]

Not only does the public at large have a generally negative view of taxes, but tax scholars tend to study taxes from the perspective of how taxes burden individuals and the public generally.[195]

People generally view taxes negatively because they focus on the taking aspect of taxes.[196] As one scholar summed up,

> The vast majority of the time, we (1) associate taxes with revenue collection, (2) evaluate taxes with respect to their economic effects and (3) tax people based on their economic characteristics. We think of taxes as nonnormative, which leads us to generate tax bases not related to behavioral norms. Then, because we choose to tax economically productive behaviors rather than immoral ones, tax laws appear to lack moral legitimacy. This, in turn, further convinces us that we were right to think that taxes are essentially nothing more than the tools of governmental taking, and reinforces our attention to the taking done by taxes.[197]

There are a number of ideas of how to improve the public perception of taxes. Improving public perception of taxes can be accomplished by shifting the focus on the taking aspect of taxes to the benefits of taxes.[198] One scholar believes that positive role models of taxpaying could improve the public perception of a tax.[199] Another study analyzes how trust in government impacts the public's willingness to comply with taxes.[200] In that study, the scholars concluded that even after controlling for fear of being caught not paying taxes and a feeling of public duty,

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191.. *See id.* at 158 (reporting that economists estimate $100,000,000,000 per year in fraudulently withheld taxes in the U.S.).

192. *Id.* at 157.

193. *Id.* at 158.

194. *Id.* at 178 (footnote omitted).

195. Alice G. Abreu, *Taxes, Powers, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 9 (1996).

196. Rosenberg, *supra* note 190, at 161.

197. *Id.* at 170–171.

198. *Id.* at 227.

199. *Id.* at 228–229.

200. John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398, 398–417 (1998).

trust in the government increases the public's willingness to pay taxes.[201]

All of these approaches to improving the public perception of taxes can be considered in deciding how to approach the public with new taxes and fees. Specifically, an attempt by municipalities to increase costs on the public, or garner the support of the public to gain the authority to impose taxes or fees by public initiative, should involve an analysis of how the subject matter of the taxing can best be presented to the public. This analysis will help municipalities to be more successful in taking this path to address their financial troubles related to federal mandates.

4. Public feeling toward environmental issues

Because this article deals with municipal funding of federal mandates under the general framework of addressing federally mandated environmental systems, here the article will look at how environmental issues in particular may be issues that could garner public support in the area of taxation.

Increasing taxes or imposing fees to pay for environmental issues may be an area where the public is willing to look past the negative impact of the costs and look more readily to the benefits. Since the 1970s, the environment has taken a "prominent, and seemingly permanent, place on the public agenda" and in the political realm.[202]

The public perception of environmental issues since environmentalism's rise to prominence in the seventies may be waning, but support for environmental change increases in the face of environmental crises such as major oil spills or natural disasters.[203] Unless environmental issues are repeatedly dramatized and personalized, the public seems to be unable to hold its attention on environmental issues long enough to effect any major change.[204] This indicates the public's tendency toward latent environmentalism, which shows its power only when the public is sufficiently incensed by environmental problems.[205] At the same time, the lessons of the beginnings of the environmental movement can be instructive in passing future legislation regarding environmental mandates.

In Idaho, environmental protection has traditionally been viewed by most Idahoans to be a major concern.[206] However, much of the political debate over environmental protection in Idaho has been focused on

201. *Id.* at 412.

202. Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 86–87 (2001).

203. *Id.* at 110.

204. *Id.* at 110–11.

205. *Id.* at 110–12.

206. WEATHERBY & STAPILUS, *supra* note 127, at 203.

nuclear development and the Idaho National Laboratory.[207] It is not clear if addressing environmental mandates is the type of environmental issue Idahoans are likely to be concerned with.

5. Hypothetical application of principles to environmental mandates

For those who would choose to take the path of trying to gain the authority for municipalities to assess taxes or impose fees in response to environmental mandates, the first decision is whether to appeal to the legislature or to choose the initiative process. As has been discussed, appealing to the legislature is a practice in gaining the ear of the legislature. One who wishes to follow the traditional path of legislation can hope for greater access in Idaho because of the closeness of legislators to their constituents, but gaining the margin of approval needed to give local governments discretion in how to address the financial strains of environmental mandates is speculative. Suffice it to say that with the mixture of both environmental issues and local government issues, legislation proposed in this area is likely to be complicated.

The initiative process as a second choice is also a difficult road to travel. Especially in the realm of municipal power, the issue must be presented to the public in the most appealing way possible in order to garner the support necessary to pass the initiative. The history of Idaho's initiative lawmaking shows no easily recognizable trend that would indicate if environmental mandates and municipal power would or would not draw the attention of the public enough to receive enough support to pass any kind of legislation. Both governmental authority and environmental issues have been previously addressed through the initiative process,[208] but the only evident trend in initiative lawmaking is that the issues addressed in the lawmaking have risen to a level of public prominence such that some portion of the public would, at that time, be inclined to vote on measures directly concerning the issues. The one rule, then, to take away from the idea of going down the initiative lawmaking path is that public awareness of the issue—whether through natural forces or through the efforts of activists— must reach a certain level and then it is up to those in support of new laws to *carpe diem* and ride the wave of public support to pass the proposed laws.

As has been discussed, it is important for the municipal power activist to address the concerns of the public and avoid the stigma of taxation. Especially in the realm of the environment, taking advantage of the public's general support of environmentalism can be a way to overcome the stigma of taxation. Positive examples of taxpaying and focusing on the benefits of the municipal taxing authority will be key to helping garner public support. This is mostly an exercise in public relations,

207. *Id.* at 203–04.
208. *Idaho Initiative History*, *supra* note 183.

but it is important to consider whenever legal issues and the general public intersect.

D. Attempting to Change the State Constitution: Home Rule

Cities in America have traditionally been creatures of, or appendages to, the state. In one statement about Dillon's Rule, the assumption made was that cities are given power by the state, and there is very little room outside those grants of power to take any discretionary action.[209]

Home Rule provisions are set in state constitutions as "mini-Tenth Amendments" and set aside certain matters for municipal discretion because they are local matters in nature.[210] The essential difference, then, between states following Dillon's Rule and those that follow Home Rule, is that under Dillon's Rule, a city may only exercise the powers specifically conferred on it while under Home Rule, a city may exercise any power not specifically withheld or not in opposition to state law.

While Home Rule seems an attractive idea, there is some doubt that Home Rule can really accomplish what it seems to accomplish at face value. With state courts construing Home Rule narrowly, the supremacy of state power is even more ominous than the supremacy the federal government holds over state governments.[211] This could potentially mean that Home Rule is not as powerful as advertised. At the same time, when a state authorizes Home Rule, it tends to show a willingness to grant more local authority to local governments. While Home Rule might not give a city everything it wants, it still seems to be a step in the right direction for those who support greater local authority.

In Idaho, there have been many calls to give Home Rule power to local governments.[212] However, a leading study ranked Idaho fiftieth among states in the amount of local discretionary authority granted to cities and other branches of local government.[213]

The provision in the Idaho Constitution that seems to grant Home Rule power[214] is generally construed as granting Home Rule power in

209. Katherine Newby Kishfy, Note, *Preserving Local Autonomy in the Face of Municipal Financial Crisis: Reconciling Rhode Island's Response to the Central Falls Financial Crisis with the State's Home Rule Tradition*, 16 ROGER WILLIAMS U. L. REV. 348, 365–66 (2011) (discussing a statement made by legal scholar and Iowa justice John Dillon).

210. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001).

211. *Id.*

212. WEATHERBY & STAPILUS, *supra* note 127, at 163.

213. Macdonald, *supra* note 2, at 589 (citing Advisory Comm'n on Intergovernmental Relations, Measuring Local Discretionary Authority 59 (1981)).

214. IDAHO CONST. art. XII, § 2 ("Any 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.").

police powers only.[215] The courts have not looked at the provision as granting the same level of authority that other states have granted in their Home Rule provisions, even though the language of the provisions are nearly identical.[216]

Another important Idaho law regarding Home Rule is § 50–301 of the Idaho Code. This section originally seems to have stated that the power of local governments was governed by Dillon's Rule.[217] In 1976 the state legislature amended the section and seemed to be moving toward more Home Rule power, granting authority to municipalities to exercise authority in any area not specifically prohibited by the laws of the state.[218] But courts have continued to interpret the issue as cities having limited power, basically because the Act granting Home Rule power is only an act and not a constitutional amendment.[219] This means there is still an opportunity to argue for a greater grant of power to local authorities. Home Rule power can probably be implemented through convincing the courts to change the current interpretation or petitioning the legislature to amend the Constitution to make the provisions in the Constitution and Code less ambiguous.

One argument for granting more Home Rule power is the undue burden that federal action has directly on municipalities. One scholar asserts that the fact that a mandate is unfunded does not affect its constitutionality.[220] However, if a federal mandate threatened a state's very existence, there might be a Tenth Amendment argument to be made against the federal mandate.[221] This same argument might be extended to the effect of federal mandates on cities. The argument would be, essentially, that when a federal mandate threatens the existence of a municipality, municipal autonomy is threatened and greater authority

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215. Macdonald, *supra* note 2, at 606.

216. *Id.* at 605.

217. IDAHO CODE ANN. § 50-301 (West 1967) ("Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; *and exercise such other powers as may be conferred by law.*" (emphasis added)).

218. IDAHO CODE ANN. § 50-301 (West 2013) ("Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; *and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.*" (emphasis added)). This is generally known as the Local Self-Government Act of 1976.

219. Macdonald, *supra* note 2, at 609; *see also* WEATHERBY & STAPILUS, *supra* note 128, at 163–164.

220. *See* Patricia T. Northrop, Note, *The Constitutional Insignificance of Funding for Federal Mandates*, 46 DUKE L.J. 903, 904 (1997).

221. *Id.* at 925.

should be given to municipalities to address these issues. Any number of other arguments could be crafted along this vein—that cities should be given more local power based on the need for local power to address local needs and crises—however, they all come back to the general premises of Home Rule: local needs are best addressed by those closest to the problem. Unless this idea can permeate more deeply into the legal structure of Idaho through the legislature and through the courts, the pattern of interpretation of municipal power in Idaho is not likely to change.

E. Implementation of Efficiency Strategies

Efficiency in municipal organizations is evaluated from multiple viewpoints. The two main areas of efficiency in the realm of municipal projects are (1) energy and resource efficiency and (2) structural efficiency. A popular area to evaluate efficiency is in the realm of energy and resource efficiency.[222]

1. Resource efficiency

Even a superficial survey of both private and public organizations will likely indicate a general understanding that energy efficiency is a goal sought by all trying to reduce costs. Since the election of President Barack Obama in 2008, the White House has encouraged an increase in renewable energy sources and an overall increase in energy efficiency.[223] Some of the popularity of the energy efficiency movement may be contributable to the American Recovery and Reinvestment Act, which has paid out $30.1 billion in funding to energy and environmental projects with an additional $10.9 billion in energy efficiency tax credits and incentives and $21.4 billion in energy entitlements since its enactment in 2009.[224] Though many of the tax credits for energy efficiency expired in 2012, the recent American Taxpayer Relief Act of 2012 extended many energy efficiency tax credits.[225] In the coming years it seems that there will be an even heightened emphasis put on energy efficiency in Presi-

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222. *See generally* NIGEL JOLLANDS, STEPHEN KENIHAN & WAYNE WESCOTT, PROMOTING ENERGY EFFICIENCY BEST PRACTICES IN CITIES - A PILOT STUDY, INTERNATIONAL ENERGY AGENCY (2008), *available at* http://www.iea.org/publications/freepublications/publication/cities_bpp-1.pdf.

223. *See Securing American Energy*, THE WHITE HOUSE, http://www.whitehouse.gov/energy/securing-american-energy#energy-menu (last visited April 8, 2014).

224. *Breakdown of Funding by Category*, RECOVERY.GOV, http://www.recovery.gov/arra/Transparency/fundingoverview/Pages/fundingbreakdown.aspx (last visited April 8, 2014).

225. *See* American Taxpayer Relief Act of 2012, H.R. 8, 112th Cong. (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr8enr/pdf/BILLS-112hr8enr.pdf.

dent Obama's second term.[226] Whatever the source of the emphasis on energy and resource efficiency, the general push toward energy efficiency has opened up many avenues of cost saving in the realm of municipal projects.

2. Structural efficiency and efficiency through collaboration

Some local governments have taken the stance that the best way to lower the cost of local government is to downsize the size of government or dissolve municipalities.[227] This stance garners little support from the public.[228] Intergovernmental collaboration efforts have been influential in reducing the budgetary strains on local governments.[229] Collaboration is seen as a strong alternative to municipal dissolution or government downsizing as a means to reduce local government costs.[230]

Intermunicipal cooperation as a means of eliminating inefficiencies and capitalizing on economies of scale promises to trim the cost of government, and is far more likely to earn immediate public support than consolidation or dissolution of municipalities has. An intergovernmental relations council—or any committee of motivated volunteers—offers a valuable medium for the exchange, development, and recommendation of cost-saving strategies for adoption and implementation by the elected officials who serve its sponsoring communities.[231]

The basic premise of intergovernmental collaboration is that municipalities (or any group of government units) can come together and pool resources in an effort to take advantage of sharing personnel, equipment, and expertise.[232] Another important advantage to intergovernmental collaboration is the ability to take advantage of economies of scale savings from pooling resources.[233] Overall, the hope is that through collaboration, governmental units can create a structure to their operations that is more streamlined and cuts extraneous functions that increase cost unnecessarily.

The promise of intergovernmental collaboration, while theoretically enticing, still faces obstacles. The main obstacles to intergovernmental collaboration are practical and political. Practically, collaboration requires representation from different municipalities to come together and find ways that they can work together to decrease costs. In a New Jer-

226. Nichola Groom, *Analysis: Obama Climate Push to Benefit Energy Efficiency Firms*, REUTERS, (Jan. 25, 2013, 4:34 PM), http://www.reuters.com/article/2013/01/25/us-climatechange-winners-idUSBRE90O14K20130125.

227. Craig R. Bucki, *Downsizing Done Right: Cutting the Cost of Government Through Intermunicipal Collaboration*, 44 URB. LAW. 689, 689–90 (2012).

228. *Id.* at 690–94.

229.. *Id.* at 700–02.

230. *Id.* at 690.

231. *Id.* at 701–02.

232. Richard G. Hatcher, *Towards a New Form of Local Government: The Urban Common Market*, 7 DEPAUL BUS. L.J. 253, 270 (1995).

233. *Id.* at 273.

sey report on intergovernmental collaboration efforts, the main practical reasons for failure to collaborate were because it was "too costly," "too complicated," and "just not workable."[234] In the same report, the political reasons stated for failure to collaborate were that it "infringes on 'Home Rule,'" was "too political an issue," and "citizens objected."[235] Whatever the obstacles to collaboration, there still seems to be a good motivational reason to attempt collaboration with other municipalities in providing services, at least when feasible.

3. Management strategies

A management strategy that has been gaining popularity for municipal projects and utilities is an environmental management system (EMS).[236] An EMS is a way for a company to assess its environmental regulatory demands and address them. The basic elements of an EMS are (1) "reviewing the company's environmental goals," (2) "analyzing its environmental impacts," (3) "setting environmental objectives and targets to reduce environmental impacts and comply with legal requirements," (4) "establishing programs to meet these objectives and targets," (5) "monitoring and measuring progress in achieving the objectives," (6) "ensuring employees' environmental awareness and competence," and (7) "reviewing progress of the EMS and making improvements."[237]

The EPA has put its support behind the implementation of EMSs in public and private organizations.[238] The EPA itself has been required to implement EMSs for many of its facilities.[239] The EPA states that an EMS does not replace regulatory and enforcement programs, but can complement them.[240]

One study looked at the costs and benefits to organizations both private and public that implemented EMSs.[241] The study states that

> Overall benefits of EMS utilization in government facilities included better operational control in areas that impact the environment; better understanding of the root causes of noncompliance; improved operational efficiency and cost savings;

234. Michael A. Pane, *The Case for Interlocal Cooperation*, 35A N.J. PRAC., LOCAL GOVERNMENT LAW § 31:2 (West 2013).

235. *Id.*

236. EPA, *supra* note 12, at 3–6.

237. *Environmental Management Systems (EMS)*, ENVTL. PROT. AGENCY, http://www.epa.gov/ems/#iso14001 (last updated Apr. 10, 2013).

238. *Position Statement on Environmental Management Systems (EMSs),* ENVTL. PROT. AGENCY, (May 15, 2002), http://www.denix.osd.mil/ems/upload/epa-ems-position.pdf.

239. *Id.*

240. *Id.*

241. Dep't of Pub. Policy, The Univ. of N.C. at Chapel Hill, *Environmental Management Systems: Do They Improve Performance?*, UNIVERSITY OF N.C. AT CHAPEL HILL, (2003), http://www.epa.gov/environmentalinnovation/ems/ems_execsum_dotheywork.pdf.

> improved communications within the organization and with outside stakeholders and contractors/vendors; and better relationships with regulators and stakeholders.[242]

The study showed that EMS implementation in public entities is sometimes more difficult because certain barriers come in to play.[243] The barriers are, "management issues (integrating new approaches in strongly bureaucratic organizations); insufficient leadership (visibility and involvement from top management); organizational issues (time, employee buy-in); lack of public awareness; understanding and buy-in; and political uncertainty."[244] The costs of EMS implementation decrease as facilities and programs become better at implementing EMSs. Government EMS programs can reduce their costs by applying for EMS assistance programs.[245]

Looking into the possibilities of implementing an EMS in a municipal utility or system seems well worth the time. A system that can save resources through efficiency, while perhaps difficult to implement, allows a city to address financial needs without needing to appeal to other powers for help. And for some cities an EMS could be all that is needed to avoid a financial crisis.

V. CONCLUSION

This article attempts to accomplish one main goal: to help local government leaders understand the situation they are in when it comes to addressing federal mandates in Idaho. It is not always an easy situation to be in. Pressures from the federal government and restrictions from the state government can result in a feeling of being between a rock and a hard place. The current situation in Idaho requires local governments to take an all-possible-methods approach to addressing the financial burdens of federal mandates.[246] The case of *Lewiston Independent School District* and previous Idaho case law show that there is room for cities to craft ordinances to address their financial needs, but it will require that local leaders use the lessons from *Lewiston Independent School District* and provide the Court with the context and reasoning that the Court requires. At the same time, the Court must recognize the position cities are in and see past the formalistic distinctions put before it to address the real needs of local governments.

*By David Law**

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242. *Id.* at ES-22.
243. *Id.* at ES-22 to ES-23.
244. *Id.*
245. *Id.* at ES-23.
246. EPA, *supra* note 12.

* David Law is a 2014 J.D. candidate at the University of Idaho College of Law. I would like to thank the Idaho Law Review staff for the great help in publishing this article. Also, special thanks to Professor Jerrold Long for his help and prodding to really get to the

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