

6-4-2014

# City of Challis v. Consent of Governed Caucus Clerk's Record v. 2 Dckt. 41956

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41956  
Custer County Case CV-2013-120

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

---

**THE CITY OF CHALLIS, an Idaho municipal corporation,**

*Petitioner/Respondent*

vs.

**CONSENT OF THE GOVERNED CAUCUS, an Idaho unincorporated nonprofit association; and CLARENCE LEUZINGER, an individual**

*Respondents/Appellants.*

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**CLERK'S RECORD ON APPEAL**

*Appealed from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer*

*Before the Honorable Alan C. Stephens, District Judge*

---

David P. Claiborne  
Attorney at Law

*Attorney for Appellant*

Paul J. Fitzer  
Attorney at Law

*Attorney for Respondent*

---

**41956**

FILED - COPY  
JUN - 4 2014  
Supreme Court Court in response  
Entered on ADS by

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
LAURA FLETCHER  
2013 OCT 10 PM 12:34

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
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Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**AFFIDAVIT OF DAVID P. CLAIBORNE**

STATE OF IDAHO )  
                  ) ss.  
COUNTY OF ADA )

**DAVID P. CLAIBORNE**, being first duly sworn upon oath, deposes and states the  
following:

AFFIDAVIT OF DAVID P. CLAIBORNE - 1

**ORIGINAL**

1. That I am an individual over the age of eighteen, a resident of the State of Idaho, and have personal knowledge of the facts set forth herein, believing them all to be true and correct to the best of my knowledge and belief.
2. That I am an attorney licensed to practice law in the State of Idaho. I represent the interests of Consent of the Governed Caucus and Clarence Leuzinger in the above-titled action.
3. That this action for judicial confirmation was originally filed August 29, 2013 in Custer County, Idaho.
4. That, on September 9, 2013, *Notice* was first filed of record of a hearing on the request for judicial confirmation, said hearing to be held October 16, 2013 at 2:00 p.m.
5. That, on October 1, 2013, I entered an appearance and filed an *Answer* on behalf of a group of many Challis, Idaho citizens opposing the request for judicial confirmation. The Respondents contest both the legal and factual basis for the requested judicial confirmation.
6. That Respondents anticipate presenting one expert witness, Jack S. Hammond, P.E., in the field of engineering, to provide factual and opinion testimony in contravention of the allegations of Petitioner. Given prior commitments of Mr. Hammond, he is not available to attend the hearing on October 16, 2013, and is not available until after October 31, 2013. A true and correct summary of the opinions of Mr. Hammond is attached hereto as **Exhibit A**. It is anticipated that at hearing Mr. Hammond would provide additional and more detailed information as to the facts and assumptions underlying his opinions.
7. That the Idaho Judicial Confirmation Law, at IDAHO CODE § 7-1310, provides that “[t]he Idaho rules of civil procedure shall govern in matters of pleadings **and practice** where not




otherwise specified herein.” (Emphasis added). Respondents have exercised their rights as provided by statute by serving interrogatories, requests for production, and requests for admission upon the City of Challis, as allowed by the Idaho Rules of Civil Procedure. A true and correct copy of the same is attached hereto as **Exhibit B**. They were served on October 1, 2013. No response has yet been received at the time of signature by the undersigned. As a matter of fundamental fairness, Respondents ought to be afforded sufficient time to receive and conduct follow-up investigation to the materials and information requested by way of discovery before hearing is required so that Respondents can accurately and competently cross-examine Petitioner’s witnesses and present their own testimony and evidence.

8. That the Idaho Judicial Confirmation Law mandates that the Court “examine into and determine all matters and things” presented by a request for judicial confirmation. I.C. 7-1308(1). The City of Challis has admitted as much. See Memorandum in Support of Judicial Confirmation, at p. 7. As such, because the Court will have to hear and receive evidence, the undersigned hereby provides notice, pursuant to I.C. 7-1308(1) and I.R.C.P. 65(g), of its intent to cross-examine, at hearing on the City of Challis’ request for judicial confirmation, the affiants upon which the City of Challis relies to support its requested relief, including but not limited to Mayor Mark Lupher, City Clerk Kellie Wahlstrom, and City Engineer Donald Acheson.
9. That Respondents request that, pursuant to the Idaho Judicial Confirmation Law and Rules 6, 7 and 16 of the IDAHO RULES OF CIVIL PROCEDURE, the October 16, 2013 hearing be vacated and reset to a date and time convenient to the Court and counsel. Respondents are

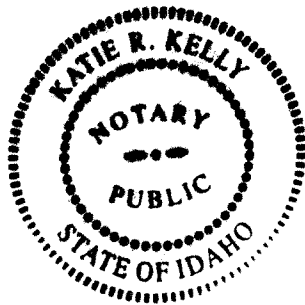
mindful that this matter is of great public concern, and therefore suggest the hearing be reset for December, 2013. Respondents believe it would be unjust to begin hearing on this matter on October 16, 2013 without having the opportunities provided by statute for the conduct of discovery.


DATED this 8<sup>th</sup> day of October, 2013.

SAWTOOTH LAW OFFICES, PLLC

by:   
David P. Claiborne

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of October, 2013.



  
NOTARY PUBLIC  
Residing at Oasis, ID  
My commission expires 2/20/14

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8<sup>th</sup> day of October, 2013 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: [sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)  
*Attorneys for Petitioner*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**HONORABLE JOEL E. TINGEY**  
**DISTRICT JUDGE**  
Bonneville County Courthouse  
605 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 529-1350  
Facsimile: (208) 524-7909  
E-Mail: [msouthwick@co.bonneville.id.us](mailto:msouthwick@co.bonneville.id.us)  
*Courtesy Copy - Judge's Chambers*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
\_\_\_\_\_  
David P. Claiborne

**EXHIBIT A**

AFFIDAVIT OF DAVID P. CLAIBORNE - 6

**David Claiborne**

---

**From:** LHammond <lhammond@turbonet.com>  
**Sent:** Thursday, October 03, 2013 3:31 PM  
**To:** David Claiborne  
**Subject:** Case No. CV 2013-120 City of Challis  
**Attachments:** Challis testimony.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

David,

Please find the attached letter.

Jack Hammond

October 3, 2013

Honorable Joel E. Tingey, District Judge  
District Court of the Seventh Judicial District of Idaho

Re: Case No. CV 2013-120  
City of Challis

In accordance with the September 9, 2013 Notice by the Clerk of the above referenced Court, I hereby request that the following information be entered into these proceedings as a "Written Appearance" or answer to the Petition by the City of Challis filed with the Clerk of the above-entitled Court.

I have standing in this matter as I own three (3) properties within the City of Challis that receive water service from this municipal system and, as such, participate in the financial solvency of this City enterprise facility. Additionally, I am a licensed Professional Civil Engineer in the State of Idaho and owner of a Consulting Engineering Firm with 40 years experience in planning, design and project management for construction and implementation of new, municipal public works facilities.

As such, I find significant portions of the proposed City of Challis Water System Improvements Project, for which the City is seeking "Judicial Confirmation" to incur an indebtedness of \$3,200,000 as an "ordinary and necessary expense" of the City authorized by the general laws of the State, to be far in excess of an "ordinary and necessary expense" of the City's municipal water system.

The proposed water system improvements project consists of three (3) significant cost components plus contingencies, engineering, administration, etc., as outlined in the study entitled "City of Challis Water Facility Plan Study" (the "Study"):

Estimated Construction Cost

1. Old Town Improvements	\$ 920,853
2. Airport Extension	\$ 563,178
3. Metering & Telemetry	<u>\$ 645,036</u>
Estimated Construction Total	\$2,129,066
4. Contingencies	\$ 236,827
5. Design Engineering, Bidding & Award	\$ 348,715
6. Construction Observation, Testing & Administration	\$ 207,352
7. Other (Legal, Interest & Grant Administration)	<u>\$ 115,000</u>
TOTAL ESTIMATED PROJECT	\$3,036,960

1. Old Town Improvements

Prudent periodic and continuing replacement of aging, underground utility systems is certainly an “ordinary and necessary expense” of a municipal infrastructure component. However, replacing approximately 2½ miles of City water mains with new 6” mains (why not some 8” or 10”) at a cost of \$480,785 without a thorough analysis of existing water main condition as well as installing 52 new fire hydrants at a cost of \$192,400 without a detailed assessment and replacement priority list of existing hydrants is not the “ordinary” approach to prudent replacement of municipal water system components and facilities. The study entitled “City of Challis Water Facility Plan Study” (the “Study”) prepared by the City’s contract Engineer does not even come close to this level of detail to support the conclusion that \$920,853 of immediate improvements are required for continuing operation of the City’s water distribution system to comply with Idaho Rules for Public Drinking Water Systems.

2. Airport Extension

The proposed 1.1 miles of new 8” water main and 0.4 miles of new 6” water main to serve the City General Aviation Airport facilities at a cost of \$563,178 is not an “ordinary and necessary” expense of the City without a thorough and detailed analysis of the Airport facilities water demand quantification and the potential alternatives to meet this quantified demand, such as an on-site production well equipped with variable frequency drive (VFD) pump, the proposed “Airport Extension” project, etc., the “Study” does not present any evidence that this level of analysis was even attempted. Therefore, how can this project component, at a cost of \$563,178 even be considered as an “ordinary and necessary” expense of the City’s municipal water system. An “on-site” production well and limited airport facilities distribution system (with fire hydrants) would probably cost less than \$200,000.

3. Metering & Telemetry

The proposed Metering & Telemetry Project at a cost of \$645,036 cannot, by any stretch of the imagination, be considered an “ordinary and necessary” expense of the City based on the following observations:

- a) The proposed computer based Metering & Telemetry System has obviously been proposed by a vender of these systems as referenced by the “BANYAN Telemetry Estimate” included in the “Study”. The “Study” simply states that “a more robust SCADA (Supervisory Control and Data Acquisition) system will reduce staff time, improve overall monitoring of key elements, enhance reporting and response of alarm conditions, and improve the security of the system.” A recommended expenditure of \$167,113 for a SCADA System is certainly not an “ordinary and necessary expense” of the City based simply on a stated opinion in the “Study” without any analysis of man-hour costs to monitor and read the existing meters compared to the man-hours required under the proposed “BANYAN” SCADA system or an evaluation of the relative importance and cost of monitoring key water system elements with “enhanced alarm and notifications features”.

- b) A far more prudent approach would be to replace the existing meters (not replace existing meter boxes, meter box rings, meter setters, installation, etc.) with new remote read meters at an estimated project cost of \$200,000 plus the vehicle remote meter reading hardware and software at an estimated cost of \$25,000 as compared to the estimated cost of \$477,923 recommended in the “Study”. Therefore, the City could probably justify an expenditure of \$225,000 (compared to proposed expenditure of \$645,036) to implement a modern meter reading system (includes new meters throughout the system) to reduce labor commitment and provide the ability to read the meters year round.

4. Contingencies

The “Study” estimates project contingencies at \$236,827 or 11.12% of the estimated construction cost of \$2,129,066. Forty years of similar project experience indicates that project contingencies of 5% to 8% of construction costs for a proposed project of this construction risk category is more than adequate.

5. Design Engineering, Bidding & Award

The “Study” concludes that the cost of preparation of Plans, Specifications, Bid Documents and Contract Documents as well as assisting the City in project Bidding and Contract Award is \$348,715 or 16.38% of the estimated construction cost of \$2,129,066. Again, professional and industry experience indicates that an “ordinary and necessary” expense for design and bidding assistance professional engineering services is not more than 12% of the construction cost.

6. Construction Observation, Testing & Administration

The “Study” concludes that the cost of these services is \$207,352 or 9.74% of the estimated construction cost of \$2,129,066. Experience indicates that these professional engineering services should not exceed 8% of the project construction cost. A total estimating engineering cost for professional services as described in item 5. & item 6. above should not exceed 20% (12% + 8%) of the estimated project construction cost.

7. Other (Legal, Interest & Grant Administration)

The “Study” concludes that the total estimated cost of these items is \$115,000 or 5.40% of the estimated construction cost of \$2,129,066. These project components are normally estimated at 5% of the estimated construction cost, depending on project complexity, borrowing costs and the number and type of grants sought.

In conclusion, the City could far more reasonably accomplish the goal of a significant Water System Improvement Project for an estimated construction cost of \$1,350,000 (\$925,000 + \$200,000 + \$225,000) including all of the proposed “Old Town” Improvements supported by conducting a thorough analysis of existing water main conditions and prioritizing individual main replacement. Based on the above enumerated, “normal” project percentages for Contingencies (8%), Design Engineering (12%), Construction Observation, etc. (8%) and Other (5%), the estimated project cost for



an “ordinary and necessary” expense of the City for the adjusted, recommended project would be \$1,350,000 plus \$445,500 (8% + 12% + 8% + 5% + = 33%) or \$1,795,500 rounded to \$1,800,000. A City of Challis Water System Improvement Project costing \$1,800,000, as compared to the proposed \$3,200,000 project, would far better meet the “Judicial Confirmation” requirement as an “ordinary and necessary expense” of the City for the benefit of the water system user rate paying citizens.

Again, periodic and continuing replacement of aging, municipal utility systems is certainly an “ordinary and necessary expense” of municipal infrastructure. However, for the City of Challis to seek “Judicial Confirmation” to incur an indebtedness of \$3,200,000 that will dramatically increase water user rates for Challis citizens based on the significant, unsupported conclusions of the “Study” and without an approving vote of the electors of Petitioner either being sought or obtained, it is my strong opinion that the City’s Petition for Judicial confirmation should be denied by the District Court of the Seventh Judicial District of the State of Idaho, for the reasons stated above.

Thank you for the opportunity to submit my “Written Appearance” to the Petition by the City of Challis filed as Case No. CV 2013-120.

Sincerely,

Jack S. Hammond, P.E.

**EXHIBIT B**

AFFIDAVIT OF DAVID P. CLAIBORNE - 7

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
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1101 W. River St., Ste. 110  
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Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**RESPONDENTS' FIRST SET OF  
DISCOVERY REQUESTS UPON  
PETITIONER**

**TO: THE CITY OF CHALLIS**, above-referred, and your attorneys of record:

**YOU WILL PLEASE TAKE NOTICE** that the Respondents require you to answer under oath the following discovery requests within thirty (30) days from the service hereof, and in conformance with all provisions of Rule 26, 33, 34, 36, and 37 of the IDAHO RULES OF CIVIL

RESPONDENTS' FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 1

PROCEDURE.

DEFINITIONS

The following terms used herein have the following meanings, unless otherwise indicated:

1. The term “answering party” refers to the party or parties to whom this request is directed, as identified above.

2. A “communication” includes, but is not limited to, all oral or written conversations, discussions, letters, telegrams, memoranda, e-mail, facsimile transmission, text messages, instant messages, electronic chats, Internet blogs, Internet web posts, Twitter feeds, Facebook posts, and any other transmission of information in any form, both oral and written.

3. A “document” includes, but is not limited to, all written or printed matter of any kind, including legal documents, letters, memoranda, business records, interoffice communications, notes, diary entries, reports, compilations, and data stored electronically, which are in possession or control of the answering party.

4. To “identify” means to (a) state a person’s full name, occupation, home address, business address, home telephone number, business telephone number, and present and past relationship to any party; and/or (b) state the title of any document, who prepared it, when it was prepared, where it is located, and who its custodian is.

5. “Hearing” shall mean any evidentiary hearing, contested hearing, and/or trial in relation to the above-entitled matter.

6. A “record” includes, but is not limited to, any document, writing, drawing, graph, chart, photograph, video, phono record, data compilation, or any other tangible or intangible item

RESPONDENTS’ FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 2

depicting sound, visual images, or data.

7. The term “requesting party” refers to the party making this request and requiring a response, as identified above.

8. The term “you” and/or “your” refers to the answering party.

#### INSTRUCTIONS

9. In responding to these discovery requests, furnish all information available to you, including information in the possession of your attorneys (and investigators, experts, etc., retained by you and your attorneys) not merely information known of your own personal knowledge.

10. If you cannot respond to the following discovery requests in full, after exercising due diligence to secure the information to do so, so state, and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information and knowledge you have concerning the unanswered portion.

11. These discovery requests are deemed continuing and your answers thereto are to be supplemented as additional information and knowledge becomes available or known to you.

12. The requesting party reserves the right to ask additional interrogatories and request additional documents or admissions, and/or take oral depositions.

13. Your failure to supply answers and/or supplementary answers to any interrogatory, request for production, or request for admission contained herein will result in an objection at any trial or evidentiary hearing in this matter where you attempt to call as a witness, offer a record, or contest an admission not so identified, provided, or denied in accordance with these discovery requests.

INTERROGATORIES

INTERROGATORY NO. 1: PERSONS WITH KNOWLEDGE. Please identify and provide the name, address, and telephone number of each individual that purports to have knowledge or is likely to have knowledge of discoverable information relevant to the disputed and undisputed facts at issue in this action, as determinable from the pleadings filed incident to this action, and identify the subjects of the information possessed by each individual.

INTERROGATORY NO. 2: POTENTIAL WITNESSES. Please identify those persons who you may call as witnesses at any Hearing, and for each such witness, state the substance of his/her expected testimony.

INTERROGATORY NO. 3: EXPERT WITNESS DISCLOSURE. Please identify each individual you may call or intend to call/qualify as an expert witness at any Hearing and please provide a written report prepared and signed by each person who may serve as a witness in this case and who has been retained or specially employed by you to provide expert testimony in the case, or whose duties as an employee of you regularly involve giving expert testimony, and such report shall contain the following:

- (a) A complete statement of all opinions to be expressed and the basis and reasons therefor;
- (b) The data or other information considered by the witness in forming the opinions;
- (c) Any exhibits to be used as a summary of or support for the opinions;
- (d) The qualifications of the witness;
- (e) A list of all publications authored by the witness within the preceding ten (10)

years;

(f) The compensation to be paid for the study and testimony; and

(g) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

INTERROGATORY NO. 4: YOUR COMMUNICATIONS AND STATEMENTS. If you or any of your agents or representatives are aware of any communications or statements made by you or anyone on your behalf, oral or written, which relate to any of the issues involved in this action, as determinable from the pleadings filed incident to this action, for each such communication or statement, please state:

(a) The date and time it was made;

(b) The place it was made;

(c) Whether it was oral or written;

(d) The identity (i.e. please identify) of each person who claims to have knowledge of the statement; and

(e) The substance of the statement.

INTERROGATORY NO. 5: POTENTIAL TRIAL EXHIBITS. Identify each and every document, record, or exhibit which you intend to use at any Hearing, including applicable dates, persons involved in, and subject matter or nature. For each such document, record, or exhibit, please attach a copy to your responses to these Discovery Requests.

INTERROGATORY NO. 6: IDENTITY OF DOCUMENTS AND RECORDS. Identify each and every document or record which you know to be in existence which pertains to any of the issues involved in this litigation, as determinable from the pleadings filed incident to this

RESPONDENTS' FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 5

action. For each such document or record, please attach a copy to your answers to these responses to these Discovery Requests.

INTERROGATORY NO. 7: STATEMENTS AGAINST INTEREST. If you intend to present at any Hearing any statement against interest of the requesting party, then with regard to each statement against interest, please state: (a) The date and time it was made; (b) The place it was made; (c) Whether it was oral or written; (d) The identity (i.e. please identify) of each person who claims to have knowledge of the statement; and (e) The substance of the statement.

INTERROGATORY NO. 8: BASIS OF DENIALS. If your answer to an Request for Admission set forth herein is anything other than an unqualified admission, then with regard to each qualified admission, partial admission or denial, please set forth with particularity each and every fact upon which you base the same.

INTERROGATORY NO. 9: PREPARATION OF DISCOVERY RESPONSES. Please identify each and every person that was contacted or consulted in preparation of your answers and responses to these Discovery Requests, or who otherwise participated in the preparation of your answers and responses to these Discovery Requests. In answering this Interrogatory, it is not necessary to identify your attorneys and your attorneys' staff.

#### REQUESTS FOR PRODUCTION OF DOCUMENTS

You are requested to make the following documents available on the date thirty (30) days from the service hereof, at the hour of 3:00 p.m of said date, at the law offices of Sawtooth Law Offices, PLLC, 1101 West River Street, Suite 110, Boise, Idaho, or at such time prior thereto as the parties may find convenient. Said documents and things are not privileged and are within the scope of examination as permitted by Rule 26(b) of the IDAHO RULES OF CIVIL PROCEDURE.

RESPONDENTS' FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 6



REQUEST FOR PRODUCTION NO. 1: RELEVANT DOCUMENTS. Please produce a copy of all documents, data compilations, and tangible things in the possession, custody, or control of you that are relevant to the disputed and undisputed facts at issue in this action, as determinable from the pleadings filed incident to this action.

REQUEST FOR PRODUCTION NO. 2: SUPPORTIVE DOCUMENTS. Please produce any and all documents and records identified, relied on, or supportive of any response to the above Interrogatories, as well as any and all documents reviewed in preparing your answers to the above Interrogatories.

REQUEST FOR PRODUCTION NO. 3: POTENTIAL TRIAL EXHIBITS. Please produce all documents and records which you intend to offer into evidence at any Hearing.

REQUEST FOR PRODUCTION NO. 4: INSURANCE INFORMATION. Please provide a copy of any insurance agreements under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered against you in the action or to indemnify or reimburse for payments made to satisfy the judgment entered against you in the action.

REQUEST FOR PRODUCTION NO. 5: TAPE RECORDINGS. Please produce copies of any video or tape recordings of any conversations between you and any third parties, including the requesting party, provided such conversation are relevant to the issues involved in this action, as determinable from the pleadings filed incident to this action.

REQUEST FOR PRODUCTION NO. 6: DOCUMENTS SUPPORTING DENIALS. If your answer to an Request for Admission set forth herein is anything other than an unqualified admission, then with regard to each qualified admission, partial admission or denial, please

RESPONDENTS' FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 7

produce all documents and records which tend to support the same.

REQUEST FOR PRODUCTION NO. 7: Please produce all documents and records evidencing your compliance, prior to initiating this action, with the Idaho Judicial Confirmation Law.

REQUEST FOR PRODUCTION NO. 8: Please produce all documents and records evidencing minutes of any meeting of the city council, or any committee thereof, of the City of Challis that reference, discuss, or relate to the "System" identified in your *Petition for Judicial Confirmation* filed August 29, 2013 for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 9: Please produce all documents and records evidencing the budget for the maintenance and operation of the "System" identified in your *Petition for Judicial Confirmation* filed August 29, 2013 for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 10: Please produce all documents and records evidencing any operating plans, operations studies, health and safety inspections/studies, and the like for the "System" identified in your *Petition for Judicial Confirmation* filed August 29, 2013 for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents and records relating to, referencing or describing any water rights owned by you, or used by you, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents and records of communications between you and Riedesel Engineering for the time period beginning January 1,

RESPONDENTS' FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 8

2010 through the present date.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents and records provided by you to Riedesel Engineering, or provided to you by Riedesel Engineering, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents and records of communications between you and State of Idaho, Department of Environmental Quality for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 15: Please produce all documents and records provided by you to State of Idaho, Department of Environmental Quality, or provided to you by State of Idaho, Department of Environmental Quality, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 16: Please produce the “Study” identified in your *Petition for Judicial Confirmation* filed August 29, 2013, together with all other documents and records related to, referencing, reflecting or relied upon incident to the “Study”.

REQUEST FOR PRODUCTION NO. 17: Please produce all documents and records upon which you rely for your assertions set forth at paragraph VI in your *Petition for Judicial Confirmation* filed August 29, 2013.

REQUEST FOR PRODUCTION NO. 18: Please produce all documents and records of communications between you and the Drinking Water Loan Program referenced in your *Petition for Judicial Confirmation* filed August 29, 2013.

REQUEST FOR PRODUCTION NO. 19: Please produce all documents and records provided by you to the Drinking Water Loan program, or provided to you by the Drinking Water

Loan program, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 20: Please produce all documents and records of communications between you and Bonneville Power Administration for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 21: Please produce all documents and records provided by you to Bonneville Power Administration, or provided to you by Bonneville Power Administration, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 22: Please produce all documents and records of communications between you and Custer Soil and Water Conservation District for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 23: Please produce all documents and records provided by you to Custer Soil and Water Conservation District, or provided to you by Custer Soil and Water Conservation District, for the time period beginning January 1, 2010 through the present date.

REQUEST FOR PRODUCTION NO. 24: PREPARATION OF DISCOVERY RESPONSES. Please produce all documents and records that were reviewed or consulted by you in preparation of your answers and responses to these Discovery Requests.

#### **REQUESTS FOR ADMISSION**

REQUEST FOR ADMISSION NO. 1: Admit that the “System” identified in your *Petition for Judicial Confirmation* filed August 29, 2013 is not presently required to be in compliance with IDAPA 58.01.08.501.

REQUEST FOR ADMISSION NO. 2: Admit that the “System” identified in your  
RESPONDENTS’ FIRST SET OF DISCOVERY REQUESTS UPON PETITIONER - 10


*Petition for Judicial Confirmation* filed August 29, 2013 is not presently required to be in compliance with IDAPA 58.01.08.552.

REQUEST FOR ADMISSION NO. 3: Admit that the State of Idaho, Department of Environmental Quality has not issued to you a non-compliance order relative to the "System" identified in your *Petition for Judicial Confirmation* filed August 29, 2013.

REQUEST FOR ADMISSION NO. 4: Admit that you have published no notice of any opportunity to bid on the capital works projects you are proposing in your *Petition for Judicial Confirmation* filed August 29, 2013.

**DATED** this 1<sup>st</sup> day of October, 2013.

SAWTOOTH LAW OFFICES, PLLC


by:   
David P. Claiborne

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 1<sup>st</sup> day of October, 2013 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
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*Attorneys for Petitioner*

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
David P. Claiborne

2013 OCT 11 AM 10:08

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
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E-mail: david@sawtoothlaw.com

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re;

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents,

Case No. CV-2013-120

**STIPULATION TO VACATE AND  
RESET HEARING ON JUDICIAL  
CONFIRMATION**

**COME NOW** the Petitioner, City of Challis, by and through their attorneys of record, Moore Smith Buxton & Turcke, Chartered, and the Respondents, Consent of the Governed Caucus and Clarence Leuzinger, by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby **STIPULATE** to the following:

STIPULATION TO VACATE AND RESET HEARING ON JUDICIAL CONFIRMATION - 1

1. That hearing on Petitioner's request for judicial confirmation presently set for Wednesday, October 16, 2013, at 2:00 p.m., be VACATED; and
2. That hearing on Petitioner's request for judicial confirmation be RESET to be called up for hearing on the 20 day of November, 2013, at the hour of 2:00 pm, before the Honorable Joel E. Tingey at the Custer County Courthouse in Challis, Idaho.

DATED this \_\_\_\_\_ day of October, 2013.

MOORE SMITH BUXTON &  
TURCKE, CHARTERED

by: 

Paul J. Fitzer  
Stephanie J. Bonney

DATED this 11<sup>th</sup> day of October, 2013.

SAWTOOTH LAW OFFICES, PLLC

by: 

David P. Claiborne

STIPULATION TO VACATE AND RESET HEARING ON JUDICIAL CONFIRMATION - 2

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 11<sup>th</sup> day of October, 2013 by the following method:

**STEPHANIE J. BONNEY  
MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
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E-Mail: [sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)  
*Attorneys for Petitioner*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
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- Facsimile
- Electronic Mail or CM/ECF

**HONORABLE JOEL E. TINGEY  
DISTRICT JUDGE**  
Bonneville County Courthouse  
605 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 529-1350  
Facsimile: (208) 524-7909  
E-Mail: [msouthwick@co.bonneville.id.us](mailto:msouthwick@co.bonneville.id.us)  
*Courtesy Copy - Judge's Chambers*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
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- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
David P. Claiborne



2013 OCT 11 AM 10:16

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In r e:

THE CITY OF CHALLIS, an Idaho Municipal  
Corporation,

Petitioner,

vs.

CONSENT OF THE GOVERNED CAUCUS,  
an Idaho unincorporated non-profit association;  
and CLARENCE LEUZINGER, an individual;

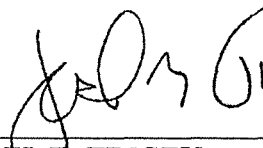
Respondent.

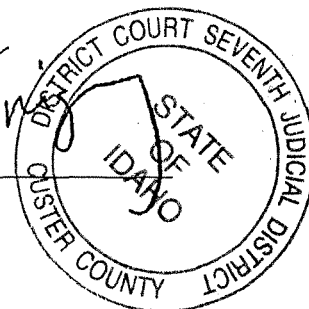
Case No. CV-2013-120

**ORDER VACATING HEARING**

IT IS HEREBY ORDERED that the hearing in this matter scheduled for October 16,  
2013 is vacated. A status conference on this matter will be held on November 20, 2013 at 2:00  
p.m. The Parties may participate in the status conference by phone upon notice to the clerk.

DATED this 11<sup>th</sup> day of October, 2013.

  
\_\_\_\_\_  
JOELLE TINGEY  
DISTRICT JUDGE



**CERTIFICATE OF SERVICE**

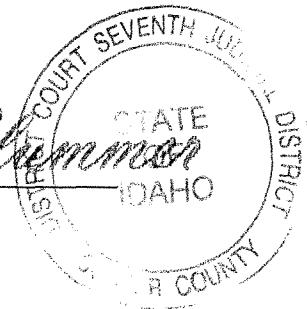
I hereby certify that on this 11<sup>th</sup> day of October, 2013, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon.

Paul J. Fitzer  
Stephanie J. Bonney  
MOORE SMITH BUXTON  
950 West Bannock Street, Suite 520  
Boise, ID 83702

David P. Claiborne  
SAWTOOTH LAW OFFICES  
Golden Eagle Building  
1101 W. River St. Ste 110  
Boise, ID 83707

BARBARA TIERNEY  
Clerk of the District Court  
Custer County, Idaho

By Laila Plummer  
Deputy Clerk

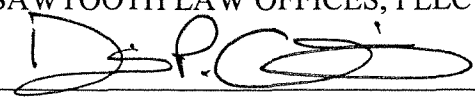




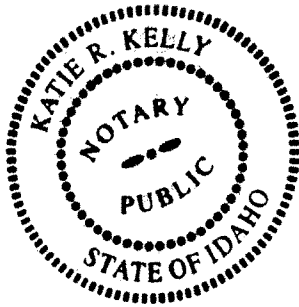
1. That I am an individual over the age of eighteen, a resident of the State of Idaho, and have personal knowledge of the facts set forth herein, believing them all to be true and correct.
2. That I am an attorney licensed to practice law in the State of Idaho, and represent the interests of the Respondents in the above-titled action.
3. That, on or about October 2, 2013, Petitioner caused to be filed the *Affidavit of Paul J. Fitzer*, which attached and submitted to the Court several unreported Idaho district court decisions on matters related to judicial confirmation during a time period ranging from 2006 through 2012.
4. That Petitioner did not attach and submit to the Court, with the *Affidavit of Paul J. Fitzer*, the decision of the Fifth Judicial District, County of Gooding, entered February 26, 2013 in the matter of In re: City of Gooding, Case No. CV-2012-559. A true and correct copy of said decision is attached hereto. Counsel for Petitioners acted as counsel for the City of Gooding in that case and therefore must have been aware of its existence and comparable applicability as the cases submitted with the said *Affidavit*. In the City of Gooding case, the District Court denied the City of Gooding's request for judicial confirmation of a plan to incur debt without voter approval to improve a public water system with respect to the water delivery system and fire protection system.

Your affiant says nothing further.

**DATED** this 12<sup>th</sup> day of November, 2013.

SAWTOOTH LAW OFFICES, PLLC  
by:   
David P. Claiborne

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of November, 2013.



Katie R. Kelly  
NOTARY PUBLIC  
Residing at Oasis, ID  
My commission expires 2/20/14

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 12<sup>th</sup> day of November, 2013 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
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*Attorneys for Petitioner*

- U.S. First Class Mail, Postage Prepaid
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**HONORABLE JOEL E. TINGEY**  
**DISTRICT JUDGE**  
Bonneville County Courthouse  
605 N. Capital Ave.  
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*Courtesy Copy - Judge's Chambers*

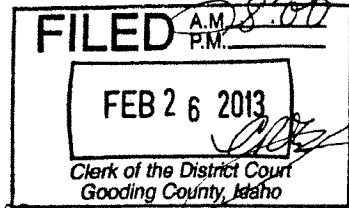
- U.S. First Class Mail, Postage Prepaid
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David P. Claiborne  
David P. Claiborne

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

IN RE: )  
 )  
 )  
THE CITY OF GOODING, an Idaho )  
municipal corporation, )  
 )  
Petitioner. )  
 )  
 )  
 )  
 )  
 )

Case No. CV-2012-559




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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

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This matter came before the Court for hearing on February 15, 2013 on the Verified Petition for Judicial Confirmation (Petition), which was supported by a Memorandum in Support of the Petition as well as the Affidavits of Stephanie J. Bonney; Monte Hall; and James P. Mullen. Appearing on behalf of the Petitioner at the hearing was Counsel, Stephanie J. Bonney/Paul J. Fitzer, attorney for the Petitioner with Ms. Bonney arguing on behalf of the Petitioner.

The Petition was opposed by JoAnn Doerr who appeared through Counsel, Joe James who filed a Motion to Dismiss the Petition pursuant to I.C. § 7-1307. Mr. James, argued on behalf of the Respondent.

The Court has considered the Verified Petition for Judicial Confirmation together with the Affidavits filed in support of the Petition; the Briefs filed in support and in opposition to the

Petition; the Water Facilities Planning Study dated September, 2012; the testimony of James Patrick Mullen; and the arguments of counsel. At the conclusion at the conclusion of the hearing the court took the matter under advisement for a written decision.

I.

**STATEMENT OF CASE**

The Petition was made pursuant to I.C. § 7-1301, et seq. by the Petitioner, City of Gooding, ("Petitioner"). The Petitioner is a municipal corporation incorporated pursuant to I.C. § 50-101, et seq. and is a political subdivision of the State of Idaho within the meaning of I.C. § 7-1303(6). Petitioner seeks judicial confirmation of its authority to enter into a loan agreement or to issue its promissory note, water revenue bond or other evidence of indebtedness whereby the Petitioner will borrow funds to improve the Petitioner's drinking water system and fire flow protection. The petitioner claims that the proposed expenditure is an "ordinary and necessary expense". The amount of the indebtedness to be incurred by the Petitioner is \$9,454,000.00 to be paid for over a period of thirty (30) years.

The issue for this Court is whether the City of Gooding must first receive voter approval before incurring the legal obligation to pay for improvements to its public water system. Article VIII § 3 of the Idaho Constitution requires that all debt exceeding the annual income/revenue of a municipality must first be approved by the voters, except for debt that is ordinary, necessary, and authorized by state law. There can be no dispute that a city such as the City of Gooding is authorized by law to maintain a domestic/public water system pursuant to I.C. § 50-323. Therefore, the only issue for this Court is whether the proposed improvements to the water system are an "ordinary and necessary" expense as defined by case law interpreting Article VIII, § 3 of the Idaho Constitution.

The Respondent objects to the petition for judicial confirmation and seeks to have the court dismiss the petition on the basis that the proposed expenditure is not an ordinary and necessary expense and that the proposed expenditure far exceeds the annual income/revenue of the petitioner.

## II.

### TESTIMONY

**JAMES PATRICK MULLEN:** Mr. Mullen is a licensed Civil Engineer and is employed by Keller & Associates. He has expertise in the areas of water and wastewater facilities management and design. He has also been acting as the City Engineer for the petitioner for the last 12 years.

Keller & Associates was retained by the petitioner to prepare a water facilities planning study which was intended to evaluate the petitioner's water system and to "identify deficiencies and make recommendations for addressing those deficiencies." He prepared the Water Facilities Planning Study (Study) for the petitioner. The Study identified a number of alternatives for the petitioner and the petitioner ultimately elected Alternative 3a, which he described as "drill three new wells and upgrade... some of their distribution system".

The Study as to the listed alternatives, including Alternative 3a, in part evaluated the present demand for water as well as anticipated future demand. In calculating the anticipated growth of the City of Gooding he used an anticipated growth rate of 1.2% although he admitted that the actual growth rate over the last 10 years has only been .54%. His calculations for demand also took into account that the residents would be converting from surface water system to the potable water system for irrigation needs.



His review of the water system also includes the amount of water necessary for fire protection. The Department of Environmental Quality (DEQ) requires that there be minimum fire flow of 1500 gallons per minute (gpm) and that the system maintain pressure of not less than 20 psi. The minimum "20 psi requirement refers to under high demand scenarios, such as an emergency condition." As part of the Study relative to fire flow protection they did a sampling of the hydrant fire flow tests conducted in June of 2008 and developed a computer model simulating different fire scenarios to evaluate the fire flows and pressures under the differing scenarios. The test results of the hydrants, used in the Study, were listed in Table 5-6 of the Study. He did acknowledge that since the hydrant testing in June 2008, that there have been some upgrades to the water system which included a new main line for the new hospital that could have increased the fire flow in some of the hydrants used in the computer model.

His Study noted that there could be a risk of backflow contamination if low pressure were to develop within the potable water system, however, his Study found that the water system had no history of contamination, including coliform. At page 47 of the Study he concluded that the potable water system was overall in good operating condition and up to date on the State rules and regulations, except as to certain recommendations set forth on that page. Those recommendations consist of (1) to meet fire flow requirements of some of the fire hydrants that the city replace some of the water distribution lines which are less than six (6) inches in diameter; (2) that the petitioner, establish a valve-check routine on a two year rotation. The upgrade to six (6) inch piping for the fire hydrants is part of Alternative 3(a). The water supply for the City of Gooding is sufficient for the year 2012 and does not become deficient before the year 2017 and the deficiency in 2017 is based on a growth rate of 1.2%.

It is his opinion that the difference in growth rate of .54% and 1.2% would not change his recommendations or the deficiencies in the system. The public water system in his opinion does meet currently State requirements for storage but not water supply. The system also does not meet fire flow requirements. He indicated that if there would be a fire in a school or "another high demand area, the city would not be able to pull the water with the pumper truck through the system without potentially collapsing the lines or providing backflow contamination to the system in order to put out the fire...". In his opinion the current deficiencies in the potable water system present a risk to public health and safety. Based on the current State requirements for fire protection the city cannot meet the current State requirements to provide water for larger facilities in the city.

**I.**

**FINDINGS OF FACT**

1. A resolution of the Petitioner's Council authorizing the filing of the Petition was duly passed, after notice and hearing in compliance with I.C. § 7-1304.
2. Notice of the Petition and the District Court hearing was published in the Times News once per week for three (3) consecutive weeks, in compliance with I.C. § 7-1306.
3. Notice of the Petition and the hearing was posted near the main door of the Petitioner's Hall/Office for at least 30 days, in compliance with I.C. § 7-1306.
4. This court held a hearing in open court on January 8, 2013, for the purpose of identifying any interested parties who had appeared in opposition to the Petition in accordance with I.C. § 7-1307. The Court continued the hearing to February 15, 2012 to allow the parties to conduct informal discovery and briefing and to allow additional parties to appear in accordance with I.C. § 7-1307(1).

5. Petitioner is a municipal corporation incorporated pursuant to I.C. § 50-101 et seq.
6. Petitioner possesses authority to borrow money or issue water revenue bonds or other evidence of indebtedness to finance its public water system pursuant to I.C. § 50-1027, et seq. and I.C. § 39-7601, et seq., subject to Article VIII, § 3, Idaho Constitution.
7. Petitioner operates a potable water system (PWS) for drinking water and fire protection pursuant to I.C. § 50-323 and 50-1028, et seq. The Petitioner also operates a gravity irrigation system (GIS) for the delivery of irrigation water to its residents.
8. Petitioner makes this Petition as a political subdivision pursuant to the Idaho Judicial Confirmation Law, I.C. § 7-1301, et seq.
9. In 2012 the petitioner contracted with Keller Associates, Inc. to "...provide a comprehensive evaluation of the existing [Water] system and provide recommendations to meet future demands and to continue to provide quality water to all residents in the service area." The evaluation was completed and is set forth in the Water Facilities Planning Study (Study) dated September 2012.
10. The PWS currently has 1378 residential connections and 231 commercial connections and the water supply is provided by three (3) ground water wells which have a combined allowed rate of 3,164 gallons per minute. The PWS also has storage capacity for 1.19 million gallons of water. The PWS consists of 42.5 miles of piping, which consist of 12.77 miles of 4" diameter pipe; 4.65 miles of 6" diameter pipe; 11.58 miles of 8" diameter pipe; 2.72 miles of 10" diameter pipe; and 10.74 miles of 12" diameter pipe.
11. The Petitioner in 2008 completed an upgrade to the PWS to provide adequate water flows to the hospital which consisted of 4,200 feet of 12" waterline.

12. The Petitioner's fire department relies upon the PWS to provide water for fire protection. The Petitioner has 142 fire hydrants which are connected to the PWS and some of these fire hydrants are not connected to a waterline that is at least of a 6" diameter and as a result some of the fire hydrants based on a June 2008 fire flow test, may not, meet minimum requirements for fire flow of 1500 gallons per minute (gpm), although the upgrades to the water system for the new hospital could have improved fire flow since June 2008, although the extent of any such improvement in fire flow protection is not known since no actual tests have been repeated since June 2008.<sup>1</sup> There is no evidence in the record to indicate that the petitioner's local fire authority has determined the adequacy or inadequacy of the fire flow capacity of the water system.

13. The water provided by the PWS is of "excellent quality" and there are "no environmental conditions in the planning area that need to be addressed with regard to public health". Water quality with respect to storage water is not a reported concern. Overall the Study concluded that with the exception of certain fire flow tests, that the PWS is "in overall good operating condition and is up-to-date on current IRPDWS and SDWA rules and regulations." The Study does recommend that the petitioner replace water distribution lines to fire hydrants that are less than six (6) inches in diameter and that the petitioner establish a "valve-check routine on a two year rotation". However, it is clear from the evidence that the petitioner has been aware of the lack of minimum fire flow in some of its fire hydrants since June 2008 and for the last five (5) years the petitioner has not taken action to upgrade the fire flow for those fire hydrants.

<sup>1</sup> IDAPA 58.01.08.542.06 - **Size of Water Mains.** When fire hydrants are provided, they shall not be connected to water mains smaller than six (6) inches in diameter, and fire hydrants shall not be installed unless fire flow volumes are available. If fire flow is not provided, water mains shall be no less than three (3) inches in diameter. Any departure from this minimum standard shall be supported by hydraulic analysis and detailed projections of water use. (3-30-07)

IDAPA 58.01.08.50 - **Fire Flow Capacity.** The water system capacity, in addition to maximum day demand, that is available for fire fighting purposes within the water system.... **Adequacy of the water system fire flow capacity is determined by the local fire authority.** (emphasis added).

14. The Petitioner operates and maintains a separate surface water gravity irrigation system (GIS) which provides irrigation water to approximately 73% of the homes in the City of Gooding. The source of the water is surface water rights from the little Wood River. The Petitioner has water shares and a decreed right which provides nine (9) cfs of water from six (6) diversion points. The water is diverted and supplied to those who use it through pipes and ditches. According to the Study 44% of the homes in the City of Gooding use the GIS to irrigate; 29% of the homes in the City use both the PWS and GIS to irrigate; and 27% of the homes in the City use the PWS to irrigate. The Study does find that the GIS "has deteriorated beyond repair and is becoming unmanageable". The evidence shows that the maintenance and operation of the GIS has become overly expensive for the Petitioner. However, there is no evidence that the operation or maintenance of the GIS is a threat to the public health or safety of the residents of the City of Gooding.

15. The Study recommends a number of alternatives to the petitioner's water system:

Alternative 1: Maintain Existing Gravity Irrigation System

Alternative 2: Install Pressure Irrigation System

Alternative 3: Abandon Existing Irrigation System and Augment Potable Water System

Alternative 3a: Augment Potable Water System by Drilling New Wells

Alternative 3b: Augment Potable Water System by Constructing Surface Water Treatment Plant

Alternative 3c: Augment Potable Water System by Constructing Surface Water Treatment Plant and New Well

16. The focal point of the Study is the petitioner's GIS. All of the alternatives recommended in the Study are dependent on either, improving, modifying or abandoning the GIS. If the petitioner continues to rely on surface water for irrigation future demands may still require that

additional water be added to the PWS. If the petitioner were to abandon its reliance on surface water for irrigation, the petitioner would need to add additional groundwater supply to the PWS in order to meet present and future demands for water and maybe to comply with DEQ design requirements.

17. The cost of each of the alternatives are in excess of the petitioner's annual revenue. The cost of any such alternative would be financed by the petitioner over a period of thirty (30) years. There is no evidence in the record as to the annual cost of such indebtedness or the what percentage of the petitioner's annual budget would be required to cover the cost of the financing.

18. The petitioner in its petition seeks authorization for a modified version of Alternative 3a. Under the modified version the petitioner would augment to PWS with two new wells and upgrade its distribution lines. The projected cost of the modified Alternative 3a is \$9,454,000.00. The petitioner's annual revenue, inclusive of revenues from its water system is \$7,886,300.00.

19. If the petitioner continued to use their surface water rights for irrigation in Alternative 1 there would not appear to be a need for additional water supply prior to 2017 assuming a growth rate of 1.2% and assuming that the petitioner continued to allow those residents to use the existing potable water for irrigation.<sup>2</sup>

20. The Study does not indicate that if the petitioner were to use Alternative 2 and convert the surface irrigation with the surface water rights, to a pressurized irrigation system that additional water supply would be necessary. This court assumes based on the recommendations in the Study that if the petitioner were to install a pressurized irrigation system, that the residents currently using the PWS for irrigation would convert to the use of the pressurized system and therefore additional water supply for the PWS would not be needed immediately before or after the year 2017.

<sup>2</sup> The Study indicates that 27% of the petitioner's residents currently use the PWS for irrigation.

21. If Alternative 1 or 2 were accepted by the petitioner it does not appear that there would be any substantial modifications made to the PWS, although the Study does recommend the upgrading of the main lines for the fire hydrants that are less than six (6) inches in diameter.

22. Under Alternative 3, substantial modifications may be required of the PWS to allow for the delivery of irrigation water, in addition to drinking water and fire flow protection. If the petitioner were to abandon the use of its surface water rights for irrigation purposes, it would be compelled to purchase additional groundwater rights to place additional wells online to supply necessary water for the PWS.<sup>3</sup>

23. The petitioner, if authorized by this court, has elected to proceed with the modified version of Alternative 3a, i.e. add two new wells to the PWS and upgrade and improve its transmission lines. According to the Study, acceptance of this alternative **may** require the petitioner comply with certain DEQ design requirements, IDAPA 58.01.08.501 specifically, as follows:

**07. Reliability and Emergency Operation.** New community water systems constructed after April 15, 2007 are required to have sufficient dedicated on-site standby power, with automatic switch-over capability, or standby storage so that water may be treated and supplied to pressurize the entire distribution system during power outages. During a power outage, the water system shall be able to meet the operating pressure requirements of Subsection 552.01.b. for a minimum of eight (8) hours at average day demand plus fire flow where provided. A minimum of eight (8) hours of fuel storage shall be located on site unless an equivalent plan is authorized by the Department. Standby power provided in a public drinking water system shall be coordinated with the standby power that is provided in the wastewater collection and treatment system. (5-8-09)

a. The Department may require the installation of standby power or storage facilities in existing systems if the frequency and duration of power outages a system experiences constitute a health hazard. (3-30-07)

b. Existing community public water systems that are substantially modified after April 15, 2007 shall meet the requirements of Subsection 501.07. in those portions of the system affected by the modifications. (3-30-07)

c. New sources and booster pumps intended to increase system capacity shall be provided with standby power or equivalent. (3-30-07)

d. For both new and existing public water systems, the Department may reduce the requirements of Subsection 501.07 if the system can demonstrate the capacity to adequately protect public health during a power outage. Any decision by the Department will be based on, but not limited to, the following considerations: (3-30-07)

i. An adequate emergency response and operation plan and the capacity to implement that plan. (3-30-07)

ii. The adequacy of the system's cross connection control program and the capacity to protect public health in the event of a system wide depressurization. (3-30-07)

iii. Demonstration of historical and projected reliability of the electrical power supplied to the water system. (3-30-07)

<sup>3</sup> The purchase of additional groundwater may not be necessary if the petitioner were to construct a water treatment plant to treat the petitioner's surface water to drinking water standards. This water once treated would be "pumped directly into the existing distribution system." (Study, pg. 54)

iv. A strategy for providing information to the public during power outages, including instructions to stop irrigation, boil water, etc., until notified otherwise. (3-30-07)

v. The level of reliability acceptable to consumers. This can be accomplished with either a vote of the majority of consumers for privately owned and operated systems or a decision by the governing body for publicly governed systems. (3-30-07)

vi. Other considerations that may be pertinent, including connections to other public water systems, agreements to provide water in emergency situations, and the availability of dedicated portable auxiliary power. (3-30-07)

**17. Ground Water Source Redundancy.** New community water systems served by ground water shall have a minimum of two (2) sources if they are intended to serve more than twenty-five (25) connections or equivalent dwelling units (EDUs). Under normal operating conditions, with any source out of service, the remaining source(s) shall be capable of providing either the peak hour demand of the system or a minimum of the maximum day demand plus equalization storage. See Subsection 501.18 for general design and redundancy requirements concerning fire flow capacity. (5-8-09)

**18. Redundant Fire Flow Capacity.** (3-30-07)

a. Public water systems that provide fire flow shall be designed to provide maximum day demand plus fire flow. Pumping systems supporting fire flow capacity must be designed so that fire flow may be provided with any pump out of service. (5-8-09)

b. The requirement for redundant pumping capacity specified in Subsection 501.18.a. may be reduced to the extent that fire suppression storage is provided in sufficient quantity to meet some or all of fire flow demands. Where fire suppression storage is not provided, the requirement for fire flow pumping redundancy may be reduced or eliminated if the following conditions are met: (5-8-09)

i. The local fire authority states in writing that the fire flow capacity of the system is acceptable and is compatible with the water demand of existing and planned fire fighting equipment and fire fighting practices in the area served by the system. (3-30-07)

ii. In a manner appropriate to the system type and situation, positive notification is provided to customers that describes the design of the system's fire fighting capability and explains how it differs from the requirements of Subsection 501.18.a. The notice shall indicate that the local fire authority has provided written acceptance of the system's fire flow capacity. (5-8-09)

24. Uncertainty does exist as to the necessity or requirement for compliance with the redundant water supply rules, which in large part, is a factor in determining the necessary additional water supply. The Study states in relevant part:

“There are several items that could be further investigated and considered. Because the redundant water supply rule is relatively new in the State of Idaho, practical implementation is still being considered. Conversations with DEQ representatives have indicated that there may be the potential for a waiver of this rule, if an emergency plan is in place to reduce demand on peak day scenarios. This could reduce the number of wells that would need to be constructed or the size of the water treatment facilities. However, if the existing irrigation system is abandoned, additional water supply facilities will need to be constructed...”  
(Study, pg.57)

25. In abandoning the GIS the petitioner is proposing substantial modifications to the PWS and therefore certain aspects of the PWS may have to be upgraded or improved to comply with certain DEQ design requirements, unless waived by DEQ. If the GIS were abandoned, the PWS



would then be augmented with additional wells to meet the petitioner's irrigation to meet water demand requirements if the PWS is to provide irrigation water in addition to drinking water and fire flow protection.

26. The petitioner is seeking to improve the PWS and the petitioner is not seeking to preserve the GIS, although the petitioner does seek to preserve the delivery of irrigation water to the 73% of its residents that rely in whole or in part on the GIS for irrigation. The petitioner is seeking to substantially modify its two separate and distinct water delivery systems and create a single delivery system for its delivery of drinking water, fire protection and irrigation water to the petitioner's residents.

27. The GIS is currently complex and expensive to maintain and while perhaps even obsolete, it does not presently present any risk to the public health or safety of the petitioner's residents or that DEQ requires any modifications or changes to the GIS as a separate water delivery system. However, the elimination of the GIS as a separate system for the delivery of irrigation water could lead to a public safety concern if the irrigation water were delivered through the PWS without an additional supply of groundwater in order to comply with DEQ requirements.

28. The need for additional water supply is the result of the decision of the petitioner to abandon the GIS and not any current or immediate risk to public health or safety.

29. The Petitioner anticipates funding through Grants and the Idaho Drinking Water Loan Program (IDWLP), pursuant to I.C. § 39-7601, et seq. or in the alternative the petitioner would issue a promissory note, water revenue bond or other evidence of indebtedness to a qualified third party. The promissory note or other evidence of indebtedness would be in the principal sum

of \$9,454,000.00 payable over 30 years from the water system revenues or other lawfully available funds of the Petitioner.

## II.

### CONCLUSIONS OF LAW

#### A. Article VIII, Section 3, Idaho Constitution

This Court has subject matter jurisdiction of the requested relief and has jurisdiction to adjudicate this matter and validate the proceedings taken by the Petitioner pursuant to I.C. § 7-1301, et seq. The petition seeks judicial confirmation to incur indebtedness in excess of its annual income and revenue for the improvement of its public water system.

The City of Gooding has the power and authority to “establish, create, develop, maintain and operate a domestic water system” and the definition of “domestic water system” is sufficiently broad so as to include a public water system which provides water for drinking, fire protection and irrigation. I.C. § 50-323.

A city such as the City of Gooding is “generally barred from incurring debts or liabilities, in excess of the income and revenue provided for debts and liabilities in such year, unless they first conduct an election and secure voter approval of the proposed expenditure...”. *City of Idaho Falls v. Fuhriman*, 149 Idaho 574, 576-577, 237 P.3d 1200, 1202-1203; Article VIII, § 3, Idaho Constitution. There is “one relevant exception known as the ‘proviso clause’ wherein no public vote is required if the expenditures constitute ‘ordinary and necessary expenses authorized by the general laws of the state.’” *City of Idaho Falls v. Fuhriman*, 149 Idaho 574, 577, 237 P.3d 1200, 1203; Article VIII, § 3, Idaho Constitution. Our courts have previously but not recently discussed the purchase or improvement of public water systems and the application of the proviso clause. *Woodward v. City of Grangeville*, 13 Idaho 652, 92 P. 840 (1907) (purchase of a water system

held not to be an ordinary and necessary expense); *Feil v. City of Coeur d' Alene*, 23 Idaho 32, 129 P. 643 (1912) (purchase of a water works system requires a vote of the people); *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912) (repair of an existing water system as the result of a calamity held to be an ordinary and necessary expense). In *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941), the City of Moscow sought voter approval to issue bonds "for the purpose of improving the waterworks system of the City of Moscow and building a water storage tank", "to provide a more adequate water supply for the city and better fire protection", etc. The voters approved the issuance of bonds, however after construction of the improvements began, the city treasurer refused to pay for the drilling of a well and the question the court answered was whether the city had the authority to pay for the drilling of the well out of the monies derived from the sale of the bonds. The court held that the ordinance authorizing the vote and the vote approving the bond issue was sufficient to authorize payment of the well. The issue in that case did not concern the proviso clause of Article VIII, § 3, of the Idaho Constitution.

The petitioner in support of the petition for judicial confirmation has asked the court to consider the findings of fact and conclusions of law entered in other district courts on petitions for judicial confirmation and some of which concerned the improvement of municipal water systems. However the district court opinions do not have binding authority upon this court and while they may be entitled to some consideration, this court must make its findings and conclusions based on the law as it exists today and on the facts or circumstances of this case. To the extent that these prior district court decisions have any persuasive value, they all establish that the need for the expenditure was based in large part on the finding that the water quality presented an immediate risk to the public health of the residents of the city which sought judicial

confirmation. *In Re: The City of Newdale*, CV-2009-339; *In Re: City of Inkom*, CV-2006-1545 OC.

On May 19, 1988 the Office of the Attorney General issued its opinion as to whether voter approval was required for the improvement of the City of Cascade water system.<sup>4</sup> *Idaho Op. Atty. Gen. No. 88-3*. The facts of that opinion indicated that the City of Cascade's water system was "fraught with serious problems" in that the water provided to the residents of the city could not "consistently meet turbidity standards of the state's drinking water regulations"; was at risk for contamination from *Giardia lamblia* which would render the only water treatment plant inoperable; that there was "insufficient water pressure and volume to provide adequate fire flow protection"; and since the city was dependent upon only one source of water a "routine pipeline or mechanical failure would shut off Cascade's water supply". The Attorney General opined that (1) the "city has the legal authority to operate a municipal water system under Idaho Code § 50-323"; and (2) that "the costs [to repair or improve the water system] will exceed Cascade's annual budget". The Attorney General then examined whether the proposed expenditures were "ordinary and necessary expenses". The opinion concluded that expenditures to improve the "pressure zone distribution system and to the treatment plant are clearly repairs and maintenance to an existing system" and were not subject to voter approval. (Atty. Gen. Op. pg. 5). The proposed work contemplated the addition of a groundwell to water system, and the opinion in reliance upon the prior decisions of the court in *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) and *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970) concluded as follows (Atty. Gen. Op. pg. 5):

<sup>4</sup> While not binding on this Court, those opinions are entitled to consideration. *Ehco Ranch, Inc. v. State ex rel. Evans*, 107 Idaho 808, 811, 693 P.2d 454, 457 (1984).

The addition of a groundwell, however, is not as clearly characterized as “repair or maintenance.” If the court had not defined “ordinary and necessary” in *City of Pocatello and Asson*, then the applicable authority would be the constitutional language requiring majority approval for extensions to water systems. Under *City of Pocatello and Asson*, however, new construction or extensions that are ordinary and necessary are not subject to voter ratification. The balancing test of *City of Pocatello and Asson* supports characterizing the new well as ordinary and necessary. The \$228,000 cost is significantly less than the \$1.44 million price for the ordinary and necessary airport in Pocatello. The total proposed debt is less than the yearly payments for any city in Asson. Like the Pocatello airport, the water system is an on-going municipal obligation. Although the well has not been built, it is better characterized as a system wide improvement more similar to Pocatello's airport than to the unbuilt electrical generating plant of Asson. Indeed, the Cascade facts are even more persuasive than those of *City of Pocatello*. The service in Cascade is a water system, an absolute necessity to every municipality. The municipal liability for an inadequate and potentially contaminated water system is as significant, if not more so, than the potential liability for an obsolete airport. See, *Asson*, supra, at 442. Therefore, the new well would also be ordinary and necessary under current Idaho law.

**B. Is the Proposed Expenditure an “Ordinary Expense”?**

The petitioner's proposed expenditure is “ordinary” “if in the ordinary course of municipal business, or the maintenance of municipal property, it may be and is likely to become necessary.” *City of Boise v. Frazier*, 143 Idaho 1, 4, 137 P.3d 388, 391 (2006); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968). The *Frazier* court took a rather simplistic approach to the term “ordinary” as that term is used in the proviso clause of Article VIII, § 3 of the Idaho Constitution.<sup>5</sup> So long as Idaho law authorizes a municipality to operate or maintain the property or activity at issue and so long as the proposed project or expenditure is to improve the property or activity for a legitimate purpose, i.e. “to keep pace with rising demand”, the proposed project or expenditure may be deemed to be “ordinary”.<sup>6</sup> *Id.*

<sup>5</sup> The current and most recent case law makes it questionable as to whether the cost of proposed expenditure in relation to the municipality's annual revenue or income is a significant factor in answering the question as to whether the expenditure is “ordinary” or “necessary”.

<sup>6</sup> “Idaho law provides for local governments to maintain and operate airports. *I.C. § 50-321*. The City's proposal to expand the Boise airport's parking facilities to keep pace with rising demand is entirely consistent with “the ordinary course of municipal business” in operating City property and is a type of expense that “may be and is likely to become necessary.”

By analogy the operation and maintenance of the petitioner's PWS and/or GIS is authorized by the general laws of this state. I.C. §§ 50-323; 50-1028. The repair, maintenance and even the improvement of a public water system is consistent with the "ordinary course of municipal business" and it is this type of expense that "may be and is likely to become necessary." *City of Boise v. Frazier, supra*. The maintenance, repair and improvement of a municipal water system is to be expected for every municipality. The Study shows that repair and improvement of both the PWS and GIS maybe needed to meet future water demands of the petitioner's residents based on a projected growth rate of 1.2%, although the actual growth rate over the last 10 years has only been .54%; that the GIS upon which 73% of its residents rely upon for irrigation water is in need of substantial repair and maintenance and that the current GIS is difficult and expensive to maintain and that if the GIS were abandoned that substantial modifications to the PWS may be required to comply with State regulations in order for the PWS to effectively provide drinking water, fire protection and irrigation water to the residents who rely on the petitioner to provide water for these purposes. For the reasons set forth, in *City of Boise v. Frazier, supra.*, the petitioners proposed expenditure would be considered by this court to be an "ordinary expense".

**C. Is the Proposed Expenditure a "Necessary Expense"?**

This court having determined that the proposed expenditure for its PWS, based on Alternative 3a, is "ordinary", this court must also determine whether the proposed expenditure is "necessary". Our courts have clearly held that since the phrase "ordinary and necessary" is used in the conjunctive, that the expenditure must not only be ordinary but also must be necessary. *Asson v. City of Burley*, 105 Idaho 432, 443, 670 P.2d 839, 850 (1983). *Also See, City of Boise v.*

*Frazier, supra*. In determining whether a proposed expenditure is “necessary” the *Frazier* court stressed the application of the *Dunbar* test. *City of Boise v. Frazier*, 143 Idaho 1, 4, 137 P.3d 388, 391 (2006); *Dunbar v. Board of Commissioners of Canyon County*, 5 Idaho 407, 412, 49 P. 409, 411 (1897). The petitioner must prove that there is “a necessity for making the expenditure at or during such year” and that only such “expenditures qualify as ‘necessary’ only if they are truly urgent.” *City of Boise v. Frazier*, 143 Idaho at 4, 137 P.3d at 391. The court therein stated:

“We observe that the expenditures contemplated by the delegates involved immediate or emergency expenses, such as those involving public safety, or expenses the government entity in question was legally obligated to perform promptly.”

This same court in its conclusion stated:

The required urgency can result from a number of possible causes, such as threats to public safety, *Board of County Comm’rs*, 96 Idaho at 510, 531 P.2d at 600, the need for repairs, maintenance, or preservation of existing property, *Asson*, 105 Idaho at 441–42, 670 P.2d at 848–49, or a legal obligation to make the expenditure without delay, see *Butler*, 11 Idaho at 404, 83 P. at 238. Whether a proposed expenditure is ordinary and necessary depends on the surrounding circumstances of each case. *Asson*, 105 Idaho at 442, 670 P.2d at 849; *Board of County Com’rs*, 96 Idaho at 510, 531 P.2d at 600; *Peterson*, 93 Idaho at 776, 473 P.2d at 646.

*City of Boise v. Frazier*, 143 Idaho at 6–7, 137 Idaho at 393–394

In *City of Idaho Falls v. Fuhriman, supra*, the court reaffirmed its conclusion in *Frazier*, when it stated:

In *Frazier*, this Court considered whether the City of Boise could incur long-term indebtedness in financing an expansion of the City’s airport parking facilities without first submitting the project to a vote. 143 Idaho at 2, 137 P.3d at 389. This Court, in holding that the project did not fit within the proviso clause, wrote that “in order for an expenditure to qualify as ‘necessary’ under the proviso clause of Article VIII, § 3 there must exist a necessity for making the expenditure *at or during such year*.” 143 Idaho at 5, 137 P.3d at 392 (emphasis added). “The required urgency can result from a number of possible causes, such as threats to public safety, the need for repairs, maintenance, or preservation of existing property, or a legal obligation to make the expenditure without delay.” *Id.* at 6–7, 137 P.3d at 393–94 (internal citations omitted).



*City of Idaho Falls v. Fuhriman*, 149 Idaho at 578, 237 P.3d at 1204.

The facts and circumstances of the proposed expenditure must show and establish that there exist, an “urgency” for the expenditure and that there is a “necessity” for making the expenditure during the year in question, without delay. The court in *Frazier* disavowed the term “indispensable” in the determination of whether a proposed expense was “necessary”. *Id.* 143 Idaho at 4, 137 P.3d at 391.

The Study in evaluating the current condition of the PWS has found that the drinking water is of good quality and there does not appear to be any public health or safety risks and that the water system is in “overall good operating condition and is up-to-date on current IRPDWS and SDWA rules and regulations, except as it comes to fire flow protection. (Study, pg. 23, 47). In terms of water storage the petitioner has 1.19 million gallons in storage and while there have been no reported concerns of water quality “due to prolonged water age in the storage”, the Study does recommend some improvements to “tank mixing” through the use of “water jets or properly designed inlet and outlet manifolds. (Study, pg. 32). The Study indicated that there might be a minor deficiency in the overall water storage<sup>7</sup> for “fire storage” by approximately 13,920 gallons however the Study did conclude that additional storage for “fire storage” would not be necessary if additional groundwater wells were added to the water supply for the PWS. (Study, pg. 40). Lastly, in terms of fire flow protection the Study found that based on fire flow field tests conducted in June 2008 that some of the petitioner’s 142 fire hydrants did not meet minimum fire flow requirements which were attributable to “small diameter piping (less than 6-inch pipe) and long transmission lines of inadequate sizing.” (Study, pg. 38). The Study overall

<sup>7</sup> Mr. Mullen testified that water storage was in compliance with State requirements, but not water supply. This would suggest that the need for additional storage is not presently urgent and the court assumes that his opinion regarding water supply is based on the State’s redundancy requirements which are discussed later in this opinion.



as concerns the PWS recommends that that the petitioner to address fire flow “replace water distribution lines less than 6 inches in diameter” and that the petitioner “establish a valve-check routine on a two year rotation to identify closed, paved-over or broken valves in the system.” (Study, pg. 47). While the improvement in fire flow protection can concern the protection of public safety, the urgency during this year would not appear to exist, since the petitioner has been aware of this issue since June 2008 and has not attempted to previously improve fire flow protection nor is there evidence that the local fire authority has determined that there is a lack of fire flow capacity. The court in *City of Idaho Falls v. Fuhriman, supra.*, observed that there was no urgency to enter into the power sales agreement “during such year”, for the purchase of electricity, since there was ample time to submit the agreement for a vote of the people. *Id.* 149 Idaho at 578, 237 P.3d at 1204. The petitioner has had almost 5 years to seek to upgrade or replace the water mains that are less than six (6) inches in diameter that is said to reduce the required flows. If the petitioner can wait five years to address this issue there is time to submit the matter to a vote of the people, since the petitioner wants to do more than merely replace water mains. The proposed upgrades and improvements to improve fire flow or storage are more so the direct result of the petitioner’s decision to abandon the GIS.

The proposed expenditure goes beyond the need to improve fire flow protection even assuming that the improvement of fire flow protection was urgent. The overall concern of the Study is not public health or safety. The focus of the Study is what can the petitioner do with the GIS. The Study found that 73% of the residents rely on the GIS in whole or in part for irrigation water and that 29% of the residents rely solely on the PWS for irrigation water. The Study concludes that the GIS is an “old and outdated system [which] has become increasing complex and difficult to manage.” (Study, pg. 44). If the petitioner were to continue its maintenance of the

current GIS it "will spend a substantial amount of money periodically for maintenance." (Study, pg. 48).

The Study presented to the petitioner a number of alternatives to address both the PWS and the GIS. The petitioner is seeking judicial confirmation as to Alternative 3a, wherein the petitioner would abandon the GIS and combine drinking water, fire protection water and irrigation water in one single system. (Study, pg. 53-54). This alternative in addition to the other recommendations would require the petitioner to acquire new groundwater rights and drill two new wells. The two new wells would be required since the intent of the proposal is that the petitioner would no longer rely upon its surface water rights for irrigation and the two wells would be needed to make up in part the loss of the surface water that the petitioner had relied upon for irrigation needs of its residents.

The expenditures that are the subject of this petition are substantially driven by the proposed abandonment of the GIS and the incorporation of irrigation water into the PWS. The irrigation system as it exists today has not been shown to present any risk to the health or safety of the residents who rely upon surface water for irrigation or any of the petitioner's residents, however, it is in need of substantial expenditures to preserve the existing delivery system for irrigation water. The petitioner does not seek to maintain or repair the irrigation system because of public health, but only because it is so costly to maintain and repair. Therefore, the court in assessing the necessity for the proposed expenditure is based on some urgency and this court must assess the circumstances that give rise to the urgency, i.e. the cause of the urgency. The court in *Frazier* indicated that while adequate parking was critical to the operation of an airport, it was not "urgent" that the city construct a new parking garage without a vote of the people, since the city was temporarily meeting the demands of the airport using the surface land for

parking on a temporary basis. Since the needs of the airport were currently being met on a temporary basis, the need for the parking structure was not so immediate or urgent as to be “necessary” as used in the proviso clause.

In *Hickey v. City of Nampa*, the public water system, during attempts to extinguish a fire, was damaged so as to make the system not operational. The court found that the expense to repair the water system was “ordinary and necessary” because it was an “expenditure rendered necessary by casualty or accident, which has impaired or injured municipal property that is necessary for the protection of the city against fires, or for the health and welfare of the city.” *Hickey v. City of Nampa*, 22 Idaho at \_\_\_, 124 P. at 281. The evidence in this case is insufficient to indicate or even suggest that the proposed expenditure to the extent that it concerns the modification of the PWS to provided irrigation water is necessary for the immediate protection of the health or safety of the petitioner’s residents, since, there is no evidence that the current GIS presents any health or safety risks to the residents who rely on the system for irrigation water. At the present time the PWS is in overall good working condition and the GIS is meeting the irrigation needs of the residents who rely upon it for irrigation water, albeit, the GIS is difficult and expensive to maintain.

The evidence before this court does not suggest that the petitioner is currently under any legal obligation to alter or change its PWS or GIS, except if the system is substantially modified<sup>8</sup> in some circumstances as concerns the DEQ design requirements. There is evidence that the state regulations may require the petitioner to comply with certain regulations if substantial modifications were made, however, the regulations to some extent only apply to new community

<sup>8</sup> IDAPA 58.01.08.118 – **Substantially Modified**. The Department shall consider a public water system to be substantially modified when, as a result of one (1) or more projects, there is a combined increase of twenty-five percent (25%) or more above the system’s existing configuration in the population served or number of service connections, the total length of transmission and distribution water mains, and peak or average water demand.

water systems.<sup>9</sup> There is even a suggestion that the petitioner may be able to obtain a waiver of the redundancy requirements. The current water system is acknowledged by the petitioner to have been in operation for over 30 years. There is simply no evidence that the current operation of the petitioner's two water systems is subject to any legal obligation or legal liability that would require the petitioner "to make the expenditure without delay." The court in *City of Pocatello v. Peterson, supra.*, held that the city's decision to build a new airport terminal was a necessary expense because the old terminal was obsolete and that it was unsound and not safe for the users of the terminal. The court's focus was on the potential legal liability of the City in making the determination of necessity. The evidence would suggest that the petitioner's GIS may very well be obsolete, however, again the GIS as it presently exists is not a threat to the petitioner's residents. The petitioner is not under any "legal obligation to make the expenditure without delay" as concerns the abandonment of the GIS. The Study states that the PWS is in good operating condition and up-to-date on State and Federal regulations. The evidence does not indicate that the petitioner, with respect to the PWS without the augmentation of the irrigation water, is under any legal obligation to improve or modify or upgrade the water system. While there is evidence to suggest that the fire flow protection may be in need of improvement, there is no evidence that the local fire authority has indicated that current fire flows are in fact inadequate to provide fire fighting services.

Our courts have also stated that the urgency for the expenditure can be shown by "the need for repairs, maintenance or preservation of existing property", which can also be interpreted to mean "existing facilities". The petitioner does not propose to "preserve" the GIS and in fact intends to abandon it because it is an expensive and complex system to maintain and repair. Yet the petitioner does intend to "preserve" the delivery of irrigation water but with a different

<sup>9</sup> IDAPA 58.01.08.501.07; 58.01.08.501.17; 58.01.08.501.18

method of delivery. The *Frazier* court recognized that the “repair and improvement of existing facilities can qualify as an ordinary and necessary expense”, but not to approve “entirely new construction.” *Id.* 143 Idaho at 6, 137 P.3d at 393. In this case the proposed expenditure is driven by the petitioner’s decision to abandon and not preserve the GIS. The petitioner seeks to improve the delivery of water for all legitimate purposes to its residents but the petitioner is not seeking to preserve all of its existing facilities. The upgrades and improvement of the PWS is based on the petitioner’s decision to abandon the GIS. Our courts in referring to *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941) seem to suggest that the City of Moscow’s decision to “improve its existing waterworks system and build a water storage tank, to provide a “more adequate water supply” [to be] within the application of Art. 8, § 3 of the Constitution.”. *See, City of Idaho Falls v. Fuhrman*, 149 Idaho at 582, 237 P.3d 1208; *Asson v. City of Burley*, 105 Idaho at 442, 670 P.2d at 849. If that is what our courts have intended to imply, then clearly the petitioner’s decision to proceed pursuant to Alternative 3a is not much different from the decision of the City of Moscow. This court does not necessarily find that the *Durand* decision is persuasive authority in this matter. The issue in *Durand* whether some of the work approved by the City was authorized by the bond issue submitted to the voters. The court did not decide whether a vote of the people was required under Article VIII, § 3 or whether the proposed expenditure was an ordinary or necessary expense. The holding in *Durand* does not assist this court in resolving the issue presented herein. It only indicates that the City of Moscow elected to have the voters decide the bond issue and not that the voters were required to approve the expenditure.

The PWS currently is in “good operating condition”; in compliance with State and Federal regulations; has good water quality; and has sufficient water to meet the needs of the petitioner’s residents until at least 2017 unless the petitioner abandons the GIS and begins to

deliver irrigation water through the PWS. As was the case in *Fuhriman*, there is no showing of the requisite urgency in the need to abandon the GIS that would suggest there is not time to submit the proposal to a vote of the people.

11. Therefore, based on the facts and circumstances of this case the court must find and determine as a matter of law that the proposed expenditure of \$9,454,000.00 to abandon the GIS and improve the PWS is not a necessary expense under the proviso clause of Article VIII, § 3 of the Idaho Constitution, and that the proposed expenditure is subject to a confirmatory vote of the people.

### III.

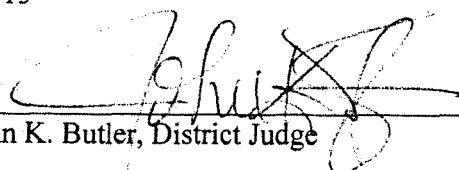
#### ORDER

Now therefore, IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. That the findings and conclusions made here are intended to be and are legally binding upon all persons interested in the outcome of this proceeding including but not limited to all persons or entities who received actual or constructive notice of the filing of the Petition;
2. The Respondent's Motion to Dismiss is GRANTED, for albeit, different reasons set forth above;
3. The petitioner's proposed expenditure requires a confirmatory vote of the people in accordance with Article VIII, § 3 of the Idaho Constitution; and
4. That the petition for judicial confirmation is hereby DISMISSED;

IT IS SO ORDERED.

DATED this 26 day of February, 2013

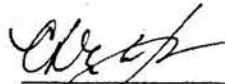
  
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John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

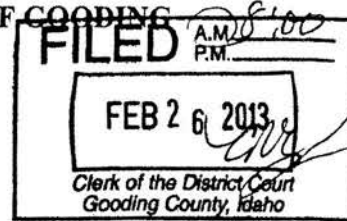
I, undersigned, hereby certify that on the 26 day of February, 2013 a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was mailed, postage paid, and/or hand-delivered to the following persons:

Stephanie J. Bonney  
Moore Smith Buxton & Turcke, Chartered  
950 W. Bannock Street, Ste. 520  
Boise, Idaho 83702

Joseph F. James  
Brown & James  
130 Fourth Avenue West  
Gooding, Idaho 83330

  
\_\_\_\_\_  
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING



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)  
)  
)  
IN RE: CITY OF GOODING, an Idaho )  
municipal corporation, )  
  
Petitioner. )

) Case No. CV-2012-559  
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**JUDGMENT AND DECREE**

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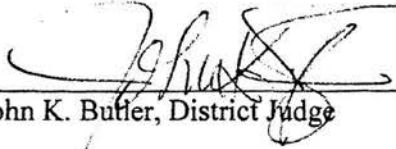
The Court having entered its Findings of Fact, Conclusions of Law and Order on the Petition for Judicial Confirmation,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That the findings and conclusions made here are intended to be and are legally binding upon all persons interested in the outcome of this proceeding including but not limited to all persons or entities who received actual or constructive notice of the filing of the Petition;
2. The Respondent's Motion to Dismiss is GRANTED;
3. The Petitioner's proposed expenditure requires a confirmatory vote of the people in accordance with Article VIII, § 3 of the Idaho Constitution; and
4. That the petition for judicial confirmation is hereby DISMISSED.

IT IS SO ORDERED.

DATED this 26 day of February, 2013

  
\_\_\_\_\_  
John K. Butler, District Judge



CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 26 day of February, 2013 a true and correct copy of the foregoing JUDGMENT AND DECREE was mailed, postage paid, and/or hand-delivered to the following persons:

Stephanie J. Bonney  
Moore Smith Buxton & Turcke, Chartered  
950 W. Bannock Street, Ste. 520  
Boise, Idaho 83702

Joseph F. James  
Brown & James  
130 Fourth Avenue West  
Gooding, Idaho 83330

  
Deputy Clerk

DISTRICT COURT  
CUSTER COUNTY  
IDAHO

*B. Finney*  
2013 NOV 15 PM 1:49

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**SECOND STIPULATION TO RESET  
HEARING ON JUDICIAL  
CONFIRMATION**

**COME NOW** the Petitioner, City of Challis, by and through their attorneys of record, Moore Smith Buxton & Turcke, Chartered, and the Respondents, Consent of the Governed Caucus and Clarence Leuzinger, by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby **STIPULATE** to the following:

SECOND STIPULATION TO RESET HEARING ON JUDICIAL CONFIRMATION - 1

**ORIGINAL**

1. That hearing on Petitioner's request for judicial confirmation, presently set for Wednesday, November 20, 2013, at 2:00 p.m., be continued to Wednesday, January 15, 2014, commencing at the hour of 2:00 p.m., at the Custer County Courthouse in Challis, Idaho; and
2. That counsel for one or both of the parties will appear, in person or by telephone, for the hearing as presently set for Wednesday, November 20, 2013, at 2:00 p.m., will appear at said date and time for the purpose of confirming the continuation in open court so as to avoid the necessity for further and additional publication of the continued hearing date.

DATED this \_\_\_\_\_ day of November, 2013.

MOORE SMITH BUXTON &  
TURCKE, CHARTERED

by: 15/  
Paul J. Fitzer  
Stephanie J. Bonney

DATED this 13<sup>th</sup> day of November, 2013.

SAWTOOTH LAW OFFICES, PLLC

by: D.P. Claiborne  
David P. Claiborne

1. That hearing on Petitioner's request for judicial confirmation, presently set for Wednesday, November 20, 2013, at 2:00 p.m., be continued to Wednesday, January 15, 2014, commencing at the hour of 2:00 p.m., at the Custer County Courthouse in Challis, Idaho; and
2. That counsel for one or both of the parties will appear, in person or by telephone, for the hearing as presently set for Wednesday, November 20, 2013, at 2:00 p.m., will appear at said date and time for the purpose of confirming the continuation in open court so as to avoid the necessity for further and additional publication of the continued hearing date.

**DATED** this 13 day of November, 2013.

MOORE SMITH BUXTON &  
TURCKE, CHARTERED

by: 

Paul J. Fitzer  
Stephanie J. Bonney

**DATED** this \_\_\_\_\_ day of November, 2013.

SAWTOOTH LAW OFFICES, PLLC

by: \_\_\_\_\_

David P. Claiborne

SECOND STIPULATION TO RESET HEARING ON JUDICIAL CONFIRMATION - 2

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 13<sup>th</sup> day of November, 2013 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: [sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)  
*Attorneys for Petitioner*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**HONORABLE JOEL E. TINGEY**  
**DISTRICT JUDGE**  
Bonneville County Courthouse  
605 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 529-1350  
Facsimile: (208) 524-7909  
E-Mail: [msouthwick@co.bonneville.id.us](mailto:msouthwick@co.bonneville.id.us)  
*Courtesy Copy - Judge's Chambers*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF



\_\_\_\_\_  
David P. Claiborne

2013 NOV 26 PM 4:11

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
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Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
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E-mail: david@sawtoothlaw.com

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**ORDER CONTINUING HEARING ON  
JUDICIAL CONFIRMATION**

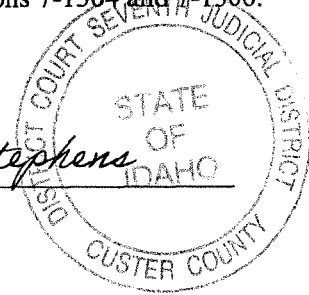
**THE ABOVE-TITLED MATTER** came before the Court for hearing on the City of Challis' *Petition for Judicial Confirmation* on the 20<sup>th</sup> day of November, 2013, at the hour of 2:00 p.m., at the Custer County Courthouse in Challis, Idaho, as duly and properly noticed, in accordance with IDAHO CODE Sections 7-1304 and 7-1306. At said time and place the Court continued hearing

ORDER CONTINUING HEARING ON JUDICIAL CONFIRMATION - 1

on the said *Petition* to the 17<sup>th</sup> day of January, 2014, commencing at the hour of 9:00 a.m. at the Custer County Courthouse in Challis, Idaho. Given the above and foregoing, and the announcement of the continued hearing in open court at the time duly and properly noticed, the parties hereto shall not be required to publish further notice pursuant to IDAHO CODE Sections 7-1304 and 7-1306.

IT IS SO ORDERED this 26 day of November, 2013.

by: Alan C Stephens  
Alan C. Stephens  
District Judge



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this \_\_\_\_\_ day of November, 2013 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
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E-Mail: [sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)  
*Attorneys for Petitioner*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**DAVID P. CLAIBORNE**  
**SAWTOOTH LAW OFFICES, PLLC**  
1101 W. River St., Ste. 110  
Boise, Idaho 83707  
Facsimile: (208) 629-7559  
E-mail: [david@sawtoothlaw.com](mailto:david@sawtoothlaw.com)  
*Attorneys for Respondents*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

\_\_\_\_\_  
Deputy Clerk

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
LAILA PLUMMER  
2013 NOV 26 PM 5:16

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THE CITY OF CHALLIS, an Idaho	)	
municipal corporation,	)	
	)	
Petitioner,	)	CASE NO. CV-2013-120
	)	
vs.	)	
	)	
CONSENT OF THE GOVERNED	)	MINUTE ENTRY
CAUCUS, an Idaho unincorporated nonprofit	)	
association; and CLARENCE LEUZINGER,	)	
an individual;	)	
	)	
Respondents,	)	
	)	
	)	
	)	

This matter came before the court on the 20<sup>th</sup> day of November, 2013, for a scheduled Status before the Honorable Alan C. Stephens, District Judge, in the Custer County Courthouse.

Paul J. Fitzer, Esq. was present via telephone on behalf of the Petitioner. David P. Claiborne, Esq. was present on behalf of the Respondents.

The parties addressed the Court as to needing a day for the hearing. The Court stated that January 17<sup>th</sup> would work. Madam Clerk informed the Court that there is already a Magistrate Jury Trial set for that day. Mr. Fitzer is the prosecutor for the Magistrate case and he informed the Court that it is not going to go forward.

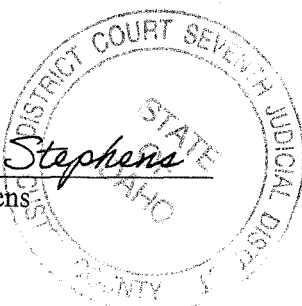
This matter shall be set for an Evidentiary Hearing on January 17<sup>th</sup>, 2014 at 9:00am.

Mr. Claiborne will present an order to the Court.

The Court informed counsel that we do not have an official Court Reporter for today's proceedings, the parties waived the Court Reporter.

DATED this 26 day of November, 2013.

*Alan C Stephens*  
 Alan C. Stephens  
 District Judge





CERTIFICATE OF MAILING

On the 24<sup>th</sup> day of November, 2013, I, Laila Plummer, certify that I mailed a full and true copy of the foregoing, in the manner indicated below to:

Paul J. Fitzer, Esq.

Email

David P. Claiborne, Esq.

Email

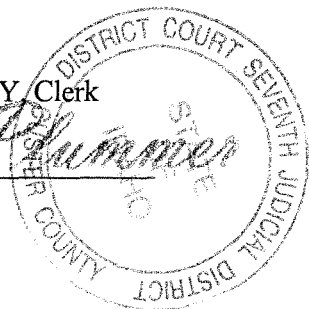
BARBARA C. TIERNEY, Clerk

By

*Laila Plummer*

Laila Plummer

Deputy Clerk



PAUL J. FITZER #5675  
STEPHANIE J. BONNEY ISB #6037  
MOORE SMITH BUXTON & TURCKE, CHARTERED  
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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re: )  
 )  
THE CITY OF CHALLIS, )  
an Idaho municipal ) Case No. CV 2013-120  
corporation, )  
 )  
Petitioner. )  
\_\_\_\_\_ )

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**CLOSING ARGUMENT AND  
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW**

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**I.  
STATEMENT OF THE CASE**

Petitioner, the City of Challis, Custer County, Idaho (the "City"), is a political subdivision within the definition contained in Section 7-1303(6), Idaho Code, and has filed this action pursuant to Sections 7-1301, et seq., Idaho Code (the "Judicial Confirmation Law"), seeking judicial confirmation of the validity of the issuance of its promissory note or other evidence of indebtedness, whereby the City seeks to borrow funds for improvements to the City's domestic water system and fire flow protection, to cause to be issued its promissory note or other evidence of indebtedness, and pledge the net revenues of its water system and other lawfully available

funds of the City to the payment thereof. The City asserts that the proposed expenditure is an “ordinary and necessary expense”. The amount of the indebtedness to be incurred by the City is an amount not to exceed \$3,200,000 to be paid for over a period of thirty (30) years.

Article VIII, § 3 of the Idaho Constitution requires all debt exceeding the annual income / revenue of a municipality must first be approved by the voters, except for debt that is ordinary, necessary, and authorized by state law. There can be no dispute that a city such as the City of Challis is authorized by law to maintain a domestic public water system pursuant to I.C. § 50-323. Therefore, the only issue for this Court is whether the City of Challis’ proposed improvements to the water system are an “ordinary and necessary expense” as defined by the case law interpreting Article VIII, § 3 of the Idaho Constitution.

## II. SUMMARY

Pursuant to the City of Challis Water Facility Plan, (the “Study”), attached exhibits, and the testimony of Donald Acheson, the City’s adopted Project represents the minimum crucial improvements that are necessary to keep its preexisting obligatory system in good repair, meet minimum State requirements, insulate the City from potential tort liability and most importantly to protect the public health and safety of the citizenry. With the aid of a hydraulic analysis performed by a licensed engineer on each and every pipe in the system, standards and concerns opined by Chief Gunderson, and testimony from the public works director that the flow rate in the City’s system is substandard, the City Council had sufficient evidence upon which to determine that the proposed expenditures are ordinary and necessary expenses. The bottom line is that there is simply insufficient flow in the system to fight a fire both in town and at the airport. In addition, a great majority of the system is aged and routinely fails; even this year. If the City

does not immediately address its water system, a fire or outright breach can cripple the City; that it has not happened yet or that the City might or might not have time to conduct an election is irrelevant.

Respondent witness, Jack Hammond, concedes that prudent periodic and continuing expenses related to the repair or replacement of an aging public water system are certainly ordinary and necessary expenses. However, Mr. Hammond believes that the City could perform a piecemeal completion of the project utilizing less costly alternatives at an estimated cost of approximately \$1.8 million. In his correspondence to the Court as well as his testimony he concludes with his statement that a

City of Challis Water System Improvement Project costing \$1,800,000, as compared to the proposed \$3,200,00 project, would far better meet the “Judicial confirmation” requirement as an “ordinary and necessary expense” of the City for the benefit of the water system user rate paying citizens.<sup>1</sup>

In conceding that the *need* to address improvements is necessary, this analysis for purposes of judicial confirmation is essentially at an end as it is within the purview of the elected officials to determine *how* the need is to be solved subject only to review by this Court to discern whether the City’s legislative solution is arbitrary and capricious as in *Frazier*.

The City of Challis’ proposed repairs to its existing water system are ordinary and necessary expenses. As a matter of law, expenses incurred in the repair and improvement of

---

<sup>1</sup> Given the Respondent’s line of questioning, the City anticipates other spurious and irrelevant arguments to be proffered by Respondent including that: 1) the City of Challis could and should have explored more and possibly less expensive options; 2) the City could replace system components in a piecemeal fashion; 3) since the City took four years to study and address its public safety concern, the urgency during this year does not exist since the city could have sought to repair its system in that timeframe; 4) that because metering/telemetry improvements are not sought to protect the public health and safety, they are precluded from being a necessary expense; 5) lower priority items are not necessary.

existing facilities in such manner as to render it serviceable to the municipality<sup>2</sup> can and do qualify as ordinary and necessary expenses and are therefore not subject to voter approval. As the Supreme Court as noted on multiple occasions “[i]t is one of the incidents of ownership of property that it must be kept in repair.” The City’s potable water system is a preexisting system; an ongoing municipal obligation. The decision to purchase a water system, a decision which very well may be subject to the vote of the people, occurred nearly a century ago. Now, the system is obsolete, undersized, and dilapidated; with regular breaches occurring even this year. The hydrants cannot be repaired; the meters are inaccurate. Though Respondent supports a piecemeal approach to replacement, the engineer, public works director, and the fire chief simply do not know where the next breach will occur; where the fire will be needing sufficient fire flow.

Expenditures made to preserve the public health and safety of the inhabitants of the municipality is necessary as are improvements to bring the system into compliance<sup>3</sup> The system is simply incapable of providing potable water for fire protection services both in town and at the airport. Although the City has taken a number of years to study and adopt solutions to this public safety risk and fortuitously no fire has in fact befallen the City, this in no way reduces the inherent risk to the public safety as testified by the City’s engineer, public works director, and as provided in the Study by the local fire authority.

Improvements to bring the system into compliance with current IDAPA standards regardless of whether an enforcement action has been undertaken against the municipality qualify

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<sup>2</sup> *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388, 391 (2006); *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *City of Pocatello v. Peterson*, 93 Idaho 774, 779, 473 P.2d 644, 649 (1970).

<sup>3</sup> The impact a proposed expenditure may have on public safety is fundamental to the determination of whether a project is necessary. *City of Boise*, supra;

as ordinary and necessary expenses.<sup>4</sup> The very purpose of the IDAPA rules is to set minimum standards to protect the public safety and health. While the City may not be the subject of a current enforcement action and/or the City may be eligible for a waiver, this in no way vitiates the risk to the public safety nor reduces the potential tort liability<sup>5</sup> to the City should a fire occur damaging persons or property. Instead, the City has proactively sought approval of its Study from DEQ and hopefully will not be subject to enforcement. Yet, Respondent would have this Court find that an enforcement action is a precondition to a finding that a system is necessary. If such is the case, one would hope the enforcement action is undertaken before the system is in breach or a fire occurs.

Lastly as will be discussed herein, Respondent's various arguments that other alternatives might be available or that the City has known about its dilapidated system over a period of years thus undermining a necessity argument misconstrue *Frazier* and other applicable case law. Where an expense is incurred to repair a preexisting utility and/or expended to protect the health and safety, the expense is by definition necessary, i.e. urgent, without a temporal constraint. The *Frazier* lines of cases merely look to the proportionality of the solution in the absence of a risk to the public safety. Thus, where a project in no way entails the public health and safety and a temporary solution is in existence, a court could reasonably determine that the project as a whole is so profound as to constitute entirely new construction in every meaningful sense. In *Frazier*, the Court rejected the City of Boise's attempted replacement of a fully functional, albeit temporary, *safe* flat parking lot with an enormous five floor parking garage. The Court could

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<sup>4</sup> *Board of County Comr's v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975).

<sup>5</sup> The elimination of tort liability also satisfies the ordinary and necessary proviso. *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970)(replacing an unsafe airport terminal); *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 889 (1983).

find no public safety aspect, no recognizable form of repair or maintenance, and the solution was grossly disproportionate to the temporary lot.

### III. FINDINGS OF FACT

1. On August 27, 2013 the City's governing body adopted Resolution No. 25-082713 authorizing the filing of this Petition for Judicial Confirmation at least fourteen (14) days following a public hearing duly held and conducted on August 13, 2013 pursuant to the July 18, 2013 publication of notice containing the date, time, and place of such hearing and a summary of the matter which was at least fifteen (15) days prior to the date set for the public hearing in the Challis Messenger, a newspaper of general circulation within the city, in the form and content described in Section 7-1306(2), Idaho Code.
2. Notice of the Petition and the hearing was duly posted as required by law at the offices of the City at 21 E. Main Avenue, Challis, Idaho 83226 on September 12, 2013, which was at least 30 days prior to the date established for the hearing in this matter as prescribed by Section 7-1306, Idaho Code.
3. This court held a hearing in open court on January 17, 2013 for the purposes of identifying any interested parties who had appeared in opposition to the petition in accordance with Section 7-1307, Idaho Code following an appropriate period for the parties to conduct discovery and thereafter appear before this court.
4. The City of Challis is an incorporated city duly organized, existing, and operating pursuant to Title 50, Idaho Code, and as such is a "political subdivision" within the definition contained in Section 7-1303(6), Idaho Code.

5. The City possesses authority to borrow money or issue water revenue bonds pursuant to Section 50-1027, et seq. and Section 39-7601, et seq., subject to Article III, § 3, Idaho Constitution.
6. The City is authorized to institute a judicial confirmation proceeding pursuant to Section 7-1304, Idaho Code.
7. The City is authorized by law to own, operate, and maintain, and has for many years owned, operated, and maintained, a public drinking water supply system (the "System") pursuant to Section 50-323 and 50-1028 et seq. The System serves the entire City of Challis, Idaho
8. As owner and operator of the System, the City is charged with the duty of maintaining safe and reliable water services for the City and its residents, and to do so in a manner that does not jeopardize the City's drinking water supply and provides sufficient fire flow. In furtherance of that responsibility in December 2011, the City retained the services of Riedesel Engineering, a professional consulting civil engineering firm duly authorized and licensed to practice in Idaho (the "Engineer"), to conduct a study of the System for the purpose of determining the adequacy of the System for present and future needs with respect to standards established by the local fire authority, the State of Idaho through its Department of Environmental Quality ("DEQ") and the United States Environmental Protection Agency ("EPA"). The Engineer performed a study entitled "City of Challis Water Facility Plan" along with the supplemental information and emergency protocol for the City's existing water system (DEQ No. 11-13-19) (the "Study").
9. The most recent water system facility plan and resulting improvement project performed for the City had dated from 1981 and is approximately 30 years old. The residential services and meters installed with the 1980s capital project are aged and need to be replaced.



10. However the majority of the system, the Old Town distribution system, dates back to the 1930s. System-wide these pipes have reached their useful life and are now dilapidated and in need of replacement resulting in multiple breaches in the city; including several this year. Should a breach occur in a main section of this distribution line, entire sections of the City could be without water.

11. Although no enforcement action has been brought against the City, the City's system is not in compliance with State law.

a. The City is not able to provide adequate fire flows due to the use of existing four (4) inch old and dead end water mains, and small diameter un-looped lines. IDAPA 58.01.08.542.06 addresses the size of water mains. The section provides that where fire hydrants are provided, they shall not be connected to water mains smaller than six (6) inches in diameter, and fire hydrants shall not be installed unless fire flow volumes are available.

b. As testified to by the engineer and the public works director, all of the 130 fire hydrants are in need of replacement because they contain dilapidated componentry that cannot be serviced. To date only 25-30 have been replaced.

c. However, the hydrants are connected to four (4) inch lines. Pursuant to IDAPA 58.01.08.50 the adequacy of the water system fire flow capacity is determined by the local fire authority. The Challis system does not meet the minimum standard established by the local fire authority, Chief Gunderson, who expressed concerns that the Challis' system limits the District's ability to fight a fire. The concerns include

i. The use of 4 inch lines in violation of IDAPA 58.01.08.542.06 .

- ii. Improper spacing of fire hydrants in violation of IFC Appendix B, Table C105.1.
- iii. The existing distribution system cannot meet peak hour demand with the design fire criteria in violation of IDAPA 58.01.08.552.01.b.i.
- iv. Many of the fire hydrants are dysfunctional.
- v. The public works director testified that the fire hydrants provide suitable flow for only approximately 45 seconds.
- vi. In short, the fire chief, engineer, and public works director expressed concerns that the system cannot effectively fight a fire.

12. In order to repair this preexisting and obligatory utility, achieve compliance with state law minimum safety regulations, and obtain the required amount of fire flow to protect the health and safety of the citizenry, the Study (which as a planning document contains over \$8 million dollars of recommended upgrades) was paired down to meet the immediate needs of the System totaling \$2,129,066 in repairs and replacement plus additional estimated funding requirements for contingencies, design engineering, bidding, testing, and other costs total \$3,036,960. These include:

- a. Construction of distribution system improvements to tie the Old Town system eliminating the 4-inch pipes and the fire hydrants that tie to them, install new and properly spaced fire hydrants, and tie-in dead end lines. Add pressure reducing stations and isolation valves to create (4) pressure zones which eliminates service areas that are over-pressurized.

b. Install a telemetry system to improve supervisory control and data acquisition to protect the water system.

c. Replace metering with new automated meter read (AMR) equipment taking the first steps to recover the estimated 4% lost water identified by Idaho Rural Water, which will provide accuracy of water usage, but more importantly the billing, which is necessary precondition for DEQ approval, funding and to comply with a water audit.

d. Installation of a transmission pipeline to provide the minimum supply of water necessary for firefighting service to the Challis Airport as determined by the fire authority, Chief Gunderson.

13. Respondent witness, Jack Hammond, concedes that prudent periodic and continuing replacement of aging, underground utility systems are certainly ordinary and necessary expenses.

However, Mr. Hammond believes that the City could perform a piecemeal completion of the project utilizing less costly alternatives at an estimated cost of approximately \$1.8 million. He concludes with stating that a

City of Challis Water System Improvement Project costing \$1,800,000, as compared to the proposed \$3,200,00 project, would far better meet the "Judicial confirmation" requirement as an "ordinary and necessary expense" of the City for the benefit of the water system user rate paying citizens.

14. Donald Acheson, the city engineer, believes that a piecemeal approach to replacement of the aging componentry does not mitigate the danger to the public safety as a system is only as strong as its weakest link, and it is not foreseeable as to exactly where the breach or fire will occur.

15. Based on the Study and other available information, the City's Mayor and Council have properly determined that the proposed improvements are necessary to meet the present and

immediate needs of the City. The improvements are essential to ensuring that the System remains functional and adequate to meet the requirements of Idaho law and provide for minimum required fire flow protection both in old town and to the airport, and to provide security for this valuable resource. Additionally, the replacement of pipes, hydrants, meters, and telemetry are part of a regular, ordinary, and necessary maintenance of a preexisting and obligatory utility.

16. The total cost of the Project pursuant to the preliminary planning has been estimated at an amount not to exceed \$3,200,000. The City does not have funds available to it within its present budget to meet the cost of the Project, and has determined that such cost must be financed over a term of years from the revenues of the System and other lawfully available funds of the City.

a. With payments on the debt estimate at a rate of 1.75%, yearly payments should be approximately \$150,000 per year.

b. The City's sinking fund or enterprise fund for water totaled \$144,147.48 and the City's total 2012-2013 annual budget was \$2,175,074.<sup>6</sup>..

c. Water fund revenue for 2012/2013 totaled \$572,424.

17. With the assistance of the Development Company, the City has determined to finance the cost of the Project by entering into the loan obligation with the State, pursuant to which the State will loan to the City the funds required to finance the Project, and the City will issue its promissory note or other evidence of such indebtedness and will repay the loan over a 30 year period from System revenues together with other lawfully available funds of the City.

18. The loan, promissory note, or other evidence of indebtedness thereof, would constitute an indebtedness of the City extending beyond its current year's revenues. The City has not sought or

obtained an approving vote of the electors at a special election called for the purpose of approving such indebtedness, nor has the City made provision for the levying of an annual property tax to constitute a sinking fund for the payment of the interest on or principal of such indebtedness.

19. Article 8, Section 3, of the Idaho Constitution provides, in relevant part, that no county, city, or other political subdivision shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in that year the income and revenue provided to it for such year, without the assent of two-thirds (or, in the case of certain revenue bonds, the assent of the majority) of the qualified electors thereof voting at an election held for that purpose, but said Article 8, Section 3, contains the following exception: “provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .”

20. The City, by and through its Council, has determined that the proposed loan obligation for the financing of the Project constitutes an “ordinary and necessary expense” of the City within the meaning of the above-quoted proviso to Article 8, Section 3, Idaho Constitution, for which no approving vote of the electors is required. This determination is based upon the following factor: the legal issue, arising under Article 8, Section 3, Idaho Constitution, as to whether or not the proposed loan obligation and any promissory note or other obligation evidencing such obligation constitutes an “ordinary and necessary expense” of the City, authorized by the general laws of the State, for which an approving vote of the electors is not required.

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<sup>6</sup> The parties stipulated to the admission of Ordinance No. 506 representing the total annual appropriation ordinance for 2012-2013.

21. The City Council has determined that the loan obligation may be validly secured by the City's execution of the proposed loan obligation, by the issue of its promissory note and by repayment of the same from its System revenues and other lawfully available funds of the City.

Based upon the foregoing Findings of Fact, the Court now makes the following:

**IV.**  
**CONCLUSIONS OF LAW**

1. Proceedings under the Judicial Confirmation Law, Title 7, Chapter 13, Idaho Code, are proceedings in rem, and jurisdiction of the subject matter and of all interested parties is lawfully obtained through publication and posting as provided therein. Publication and posting as authorized by the Judicial Confirmation Law is a valid method of vesting jurisdiction of this Court over all interested parties and over the subject matter.
2. Jurisdiction of this Court over the subject matter of the Petition for Judicial Confirmation and over all interested parties has, as a matter of law, been obtained herein by publication and posting as provided by law.
3. The Judicial Confirmation Law is valid and constitutional.
4. The City of Challis has the power to “establish, create, develop, maintain, and operate a domestic water system” pursuant to I.C. § 50-323.
5. The Project proposed to be made by the City, and the indebtedness proposed to be incurred therefor, meets the criteria articulated by the Idaho Supreme Court to qualify under the “ordinary and necessary expenses” exception to Article 8, Section 3, Idaho Constitution as follows:

**A. Article VIII, Section 3, Idaho Constitution.**

Article 8, Section 3, of the Idaho Constitution, provides that no county, city, etc., shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose, “provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .”

This section of the Constitution thus permits a city to incur an indebtedness or obligation, without an approving vote of the electors, exceeding the revenue for the current year, where the expense (i) is both ordinary and necessary, and (ii) is authorized by the general laws of the state. The issue of whether an expense is “ordinary and necessary” within this provision of the Constitution has been before the Idaho Supreme Court on numerous occasions.

**B. Standard of Review – Deference to the Elected Officials**

For purposes of judicial confirmation, much of the testimony elicited by Respondent, is irrelevant. Any speculative testimony pertaining to less expense alternatives, timelines, or the parceling out of individual elements are legislative determinations that fall squarely within the purview of the elected officials. A court will not second-guess the legislative acumen of the elected officials or otherwise parcel out a Project in a piecemeal fashion. As in all legislative decisions rendered by an elected body, every legislative enactment is entitled to a strong presumption of validity and will not be disturbed by a reviewing Court unless the decision is

clearly arbitrary or capricious.<sup>7</sup> Rather the jurisdiction of the court is limited to a determination of whether the expenditure, i.e. the *need* for the improvements, is ordinary and necessary.

### C. Ordinary and Necessary Under Frazier

Before addressing the merits of the evidence presented, it is prudent to address the Respondents' apparent misconception of what is a necessary expense. Throughout testimony a recurring theme in Respondent's questioning is its belief that to be necessary, the law requires that the expenditure must be utilized in that current year. The testimony directed at Mayor Lopher and Don Acheson focus on the declaration of the danger to the public in 2011, subsequent planning to remediate this danger culminating in this action. The argument appears to be that since the calamity has not befallen the community in the past three years, there is no urgency and the issue should be submitted to the vote of the people. Besides usurping the power vested in the elected officials to render such legislative decisions, this is an outright distortion of

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<sup>7</sup> As expressed in *Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 501, 531 P.2d 588, 591 (1975) "every legislative enactment is entitled to a strong presumption of constitutionality" wherein the governing board. This is analogous to the plethora of case law governing the standard of review of legislative decisions in the land use arena. For example, a seminal case is *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511-12, 567 P.2d 1257, 1262-63 (1977) wherein the Court noted that a local city council's enactment of legislation

is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion. Since the local governmental bodies are most familiar with the problems of their particular jurisdictions, their legislative determinations come before us with a strong presumption of validity. Such presumption can only be overcome by a clear showing that the ordinance as applied is confiscatory, arbitrary, unreasonable and capricious. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control and the court may not substitute its judgment for that of the zoning authority. It is not the function of this Court or of the trial courts to sit as super zoning commissions. The burden of proving that the ordinance is invalid rests upon the litigant who attacks the validity of the ordinance.

Although interpretation of an ordinance is a question of law over which this Court exercises free review, *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 89, 175 P.3d 776, 778 (2007), "there is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999) (citing *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996)).



the *Frazier* decision taking the Idaho Supreme Court's "urgency" analysis out of context. Further, while Respondent appears to recognize the public health and safety exception, it wholly ignores the repair and maintenance exception; all of which satisfy the urgency prerequisite without a temporal limitation.

In *Frazier*, the City of Boise sought judicial confirmation for the construction of a new five story parking garage on an existing parking lot at the Boise Airport. The Idaho Supreme Court clarified the requirements of Article VIII, Section 3 of the Idaho Constitution, which allows a political subdivision to incur indebtedness without a vote if the expense is "ordinary and necessary." The *Frazier* Court accepted the construction of the parking garage as ordinary and focused its attention instead on the "necessary" requirement.

The clarification of the necessary prong came from *Frazier's* revival of what is referred to as the "Dunbar test." The *Dunbar* test stems from the case of *Dunbar v. Bd. Of Comm'rs of Canyon County*, 5 Idaho 407, 412, 49 P. 409, 411 (1897). *Dunbar* concerned the payment of rabbit scalp warrants, road fund warrants and other miscellaneous expense warrants issued by Canyon County. The *Dunbar* Court did not confirm such expenses as "necessary," holding that "there must exist a necessity for making the expenditure at or during such year." *Id.* at 411.

Unfortunately, this has precipitated arguments by some litigants to assert that every expenditure must be urgent such that the expenditure must be made at or during such year to qualify as necessary. This is completely false. The *Frazier* Court's analysis did not end with the revival of the *Dunbar* test. Instead, the Court carefully distinguished the *Frazier* case, and in aligning *Frazier* with its prior holdings, it loosened the urgency standard for certain categories of expenses. Rather than overturning existing case law which conflicted with the *Dunbar* test, the

Court provided a long list of prior decisions that the Court determined were “broadly consistent” with the *Dunbar* test. *Frazier* at 4, 391. Of note, the Court explicitly distinguished *Frazier* from *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970)(replacing an unsafe airport terminal), and *Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975)(expanding a hospital). *Peterson* and *Twin Falls* relied on public health and safety issues, regulatory compliance, and the need for the repair, maintenance and even replacement of existing systems to create the requisite urgency that was not present in Boise’s construction of a parking garage, but which obviously took far longer than a year to plan and thereafter build. As the Court stated in its discussion of *Peterson* and *Twin Falls*, “[t]he impact on public safety found in both decisions provided the requisite urgency missing from the present case.” *Frazier* at 6, 393 and that “the need for repairs, maintenance, or preservation of existing property” possesses the required urgency to meet the necessary prong under Article VIII, Section 3. *Id.* at 7,. As the *Frazier* Court reasoned

The district court accurately cited to our decisions in Board of County Commissioners, 96 Idaho 498, 531 P.2d 588, and Peterson, 93 Idaho 774, 473 P.2d 644, for the proposition that expenses incurred in the repair and improvement of existing facilities can qualify as ordinary and necessary under the proviso clause. Both Board of County Commissioners and Peterson, however, are distinguishable from this case. First, in both cases we noted the important safety implications of the proposed expenditures. In Board of County Commissioners we stressed the impact of public health in relation to the proposed hospital expansion. 96 Idaho at 510, 531 P.2d at 600. In Peterson we noted the safety threat posed to passengers by an unsound airport passenger terminal and other facilities the City of Pocatello sought to replace. 93 Idaho at 778-79, 473 P.2d at 648-49. The impact on public safety found in both decisions provided the requisite urgency missing from the present case.

Second, the logic holding that repair and improvement of existing facilities can qualify as an ordinary and necessary expense, while sound, simply cannot be extended so far as to cover the circumstances of this case. Converting a flat parking lot into a five floor parking garage is not a repair, nor any recognizable form of maintenance. Likewise, while it is an “improvement” of the existing

surface parking, the expansion is so profound as to constitute an entirely new construction in every meaningful sense. Accordingly, we hold that the proposed expenditure is not “necessary” within the meaning of the proviso clause in Article VIII, § 3....

393 *Frazier* at 6, 393.

Accordingly, *Frazier* preserved a long line of cases in which the necessary prong was satisfied not by a temporal urgency as was needed by the City of Boise in the *Frazier* decision, but by an urgency created out of a legal obligation, a public health and safety concern, or in the continued repair and maintenance a presently existing and on-going system. In short, any literal temporal aspect of “urgency” was supplanted by these legitimate and necessary public health and safety and/or repairs endeavors. In its discussion of debates at the Idaho Constitutional Convention, the *Frazier* Court recognized that ordinary and necessary expenses contemplated by the delegates included “those involving public safety or expenses the government entity in question was legally obligated to perform properly.” *Frazier* at 4, 391.

Thus, a strict reading of the urgency standard proffered by many litigants including Respondent herein conflicts with the *Frazier* Court’s distinguishing of the *Peterson* and *Twin Falls* cases and conflicts with the *Frazier* Court’s recognition that public safety or repair and maintenance qualify as necessary. For example, maintenance or replacement of aging system components could always be a foreseen expense and thus, a strict application of the *Dunbar* test could not qualify such expenses as ever being urgent. Also, many capital projects such as regional sewer facilities are quite extensive requiring planning many years in advance and thereafter construction for multiple years. As the *Frazier* Court explicitly recognized repair, maintenance, and replacement of existing systems as qualifying as necessary, such a strict application was clearly not the *Frazier* Court’s intent. Instead, the *Frazier* Court distinguished

those cases that relied on legal obligations and/or public health and safety concerns and implicitly held that the *Dunbar* test is more strictly applied to those cases that do not involve public health and safety and/or repairs and maintenance.

Here, Respondent concedes that prudent periodic and continuing replacement of aging, underground utility systems are certainly ordinary and necessary expenses, but wishes to supplant the legislative discretion of the City Council by replacing portions of the system in a piecemeal fashion with less expensive alternatives. Mr. Hammond states:

City of Challis Water System Improvement Project costing \$1,800,000, as compared to the proposed \$3,200,00 project, would far better meet the “Judicial confirmation” requirement as an “ordinary and necessary expense” of the City for the benefit of the water system user rate paying citizens.

There is no Idaho precedent wherein the Idaho Supreme Court parceled out individual aspects of a project. By way of example, if in *Peterson* the airport facility was deemed ordinary and necessary, it was not within the purview of the Court to approve the airport facility as ordinary and necessary but second guess the proposed security system (telemetry) utilized therein or whether a restaurant facility should or should not be included. That is left to the discretion of the elected officials.

Respondent is trying to impermissibly extend *Frazier*; but *Frazier* is entirely distinguishable. In *Frasier*, the city sought to replace a fully functional albeit temporary *safe* flat parking lot with an enormous five floor parking garage. In the absence of a public safety aspect the court determined that the project as a whole was so profound and so disproportional to the immediate need as to constitute entirely new construction in every meaningful sense.

Here, Respondent concedes that the pipes, meters, and hydrants are failing; that the four inch pipes do not meet minimum fire flow requirements. There is no temporary substitute and

the expenses are clearly to protect the public health and safety. The City cannot fight a fire in the system's current condition. In short, because Respondent concedes the need exists, i.e. a risk to public safety, the analysis is at an end leaving the means to the elected officials unless the proposed solution is so vastly disproportionate to the need that it constitutes an arbitrary and capricious decision. It matters not whether Respondent speculates as to other potential solutions.

**D. The Proposed Expenditures are Ordinary.**

That the proposed indebtedness is ordinary is not in dispute. An expense is ordinary if in the ordinary course of municipal business, or in the maintenance of municipal property, it may be and is likely to become necessary.<sup>8</sup> So long as Idaho law authorizes a municipality to operate or maintain the property or activity at issue and so long as the proposed project or expenditure is to improve the property or activity for a legitimate purpose, the proposed project is "ordinary". Certainly, the repair and replacement of existing water system components constitutes an ordinary expense. There can be no dispute that a city such as the City of Challis is authorized by law to maintain a domestic public water system pursuant to I.C. § 50-323 and the continued utilization of its public water system to provide this utility to the citizenry is a preexisting and continuing obligation of the City.

**E. The Proposed Expenditures are Necessary.**

The proposed expenditures are necessary. As provided herein expenses incurred in the repair and improvement of existing facilities in such manner as to render it serviceable to the municipality<sup>9</sup> can and do qualify as ordinary and necessary expenses.<sup>10</sup> Further, expenditures

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<sup>8</sup> *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388, 391 (2006); *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).

<sup>9</sup> "It is one of the incidents of ownership of property that it must be kept in repair." *City of Pocatello v. Peterson*, 93 Idaho 774, 779, 473 P.2d 644, 649 (1970).

made to preserve the public health and safety of the inhabitants of the municipality are necessary. Elimination of potential tort liability also satisfies the ordinary and necessary proviso.<sup>11</sup> Pursuant to the City of Challis Water Facility Plan, (the “Study”), attached exhibits, and the testimony of Donald Acheson, the Project is necessary to protect the public health and safety of the citizenry due to risk of fire, to repair and maintain a preexisting and obligatory system, to eliminate potential tort liability for the City’s failure to adequately protect property, and to bring the system into compliance with current standards pursuant to IDAPA and the fire authority.

1. Public Health and Safety

The City is not able to provide adequate fire flows due to the inadequate pipe size within the majority of the system (4” mains), existing dead end water mains, and small diameter un-looped lines. This clearly violates IDAPA 58.01.08.501.18, which provides:

[p]ublic water systems shall be designed to provide maximum day demand plus fire flow. Fire flow requirements ... shall be determined by the local fire authority or by a hydraulic analysis by a licensed professional engineer to establish required fire flows...

The City of Challis did both. First, Chief Gunderson of the North Custer Rural Fire District is vested with the authority to set the minimum fire flows required to fight a fire. As noted on page 35 of the Study, Chief Gunderson determined that the City’s existing distribution system does not meet minimum standards due to the prevalence of aged 4” lines in the system, fire hydrants that

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10 Not only repairs, but also expansion and replacement of existing property or services with completely new facilities, may constitute ordinary and necessary expenses. *City of Pocatello v. Peterson*, supra. Thus, in *Hickey v. City of Nampa*, supra, the city was permitted to replace outmoded and unserviceable wooden water pipes with new iron pipe and equip and improve a pumping station, and in *City of Pocatello v. Peterson*, the city's replacement of its existing airport terminal system with an entirely new structure was upheld. In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), the Court stated that an expenditure which is incurred for the purpose of repairing a public work is ordinary and necessary.

11 *City of Pocatello v. Peterson*. Cf. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 889 (1983).

are non-functional and/or connected to 4" lines, and they are improperly spaced.<sup>12</sup> The fire chief unequivocally stated that he has serious concerns as to whether the City is capable of fighting a fire.<sup>13</sup> The system does not meet the standards determined by this authority.

Second, Mr. Acheson, a duly licensed engineer, prepared a comprehensive facility plan including an extensive hydraulic analysis to determine the performance of the system under peak flow conditions. Although Mr. Hammond admittedly did not have and therefore failed to review the appendices attached to the Study, the major portion of the appendices are dedicated to the result of the hydraulic analyses. Each and every pipe in the system was subject to the Study.<sup>14</sup> The results were abysmal. Even if the pipes were brand new, (which they are not) the system does not meet minimum fire flow requirements. The City cannot effectively fight a fire as evidenced by a licensed engineer, the fire authority, and the public works director.

Third, the public works director Mr. Rice testified that, in the field, after only 45 seconds upon turning on the 6" fire hydrants, the flow rate significantly diminishes due to the 4" pipe.<sup>15</sup> As he noted to the court,

A: The flow is the issue. They'll all open and close, or they are being dug up right now. That's a safety precaution that I would not allow to happen. The flows are

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<sup>12</sup> 4" mains do not meet current law as a minimum of 6" mains must be utilized to provide the minimum supply for fire suppression). See IDAPA 58.01.08.552

<sup>13</sup> See Tr. 54-55.

<sup>14</sup> Tr. p. 110-111.

<sup>15</sup> See Tr. p. 69 wherein this Court questioned Mr. Rice on this topic:

A Hydrant?

Q Excuse me. I used the wrong word. Hydrant. Sorry. So you talked about a 6-inch hydrant on a 4-inch water line. Based on your observation, what happens to the water pressure --

A The flow starts out real good for probably the first 45 seconds to maybe a minute, minute and a half. And just because of the velocity and the friction in the lines, they start slowing down. They won't flow to their capacity on a 4-inch most of the time. If the pressure's real high, you can get the flows. But in the top half of town, when the pressures are down to the 50s and 60s, they generally don't flow as well, or the volume's not there.

down on those bigger hydrants. 4-inch line through a 6-inch hydrant, simple math.<sup>16</sup>

The extension of the line to the airport is also essential for fire safety. Although the subject of considerable cross-examination, the simple fact is that the sole expenditure in this judicial review pertaining to the airport is not an expansion, i.e. a frolic and detour, but the replacement of the aged faulty lines with the minimum sized line required to meet the requisite fire flows. Many other airport facility projects are identified in the Study, but the sole item subject to this action is the replacement of the pipes to ensure proper fire flow.

The system at the airport is a stand-alone, small diameter, residential or individual type well. It can provide the potable needs at the airport. It can't come even close to providing any kind of fire protection at the airport.<sup>17</sup>

Disagreeing with Chief Gunderson, the sole authority to determine fire flow at the airport, the Respondent's witness, Mr. Hammond, believes that the proposed improvements to the fire flow at the airport are more than is necessary to meet fire flow needs.<sup>18</sup> He is of course entitled to his personal opinion, but Mr. Hammond is not the authority nor has he studied the inadequacies at the airport or the potential solutions to mitigate those inadequacies.

Fourth, the Department of Environmental Quality has approved the City's proposed repair and replacement to its system. Improvement and rehabilitation of property to comply with state safety standards constitutes an ordinary and necessary expense.<sup>19</sup> Here, it is undisputed that the Challis system is not in compliance with current IDAPA standards. Respondent, however, wishes to distinguish between the absence of a fine, non-compliance letter or other enforcement

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16 Tr. 67. In addition, Mr. Rice testified that all of the 136 hydrants had to come out because they contain unserviceable components inside of them. To date, they have replaced 25 or 30. Tr. 67-68.

17 Tr. P. 49, 59-61.

18 Tr. 39-41, 47-49, 114

19 Board of County Comr's v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).



measure initiated by DEQ and the unequivocal fact that the system is not compliance with the current IDAPA rules. The IDAPA rules exist in order to protect the public health and safety. The mere fact that the City has not as yet been subject to an enforcement action does not lessen the danger to the public health and safety.<sup>20</sup> Rather than proverbially burying its head in the sand, the City is proactively bringing its system into compliance which includes its submission and approval of its facility plan to DEQ. Mr. Acheson testified that in his experience, DEQ has found it counterproductive to issue a non-compliance letter to an entity that is proactively seeking to bring its system into compliance.

Apparently, Respondent presents an argument that an expenditure is not necessary unless and until an enforcement action is waged, the pipes breach (more than they have), or a fire occurs; that repairs should be done on a piecemeal approach. Such an argument is without merit and against public policy. Given that the IDAPA standards are in place to protect the public health and safety of the citizenry, the mere fact that a City could feasibly ignore the problem until an enforcement action is brought or otherwise seek a waiver in no way mitigates the danger that the IDAPA rules seek to protect. While Respondent notes that City has been fortunate enough to not have had a fire in the years since the City began investigating the adequacy of its water system, there nonetheless presently exists a very real and immediate danger to the public health and safety due to the substandard sizing and spacing of the system lines and hydrants.

Don Acheson testified that the proposed telemetry improvements are equally necessary to protect the public health and safety of the citizenry.

The City has lots of assets throughout the community. These include pumping stations, water storage tank , valves , and so forth. Unauthorized entrance to a

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<sup>20</sup> See Tr. 50-52.

pumping facility or to a storage facility, whether it be concrete storage tanks or the slow-sand-filter reservoir, could introduce harmful elements into the drinking water system without the knowledge of the operations of the City. But telemetry is designed to provide the City some idea of unauthorized entry to those critical assets of the City. So that's why I would include those under a health and safety concern. The City is not derelict in maintaining those. Those assets are locked. But that's the extent of the security precautions that are provided. ...[S]ince 9/11 we are all having a level of anxiety about our public assets and public infrastructure.<sup>21</sup>

Respondent contends that this is less of a priority and therefore unnecessary. Again, there is not a single case wherein the Idaho Supreme Court parceled out particular elements of a project. Telemetry in an ancillary concern insofar as it is not the actual delivery system of the water utility, but this in no way lessens it as a necessity. Taking the *Peterson* case as an example, if the Court determined that an airport facility was an ordinary and necessary expense, then ancillary elements pertaining thereto are equally essential and within the discretion of the elected officials. Given 9/11 no one would suggest that in constructing an airport facility, it would be unreasonable to include security prevention to prevent unauthorized personnel from accessing vulnerable systems. One need only google "poison in the water supply" to note that securing the safety of our water supply is equally necessary. Yet, Respondent wishes this Court to parcel out individual aspects of the Project second guessing the expertise of the engineer and usurping the decision making authority of the elected officials.

## 2. Repair, Replacement, or Maintenance.

In addition to expenditures rendered to protect the public health and safety, expenses incurred in the repair and improvement of existing facilities in such manner as to render it serviceable to the municipality can and do qualify as ordinary and necessary expenses. Mr.

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<sup>21</sup> Tr. P. 58-59; see also Tr. p. 119, 128-131

Acheson ably testified and explained in the Study that the four inch lines, hydrants, and the meters must be replaced as all are obsolete and dilapidated. In *Peterson*, the Court emphasized that the obsolescence and unsafe condition of the twenty-year old [airport] facility places it within the “repair or maintenance” line of case authority. The court considered the expenditure in light of the city’s obligation to maintain a safe, sound structure and the concomitant legal liability for failure to do so, which liability might itself create an ordinary and necessary expense.<sup>22</sup>

As provided herein the four inch lines do not meet current fire flow requirements placing the public at risk, but compounding these fire flow issues are the aged condition of the Challis’ system. The pipes, especially in Old town, date back to the 1930’s in most cases. They have simply exceeded their useful life, and as testified by Mr. Acheson, they must come out. There have already numerous instances just this year of failing water lines. Notably, the latest failure occurred during a time of low demand.<sup>23</sup>

Respondent’s witness Jack Hammond concedes the system is in need of replacement; some portions immediately.

I don't think there's anybody in this room that would not agree that the Old Town distribution system has some significant needs for line replacement, line size, upgrades, et cetera. I think the report pretty well spelled that out.<sup>24</sup>

However, Mr. Hammond believes the system should be replaced piecemeal pursuant to a prioritization schedule after having conducted an extensive in-depth investigation of each pipe in the system.

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22 See analysis of *Pocatello* in *Asson v. City of Burley*, 105 Idaho 432, 442, 670 P.2d 839, 849 (1983).

23 Tr. 111

24 Tr. p. 79.

Q Let me ask you. Before I know if I should replace a particular pipe, does that mean you have to dig up each and every pipe?

A I think it's prudent, if that pipe is 70 or 80 years old, to at least pocket that pipe and maybe even cut a piece out of it.

Q Every pipe in town?

A I didn't say every pipe in town. I said pipes that were 60, 70, 80 years old. This cuts to the core of developing a prioritization of the system and trying to identify the most critical segments, rather than blanket wholesale replacement of the entire distribution system. I'm reasonably certain there's some water mains in Old Town that probably have significant service life left. Obviously I'm speculating.

Mr. Acheson believes this is foolishness and in no way mitigates the immediate danger to the public health and safety; the very reason for replacement of the system.

Q Mr. Hammond spoke of proverbially digging up the pipe and taking a look at it, in the way of sampling. Does the hydraulic analysis that you're referring to perform a similar function, except with science?

A In a sense. In truth, there is nothing better than the actual data of seeing the conduit in question. Economic-wise, my opinion, to do that is a poor expenditure of capital funds of the City and foolishness.

Q Why?

A We know that the 4-inch lines in the city are aged. We know that they are failing. We have had instances just this year of failing water lines. And it's interesting to me as an engineer that the most recent failures of the water line occur during a time of year when there is the least demand and stress on the water system. The 4-inch lines need to come out. I don't see any benefit to a step-by-step investigation of a conduit that has that age involved with it. The City can certainly do that on a basis, as the City has been doing for their defective hydrants. They can certainly do that. But that does not address -- it addresses the problem in a piecemeal fashion that, in my opinion, is not prudent, especially when there's an opportunity to rectify the entire system.<sup>25</sup>

....

The system needs to be replaced. The 4-inch lines in the Old Town system need to be replaced.

Q And not in incremental fashion?

A That is certainly a process by which the City can go after that. But in an incremental fashion -- if you have a stress, like a fire demand, and you needed the water, an incremental fashion doesn't take care of that. It doesn't remedy the problem.<sup>26</sup>

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25Tr. p111.

26 Tr. p. 114

The old town distribution system improvements as well as the airport extension are ordinary and necessary expenses. The replacement of all 4-inch pipes, installation of new properly spaced hydrants, the installation of pressure reduction stations, and roadway pavement replacement for pipeline trenching are immediately necessary and proportionate to the immediate need.

As testified by Mr. Rice and Donald Acheson, the metering system is inaccurate, dilapidated, and in need of replacement.

Metering accomplishes several things. First of all, the city was metered in the 1980 project. Metering is a conservation step in a community. It encourages more -- it encourages proper water use by the community, number one. So it's a conservation step. That conservation step backs up through the system to the demands on the pumps and the pipes and the electrical demands and all of those things. Number two, metering provides a way of equitably distributing the costs of the operation and maintenance of the water system through the community. The importance of having properly read meters ensures that a citizen is not overpaying or a citizen is not under paying. The responsibility for the system is equally borne by all the metered connections.

Q And the boots-on-ground system, you mentioned that it was completed in the 1980 project. Do you know what the shelf life of these meters are?

A Typically, as a rule of thumb, a 20-year life on a meter is extraordinary, ... But during that life -- we should discuss what the life of a meter is. The meter starts registering, when it's new, accurately. As it ages the accuracy of the meter changes. And it usually changes, as I recall, to under-registering the amount of water that it delivers to the service. So at some point in time, the meter ceases to register altogether. That is a failed meter. In the Old Town system, I'm sure we have meters that are under-registering, and we certainly have meters that have failed.

Mr. Hammond believes that this is a negligible problem and the meters should be replaced piecemeal.<sup>27</sup> A piecemeal replacement is inadequate. The debt on the water system is to be paid

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<sup>27</sup> Tr. p. 104-106, Mr. Hammond's testimony provided:

Q Well, you've had conversations with Mr. Rice. Has he told you how the meters are failing?

A Yes, we've had significant conversations about not only the meters, but the wells, as well as the sand filter system.

by the revenue derived by the water system. Accurate water meters are the only fair and equitable way to bill for the actual water used. Although water meters do not support the health and safety of the citizens, they are "necessary" pursuant to the exception for the repair and maintenance of a preexisting system. Accurate and well maintained water meters are the only cost effective way to monitor the consumption of water by each property owner. The existing water meters are inaccurate and current users may be paying too little or too much based on actual consumption. With the proposed water meter replacement and installation the City will be able to fairly and equitably charge each user for the actual usage and thus provide an accurate bill. The bill rate and consumption charge will be used to repay any debt incurred during the proposed project.

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Q And are you aware that meters generally have a life span of about 20 years?

A It depends on the manufacturer and the materials used in that meter...

Q System-wide, the evidence is that all of the meters are well past their shelf life or well past their usability rate. What would you say then? Replace three a year?

A No, and I don't think I said that in my letter to the Court. I said I agree. Replace the meters, not the meter yoke or the canister or the service line -- the meters primarily, so that you can get a new meter that has the ability to be read with the remote hand-held.

Q And it's your interpretation of the study that the study's recommending wholesale replacement of the entire system, yoke, whole nine yards?

A That's my understanding.

On direct Tr. p. 117-118, Don Acheson corrected this mistake:

Q: He also read your Facility Plan to include basically a wholesale replacement of not only the meter, but the yoke, the boxes, everything else of that . Is that accurate?

A No, sir, that is incorrect. He misread the information in the document. There are something like 7- to 800 services in the City of Challis. I added a contingency of about 75 services to be replaced, meter boxes, meter lids, yokes, centers, or whatever you want to call them, as a precaution because they are old. The City's intent -- and it has always been through the Facility Plan -- is to reuse the services. I added a factor in there in case some of the services were damaged and needed to be replaced. It does not wholesale replace the meter boxes, meter lids, or the service yokes. And it has never addressed the services lines to the individual homes.

The installation of system components in a piecemeal fashion fails to address the inadequacies of the system and the risk to the public health and safety of the citizenry. The replacement of piecemeal sections renders the system as strong as its weakest link.

3. The Expenditure is proportionate to the need

The proposed solution is proportionate to the need. Of the \$8,078,877.00 of recommended improvements contained in Recommended Project 1, the City Council has carved out the minimum attributes that are necessary to meet the City's immediate needs. These include the replacement of the Old Town Distribution System which date back to the 1930's including the pipes, hydrants, pressure reduction stations, and roadway pavement replacement for trenching. The project additional includes the installation of an airport line extension thereby providing the airport with connectivity and proper fire flows. While many other improvements are in the pipe-line (pun), the airport line extension for fire support is the only item subject to judicial confirmation. Lastly, the replacement of all existing water meters with new automated read equipment, metering software, and the installation of a telemetry SCADA system to provide security to the system. A duly licensed engineer has studied the system and the sole fire authority has provided the minimum standards. The Department of the Environmental Quality has approved facility plan. The failure to now do so, just like the airport facility in *Peterson*, could subject the City to legal liability.<sup>28</sup>

The Idaho Supreme Court has, in determining whether an expenditure is ordinary and necessary, considered the amount of the proposed expenditure in proportion to the revenues for

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<sup>28</sup> *Asson*, 105 Idaho at 442.

that year.<sup>29</sup> In *Asson*, the expense for electrical “project capability” was many times the total annual budgets of the cities involved. The Court characterized the project “a colossal undertaking, fraught with financial risk... [with] open-ended” liability; leaving the cities with “extensive indebtedness-yet no ownership, and minimum control, with only the possibility of [successfully providing] electricity.” *Id.* 105 at 442. Therefore, the Court held that the expenditure was not “ordinary.”

In contrast, the City's proposed expenditure is “ordinary.” The proposed expenditure is in a fixed amount with minimal financial risk, is not disproportionate to the over-all budget, and will result in City-owned public improvements.<sup>30</sup> As testified by Mayor Mark Lupher (“Lupher”) and later supplemented by the City Budget, the City's fiscal budget for 2013-2013 was \$2,175,074.<sup>31</sup>... The City's sinking fund or enterprise fund for water totaled \$144,147.48 and water fund revenue for 2012/2013 totaled \$572,424. The proposed annual debt payments on the expenditures (at 1.75% about \$150,000 per year as testified to by Don Acheson) is proportional to the City's annual revenue.

#### 4. Conclusion of Ordinary and Necessary.

The Project proposed to be acquired by the City meets the various criteria articulated by the Idaho Supreme Court to qualify under the “ordinary and necessary expense” exception. The City Council has determined that the expense for improvements to the City's existing System is necessary to protect the public health and safety and comply with applicable environmental health standards and regulations and safe drinking water standards and regulations. The City is

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<sup>29</sup> See *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 889 (1983).

<sup>30</sup> Tr. p. 112

<sup>31</sup> The parties stipulated to the admission of Ordinance No. 506 representing the total annual appropriation ordinance for 2012-2013.



obligated to perform and incur expenditures immediately to protect the City's water supplies and provide sufficient fire flow. Though not a regularly recurring expense, the Project is for the purpose of making immediate and necessary repairs to the existing System so as to continue existing domestic water services of the City so that public water services are available and usable to the City and the City's inhabitants.

The City has a long-standing involvement in the enterprise; the expense does not involve a new service; and the Project represents needed improvements to the existing water system and facilities in order to comply with applicable laws and provide a safe and sufficient domestic water system. The amount to be financed is not disproportionate to the City's over-all current budget.

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6. As "ordinary and necessary expenses" within the meaning of Article 8, Section 3, Idaho Constitution, no approval of the electors of the City at a special election called for such purpose is required.

#### VII.

The loan obligation, when duly executed by the City and a third party, and the promissory note when issued pursuant thereto will be valid and binding special obligations of the City, payable in accordance with their terms.

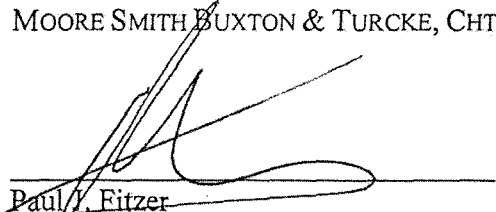
#### VIII.

The City may validly pledge its water system revenues and other lawfully available funds of the City appropriated by the City for such purpose, as security for its required payments under the Loan obligation.

Based on the Findings of Fact and Conclusions of Law, and good cause appearing therefor, THE COURT HEREBY DIRECTS that Judgment be entered in accordance with the Petition for Judicial Confirmation, to the effect that the loan obligation constitutes a valid, binding, and enforceable obligation of the City and may be entered into and performed in accordance with its terms.

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This Closing Argument and proposed Findings of Fact, Conclusions of Law are Respectfully submitted this 31<sup>st</sup> day of January 2014.

MOORE SMITH BUXTON & TURCKE, CHTD.

  
Paul J. Fitzer  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

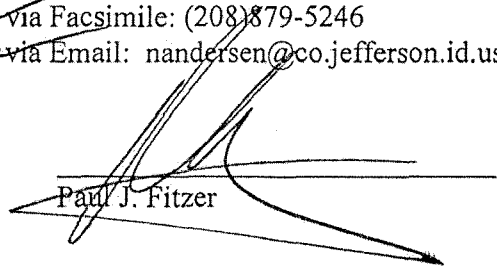
I hereby certify that a true and correct copy of the foregoing **CLOSING ARGUMENT AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW** this 31<sup>st</sup> day of January 2014 served upon the following individuals and in the corresponding manner:

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DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE

2014 JAN 31 PM 5: 00

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**RESPONDENTS' PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF  
LAW**

**COME NOW** the Respondents, Consent of the Governed Caucus and Clarence Leuzinger, by and through their attorneys of record, Sawtooth Law Offices, PLLC, and submit the following proposed findings of fact and conclusions of law.

**I. PROPOSED FINDINGS OF FACT.**

This matter having come before the court as a bench trial, and the Court having carefully

RESPONDENTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

considered the testimony of all witnesses called at trial, and having considered all of the exhibits admitted in evidence, and having considered the arguments of the parties through counsel, the Court makes the following Findings of Fact pursuant to Rule 52(a), Idaho Rules of Civil Procedure:

1. This action concerns the City of Challis, Custer County, Idaho, a body politic and municipal corporation organized and existing pursuant to Idaho law (herein “the City”).
2. The City is authorized by law to, and does in fact, own, operate and maintain a public drinking water system (herein “the System”).
3. The City desires to undertake a project for the purpose of (a) making Old Town distribution system improvements, (b) constructing a new airport water line fire-fighting extension, and (c) upgrading metering and telemetry (herein “the Project”). *See Affidavit of Donald Acheson*, at 9 (Oct. 3, 2013). The Old Town improvement includes replacing 4-inch pipes with larger pipes, installing new fire hydrants, looping dead end pipes, installing pressure reduction stations, and making associated roadway improvements. *Id.* The airport expansion consists of extending new 6-inch and larger main pipes to the airport and installing fire hydrants. *Id.* The metering and telemetry upgrade consists of replacing all existing water meters in the City with auto-read equipment, providing software, coordination and training for the auto-read system and new accounting system, and upgrading the City’s SCADA system. *Id.*
4. The City has insufficient funds on hand, and insufficient annual revenues, to complete the Project and therefore proposes to incur \$3,200,000 in debt to be financed over a term of thirty years and to be paid from revenues of the System. *See Petition for Judicial Confirmation*, at 4-5 (Sept. 9, 2013).

5. The amount of debt proposed to be incurred by the City exceeds the City's annual revenues. Tr<sup>1</sup>, at 6. For fiscal year 2012-2013, the City budgeted \$1,635,423 in revenue from all sources, including revenue-producing systems such as the water system. See Affidavit of Kellie Wahlstrom, at 3 (Oct. 3, 2013). In actuality, the fiscal year 2012-2013 revenues of the City, from all sources, totaled \$1,078,400.11. See City of Challis, Statement of Revenues, period ending September 2013 (submitted electronically Jan. 30, 2014). For its last fiscal year the City over-projected revenues by more than one-half million dollars. As a result of the foregoing, it is clear that the proposed indebtedness is more than three times the City's annual revenues.
6. System expenses for the City's last fiscal year were projected at \$572,424. See City of Challis Ordinance No. 506 (submitted electronically Jan. 30, 2014). Water revenues for the City in its last fiscal year were \$210,308.67. See City of Challis, Statement of Revenues, period ending September 2013 (submitted electronically Jan. 30, 2014). As a result of the foregoing, it is clear that given operating costs of the System, and the amortized payments of the proposed indebtedness (testified to be in the range of \$200,000 per year), water fund expenditures if the proposed indebtedness is incurred will be more than three times the annual water revenues.
7. The City began studying its System approximately four years ago. Tr, at 8. With respect to fire flow service at the airport, that has been a concern of the City, historically, for many years before that. Tr, at 61-62.
8. By April, 2011, the City knew that its System had vulnerabilities and that there was a need to upgrade the water distribution system, metering and telemetry. Tr, at 9. By May,

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<sup>1</sup> "Tr" refers to the Court Reporter's Transcript of the Hearing on Judicial Confirmation (Jan. 17, 2014).

2011, the City Engineer presented the City with options to address the System vulnerability and upgrade needs. Tr, at 9-10. By July, 2011, the City was evaluating and prioritizing those options. Tr, at 10.

9. Between August, 2011, and October, 2012, the City did not approve any project to address the System vulnerabilities or upgrades, and did not seek judicial confirmation of financing to make improvements, and did not submit a revenue bond election to its citizens for approval to proceed with financing to make improvements. Tr, at 10-12. This is despite the fact that the City purports that the water system was a threat to public health and safety at that time. Tr, at 19.
10. In November, 2012, the City explored cost options to begin the improvements sought through this proceeding. Tr, at 12.
11. Between November, 2012, and August, 2013, the City did not approve any project to address the System vulnerabilities or upgrades, and did not seek judicial confirmation of financing to make improvements, and did not submit a revenue bond election to its citizens for approval to proceed with financing to make improvements. Tr, at 12.
12. Presently, the City is not maintaining its System subject to any noncompliance order of the State of Idaho or any fire authority. Tr, at 17, 33, 35. The City's water is safe and meets all water quality standards. Tr, at 25-26, 35. The City's water has no history of contamination or water quality problems, and the City received an award for having the best tasting drinking water in the State of Idaho in 2013. Tr, at 27-28.
13. Although portions of the System are not in compliance with current DEQ regulations, the System is "grandfathered" and compliance is not required except as to new construction and repairs. Tr, at 26-27. For example, although the System does not meet DEQ requirements

for groundwater source redundancy and redundant fire flow capacity, the City is not legally required to immediately comply with such rules. Tr, at 43-44. Even if the City was out of compliance, it has the ability to seek a waiver or extension based on economic infeasibility, but the City has not sought such relief. Tr, at 44-45.

14. There is no legal requirement that the City replace all of its water meters. Tr, at 27. Furthermore, the current metering system poses no danger to public health or safety. Tr, at 36-38, 63-64, 115. As such, replacement of meters is something the City could do incrementally, as operating funds allow. Tr, at 39, 86-87. A public drinking water system can meet its public needs and demands in the absence of metering. Tr, at 125-127.
15. The City has never sought an extension of time to obtain low-interest financing in order to have the Project approved by a confirmatory vote of its citizens, despite the fact that extensions of time are available and have been granted to the City on one or more occasions. Tr, at 21.
16. With respect to fire flow capacity, the City was unable to prove that its 4-inch hydrants are unable to meet fire demand when connected to a pumper truck. Tr, at 70-71. Furthermore, the City conducted no study to determine flow needs at the airport and options to provide fire flow demand at the airport through means other than expansion of distribution lines. Tr, at 81-82, 122-123.
17. There is no legal requirement that all aspects of the Project be completed immediately. Tr, at 88. There is no immediate and ongoing health or safety problem in the City requiring that all aspects of the Project be done immediately. Tr, at 88.
18. To the extent that any of the following conclusions of law are deemed to be findings of fact, they are incorporated by reference into these findings of fact.



## II. PROPOSED CONCLUSIONS OF LAW.

The Court hereby holds the following as a matter of law:

19. To the extent any of the above findings of fact are deemed to be conclusions of law, they are incorporated by reference into these conclusions of law.
20. This Court has jurisdiction over this matter based upon Idaho's *Judicial Confirmation Law*. I.C. 7-1301 *et seq.*
21. The City's *Petition for Judicial Confirmation*, filed September 9, 2013, must set forth the basis for the City's request to obtain debt financing without approval of its citizens. I.C. 7-1304(2), 7-1308.
22. According to the City, it needs debt financing in order to –
  - (a) “meet the State of Idaho requirements for Ground Water Source Redundancy”;
  - (b) “meet the State of Idaho requirements for . . . Redundant Fire Flow Capacity”;
  - (c) correct “violation of the Idaho Rules for Public Drinking Water Systems”;
  - (d) “obtain the required amount of clean drinking water”; and
  - (e) “obtain the required amount of . . . fire flow”.

See *Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013).
23. The IDAHO CONSTITUTION, at Article VIII, section 3, provides that “[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose . . . : **Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.**” (emphasis added). The latter clause of the foregoing is commonly known as the proviso clause. City of Boise v. Frazier, 143 Idaho 1, 3

(2006).

24. There is no dispute between the parties that the indebtedness sought by the City exceeds the City's annual income and revenue.
25. There is no dispute between the parties that the City has not obtained the assent of its qualified electors to incur the indebtedness.
26. The proviso clause is required to be read in the conjunctive – the expense must be both ordinary and necessary. City of Boise, 143 Idaho at 4.
27. There is no dispute between the parties that the Project expenses are ordinary, authorized by the general laws of the State, and relate to the City's ownership, operation and maintenance of the System. The dispute in this action is whether the expense sought – \$3.2 million for the Project – is “necessary.”
28. Historically the Court has held that a “necessary” expense is one that is “indispensable.” City of Boise, 143 Idaho at 4. More recently, the Court has explained that this means the expense must be “truly urgent,” meaning “there must exist a necessity for making the expenditure at or during such year.” City of Boise, 143 Idaho at 4, 5. For example, a permanent courthouse is not a necessary expense and requires voter approval, while a temporary jail is a necessary expense as it is a stop-gap measure while a permanent solution is determined by the people. City of Boise, 143 Idaho at 5, citing Bannock County v. C. Bunting & Co., 4 Idaho 156 (1894). Our Court has also recognized that an expense is “necessary” if a specific duty is imposed by law so that no discretion is left with the city. Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 752 (D. Idaho 1916), affirmed 248 F. 401 (9<sup>th</sup> Cir. 1918). The Court has also agreed that an expense is “necessary” if casualty or accident impairs or injures public property that must be immediately restored in

order to protect the city from fire, or for the city's health and welfare. Hickey v. City of Nampa, 22 Idaho 41, 45 (1912).

29. The restrictive and narrow application of the proviso clause is certainly appropriate given our Court's recognition that –

The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a pay-as-you-go system of finance. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay. Such policy entails a measure of crudity and inefficiency in local government, but doubtless the men who drafted the Constitution, having in mind disastrous examples of optimism and extravagance on the part of public officials, thought best to sacrifice a measure of efficiency for a degree of safety. *The careful, thrifty citizen sometimes gets along with a crude instrumentality until he is able to purchase and pay for something better. And likewise, under the Constitution, county officers must use the means they have for making fair and equitable assessments until they are able to pay for something more efficient, or obtain the consent of those in whose interests they are supposed to act.*

Dexter, 235 F. at 754 (emphasis added).

30. There exists no legal requirement that the City immediately “meet the State of Idaho requirements for Ground Water Source Redundancy”, meet the State of Idaho requirements for . . . Redundant Fire Flow Capacity”, or correct “violation of the Idaho Rules for Public Drinking Water Systems”, as alleged in the *Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013). The groundwater source redundancy rules and redundant fire flow capacity rules of the State of Idaho are located at IDAPA 58.01.08.501. The Idaho Rules for Public Drinking Water Systems are located at IDAPA 58.01.08.552. Both rules expressly provide that their mandates apply only to “the design of new drinking water systems, or modifications to existing, public drinking water systems.” Id. A waiver or exemption from these rules can also be obtained for various reasons, including lack of financing. IDAPA 58.01.08.005. As such, the City has failed to establish its allegation that the Project is “necessary” in order to obtain compliance with the law. The City must only comply with these regulations as new

construction is done, or repairs are made, and the City always has the ability to obtain a waiver or exemption. As such, complying with these regulations is a discretionary, as opposed to mandatory, endeavor and the assent of the City's citizens is therefore required.

31. The City has failed to establish that the Project is immediately needed in order to provide its users with the "required amount of clean drinking water". See *Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013). The City offered no testimony indicating it was unable to meet current user demand. The testimony also indicated that the water provided is safe and among the best in Idaho. The City is presently providing its users with clean drinking water. A risk of future inability to provide safe and reliable water due to deterioration of pipes is insufficient to meet the demands of the proviso clause. What the City proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem. As such, the assent of the City's citizens is required before engaging in a project designed to reduce risk of future problems not currently existing.

32. The City has failed to establish that the Project is immediately needed in order to provide its users with the "required amount of . . . fire flow". See *Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013). The City cites to no legal requirement upon which immediate compliance is required relative to fire flow. The fire authority has not issued any noncompliance order, nor was any evidence elicited by the City from the fire authority that existing fire flow does not meet current demand. Here, yet again, what the City proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem. As such, the assent of the City's citizens is required before engaging in a project designed to reduce risk of future problems not currently existing.

33. It is not truly urgent, indispensable and necessary that the expenditures included within

the Project be incurred this year. The City leaders have discussed and debated the issues over a four year period. The circumstances have not changed. If the City leaders truly felt the Project was emergently necessary, this action would have been brought four, three or two years ago. The fact that these issues have been subject to debate and discussion for such a lengthy period of time confirms that the Project is not necessary. The assent of the City's citizens is required before incurring such significant debt to engage in a public works project that is not so urgent that it has been subject to discussion for nearly four years.

34. The judicial confirmation process requires a great deal of public process and public decision-making before the question is presented to the Court. The Court must view the Project as a whole, and cannot divide it into subparts, approving some and rejecting others. To do so would elevate this Court to the status of a policy-maker, which would not be appropriate. If the Project is not necessary, as a whole, judicial confirmation must be denied. The citizens and leaders of the City can then determine, through the appropriate legislative processes, whether a narrower project might meet the demands of the proviso clause and then submit it for judicial confirmation in a new proceeding. This Court cannot be placed in the position of making the decision that the City would like to proceed with only parts of the Project if other parts are rejected – that is a decision for the leaders or people of the City.

35. If a petition for judicial confirmation is denied, any interested person that appeared to contest the petition is entitled to an award of reasonable attorney fees and court costs. I.C. 7-1313, I.C. 12-101. Because the Court has concluded the City is not entitled to relief on its *Petition*, Respondents are entitled to an award of reasonable attorney fees and court costs, subject to submission and approval pursuant to I.R.C.P. 54.

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RESPONDENTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - 10

**III. PROPOSED JUDGMENT.**

Based on the foregoing findings of fact and conclusions of law, **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

1. That the findings of fact and conclusions of law made herein are intended to be and are legally binding upon all persons interested in the outcome of this proceeding including but not limited to all persons or entities who received actual or constructive notice of the filing of the *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013;
2. That the *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013, be and is hereby denied and **DISMISSED**, with prejudice;
3. That the City's proposed indebtedness for the Project requires a confirmatory vote of the people in accordance with Article VIII, Section 3 of the IDAHO CONSTITUTION;
4. That **JUDGMENT** be and is hereby entered in favor of Respondents; and
5. That Respondents are the prevailing party in this action.

**DATED** this 31<sup>st</sup> day of January, 2014, at Boise, Idaho.

SAWTOOTH LAW OFFICES, PLLC

by:

  
David P. Claiborne

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 31<sup>st</sup> day of January, 2014 by the following method:

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DISTRICT JUDGE**  
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- Electronic Mail or CM/ECF



\_\_\_\_\_  
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DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE  
2014 JAN 31 PM 5:00

Attorneys for Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
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association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents.

Case No. CV-2013-120

**RESPONDENTS' FINAL ARGUMENT**

**COME NOW** the Respondents, Consent of the Governed Caucus and Clarence Leuzinger, by and through their attorneys of record, Sawtooth Law Offices, PLLC, and submit the following as their Final Argument and in support of entry of a Judgment in their favor.

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RESPONDENTS' FINAL ARGUMENT - 1



**I. THE IDAHO CONSTITUTION CONTAINS ONE EXCEPTION TO VOTER APPROVAL OF PUBLIC DEBT, AND THE JUDICIAL CONFIRMATION LAW ALLOWS THE COURT TO DETERMINE WHETHER THAT EXCEPTION APPLIES TO UNIQUE CIRCUMSTANCES.**

The IDAHO CONSTITUTION, at Article VIII, section 3, provides that “[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose . . . : **Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.**” (emphasis added). The latter clause of the foregoing is commonly known as the proviso clause. City of Boise v. Frazier, 143 Idaho 1, 3 (2006). The Idaho Legislature has conferred on District Courts the power to determine whether proposed public indebtedness to undertake public projects fits within the confines of the proviso clause. See Idaho Judicial Confirmation Law, I.C. 7-1301 et seq. When a public body seeks judicial confirmation, it must file with the District Court a petition, and provide notice thereof to the public, setting forth the legal and factual basis for incurring public debt pursuant to the proviso clause. I.C. 7-1304(2), 7-1308.

As is relevant to this case, the Court must find the legal and factual basis for the City of Challis’ (herein “the City”) proposed debt under the proviso clause in its *Petition for Judicial Confirmation*, filed September 9, 2013. As the Court knows, the City is authorized by law to, and does in fact, own, operate and maintain a public drinking water system (herein “the System”). By its *Petition*, the City desires to undertake a project for the purpose of (a) making Old Town distribution system improvements, (b) constructing a new airport water line fire-fighting extension, and (c) upgrading metering and telemetry (herein “the Project”). The City readily acknowledges that it has insufficient funds on hand, and insufficient annual

revenues, to complete the Project and therefore proposes to incur \$3,200,000 in debt to be financed over a term of thirty years and to be paid from revenues of the System. See Petition for Judicial Confirmation, at 4-5 (Sept. 9, 2013).

The City asserts in its *Petition* only five discrete bases for incurring debt pursuant to the proviso clause – *First*, to “meet the State of Idaho requirements for Ground Water Source Redundancy”; *Second*, to “meet the State of Idaho requirements for . . . Redundant Fire Flow Capacity”; *Third*, to correct “violation of the Idaho Rules for Public Drinking Water Systems”; *Fourth*, to “obtain the required amount of clean drinking water”; and *Fifth*, to “obtain the required amount of . . . fire flow”. See Petition for Judicial Confirmation, at 3, 6 (Sept. 9, 2013). Consequently, the burden lies on the City to prove that one or more of these circumstances actually exist, and if so, that the Project meets the needs of that circumstance and that the indebtedness is appropriate under the proviso clause.

In this action, there is no dispute between the parties that the indebtedness sought by the City exceeds the City’s annual income and revenue. There is also no dispute between the parties that the City has not obtained the assent of its qualified electors to incur the indebtedness. As such, court approval of the expense, as appropriate under the proviso clause, is necessary. Further, such approval is permitted by the *Judicial Confirmation Law*.

## **II. THE PROVISIO CLAUSE REQUIRES THAT THE EXPENSE BE BOTH ORDINARY AND NECESSARY.**

Our Court has been clear that the proviso clause is required to be read in the conjunctive – the expense must be both ordinary and necessary. City of Boise, 143 Idaho at 4. In this action, there is no dispute between the parties that the Project expenses are ordinary, authorized by the general laws of the State, and relate to the City’s ownership, operation and maintenance of the System. The dispute in this action is whether the expense sought – \$3.2 million for the Project –

is “necessary.”

The Idaho Supreme Court has explained the meaning of what constitutes a “necessary” expense. Historically the Court has held that a “necessary” expense is one that is “indispensable.” City of Boise, 143 Idaho at 4. More recently, the Court has explained that this means the expense must be “truly urgent,” meaning “there must exist a necessity for making the expenditure at or during such year.” City of Boise, 143 Idaho at 4, 5. For example, a permanent courthouse is not a necessary expense and requires voter approval, while a temporary jail is a necessary expense as it is a stop-gap measure while a permanent solution is determined by the people. City of Boise, 143 Idaho at 5, citing Bannock County v. C. Bunting & Co., 4 Idaho 156 (1894). Our Court has also recognized that an expense is “necessary” if a specific duty is imposed by law so that no discretion is left with the city. Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 752 (D. Idaho 1916), affirmed 248 F. 401 (9<sup>th</sup> Cir. 1918). The Court has also agreed that an expense is “necessary” if casualty or accident impairs or injures public property that must be immediately restored in order to protect the city from fire, or for the city’s health and welfare. Hickey v. City of Nampa, 22 Idaho 41, 45 (1912).

It is important for this Court to recognize its solemn duty on the Constitutional question presented by this action. The proviso clause is restrictive and narrow in its applicability, representing the fundamental right of the electorate to determine when and under what circumstances public debt ought to be incurred. Importantly, the Idaho Supreme Court has explained that –

The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a *pay-as-you-go system of finance*. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay. Such policy entails a measure of crudity and inefficiency in local government, but doubtless the men who drafted the Constitution, having in mind disastrous examples of optimism and extravagance on the part of public

officials, thought best to sacrifice a measure of efficiency for a degree of safety. *The careful, thrifty citizen sometimes gets along with a crude instrumentality until he is able to purchase and pay for something better. And likewise, under the Constitution, county officers must use the means they have for making fair and equitable assessments until they are able to pay for something more efficient, or obtain the consent of those in whose interests they are supposed to act.*

Dexter, 235 F. at 754 (emphasis added). The Court often returns to this explanation in cases involving judicial confirmation. This language demonstrates that economic convenience is not a basis to avoid constitutional requirements. Even if a public work is crude and inefficient, and in desperate need of modernization, the decision on whether to permanently improve the public work by incurring debt is one of the people, not of its elected representatives, unless the expense is urgently needed within the current year. The circumstances of this action do not provide a basis for the Court, or the City, to circumvent the assent of the governed – those that must pay the bill.

### **III. THE PROJECT PROPOSED BY THE CITY IS NOT URGENT AND THE PROJECT EXPENSES NEED NOT BE INCURRED THIS YEAR.**

Clearly the law requires that, in order for the Project to be deemed necessary under the proviso clause, the Project must be “truly urgent” **and** “there must exist a necessity for making the expenditure at or during” the current year. City of Boise, 143 Idaho at 4, 5. The City has failed to prove that the Project is truly urgent, and the City has failed to prove that the Project expenditures must be made this year. The City’s own engineer agrees that aspects of the Project can be put off and completed later (i.e. meter replacement). Moreover, the lengthy history of the Project in itself demonstrates and lack of urgency. The City’s own engineer recommended the Project in the summer of 2011. Here we are in early 2014 and the Project has yet to begin.

The City leaders have discussed and debated the Project over a four year period. The circumstances have not changed. If the City leaders truly felt the Project was emergently

necessary, this action would have been brought four, three or two years ago. The fact that these issues have been subject to debate and discussion for such a lengthy period of time confirms that the Project is not urgently needed.

When urgent matters are presented, public bodies react immediately. They do not debate and prioritize issues over a four year period. This is precisely why the Court has held that a temporary jail is allowed under the proviso clause, while a permanent courthouse is not. A county without a jail cannot meet its immediate public demands and therefore must act without delay to provide a temporary solution. On the other hand, a county conducting business out of temporary quarters has no immediate need to build a permanent courthouse. That is an issue to be decided and reflected upon thoughtfully and with the input of the electorate. If the City's System had failed, the current circumstance would be entirely different, but that is not the situation. The City's System is functioning, meeting current demand, and not harmful to public health or safety. The Project proposed is not even a temporary solution to an imminent threat. To the contrary, the Project is in the nature of a permanent, long-term solution for the water system.

The Project is not urgent, and the City has not shown that the Project must be done this year. The City has discussed, debated and considered the Project for years. Certainly if the City has such time available, the matter is not urgent and can be subject to a confirmatory vote of the electorate, rather than ignoring their wishes.

**IV. NO SPECIFIC DUTY IS IMPOSED BY LAW THAT ELIMINATES THE DISCRETION OF THE CITY TO PROCEED WITH THE PROJECT.**

As explained above, "necessity" can be found if a specific duty is imposed by law so that no discretion is left with the city. Dexter Horton Trust & Sav. Bank v. Clearwater County, 235 F. 743, 752 (D. Idaho 1916), affirmed 248 F. 401 (9<sup>th</sup> Cir. 1918). The City has failed to prove that

the Project is required by law without any discretion left with the City. To the contrary, the evidence presented shows that the System is in compliance with applicable law, and, even if it is not, the City has discretion as to when and in what manner to proceed with System improvement. The law allows the City to exercise discretion to make system improvements as repairs are needed, or alternatively to seek waivers or exemptions from compliance concerns.

There exists no legal requirement that the City immediately “meet the State of Idaho requirements for Ground Water Source Redundancy”, meet the State of Idaho requirements for . . . Redundant Fire Flow Capacity”, or correct “violation of the Idaho Rules for Public Drinking Water Systems”, as alleged in the *Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013). The groundwater source redundancy rules and redundant fire flow capacity rules of the State of Idaho are located at IDAPA 58.01.08.501. The Idaho Rules for Public Drinking Water Systems are located at IDAPA 58.01.08.552. Both rules expressly provide that their mandates apply only to “the design of new drinking water systems, or modifications to existing, public drinking water systems.” *Id.* A waiver or exemption from these rules can also be obtained for various reasons, including lack of financing. IDAPA 58.01.08.005. All of the foregoing is consistent with the testimony of the witnesses. As such, the City has failed to establish its allegation that the Project is “necessary” in order to obtain compliance with the law. The City must only comply with these regulations as new construction is done, or repairs are made, and the City always has the ability to obtain a waiver or exemption. As such, complying with these regulations is a discretionary, as opposed to mandatory, endeavor and the assent of the City’s citizens is therefore required.

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**V. THE PROJECT IS NOT NECESSARY TO RESTORE IMPAIRED PUBLIC PROPERTY THAT CURRENTLY THREATENS THE FIRE PROTECTION, HEALTH OR WELFARE OF THE CITY.**

Respondents recognize that the Idaho Supreme Court has held that an expense is “necessary” under the proviso clause **if** (1) casualty or accident impairs or injures public property (2) that must be immediately restored (3) in order to protect the city from fire, or for the city’s health and welfare. Hickey v. City of Nampa, 22 Idaho 41, 45 (1912). However, in this action, the City has failed to prove such a circumstance. The City offered no evidence of any recent casualty or accident that has impaired the System. The City only offered evidence of System deterioration in Old Town and in the meters. There has been no System impairment at the airport, or related to Telemetry. Even assuming there has been some recent casualty or accident that has impaired the System, the City has not shown a current lack of fire protection, or a current health or welfare danger.

As to public health and welfare, the City has failed to establish that the Project is immediately needed in order to provide its users with the “required amount of clean drinking water”. See Petition for Judicial Confirmation, at 3, 6 (Sept. 9, 2013). The City offered no testimony indicating it was unable to meet current user demand. The testimony also indicated that the water provided is safe and the best in Idaho. The City is presently providing its users with clean drinking water. A risk of future inability to provide safe and reliable water due to deterioration of pipes is insufficient to meet the demands of the proviso clause. What the City proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem. As such, the assent of the City’s citizens is required before engaging in a project designed to reduce risk of future problems not currently existing.

As to fire protection, the City has failed to establish that the Project is immediately needed in

order to provide its users with the “required amount of . . . fire flow”. *See Petition for Judicial Confirmation*, at 3, 6 (Sept. 9, 2013). The City cites to no legal requirement upon which immediate compliance is required relative to fire flow. The fire authority has not issued any noncompliance order, nor was any evidence elicited by the City from the fire authority that existing fire flow does not meet current demand. The City is presently able to fight actual fires, as evidenced by the lack of any evidence to the contrary.<sup>1</sup> Here, yet again, what the City proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem. As such, the assent of the City’s citizens is required before engaging in a project designed to reduce risk of future problems not currently existing.

**VI. THE COURT CANNOT CONFIRM ONLY PARTS OF THE PROJECT – THE PROJECT MUST EITHER BE CONFIRMED OR DENIED AS A WHOLE.**

The judicial confirmation process requires a great deal of public process and public decision-making before the question is presented to the Court. The Court must view the Project as a whole, and cannot divide it into subparts, approving some and rejecting others. To do so would elevate this Court to the status of a policy-maker, which would not be appropriate. If the Project is not necessary, as a whole, judicial confirmation must be denied. The citizens and leaders of the City can then determine, through the appropriate legislative processes, whether a narrower project might meet the demands of the proviso clause and then submit it for judicial confirmation in a new proceeding. This Court cannot place itself in the position of making the decision that the City would like to proceed with only parts of the Project if other parts are rejected – that is a decision for either the leaders of people of the City.

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<sup>1</sup> In fact, after the evidentiary hearing in this action, on January 21, 2014, a residential fire broke out in the City and was suppressed without incident and with the use of fire-fighting water. *See The Challis Messenger*, “Fire Destroys Challis trailer home” (V. 132, No. 51; Jan. 23, 2014). This is a fact generally known within the Court’s jurisdiction,



**VII. THE PROJECT PROPOSED BY THE CITY IS CLOSELY ANALOGOUS TO A PROJECT PROPOSED BY THE CITY OF GOODING WHICH WAS REJECTED UNDER THE PROVISIO CLAUSE.**

On file with this Court attached to the *Second Affidavit of David P. Claiborne* (Nov. 14, 2013), Respondent submitted a District Court decision in the matter of The City of Gooding, *Findings of Fact, Conclusions of Law, and Order*, Gooding County Case No. CV-2012-559 (Feb. 26, 2013). The City of Gooding sought judicial confirmation to obtain a low-interest loan to borrow funds to improve Gooding's public drinking water system and fire flow protection. Id. at 2. The Gooding water system had no history of contamination. Id. at 4. Gooding argued the City water system was out of compliance with DEQ regulations and did not meet fire flow capacity, and there was therefore a risk to public health and safety. Id. at 5. However, the water quality was excellent and the fire flow concerns with fire hydrants had been a problem for five years. Id. at 7. Gooding had taken no action to address fire flow capacity over the past five years. Id.

The District Court in the Gooding case determined that because the water quality was good, there existed no public health or safety risk to maintaining the status quo of the public drinking water system. Id. at 19. The court recognized fire flow implicated issues of public safety, but because the city had been aware of the issue for five years and taken no action on it, there was no apparent urgency for immediate improvement of fire flow capacity. Id. at 20. The court noted that given that period of time the city had ample time to obtain a confirmatory vote of the people. Id. The court further concluded that Gooding was not obligated to improve its system, under DEQ regulations, until it substantially modified or repaired the existing facilities, and that even if presented with that requirement, the City could obtain a waiver. Id. at 22-23. This

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of which the Court can take judicial notice at any stage of these proceedings. I.R.E. 201.

demonstrated that the proposed improvements were discretionary. As to fire protection, the court was provided with no evidence that the fire authority had issued an order that current fire flows were inadequate to provide fire-fighting services. Id. at 23. As such, the court concluded the expenses were not necessary and a confirmatory vote of the electorate was required. Id. at 25.

The facts of this case are closely similar and the result ought to be the same. The City's water is the best in the State of Idaho. The City has been aware of the concerns it elicits in this case over a period of four years and has not taken action until five months ago. The DEQ compliance issues raised by the City are not current requirements and are discretionary. Although the fire authority has made recommendations as to fire flow, no evidence has been submitted to show that current fire flows are inadequate to provide fire-fighting services. Just like in the Gooding case, judicial confirmation must be denied to the City and the Project ought to be subject to a confirmatory vote of the City's electorate.

**VIII. THOSE WHO OPPOSE JUDICIAL CONFIRMATION ARE ENTITLED TO AN AWARD OF ATTORNEY FEES AND COURT COSTS IF JUDICIAL CONFIRMATION IS DENIED.**

If a petition for judicial confirmation is denied, any interested person that appeared to contest the petition is entitled to an award of reasonable attorney fees and court costs. I.C. 7-1313, I.C. 12-101. In the instant action, judicial confirmation must be rejected, and as such Respondents are entitled to an award of reasonable attorney fees and court costs, subject to submission and approval pursuant to I.R.C.P. 54.

**IX. CONCLUSION.**

Based on the above and foregoing, and based on Respondents proposed findings of fact and conclusions of law (filed herewith), which are incorporated by this reference herein, the Court

ought to deny judicial confirmation, dismiss the City's *Petition* with prejudice, enter Judgment in favor of Respondents, and award Respondents their reasonable attorney fees and court costs.

**DATED** this 31<sup>st</sup> day of January, 2014, at Boise, Idaho.

SAWTOOTH LAW OFFICES, PLLC

by:   
\_\_\_\_\_  
David P. Claiborne

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 31<sup>st</sup> day of January, 2014 by the following method:

**STEPHANIE J. BONNEY**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: [sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)  
*Attorneys for Petitioner*

U.S. First Class Mail, Postage  
Prepaid  
 U.S. Certified Mail, Postage Prepaid  
 Federal Express  
 Hand Delivery  
 Facsimile  
 Electronic Mail or CM/ECF

**HONORABLE ALAN C. STEPHENS**  
**DISTRICT JUDGE**  
Jefferson County Courthouse  
210 Courthouse Way, Suite 120  
Rigby, ID 83442  
Telephone: (208) 745-7736  
Facsimile: (208) 745-6636  
E-Mail: [nandersen@co.jefferson.id.us](mailto:nandersen@co.jefferson.id.us)  
*Courtesy Copy - Judge's Chambers*

U.S. First Class Mail, Postage  
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 Hand Delivery  
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 Electronic Mail or CM/ECF



David P. Claiborne

2014 FEB -4 AM 9:35

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

CITY OF CHALLIS,	)	
	)	
Plaintiff,	)	CASE NO. CV-2013-120
	)	
-VS-	)	MINUTE ENTRY
	)	
CONSENT OF THE GOVERNED CAUCUS	)	
AND CLARENCE LEUZINGER,	)	
Defendant,	)	
_____	)	

This matter came before the court on the 17<sup>th</sup> day of January, 2014, for a scheduled hearing on Judicial Confirmation before the Honorable Alan C. Stephens, District Judge, in the Custer County Courthouse. Paul J. Fitzer, Esq. was present on behalf of the plaintiff. David Claiborne, Esq. was present on behalf of the defendants.

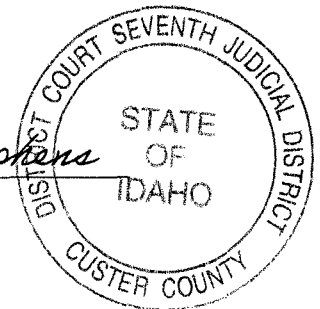
The following witnesses were called by the plaintiff: Mark Lupher, Corey Rice, Donald Acheson, Corey Rice and Jack Hammond.

The following witnesses were called by the defendant: Donald Acheson.

After hearing testimony, the court gave the parties 14 days to submit their written closing argument and proposed Findings of Fact and Conclusions of Law.

DATED this 4th day of February, 2014.

*Alan C Stephens*  
Alan C. Stephens  
District Judge



**CERTIFICATE OF MAILING**

On the 11<sup>th</sup> day of February 2014, I, Tammy Rice, certify that I mailed a full and true copy of the foregoing, securely sealed in an envelope with postage prepaid to:

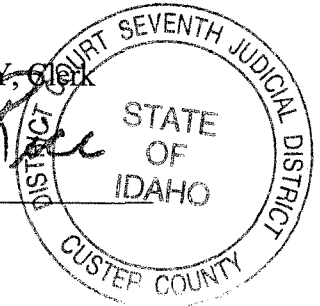
Stephanie J. Bonney, Esq.  
P.O. Box 2949  
Idaho Falls, Idaho 83403-2949

Paul J. Fitzer  
950 W. Bannock, Ste 520  
Boise, Idaho 83702

David P. Clairborne, Esq.  
Sawtooth Law Offices  
P.O. Box 7985  
Boise, Idaho 83707

BARBARA C. TIERNEY, Clerk

By Tammy Rice  
Deputy



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:	)	
	)	
<b>THE CITY OF CHALLIS,</b>	)	
an Idaho municipal	)	Case No. CV 2013-120
corporation,	)	Decision and Order
	)	
vs.	)	
	)	
<b>CONSENT OF THE GOVERNED</b>	)	
<b>CAUCUS,</b> an Idaho unincorporated	)	
nonprofit association; and	)	
<b>CLARENCE LEUZINGER,</b>	)	
an individual.	)	

I.  
INTRODUCTION

This case is a judicial confirmation case involving proposed repairs and improvements to the City of Challis' municipal water supply. Petitioner is the City of Challis. Respondents are a group of citizens of Challis concerned about the scope of the project and/or the expenses involved. An evidentiary hearing was held on January 17, 2014, with both petitioner and respondents presenting evidence. The Court GRANTS the City of Challis' Petition for Judicial Confirmation based upon the following findings of fact and conclusions of law.

II.  
FINDINGS OF FACT

1. On August 27, 2013 the City's governing body adopted Resolution No. 25-082713 authorizing the filing of this Petition for Judicial Confirmation at least fourteen (14) days following a public hearing duly held and conducted on August 13, 2013 pursuant to the July 18, 2013 publication of notice containing the date, time, and place of such hearing and a summary of

the matter, which was at least fifteen (15) days prior to the date set for the public hearing in the Challis Messenger, a newspaper of general circulation within the city, in the form and content described in Section 7-1306(2), Idaho Code.

2. Notice of the Petition and the hearing was duly posted as required by law at the offices of the City at 21 E. Main Avenue, Challis, Idaho 83226 on September 12, 2013, which was at least 30 days prior to the date established for the hearing in this matter as prescribed by Section 7-1306, Idaho Code.

3. This court held a hearing in open court on January 17, 2014 for the purposes of identifying any interested parties who had appeared in opposition to the petition in accordance with Section 7-1307, Idaho Code following an appropriate period for the parties to conduct discovery and thereafter appear before this court.

4. The City of Challis is an incorporated city duly organized, existing, and operating pursuant to Title 50, Idaho Code, and as such is a "political subdivision" within the definition contained in Section 7-1303(6), Idaho Code.

5. The City possesses authority to borrow money or issue water revenue bonds pursuant to Section 50-1027, et seq. and Section 39-7601, et seq., subject to Article III, § 3, Idaho Constitution.

6. The City is authorized to institute a judicial confirmation proceeding pursuant to Section 7-1304, Idaho Code.

7. The City is authorized by law to own, operate, and maintain, and has for many years owned, operated, and maintained, a public drinking water supply system (the "System") pursuant to Section 50-323 and 50-1028 et seq. The System serves the entire City of Challis, Idaho



8. As owner and operator of the System, the City is charged with the duty of maintaining safe and reliable water services for the City and its residents, and to do so in a manner that does not jeopardize the City's drinking water supply and provides sufficient fire flow. In furtherance of that responsibility in December 2011, the City retained the services of Riedesel Engineering, a professional consulting civil engineering firm duly authorized and licensed to practice in Idaho (the "Engineer"), to conduct a study of the System for the purpose of determining the adequacy of the System for present and future needs with respect to standards established by the local fire authority, the State of Idaho through its Department of Environmental Quality ("DEQ") and the United States Environmental Protection Agency ("EPA"). The Engineer performed a study entitled "City of Challis Water Facility Plan" along with the supplemental information and emergency protocol for the City's existing water system (DEQ No. 11-13-19) (the "Study").

9. The most recent water system facility plan and resulting improvement project performed for the City had dated from 1981 and is approximately 30 years old. The residential services and meters installed with the 1980s capital project are aged and need to be replaced.

10. However, the majority of the system, the Old Town distribution system, dates back to the 1930s. These pipes have reached their useful life and are now dilapidated and in need of replacement resulting in multiple breaches in the city, including several this year. Should a breach occur in a main section of this distribution line, entire sections of the City could be without water.

11. Although no enforcement action has been brought against the City, the City's system is not in compliance with State law.

a. The City is not able to provide adequate fire flows due to the use of existing four (4) inch old and dead end water mains, and small diameter un-looped lines. IDAPA 58.01.08.542.06 addresses the size of water mains. The section provides that where fire hydrants are provided, they shall not be connected to water mains smaller than six (6) inches in diameter, and fire hydrants shall not be installed unless fire flow volumes are available.

b. As testified to by the engineer and the public works director, all of the 130 fire hydrants are in need of replacement because they contain dilapidated componentry that cannot be serviced. To date only 25-30 have been replaced.

c. However, the hydrants are connected to four (4) inch lines. Pursuant to IDAPA 58.01.08.50 the adequacy of the water system fire flow capacity is determined by the local fire authority. The Challis system does not meet the minimum standard established by the local fire authority, Chief Gunderson, who expressed concerns that the Challis' system limits the District's ability to fight a fire. The concerns include

- i. The use of 4 inch lines in violation of IDAPA 58.01.08.542.06.
- ii. Improper spacing of fire hydrants in violation of IFC Appendix B, Table C105.1.
- iii. The existing distribution system cannot meet peak hour demand with the design fire criteria in violation of IDAPA 58.01.08.552.01.b.i.
- iv. Many of the fire hydrants are dysfunctional.
- v. The public works director testified that the fire hydrants provide suitable flow for only approximately 45 seconds.

vi. In short, the fire chief, engineer, and public works director expressed concerns that the system cannot effectively fight a fire.

12. In order to repair this preexisting and obligatory utility, achieve compliance with state law minimum safety regulations, and obtain the required amount of fire flow to protect the health and safety of the citizenry, the Study (which as a planning document contains over \$8 million dollars of recommended upgrades) was paired down to meet the immediate needs of the System totaling \$2,129,066 in repairs and replacement plus additional estimated funding requirements for contingencies, design engineering, bidding, testing, and other costs total \$3,036,960. These include:

- a. Construction of distribution system improvements to tie the Old Town system eliminating the 4-inch pipes and the fire hydrants that tie to them, install new and properly spaced fire hydrants, and tie-in dead end lines. Add pressure reducing stations and isolation valves to create (4) pressure zones which eliminates service areas that are over-pressurized.
- b. Install a telemetry system to improve supervisory control and data acquisition to protect the water system.
- c. Replace metering with new automated meter read (AMR) equipment taking the first steps to recover the estimated 4% lost water identified by Idaho Rural Water, which will provide accuracy of water usage, but more importantly the billing, which is necessary precondition for DEQ approval, funding and to comply with a water audit.

d. Installation of a transmission pipeline to provide the minimum supply of water necessary for firefighting service to the Challis Airport as determined by the fire authority, Chief Gunderson.

13. Donald Acheson, the city engineer, believes that a piecemeal approach to replacement of the aging componentry does not mitigate the danger to the public safety as a system is only as strong as its weakest link, and it is not foreseeable as to exactly where the breach or fire will occur.

14. Based on the Study and other available information, the City's Mayor and Council have determined that the proposed improvements are necessary to meet the present and immediate needs of the City. The improvements are essential to ensure that the System remains functional and adequate to meet the requirements of Idaho law and provide for minimum required fire flow protection both in old town and to the airport, and to provide security for this valuable resource. Additionally, the replacement of pipes, hydrants, meters, and telemetry are part of a regular, ordinary, and necessary maintenance of a preexisting and obligatory utility.

15. The total cost of the Project pursuant to the preliminary planning has been estimated at an amount not to exceed \$3,200,000. The City does not have funds available to it within its present budget to meet the cost of the Project, and has determined that such cost must be financed over a term of years from the revenues of the System and other lawfully available funds of the City.

a. With payments on the debt estimate at a rate of 1.75%, yearly payments should be approximately \$150,000 per year.

b. The City's sinking fund or enterprise fund for water totaled \$144,147.48 and the City's total 2012-2013 annual budget was \$2,175,074.<sup>1</sup>

c. Water fund revenue for 2012/2013 totaled \$572,424.

16. With the assistance of the Development Company, the City has determined to finance the cost of the Project by entering into the loan obligation with the State, pursuant to which the State will loan to the City the funds required to finance the Project, and the City will issue its promissory note or other evidence of such indebtedness and will repay the loan over a 30 year period from System revenues together with other lawfully available funds of the City.

17. The loan, promissory note, or other evidence of indebtedness thereof, would constitute an indebtedness of the City extending beyond its current year's revenues. The City has not sought or obtained an approving vote of the electors at a special election called for the purpose of approving such indebtedness, nor has the City made provision for the levying of an annual property tax to constitute a sinking fund for the payment of the interest on or principal of such indebtedness.

18. The proposed loan obligation for the financing of the Project constitutes an "ordinary and necessary expense" of the City within the meaning of Article 8, Section 3, Idaho Constitution, for which no approving vote of the electors is required.

19. The loan obligation may be validly secured by the City's execution of the proposed loan obligation, by the issue of its promissory note and by repayment of the same from its System revenues and other lawfully available funds of the City.

### III. CONCLUSIONS OF LAW

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<sup>1</sup> The parties stipulated to the admission of Ordinance No. 506 representing the total annual appropriation ordinance for 2012-2013.

1. Proceedings under the Judicial Confirmation Law, Title 7, Chapter 13, Idaho Code, are proceedings in rem, and jurisdiction of the subject matter and of all interested parties is lawfully obtained through publication and posting as provided therein. Publication and posting as authorized by the Judicial Confirmation Law is a valid method of vesting jurisdiction of this Court over all interested parties and over the subject matter.

2. Jurisdiction of this Court over the subject matter of the Petition for Judicial Confirmation and over all interested parties has, as a matter of law, been obtained herein by publication and posting as provided by law.

3. The Judicial Confirmation Law is valid and constitutional.

4. The City of Challis has the power to “establish, create, develop, maintain, and operate a domestic water system” pursuant to I.C. § 50-323.

5. The Project proposed to be made by the City, and the indebtedness proposed to be incurred therefor, meets the criteria articulated by the Idaho Supreme Court to qualify under the “ordinary and necessary expenses” exception to Article 8, Section 3, Idaho Constitution as follows:

**A. Article VIII, Section 3, Idaho Constitution.**

Article 8, Section 3, of the Idaho Constitution, provides that no county, city, etc., shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose, “provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state ... .”

This section of the Constitution thus permits a city to incur an indebtedness or obligation, without an approving vote of the electors, exceeding the revenue for the current year, where the expense (i) is both ordinary and necessary, and (ii) is authorized by the general laws of the state. The issue of whether an expense is "ordinary and necessary" within this provision of the Constitution has been before the Idaho Supreme Court on numerous occasions.

**B. The Proposed Expenditures are Ordinary.**

That the proposed indebtedness is ordinary is not in dispute. An expense is ordinary if in the ordinary course of municipal business, or in the maintenance of municipal property, it may be and is likely to become necessary.<sup>2</sup> So long as Idaho law authorizes a municipality to operate or maintain the property or activity at issue and so long as the proposed project or expenditure is to improve the property or activity for a legitimate purpose, the proposed project is "ordinary." Certainly, the repair and replacement of existing water system components constitutes an ordinary expense. There can be no dispute that a city such as the City of Challis is authorized by law to maintain a domestic public water system pursuant to I.C. § 50-323 and the continued utilization of its public water system to provide this utility to the citizenry is a preexisting and continuing obligation of the City.

The City's proposed expenditure is "ordinary." The proposed expenditure is in a fixed amount with minimal financial risk, is not disproportionate to the over-all budget, and will result in City-owned public improvements.<sup>3</sup> As testified by Mayor Mark Lupher ("Lupher") and later

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<sup>2</sup> *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388, 391 (2006); *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).

<sup>3</sup> Tr. p. 112

supplemented by the City Budget, the City's fiscal budget for 2012-2013 was \$2,175,074.<sup>4</sup> The City's sinking fund or enterprise fund for water totaled \$144,147.48 and water fund revenue for 2012/2013 totaled \$572,424. The proposed annual debt payments on the expenditures (at 1.75% about \$150,000 per year as testified to by Don Acheson) is proportional to the City's annual revenue.

**C. The Proposed Expenditures are Necessary.**

Respondents argue that the proposed expense is not "necessary" because the need is not *urgent* enough. However, an expense can be necessary without an immediate "urgency" or emergency if the repair is necessary for the good of the public health and safety. This Court finds that the proposed repairs do not need to be "urgent" in the sense that Respondents argue, but instead the repairs must be *necessary* under the meaning of the Idaho Constitution.

The proposed repairs are necessary under the constitutional definition, and therefore fit the "ordinary and necessary" test. There are ample examples of cases in similarly situated counties where the judiciary confirmed proposed repairs, without an urgent emergency, using a consistent interpretation as this Court's interpretation of the "necessary" prong of the Constitutional requirement. As provided herein, expenses incurred in the repair and improvement of existing facilities in such manner as to render it serviceable to the municipality<sup>5</sup> can and do qualify as ordinary and necessary expenses.<sup>6</sup> Further, expenditures made to preserve the public

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<sup>4</sup> The parties stipulated to the admission of Ordinance No. 506 representing the total annual appropriation ordinance for 2012-2013.

<sup>5</sup> "It is one of the incidents of ownership of property that it must be kept in repair." *City of Pocatello v. Peterson*, 93 Idaho 774, 779, 473 P.2d 644, 649 (1970).

<sup>6</sup> Not only repairs, but also expansion and replacement of existing property or services with completely new facilities, may constitute ordinary and necessary expenses. *City of Pocatello v. Peterson*, *supra*. Thus, in *Hickey v. City of Nampa*, *supra*, the city was permitted to replace outmoded and unserviceable wooden water pipes with new iron pipe and equip and improve a pumping station, and in *City of Pocatello v. Peterson*, the city's replacement of its



health and safety of the inhabitants of the municipality are necessary. Elimination of potential tort liability also satisfies the ordinary and necessary proviso.<sup>7</sup> Pursuant to the City of Challis Water Facility Plan, (the "Study"), attached exhibits, and the testimony of Donald Acheson, the Project is necessary to protect the public health and safety of the citizenry due to risk of fire, to repair and maintain a preexisting and obligatory system, to eliminate potential tort liability for the City's failure to adequately protect property, and to bring the system into compliance with current standards pursuant to IDAPA and the fire authority.

The City is not able to provide adequate fire flows due to the inadequate pipe size within the majority of the system (4" mains), existing dead end water mains, and small diameter un-looped lines. This clearly violates IDAPA 58.01.08.501.18. The system does not meet the standards determined by this authority, and the expense to bring the system up to standard is a necessary expense.

The proposed water meters are also a necessary expense. Accurate water meters are the only fair and equitable way to bill for the actual water used. Although water meters do not support the health and safety of the citizens, they are "necessary" pursuant to the exception for the repair and maintenance of a preexisting system. Accurate and well maintained water meters are the only cost effective way to monitor the consumption of water by each property owner. The existing water meters are inaccurate and current users may be paying too little or too much based on actual consumption. With the proposed water meter replacement and installation, the City will be able to fairly and equitably charge each user for the actual usage and thus provide an accurate

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existing airport terminal system with an entirely new structure was upheld. In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), the Court stated that an expenditure which is incurred for the purpose of repairing a public work is ordinary and necessary.

<sup>7</sup> *City of Pocatello v. Peterson*. Cf. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 889 (1983).

bill. The bill rate and consumption charge will be used to repay any debt incurred during the proposed project.

The proposed solution is proportionate to the need. Of the \$8,078,877.00 of recommended improvements contained in Recommended Project 1, the City Council has carved out the minimum attributes that are necessary to meet the City's immediate needs. These include the replacement of the Old Town Distribution System which date back to the 1930s, including the pipes, hydrants, pressure reduction stations, and roadway pavement replacement for trenching. The project also includes the installation of an airport line extension thereby providing the airport with connectivity and proper fire flows. Lastly, the replacement of all existing water meters with new automated read equipment, metering software, and the installation of a telemetry SCADA system to provide security to the system. A duly licensed engineer has studied the system and the sole fire authority has provided the minimum standards. The Department of the Environmental Quality has approved facility plan. The failure to now do so, just like the airport facility in *Peterson*, could subject the City to legal liability.<sup>8</sup>

**D. Conclusion of "Ordinary and Necessary"**

The Project proposed to be acquired by the City meets the various criteria articulated by the Idaho Supreme Court to qualify under the "ordinary and necessary expense" exception. The City Council has determined that the expense for improvements to the City's existing System is necessary to protect the public health and safety and comply with applicable environmental health standards and regulations and safe drinking water standards and regulations. The City is obligated to perform and incur expenditures immediately to protect the City's water supplies and

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<sup>8</sup> *Asson*, 105 Idaho at 442.

provide sufficient fire flow. Though not a regularly recurring expense, the Project is for the purpose of making immediate and necessary repairs to the existing System so as to continue existing domestic water services of the City so that public water services are available and usable to the City and the City's inhabitants.

6. As "ordinary and necessary expenses" within the meaning of Article 8, Section 3, Idaho Constitution, no approval of the electors of the City at a special election called for such purpose is required.

7. The loan obligation, when duly executed by the City and a third party, and the promissory note when issued pursuant thereto will be valid and binding special obligations of the City, payable in accordance with their terms. The City may validly pledge its water system revenues and other lawfully available funds of the City appropriated by the City for such purpose, as security for its required payments under the Loan obligation.

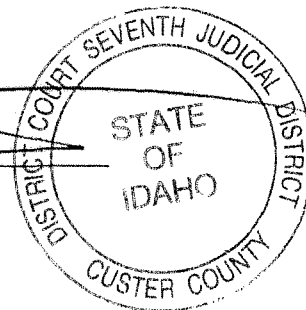
**IV.  
CONCLUSION AND JUDGMENT**

Based on the foregoing findings of fact and conclusions of law, **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

1. That the findings of fact and conclusions of law made herein are intended to be and are legally binding upon all persons interested in the outcome of this proceeding including but not limited to all persons or entities who received actual or constructive notice of the filing of the *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013;
2. That the *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013, be and is hereby **GRANTED**;
3. That **JUDGMENT** be and is hereby entered in favor of Petitioners.

DATED this 5<sup>th</sup> day of February, 2014.

Alan C. Stephens  
District Judge



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DECISION AND ORDER** this 5<sup>th</sup> day of February, 2014 served upon the following individuals and in the corresponding manner:

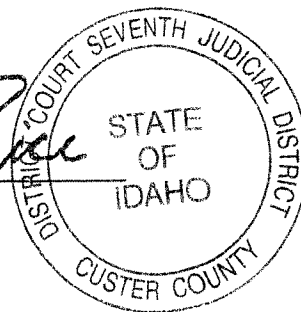
David P. Claiborne  
Sawtooth Law Offices  
1101 W. River Street, Suite 110  
PO Box 7985  
Boise, ID 83707

\_\_\_\_\_ via <sup>Email</sup>~~U.S. Mail~~  
\_\_\_\_\_ via Hand Delivery  
\_\_\_\_\_ via Overnight Delivery  
\_\_\_\_\_ via Facsimile: (208) 629-7559

PAUL J. FITZER #5675  
STEPHANIE J. BONNEY ISB #6037  
MOORE SMITH BUXTON &  
TURCKE, CHARTERED  
950 W. Bannock Street, Suite 520  
Boise, Idaho 83702

\_\_\_\_\_ via <sup>Email</sup>~~U.S. Mail~~  
\_\_\_\_\_ via Hand Delivery  
\_\_\_\_\_ via Overnight Delivery  
\_\_\_\_\_ via Facsimile: (208) 331-1202

Tammy Rose  
Clerk



DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE  
2014 MAR 10 PM 5: 07

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents / Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner / Respondent on Appeal;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents / Appellants.

Case No. CV-2013-120

**NOTICE OF APPEAL**

**TO: THE ABOVE-NAMED RESPONDENT(S) ON APPEAL, THE CITY OF CHALLIS,  
AND ITS ATTORNEYS OF RECORD, MOORE SMITH BUXTON & TURCKE,  
AND THE CLERK OF THE ABOVE-TITLED COURT.**

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Appellant(s), Consent of the Governed Caucus and Clarence Leuzinger,  
appeal against the above-named Respondent(s) to the Idaho Supreme Court from the

**ORIGINAL**


***Decision and Order***, entered in the above-titled action on the 5<sup>th</sup> day of February, 2014, Honorable Judge Alan C. Stephens, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
3. A preliminary statement of the issues on appeal which the Appellant(s) then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant(s) from asserting other issues on appeal.
  - (a) Whether the District Court erred in granting judicial confirmation to the City of Challis for the purpose of incurring indebtedness for the repair and improvement of a municipal water supply system; and
  - (b) Whether the District Court properly applied controlling constitutional law related to the *proviso clause* of Article VIII, Section 3 of the Idaho Constitution; and
  - (c) Whether the District Court's findings of fact are based upon substantial and competent evidence.
4. Has an order been entered sealing all or any portion of the record? No.
  - (a) If so, what portion? N/A.
5.
  - (a) Is a reporter's transcript requested? Yes.
  - (b) The Appellant(s) requests the preparation of the following portions of the reporter's transcript, in hard copy and electronic form: the entire reporter's standard transcript, as defined in Rule 25(c), I.A.R., as supplemented by the following - *Hearing on Judicial Confirmation* (Jan. 17, 2014), 134 pages (already prepared and paid for).

6. The Appellant(s) requests the following documents to be included in the Clerk's record, in addition to those automatically included under Rule 28, I.A.R.: *Petition for Judicial Confirmation* (Aug. 29, 2013); *Answer* (Oct. 1, 2013); *Affidavit of Paul J. Fitzer* (Oct. 2, 2013); *Affidavit of Kellie Wahlstrom* (Oct. 2, 2013); *Affidavit of Donald Acheson* (Oct. 2, 2013); *Affidavit of David P. Claiborne* (Oct. 10, 2013); *Second Affidavit of David P. Claiborne* (Nov. 14, 2013); *Decision and Order* (Feb. 5, 2014).
7. The Appellant(s) requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court - all exhibits and documents allowed in evidence at the *Hearing on Judicial Confirmation* (Jan. 17, 2014), including those submitted by Respondent after said *Hearing* to supplement the record.
8. The undersigned hereby certifies:
  - (a) That a copy of this Notice has been served on the reporter.
  - (b) That the Clerk of the District Court has been paid the actual fee for preparation of the reporter's transcript.
  - (c) That the estimated fee for the preparation of the Clerk's record has been paid.
  - (d) That the appellate filing fee has been paid.
  - (e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

**DATED** this 7<sup>th</sup> day of March, 2014.

SAWTOOTH LAW OFFICES, PLLC

by:   
David P. Claiborne



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 7<sup>th</sup> day of March, 2014 by the following method:

**PAUL J. FITZER**  
**MOORE SMITH BUXTON & TURCKE**

950 W. Bannock St., Ste. 520

Boise, Idaho 83702

Telephone: (208) 331-1800

Facsimile: (208) 331-1202

E-Mail: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)

*Attorneys for Respondent(s) on Appeal*

U.S. First Class Mail, Postage Prepaid

U.S. Certified Mail, Postage Prepaid

Federal Express

Hand Delivery

Facsimile

Electronic or CM/ECF

**MARY ANN ELLIOTT**

210 Courthouse Way, Ste. 120

Rigby, ID 83442

Telephone: (208) 745-7736

Facsimile: n/a

E-Mail: [elliott.mare@gmail.com](mailto:elliott.mare@gmail.com)

*Court Reporter*

U.S. First Class Mail, Postage Prepaid

U.S. Certified Mail, Postage Prepaid

Federal Express

Hand Delivery

Facsimile

Electronic Mail or CM/ECF

**BARBARA C. TIERNEY**

**CLERK OF COURT**

P.O. Box 385

Challis, ID 83226

Telephone: (208) 879-2360

Facsimile: (208) 879-5246

E-Mail: [trice@co.custer.id.us](mailto:trice@co.custer.id.us)

*Clerk of Court*

U.S. First Class Mail, Postage Prepaid

U.S. Certified Mail, Postage Prepaid

Federal Express

Hand Delivery

Facsimile

Electronic Mail or CM/ECF

**HONORABLE ALAN C. STEPHENS**

Jefferson County Courthouse

210 Courthouse Way, Suite 120

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Telephone: (208) 745-7736

Facsimile: (208) 745-6636

E-Mail: [nandersen@co.jefferson.id.us](mailto:nandersen@co.jefferson.id.us)

*Courtesy Copy - Judge's Chambers*

U.S. First Class Mail, Postage Prepaid

U.S. Certified Mail, Postage Prepaid

Federal Express

Hand Delivery

Facsimile

Electronic Mail or CM/ECF



David P. Claiborne

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE

2014 MAR 12 PM 4:08

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

THE CITY OF CHALLIS, an Idaho  
municipal corporation,

Petitioner/Respondent on Appeal,

CASE NO. CV-2013-120

vs

CLERK'S CERTIFICATE  
OF APPEAL

CONSENT OF THE GOVERNED  
CAUCUS, an Idaho unincorporated  
Nonprofit association; and CLARENCE  
LEAUZINGER, an individual,

Respondent/Appellants.

Appeal from District Court, Custer County, State of Idaho, to Idaho Supreme Court, State of Idaho.

District Court Judge: Honorable Alan C. Stephens

District Court No: CV-2013-120

Order or judgment appealed from: Decision and Order

Attorney for Appellant: David P. Claiborne

Attorney for Respondent: Paul J. Fitzer

Appealed by: Consent of the Governed Caucus and Clarence Leuzinger

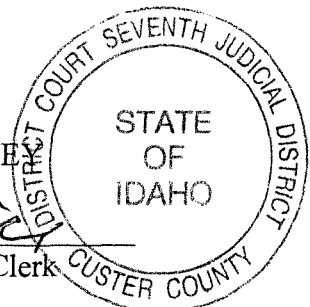
Appealed against: The City of Challis

Notice of Appeal filed: March 10<sup>th</sup>, 2014

Appellate Fees Paid: Yes  
Clerk's Record Fee Paid: Yes  
Reporter's transcript requested: Yes  
Name of Reporter: Mary Ann Elliot  
Estimate of cost of transcript: NA

Dated: March 12<sup>th</sup>, 2014

BARBARA C. TIERNE  
Clerk of the Court  
*Tammy Rice*  
Tammy Rice, Deputy Clerk



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

JAMMY RICE  
 2014 MAR 19 AM 10:54

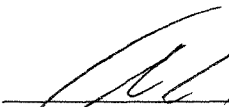
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

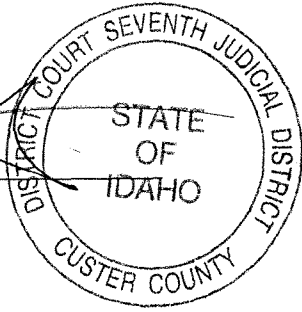
In re:	)	
	)	
<b>THE CITY OF CHALLIS,</b>	)	
an Idaho municipal	)	Case No. CV 2013-120
corporation,	)	JUDGMENT
	)	
vs.	)	
	)	
<b>CONSENT OF THE GOVERNED</b>	)	
<b>CAUCUS</b> , an Idaho unincorporated	)	
nonprofit association; and	)	
<b>CLARENCE LEUZINGER,</b>	)	
an individual.	)	
_____	)	

Judgment is hereby granted The City of Challis as follows:

The *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013, is hereby **GRANTED**.

DATED this 18th day of March, 2014.

  
 \_\_\_\_\_  
 Alan C. Stephens  
 District Judge



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **JUDGMENT** this 20<sup>th</sup> day of March, 2014 served upon the following individuals and in the corresponding manner:

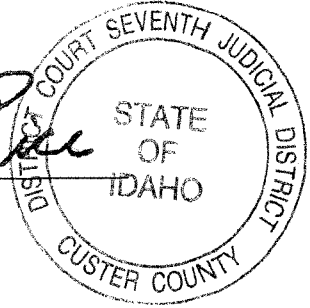
David P. Claiborne  
Sawtooth Law Offices  
1101 W. River Street, Suite 110  
PO Box 7985  
Boise, ID 83707

\_\_\_\_ via U.S. Mail  
\_\_\_\_ via Hand Delivery  
\_\_\_\_ via Overnight Delivery  
 via Facsimile: ~~(208) 629-7559~~ *Email*

PAUL J. FITZER #5675  
STEPHANIE J. BONNEY ISB #6037  
MOORE SMITH BUXTON &  
TURCKE, CHARTERED  
950 W. Bannock Street, Suite 520  
Boise, Idaho 83702

\_\_\_\_ via U.S. Mail  
\_\_\_\_ via Hand Delivery  
\_\_\_\_ via Overnight Delivery  
 via Facsimile: ~~(208) 331-1202~~ *Email*

*Tammy Rice*  
\_\_\_\_\_  
Clerk



DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE

2014 MAR 20 PM 12:21

PAUL J. FITZER #5675  
STEPHANIE J. BONNEY ISB #6037  
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e-mail: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)  
[sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)

Attorneys for Petitioner-Respondent on Appeal

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:	)	
	)	Case No. CV 2013-120
THE CITY OF CHALLIS, an Idaho	)	
municipal corporation,	)	<b>MOTION TO AUGMENT</b>
	)	<b>RECORD ON APPEAL</b>
Petitioner-Respondent on Appeal,	)	
	)	
Vs.	)	
	)	
CONSENT OF THE GOVERNED	)	
CAUCUS, an Idaho unincorporated nonprofit	)	
association; and CLARENCE LEUZINGER,	)	
an individual,	)	
	)	
Respondents-Appellants.	)	

COMES NOW Petitioner-Respondent on Appeal, City of Challis, by and through its counsel of record, and submits this Motion to Augment Record on Appeal and requests that the Court cause the following document be provided in the record in addition to those already included under Rule 28, I.A.R. and pursuant to the Notice of Appeal filed March 7, 2014:

1. Memorandum in Support of Judicial Confirmation filed October 2, 2013;
2. Closing Argument and Proposed Findings of Fact, Conclusions of Law filed February 3, 2014;

3. Respondent's Final Argument filed February 3, 2014;
4. Respondent's Proposed Findings of Fact and Conclusion of Law filed February 3, 2014.

Respectfully submitted this 18 day of March, 2014.

MOORE SMITH BUXTON & TURCKE, CHTD.



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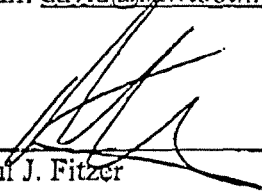
Paul J. Fitzer  
Attorney for Petitioner-Respondent on Appeal

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **MOTION TO AUGMENT RECORD ON APPEAL** this 19 day of March, 2014 served upon the following individuals and in the corresponding manner:

David P. Claiborne  
Sawtooth Law Offices  
1101 W. River Street, Suite 110  
PO Box 7985  
Boise, ID 83707

- via U.S. Mail
- via Hand Delivery
- via Overnight Delivery
- via Facsimile: (208)629-7559
- via Email: david@sawtoothlaw.com



\_\_\_\_\_  
Paul J. Fitzer

# In the Supreme Court of the State of Idaho

THE CITY OF CHALLIS, an Idaho municipal corporation, )

Petitioner-Respondent, )

v. )

CONSENT OF THE GOVERNED CAUCUS, An Idaho unincorporated nonprofit association; and CLARENCE LEUZINGER, an individual, )

Respondents-Appellants. )

ORDER CONDITIONALLY  
DISMISSING APPEAL

Supreme Court Docket No. 41956-2014  
Custer County No. 2013-120

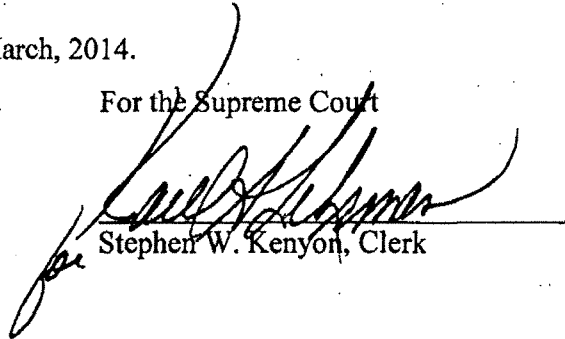
This appeal is from the DECISION AND ORDER file stamped in District Court on February 5, 2014. Idaho Code 7-1310 states that Judicial Confirmation cases shall be governed by the Idaho Rules of Civil Procedure. It appears that a final JUDGMENT has not been entered by the District Court that complies with I.R.C.P. 54(a). Therefore,

IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, CONDITIONALLY DISMISSED; however, the Appellant must file a RESPONSE with this Court within twenty-one (21) days from the date of this Order why this appeal should not be DISMISSED.

IT FURTHER IS ORDERED that proceedings in this appeal are SUSPENDED until further notice.

DATED this 24<sup>th</sup> day of March, 2014.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Judge

ORDER CONDITIONALLY DISMISSING APPEAL – Docket No. 41956-2014



DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
**TAMMY RICE**  
2014 MAR 24 AM 10:11

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents / Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner / Respondent on Appeal;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents / Appellants.

Case No. CV-2013-120

**NOTICE OF NON-OPPOSITION RE:  
PETITIONER-RESPONDENTS ON  
APPEAL'S MOTION TO AUGMENT  
RECORD ON APPEAL**

**COMES NOW** the Respondents-Appellants, Consent of the Governed Caucus and Clarence Leuzinger, by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby provides notice of its non-opposition to Petitioner-Respondents on Appeal's Motion to Augment Record on Appeal.

NOTICE OF NON-OPPOSITION RE: PETITIONER-RESPONDENTS ON APPEAL'S MOTION TO AUGMENT RECORD ON APPEAL- 1

DATED this 24<sup>th</sup> day of March, 2014.

SAWTOOTH LAW OFFICES, PLLC


by:   
David P. Claiborne

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 24<sup>th</sup> day of March, 2014 by the following method:

**PAUL J. FITZER**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)  
*Attorneys for Respondent(s) on Appeal*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic or CM/ECF

  
David P. Claiborne

NOTICE OF NON-OPPOSITION RE: PETITIONER-RESPONDENTS ON APPEAL'S MOTION  
TO AUGMENT RECORD ON APPEAL- 2

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE  
2014 MAR 25 PM 2:14

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents / Appellants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In re:

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner / Respondent on Appeal;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents / Appellants.

Case No. CV-2013-120

**AMENDED NOTICE OF APPEAL**

**TO: THE ABOVE-NAMED RESPONDENT(S) ON APPEAL, THE CITY OF CHALLIS,  
AND ITS ATTORNEYS OF RECORD, MOORE SMITH BUXTON & TURCKE,  
AND THE CLERK OF THE ABOVE-TITLED COURT.**

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Appellant(s), Consent of the Governed Caucus and Clarence Leuzinger, appeal against the above-named Respondent(s) to the Idaho Supreme Court from the

AMENDED NOTICE OF APPEAL - 1

Judgment entered in the above-titled action on the 19<sup>th</sup> day of March, 2014, as a result of the Decision and Order, entered in the above-titled action on the 5<sup>th</sup> day of February, 2014, Honorable Judge Alan C. Stephens, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
3. A preliminary statement of the issues on appeal which the Appellant(s) then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant(s) from asserting other issues on appeal.
  - (a) Whether the District Court erred in granting judicial confirmation to the City of Challis for the purpose of incurring indebtedness for the repair and improvement of a municipal water supply system; and
  - (b) Whether the District Court properly applied controlling constitutional law related to the *proviso clause* of Article VIII, Section 3 of the Idaho Constitution; and
  - (c) Whether the District Court's findings of fact are based upon substantial and competent evidence.
4. Has an order been entered sealing all or any portion of the record? No.
  - (a) If so, what portion? N/A.
5.
  - (a) Is a reporter's transcript requested? Yes.
  - (b) The Appellant(s) requests the preparation of the following portions of the reporter's transcript, in hard copy and electronic form: the entire reporter's standard transcript, as defined in Rule 25(c), I.A.R., as supplemented by the following - *Hearing on*

*Judicial Confirmation* (Jan. 17, 2014), 134 pages (already prepared and paid for).

6. The Appellant(s) requests the following documents to be included in the Clerk's record, in addition to those automatically included under Rule 28, I.A.R.: *Petition for Judicial Confirmation* (Aug. 29, 2013); *Answer* (Oct. 1, 2013); *Affidavit of Paul J. Fitzer* (Oct. 2, 2013); *Affidavit of Kellie Wahlstrom* (Oct. 2, 2013); *Affidavit of Donald Acheson* (Oct. 2, 2013); *Affidavit of David P. Claiborne* (Oct. 10, 2013); *Second Affidavit of David P. Claiborne* (Nov. 14, 2013); *Decision and Order* (Feb. 5, 2014).
7. The Appellant(s) requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court - all exhibits and documents allowed in evidence at the *Hearing on Judicial Confirmation* (Jan. 17, 2014), including those submitted by Respondent after said *Hearing* to supplement the record.
8. The undersigned hereby certifies:
  - (a) That a copy of this Amended Notice has been served on the reporter.
  - (b) That the Clerk of the District Court has been paid the actual fee for preparation of the reporter's transcript.
  - (c) That the estimated fee for the preparation of the Clerk's record has been paid.
  - (d) That the appellate filing fee has been paid.
  - (e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

//

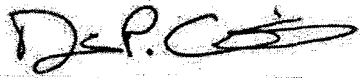
//

//

AMENDED NOTICE OF APPEAL - 3

**DATED** this 25<sup>th</sup> day of March, 2014.

SAWTOOTH LAW OFFICES, PLLC

by:   
\_\_\_\_\_

David P. Claiborne

AMENDED NOTICE OF APPEAL - 4

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 25<sup>th</sup> day of March, 2014 by the following method:

**PAUL J. FITZER**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)  
*Attorneys for Respondent(s) on Appeal*

U.S. First Class Mail, Postage Prepaid  
 U.S. Certified Mail, Postage Prepaid  
 Federal Express  
 Hand Delivery  
 Facsimile  
 Electronic or CM/ECF

**MARY ANN ELLIOTT**  
210 Courthouse Way, Ste. 120  
Rigby, ID 83442  
Telephone: (208) 745-7736  
Facsimile: n/a  
E-Mail: [elliott.mare@gmail.com](mailto:elliott.mare@gmail.com)  
*Court Reporter*

U.S. First Class Mail, Postage Prepaid  
 U.S. Certified Mail, Postage Prepaid  
 Federal Express  
 Hand Delivery  
 Facsimile  
 Electronic Mail or CM/ECF

**BARBARA C. TIERNEY**  
**CLERK OF COURT**  
P.O. Box 385  
Challis, ID 83226  
Telephone: (208) 879-2360  
Facsimile: (208) 879-5246  
E-Mail: [trice@co.custer.id.us](mailto:trice@co.custer.id.us)  
*Clerk of Court*

U.S. First Class Mail, Postage Prepaid  
 U.S. Certified Mail, Postage Prepaid  
 Federal Express  
 Hand Delivery  
 Facsimile  
 Electronic Mail or CM/ECF

**HONORABLE ALAN C. STEPHENS**  
Jefferson County Courthouse  
210 Courthouse Way, Suite 120  
Rigby, ID 83442  
Telephone: (208) 745-7736  
Facsimile: (208) 745-6636  
E-Mail: [nandersen@co.jefferson.id.us](mailto:nandersen@co.jefferson.id.us)  
*Courtesy Copy - Judge's Chambers*

U.S. First Class Mail, Postage Prepaid  
 U.S. Certified Mail, Postage Prepaid  
 Federal Express  
 Hand Delivery  
 Facsimile  
 Electronic Mail or CM/ECF



David P. Claiborne

TAMMY RICE  
2014 MAR 25 PM 2: 23

DAVID P. CLAIBORNE  
[Idaho State Bar No. 6579]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: david@sawtoothlaw.com

Attorneys for Respondents / Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

**THE CITY OF CHALLIS**, an Idaho  
municipal corporation,

Petitioner - Respondent;

vs.

**CONSENT OF THE GOVERNED  
CAUCUS**, an Idaho unincorporated nonprofit  
association; and **CLARENCE  
LEUZINGER**, an individual;

Respondents - Appellants.

Supreme Court Docket No. 41956-2014

Custer County Case No. CV-2013-120

**RESPONSE TO ORDER  
CONDITIONALLY DISMISSING  
APPEAL**

**COME NOW** the Respondents - Appellants, by and through counsel of record, and submits this response to the Court's *Order Conditionally Dismissing Appeal*, entered March 24, 2014. A final Judgment was not entered by the District Court until after the filing of Respondent's *Notice of Appeal*. The *Judgment* was entered by the District Court on March 19, 2014. A true and correct copy is attached. The *Notice of Appeal* was therefore premature. An *Amended Notice of Appeal* is

RESPONSE TO ORDER CONDITIONALLY DISMISSING APPEAL - 1




being filed with the District Court to identify that the *Judgment* is being appealed. A true and correct copy of the *Amended Notice of Appeal* is attached hereto. it is being forwarded to the District Court for filing this date.

Given the above circumstances, Respondents respectfully request that the Court retain this appeal proceeding, and that the Court vacate the suspension of proceedings.

**DATED** this 25<sup>th</sup> day of March, 2014.

SAWTOOTH LAW OFFICES, PLLC

by:   
\_\_\_\_\_  
David P. Claiborne

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 25<sup>th</sup> day of March, 2014 by the following method:

**PAUL J. FITZER**  
**MOORE SMITH BUXTON & TURCKE**  
950 W. Bannock St., Ste. 520  
Boise, Idaho 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
E-Mail: pjf@msbtlaw.com  
*Attorneys for Respondent(s) on Appeal*

- U.S. First Class Mail, Postage Prepaid
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- Federal Express
- Hand Delivery
- Facsimile
- Electronic or CM/ECF

**BARBARA C. TIERNEY**  
**CLERK OF COURT**  
P.O. Box 385  
Challis, ID 83226  
Telephone: (208) 879-2360  
Facsimile: (208) 879-5246  
E-Mail: trice@co.custer.id.us  
*Clerk of Court*

- U.S. First Class Mail, Postage Prepaid
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**HONORABLE ALAN C. STEPHENS**  
Jefferson County Courthouse  
210 Courthouse Way, Suite 120  
Rigby, ID 83442  
Telephone: (208) 745-7736  
Facsimile: (208) 745-6636  
E-Mail: nandersen@co.jefferson.id.us  
*Courtesy Copy - Judge's Chambers*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF



David P. Claiborne

CUSTER COUNTY  
2014 MAR 19 AM 10:54

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

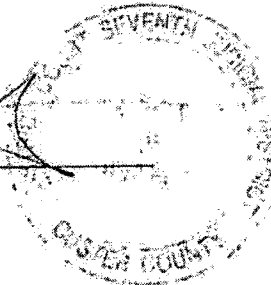
In re:	)	
	)	
<b>THE CITY OF CHALLIS,</b>	)	
an Idaho municipal	)	Case No. CV 2013-120
corporation,	)	JUDGMENT
	)	
vs.	)	
	)	
<b>CONSENT OF THE GOVERNED</b>	)	
<b>CAUCUS,</b> an Idaho unincorporated	)	
nonprofit association; and	)	
<b>CLARENCE LEUZINGER,</b>	)	
an individual.	)	
	)	

Judgment is hereby granted The City of Challis as follows:

The *Petition for Judicial Confirmation*, filed in this action by the City of Challis, on September 9, 2013, is hereby **GRANTED**.

DATED this 18th day of March, 2014.

Alan C. Stephens  
District Judge



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing JUDGMENT this 30<sup>th</sup> day of March, 2014 served upon the following individuals and in the corresponding manner:

David P. Claiborne  
Sawtooth Law Offices  
1101 W. River Street, Suite 110  
PO Box 7985  
Boise, ID 83707

via U.S. Mail  
 via Hand Delivery  
 via Overnight Delivery  
 via Facsimile: ~~(208) 629-7559~~ Email

PAUL J. FITZER #5675  
STEPHANIE J. BONNEY ISB #6037  
MOORE SMITH BUXTON &  
TURCKE, CHARTERED  
950 W. Bannock Street, Suite 520  
Boise, Idaho 83702

via U.S. Mail  
 via Hand Delivery  
 via Overnight Delivery  
 via Facsimile: ~~(208) 331-1202~~ Email

  
Clerk

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
TAMMY RICE

MARY ANN ELLIOTT, RPR, CSR  
Official Court Reporter  
Seventh Judicial District  
Jefferson County Courthouse  
210 Courthouse Way, Suite 120  
Rigby, Idaho 83442  
(208) 745-7736

2014 MAR 25 AM 11:55

\*\*\*\*\*

NOTICE OF TRANSCRIPT LODGED

\*\*\*\*\*

DATE: March 21, 2014, 2014

TO: Stephen W. Kenyon, Clerk of the Court  
Supreme Court/Court of Appeals  
P.O. Box 83720  
Boise, Idaho 83720-0101

SUPREME COURT DOCKET NO.: 41956

DISTRICT COURT CASE NO.: CV-2013-120

CAPTION OF CASE: City of Challis v. Consent of the  
Governed Caucus, et al.

You are hereby notified that a reporter's  
appellate transcript in the above-entitled and  
numbered case has been lodged with the District  
Court Clerk of the County of Custer in the Seventh  
Judicial District. Said transcript consists of the  
following proceeding, totaling 136 pages:

1. Hearing on Judicial Confirmation  
(January 17, 2014)

Respectfully,

*Mary Ann Elliott*

-----  
Mary Ann Elliott, RPR, Idaho CSR #SRT-1015

xc: District Court Clerk

PAUL J. FITZER #5675  
 STEPHANIE J. BONNEY ISB #6037  
 MOORE SMITH BUXTON & TURCKE, CHARTERED  
 950 W. Bannock Street, Suite 520  
 Boise, Idaho 83702  
 Telephone: (208) 331-1800  
 Facsimile: (208) 331-1202  
 e-mail: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)  
[sjb@msbtlaw.com](mailto:sjb@msbtlaw.com)

DISTRICT COURT  
 CUSTER COUNTY  
 IDAHO

TAMMY RICE  
 2014 APR -2 AM 10:40

Attorneys for Petitioner-Respondent on Appeal

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THE CITY OF CHALLIS, an Idaho municipal corporation,	)	Case No. CV 2013-120
	)	
Petitioner-Respondent on Appeal,	)	<b>ORDER TO AUGMENT</b>
	)	<b>RECORD ON APPEAL</b>
vs.	)	
	)	
CONSENT OF THE GOVERNED CAUCUS, an Idaho unincorporated nonprofit association; and	)	
CLARENCE LEUZINGER, an individual,	)	
	)	
Respondents-Appellants.	)	
	)	

THIS MATTER came on pursuant to Petitioner-Respondent on Appeal's Motion to Augment Record on Appeal, and Respondents-Appellants' Notice of Non-Opposition re: Petitioner-Respondents on Appeal's Motion to Augment Record on Appeal, and the Court being fully advised and good cause appearing therefore;

ORDER TO AUGMENT RECORD ON APPEAL-- 1

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following documents shall be included in the appeal record in addition to those already included under Rule 28, I.A.R. and requested in the Notice of Appeal filed March 7, 2014:

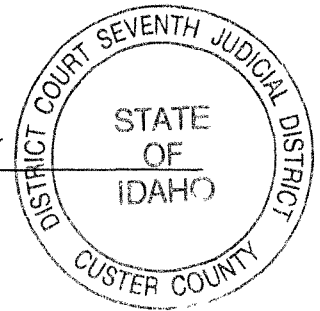
1. Memorandum in Support of Judicial Confirmation filed October 2, 2013;
2. Closing Argument and Proposed Findings of Fact, Conclusions of Law filed February 3, 2014;
3. Respondent's Final Argument filed February 3, 2014;
4. Respondent's Proposed Findings of Fact and Conclusion of Law filed February 3, 2014.

IT IS SO ORDERED.

DATED this 2nd day of <sup>April</sup>~~March~~, 2014.

*Alan C Stephens*

Hon. Alan C. Stephens  
DISTRICT JUDGE



**CERTIFICATE OF SERVICE**

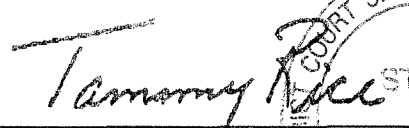
I HEREBY CERTIFY that on the \_\_\_\_\_ day of March, 2014, I caused to be served a true and correct copy of the foregoing ORDER TO AUGMENT RECORD ON APPEAL by the method indicated below, and addressed to the following:

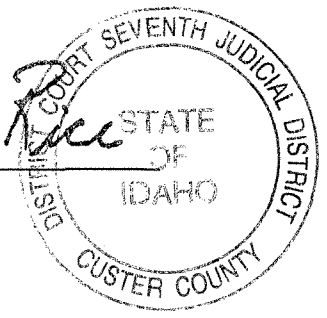
David P. Claiborne  
Sawtooth Law Offices  
1101 W. River Street, Suite 110  
PO Box 7985  
Boise, ID 83707

\_\_\_\_ U.S. Mail  
\_\_\_\_ Facsimile: (208) 629-7559  
 Email: [david@sawtoothlaw.com](mailto:david@sawtoothlaw.com)

Paul J. Fitzer  
MOORE SMITH BUXTON  
& TURCKE CHARTERED  
950 W Bannock, Ste 520  
Boise, ID 83702

\_\_\_\_ U.S. Mailed  
\_\_\_\_ Facsimile: (208) 331-1202  
 Email: [pjf@msbtlaw.com](mailto:pjf@msbtlaw.com)

  
\_\_\_\_\_  
Clerk of the Court



DISTRICT COURT SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO  
CUSTER COUNTY



# In the Supreme Court of the State of Idaho

THE CITY OF CHALLIS, an Idaho municipal corporation,	)	
	)	
Petitioner-Respondent,	)	ORDER TO WITHDRAW
	)	CONDITIONAL DISMISSAL AND
v.	)	REINSTATE APPEAL
	)	
CONSENT OF THE GOVERNED CAUCUS,	)	Supreme Court Docket No. 41956-2014
An Idaho unincorporated nonprofit association; and CLARENCE LEUZINGER,	)	Custer County No. 2013-120
an individual,	)	Ref. No. 14-156
	)	
Respondents-Appellants.	)	

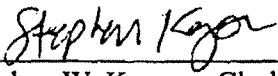
1. The above entitled appeal is from a DECISION AND ORDER file stamped in the district court on February 5, 2014; however, it appeared that a final judgment had yet to be entered in the District Court that complies with I.R.C.P. 54(a). Furthermore, Idaho Code 7-1310 states that Judicial Confirmation cases shall be governed by the Idaho Rules of Civil Procedure. Therefore, this Court issued an ORDER CONDITIONALLY DISMISSING APPEAL on March 24, 2014, and allowed counsel for Appellants time to file a Response with this Court regarding why this appeal should not be dismissed and proceedings in this appeal were SUSPENDED until further notice.
2. A RESPONSE TO ORDER CONDITIONALLY DISMISSING APPEAL with a Judgment and Amended Notice of Appeal attached was filed by counsel for Appellants on March 26, 2014.

Therefore,

IT HEREBY IS ORDERED that the ORDER CONDITIONALLY DISMISSING APPEAL issued by this Court on March 24, 2014, SHALL BE WITHDRAWN and the above entitled appeal SHALL BE REINSTATED with the due date for the filing of the Clerk's Record and Reporter's Transcript now being set.

DATED this 23 day of April, 2014.

By Order of the Supreme Court

  
 \_\_\_\_\_  
 Stephen W. Kenyon, Clerk

cc: Counsel of Record  
 District Court Clerk  
 Court Reporter Mary Ann Elliot  
 District Judge Alan C. Stephens

ORDER TO WITHDRAW CONDITIONAL DISMISSAL AND REINSTATE APPEAL – Docket No. 41956-2014

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT STATE OF

IDAHO, IN AND FOR THE COUNTY OF CUSTER

2014 APR 29 AM 8:49

THE CITY OF CHALLIS, an Idaho )  
municipal corporation, )  
) )  
Petitioner/Respondent, )  
) )  
-vs- )  
) )  
CONSENT OF THE GOVERNED )  
CAUCUS, an Idaho unincorporated )  
nonprofit association; and CLARENCE )  
LEUZINGER, an individual, )  
) )  
) )  
Respondents/Appellants. )

Supreme Court Case No. 41956

CLERK'S CERTIFICATE

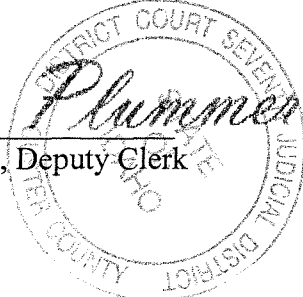
I, BARBARA C. TIERNEY, Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Custer, do hereby certify that the above and foregoing Clerk's Record in the above-entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents as are automatically required under Rule 28 of Idaho Appellate Rules along with all requested documents.

I do further certify that the Court Reporter's Transcript and Clerk's Record will be duly lodged with the Clerk of the Supreme Court, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I hereunto set my hand and affixed the seal of said Court at Challis, Idaho this 29<sup>th</sup> day of April, 2014.

Barbara C. Tierney  
Clerk of the District Court

By: Laila Plummer  
Laila Plummer, Deputy Clerk



Cc: Clerk of the Court  
Idaho Supreme Court

CLERK'S CERTIFICATE

DISTRICT COURT  
CUSTER COUNTY  
IDAHO  
LAILA PLUMMER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

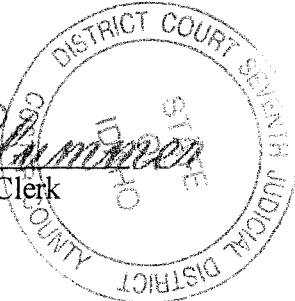
THE CITY OF CHALLIS, an Idaho municipal corporation,	)	
	)	
	)	
Petitioner/Respondent,	)	Supreme Court No. 41956
	)	
v.	)	County Case No. CV-2013-120
	)	
CONSENT OF THE GOVERNED CAUCUS, an Idaho unincorporated nonprofit association; and	)	NOTICE OF LODGING OF
CLARENCE LEUZINGER, an individual,	)	CLERK'S RECORD AND
	)	REPORTER'S TRANSCRIPT
	)	
Respondents/Appellants.	)	
_____	)	

Notice is hereby given that the Clerk's Record was lodged with the District Court on April 29<sup>th</sup>, 2014 and the Reporters Transcript was lodged on March 25<sup>th</sup>, 2014.

The parties shall have twenty-eight (28) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

BARBARA C. TIERNEY  
Clerk of the District Court

By Laila Plummer  
Laila Plummer, Deputy Clerk



cc: Idaho Court of Appeals  
Idaho Supreme Court

2014 APR 29 AM 8:49

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER**

THE CITY OF CHALLIS, an Idaho )  
municipal corporation, )  
 )  
Petitioner/Respondent, )  
 )  
-vs- )  
 )  
CONSENT OF THE GOVERNED )  
CAUCUS, an Idaho unincorporated )  
nonprofit association; and CLARENCE )  
LEUZINGER, an individual, )  
 )  
 )  
 )  
Respondents/Appellants. )

Supreme Court Case No. 41956

**CERTIFICATE OF SERVICE**

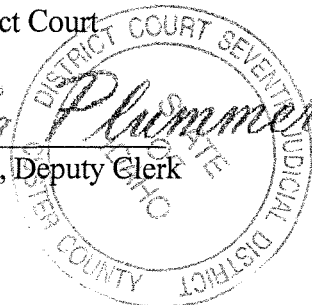
I, BARBARA C. TIERNEY, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record (the Transcript was sent directly to the attorney's by the Court Reporter) to each of the parties or their Attorney of Record, this 29<sup>th</sup> day of April, 2014, as follows:

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