7-10-2014

City of Challis v. Consent of Governed Caucus Appellant's Brief Dckt. 41956

BEFORE THE
SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 41956-2014
Case No. CV-2013-120 (Custer County, 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.

On appeal from the
Seventh Judicial District of the State of Idaho,
in and for the County of Custer

Honorable Alan C. Stephens, District Judge, presiding

BRIEF FOR THE APPELLANT

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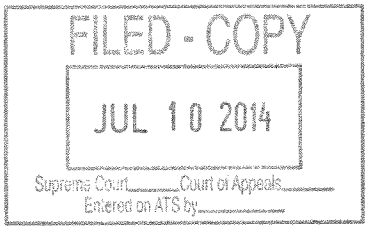

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STATEMENT OF THE CASE

Nature of the Case

This is a special proceeding brought pursuant to Chapter 13, Title 7, IDAHO CODE, seeking judicial confirmation to incur public debt as allowed by the *proviso* clause of Article VIII, Section 3, IDAHO CONSTITUTION. The public debt sought in this action relates to a public drinking water system serving Challis, Idaho.

Proceedings Below

Respondent (Petitioner below), the City of Challis (herein "Challis"), initiated this action on August 29, 2013. R Vol. 1, p. 8. The action was initiated as an *in rem* proceeding under Idaho's *Judicial Confirmation Law* seeking judicial approval to incur $3.2 million in public indebtedness for alleged "ordinary and necessary expenses" related to the public drinking water system serving Challis. R Vol. 1, p. 14. On October 1, 2013, Consent of the Governed Caucus and Clarence Leuzinger (herein "the Caucus") appeared in the action as Respondents (now Appellants) contesting the necessity of the indebtedness. R Vol. 1, p. 17. The Caucus generally is composed of property owners, taxpayers, electors and rate payers in Challis. R Vol. 1, p. 17.

An evidentiary hearing was held on the petition filed by Challis on January 17, 2014. R Vol. 2, p. 375. Thereat, testimony was received from Mark Lupher (the Challis mayor), Corey Rice (the Superintendent of Public Works for Challis), Donald Acheson (the City Engineer for Challis) and Jak Hammond (an engineer retained by the Caucus). R Vol. 2, p. 375. On February 5, 2014, the Court entered a *Decision and Order* that included findings of fact and conclusions of law. R Vol. 2, p. 377-390. Ultimately, the Court sided with Challis. R Vol. 2, p. 377-390. A *Judgment* was entered March 19, 2014 granting judicial confirmation as requested by Challis. R Vol. 2, p. 413.

This appeal followed. Challis made no request for an award of court costs or attorney fees as part of the proceedings below.

Disposition Below

In the proceedings below, the district court granted the request for judicial confirmation made by Challis, thereby entitling Challis to incur $3.2 million in public indebtedness for purposes of making improvements to its public drinking water system. R Vol. 2, p. 377-390, 413. The improvements relate to three distinct parts of the public drinking water system - mainlines in old town; expansion to the airport, and new metering and telemetry. R Vol. 2, p. 377-390, 413.

Statement of Facts

Challis is a body politic and municipal corporation organized and existing pursuant to Idaho law. R Vol. 1, p. 8-9, and Vol. 2, p. 378. Challis is authorized by law to, and does in fact, own, operate and maintain a public drinking water system (herein "the System"). R Vol. 1, p. 9, and Vol. 2, p. 378. Challis determined that it needed to undertake a project for the purpose of (a) making Old Town distribution system improvements, (b) constructing a new airport water line service extension, and (c) upgrading metering and telemetry (herein "the Project"). R Vol. 1, p. 132. Challis contended these improvements were necessary and that it needed debt financing in order to (1) "meet the State of Idaho requirements for Ground Water Source Redundancy"; (2) "meet the State of Idaho requirements for . . . Redundant Fire Flow Capacity"; (3) correct "violation of the Idaho Rules for Public Drinking Water Systems"; (4) "obtain the required amount of clean drinking water"; and (5) "obtain the required amount of . . . fire flow". R Vol. 1, p. 10, 13.

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. R Vol. 1, p. 132. The airport expansion consists of extending new 6-inch and larger main pipes to the airport and installing fire hydrants. R Vol. 1, p. 132. The metering and telemetry upgrade consists of replacing all existing water meters in Challis with auto-read equipment, providing software, coordination and training for the auto-read system and new accounting system, and upgrading Challis' SCADA system. R Vol. 1, p. 132. Challis 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. R Vol. 1, p. 11-12.

The amount of debt proposed to be incurred by Challis exceeds its annual revenues. Tr Vol. 1, p. 7. For fiscal year 2012-2013, Challis budgeted $1,635,423 in revenue from all sources, including revenue-producing systems such as the water system. R. Vol. 1, p. 46. In actuality, the fiscal year 2012-2013 revenues of Challis, from all sources, totaled $1,078,400.11. R Vol. 2, p. 352. For its last fiscal year Challis over-projected revenues by more than one-half million dollars. R Vol. 2, p. 352. As a result of the foregoing, it is clear that the proposed indebtedness is more than three times Challis' annual revenues. R Vol. 2, p. 352. System expenses for Challis' last fiscal year were projected at $572,424. R Vol. 2, p. 352. Water revenues for Challis in its last fiscal year were $210,308.67. R Vol. 2, p. 352. 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. R Vol. 2, p. 352.

Challis began studying its System approximately four years ago. Tr Vol. 1, p. 9. With respect to fire flow service at the airport, that has been a concern of Challis, historically, for many

years before that. Tr Vol. 1, p. 62-63. By April, 2011, Challis knew that its System had vulnerabilities and that there was a need to upgrade the water distribution system, metering and telemetry. Tr Vol. 1, p. 10. By May, 2011, the City Engineer presented Challis with options to address the System vulnerability and upgrade needs. Tr Vol. 1, p. 10-11. By July, 2011, Challis was evaluating and prioritizing those options. Tr Vol. 1, p. 11. Between August, 2011, and October, 2012, Challis 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 Vol. 1, p. 11-13. This is despite the fact that Challis purports that the water system was a threat to public health and safety at that time. Tr Vol. 1, p. 20. In November, 2012, Challis explored cost options to begin the improvements sought through this proceeding. Tr Vol. 1, p. 13. Between November, 2012, and August, 2013, Challis 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 Vol. 1, p. 13.

Presently, Challis is not maintaining its System subject to any noncompliance order of the State of Idaho or any fire authority. Tr Vol. 1, p. 18, 34, 36. Challis' water is safe and meets all water quality standards. Tr Vol. 1, p. 26-27, 36. Challis' water has no history of contamination or water quality problems, and Challis received an award for having the best tasting drinking water in the State of Idaho in 2013. Tr Vol. 1, p. 28-29. 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 Vol. 1, p. 27-28. For example, although the

System does not meet DEQ requirements for groundwater source redundancy and redundant fire flow capacity, Challis is not legally required to immediately comply with such rules. Tr Vol. 1, p. 44-45. Even if Challis was out of compliance, it has the ability to seek a waiver or extension based on economic infeasibility, but Challis has not sought such relief. Tr Vol. 1, p. 45-46.

With respect to fire flow capacity, Challis was unable to prove that its 4-inch hydrants are unable to meet fire demand when connected to a pumper truck. Tr Vol. 1, p. 71-72. Furthermore, Challis 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 Vol. 1, p. 82-83, 123-124.

There is no legal requirement that Challis replace all of its water meters. Tr Vol. 1, p. 28. Furthermore, the current metering system poses no danger to public health or safety. Tr Vol. 1, p. 37-39, 64-65, 116. As such, replacement of meters is something Challis could do incrementally, as operating funds allow. Tr Vol. 1, p. 40, 87-88. A public drinking water system can meet its public needs and demands in the absence of metering. Tr Vol. 1, p. 126-128.

Challis 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 Challis on one or more occasions. Tr Vol. 1, p. 22. There is no legal requirement that **all** aspects of the Project be completed immediately. Tr Vol. 1, p. 89. There is no immediate and ongoing health or safety problem in the City requiring that **all** aspects of the Project be done immediately. Tr Vol. 1, p. 89.

There is no dispute between the parties that the indebtedness sought by Challis exceeds its annual income and revenue. R Vol. 2, p. 356. There is no dispute between the parties that Challis

has not obtained the assent of its qualified electors to incur the indebtedness. R Vol. 2, p. 356. There is further no dispute between the parties that the Project expenses are ordinary, authorized by the general laws of the State, and relate to Challis' ownership, operation and maintenance of the System. R Vol. 2, p. 356. The dispute in this action is whether the expense sought – $3.2 million for the Project – is "necessary." R Vol. 2, p. 356.

STATEMENT OF ISSUES PRESENTED

1. Was it proper for the district court to grant judicial confirmation to a city to incur public debt without the assent of its electors where the purpose of the indebtedness was to incur expenses that were not necessary or emergently needed?

2. Did the district court properly apply controlling constitutional law related to the *proviso clause* of Article VIII, Section 3 of the IDAHO CONSTITUTION?

3. Are the district court's findings of fact supported by substantial and competent evidence?

4. Is the Caucus entitled to costs and attorney fees on appeal pursuant to IDAHO CODE §§ 7-1313 and 12-101?

STANDARD OF REVIEW

As to factual findings, the Court "defers to the factual findings of the district court unless those findings are clearly erroneous." City of Boise v. Frazier, 143 Idaho 1, 3 (2006). The Court has free review over "application of the relevant law to the facts." Id. "Constitutional issues are questions of law over which [the Court] also exercise[s] free review." Id. at 3-4.

SUMMARY OF ARGUMENT

The IDAHO CONSTITUTION requires a city to obtain the consent of its electorate before incurring public debt, unless the expense is "ordinary and necessary." Over time, the word "necessary" has been interpreted by this Court to mean that the expense for which debt is sought must be truly urgent - it must be an expense that must be incurred during the present year. This Court has further held that "necessary" expenses are those a city is compelled to incur by law, without any discretion to act otherwise. This Court has also determined an expense is "necessary" if it must be incurred to repair public property impaired by some casualty or accident that results in a threat to public safety. Here, the district court failed to recognize and apply the foregoing interpretations, and granted judicial confirmation without a proper factual basis. The district court erred not only in determination of the facts, but in its application of correct, controlling law. Challis has been discussing and debating aspects of the Project for over four years, demonstrating a lack of urgency. The System serving Challis provides the best drinking water in Idaho and it is not out of compliance with DEQ regulations - to the contrary, compliance with new DEQ regulations is not presently required of Challis. No casualty or accident has occurred in Challis, in relation to the System, creating a public health risk. Because of these circumstances, the Court erred in granting judicial confirmation, and the district court ought to be reversed.

ARGUMENT

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**.

Id. (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*, IDAHO CODE § 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*. IDAHO CODE §§ 7-1304(2), 7-1308.

As is relevant to this action, the district court was required to find the legal and factual basis for Challis' proposed debt under the *proviso clause* in its original petition. Clearly, Challis is authorized by law to, and does in fact, own, operate and maintain its System. Challis desired to undertake the Project for the purpose of (a) making Old Town distribution system improvements, (b) constructing a new airport service line extension, and (c) upgrading metering and telemetry. Challis readily acknowledges that it has insufficient funds on hand, and insufficient annual revenues, to complete the Project and therefore wanted 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. Challis contends it needs debt financing without voter approval in order to comply with State of Idaho regulations, to obtain clean drinking water and to meet necessary fire flow. R Vol. 1, p. 10, 13. Consequently, the district court had to determine that one or more of these circumstances existed, and if so, that the Project met the needs of that circumstance and that the indebtedness was appropriate under the *proviso clause*.

II. THE PROVISO CLAUSE REQUIRES THAT THE EXPENSE BE BOTH ORDINARY AND NECESSARY.

This 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 Challis' 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 district court failed to recognize and apply controlling law, as set forth in City of Boise v. Frazier, as to the meaning of "ordinary" within the *proviso clause*. In fact, in its decision, the district court only referenced the City of Boise v. Frazier case in its discussion of "ordinary" expenses, and in its discussion of "necessary" expenses completely ignored this Court's application of that term as articulated in City of Boise v. Frazier. R Vol. 2, p. 385-388. This was clear and fundamental error by the district court as it did not even apply this Court's current interpretation of the *proviso clause*.

This Court has explained the meaning of what constitutes a "necessary" expense. Current, controlling precedent dictates that a "necessary" expense is one that is "indispensable." City of Boise, 143 Idaho at 4. This 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. The district court completely ignored this precedent. This Court has explained that 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). This Court recognizes 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 (9th Cir. 1918). This 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). All of these concepts and precedent were not applied by the district court in reaching its decision.

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, this 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). This 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 did not provide a basis for the district court, or Challis, to circumvent the assent of the governed – those that must pay the bill.

III. THE PROJECT PROPOSED BY CHALLIS 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 district court erred in determining that the Project is truly urgent, and that the Project expenditures must be made this year. Challis' own engineer agreed 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 a lack of urgency. Challis' own engineer recommended the Project in the summer of 2011. The action was heard by the district court in early 2014 and the Project had not yet begun. It was clearly erroneous for the district court to determine that the Project was urgent in light of this candid evidence.

Challis 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, judicial confirmation 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 this 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 System had failed, the current circumstance would be entirely different, but that is not the situation. The 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 System.

The Project is not urgent, and Challis did not establish that the Project must be done this year. Challis has discussed, debated and considered the Project for years. Certainly if Challis 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 CHALLIS TO PROCEED WITH THE PROJECT.

The district court clearly erred in determining that the Project was necessary in order to comply with the law. 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 (9th Cir. 1918). The district court's determination that the Project is required by law, and no discretion is left with Challis, is clearly erroneous. The evidence demonstrated that the System was in compliance with applicable law, and, even if it was not, Challis had discretion as to when and in what manner to proceed with System improvement. The law allows Challis 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 Challis 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." 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." IDAPA 58.01.08.501, 58.01.08.552. 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 referenced above in the statement of facts. As such, the evidence did not support any finding that the Project was "necessary" in order to obtain compliance with the law. Challis must only comply with the referenced regulations as new construction is done, or repairs are made, and Challis always has the ability to obtain a waiver or exemption. As such, complying with these regulations is a discretionary, as opposed to mandatory, endeavor. The district court wrongfully concluded otherwise.

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

The district court further erred in its determination that the Project was necessary for fire protection, health or welfare. This 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, there was no such circumstance. There was no evidence of any recent casualty or accident that impaired the System. While there was evidence of System deterioration in Old Town and in the meters, it was due to the effects of time and use, and not the result of a casualty or accident. There had been no System impairment at the airport, or related to telemetry. Even assuming there had been some recent casualty or accident that had impaired the System, there was no evidence of a current lack of fire protection, or a current health or welfare danger.

As to public health and welfare, Challis' only contention was that improvements were emergently needed in order to provide its users with the "required amount of clean drinking water". However, there was no evidence to support such a finding. The System met current user demand. The testimony also indicated that the water provided is safe and the best in Idaho. Challis 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 Challis proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem. This is not permissible under the *proviso clause*.

As to fire protection, there was a lack of evidence that the Project is immediately needed in order to provide its users with the "required amount of . . . fire flow". The district court, and Challis, cites to no legal requirement upon which immediate compliance is required relative to fire flow. The local fire authority has not issued any noncompliance order, nor was any evidence offered that existing fire flow does not meet current demand. Challis is presently able to fight actual fires, as evidenced by the lack of any evidence to the contrary.[1] Here, yet again, what Challis proposes is a permanent solution to a future risk – not a temporary solution to an immediate problem.

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 a district court. A district court must view any proposal for which public indebtedness will be obtained as a whole, and cannot divide it into subparts, approving some and rejecting others. To do so would elevate a district court to the status of a policy-maker, which would not be appropriate. If any part of a proposed project is not necessary, judicial confirmation must be denied. The citizens and leaders of the community 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. A district court cannot place itself in the position of making the decision that a community would like to proceed with only parts of a project if other parts are rejected – that is a decision for either the leaders or the people of the community.

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[1] 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 district court's jurisdiction, of which the district court could take judicial notice at any stage of the proceedings. I.R.E. 201. See also R Vol. 2, p. 370-371.

Here, the evidence was clear that the metering and telemetry aspects of the project were not "necessary" as that term is applied in the *proviso clause*. It was therefore improper for the district court to confirm the Project, as it was not "necessary" as a whole. Likewise, the district court would have no authority to approve pieces of the Project, as that would be an improper assumption that Challis wished to proceed with the Project in the absence of proposed parts of the Project. Because at least one aspect of the Project was not necessary, and the parties admitted as such, the district court was compelled to reject the entirety of the request for judicial confirmation. It erred in not doing so.

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

At least one other district court has considered a situation with circumstances similar to Challis, and that district court properly determined that judicial confirmation was not proper. R Vol. 2, p. 280-307. See also In re: The City of Gooding, *Findings of Fact, Conclusions of Law, and Order*, Gooding County Case No. CV-2012-559 (Feb. 26, 2013). In that action 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. R Vol. 2, p. 281. The Gooding water system had no history of contamination. R Vol. 2, p. 283. 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. R Vol. 2, p. 284. However, the water quality was excellent and the fire flow concerns with fire hydrants had been a problem for five years. R Vol. 2, p. 286. Gooding had taken no action to address fire flow capacity over the past five years. R Vol. 2, p. 286.

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. R Vol. 2, p. 298. The district 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. R Vol. 2, p. 299. The district court noted that given that period of time the city had ample time to obtain a confirmatory vote of the people. R Vol. 2, p. 299. The district 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. R Vol. 2, p. 301-302. This demonstrated that the proposed improvements were discretionary. As to fire protection, the district 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. R Vol. 2, p. 302. As such, the district court concluded the expenses were not necessary and a confirmatory vote of the electorate was required. R Vol. 2, p. 304.

The facts of this case are closely similar and the result ought to be the same. Challis' water is the best in the State of Idaho. Challis 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 before the evidentiary hearing. The DEQ compliance issues raised by Challis are not current requirements and are discretionary. Although the fire authority has made recommendations as to fire flow, no evidence was submitted to show that current fire flows are inadequate to provide fire-fighting services. Just like in the Gooding case, judicial confirmation should have been denied and the Project ought to be subject to a confirmatory vote of Challis' electorate.

ATTORNEY FEES ON APPEAL

The Caucus is entitled to costs and attorney fees on appeal, and for the proceedings before the district court. 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. IDAHO CODE §§ 7-1313, 12-101. If this Court concludes Challis is not entitled to judicial conformation, then the Caucus is entitled to an award of reasonable attorney fees and court costs.

CONCLUSION

For the foregoing reasons, the Caucus respectfully requests that this Court **REVERSE** the district court's determination that judicial confirmation is appropriate and, alternatively, determine that judicial confirmation is not appropriate under the circumstances of this action. The Caucus further requests an award of costs and attorney fees on appeal, and requests that this matter be **REMANDED** to the district court for entry of a judgment dismissing Challis' petition and fore entry of a judgment awarding the Caucus costs and attorney fees incurred in the district court proceedings.

RESPECTFULLY SUBMITTED this 10th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing brief were served on the following on this 10th day of July, 2014 by the following method:

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