9-4-2014

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

In the Supreme Court of the State of Idaho

Supreme Court Case No. 41956-2014

CITY OF CHALLIS, an Idaho municipal corporation,

Respondent-Respondent on Appeal

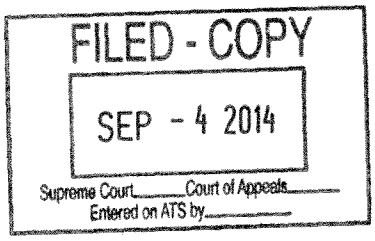
v.

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

Respondents-Appellants.

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Custer County
Case No. CV 2013-120
Hon. Alan C. Stephens, presiding



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I.
STATEMENT OF THE CASE

Nature of the Case

Consent of the Governed Caucus and Clarence Leuzinger (the "Caucus") appeals the district court's decision that the proposed water system expenditures sought to maintain and upkeep the City of Challis ("City") pre-existing, long-standing, and obligatory municipal water system are "necessary" pursuant to the public safety exception and the repair and maintenance exception pursuant to the *proviso* clause of Idaho Const. Art. VIII, § 3.

Summary

As a matter of law, 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 and are therefore not subject to voter approval.[1] More importantly, expenditures made to preserve the public health and safety of the inhabitants of the municipality are necessary[2] as are improvements to bring the system into compliance with current state safety requirements regardless of whether an enforcement action has been undertaken.[3]

The City of Challis needs to repair and maintain its long-standing, pre-existing, obligatory water system. The decision to own and provide a municipal water system occurred long ago. Now it must be maintained. The great majority of the system is undersized and dilapidated with and breaches in the line regularly occurring. A significant breach could cripple the system. The

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1 *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388, 391 (2006) (hereinafter "*Frazier*") citing to *City of Pocatello v. Peterson*, 93 Idaho 774, 779, 473 P.2d 644, 649 (1970) (hereinafter "*Peterson*") and *Board of County Commr's v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975) (hereinafter "*Twin Falls*"); *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983); *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968)..

2 *Id.* The impact a proposed expenditure may have on public safety is fundamental to the determination of whether a project is necessary.

3 *Twin Falls,* 96 Idaho at 510, 531 P.2d at 600.

City has extensively studied its system and has concluded that there is a risk to the public's health and safety due to a breach or fire. Based upon the comprehensive study entitled "City of Challis Water Facility Plan" along with the supplemental information and emergency protocol for the City's existing water system (IDEQ No. 11-13-19) (the "Study"), the minimum IDAPA safety standards, and the conclusions drawn therefrom by a licensed engineer, the fire authority, Idaho Department of Environmental Quality ("IDEQ"), and the public works director's personal knowledge of the system, the City and the district court rendered the factual finding that the system is not capable of safely and consistently providing potable water for fire protection services. The very purpose of the IDAPA rules is to set minimum standards to protect the public safety and health. While a fire has not as yet befallen the City and the City has not been the subject of an enforcement action, this in no way vitiates the risk to the public safety nor reduces the potential tort liability[4] to the City should a fire occur damaging persons or property.

The Caucus takes a myopic interpretation of the *proviso* clause taking excerpts of a select number of cases out of context to support its argument that an expenditure can only be "necessary" under the *proviso* clause for a temporary response to an unforeseen emergency; that an expense is not truly "urgent" if the needed repair is not identified, studied, and the expenditures rendered within a one year timeframe; or where the City is legally obligated to make the repairs after having been fined or sued by the state or federal government. The Caucus in essence argues that an unforeseen catastrophe or state/federal enforcement action is a condition precedent to an expenditure being deemed as necessary. While a catastrophe or legal obligation certainly can render an expenditure as necessity, there is no case that requires such as a condition precedent to a finding of necessity.

4 The elimination of tort liability also satisfies the ordinary and necessary proviso. *Peterson.* 93 Idaho at 774, 473

Moreover, the Caucus' factual conclusions are wholly speculative. While the Caucus contends the system is safe and believes a piecemeal replacement of the system is less costly, the Caucus fails to present substantive evidence in support of its theories and, more importantly, demonstrate that the City and district court's factual findings are clearly erroneous. The City has spent years studying its system and formulating a comprehensive solution with the assistance of a myriad of experts including engineers, fire authorities, and with the assistance and approval of IDEQ. The solution is proportional to the need in keeping its ongoing, obligatory system safe and in good working order.

II.
ATTORNEY FEES ON APPEAL

The City seeks attorney fees and costs incurred in defending this action on appeal in accordance with Idaho Code § 12-117, 12-120, and 12-121 and Idaho Appellate Rules 40 and 41 for the reason that the Caucus brought this cause of action frivolously and/or without a reasonable basis in fact or law nor reasonable extension thereof.

III.
STATEMENT OF FACTS

1. The City is authorized by law to own, operate, and maintain, and has for many decades 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.[5]

2. 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

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P.2d at 644.
5 R. Vol. 2, p. 378-379.

not jeopardize the City's water supply and provide sufficient fire flow.[6] 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 with respect to standards established by the local fire authority, IDEQ, and the United States Environmental Protection Agency ("EPA"). The Engineer performed the Study which is incorporated herein as if stated in full[7].[8]

3. 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.[9]

4. However the majority of the system, the Old Town distribution system, dates back to the 1930's. Pursuant to a hydraulic analysis conducted by the engineer on every pipe in the system it was determined that 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.[10]

5. Although no enforcement action has been brought against the City, it is undisputed that the City's system is not in compliance with State law.[11]

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.[12] IDAPA

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6 R. Vol. 1, p. 127.
7 See the Study: R. Vol. 1, p. 136-248.
8 R. Vol. 2, Vol. 1, p. p. 379; 127.
9 R. Vol. 2, p. 379, Vol. 1, p. 125-126.
10 R. Vol. 2, p. 379; R. Vol. 1, p. 127; R. 136-248.
11 Tr. Vol. 1, p. 49-50; R. Vol. 1, p. 126, 128.

58.01.08.542.06 addresses the size of water mains. This 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.[13]

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.[14]

c. In addition, 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[15]:

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 International Fire Code ("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 hydrants provide suitable flow for only approximately 45 seconds.[16]

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12 Tr. Vol. 1, p. 54-55; R. 128
13 R. Vol. 1, p. 128; R. Vol. 2, p. 380.
14 R. Vol. 2, p. 380; Tr. Vol. 1, p. 52, 67-68; R. Vol. 1, p. 219.
15 R. Vol. 2, p. 380; See R. Vol. 1, p. 221-222.
16 R. Vol. 2, p. 380.

vi. In short, the fire chief, engineer, and public works director do not believe that the system can effectively fight a fire.

6. 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.[17] These include:

a. Construction of distribution system components in 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.[18]

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 IDEQ approval, funding and to comply with a water audit.

17 R. Vol. 2, p. 381-382.
18 Tr. Vol. 1, p. 57-60.

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. [19]

7. The Caucus' expert witness, Jack Hammond, conceded that prudent periodic and continuing replacement of aging, underground utility systems are certainly ordinary and necessary expenses,[20] and that large portions of the City's system must be replaced. [21] However, although Mr. Hammond did not conduct a study and admittedly did not review any of the supporting materials in the City's Study, 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.[22] He concludes with stating that:

> 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. [23]

8. 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. [24]

9. Based on the Study and other available information, the City's Mayor and Council have properly determined that the proposed improvements are essential to ensuring that the System remains functional and adequate to meet the minimum safety requirements to provide for minimum required fire flow protection both in Old Town and to the Airport, and to provide

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19 R. Vol. 2, p. 381-382.
20 Tr. Vol.1. p. 93-94.
21 Tr. Vol.1. p. 78-80.
22 Tr. Vol.1. p. 93-94.

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.[25]

10. 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. [26]

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.

c. Water fund revenue for 2012/2013 totaled $572,424.00

d. Thus the proposed debt is proportional to the City's revenues. [27]

IV.
STANDARD OF REVIEW – DEFERENCE TO THE ELECTED OFFICIALS

On appeal, this Court will defer to the factual findings of the district court unless those findings are clearly erroneous.[28] Moreover, a strong presumption of constitutionality is implicitly afforded in this Court's analysis of the local governmental elected officials' legislation determinations including as herein that such expenditures are ordinary and necessary.[29] This

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23 R. Vol. 2, p. 259.
24 R. Vol. 2, p. 382.
25 R. Vol. 2, p. 382.
26 R. Vol. 2, p. 382-383.
27 R. Vol. 2, p. 382-383.
28 *Frazier,* 143 Idaho at 2, 137 P.3d at 389.
29 *Twin Falls,* 96 Idaho at 501, 531 P.2d at 591.

Court exercises free review over the district court's application of the relevant law to the facts as well as to constitutional questions of law.

That the Caucus bears the burden to demonstrate that the City and district court's factual findings are clearly erroneous cannot be overstated. The most pertinent factual findings are that the City's water system is dilapidated and unreliable; susceptible to breach. In addition to being dilapidated, the pipes are undersized. The City's system does not meet the minimum IDAPA safety standards for fire suppression; standards of which the very purpose is to protect the public health and safety of the citizenry. These factual findings are based upon comprehensive evidence developed over the course of several years by the experts, notably the Study. In short, based upon the minimum legal requirements and the dilapidated condition of the system, the City Council with the aid of numerous experts determined that the system is not capable of safely and consistently providing adequate water for fire protection services.

Against this great weight of evidence, the Caucus merely offers its opinion that the water system is safe as evidenced by the absence of a calamity or enforcement action. Favoring a piecemeal replacement of the system utilizing a prioritization schedule, they merely offer a factually unsupported alternative solution. Gambling with the public's safety, the Caucus unabashedly wished the district court to supplant the experts' factual findings and parcel out individual elements of a project finding some necessary but those that are lower in prioritization are then, by definition, deemed unnecessary.

The judiciary's role is not to second-guess the experts and legislative acumen of the elected officials by picking apart a project in a piecemeal fashion as the Caucus has attempted to do so. These are legislative determinations that fall squarely within the purview of the elected

officials.[30] As in all legislative decisions rendered by an elected body, legislative enactments are entitled to a strong presumption of validity and will not be disturbed by a reviewing Court unless the decision is clearly arbitrary or capricious; i.e. lacking proportionality to the need.[31]

V.
ANALYSIS

A. "Necessary" under Idaho Const. art. VIII, § 3.

The only issue remaining on appeal is whether the proposed expenditures are necessary pursuant to the *proviso* clause under Idaho Const. art. VIII, § 3.[32] As this Court noted in *City of Boise v. Frazier,* 143 Idaho 1, 2-3, 137 P.3d 388, 389-390 (2006),

> Article VIII, § 3 of the Idaho Constitution generally bars cities from incurring debts or liabilities without first conducting an election to secure voter approval for the proposed expenditure. The section, however, contains a notable exception. No public vote is required if the expenditure is for an "ordinary and necessary" expense "authorized by the general laws of the state...." This exception is referred to as the "proviso clause."[33]

This Court has addressed the *proviso* clause on numerous occasions. Taking excerpts of many such opinions out of their factual context, the Caucus takes a myopic and untenable interpretation of the *proviso* clause. The Caucus argues that to be necessary the expenditure: 1) must *in all*

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30 As expressed in *Twin Falls,* 96 Idaho at 501, 531 P.2d at 591 "every legislative enactment is entitled to a strong presumption of constitutionality". This is analogous to the plethora of case law governing the standard of review of legislative decisions in the land use arena. See *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999).

31 Examples include the "colossal" not "ordinary" power agreement in *Asson,* 105 Idaho at 442 and *Frazier's* unnecessary conversion of a flat parking lot with a five story parking garage, which is neither a repair, nor "recognizable form of maintenance." *Frazier,* 143 at 6, 137 P.3d at 393. Conversely, once this Court determined that an airport terminal was necessary in *Peterson*, this Court did not second guess the decision to use one security system over another or where an airport wing should be; something the Caucus attempts here. *Peterson*, 93 Idaho at 776, 473 P.2d at 646.

32 The Caucus concedes that the City has legal authority to operate a municipal water system; that the proposed expenditures exceed the City's annual budget; and that the expenses are ordinary. "There is further no dispute between the parties that the Project expenses are ordinary, authorized by the general laws of the State... The dispute in this action is whether the expense ought... is 'necessary'." Brief for the Appellant, p. 6. Therefore, this Brief will focus solely on the issue of whether the expenditure is "necessary".

33 *Id.* citing to *City of Pocatello v. Peterson,* 93 Idaho 774, 778, 473 P.2d 644, 648 (1970).

circumstances be made at or during such year; 2) can only be a temporary response to an unforeseen and immediate emergency; 3) must be compulsory; i.e. a legal necessity bereft of any local governmental discretion.

This is a misrepresentation of the *Frazier* analysis; an interpretation which, if true, would directly overturn a plethora of case law. As reiterated in *Fuhriman*:

> We shall not stray from the principle of *stare decisis* without an exceptionally compelling reason to do so, particularly where doing so would be a move to embrace ambiguity over order.[34]

This Court was careful not to overturn its previous decisions by specifically distinguishing *Frazier* from earlier decisions, notably *Peterson* and *Twin Falls.* As articulated in *Frazier*,

> [t]he required urgency can result from a number of 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.[35]

In *City of Idaho Falls v. Fuhriman*, this Court clarified an apparent misconception of *Frazier* and "recognized that repairs and maintenance satisfy the urgency requirement as they are related to public safety."[36] As will be discussed herein, the continued upkeep and repair of a pre-existing, obligatory water or sewer system is easily distinguishable from a five-story parking garage.

1. Pre-*Frazier*: New Construction versus repair / replacement and Continuity of On-Going and Long-standing Obligatory Municipal Services

The early Idaho Supreme Court decisions in this arena reveal a consistent rationale

> between those expenses held to be ordinary and necessary and those held not to be: new construction or the purchase of new equipment or facilities as opposed to repair, partial replacement, or reconditioning of existing facilities.[37]

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34 *Fuhriman,* 149 Idaho at 579, 237 P.3d at 1205.

35 *The City of Idaho Falls v. Fuhriman,* 149 Idaho 574, 578, 237 P.3d 1200, 1204 (2010) citing to *Frazier,* 143 at 6, 137 P.3d at 393.

36 *Fuhriman,* 149 Idaho at 579, 237 P.3d at 1206.

37 *Asson v. City of Burley,* 105 Idaho 432, 441-442, 670 P.2d 839 (1983). Thus, the City of Grangeville in *Woodward v. City of Grangeville,* 13 Idaho 652, 92 Pac. 840 (1907) was not authorized without an election to purchase a water system but the City of Nampa in *Hickey v. City of Nampa,* 22 Idaho 41, 124 Pac. 280 (1912) was

Later in *Peterson*, this Court characterized the issue as to "whether the repair and improvement of the municipal airport by the City of Pocatello is an ordinary and necessary expense...."[38] Because the construction of an entirely new airport facility did not squarely fall within the aforementioned new construction versus repair distinction, the Court recognized a list of project-specific factors that rendered the expenditure as necessary. The factors included: 1) the City had operated the airport since 1947 and thus it was an on-going municipal obligation; 2) the terminal would be an expansion/repair to an existing facility; 3) the facility was obsolete and inadequate to meet the needs of the public; and 4) the current facility was unsafe for travelers.[39] In *Asson v City of Burley,* this Court cited to *Peterson* with approval:

> In *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970), the court held that while repair and renovation of a municipal airport were not "inherently 'ordinary and necessary expenses' " the particular facts of that case brought them within the constitutional category. In its opinion the court stressed the upkeep and maintenance aspect of the city's expenditure. The court noted that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., Id. at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense.[40]

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authorized without voter approval to repair and restore its pre-existing water system. In *Hickey*, the water system needed improvement after it was badly damaged fighting a fire. However, in *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941) the city of Moscow's sought after improvement to its existing waterworks system including a water storage tank in order to provide a "more adequate water supply" for better fire protection and was nonetheless deemed to be within the application of Art. 8, § 3 of the Constitution.

See also, *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930), (purchase of electric generating system, to be paid for from receipts from sale of power and light, held to be required to comply with Art. 8, § 3); *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956), (entering into agreement with natural gas distribution system to provide gas for city residents and vicinity held to be covered by requirements of Art. 8, § 3, Idaho Const.); *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932), (purchase by city of municipal lighting plant, and of waterworks system, held to be within application of Art. 8, § 3).

38 *Peterson*, 93 Idaho at 776, 473 P.2d at 646.

39 *Peterson*, 93 Idaho at 778-779, 473 P.2d at 648-649.

40 *Asson;* 105 Idaho at 442, 670 P.2d at 849 citing to *Peterson,* 93 Idaho at 779, 473 P.2d at 649.

Similarly, in *Twin Falls* this Court ruled that "expenditures made for the purpose of improving the structure of a hospital so that it will comply with state safety standards is an ordinary and necessary expense."[41] The factors considered by this Court included 1) that the hospital was an existing hospital facility; 2) the repairs were needed to comply with state safety requirements; 3) stressing the importance of maintaining hospitals generally versus allowing even a portion of a hospital to become inoperable. [42] "It is certainly an ordinary and necessary undertaking to keep existing hospitals operational and in good repair." [43]

In *Asson v. City of Burley,* this Court conducted an in-depth review of the case law relating to ordinary and necessary expenses. This Court endorsed the list of factors articulated in *Peterson* specifically focusing on the necessity to upkeep and maintain the city's ongoing asset. [44]

> The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense.[45]

The *Asson* Court did not base its decision on whether the expenditure was necessary, however, but rather whether it was "ordinary". The Court described the multi-jurisdictional agreement for power as a "colossal undertaking, fraught with financial risk"; open-ended without any predictability of the ultimate debt or liability.

> One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness—yet no ownership, and minimal control, and only the possibility of electricity. ... One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them. [46]

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41 *Id.*
42 *Id.*
43 *Twin Falls*, 96 Idaho at 510, 531 P.2d at 600.
44 *Asson;* 105 Idaho at 442, 670 P.2d at 849.
45 *Id.*
46 *Asson,* 105 Idaho at 443, 670 P.2d at 850. Although analyzed under the "necessary" prong the proportionality analysis is closely analogous to the reasoning in *Frazier* wherein this Court acknowledged that although the repair

B. Urgency: Does the Holding in *City of Boise v. Frazier* require than an expenditure must be made at or during such year to qualify as necessary?

Relying upon *Frazier,* the Caucus' takes an absolutist interpretation that an expenditure can only be "necessary" if the expenditure is a temporary response to an unforeseen emergency[47] such that the expenditure must be made at or during such year.[48] The Caucus argues that because the City took three years to identify, study, and eventually adopt a solution to repair its pre-existing water system it did not constitute a temporary response to an unforeseen emergency and therefore not an expenditure that is made at or during such year per *Frazier.* "The fact that these issues have been subject to debate and discussion for such a lengthy time confirms that the Project is not urgent."[49] The argument appears to be that since the system is still plugging along and calamity has not befallen the community in the past three years, there is no urgency and the *proviso* clause does not apply. This misrepresentation of the *Frazier* decision ignores the modern complexity of water and sewer facilities and what makes such an action distinguishable from *Frazier:* the public safety exception and 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 brand new five story parking garage at the Boise Airport in place of a pre-existing flat parking lot. Though acknowledging the city's assertion that expanded parking facilities are important, even critical, to a well-functioning transportation infrastructure, the Court could find no urgent need to

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and improvement of a pre-existing facility can satisfy the urgency necessity, the exception cannot be extended to allow the city to convert a flat parking lot into a five floor parking garage; an expansion "so profound as to constitute an entirely new construction in every meaningful sense." *Frazier,* 143 Idaho at 6, 137 P.3d at 393.

47 Reviving the "*Dunbar* test" this Court held that to be "necessary", "there must exist a necessity for making the expenditure at or during such year." *Dunbar v. Bd. Of Comm'rs of Canyon County*, 5 Idaho 407, 412, 49 P. 409, 411 (1897). The *Dunbar* Court did not confirm the payment of rabbit scalp warrants, road fund warrants and other miscellaneous expense warrants issued by Canyon County as "necessary".

48 *Frazier,* 143 Idaho at 6, 137 P.3d at 393.

49 Brief For The Appellant, p. 12.

fund a five story parking garage at or during such year.[50] The City was successfully albeit temporarily meeting the current parking demand by shuttling drivers from offsite parking areas. [51] More importantly, this Court could find no threat to the public safety or how a brand new five story parking facility constituted a repair of a flat parking lot.

Unfortunately, there are those who view "urgency" as an absolute temporal constraint such that *every* expenditure must be made at or during such year to qualify as "necessary". This is simply not true. The *Frazier* Court's analysis did not end with the revival of the *Dunbar* test. Rather, the Court carefully distinguished *Frazier*[52]; and in aligning *Frazier* with its prior holdings, it reiterated the validity of other categories of expenses within the purview of the *proviso* clause.[53]

> The district court accurately cited to our decisions in ... [*Twin Falls* and *Peterson*] 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 [cases] however, are distinguishable from this case. First, in both cases we noted the important safety implications of the proposed expenditures. In [*Twin Falls*] we stressed the impact of public health in relation to the proposed hospital expansion. 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. 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...[54].

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50 *Frazier,* 143 Idaho at 6, 137 P.3d at 393.
51 *Frazier,* 143 Idaho at 5, 137 P.3d at 392.
52 *Frazier,* 143 Idaho at 6, 137 P.3d at 393.
53 *Id.* 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.
54 *Frazier,* 143 Idaho at 6, 137 P.3d at 393(internal citations omitted).

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 public health and safety concern or in the continued repair and maintenance a presently existing and on-going system; both of which were completely absent in *Frazier.* In short, any literal temporal connotation of "urgency" was supplanted by these legitimate and necessary public health and safety and/or repair endeavors.

The Caucus erroneously focuses on the time taken to address the repair of the Challis water system; that since there is time to hold an election (that is if luck holds and a fire does not occur), an election is mandatory. The Caucus' strict reading of the urgency standard in essence requires a catastrophe as a condition-precedent to deem a repair as necessary. True, in the absence of a public safety or repair consideration, the *Frazier* Court noted the predictability of needing a parking garage and the ability in the short term to ferry passengers from an off-site facility. As will be discussed herein, here there is no such temporary alternative measure as the experts have indicated that the system is compromised and the risk to the public safety due to a breach or a fire is a present public safety risk; that a calamity has not in fact occurred yet is serendipitous, not portentous. Further, the maintenance or replacement of aging system components could always be viewed as a foreseen expense and thus, if this Court were to take such a strict application of the *Dunbar* test the upkeep and maintenance of a pre-existing system could *never* qualify as being urgent unless a catastrophe befalls a city. Also, many capital projects such as regional sewer facilities are quite extensive requiring planning many years in advance; state and federal approval processes take considerable time; and thereafter construction can take multiple years. As the *Frazier* Court explicitly recognized repair, maintenance, and

replacement of existing systems as qualifying as necessary, such a strict application espoused by the Caucus appears not to have been the *Frazier* Court's intent.

C. The district court did not err in determining that the Proposed Indebtedness was "Necessary" under the public safety and repair/maintenance exceptions of the *proviso* clause.

1. Public Health and Safety Exception.

The system is clearly not in compliance with the minimum safety requirements codified in IDAPA, specifically 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. The local fire authority, 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. IDAPA 58.01.08.552 requires a minimum of 6" mains to provide the minimum supply for fire suppression. 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 are non-functional and/or connected to 4" lines, and they are improperly spaced. (Improper spacing of fire hydrants in violation of IFC Appendix B, Table C105.1) 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. The fire chief unequivocally stated that she has serious concerns as to whether the City is capable of fighting a fire.[55] In short, the system does not meet the standards determined by this fire authority.

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55 R. Vol. 1, p. 35-36; Tr. Vol. 1, p. 54-55.

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. Each and every pipe in the system was subject to the Study.[56] The results were abysmal. The bottom line is that a great majority of the system is aged and routinely fails; even this year. Moreover, the pipes, even if they were brand new, are too small. The system does not meet minimum fire flow requirements regardless of whether a City can legally ignore the problem or seek a waiver. 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 diminished due to the 4" pipe.[57]

> 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 down on those bigger hydrants. 4-inch line through a 6-inch hydrant, simple math.[58]

In short, based upon the minimum IDAPA safety standards and the conclusions drawn therefrom a licensed engineer and the fire authority, the City Council and thereafter the district court rendered the factual finding that the system is not capable of safely and consistently providing 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.[59][60]Although the

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56 Tr. Vol. 1, p. 110-111.

57 Tr. Vol. 1, p. 69 wherein the district court questioned Mr. Rice on this topic:

> Q. ... 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.

58 Tr. Vol. 1, p. 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. Vol. 1, p. 67-68.

59 The extension of the line to the airport is also essential for fire safety. Although the subject of considerable cross-

City has taken a number of years to study and adopt solutions to this public safety risk and fortuitously no fire has destroyed the City, this in no way reduces the inherent and immediate risk to the public safety.

a. The Caucus fails to demonstrate the factual findings are clearly erroneous.

Without a shred of evidence demonstrating the district court's findings are clearly erroneous, the Caucus merely argues that during the several years that the City has studied the problem, no fire has occurred; thus no emergency and no "necessity". "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'."[61] In a footnote, the Caucus wished the district court to take judicial notice that a fire was extinguished utilizing the existing system while this case was still pending. The Caucus believes that this is conclusive proof that it is not "necessary" for

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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 expenditure 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.

Tr. Vol. 1, p. 49, 59-61.

60 Don Acheson also 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 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 Ci ty. 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.

Tr. Vol. 1, p. 58-59; 119, 128-131

61 Brief for the Appellant, p. 15.

the system to be repaired/replaced. "Challis is presently able to fight actual fires, as evidenced by the lack of evidence to the contrary."[62]

The Caucus additionally argues that that a condition precedent to a finding of "necessary" is an enforcement action; that unless the local fire authority or IDEQ has actually fined the city or issued a noncompliance order rendering the City under a legal obligation to update its system without the exercise of discretion, a finding of necessary is precluded. The Caucus wishes to distinguish between the absence of a fine, non-compliance letter or other enforcement measure initiated by IDEQ and the unequivocal fact that the system is not compliance with the current IDAPA rules.[63] This is a misstatement of law. While it is certainly true that a legal obligation can easily can render an expenditure necessary, the absence of an enforcement action does not render a system "safe" to the public or in compliance with the applicable safety standards. In the *Twin Falls* case this Court held that the improvement and rehabilitation of property to comply with state safety standards constituted an ordinary and necessary expense.[64] This satisfied the necessity prong without the hospital being subject to an enforcement action.

For purposes of this appeal, the Caucus has failed to demonstrate that the City Council and the district court's findings of fact are clearly erroneous. The applicable safety standards and engineering studies are clear that the system is undersized and dilapidated. There is no evidence to the contrary. The IDAPA provisions are by definition designed and implemented to protect the public health and safety of the citizenry. By and through its rulemaking authority, the State has established these standards as the *minimum* required safety factors. The mere fact that the City has not as yet burned or been subject to an enforcement action or could seek a waiver or

62 Brief for the Appellant, p. 15.
63 Mr. Acheson discussed this distinction; see Tr. Vol. 1, p. 49-50.
64 *Twin Falls*, 96 Idaho at 510, 531 P.2d at 600.

could feasibly ignore its system in no way mitigates the immediate danger to the public health and safety.[65] If the risk to public safety is a recognized exception pursuant to the *proviso clause,* the Caucus' argument requiring a catastrophe or a state or federal enforcement action as a condition precedent is its antithesis; an irresponsible gamble with the public's safety.[66]

2. Repair, Replacement, or Maintenance.

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. As this Court has noted on multiple occasions "[i]t is one of the incidents of ownership of property that it must be kept in repair." [67] In *Peterson*, this 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. This 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.[68]

The City's water system is a pre-existing, long-standing, obligatory system. The proposed expenditures are to maintain this system. The solution is proportionate to the need. The decision to construct a water system occurred nearly a century ago. Now, the City has an

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65 See Tr. Vol. 1, p. 50-52.

66 The Caucus makes the argument that the City is grandfathered unless it modifies its system. See IDAPA 58.01.08.118 – Substantially Modified. This is a partial truth but nontheless unrelated to the issue of public safety. All agree that the City must repair (modify) significant portions of its system. Thus, it will be modified. While the Caucus prefers a piecemeal prioritization schedule, the factual conclusions based upon the considerable evidence is that a piecemeal replacement will not protect the public safety. Thus, a modification of a majority of the system will occur. Perhaps the Caucus is correct in stating that the City could no nothing and not be subject to an enforcement action until it begins its modification. 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 IDEQ. Mr. Acheson testified that in his experience, IDEQ has found it counterproductive to issue a non-compliance letter to an entity that is proactively seeking to bring its system into compliance. See Tr. Vol. 1, p. 51.

67 *Peterson*, 93 Idaho at 779, 473 P.2d at 649. Not only repairs, but also expansion and replacement of existing property or services with completely new facilities, may constitute ordinary and necessary expenses.

68 See analysis of *Peterson* in *Asson*, 105 Idaho at 442, 670 P.2d at 849.

ongoing municipal obligation to maintain that system. As provided herein pursuant to the Study, the Challis' system is obsolete, undersized, and dilapidated. 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 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 been numerous instances of failing water lines.[69] A significant breach can cripple the system. Further, the hydrants are antiquated and cannot be repaired; the meters[70] are aged and inaccurate. In short, the expenditures are ordinary and necessary repairs to this preexisting system.

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69 Tr. Vol. 1, p. 111.

70 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 pump s 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.
>
> Again, the Caucus, through Mr. Hammond believes that this is a negligible problem and the meters should be replaced piecemeal. A piecemeal replacement is inadequate. The debt on the water system is to be paid 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

The Caucus, through its expert witness Jack Hammond, concedes that prudent periodic and continuing replacement of aging, underground utility systems are certainly ordinary and necessary expenses.

> 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.[71]

However, the Caucus believes the system should be replaced piecemeal pursuant to a prioritization[72] schedule after having conducted an extensive in-depth investigation of each pipe in the system. Conceding its necessity but without conducting a study or presenting any evidence in support of his calculations, Mr. Hammond merely prefers a cheaper solution:

> 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.[73]

Mr. Hammond's speculation does not demonstrate that the Study is clearly erroneous. Moreover, piecemeal replacement was considered but rejected. Mr. Acheson testified that this is foolishness

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> 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.

Tr. Vol. 1, p. 115-116.

71 Tr. Vol. 1, p. 79.

72 The Caucus' attempt to equate a lower priority item with being unnecessary was soundly refuted by Mr. Acheson. See. Tr. Vol. 1, p. 53-54.

73 R. Vol. 2, p. 259. On Cross-examination, the difficulty of predicting what pipes should be replaced became self-evident:

> 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.

Tr. Vol. 1, p. 96-97.

and in no way mitigates the immediate danger to the public health and safety; the very reason for replacement of the system [74] As ably articulated by the district court[75]:

> 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.

There is a strong presumption of constitutionality to which every legislative enactment is entitled. There is no Idaho precedent wherein this 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 an additional bathroom facility should or should not be included. That is left to the discretion of the elected officials.

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74 Tr. Vol. 1, p. 114.
75. See Tr. Vol. 1, p. 110-112:

> 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.[75]
> ....
> 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.

Here, Respondent concedes that significant portions of the pipes, meters, and hydrants are failing and that the four inch pipes do not meet minimum fire flow requirements. The proposed expenses are clearly to protect the public health and safety and to upkeep and maintain this pre-existing, ongoing, and obligatory system. In short, because the Caucus concedes the *need* to repair and maintain the City's infrastructure exists, the analysis is at an end leaving the means to the elected officials. Provided the City's legislative solution is based upon substantive analysis and is not so out of proportion as to constitute entirely new construction as in *Frazier* or a "colossal" undertaking as in *Asson*, it matters not whether some of the local jurisdiction's constituents can theorize potential alternative solutions.

B. The Caucus' reference to In Re City of Gooding; a district court opinion, is irrelevant but nonetheless distinguishable.

The Caucus argues that the City of Challis' water system project is analogous to the City of Gooding's project; a project which the district court held was not necessary in *In re: City of Gooding,* Case No. CV-2012-559.[76] The fact pattern in Gooding, however, is clearly distinguishable. In Gooding, the district court noted that the City operated both a potable water system (PWS) for drinking water and fire protection AND a separate gravity irrigation system (GIS) for irrigation water.[77] The City wished to combine these two systems and provide fire, drinking water, and irrigation with one system.[78] Upon the abandonment of the GIS, there would be a public safety issue as the PWS by itself was insufficient to meet BOTH the irrigation needs and the fire flow/drinking water demands of the City.[79] The district court found that this was

76 In re: The City of Gooding, *Findings of Fact, Conclusions of Law, and Order* (Good County Case No. CV-2012-559 (Feb. 26, 2013). ("Gooding")
77 R. Vol. 2, p. 285, 287.
78 R. Vol. 2, p. 300-301.
79 R. Vol. 2, p. 300.

elective in nature; that the City created its own necessity by abandoning an inconvenient but viable system. [80] There was no evidence that the operation or maintenance of the GIS posed a threat to the public health or safety of its residents. [81] Further, the City was not seeking to repair this pre-existing system, but abandon the system altogether attributable entirely to convenience and financial considerations. [82] Certainly, the GIS was complex, inconvenient, and expensive to maintain but it remained viable and did not endanger the public safety. [83]

> The proposed expenditure goes beyond the need to improve fire flow protection even assuming the improvement of fire flow protection was urgent. The overall concern of the Study is not public health and safety. The focus of the Study is what can the petitioner do with the GIS. [84]

The Study's concern regarding the GIS was financial; the inefficiency of utilizing such a system not the repair of the system or the risk to the public safety of continuing to utilize that system.

> 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 health, but only because it is so costly to maintain and repair. Therefore, the court ... must assess the circumstances that give rise to the urgency, i.e. the cause of the urgency. [85]

The district court thereafter observed that the public safety need of expanding its PWS to attain sufficient fire flows only came into being by the decision to abandon the GIS. But for the decision to abandon the GIS, the PWS would meet the needs of the citizenry until at least 2017.[86] "In this case the proposed expenditure is driven by the petitioner's decision to abandon and not

80 R. Vol. 2, p. 300-304.
81 R. Vol. 2, p. 300-304.
82 R. Vol. 2, p. 300-304.
83 R. Vol. 2, p. 291.
84 R. Vol. 2, p. 299.
85 R. Vol. 2, p. 300-301.

preserve the GIS." [87] Thus, there was no showing of the requisite urgency to abandon the GIS and enlarge the PWS without a vote of the people.

For the reasons stated herein, the factors considered by the district court in the City of Gooding case are easily distinguishable.

VI.
ATTORNEY FEES

The City may recover its reasonable costs and attorney fees on appeal pursuant to Idaho Appellate Rules 40 and 41 and Idaho Code §§ 12-117, 12-120 where it can show that the non-prevailing party acted frivolously and/or "without a reasonable basis in fact or law".[88] The Caucus' argument that an expenditure can only be necessary where a catastrophe has befallen a governmental entity and/or where the local governmental entity is compelled to act by a state/federal enforcement action is legally unsupportable and an untenable position that all but strips the purpose of the *proviso* clause. Once a municipality and its citizenry has made the decision to own and operate a water system, sewer system, etc. it is under a duty and obligation to maintain that system. This is the very reason why for a century the repair and maintenance of a pre-existing system has been deemed "necessary". The Caucus represents a small minority of citizenry that fully aired their concerns and preferences to the local *elected* governmental officials during numerous public hearings. They simply did not get their way and this action is frivolously brought in an attempt to delay, hinder the process, and unnecessarily place the public at risk.

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86 R. Vol. 2, p. 303-304.
87 R. Vol. 2, p. 303.
88 *Alpine Village Co. v. City of McCall,* 303 P.3d 617, 154 Idaho 930 (2013)

VII.
CONCLUSION

For the reasons stated herein, the district court's factual findings have not been demonstrated as being clearly erroneous. The City's pre-existing obligatory water system is dilapidated and undersized necessitating considerable repair. The failure to do so represents a very real and immediate threat to public safety as ably demonstrated in the Study. The Caucus does not refute the Study but offers anecdotes that a fire has not occurred and therefore there is, we hope, time to conduct an election. The Caucus bases this conclusion on various legal arguments that misrepresent the applicable case precedent. For the reasons stated herein and based on supporting documentation filed herewith, the City respectfully requests that the district court's decision be affirmed.

RESPECTFULLY SUBMITTED this 4th day of September, 2014.

MOORE SMITH BUXTON & TURCKE, CHTD.

Paul J. Fitzer
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT'S BRIEF** this 4th day of September, 2014 served upon the following individuals and in the corresponding manner:

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