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

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**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

REPLY BRIEF FOR THE APPELLANT

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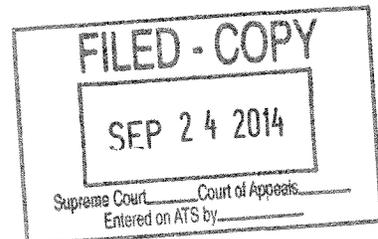


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ARGUMENT¹

In its response brief, Challis narrowly analyzes the evidence and circumstances presented to the Court on appeal. Challis focuses only on the fire flow concerns of the **existing** system in Old Town, and the public health and safety impacts of the same. While the Caucus disagrees such an immediate concern exists with respect to the **existing** system, Challis fails to address other aspects of the Project that constitute new construction and major improvements. These include new construction to the airport area, and new high-tech metering and telemetry. Challis concedes that the judiciary cannot substitute itself for the legislative determination that a Project is needed,² but if the legislative determination lacks all of the constitutional requirements of the *proviso* clause (at issue here, “necessity”), then the Court must reject judicial confirmation and send the Project back to the legislative body to reconsider what must be done in light of what the Court deems unnecessary. That is precisely what the Caucus seeks of this Court - a determination that all aspects of the Project are not necessary, that judicial confirmation must be denied, and that the city leaders must reconsider what to do (bond election or restructure project based on need). This result is supported by both the facts and the law.

With respect to the material and relevant facts, Challis does not dispute, or argue otherwise, that the following facts are applicable -

1. The Project encompasses three principal, and discrete, components - (a) making Old Town distribution system improvements, (b) constructing a new airport water line service extension,

¹The Caucus adopts and incorporates herein all argument previously set forth in the Brief for the Appellant, filed July 10, 2014. Much of the argument therein is responsive to the argument of Respondent, and in the interests of brevity is not restated herein.

²Respondent’s Brief, at 9-10.

and (c) upgrading metering and telemetry. R Vol. 1, p. 132.

2. 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.

3. The airport expansion consists of extending **new** 6-inch and larger main pipes to the airport and installing **new** fire hydrants. R Vol. 1, p. 132. There is currently no such water service at the airport area.

4. 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.

As argued previously, and herein, **all** aspects of the Project are not necessary, and as such judicial confirmation is not appropriate.

The airport expansion clearly constitutes **new** construction and system **expansion**. There is no dispute that the airport is not currently served by the Challis water system. What Challis wants to do is construct new water service to the airport area, an area not historically served by Challis. Because there is no water service there at this time, there is certainly no public health or safety concern posed by the water service in that area - it does not exist. Challis has no legal obligation to provide water service to that area, at least none has been articulated by Challis. City of Boise v. Frazier, 143 Idaho 1, 6 (2006), made clear a distinction between repair and improvement of existing facilities and expansion, or new construction. The former fits within the *proviso* clause, while the latter does not.

As previously explained by this Court, a permanent courthouse is not a necessary expense and thus 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). Expansion of water service to the airport area is both new construction and system expansion. It is a new, permanent facility. It is not temporary in nature, designed to fill a gap or urgent need. Expansion is permanent, and as such voter input is necessary.

The Project, at least with respect to airport area expansion, is not truly urgent. There is no evidence suggesting that expanding the municipal water service to the airport must be done immediately. Rather, it is a matter of convenience, and a desire to expand the service area. While some cities accommodate expansion of their municipal water system through growth, with the growth paying for the expense, others may choose to expand the system at the expense of the entire city. However, resolution of this issue, where public indebtedness is necessary, is not a matter to be decided solely by a city council. Our Constitution mandates otherwise. There is no dispute that airport expansion has been a topic of frequent city discussion for decades. However, there has been no immediate response. This reflects a lack of urgency. Expansion of the municipal water system to new areas is an issue deserving of reflection and decision by the informed electorate of the city.

Challis suggests that the Court continue to employ the Peterson standard for determining necessity, rather than factors expressed in Frazier, and subsequent cases.³ According to Challis, the Peterson standard explores (1) whether the expense is sought for an ongoing municipal service or obligation; (2) whether the expense is sought for repair, or for expansion or something new; (3)

³Respondent's Brief, at 12.

whether the existing facility meets current needs of the public; and (4) whether the current facility is unsafe. See also City of Pocatello v. Peterson, 93 Idaho 774, 778-79 (1970). These factors apply differently to various aspects of the Project proposed by Challis, as reflected by the following matrix, where matters tending to lend against “necessity” are shaded in gray.

CHALLIS MUNICIPAL WATER SYSTEM	Old Town Improvement	Airport Area Expansion	Metering & Telemetry
Is this an ongoing municipal service or obligation?	Yes	No	Yes as to metering, no as to telemetry
Is the expense sought for repair, expansion or new construction?	Repair	Expansion, new construction	Repair as to metering; expansion as to telemetry
Does the existing facility meet public need?	Yes ⁴	N/A - no existing facility	No as to metering; ⁵ not applicable as to telemetry
Is the current facility unsafe?	Yes ⁶	N/A - no existing facility	No

The foregoing illustrates that the Project as a whole fails to meet the “necessity” standard as to each of its component parts. The airport expansion is clearly not necessary, while only partial aspects of the metering and telemetry system can be characterized as necessary.

⁴There is no evidence to suggest that public demands upon drinking water are not being met. That is, there are no complaints by citizens that when they turn their faucet on, they receive no water.

⁵The evidence suggests that existing meters are failing and not properly recording water use.

⁶The Caucus disputes Challis’ determination that the current water facility is not safe, but for purposes of this matrix it can be assumed as such.

Given the foregoing, the issue for this Court, clearly, is whether judicial confirmation can be granted as to a multi-part project, where only some aspects of the project may be necessary and urgent, and other aspects are not. As previously argued, the Caucus submits that the entirety of an expense for which public debt will be incurred must meet the standards of the *proviso* clause in order to be allowed by judicial confirmation, and not by public vote. Such a determination is consistent with the text and spirit of the Idaho Constitution, and a principled form of democracy.

The district court should be required to examine and confirm any expense requested by way of judicial confirmation as a whole. To do otherwise would be to permit the judiciary to become a policy-maker, thereby deciding for a city that it would still want to proceed with a project of which only portions can be financed without public approval. This Court ought not put district judges in that position. If a significant part⁷ of a proposed expense is not “necessary,” a district court should be required to reject judicial confirmation, and then allow the city leaders to determine how it wishes to proceed. Such a result is required in this case.

ATTORNEY FEES ON APPEAL

The Caucus reiterates that it 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

⁷In this case, of the \$3.2 million sought in public indebtedness, over \$600,000 (at least 20%) of the Project will relate to unnecessary airport expansion, and related contingencies, design, bidding, supervision, management, and administration. R Vol. 2, pg. 256. This is a significant part of the Project.

judicial confirmation, then the Caucus is entitled to an award of reasonable attorney fees and court costs.

Challis argues that attorney fees and court costs ought to be assessed against the Caucus for bringing this action frivolously and without foundation, and for delaying improvement of the Challis water system. The Caucus' argument, both before this Court and the district court, is supported by the facts and by current law, including but not limited to the *proviso* clause, the judicial confirmation statutes, and case law interpreting the foregoing. The Caucus has advanced good faith argument for its position.

Challis contends that the Caucus represents a small minority of citizens opposed to public funding of the entire Project. This statement is not supported by the evidence in the record. The statement further begs the question - if that is the case, and the Caucus represents only a small minority, why has Challis fought for judicial confirmation and done everything possible to avoid a public vote on the issue, despite the passage of more than four years of consideration of the Project.

Challis further contends that the Caucus has placed the public at unnecessary risk by seeking judicial confirmation and pursuing an appeal. This statement is without merit. The judicial confirmation law expressly grants citizens the right to oppose requests for judicial confirmation. The Caucus has merely utilized its statutory, and constitutional, rights. Moreover, the judicial confirmation law allows for an appeal to this Court. Nothing requires, however, that the district court's decision is stayed pending this Court's review, and the Caucus sought no such relief. If the Project was a pressing and immediate public concern, one must assume Challis would have proceeded in reliance on the enforceable district court opinion. Even more telling, Challis has not sought any expedited review of this action, as may be allowed by I.A.R. 44 and Idaho Code § 7-

1310.⁸ Again, if there was such an immediate need to proceed with the Project, one would have to assume Challis would be seeking expedited review. It has not. The Caucus cannot be blamed for delay in proceeding with the Project - that is a knowing decision of Challis that reveals volumes as to the urgency of the Project.

The Caucus has done nothing but exercise rights extended to it under the Idaho Constitution, Idaho statutes, and applicable rules of procedure, all supported by facts not in dispute and by existing law, or a good faith argument as to modification of existing law. As such, in any event, the Caucus ought not be required to pay any fees or costs of Challis, and the opposite ought to be required.

CONCLUSION

For the foregoing reasons, and for those reasons previously articulated in the *Brief for the Appellant*, filed July 10, 2014, 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 for entry of a judgment awarding the Caucus costs and attorney fees incurred in the district court proceedings.

RESPECTFULLY SUBMITTED this 24th day of September, 2014.

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⁸I.C. 7-1310(3) requires that proceedings regarding the validity of judicial confirmation "shall be advanced as a matter of immediate public interest and concern, and be heard at the earliest practicable time."

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing brief were served on the following on this 24th day of September, 2014 by the following method:

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