D. Blair Clark ISB#1367
Jeffrey P. Kaufman ISB#8022
LAW OFFICES OF D. BLAIR CLARK PLLC
1513 Tyrell Lane, Suite 130
Boise, ID 83706
Phone: (208) 475-2050
Fax: (208) 475-2055
Email: dbc@dbclarklaw.com
Email: jeffrey@dbclarklaw.com
Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In re:	Case No. 11-00481-TLM
BOISE COUNTY	Chapter 9
Debtor.	

MEMORANDUM OF BOISE COUNTY IN OPPOSITION TO MOTION TO DISMISS

STATEMENT OF THE CASE

Boise County, Idaho, is a body politic under Idaho law. It is authorized to file for chapter 9 relief by Idaho Code §67-3903.

The facts surrounding this case and the need for filing of the chapter 9 petition are set forth at greater length in the Declarations filed herewith. They are also set out at length in the proposed Disclosure Statement, which is filed herewith and which should be reviewed in the context of this memorandum. Boise County's contentions of fact are stated in those documents, and need not be further expounded. Those facts will be bolstered by the evidence to be presented at the hearing. Suffice it to

say that Debtor believes it is imperative for the Court to allow this case to continue and to submit a Plan in accordance with the provisions of Chapter 9 of the Code.

The issues presented below will be discussed as stated. However, there are many arguments made that are applicable to multiple issues. The Court is urged to consider those arguments as applicable to all of the issues–for example, the issue of solvency, of good faith negotiation, and the effect of the laws of collection are completely interrelated.

ISSUES PRESENTED

1. Was Boise County insolvent on the date of the petition?

2. Does Boise County desire to effect a plan to adjust its debts?

3. Does Boise County meet the requirements of 11 USC §109(c)(5)(C) or (D)?

4. What is the effect of the Idaho Tort Claims Act?

5. Should the petition be dismissed?

POINTS AND AUTHORITIES

Judge Hagan was one of the first authorities to rule on the issue of insolvency, eligibility and good faith in In re Columbia Falls, Montana, 91 IBCR 127, 1991 Bankr. LEXIS 905. In that decision, Judge Hagan made several rulings which are still applicable and still good law today. Those are:

A. "Solvency" is a question of fact. As the Court held, "the fact remains the City has not made the payments and at the present time there are not sufficient funds available for principal and interest payments on the bonds. The definition of insolvency afforded by U.S.C. § 101(32)(C)(ii) provides a municipality is insolvent if the debtor is "... unable to pay its debts as they become due ..." The three special improvement districts are not paying their debts as they become due and thus the

insolvency requirement of 11 U.S.C. § 109(c)(3) has been met regardless of the City's indebtedness to the districts." As the facts presented in the written submissions, and in the testimony to be presented corroborate, the County has had shortfalls for some time in many of its funds, including the General Fund. It also was not paying debts as they became due, as evidenced by the $550,000 in unpaid indigency claims with which it is now faced. The Alamar judgment adds to this insolvency.

B. "Good faith" should be reviewed in the context of confirmation more than in the context of the initial filing. This was discussed at some length in Columbia Falls, and the line of reasoning used is set forth herein as it is applicable to the case before this Court involving Boise County. The questions of alternatives, viability of plans, and the like were addressed in Columbia Falls. It is also important to notice that Columbia Falls, much like Boise County is being accused of doing in the present case, was allegedly attempting to circumvent the District Court decision. (Emphasis added)

> In support of its lack of good faith contention, *Davidson alleges the Chapter 9 filing is an attempt by the City to avoid the consequences of the Montana District Court decision* in Albright v. City of Columbia Falls, and the effects of certain Montana Statutes, which Davidson further contends, cannot be avoided by the chapter 9 filing. *It is alleged the City has failed to follow the Montana statutory scheme designed for insuring payments of special improvement district obligations and specifically that the City has failed to levy the assessment provided by Montana law for funding the revolving fund. Davidson contends the City must follow these provisions of Montana law as its only resort to the shortfalls, rather than use the provisions of Chapter 9.* Davidson contends the only plan the debtor can propose would be a plan to pay the obligations in conformity with the Montana Statutes.
>
> *The City's failure to follow the requirements of Montana law concerning the levy and funding of the revolving fund based on the levy and its failure to pay its assessments is not conclusive on the issue of a bad faith filing*. It has not been shown the shortfalls have been caused *solely* by the lack of funds in the revolving fund on the failure of the City to pay its share of the assessments. Nor can it be said the City intends to further escape its responsibility to the requirements of Montana Statutes by filing the chapter 9 plan. Indeed, the revolving fund account, and its funding sources, wou1d most likely be expected to be an essential part of the debtor's plans.

> While Davidson makes a strong argument for wrongdoing on the part of the City under both the insolvency and lack of good faith issues with the contentions the City has not made the proper levies to fund the revolving fund and for failure to pay its assessments, nevertheless, *at this stage of the proceedings the City deserves an opportunity to attempt to reorganize the debt of the three entities. It cannot, at this point in the chapter 9 process be concluded the City has filed the chapter 9 proceeding solely to escape its statutory responsibilities or to delay the bond payment process by way of the Section 362 automatic stay, or that the City does not intend to seek confirmation or reorganization plans*. Except to the extent prohibited by 11 U.S.C. § 904, *these matters can be further considered in connection with plan confirmation issues*. It is concluded the evidence at this point of lack of good faith on the part of the City is insufficient to support a dismissal of the filings under the provisions of 11 U.S.C. § 921(a).

C. In re City of Vallejo, 408 BR 280; 2009 Bankr. LEXIS 1583 (9th Cir. BAP, 2009) and In re Pierce County Housing Authority, 414 BR 702, 2009 Bankr. LEXIS 2405 (W.D. Wash., 2009) set forth the standards for reviewing eligibility in the context of Chapter 9 cases.

1. 11 USC § 109(c)'s eligibility requirements should be broadly construed to provide access to relief in furtherance of the Code's underlying policies. City of Vallejo, supra.

2. In reviewing the standard for determining insolvency under §109(c)(3), the Court should determine this using a cash flow basis. The municipality should demonstrate an inability to pay its debts due within the next year. City of Vallejo, supra; Pierce County Housing Authority, supra.

3. The data supplied needs to show the facts and circumstances that existed as of the petition date. Id.

4. Restrictions on the uses of various municipal funds should be considered in determining the insolvency of a municipal debtor. That can be done by the summary of the municipality's finance director, even if a lay person, and is admissible under FRE 701, because it is "helpful to the fact finder because of the complexity of municipal accounting practice." City of Vallejo, supra.

5. Reporting its assets in terms of "funds" is proper. "Generally accepted accounting principles ("GAAP") as promulgated by the Governmental Accounting Standards Board ("GASB") require municipalities to account for their activities in separate funds. The segregation permits a transparent reporting process that reflects the financial activities of each fund and complies with restrictions placed on the funds." Id.

6. Requiring a municipality to not comply with GASB to avert a short-term cash flow problem and to ignore restrictions on funds and funding would be improper and not sufficient grounds for dismissal.

7. Compliance with §109(c)(4) ("Desire to Effect a Plan"), which is a subjective requirement, may be shown with direct and circumstantial evidence. "They may prove their desire by attempting to resolve claims as in County of Orange; by submitting a draft plan of adjustment as in Sullivan County; or by other evidence customarily submitted to show intent. **See** Slatkin, 525 F.3d at 812. The evidence needs to show that the "'purpose of the filing of the chapter 9 petition not simply be to buy time or evade creditors.'" Id.

8. Negotiation with creditors may be shown by negotiating a format for a Plan, which would involve classification (§109(c)(5)(B) or by "The Alternative Creditor Negotiation Requirement" per §109(c)(5)(C). Another alternative is §109(c)(5)(D), which is shown if the Debtor reasonably believes that a creditor may attempt to obtain a preferential transfer under §547.

Analyzing the status of this case, the evidence clearly shows that Boise County was insolvent, desires to formulate a Plan, and meets the tests of both §109(c)(5)(C) and (D).

9. The Idaho Tort Claims Act is the exclusive procedure for recovering claims against governmental entities that come within its terms. Idaho Code §6-903. The entity may purchase insurance to cover these claims. Idaho Code §6-923. If the entity does not have sufficient funds to pay it, then it "shall levy and collect a property tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act." Idaho Code §6-928. However, if there is no coverage from the entity's insurer, then the maximum recovery from the entity is $500,000. Idaho Code §6-926. If there is a judgment in excess of that sum, the Court has an affirmative duty to reduce it to that amount. Barringer v. State of Idaho, 111 Idaho 794 (1986).

10. Idaho Code § 63-802(3) unambiguously states that a Board of County Commissioners is without authority to levy a tax in excess of a 3% limitation, unless the majority of the taxing district's electors approve a greater amount of taxation.

ARGUMENT

1. *Was Boise County Insolvent on the Petition Date?* This must be answered in the affirmative. Boise County could not meet the obligation of paying all its debts as they became due including the Alamar judgment.

In order to review the financial condition of the County as of a given date, it is necessary to review several documents–almost all of the Debtor's Exhibits. These will be presented primarily by the County Clerk, Mary T. Prisco, who is a CPA as well as the County Clerk, Auditor, and Budget Officer. Other testimony will bolster hers, but it can be determined from the records of the County as corrected that the County had been operating at a shortfall for several years. In addition, as stated hereafter, there were several hundreds of thousands of dollars of unbooked liabilities.

Boise County has a small population base--7,500-8,000. (Prisco deposition, p. 25, l. 7-10). There is "no way that the county could pay the $4 million judgment and the attorney fees as petitioned for $1.4 million. There was no way we (Boise County) could do that and continue to exist as an operating entity." (Prisco deposition, p. 48, l. 13-17.) Filing the Chapter 9 was not the desired alternative; if the County could have obtained a bond to pay it over time, that would be the preferred method, but the County has "nothing to bond." (Prisco deposition, p. 50, l. 5-10).

But this is not the only problem that Boise County faces. The County owes over $550,000 in unpaid medical indigency claims that were unrecorded liabilities discovered by the new Clerk when she assumed office in 2011. (Prisco deposition, p. 51, l. 21-25, p. 52, l. 1-15). The exact amount is unknown.

Furthermore, on the date of the petition, the County faced severe uncertainty concerning the budget cuts being proposed by the U.S. Government and the Idaho State Legislature (Prisco deposition, p. 52, l. 24-25, p. 53, l. 1-11,). Those two funding sources account for 2/3 of Boise County's budget.

The Clerk's opinion was and is that the County, when the judgment is considered, is 'insolvent' as the term is defined. As Ms. Prisco stated in her deposition, p. 57, l. 22-25, p. l. 1-15:

> A. Well, I'll share with you sort of the bird's-eye view that I have, which is that our total budget for a fiscal year is approximately $9 million. And obviously that budget is, you know, appropriated out to different funds and for different expenditures and reasons and activities, et cetera. And so, you know, from my perspective, if you have an annual budget of $9 million and you have a judgment of $4 million, plus attorney fees of 1.4, plus there is some amount of accrued interest sitting out there -- which I've never been able to get my hands on what that amount is -- that's well over half of your annual budget. So, to me, it's pretty clear that with the judgment and attorney fees and taking into account that the county is there for a reason, it's there to provide a variety of services to its residents, that judgment and the attorney fees associated with it, there is no way the county can pay that.

The only County fund that can be used for payment of the judgment is the General Fund. All of the other funds are restricted by law for specific purposes and cannot legally be used for others. This is much akin to the situation discussed by City of Vallejo.

Before the County decided to take the step of filing for Chapter 9, it considered various other options. As Jamie Anderson, the Commission Chair testified in her deposition, the Commissioners looked at "financial documents to see what money we had obligated, what money was available to pay the judgment, and what future obligations we had already agreed to." (Anderson deposition, p. 25, l. 3-6). They looked at budgets, revenues, expenses, and lawfully "what can we pull out of the county accounts." (l. 9-10).

The Commissioners considered the statutory and state constitutional limitations on encumbering future Boards. The Commissioners also discussed the Tort Claims Act. Both the Commissioners and the Board were of the opinion that a bond election would probably not be approved by the electorate (p. 42, l. 6-23), especially true since local bond issues for the Garden Valley Schools and the City of Crouch (March 17, 2011) have failed. They also considered "registered warrants," tax anticipation notes[1], and the 3% property tax levy increase. However, in light of the Judgment held by Alamar, the Commissioners did not have the ability to pay their debts. The arguments that "but for" the judgment they could pay their debts as they come due is meaningless, because it has to be determined as of the

[1] Counties are authorized by Title 63, Chapter 31, Idaho Code, to borrow money in anticipation of taxes and other revenues duly budgeted and appropriated but not yet collected for the current fiscal year. The amount borrowed shall not exceed 75% of the amounts budgeted and not yet received, and the proceeds of the tax anticipation notes ("TANs") are only to be used "for the purpose for which said taxes are levied or such other funds or other revenues are appropriated…." Idaho Code 63-3102. There is nothing in the language of the TAN statutes that would exempt a TAN from the general tax restrictions of Idaho Code 31-802 (3% cap).

petition date. (City of Vallejo, supra; Pierce County Housing Authority, supra). Try as it might, Alamar cannot create funding where none exists.

A board of county commissioners derives its power to levy taxes solely from the State Constitution and statutes and can levy no tax that is not provided by those sources. Oregon Short Line R.R. Co. v. County of Gooding, 33 Idaho 452, 196 P. 196 (1921). Idaho Code § 31-811 specifically authorizes boards of county commissioners to levy such tax annually on the taxable property of the county as may be necessary not exceeding the amount authorized by law; and to levy such taxes as are required to be levied by special or local statutes. Additionally, Idaho Code § 31-604(5) re-confirms this authority as boards of county commissioners are authorized to "levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law." However, although counties have the authority to levy taxes, this authority is not without limitations.

Idaho Code § 63-802(3) provides: "No board of county commissioners shall set a levy, nor shall the state tax commission approve a levy for annual budget purposes which exceeds the limitations imposed in subsection (1) of this section, unless authority to exceed such limitation has been approved by a majority of the taxing district's electors voting on the question at an election called for that purpose and held pursuant to section 34-106, Idaho Code, provided however, that such voter approval shall be for a period not to exceed two (2) years." Based upon the plain language of Idaho Code §63-802(3), there are no exceptions to this statutory directive.

Further, the State Tax Commission reviews and approves levy portions of a county budget. The Tax Commission is prohibited by law to approve a levy amount which exceeds the 3% limitation. Idaho Code §63-802 (3). Even if a county were to raise taxes, the tax commission would have to approve of

that tax increase raise and they are prohibited from approving a levy exceeding a 3% increase. Idaho Code §63-809. The State Tax Commission's counsel has stated in writing and will corroborate that they will not approve a levy of over 3% to pay this judgment. There are no other viable methods, short of a bond election, to levy a tax in excess of the 3% cap.

So what are the options available to the County except for Chapter 9?

One question that the Alamar creditors have raised is registered warrants.[2] "All emergency expenditures may be paid from any moneys on hand in the county treasury in the fund properly chargeable with such expenditures…" Idaho Code § 31-1608. If there are insufficient funds on hand, a warrant is to be registered, bear interest, and be called in the manner provided by law for other county warrants. Idaho Code § 31-1608. Warrants against a county may be redeemed through short term borrowing from other county funds or a financial institution at market interest rates until a levy is established in accordance with Idaho Code § 63-806. Idaho Code § 31-1507.

However, such borrowing is substantially restricted pursuant to Art. VIII, §3, Idaho Constitution. This limits the County's ability to incur indebtedness without a vote of the electorate. Courts have found that this section does not authorize county commissioners to incur indebtedness in excess of income provided for the county for the year, in violation of the Idaho Constitution Article 8, §3. Lloyd Corp. v. Bannock County, 53 Idaho 478, 25 P.2d 217 (1933).

[2] Idaho Code sections 63-1608 and 31-2124 through 31-2126 authorize counties to issue registered warrants for payment of indebtedness. If moneys are not available to pay the warrants, the county treasurer is directed to proceed under Idaho Code section 31-1507 (borrowing from other funds) and Idaho Code section 31-1508 (warrant redemption levy under Idaho Code section 63-806). Section 63-806 contains no exemption from the restrictions of section 63-802 and, in fact, has a .2% limitation of its own. The issuance of registered warrants may be used to pay a judgment but the amount of such warrants are limited by the general restrictions on the amount of taxes which a county may levy which include the 3% limitation of section 63-802.

If there is a "general reserve appropriation fund," the Board could conceivably make an appropriation from that fund per Idaho Code § 31-1605. But this is not an option as Boise County does not have a general reserve appropriation fund.

There is also the "emergency" statutory authorization. In emergency situations, Idaho law allows a board of county commissioners "to make the expenditures necessary to investigate, provide for and meet such emergency." Idaho Code Section § 31-1608. As explained in this statute, an emergency is:

> caused by fire, flood, explosion, storm, epidemic, riot or insurrection, or for the immediate preservation of order or of public health or for the restoration to a condition of usefulness of public property, the usefulness of which has been destroyed by accident, or for the relief of a stricken community overtaken by a calamity, or the settlement of approved claims for personal injuries or property damages, exclusive of claims arising from the operation of any public utility owned by the county, or to meet mandatory expenditures required by law, or the investigation and/ or prosecution of crime, punishable by death or imprisonment, when the board has had reason to believe such crime has been committed in its county, the board of county commissioners may, upon the adoption, by a unanimous vote of the commissioners, of a resolution stating the facts constituting the emergency and entering the same upon their minutes, make the expenditures necessary to investigate, provide for and meet such an emergency.

Idaho Code Section § 31-1608.

There is no dispute that this judgment is an "expenditure required by law" to be paid. Idaho Code § 31-1608 allows emergency expenditures to be paid "from moneys on hand in the county treasury in the fund properly chargeable with such expenditures…" or from registered warrants, but this provision contains no exemption from the general tax limitations under Idaho Code section 63-802. However, there is a dispute concerning exactly <u>how, when, and from what source</u> the Judgment will be paid. The Boise County Commissioners must still adhere to their financial responsibilities, including

limitations, contained in Idaho law and the Idaho Constitution. The 3% cap on property tax levies contained in Idaho Code §63-802(a) does not provide for any exclusions.

Furthermore, although there may be potential for "judicial confirmation" as an "ordinary and necessary" County expense, no court decisions have ever held that the status of indebtedness as "ordinary and necessary" carries with it the authority to levy a special tax to pay for that indebtedness. A finding of "ordinary and necessary" would authorize the incurring of a valid indebtedness for that purpose, but such indebtedness would still be subject to the general restrictions on taxes.

See Boise City v. Frazier, 143 Idaho 1, 137 P.3d 388 (2006), where the extent of judicial confirmation is clearly determined. Frazier involved attempting to use judicial confirmation to obtain long-term financing for construction of a parking garage at the Boise Airport. The Court discussed Art. VIII, §3, Idaho Constitution, and determined that the 2/3 vote of the populace was required to incur long-term debt unless the expense was an "ordinary and necessary" expense under the government's general authority, citing examples from the Idaho Constitutional Convention such as "payment of witness fees. . Other delegates mentioned juror fees and criminal court expenses, id. at 590, the expense of controlling streams and ditches, id. at 592, and "any emergency" id. at 587."

The Court held that while the operation of the airport and the expansion of its facilities may be "ordinary," they were certainly not "necessary." The term "necessary" was not "indispensable" as that definition was rejected as circular and meaningless. Rather, the Idaho Supreme Court construed "necessary" as needing to be paid immediately, within one year, relying on the 1897 case of Dunbar v. Canyon County, 5 Idaho 407 as being nearest to the date of the expressed Constitutional framers' intent. The Court held that although the garage was "important, or even critical to the operation of the airport is

insufficient to satisfy the constitutional requirements of Article VIII, §3. Instead, we have held that there must exist a necessity not simply for the expenditure, but also for making the proposed expenditure at or during such year. Dunbar, 5 Idaho at 412, 49 P. at 411." Anything else, held the Court, requires an election pursuant to the Constitution with the supermajority required.

There is a maximum cap on the amount a board of commissioners may raise property taxes of 3% increase in base property taxes each year.3 Idaho Code § 63-802(a). A board of commissioners is without authority to exceed this 3% limitation, unless the majority of the taxing district's electors approve a greater amount of taxation. Idaho Code § 63-802(3). Without an election, Boise County can neither levy nor receive more than 3% more of the total property taxes than in the prior year. Furthermore, the voter approval for a greater tax amount is only good for a period not to exceed two years. Idaho Code § 63-802(3). Other than a vote by the county electorate, no exceptions to the 3% cap appear to exist in Idaho law.

Courts have opined that the judiciary's power is limited to ordering governmental entities to take action within existing laws. Courts in sister jurisdictions have refused to "require a levy of taxes beyond the constitutional or statutory limitations, where such limitations exist; [and furthermore] even within these limits it may be accepted as established law that private rights must be subordinated to public necessity in the sense that needs of government, economically administered, have a prior demand on the proceeds of taxation." Defoe v. Town of Rutherfordton, 122 F.2d 342, 344 (4th Cir. 1941); State v. City of Mound City, 73 S.W.2d 1017 (Mo. 1934) ("Mandamus will lie to compel the municipal authorities to

[3] Idaho Code § 63-802(e) allows for counties that have foregone the 3 % tax increase in a previous year to recoup those foregone taxes. Those counties may "in any following year," recover the foregone increase by certifying the amount up to 100 % of the original increase that was not taken. Idaho Code § 63-802(e).

levy an annual tax to pay such judgment up to the limit authorized by statute, which in turn, is limited by … the [state] Constitution.") (emphasis in original); Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 111 S.W.2d 946, 952-53 (Mo. Ct. App. 1938). The courts "have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is bring existing laws into operation. Missouri v. Jenkins, 495 U.S. 33, 72, 110 S.Ct. 1651, 1674 (1990) (quoting United States v. County of Macon, 99 U.S. 582, 25 L.Ed. 331 (1879).

To summarize, then, the County was and is faced with a task of paying a judgment of potentially in excess of $4 million in a time of declining State and Federal contributions and with no power, without an election, to increase taxes over 3% per year. Boise County did not have the ability to do so.

Further, as of the petition date, several things had occurred:

A. The County's settlement offer of February 22, 2011 (docket 69-3, Exhibit C, pp. 2-3) had been rejected. This offer was for $3.2 million, with $1.9 million "down" and the 3% increase allocated to Alamar, in addition to some tax reductions on Alamar's real property.

B. Alamar's counsel had applied for a Writ of Execution.

C. Alamar's counsel had stated their intent to take all of the County's operating cash. And while they said on paper that they would "consider" the County's argument that many of its funds were restricted by law, they orally said that there were no such restrictions and they would pursue the levy (Buxton Affidavit).

Alamar cannot successfully contend that a judgment is not "due" when the Writ of Execution was admittedly sought. FRCP 62 clearly states that after the 14-day 'grace period,' there is no stay of

execution on the judgment, even if appealed. And FRCP 69 states unequivocally that the Writ of Execution is the method for enforcement of the money judgment, in accordance with the law of the State.

Turning then to Idaho Code Title 11 Chapter 5, there can be no dispute that the judgment is immediately due, the Sheriff (or U.S. Marshal) must levy on personal property of the Debtor (which includes bank accounts), and may be sought at any time within five years of the judgment's entry. Furthermore, Idaho Code §11-201 provides that anything not exempt by law is subject to seizure under the Writ. This includes "All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action . . . " (emphasis added). The arguments of the Alamar creditors that the County cannot consider that as realistic are, frankly, unbelievable if not ridiculous.

By these standards, the County was clearly insolvent. These factors also bolster many of the other elements of §109 as will be discussed hereafter.

2. *Does Boise County desire to effect a plan to adjust its debts?* Clearly it does. Disclosure Statement and Plan are submitted. Under City of Vallejo, that is sufficient.

3. *Does Boise County meet the requirements of 11 USC §109(c)(5)(B), (C) or (D)?* Since the Vallejo case was decided and the standard in the 9th Circuit is now that negotiations with creditors should be in the context of a Plan, Alamar now asserts that Boise County cannot meet the criteria of (B). This is inaccurate; the case states that "because § 109(c)(5)(B) involves classification and impairment, it would be difficult for a municipality to prove that it negotiated in good faith with creditors it intends to

impair unless the municipality had a plan of adjustment drawn or at least outlined when it negotiated with the creditors. Thus, we conclude that the plain language of §109(c)(5)(B) requires negotiations with creditors revolving around a proposed plan, at least in concept."

The County did have a plan of adjustment outlined–the offer of February 22. The creditor which was sought to be impaired was Alamar. Not only was it the "800 pound gorilla," it had its judgment which was admittedly a legal obligation, and it was the creditor that needed to be impaired. The offer of February 22, 2011, which was rejected as "outside the scope of reasonability," would qualify for such a concept.

The argument is made–indeed, Alamar's primary argument–that the County has never negotiated with Alamar in 'good faith.' This is discussed both under subsections (B) and (C) of §109(c)(5). In order to evaluate this, it is necessary for the Court to review the availability of various "funds" for this use. This discussion is also relevant when considering the County's "insolvency" as discussed in Vallejo.

This is crucial, because the Commissioners may not transfer any money from one fund to another except in cases expressly provided and permitted by law.[4] Counties have specific obligations

[4] Article XVIII, § 6, of the Idaho Constitution states, in part, as follows: "…[T]he legislature shall provide for the strict accountability of county, township, precinct and municipal officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession…."

Specifically, "any public officer … charged with the receipt, safe keeping or disbursement of public moneys who misuses public funds … is guilty of felony…." Idaho Code § 18-5702(2). Misuse of public funds includes the failure to keep public moneys in his possession until disbursed or paid out by authority of law when legally required to do so. Idaho Code § 18-5701(3). It also includes appropriating public moneys to the use of another. Idaho Code § 18-5701(1). Those entrusted with the care and safekeeping of public funds are held to strict accountability for the safeguarding of those funds and in compliance with the statutes governing the same. Bonneville County v. Standard Accident Ins. Co. of Detroit, 57 Idaho 657, 67 P.2d 904 (1937). County officials may not transfer any money from one fund to another or in any manner divert the money in any fund to other uses, except in cases expressly provided and permitted by law…." Idaho Code § 31-1508. If this were to occur, not only would county officials violate the financing laws of the state and open themselves up to civil complaints, they would also be criminally liable.

concerning the funds for which they are accountable. Funds that are set aside for a specific purpose cannot be interchanged or mixed with other monies. Idaho Code §31-1508.

Once again, under the rules of statutory construction, a court must determine and give effect to the legislative intent of the statute based upon the entire act and every word therein, lending substance and meaning to the provisions." Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993).

A board of county commissioners may not transfer any money from one fund to another or in any manner divert the money in any fund to other uses, except in cases expressly provided and permitted by law…." Idaho Code §31-1508. This requirement is not ambiguous. If current funds are to be expended for the purpose of paying off the Alamar judgment, such funds must be budgeted and expenditures made within these limits and from monies available for such purpose. Title 31, Idaho Code, contains charges which are the obligation of the County to pay. Idaho Code Section 31-3302, Idaho Code sets out the various county charges. These charges include, but are not limited to: compensation of constables and sheriffs, jail services, service of subpoenas, grand jurors, coroner services, indigent sick and non-medical assistance, contingent services necessarily incurred for the use and benefit of the county, and other services directed to be raised for any county purpose at the direction of the county commissioners. In compliance with these obligations, Boise County Commissioners have

established many "funds" to pay for county charges. Many of the specific charges in Boise County along with their statutory authority, are considered below.[5]

a. Highways and Bridges Fund

Idaho Code §40-701 sets forth the highway distribution account including distribution of monies to local units of government. All monies are to be used for highway use, including idle funds. There is also a local bridge inspection account to be established pursuant to §40-703, Idaho Code. The local bridge inspection account is also a dedicated fund and addresses idle monies to be held in such account. § 40-715 also diverts the transfer of allocable highway funds for the state controller to deposit to the county highway fund.

Idaho Code §40-701(7), specifically states that "[n]o part of highway funds or any apportionment from it shall ever be used for any purpose other than those provided in this section, except as specifically otherwise provided." Unused funds are carried over to be used for maintenance and construction of highways or the payment of bonds. Idaho Code §40-701(7). It does not appear, therefore, that even idle highways and bridges funds can be used or transferred for any other use. See also §§40-801 and 40-504.

b. County Justice Fund

The legislature specifically delegated the establishment of a County Justice Fund. §31-4602 et. seq., Idaho Code. The county justice fund is to "provide funding for the operation of the county sheriff's department, construction, remodeling, operation and maintenance of county jails, juvenile detention facilities and/or county courthouses, operation of prosecuting attorney's office, provision of public defender service and otherwise court-appointed counsel, and operation of the office of the clerk of the district court…" Idaho Code § 31-4602. "The justice fund shall be separate and distinct from the county current expense fund and expenditures from the justice fund and shall be solely dedicated to the purposes set forth in this section." §31-4602.

c. Solid Waste

The county has the authority to levy a tax or collect fees specifically for solid waste disposal systems. §31-4404, Idaho Code. To operate a solid waste disposal site, a board of county commissioners may either: levy a tax not to exceed .04% of the market value for assessment purposes on all taxable property; or, collect fees from users of the facility; or, finance the facility from current revenues; or, use monies from other sources; or use a combination of any of the above. Idaho Code §31-4404. It appears that Boise County Ordinance No. 82-02 allows for the collection of fees from users of the solid waste facility. However, Boise County only collects fees from solid waste users under special

[5] The County witnesses will also explain these funds and their use.

circumstances. The County does not collect fees from every user who brings waste to the solid waste site.

Further, the County Solid Waste fund includes moneys which have been set aside as a form of self-insurance for when the landfill will close. The federal government, under the Environmental Protection Agency, EPA, and in accordance with the Resource Conservation and Recovery Act, (RCRA), established financial responsibility provisions to assure that landfills set aside money for closure and post-closure activities. 40 C.F.R. § 258 Subpart G. Boise County is required to maintain financial assurances which will address the cost of closing the county landfill including any corrective action that may be required. Boise County keeps approximately $297,000.00 in its solid waste fund to fulfill this obligation; it cannot be diverted elsewhere.

d. Indigency Fund

Section 31-3401 *et seq.*, Idaho Code, sets forth the non-medical assistance account for funding services for indigent persons in temporary situations. For purposes of funding for these services, county commissioners are authorized to levy an *ad valorem* tax on taxable properties within the county. Nowhere is there authorization to use the monies from this fund for any other purpose. It does not appear, therefore, that indigency funds can be used or transferred for any other use.

e. Emergency Communications Fund

Idaho Code §31-4801 et seq., provides counties the authority to impose an emergency communications fee on telephone lines and wireless communications systems. This act further instructs that the fee collected shall be "exclusively utilized … to finance the initiation, maintenance, operation, enhancement and governance of consolidated emergency systems…" Idaho Code §31-4804.

f. County Noxious Weed Fund

Boise County has established a noxious weed fund as allowed under Idaho Code § 22-2401, *et seq*. Once a noxious weed fund is created, the fund monies "shall be used exclusively for the control of noxious weeds. Specifically, amounts collected under the provisions of [the Noxious Weed Act] shall be deposited to the noxious weed fund of the county and shall be accounted for as prescribed by the county auditor. Disbursements from the noxious weed fund shall be made only for noxious weed control purposes." Idaho Code §22-2405(5). See also § 22-2406(h) which states the fund may be revolving but again states the fund may only be used for noxious weed purposes.

g. District Court Fund

Idaho Code §31-867 sets forth the authority for county commissioners to annually levy a special tax for the purposes of providing for the functions of the district and magistrate courts within the county.

All monies are to be for court expenditures other than courthouse construction and remodeling. ." Fund balances may be accumulated year to year; however, balance amounts are limited as they "shall not exceed sixty per cent (60%) of the total budget for court functions for the current year." Idaho Code §31-867(2). Like the Indigency Fund, nowhere in this statute is there authorization to use the monies from this fund for any other purpose.

h. Community College Fund

Boise County has established a community college fund in accordance with Idaho Code §33-2110A (3). The money for the funds come from money apportioned to the county from the sale of liquor and the levy of a tax, if the funds from liquor sales is insufficient to pay tuition of Boise county resident students. Idaho Code §33-2110A (3). All proceeds from the levy shall be placed in the county community college fund. The statute is silent concerning the use of monies from this fund for any other purpose. Without specific authority to do so, such funds may not be transferred to any other fund in accordance with Idaho Code §31-1508.

i. County Tort Fund

The legislature specifically delegated the establishment of a tort fund by all political subdivisions. § 6-927, Idaho Code. "… [A]ll political subdivisions shall have authority to levy an annual property tax in the amount necessary to provide for a comprehensive liability plan whether by the purchase of insurance or otherwise as herein authorized; provided that the revenues derived there from may not be used for any other purpose." Idaho Code § 6-927. This is the payment for the insurance premiums to ICRMP and other carriers.

j. County Revaluation Fund

In accordance with Idaho Code §63-314(3), Boise County Commissioners have created a County Revaluation Fund in order to "furnish the assessor with such additional funds and personnel as may be required to carry out the [county valuation program] hereby provided." Idaho Code §63-314(3). The County has the authority to levy an annual tax not to exceed four-hundredths percent (.04%) of the market value of taxable property to be collected and paid into the county treasury and appropriated to the property valuation fund. There is no authorization to use the monies from this fund for any other purpose.

k. Sheriff's Water Vessel Fund

Idaho Code § 67-7013(3) requires that monies paid to the Idaho Department of Parks and Recreation state vessel account be remitted to counties with a boating improvement program, as defined by Idaho Code § 67-7013(6), in January, April, July and October of each year. The money that each county receives is based upon designations made by watercraft owners on their registration applications.

§ 67-7013(5). The moneys "shall be used and expended by the board of county commissioners for the exclusive purpose of maintaining and improving the pub1ic waters of this state for recreational boating purposes and for law enforcement activities related to the enforcement of the provisions of law." Idaho Code § 67-7013 (7). Furthermore, unless county commissioners give written notice of an intent to retain monies for a specific boating purpose, and if the adjusted ending fund balance is greater than the amount received from the state vessel account during the fiscal year, the county clerk shall remit the surplus moneys to the department of parks and recreation. Idaho Code § 67-7013 (8).

l. East Boise County Ambulance District Administrative Services Account

The legislature authorized boards of county commissioners to create, operate and maintain an ambulance district where none exists per Idaho Code §31-3901. In 1988, the Boise County Board of Commissioners created the East Boise County Ambulance District to serve the emergency medical needs of residents and visitors on the east side of Boise County by Resolution #1988-07. The East Boise County Ambulance District is a separate and distinct taxing authority; the moneys supplied by Boise County to the Ambulance District are solely for administrative services. At the creation of ambulance service districts, the Legislature required that a fund be established as a service account for the ambulance district. Idaho Code §31-3902. The ambulance service fund is to be "used exclusively for the purposes of [the Ambulance Services Act, Idaho Code §31-3901, *et. seq.*]" Likewise, "[a]ll such fees collected, accounted for and paid to the county treasurer for deposit in the ambulance service fund … shall be used to pay expenses as incurred in the maintenance and operation of said ambulance service. Idaho Code § 31-3904. Once again, the monies in this fund cannot be used or transferred for any purpose other than the expenses of the ambulance district.

m. Two County Snow Groomers Funds, one each for trails near Garden Valley and one for park-and-ski trails and parking lots near Idaho City.

In accordance with § 67-7106, Idaho Code, Boise County has established two separate funds for monies generated by the registration of snowmobiles and received from the state department of parks and recreation, as well as moneys received from the Federal Government and the Boise National Forest. Boise County has a Cooperative Agreement with these two government agencies to groom the trails. The trail grooming equipment is owned by the department of parks and recreation. The county merely performs the trail grooming. Again, state law requires that all moneys received by the county from the state out of snowmobile registration "shall be used solely for a bona fide snowmobile program." Idaho Code § 67-7106 (2).

n. Sheriff's reserve fund for special events.

The Board of Commissioners for Boise County has established a reserve fund for the policing of special events by the County Sheriff. These events include the Race to Robie Creek and Boise Ridge Riders trail ride. This county charge is authorized under the catchall of Idaho Code §31-3302. It is

strictly used to pay the County Sheriff for policing these events which benefit county residents and visitors.

While there are specified "funds" which by law cannot be applied to any other source, Idaho law is far from clear that these funds cannot be garnished or levied.

When considering specific property as exempt from execution of a judgment, the Court must first consider examine Idaho Code §11-605. This statute contains a specific list of public property which is exempt in that section. It consists of:

> (5) All courthouses, jails, public offices and buildings, schoolhouses, lots, grounds and personal property appertaining thereto, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the courthouse, jail and public offices belonging to any county of this state, or for the use of schools, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state. No article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

No accounts, funds or cash are therein mentioned. The County, therefore, is faced with a huge dilemma. It cannot legally incur long-term debt to pay the judgment without an election (the success of which is extremely doubtful), it cannot take from its own funds to pay the judgment if those funds are restricted (assuming it had the wherewithal to do so, which it does not) but the Alamar creditors may be able to levy on the funds and make the County destitute.

Secondly, even if those "funds" are somehow exempt, General Fund monies are not. But the County does not allocate its separate funds into separate accounts. Rather, most of the County's bank accounts will have some General Fund money and some money from the "restricted funds" therein. Idaho has held, as has this Court, that exemption from garnishment is lost upon commingling. See

Hooper v. State of Idaho, 127 Idaho 945 (Idaho App.1995), and In re Merrill, 431 B.R. 239 (Bkrtcy.D.Idaho 2009).

Assuming the Court does not consider the settlement offers as an adequate "plan" for purposes of §109(c)(5)(B), the history of those discussions certainly verifies a finding that negotiations were impractical under §109(c)(5)(C).

It is interesting to note in the Alamar memorandum (docket 69) that never does this creditor set forth any affirmative counteroffers. This is not negotiation. The dictionary definition of "negotiation" is "1. a discussion set up or intended to produce a settlement or agreement, or 2. the act or process of negotiating." There was no discussion; this was not a two-way street. Judicial decisions have construed "good faith negotiations" as requiring the parties to meet and confer regarding the issues, although it does not require either side to make concessions. See for example Charles D. Bonanno Linen Serv. v. NLRB, 454 U.S. 404, 406 (U.S. 1982) [labor dispute]; City of Naperville v. Old Second Nat'l Bank of Aurora, 327 Ill. App. 3d 734, 741-742 (Ill. App. Ct. 2d Dist. 2002) [condemnation action]. 6 Furthermore, the "negotiations" made in this case approached the level of duress as defined under Idaho law.

In Inland Empire Refineries, Inc. v. Jones, 69 Idaho 335, 340 (Idaho 1949), the Idaho Supreme Court held that the Appellant's threat "to withhold from the respondent the money to which he had a legal right after the mutual accounts were balanced" was sufficient as a matter of fact to constitute

[6] The Naperville decision demonstrates what is required for a good faith negotiation. The City had argued that the law did not require it to make a counteroffer. The Court in that case agreed, IF it had made a reasonable offer in the process, saying "It would be unreasonable to expect that the Ahasics would be willing to negotiate when Naperville repeatedly made offers that were well below the market value of the property."

duress. The Court held that "Whether or not the respondent by such threat, under the circumstances disclosed in this case, was rendered incompetent to contract with the exercise of his free will power, was likewise a question of fact for the jury."

Consider the facts Boise County faced at the time of the petition. The C ounty had made an offer which was summarily rejected, and which Alamar contends in its brief is manifestly unreasonable (docket 69, p. 26). Alamar was proceeding with a writ of execution. Now, Alamar contends with a straight face that Boise County should not have defended itself as it did by filing the Chapter 9 petition, even though:

- The County, on February 22, made a settlement proposal which they believed reflected their legal ability to perform. (Docket 69.3, Ex. 3. The offer itself is p. 2-4, with supporting documents and data for the remainder).
- Mr. Banducci had previously (January 19) demanded a detailed debtor's examination concerning the location of all personal property, including cash, bank accounts, etc. (docket 69.2, Ex. B, p. 2).
- Mr. Woodard responded to the February 22 letter in two responses dated February 24. These are dockets 69-4 and 69-5, Exhibits D and E. In Ex. D, they said that they would still "consider" a reasonable offer (undefined) to settle, that they were persisting in collection, that the prior offer was unreasonable, that any efforts to impede collection would be pursued for personal liability. In Ex. E, they graciously offered to let the County have until March 2–six calendar days–to commit to having the <u>full amount</u> paid by March 25. Evidently they believe this is a good faith negotiation on their part.

- Even after the filing of the petition, negotiations continued. Again, docket 69.3 "looked forward to receiving the County's offer" after belittling the County's filings. Please note that Mr. Kelly's letter never sets forth a counteroffer, never implies (let alone expresses) any willingness to negotiate for anything less than full payment, and condemns the County for proposing different terms than that of the rejected February 22 offer.[7]
- Consider also dockets 69-14 through 69-20; it was clear that negotiations were still attempted to be pursued even after filing this case. But there is no counteroffer from Alamar–none exists. There is only an invitation for the County to make yet another proposal.
- Neither the Declarations of Messrs. Banducci or Woodard set forth any proposal by Alamar to do anything except pay the full amount of the judgment plus another $1 million.

The situation presented by Alamar is similar to that presented by the objecting creditors in In re Valley Health Systems, 383 B.R. 156, 163 (Bankr. C.D. Cal. 2008), where the Court held as follows:

> Negotiations may also be impracticable when a municipality must act to preserve its assets and a delay in filing to negotiate with creditors risks a significant loss of those assets. See County of Orange, 183 B.R. at 607-08 ("The OCIP had no time to enter into negotiations with its participants before acting to protect its portfolio assets."); see also 2 Collier P 109.04[3][e][iii], at 109-35 ("[W]here it is necessary to file a chapter 9 case to preserve the assets of a municipality, delaying the filing to negotiate with creditors and risking, in the process, the assets of the municipality makes such negotiations impracticable.").

[7] The reduction from $1.9 to $1.7 was due to the County's considerations, after further discussion with counsel and its own review, and finding the "missing" $550,000 in medical indigency claims, that they could not legally or practically pay the $1.9 million from unrestricted funds. This will be discussed in detail at the evidentiary hearing.

> Finally, U.S. Bank's construction of § 109(c)(5)(C) is not supported by the purpose of chapter 9. Section 109(c)'s eligibility requirements "are to be construed broadly to provide access to relief in furtherance of the Code's underlying policies." Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.), 143 F.3d 1381, 1384 (10th Cir. 1998). Chapter 9 affords a municipality temporary protection from debt collection efforts so that it may establish a plan of adjustment with its creditors. Id. at 1386; In re Addison Comm. Hosp. Auth., 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994).
>
> In this case, the evidence supports a finding that the District filed its chapter 9 petition in the good faith belief that it was the only means to preserve the value of its assets, continue its business operations, and facilitate continued and uninterrupted healthcare services to its patients while simultaneously developing a viable, comprehensive business plan that would provide the basis for a plan of adjustment and meaningful negotiations with all classes, including U.S. Bank and the Unions. The District did not view the requirements of chapter 9 lightly.

So in this case we see Alamar proceeding with execution, demanding full payment, and never making a scintilla of a proposal that could have led to any sort of negotiated agreement. Yet it is the Debtor, who was trying to do the things that Valley Health found legitimate, who is so accused. This argument should be rejected in total, based upon the evidence submitted by Alamar itself. Boise County will put forth evidence at the hearing to support its actions in light of this position.

But even if the Court determines that §§109(c)(5)(B) or (C) were not met, there is no dispute that there was a threat to recover a preferential transfer under §109(c)(5)(D). This is the "reasonable belief" that a preferential transfer may occur. Boise County has found no case law construing this provision, and evidently Alamar has likewise come up empty. But the plain language of the statute should be self-evident.

§109(c)(5)(D) simply provides that the filing is valid if the Debtor "reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title." Alamar cannot argue that the Debtor's belief that an execution on funds, the denial or rejection of any exemption claim thereon, and the pursuit of immediate payment was unreasonable–this was Alamar's avowed intention. The attorneys for Alamar had themselves informed the news media that "they will move to have the judgment executed and will seek the county's operating cash to satisfy the judgment."8

The levy on the writ would obviously create a voidable transfer under §547. In re Roberson, 80 IBCR 54, 7 B.R. 34 (Bankr. D. Idaho 1980). Levies and garnishments, if occurring with the preference period, are undeniably preferential transfers.

Nor was the judgment a 'secured' debt, because under §11-605, the County's real property is exempt from execution.9 There would be no judicial lien, therefore. There was only the pending Writ.

Alamar's glossing over the Debtor's meeting the standard of §109(c)(5)(D) would require this Court to assume that Messrs. Banducci and Woodard were lying when they said that they were pursuing their judgment. Is it reasonable for the County to assume that they should be taken at their word?

This argument should be summarily rejected.

To summarize, then, Boise County complies with all of the required provisions of §109. It is a municipality that is allowed to file for relief. It is insolvent as of the petition date, which is the germane time. It desires to effect a Plan. It has attempted to negotiate with the impaired class–Alamar,

[8] KTVB Online, March 2, 2011. A copy is submitted herewith.

[9] Alamar seems to agree with this point; in docket 69-2, Ex. B, p. 2, Mr. Banducci refers only to personal property of the Debtor.

negotiation was never fruitful, and was in fact impractical, and a preferential transfer was avowedly threatened.

4. *What is the effect of the Idaho Tort Claims Act?* As Alamar would have this Court hold, the Tort Claims Act applies when it wants and doesn't apply when it doesn't want. This is a patently illegal application of the statute.

Idaho has held consistently that where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect. State Department of Law Enforcement v. One 1955 Willys Jeep, 100 Idaho 150, 153, 595 P.2d 299, 302 (1979); Worley Highway Dist. v. Kootenai County, 98 Idaho 925, 928, 576 P.2d 206, 209 (1978). Idaho's rule on statutory construction is that the Court "is required to give effect to every word, clause and sentence of a statute, where possible." University of Utah Hospital v. Bethke, 101 Idaho 245, 248, 611 P.2d 1030, 1033 (1980). "A statute should be construed so that effect is given to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. 2 J. Sutherland, Statutory Construction § 4705 (3d ed. F. Horack 1943) " East Shoshone Hosp. Dist. v. Nonini, 109 Idaho 937, 941 (Idaho 1985). In determining the meaning of a statute, a court must determine and give effect to legislative intent. Idaho Cardiology Assocs. v. Idaho Physicians Network, 141 Idaho 223 (2005). When construing a statute, the Court "will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425 (1993).

With those statutory guidelines in mind, this Court is asked to consider the argument of the Alamar creditors that the Tort Claims Act applies to require the County to pass a property tax levy to pay the judgment in excess of $4 million as soon as is practicable. See docket 69, pp. 4, 26, 27.

In so doing, they ignore the "expressed intent of the legislature" that this only applies in situations where there is no insurance, and the mandatory limit is $500,000.00. Not one penny more is allowable; the court is required by the Tort Claims Act to reduce the judgment to that amount. Barringer v. State of Idaho, supra.

The Tort Claims Act, which now seems to be Alamar's new weapon of choice, must be construed so as to give effect to all of it. To that end, the County's proposed Plan does so:

A. It gives them the $500,000 cap virtually immediately;

B. It provides them the opportunity to seek to have the remainder of their claim allowed as unsecured (which this Court will have to decide in the context of claims litigation and plan confirmation); and,

C. If the appeal from the ICRMP litigation prevails, that award would go to Alamar up to the amount of their judgment.

The Plan, then, gives credence to the entirety of the Tort Claims Act. The County believed, and still believes, it had insurance for this claim. ICRMP and the Idaho District Court rejected that. However, this matter is on appeal and has been briefed.10

[10] The County's appeal brief is attached to the Declaration of Robert T. Wetherell. Please note that the elements of the Tort Claims Act are basically advocated therein.

5. *Should the petition be dismissed?* Boise County would certainly answer this with a resounding "NO." There are simply no grounds to warrant such action.

First of all, although the burden of proof is on the Debtor, the law has not changed from In re Columbia Falls, Montana to Valley Health Systems that the construction of § 109(c) is to be examined in the context of the purpose of chapter 9. As was held in Valley Health, "Section 109(c)'s eligibility requirements 'are to be construed broadly to provide access to relief in furtherance of the Code's underlying policies.' Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.), 143 F.3d 1381, 1384 (10th Cir. 1998). Chapter 9 affords a municipality temporary protection from debt collection efforts so that it may establish a plan of adjustment with its creditors. Id. at 1386; In re Addison Comm. Hosp. Auth., 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994)."

This is certainly warranted here. Although Alamar may protest vehemently that it was the County who was not negotiating in good faith, the contrary is true. To believe Alamar's story would require this Court to consider their written, avowed statements as fabrications in total. The Court would have to ignore the issuance of the Writ. The Court would, in short, have to advise the County that it could not protect itself from a definite and stated threat.

What Alamar believes is, instead, that Boise County needs to follow a plan of appeasement. They wish this case to be dismissed not because they intend to negotiate–the facts belie their protestations. They do so to avoid the automatic stay and the potential of a Plan. The words of Winston Churchill should answer that, and provide a framework for the consideration of Boise County's position when faced with Alamar's attack in this case: "I cannot subscribe to the idea that it might be possible to

dig ourselves in and make no preparations for anything else than passive defense. It is the theory of the turtle."

Valley Health Systems, City of Vallejo and the rest of the cases cited do not require that. Rather, the case law looks at the entirety of the situation from the concept of a reasonable belief and a good faith attempt to negotiate, while preserving that which is necessary for the municipality's existence and its required activities.

This Court should so hold.

Dated this 14th day of June, 2011.

LAW OFFICES OF D. BLAIR CLARK PLLC

by /s/
D. Blair Clark
Attorneys for Debtor

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2011, I served a copy hereof upon the following parties, as follows:

ECF:

Mark E Hindley on behalf of Creditor Alamar Ranch
mehindley@stoel.com

Bryan Albert Nickels on behalf of Creditor Fred Lawson
ban@hallfarley.com klc@hallfarley.com
Richard Wayne Sweney on behalf of Creditor Mountain West Bank
rws@lukins.com

Elizabeth M Taylor on behalf of Creditor Ada County
btaylor@adaweb.net jpeterson@adaweb.net

US Trustee
ustp.region18.bs.ecf@usdoj.gov

Wade L. Woodard on behalf of Creditor Alamar Ranch
wwoodard@bwslawgroup.com, jrose@bwslawgroup.com;tbanducci@bwslawgroup.com;
mream@bwslawgroup.com ksavell@bwslawgroup.com dparker@bwslawgroup.com

ELECTRONIC MAIL:

Andrew C. Brassey
Brassey Wetherell & Crawford
acb@brassey.net

Susan Buxton
Moore Smith Buxton & Turke
seb@msbtlaw.com

FIRST CLASS MAIL:

Recovery Management Systems Corporation for Capital Recovery
25 SE 2nd Avenue, Suite 1120
Miami, FL 33131

/s/
D. Blair Clark