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

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Plaintiffs, vs. IDAHO TRANSPORTATION DEPARTMENT, Defendant.	Case No. CV 40411 MOTION FOR DISQUALIFICATION

The Plaintiff, State of Idaho, Idaho Transportation Board, by and through its attorney of record, J. Tim Thomas, pursuant to Rule 40(d)(1), Idaho Rules of Civil Procedure, providing for automatic disqualification, hereby moves to disqualify Judge John Bradbury from acting further in this matter.

DATED this 17th day of August, 2010.

J. Tim Thomas
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT
FOR THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Plaintiffs, v. IDAHO TRANSPORTATION DEPARTMENT, Defendant.	No. CV-40411 **OPPOSITION TO MOTION FOR DISQUALIFICATION**

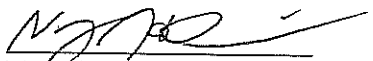
The Defendant is not entitled to mandatory disqualification in this case. The rule allowing disqualification without cause does not apply when the judge is "acting in an appellate capacity." I.R. Civ. P. 40(d)(1)(I)(i). A judge presiding over a petition for judicial review of agency action under the Idaho Administrative Procedure Act is "acting in an appellate capacity" and is therefore not subject to automatic disqualification. *Arthur v. Shoshone County*, 133 Idaho 854, 856-858, 993 P.2d 617, 619-621 (Idaho Ct. App. 2000).

As the Plaintiffs have previously explained, the provisions of the Idaho Administrative Procedure Act govern the Court's judicial review of this case. I.C. § 67-5270 *et seq.*; I. R. Civ. P. 84. It will consequently be decided based upon a review of the

record developed by the agency. I.C. § 67-5277; *In re Idaho Dept. of Water Resources Amended Final Order Creating*, 148 Idaho 200, 220 P.3d 318, 323 (Idaho 2009). Allowing automatic disqualification of a judge is ordinarily important at the trial level because, "it is within the province of trial judges to make factual findings and discretionary decisions that are subject to only deferential review on appeal." *Arthur*, 133 Idaho at 857, 993 P.2d at 630. In contrast, "the role and scope of authority of a judge conducting a judicial review under the APA is more analogous to that of an appellate court judge than that of a trial court judge." *Id.*

This case accordingly falls under the "appellate capacity" exception to Rule 40(d)(1) and the Court should deny the Defendant's Motion for Disqualification.

Respectfully submitted,



Natalie J. Havlina
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Plaintiffs, vs. IDAHO TRANSPORTATION DEPARTMENT, Defendant.	Case No. CV 40411 REPLY IN SUPPORT OF MOTION FOR DISQUALIFICATION

Idaho Transportation Department ("ITD") submits this Reply in response to Plaintiffs' Opposition to Motion to Disqualify ("Opposition") filed August 18, 2010.

I. INTRODUCTION

Plaintiffs oppose ITD's Motion for Disqualification pursuant to the exception contained in I.R.C.P. 40(d)(1)(I)(i). However, the exception only applies when the trial court (1) is conducting the judicial review of an agency action and (2) is not making any factual findings.

Plaintiffs fail to satisfy the first requirement. Plaintiffs' lawsuit is not seeking judicial review of an agency action. ITD has not yet issued the permit that is the subject of Plaintiffs' lawsuit. In fact, Plaintiffs obtained an ex parte TRO ("TRO") on April 17, 2010 which expressly prohibits ITD from issuing the permit, the very action that Plaintiffs are now asserting should be judicially reviewed. Accordingly, the trial court cannot judicially review an action (issuance of the permit) which has not occurred and is currently prohibited from occurring.

Plaintiffs fail to satisfy the second requirement for application of I.R.C.P. 40(d)(1)(I)(i), the absence of fact finding by the trial court. Plaintiffs have filed a lawsuit which introduces new factual issues and requires the trial court to engage in fact finding in order to grant the requested injunctive relief.

II. ARGUMENT

A. The Trial Court Is Not Sitting In An Appellate Capacity Regarding An Agency Action.

In *Arthur v. Shoshone County*, 133 Idaho 854, 856-858, 993 P.2d 617, 619-621 (Idaho Ct. App. 2000), the Court of Appeals found that the exception contained in I.R.C.P. 40(d)(1)(I)(i) could only apply to a trial court when the trial court was "acting in an appellate capacity," conducting a judicial review under the Idaho APA.

Contrary to their characterization, Plaintiffs lawsuit is not truly seeking judicial review of an agency action by ITD. ITD has not yet issued a permit allowing transportation of the equipment at issue up Highway 12. The TRO issued by this Court on August 17, 2010 specifically forbids ITD from taking the

final, reviewable action of issuing the permit. (August 17 TRO at 1) (ITD is "hereby restrained from issuing permits to ConocoPhillips . . .") Accordingly, there is not an agency action regarding which the trial court can properly sit in "an appellate capacity". Regardless of how Plaintiffs attempt to style it, Plaintiffs' lawsuit does not, in truth, seek judicial review of any past action by ITD. *Cf. Arthur*, 133 Idaho 854, 856-858. In reality, Plaintiffs seek to prevent a future action by ITD, the future issuance of a permit.

B. This Case Demands Fact Finding by the Trial Court.

The second requirement under I.R.C.P. 40(d)(1)(I)(i) is that the trial court cannot be engaged in fact finding. *See Arthur v. Shoshone County*, 133 Idaho 854, 853, 993 P.2d 617, 619 (Ct. App. 2000) ("The opportunity for bias to taint a judicial decision rendered under these constraints is substantially less than in other civil cases where the judge has authority to make findings, resolve evidentiary issues, determine the credibility of witnesses, and render a multitude of discretionary decisions.")

Here, Plaintiffs have introduced facts into the case through affidavits and through their Complaint. Plaintiffs sought, and obtained a TRO in this case based on the facts Plaintiffs presented. *See* I.R.C.P. 65(b) (A TRO "may be granted . . . only if (1) it clearly appears from specific facts . . . that irreparable injury . . . will occur . . ."). Further, in order to grant the preliminary injunction sought in this case, the trial court will be required to make additional factual findings. *See* I.R.C.P. 65(e). Plaintiffs cannot in good faith assert that the trial court here has not already made factual findings and cannnot deny that the trial court will soon be asked to make additional factual findings related to the

preliminary injunction Plaintiffs seek. In turn, the exception to disqualification does not apply.

III. CONCLUSION

Based on the foregoing, ITD requests that its Motion for Disqualification pursuant to I.R.C.P. 40(d)(1) be granted.

Dated this 18th day of August, 2010.

J. Tim Thomas
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this ~~17th~~ 18th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Plaintiffs, v. IDAHO TRANSPORTATION DEPARTMENT, Defendant.	No. CV40411 **PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY ON ITD'S MOTION FOR DISQUALIFICATION; AND PROPOSED SURREPLY** *Hearing Date and Time: August 19, 2010 at 10 AM (Telephonic)*

I. PLAINTIFFS SHOULD BE ALLOWED TO FILE A SURREPLY.

Late on Wednesday, August 18, 2010, the Idaho Transportation Department (IDT) filed a "Reply in Support of Motion For Disqualification" which argues – for the first time – that ITD "has not yet issued the permit that is the subject of Plaintiffs' lawsuit," and accordingly, "the trial court cannot judicially review an action (issuance of the permit) which has not occurred and is currently prohibited from occurring." *See* ITD Reply, p. 2.

Based on these assertions, ITD contends that its motion for disqualification without cause does not fall under the exception for a trial judge "when acting in an

appellate capacity" under Idaho Rule of Civil Procedure 40(d)(1)(I)(i), as cited by Plaintiffs in their Opposition To Motion For Disqualification (filed 8/17/10). *Id.*

These are new factual and legal assertions that ITD did not raise in its Motion For Disqualification. In the interest of fairness, the Court should permit Plaintiffs to address ITD's new arguments through this Surreply, in order to explain to the Court why ITD's factual and legal arguments are mistaken, as set forth below.

Accordingly, the Court should grant Plaintiffs leave to file this proposed Surreply in response to ITD's Motion For Disqualification.

II. BECAUSE THIS COURT IS SITTING IN AN APPELLATE CAPACITY UNDER THE IDAHO APA AND RULE 40(d), ITD'S MOTION FOR DISQUALIFICATION FAILS.

A. Plaintiff's Petition For Judicial Review Is Proper Under The APA.

Plaintiffs' Petition for Judicial Review states – on the first page – that the "Conoco shipments are expected to start as early as Wednesday, August 18, 2010, under a five-day permit that either has been issued, or imminently will be issued, by ITD." Petition, ¶ 1 (emphasis added). Plaintiffs further alleged that ITD's approval of the Conoco shipments is subject to judicial review and reversal under the Idaho APA for two separate reasons, based on ITD's violations of its own regulations. *See* Petition, ¶¶ 36-52 (First and Second Causes of Action).

Because the shipments would occur very quickly under the permit, Plaintiffs sought injunctive relief barring ITD from authorizing them until the Court could review the merits of these challenges. *See* Plaintiffs' Motion For Temporary Restraining Order and/or Preliminary Injunction, p. 1 (filed August 16, 2010) (requesting injunctive relief

"prohibiting the Idaho Transportation Department from authorizing ConocoPhillips to transport massive oil refining equipment up Highway 12").

In now asserting in its Reply Brief that "ITD has not yet issued the permit that is the subject of Plaintiffs' lawsuit," and hence supposedly there is no final action for judicial review under the APA, ITD is playing semantic games with the Court. ITD does not dispute that it did determine to approve the Conoco application for overlegal shipments; nor that it determined to authorize those shipments to begin on Wednesday, August 18th, under a five-day permit.

Indeed, on August 12th and 13th, ITD's employees told members of the public who called ITD to inquire about the Conoco loads that they would be moved on either August 18 or August 19. ITD's representatives were unable or unauthorized to tell the public the specific date on which the permit would be issued, but advised that it would be issued in the imminent future. Confirming this fact, after the Court issued the TRO on August 17th, ITD's Director of Communications Jeff Stratten told the media that ITD had been planning to issue the 5-day permit on that same day. *See* Russell, Betsy Z., "Idaho judge blocks huge truck shipments," *Lewiston Morning Tribune* (Aug. 17, 2010).

These facts show that judicial review is proper under the Idaho APA, to determine whether ITD acted arbitrarily, capriciously, and contrary to its own regulations in determining to approve the Conoco oversized shipments, under Plaintiffs' Petition for Judicial Review. ITD has made a final decision to approve those shipments, and hence Plaintiffs can seek review of that final decision under I.C. § 67-5270.

Moreover, even if ITD is correct that it had not actually issued the 5-day permit at the time Plaintiffs filed their Petition for Judicial Review, the APA expressly allows for judicial review under these circumstances, stating:

> "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy."

See I.C. § 67-5271(2) (emphasis added). The reviewing court applies the same standard of review whether it is reviewing a final or preliminary/intermediate agency action. *See* I.C. § 67-5279 (articulating a single standard for review under Idaho APA).

At a minimum, ITD here has unquestionably made a "preliminary" or "intermediate" decision to issue an overlegal permit to Conoco, which is subject to judicial review under the Idaho APA provisions above. ITD cannot shield itself from this Court's review now, simply because it played "hide the ball" with the public in refusing to say exactly when the 5-day permit would be issued.

B. The Court's Determination Whether To Issue Injunctive Relief Does Not Alter The Nature Of This Case As An Appellate Action.

Because Plaintiffs are seeking judicial review of ITD's approval of the Conoco shipments under the Idaho APA, as explained above, ITD is mistaken in moving to disqualify the presiding judge without cause under Rule 40(d)(1). As explained in Plaintiffs' Opposition To Motion For Disqualification, the exception to Rule 40(d)(1) for a "judge when acting in an appellate capacity" applies to judicial review of agency actions under the APA. *See* Rule 40(d)(1)(I)(i); *Arthur v. Shoshone County*, 133 Idaho 854, 856-58 (Ct. App. 2000).

ITD never acknowledged this exception in its Motion for Disqualification; and its Reply now misstates the scope of this exception by asserting that it only applies when the

court "is not making any factual findings," which it contends is the case here because because the Court will make "factual findings" in connection with resolving Plaintiffs' motion for injunctive relief.

ITD misunderstands the Court of Appeals' opinion in *Arthur v. Shoshone County*. In *Arthur*, the Court of Appeals squarely held that a district judge engaging in judicial review of agency action under the Idaho APA is sitting in an appellate capacity. *Arthur*, 133 Idaho at 858, 993 P.2d at 621. The *Arthur* court did not limit this holding to cases where "the court is not making any factual findings." Rather, the Court of Appeals considered the fact that a district court reviewing agency action defers to agency factual findings as one of several factors in reaching its conclusion. *See id.*, 133 Idaho at 856-857, 993 P.2d at 619-620 (discussing Supreme Court decisions that analyzed the role of the district court in reviewing agency action).

ITD's interpretation of Rule 40(d)(I)(i) is also inconsistent with the plain meaning of the rule. The interpretation of the law "begins with an examination of the [its] literal words." *Arthur*, 133 Idaho at 859, 993 P.2d at 622. Under Rule 40(d)(1)(I)(i), mandatory disqualification is unavailable in cases where the court is sitting in appellate capacity. This limitation is not premised on the complete absence of fact finding, and the rule does not exempt cases where injunctive relief is requested as ancillary to petitions for judicial review (as is the case here). Reading such an exception into Rule 40(d)(I)(i) would be inconsistent with the plain language of the statute.

Finally, ITD ignores the fact that appellate courts are authorized to – and routinely do – issue injunctive relief in connection with appellate review of lower court's decisions, so it cannot be the case that this Court's consideration of Plaintiffs' motion for injunctive

relief somehow changes the nature of the action. *See* Idaho Appellate Rules 13 & 13.1. Again, determining whether to issue injunctive relief in the course of appellate review does not entail the kind of factual determination on the merits that is addressed in Arthur; and confirms that the exception of Rule 40(d)(1)(I)(i) does apply here, since Plaintiffs seek judicial review from this Court sitting in an appellate capacity.

WHEREFORE, Plaintiffs respectfully pray that the Court deny ITD's motion for disqualification.

Dated: August 19, 2010

Respectfully submitted,

Natalie J. Havlina
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