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IN THE SUPREME COURT OF THE STATE OF IDAHO

LINWOOD LAUGHY, KAREN)
HENDRICKSON, and PETER GRUBB,)

Plaintiffs/Respondents,)

v.)

IDAHO TRANSPORTATION)
DEPARTMENT,)

Defendant,*)

CONOCOPHILLIPS COMPANY,)

Intervenor/Appellant)

Supreme Court No. 37985-2010
District Court No. CV 10-40411

**PLAINTIFF’S BRIEF IN
RESPONSE TO CONOCO’S
MOTION FOR EXPEDITED
HEARING**

Plaintiffs/Respondents Linwood Laughy *et al.* respectfully submit the following brief in response to the “Motion for Expedited Hearing Pursuant To Idaho Appellate Rule 44” submitted on August 26, 2010 by Intervenor/Appellant ConocoPhillips Company (“Conoco”):*

* Although Conoco’s motion identifies the Idaho Transportation Department (“ITD”) as “Defendant/Appellant” in the caption, to Plaintiffs’ knowledge ITD has not filed any notice of appeal in this matter.

INTRODUCTION

The Court should deny Conoco's motion to expedite the hearing in this appeal because even the super-expedited scheduling apparently sought by Conoco will not redress its stated concerns; and because Conoco has failed to demonstrate a compelling reason why this case should be elevated above the many other cases before this Court.

As explained below and in the accompanying Affidavit of Laird J. Lucas, Conoco's counsel represented to the district court last week that Conoco had to know "at the very latest" by Tuesday, August 24, 2010 whether its shipments could proceed, in light of construction work slated to resume imminently on the Arrow Bridge on Highway 12. Based on that representation, the district court and parties rapidly briefed and argued the case on its merits, resulting in Judge Bradbury's decision issued on August 24th – just as Conoco had requested.

Conoco's motion to expedite its appeal contravenes that representation by suggesting that different deadlines now apply – yet Conoco is exceedingly vague about the timeframe available for the Conoco shipments, saying only that "[g]iven ongoing construction projects on the Arrow Bridge in Lewiston and fast-approaching winter weather, ConocoPhillips has only a short window of time" to make the shipments, without specifying any deadline or even attempting to explain why the prior deadline asserted by Conoco supposedly now does not apply. *See* Conoco Motion, p. 2; Stindham Affidavit, ¶ 7. Because the parties and district court relied on Conoco's earlier representation as to the timing requirements of its shipments, it should not be allowed to argue differently before this Court in seeking an expedited hearing.

Moreover, while Conoco does not specify exactly what expedited treatment it seeks from this Court, its apparent suggestion that the Court should hear this case within 2-3 weeks, *see* Conoco Motion, p. 5, fails to recognize that even such super-expedited scheduling would not give Conoco the relief it seeks – since construction will have resumed on the Arrow Bridge, and the Conoco shipments will be unable to pass anyway. *See* Lucas Aff., ¶ 5-6 & Ex. 2.

Finally, it bears underscoring that Conoco’s allegations of some “emergency” are self-serving claims that do not justify expedited review, supplanting the many other cases pending before this Court. Conoco’s desire to expedite the appeal is based on its contention that it could suffer up to \$9 million in losses associated with the delay in replacing the coke drums at its Billings refinery, which continues to operate using the existing coke drums. *See* Conoco Motion, p. 5; Stidham Aff., Ex. B (attaching copy of Steven Steach affidavit). For the world’s third largest oil and gas company, which earned \$4.2 billion in the last quarter alone, such alleged losses are immaterial and insignificant, even if these untested allegations are true. *See* Lucas Aff., Ex. 3 (copy of Conoco press release announcing second quarter earnings).

Accordingly, because Conoco is now changing its story and has not established compelling reasons for elevating this case above the many others pending in this Court, its motion for expedited hearing should be denied.¹

¹ If expedited treatment is granted, then Plaintiffs respectfully request adequate time to prepare their response merits brief and accommodate their counsel’s scheduling needs, as discussed below and in the accompanying Lucas Affidavit.

STATEMENT OF RELEVANT FACTS

Conoco's motion for expedited hearing presents a one-sided view, evidently aimed at pre-arguing the merits of its case before this Court. To help the Court fully understand the facts and claims in this case, Plaintiffs are submitting their Petition for Judicial Review (Lucas Aff., Ex. 4) and affidavits filed in the district court (Lucas Aff., Exs. 5-9).

To recap those materials briefly, Plaintiffs Linwood Laughy, Karen "Borg" Hendrickson, and Peter Grubb are business owners and residents along Highway 12, who are deeply concerned about the ongoing efforts by the oil industry and Idaho Transportation Department to transform Highway 12 into a "high and wide" corridor for shipments of massive oil industry equipment from overseas manufacturers to distant inland locations. *See* Petition for Judicial Review (Lucas Aff., Ex. 4), ¶¶ 1-22.

With ITD's support, ExxonMobil – the world's largest oil company – has spent millions of dollars in the last two years quietly preparing Highway 12 for this "high and wide" corridor, including by moving or burying utility lines to allow the massive shipments to proceed from Lewiston, along the Clearwater and Lochsa Rivers, and up over the Lolo Pass into Montana. *Id.* Exxon reportedly plans to make over 200 shipments to the Alberta oil sands beginning later this year. *Id.*

But the first oil company attempting to use Highway 12 as a new "high and wide" corridor is Conoco, which proposes to transport Japanese-manufactured coke drums from the Port of Lewiston to replace existing coke drums at its Billings refinery. *Id.*, ¶¶ 23-30. Weighing well over a half million pounds, standing nearly three stories tall, and spanning two-thirds of a football field in length, the Conoco shipments will entirely block Highway

12 as they pass over the Arrow Bridge and then inch slowly up the Middle Fork Clearwater and Lochsa River canyon all the way to Lolo Pass; and all vehicle traffic will be required to wait 15 minutes or more, before being able to pass. *Id.*

In approving Conoco's application for an oversized permit to haul these loads, ITD violated its own regulations in multiple respects, as Plaintiffs alleged in their Petition for Judicial Review and successfully demonstrated before the district court. First, the regulations specifically limit oversized load permits to 10-minute delays – not the 15-minute delays allowed by ITD. *See* IDAPA 39.03.16.100.01. Second, the regulations require ITD to make a “reasonable determination” that oversized shipments are both feasible and necessary, and to place a “primary concern” on public convenience and safety – none of which ITD has done here. *See* IDAPA 39.03.09.100.

Indeed, ITD has failed to conduct any public hearing on the Conoco proposal, and it has repeatedly brushed off concerns voiced by Plaintiffs and many other members of the public about the harms that these massive oil shipments will cause to their business operations and personal lives. *See* Laughy, Hendrickson, Grubb, May and Caldwell Affidavits (Lucas Aff., Exhs. 5-9).

The Conoco loads are the largest shipments ever authorized by ITD on Highway 12; and will completely block the highway, preventing traffic from passing in either direction for at least fifteen (15) minutes.² These delays will seriously inconvenience local residents and visitors traveling Highway 12, and even threaten their health and well-being, as Plaintiffs' affidavits attest. *Id.*

² A photograph illustrating the massive size of these coke drums is attached as Exhibit 1 to the Lucas Affidavit.

Indeed, the Administrative Record confirms that ITD did not place a “primary concern” on public convenience or emergency medical and other local resident safety concerns in approving the Conoco permits, as required by Section 9 of the ITD regulations. *See* IDAPA § 39.03.09.100.01. And as Judge Bradbury rightly concluded, ITD did not make a “reasonable determination of the necessity and feasibility of the proposed movement,” as required by IDAPA § 39.03.09.100.02.

Based on the Administrative Record, Judge Bradbury thus agreed with Plaintiffs that ITD violated its own regulations, and acted arbitrarily and capriciously, in approving the Conoco shipments; and he reversed and remanded the permits in question. *See* Stidham Aff., Ex. A (copy of Bradbury Decision).

ARGUMENT

I. THE COURT SHOULD DENY THE MOTION BASED ON CONOCO’S PRIOR REPRESENTATIONS ABOUT ITS TIMING REQUIREMENTS, WHICH WILL NOT BE MET BY THE REQUESTED EXPEDITED HEARING.

To prevent the irreparable harms threatened by the Conoco shipments to the Plaintiffs and to the public, as identified in Plaintiffs’ affidavits and Petition for Judicial Review, Plaintiffs filed this case on Monday, August 16th and sought issuance of temporary restraining order to prevent ITD from authorizing the Conoco shipments from beginning on Wednesday, August 18th, as ITD planned to allow.

Notably, the Conoco coke drums had been shipped to the Port of Lewiston back in May, 2010 – indicating that ITD had already determined to approve the overlegal permits sought by Conoco to transport the massive equipment up Highway 12 well before then. Although Conoco intended to make the shipments shortly after the equipment arrived in Lewiston, they were delayed due to construction on the Arrow Bridge on

Highway 12, which dragged out during the summer. Public statements by ITD, as well as media reports, indicated that ITD would allow the shipments to begin on August 18th, after one lane of the bridge had been reconstructed and before construction started on the other lane. *See* Petition for Judicial Review, ¶¶ 23-30.

Judge Bradbury granted Plaintiffs' motion for immediate relief and issued a TRO on August 17th; and set a preliminary injunction hearing for Friday, August 20th. However, on a telephonic hearing with the Court conducted on Thursday, August 19th, counsel for Conoco – which Judge Bradbury allowed to intervene during that hearing – advised the Court that Conoco sought a ruling on the merits of Plaintiffs' claims as soon as possible; and specifically stated that a ruling was needed by Monday, August 23rd or “at the very latest” on Tuesday, August 24th, in order to allow the Conoco shipments to proceed before the Arrow Bridge construction resumed. *See* Lucas Aff., ¶¶ 3-4.

In response to Conoco's representations about its timing needs, the parties and district court agreed to reschedule the hearing from Friday to Monday, August 23rd; ITD filed the Administrative Record, and both ITD and Conoco filed response briefs; and Plaintiffs filed a reply brief, all addressing the merits of Plaintiffs' claims. *Id.*, ¶¶ 5-6. At the hearing on Monday, August 23rd, with agreement of all parties, the district court then proceeded to take argument on the merits; and rendered its decision on Tuesday, August 24th – just as Conoco had requested. *Id.*

Consistent with Conoco's stated timing needs, media reports have indicated that construction is set to resume on the Arrow Bridge on or about Monday, August 30th. *See* Lucas Aff., ¶ 7 & Ex. 2.

However, Conoco's motion to expedite before this Court appears inconsistent with the representations Conoco previously made to the district court about the construction schedule and its timing needs, on which the parties and district court relied. Indeed, Conoco's motion and supporting affidavit of counsel avoid mentioning any deadline regarding the Arrow Bridge construction at all, stating vaguely instead that "there is a short window of time to get across the bridge before construction resumes." *See* Conoco Motion, p. 5; Stidham Aff., ¶ 7.

Given that Arrow Bridge construction is actually set to resume next week, even super-expedited briefing and hearing by this Court will not afford Conoco the relief it seeks. The timing is such that the Court certainly could not render a decision before the resumed construction will prevent the Conoco shipments from occurring, which will take several weeks; and after that, according to Conoco's own statements to this Court, winter weather will prevent shipments from occurring until next spring. *See* Stidham Aff., ¶ 7.

In short, the timing constraints of this litigation mean that the Court will have until next spring to resolve the merits of Conoco's appeal, due largely to events beyond any party's control (namely, the lengthy construction of the Arrow Bridge). The Court can certainly ensure that briefing and hearing are conducted in this appeal in a sufficiently timely manner to allow issuance of a decision by next spring. But the super-expedited treatment sought by Conoco is unnecessary and unavailing under the circumstances; and hence its motion should be denied.

II. CONOCO HAS NOT ESTABLISHED GROUNDS JUSTIFYING THE EXPEDITED HEARING IT SEEKS.

Aside from these considerations of timing, the Court should still deny Conoco's motion for expedited briefing and scheduling, because the facts presented by Conoco do

not establish sufficient grounds to warrant elevating this appeal above all the others pending before this Court.

As Conoco admits in its motion and supporting Affidavit of Steven Steach (Stidham Aff., Ex. B), the shipments in question are replacements for existing coke drums that Conoco continues to use at the Billings refinery. Conoco evidently has planned these replacements for many months; and even shipped them to Lewiston in May on the expectation – gamble, one might say – that ITD would grant it the overlegal permits necessary to ship them up Highway 12 and into Montana.

Because of the Arrow Bridge construction, Conoco could not ship the coke drums shortly after their arrival, as it had planned. While it would now prefer to get them shipped to Billings before the winter weather sets in, Conoco makes no assertion whatsoever that public health or safety – or even the continued refining operations at the Billings plant – would suffer in any material way if it cannot do so.

Instead, Conoco asserts that delays in replacing the coke drums on its desired schedule would supposedly cost it \$9 million, as identified in the Steach Affidavit. While this is certainly a healthy sum of money to the average citizen, it represents an immaterially small amount of money to Conoco. The world's third largest oil company, Conoco recently reported earning profits of \$4.2 billion in the second quarter of 2010 alone. *See* Lucas Aff., ¶ 8 & Ex. 3 (copy of Conoco's press report on these earnings).

In contrast to Conoco's monetary concerns, Plaintiffs and the public face serious irreparable harm, if Conoco's shipments are allowed to proceed in violation of law. These include health and safety risks to the public that uses Highway 12 to access emergency medical care, as well as great inconvenience to the many people who travel

Highway 12 for work and recreation. *See* Lucas Aff., Exs. 5-9 (attaching Plaintiffs' affidavits). Moreover, as Judge Bradbury correctly noted in his decision, the Administrative Record underscores the real risk of an accident that could block Highway 12 for days or weeks, and possibly result in massive equipment falling into the Lochsa River. *See* Stidham Aff., Ex A (copy of Bradbury Decision).

Beyond these harms is the further risk that the Clearwater-Lochsa river corridor and Highway 12 will become irreparably tainted in the eyes of the traveling public, should the Conoco shipments be allowed as the first massive loads up the "high and wide" corridor envisioned by the oil industry and ITD. The only economic growth engine in this part of Idaho is tourism and recreation; and Plaintiffs and the public will suffer if that source of revenue is harmed because the public views Highway 12 as a congested industrial transportation corridor, with lengthy delays, instead of the scenic and recreation destination it currently is. *Id.*

Where this Court has authorized expedited appeals in the past, the cases have typically involved much more serious injury and public interests than the minor economic losses to a gigantic corporation that Conoco asserts here. *See, e.g. Gibbons v. Cenarrusa*, 140 Idaho 316, 92 P.3d 1063 (2002) (original jurisdiction case challenging Term Limits Act initiative, with expedited proceedings ordered to allow decision before election was held); *In Re Doe*, 147 Idaho 243, 207 P.3d 974 (2009) (granting expedited appeal in case where juvenile was charged with first-degree murder and state sought to prosecute defendant as an adult); *In Re Termination Of Parent-Child Relationship Of Jane Doe*, 146 Idaho 759, 203 P.3d 689 (2009) (expedited appeal of magistrate order terminating parent-child relationship); *In Re Validity Of Power Sales Agreement, City of Idaho Falls*

v. Fuhriman, No. 36721, 2010 Opinion No. 84 (July 8, 2010) (expedited appeal in challenge by city mayor to municipality power contract with BPA, challenged as violating constitutional provisions).

Because Conoco's alleged harms do not arise to these levels, and instead its allegations of potential economic loss do not differ materially from the many other cases involving economic interests before this Court, the Court should not set the precedent of expediting this appeal over its pending caseload.

III. IF EXPEDITED HEARING IS ORDERED, PLAINTIFFS' COUNSEL SHOULD BE GIVEN ADEQUATE TIME TO BRIEF THE MERITS.

Finally, if the Court is inclined to grant expedited hearing in this matter, it should set the briefing schedule and hearing date so as to allow adequate time for Plaintiffs' counsel to brief the merits in response to Conoco's opening merits brief.

At the very minimum, the Court should consider the scheduling limitations on the undersigned counsel, who is the supervising attorney in this matter and who will be out of the office and unavailable for the period August 30-September 8. *See Lucas Aff.*, ¶¶ 11-12. To ensure that Mr. Lucas can adequately participate in preparing Plaintiffs' merits response brief, the Court is respectfully requested to set the briefing deadline for Plaintiffs' brief on or after September 13, 2010, at the very minimum. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny Conoco's motion to expedite the hearing in this matter. At a minimum, if the Court does expedite, Plaintiffs request that their merits response brief be due on or after September 13th.

Dated: August 27, 2010

Respectfully submitted,

Laurence ("Laird") J. Lucas
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, I caused the foregoing Response To Motion To Expedite, and the accompanying Affidavit of Laird J. Lucas (plus all exhibits thereto) to be served via hand-delivery on the counsel named below:

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