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BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Proposed Intervenors, vs. CONOCOPHILLIPS AND EMMERT INTERNATIONAL, Applicants, and IDAHO TRANSPORTATION DEPARTMENT, Respondent.	Case No. _____ **RESPONSE TO PETITION TO INTERVENE IN THE CONTESTED CASE REGARDING THE COKE DRUM TRANSPORT PROJECT**

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Applicant and real party in interest ConocoPhillips Company ("ConocoPhillips"), by and through its counsel of record Holland & Hart LLP, submits this Response to the Petition to Intervene in the Contested Case Regarding the Coke Drum Project ("Petition").

I. INTRODUCTION

The Petition should be denied because there are no ongoing proceedings into which the Proposed Intervenors can intervene. The Idaho Transportation Department ("ITD") already took final agency action, accepted the negotiated transportation plan ("Transportation Plan"), and issued the permits. Even if there were ongoing proceedings, the Petition should be denied for three additional reasons: *First*, Proposed Intervenors have not shown a direct and substantial interest in the proceedings on the four permits. Instead, the Proposed Intervenors assert interests held by absent third parties and allege speculative interests based upon assumed or misrepresented facts. *Second*, intervention would unduly broaden the issues. The Proposed Intervenors' expressly stated political agenda is about opposition to "Big Oil." Rather than only address the four discrete shipments, the Proposed Intervenors seek a broad referendum on whether other shipments from Imperial Oil/Exxon Mobil (one of CononcoPhillips' competitors) should be allowed and on the appropriate commercial use of the Port of Lewiston. *Finally*, Proposed Intervenors fail to satisfy procedural requirements governing intervention.

II. PROCEDURAL HISTORY

On August 16, 2010, Proposed Intervenors filed a Petition for Review and Request for Immediate Injunctive Relief in the Second Judicial District of the state of

Idaho, the Honorable John T. Bradbury presiding. Judge Bradbury entered a temporary restraining order preventing ITD from issuing the permits. On August 19, 2010, Judge Bradbury dissolved the TRO. On August 20, 2010, ITD issued a Memorandum of Decision and issued the permits to Emmert International ("Emmert") and ConocoPhillips. On August 23, 2010, Judge Bradbury held a hearing on the merits of the permits and thereafter, on August 24, 2010, wrongly entered an order invalidating the permits and remanding for further proceedings.

Given the time critical nature of the needed repairs at ConocoPhillips' refinery in Billings, Montana ("Billings Refinery") and the huge damages that would be caused by further delay, ConocoPhillips requested and received an expedited hearing before the Idaho Supreme Court. On November 1, 2010, the Idaho Supreme Court issued a decision dismissing the Proposed Intervenors' action for lack of jurisdiction. *Laughy, et. al v. Idaho Dep't of Transp., et al.*, Nos. 27985, 37994, 2010 WL 4297807 (Idaho Nov. 1, 2010). Explaining that the litigation gamesmanship employed by the Proposed Intervenors was improper, the Idaho Supreme Court held that the law "prevents anyone from doing what the [Proposed Intervenors] did here: sit out agency proceedings, show up in court just as a decision was made, and force the agency to litigate the matter." *Id.* at *4. This decision reinstated the permits that Judge Bradbury previously invalidated.

On November 2, 2010, months after ITD issued the permits, the Proposed Intervenors filed the Petition. The Proposed Intervenors seek to make the same arguments to ITD regarding the Idaho Rules of Administrative Procedure ("IDAPA") that ITD rejected and opposed at the district court level and that ITD opposed before the Idaho Supreme Court.

III. FACTUAL BACKGROUND

A. UNITED STATES HIGHWAYS SERVE INTERSTATE COMMERCE.

Highways of the United States, like U.S. Highway 12 ("U.S. 12"), were constructed with federal funds and state monies to facilitate interstate commerce. The Proposed Intervenors chose to move near or locate businesses near U.S. 12 and wrongly assert that the use of U.S. 12 for commercial purposes has been or should be restricted. While U.S. 12 may be part of the National Scenic Byways Program,[1] this program mandates that the designated roads continue to accommodate the basic transportation functions for different modes of vehicle travel and commerce. *See, e.g.*, 60 Fed. Reg. 26759, 26761 (May 18, 1995) (FHWA interim policy for management of highways designated under National Scenic Byways Program). Thus, the National Scenic Byways Program does not preclude or regulate the use of U.S. 12 for commerce and transportation purposes, including ConocoPhillips' shipments permitted by ITD here.

B. CONOCOPHILLIPS' REFINERY PROVIDES A SIGNIFICANT PERCENTAGE OF IDAHO'S GASOLINE, JOBS FOR THE REGION, AND REQUIRES THE COKE DRUMS TO REPAIR ITS FACILITIES.

Throughout this litigation, in pleadings and in their unrelenting efforts to generate media attention, the Proposed Intervenors have sought to mislead Idahoans into believing that the Billings Refinery is not relevant to Idaho. In truth, the Billings Refinery is a direct and vital part of Idaho's economy. Affidavit of Steven Steach dated November 8, 2010 ("Steach Aff.") ¶¶ 3, 6. For example, in 2009, the Billings Refinery provided Idaho with more than 7% of its gasoline. *Id.* ¶ 3. Specifically, in 2009, the

[1] In 2005, the Federal Highway Administration ("FHWA") of the U.S. Department of Transportation designated the route as an "All-American Road." *See* www.bywaysonline.org/inventory/byways/2043.

Billings Refinery provided Idaho with 65,355,000 gallons of motor fuel, 34,515,000 gallons of distillate, and 223,000 gallons of AvGas. *Id.* The total of gross sales for products from the Billings Refinery in Idaho exceeded $275,537,509 in 2009. *Id.* ¶ 4. By providing a ready supply of fuel from a bordering state, the Billings Refinery adds supply to the Idaho market, reducing the cost that Idahoans pay at the pump. *Id.* ¶ 5.

The Billings Refinery directly provides jobs for more than 400 employees and contractors. *Id.* ¶ 2. The men and women working at the Billings Refinery play an important role in helping reduce the United States' dependence on foreign oil. *Id.* Moreover, ConocoPhillips also supports 100 wholesale operators in Idaho. *Id.* ¶ 6. ConocoPhillips' activities in Idaho generate several hundreds of thousands of dollars in tax payments to Idaho. *Id.*

ConocoPhillips needs to replace two aging coke drums at the Billings Refinery. *Id.* ¶¶ 3,7. ConocoPhillips hired Emmert, a leading transporter with over forty years of experience safely hauling large loads to bring the replacement drums to the Billings Refinery for the needed repairs. *Id.* ¶¶ 7-9. These drums are intended to replace the drums currently in use at the Billings Refinery and are critical to the continued long-term safe, reliable, uninterrupted operation of that refinery. *Id.* The repair project will result in the employment of an additional 1,700 people through contracted firms. *Id.* ¶ 10.

C. THE PERMITS ARE BASED UPON A TRAVEL PLAN THAT PRIORITIZES SAFETY AND MINIMIZES INCONVENIENCE TO THE TRAVELING PUBLIC.

In the business for over forty years, Emmert is a transportation company that specializes in hauling large loads. ITD00756-68.[2] Since 2007, Emmert engaged in extensive engineering and long range planning to ensure the drums will be transported safely and successfully from Lewiston to Billings. ITD00626, 01268.

During its review of the proposed transport of the coke drums to the Billings Refinery, Emmert examined the feasibility and viability of transport along U.S. 12 to the Montana border. ITD00629. Emmert performed or hired others to perform numerous detailed field surveys of the route. *See, e.g.*, ITD00029, 00042, 00161-256, 00626, 00629, 00744.

This review process involved extensive back and forth between Emmert and ITD. Emmert drafted and submitted a detailed transportation plan to ITD on four occasions from September 2009 through July 2010. *See* ITD00001, 00317, 00623, 00674. The July 2010 version of the transportation plan reflects three years of effort and careful planning. *See, e.g.*, ITD00626, 01268. Each transport will include five pilot car escorts, two state police escorts, and two sign boards. ITD00112-115, 00270-273; *see also* the Appendix to ConocoPhillips' Opening Brief to the Idaho Supreme Court, attached as Exhibit A to the Stidham Affidavit. All parties involved will be in direct communication throughout the transport through use of Global Positioning Systems ("GPS"), satellite phones, and radios. ITD00114-15. Also, although not required by

[2] References to documents with an ITD prefix are found in the administrative record, previously prepared and compiled in this closed informal proceeding. *See* Ex. C to the Affidavit of Erik F. Stidham dated November 9, 2010 ("Stidham Aff.").

the Transportation Plan, Emmert has taken the additional step of providing an ambulance and paramedic to travel with the loads. Affidavit of Terry M. Emmert dated November 9, 2010 ("Emmert Aff.") ¶ 7.

Travel is limited to between 10:00 p.m. and 5:30 a.m. ITD2290, 2300, 2310, 2319. During each leg of the trip, the transport will pull off the road at regular intervals to allow passage by other road users. ITD00114. Emmert identified one hundred and two (102) primary and secondary "pull offs" where traffic can pass the load along the 172.5 mile route from Lewiston to the Montana border. ITD00289-95. Emmert then broke the trip down into seventy-eight individual segments between primary pull offs, each of which was measured for travel distance and time. *Id.* Of the seventy-eight segments, only eleven segments are projected to take more than ten minutes and none are projected to take more than fifteen minutes. *Id.* Of those eleven segments, four segments have secondary pull offs between the primary pull offs, and three segments are partially or entirely three or more lanes wide. *Id.*

There will be thirty-nine flagger stations spread at regular intervals along the route. *Id.* The flaggers will be in direct communication with the remainder of the personnel and the load throughout the trip and will provide advanced warning of an approaching emergency, including cases in which a person needing emergency medical treatment is traveling in non-emergency vehicle, should one arise. ITD00114-15.

On the first leg of the trip, during which the load will move from Lewiston to Orofino, no segments are projected to exceed ten minutes. ITD00290. For the second leg of the trip, during which the transport will travel from Orofino to Kooskia, only one segment is projected to take more than ten minutes. ITD00291. That segment is just

outside of Orofino and is three lanes wide for the entire segment, allowing almost immediate passage in an emergency. *Id.* There will be eleven flagger stations at regular intervals along the route. *Id.* On the third leg of the trip, the load will travel from Kooskia to milepost 127, there is only one segment of this leg of the route that is projected to take over ten minutes and does not have a secondary pull off. *Id.* at ITD00291-292, 00295. After the third day of the trip, all of the loads will be past the property of the Proposed Intervenors.

D. THE TRANSPORTATION PLAN MAKES SAFETY THE HIGHEST PRIORITY.

"Emmert International's commitment to safety is the benchmark of this plan." ITD00352. Emmert identified risks associated with the transport of the coke drums and went to exceptional lengths to minimize them. *See, e.g.*, ITD00042. To mitigate the risks, the "road has been subjected to detailed and extensive design checks based on the construction plans supported by condition surveys;" "[t]he structural integrity of the loads . . . have been rigorously checked by competent, licensed engineers . . .; [and the] transporters to be used for the operation have [been] the subject of extensive design checks" and "are regularly inspected for any structural defects before and during the actual transports." ITD00043.

The coke drums will be carried approximately eight inches from the road resulting in "a very high stability and also minimize[ing] any potential for the load to overturn as it will contact the road first." *Id.* Further minimizing any risk, the "systems are designed so that any hydraulic suspension failures will not endanger the load and the pneumatic brake systems are all fail safe." *Id.* "A large degree of redundancy is also built into the system" to further ensure the safe and successful

transport of the drums. *Id.* For example, "[e]very axle in the system has brakes fitted to ensure rapid and controlled braking." *Id.* For another example, the "load will be controlled by 2 trucks each of which has the capacity to move the load transporter on its own." *Id.*

E. ITD Required Enhanced Safety Measures in the Transportation Plan.

Throughout the planning and permit application process, ITD stressed to Emmert that its primary concern was to "minimize inconvenience and maximize safety to [Idaho] motorists." *See, e.g.*, ITD00619. ITD satisfied this objective by requiring Emmert to revise the transportation plan on multiple occasions. The scope of these transportation plans illustrates the significant engineering and planning invested by Emmert and ITD. *See, e.g.*, ITD00001-00729. On numerous occasions, ITD asked Emmert for more information, improvements and changes to the proposed plans. *See, e.g.*, ITD00300-305, 00317, 00619-622. As late as July 2010, ITD posed specific and direct questions to Emmert about numerous aspects of the shipments. *See, e.g.*, ITD00306-308, 319.

As a result of the multi-year process, and after concluding that the Transportation Plan satisfied its criteria and adequately protected the health and safety of the public, ITD issued the Memorandum of Decision and the permits on August 20, 2010. ITD02290-2327. The permits were effective when issued and allowed Emmert to commence transport, effective immediately. *Id.*

F. The Proposed Intervenors Rely on Three Deficient Affidavits in Support of the Petition.

The Proposed Intervenors submitted three affidavits in support of their Petition to Intervene. *See* Affidavit Linwood Laughy dated August 16, 2010 ("Laughy Aff.");

Affidavit of Karen Hendrickson dated August 16, 2010 ("Hendrickson Aff."); Affidavit of Peter Grubb, dated August 15, 2010 ("Grubb Aff."). As discussed in Section IV.B below, these affidavits are speculative, conclusory, and assume facts that are not supported by the record. The affidavits do not support a direct and substantial interest necessary for intervention into already completed proceedings. The already decided proceeding was limited to the determination of four permits. Proposed Intervenors' attempts to use this terminated proceeding as a forum to challenge the actions of other nonparties should be rejected.

G. ConocoPhillips Has Suffered Millions in Damages and Months of Delay.

ConocoPhillips has already suffered in excess of two million dollars in losses as result of the Proposed Intervenors' litigation. Steach Aff. ¶ 11. The transportation of the coke drums has already been delayed by months. Had the Proposed Intervenors not sued in August 2010, the shipments would already be in Billings to allow the repair of the Billings Refinery to commence. ITD02290-2327. If the Proposed Intervenors are allowed to reopen proceedings, ConocoPhillips likely will suffer damages on the order of tens of millions of dollars. Steach Aff. ¶ 12.

IV. ARGUMENT

The Petition to Intervene can and should be rejected for the sole reason that Proposed Intervenors filed the Petition *after* ITD arrived at a final agency action and issued the four permits. Even if the Proposed Intervenors filed the Petition before ITD issued the permits, which they did not, the Petition should be denied because: (1) Proposed Intervenors fail to establish a "direct" or "substantial" interest in the proceedings on the four permits; (2) granting the Petition would unduly broaden the

issues; and (3) the Petition is procedurally lacking under the Attorney General's Rules, which control proceedings before ITD. *See* Idaho Code § 67-5206(5); IDAPA 30.03.11.003; *Laughy*, 2010 WL 4297807, *5.

A. PROPOSED INTERVENORS CANNOT INTERVENE AFTER ISSUANCE OF THE PERMITS, A FINAL AGENCY ACTION.

ITD issued the overlegal permits on August 20, 2010, following years of negotiation over a detailed transportation plan to maximize safety and minimize potential inconvenience to the public. The issuance of the permits was a final agency action by ITD. Idaho Code § 67-5241(d). The Proposed Intervenors chose not to formally participate in the administrative process. They failed to request leave to intervene before ITD took its final agency action and issued the permits. The Petition can and should be denied for this reason alone.

1. ITD Resolved This Contested Case Through Informal Proceedings Concluding in a Final Agency Action When it Issued the Permits.

ITD resolved this contested case by negotiation and agreed settlement.[3] The Idaho Administrative Procedure Act ("IAPA") expressly encourages informal settlement of contested cases. Idaho Code § 67-5241(1)(c). To that end, the IAPA states: "Disposition of a contested case ***as provided in this section [Section 67-5241] is a final agency action***." Idaho Code § 67-5241(d) (emphasis added). Section 67-5241 of the IAPA specifically provides for "informal disposition . . . of any contested case by

[3] The question of whether the interaction between ITD and Emmert/ConocoPhillips was a contested case is beyond dispute. *See Laughy*, 2010 WL 4297807, at *4. ("This was a contested case even though ITD followed informal procedures because the IAPA both authorizes and expressly encourages state agencies to resolve issues informally.").

negotiation, stipulation, agreed settlement, or consent order." Idaho Code § 67-5241(1)(c).

"ConocoPhillips and its shipping company, Emmert International, worked with ITD for over a year to develop a detailed transportation plan to move the drums." *Laughy*, 2010 WL 4297807, at *1. Preparations for the negotiation began in 2007 ITD00626, 01268. This process included numerous versions of the Transportation Plan submitted by Emmert/ConocoPhillips to ITD. *See* ITD00001, 00317, 00623, 00674. When Emmert/ConocoPhillips submitted revised plans in response to ITD's comments or requests, ITD reviewed and analyzed the Plan for compliance with the pertinent statutory and regulatory requirements. *See, e.g.*, ITD00300-305, 00317, 00619-22. In short, ITD and Emmert/ConocoPhillips engaged in significant and important back-and-forth communications to ensure that the shipments met the relevant statutory and regulatory requirements, maximized safety, and minimized inconvenience to the public.

After years of these negotiations, ITD concluded, and Emmert/ConocoPhillips agreed, that the Transportation Plan met the relevant statutory and regulatory requirements. ITD then issued the permits and the Memorandum of Decision. *See* ITD02290-02327; ITD02328-2334. The finalized Transportation Plan, permits, and Memorandum of Decision illustrate that ITD and Emmert/ConocoPhillips reached an agreement regarding the shipments.

As a matter of law and the plain language of the IAPA, the completion of those negotiations and the agreement resulted in a final agency action. Idaho Code § 67-5241(4). The present attempt to intervene in a contested case that ended in a final agency action fails for there is nothing left in which to intervene.

2. NO FINAL ORDER IS REQUIRED TO CREATE A FINAL AGENCY ACTION.

Proposed Intervenors suggest the administrative process is ongoing in this case because the Idaho Supreme Court held that no "final order" has been issued by ITD. *See* Petition at ¶ 19. This suggestion is contrary to the plain language of the IAPA.

Section 67-5241(4) contains no requirement that ITD issue a "final order" for the informal disposition to become a final agency action. Just as "no statute or rule makes formal proceedings a prerequisite to a contested case," *Laughy*, 2010 WL 4297807, at *8, no statute or rule makes a "final order" a prerequisite to an informal disposition of a contested case becoming a final agency action. Instead, the sole statute on point, Section 67-5241(4), requires only that the disposition of the contested case be achieved "as provided in this section," that is, "by negotiation, stipulation, agreed settlement, or consent order," Idaho Code § 67-5241(1)(c). *Id.* Whether a "final order" was issued is irrelevant as to whether this contested case became a final agency action.

3. ALLOWING INTERVENTION AFTER A FINAL AGENCY ACTION WILL UNDERMINE THE EXPRESS POLICY OF THE IAPA AND EVISCERATE THE ADMINISTRATIVE PROCESS IN GENERAL.

Section 67-5241 of the IAPA "represents a conscious legislative effort to 'encourage informal dispute resolution' related to all kinds of agency action."[4] *Laughy*,

[4] The significance of the Idaho Legislature's conscious legislative effort to encourage informal dispute resolution is amplified by the fact that while many states have similar statutes allowing for informal disposition by negotiation, agreed settlement, and consent order, the IAPA is apparently the only one containing a specific statutory statement that such disposition is a "final agency action." *See, e.g.*, Fla. Stat. § 120.57 (4) ("Informal Disposition—Unless precluded by law, informal disposition of any proceeding may be made of any proceeding by stipulation, agreed settlement, or consent order); Ha. Rev. State § 91-9(d) (essentially the same); La. Stat. Ann. § 49:955(d) (same); Nev. Rev. Stat. § 233B.121(5) (same); Or. Rev. Stat. § 183.417(3) (same); Wyo. Stat. Ann § 16-3-107(n) (same).

2010 WL 4297807, at *4 (citing Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 280 (1993); Act of April 8, 1992, ch. 263, § 25, 1992 Idaho Sess. Laws 783, 802 (adding Idaho Code § 67-5241)); *see also* IDAPA 04.11.01.101 ("Statute authorizes and these rules encourage the use [of] informal proceedings to settle or determine contested cases.").

That conscious legislative effort will be eliminated from the IAPA if Proposed Intervenors are afforded the remedy they seek—intervention and a formal contested case after the matter has been resolved. *See* Petition at ¶ 34. A decision allowing intervention in this case will set a very public precedent that will *discourage* agencies and private entities alike from engaging in informal dispute resolution proceedings because such proceedings will be shown to never truly reach resolution. After-the-fact attacks, as happened here, should be rejected.

Such a precedent "would place a crushing burden on state agencies if anyone supposedly aggrieved by an agency action could become a 'participant' by commenting on a permit application,[5] then drag the agency into court and force it to hold formal hearings after making its decision." *Laughy*, 2010 WL 4297807, at *10. The result would be to "eviscerate the administrative process and allow anyone to unfairly prevent an applicant from receiving a license from a state agency." *Id.* This is particularly significant given that "ITD handles roughly 28,000 overlegal permits per year." *Id.*

[5] That is exactly what happened here. *See* the Petition at ¶ 32 ("Proposed Intervenors participated in ITD's informal proceeding concerning the Coke Drum Transport Project by submitting numerous comments and attending public meetings.").

The Idaho Supreme Court identified Proposed Intervenors' conduct as "sit out the agency proceedings, show up in court just as a decision is made, and force the agency to litigate the matter." *Id.* Rewarding such conduct by granting the Petition to Intervene would set an undesirable and unworkable precedent and would remove the "conscious legislative effort to 'encourage informal dispute resolution'" from the IAPA. *Id.* at *4. The Petition to Intervene should be rejected to avoid this undesirable result.

4. Proposed Intervenors Chose Not to Intervene Before the Agency Action Became Final in This Case.

Proposed Intervenors suggest that prior to the Supreme Court's November 1, 2010 decision the "appropriate manner and forum for raising their concerns" had not been "identified." Petition at ¶ 32. They take the untenable position that they "have taken prompt action to become parties to the contested case." *See id.* While the Supreme Court described the procedures Proposed Intervenors could have followed to become parties in this contested case before it became a final agency action, those procedures were put in place by the Idaho Legislature in 1993 when the IAPA became law.

Ultimately, Proposed Intervenors have, as one court put it, foregone their point of entry into the administrative process. *See Florida Med. Ctr. v. Dep't of Health and Rehab. Servs.*, 484 So.2d 1292, 1295 (Fla. Ct. App. 1986) (noting that where proposed intervenors fail to avail "themselves of a clear point of entry provided to them by the administrative process, they must be considered to have waived their rights to such hearing."). As discussed above, Proposed Intevenors were aware of the issues that they now assert as the basis for their position to intervene long before ITD took final agency action.

Proposed Intervenors had notice of the informal proceedings, their current counsel was aware of the proceedings at that time, and they chose not to intervene at that point—the "clear point of entry provided to them by the administrative process." *See Florida Med. Ctr.*, 484 So.2d at 1295. They had the opportunity via the IAPA and Attorney General Rules to intervene in this case but chose not to do so. The Petition to Intervene should be denied because allowing intervention now will reward their inaction and cause further delay. For this reason, the Petition should be denied. IDAPA 04.11.01.304 ("Defective, insufficient or late pleadings may be returned or dismissed.").

5. The Dates on the Permit Do Not Alter the Fact that ITD Took "Final Agency Action."

Proposed Intervenors appear to argue that they can intervene and force formal proceedings because the "overlegal permits expired by their own terms on August 31, 2010." Petition at ¶ 16. But Proposed Intervenors neglect to mention that *they* caused the expiration by belatedly contesting the permits. And when they did finally show up to formally contest the permits, the Idaho Supreme Court held that it did not have jurisdiction to consider Proposed Intervenors' petition for review.

The fact that the original permit date windows have now passed should not open the door to further proceedings. No substantive or discretionary changes are necessary to the permits. No further administrative proceedings are required where the action challenged—revision of the already-issued overlegal permits to include current dates for the transport—is the logical outgrowth of the original final agency action by ITD. *See, e.g., Aeronautical Radio, Inc. v. F.C.C.*, 928 F.2d 428, 466 (D.C. Cir. 1991) ("The

focus of the 'logical outgrowth' test . . . "is whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be imposed.")

Proposed Intervenors should have anticipated that the dates on the permits might change if their challenge was not successful. This technical correction of the already-issued permits does not start anew the administrative process. The Proposed Intervenors should not be allowed to rely on the need to update the permit dates as a trigger to re-start the administrative process when the expiration of the original permit dates was caused in the first instance by the Proposed Intervenors' improper petition for review.

B. PROPOSED INTERVENORS FAIL TO ESTABLISH THE REQUISITE "DIRECT" OR "SUBSTANTIAL" INTEREST IN THE PROCEEDINGS ON THE FOUR PERMITS.

Even if the permits did not constitute a final agency action and the Proposed Intervenors could legitimately seek to intervene at this late date, the Petition should still be denied because each of the three Proposed Intervenors lack the "direct and substantial interest" in the proceedings on the four permits necessary to intervene. *See* IDAPA 04.11.01.353.

1. ITD'S FINAL AGENCY ACTION ON THE FOUR PERMITS ONLY APPLIES TO CONOCOPHILLIPS AND NOT FUTURE OVERLEGAL LOADS BY NON-PARTIES.

Emmert/ConocoPhillips requested that ITD issue overlegal permits for four shipments to move the coke drums from Lewiston to the Montana border. And ITD approved the permit applications and issued the permits for only those four shipments. In doing so, Alan Frew, Administrator, Division of Motor Vehicles for ITD, specifically stated that issuance of the four permits has no effect on future permits to ConocoPhillips or other third parties. Mr. Frew explained:

> ITD reviews permit applications on an individual basis and grants/denies the permits based upon the specific circumstances of that permit request. In this application, ITD has before it a single application for a set number of loads. It cannot speculate as to the number, type, or scope of future requests. If the circumstance arises that the number, type and scope of permits requested rises to the level of impacting the safety and convenience of the traveling public or the preservation of the highway system, it may be necessary for ITD to take appropriate action to address those issues. However, that situation is not presented in the permit requests that is currently before the Department.

ITD02334.

2. THE PROPOSED INTERVENORS CANNOT INTERVENE WITHOUT PROOF OF A DIRECT OR SUBSTANTIAL INTEREST IN THE PROCEEDING ON THE FOUR PERMITS.

The terms "direct interest" or "substantial interest" are not defined in the IAPA or the Attorney General's Rules. And ITD has not issued any precedential opinions discussing the agency's interpretation of those terms. The Idaho Board of Environmental Quality, however, has interpreted a nearly identical rule and addressed the standards applicable here. *See J.R. Simplot Co. v. Idaho Dep't of Env. Quality*, Docket No. 01001-03-07, *4 (August 13, 2003) (attached as Exhibit A hereto).

In *J.R. Simplot Co.*, the agency addressed whether complaints by proposed intervenors about the cleanliness of the air near Pocatello demonstrated a direct or substantial interest in a proceeding regarding Simplot's facility. *Id.* at *4-6. The agency denied the motion to intervene, holding that there is no right to intervene based on generalized concerns about clean air. *Id.* ("Generalized grievances or concerns shared by all citizens do not suffice."). The agency also rejected as insufficient arguments by one of the proposed intervenors who asserted that he had developed

asthma since moving to Pocatello. *Id.* at 7. The agency reasoned that his statements did not articulate a direct and substantial interest in the contested case proceeding, but instead represent generalized concerns and interests." *Id.*

To justify intervention in this case, Proposed Intervenors must show a direct interest by articulating "the unique way in which he or she will be affected by disposition of the case." *Id.* at *4. And Proposed Intervenors must also show a substantial interest by demonstrating more than "mere concern or tangential interest in the contested matter." *Id.* Any claim of potential injury must be "factually supported and specific to the party making the claim." *Id.* Finally, the concerns articulated by Proposed Intervenors must be causally connected with the matters under consideration by the agency. *Id.* at *7 (rejecting concerns in part due to lack of nexus between "generalized concerns and the specific conditions of the permit").

3. PROPOSED INTERVENORS RELY ON THE THREE DEFICIENT AFFIDAVITS ATTACHED TO THE PETITION IN AN ATTEMPT TO ESTABLISH DIRECT OR SUBSTANTIAL INTEREST.

Proposed Intervenors' apparent claim to a "direct" or "substantial" interest in the ITD proceedings is potential harm to themselves and unnamed third parties. Petition ¶¶ 4-11. However, the alleged potential harm discussed in the Petition is not factually supported by the record and is unrelated to the four shipments previously approved by ITD. The allegation that the *four* shipments will turn U.S. 12 into "high and wide corridor" is contradicted by the record. Because Proposed Intervenors do not have a direct or substantial interest in the proceedings on the four overlegal permits, their Petition to Intervene is properly denied.

4. PROPOSED INTERVENORS FAIL TO SHOW A DIRECT INTEREST IN THE PROCEEDINGS ON THE FOUR PERMITS.

Proposed Intervenors must make a showing of a direct interest to intervene in the ITD proceedings on the four permits. IDAPA 04.11.01.353; *J.R. Simplot Co.*, Docket No. 01001-03-07, at *4. The Proposed Intervenors have only offered generalized statements regarding their concerns about the proposed transport of the two coke drums across Highway 12, concerns that they claim are shared by over 3,500 citizens in the area. Petition ¶ 8.

In *Simplot*, the agency rejected intervention by one of the proposed intervenors because he made "no connection" between the agency proceedings and a "specific effect on him personally." *J.R. Simplot Co.*, Docket No. 01001-03-07, at *7. The same analysis applies here. Proposed Intervenors offer "no connection" between the proceeding on the four permits and the generalized concerns they attribute to U.S. 12 being turned into a "high and wide corridor." The proceedings at issue are limited to four permits and four shipments. *See* ITD02334. There is simply "no connection" between the proceedings on these permits and the potential harm claimed by the Proposed Intervenors. *J.R. Simplot Co.*, Docket No. 01001-03-07, at *7.

5. PROPOSED INTERVENORS HAVE NOT SHOWN A SUBSTANTIAL INTEREST IN THE PROCEEDINGS ON THE FOUR PERMITS.

Proposed Intervenors have not demonstrated a substantial interest necessary to justify intervention. IDAPA 04.11.01.353; *J.R. Simplot Co.*, Docket No. 01001-03-07, at *4.[6] The Proposed Intervenors' affidavits should not to be evaluated collectively, but

[6] A neighboring western state has specifically defined "direct and substantial interest" as "an interest relating to the property or transaction which is the subject of the (cont'd)

instead each Proposed Intervenor may rely only on his or her own affidavit. *Id.* ("To support a claim of . . . substantial interest, the allegations made in support of the claim must be factually supported *and specific to the party making the claim.*") (emphasis added). None of the Proposed Intervenors establish a "substantial interest" in the proceeding before ITD through their affidavits. And Proposed Intervenors offer *no* other facts to support their alleged right to intervene.

a. Linwood Laughy Fails to Assert a Substantial Interest in the Proceedings.

Linwood Laughy speculates: "I believe that allowing the massive equipment shipments proposed by ConocoPhillips and Exxon Mobile [sic] will injure me, my family, and my neighbors in numerous ways." Laughy Aff. ¶ 14. Laughy apparently claims an interest in the agency proceedings because the shipments will reduce his "business revenues," and affect his ability to "hunt, fish, float, swim, hike, camp and picnic along U.S. 12 in the Lochsa River corridor." *Id.* ¶¶ 16-17.

(footnote cont'd)
proceeding and the person is so situated that the disposition of the proceeding will, as a practical matter, impair or impede the ability of the person to protect that interest." Nevada Administrative Code ("NAC") § 703.580. As a practical matter, ITD's decision to grant Emmert/ConocoPhillips permit applications, isolated to four permits on four shipments, has no effect on the Proposed Intervenors' interests.

An individual does not have a "direct and substantial interest" in a proceeding if the person claims an interest that is "[b]ased on a speculative business or marketing plan," "[b]ased solely on a person's involvement in a proceeding in another unrelated docket," or "[b]ased on an interest that is irrelevant to the proceeding." NAC § 703.580(3). It is speculation for the Proposed Intervenors to assume that the four permits will somehow negatively impact their business, or negatively impact the environment. Proposed Intervenors instead seek to use the proceedings on the four permits as a forum to challenge any subsequent permit applications that may come before ITD in the future. Proposed Intervenors' interests are irrelevant to this proceeding.

These allegations, however, necessarily make one of two assumptions that are not supported in the record. Laughy either assumes that the *four* ConocoPhillips shipments, which will occur over a total of 16 nights of travel, will alone turn U.S. 12 into what he calls a "high-and-wide corridor." *Id.* ¶ 15. At most this unsupported assumption is a "mere concern or tangential interest in the contested matter." *See J.R. Simplot Co.*, Docket No. 01001-03-07, *4. Or Laughy assumes that the four shipments will necessarily translate into further undisclosed shipments by ConocoPhillips or shipments by other third parties unrelated to ITD's decision to issue overlegal permits for the four shipments. This assumption is directly rejected by the record because Mr. Frew stated that the issuance of the four permits has no effect on future permits to ConocoPhillips or other third parties. ITD02334. Laughy fails to assert a "substantial interest" as to the proceedings before ITD regarding the four ConocoPhillips shipments.

b. Peter Grubb Fails to Assert a Substantial Interest in the Proceedings.

Peter Grubb complains of "road construction on Highway 12 that has created a serious problem and nuisance for his business." Grubb Aff. ¶ 5. He alleges that the "construction activities have included traffic delays, as well as additional traffic, and loud noises at night." *Id.* He then asserts that his business has declined because of these "Highway 12 activities." *Id.* But none of these activities is attributable to ConocoPhillips. And none of this alleged harm demonstrates that he has a "substantial interest" in the ITD proceedings on the four Conoco permits. Much like Laughy's failed attempt to assert a "substantial interest" in the ITD proceedings, Grubb also makes the same assumption that the four shipments will turn U.S. 12 into a "high and

wide corridor." Grubb Aff. ¶ 7. The record evidence does not support Grubb's conclusory allegation of a substantial interest.

c. Karen Hendrickson Fails to Assert a Substantial Interest in the Proceedings.

Karen Hendrickson speculates: "I and other residents of the Highway 12 corridor will be harmed if the Conoco Phillip's Coke Drum Transport Project is implemented." Hendrickson Aff. ¶ 12. To support this allegation, she further asserts: (1) that the four shipments "will damage the area's reputation, disrupt and degrade the natural and scenic character of the river corridor, harm the tourism industry, and damage our family's businesses;" (2) that "light and noise disturbance" from the four shipments "threaten my health by disrupting my sleep;" and (3) that the four shipments "endanger my safety and the safety of my fellow local residents" because local residents will be blocked from assess to the Clearwater Valley Hospital. *Id.* ¶¶ 12-13.

Hendrickson's conclusory assertion of a "substantial interest" based on "area reputation" fails for the same reasons Laughy's and Grubb's assertions fail—she makes the same unsupportable assumption that the four shipments will forever change U.S. 12. Hendrickson's argument as to "light and noise disturbance" also fails to support a "substantial interest" in the ITD proceedings. To the extent there is any light and noise disturbance beyond that of usual highway traffic, it will occur for a short period of time. Emmert Aff." ¶ 6.

The shipments will not inhibit access to emergency care. Affidavit of Doug Giddings dated November 8, 2010 ("Giddings Aff."). Grangeville is approximately twenty-five (25) miles south of Kooskia on Highway 13. Giddings Aff. ¶ 7. There is a hospital in Grangeville. *Id.* Orofino is approximately thirty (30) miles north of

Kooskia on U.S. 12. Giddings Aff. ¶ 6. Thus, those who live near Kooskia, including Hendrickson, have two approximately equidistant hospitals available to them. *Id.* ¶¶ 6-9.

Moreover, out of an abundance of caution, and of its own volition, Emmert has hired an ambulance to travel with each shipment at no cost to the public. Emmert Aff. at ¶ 7, Ex. A. Thus, in the scenario where a resident in the Kooskia area had a medical emergency and the shipment was between them and Orofino, that person will have immediate access to medical care upon encountering the transport vehicles. The loads will also be accompanied by two state police officers, again at no cost to the public, who will be in direct communication with all other emergency vehicles in the area. ITD00270-273.

Henderickson failed to assert a "substantial interest" in the proceeding before ITD. Her Petition to Intervene is therefore properly denied.

C. ALLOWING THE PROPOSED INTERVENORS TO INTERVENE WOULD UNDULY BROADEN THE ISSUES.

Even if the Proposed Intervenors were not late and they had a direct and substantial interest in the proceedings on the four permits, the Petition should be denied because it would unduly broaden the issues under consideration. *See* IDAPA 04.11.01.353 (petition to intervene may be granted only where it "does not unduly broaden the issues").

The Proposed Intervenors seek to interject a host of new issues into this matter and, if permitted to do so, will unduly broaden the issues previously considered by ITD. For example, the Petition and the supporting affidavits contain numerous allegations and assertions regarding road construction related to shipments by Imperial Oil to

Alberta, Canada. Petition at ¶ 5 (discussing informational meeting related to the Imperial Oil project); Laughy Aff. ¶¶ 5-10 (expressing concerns about Imperial Oil project), ¶¶ 12-14 (discussing alleged injury resulting from Imperial Oil project); Grubb Aff. ¶ 5 (discussing alleged impact of road construction related to Imperial Oil project), ¶ 6 (discussing concerns regarding shipment of "oil field equipment" related to Imperial Oil project), ¶ 8 (discussing complaints related to past construction activities and Imperial Oil project); Hendrickson Aff. ¶ 6 (registering complaints about Imperial Oil project), ¶¶ 8, 10-11 (discussing concerns regarding issuance of permits for Imperial Oil project).

The Proposed Intervenors seek to use this completed administrative proceeding on the four permits as a forum for debate about the merits of the Imperial Oil project and whether those permits should be approved. Allowing the Proposed Intervenors to offer testimony or other evidence regarding the Imperial Oil project will unduly broaden the issues that were previously considered and resolved by ITD when it decided to issue the permits to Emmert/ConocoPhillips. The ConocoPhillips project is unrelated to the Imperial Oil project and ConocoPhillips should not have to speculate about or answer for Imperial Oil or other third parties.

D. INTERVENTION SHOULD BE DENIED FOR PROCEDURAL SHORTCOMINGS.

Petitions to intervene must comply with Attorney General's Rules 200, 300, and 301 and "must set forth the name and address of the potential intervenor." IDAPA 04.11.01.351. The Petition does not set forth the addresses of the Proposed Intervenors as required by Rule. For this additional reason, the Petition is properly denied.

V. CONCLUSION

The Petition should be denied. The Proposed Intervenors cannot intervene in this action after ITD took its final agency action by issuing the permits. Even if the Petition were timely, it should be denied because each of the three Proposed Intervenors fail to establish a direct and substantial interest in the proceedings on the four permits necessary for intervention. Intervention would also unduly broaden the issues previously decided by ITD forcing ConocoPhillips to answer for other nonparties. Finally, the Petition should be denied because Proposed Intervenors failed to satisfy the requirements of the Attorney General's Rules.

Dated this 9th day of November, 2010.

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By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 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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