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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.	DEPARTMENT'S RESPONSE TO INTERVENORS' EXCEPTIONS TO THE ITD DIRECTOR

Respondent, Idaho Transportation Department, by and through its counsel of record, submits this Response to Intervenors' Exceptions to ITD Director RE: Hearing Officer Clark's

Findings of Fact, Conclusions of Law and Recommended Order on Conoco Coke Drum Overlegal Permits.

I.
Introduction

The Intervenors failed to meet their burden of proof. There are two burdens of proof that must be met. Initially, a party must meet the burden of production – which is the burden of producing enough evidence to cause the other parties to present a case. After the Intervenors presented their case, both ConocoPhillips and the Department made motions to dismiss this case because they felt the Intervenors had not met their initial burden. The Hearing Officer denied the motion, stating he wanted to hear from the Department and Conoco regarding specific issues. However, as discussed below, the Intervenors in fact failed to meet even this initial burden of proof.

The second type of burden of proof is often referred to as the burden of persuasion. In essence, the party presenting a claim (here the Intervenors) must convince or "persuade" the fact finder that its evidence is better than the evidence presented by the other party and that it is entitled to prevail. The burden of persuasion often is referred to as the ultimate burden of proof, because at the end of the hearing, it is this standard the hearing officer or judge applies to all of the evidence presented by the parties. While the Intervenors take exception to several of the Hearing Officer's findings and conclusions, the bottom line is that the Intervenors, despite every opportunity to do so, simply failed to meet the burden of persuading the Hearing Officer in this matter.

An administrative hearing was held on December 8 and 9 of 2010, in front of Merlyn W. Clark, a hearing officer duly appointed by the Director of the Idaho Transportation Department pursuant to the Idaho Administrative Procedures Act. Although counsel for the Intervenors

initially indicated in an article posted in the Moscow-Pullman Daily News, of Mr. Clark's appointment that "He commands the respect of all the lawyers in the state", Intervenors now claim that "[b]y rendering a one-sided, unfair, and clearly erroneous decision, the Hearing Officer has performed a disservice to the ITD Director ...." Exceptions, p. 2.

Although the Intervenors now complain about the Hearing Officer, what really has happened is that the Intervenors failed to carry their burden of persuasion in this matter. The Intervenors failed to meet their burden of persuasion for two reasons. First, the Intervenors raised issues and presented evidence that simply were not relevant to the four permits at issue. Second, concerning issues that were germane to the permits, the Intervenors failed to present sufficient evidence to overturn the determinations of the staff. Simply put, after weighing the evidence presented by the parties, the Hearing Officer found the Department had properly considered the information submitted by both Emmert International, Inc. and the Intervenors, and correctly exercised its discretion in issuing the permits.

In filing exceptions to the Hearing Officer's findings of facts and conclusions of law, the Intervenors simply are rehashing the same evidence presented at the hearing, hoping the Director will reweigh the evidence, including evidence the Hearing Officer found to be irrelevant, and issue a new ruling in their favor. However, the Hearing Officer applied the correct legal standards and properly applied the burden of proof. The Hearing Officer's recommended order should be adopted.

II.
The Hearing Officer Applied the Correct Legal Standards to the Relevant Evidence

In their Exceptions to the ITD Director, the Intervenors state that the "Hearing Officer applied the incorrect legal standards" by giving deference to the Department in its interpretation and application of its own IDAPA Rules. Exceptions, p. 3. However upon review, it is clear that

the actual contention is not the application of incorrect legal standards, rather it is the result of the application of the correct standards of which Intervenors complain.

The issue of deference to be given a state agency in the interpretation and application of its own administrative rules is well established law in Idaho. Known as the Simplot standards (Cited by all of the parties and the Hearing Officer) the case of J.R. Simplot Co. v. Tax Commission, 120 Idaho 849, 820 P.2d 1206 (1991), set the standards which a reviewing fact finder should consider in determining whether to give deference to an agencies interpretation of its own administrative rules.

Under the Simplot analysis, the Idaho Supreme Court "established a four-prong test for determining the level of deference to be given to an agency construction of a statute."

> First, we must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, we must determine whether the statutory language at issue does not expressly treat the precise question at issue. Finally, we must ask whether any of the rationales underlying the rule of deference are present. (Citing *J. R. Simplot Co. v. Tax Com'n.* 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

Mason v. Connelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001).

> The rationales include: (1) public groups' reliance on the agency's interpretation over a period of time; (2) the agency's interpretation represents a "practical" interpretation of the statute; (3) the Legislature is charged with knowledge of how its statutes are interpreted, and thus when it does not alter the statute, it presumably sanctions the agency's interpretation; (4) the agency's interpretation is entitled to additional weight when it is formulated contemporaneously with the passage of the statute at issue; and (5) courts should recognize and defer to the agency's expertise.

Farber v. Idaho State Ins. Fund, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (citing J. R. Simplot Co. v. Tax Com'n, 120 Idaho, 849, 857-59, 820 P.2d 1206, 1214-16 (1991)). If the four-prong test is met, then courts must give "considerable weight" to the agency's interpretation of the statute. Mason v. Donnelly Club, 135 Idaho 581, 21 P.3d 903 (2001). This principle also

applies to an agency's interpretation of its Administrative Rule. Id. at 905, 21 P.3d at 583. However, if the agencies interpretation of its administrative rule is unreasonable, then the interpretation is not entitled to deference under the Simplot test. Id.

In this case, the Hearing Officer found that the Department's interpretation was reasonable and that "ITD's interpretation of its own regulations is entitled to deference." Hearing Officer's Recommended Order, p. 14. In so finding, it is clear that the Intervenors simply failed to meet their burden of convincing the hearing officer that the Department's interpretation of its rules was unreasonable. Although their failure applies to all three of the issues equally, it is particularly true in the issue regarding the so called 10-minute rule.

In attempting to discredit the Department's interpretation of the frequent passing requirement of Chapter 16, the Intervenors offered their own interpretation of the rule to the effect that "'frequent passing' must allow for traffic delays of less than the 10-minute outer delay limit set by Chapter 16." Exceptions, p. 4. This interpretation is based, neither upon the Department's interpretation nor practices; rather they are simply the result of the Intervenors' efforts in reading the Rules and attempting to discern a contrary meaning. As indicated by Counsel for Intervenors at the hearing on the Motion to Intervene, "Ten minutes is the outer bounds of delays that are allowed under ITD's regulations. And you know what, Petitioner Linwood Laughy is the guy who figured this out. He's a smart guy with a PhD who read the regulations" and came up with the so-called ten minute rule. Hrg. Transcr. 29:4-8 (Nov. 19, 2010).

As proposed by the Intervenors, the so called 10-minute rule would set an absolute limitation on the traffic delay allowed by the Department for overlegal permits, regardless of whether a traffic control plan had been submitted. Such an interpretation, however, not only

removes all discretion from the Department, but it ignores the plain language of the Rule. As repeatedly explained by the ITD witnesses at the hearing, and as found by the Hearing Officer, the time limitation in chapter 16 only applies when there is either no traffic control plan or a lack of adequate detours.

Thus, under the four factors of the J.R. Simplot Co. test, the Department's interpretation of its rules is entitled to deference. The first prong of the test is satisfied because the Department has been entrusted with the rulemaking authority regarding the issuance of overlegal permits. The second prong is satisfied because the Department's interpretation of its rules is reasonable. The third prong of the test is satisfied because the specific rules in question are not specifically addressed in the statutes; rather the Legislature left the issuance of these permits to the discretion of the Department.

The rationale underlying the Department's interpretation also satisfies the fourth prong of the Simplot test. First, the Department has followed and applied these administrative rules for several years, and has built its process around its reasonable interpretation of the Rules. Second, the Department and its customers have relied upon this interpretation of the rule in the past. Third and foremost, the Department's interpretations of the rules are practical. The interpretations above allows the Department the flexibility to review the traffic control plan and provide limitations and conditions within the permit which are fact specific, rather than having an immovable maximum delay which must be adhered to regardless of the facts and circumstances.

III.
The Intervenors Asserted Claims that Are Not Relevant to the Permit Process

Additionally, Intervenors take issue with the Hearing Officer's Recommended Order on the basis that "not once in all the pages does the Recommended Decision identify-much less discuss in detail- any of the evidence or testimony submitted by Intervenors." Exceptions, p. 6.

There were three issues before the hearing officer in this appeal. They were:

> a. Whether the Idaho Transportation Department ("ITD") complied with the requirement of IDAPA 30.03.09.100.01 that it place a primary concern on the safety and convenience of the general public in determining whether to issue the ConocoPhillips permits;
>
> b. Whether ITD made a reasonable determination of the necessity of the proposed shipments under IDAPA 30.03.09.100.02; and
>
> c. Whether ITD properly followed IDAPA regulations regarding traffic interruption, as provided by IDAPA 39.03.11.05 and IDAPA 39.03.16.100.01.

Hearing Officer's Recommended Order, p. 11.

In their briefing, the Intervenors take exception to the fact that the Hearing Officer did not address or "grapple with" all of the evidence they presented at the hearing. Specifically, they claim that the hearing officer failed to address: 1) Unique values of Highway 12, 2) Massive size and unprecedented nature of the Conoco Mega-loads, 3) Precedential impact and Exxon Imperial Shipments, 4) "Speculation" about other shipments, 5) Admitted errors in Frew's Memorandum of Decision, 6) No ITD verification of Emmert assertions, 7) Other problems with the 15-minute delay spreadsheets, 8) Definition of Delay, 9) Actual speeds and travel time, 10) Alternative routes, and 11) Public notice and hearing.

As explained by the Supreme Court, the fact finder is not required to discuss all evidence submitted during an evidentiary hearing.

> Finally, Petitioners contend that the Director's determination was arbitrary because he failed to discuss all evidence in the administrative record and to

> explain the information that runs counter to his ultimate determination. We have never imposed that requirement upon either a judge in a bench trial or an agency in an administrative proceeding. The administrative record in this case consists of over 3200 pages. It would be needlessly burdensome to require the Director to discuss each document in the record. The Director adequately addressed the factors required by Idaho Code § 22-4803(1). It was his province to decide the weight to be given the various items of evidence. The Petitioners have failed to show that his determination was arbitrary or capricious.

American Lung Ass'n v. Dept. of Agriculture, 142 Idaho 544, 549, 130 P.3d 1082, 1087 (2006).

a. The Intervenors' Lack of Relevant Evidence

Most of the issues above, however, are irrelevant to the specific issues being presented at the administrative hearing. Of all of these issues, only the issue of the potential delay and its legal definition is even arguably relevant to the permits. Unfortunately, the Intervenors failed to understand the transportation plan and therefore failed to meet their burden in attempting to identify its alleged deficiencies.

The supposed problems with the 15-minute delay spreadsheets could have potentially been a relevant issue, but it turned out that it was only an issue because the Intervenors did not understand the transportation plan developed by Emmert and approved by the Department. In an administrative hearing, the hearing officer is required to consider and evaluate the evidence which is relevant to the issues which are before him. In this case, those issues are limited to the three issues articulated above. In the case of the 15-minute spreadsheets the hearing office heard the evidence which overwhelmingly supported the Department's approval of the plan. It became apparent that the Intervenors had misunderstood the transportation plan and thus their underlying assumptions and alleged errors were simply wrong. As a result, they could not present any relevant evidence on this issue and the hearing officer was not required to make any findings.

The Idaho Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." I.R.E. 401. The Rules also provide that some relevant evidence may be excluded. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. 403. Additionally, relevant evidence must be germane to the issues that are before the trier of fact.

Because the Intervenors could not produce any relevant evidence to even the one evidentiary-based issue that could have been relevant to the issuance of the permits, the Hearing Officer did not err when he declined to refer to their arguments in the findings of fact.

b. Evidence Regarding Non-Relevant Issues Need Not Be Addressed in the Findings of Fact

In this case, evidence which is relevant would be that evidence which would assist the Hearing Officer, as the trier of fact, in ruling upon the three specific issues at hand, all of which deal specifically with the Department's required findings prior to the issuance of overlegal permits. The Department has discretion to issue overlegal permits under Idaho Code § 40-1004. The Department established administrative rules which provide how that discretion is exercised. When an applicant for an overlegal permit has satisfied all of the requirements for an overlegal permit set forth in the administrative rules, the Department does not have the authority to deny the permit.

In this case, the Intervenors have pointed to three specific rules in which they claim the Department erred in its interpretation and application. Any evidence, therefore, which is not germane to those three issues is irrelevant and does not need to be addressed by the Hearing Officer.

As stated above, most of the issues simply are not relevant to the criteria established for overlegal permits. For example, the Intervenors' primary issue is "the next 200 loads." The allegation that the Conoco permits would set a precedent was not an issue before the hearing officer in this case and therefore was not relevant.

The Department received many comments from the public about the loads at issue. Among the comments was the following comment from Lorain Roach, consultant to the 1997 Scenic Byway Management Corridor Plan.

> Oversize equipment has been hauled on U.S. 12 for many years with very little (if any) impact. Some of it is mining equipment bound for Wyoming, eastern Montana, and Alberta, some is airplane parts (en route to/from Boeing), some is wind turbines for alternative energy, some is manufactured homes or other buildings, etc. The special trailers used to haul the equipment are designed to distribute the weight so there is actually less impact on the roadbed (because of the weight per axle or per wheel) than with traditional commercial vehicles. This federal highway corridor is often used for this purpose because of the low traffic volumes (i.e. fewer people impacted). Moreover, this corridor was used for hauling commercial products (logs, grain, etc.) long before it was designated as a wild and scenic or scenic byway corridor, and after input from 30 public meetings, the Corridor Management Plan endorsed continued commercial use.

A.R. at ITD01283.

The Department recognizes that Highway 12 is part of the national highway system; Highway 12 is an east-west United States highway. It runs from Grays Harbor on the Pacific Ocean (near Aberdeen, Washington) to Downtown Detroit, at the comer of Michigan and Cass Avenues. The highway is nearly 2,500 miles long and runs through Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, Wisconsin, Illinois, Indiana, and Michigan. The highway has long been used by both the traveling public and commercial transports.

The Intervenors ask the Department to look beyond the specific loads in question and prohibit not only the four ConocoPhillips loads, but also any future loads of similar size and purpose. In essence, the Intervenors ask the Department to prohibit a pattern of certain

commercial uses of Highway 12. The Department simply does not have the authority to prohibit a potential "pattern" of commercial use of Highway 12. The Department only has the authority granted to it by the Legislature, namely, to determine whether a particular load may travel on Idaho's roads.

The Department and the Hearing Officer have examined the evidence. The fact is the four Conoco loads in question will have no more impact to Highway 12 and the surrounding area than any other overlegal load that has travelled Highway 12. If the Intervenors wish to set new policy for the overall commercial use of Highway 12, the proper forum is in the federal and state legislatures.

Likewise the fact that Highway 12 has been designated as a Scenic Byway and an All American Road is irrelevant to the Department's application of the administrative rules. Nowhere in the rules is the Department allowed, much less required, to take into consideration these designations. Intervenors have merely raised the issue and implied that based upon these designations, the Department should ignore the plain language of its administrative rules and deny the permits, even though Emmert has satisfied the Department's requirements. As with the remainder of their issues, passed upon by the Hearing Officer, the Intervenors have failed to carry their burden of establishing how these complaints are relevant to the three issues at hand.

The fact that Highway 12 has been designated as a Scenic Byway or as an All American Road does not change the fact that Highway 12 is part of the National Highway System which primary purpose is the moving of people and products, specifically those in commerce. The Director may take judicial notice of the fact that in Idaho, there are 30 sections of roads (totaling 2,404 miles) designated as Scenic Byways, and 4 highways (totaling 193 miles) designated as All American Roads.

In consideration of the above, the Hearing Officer correctly found that "Nothing in the designation as a Scenic Byway or an All American Road prohibits the transport of the drums over U.S. 12." Hearing Officer's Recommended Order, p. 21. Additionally, the Hearing Officer also found (based upon the Affidavit of one of the Intervenors) that Highway 12 "is also a commercial highway that is frequently used by logging trucks and other commercial vehicles, including semi-trucks hauling grain from Montana and the Dakotas to the Port of Lewiston." Id. Thus, the Recommended Order of the Hearing Officer indicates that he did consider the fact that Highway 12 has received State and Federal designation. However, the Recommended Order also indicates that the Hearing Officer was not persuaded by the Intervenors' contentions that such designation would require the denial of the permits. Again, Intervenors failed to meet their burden of persuasion.

V.
Conclusion

In cases where an agency's decision is being challenged, "The party attacking the agency's decision ... must first illustrate that ITD erred in a manner specified in Idaho Code § 67-5279(3), and then establish that a substantial right has been prejudiced. Druffel v. State, Dept. of Transp. 136 Idaho 853, 855, 41 P.3d 739, 741 Idaho (2002) citing Barron v. Idaho Dept. of Water Resources, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). In this case, the hearing officer found that Intervenors had failed to both 1) establish that the Department had violated its rules as specified in Idaho Code § 67-5279, and 2) establish that their substantial rights had been violated. Hearing Officer's Recommended Order, p. 55.

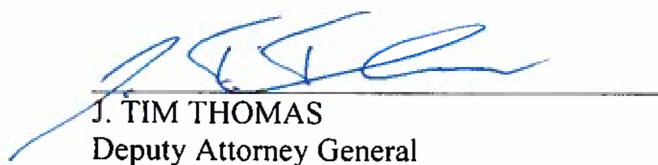
Specifically in this case, the Intervenors had the burden of presenting sufficient evidence to the Hearing Officer that ITD had violated its IDAPA rules as set forth in the three issues of the hearing. While Intervenors did call one of their own witnesses to substantiate their claim, they

failed to meet their burden by merely relying upon the cross examinations of the ITD witnesses. However, as found by the Hearing Officer, this reliance was misplaced and the Intervenors simply failed to establish that the Department had violated its rules. Additionally, Intervenors failed to present credible evidence to establish that their substantial rights had been violated. Surprisingly, the Intervenors did not call any of the other 12 Intervenors to testify regarding their alleged damages caused by the issuance of the permits.

In their Exceptions to the Hearing Officers recommended findings, Intervenors do not raise any new or different arguments; rather they are simply reasserting and rehashing the same positions and theories which they asserted at the Administrative Hearing.

Based on the foregoing, the Findings of Fact, Conclusions of Law and Recommended Order should be adopted by the Director and made final.

DATED this 13th day of January, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2011, 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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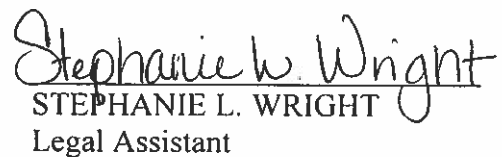

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