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BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY *et al.*, Intervenors, v. CONOCOPHILLIPS AND EMMERT INTERNATIONAL, Applicants, and IDAHO TRANSPORTATION DEPARTMENT, Respondent.	**INTERVENORS' EXCEPTIONS TO THE ITD DIRECTOR RE: HEARING OFFICER CLARK'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER ON CONOCO COKE DRUM OVERLEGAL PERMITS**

INTRODUCTION

The Idaho Transportation Department ("ITD") has never had a case like this before. It has never seen such public opposition to overlegal permits. It has never conducted a contested hearing over the concerns of local residents and small business owners about mega-loads traveling up their rural highway. And never before has ITD allowed massive shipments of the size and weight of the Conoco coke drums up Highway 12 – Idaho's premier scenic byway, and the heart of the central Idaho tourism economy.

These circumstances demand that the ITD Director fully evaluate all the relevant facts and considerations before making a final determination on the Conoco permits.

Regrettably, the Hearing Officer's Recommended Decision[1] does not present a full and fair evaluation of the facts and law. Just the opposite – the Hearing Officer has simply regurgitated the case presented by ITD staff and Conoco/Emmert, without bothering to address key points and evidence presented by Intervenors.

As explained below and in the accompanying Intervenors' Post-Hearing Brief (which is attached and incorporated by reference), the hearing evidence included damning admissions from ITD staff which demonstrate that, at a minimum, very serious questions exist about whether ITD has complied with its own regulations in approving the Conoco permits. Yet these admissions are not even mentioned in the Hearing Officer's decision, much less evaluated under the correct legal standards – which the Hearing Officer also misstates regarding interpretation of ITD's regulations.

Simply ignoring contrary evidence or inconvenient facts is not the way to reach a sound decision, particularly when the public interest is so high. By rendering a one-sided, unfair, and clearly erroneous decision, the Hearing Officer has performed a disservice to the ITD Director – and to the general public that uses Highway 12, including Petitioners.

Because the contested case hearing confirms the prior verdict of the only court to address the merits of Intervenors' claims,[2] and shows that ITD violated its own regulations as alleged by Intervenors, the ITD Director should thus reject the Hearing Officer's recommendations and deny the Conoco overlegal permits.

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[1] *See* "Administrative Hearing Officer's Findings Of Fact, Conclusions Of Law And Recommended Order To The Director Re: Intervenors' Objections To Overlegal Permits," issued on December 28, 2010 by Hearing Officer Merlyn Clark (hereafter, "Recommended Decision").

[2] *See* Opinion by Hon. John Bradbury in *Laughy et al. v. ITD*, No. CV-10-40111 (2nd Dist., 8/24/10).

EXCEPTIONS

Pursuant to I.C. § 67-5244 and IDAPA 04.11.01.720.02.b, Intervenors hereby take exception to the ITD Director regarding the Hearing Officer's Recommended Decision.

For reasons set forth below and in the attached Intervenors' Post-Hearing Brief the contested case hearing record shows that ITD violated its regulations on the three claims presented by Intervenors at hearing.[3] Accordingly, the ITD Director should reject the Hearing Officer's Recommended Decision, and deny the Conoco overlegal permits at issue here.

I. THE HEARING OFFICER APPLIED INCORRECT LEGAL STANDARDS IN SIMPLY DEFERRING TO ITD.

The Hearing Officer's Recommended Decision is clearly erroneous, first, in the legal standards he applied to Intervenors' claim that ITD misread the 10-minute delay rule for non-reducible loads, under Chapters 16 and 11 of the ITD regulations.

The "Legal Standards" section of the Recommended Decision reveals that the Hearing Officer gave complete deference to ITD's legal reading, stating:

> ITD's interpretation of its own regulations is entitled to deference. *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (citing *J. Simplot Co. v. Tax Comm'n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991). Deference is appropriate because ITD is charged with managing Idaho's roadways, and in managing its "administrative area of responsibility," ITD's expertise in applying its own regulations is entitled to deference. *Id.*

See Recommended Decision, p. 14.

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[3] Those claims, as explained in Intervenors' Post-Hearing Brief and summarized at page 11 of the Recommended Decision, are: (1) ITD violated its duty under IDAPA 30.03.09.100.01 to place a "primary concern" on the safety and convenience of the general public in determining whether to issue the Conoco permits; (2) ITD did not make a "reasonable determination of the necessity" of the proposed shipments under IDAPA 30.03.09.100.02; and (3) ITD violated the "frequent passing" and "10-minute delay" requirements of IDAPA 39.03.11.05 & 39.03.16.100.01.

This is erroneous as a matter of law. As Intervenors' Post-Hearing Brief explained (pp. 31-37), no deference is owed under *J.R. Simplot* to an agency interpretation of regulations that is unreasonable. Following *Simplot*, the *Mason* case specifically rejected an agency reading of timing requirements under its regulations which was not reasonable – demonstrating that the Hearing Officer's complete deference to ITD here is improper. Doing so, *Mason* held that the proper construction of agency regulations requires evaluating related regulations together, in order to determine the proper meaning of undefined terms – a task which the Hearing Officer also failed to undertake in his Recommended Decision. *See Mason*, 21 P.3d at 907-8.

Following these principles, as Intervenors explained in their post-hearing brief to the Hearing Officer, Chapters 16 and 11 must be construed together in evaluating whether the Conoco proposed shipments meet the requirements of the ITD regulations. *See* Intervenors' Post-Hearing Brief, pp. 31-37. Chapter 16 expressly applies to non-reducible loads, such as the Conoco mega-shipments here; and it requires that overlegal permits will not normally be granted if the "frequent passing" standard of Chapter 11 is not met, except in unusual circumstances of light traffic where a maximum delay of 10-minutes may be allowed. Because Chapter 11 does not define "frequent passing," yet is expressly referenced in Chapter 16, these regulatory provisions must be read together under *Mason* and other cases cited by Intervenors – and the only logical way to read them together is that "frequent passing" must allow for traffic delays of less than the 10-minute outer delay limit set by Chapter 16. *Id.*

Under ITD's reading, however, the regulations are not construed together; and an absurd result occurs, because "frequent passing" can mean delays over more than 10-

minutes, thus effectively writing the 10-minute delay limit of Chapter 16 out of existence. *Id.* This violates the principles of regulatory construction articulated in *Mason* and other cases cited by Intervenors, that all provisions of regulations should read together to give them meaning. *Id.* Intervenors also noted that Judge Bradbury's Opinion in *Laughy v. ITD*, CV-10-40111 (2d District, 8/24/10) – the only court to have addressed this question – agreed with them that ITD unlawfully read its regulations, thus violating the well-established canons of regulatory interpretation and the cases cited by Intervenors. *Id.*

Yet none of these legal principles is recognized, much less addressed, in the Hearing Officer's Recommended Decision. In asserting in the Legal Standards section, quoted above, that ITD deserves deference simply because it administers the regulations, the Hearing Officer has clearly erred in not following the holdings of *Simplot* and *Mason* that agency interpretations are not entitled to deference if they are not reasonable as a matter of law. And the Hearing Officer did not follow the rulings of *Mason* and other cases cited by Intervenors, holding that agency regulations are to be construed together, so as to avoid absurd results or a result which effectively writes regulatory provisions out of existence.

In short, the Hearing Officer has clearly erred in application of relevant legal principles to Intervenors' claim that ITD has misread the traffic delay provisions of Chapters 16 and 11 of its own regulations. This clear legal error thus requires that the ITD Director reject the Hearing Officer's recommended order, and deny the Conoco overlegal permits since they admittedly cannot satisfy the 10-minute traffic delay limit imposed by Chapters 16 and 11 of the ITD regulations. *See* Intervenors' Post-Hearing Brief, pp. 30-37 (discussing this issue in detail).

II. THE HEARING OFFICER'S RECOMMENDED DECISION IS CLEARLY ERRONEOUS BECAUSE IT FAILS TO ADDRESS THE EVIDENCE SUBMITTED BY INTERVENORS.

In addition to the clear legal error described above, the Hearing Officer's Recommended Decision must also be rejected because it is clearly erroneous in its treatment of the evidence from the contested case hearing – presenting a one-sided view that wholly ignores the contrary evidence submitted by Intervenors.

The Recommended Decision devotes 38 pages to Findings of Fact and 4 pages to Conclusions of Law based on those recommended factual findings. Remarkably, <u>not once</u> in all these pages does the Recommended Decision identify – much less discuss in detail – <u>any</u> of the evidence or testimony submitted by Intervenors. Neither do the findings address the admissions wrung by Intervenors from ITD staff upon cross-examination, as detailed more fully in Intervenors' Post-Hearing Brief and discussed briefly below.[4]

Instead of grappling with the evidence that Intervenors submitted at hearing, the Findings of Fact largely regurgitate information from the Administrative Record materials that ITD compiled to support the decision to approve the Conoco permits. Over 12 pages of the findings are devoted to quoting at length passages from the August 2010 Memorandum of Decision and November 2010 Updated Memorandum of Decision by Motor Vehicles Department administrator Alan Frew, and then repeatedly asserting that "the evidence in the Administrative Record supports these findings." *See* Recommended Decision, pp. 32-44.

[4] Because Intervenors' Post-Hearing Brief contains a thorough recitation of the evidence that Intervenors presented at hearing and explains why that evidence supports their challenges, Intervenors will not repeat that detailed showing here; and instead incorporate their post-hearing brief by reference as part of these Exceptions.

In truth, as discussed below, the hearing record refutes many of the assertions made by Frew in his decision memoranda. Yet despite the fact that Intervenors pointed these facts out in their post-hearing brief, the Hearing Officer made no effort to discuss them. It is clearly erroneous for the Hearing Officer to make findings and conclusions that simply disregard the evidence presented by Intervenors and discussed at length in their post-hearing brief.

Among the points established by Intervenors at hearing, as discussed in Intervenors' Post-Hearing Brief, the Hearing Officer's findings and conclusions are clearly erroneous because they fail to address the following key evidence and issues presented by Intervenors:

Unique Values of Highway 12: The Findings of Fact begin by devoting several paragraphs to Conoco's need to replace coke drums at its Billings refinery. This issue is irrelevant, because the "necessity" determination that ITD must make under Chapter 9 of the regulations concerns necessity of the proposed shipments up Highway 12 – which required ITD, and the Hearing Officer, to fully evaluate the unique values of that state-designated and federally-designated scenic byway.

Rather than do so – and in contrast to the fawning attention given to Conoco's interests – the Hearing Officer stated in just a single sentence that Highway 12 is a scenic highway and "All-American Road." *See* Recommended Decision, pp. 14-16, 21. He did not discuss the further designations of the area noted by Intervenors, including as the Nez Perce National Historic Park, Wild and Scenic River Act Designation, Lewis and Clark Historical Trail, or the management agreements between the federal government and ITD requiring that ITD preserve the scenic and other values of the Highway 12 corridor – as

testified by both ITD's Mr. Rodriguez and Mr. Carpenter, and by Mr. Laughy, and as established in the Administrative Record. *See* AR 1328-1694; Exhibits 68-69.

Moreover, the Hearing Officer never acknowledged how unique and special the Clearwater/Lochsa Highway 12 corridor is – both to local residents, including Intervenors, and nationally – nor did he address the importance of Highway 12's scenic values to the tourism economy of central Idaho.

Again, it is clearly erroneous for the Hearing Officer to disregard the special values of the region and Highway 12 in rendering his Recommended Decision, when those facts are central to ITD's determination of the "necessity" of the shipments and impacts to the general public's safety and convenience under Chapter 9 of the ITD regulations.

<u>Massive Size and Unprecedented Nature of the Conoco Mega-Loads</u>: The Hearing Officer never once acknowledged the fact that there have never been shipments of the massive size and weight of the Conoco coke drums allowed up Highway 12 before.

Even though ITD staff – including Mr. Rodriguez, Mr. Frew, Mr. Carpenter, and Mr. Hoff – all admitted that loads of this size have never before been approved on Highway 12, the Hearing Officer did not address these facts, nor acknowledge that these mega-loads are unprecedented. To the contrary, the Findings of Fact simply stated that other "large" loads have gone up Highway 12, as if to suggest these loads are nothing new – which is clearly erroneous. *See* Recommended Decision, p. 28, ¶ 68.

Moreover, the Hearing Officer's findings actually understate the massive size of the shipments themselves – discussing only the size of the coke drums, not the size of the shipments nor the size of the accompanying convoy of escort, maintenance, state police,

and other vehicles that will accompany them up Highway 12. *See* Recommended Decision, p. 17, ¶ 13 (discussing size of coke drums); pp. 19-20 (discussing load configurations and trucks, but never discussing size of the coke drums loaded on the trucks); p. 24, ¶ 47 (discussing convoy but not length it will occupy on the highway). It is clear error for the Hearing Officer to fail to address the full size of the Conoco mega-shipments and the associated convoy in considering Intervenors' claims about their impacts on public safety, convenience, and traffic delays.

Precedential Impact and Exxon Imperial Shipments: There is also not a single mention by the Hearing Officer of the facts – established in the Administrative Record compiled by ITD itself – that Exxon Mobil and its Canadian affiliate Imperial Oil ("Exxon Imperial") are currently seeking ITD approval for 207 similar mega-shipments up Highway 12; and that the only reason the Conoco loads could use Highway 12 is because Exxon has spent the last two years and millions of dollars preparing the route by raising or burying utility lines and reinforcing turn-outs

Intervenors presented substantial evidence showing that Exxon Imperial has cleared the way for Highway 12 to be used as a "high and wide" corridor for such mega-shipments. *See, e.g.*, Exhibit 1003; Testimony of Darrell Hoff; Testimony of Linwood Laughy. Yet the Findings Of Fact solely address actions taken by Emmert in concert with ITD to take the Conoco shipments up Highway 12, as if the actions by Exxon Imperial did not even occur. *See* Recommended Decision, pp. 15-19.

Neither do the Findings of Fact mention ITD's own public statement – in a federal grant request – that "If one oil company is successful with this alternative route, many other companies will follow their lead." *See* Exhibit 1004. This statement from ITD

evidences its own recognition that the Conoco permits will set a precedent allowing use of Highway 12 for hundreds of other mega-shipments in the future.[5]

The hearing officer also ignored evidence that the proposed Conoco shipments are intertwined with the Exxon shipments in the mind of the public. *See* Testimony of Adam Rush, Tr. p. 255 (describing how ITD received comments that addressed both Conoco and Exxon loads, often together).

<u>"Speculation" About Other Shipments</u>: The Hearing Officer also failed to address Mr. Frew's admission on cross-examination that he and ITD were well aware of the proposed 207 Exxon Imperial shipments headed for the Kearl Tar Sands Project up Highway 12, thus refuting Mr. Frew's assertion in his decision memos that ITD "cannot speculate as to the number, type, or scope of future requests" for overlegal permits up Highway 12. *See* Recommended Decision, pp. 42-43.

The Hearing Officer found that the "evidence in the Administrative Record supports" this statement, *id.* – even though the Administrative Record in fact contains extensive documentation (including public "open houses," public comments, and internal memos among ITD staff) showing that ITD is fully aware of the pending Exxon Imperial shipments. At hearing, Mr. Hoff even testified that he briefed the ITD Board about "several applications that had been received from the oil industry" in April 2010, and that those "several applications" were brought to the Board's attention as a single issue "because of the nature of the wide loads that were being proposed." Testimony of Doral Hoff, Tr. pp. 314-316. Mr. Frew conceded on cross-examination that he knew of both the Exxon Imperial and Harvest Energy proposals. Tr., p. 236.

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[5] As explained below, the Hearing Officer consistently prohibited Intervenors from presenting evidence about the harmful effects of these many other mega-shipments and the precedential impact of the Conoco loads, even while he summarily rejected their claims of harm. This also constitutes clear error.

It is thus clearly erroneous for the Hearing Officer to approve Mr. Frew's assertion that considering such proposals in connection with the Conoco shipments would be "speculative," when Mr. Frew and ITD were fully aware of these other proposals.

Admitted Errors In Frew's Memoranda of Decision: According to the Hearing Officer, Mr. Frew's August 2010 Memorandum of Decision "contains a thorough analysis," and he repeatedly found that the record "supports the findings" stated in both Frew's August and November decision memos. *See* Recommended Decision, pp. 32-44. Yet the Hearing Officer did not bother to address the ramifications of Mr. Frew's admissions that his decision memos of August and November 2010 contained errors.

During his testimony, Mr. Frew confessed that his original and updated decision memos contained three "problems" or information that was "not accurate." He testified that "I made a mistake" and had "bad information." *See* Tr., p. 190.

One of these errors concerned the speeds of the Conoco shipments, which Mr. Frew's decision memos stated would average 15 mph and be limited to a maximum of 25 mph to "ensure safety and stability of the loads along the proposed U.S. 12 route." *See* Recommended Decision, p. 39 (quoting Frew memo). Yet at hearing Mr. Frew, as well as other ITD and Emmert witnesses, testified that speeds could be much higher than that. Having specifically asserted that public safety would be assured by limiting the speeds of the Conoco mega-shipments, it should have been a matter of grave concern for the Hearing Officer whether the record now supports ITD's determination that public safety will nevertheless be assured. Yet the Findings of Fact simply state that Mr. Frew "clarified" his decision memos, without discussing the ramifications of this error at all. *See* Recommended Decision, p. 44.

Likewise, the second error concerned traffic delays of greater than 10 minutes, which Mr. Frew's November 2010 decision memo stated may occur at 12 locations, but then Mr. Frew testified at hearing that traffic on additional segments could experience longer than 10 minute delays. Despite this testimony, the Findings of Fact repeatedly reiterate that traffic delays longer than 10 minutes will only occur at 12 locations. *See* Recommended Decision, pp. 26, ¶ 56; pp. 30-31, ¶ 81; p. 51, ¶ 133.

The third error concerned Mr. Frew's assertion in the decision memos that the Conoco shipments would travel in two convoys, which Mr. Frew later conceded is wrong because they will travel separately in four different shipments. *See* Recommended Decision, p. 44, ¶ 113. This means that the public will suffer twice the potential delays from the shipments as contemplated when ITD approved the permits; yet this fact again is wholly ignored in the Hearing Officer's Findings of Fact and Conclusions of Law.

Moreover, the Hearing Officer described these confessions of error as simply "clarifications" by Mr. Frew, *see* Recommended Decision, p. 44; and continued to assert in the Findings of Fact that the record "fully supported" all of Mr. Frew's assertions in the decision memos – even those Mr. Frew had disavowed at hearing! It is obviously clearly erroneous for a hearing officer to say that decision memos by an agency staffer are "fully supported" when that staffer has admitted they are in error.

No ITD Verification Of Emmert Assertions: The Hearing Officer's Recommended Decision never even mentioned the fact that ITD's staff acknowledged at hearing that ITD did not independently verify Emmert's assertions about the size of turnouts for the mega-shipments. *See* Tr., p. 326. Neither do the Hearing Officer's factual findings mention the admission wrung by Intervenors at hearing that Emmert's

measurements concerning the size of planned turnouts appear to be inaccurate in at least several key locations, as reflected in the photographs from the record and admitted by ITD traffic engineer Doral Hoff at the hearing.

As explained in more detail in Intervenors' Post-Hearing Brief, pp. 37-39, these facts are central to the issue of whether the Conoco shipments can meet even the 15-minute traffic delay rule used by ITD to approve them. Intervenors identified many specific locations on the Highway 12 route where the 15-minute delays are likely to be exceeded because the turnouts are not available for the mega-shipments to use, as projected by Emmert – including at mileposts 31.5, 48.5, 77.4 and 116.6 – based on both Administrative Record materials and the testimony of Mr. Hoff and Mr. Laughy. *Id.* The Hearing Officer's Recommended Decision utterly ignores all this evidence, not even mentioning these issues once.

Other Problems With 15-Minute Delay Spreadsheet: The Findings of Fact also ignore other testimony and analysis presented by Intervenors showing that 15-minute traffic delay spreadsheet compiled by Emmert contains apparent errors, or least significant questions exist about Emmert's ability to meet these projections. See Recommended Decision, pp. 22-28 (addressing 15-minute delay spreadsheets without mentioning any of Intervenors' points or evidence).

As discussed in more detail in Intervenors' Post-Hearing Brief, the evidence presented at hearing by Intervenors included many photographs and other materials from the Traffic Control Plan on a mile-by-mile basis; as well as testimony from Mr. Laughy, who has fifty years of experience with Highway 12 and wrote a guidebook about it, and admissions on cross-examination of ITD's staff. This evidence showed that numerous

sections of Highway 12 have curves, rock walls, narrow bridges, and other features that will be difficult or impossible for Emmert to meet its traffic delay projections, as set forth in the 15-minute delay spreadsheet.

Intervenors' evidence further showed that the 15-minute delay spreadsheet prepared by Emmert did not even identify the locations of the Maggie Creek and Fish Creek bridges, and did not include delays associated with crossing the Arrow, Maggie Creek, and Fish Creek bridges, where Emmert will be required to lower dollies for crossing – which Emmert's own memorandum to ITD said would require 5 minutes to do at each end, and thereby threaten further delays that Emmert has not accounted for.

Intervenors also showed that Mr. Laughy and his wife live and own property just past the Maggie Creek bridge, near the turnout where Emmert's spreadsheet says a turnout is much wider than it actually is, raising serious questions about its traffic delay projections for the segments across and past the Maggie Creek bridge. Likewise, Intervenors pointed out that the 15-minute spreadsheet says that the Fish Creek Rest Area can only be used for emergencies – yet Emmert plans on using it for traffic clearing and parking after crossing the Fish Creek bridge, again suggesting that traffic delays will be longer than Emmert projected. And Mr. Laughy's testimony noted that traffic delays projected by Emmert at the top of the Lolo Pass are questionable, since the top two segments are very similar yet Emmert projects having to take 15 minutes to go just a half-mile on one segment and over 2 miles on the other.

Where Intervenors presented such mile-by-mile analysis showing that traffic delays are likely to be longer than Emmert has projected – and that ITD has approved

under its own 15-minute rule – it is clearly erroneous for the Hearing Officer to simply ignore all this evidence in his findings, as he did.

Definition of "Delay": Neither did the Hearing Officer address the admissions by ITD staffers Carpenter and Hoff that vehicles traveling on Highway 12 experience "delay" when traffic is slowed before being stopped, while traffic is slowly routed around the loads, or other delays caused by the convoys. *See, e.g.,* Testimony of Jim Carpenter, Tr., p. 277 (acknowledging that a "delay" is the "the amount of additional time that a driver spends on the road due to a construction project, overlegal permit, or the activity at issue").

Yet the Hearing Officer found that ITD used a definition of traffic "delay" that only includes time that vehicles are actually stopped at flagging stations, without addressing this testimony. *See* Recommended Decision, p. 45, ¶ 117. In concluding that the Conoco shipments can meet the 15-minute traffic delay limit imposed by ITD, the Hearing Officer did not take into account the fact that delays experienced by vehicles on Highway 12 will be much longer than the time the vehicles are actually stopped. *Id.*, pp. 45-46. This is clearly erroneous, since the hearing evidence showed that delays will be longer than projected by Emmert and ITD in the 15-minute spreadsheet.

Actual Speeds and Travel Time: Even though Intervenors repeatedly pressed ITD and Emmert's witnesses to identify the actual speeds and travel time that the Conoco shipments would use, they steadfastly refused to do so. This made it impossible to determine whether Emmert's projected traffic delays are reasonable or not – as pointed out in Intervenors' Post-Hearing Brief, pp. 37-39.

It is thus clearly erroneous for the Hearing Officer to render Findings of Fact stating that Emmert's actual travel time would be "a total of 516 minutes or 8.6 hours," and that "[b]y providing a window greater than needed for the actual travel, ITD has provided for minimal inconvenience to the public." *See* Recommended Decision, pp. 25, 53-54. To support these assertions, the Findings of Fact further state that Emmert will have a "7.5 hour window to complete each segment" of the four-night journey that each of the four Conoco shipments will require; and "the estimated travel time under the approved transportation plan is 122 minutes for day one, 122 minutes for day two, 140 minutes for day three, and 257 minutes for day four, a total of 516 minutes of 8.6 hours." *Id.,* ¶¶ 51-52. These Findings solely cite the 15-minute spreadsheet prepared by Emmert and approved by ITD as part of the Conoco permits for support. *Id.*

The Hearing Officer thus obviously misunderstood the 15-minute spreadsheets, which Emmert and ITD witnesses made clear at hearing only address projected traffic delays – not actual travel times. These findings, and the conclusions that flow from them, are thus clearly erroneous for this reason alone.

Similarly, the Hearing Officer's Findings of Fact fails to address how traffic will actually be delayed once it encounters flaggers. The Hearing Officer stated that flaggers will "ensure no delay exceeds the time allotted by the traffic control plan," and notes that front flaggers will be located "a full segment ahead of the load" – *i.e.*, at least 4-5 miles – and "the load will not begin any segment of travel until all traffic has been cleared." *See* Findings of Fact, pp. 26-27, ¶ 58. This increases the likelihood that oncoming traffic will be delayed longer, or the transport will be "on the road" for much longer each night as it waits for traffic to be cleared – adding to public inconvenience. The Hearing Officer did

not understand this additional time, again basing his conclusion that the public would not suffer much inconvenience on his understanding that each night will only involve 122 or 140 minutes.

Similarly, the Hearing Officer did not account for traffic delays that vehicles following the loads will experience. A following vehicle would slow considerably upon encountering the Idaho State Police rear vehicles, could follow a load for 10 or more minutes, then be stopped for 10 minutes, spend another couple of minutes creeping past the convoy, and then require another minute or two to accelerate back to normal speed. In other words, following traffic could well encounter true delays of 25 minutes – not the 10-15 minutes projected by Emmert. The Hearing Officer did not consider these delays in determining the public would not be inconvenienced.

Alternative Routes: The Hearing Officer's Findings of Fact also fail to address the evidence presented at hearing, showing that ITD did not investigate alternative routes that might be available to get the coke drums to Billings; and that ITD actually approved their shipment up the Columbia and Snake Rivers to Lewiston as part of the Traffic Control Plan submitted by Emmert, thus undermining the assertions by ITD staff that ITD only examined intra-state routes. *See* Recommended Decision, pp. 15-16, 34-36.

As explained in more detail in Intervenors' Post-Hearing Brief, pp. 16-18, the record does not support the Hearing Officer's finding that Emmert "performed an extensive analysis of potential routes," and concluded that "ground transportation from Lewiston to Billings was the only feasible route." *See* Recommended Decision, ¶ 7. The evidence at hearing showed that, in fact, Emmert relied on a one-page memo to justify this assertion; that memo does not even address rail options (including a heavy haul rail

route out of Duluth); and that Emmert has recently transported a very similar massive load from the Port of Tulsa in Oklahoma to Billings for an Exxon refinery there – arriving the second day of the hearing. *See* Intervenors' Post-Hearing Brief, 40-43. All of these facts undermine Emmert's assurance that no other route exists, yet were not addressed in any way by the Hearing Officer.

Public Notice and Hearing: The Hearing Officer also never acknowledged that ITD has failed to provide the public with any notice about the proposed Conoco shipments, and to this date has still never held a public hearing about them, despite the high public opposition that has been voiced. ITD public affairs officer Adam Rush confirmed these facts at hearing; yet they are never mentioned in the Recommended Decision. *See* Testimony of Adam Rush, Tr. pp. 254, 257.

The Findings of Fact also are clearly erroneous in stating that Conoco will give the public advance notice before it moves the coke drum shipments. *See* Recommended Decision, p. 48, ¶ 126 (stating that "ConocoPhillips has committed to publish similar notifications and provide other public information several days before and a day before loads are allowed to be moved on US 12"). The Hearing Officer cites only a snippet of testimony from Conoco's Billings refinery manager Steven Steach to support this statement; but the permits approved by ITD contain no such notice requirement.

Impacts of Barricades: Perhaps most remarkably, the Hearing Officer simply noted in a single sentence that the November 2010 permits now allow Conoco/Emmert to barricade the turnouts along Highway 12 and thereby prevent the public from using them. *See* Recommended Decision, p. 31, ¶ 82.

Substantial attention was directed toward this issue at hearing – with ITD staff conceding that ITD has not consulted with the Forest Service or Nez Perce Tribe before taking this step, and that the traveling public will experience both potentially unsafe conditions and inconvenience by being prevented from using turnouts on Highway 12 for emergencies, to rest, to access usual and accustomed tribal fishing areas, or simply to enjoy the view of the Lochsa River. Yet the impacts of the barricades upon the safety and convenience of the general public are not addressed in any way, whatsoever, by the Hearing Officer in his Recommended Decision!

Summary: All of these points are documented in Intervenors' Post-Hearing Brief and the hearing record. All of them are material to the claims raised by Intervenors, including that ITD has not placed a primary concern on public safety and convenience, not made a reasonable determination of necessity, and that the travel plan approved for the Conoco shipments will not meet either the 10-minute delay rule of Chapter 16 of the ITD regulations nor the 15-minute delay limit imposed by ITD. Yet rather than acknowledge these points and grapple with them, the Hearing Officer swept them under the rug and ignored them.

It is clearly erroneous for a hearing officer to disregard the key evidence submitted by a party challengingan agency decision at a contested case hearing. The ITD Director thus must disregard the Hearing Officer's recommended findings, and must independently review the record to address the facts and evidence that Intervenors presented here. Upon such independent review, the ITD Director can only reject the

proposed findings and conclusions of the Hearing Officer; and deny the Conoco permits based on the objections raised by Intervenors.[6]

III. THE HEARING OFFICER CLEARLY ERRED IN DISMISSING INTERVENORS' CLAIMS OF HARM AS "SPECULATIVE."

In a single paragraph near the end of his Findings of Fact, the Hearing Officer summarily rejected Intervenors' claims of harm as being "speculative contentions" for which there "is no reliable evidence in the Administrative Record for support." *See* Recommended Decision, p. 51, ¶ 135. Intervenors take particular exception to this proposed finding, which is clearly erroneous for several reasons.

First, the Hearing Officer directed in pre-hearing conferences and rulings prior to the evidentiary hearing conducted on December 8-9, 2010 that Intervenors' claims of harm from the Conoco mega-shipments – and the precedent they would set, turning Highway 12 into a "high and wide corridor" for hundreds of other mega-shipments – were not issues to be addressed at the hearing. The Hearing Officer consistently held, from the beginning to the end of these proceedings, that evidence concerning other proposed mega-shipments, such as the 207 Exxon Imperial shipments and 40-60 further shipments sought by Harvest Energy, would not be proper topics for the hearing; and Intervenors would not be permitted to offer evidence on them. The Hearing Officer also ruled that Intervenors' claims of harm from the Conoco shipments were relevant only to the issue of whether they should be granted intervenor status; and that the evidentiary hearing would focus on the substantive claims they presented.

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[6] The Hearing Officer also clearly erred in stating, at pages 10-11 of the Recommended Decision, that the Affidavit of Erik Stidham dated December 15, 2010 and Exhibits A-E thereto were "stipulated" to be part of the hearing record. This affidavit was submitted after the hearing was conducted on December 8-9, as part of Conoco's post-hearing briefing. Intervenors never stipulated to admission of that post-hearing material, which is obviously improper; and the Hearing Officer clearly erred by considering those submissions and stating that they were stipulated as part of the record.

Based on those rulings – and because the Hearing Officer unilaterally limited the evidentiary hearing to just two days – Intervenors did <u>not</u> present evidence at the December 8-9 hearing concerning the personal harms they would suffer from the Conoco shipments, the precedential impact of those shipments, the harmful effects of the Exxon Imperial shipments, or similar issues. To the limited extent that Intervenors did try to get into these issues, Conoco and ITD vociferously objected; and those objections were sustained. It is thus entirely unfair and clearly erroneous for the Hearing Officer to sand-bag Intervenors by now summarily dismissing Intervenors' claims of various kinds of harm from the shipments, when the Hearing Officer's own rulings precluded them from offering evidence on those harms.

Moreover, in making Finding of Fact ¶ 135, the Hearing Officer did not even address the evidence presented in the record before him – which includes affidavits of Linwood Laughy, Karen Hendrickson, Peter Grubb, Ruth May, Janice Ingrham, Julian Mathews, Owen Fiore, and John Crock, as well as the testimony at hearing of Mr. Laughy, all of which discuss various particular kinds of harm they face from the shipments.

Mr. Laughy, Mr. Grubb, Ms. May, Ms. Ingrham, and Mr. Crock attested in their affidavits, for example, that their business operations depend on the tourism economy associated with Highway 12; that the Conoco shipments will establish the precedent that Highway 12 can be used as a "high and wide" corridor for hundreds of mega-shipments that will destroy or impair its attractiveness as tourism destination; and that they will suffer economic harms as a result. Mr. Grubb and Ms. May provided empirical evidence that disturbances on Highway 12 impact businesses along the corridor. *See* Grubb Aff. ¶

5 (describing loss of revenue caused by highway construction); May Aff. ¶ 9 (describing damage to area's reputation as a tourist destination). The Hearing Officer simply ignored this evidence from four experienced business people about the harmful and precedential impacts of the Conoco loads.

The Intervenors further attested to individual harms they face in their use and enjoyment of their property and amenities provided by Highway 12; and Mr. Laughy testified at hearing about the location of the house and property that he and Ms. Hendrickson own on Highway 12 right past the Maggie Creek bridge, where the Conoco loads are likely to delay traffic and obstruct their use of Highway 12. Yet again, none of this evidence was discussed – or even mentioned – in the Findings of Fact.

In refusing to address the precedential impacts of the Conoco loads, while summarily dismissing Intervenors' claims of harm, the Hearing Officer also disregarded extensive evidence in the Administrative Record compiled by ITD regarding the Exxon Imperial mega-shipments intended for the Kearl Tar Sands Project in Alberta. The Administrative Record itself includes public comments, materials from "open houses" conducted by ITD over the Kearl shipments, and internal ITD documents all addressing the Exxon Imperial proposed shipments. *See* AR 1695-2223. These record materials evidence the substantial public opposition to mega-shipments because of the impacts they pose in destroying the unique scenic qualities of Highway 12 and the tourism business that depend on those qualities. *Id.* Again, the Hearing Officer did not pay any attention whatsoever to these materials from the Administrative Record, confirming that Paragraph 135 is clearly erroneous.

Finally, even while he ignored the record evidence of harms threatened by the Conoco shipments and the precedent they will establish for other mega-loads, the Hearing Officer relied solely on a prior affidavit of Terry Emmert to make a series of factual findings that the Conoco shipments would not cause noises or lights that would disturb anyone. *See* Recommended Decision, pp. 20-21, ¶¶ 23-29. This is again unfair and clearly erroneous, because the Hearing Officer had instructed that the evidentiary hearing was to focus on the substance of Intervenors' claims, not the harms they alleged; and these self-serving assertions by Mr. Emmert were thus not subjected to cross-examination. At a minimum, the Hearing Officer clearly erred by citing only Mr. Emmert's affidavit, while ignoring the affidavits submitted by Intervenors.

The ITD Director should thus reject these factual findings recommended by the Hearing Officer concerning the harms alleged by Intervenors, because they were prohibited from presenting evidence on them – particularly on the precedential impacts – and because the Hearing Officer did not even bother to consider all the evidence before him in making those findings.

CONCLUSION

For reasons stated above and in the attached Intervenors' Post-Hearing Brief, the ITD Director should overrule the Hearing Officer's recommended findings and conclusion, and issue a final decision denying the requested Conoco permits.

Dated: January 10, 2011.

Respectfully submitted,

/s/ Laird J. Lucas
Natalie J. Havlina
Laurence ("Laird") J. Lucas
Attorneys for Intervenors

PROOF OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2011, I caused to be served the foregoing Intervenors' Exceptions To Hearing Officer's Recommendations upon all parties of record in this proceeding by the means indicated below:

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