IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY et al. and FRIENDS OF THE CLEARWATER, Petitioners/Intervenors, vs. IDAHO TRANSPORTATION DEPARTMENT Respondent, and IMPERIAL OIL RESOURCES VENTURES LIMITED and MAMMOET WESTERN CANADA, LIMITED Applicants.	ORDER ON MOTION FOR RECONSIDERATION

Petitioners through counsel have submitted a motion to reconsider. Briefs have been submitted and considered, and no hearing is required. For reasons stated, I recommend that the motion be denied.

A motion to reconsider is appropriate to call to the hearing officer's attention evidence that has been clearly overlooked, a finding of fact that is clearly wrong on the evidence submitted, a conclusion of law that incorrectly states settled law, or some other clear mistake. It is a method of offering the hearing officer an opportunity to correct a mistake in order to avoid unnecessary appeal.

It is not appropriate merely to reargue positions that have been decided adversely. It is especially not appropriate to misstate the context of the rulings or distort the arguments that were actually presented.

Federal Law Issues

The motion to reconsider argues that I erred in my discussion of "federal legal authorities." The contention centers on three references to federal law – the first on page 7 of the findings, where it is observed that I incorrectly described the federal scenic by-way act, the second on page 24 of the findings, where it is argued that I incorrectly concluded that no federal statues bears on the issue, and the final on page 57 where I concluded that the federal designation imposed no limitation on the type of travel.

The entire argument is irrelevant. ITD observed and petitioners conceded that there was no federal law that applied to ITD's consideration of the issuance of overlegal permits for Highway 12. While I do understand that petitioners are contending in separate federal litigation that the federal government should impose some degree of oversight or regulation over the highway, according to all of the evidence, exhibits and arguments in this case, the federal government has not done so yet. The argument on reconsideration is a red herring.

In a footnote, petitioners argue that I should delete the reference to the commerce clause in the discussion of out-of-state routes. (Petitioners' Brief, p. 5, fn. 2.) I do not consider a reference in a footnote to be sufficient to properly raise an issue in the motion. In any event, there is no basis to the argument that a hearing officer is precluded from discussion of an issue because the petitioners failed to adequately brief the issue. (The

constitutional difficulties were raised in Imperial's brief.) I conclude there is no reason to make any of the changes requested under this argument.

Feasibility – Conceded or Stipulated

In several places, I state that the parties had "stipulated" to a number of facts connected to the feasibility issue. This was a consequence of the parties stipulating to me at the time of the preliminary conference that feasibility was not being challenged, and therefore was not an issue.

Petitioners now take considerable umbrage to my fact references, arguing that in no way have they "stipulated" to these facts, contending only that they were choosing not to challenge the issue. The argument is a non sequitur. Clearly, if one stipulates that a legal position is not being challenged, the stipulation necessarily includes an agreement with, or at least a waiver of any challenge to, the foundational facts of that position. So here: my findings merely translated the petitioners' decision not to challenge feasibility into some sort of fact analysis on the specific elements so that I could place the legal issue in proper framework with those issues that were being challenged. The precise reach of the petitioners' stipulation (or waiver, if they prefer) was defined carefully at page 25 of the decision:

> The parties stipulated to feasibility, meaning to me that they are in agreement or have conceded that this thing will fit on the highway, it will negotiate all the curves and turns, the tractor and pusher trucks are capable of getting it up and over Lolo Pass at the speeds indicated in the traffic plan, and that it will fit sufficiently into the designated turnouts along the way to allow other traffic to clear and thereby accommodate the requirements of the traffic plan. I consider all of these factors to be included within the stipulation of feasibility, and therefore find such as a fact without the necessity for further evidence.

Petitioners do not argue or suggest that any part of this explanation or limitation is now wrong. If they are now attempting to withdraw their stipulation, it is too late. The argument is otherwise without merit, and there is no basis for any change to the findings.

The Correct Legal Standard

In an argument that is very difficult to follow, petitioners argue that I have created some sort of novel different standard of review rather than applying the requirements supplied by statute or regulation. Petitioners either misunderstood or have misstated the purpose of my discussion in this area.

The statutory requirement for issuance of overlegal permits is provided in the regulation and is clearly stated in the decision as being the three-part evaluation of (1) consideration of safety, (2) convenience of the general public, and (3) preservation of the highway system, which are to be the primary concerns of the agency. However, neither the regulation nor the statute defines how to measure and apply these concerns. My conclusion, as discussed in the opinion, is that these concerns are to be applied by measuring the impact of the load in question, with respect to each of the primary concerns to be considered, against other normal commercial traffic. This is to say that upon my review of whether the agency has given these elements proper consideration, I compare the operation of the megaloads under each of elements to the operation of normal commercial traffic.

There is no substitution of statutory or regulatory requirements, nor overlooking of administrative requirements. It is a definition of the method of measurement under which the application of these requirements are to be examined on review. Although it is not specifically so stated, it is clear to me from the evidence that this is the standard that

was and is generally applied at the administrative level in the administrative issuance of permits. The argument of petitioner completely confuses this distinction, and is plainly wrong.

Reiteration of Arguments Already Raised

The remainder of petitioners' arguments consists of a restatement of their arguments presented in their previous briefing. Counsel merely restates their earlier arguments with the contention that I must not have understood their position, because I got it wrong. Both the method and the arguments themselves are not persuasive in a motion to reconsider.

It is unnecessary to attempt to refute the reiterated arguments one by one. I conclude only that nothing raised in the motions persuades me that I have overlooked or misapplied the evidence offered in this case, overlooked or misapplied the law that applies to this case, or overlooked or misunderstood any of petitioners' arguments as advanced previously in their briefs and presentations at hearing.

Conclusion and Recommendation for Order

I recommend that the motion for reconsideration be denied, and that the Director enter a final order consistent with the findings and conclusions heretofore entered.

Dated: July 25, 2011.

D. Duff McKee, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 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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