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BEFORE THE DIRECTOR
OF THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY *et al.*, Petitioners, v. IDAHO TRANSPORTATION DEPARTMENT, Respondent, EXXONMOBIL CANADA PROPERTIES, IMPERIAL OIL RESOURCE VENTURES LTD., and MAMMOET CANADA WESTERN LTD., Applicants,	**PETITION FOR RECONSIDERATION BY HEARING OFFICER** (Hearing Officer Duff McKee)

Pursuant to IDAPA 04.11.01.720.02(a), Petitioners Laughy *et al.* respectfully submit this Petition For Reconsideration of the Hearing Officer's "Findings of Fact, Conclusions of Law, and Recommendations For A Final Order" dated June 27, 2011 in this matter (hereafter "Recommended Decision").

Petitioners do not agree with the Hearing Officer's Recommended Decision on numerous levels, but they do not intend to reargue points already made during the hearing and in their post-hearing brief.

However, Petitioners believe there are several clear errors of law and fact in the Recommended Decision which they should properly raise for the Hearing Officer's consideration and correction. As discussed below, these include:

• The Recommended Decision discusses questions of federal law that were not presented in this contested case hearing, and are appropriately addressed instead in the separate federal litigation over the Highway 12 mega-loads pending before the U.S. District Court for the District of Idaho;

• The Recommended Decision erroneously states, in several places, that Petitioners "stipulated" to the feasibility of transporting mega-loads up Highway 12 and then presumes a variety of facts based on that stipulation, when Petitioners never entered into any such stipulation, and indeed disputed facts that the Hearing Officer assumed to be established by stipulation;

• The Recommended Decision misstates the legal standards governing Petitioners' claims that ITD violated its duties under Chapter 9, Section 100.01 of the over-legal permitting regulations, by creating a new legal standard comparing the mega-loads to standard commercial vehicles, which is contrary to the legal standard of Chapter 9 requiring ITD to place "primary concern" on public safety, public convenience, and preservation of the highway system; and

• The Hearing Officer substituted his own speculation about the potential impacts of mega-loads on the tourism economy, without record support and contrary to the uncontested expert evidence offered by Dr. Seninger.

Accordingly, as discussed in more detail below, the Hearing Officer should reconsider these issues, and issue a substitute recommended decision which corrects the errors noted herein.

ARGUMENT

I. THE RECOMMENDED DECISION SHOULD NOT OPINE ON FEDERAL LAW ISSUES WHICH ARE NOT BEFORE THE HEARING OFFICER.

The treatment of federal law issues does not appear to be central to the Hearing Officer's resolution of the claims presented by Petitioners. Nevertheless, the Recommended Decision contains clearly erroneous statements about federal legal authorities that should be removed, because they were not presented before the Hearing Officer and are not part of this contested case proceeding.

First, the Recommended Decision states that Highway 12 was "designated a federal scenic by-way by act of Congress in 1968. . . ." Recommended Decision, p. 7. This statement is plainly erroneous. It confuses federal Wild and Scenic River Act protection of the Middle Fork Clearwater/Lochsa river corridor with the subsequent scenic byway designation of Highway 12 by federal and state transportation agencies.

Specifically, the Middle Fork Clearwater, Lochsa, and Selway Rivers were among the original rivers designated by Congress in 1968 as part of the federal Wild and Scenic Rivers system, through Section 3(a) of the Wild and Scenic Rivers Act. *See* 16 U.S.C. § 1274(a)(1). Scenic byway designation, at both the state and federal level, came later. Idaho designated Highway 12 as a state scenic byway in 1989. The Federal Highway Administration (FHWA) approved Highway 12 as a federal scenic byway in 2002 after ITD submitted an application for federal designation. By confusing and conflating the congressional Wild and Scenic Rivers Act designation from 1968 with the subsequent designation by FHWA and the Idaho Transportation Board of Highway 12 as a "scenic byway," the Recommended Decision is thus in error.

That is no surprise, since no legal issues regarding the federal Wild and Scenic Rivers Act or national scenic byways program were presented to the Hearing Officer for resolution. To the contrary, the questions presented for hearing solely addressed ITD's violations of its overlegal permit regulations, as stated in the Petitioners' Amended Petition To Intervene, their prehearing and post-hearing briefs, and the Recommended Decision itself (see p. 6, "Issues Presented").[1]

Second, because these federal law issues concerning the Wild and Scenic Rivers Act or federal scenic byway designation were never presented at the contested case hearing, it was also clearly erroneous for the Recommended Decision to summarily assert that there are no federal laws or regulations at stake in the regulation of mega-loads on Highway 12, as follows:

> Although the highway has been designated as a scenic highway, there are no restrictions on commercial traffic included within the classification. No federal statute or regulation bears on this issue. Although a significant part of the route passes through federal land regulated by the U.S. Forest Service, the rights of way are under the control of the ITD and the Forest Service has no regulation restricting commercial traffic.

See Recommended Decision, p. 24. *See also id.*, p. 57 (stating that "federal designation of Highway 12 as a 'Scenic Byway' imposes no restrictions or limitations on the type of traffic that may travel on the highway").

[1] The hearing evidence did include testimony by Ruth May and Peter Grubb about the importance of the federal Wild and Scenic and scenic byway designations to attracting tourism and recreation visitors to the area, as well as the effort that went into obtaining the federal designation. This evidence, however, was offered to demonstrate Highway 12's unique role in "preservation of the highway system" under Section 100.01 of the ITD regulations, as discussed in Section IV.D below. Never did Petitioners present claims or evidence about the federal statutes, regulations, and implementing corridor management agreements, federal easements, and other federal instruments relating to Wild and Scenic River corridor management or federal scenic byway management.

Again, it is clearly erroneous for the Recommended Decision to include these statements about the supposed lack of any federal statute or regulation relevant to management of Highway 12, when the hearing did not present these issues for resolution by the Hearing Officer.

Moreover, the Hearing Officer's Recommended Decision should be corrected to delete these assertions concerning federal laws and regulations applicable to Highway 12 in deference to the U.S. District Court of Idaho, which is currently considering separate litigation over the management of Highway 12 across federal lands and within the Middle Fork Clearwater/Lochsa Wild and Scenic river corridor. *See Idaho Rivers United v. U.S. Forest Service and Federal Highway Administration,* No. 01:11-cv-095-CWD (D. Idaho), First Amended Complaint (*Docket No. 10*). This federal litigation addresses a host of federal authorities that were not presented during the contested case hearing, including the Wild and Scenic Rivers Act, the National Forest Management Act, and the federal Transportation Act, as well as the regulations, management agreements, River Plans, and easements that implement them. It would be inappropriate, and indeed an abuse of discretion, for the Hearing Officer to purport to resolve federal issues that are not properly before him in this matter.

Accordingly, the Hearing Officer should reconsider and delete the above-noted references to federal laws and federal issues from the Recommended Decision.[2]

[2] Likewise, the Recommended Decision speculated that commerce clause violations might occur if ITD considered out-of-state routes in determining "necessity" of the mega-loads. *See* Recommended Decision, pp. 32-33. No briefings were presented on such constitutional issues, and Petitioners note that the scope of the commerce clause is a matter of dispute – the Supreme Court has held it "does not elevate free trade above all other values . . . [a state] retains broad authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor,* 477 U.S. 131, 152-153 (1986). The Hearing Officer should thus also delete from the Recommended Decision this passage about potential commerce clause or other constitutional issues that were not briefed nor presented for decision.

II. PETITIONERS DID NOT "STIPULATE" TO FEASIBILITY OF THE MEGA-LOADS.

A second clear error in the Recommended Decision is its repeated assertion that Petitioners "stipulated" to feasibility of the mega-loads travelling up Highway 12, when, in fact, they merely decided not to challenge feasibility. Based on the assumption that the Petitioners had stipulated to feasibility, the Recommended Decision reaches many erroneous factual inferences and conclusions. *See* Recommended Decision, pp. 17-18 ("the parties stipulated to feasibility meaning that the [TVM] could navigate the highway without difficulty . . . . From this testimony, and from the stipulation of the parties as to feasibility, I find that operation of the TVM on the highway to present no greater risk because of the highway limitations that [sic] is posed by normal commercial traffic"); *id.*, p. 25 ("the parties have stipulated to feasibility, meaning to me that they are in agreement or have conceded 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 a fact without the necessity of further evidence"); *id.*, p. 34 ("The parties are in agreement here that it is 'feasible' from a technical and engineering standpoint to transport the TVM – and therefore all of the remaining 200 loads to follow so long as they are configured the same as the TVM – over Highway 12 into Montana. . . . This is the conclusive answer to the question of should the refinery have used this process at all, and should the modules have been manufactured this size to begin with"); *id.*, p. 55 ("Feasibility was stipulated and was accepted as established without further evidence").

In fact, the Petitioners did not "stipulate" to feasibility of the Imperial mega-loads. There is no written stipulation regarding feasibility; and counsel for Petitioners did not stipulate to feasibility during any portion of the contested case hearing before the Hearing Officer. Indeed, the Recommended Decision initially seemed to recognize this fact, correctly noting at the outset that: "The parties agreed at the preliminary hearing that the issue of 'feasibility' under IDAPA 30[sic].03.09.100.02 was not being challenged." *See* Recommended Decision, p. 6 (emphasis added).

Just because a challenging party does not raise a challenge that might be theoretically available does not mean that the party has stipulated to the issue. A stipulation is a binding agreement among parties that may be properly enforced within its terms. But where parties have not reached a stipulation, it is improper to enforce against them a stipulation that never existed.

The Amended Petition To Intervene set forth Petitioners' claims that were presented at the contested case hearing; and it did not include feasibility as a grounds of challenging the ITD decision. The Petitioners never stipulated as to feasibility, and certainly did not stipulate the many facts assumed by the Hearing Officer as flowing from that supposed stipulation. The Hearing Officer thus clearly erred in predicating so much of the Recommended Decision on the non-existent "stipulation" regarding feasibility.

Moreover, the evidence presented at hearing by Petitioners demonstrated that they did not "stipulate" to the all facts that the Hearing Officer assumed based on the purported stipulation. Petitioners introduced evidence – from prior mega-load shipments and from personal knowledge of highway conditions – contesting such facts as whether the designated turnouts are all adequate to accommodate the Imperial mega-loads and would allow the traffic plan to be met. *See, e.g.*, Laughy Testimony. By erroneously assuming that a stipulation existed while disregarding

contrary evidence at hearing, the Recommended Decision is again in error and the Petitioners urge the Hearing Officer to correct this error.

III. THE HEARING OFFICER APPLIED AN INCORRECT LEGAL STANDARD UNDER CHAPTER 9, SECTION 100.01 OF THE ITD REGULATIONS.

A third and more fundamental error in the Recommended Decision lies in the erroneous standard of review that the Hearing Officer applied in assessing Petitioners' challenges under Section 100.01 of Chapter 9 of the ITD overlegal permit regulations. This error arises because the Recommended Decision adopted a novel legal standard not applied by ITD, in which the mega-loads were analyzed in comparison to other commercial traffic rather than applying the standard set forth in Section 100.01.

The Recommended Decision adopted a novel legal standard of review that evaluated safety and convenience by comparing the mega-loads to normal commercial traffic. *See* Recommended Decision, pp. 7-9. The Recommended Decision discussed whether to compare the mega-loads to no other traffic, to normal traffic, and to other overlegal legals; and determined that the appropriate standard was to compare the mega-loads to standard commercial traffic. *Id.* The Recommended Decision thus identified the standard of review to be applied to Petitioners' challenges relating to public safety and convenience as follows:

> Based upon all of this, I conclude that from a practical standpoint, <u>the standard to be applied must be to measure the megaloads against other commercial traffic that is within legal limits</u>. In other words, and for ease of comparison, I conclude that the questions become on each of the elements under consideration, how does or will the operation of the TVM (and by inference the remaining 200 megaloads of Imperial) compare with the operation of a legal and fully loaded 18 wheel semi-truck and trailer operating on the highway under the same or similar conditions?

Id., pp. 8-9 (emphasis added).

There are three fundamental legal problems with this standard adopted by the Recommended Decision comparing the mega-loads to normal commercial traffic, which deserve reconsideration by the Hearing Officer to avoid clear error.[3]

First, the comparison standard adopted in the Recommended Decision is contrary to the plain language of the applicable regulation which requires ITD to place a "primary concern" on the safety and convenience of the general public, as follows:

> 100. RESPONSIBILITY OF ISSUING AUTHORITY.
>
> **.01 Primary Concerns**. The primary concern of the Department, in the issuance of overlegal permits, shall be the safety and convenience of the general public and the preservation of the highway system.

IDAPA 39.03.09.100.01 (underscore added). By requiring ITD to place primary concern on the safety and convenience of the general public, Section 100.01 thus does not limit ITD's analysis even to the travelling public on Highway 12, much less the smaller subset that is standard commercial traffic. Instead, it requires looking at the general public's safety and convenience.

Petitioners asserted in their Amended Petition To Intervene that ITD breached this duty by placing a priority on approving the mega-loads rather than placing a primary concern on the safety and convenience of the general public (and preservation of the highway system). This claim was a focus of much of Petitioners' evidentiary presentation at hearing. And Petitioners' post-hearing brief spent over 20 pages discussing how the hearing evidence indeed confirmed that ITD did not place a primary concern on public safety, convenience or preservation of the

[3] The Recommended Decision's assertion here that Petitioners' testimony was all based on passenger vehicles and pickup trucks is also factually inaccurate. The Petitioners' testimony was based on years of experience with all kinds of traffic on Highway 12, including commercial traffic such as logging trucks. *See* Inghram Test., April 29, 2011 at 14 (explaining that she has "definitely" encountered logging trucks along Highway 12); Laughy Test., May 2, 2011 at 50 (describing commercial traffic of Highway 12 in the early mornings).

highway system, as required by Section 100.01 of Chapter 9, but instead placed a priority on authorizing the mega-loads. *See* Petitioners' Post-Hearing Brief, pp. 33-56.

The Recommended Decision never addressed this key claim that ITD breached its duty under Section 100.01 to place a primary concern on the safety and convenience of the general public. Although the Recommended Decision does deal with many of the component issues involving public safety and convenience – finding that nighttime travel of the mega-loads would cause less inconvenience than daytime travel, for example – the Recommended Decision failed to deal with the evidence as whole demonstrating that ITD violated its duty to place a "primary concern" on the safety and convenience of the general public.

In failing to address how the mega-loads may impact the safety and convenience of the general public, and instead focusing on comparison between the mega-loads and standard commercial traffic, the Recommended Decision thus misapplies the legal standard established under Section 100.01 of the Chapter 9 regulations.

Second, it is inappropriate for the Hearing Officer to adopt a standard which ITD itself did not employ, rather than determining whether the ITD decision was arbitrary, capricious, an abuse of discretion, or contrary to law under the APA standards. As all parties agreed in their prehearing and post-hearing briefs, the Hearing Officer was appointed to review Petitioners' challenges to Mr. Frew's determination to approve the mega-loads, as set forth in his February 14, 2011 Memorandum of Decision (Hearing Ex. 1), under the "arbitrary and capricious" review standards of the Idaho APA. The Hearing Officer was <u>not</u> appointed to conduct a determination *de novo* for the Department. The February 14th Memorandum of Decision itself did not employ such a comparison standard as adopted in the Recommended Decision, and the testimony of Mr. Frew and other ITD confirmed that ITD did not otherwise engage in such a comparison.

Third, the Recommended Decision's determination to compare the mega-loads to standard commercial traffic is mistaken, because it disregards the significant differences between mega-loads and standard commercial traffic. The regulations allow ITD to approve overlegal loads that exceed normal statutory limits only if the requirements of Chapter 9 and other provisions of the permit regulations are satisfied. By contrast, standard commercial loads do not require any ITD permit, since they do not violate the normal statutory limits for weight, length, width, or height. And most overlegal loads do not simultaneously exceed the weight, length, width, and height limits, as the mega-loads do. Standard commercial vehicles do not block the entire highway, and require extensive traffic control and highway patrol escorts to allow their transit. Comparing mega-loads to standard commercial loads is thus like comparing apples and oranges – yes, they are both types of commercial loads (like apples and oranges are types of fruit), but they are very different in the characteristics that are relevant to ITD's permitting decisions. The Hearing Officer's use of standard commercial traffic as a comparison to the mega-loads thus fails to appreciate these significant differences between them.

Adopting a different legal standard than that set forth in Section 100.01 of the regulations thus represents a clear legal error, which the Hearing Officer should rectify by reconsidering and revising the Recommended Decision.

IV. THE RECOMMENDED DECISION ERRED IN ITS TREATMENT OF PUBLIC SAFETY AND CONVENIENCE ISSUES.

By failing to apply the correct legal standard of Section 100.01 and instead adopting the erroneous comparative standard discussed above, the Recommended Decision also went astray in its treatment of the public safety and convenience issues raised by Petitioners, which again warrant reconsideration by the Hearing Officer for reasons identified below.

A. Public Safety -- Access to Health Care.

The errors resulting from application of this incorrect legal standard can be immediately seen in the section of the Recommended Decision addressing access to emergency medical care, which follows the discussion of the comparative standard adopted by the Hearing Officer. *See* Recommended Decision, pp. 9-12.

The question as framed in the Recommended Decision here was, "does the possibility of a medical emergency of the nature described outweigh the commercial utility of allowing the highway to be used as requested . . .?" *Id.*, p. 10. But considering the legal standard stated in Section 100.01 of the regulations, the correct question before the Hearing Officer is, "Did ITD 'place a primary concern on public safety' in considering how the mega-loads will impact access to emergency health care?" The evidence presented at hearing demonstrates that the answer to this question is "No."

Applying the incorrect standard, the Hearing Officer faulted the Petitioners for failing to supply a statistical breakdown of the number of time-sensitive, life-threatening emergencies that occur during the late night hours in the vicinity of Highway 12. *Id.*, pp. 10-11. However, the Petitioners' burden in challenging the February 14, 2011 Memorandum of Decision is to prove that ITD failed to prioritize public safety and convenience, as required by Section 100.01, not to definitively prove that a medical emergency will occur on any given night.

Had the Hearing Officer applied the correct legal standard under Section 100.01, he should have determined whether ITD investigated the likelihood of medical emergencies, in order to assess how the Imperial mega-loads could impact this aspect of public safety. But ITD did not undertake any such investigation, as the hearing showed – it was Petitioners and other members of the public who raised the question of access to medical care, including in comments

to ITD; and it was Petitioners who offered evidence at hearing about potential impacts of mega-loads on emergency medical care, including through the testimony of business owners Ruth May, Linwood Laughy, and Peter Grubb, and the expert testimony of an emergency medical provider from the area, Dr. Caldwell.

By contrast, ITD did no investigation of medical emergency issues, and certainly did not prepare any statistical analysis such as the Hearing Officer faulted Petitioners for not providing at hearing. The fact that ITD could provide no such statistical breakdown, either in response to public comments or at hearing, corroborates the other evidence that public safety was not ITD's primary concern.

Moreover, the evidence presented at hearing does not support the Recommended Decision's conclusion, based on the erroneous comparative standard discussed above, that "the probability of encountering a medical emergency that would be impacted at all by a megaload on the highway is quite low." *Id.*, pp. 12-13. While the Petitioners presented evidence that time-sensitive medical emergencies do occur along Highway 12, *see id.*, p. 10, no party offered evidence about the statistical probability of a mega-load encountering and impeding a medical emergency, so it is speculative for the Hearing Officer to conclude that any probability is "quite low".

The Hearing Officer should also reconsider his conclusion about the probability of a life-threatening medical emergency because he relied on two assumptions that are contradicted by the evidence. First, the Hearing Officer assumed, "If the load is above or below either the location of the emergency or the hospital, it poses no problem." *Id.*, p. 11. However, the Transportation Plan incorporated into the February 14th Memorandum of Decision allows Imperial to transport up to <u>three</u> loads on Highway 12 on any given night (one per stage). Under

these circumstances, there would inevitably be at least one load between Kooskia and Lewiston,[4] s*ee* Hrg. Ex 2, p. 7; and residents coming from farther east up Highway 12 would have a chance of encountering two or even three mega-loads on their way to emergency health care in Orofino, Grangeville, or Lewiston. *See* Caldwell Test., May 3, 2011 Tr. at 66-68 (describing the location of emergency medical services in north central Idaho); Ex. 2 at 7 (map illustrating transport route stages).

Second, the Hearing Officer erroneously assumed that the presence of an ambulance with the mega-load convoy will decrease the risk of delayed access to medical care. *See* Recommended Decision, p. 11. This assumption conflicts with the only competent evidence in the record: Dr. Caldwell's explanation that the increased level of care available in the back of an ambulance is "really negligible." Caldwell Test., May 3, 2011 Tr. at 98.

Turning to the question properly before the Hearing Officer—whether ITD placed a primary concern on public safety—the Petitioners proved that ITD failed to investigate how the presence of multiple rolling roadblocks caused by the mega-loads on Highway 12 would impact the public's ability to access emergency health care. ITD did not confer with any experts in the health care field about the impacts of the proposed mega-loads on public health. ITD did not contact the Clearwater Valley Hospital or the head of the emergency medical system in Clearwater County, *see* Caldwell Test., May 3, 2011 Tr., pp. 74-75; and no evidence was presented that ITD had contacted any other hospital or the emergency medical system in any of the other affected counties. ITD's failure to consider the mega-loads' impact on health care demonstrates that it did not place a primary concern on public safety.

[4] Reaching Lewiston is often just as important as reaching an emergency room in a timely fashion due to the limitations on surgeries available in Orofino. Caldwell Test., May 3, 2011 at 67-68. *See also id.* at 72-73 (explaining that Dr. Caldwell transfers to patients from Orofino to Lewiston by ambulance rather than helicopter because it's faster).

The Petitioners also proved that blocking the public's route to emergency medical care is inconsistent with public safety. The only expert testimony about the mega-loads' impacts to public health is that of Dr. Caldwell, who concluded that the mega-loads "would have significant impact on public safety." Caldwell Test., May 3, 2011 Tr., p. 104. Although Dr. Caldwell recognized the merits of the Transportation Plan, including the emergency response scenarios relied upon by the Hearing Officer, *see* Recommended Decision, p. 14, Dr. Caldwell explained that no amount of planning, however well done, can overcome the danger to the public inherent in blocking Highway 12.

The Hearing Officer's recommendation rejects Dr. Caldwell's conclusion because he "appears to hold the opinion that any delay on the highway would not be acceptable." *Id.*, p. 12. This misunderstood Dr. Caldwell's testimony. Dr. Caldwell did not advocate that all traffic should be prohibited or that no amount of delay can be tolerated. Rather, given the many other contingencies that will inevitably arise, it is inconsistent with public safety to voluntarily block Highway 12 with multiple mega-loads. *See* Caldwell Test., May 3, 2011 Tr., pp. 105-106 (explaining that bad outcomes are usually the result of multiple factors and, "So going back to the public safety days, you try to eliminate the ones that you can.")

Thus, under the correct legal standard of Section 100.01, Petitioners proved that ITD failed to place a primary concern on public safety by failing to consider the inherent danger of blocking the public's access to emergency health care; and ITD did not present any countervailing evidence at hearing. Accordingly, applying the correct standard to the facts in the record, the Hearing Officer should reconsider his findings and conclusions as to the medical care access aspect of Petitioner's challenges.

B. Traffic Safety.

Similarly, the Hearing Officer's application of the incorrect legal standard under Section 100.01 tainted his recommendations on traffic safety. *See* Recommended Decision, pp. 15-17. The Hearing Officer considered whether the risks posed by nighttime travel of the mega-loads, versus daytime travel, "should be considered unacceptable." *Id.*, p. 16. The Recommended Decision found that, in comparison to standard commercial traffic, ITD's decision to allow nighttime travel of the mega-loads was justified, because standard commercial traffic travelling at night "would be travelling at higher speeds and without the illumination, escorts, and warnings" of the mega-loads. *Id.*, p. 17.

This again misstates the actual inquiry which the Hearing Officer should undertake – which is not whether the mega-loads pose relatively greater risks than standard commercial traffic traveling on Highway 12, but how the mega-loads in addition to all other traffic would affect public safety and convenience. And in solely comparing the mega-loads to commercial traffic also travelling at night, the Hearing Officer failed to address the issue raised by Petitioners – including through the testimony of Ruth May, Peter Grubb, and Linwood Laughy, supported by Petitioners' expert Pat Dobie – that travel of mega-loads at night will displace other nighttime commercial traffic into daylight hours, thus causing further safety and convenience problems for the general public as additional commercial traffic further clogs Highway 12 during daytime.

By narrowly focusing only on whether the mega-loads will increase traffic safety risks at night compared to standard commercial vehicles, the Hearing Officer thus did not consider the broader impacts of the mega-loads upon traffic safety conditions on Highway 12, despite the record evidence on this point – which again ITD never considered in approving the February 14,

2011 Memorandum of Decision. Accordingly, the Hearing Officer should reconsider the evidence on this point applying the correct legal standard under Section 100.01.

C. Public Inconvenience.

The Hearing Officer should also reconsider his findings and conclusions regarding the public convenience factor under Section 100.01, which are clearly erroneous for several reasons. *See* Recommended Decision, pp. 18-23.

First, with respect to delays to following traffic, the Hearing Officer acknowledged that ITD did not consider delays when following traffic is slowed but not stopped. *Id.*, p. 18. However, the Recommended Decision excused this omission because it concluded that following delays would never exceed delays of stopped traffic "as a matter of simple physics." *Id.*, p. 19.

This is plainly erroneous. The Hearing Officer's conclusion here hinges on the assumption that the mega-load convoy will pull over at every turnout, while disregarding the delays that even oncoming traffic will encounter before it is stopped at flagger stations.

As Petitioners noted in the first paragraph of their post-hearing brief, Administrator Frew's February 14th Memorandum of Decision apparently does require the Imperial mega-loads to utilize all the turnouts, stating that: "it is appropriate in this instance to permit the [mega-load] vehicles to travel uninterrupted for a period not to exceed 15 minutes as identified in the approved transportation plan," *see* Hrg. Exh. 1, p. 2 (emphasis added). Yet Mammoet's lead witness Darren Bland stated unequivocally at hearing that the mega-load convoys would travel more than 15 minutes without stopping and hence would not meet that requirement, *see* Bland Test., May 6, 2011 pp. 191-92 & 199. By assuming that the mega-load convoys will utilize all turnouts, the Recommended Decision does not address this key disconnect between what ITD

believes it authorized in the travel plan, and how Mammoet intends to actually move the mega-loads on the highway.[5]

Moreover, the hearing record confirms that oncoming traffic will experience delays when encountering the advance cars and flagger teams before the traffic is stopped to allow the mega-load convoy to pass – delays that ITD admittedly did not consider. Likewise, following traffic may be slowed for far longer than 15 minutes if there is no oncoming traffic requiring the mega-load to pull over; and then once it does, the following traffic will have to wait while oncoming traffic is cleared. By counting only stopped traffic in its delay calculations, ITD has thus omitted consideration of actual delays that will be experienced by travelling public on Highway 12. Omitting consideration of these delays thus violates ITD's duty under Section 100.01 to place a primary concern on public convenience.

Second, application of the erroneous legal standard as discussed above led the Hearing Officer to wrongly discount the other types of inconvenience – including traffic delays, power outages, and the uncertainty that folks living along Highway 12 have experienced in not knowing when and where the mega-loads will actually travel on the highway – which all affect the general public as a result of the mega-load shipments. *See* Recommended Decision, pp. 20-23. The Recommended Decision did not address the adverse impacts that poor communication and constant changes in the mega-loads' travel schedules have already caused to local residents and businesses, as Mrs. May and Mr. Laughy described in their testimony. And the hearing evidence

[5] The Recommended Decision's findings that the TVM went according to the travel plan after the first night is also contrary to the hearing evidence – which was scant because the TVM was underway on Highway 12 while the hearing was in progress. The evidence showed that the TVM did <u>not</u> follow the travel plan's stages after the first day, but instead covered most of sections two and three in a single night before being stopped (for several days) just below Lolo Pass. *See* Bland Testimony. The TVM thus did <u>not</u> follow the plan, even leaving aside the fact that it hit a tree and then a power line on its first night of travel.

from these and other witnesses showed that the extensive tree trimming along Highway 12 – which was required solely to allow the TVM to continue after it clipped the guy wire (causing a power outage that Mr. Frew had advised in the Memorandum of Decision was not expected) – has not been the usual course of business, but has caused unusual traffic delays while marring the scenic qualifies of the Highway 12 route.

These are significant impacts upon the general public, which the Recommended Decision erroneously dismissed as being "hyperbolic" or "not plausible," and likened them to other "minor" such as caused by a school bus stop or highway accident. *Id.*, pp. 22-23. Again, the proper legal inquiry here is not whether normal traffic on Highway 12 may cause delays or traffic obstructions – which they certainly do – but whether the further delays and hardships that will be caused by mega-loads were given "primary concern" by ITD in its permitting decision.

What Petitioners proved at hearing is that ITD did not consider these many types of delay and inconvenience associated with the mega-loads, thus confirming their claim under Section 100.01. Because the Hearing Officer did not consider the evidence in light of the appropriate standard under Section 100.01, reconsideration is appropriate.[6]

D. Preservation Of Highway System.

Petitioners understand that the Hearing Officer has rejected the views and analysis of their traffic engineer, Mr. Dobie, and will not attempt to reargue that evidence.

[6] Petitioners also note that the Hearing Officer's treatment of the delays projected under the traffic control plan is contrary to the record evidence. The record demonstrated that Imperial used only partial traffic count data, such as using 2008 data for the Kooskia-Lowell reach when ITD has prior years' data showing higher traffic counts. Moroever, as noted above, the TVM did not follow the three-stage transport plan on its second and third stages of travel, meaning that the projected delays in the reaches from Kamiah to the Lolo Pass cannot be evaluated based on the experience of the TVM.

However, the Hearing Officer's misapplication of the legal standard under Section 100.01 also taints his recommended findings and conclusions on this topic. As quoted above, Section 100.01 requires ITD not only to place a primary concern on the safety and convenience of the general public, but also on preservation of the highway system. The correct question for resolution is not whether ITD's materials engineer or Mr. Dobie is correct, but whether the record shows that ITD satisfied this regulatory duty in approving the mega-loads.

Petitioners have not challenged the extensive analysis of ITD's bridge engineers, but the hearing evidence showed that – in contrast to the bridges – ITD paid virtually no attention to potential impacts of the mega-loads on the highway pavement. ITD did not consider the current conditions of the highway, which are rated poor in many stretches and have potholes, ruts and other problems. ITD's materials engineer, Mr. Miles, only performed his EASL calculations about impacts to the highway surface after Petitioners brought this challenge and he was called to testify at hearing for a second time. ITD prepared no report or study about pavement impacts prior to approving the Imperial mega-loads, as the hearing confirmed. And ITD did not analyze costs that will be incurred by Idaho taxpayers to repair damage that the mega-loads may cause. This evidence – really, the lack of evidence showing analysis and consideration by ITD of this factor – again confirms Petitioners' claim that ITD violated its Section 100.01 duty to place a primary concern on preservation of the highway system.

Likewise, the hearing record confirms that ITD violated Section 100.01 as well by failing to consider Highway 12's unique values and its role in the Idaho highway system, serving as both a conduit for interstate commerce (as the Hearing Officer has described) and an indispensable part of north central Idaho's tourism economy. *See* Testimony of Ruth May, Peter Grubb, Linwood Laughy & Dr. Steve Seninger. Highway 12's numerous special designations—

both state and federal—are just a few of the objective facts in the record that illustrate Highway 12's role in the state highway system.

Yet ITD failed to consider Highway 12's particular role in the highway system before deciding to issue the February 14th Memorandum of Decision, as the Petitioners demonstrated. *See* Hoff Test., April 27, 2011 Tr., pp. 75-76, 131-132; Frew Test., April 28, 2011 Tr., p. 82. Whether or not the Petitioners' concerns can fairly be called "NIMBY"—and neither ITD nor the Applicants ever made this argument—it remains ITD's responsibility to examine the "back yard" and determine whether the issuance of overlegal permits is consistent with preserving it (*i.e.*, the highway system).

The Hearing Officer rejected the Petitioners' concerns about the creation of a high-and-wide corridor[7] on the grounds that the mega-loads are no different from ordinary commercial traffic. However, the Hearing Officer's own Recommended Decision recognizes that no loads this large have ever used Highway 12 before. *See* Recommended Decision, p. 7 ("Until the Conoco loads arrived on the highway in late 2010, nothing like these loads had ever been seen on Idaho roads before, and certainly not on the winding mountain roads above Lewiston"). The notion that the mega-loads are no different from commercial traffic is also contradicted by the evidence presented at hearing that the mega-loads are, in fact, categorically different. *See* Inghram Test., April 29, 2011 at 21-22 (comparing the experience of encountering a mega-load to what it is like to encounter regular commercial traffic).

[7] It was Mammoet—not the Petitioners—who first proposed turning Highway 12 into a "high load corridor." Ex. 200 at 5. *See also* Couch Test., April 28, 2011 at 128-129 ("I believe it was the Mammoet group that came in the first meeting that mentioned that, potentially, because of the lack of vertical clearances that this would be a nice corridor for height loads, yes."). The Recommended Decision, p. 24, is thus in error in asserting that Petitioners came up with this concept.

Finally, Petitioners introduced evidence at hearing demonstrating that the modifications to Highway 12 made in order to accommodate Imperial's mega-loads have already led a number of other companies to contact ITD about using Highway 12 to transport similar loads, including ConocoPhillips and Harvest Energy. *See* Phipps Test., April 26, 2011 p. 457, 473. *See also* Ex. 187. This evidence again illustrates that ITD failed to prioritize the preservation of the highway system in deciding to approve the Imperial mega-loads without regard to impacts on Highway 12's unique values within the highway system.

V. PREJUDICE TO THE PETITIONERS' SUBSTANTIAL RIGHTS.

Finally, the Hearing Officer should reconsider his finding that there will be no adverse impacts to the tourism industry as a result of the mega-loads because this conclusion is inconsistent with the evidence presented at hearing. The Petitioners presented evidence that traffic disruptions affect tourism, as well as the opinion of an expert economist that the authorization of 200-plus mega-loads on Highway 12 will negatively impact the tourism industry. None of this testimony was refuted by ITD or the Applicants.

It has been empirically demonstrated that traffic disruptions on Highway 12 negatively impact tourism operations. *See* May Test., April 25, 2011, pp. 28-29; Grubb Test., April 25, 2011, p. 98-99. The Hearing Officer's suggestion that the Petitioners' claims of economic harm are purely speculative fails to take this evidence into account.

It has also been demonstrated that north central Idaho's scenic views and natural resources are the main attractive forces driving the tourism industry. Seninger Test., April 26, 2011 Tr. at 524-525. Considering "what the region represents in terms of a market for travel and tourism and the inconsistency between that marketing . . . what this industrial transportation activity represents against those values and attributes," the only qualified economist to examine

the issued has concluded that the mega-loads will damage the tourism industry. Seninger Test., April 26, 2011 Tr. at 557-558.

It is true, as the Hearing Officer observed, that all discussions about future impacts are necessarily prospective. However, making projections about the impacts of a proposed action is an accepted practice in the field of economics and Dr. Seninger has experience making such projections. Seninger Test., April 26, 2011 Tr. at 455-456, 529. As the Hearing Officer acknowledged at hearing, "the subject matter is capable of economic analysis." *Id.* at 110.

Dr. Seninger is the only qualified economist who has reviewed the available studies and proffered an opinion about how the mega-loads will impact north central Idaho's tourism industry. ITD refused to conduct an economics study, Frew Test., April 28, 2011 p. 83, and Imperial's representations to the agency were confined to questionable[8] assertions about the project's potential benefits; Imperial made no attempt to address the project's potential economic costs. Seninger Test., April 26, 2011 at 556.

Neither ITD nor the Applicants so much as argued—much less proved—that the mega-loads themselves could serve as a tourist attraction. The Hearing Officer's speculation that this might occur, *see* Recommended Decision, pp. 49-50, thus lacks any grounding in the evidence at hearing. If anything, the evidence presented at hearing refutes this possibility, as it demonstrates that it is precisely Highway 12's non-industrial components that draw tourists there. Consequently, it is far more speculative to say that the mega-loads might attract tourists than to predict, based on past events and the carefully considered opinions of an expert, that they will repel them.

[8] As Dr. Seninger explained, even these assertions were based on a misuse of the available methodologies. Seninger Test., April 26 at 542-543 (explaining that Exxon-Imperial's projected benefits confuse spending and employment multipliers; "basically, it's apples and oranges").

The Hearing Officer also dismissed the testimony of Dr. Seninger, Ms. May, Mr. Grubb, and Mr. Laughy on the assumption that the transport of the TVM allegedly did not impact businesses along the route. This conclusion does not follow from the evidence presented at hearing, however. For one thing, the TVM did not travel during height of the tourist season, the time when impacts would most likely to occur. More importantly, the fact that the TVM finally made it through Idaho – three weeks after it left Lewiston, and as the hearing was being concluded – does not prove anything about how its transport has affected north central Idaho's reputation. Accordingly, the Hearing Officer should reconsider and correct the Recommended Decision's treatment of mega-load impacts on the tourism industry and Petitioners themselves.

CONCLUSION

Again, in presenting this Petition For Reconsideration by the Hearing Officer, Petitioners are not attempting to reargue the facts and law they previously submitted. For example, Petitioners disagree with the Hearing Officer's resolution of their claims relating to the 10-minute rule of Chapters 11 and 16 of the ITD regulations, for reasons already briefed; but they understand the Hearing Officer has rejected those arguments and will not reargue them. However, Petitioners do not waive any such errors in the Recommended Decision simply because they have not included them here.

For the foregoing reasons, the Hearing Officer should reconsider and revise the Recommended Decision to correct the clear errors identified above.

Dated this 11th day of July, 2011.

Respectfully submitted,

/s/ Laird J. Lucas_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2011, I caused to be served the foregoing Petition For Reconsideration By Hearing Officer upon the following persons by email:

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