

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

FRIENDS OF THE CLEARWATER,)	
)	
Petitioner,)	
)	
vs.)	
)	
IDAHO TRANSPORTATION)	FINAL ORDER DENYING
DEPARTMENT,)	PETITION TO INTERVENE
)	
Respondent,)	
)	
and)	
)	
NICKEL BROS.,)	
)	
Applicant.)	
_____)	

I. PROCEDURAL BACKGROUND

Friends of the Clearwater (“FOC”) filed a Petition to Intervene with the Idaho Transportation Department on September 7, 2011. FOC requested to intervene in the matter of overlegal permit applications filed by Weyerhaeuser, Inc. and its transportation company, Nickel Bros.

Weyerhaeuser and Nickel Bros. sought twelve overlegal permits to transport equipment over U.S. Highway 12 from Lewiston, Idaho to the Montana State Border. Prior to the filing of the Petition by FOC, the Idaho Transportation Department’s Division of Motor Vehicles had granted two of the applications and issued permits. Nickel Bros. successfully transported the two permitted loads over Highway 12 to the Idaho-Montana border. FOC does not contest the two loads that have been transported, but protests the other ten pending applications/permits.

FOC protests granting the remaining permit applications on the grounds that the overlegal loads will: (1) delay other traffic on Highway 12; (2) risk damage to the Clearwater National Forest; (3) degrade the Highway 12 corridor's scenic values; (4) impede access to the highway; (5) impede access to public lands; and (6) will set precedence for transporting additional overlegal loads over Highway 12 with the result of further exacerbating the foregoing issues.

On September 14, 2011, Nickel Bros. and the Idaho Transportation Department ("Objectors") each filed objections to FOC's Petition to Intervene. The objections filed by Nickel Bros. were supported by affidavits of the Operating Manager of Nickel Bros., the Vice-President and Mill Manager of Weyerhaeuser, and the companies' legal counsel. Both Objectors argue that the Petition should be denied because, among other grounds, the Petitioner: (1) failed to allege a "direct and substantial interest" in the permit applications; (2) failed to otherwise include information required for a proper Petition to Intervene; and (3) already litigated the issues presented in the Petition in a previous hearing before the Department, and now cannot seek to re-litigate the same issues before the Department.

I have reviewed the Petition and the Objections filed in this matter. For the reasons set forth below, I agree with the Objectors and deny the Petition to Intervene.

II. FACTUAL BACKGROUND

Nickel Bros. is responsible for a transportation project that involves moving twelve pieces of equipment from the Port of Wilma, Washington across Idaho on U.S. Highway 12 ("Highway 12"), through Montana, and into Canada for delivery to Weyerhaeuser Company Limited's pulp and paper facility (the "Mill") in Grande Prairie, Alberta, Canada. Affidavit of Adam Greve ("Greve Aff.") ¶¶ 4, 9. The equipment is necessary for the construction of a Seven-

Effect Evaporator System (“Evaporator Plant”) at the Mill. Greve Aff. ¶ 9; Affidavit of Aleasa Tasker Dated September 14, 2011 (“Tasker Aff.”) ¶¶ 2, 5-11.

Powered by waste products, the Evaporator Plant will reduce greenhouse gases, produce green energy, and generate 23 megawatts of electricity, enough energy to power 16,000 homes annually. Tasker Aff. ¶ 2. The Evaporator Plant will also decrease the quantity of chemicals and water the Mill uses, in turn improving the efficiency of waste-water treatment and decreasing wastewater discharges. Tasker Aff. ¶ 3. The Government of Alberta has designated the Mill an EnviroVista Leader six years in a row. Tasker Aff. ¶ 4.

If the equipment is not delivered before winter in 2011, the entire evaporator project may be delayed by a full year. Id. ¶ 7. This will result in a loss of green energy to Alberta and a financial loss to Weyerhaeuser related to the delay of the project and lost income and grants in excess of \$4 million for a 1 month delay; \$12 million for a 3 month delay; and \$15 million for a 6 month delay. Id. ¶ 9, 11.

Nickel Bros. began working with the Idaho Transportation Department (“ITD”) in December of 2010 to develop a transportation plan (“Transportation Plan”) and to obtain overlegal permits. Greve Aff. ¶ 5. Over the course of eight months, Nickels Bros. worked with the ITD to develop a Transportation Plan which prioritizes the safety and convenience of the general public and the preservation of the highway system. See IDAPA 39.03.09.100.01; Greve Aff. ¶¶ 5-8.

In May, 2011, ITD issued a press release which informed the public of Nickel Bros. request for overlegal permits. Wonderlich Aff. Ex. A. Press coverage also occurred in May 2011, providing further information to the public. Id. Ex. B. In fact, Nickel Bros. published a

website in May 2011 to provide the public with information about these shipments. Greve Aff. ¶ 20, Ex. B.

In August, 2011, ITD approved the Transportation Plan for the twelve shipments. Of the twelve loads under consideration, two are over 22' wide (one is 22'5" and the other is 23'9"), three are 14' wide, and the remaining seven range from 16'7" to 19'10." Nine of these loads, measuring more than 16' in width, require movement under a Transportation Plan, while the three 14' wide loads are allowed to travel without a Transportation Plan. On August 25, 2011, ITD issued two permits that incorporated the Transportation Plan and required Nickel Bros. to comply with the Plan. Nickel Bros. used the first two permits on September 1, 2011 and then on September 6, 2011. As indicated above, the loads were successfully transported to the Idaho-Montana border. A third permit was issued on September 6, 2011. However, the third permit has not been acted upon as of this date.

The Petitioner, Friends of the Clearwater, is a non-profit conservation group that is concerned with protecting and preserving the qualities and resources of the Clearwater bioregion, through which Highway 12 runs. Petition to Intervene (Petition), ¶ 5. A number of FOC's members are long-time property and business owners on or near Highway 12. *Id.* FOC states that its members will be harmed by the transport of the overlegal loads at issue, including "irreparable harm to their property rights, livelihoods, health and safety" if ITD approves the applications submitted by Nickel Bros. In terms of livelihood, FOC is particularly concerned with the affect that overlegal loads may have on the area's tourism trade. Petition ¶ 10.

Also, FOC is concerned that if the overlegal loads used Highway 12, "The ability of FOC's staff and members to use and enjoy the public resources of the Clearwater Bioregion, and the fish and wildlife associated with them, will be substantially and directly affected" Petition

¶ 5. FOC states that its staff and members will be substantially delayed and hindered in the ability to access these resources, especially in light of the precedence the permits at question may set for additional overlegal loads to use Highway 12 in the future. Id.

Additionally, FOC notes that Highway 12 is the arterial roadway that connects the communities of the Clearwater/Lochsa River corridor to essential goods and services, including medical care and groceries. Petition ¶ 8. Firefighters and Emergency Medical Technicians use Highway 12 to reach duty stations, accidents, and fires. Petition ¶ 9.

Based on these concerns, FOC has petitioned to intervene in the application and permit process for the transportation of the overlegal loads at issue.

III. DISCUSSION

A. THE PETITIONER CANNOT RE-LITIGATE THE SAME ISSUES UPON WHICH THE DEPARTMENT RULED AGAINST THE PETITIONER IN A PREVIOUS HEARING.

FOC previously intervened concerning applications submitted by Imperial Oil, and its transporter, Mammoet International. In that matter, the Petitioner raised the same issues raised here. The Petitioner participated in a nine-day administrative hearing in which it presented testimony of individual members, expert witnesses, law enforcement officers, and numerous exhibits. The hearing officer in that matter was a retired district court judge, an independent and objective individual. Following the hearing, the hearing officer issued extensive findings of fact, conclusions of law and a recommended order. In his recommended order, the hearing officer determined the Idaho Transportation Department had not abused its discretion in approving the permit applications, and had taken reasonable steps to protect the safety and convenience of the public. Moreover, despite having a full opportunity to present its evidence and arguments, the hearing officer found FOC failed to demonstrate that there would be “irreparable harm to their property rights, livelihoods, health and safety” or that the Clearwater Bioregion, or Petitioner’s

use of the region, would be substantially affected by the proposed transport of overlegal loads over Highway 12.

As the Director of the Idaho Transportation Department, I formally adopted the findings, conclusions and recommended order of the hearing officer in a Final Order dated September 7, 2011. On the same day, after I had issued the Final Order in the Imperial Oil matter, FOC filed the Petition to Intervene in this matter raising the same issues.

The doctrine of collateral estoppel bars re-litigation of an issue determined at a prior proceeding when the issue in a subsequent proceeding is identical to an issue actually litigated and necessarily decided in a prior proceeding. Hill v. Am. Family Mut. Ins. Co., 150 Idaho 619, --, 249 P.3d 812, 820 (Idaho 2011). “Collateral estoppel applies to bar a litigant from re-litigating issues previously decided when: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.” Waller v. State, Dept. of Health and Welfare, 146 Idaho 234, 238, 192 P.3d 1058, 1062 (2008). See Pence v. Idaho State Horse Racing Comm’n, 109 Idaho 112, 115, 705 P.2d 1067 (Idaho 1985) (discussing the application of collateral estoppel and res judicata in administrative proceedings) and State v. Powell, 120 Idaho 707, 708, 819 P.2d 561, 562 (1991), in which the Court indicated that “decisions of administrative agencies could be accorded preclusive effect in subsequent litigation.”

I note that FOC has indicated in its Petition that this matter is distinguished from the Imperial Oil matter in that permits issued to Imperial Oil restricted traffic delays caused by the

overlegal loads to be limited to 15 minutes. Petition ¶ 11. The Petitioner alleges there is not a similar requirement for the overlegal loads in this matter. Petition ¶ 16. Petitioner implies that the Department must apply a fifteen minute requirement to every overlegal load.

However, as noted in the Imperial Oil case, there is not a 15 minute requirement for traffic delay imposed by either statute or rule. Rather, as the Petition itself states: “The ITD regulations further require that ITD must ensure the load is transported ‘in such a way that the traveled way will remain open as often as feasibly possible and to provide for frequent passing of vehicles traveling in the same direction.’ IDAPA 39.03.11.100.05(a). Petition ¶ 26. As the hearing officer found in the Imperial Oil matter, the Department is not required to impose either a fifteen-minute requirement, or a ten-minute requirement for potential traffic delay as FOC argued in that case.

As a side note, as stated in the Department’s objections, FOC appears to have misunderstood the facts in this matter. The Transportation Plan for these loads provides that “traffic delays will be limited to 15 minutes.” Transportation Plan, p. 24. The Plan further provides that, “This plan coupled with transport travel limited to late night early morning hours will ensure that traffic will not be held up more than 15 minutes before being able to pass the load safely.” Transportation Plan, p. 44.

Accordingly, I find the Petitioner simply is attempting to re-litigate the same issues decided in a previous administrative proceeding. The Petitioner is collaterally estopped from pursuing those same issues again in this matter.

B. THE PETITIONER FAILED TO ALLEGE THAT THEY HAVE A SUBSTANTIAL AND DIRECT INTEREST IN THE PERMIT PROCESS.

Petitioner notes that the procedures governing a contest of an overlegal permit are set forth in the Idaho Rules of Administrative Procedure of the Attorney General. Petition ¶ 30.

Those rules are found at IDAPA 04.11.01, *et seq.* Petitioner further notes that under these rules, persons with a direct and substantial interest in a contested case may petition to intervene in the case. Petition ¶ 30. These are accurate statements.

However, in order for the petition to be granted, the petition to intervene must actually “show” a “direct and substantial interest in any part of the subject matter of a proceeding ...” IDAPA 04.11.01.353. In its present Petition to Intervene, FOC failed to adequately claim, or “show” that they have a direct and substantial interest in the Nickel Bros. permits.

The issue of what constitutes “direct and substantial interests” in a contested case has been considered and addressed by the Idaho State Board of Environmental Quality. In *J.R. Simplot Co. v. Idaho Dep’t Environmental Quality*, Docket No. 0101-03-07, the Board of Environmental Quality found that the rules did not define the “direct and substantial interests” necessary to intervene in a contested case. However, the Board reasoned that the plain meaning of the phrase requires the petitioner to allege more than a generalized interest in the proceedings. The Board went on: “To support a claim of direct and substantial interest, the allegation made in support of the claim must be factually supported and specific to the party making the claim. The would-be Intervenor must articulate the unique way in which he or she will be affected by disposition of the case.” This reasoning is consistent with rulings from the Idaho Supreme Court regarding standing. The courts have held that individuals who challenge governmental actions must make allegations of particular individual harm rather than harm to the general public. *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002).

In the present Petition to Intervene, the Petitioner has failed to provide any “factually supported and specific” information regarding their claimed interests. FOC has not provided affidavits of any of its members or staff indicating how they as individuals are going to be

directly or substantially impacted by the Nickel Bros loads. As indicated above, the Petition contains allegations of a generalized harm that any member of the public could make. However, FOC has not provided any specific factual information to support its general claims.

Without a sufficient showing of direct and substantial harm, the Petitioner failed to demonstrate that it should be allowed to intervene in this matter.

C. THE PETITION TO INTERVENE ALSO FAILS TO COMPLY WITH OTHER APPLICABLE REQUIREMENTS OF THE IDAHO RULES OF ADMINISTRATIVE PROCEDURE OF THE ATTORNEY GENERAL.

The rules governing intervention in the IDAPA also provide that: “The petition must set forth the name and address of the potential Intervenor and must state the direct and substantial interest of the potential Intervenor in the proceeding.” IDAPA .04.11.01.351. Friends of the Clearwater did not provide its corporate address or the names of the members and staff which are claiming direct and substantial impacts from the loads at issue.

D. THE REQUEST TO HOLD THE ISSUANCE OF THE PERMITS IS DENIED.

While not expressly stated in the Petition, the implication is that the Department should not issue permits while the Petition is pending. For the reasons stated above, the Petition is denied and therefore, the request to stay the permits also is denied.

I also note Idaho Code § 49-1004(6) provides that a bond may be required before a stay of the permit is ordered. This is the third Petition to Intervene filed by the Advocates for the West (the law firm) on behalf of their clients, and the second by FOC challenging overlegal loads on Highway 12. Two different hearing officers have already ruled, in two separate and fully litigated contested case hearings, that the Department properly interpreted and applied its rules, and appropriately issued overlegal permits for overlegal loads to travel on Highway 12. The first administrative hearing involved applications submitted by ConocoPhillips. Although

FOC was not a party to the first administrative hearing on the Conoco loads, the issues challenged in that hearing are identical to the issues being challenged here. In the second hearing for the Imperial Oil loads, the Petitioner was a party to the administrative hearing, and again brought the same issues as being raised in their current Petition.

Twice these issues have been fully litigated in front of and reviewed by an independent hearing officer, and each hearing officer found the claims to be without merit. Given these circumstances it appears that the posting of a bond would be appropriate.

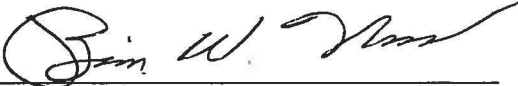
ORDER

Now Therefore, It is Hereby Ordered that the Petition to Intervene filed by the Friends of the Clearwater is DENIED.

It is Further Ordered, the remaining applications and permits challenged by the Friends of the Clearwater are NOT STAYED and that the Department may proceed with issuing the permits.

This Order is a Final Order and is the final administrative action of the Idaho Transportation Department in the matter pursuant to Idaho Code § 67-5246. Any party to this proceeding has the right to judicial review in the District Court, pursuant to Idaho Code §67-5270.

DATED this 16th day of September, 2011.



BRIAN W. NESS
Director
Idaho Transportation Department

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 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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