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BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

FRIENDS OF THE CLEARWATER,)	
)	
Petitioner,)	PETITION TO INTERVENE
)	IN THE CONTESTED CASE
vs.)	REGARDING THE
)	EVAPORATOR SYSTEM
IDAHO TRANSPORTATION)	TRANSPORTATION
DEPARTMENT,)	PROJECT
)	
Respondent,)	
)	
and)	
)	
NICKEL BROS,)	
Petitioner.)	

INTRODUCTION

1. Pursuant to IDAPA 4.11.01.350 and *Laughy et al. v. IDT*, 2010 Idaho S.Ct. Opinion No. 110 (2010), Petitioner Friends of the Clearwater hereby petitions the Idaho Transportation Department to grant it intervenor status in the contested case regarding the application by Weyerhaeuser and its contractor Nickel Bros Inc. for overlegal permits to transport eleven evaporator units up U.S. Highway 12 from the Port of Wilma to Lolo Pass.

2. Eight of the Nickel Bros proposed loads are “mega-loads” that will require the use of rolling roadblocks, delay other traffic for considerable periods of time, risk damage to natural features of the Clearwater National Forest, degrade the corridor’s scenic values, and/or impede access to the highway and nearby public lands.

3. The Nickel Bros proposal confirms what the Idaho Transportation Department (“ITD”) itself predicted over a year ago: the use of Highway 12 to transport one set of mega-loads has paved the way for additional mega-load proposals. Further use of Highway 12 to transport mega-loads will solidify this precedent, undermining Highway 12’s scenic and recreational values and causing further injury to FOC, its staff and members.

4. In *Laughy v. ITD*, the Idaho Supreme Court held that an application for an overlegal permit creates a contested case that individuals with a “direct and substantial interest” may join as intervenors. See *Laughy et al. v. IDT*, 2010 Idaho S.Ct. Opinion No. 110 (Nov. 1, 2010).

5. Petitioner Friends of the Clearwater (“FOC”) is a non-profit conservation group that has direct and substantial interests as an organization, and on behalf of its staff and members in preserving the unique qualities and resources of the Clearwater bioregion. FOC’s membership includes long-time property and business owners on and near Highway 12 who will suffer prejudice to their substantial rights, including irreparable harm to their property rights, livelihoods, health, and safety if ITD allows Nickel Bros to transport mega-loads up 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 by the

transport of Weyerhaeuser's evaporator units, including because FOC's staff and members will be substantially delayed and hindered in their ability to access these resources; and because the mega-loads pose direct, indirect and cumulative impacts to the Clearwater bioregion.

6. Petitioner thus has direct and substantial interests in Nickel Bros' application for overlegal permits on Highway 12 and in the impacts that the proposed shipments may have upon them and their communities; and accordingly are entitled to intervenor status in the contested case.

FACTUAL BACKGROUND

7. The Clearwater bioregion contains many unique qualities and resources, including federal public lands in the Clearwater and Nez Perce National Forests, federally-designated national historic trails and park lands, and the federally-designated Middle Fork Clearwater, Lochsa, and Selway Wild and Scenic River System. The public, including staff and members of FOC, rely on U.S. Highway 12 to provide access to these resources.

8. Highway 12 is also the artery that connects the rural people and communities of the Clearwater/Lochsa River corridor to essential goods and services. Local residents and visitors, including FOC staff and members, rely on Highway 12 to provide access to essential goods and services, including medical care and grocery stores.

9. Local residents also rely on Highway 12 to provide emergency services, including access to medical emergency rooms. Firefighters and Emergency Medical Technicians in this part of Idaho are volunteers, and many of them must travel on Highway 12 to reach duty stations, accidents, and fires.

10. Tourism and recreation represent a growing industry and source of economic benefits to local residents and business owners in north/central Idaho. People from across the United States flock to the Highway 12 corridor to hike, hunt, fish, raft, and appreciate the nationally recognized scenic views.

11. Despite the area's unique qualities, ITD has authorized both ConocoPhillips ("Conoco") and Imperial Oil, a subsidiary of Exxon Mobil ("Exxon Imperial") to transport mega-loads up Highway 12. In both cases, the transporters were required to limit traffic delays to no more than fifteen minutes.

12. FOC and local individuals challenged ITD's decisions to approve the Conoco and Exxon-Imperial mega-loads in prior contested case hearings before ITD. In neither contested case hearing did ITD consider the issue of whether the authorization of the mega-loads would create a precedent with impacts on public safety and convenience stretching into the future.

13. On information and belief, ITD has decided to authorize Nickel Bros to transport eight mega-loads on Highway 12 on behalf of Weyerhaeuser.

14. Weyerhaeuser has hired Nickel Bros to transport a total of eleven shipments of evaporator units to one of its pulp mills in Grande Prairie, Alberta. The proposed shipments will vary in size, ranging from 17 feet 8 inches to 22 feet in height, and 14 feet to 23 feet 9 inches in width. While the equipment itself weighs between 97,003 and 295,420 pounds, most of the mega-loads will weigh more than 400,000 pounds once the equipment is mounted for transport.

15. Eight of these shipments will block both lanes of Highway 12 as they slowly travel along the Clearwater and Lochsa Rivers. Pursuant to a Traffic Control Plan

approved by ITD, Nickel Bros proposes to have the shipments travel at night. Nickel Bros will place "No Parking" signs in the turnouts they may use as much as twenty-fours in advance of their proposed movement, but no other form of public notice is required.

16. Contrary to all prior precedent, the Traffic Control Plan does not require Nickel Bros to pull over every fifteen minutes. Instead, the load superintendent will decide when to allow following traffic to pass. The permits ITD issued for the first two Nickel Bros loads allow them to delay up to three following vehicles for an unlimited amount of time; they need only pull over when a fourth vehicle arrives.

17. The Traffic Control Plan does not adequately provide for accidents involving the mega-loads, medical emergencies, or other contingencies that may arise during the transport of the mega-loads. The emergency response plan is flawed in a variety of ways, including, but not only, because it relies on actions that are impossible, time-consuming, or that Nickel Bros and ITD lack the legal authority to take, such as constructing an "environmental dam" or diverting water.

18. ITD did not notify the public of Nickel Bros intentions to transport mega-loads on Highway 12 until August 25. No public meeting or opportunity to comment was provided to the public.

19. The transport of Weyerhaeuser's evaporator units will cause substantial inconvenience to FOC's staff and members, as well as other members of the public; and threaten the public safety and convenience in many ways. Petitioner is informed and believes, and alleges thereon, that the obstructions and traffic delays caused by the shipments will routinely exceed fifteen minutes.

20. The mega-loads will block the public's access to emergency medical services and impede the ability of police officers, Emergency Medical Technicians, and fire fighters to respond to emergencies.

21. If an accident occurs, Highway 12 could be impassible for days or weeks, due to the massive size of the loads and the difficulty of recovering any load that might capsize onto the highway or fall into the Lochsa or Clearwater Rivers.

22. Two of the Nickel Bros loads have already traveled up U.S. Highway 12. FOC does not challenge either of these shipments.

LEGAL FRAMEWORK

23. By statute, the Idaho legislature has limited the size and weight of vehicles that may travel on Idaho's highways. I.C. §§ 49-1001, 49-1002, 49-1010. The Idaho legislature has also authorized ITD to exercise its discretion in approving loads that exceed these limits. I.C. § 49-1004.

24. Pursuant to its statutory authority, ITD has adopted regulations which set forth the considerations and requirements for overlegal permits, such as those requested for the shipment of the evaporator units. *See* IDAPA §§ 39.03.01 *et seq.*

25. The ITD regulations mandate that the Department's "primary concern" in approving any overlegal permit must be "the safety and convenience of the general public and the preservation of the highway system." IDAPA § 39.03.09.100.01 (emphasis added).

26. 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). In an attempt to comply with this mandate, ITD has always required overlegal loads to limit delays to other traffic to fifteen minutes or less.

27. An application for an overlegal permit creates a contested case that, if granted, results in an order reviewable under the Idaho Administrative Procedure Act, I.C. § 67-5270(3). *Laughy*, 2010 Idaho S.Ct. Opinion No. 110, at 6.

28. The APA authorizes and encourages the use of informal procedures to resolve contested cases. I.C. § 67-5241(1)(c). However, “an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings.” *Id.* at 7.

29. While an agency may decline to initiate a contested case when acting in a prosecutorial capacity, ITD may not “decline to follow the required statutory procedures in a contested case.” *Id.* at 8 (citing I.C. § 67-5241(1)(a)).

30. ITD’s regulations governing the issuance of overlegal permits adopt the procedures set forth in the Idaho Attorney General’s rules. *Laughy*, 2010 Idaho S.Ct. Opinion No. 110, at 7. *See also* IDAPA 04.11.01.104 *et seq.*; IDAPA 39.03.01 *et seq.* (incorporating Attorney General APA rules). Under these rules, persons with “a direct and substantial interest” in a contested case may petition to become parties to the case as intervenors. IDAPA 4.11.01.350.

INTERVENTION MUST BE GRANTED HERE

31. FOC has a direct and substantial interest in ITD’s decision to grant or deny overlegal permits for Weyerhaeuser’s evaporator units because FOC, its staff, and its members will be directly and indirectly harmed by these shipments in a variety of ways.

32. Allowing Nickel Bros to transport mega-loads up Highway 12 would harm the economic interests of FOC's members, their use and enjoyment of property, and their health and safety.

33. The transport of mega-loads up Highway 12 will compromise the ability of FOC's members to earn a living by damaging the Highway 12 corridor's reputation as a destination for outdoor recreation and tourism. The loads will cause traffic delays, degrade the scenic value of the area by parking in turnouts during the day, and disrupt the rest of visitors staying at campgrounds and hotels near the highway.

34. The transport of the evaporator unit mega-loads would also interfere with FOC's members' quiet use and enjoyment of their property. The transport of mega-loads directly affects members of FOC who live on the highway, including by causing noise, creating traffic congestion around their driveway, and disrupting their sleep. Blocking Highway 12 also places the safety of FOC's members at risk by delaying their access to the hospital and other emergency services. Past experience illustrates that a delay of fifteen minutes can be life threatening.

35. FOC staff and members have already been directly and substantially affected in their use and enjoyment of the Clearwater region, including their lawful use of Highway 12, by the initial mega-loads approved by ITD for the ConocoPhillips' Coke Drum Transport Project and Exxon-Imperial's Test Validation Module. FOC staff and members have been prevented from using public turnouts along Highway 12; they have been delayed and inconvenienced in their travel on Highway 12; and they have been warned or threatened with legal sanctions for exercising their lawful rights to monitor, observe and voice opposition to the mega-loads on Highway 12.

36. The proposed evaporator unit shipments will also cause direct, indirect, and cumulative impacts to the public lands and resources of the Clearwater region which FOC strives to protect and defend, including impairment of the outstandingly remarkable values of the Middle Fork Clearwater and Lochsa wild and scenic river system; and to the wildlife of the region, such as bald eagles that nest or roost along the highway and will be disturbed by the passing mega-loads.

37. A formal contested case is necessary for FOC to present the facts and evidence demonstrating that the ITD must deny the requested permits under these regulatory provisions.

38. This petition is timely filed under IDAPA § 04.11.01.352 because it is submitted within fourteen days of the ITD's permit for the first evaporator unit and no date has been set for a contested case hearing in this matter. ITD announced to the public that Nickel Bros was proposing to transport overlegal loads up Highway 12 barely a week ago, on August 25, 2011. The first potential notice that the public had of a potential mega-load transport by Nickel Bros this month appeared in an August 23 article in the Lewiston Morning Tribune, which indicated that only one of the eleven Nickel Bros shipments would be a mega-load. ITD did not provide FOC or any of its staff or members with a copy of the Nickel Bros Traffic Control Plan until September 4, 2011.

39. In light of the statutory and regulatory provisions above, and in light of the impacts posed by the shipment of Weyerhaeuser's evaporator units to FOC's staff and members and other concerned and aggrieved individuals and business owners along the Highway 12 corridor, ITD is statutorily obligated and mandated to grant intervention and conduct a formal contested case hearing pursuant to the Idaho Administrative Procedure

Act, I.C. § 67-5240 *et seq.*; and by the implementing regulations of the Idaho Attorney General and ITD.


40. FOC's members will be deprived of their due process and equal protection rights guaranteed under the federal and state constitutions if ITD fails or refuses to conduct a contested case hearing in response to this petition prior to issuing further permits to Nickel Bros for the transport of Weyerhaeuser's evaporator units.

CONCLUSION

Therefore, FOC respectfully prays that ITD grant this petition for intervention, hold a formal contested case hearing before approving any further permits for the shipment of evaporator units by Nickel Bros; and that based on the record of such contested case hearing, ITD deny the requested overlegal permits for evaporator units.

Dated this 7th day of September, 2011.

Respectfully submitted,


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Attorney for Petitioner

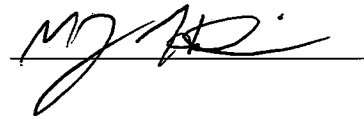
PROOF OF SERVICE

I HEREBY CERTIFY that on this 7th day of September 2011, I caused to be served the foregoing Petition to Intervene upon all parties of record in this proceeding by the means indicated below:

Director
Idaho Transportation Department
3311 West State Street
Boise, ID 83707
Via hand-delivery

Tim Thomas
tim.thomas@itd.idaho.gov
Deputies Attorney General
Idaho Transportation Department
3311 West State Street
Boise, ID 83707
Via hand-delivery and email

Nickel Bros
625 Riverside Rd #1
Everett, WA 98201
Via Federal Express

A handwritten signature in black ink, appearing to be 'MJH', written over a horizontal line.