

Erik F. Stidham, ISB # 5483
Scott E. Randolph, ISB # 6768
Brian C. Wonderlich, ISB #7758
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
efstidham@hollandhart.com
serandolph@hollandhart.com
bcwonderlich@hollandhart.com

Attorneys for Intervenor ConocoPhillips Company

IN THE SUPREME COURT FOR THE STATE OF IDAHO

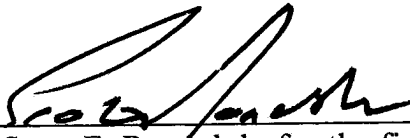
<p>LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB</p> <p>Plaintiffs/Respondents,</p> <p>vs.</p> <p>IDAHO TRANSPORTATION DEPARTMENT,</p> <p>Defendant/Appellant,</p> <p>CONOCOPHILLIPS COMPANY,</p> <p>Intervenor/Appellant</p>	<p>Supreme Court No. 37985-2010 District Court Case No. CV 10- 40411</p> <p>CONOCOPHILLIPS COMPANY'S MOTION FOR EXPEDITED HEARING PURSUANT TO IDAHO APPELLATE RULE 44</p>
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Intervenor-Appellant ConocoPhillips Company (“ConocoPhillips”), by and through its counsel of record Holland & Hart LLP, submits this Motion for Expedited Hearing Pursuant to Idaho Appellate Rule 44. The grounds, authority, and extraordinary circumstances justifying an expedited appeal are stated in the corresponding brief in support and the affidavits thereto.

COPY

Dated this 26th day of August, 2010.

HOLLAND & HART LLP

By: 
Scott E. Randolph, for the firm
Attorney for ConocoPhillips
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Natalie J. Havlina
Advocates for the West
P.O. Box 1612
Boise, Idaho 83701

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J. Tim Thomas
Deputy Attorney General
Idaho Department of Transportation
3311 W. State St.
Boise, Idaho 83707-1129

- U.S. Mail
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for HOLLAND & HART LLP

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HOLLAND & HART LLP
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Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
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bcwonderlich@hollandhart.com

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

<p>LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB</p> <p>Plaintiffs/Respondents,</p> <p>vs.</p> <p>IDAHO TRANSPORTATION DEPARTMENT,</p> <p>Defendant/Appellant,</p> <p>CONOCOPHILLIPS COMPANY,</p> <p>Intervenor/Appellant</p>	<p>Supreme Court No. 37985-2010 District Court Case No. CV 10- 40411</p> <p>BRIEF IN SUPPORT OF CONOCOPHILLIPS COMPANY'S MOTION FOR EXPEDITED HEARING PURSUANT TO IDAHO APPELLATE RULE 44</p>
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Intervenor-Appellant ConocoPhillips Company (“ConocoPhillips”), by and through its counsel of record, submits this Brief in Support of its Motion for Expedited Hearing Pursuant to Idaho Appellate Rule 44.

I. INTRODUCTION

Extraordinary circumstances justify an expedited appeal in this case.

COPY

At about 5 p.m. MST on August 24, 2010, Judge Bradbury of the Second Judicial District issued an Opinion (“Bradbury Opinion”) in the matter of *Laughy, et al vs. Idaho Transportation Department, et al.*, Case No. CV 10-40411¹, which reversed permits issued by the Idaho Transportation Department (“ITD”) preventing four (4) shipments from Lewiston to ConocoPhillips’s Billings Montana refinery. Affidavit of Erik F. Stidham dated August 26, 2010 (“Stidham Aff.”), at Exhibit A. The next day, ConocoPhillips filed a Notice of Appeal regarding the Bradbury Opinion. *Id.* at Ex. E.

Given ongoing construction projects on the Arrow Bridge in Lewiston and fast-approaching winter weather, ConocoPhillips has only a short window of time in which to get the needed shipments to Billings so that repairs can be made. Stidham Aff., at ¶ 7. If this window is missed, ConocoPhillips likely will be forced to delay shipment until spring 2011, causing the needed repairs to be postponed until late summer 2011. Stidham Aff., at Ex. B (Affidavit of Steven Steach). Absent an expedited appeal, the delay will impose millions of dollars of loss and will disrupt and compromise the production of the Billings refinery—all before the merits of the appeal are addressed. *Id.*

Moreover, the Bradbury Opinion creates a public impact that should be addressed on an expedited basis. It is estimated that each year ITD issues approximately 28,000 permits for oversized or overweight (collectively “overlegal”) loads. Stidham Aff., at ¶ 8. The Bradbury Opinion rejects and reverses ITD’s longstanding interpretations of key regulations for overlegal loads and seeks to replace ITD’s interpretations with new, judicially-created, and significantly different interpretations that create inconsistencies and limitations. *Compare* Stidham Aff., at Ex. A (Bradbury Opinion) *with id.* at Ex. C (ITD’s Memorandum of Decision (“MOD”)). An

¹ The Plaintiffs initiated this litigation on August 16, 2010. The district court entered its Opinion eight days later.

expedited appeal is needed to clarify these key regulations for the benefit of ITD and its customers, including ConocoPhillips.

Given the narrow scope of the issues, complete administrative record, and brief duration of the underlying proceedings, the appeal can be handled properly on an expedited basis.

II. FACTS

1. Billings Repair Project

ConocoPhillips is engaged in a project to repair its Billings, Montana refinery which supplies fuel and other energy products to customers in Idaho, Montana, and the surrounding region. Stidham Aff., at Ex. C (MOD at p. 1). As part of the repair project, ConocoPhillips purchased two new coke drums to replace existing equipment. *Id.* The existing drums are nearly 20 years old and are at the end of their useful life. *Id.* ConocoPhillips needs the new drums to make repairs that will improve the operational reliability of the refinery. *Id.* Given the age of its existing drums, ConocoPhillips is not able to continue using existing equipment without adverse impacts, potential interruptions in the refinery's operations, and increased maintenance costs. *Id.*

2. Transportation of the Repair Drums Required Lengthy Planning

Transportation of the drums is a significant project that required long-range planning. Since at least 2009, ConocoPhillips has been working with its transportation contractor, Emmert International Co. ("Emmert"), and ITD about the need to transport the coke drums from Lewiston to Billings over U.S. Highway 12 ("U.S. 12"). Stidham Aff., Ex. D (Agency Record, at ITD00761-62, ¶ 23). Preparations have taken years to put into place. *Id.* In order to get the coke drums to Billings in time, the transportation plan was carefully orchestrated to coincide with the schedule for repairs being performed on the Arrow Bridge in Lewiston. Stidham Aff. at Ex. C (MOD at p. 3). The coke drums cannot be transported while Arrow Bridge repairs are

underway. Stidham Aff. at ¶ 7. *Id.* Repairs on the Arrow Bridge are currently on hold awaiting the transport of the drums. The bridge repairs will have to resume imminently. *Id.*

Consequently, ConocoPhillips faces time limitations owing both to the Arrow Bridge construction and the coming winter weather. *See, e.g.,* Stidham Aff., at Ex. B, ¶ 3. If the shipments do not commence without delay, ConocoPhillips likely will suffer financial losses in excess of \$9 million and will have its Billings refinery significantly compromised. Stidham Aff., at Ex. B, ¶ 2-5.

III. ARGUMENT

A. Expedited Review is Authorized by the Idaho Appellate Rules

Idaho Appellate Rule 44 gives this Court the authority to “alter, shorten, or eliminate any step or procedure in the appeal from an appealable order or judgment upon finding extraordinary circumstances.” Idaho App. R. 44. Expedited review under Rule 44 has been found to be appropriate where “[t]iming is clearly a critical concern” and where it will allow the parties to “proceed with certainty as to the current state of the law.” *Gibbons v. Cenarrusa*, 140 Idaho 316, 319, 92 P.3d 1063, 1066 (2002).

An expedited appeal is appropriate here because: (a) extraordinary circumstances exist in this case that will result in significant loss to ConocoPhillips without any meaningful right of review without expedited review; (b) the Bradbury Opinion creates new, conflicting interpretations of ITD regulations that should be resolved on an expedited basis; (c) the parties and the district court have recognized the urgency of this case in expediting the proceedings below; and (d) an expedited appeal can be accomplished efficiently because the administrative record is complete and the issues on judicial review have already been briefed by the parties.

B. Extraordinary Circumstances Justify Expedited Review of this Case

In *Gibbons*, an expedited appeal was set for hearing, briefed, argued, and decided in a matter of two weeks. *See* 140 Idaho at 316, 92 P.3d at 1063 (stating May 3, 2002 as the date of decision); *id.* at 317, 92 P.3d at 1064 (“[B]riefs have been submitted and received by the Court. Oral argument has been heard.”); *id.* at 321, 92 P.3d at 1068 (Kidwell, J., specially concurring) (“On April 17, 2002, this Court set the present action for an expedited hearing . . .”). The *Gibbons* appeal was expedited because “[t]iming [was] clearly a critical concern in th[e] case” and because doing so would allow the parties “to proceed with certainty as to the current state of the law.” *Id.* at 319, 92 P.3d at 1066.

The appeal in *City of Idaho Falls v. Fuhriman* was also expedited. No. 36721, -- Idaho --, -- P.3d --, 2010 WL 2681084, at *1 (July 8, 2010). At issue in *Fuhriman* was a commercial contract for the long-term sale of power to a municipality beginning in October, 2011. *Id.* at * 1. The Supreme Court granted the municipality’s motion to expedite and issued its decision in July, 2010. *Id.* Although not expressly stated, the *Fuhriman* appeal was likely expedited because timing was a critical concern and because an expedited decision allowed the parties to proceed with certainty as to the current state of the law in implementing the contract at issue. *Id.*

As in *Gibbons* and *Fuhriman*, timing is a critical concern in this case. ConocoPhillips stands to lose \$9 million if the shipments do not cross Arrow Bridge before construction is forced to resume immediately. At that point, ConocoPhillips’s loss will be unavoidable regardless of the outcome of the appeal and regardless of the merits of the Plaintiffs’ claims.

Furthermore, just as in *Gibbons* and *Fuhriman*, an expedited appeal will allow the parties to proceed with certainty as to the current state of the law. Plaintiffs will know whether these

shipments will be traveling U.S. 12, and, if so, when. ConocoPhillips will know whether the shipments will make it to Billings this year, and, if not, can plan accordingly to minimize its loss. Maybe most importantly, ITD will know whether the process it followed in issuing the permits was proper. As Plaintiffs themselves point out, ITD faces applications for many more similar permits. An expedited appeal will provide certainty as to the current state of the law and allow ITD to proceed with those applications in accordance with the law.

An expedited appeal is justified in this case because timing is of critical concern—delay will ensure a substantial loss to ConocoPhillips without any meaningful review—and because it will allow all parties to proceed with certainty as to the current state of the law.

C. The Trial Court’s Interpretations of ITD’s Regulations Should Be Reviewed on an Expedited Basis

The Bradbury Opinion imposes new, conflicting interpretations of IDAPA 39.03.09.100.02 and IDAPA 39.03.16.100.01. Bradbury Opinion, at p. 15-16. This interpretation imposes onerous new requirements on ITD that are in conflict with the plain language of the applicable regulations.

1. The Bradbury Opinion Imposes a New Duty on ITD To Determine That There Are No Other Viable Routes

In relevant part, IDAPA 39.03.09.100.02 states “[t]he Department shall, in each case, predicate the issuance of an overlegal permit on a reasonable determination of the necessity . . . of the proposed movement.”

The Bradbury Opinion interprets the “reasonable determination of necessity” in IDAPA 39.03.09.100.02 to require an independent analysis by ITD that the proposed route to be traveled pursuant to an overlegal permit be “the only viable option” to the destination. Bradbury Opinion, at p. 15. In effect, the Bradbury Opinion would prevent ITD from issuing any overlegal

permits unless ITD determines that no other “viable” route to the destination exists through other states or nations. Such a standard is practically unworkable for ITD given that it handles approximately 28,000 permits per year and would implicate a host of legal issues, including conflicts with the Interstate Commerce Clause of the United States Constitution.

2. The Bradbury Opinion Eliminates ITD’s Discretion to Issue Permits

ITD has interpreted IDAPA 39.03.16.100.01 as “not limit[ing] the Department’s discretion to grant or deny overlength permits. Rather, it sets forth certain circumstances in which a request for an overlength permit will normally be granted.” Stidham Aff. at Ex. C, (MOD at p. 3-4). In contrast, the Bradbury Opinion interprets that section to mean that ITD has no discretion to decide whether a particular overlegal permit should be granted. Bradbury Opinion, at p. 15-16.

Accordingly, until this appeal is heard, ITD is confronted with a judicial interpretation of its regulations which strips ITD of discretionary authority that appears in the plain language of the regulations and which conflicts with ITD’s own reasoned interpretation of the section. The Bradbury Opinion imposes costly, confusing and potentially unconstitutional requirements. Given that ITD issues approximately 28,000 overlegal permits per year, clarification regarding these regulations is needed on an expedited basis.

D. The Parties and the District Court Recognize the Urgent Nature of this Case

In the underlying litigation, the parties and the district court agreed to and complied with an expedited briefing process and hearing. In fact, the hearing was held exactly one week after Plaintiffs filed their complaint, and the district court issued its decision the very next day. Further, counsel for the Plaintiffs-Respondents has stated that a response to ConocoPhillips’s Motion to Expedite will be filed by tomorrow, Friday, August 27, 2010. *See* Affidavit of Scott

E. Randolph. There can be no doubt that the parties and district court recognize the urgency of this case and the necessity for it to be resolved expeditiously.

E. An Expedited Appeal Can be Accomplished Efficiently

Plaintiffs' Complaint sought judicial review of an agency action—ITD's issuance of a permit. The district court's review was based upon the record before the agency. *See, e.g.,* Idaho R. Civ. P. 84(e)(1). That record is complete and has already been prepared for judicial review by the district court. Additionally, the parties have already presented their positions and arguments before the district court.

In reviewing an agency action such as this, the Court "review[s] the agency's decision directly." *Willig v. State Dep't of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Indeed, "this Court reviews the record independently of the district court's decision." *Idaho Power Co. v. Idaho State Tax Comm'n*, 141 Idaho 316, 321, 109 P.3d 170, 175 (2006).

Given this standard of review and the procedural posture of the case, the record is complete and the case ready for appellate review without delay. While the parties may seek to supplement with some limited briefing, the issues are already presented in their briefing to the district court. An expedited appeal in this case can be accomplished quickly and efficiently because the record to be reviewed is already prepared and the issues fully briefed.

IV. CONCLUSION

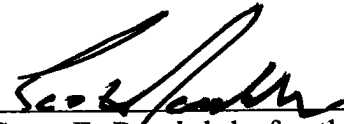
As in *Gibbons* and *Fuhriman*, extraordinary circumstances justify an expedited appeal in this case. ITD will be left in the untenable position of trying to comply with conflicting rules of law in issuing these permits. And, unless ConocoPhillips is allowed to transport the drums within the next few weeks, ConocoPhillips will incur several millions of dollars of loss and

suffer impairment of its refinery without any meaningful right of review. Plaintiffs will have achieved their objective regardless of the merits of their claims.

The administrative record and briefing is complete and ripe for this Court's review. An expedited appeal of this case is justified and should be granted. ConocoPhillips respectfully requests the Court set this case for hearing at the next available date.

Dated this 26th day of August, 2010.

HOLLAND & HART LLP

By: 

Scott E. Randolph, for the firm
Attorney for ConocoPhillips Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2010, 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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Advocates for the West
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for HOLLAND & HART LLP

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Attorneys for Intervenor ConocoPhillips Company

IN THE SUPREME COURT FOR THE STATE OF IDAHO

LINWOOD LAUGHY, KAREN
 HENDRICKSON, and PETER GRUBB

Plaintiffs/Respondents,

vs.

IDAHO TRANSPORTATION
 DEPARTMENT,

Defendant/Appellant,

CONOCOPHILLIPS COMPANY,

Intervenor/Appellant

Supreme Court No. 37985-2010
 District Court Case No. CV 10-
 40411

**AFFIDAVIT OF SCOTT E.
 RANDOLPH IN SUPPORT OF
 CONOCOPHILLIPS
 COMPANY'S MOTION FOR
 EXPEDITED HEARING
 PURSUANT TO IDAHO
 APPELLATE RULE 44**

STATE OF IDAHO)
)ss.
 COUNTY OF ADA)

SCOTT E. RANDOLPH, first being duly sworn on oath, states and affirms as

follows:

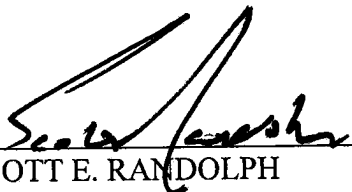
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AFFIDAVIT OF SCOTT E. RANDOLPH IN SUPPORT OF CONOCOPHILLIPS
 COMPANY'S MOTION FOR EXPEDITED HEARING PURSUANT TO IDAHO
 APPELLATE RULE 44 - 1

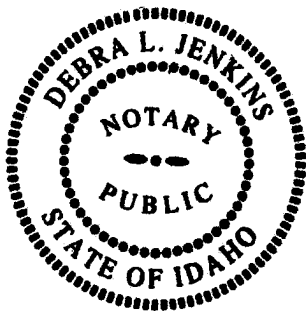
1. I am an attorney on behalf of Intervenor-Appellant ConocoPhillips Company ("ConocoPhillips") in this matter and I make this Affidavit in support of ConocoPhillips's Motion for Expedited Hearing Pursuant to Idaho Appellate Rule 44. I have personal knowledge of the matters stated herein and make this Affidavit based upon my personal knowledge.

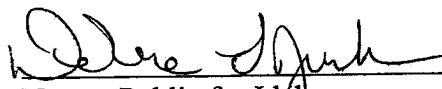
2. Today, August 26, 2010, I spoke to Laird Lucas, Executive Director of Advocates for the West and counsel to the Plaintiffs-Respondents in this case. He represented to me that while Plaintiffs-Respondents would not stipulate to an expedited appeal, they would file their response to Intervenor-Appellant ConocoPhillips Company's Motion to Expedite on Friday, August 27, 2010.

Dated this 26th day of August, 2010.


SCOTT E. RANDOLPH

SUBSCRIBED and SWORN to before me this 26th day of August, 2010.




Notary Public for Idaho
Residing at: Meridian, Idaho
My Commission Expires: 5-15-15

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2010, 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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STATE OF IDAHO)
)ss.
 COUNTY OF ADA)

ERIK F. STIDHAM, first being duly sworn on oath, states and affirms as follows:

1. I am an attorney on behalf of Intervenor Appellant ConocoPhillips Company ("ConocoPhillips") in this matter and I make this Affidavit in support

of ConocoPhillips's Motion for Expedited Hearing Pursuant to Idaho Appellate Rule 44. I have personal knowledge of the matters stated herein and make this Affidavit based upon my personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of Judge John Bradbury's Opinion dated August 24, 2010.

3. Attached hereto as Exhibit B is a true and correct copy of the Affidavit of Steven Steach dated August 18, 2010.

4. Attached hereto as Exhibit C is a true and correct copy of the Idaho Transportation Department's Memorandum of Decision dated August 20, 2010.

5. Attached hereto as Exhibit D is a true and correct copy of the record that the Idaho Transportation Department developed and relied upon in its Memorandum of Decision dated August 20, 2010. The record is provided as both a hard copy and, for ease of reference, on CD in a searchable PDF format. The record contains the bates stamp numbering referred to by the parties and district court in the proceedings below.

6. Attached hereto as Exhibit E is a true and correct copy of ConocoPhillips's Original and Amended Notice of Appeal in this matter.

7. I have been informed that, given the ongoing construction projects on the Arrow Bridge in Lewiston, there is only a short window of time in which to get across the bridge before construction resumes. Transport cannot occur while bridge repairs are underway. I have been informed that once the bridge construction resumes, there will not be another window for crossing the bridge

that will allow the shipments to get to Billings before winter weather prohibits the transport.

8. I have been informed by legal counsel for the Idaho Transportation Department ("ITD") that ITD issues approximately 28,000 overlegal permits each year.

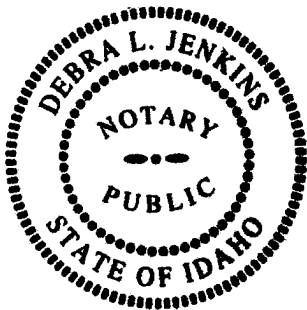
9. The entirety of the underlying litigation was completed in eight days. In turn, this matter is suitable for an expedited appeal.

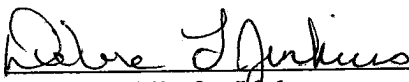
Further the affiant sayeth naught.

Dated this 26th day of August, 2010.


ERIK F. STIDHAM

SUBSCRIBED and SWORN to before me this 26th day of August, 2010.




Notary Public for Idaho
Residing at: Meridian, Idaho
My Commission Expires: 5-18-15

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for HOLLAND & HART LLP

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and the Lochsa River for its esthetics and amenities.

The Department is charged with overseeing the construction, maintenance and use of all highways, roads and bridges in Idaho that come under its jurisdiction.

B. Background

ConocoPhillips Company (Conoco) is replacing its two coke drums at its Billings, Montana, refinery. Conoco engaged Emmert to transport the drums. Depending on their configuration, the loads will approximately be 110 feet long, 27 feet wide, 29 feet high and weigh 646,204 pounds, or 225 feet long, 29 feet wide, 27 feet high and weigh 636,200 pounds. To accomplish the transit Emmert applied in July of 2009 to the Department for special permits to haul the drums because they exceed the weight and size limits for Highway 12.

C. Special Permits standards

The legislature set the weight and size limits for vehicles traveling highways within the Department's jurisdiction. See I.C. §49-1001. The Department, in its discretion, is authorized to issue permits for oversized and overweight loads. I.C. §49-1004. The permits must be in writing and may include limits on the times during which the highways and bridges can be traversed. I.C. §49-1004(1)(a). The permits may also require security to indemnify the Department for damage to the highway and bridges and also for damages to persons or property resulting from the operation. *Id.*

The Department regulations set the standards with which a special permit applicant must comply to receive a permit.

.01 Primary Concerns The primary concerns 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.

.02 Permit Issuance The Department shall, in each case, predicate the issuance of a [sic] overlegal permit on a reasonable determination of the necessity and the feasibility of the proposed movement.

IDAPA 39.03.09.100

When the width of the load exceeds twenty feet and the length exceeds one hundred fifty feet and it is being hauled on a two lane highway, the Department standards include:

- a. The movement of over legal loads shall be made 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 traffic control plan to implement those standards is required and it must include a "[p]rocedure for allowing emergency vehicles to navigate around the vehicle load when necessary." *Id.*

The Department regulations that specifically apply to non-reducible loads, which the subject loads are, provides:

.01 Maximum Dimensions Allowed The maximum dimensions of oversized vehicles or oversize loads shall depend on the character of the route to be traveled, width of roadway, alignment and sight distance, vertical or horizontal clearance, and traffic volume. Overlegal permits will not normally be issued for movements which cannot allow for passage of traffic as provided in IDAPA 39.03.11, "Rules Governing Overlegal Permit Responsibility and Travel Restrictions," Subsection 100.05, except under circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10)

minutes) or when adequate detours are available."

D. The Decision

Division of Motor Vehicles Administrator Alan Frew issued his Memorandum of Decision (Decision) on August 20, 2010, authorizing the issuance of overlegal permits to Emmert. He relied on the administrative record. (AR) He concluded the permits were feasible and necessary.

Mr. Frew explained the permits were predicated on a "reasonable determination of the necessity and feasibility of the proposed movement" as required by IDAPA 39.03.09.100.02. As to the necessity of the permit, he pointed to Emmert's exploring other routes and he then concluded Highway 12 was the "only viable option." Decision at AR, ITD 02330.

He explained the permit was feasible because of the traffic plan that had been agreed to between Emmert and the Department which included four surveys and its coordination with the repair of the Arrow Bridge. *Id.*

Mr. Frew concluded that the ten minute rule specified by IDAPA 39.03.16.100.01 did not apply to these permits because he found the proposed permit met the requirements of IDAPA 39.03.11 regarding traffic flow. He based this on the traffic management plan that provides for turnouts at fifteen minute intervals, the use of pilot cars and traffic control people, and arrangements for emergency vehicles to get around the loads. AR, ITD 02331. The emergency vehicle plan contemplates the transport being notified in advance of its arrival so the load can be circumvented.

Mr. Frew submits that the Department also considered and provided for the public's safety and convenience by scheduling the loads movements between 10:00 p.m. and 5:30 a.m., when the traffic flow is light, and a maximum of fifteen minutes

delays between turnouts.

Mr. Frew is dismissive of the public's comments and the Laughy petition for review regarding the permits' effects on tourism, vacationers, and medical emergencies as being subjective. He states, however, the concerns were considered and were addressed by the requirement for a \$10,000,000 bond that will indemnify the Department for any damages to the highway and the bridges.

E. Petitioners' Contentions

The petitioners allege the Department did not reasonably determine that the project was necessary and feasible and that the safety and convenience of the public was not its primary concern, contrary to the requirements of *IDAPA* 39.03.09.100. They complain that the permits now at issue are just a forerunner of an effort to transform a federally designated scenic byway into a high and wide corridor to transport "massive oil industry equipment that is manufactured and shipped from overseas to distant inland locations." *Petition* at 5.

More specifically they allege the project will threaten the safety of highway residents by interfering with access to local hospitals. At its core, however, the petitioners' complaint is that the Department was arbitrary and capricious because it did not have a reasonable basis for deciding the project was necessary and feasible, that the safety and convenience of the public was not a primary concern as required by *IDAPA* 39.03.09.100, and that a delay of not more than ten minutes was required by *IDAPA* 39.03.16.100.

F. The Record

While I am obliged to limit my review to the administrative record when deciding if the Department's final action passed statutory muster, I am permitted to go beyond

that record to determine what process the Department followed. See, *Clow v. Board of County Commissioners* 105 Idaho 714 (1968), *University of Utah Hospital v. Board of County Commissioners* 113 Idaho 441 (Ct. App. 1987).

It is extremely difficult to determine when the decision was made and therefore what portion of the record was relied on by the person who made the decision. The Memorandum Decision was dated August 20, 2010. Neither counsel for the Department nor for Conoco could tell me when the decision Mr. Frew memorialized occurred. The drums have been at the Port of Lewiston since May. It would be difficult to accept Mr. Frew's statement that he considered the public's comments if the decision that he memorialized was made before the drums were shipped to Lewiston and the comments were lodged with the Department.

The difference between making findings and conclusions to justify a decision already made and the rigor of reasoned discretion to arrive at a decision is one of kind, not degree. The United States Supreme Court has held that these types of "post hoc rationalizations" are not entitled to the substantial deference they otherwise would enjoy. See *Martin v. Occupational Safety and Health Review Commissioners*, 499 U.S. 144, 156-157 (1991); *Burlington Truck Lines, Inc. v. United States* 371 U.S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action;...").

The Decision reads like a legal brief, rebutting even the allegations in the petition for review. There are no findings of fact based on specific data; merely representations that the record has been considered. I question whether the decision to issue the permits was deferred until after the lawsuit was commenced and only two days before the hearing on August 23, 2010, when the Department previously and publicly

announced that it planned to issue the permits on August 18, 2010. As a result I give very little deference to the Department's interpretation of its own regulations.

G. Discussion

1. Safety and Convenience of the General Public and Preservation of the Highway System

I harbor no doubt that there is substantial evidence that the Department honored its duty to preserve Highway 12. The four traffic studies and the extensive discourse between the Department and Emmert regarding what the highway could tolerate and ensuring that the loads came within that tolerance are thorough and replete. A \$10,000,000 bond was required to indemnify the State for any damage that might occur to the highway. The same cannot be said about the public's safety and convenience.

The Department argues that scheduling the transport of the drums at night when traffic is light mirrors the Department's concern for safety and convenience. The Department never solicited public comments about what would best serve its safety and convenience. Those who commented, notwithstanding the lack of an invitation to do so, expressed their concern about reaching a hospital if a medical emergency occurred, See, e.g. *comments of Ruth Graham*, AR, ITD 1792-93; *Affidavit of Karen Hendrickson* at AR, ITD at 790-791. Ms. Hendrickson avers that 85 percent of Clearwater Valley Hospital emergency room patients arrive in personal vehicles with about half of them traveling by way of Highway 12. Despite this record, the Department has not required or arranged for any means for private vehicles involved with emergent medical situations to contact it, or Emmert, or the state Police to arrange for access to the local hospital. *Decision*, AR, ITD 2331. Nor has the Department or Emmert dealt with responding to an emergent situation in the transportation process itself.

Emmert's Risk Assessment and Management states in part:

It is inevitable that on a transportation project of this size and complexity, which uses the variety of equipment types that Emmert International will have to employ, some abnormal and/or emergent situations may occur. These may be caused by a variety of factors including equipment breakdown or malfunction, meteorological, environmental, structural failures in the load or in the ground under transportation equipment, human error or the impact of third parties. It is essential that contingencies be in place to deal with these situations and Emmert International constantly review and update as necessary their procedures and detailed scheduling to cover these occurrences.

AR, ITD 16.

Yet there is no contingency response plan to deal with a breakdown in transit, except for Emmert's recognition of the possibility of having to recover a load and the possibilities a recovery of the drum might entail. AR, ITD 43-44. There is no contingency plan as such. The citizens who submitted comments alerted the Department to how dire the consequences of this risk could be. For example, Cheryl Halverson described the problem of using a crane in the event a mishap occurred in transit.

There has been a change in Imperial oil/Exxon Mobil's transportation plan and they now address the problem of overturning the load and transporter into the water. Their plan cites the need for a crane "with up to approximately 500-ton capacity." Unfortunately that large a mobile crane requires a larger surface area to place its outriggers. And according to local research (where is ITD's?)" to achieve maximum lift capacity, the outriggers must be placed on outrigger floats.

which extend beyond the required 39-foot pad (would take up to 45x45 feet).

This space requirement eliminated the possible use of a 500-ton crane on approximately 80 percent of U.S. 12's 174 miles in Idaho, and likely 100% of the route along the 100+ miles close to or hugging the riverbank."

AR, ITD 1984.

Nick Gier, a professor emeritus at the University of Idaho, described the difficulty of getting a crane with 500 ton capacity to an accident site and the likely consequences of having to do so.

Transporting and setting up a crane is a complex task. For example, the largest mobile crane available in Spokane, a 440-ton hydraulic boom crane, requires a separate 60-ton crane on site just to lift the main boom into place. The boom itself has to be transported by a separate truck. Three more trucks are required to haul the necessary counter balance. The luffer jib and other equipment require more trucks. The assembly of the crane on site requires significant time. Even if it were possible to site a crane on a pad of sufficient size and density, and even if that crane could reach out over the Clearwater and Lochsa Rivers – neither of which is the case – getting a 500-ton crane in place and operational would likely require several days. The IO/EM transportation plan further states the company would take appropriate measures during a "recovery" period "so as to disrupt traffic as little as possible." The reality is, of course, there wouldn't be any traffic because north central Idaho's single east-west highway would be blocked. With a 22-23 foot roadbed, a river on one side and rock bluffs or steep hills on the other, U.S. 12 would be closed for several days, probably weeks.

IO/EM lists 16 crane companies in an appendix to their transportation plan. However, 8 of them have no cranes with the needed 500-ton capacity, including Spokane. Companies with cranes this size are in locations like Edmonton, Calgary, Seattle, Portland, and Salt Lake City.

Imperial Oil/Exxon Mobile recognizes the need in their transportation plan for an adequate emergency response plan to address a "module overturning incident," including such an incident that involves water. As 1-5 above show, they have not provided such a plan. The above information in fact indicates that any such plan for U.S. 12 in Idaho would be highly suspect and could likely not be executed. At best, U.S. 12 would be closed to all traffic for days or weeks and the probability of highway and environmental damage and economic loss to the residents of Idaho would be significant, along with their inability to travel freely for everyday purposes or medical emergencies.

AR, ITD 1969. See also the comments of David Hall, AR, ITD 1841, Gary McFarlane AR, ITD 1854, Dr. Laura Earles AR ITD 1859-60, David Beamman, AR, ITD 1880, and Jim and Zoe Cooley, AR, ITD 1980-81.

If what Emmert predicts as "inevitable" occurs, Highway 12 could be blocked to traffic for hours or days. There is no substantial evidence that the Department dealt with the most serious safety risks to the people who live along the Highway 12 corridor. Mr. Frew does not even acknowledge this risk and concludes as follows:

Emergency vehicle access will be maintained throughout the entire route through the continued communication between Emmert personnel on each vehicle, the Emmert driver, state police, and the lead flagger/escort.... If a non-emergency vehicle has an emergency situation and needs to pass, Emmert will make the

necessary accommodations to allow the vehicle the pass.

Decision, AR, ITD 2332. Mr. Frew does not explain how that can occur if the entire highway is blocked for hours or days. There is no substantial evidence to support his conclusion in view of the record.

The overall record reflects that the Department was very careful to protect itself and the highways and bridges. The traffic management plan has been engineered in great detail. It has required a bond and a hold harmless agreement from Emmert for any damage to the Department.

Yet it has required no bond for damages to people or their property which may result from the project. Counsel for Department indicated during argument the citizens were left to their own devices. There is no requirement that Emmert or Conoco submit to jurisdiction in Idaho state courts or in any other way to make themselves amenable to service or to answer for any damages that might occur.

2. Reasonable determination of the necessity and feasibility of the proposed movement.

Mr. Frew states that Emmert investigated the feasibility of "transporting the drums by various combinations of barge, rail, and truck from several different ports of entry. *Decision*, AR, ITD 2330. He concludes from the investigation that "[t]he only viable option for the transport of the coke drums to Billings, Montana, is from Lewiston, Idaho – the nearest navigable water to Billings – along U.S. 12." *Id.* Mr. Frew relies on memorandum in which Emmert says it conducted several surveys and studies and considered Houston, New Orleans, Duluth and Minneapolis with negative results. AR, ITD 40. That survey apparently assumed the drums would be transported in one piece. Emmert represented that permits could be acquired in other states if the drums were

cut in half. The drums that are being transported along Highway 12 will have been cut in half. It is unclear therefore how Mr. Frew drew his conclusion that Highway 12 is the only viable option. There is no evidence in the record to support it. As pointed out by Anastasia Telesetsky, "The Idaho Department of Transportation have [sic] not made a neutral determination of necessity as required by the rules." AR, ITD 1966. I agree.

While the transportation of the drums has inherent risks, Mr. Frew had substantial evidence to support his conclusion that the project is feasible.

3. IDAPA §39.03.16.100.01 and 39.03.11.100.05(a) Limit ITD's Discretion to Issue Overlegal Permits

IDAPA §39.03.16.100.01 states as follows:

01. Maximum Dimensions Allowed. . . . Overlegal permits will not normally be issued for movements which cannot allow for the passage of traffic as provided in IDAPA 39.03.11, "Rules Governing Overlegal Permittee Responsibility and Travel Restrictions," Subsection 100.05, except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available. (4-5-00).

It is clear to me that the regulation provides that overlegal permits will normally not be issued if the provisions for passage in 39.03.11.100.05 will not be met during the course of the movement. The regulation then goes on to state that, although movements are not normally permitted when the requirements of 11.100.05 are not met, movements can still be permitted, but only if they will only interrupt low volume traffic for a period of time not exceeding ten minutes (or if adequate detours are available, though the Department does not contend that

any adequate detours are available). Under this plain language reading of 16.100.01, the Department's discretion in issuing overlegal permits is limited in that they can only issue a permit if either the passage of traffic provisions in 11.100.05 are met, or if the interruption will be to low volume traffic, and for a time not exceeding ten minutes.

IDAPA § 39.03.11.100.05(a) states, in pertinent part: "a. The movement of overlegal loads shall be made 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."

It is clear to me that the language of 39.03.16.100.01 requires that 11.100.05 be read in conjunction with 16.100.01. This is because, as previously stated, 16.100.01 essentially states that a movement must either meet the requirements of 11.100.05, or meet the ten minute limitation. As 16.100.01 therefore wholly incorporates 11.100.05, that provision must be read in conjunction with 16.100.01.

If one substitutes the passage restriction of 11.100.05(a) that is at issue, the "frequent passing" limitation, for the language "the passage of traffic . . . Subsection 100.05" in 16.100.01, then 16.100.01 would read as follows:

01. Maximum Dimensions Allowed. . . . Overlegal permits will not normally be issued for movements which cannot allow for [frequent passing of vehicles in the same direction], except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available. (4-5-00).

When the "frequent passing" restriction is thus viewed within the context of 16.100.01, it is clear that "frequent" must mean something less than ten minutes; any other interpretation would be incompatible with the context of 16.100.01. For instance, the interpretation proffered by the Department would mean that, after placing the "frequent passing" restriction within the context of 16.100.01, the regulation would read as follows:

01. Maximum Dimensions Allowed. . . . Overlegal permits will not normally be issued for movements which cannot allow for [passing of vehicles in the same direction at least every fifteen minutes], except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available. (4-5-00).

Under the plain meaning reading of 16.100.01 announced above, the Department's interpretation would thus be that one cannot normally obtain a permit if traffic will be delayed more than fifteen minutes, but, even if it will be delayed more than fifteen minutes, one can still obtain a permit if a movement will at least not delay traffic more than ten minutes. Such an interpretation of "frequent" is untenable at best, and it is clear to me that, when the "frequent passing" restriction is read in the context of 16.100.01, as it must be, the term "frequent" must mean something less than every ten minutes.

In summary, 39.03.16.100.01 plainly states that, if a movement will not meet the passage requirements of 39.03.11.100.05, then, to be permitted, the movement must at least not interrupt the flow of traffic for more than ten minutes. Furthermore,

11.100.05(a)'s passage requirement that "frequent passing" be provided for during a movement, when read in the context of 16.100.01, as it must be, necessarily means that passing must be possible at least every ten minutes.

H. Conclusion

Idaho Code §67-5279 limits the bases for which agency action can be reversed. They include decisions that are not supported by substantial evidence on the record as a whole or if they were arbitrary, capricious or an abuse of discretion. I.C. 67-5227(d) & (e).

When the Department has acted, it has done well. Evidence of its engineering expertise is replete. When it has not acted, its lack of interest is equally apparent. I do not for a moment question the Department's good faith. The project is daunting in all of its dimensions. However, the public is entitled to have the regulations observed in their totality. I conclude that there was not substantial evidence to support the Department's decision that the public's safety and convenience was given the priority that IDAPA 39.03.09.100.01 requires. Its failure to address the "inevitable" accident or breakdown that could shut down Highway 12 for days or weeks overlooks the quintessential disaster and its effects on the users of Highway 12 that Emmert itself forecasts as possible.

Likewise, the record reflects no evidence that the Highway 12 corridor was the "only viable option." It was the Department's duty to independently make that determination or verify the accuracy of information on which it relied. The duty is solely on the Department to "predicate the issuance of a [sic] overlegal permit on a *reasonable determination of the necessity* of the proposed movement. (Emphasis added). There is no substantial evidence for such a reasonable determination.

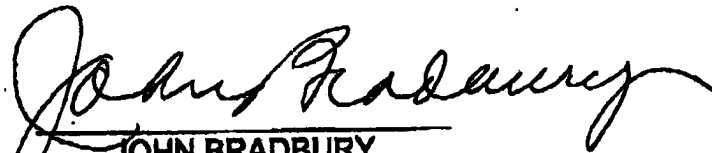
Although no Idaho case law explicitly states that an action by an agency in violation of its own regulations is arbitrary, capricious, or an abuse of discretion, the Idaho Supreme Court has stated that agency regulations have the "same effect of law as statutes," *Huyett v. Idaho State University*, 140 Idaho 904, 908 (2004), and that an agency certainly cannot act outside of the limits of its statutory discretion. *Fritchman v. Athey*, 36 Idaho 560, 211 P. 2d 1080, 1081 (1922). It is only logical then, that it would be arbitrary, capricious and an abuse of discretion for an agency to act outside of the limits of its self imposed regulatory discretion. Indeed, other courts have specifically so held. See, e.g., *Aerial Banners, Inc. v. F.A.A.*, 547 F.3d 1257, 1260 (11th Cir. 2008).

As previously stated, the Department's own regulations, 39.03.16.100.01, limits its discretion by requiring that a permit can only issue if the passage requirements of 39.03.11.100.05 are met, including the requirement that frequent passing (passing at least as often as every ten minutes) be allowed, or if traffic will not be delayed more than ten minutes. On the face of the Department's Memorandum of Decision, it is clear that the permits were issued while allowing for delays of up to fifteen minutes, which of course would also not allow for passing at least more frequently than every ten minutes, and thus its decision is arbitrary, capricious, and an abuse of discretion.

ORDER

The issuance of the overlegal permits to Emmert International for the dates 8/25/2010 through 8/29/2010, is REVERSED and REMANDED to the Idaho Transportation Department for further proceedings consistent with this opinion.

IT IS SO ORDERED, this the 24th day of August, 2010.


JOHN BRADBURY
DISTRICT JUDGE

Mailing Certificate


I, the undersigned Deputy Clerk, do hereby certify that I mailed or delivered a copy of the foregoing document to the following persons on August 24, 2010:

Natalie Havlina
Attorney at Law
P.O. Box 1612
Boise, ID 83701
Fax# 208-342-8286

J. Tim Thomas
Attorney at Law
P.O. Box 7129
Boise, ID 83707-1129
Fax# 208-334-4498

Erik Stidham
Attorney at Law
US Bank Plaza, Ste 1400
101 S. Capitol Blvd.
Boise, ID 83701
Fax#208-343-8869

ROSE E. GEHRING, CLERK

BY: 
Deputy Clerk

Erik F. Stidham, ISB # 5483
Scott E. Randolph, ISB # 6768
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
efstidham@hollandhart.com
serandolph@hollandhart.com

Attorneys for Intervenor ConocoPhillips Company

**IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO**

LINWOOD LAUGHY, KAREN
HENDRICKSON, and PETER GRUBB

Plaintiff,

vs.

IDAHO DEPARTMENT OF
TRANSPORTATION

Defendants

Case No. CV 40411

**AFFIDAVIT OF STEVEN
STEACH**

STATE OF MONTANA)
): ss
County of Yellowstone)

Steven Steach, being first duly sworn, states:

1. I am the plant manager at the ConocoPhillips refinery in Billings, Montana. I have served in that capacity since 7/1/2008. I make this affidavit based on my own personal knowledge of the refinery operations, our plan to replace the coker drums utilized in the refinery in Billings since 1992, and familiarity with the permit request to

AFFIDAVIT OF STEVEN STEACH - 1



allow Emmert International to deliver the replacement coker drums by truck with a route beginning in Lewiston, Idaho.

2. The drums being transported are new coker drums which will replace existing drums in use at the ConocoPhillips Refinery in Billings, Montana. The existing drums are almost 20-years old and are nearing the end of their useful life. Allowing the replacement drums to be transported in a timely manner will allow the Refinery to install the replacements in a controlled, planned and safe manner. Delaying the transport potentially requires ConocoPhillips to make the replacements in a less controlled and as discussed further below, more costly manner. Replacement of the existing drums does not allow ConocoPhillips to change or increase its current processing capability.

3. ConocoPhillips has a substantial financial interest in the above-captioned case. The permit sought by Emmert would facilitate the arrival of the new coker drums this fall. The proposed schedule will allow completion of the transit before inclement weather would jeopardize Emmert's ability to safely deliver the replacement drums. It is designed to avoid a delay in the transit occasioned by a bridge reconstruction project. If a preliminary injunction precludes the issuance of the permit by the Idaho Transportation Department, ConocoPhillips will incur substantial costs.

4. The total direct costs associated with a delay in the issuance of the permit to facilitate transportation of the drums through Idaho before weather risks preclude travel are estimated at \$ 9 million as follows:

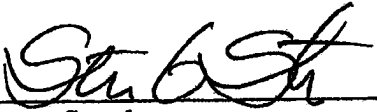
- **Coke Drum Project Cost Impacts:** The anticipated direct project cost due to delay of Coke Drum delivery until approximately July 2011 is \$4.5 million. The crane to be used to lift and remove the current coke drums and install the new coke drums is very large, highly specialized and very limited in availability. This crane must be reserved well in advance, which ConocoPhillips has done. If we are unable to use the crane at the

set time, ConocoPhillips will incur a \$1.5 million cancellation cost. The general contractor that will be used to install the new drums is on site and there will be a \$0.3 million cost associated with demobilization and remobilization. If we cannot adhere to the established implementation schedule, ConocoPhillips will absorb a \$0.5 million cancellation cost associated with a smaller crane that will be used to reassemble the new drums. Transportation costs for the new drums will increase by \$1.8 million due to the delay. Project management costs will increase by \$0.4 million due to the delay.

- **Refinery Turnaround Cost Impacts:** The manpower projection for the implementation of the new coker drums in the Spring of 2011 is 600,000 labor man-hours. Deferring our planned implementation from the spring to the fall of 2011 would place it in direct competition with other local and regional construction activities which could directly impact overall labor expenses by approximately \$1.8 million. Material costs would also increase by an estimated \$0.2 million bringing the total cost impact to \$2 million.
- **Cost of online inspection of existing Coke Drums:** The insulation will need to be stripped from the existing Coke Drums to allow for on line external inspection to determine necessary repairs prior to an additional 8 days shutdown in March 2011. The estimated costs for insulation removal and inspection is \$0.5 million.
- **Cost of additional 8 day shutdown:** Additional maintenance costs in the amount of \$2.0 million will be incurred for equipment items that will have to be taken out of service in spring and cannot be extended (without incurring additional expense) to the fall. This includes the Coke Drums, our Crude Unit charge heater and ancillary preheat exchanger train in addition to other piping items.

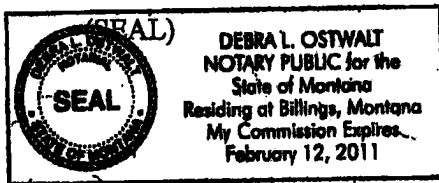
5. Based upon this recitation of the interest of ConocoPhillips and the costs to be incurred if the permits are not issued and the transit does not proceed because of the imposition of a preliminary injunction, ConocoPhillips will be adversely impacted.


DATED this 18th day of August, 2010.



Steven Steach

SUBSCRIBED AND SWORN TO before me this 18 day of August, 2010.





Debra L. Ostwalt

[Type or Print Name]
Notary Public for the State of Montana
Residing at Billings
My Commission expires Feb. 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Natalie J. Havlina
Advocates for the West
P.O. Box 1612
Boise, Idaho 83701

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax) (208) 342-8286

J. Tim Thomas
Deputy Attorney General
Idaho Department of Transportation
3311 W. State St.
Boise, Idaho 83707-1129

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax) (208) 334-4498

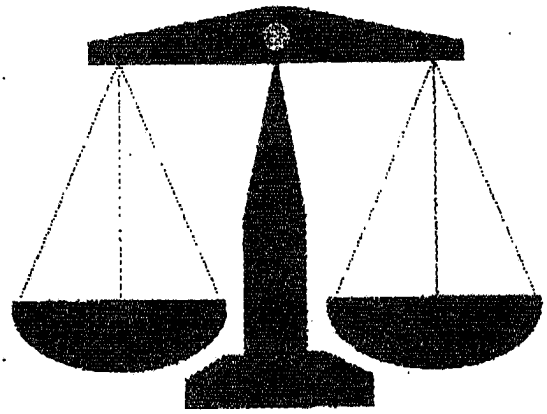


of HOLLAND & HART LLP

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FAX COVER LETTER

IDAHO COUNTY DISTRICT COURT
320 W. Main
Grangeville, ID 83530
Telephone 208-983-2776
Fax - 208-983-2376



PLEASE DELIVER THE FOLLOWING TO:

NAME: Erik Stidham

LOCATION: 208.343.8869

FROM: Daphy

RE: Daughy -v- ITD

Date: 8.20.10 Time: _____

Number of Pages (including cover sheet): 2

COMMENTS: _____

Please remit \$1 for the following
fax.

Thank,
KJ

If you do not receive all of the described material,
please call the District Court Office at 208-983-2776.





MEMORANDUM OF DECISION

ConocoPhillips Company/Emmert International Co Request for Over-legal Permit

BACKGROUND

The ConocoPhillips Company ("ConocoPhillips") is engaged in a project to rebuild its Coke Unit at its Billings, Montana refinery. As part of the project, ConocoPhillips has acquired two new coke drums to replace existing equipment at its Billings facility. The existing drums are 20 years old and are at the end of their useful life. According to ConocoPhillips, the new drums will improve the operational reliability of the refinery, which supplies fuel and other energy products to customers in Idaho, Montana and the surrounding region. ConocoPhillips is not able to continue using its existing equipment without a safety risk, potential interruptions in the refinery's operations, and increased maintenance costs.

The ConocoPhillips Company, working with its transportation contractor Emmert International (collectively referred to as "Emmert"), contacted ITD about ConocoPhillips's business need to transport four coke drums from Lewiston to Billings over U.S. Highway 12 ("U.S. 12"). Under Emmert's proposed transportation plan, the coke drums would be supplied by a foreign manufacture. The coke drums would arrive in the United States at one of its Ports of Entry and then be transported by barge to the Port of Lewiston in North Idaho. The drums would then be moved over the highways of Idaho and Montana in specialized highway transport systems to ConocoPhillips' refinery in Billings.

The new coke drums have been fabricated in a specialty shop in Japan. The drums are approximately 24 feet in diameter and 100 feet long. They weigh approximately 350 tons each. In order to transport the drums by land, they must be cut in half before they are shipped. As proposed by Emmert, the coke drums would be transported over the highways using specialized Beam & Dolly heavy haul equipment. The transport of the drums would entail four loads, consisting of two separate convoys of two drum sections. The transport vehicles would travel at night between the hours of 10 p.m. and 5:30 a.m.

Emmert has requested an over-legal permit from ITD to allow for the transport of the coke drum sections.

DECISION

It is my decision to issue the over-legal permit to Emmert. The decision is based upon my review and analysis of the transportation plan submitted by Emmert, all of the supplemental information provided, and all of the revisions made by Emmert to the proposed



ITD02328

plan. My decision is also based upon my review and consideration of all relevant documents received by ITD as part of the permit process, including the public comments received by ITD in regards to the permit request.

The Emmert overlegal permit is both feasible and necessary. In making this determination, I considered the safety and convenience of the traveling public in my decision-making process and determined that the overlegal permits take these factors into consideration and are subject to specific limitations and restrictions so as to address the safety and convenience of the traveling public. In addition, I have determined, in my discretion, that it is appropriate in this instance to permit the vehicles to travel uninterrupted for a period not to exceed 15 minutes. The traffic plan provided by Emmert allows for U.S. 12 to remain open as often as feasibly possible and provides for the frequent passing of vehicles traveling in the same direction as required by the applicable rules. In making this decision, I have weighed the safety and convenience of the traveling public and the preservation of the highway system and determined that a 15-minute maximum period for travel time, combined with the other limitations and restrictions placed on ConocoPhillips and Emmert is reasonable and appropriate.

AGENCY RECORD

The documents relied upon in making my determination include all of the documents attached to this Memorandum Decision. The documents constitute the agency's record for my determination and decision to issue the overlegal permit.

ANALYSIS

ITD is an executive department of Idaho state government established by the Legislature and headed by the Idaho Transportation Board. Idaho Code § 40-501. Among ITD's powers and duties are the location, design, construction, maintenance, and reconstruction of state highways and the planning, design, and development of transportation systems that the Idaho Transportation Board determines to be in the public interest. Idaho Code § 40-310(3). Additionally, ITD is authorized to exercise its discretion and "issue a special permit to the owner or operator of any vehicle allowing vehicles or loads having a greater weight or size than permitted by law to be carried over or on the highways and bridges." Idaho Code § 49-1004. ITD has further defined the conditions and requirements for issuing an overlegal permit through the adoption of rules under the Idaho Administrative Procedures Act ("IDAPA"). Under its rules, "[t]he Department shall, in each case, predicate the issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement." IDAPA 39-03.09.100.02. In determining the appropriateness of an overlegal permit, "[t]he primary concern of the Department, . . . , shall be the safety and convenience of the general public and the preservation of the highway system." IDAPA 39.03.09.100.01.

Necessary and Feasible Standard

In applying these standards to Emmert's request for an overlegal permit, the Department considered both the necessity and the feasibility of the proposed movement. Based upon my review of the agency record and the application of the required standards, the permit request by

Emmert satisfies both of requirements. The transports have been carefully planned with support and input from state agencies, including ITD, as well as utilities and law enforcement in order to ensure safe, environmentally responsible movement with minimal disruption to Idaho citizens. Emmert investigated the feasibility of the transportation of the coke drums by considering several different options, including transporting the drums by various combinations of barge, rail and truck and from several different ports of entry. The extreme dimensions of the drums precluded the possibility of shipping the drums by rail, leaving only barge and truck options. The only viable option for the transport of the coke drums to Billings, Montana, is from Lewiston, Idaho—the nearest navigable water to Billings—along U.S. 12.

As to the feasibility of the transport of the coke drums on U.S. 12, Emmert surveyed the U.S. 12 route four separate times. Additionally, Emmert worked with ITD's Commercial Vehicles Services, Bridge Engineering, and District 2 staff to develop a viable plan. Through that process Emmert provided its initial request and made numerous modifications to the plan, as requested by ITD, and it provide supplemental information and detail about the feasibility of the plan. The schedule for the transportation of the coke drum sections is being coordinated with on-going construction activities at Arrow Bridge, which is located near the beginning of the proposed route in Lewiston near milepost 14.

The Requirements of IDAPA 39.03.16.100.01

I have concluded that the Department has the discretion to grant the proposed overlegal permit pursuant to IDAPA 39.03.16.100.01.

IDAPA 39.03.16.100.01 does not limit the Department's discretion to grant or deny overlength permits. Rather, it sets forth certain circumstances in which a request for an overlength permit will "normally" be granted. The use of the qualifying phrase "not normally" is significant as it clearly indicates that this IDAPA section does not establish circumstances in which an overlegal permit must be granted and does not establish circumstances in which a request for an overlegal permit must be denied. Accordingly, ITD has discretion to grant the request in question.

Further, the request qualifies as a type of overlegal request that is "normally" accepted, a overlegal request that falls within IDAPA 39.03.11. In relevant part, IDAPA 39.03.16.100.01 provides that:

Overlegal permits will not normally be issued for movements which cannot allow for the passage of traffic as provided in IDAPA 39.03.11, "Rules Governing Overlegal Permittee Responsibility and Travel Restrictions," Subsection 100.05, except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed (10) minutes) or when adequate detours are available.

IDAPA 39.03.16.100.01 (emphasis added). Additionally, IDAPA 39.03.11.100.05 provides that:

“[t]he movement of overlegal loads shall be made 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). That provision further states that “[i]n order to achieve this a traffic control plan is required to be submitted when operating on two (2) lane highways and exceeding the following dimensions: (i) width exceeds twenty (20) feet. (ii) Length exceeds one hundred fifty (150) feet.” IDAPA 39.03.11.100.05(a). Subsection (b) of that provision states that the traffic control plan is to include: “(i) Location and mileposts of where the vehicle/load can pull over to allow for traffic relief; (ii) How pilot cars and traffic control personnel will be utilized; (iii) Identification of any railroad tracks being crossed and emergency contact number for the governing entity; and (iv) Procedure for allowing emergency vehicles to navigate around the vehicle/load when necessary.” IDAPA 39.03.11.100.05(b).

As required by the IDAPA provisions, my analysis included an evaluation of whether the proposed overlegal loads could be transported in such a way that Highway 12 would remain open as often as feasibly possible and provided for the frequent passing of vehicles traveling in the same direction as required by IDAPA 39.03.11.05(a). In connection with this review, I reviewed the proposed traffic control plan submitted by ConocoPhillips and Emmert. The plan is in excess of 700 pages and includes the following information: (a) the locations and mileposts where the overlegal vehicle can pull over to allow for traffic relief; (b) how pilot cars and traffic control personnel will be utilized; (c) identification of any railroad tracks being crossed and emergency contact number for the governing entity; and (d) the procedure for allowing emergency vehicles to navigate around the anticipated overlegal loads when necessary. ITD concluded that the traffic control plan satisfied the necessary traffic safety objectives and allowed for frequent passing of vehicles in the same direction. The information provided and the traffic plan complies with the requirements of IDAPA 39.03.11.05(a) and (b).

Because the contemplated movements of the four coke drums sections over Highway 12 allows for the passage of vehicles “as provided in IDAPA 39.03.11” and the reference in IDAPA 39.03.16.100.01 to a ten limit limitation does not apply in the current situation. Emmert’s traffic control plan ensures that the proposed overlegal movements are made “in such a way that the traveled way will remain open as often as feasibly possible” and provides “for frequent passing of vehicles traveling in the same direction.” IDAPA 39.03.11.100.05(a).

Safety and Convenience

ITD has also considered the potential impacts of the transportation of the coke drums on the safety and convenience of the general public and the preservation of the highway system. The details of the transportation plan will be for the loads to travel U.S. 12 east from Lewiston up to the Montana state line at Lolo Pass. The actual movement and transport of the loads will occur only during overnight hours between 10 p.m. and 5:30 a.m. to minimize traffic disruption. Specific transportation turn-outs and secondary back up locations have been identified throughout the course of the route to prevent traffic delays greater than 15 minutes.

In addition, multiple axles are to be used to spread the weight of the load per Idaho requirements in order to protect the integrity of Idaho roads and bridges. All equipment will be

thoroughly inspected and cleaned before transport begins. The coke drum equipment that is to be transported is in new condition, does not have chemical or hydrocarbon inventory, and consists of new, clean carbon steel alloys. A full complement of support vehicles providing replacement parts and maintenance tools will accompany each transport vehicle.

Additionally, during the transport of the drums, Idaho utility service interruptions for Idaho customers are not expected. No impact to the Idaho environment or scenery will occur, since the transports will make use of existing Idaho infrastructure with no road alterations being required. To ensure safety and stability of the loads along the proposed U.S. 12 route, the maximum speed of the loads will be 25 mph, and they will average 15 mph. State police escorts and traffic-control contractors will maintain emergency vehicle access throughout the route. Global Positioning Systems (GPS) and satellite communications will also be used to provide continuous location information. Key Emmert personnel and a lead flagger/escort will be equipped with the GPS equipment, and it will be available to others as necessary. This system will ensure a direct contact is maintained with the loads at all times and provide additional safety protections for the traveling public and the transporters.

A specific component of the transportation plan includes a traffic management strategy. This strategy was included as a specific response to an inquiry from ITD in early 2010. In that strategy, Emmert recognized that it was a significant concern to accommodate emergency vehicle traffic. In order to address that issue and allow for safe and unhindered travel for emergency vehicles, Emmert will use police escorts and lead flaggers/escort to accompany the loads and monitor the emergency communications between the various jurisdictions. Emmert will then be aware of any emergency vehicles that may need to pass through the transport route with sufficient advance time for the transport vehicles to reach a pull-out before the emergency vehicle arrives. The emergency vehicles would then be able to pass through the route unimpeded. Emergency vehicle access will be maintained throughout the entire route through the continual communication between Emmert personnel on each vehicle, the Emmert driver, state police, and the lead flagger/escort.

Additionally, Emmert will treat non-emergency vehicles in the same fashion. If a non-emergency vehicle has an emergency situation and needs to pass, Emmert will make the necessary accommodations to allow the vehicle to pass.

Significant steps have been taken and assurances made to protect the safety of, and to not cause unreasonable inconvenience to, the traveling public. These issues are of primary concern to ITD and it is my conclusion, based upon my review of the agency record, that these issues have been adequately and appropriately considered and addressed.

PUBLIC COMMENTS

The Department received a significant number of public comments related to the shipment of oversized loads for ConocoPhillips. A substantial number of the comments opposed permitting for oversized loads on U.S. 12, including the ConocoPhillips project. Broadly speaking, many of the comments in opposition focused on concerns regarding safety, impact to tourism, impact to the infrastructure, delays, and potential impacts to the scenic beauty of the highway. The Department did receive comments in support of permitting, although the

supportive comments were significantly fewer in number. The supportive comments included references to potential beneficial economic impacts to the local economy. The Department also received comments from the Project Manager for the Coke Drum Replacement Project for ConocoPhillips who noted that the oversized shipments in question were critical to the "continued long term safe and reliable operations of the Billings Refinery."

The Department gave consideration to the comments, particularly the comments related to concerns regarding public safety, impact to tourism, impact to the infrastructure, potential delays, and adverse impact to the scenic beauty of the highway. In addressing these comments, the Department required Emmert International to enter a Hold Harmless Agreement and to provide a \$10,000,000 insurance policy for the benefit of the Department. Further, the Department required ConocoPhillips to put together a thorough, detailed plan regarding how the equipment would be moved. The Department also required, as part of the detailed plan, that the proposed loads be of a size that prevents damage to the trees and hillsides and that the trucks hauling the equipment have enough axles to prevent the shipments weight from damaging the highway, that there be minimal impact to day time travel, and that emergency vehicle access be available, be made a primary concern of the plan. The Department has given due consideration to the public comments and used its discretion and judgment to address concerns raised by the comments.

BOND REQUIREMENT

To further help address concerns regarding "the safety and convenience of the general public and the preservation of the highway system," the Department required Emmert to sign a broad "Hold Harmless Agreement." Pursuant to the Hold Harmless Agreement, Emmert promised to, among other things, indemnify the Department from any losses related to the transportation of the ConocoPhillips equipment. The Department required that Emmert back this obligation with a \$10,000,000 insurance policy. By requiring that this type of financial protection for the public was in place, the Department reasonably acted to address concerns related to public safety, public convenience, and preservation of the highway system.

LAUGHY LAWSUIT

Before ITD completed its decision-making process in this matter, a lawsuit was filed against the Department. The lawsuit was entitled *Linwood Laughy, Borg Hendrickson, and Peter Grubb v. Idaho Transportation Department*, Case No. CV 40411 ("Laughy Lawsuit") and was accompanied by affidavits from Karen ("Borg") Hendrickson, Linwood Laughy, and Peter Grubb. Consideration has been given to the concerns expressed in the lawsuit as part of ITD's decision-making process.

In the Laughy Lawsuit, the plaintiffs raised concerns regarding supposed impacts from Emmert's transportation of the coke drums. Consideration was given to the concerns raised and stated impacts that the transport of the drums might cause.

It is my conclusion that the Transportation Plan addresses the concerns raised by the Laughy Lawsuit. The Transportation Plan calls for travel to be at night during limited hours so as to

minimize inconvenience and safety concerns. It also requires a carefully planned transport schedule so that impacts can be anticipated, and it requires that state police escort and traffic control work to maintain emergency vehicle access. The Transportation Plan places other procedures and mechanisms in place to minimize impacts of the kind alleged in the Laughy Lawsuit.

As part of my analysis, I considered the fact that the potential impacts identified in the Laughy Complaint were, in many ways, subjective (e.g., diminishment of scenic beauty) or hypothetical (possible adverse impacts to tourism, disturbing vacationers, heart attack or hemorrhage victims being delayed, security emergencies at prisons). While the Department does consider subjective and hypothetical concerns like those raised in the Laughy complaint, the Department must use its discretion to weigh the likelihood of the alleged impacts, how certain or uncertain they might be, the potential severity of the potential impacts, and other similar factors when balancing competing concerns and making its decision. The Department must also weigh the fact that the permit is of limited duration and, in turn, the concerns raised by the Laughy Complaint are transitory.

The Laughy Complaint also raises issues regarding the Department's compliance with IDAPA. Contrary to the positions set out in the Laughy Complaint, I have concluded that the Department properly acted within its discretion under IDAPA and has certainly complied with the Department's interpretation of the IDAPA sections called into question by the Laughy Complaint.

Additionally, concerns have been raised regarding the potential cumulative impact of future permits. ITD reviews permit applications on an individual basis and grants/denies the permits based upon the specific circumstances of that permit request. In this application, ITD has before it a single application for a set number of loads. It cannot speculate as to the number, type, or scope of future requests. If the circumstance arises that the number, type and scope of permits requested rises to the level of impacting the safety and convenience of the traveling public or the preservation of the highway system, it may be necessary for ITD to take appropriate action to address those issues. However, that situation is not presented in the permit requests that is currently before the Department.

CONCLUSION

Based upon all of the considerations and analyses outlined above, the overlegal permit requested by Emmert complies with the ITD requirements and may appropriately be issued.

DATE: 20 August 2010

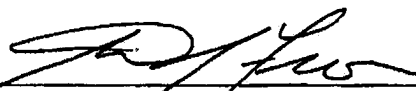
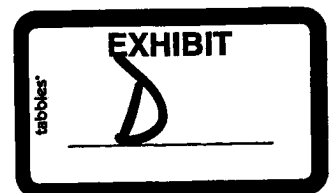

ALAN FREW, Administrator
Division of Motor Vehicles
Idaho Transportation Department

EXHIBIT D

One hard copy of the Administrative Record was delivered to the Supreme Court with the Affidavit of Erik F. Stidham in Support of ConocoPhillips Company's Motion for Expedited Hearing Pursuant to Idaho Appellate Rule 44. An electronic copy of that record is attached hereto.



Erik F. Stidham, ISB # 5483
Scott E. Randolph, ISB # 6768
Brian C. Wonderlich, ISB # 7758
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
efstidham@hollandhart.com
serandolph@hollandhart.com

DOCKETED

IDAHO COUNTY DISTRICT COURT
AT 4:00 FILED 9 O'CLOCK P.M.

AUG 25 2010

ROSE E. GEHRING
CLERK OF DISTRICT COURT
Rose E. Gehring DEPUTY

Attorneys for Intervenor ConocoPhillips Company

**IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO**

LINWOOD LAUGHY, KAREN
HENDRICKSON, and PETER GRUBB

Case No. CV 40411

Plaintiffs/Respondents,

NOTICE OF APPEAL

vs.

IDAHO TRANSPORTATION
DEPARTMENT,

Defendant/Appellant,

CONOCOPHILLIPS COMPANY,

Intervenor/Appellant

TO: THE ABOVE NAMED PLAINTIFFS, LINWOOD LAUGHY, KAREN
HENDRICKSON, AND PETER GRUBB, regarding ConocoPhillips Company's
("Conoco") over-legal permit.

NOTICE IS HEREBY GIVEN THAT:

NOTICE OF APPEAL - 1



1. The Intervenor-Appellant ConocoPhillips Company (“ConocoPhillips”) appeals against the above-named Respondents to the Idaho Supreme Court from the oral ruling on August 23, 2010, denying ConocoPhillips Motion to Strike and from the Opinion, entered in the above-entitled action on August 24, 2010, the Honorable John Bradbury presiding (“District Court Decision”).

2. On August 20, 2010, the Idaho Transportation Department (“ITD”) issued over-legal permits (“Permits”) allowing for the transport of four shipments of ConocoPhillips property pursuant to specified terms.

3. The District Court Decision reversed and remanded ITD’s issuance of the Permits.

4. ConocoPhillips has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is appealable under and pursuant to Rule 11(f), I.A.R.

5. Through separate motion, ConocoPhillips will seek to have this appeal expedited pursuant to Idaho Appellate Rule 44.

6. The following is a preliminary statement of the issues on appeal:

(a) Whether Respondents lack standing because their alleged injuries are speculative, hypothetical, abstract, and are not causally related to the four shipments that are at issue;

(b) Whether Respondents fail to meet their burden under I.C. § 67-5279(4) to demonstrate that their substantial rights have been prejudiced where their alleged injuries are speculative, hypothetical, abstract, and are not causally

related to the four shipments that are at-issue or the alleged defects in ITD's issuance of the Permits;

(c) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied the "reasonable determination of necessity" language in IDAPA 39.03.09.100.02 in a manner that was arbitrary, capricious, an abuse of discretion, or contrary to law;

(d) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(e) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.16.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(f) Whether the district court erred in refusing to give ITD deference regarding interpretation of its own regulations;

(g) Whether the district court erred in considering evidence that was outside of or inappropriately included in the administrative record;

(h) Whether the district court erred in ignoring evidence in the record, including, but not limited to, evidence relating ITD's consideration of public safety and convenience;

(i) Whether the district court erred in denying ConocoPhillips' Motion to Strike Portions of Affidavits dated August 23, 2010.

7. The Intervenor-Appellant requests the preparation of the following portions of the reporter's transcript in electronic or hard copy form:

Hearing dated August 23, 2010

8. The Intervenor-Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: all pleadings in the district court's files, including the administrative record filed with the District Court on August 23, 2010.

9. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address: Keith Evans,
Idaho County District Court
320 W Main
Grangeville, ID 83530

Name and Address: Linda Carlton
425 Warner
Lewiston, ID 83501

(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript;


(c) That the estimated fee for preparation of the clerk's or agency's record has been paid;

(d) That the appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20 and the attorney general of Idaho pursuant to I. C. § 67-1401(1).

Dated this 25th day of August, 2010.

HOLLAND & HART LLP

By 
Erik F. Stidham, of the firm
Attorney for ConocoPhillips
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Natalie J. Havlina
Advocates for the West
P.O. Box 1612
Boise, Idaho 83701

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)

J. Tim Thomas
Deputy Attorney General
Idaho Department of Transportation
3311 W. State St.
Boise, Idaho 83707-1129

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)

Keith Evans,
Idaho County District Court
320 W Main
Grangeville, ID 83530

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)

Linda Carlton
425 Warner
Lewiston, ID 83501

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)


for HOLLAND & HART LLP

Erik F. Stidham, ISB # 5483
Scott E. Randolph, ISB # 6768
Brian C. Wonderlich, ISB # 7758
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
efstidham@hollandhart.com
serandolph@hollandhart.com
bcwonderlich@hollandhart.com

Attorneys for Intervenor ConocoPhillips Company

**IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO**

LINWOOD LAUGHY, KAREN
HENDRICKSON, and PETER GRUBB

Plaintiffs/Respondents,

vs.

IDAHO TRANSPORTATION
DEPARTMENT,

Defendant/Appellant,

CONOCOPHILLIPS COMPANY,

Intervenor/Appellant

Case No. CV 10-40411

**AMENDED NOTICE OF
APPEAL**

TO: THE ABOVE NAMED PLAINTIFFS, LINWOOD LAUGHY, KAREN
HENDRICKSON, AND PETER GRUBB, regarding the above captioned matter.

NOTICE IS HEREBY GIVEN THAT:

1. The Intervenor-Appellant ConocoPhillips Company (“ConocoPhillips”) appeals to the Idaho Supreme Court from the oral ruling on August 23, 2010, denying ConocoPhillips’ Motion to Strike and from the Opinion, entered in the above-entitled action on August 24, 2010, the Honorable John Bradbury presiding (“District Court Decision”).
2. On August 20, 2010, the Idaho Transportation Department (“ITD”) issued overlegal permits (“Permits”) allowing for the transport of four shipments of ConocoPhillips’ property pursuant to specified terms.
3. The District Court Decision reversed and remanded ITD’s issuance of the Permits.
4. ConocoPhillips has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is appealable under and pursuant to Rule 11(f), of the Idaho Appellate Rule.
5. Through separate motion, ConocoPhillips will seek to have this appeal expedited pursuant to Idaho Appellate Rule 44.
6. The following is a preliminary statement of the issues on appeal:
 - (a) Whether Respondents lack standing because their alleged injuries are speculative, hypothetical, abstract, and are not causally related to the four shipments that are at issue;
 - (b) Whether Respondents fail to meet their burden under I.C. § 67-5279(4) to demonstrate that their substantial rights have been prejudiced where their alleged injuries are speculative, hypothetical, abstract, and are not causally

related to the four shipments that are at-issue or the alleged defects in ITD's issuance of the Permits;

(c) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied the "reasonable determination of necessity" language in IDAPA 39.03.09.100.02 in a manner that was arbitrary, capricious, an abuse of discretion, or contrary to law;

(d) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(e) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.16.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(f) Whether the district court erred in refusing to give ITD deference regarding interpretation of its own regulations;

(g) Whether the district court erred in considering evidence that was outside of, or inappropriately included in, the administrative record;

(h) Whether the district court erred in ignoring evidence in the record, including, but not limited to, evidence relating ITD's consideration of public safety and convenience;

(i) Whether the district court erred in denying ConocoPhillips' Motion to Strike Portions of Affidavits dated August 23, 2010.

7. The Intervenor-Appellant requests the preparation of the following portions of the reporter's transcript in electronic or hard copy form:

Hearing dated August 19, 2010; and

Hearing dated August 23, 2010

8. The Intervenor-Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- (a) Affidavit of Linwood Laughy dated August 16, 2010;
- (b) Affidavit of Karen Hendrickson dated August 16, 2010;
- (c) Affidavit of Peter Grubb dated August 16, 2010;
- (d) Motion for Disqualification dated August 17, 2010;
- (e) Opposition to Motion for Disqualification dated August 18, 2010;
- (f) Reply in Support of Motion for Disqualification dated August 18, 2010;
- (g) Motion to Shorten Time on ConocoPhillips Company's Motion to Intervene dated August 19, 2010;
- (h) Affidavit of Steven Steach dated August 18, 2010;
- (i) Brief in Support of Motion to Intervene by ConocoPhillips Company dated August 19, 2010;
- (j) Plaintiff's Motion for Leave to File Surreply on ITD's Motion for Disqualification; and Proposed Surreply dated August 19, 2010;
- (k) Order re Motion to Shorten Time on ConocoPhillips Company's Motion to Intervene dated August 19, 2010;
- (l) Order dated August 19, 2010;
- (m) Brief in Opposition to Judicial Review Hearing on August 23, 2010 at 11:00 dated August 20, 2010;

- (n) ConocoPhillips Company's Motion to Strike Portions of the Affidavits of Laughy, Grubb and Hendrickson dated August 23, 2010;
- (o) ConocoPhillips Company's Brief in Support of Motion to Strike Portions of the Affidavits of Laughy, Grubb and Hendrickson dated August 23, 2010;
- (p) ConocoPhillips Company's Joinder in Brief in Opposition re Judicial Review Hearing August 23, 2010 dated August 23, 2010;
- (q) ConocoPhillips Company's Brief in Opposition to Motion for Preliminary Injunction dated August 23, 2010; and
- (r) Plaintiff's Reply Brief dated August 23, 2010.

9. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address: Keith Evans,
Idaho County District Court
320 W. Main
Grangeville, ID 83530

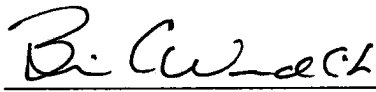
Name and Address: Linda Carlton
425 Warner
Lewiston, ID 83501

- (b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript;
- (c) That the estimated fee for preparation of the clerk's or agency's record has been paid;
- (d) That the appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20 and the attorney general of Idaho pursuant to I. C. § 67-1401(1).

Dated this 26th day of August, 2010.

HOLLAND & HART LLP

By: 
Brian C. Wonderlich, for the firm
Attorney for ConocoPhillips
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Natalie J. Havlina
Advocates for the West
P.O. Box 1612
Boise, Idaho 83701

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)

J. Tim Thomas
Deputy Attorney General
Idaho Department of Transportation
3311 W. State St.
Boise, Idaho 83707-1129

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- Telecopy (Fax)

Linda Carlton
425 Warner
Lewiston, ID 83501

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)



for HOLLAND & HART LLP

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