

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY, KAREN)	
HENDRICKSON, and PETER)	
GRUBB, JOHN CROCK, JANICE)	
INGHRAM, ROGER INGHAM,)	ADMINISTRATIVE HEARING
JULIAN MATTHEWS, OWEN FIORE,)	OFFICER'S FINDINGS OF FACT,
MARY ANN FIORE, RUTH MAY,)	CONCLUSIONS OF LAW AND
GAIL RYAN, AND RICHARD RYAN,)	RECOMMENDED ORDER TO
Intervenors,)	THE DIRECTOR RE:
)	INTERVENORS' OBJECTIONS
)	TO OVERLEGAL
)	PERMITS
vs.)	
)	
CONOCOPHILLIPS AND EMMERT)	
INTERNATIONAL,)	
Applicants,)	
)	
And)	
)	
IDAHO TRANSPORTATION)	
DEPARTMENT,)	
Respondent.)	

I.

INTRODUCTION

This administrative appeal is a formal contested case between the Intervenors, Linwood Laughy, Karen Hendrickson, Peter Grubb, John Crock, Owen Fiore, Mary Ann Fiore, Janice Inghram, Roger Inghram, Julian Matthews, Ruth May, Jim May, Gail Ryan, and Richard Ryan (“Intervenors”); Applicants, ConocoPhillips/Emmert International (“Applicants”); and Respondent, Idaho Transportation Department (“ITD” or “the Department”). The Intervenors have appealed from the decision of the ITD to issue overlegal permits to allow Petitioners to transport four oversize loads of equipment from Lewiston, Idaho to the Montana border over U. S. Highway 12. The Intervenors have alleged that ITD’s issuance of overlegal permits for the

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oversize loads is arbitrary, capricious, or abuse of discretion, or not in accordance with the law. Intervenor contend that ITD abused its discretion by: (1) not making its primary concern the safety and convenience of the general public; (2) misinterpreting its regulations as to traffic interruption; and (3) failing to make a reasonable determination of necessity.

For the reasons stated herein, it is my decision and recommendation that the Director should deny the appeal and approve the issuance of the permits to Petitioners.

II.

PROCEDURAL BACKGROUND

Applicants had been working with the ITD since 2007 to obtain permits to transport four oversize loads of refinery equipment (sometimes referred to as “drums” or “coke drums”) down U.S. Highway 12 from Lewiston to the Montana border at Lolo Pass. Highway 12 is a two-lane paved road that borders the main stem of the Clearwater River from Lewiston to the confluence of the Clearwater River and the South Fork of the Clearwater River near Kooskia. From the confluence it borders the Middle Fork of the Clearwater River to the confluence of the Middle Fork with the Locksa River and the Selway River. From the confluence of the three rivers, Highway 12 borders the Locksa River almost to the Montana border. The Montana border at Lolo Pass is approximately 173 miles east of Lewiston. The shipments will be large enough to take up the entire two-lane highway, requiring a rolling roadblock along with a number of traffic flaggers and escort vehicles.

The maximum size and weight of vehicles and their loads allowed on state highways are prescribed by statute. *See* Idaho Code §§ 49-1001, -1002, -1010 (defining the maximum gross load weight and maximum vehicle and load sizes allowed on the State of Idaho highways). The

statutes and relevant regulations grant ITD the authority to issue “overlegal” permits under ITD’s rules regarding special permits. *See* Idaho Code § 49-201; IDAPA 39:03:16.

Intervenors assert, among other things, that moving the loads down Highway 12 will degrade the local tourism industry, disturb the peaceful enjoyment of their homes, interfere with the convenience of the general public who use the highway, impede highway users from reaching medical care in an emergency, and could create logistical and environmental problems if a drum topples into the river. *See* Petition to Intervene and Amended Petition to Intervene, with supporting Affidavits of Intervenors.

On August 16, 2010, before ITD had issued any permits, the initial Intervenors, Laughy, Hendrickson and Grubb, filed a Petition for Judicial Review and Request for Immediate Injunctive Relief in the Idaho County District Court. On August 17, 2010, the District Court granted a preliminary restraining order, enjoining the ITD from issuing the overlegal permits. On August 19, 2010, the District Court lifted the restraining order, finding that it did not have jurisdiction over the matter until the ITD issued a final agency order. On August 20, 2010, ITD issued four overlegal permits to Applicants to transport the coke drums over Highway 12 from Lewiston, Idaho to the Montana border. AR ITD02290-02327. The permits listed a variety of specifications and requirements for the loads. AR ITD02291-02396.

On August 24, 2010, the District Court reversed the ITD’s decision to issue the permits. Petitioner and ITD appealed the District Court’s decision to the Idaho Supreme Court. The Supreme Court concluded that neither the District Court nor the Supreme Court had jurisdiction to consider the petition for judicial review and remanded the case for entry of an order of

dismissal without prejudice to seek relief. *See Laughy v. Idaho Department of Transportation, et al.*, 2010 WL 4297807, Idaho November 01, 1010 (No. 37985-2010 and 37944-2010).

On November 02, 2010, Intervenors, Laughy, Hendrickson and Grubb, filed a Petition to Intervene in the permit application proceedings. The Intervenors requested the Department conduct a formal contested case hearing pursuant to the Idaho Administrative Procedures Act (“IAPA”), I.C. § 67-5240, *et seq.*, and the regulations of the Idaho Attorney General and ITD, and deny the overlegal permits. *See* Petition to Intervene in the Contested Case Regarding the Coke Drum Transport Project.

On November 10, 2010, pursuant to Idaho Code § 49-1004 and applicable rules, the Department reissued the permits to the Applicants regarding the Coke Drum Transport Project, subject to the condition that the use of the permits is stayed until the formal contested case proceedings are concluded. The issuance of these permits represents the order of the Department and is a final agency action on this matter. IDAPA 04.11.01.104. *See also, Laughy v. Idaho Department of Transportation*, 2010 WL 4297807, Idaho Supreme Court 2010 Opinion No. 110 (November 1, 2010) at 14.

On November 10, 2010, the Director issued a letter to all the parties and the proposed Intervenors, that the Department had issued overlegal permits to ConocoPhillips/Emmert International and that the issuance of the permits represents the order of the Department and is a final agency action on this matter. The letter states: “IDAPA 04.11.01.104 Idaho Rules of Administrative Procedure of the Attorney General provides that through this order, the Department may initiate formal contested case proceedings and the Department by this notification hereby initiates those proceedings.” The letter requested briefing from the parties and

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proposed intervenors on 1) the issue of the alleged and direct and substantial interests claimed by the proposed intervenors in their petition and 2) the issue of whether the Department may or must hold formal contested case hearings before the ConocoPhillips/Emmert overlegal loads are allowed to travel under the permits. The Director appointed Merlyn W. Clark, Esq. as the Hearing Officer pursuant to the provisions of Idaho Code § 67-5240 et seq. and IDAPA 04.11.01.413 to conduct the formal contested case hearing in this matter.

A hearing was held on November 19, 2010 on two issues, 1) the issue of the alleged direct and substantial interests claimed by the Petitioners as outlined in their Petition to Intervene and 2) the issue of whether the Department may or must hold formal contested case hearings before the ConocoPhillips/Emmert overlegal loads are allowed to travel under the permit.

Following the hearing, the Hearing Officer entered Findings of Fact, Conclusions of Law and a Recommended Order to the Director, pursuant to Idaho Code § 67-5243, recommending to the Director that the Petition to Intervene be granted. The Director reviewed the relevant record of the proceedings before the Hearing Officer, found that the evidence exists to support the Findings of Fact and Conclusions of Law made by the Hearing Officer in the Recommended Order. The Director did not find the Findings of Fact or Conclusions of Law to be clearly erroneous or unsupported by the record in any respect. Accordingly, the Director adopted the Findings of Fact and Conclusions of Law of the Hearing Officer contained in the Recommended Order as his own, and incorporated said Findings of Fact and Conclusions of Law by reference into his Final Order and granted the Petition to Intervene on November 29, 2010.

The Director ordered that the Department allow Petitioners, Linwood Laughy, Karen Hendrickson, and Peter Grubb to intervene in the contested case hearing regarding the overlegal

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permits for the Coke Drum Transport Project. The Order is a final order and is the final administrative action of the ITD, pursuant to Idaho Code § 67-5246 on the Petition to Intervene. Any party was entitled to file for reconsideration of the final order as provided in IDAPA 04.11.01.740. The parties subsequently informed the Hearing Officer that in order to expedite the proceedings, they waived the right to file for reconsideration of the final order re Petition to Intervene. Any party to this proceeding also has the right to judicial review in the District Court, pursuant to Idaho Code § 67-5270.

On November 17, 2010, John Crock, Janice Inghram, Roger Inghram, Julian Matthews, Owen Fiore, Mary Ann Fiore, Ruth May, Jim May, Gail Ryan, and Richard Ryan (herein “Intervenors”) filed a Motion for Leave to File Amended Petition to Intervene and an Amended Petition to Intervene with supporting affidavits in the Contested Case Over Coke Drum Transport Project. As part of the requested relief in the Amended Petition to Intervene, the Intervenors requested the Department not approve the permits until after formal contested case disposition. Applicants and ITD filed objections to the Motion and Amended Petition with supporting memoranda and affidavits. At the hearing on November 19, 2010, the Hearing Officer ruled that he would not consider the Motion and Amended Petition at the hearing on November 19, 2010 because they were filed only two days prior to the hearing on the Petition to Intervene.

On December 3, 2010, a hearing was held on the Amended Petition to Intervene. All parties were represented by their respective counsel at the hearing. The Hearing Officer heard oral arguments in favor of and in opposition to the Amended Petition. At the close of the oral arguments, the Hearing Officer announced that he would recommend to the Director that the Amended Petition be approved and that the Amended Petitioners be allowed to intervene on the

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condition that they not present duplicative or unduly cumulative evidence at the evidentiary hearing.

The Hearing Officer entered Findings of Fact, Conclusions of Law and a Recommended Order to the Director, pursuant to Idaho Code § 67-5243, recommending to the Director that the Amended Petition to Intervene be granted. The Director reviewed the relevant record of the proceedings before the Hearing Officer, found that the evidence exists to support the Findings of Fact and Conclusions of Law made by the Hearing Officer in the Recommended Order. The Director did not find the Findings of Fact or Conclusions of Law to be clearly erroneous or unsupported by the record in any respect. Accordingly, the Director adopted the Findings of Fact and Conclusions of Law of the Hearing Officer contained in the Recommended Order as his own, and incorporated said Findings of Fact and Conclusions of Law by reference into his Final Order On Amended Petition to Intervene.

On December 8, 2010, the Director ordered that the Department allow Petitioners, John Crock, Janice Inghram, Roger Inghram, Julian Matthews, Owen Fiore, Mary Ann Fiore, Ruth May, Jim May, Gail Ryan, and Richard Ryan to intervene in the contested case hearing regarding the overlegal permits for the Coke Drum Transport Project. The Order is a final order and is the final administrative action of the ITD, pursuant to Idaho Code § 67-5246 on the Petition to Intervene. Any party was entitled to file for reconsideration of the final order as provided in IDAPA 04.11.01.740. The parties subsequently informed the Hearing Officer that in order to expedite the proceedings, they waived the right to file for reconsideration of the final order re Amended Petition to Intervene. Tr. 7:9 – 8:4. The Order further provided that any party to this

proceeding has the right to judicial review in the District Court, pursuant to Idaho Code § 67-5270.

On December 8, 2010, pursuant to the stipulation of the parties and lawful notice, an evidentiary hearing was conducted by the Hearing Officer in Boise, Idaho. Natalie J. Havlina and Laurence (“Laird”) J. Lucas, and Leigh Luster, Advocates for the West appeared on behalf of the Intervenors. Erik F. Stidham, Murray D. Feldman, and Scott E. Randolph, Holland & Hart LLP, and Carolyn Montgomery, paralegal with Holland & Hart LLP, appeared on behalf of Applicants. J. Tim Thomas and Lawrence G. Allen, Deputy Attorneys General, appeared on behalf of Respondent ITD. Karl Vogt, Deputy Attorney General, appeared representing the Director of ITD. Following the close of the evidence, the parties agreed to submit written closing arguments on or before December 15, 2010. The written closing arguments have been received by the Hearing Officer and the matter is fully submitted to the Hearing Officer for Findings of Fact, Conclusions of Law and a Recommended Order to the Director upon the Administrative Appeal of the Intervenors.

III.

THE ADMINISTRATIVE RECORD

The administrative record in this matter consists of:

1. The Administrative Record (“AR”), Bates Nos. AR ITD00001 – ITD02334.
2. Supplements to the Administrative Record, Bates Nos. AR ITD002335 – 2374.
3. Supplements to the Administrative Record, Bates Nos. AR PR00111 – PR000131.
4. The transcript of the evidentiary hearing that was held on December 8 and 9,

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2010 in Boise, Idaho.

5. Exhibits that were marked and/or admitted during the evidentiary hearing:

Exhibit 53 – ITD Permit List

Exhibit 54 – ITD Permits 2000 to 20010

Exhibit 55 – ITD Permits 2003 to 2010

Exhibit 57 (Replacement) – Diagrams indicating Primary Pull Offs, Flagger Stations, Secondary Pull Offs, 3 Lane Highway and 4 Lane Highway

Exhibit 68 – Federal Register Vol. 60, No. 96 5/18/95 National Scenic Byways Program

Exhibit 69 – Northwest Passage Scenic Byway Corridor Management Plan 2006 Update

Exhibit 70 – Photos of Buildings Moved by Emmert and a Diagram of Dollie Beam Transport System showing trucks and trailers and position of a loaded ½ drum

Exhibit 71 – Email dated 6/14/10 from Travis Sloan to Bill R. Stevens, et al. re public notification

Exhibit 72 – Public Notice: Transport of Four (4) Oversize Loads

Exhibit 516 – Decision-Path Diagram

Exhibit 1001 (Offered and Rejected) – Offer of Proof of Photos and News Article of Tunnel-Sized Steel Cylinder that Rolled off Transporter onto the Roadway

Exhibit 1002 (Offered and Rejected) – Offer of Proof of Photo and News Article of Oversize Steel Tank and Vehicle that was involved in Transport Accident

Exhibit 1003 – Summary of Utility Relocation Permits for Highway 12 Issued 5/12/09 – 9/30/09

Exhibit 1004 – USDOT TIGER Grant Application re Expansion of Port of Lewiston Dock and State Highway 128

4. Affidavits of the following individuals that were admitted by stipulation of the parties:
 - a. Affidavit of Peter Grubb dated August 18, 2010 (AR ITD00795-797)
 - b. Affidavit of Gail Ryan dated November 15, 2010
 - c. Declaration of Ruth May dated November 16, 2010
 - d. Affidavit of Julian Matthews dated November 15, 2010
 - e. Affidavit of Linwood Laughy dated August 16, 2010. (AR ITD00783-787)
 - f. Supplemental Declaration of Linwood Laughy dated November 17, 2010
 - g. Affidavit of John Crock dated November 17, 2010
 - h. Affidavit of Janice Inghram dated November 15, 2010
 - i. Affidavit of Karen Hendrickson dated August 16, 2010 with one Exhibit (AR ITD00788-794)
 - j. Affidavit of Owen Fiore dated November 15, 2010
 - k. Affidavit of Erik Stidham dated December 2, 2010 with Exhibits A-B
 - l. Affidavit of Erick Stidham dated November 9, 2010 with Exhibits A-C
 - m. Affidavit of Steven Steach dated November 8, 2010 with Indemnity Agreement
 - n. Affidavit of Doug Giddings dated November 8, 2010
 - o. Affidavit of Terry M. Emmert dated November 9, 2010 with letter dated November 9, 2010 from Mark Albrecht to Alan Frew
 - p. Affidavit of Scott E. Randolph dated November 17, 2010 with Exhibits A-P
 - q. Affidavit of Steven Steach dated November 17, 2010
 - r. Affidavit of Andrew Lawless dated November 17, 2010 with Exhibits A-O on a disk

- s. Affidavit of Adam H. Green dated November 17, 2010
- t. Affidavit of Carolyn R. Montgomery dated November 17, 2010 with Exhibits A-D
- u. Affidavit of Erik F. Stidham dated December 15, 2010 with Exhibits A-E

IV.

JURISDICTION OF HEARING OFFICER

The Director of ITD has initiated this formal contested case proceeding to obtain a final order pursuant to I.C. § 67-5241 and IDAPA 04.11.01.100-104. The Hearing Officer has been appointed pursuant to IDAPA 04.11.01.410 and 413 to conduct the formal contested case hearing in this matter and has jurisdiction to determine findings of fact, conclusions of law and a recommended order upon the issues.

V.

ISSUES

The issue to be determined by the Hearing Officer is whether the ITD's decision to issue the permits to Petitioners was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence on the record as a whole, or contrary to law. Idaho Code §67-279. Included within the issue are the following questions:

- a. Whether the Idaho Transportation Department ("ITD") complied with the requirement of IDAPA 30.03.09.100.01 that it place a primary concern on the safety and convenience of the general public in determining whether to issue the ConocoPhillips permits;
- b. Whether ITD made a reasonable determination of the necessity of the proposed shipments under IDAPA 30.03.09.100.02; and
- c. Whether ITD properly followed IDAPA regulations regarding traffic interruption, as provided by IDAPA 39.03.11.05 and IDAPA 39.03.16.100.01.

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The Intervenors agreed not to challenge the issuance of the Permits regarding “preservation of the highway system” under IDAPA 30.03.09.100.01 or “feasibility” under IDAPA 30.03.09.100.02. See *Pre-Hearing Order Re Amended Motion to Intervene and Hearing Procedures*, dated December 6, 2010 (“Pre-Hearing Order”), pp. 2-3.

VI.

LEGAL STANDARDS

A proceeding by an agency, other than the public utilities commission or the industrial commission, that may result in the issuance of an order is a contested case and is governed by the provisions of the Idaho Administrative Procedure Act (“IAPA”), Ch. 52, Title 67, Idaho Code. Idaho Code § 67-5240. This contested case is governed by the IAPA, Ch. 51, Title 67, Idaho Code.

When the agency is required to issue an order, a court will affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279.

The party contesting an agency’s decision has the burden to show how the agency erred in a manner specified in Idaho Code § 67-5279 and to establish that a substantial right of the party has been prejudiced. *Wheeler v. Idaho Dep’t Health & Welfare*, 147 Idaho 257, 207 P.3d 988

(2009). Intervenors have the burden to establish that the decision of the ITD to issue the permits was erroneous in a manner specified in Idaho Code §67-5279. *See also, Pre-Hearing Order*, p. 2.

“A strong presumption of validity favors an agency’s actions.” *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001). The Hearing Officer will not substitute his judgment for that of the agency as to the weight of the evidence on questions of fact, but instead will defer to the agency’s findings of fact unless they are clearly erroneous. *See Idaho Code § 67-5279; Chisholm v. Idaho Dept. of Water Resources*, 2005 WL 3118057 (Idaho 2005); *Marshall v. Department of Transp.*, 137 Idaho 337, 48 P.3d 666 (Ct. App. 2002) (citing *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

A decision is not arbitrary and capricious where the conclusions and decision of the agency are “sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision . . . based on substantial evidence in the record.” *Brett v. Eleventh Street Dockowner’s Ass’n, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005). There is no requirement that ITD “discuss each document in the record” in explaining its decision. *Am. Lung Ass’n of Idaho/Nevada v. State Dep’t of Agric.*, 142 Idaho 544, 549, 130 P.3d 1082, 1087 (2006). Instead, ITD needs only to “adequately address the factors required by” statute or rule because it is within the agency’s “province to decide the weight to be given the various items of evidence.” *Id.* (Noting there is no need for the agency to identify and discuss any document contained in the record). *See also Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 129, 176 P.3d 126, 134 (2007) (explaining that “[t]he Court defers to the agency’s findings of fact unless they are clearly erroneous, and the agency’s factual determinations are binding on review, even

when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record.”).

ITD’s interpretation of its own regulations is entitled to deference. *See Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (citing *J.R. Simplot Co. v. Tax Comm’n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991)). Deference is appropriate because ITD is charged with managing Idaho’s roadways, and in managing its “administrative area of responsibility,” ITD’s expertise in applying its own regulations is entitled to deference. *Id.*

VI.

FINDINGS OF FACT

I find the evidence in the administrative record described above establishes the following facts:

1. The ConocoPhillips Company (“ConocoPhillips”) operates a refinery in Billings, Montana and utilizes coke drums in its production process. ConocoPhillips is engaged in a project to rebuild its Coke Unit at its Billings Refinery. AR ITD002368; Tr. 667:9-10, 668:14-669; *see also* Affidavit of Steven Steach (“Steach Aff. Nov. 8, 2010”) dated November 8, 2010, ¶¶ 2-6.

2. The existing coke drums are 20 years old and are at the end of their useful life. By 2005, it became apparent that the coke drums at the Billings Refinery needed to be replaced due to severe fatigue stress resulting in bulging and cracking of the coke drum walls. Tr. 670:7-9, 674:4-11; Steach Aff. Nov. 8, 2010, ¶ 3, 7; AR ITD02328, 2368.

3. These drums must meet very exacting specifications because of the way they are used in the refining process. Tr. 671:13-22. ConocoPhillips found only four manufacturers in the

world and none in the United States that manufacture drums meeting ConocoPhillips' technical requirements. Tr. 671:19-21. ConocoPhillips selected a manufacturer in Japan. Tr. 671:21-22.

4. 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. AR ITD002368; Tr. 667:9-10, 668:14-669:3.

5. 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. AR ITD002368.

6. In 2007, ConocoPhillips hired an expert in engineered transportation, Emmert International ("Emmert"), to perform a transportation survey to determine if there was a viable route to transport the coke drums from Japan to the Billings Refinery. Tr. 574:16-575:5, 670:12-14. Based in the Pacific Northwest, Emmert is recognized as the industry leader at hauling large loads. Tr. 539:4-545:12, 572:14-574:12, 670:12-13; Hearing Ex. 70. Emmert has safely moved hundreds of loads larger, taller, and heavier than the coke drums. Tr. 540:25-542:15. For example, Emmert moved a 1.6 million pound generator six hundred miles across Texas. Tr. 543:13-544:7. That generator was over 4.5 times heavier than the coke drum sections and Emmert used the same type of engineered transportation configuration—dolly beam transport—that it proposes to use here. *Id.* In the nearly fifty years since Emmert has been in business, it has never lost a load. Tr. 545:13-15, 559:19-560:4.

7. In 2007, Emmert performed a feasibility study to determine viable routes for transporting the coke drums to the Billings Refinery. Emmert began this process by performing

an extensive analysis of potential routes. Tr. 555:11-18, 574:16-578:4; AR ITD00626, 01268. This included detailed analysis into the size of the shipments and the available modes of travel. Tr. 574:19-576:17. Emmert examined the possibility of rail transport but determined that the dimensions of the coke drums eliminated the possibility of shipment by rail. AR ITD00626; Tr. 219:9-17. Emmert concluded that ground transportation from Lewiston to Billings was the only feasible route. AR ITD00626; Tr. 575:11-15, 576:4-18, 584:21-585:10. ITD subsequently came to the same conclusion. Tr. 56:4-12, 79:16-24, 138:10-20.

8. ConocoPhillips, working with its transportation contractor, Emmert, contacted ITD about ConocoPhillips's business need to transport the two coke drums from Lewiston, Idaho to the Montana border over U.S. Highway 12 ("U.S. 12"). AR ITD2368.

9. ITD is an executive department of Idaho state government established by the Legislature and headed by the Idaho Transportation Board. Idaho Code § 40-501. ITD has the discretion to "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.

10. Pursuant to that discretionary authority, ITD has also promulgated regulations pertaining to oversized loads and maintains a permits office to handle permitting of overlegal loads. IDAPA 39.03.09, .11, .16; Tr. 45:22-46:10. The permits office works with the district offices within ITD and follows a process in evaluating overlegal permit applications. Tr. 47:11-52:7.

11. In fiscal year 2010, the permits office issued 64,000 permits, 30,000 of which were for nonreducible loads. Tr. 46:10-19, 62:17-63:2.

12. As part of its analysis, Emmert approached ITD to determine its requirements for obtaining an overlegal permit. Tr. 576:18-577:2. Emmert surveyed the route and then worked with its in-house engineers to evaluate and develop a plan that could meet ITD's requirements. Tr. 577:3-6. As part of this process, Emmert shared technical information with ITD, including gross weights for bridge crossings. AR ITD00628; ITD00801. ITD reviewed that information and confirmed that proposed loads could successfully cross the bridges along U.S. 12. *Id.*

13. ITD also examined the reducibility of the coke drums and required that they be cut in half and transported in two pieces each. Tr. 57:5-1, 65:4-6; AR ITD00628; Tr. 46:20-47:5 (defining reducible and non-reducible loads). Cut in half, each drum section is approximately fifty feet long, twenty-five feet wide, twenty-six feet tall, and weighs between approximately 160 and 170 tons. AR ITD00109.

14. ConocoPhillips certified to ITD that the loads could be reduced no further. Tr. 63:7-8, 64:1-65:23, 139:17-18. ConocoPhillips, through Emmert, will also certify the loads are reduced to a practical minimum upon signing the permits. Tr. 243:19-244:12; AR ITD02336 (lower left corner above the signature line).

15. ITD did not pre-approve the permits. Tr. 157:19-158:8, 577:7-11. Instead, ITD expressed its requirements to obtain overlegal permits and Emmert investigated whether it would be possible to meet those requirements. Tr. 576:18-577:6. At all times, the burden remained on Emmert to satisfy ITD's conditions. Tr. 578:14-18. This type of process is the standard procedure in the transportation industry for applying for an overlegal permit. Tr. 577:12-579:16. Emmert ultimately determined that it could meet ITD's requirements for moving these shipments along U.S. 12 and reported its conclusion to ConocoPhillips. Tr. 670:20-671:3.

16. ConocoPhillips then had five other nationwide transportation firms evaluate Emmert's feasibility study. Tr. 670:15-19. Each of those independent firms concurred with Emmert's conclusion that U.S. 12 was a feasible route. *Id.* Based on Emmert's feasibility study, the five independent reviews of that study, ITD's indication of its requirements, and Emmert's assurances that it could meet those requirements, ConocoPhillips made the informed decision to order the coke drums in mid-2008. Tr. 669:20-671:3. Emmert then began developing a transportation plan to meet its burden to comply with ITD's requirements for the overlegal permits. Tr. 580-645.

17. Emmert continued to communicate with ITD, and Emmert sent its people, including experienced engineers, drivers and superintendents, into the field to survey U.S. 12. Tr. 580:18-581:4, 587:3-5. Emmert's field surveys involved data collection about key pieces of the plan, including measuring rock outcrops, identifying overhead utility wire issues, identifying and measuring parking locations and turnouts, and measuring the grade of the road. AR ITD00626- 27; Tr. 585:25-586:18. Emmert also hired a third-party engineer to survey the route and confirm its findings as to the rock outcrops and road width, including turnouts, along the route using laser technology. Tr. 587:5-6, 588:6-21; AR ITD00029-41. The route has been surveyed by Emmert or its contractors at least twenty-five times. Tr. 587:17-22, 591:11-20. ITD confirmed these surveys using a video survey. Tr. 59:11-20.

18. Emmert's in-house engineering department evaluated and applied the survey data to create engineered drawings for the proposed engineered transportation system for the loads, commonly referred to as a Beam & Dolly trailer. Tr. 587:23-589-14; AR ITD00032-41; 139-151; 284. The Emmert engineering department confirmed that the shipments could be made as

proposed and also made suggested changes to the trailer's saddle that enhanced its safety and maneuverability by obtaining further clearance for the load to navigate the narrowest segments of the route. Tr. 589:15-590:24; AR ITD00032-41. Emmert implemented this change, which added two-and-one-half to three feet of clearance to travel around those narrow areas and increased the amount of space Emmert can provide for passing cars. Tr. 590:17-24, 592:12-20, 594:5-23.

19. The trailer is customized for U.S. 12. It utilizes a dolly beam transport system that uses a rectangle of beams that surround the middle of the load and supports the load using saddles that are attached to the beams and drums being transported. Tr. 546:7-547:3; Hearing Ex. 70 (developed from AR ITD00144-45).

20. The beam configuration allows the weight of the coke drums to be distributed over a greater area and number of axles. Tr. 546:13-16; Hearing Ex. 70. The load is suspended on three points—one front and center and two on the back corners—that prevent the load from separating from the trailer. Tr. 547:6-17, 605:14-606:13; Hearing Ex. 70.

21. The trailer has brakes on each axle to ensure rapid and controlled braking. Tr. 565:24-11, 643:24-25; AR ITD00043.

22. Emmert will use two trucks to move and control the load in order to increase reliability. Tr. 550:23-551:15. While the back truck only pushes the load and cannot steer, the trailer can itself be hydraulically steered by trained steersmen who ride on the trailer in segments where there is a need for additional steering. Tr. 553:1-17, 612:14-15. The truck drivers and steersmen that will be utilized for this shipment are highly experienced and qualified operators of the trucks and trailers. Tr. 552:14-24, 606:14-607:1.

23. The trucks used by Emmert under the approved transportation plan are customized over-the-road Kenworth T-800 trucks that meet all current Department of Transportation standards for emissions and noise. Tr. 550:25-551:7, 552:1-5; Affidavit of Terry M Emmert dated November 9, 2010 (“Emmert Aff.”).

24. These trucks will travel at a reduced speed and will not cause any undue vibrations or impacts. The noise generated from the trucks will be the equivalent to any other over-the-road truck traveling at low speed. *Id.* at p.2.

25. Emmert will use lights to allow the trucks to travel safely along the route. However, while the lighting will be strong enough to ensure the safety of the vehicles on the road, it will not be strong enough to penetrate the blinds or curtains of buildings near the road and will only last for a brief period of time. *Id.*

26. The shipments will use standard over-the-road heavy duty Kenworth truck/tractors that meet all current U.S. Department of Transportation emissions regulations and noise regulations. The trucks will be utilized as prime movers to transport the coke drums as a propulsion mechanism for the dolly beam transport. *Id.*

27. The reduced speed of the transport will not cause any vibration or impact during the low speed of transport. The noise generated by the Kenworth tractors is equivalent to any standard over-the-road truck traveling at a low rate of speed. *Id.*

28. The lights proposed for the project will include yellow caution lights to alert traffic of the oncoming support vehicles that meet U.S. Department of Transportation standards. The lighting that will illuminate the dolly beam system will be pointed directly onto the roadway

surface to enable Emmert's personnel to safely transport the coke drums down the road. *Id. at pp.* 2-3.

29. All lighting associated with the project is necessary to ensure the safety of all vehicles on the road and, while bright enough to be visible by oncoming traffic, will not be so bright as to significantly penetrate the blinds or curtains of a home or building near the road and to the extent there is any light or noise disturbance beyond the usual highway traffic, it will occur for only a short period of time on four nights. *Id. at p. 3.*

30. U.S. 12 is a two (2) lane highway that borders the main stem of the Clearwater River from Lewiston to the confluence of the Clearwater River and the South Fork of the Clearwater River near Kooskia. From the confluence it borders the Middle Fork of the Clearwater River to the confluence of the Middle Fork with the Locksa River and the Selway River. From the confluence of the three rivers, Highway 12 borders the Locksa River almost to the Montana border. (*Judicial Notice by Hearing Officer.*)

31. U.S. 12 has been designated a Scenic Byway and also an All American Road. It is also a commercial highway that is frequently used by logging trucks and other commercial vehicles, including semi-trucks hauling grain from Montana and the Dakotas to the Port of Lewiston. Tr. 456:11-457:8; Hearing Exhibit 69; Affidavit of Andrew Lawless dated November 9, 2010 with attached exhibits. Nothing in the designations as a Scenic Byway or an All American Road prohibits the transport of the drums over U.S. 12.

32. The Montana border at Lolo Pass is approximately 173 miles east of Lewiston. *Id.*

33. U.S. 12 has a low volume of traffic at night. Tr. 283:20-21, 598:13-15. The record contains the results of two traffic volume studies performed on U.S. 12 for the entire month of

March 2010. AR ITD00742-43. A study performed near Kamiah found a maximum of fifty-eight (58) vehicles and a minimum of zero (0) vehicles in any given hour between 10:00 p.m. and 5:00 a.m. AR ITD00742. A study done between Lewiston and Orofino found a maximum of sixty-eight (68) vehicles and a minimum of two (2) vehicles on the road at any given hour between 10:00 p.m. and 5:00 a.m. AR ITD00743. For both of these studies, the maximum daily traffic volume occurred during the daytime. AR ITD00742-43.

35. Emmert's project manager performed his own traffic volume survey, driving the route from Lewiston to Orofino on consecutive nights in the summer of 2010 and consistently found eleven (11) vehicles approaching from behind and eight (8) approaching from the front. Tr. 597:21-598:4. He also performed another similar survey in the summer of 2010 along the more remote stretches of U.S. 12 near the Lochsa Lodge and found anywhere from three (3) to five (5) cars passing each hour. Tr. 598:5-12.

36. Based on the low traffic volumes at night on U.S. 12, ITD requested and Emmert agreed that the loads travel at night. Tr. 71:24-72:14, 108:21-24, 126:10-25, 134:4-15, 597:1-14.

37. After two-years of surveying, engineering study and analysis, and significant planning, Emmert submitted a proposed transportation plan to ITD in September of 2009. AR ITD00674-729.

38. ITD reviewed and analyzed the September 2009 plan, sent comments to Emmert requiring changes and further information, and requested a revised version of the transportation plan. AR ITD01018-1021. Among other things, ITD informed Emmert that it must not delay traffic more than fifteen minutes, that certain proposed pull outs could not be used, and required

Emmert to employ a system of three flaggers “leapfrogging” in the transportation plan. AR ITD01021.

39. Representatives of both parties met on November 9, 2009 to discuss the transportation plan. AR ITD00624. Emmert subsequently submitted a revised transportation plan to ITD on November 12, 2009. AR ITD00623-673.

40. The November 2009 plan contained a number of other changes ITD required, including nighttime travel and specific identification of the pull outs that would be used for traffic relief. AR ITD00624, 631-634.

41. ITD reviewed and analyzed the November 2009 transportation plan and sent comments to Emmert requiring changes to the plan and the addition of further and more detailed information, and requesting a further revised version of the plan. AR ITD00619-622. ITD sought clarification on state police escorts, further assurance the trailers and saddles could clear obstructions on the route, and a completed communication plan. In response, Emmert submitted a newly revised version of the transportation plan on March 25, 2010. AR ITD00375-622.

42. The March 2010 transportation plan contained additional detail, including an extensive traffic management plan for the entire route, as well as substantially more photos of the route. AR ITD00504-602.

43. After reviewing the March 2010 plan, ITD again sought changes and additional information. AR ITD00317-320. ITD reminded Emmert of its 15-minute rule regarding traffic interruption and demanded a written contingency plan, one-to-one communication between the flaggers and drivers, and tables showing planned and supplementary turnouts. *Id.*

44. During this time period, ITD was receiving and reviewing public comments about the shipments and was passing those comments on to Emmert for a response. Tr. 136:16-137:9, 223:3-224:8, 582:14-583:1.

45. On July 2, 2010, Emmert submitted a further revised plan to ITD. AR ITD00001-374. The July 2010 transportation plan addressed public comments and questions, addressed further contingencies, contained further clarification of the traffic management and communication plans to address passage of emergency and non-emergency vehicles that may approach the loads. AR ITD00003; Tr. 00113-115, 00289-295, 00300-309.

46. The July 2010 version of the transportation plan reflects three years of careful planning by Emmert and demanding review by ITD. Tr. 581:12-583:1; AR ITD00626, 01268.

47. Each transport will include five pilot car escorts, four state police escorts, and two sign boards. Tr. 127:17-128:9, 335:14-336:1, 660:9-25; AR ITD00112-115, 00270-273. Among other things, the approved transportation plan provides (a) locations and mileposts where the loads can pull over to allow for traffic relief; (b) how pilot cars will be utilized in transit; (c) the identification of railroad tracks; and (d) the procedure for allowing emergency vehicles to pass. Additionally, all parties involved will be in direct communication throughout the transport through use of Global Positioning Systems, satellite phones, and radios. AR ITD00114-15.

48. Emmert and ConocoPhillips have made arrangements to provide an ambulance and paramedics to travel with the loads. Tr. 132:11-17, 603:4-604:9; Emmert Aff., ¶ 7.

49. Emmert and ConocoPhillips have obtained \$10,000,000 in insurance coverage against public and private loss and have each signed hold harmless agreements. AR ITD02349; Steach Aff. dated November 17, 2010, ¶ 21 and attached document.

50. ITD limited travel to between 10:00 p.m. and 5:30 a.m. to increase safety and convenience. Tr. 134:1-15, 597:1-7; AR ITD02290, 2300, 2310, 2319.

51. The four nights of travel are between 34.9 and 53.1 miles each and ITD has authorized Emmert a 7.5 hour window to complete each segment. AR ITD02336 (stating in November, 2010 permit that travel is limited to between 10:00 p.m. and 5:30 a.m.); Tr. 644:12-13 (Mr. Albrecht referring to time Emmert has to complete each night's travel). While ITD allowed for travel to occur during a 7.5 hour window each night, Emmert will actually be traveling on the road for only a small portion of that window. AR ITD00290-294.

52. The estimated travel time under the approved transportation plan is 122 minutes for day one, 122 minutes for day two, 140 minutes for day three, and 257 minutes for day four, a total of 516 minutes or 8.6 hours. AR ITD00294; 002344.

53. By providing a broad time window, ITD provided Emmert with flexibility to minimize traffic interruption. Emmert plans to not be moving when cars are on the road. Using its communications, Emmert plans to stay in its turn offs, waiting for any oncoming traffic to clear, before initiating travel on a segment. TR. 600:12-16, 634:9-11, 639:21-640:7. By providing a window greater than that needed for the actual travel, ITD has provided for minimal inconvenience to the general public.

54. During each leg of the trip, the transport will pull off the road at regular intervals to allow passage by other road users. Tr. 127:1-9, 599:23-601:3; AR ITD00114.

55. Emmert has identified over one hundred primary and secondary “pull offs” and flagger stations where traffic can pass the load along the 173 mile route from Lewiston to the Montana border. AR ITD00289-94 (primary pull offs and flagger stations); 00295 (secondary pull offs).

56. At ITD’s insistence, Emmert has broken the trip down into seventy-four individual segments between primary pull offs, each of which was measured for distance and estimated delay time. *Id.* Only twelve of those segments are estimated take more than ten minutes to travel and none are projected to delay traffic more than fifteen minutes. *Id.* Of those twelve segments, five have secondary pull offs or flagger stations between the primary pull offs (segments ending at mileposts 91.5, 103.7, 116.6, 126.9, and 151.7), and two segments are partially or entirely three or more lanes wide (segments ending at mileposts 46 and 171.1), all allowing for expeditious passing and ensuring delay is minimized. *Id.*

57. There will also be thirty-nine flagger stations spread at regular intervals along the route. *Id.* At ITD’s insistence, the flaggers will be in direct communication with the remainder of the personnel and the load throughout the trip and will provide advanced warning of an approaching emergency, including cases in which a person needing emergency medical treatment is traveling in a non-emergency vehicle, should one arise. Tr. 595:6-19, 601:4-15, 610:12-17; AR ITD00114-115.

58. The flaggers will also be used to ensure no delay exceeds the time allotted by the traffic control plan. Three flaggers will be utilized, one behind the truck and two in front of the truck. Tr. 595:6-19, 601:6-15. The front flagger will be a full segment ahead of the load and will be able to monitor oncoming traffic for miles in front of the load. Tr. 595:6-638:13-15, 639:21-

643:4. Similarly, the flagger behind the load will be able to monitor traffic approaching the load from behind. Tr. 595:6-19, 611:7-19. The load will not begin any segment of travel until all traffic has been cleared. Tr. 595:4-19, 599:23-601:3, 610:12-17, 639:12-643:4.

59. As part of the transportation plan, Emmert has provided for various alternatives for traffic relief. The first option Emmert will use is to hold oncoming traffic and exit the road into a pull off leaving the necessary clearance for traffic to pass. Tr. 599:23-600:16; 344:20-25; AR ITD00335. Once the load is safely off the road, the oncoming traffic, then the following traffic, will be cleared past the load. Tr. 599:23-600:16. Once all waiting traffic is cleared, Emmert will check with the lead and back flaggers to determine if any traffic is approaching. *Id.* If it is, it will be cleared, and only then will the load move on. *Id.*

60. Another option for clearing traffic is to park the traffic in the pull off instead of the load. Tr. 601:16-25; AR ITD00335. The traffic will be stopped by one of the front flaggers, parked in the turn out until the load passes, then is allowed to move on. *Id.* The turn outs along U.S. 12 are designed and regularly used for vehicles to park. Tr. 477:14-18.

61. The third option for clearing traffic is to utilize three lane segments of the highway by pulling the load over into two of the lanes and allowing oncoming, and then following, traffic to pass. Tr. 600:18-601:3; AR ITD00339. This method will be used, for example, at the segment that ends at mile post 60.8 and could be used at anytime where the road is three or more lanes wide, such as at the segment covering mile posts 39.7 to 44. AR ITD00291.

62. The structural integrity of the loads has been checked by competent, licensed engineers and the transporters to be used for the operation have had extensive design checks.

They will be regularly inspected for any structural defects before and during the actual transports.

AR ITD00043.

63. Prior to the move the Idaho State Police, on behalf of ITD, will conduct a commercial vehicle safety alliance level one inspection of all components, including parts, pieces, driver records, and driver logbooks to ensure the equipment that Emmert will be moving down the road is safe and safely secured. Tr. 131:22-132:7.

64. On each night of travel, Emmert will perform its own thorough inspection of its equipment and a service truck carrying all service equipment, materials and spare parts for the trucks and trailer will travel with the load. AR ITD00116, 118, 318-19.

65. Before each night of travel Emmert will engage in a pre-work meeting with all of its personnel where the intended operations will be fully discussed and reviewed, including any areas along the night's route where additional caution is required. AR ITD00043, 117.

66. Given the design of the transporter, absent a vehicle collision or a vehicle being driven off the road into the river, or an act of God such as an avalanche, there is no realistic possibility that the load will roll or fall off a trailer into the river. Tr. 605:14-606:10; AR ITD00043, 306. Emmert confirmed with its engineering department that the trailer would have to be completely on its side to the point where it is falling over for the load to separate from the trailer. Tr. 606:5-10.

67. Emmert has never lost a load in its nearly fifty year history of transport. Tr. 545:13-15.

68. A number of wide loads have gone up U.S. 12 and there have not been any accidents. Tr. 318:6-9; Hearing Exs. 53-55.

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69. Notwithstanding the very slight risk of losing a drum into the river, Emmert included a realistic contingency plan for recovery of the load from the river that recognizes that the conditions of the area will dictate how recovery is handled. AR ITD00043. The contingency plan discusses equipment that could be used to move the load to a safe location, including hydraulic gantries and jacks, skidding equipment, a winching system, and an appropriately sized crane. AR ITD00043-44. Emmert owns many pieces of equipment that could be used. AR ITD00044. Also, Emmert has identified crane operators in the region who can dispatch within twenty-four hours so the load can be moved as soon as feasibly possible. Tr. 607:9-15.

70. Emmert also has professional experience recovering loads, including out of water. Tr. 607:18-22.

71. ITD will not allow a traffic blockage for a significant amount of time during recovery. Tr. 322:3-5.

72. It is unlikely that the road would be completely blocked during recovery. The size of crane that would actually be needed to remove a load from the river would only take up one lane. Tr. 608:9-19.

73. Following careful study of this project as indicated above, ITD issued the permits on August 20, 2010 (“August Permits”). AR ITD02290-2327. The permits list a variety of specifications and requirements for the loads, including axle weight and spacing, lights, signs, 2-way radio communication, pilot vehicles as per the traffic control plan, limiting travel to 10:00 p.m. to 5:30 a.m., and signage of the loads. AR ITD02290.

74. ITD also made the August Permits contingent upon issuance of permits in

Montana and incorporated Emmert's traffic control plan and attached additional travel requirements. *Id.* The August Permits requirements include a list of special bridge requirements including the use of helper dollies and schematic drawings of the travel configuration. AR ITD02291-2296.

75. The August Permits requirements also provide that “[o]ncoming traffic cannot be delayed greater than 15 minutes” and following traffic “shall not be required to stop for more than 15 minutes before they are cleared.” AR ITD02297.

76. The 15-minute delay time provided in the August Permits arises from ITD's longstanding practice of setting a limit on delays caused by construction projects and users of overlegal permits. Tr. 90:6-91:22, 175:6-176:5, 275:7-17, 398:6-12.

77. The August Permits requirements also provide that the tires of the trucks and trailer are to stay between the shoulder lines of the roadway except when exiting the roadway at approved turnout locations. AR ITD02297.

78. The August Permits requirements also provide that “traffic shall not be diverted onto an unpaved surface,” and restricted travel on holiday weekends. *Id.*

79. The August Permits include a copy of the hold harmless agreement provided by Emmert. AR ITD02298-99.

80. ITD reissued the permits on November 10, 2010 (“November Permits”). AR ITD002336 – 2367.

81. The November permits were substantially similar to the August Permits, including the requirement to comply with its traffic control plan, except that the November Permits revised the traffic restriction requirement and provide that “oncoming traffic shall not be delayed greater

than 10 minutes, except at those points listed in the traffic control plan under the Idaho Traffic Management Tab. In those few identified areas the carrier will make every reasonable effort to limit the delays of oncoming traffic to as close to 10 minutes as possible, while maintaining the safety and integrity of the transport. Traffic may follow the load, but following traffic shall not be required to stop for more than 10 minutes before they are cleared to pass. There are 12 zones where Emmert will be allowed to exceed the 10 minute time frame which are attached.” AR ITD 002339, 2354.

82. The November permits also allow Emmert to barricade the turnouts 24 hours in advance of each move. AR ITD02339. This provision was added at the request of the Idaho State Police in response to reports of planned civil disobedience in the form of clogging turnouts with parked vehicles. Tr. 203:22-204:12, 657:14-659:22.

83. The November permits also specify certain locations where the loads can cross the fog line but remain on the paved surface. AR ITD002339.

84. Concurrent with issuance of the permits, Mr. Alan Frew, ITD Administrator Division of Motor Vehicles (“the Administrator”), prepared a Memorandum of Decision dated August 20, 2010 (“August Memorandum”), to explain the steps, process, and analysis taken by ITD to comply with the laws and rules governing the issuance of overlegal permits and his decision to issue the overlegal permits to Emmert. Tr. 115:25-116:3, 121:7-24; AR ITD02328-2334; AR ITD02328-2334.

85. The August Memorandum describes the background of the project, the need for ConocoPhillips to replace aging coke drums with two new coke drums at its Billings, Montana refinery, including that 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. AR ITD0238. The evidence in the Administrative Record supports these findings of the Administrator.

86. In the August Memorandum, the Administrator describes that the coke drums were manufactured in Japan and delivered to a United States port and then via barge to the port at Lewiston, Idaho; that ConocoPhillips is working with its transportation contractor Emmert and had contacted ITD about ConocoPhillips's business need to transport the coke drums from Lewiston, Idaho to the Billings, Montana refinery over Highway 12. *Id.* The evidence in the Administrative Record supports these findings.

87. The Administrator describes the coke drums as being approximately 24 feet in diameter and 100 feet long, weighing approximately 350 tons each. He states they must be cut in half before they can be transported over land. He states that Emmert proposes to transport the drums over the highways using specialized Beam & Dolly Heavy haul equipment and that the transport would entail four loads, consisting of two separate convoys of two drum sections, which would travel at night between the hours of 10 p.m. and 5:30 a.m. *Id.* The evidence in the Administrative Record supports these findings.

88. The August Memorandum contains a thorough analysis of the steps, process, and analysis taken by ITD to comply with the laws and rules governing the issuance of the overlegal permits and the basis for the decision to issue the permits. *Id.*

89. The Administrator states that he based his decision on his 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 plan. His decision was also based upon his

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 process. AR ITD02328-2329.

90. In the August Memorandum, the Administrator concludes that:

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 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.

AR ITD02329. The evidence in the Administrative Record supports these findings.

91. In his Analysis in the August Memorandum, the Administrator describes the authority of ITD to issue the permits. He states that ITD is an executive department of Idaho state government established by the Legislature and headed by the Idaho Transportation Board, citing Idaho Code § 40-501. He states that among ITD's powers and duties are the location, design, and development of transportation systems that the Idaho transportation board determines to be in the public interest, citing Idaho Code § 40-310(3). The Administrator states that, "[a]dditionally, 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,'" citing Idaho Code § 49-1004. The Administrator

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further states in his analysis, “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.” AR ITD02329.

92. The evidence in the Administrative Record clearly establishes that the Administrator knew and applied the legal standards that govern the issuance of overlegal permits. *Id.*

93. In the August Memorandum, the Administrator states that “[i]n applying these standards to Emmert’s request for an overlegal permit, the Department considered both the necessity and the feasibility of the proposed movement.” He further states, “[b]ased upon my review of the agency record and the application of the required standards, the permit request by Emmert satisfies both 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.” AR ITD 02330. The evidence in the Administrative Record supports these findings.

94. The Administrator’s statement continues, “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.” *Id.* The evidence in the Administrative Records supports this finding of the Administrator. It is reasonable for him to rely upon factual information supplied by Emmert relating to the feasibility of the transport and his own relevant knowledge in the exercise of his discretion under the governing law and rules relating to the issue of necessity.

95. As part of its reasonable determination of necessity, ITD required ConocoPhillips to certify that the loads had been reduced to their minimum practical dimensions. IDAPA 39.0316.100.02; AR ITD002336, 002351; Tr. 63:7-8, 138:24-139:18. Because of this requirement ConocoPhillips cut each coke drum into two pieces for transport, which was the most that could be done without rendering the coke drums useless. Tr. 57:5-11, 673:23-7.

96. ITD reasonably determined that overlegal travel on U.S. 12 is necessary to transport the coke drums from Lewiston to Billings. Tr. 56:6-12, 57:21-23, 138:21-23. In its review of intrastate routes, ITD tries to find the most direct route possible. Tr. 56:4-5. In making this reasonable determination, ITD must take into account the facts and circumstances of each case. Tr. 214:17-20.

97. In this case, given the height of the coke drums, and based on its institutional knowledge of Idaho’s highways, ITD reasonably concluded that U.S. 12 was the only route that would accommodate the dimensions of the four loads. Tr. 56:7-:19, 57:12-20, 79:16, 137:23-139:18, 215:22-216:5; AR ITD02330. *See also*, testimony of Reymundo Rodriquez that the Department looked at alternative routes, but that the extreme height of these loads, which could

not travel on other routes due to immovable vertical restrictions, resulted in the finding that U.S. 12 is the only route that can handle these shipments. Tr. 57:12:20.

98. In the August Memorandum, the Administrator addressed the issue of feasibility of the transport. He states:

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[d] 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.

AR ITD02330. The evidence in the Administrative Record supports these findings.

99. The Administrator recognized the requirements of IDAPA 39.03.16.100.01 and concluded that the Department has the discretion to grant the proposed overlegal permit pursuant to IDAPA 39.03.16.100.01. The Administrator correctly determined that this rule does not limit the Department's discretion to grant or deny overlength permits.

100. In the August Memorandum, the Administrator, explains his analysis of the requirements of 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 overlength 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 qualified as a type of overlegal request that is “normally” accepted, a[n] 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:

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.

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 30.03.11.100.05(b).

As required by the IDAPA provision, 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 30.03.16.100.01 to a ten limit (sp) [minute] 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).

AR ITD02331. The evidence in the Administrative Record supports these findings.

101. In the August Memorandum, the Administrator addressed the issues of Safety and Convenience of the general public and the preservation of the highway system. The Administrator states that “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.” AR ITD02332.

102. In the August Memorandum, the Administrator described how these issues are addressed:

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 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.

AR ITD02331-02332. The evidence in the Administrative Record supports these findings.

103. In the August Memorandum, the Administrator addressed the Public Comments that were received by ITD. They are significant in number and most oppose the project. AR

ITD01730-02233. In the August Memorandum, the Administrator states:

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 reference 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 (sp)[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 it (sp) [its] discretion and judgment to address concerns raised by the comments.

AR ITD02332-02333. The evidence in the Administrative Record supports these findings.

104. In the August Memorandum, the Administrator also described the bond requirement that was imposed by the Department. He states:

To further 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.

AR ITD02333. The evidence in the Administrative Record supports these findings.

105. In the August Memorandum, the Administrator also addressed the concerns that were raised in the *Laughy* lawsuit. He states:

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 accompanying (sp)[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.

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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.

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 circumstance 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 (sp) [request] that is currently before the Department.

AR ITD02334. The evidence in the Administrative Record supports the Administrator's findings.

106. In the August Memorandum, the Administrator concluded that, "[b]ased 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. AR ITD02334.

107. Concurrent with the issuance of the November permits, the Administrator issued an Updated Memorandum of Decision ("Updated Memorandum"), dated November 10, 2010. AR ITD002368-02374.

108. The Updated Memorandum contains many of the same findings as in the August Memorandum, but the Administrator revised, added and deleted certain findings. AR ITD002368-002374.

109. In the Updated Memorandum, the Administrator deleted reference to the Arrow bridge crossing. AR ITD002370.

110. In the Updated Memorandum, the Administrator revised the limitation on traffic delay from 15 minutes to "10 minutes, except in a few unavoidable locations." AR ITD002369, 2372.

111. In the section labeled, "Decision," the Administrator states:

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 10 minutes, except in

certain unavoidable locations identified on the permit. 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 vehicles traveling in the same direction as the load may be delayed no more than 10 minutes and that vehicles travelling in the opposite direction of the load may be delayed no more than 10 minutes, except in a few unavoidable locations.

AR ITD002369.

112. In the section labeled, "Analysis," under the subsection marked "Safety and Convenience," the Administrator states: "[s]pecific transportation turn-outs and secondary back up locations have been identified throughout the course of the route to prevent traffic delays greater than 10 minutes, except in a few locations." AR ITD002372.

113. During the hearing, the Administrator clarified a few points from these memoranda including that the trucks can safely travel faster than twenty-five miles per hour, that a delay can exceed ten minutes without violating ITD's regulations, and that each section will be moved one at a time, as opposed to in tandem. Tr. 122:19-123:25, 188:6-192:18.

114. I am persuaded that the Administrator correctly interpreted the requirements of IDAPA 39.03.11.100.05(a) and (b); that the ten minute limitation does not apply in the current situation; that the traffic plan satisfies the requirement that the proposed overlegal loads can be transported in such a way that Highway 12 will remain open as often as feasibly possible and provides for the frequent passing of vehicles traveling in the same direction; and allows emergency vehicles to navigate around the vehicle/load when necessary.

115. The Administrator's interpretation of the traffic interruption regulations is consistent with the Department's interpretation and application of the traffic interruption regulations for several years.

116. Acting within its discretionary authority and consistent with its past practice, ITD has imposed a 15 minute traffic interruption limitation upon the permits issued to Emmert. Based on its review and approval of the traffic control plan, ITD concluded that the 15-minute interruption contemplated by the plan satisfies the "frequent passing" standard of IDAPA 39.03.09.100.5 and safeguards the safety and convenience of the general public. AR ITD02331.

117. As interpreted by ITD, the 15-minute interruption means the time when traffic is actually stopped, not just slowed. Tr. 398:10-12; 93:21-94:7.

118. I am persuaded that Emmert will be able to avoid delaying traffic more than 15 minutes. The traffic control plan contains numerous protections and redundancies to ensure compliance with ITD's 15-minute traffic interruption limitation. The traffic control plan states that Emmert will use sophisticated communication equipment to allow Emmert to move traffic around the load and satisfy the 15-minute traffic interruption limitation. AR ITD00022-26 (listing potential hazards and planned actions by Emmert to address them); ITD00286. (discussing Emmert's reliance on communication equipment to minimize delays and ensure compliance with the traffic control plan). Using communications, Emmert will not initiate travel when vehicles are within sight of the flaggers. Likewise, communications will allow Emmert to use secondary turnouts and flagger status when vehicles have been stopped. *Id.*

119. The use of helper dollies should not cause traffic to be delayed more than 15 minutes. The transportation plan provides that helper dollies will be preloaded on the trucks so

that they can be lowered without any significant interruption to travel. AR ITD00117; ITD00309 (discussing how helper dollies would be installed in parking areas and unpinned quickly to allow for rapid transition time and minimize any potential for delay).

120. The traffic control plan also relies on numerous secondary turnouts that Emmert may utilize when traveling to ensure that traffic will not be interrupted for more than 15 minutes and, in most cases, far less. AR ITD00117; ITD00290-293 (list of primary pull offs); ITD00294 (list of secondary pull offs); ITD01262 (“The convoy will use every turnout and parking area available when traffic appears behind or ahead of the convoy to ensure that traffic is not unduly delayed during the transport.”). Even putting aside that travel time does not equal traffic delay, Emmert and ITD have created travel segments that can be traveled in 15 minutes or less. Emmert and third party contractors surveyed and measured the route between 25-30 times to ensure that all measurements were accurate and that the stated travel times are appropriate. AR ITD00029-31 (field surveys performed by Emmert and third party engineering firm); ITD00744; ITD01166. Additionally, ITD viewed the route in its sophisticated video monitoring system to ensure that the route and expected travel times were appropriate. AR ITD01039; Tr. 591:11-22. Taken together, these controls ensure that Emmert will satisfy the 15-Minute Delay Spreadsheet that is attached to the permits. AR ITD002340-2344, 2355-2359.

121. In the Updated Memorandum, in the section labeled “Analysis” in the subsection marked “Necessary and Feasible Standard,” the Administrator added the statement, “I have reviewed the options of getting the coke drums from the Port of Lewiston to the Billings Montana refinery and have concluded that the proposed route along Highway 12 is necessary.” AR ITD002370. The evidence in the Administrative Record supports this finding.

122. In the Updated Memorandum, the Administrator states that, while not a permit requirement, he is informed that Emmert has retained emergency service personnel who will be driving an ambulance during each leg of the route. He states: “[s]hould the convoy encounter a private vehicle with an emergency medical issue; the paramedics in that ambulance will begin treating the individual en route to the hospital.” AR ITD002372.

123. In the Updated Memorandum, the Administrator addresses the issue of inclement weather. He states:

As to the issue of inclement weather, no provisions have been specifically articulated in the permit because the entire permit is subject to the IDAPA Rules on Overlegal permits. Specifically IDAPA 30.03.11, Rules Governing Overlegal Permittes Responsibility and Travel Restrictions, provides in subsection .07 that “The movement of overlegal vehicles and/or loads by overlegal permit shall be prohibited and otherwise valid permits shall automatically become invalid enroute when travel conditions become hazardous due to ice, snow or frost; when visibility is restricted to less than five hundred (500) feet by fog, dust, smoke or smog or other atmospheric conditions.”

AR ITD002373. *See also*, Tr. 122:4-14, 135:9-20.

124. In the Updated Memorandum, the Administrator states that the Indemnity Agreement, the insurance contract and the bond have been updated and will be available for compensating private individuals and entities for loss, injury or damages which may result from the transport, rather than only the State of Idaho. The Administrator finds that “[b]y 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.” AR ITD002374. The evidence in the Administrative Record supports this finding.

125. In the Updated Memorandum, the Administrator makes the same conclusion as he did in the August Memorandum, that “[b]ased upon all of the considerations and analyses outlined above, the updated overlegal permit requested by Emmert complies with the ITD requirements and may appropriately be issued.” *Id.* The evidence in the Administrative Record supports the findings upon which this conclusion is based.

126. To make the public aware of the shipments, and at the request of ITD, ConocoPhillips published informational notices about the shipments (including information as to when the loads will be on the road) in the Lewiston Tribune each time the permits have issued. Tr. 672:12-673:11; Hearing Exs. 71 and 72. ConocoPhillips has committed to publish similar notifications and provide other public information several days before and a day before loads are allowed to be moved on U.S. 12. Tr. 675:24-676:3.

127. The evidence in the Administrative Record establishes that the ITD complied with the requirement of IDAPA 30.03.09.100.01 that it place a primary concern on the safety and convenience of the general public in determining whether to issue the ConocoPhillips permits. In its Updated Memorandum, ITD expressly noted that in considering the overlegal permit, it gave “primary concern” to the “safety and convenience of the general public[.]” AR ITD02329-02333; *see also*, AR ITD 00003, 22-26, 42-44, 106-118, 158-256, 258, 264-265, 289-296, 296-299,, 300-305, 306-312, 317, 620, 621, 722, 658, 267-288, 742-743, 878, 907, 947-949, 974-975, 977, 1018-1021, 1040, 1042-1044, 1066-1119, 1067, 1152, 1159, 1166, 1185-1188, 1190-1196, 1202-1204, 1206, 1209, 1221-1228, 1238, 1252-1268, 1279, 1281, 1283-1284, 1289, 1294, 1300, 1315, 1424-1426, 1551, 1579, 1817, 1894-1896, 2128, 2234-2251, and 2246; Tr. 55:6-13; 122:4-14;

125:1-4; 127:1-9, 130:16-18, 134:1-15, 135:9-24; 595:4-19; 597:1-7; 599:23-601:3; 601:6-15; 610:12-17; 611:7-19; 638:13-15; 639:12-643:4.

128. Notwithstanding the testimony of Mr. Frew that ITD balances the needs of various parties to use the highways, Tr. 207:10-14, 207:24-208:3, I am persuaded by his actions as reflected in the Administrative Record and his statements in the August Memorandum and the Updated Memorandum, as well as his testimony and the testimony of Mr. Rodriguez, that ITD's primary concern in the issuance of overlegal permits is the safety and convenience of the general public as required by IDAPA 39.03.09.100.01. *See also*, AR ITD02332, 002373; Tr. 55:6-13, 125:1-4, 130:16-18, 135:21-24.

129. The evidence in the Administrative Record establishes that ITD made a reasonable determination of the necessity of the proposed shipments under IDAPA 30.03.09.100.02. This section requires the Department to predicate the issuance of an overlegal permit on a reasonable determination of the necessity of the proposed movement. This is a discretionary standard. As part of its reasonable determination of necessity, ITD required ConocoPhillips to certify and ConocoPhillips did certify that the loads had been reduced to their minimum practical dimensions. AR ITD002336, 2352; Tr. 57:5-11, 63:7-8, 138:24-139:18, 520:6-8; 673:23-27.

130. ITD reasonably determined, in the exercise of its discretion, that overlegal travel on U.S. 12 is necessary to transport the coke drums from Lewiston to Billings. In its review of intrastate routes, ITD tries to find the most direct route possible. Tr. 56:4-5. In making this determination, ITD must take into account the facts and circumstances of each case. Tr. 214:17-20. In this case, given the height of the coke drums, and based on its institutional knowledge of Idaho's highways, ITD reasonably concluded that U.S. 12 is the only route that will accommodate

the dimensions of the four loads from Lewiston to Billings. Tr. 56:7-19, 57:12-20, 79:16, 137:23-139:18, 215:22-216:5; AR ITD02330. ITD looked at other routes, but concluded they were not available due to vertical restrictions on the other routes. Tr. 57:12:20. Although not required by the rules, ITD also considered information received from Emmert about other routes outside of Idaho and reasonably relied on Emmert's information that other routes were not feasible. Tr. 584:21-585:10, 670:12-19.

131. The evidence in the Administrative Record establishes that ITD properly followed the IDAPA regulations regarding traffic interruption, as provided by IDAPA 39.03.11.05 and IDAPA 39.03.16.100.01.

132. Sections 39.03.11.05 and 39.03.16.100.01 do not include the term "delay," nor do they define "delay." Chapter 11 provides that the movement of an overlegal load shall be made in such a way that the roadway remains open "as often as is feasibly possible" and to allow for "frequent" passage of traffic. IDAPA 39.03.11.100.05. There is no specific time limitation associated with those terms. *See id.*, IDAPA 39.03.16.100.01; Tr. 175:23-176:5. ITD has been interpreting these regulations as providing guidance that overlegal travel may be allowed if there exists a traffic control plan as provided in IDAPA 39.03.11 or, alternatively, in "special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available. IDAPA 39.03.16.100.01; *see also* AR ITD02331, ITD002371; Tr. 144:8-145:15. Of these alternatives—(1) traffic control plan, (2) less than a 10 minute interruption of low volume traffic, or (3) adequate detours—the traffic control plan is ITD's preferred alternative. Tr. 111:17-112:3 (discussing how 10 minute limitation is inapplicable where traffic plan exists); 145:9-15 ("That is the preferred method because we—it

puts a whole lot more thought and planning into the process.”); *see also* AR ITD02331; ITD02371. Based on this analysis, ITD correctly concluded that that Emmert’s traffic control plan ensures that the proposed overlegal movements will be 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. AR ITD002371. ITD further correctly concluded that because the contemplated movement of the four coke drums sections over Highway 12 allows for the passage of vehicles as provided in IDAPA 39.03.11, the reference in IDAPA 39.03.16.100.01 to a ten minute limitation does not apply to this case. *Id.*

133. Notwithstanding ITD’s interpretation of the traffic interference regulations, ITD exercised its discretion to provide the minimum traffic interference to the general public by imposing a 10-minute limitation on traffic interference, except when longer delays are unavoidable in the 12 zones listed in the traffic control plan where Emmert will be allowed to exceed the 10 minute time frame. AR ITD002339.

134. The evidence in the Administrative Record establishes that the four loads can be transported safely and with a minimum of inconvenience to the general public.

135. There is no reliable evidence in the Administrative Record to support the speculative contentions of the Intervenors that the tourism industry along Highway 12 will be damaged by the transport of the four loads; that the scenic beauty of the highway will be damaged; that the businesses of the Intervenors will suffer lost revenues as a result of the transport of the four loads; that the peaceful enjoyment of the homes of the Intervenors will be disturbed in any meaningful way by the transport of the four loads; that highway users will be prevented from obtaining medical care in an emergency; or that there is any real danger that

logistical and environmental problems will result from the loss of a load onto the highway or into the adjoining river.

136. The relocation and/or burial of utility lines along the highway does not have an adverse impact on the safety of the transport or increase the inconvenience to the general public, but rather enhances the scenic beauty of the highway.

137. The evidence in the Administrative Record clearly establishes that ITD performed its duties and exercised its discretion in processing the application of Petitioners in a manner that was reasonable and fully in compliance with the law and rules that govern the application process and issuance of overlegal permits.

CONCLUSIONS OF LAW

The following are the Hearing Officer's conclusions of law:

1. ITD is an executive department of Idaho state government established by the Legislature and headed by the Idaho Transportation Board. Idaho Code § 40-501.

2. 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 § 40-301(3).

3. 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.

4. ITD has further defined the conditions and requirement for issuing an overlegal permit through the adoption of rules under the Idaho Administrative Procedures Act ("IDAPA").

5. IDAPA 30.03.09.100.01 requires that ITD place a primary concern on the safety and convenience of the general public and the preservation of the highway system in determining whether to issue the ConocoPhillips permits.

6. ITD complied with IDAPA 30.03.09.100.01 and placed a primary concern on the safety and convenience of the general public and the preservation of the highway system in determining to issue the overlegal permits to Petitioners.

7. The Intervenors have failed to satisfy their burden to prove that ITD failed to comply with IDAPA 30.03.09.100.01.

8. IDAPA 30.03.09.100.02 requires that ITD predicate the issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement.

9. ITD complied with IDAPA 30.03.09.100.02 when made a reasonable determination of the necessity and feasibility of the propose movement of the ConocoPhillips loads and determined to issue the overlegal permits to Applicants.

10. The Intervenors have failed to satisfy their burden to prove that ITD failed to comply with IDAPA 30.03.09.100.01.

~~11. IDAPA 39.03.11.100.05 requires that 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.~~

12. IDAPA 39.03.16.100.01 requires that the 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 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.

12. The Administrator correctly interpreted the requirement of IDAPA 39.03.11.100.05.

13. ITD properly applied the IDAPA regulations regarding traffic interruption, as provided by IDAPA 39.03.11.05 and 39.03.16.100.01.

14. The traffic control plan, which provides for the movement of the overlegal loads to be 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, complies with the requirements of IDAPA 39.03.11.05.

15. The Intervenors have failed to satisfy their burden to show that IDT failed to comply with the traffic restriction requirements of IDAPA 39.03.11.05 and 30.03.16.100.01.

16. The decision of ITD is not arbitrary and capricious where the conclusions and decision the agency are sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision based on substantial evidence in the record as is established by the evidence in the Administrative Record as a whole.

17. The ITD's findings, inferences, conclusions, or decisions are; (a) not in violation of constitutional or statutory provisions; (b) are not in excess of the statutory authority of the agency; (c) are not made upon unlawful procedure; (d) are supported by substantial evidence on the record as a whole; and (e) are not arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279.

18. The findings and conclusions of ITD are not clearly erroneous.

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19. ITD's interpretation of its own regulations is entitled to deference.

20. The Intervenors have failed to satisfy their burden to show that ITD erred in a manner specified in Idaho Code § 67-5279 and to establish that a substantial right of the party has been prejudiced.

VIII.

DECISION AND RECOMMENDATION

It is the decision and recommendation of the Hearing Officer that the appeal of the Intervenors should be denied. It is further the decision and recommendation of the Hearing Officer that ITD should issue the overlegal permits to allow Petitioners to transport four oversize loads of equipment from Lewiston, Idaho to the Montana border over U.S. Highway 12 as provided in the August Memorandum of Decision and the Updated Memorandum of Decision, and as specified in the Permits at AR ITD002336 – 002367.

IDAPA 04.11.01.720.02.a, b, and c.

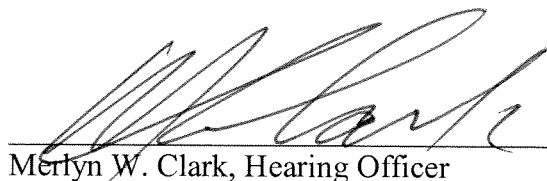
a. This is a recommended order of the Hearing Officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director with the Hearing Officer issuing the order within fourteen (14) days of the service date of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director. The Hearing Officer issuing this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director will

ADMINISTRATIVE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER TO THE DIRECTOR RE APPEAL OF INTERVENORS

dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

b. Within twenty-one (21) days after (a) the service date of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, (b) the service date of a denial of a petition for reconsideration from this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, any party may in writing support or take exceptions to any part of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director and file briefs in support of the party's position on any issue in the proceeding.

c. Written briefs in support of or taking exceptions to the Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.



Mertyn W. Clark, Hearing Officer

ADMINISTRATIVE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER TO THE DIRECTOR RE APPEAL OF INTERVENORS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 2010, a true and correct copy of the within and foregoing ADMINISTRATIVE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER TO THE DIRECTOR RE APPEAL OF INTERVENORS was transmitted via facsimile to:

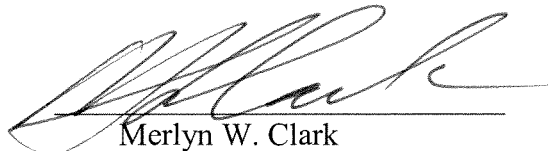
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