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BEFORE THE DIRECTOR
OF THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY *et al.*, Petitioners, v. IDAHO TRANSPORTATION DEPARTMENT, Respondent, EXXONMOBIL CANADA PROPERTIES, IMPERIAL OIL RESOURCE VENTURES LTD., and MAMMOET CANADA WESTERN LTD., Applicants.	**PETITIONERS' EXCEPTIONS TO THE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS FOR ORDER**

INTRODUCTION

Pursuant to IDAPA 04.11.01.720.02(b), Petitioners Laughy *et al.* respectfully submit these exceptions to the recommended order of the Hearing Officer, Duff McKee, in the above-entitled contested case hearing, as set forth in the Hearing Officer's "Findings of Fact, Conclusions of Law, and Recommendations For Order" dated June 27, 2011 (hereafter

"Recommended Decision"), and the Hearing Officer's subsequent "Order On Motion For Reconsideration" dated July 25, 2011.

Petitioners base their Exceptions to the Recommended Decision on the discussion set forth below, as well as on their Pre-Hearing Brief (dated April 22, 2011), their Post-Hearing Brief (dated May 23, 2011), and their Petition For Reconsideration by Hearing Officer (dated July 11, 2011), which are all incorporated by reference herein. Petitioners also base their Exceptions on all of the information contained in the record of this matter, including all hearing exhibits and testimony.

The Hearing Officer has recommended that the Director affirm a February 14th, 2011 Memorandum of Decision issued by the Department of Motor Vehicles authorizing Exxon Mobil and its subsidiary, Imperial Oil (collectively, "Exxon/Imperial") to transport "two hundred plus" overlegal loads of oil refinery equipment up U.S. Highway 12. The Director should reject the Hearing Officer's proposed findings, conclusions, and recommendations because the Hearing Officer applied an improper legal standard, erroneously assumed the Petitioners had stipulated to certain facts, and reached conclusions contradicted by the record.

Rather than evaluating whether ITD prioritized the safety and convenience of the general public and the preservation of the highway system as required by the governing regulations, the Hearing Officer applied a new legal standard of his own invention. Applying this novel standard, the Hearing Officer failed to consider the relevant factors set forth in the regulations, requiring the Petitioners to provide proof of empirical impacts rather than evaluating whether ITD had behaved arbitrarily and capriciously in approving the overlegal permits.

The Hearing Officer's conclusions must also be rejected because he assumed that the Petitioners stipulated to the feasibility of the overlegal transports when, in fact, no such

stipulation was ever entered. Relying on this non-existent stipulation, the Hearing Officer assumed the truth of contested allegations, ignored contrary evidence, and consequently, reached conclusions unsupported by the record.

Similarly, the Hearing Officer refused to consider evidence introduced by the Petitioners about the impacts of the overlegal permits on public safety and convenience, leading him to reach conclusions contradicted by the record. The Hearing Officer's conclusions about the preservation of the highway system, compliance with the 15-minute traffic delay rule, and the extent to which the transport of Exxon/Imperial's mega-loads will prejudice the Petitioners' substantial rights are likewise inconsistent with the evidence before the agency.

For the foregoing reasons, the adoption of the Hearing Officer's findings, conclusions, and recommendations would be arbitrary, capricious, an abuse of discretion, and contrary to law. The Director should accordingly reject the Hearing Officer's Recommended Decision and remand this matter to the Division of Motor Vehicles for reconsideration of the February 14, 2011 order under the correct legal standard and in light of all relevant evidence that has been brought to the agency's attention.

BACKGROUND

This section is intended to provide the Director with a general context for his consideration of the Hearing Officer's Recommended Decision. The facts underlying this matter are complex and are set forth in more detail in the Petitioners' Post-Hearing Brief, pp. 6-31, from which the following discussion is drawn.

In October 2008, representatives of Exxon/Imperial contacted the Idaho Transportation Department ("ITD") about a proposal to transport over two hundred loads of oil refinery equipment bound for the Kearl Oil Sands Project in Alberta, Canada through Idaho.

Exxon/Imperial hoped to ship the equipment modules up the Columbia River to the Port of Lewiston and then transport them to the Canadian border by truck, passing through Idaho and Montana on the way. Exxon/Imperial identified its proposed route for this movement as U.S. Highway 12, a rural, two-lane highway that parallels the Middle Fork Clearwater and Lochsa Wild and Scenic Rivers for much of its journey through Idaho.

Once mounted on trucks, the equipment modules proposed by Exxon/Imperial exceeded the legal limits for length, width, and height for vehicles traveling on Idaho's roads. In fact, Exxon/Imperial proposed transports so large that they would block both lanes of Highway 12 and necessitate the use of rolling roadblocks.

ITD engaged in extensive discussions with Exxon/Imperial over the next two years and devoted hundreds of hours of staff time to reviewing various load configurations to ensure that Exxon/Imperial's equipment could safely travel over Highway 12's bridges. ITD also reviewed and commented on a transportation plan developed by Exxon/Imperial's shipper, Mammoet. The Petitioners repeatedly sought to participate in ITD's decision-making process, including by filing a Petition for Contested Case Hearing Re: Overlegal Permits for Kearl Module Transport Project on October 19, 2010.

On February 14, 2011, ITD's Motor Vehicles Administrator, Alan Frew, issued a Memorandum of Decision authorizing Exxon/Imperial to transport "two hundred plus" overlegal loads up Highway 12. Specifically, the Memorandum of Decision authorizes Exxon/Imperial's equipment modules "to travel uninterrupted for a period not to exceed 15 minutes as identified in the approved transportation plan." Ex. 1 at 2.

The same day, ITD issued an overlegal permit for "a test load to demonstrate route viability" referred to as the Test Validation Module ("TVM"). Letter from Brian Ness, Director,

Idaho Transportation Department, to J. Tim Thomas, Office of the Attorney General, et al. (Feb. 14, 2011). The permit required the TVM to travel at night and mandated, "Opposing (oncoming) traffic shall not be delayed greater than 15 minutes." The transportation plan provides for the equipment modules in transit to be parked by the side of the road during the day.

The Director initiated the present contested case hearing through a letter also dated February 14, 2011. On March 8, the Director appointed Judge Duff McKee to conduct a hearing on the issues raised in the Petitioners' Petition for Contested Case Hearing.

A ten-day evidentiary hearing was held during April and early May 2011. At the hearing, the Petitioners argued that ITD's February 14 Memorandum of Decision violated three of ITD's regulations: IDAPA 39.03.09.100, 39.03.11 and 39.03.16. Although the Petitioners introduced the fact that Highway 12 had been designated as a federal scenic byway, they did not advance any claims on the basis of federal law.[1]

On June 27, 2011, the Hearing Officer issued a recommended order in which he recommended that the Director affirm the February 14th, 2011 Memorandum of Decision and "enter[] an order that not only resolves the issue of the TVM permit but also paves the way for administrative consideration, processing and issuance where appropriate, of overlegal permits for the remaining 200 loads of Imperial." Recommended Decision at 60.

On July 11, the Petitioners filed their Petition for Reconsideration By Hearing Officer. The Hearing Officer denied this petition by order dated July 25, 2011. Pursuant to IDAPA 04.11.01.720.02, the Petitioners then had twenty-one days within which to file exceptions to the Hearing Officers' Recommended Decision. IDAPA 04.11.01.720.02; Recommended Order at 64. These Exceptions to the Hearing Officer's Recommended Decision are thus timely.

[1] Contrary to the Hearing Officer's assertion, the Petitioners did not "conced[e] that there was no federal law that applied to ITD's consideration of the issuance of overlegal permits for Highway 12." Order on Reconsideration p. 2.

ARGUMENT

I. THE HEARING OFFICER APPLIED AN INCORRECT LEGAL STANDARD IN EVALUATING THE PETITIONERS' CHALLENGES.

The Hearing Officer's findings, conclusions, and recommendations must be rejected, first, because the Hearing Officer evaluated ITD's consideration of safety and convenience by comparing the mega-loads to normal commercial traffic, instead of using the arbitrary and capricious standard of the Idaho Administrative Procedure Act to determine whether ITD complied with the requirements of its overlegal permitting regulations. The invention and application of this comparison standard tainted the Hearing Officer's consideration of the Petitioners' claims and provides an independent basis for rejecting his recommended decision.

A. The Idaho Administrative Procedure Act Provides the "Method of Measurement" for Review of the Petitioners' Claims.

The Director appointed the Hearing Officer to "conduct a hearing, take evidence, and submit findings of fact, conclusions of law and recommended order" over the claims outlined in Petitioners' Petition for Contested Case Hearing of October 19, 2010. *See* Letter from Brian W. Ness, Director, Idaho Transportation Department, to Judge D. Duff McKee (March 8, 2011); IDAPA 4.11.01.410. Because the agency had already issued a permit which formed the subject of the contested case hearing, and the Hearing Officer was not directed to conduct a hearing for purposes of issuing a decision *de novo*, the Hearing Officer should have assessed ITD's decision to issue the February 14 Memorandum of Decision under the judicial review standards of the Idaho APA, I.C. §§ 67-5279(3). *See* Petitioners' Pre-Hearing Brief at 4. The Hearing Officer himself recognized as much in his recommendations. *See* Recommendation Decision at 53.

An agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem," *Marsh v. ONRC*, 490 U.S. 360, 378 (1989) or fails to "examine the relevant

data and articulate a satisfactory explanation" for its decision." *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency decision is also arbitrary and capricious if is not supported by substantial evidence. *See, e.g., Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927 (1988) ("substantial evidence" standard requires agency to consider all relevant evidence); *Morgan v. Dept. of Health and Welfare*, 120 Idaho 6, 813 P.2d 345 (1991) (evidence in record did not support agency's determination); *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) (lack of evidence to support agency finding requires reversal and remand); *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992) (agency finding which lacks "substantial and competent evidence to support it" is clearly erroneous); *Paul v. Board of Professional Discipline of the Idaho State Board of Medicine*, 134 Idaho 838, 11 P.3d 34 (2000) (no substantial evidence to support Board's conclusions).

Thus, the Hearing Officer was tasked with determining whether the evidence before him showed that ITD had complied with the regulatory requirements in reaching its decision to authorize the transport of "two hundred plus loads" of oil refinery equipment up Highway 12.

B. The Hearing Officer Applied a Novel Legal Standard to the Petitioners' Chapter 9 Challenges About Safety and Convenience.

The Petitioners challenged ITD's failure to prioritize the safety and convenience of the public and the preservation of the highway system as required by IDAPA 39.03.09.100 ("Chapter 9"). Chapter 9 requires ITD to place a "primary concern" on the safety and convenience of the general public in deciding whether to issue an overlegal permit, as follows:

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

IDAPA 39.03.09.100.01 (underscore added).

Rather than determining whether substantial evidence showed that ITD had prioritized the safety and convenience of the general public, Hearing Officer invented a new standard of review that evaluated safety and convenience by comparing the mega-loads to normal commercial traffic. As stated in the Recommended Order, the Hearing Officer,

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

Recommended Decision, pp. 7-9 (emphasis added).

This comparison standard is contrary to the plain language of the overlegal permit regulations. Section 100.01 of Chapter 9 requires ITD to prioritize public safety, public convenience, and preservation of the highway system above other concerns or issues, including the economic needs of a permit applicant or the convenience to the applicant of a desired transportation route. The requirement that ITD make the public's safety and convenience its primary concern forecloses exactly the kind of weighing that the Hearing Officer engaged in.

Comparing the mega-loads to regular commercial traffic is also contrary to the spirit of the overlegal permit regulations. These regulations allow ITD to approve overlegal loads that exceed normal statutory limits only if the requirements of Section 100.01 and other provisions of the permit regulations are satisfied. By contrast, standard commercial loads do not require any ITD permit, since they do not violate the normal statutory limits for weight, length, width, or height.

The Hearing Officer contends that it was appropriate to compare the mega-loads to ordinary commercial traffic because "neither the regulation nor the statute defines how to

measure and apply the[] concerns" about public safety and convenience. Order Denying Reconsideration at 4. However, the arbitrary and capricious standard of the Idaho APA provides the appropriate framework. Under this framework, ITD was required to consider all of the important aspects of public safety and convenience, examine relevant data, and make a decision consistent with the evidence.

The Hearing Officer has also suggested that Mr. Frew's February 14th Memorandum of Decision employed a comparison standard. However, Mr. Frew's opinion that public safety and convenience "[had] been adequately and appropriately considered and addressed" was premised on the nighttime travel restriction and other provisions of the transportation plan, rather than any comparison between the mega-loads and ordinary commercial traffic. Memorandum of Decision (Ex. 1) at 4-5. The testimony of Mr. Frew and other ITD witnesses confirmed that ITD did not engage in such a comparison.

The Hearing Officer's invention of a new legal standard and disregard for the considerations mandated by ITD's overlegal permit regulations and the Idaho APA constituted clear legal error. The endorsement of this error by the Director would likewise be arbitrary, capricious, and contrary to law, and require reversal by a court.

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

The Hearing Officer's conclusions must also be rejected because the Hearing Officer erroneously assumed that the Petitioners "stipulated" to the feasibility of the mega-loads traveling up Highway 12, when, in fact, they merely decided not to bring a separate legal challenge based on the feasibility requirement set forth in IDAPA 39.03.09.100.02.

Chapter 9, subsection 100.02, mandates, "In each case, the Department shall predicate its issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of

the proposed movement." IDAPA 39.03.09.100.02. The Petitioners challenged ITD's failure to make a "reasonable determination of necessity," but chose not to pursue a separate challenge to "the feasibility of the proposed movement," as they confirmed at the pre-hearing conference.

Based on this clarification, the Hearing Officer concluded that the Petitioners had stipulated that the transport of the mega-loads up Highway 12 is feasible. The Hearing Officer went on to reach numerous other factual conclusions on the basis of this erroneous assumption. For instance, the Hearing Officer opined that the Petitioners had stipulated to the fact "that the [TVM] could navigate the highway without difficulty" and that "this thing will fit on the highway, it will negotiate all the curves and turns, the tractor and pusher trucks are capable of getting it up and over Lolo Pass at the speeds indicated in the traffic plan, and that it will fit sufficiently into the designated turnouts along the way to allow other traffic to clear and thereby accommodate the requirements of the traffic plan."

The evidence presented at hearing by Petitioners demonstrated that they did not "stipulate" to the facts that the Hearing Officer assumed based on the purported stipulation. For instance, Petitioners introduced evidence – from prior mega-load shipments and from personal knowledge of highway conditions – contesting ITD's assertion that the designated turnouts are all adequate to accommodate the Exxon/Imperial mega-loads and would allow the traffic plan to be met. *See* Petition for Reconsideration, pp. 6-7.

The Petitioners also argued that the transport of Exxon/Imperial's TVM confirms that the plan approved in the February 14 Memorandum of Decision is unworkable. *See* Petitioners' Post-Hearing Brief pp. 31-32. The Petitioners explained that the TVM damaged vegetation near the road before it even left Lewiston and then collided with a guy wire, causing unanticipated power outages and highway obstruction. It was then parked at MP 61 for over two weeks while

Imperial raised utility lines and cut trees along the route. Once the TVM began moving again, it still did not follow the approved travel plan, but instead combined portions of stages one, two and three into the second night of travel, and then parked a few miles from Lolo Pass for several more days before finally completing its journey to Montana.

Although Petitioners brought this error to the Hearing Officer's attention in their Petition for Reconsideration, he continued to abide by his error, opining that a party stipulates to any issue that he or she does not challenge: "Clearly, if one stipulates that a legal position is not being challenged, the stipulation necessarily includes an agreement with, or at least a waiver of any challenge to, the foundational facts of that position." Order Denying Reconsideration p. 3.

This statement is wrong as a matter of law. A party does not stipulate to particular facts merely by choosing to pursue some claims and not others. An injured person who chooses not to bring a strict liability claim may still seek relief under a negligence theory, even though the fact that he suffered an injury is a "foundational fact" for both positions. Here, the fact that it is impossible to haul a mega-load up Highway 12 in a manner that conforms with Exxon/Imperial's Traffic Plan—*see* Petitioners' Post-Hearing Brief at 68-72—bears on the Petitioners' convenience, safety, and 10-minute rule claims, as well as the feasibility issue they chose not to pursue.

The Hearing Officer thus committed reversible error by assuming that a stipulation existed despite both evidence and argument to the contrary. The Director should accordingly reject all factual findings premised on the assumption of a feasibility stipulation.

III. ITD VIOLATED IDAPA 39.03.01.001 BY FAILING TO PLACE A PRIMARY CONCERN ON PUBLIC SAFETY AND CONVENIENCE.

The Hearing Officer's misapplication of the legal standard under Section 100.01 of the ITD regulations tainted his review of the Petitioners' claims regarding public safety and

convenience and caused him to ignore relevant evidence. The Hearing Office also substituted his own opinions for the evidence in the record and reached conclusions inconsistent with the evidence. The Director must accordingly reject the Hearing Officer's findings, conclusions, and recommendations about public safety and convenience.

A. The Hearing Officer's Application of an Erroneous Legal Standard Tainted His Review of the Evidence.

The Petitioners' claims under Section 100.01 of Chapter 9 raised the question, "Did ITD 'place a primary concern on public safety and convenience'?" Applying his comparison standard, the Hearing Officer framed the issue differently, asking instead whether the probability that the impacts identified by the Petitioners will occur "outweigh[s] the commercial utility of allowing the highway to be used as requested . . .?" *Id.*, p. 10.

With regard to public safety, the Hearing Officer faulted the Petitioners because they did not supply a statistical breakdown of the number of time-sensitive, life-threatening emergencies that occur during the late night hours in the vicinity of Highway 12. *Id.*, pp. 10-11. However, the Petitioners' burden in challenging ITD's February 14, 2011 Memorandum of Decision is to prove that ITD failed to prioritize public safety and convenience, as required by Section 100.01, not to definitively prove that a medical emergency will occur on any given night. If anyone was going to prepare a statistical breakdown of the type demanded by the Hearing Officer, it should have been ITD.

At the same time, the Hearing Officer's use of an improper legal standard caused him to overlook evidence relevant to the inquiry before him, which renders his recommendation arbitrary and capricious. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927 (1988). The Hearing Officer failed to consider the fact that ITD conducted no investigation into how the presence of multiple rolling roadblocks – caused by the "two hundred plus" shipments

each travelling the projected three nights from Lewiston to Lolo Pass up Highway 12 – would impact the public's ability to access emergency health care. As the Petitioners proved at hearing, ITD did not contact Clearwater County Hospital or the head of the emergency medical system in Clearwater County, *see* Caldwell Test., May 3, 2011 Tr., pp. 74-75; and no evidence was presented that ITD had contacted any other hospital or the emergency medical system in any of the other affected counties.

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

This again misstates the actual inquiry that the Hearing Officer should undertake – which is how the mega-loads in addition to all other traffic would affect public safety and convenience.

Likewise, application of the erroneous legal standard discussed above led the Hearing Officer to limit his consideration of public convenience to the length of delays experienced by oncoming traffic that encounters the mega-loads. In so doing, the Hearing Officer wrongly discounted the other types of inconvenience associated with the mega-loads which all affect the general public. *See* Recommended Decision, pp. 20-23.

For instance, in focusing on delays to oncoming traffic, the Hearing Officer overlooked other types of inconvenience, including tree trimming and power outages, affecting the general public as a result of the mega-load shipments. *See* Recommended Decision, pp. 20-23. The evidence at hearing proved that extensive tree trimming along Highway 12 was required solely to allow the TVM to continue after it clipped the guy wire (causing a power outage that Mr. Frew had advised in the Memorandum of Decision were not expected), and that tree trimming has not been the usual course of business but has marred the scenic qualifies of the Highway 12 route. Yet, the Recommended Decision cited other types of inconvenience that travelers may experience on Highway 12, such as from a stopped school bus, traffic accident, and others which the Hearing Officer characterized as "minor" – and then faulted Petitioners for raising what he termed "trivial" and "hyperbolic" complaints about these delays associated with the mega-loads. *Id.*, pp. 22-23.

The Recommended Decision likewise did not address the adverse impacts that poor communication and constant changes in the mega-loads' travel schedules have already caused to local residents and businesses, as Mrs. May and Mr. Laughy described in their testimony. These are significant impacts upon the general public, which the Recommended Decision erroneously dismissed as being "hyperbolic" or "not plausible," and likened them to other "minor" delays such as caused by a school bus stop or highway accident. *Id.*, pp. 22-23.

Again, the proper legal inquiry here is not whether normal traffic on Highway 12 may cause delays or traffic obstructions – which they certainly do – but whether the further delays and hardships that will be caused by the approved "two hundred plus" mega-loads were given "primary concern" by ITD in its permitting decision.

Because the Hearing Officer did not consider the evidence in light of the appropriate standard under Section 100.01, the Hearing Officer's conclusions must be rejected.

B. The Hearing Officer's Conclusions About Public Safety and Convenience Are Not Supported by the Record.

The Director should also reject the Hearing Officer's findings, conclusions and recommendations about public safety and convenience because the Hearing Officer reached conclusions that are not supported by the record.

Public Safety

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

The Hearing Officer rejected Dr. Caldwell's conclusion without any evidentiary basis. The Hearing Officer claims that Dr. Caldwell "appears to hold the opinion that any delay on the highway would not be acceptable," Recommended Decision at 12, but Dr. Caldwell did not advocate that all traffic should be prohibited or that no amount of delay can be tolerated. Rather, given the many other contingencies that will inevitably arise, it is inconsistent with public safety to voluntarily block Highway 12 with multiple mega-loads. *See* Caldwell Test., May 3, 2011 Tr., pp. 105-106 (explaining that bad outcomes are usually the result of multiple factors and, "So going back to the public safety days, you try to eliminate the ones that you can.")

With regard to traffic safety, Hearing Officer failed to address the issue raised by Petitioners – including through the testimony of Ruth May, Peter Grubb, and Linwood Laughy, and supported by Petitioners' expert Pat Dobie – that travel of mega-loads at night will displace other nighttime commercial traffic into daylight hours, thus causing further safety and convenience problems for the general public.

The Hearing Officer further erred by ignoring evidence in the record in favor of his own opinions. The Petitioners presented evidence that time-sensitive medical emergencies do occur along Highway 12. Although no party offered evidence about the statistical probability of a mega-load encountering such an emergency, the Hearing Officer concluded, "the probability of encountering a medical emergency that would be impacted at all by a mega-load on the highway is quite low." *See* Recommended Decision, pp. 12-13.

Likewise, Dr. Caldwell explained that the increased level of care available in the back of an ambulance is "really negligible." Caldwell Test., May 3, 2011 Tr. p. 98. Disregarding this evidence, the Hearing Officer opined that the presence of an ambulance with the mega-load convoy will decrease the risk of delayed access to medical care. *See* Recommended Decision, p. 11.

Similarly, the transportation plan incorporated into the February 14th Memorandum of Decision allows Imperial to transport up to three loads on Highway 12 on any given night (one per stage). Under these circumstances, there would inevitably be at least one load between Kooskia and Lewiston,[2] *see* Hrg. Ex 2, p. 7; and residents coming from farther east up Highway 12 would have a chance of encountering two or even three mega-loads on their way to

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

emergency health care in Orofino, Grangeville, or Lewiston. *See* Caldwell Test., May 3, 2011 Tr. pp. 66-68 (describing the location of emergency medical services in north central Idaho); Ex. 2 p. 7 (map illustrating transport route stages). Nevertheless, the Hearing Officer premised his conclusions about public safety on the assumption, "If the load is above or below either the location of the emergency or the hospital, it poses no problem." *Id.*, p. 11.

Public Convenience

The Hearing Officer's conclusion that the February 14 Memorandum of Decision is consistent with public convenience is contradicted by evidence in the record. The Hearing Officer acknowledged that ITD did not consider delays to following traffic when it must slow down, but not stop, due to the mega-load. *Id.*, p. 18. However, the Recommended Decision excused this omission because it concluded that following delays would never exceed delays of stopped traffic "as a matter of simple physics." *Id.*, p. 19.

This is plainly erroneous, in light of the evidence in the record. The Hearing Officer's conclusion here hinges on the assumption that the mega-load convoy will pull over at every turnout. This is the same assumption that Administrator Frew made in his Memorandum of Decision, when he stated that: "it is appropriate in this instance to permit the [mega-load] vehicles to travel uninterrupted for a period not to exceed 15 minutes as identified in the approved transportation plan," *see* Hrg. Exh. 1, p. 2 (emphasis added). Yet, as emphasized in the initial paragraph of Petitioners' Post-Hearing Brief, Mammoet's lead witness Darren Bland stated that the mega-load convoys would travel more than 15 minutes without stopping—as the TVM did on its third night of travel—and hence would not meet that requirement, *see* Bland Test., May 6, 2011 pp. 191-92 & 199. The Recommended Decision does not address this key

disconnect between what ITD believes it authorized in the travel plan, and how Mammoet intends to actually move the mega-loads on the highway.

Moreover, the hearing record confirms that delays experienced by traffic – either following or oncoming – which have to slow down before being stopped may be significant, and exceed the time that traffic is stopped to allow mega-loads to pass. Following traffic may be slowed for far longer than 15 minutes if there is no oncoming traffic requiring the mega-load to pull over; and then once it does, the following traffic will have to wait while oncoming traffic is cleared. By counting only stopped traffic in its delay calculations, ITD thus omitted consideration of actual delays that will be experienced by traveling public on Highway 12. Omitting consideration of these delays thus violates ITD's duty under Section 100.01 to place a primary concern on public convenience.

IV. ITD FURTHER VIOLATED IDAPA 39.03.01.001 BY FAILING TO PLACE A PRIMARY CONCERN ON THE PRESERVATION OF THE HIGHWAY SYSTEM.

The Hearing Officer's misapplication of the legal standard under Section 100.01 also tainted his recommended findings and conclusions about the preservation of the highway system. The Petitioners demonstrated at hearing that ITD paid virtually no attention to the potential impacts of the mega-loads on the highway pavement or to the unique role that Highway 12 plays in Idaho's highway system. Rather than evaluating whether ITD had fully considered how the Exxon/Imperial mega-loads would impact the highway system, the Hearing Officer again dismissed the Petitioners' evidence on grounds not supported by the record.

While ITD spent considerable time and public funds helping Exxon/Imperial develop configuration that could safely navigate Highway 12's bridges, ITD did not consider the current conditions of the highway pavement, which is rated poor in many stretches and has potholes,

rutting and other problems. ITD's materials team never reviewed the transportation plan, Hoff Test., April 27, 2011 p. 51, and ITD's materials engineer, Mr. Miles, only calculated how the proposed transports would impact the way surface after Petitioners brought this challenge and called Mr. Miles to testify at hearing. ITD did not analyze the costs that will be incurred by Idaho taxpayers to repair damage that the mega-loads may cause, and prepared no report or study about pavement impacts prior to approving the Imperial mega-loads. This evidence – really, the lack of evidence showing analysis and consideration by ITD of this factor – again confirms Petitioners' claim that ITD violated its Section 100.01 duty to place a primary concern on preservation of the highway system.

The hearing record likewise confirms that ITD failed to consider Highway 12's unique values and its role in the Idaho highway system. The Petitioners demonstrated at hearing that Highway 12 serves as both a conduit for interstate commerce and an indispensable part of north central Idaho's tourism economy. *See* Testimony of Ruth May, Peter Grubb, Linwood Laughy & Steve Seninger. The Petitioners also demonstrated that ITD failed to consider Highway 12's particular role in the highway system before deciding to issue the February 14th Memorandum of Decision. *See* Hoff Test., April 27, 2011 Tr., pp. 75-76, 131-132; Frew Test., April 28, 2011 Tr., p. 82.

Instead of evaluating whether ITD had lived up to its regulatory duties, the Hearing Officer rejected Petitioners' concerns about the preservation of the highway system on the grounds that the mega-loads are no different from ordinary commercial traffic. However, as the Hearing Officer's own Recommended Decision recognizes, no loads this large have ever used Highway 12 before. *See* Recommended Decision, p. 7 ("Until the Conoco loads arrived on the highway in late 2010, nothing like these loads had ever been seen on Idaho roads before, and

certainly not on the winding mountain roads above Lewiston"). By imposing special requirements for overlegal permits, ITD's regulations recognize that there are significant differences between ordinary commercial traffic and overlegal loads. Standard commercial vehicles do not block the entire highway, or require extensive traffic control and highway patrol escorts to allow their transit. The Hearing Officer's conclusion is also contradicted by the evidence presented at hearing that the mega-loads are, in fact, categorically different from ordinary commercial traffic. *See* Inghram Test., April 29, 2011 pp. 21-22 (comparing the experience of encountering a mega-load to what it is like to encounter regular commercial traffic).

Finally, Petitioners introduced evidence at the hearing demonstrating that the modifications to Highway 12 made in order to accommodate Exxon/Imperial's loads have already lead a number of other companies to contact ITD about using Highway 12 to transport similar loads, threatening to turn Highway 12 into an industrial high-and-wide[3] corridor. *See* Phipps Test., April 26, 2011 p. 457, 473. *See also* Ex. 187. This evidence illustrates that ITD failed to prioritize the preservation of the highway system in deciding to issue the Exxon/Imperial permits without regard to the permits' impacts on Highway 12's unique values. In dismissing the potential for such a high-and-wide corridor as mere speculation, the Hearing Officer has again reached a conclusion at odds with the evidence before him.

The Director should accordingly reject the Hearing Officer's conclusions about the preservation of the highway system.

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

V. ITD FAILED TO MAKE A REASONABLE DETERMINATION OF NECESSITY.

The Director should reject the Hearing Officer's conclusion that ITD's necessity determination was reasonable because the weight of the evidence demonstrates that Exxon/Imperial's proposed use of Highway 12 is not, in fact, necessary. Exxon/Imperial is in the process of reducing eighty or more of the equipment modules that it previously certified to ITD were "nonreducible." Exxon/Imperial has also been using alternate routes for its mega-loads.

As quoted above, Chapter 9 imposes a mandatory duty on ITD to make a site-specific "necessity" determination before deciding whether or not to issue an over-legal permit. The inclusion of the phrase "in each case" indicates that, in order for the necessity determination to be "reasonable," ITD must take the unique characteristics and circumstances of each load into consideration. In this case, those unique characteristics include the unprecedented size of the proposed transports, Highway 12's exceptional scenic and recreation values, and the public outcry over the proposed movement. *See* Phipps Test., April 26, 2011 p. 505 (acknowledging that Highway 12 runs through a wild and scenic river corridor); Frew Test., April 27, 2011 p. 273 (explaining that he has never, "seen a situation involving overlegal loads that's been as controversial as the mega-loads up Highway 12.")

ITD's determination that the transport of the Exxon/Imperial loads via Highway 12 is "necessary" was premised on the notion that the loads are "non-reducible," meaning they cannot be made smaller to make travel on another highway possible. *See* Frew Test., April 27, 2011 p. 223 (explaining that shipping the loads along Highway 12 is necessary because there is no other viable route from Lewiston to Montana, given the dimensions and weight of the loads); Rodriguez Test., April 25, 2011, pp. 142-143 (stating, "There was no other viable route, except

for U.S. 12, due to the fact that there were some structures on U.S. 95 that this load could not get under.")

In determining that the Exxon/Imperial loads are non-reducible, Mr. Frew relied entirely on the representations of Exxon/Imperial and Mammoet. Frew Test., April 27, 2011 p. 230. *See also id.*, pp. 250-251 (Mr. Frew expressing his belief that cutting the modules in half compromises them based entirely on Exxon/Imperial's certification that the loads were not reducible.) In upholding Mr. Frew's determination, the Hearing Officer likewise cited the "inordinate cost" of reducing the equipment modules to a more manageable size. Recommended Order at 36.

The Hearing Officer's reliance on Exxon/Imperial's claim that the equipment modules are "nonreducible" was arbitrary and capricious because the Hearing Officer ignored compelling evidence to the contrary. As described in the Petitioners' Post-Hearing Brief, the Exxon/Imperial modules are not complete machines intended to operate by themselves, but are instead separate pieces of a larger process that will be put together once the pieces arrive in Canada. Petitioners' Post-Hearing Brief at 58.

Furthermore, Exxon/Imperial's Mr. Johnson admitted that the cost of reducing the modules for transportation along other routes besides Highway 12 would not be "material" to the multi-billion-dollar Kearl Oil Sands Project. See Johnson Test., May 6, 2011, pp. 68-69. This admission belies the Hearing Officer's finding that it would not be "practical" for Exxon/Imperial to further reduce the equipment modules due to the time and cost required.

The reducibility of the mega-loads is best demonstrated by the fact that Exxon/Imperial is, in fact, reducing them. As Mr. Johnson admitted at the hearing, thirty of the equipment modules parked at the Port of Lewiston are being reduced in height so that they can travel

through Idaho on U.S. Highway 95. Johnson Test., May 6, 2011, p. 25. Last week, Exxon/Imperial announced that it had decided to reduce the size of an additional fifty loads so that they could be shipped to the Port of Pasco and then shipped through Washington on the interstate. See Attachments A-C.

These developments confirm that multiple alternative routes are available, both in and outside of Idaho. Four of the reduced modules have traveled from Lewiston to the Kearl Oil Sands using U.S. 95, and Exxon/Imperial has transported more than forty of the modules directly from the Port of Vancouver via the interstate. See Attachments A-C. Exxon/Imperial's recent announcement shows that transport from Pasco is also possible.

The evidence before the agency thus demonstrates that the transport of Exxon/Imperial's mega-loads on Highway 12 is unnecessary and the Director should reject the Hearing Officer's recommendations on this issue.

VI. THE EXXON/IMPERIAL PERMITS VIOLATE THE TIME DELAY RESTRICTIONS OF CHAPTERS 11 AND 16.

The time limits set forth in ITD's overlegal permit regulations provide an additional reason why the Director should reject the Hearing Officer's recommendations and remand the February 14 Decision.

A. The Ten-Minute Delay Rule Applies Here as a Matter Of Law.

The February 14 Memorandum of Decision is unlawful because it expressly allows the Exxon/Imperial mega-loads to delay traffic up to 15-minutes, in violation of the plain language of the over-legal permit regulations that were in place at the time of the order's issuance.[4]

[4] ITD has recently acted to revise the relevant regulations by deleting the 10-minute limitation of Section 16. However, the February 14th Memorandum of Decision, as well as the contested case hearing and the Recommended Decision, were based on the regulations in effect as of February 2011. Those are the regulations addressed in these Exceptions, and those regulations continue to

Title 39.03 of the Idaho Administrative Code contains ITD's regulations "Dealing with Highway Matters." IDAPA 39.03.01 et seq. Chapter 11 of this Title generally "states the responsibility of the permittee and the travel restrictions for overlegal loads." IDAPA 39.03.11.001.02 ("Chapter 11"). Chapter 16 of Title 39 then provides specific guidance for "non-reducible" loads – which include the Exxon/Imperial shipments here. IDAPA 39.03.16. As regulations governing the same matters, Chapters 11 and 16 must be read together. *See Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903, 907-908 (2001) (relevant rules must be construed together, and given their plain, obvious and rational meaning).

Chapter 11 provides:

> a. The movement of over legal loads shall be made in such a way that the traveled way will remain open as often as feasibly possible and to provide for the frequent passing of vehicles traveling in the same direction. In 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 exceed one hundred fifty (150) feet.

IDAPA 39.03.11.100.05 (emphasis added).

Thus, as a general rule, over-legal permits must allow for "frequent passing" of following traffic; and to ensure compliance with this requirement, Chapter 11 requires the permittee to submit a traffic control plan for any over-legal load wider than 20 feet or longer than 150 feet proposed for transport on a two-lane highway. *Id.*

Chapter 11 does not itself define "frequent passing," but the meaning of this phrase becomes clear when read in the context of Chapter 16. Chapter 16 (in the version in effect as of February 2011) specifically addresses permits for "non-reducible" overlegal loads, and provided:

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apply to the "200+" Imperial mega-loads approved under the February 14th Memorandum of Decision and Recommended Decision.

> 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 ten (10) minutes) or when adequate detours are available.

IDAPA 39.03.16.100.01 (emphasis added).

Thus, when Mr. Frew issued his Memorandum of Decision, Chapters 11 and 16 both addressed the issue of traffic passage around over-legal vehicles; and Chapter 16 specifically provided that "passage of traffic" should meet the "frequent passing" standard required by traffic control plans under Chapter 11. And if more frequent passing could not be accomplished, Chapter 16 established the outside limitation that traffic delays by non-reducible loads cannot exceed 10-minutes.

Chapter 16 thus provided a regulatory definition of the term "frequent passing" of vehicles as used under Chapter 11. As Judge Bradbury held in the only judicial opinion yet to interpret these regulations, "when the 'frequent passing' restriction is read in the context of 16.100.01, as it must be, the term 'frequent' must mean something less than every ten minutes." See Opinion, Laughy v. ITD, No. 10-40411 (Aug. 24, 2010) (copy attached to Petitioners' Prehearing Brief). Judge Bradbury's interpretation is consistent with the Supreme Court decision in *Masson v. Donnelly Club*, which similarly held that related agency regulations must be construed together; and reversed an agency reading of time limits that was unreasonable under the regulatory scheme. *See Mason v. Donnelly Club*, 21 P.3d at 905, 907-09.

ITD witnesses stated at the hearing, however, that ITD read the former Chapter 16 very differently – asserting that it only applied when there were emergency or exigent circumstances in which a non-reducible load could not obtain a traffic control plan under Chapter 11. This legal reading is erroneous for two related reasons.

First, nothing in the language of former Chapter 16 stated that its provisions only applied to emergency or exigent circumstances. On the contrary, both its title and the provisions it contained demonstrate that former Chapter 16 was the portion of the ITD over-legal regulations that specifically addressed non-reducible loads. ITD is thus reading a severe limitation into the regulations that was not supported by their plain language at the time of Mr. Frew's Memorandum of Decision.

Second, ITD's legal reading ignores the fact that Chapter 10 of the over-legal permit regulations itself addresses emergency over-legal movements. See IDAPA 39.03.10.300. Again, all the over-legal permit regulations should be construed together since they address the same general topic; yet ITD ignores this separate emergency authorization in claiming that former Chapter 16 only applies to such emergencies, when it states no such thing.

ITD's interpretation is also unreasonable, because Chapter 11 specifies that a traffic control plan is "required" for all loads that exceed 20 feet in width or 150 feet in length. Chapter 16 authorized ITD to waive the "frequent passing" requirement, but not the traffic control plan requirement. In addition, the section of Chapter 16 that contained the 10-minute rule was entitled "General Oversize Limitations," which indicates that the 10-minute rule applied to all non-reducible loads, and not merely a subset later chosen by ITD.

ITD's interpretation thus would effectively rewrite the regulations to add language regarding emergency movements in Chapter 16 that did not exist, while eliminating the language imposing 10 minutes as the maximum delay allowable for non-reducible loads. Under ITD's reading, 15 minute traffic delays caused by non-reducible loads would be acceptable as the normal standard, thus eliminating any need to impose the 10 minute delay maximum specified under Chapter 16, subsection 100.01 for "special circumstances." Accepting a reading of the

regulations that effectively rewrites them would be arbitrary and capricious. *See Farber*, 208 P.3d at 292-93 ("the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant").

Because the 10-minute delay rule of the former Chapter 16 applied at the time Mr. Frew authorized Exxon/Imperial's shipments, the February 14, 2011 Memorandum of Decision must be held invalid, because the permit expressly authorizes 15-minute delays in violation of the regulations.

B. The Exxon/Imperial Loads Will Delay Traffic Longer than Fifteen Minutes.

Even if ITD had correctly applied a 15-minute delay requirement here, the Director should nevertheless withdraw the February 14 Decision because the weight of the hearing evidence demonstrated that the Exxon/Imperial mega-loads will not be able to comply with that 15-minute delay rule.

Numerous considerations support this conclusion as the only reasonable inference that can be drawn from the evidence. For one thing, ITD applied an incorrect definition of "delay" in approving the transportation plan approved by the February 14 Memorandum of Decision. Instead of considering the true delay experienced by motorists – which includes the time during which motorists must slow down for the mega-loads and the time spent following them at a slower than normal pace– ITD adopted a delay definition that artificially limits the calculation of "delay" to the time a vehicle is stopped at a flagger station. This is arbitrary and capricious, particularly considering that ITD itself considers the full delay experienced by motorists at highway construction sites, as Mr. Dobie testified.

The Hearing Officer's conclusion that the proposed shipments will be able to meet the 15-minute rule is also contradicted by the fact that the transportation plan's delay calculations are

flawed in numerous respects. First, the plan's delay calculations assume unrealistically low levels of traffic because Exxon/Imperial relied on a traffic counter located in Lowell, Idaho to project traffic volumes on the stretch of highway between Kooskia and Lowell, based on the assumption that all traffic coming down Highway 12 turns to the west toward Kooskia. This assumption is unrealistic; multiple witnesses confirmed that a significant amount of traffic travels between Kooskia and Lowell and would thus not be counted by ITD's counters, including traffic coming up from Boise, tourists staying at the Reflections Inn or Riverdance Lodge, and a lot of local traffic. *See* Grubb Test., April 25, 2011 pp. 96-97; Garcia Test., April 28, 2011 pp. 232-233, Inghram Test., April 29, 2011 p. 13; Laughy Test., May 2, 2011, pp. 27-28.

The transportation plan also assumes that turnouts will be available when the mega-loads need them. As multiple witnesses explained, this is not the case during high season. *See* Grubb Test., April 25, 2011 p. 88 (describing common uses of the turnouts and explaining that every turnout between Lewiston and Orofino can be filled during Steelhead season "people in camper trucks that are coming and camping and spending money in the counties."); Laughy Test., May 2, 2011 p. 51.

The delay calculations are further flawed because Imperial/Mammoet used the 2008 data from the Lowell counter, which ITD data show is the lowest volume of traffic reported at that counter in the last decade or more. The record also demonstrated that Imperial used only partial traffic count data, such as using 2008 data for the Kooskia-Lowell stretch of the highway, when ITD has prior years' data showing higher traffic counts.

Furthermore, the transportation plan's delay calculations do not account for the additional delay created by the entourage of twenty or more vehicles that accompany every load. It takes the convoy far longer to pass a given point than the mega-load itself. May Test., April 25, 2011,

pp. 47-48. When the load pulls over on the right side of the road, the entourage vehicles will be stretched out for half a mile between the flaggers. Couch Test., April 28, 2011 pp. 140-141, 143. Following traffic follows behind not only the load, but the entire convoy and must then pass the 0.5-mile long convoy before being "cleared." *See* Hoff Test., April 27, 2011 p. 103. This is not reflected in either the transportation plan's schematics or its table.

Beyond the flaws in its methodology, the transportation plan contains a number of outright errors. For example, Mr. Hoff conceded that the formula Exxon/Mammoet used to calculate the delay times that will be experienced by the traveling public is "incorrect." Hoff Test., April 27, 2011 p. 106. *See also* Ex. 2, App. 2.3. Likewise, Exxon/Imperial's witness Mr. Johnson admitted that the traffic-clearing diagram in the approved transportation plan (Exh. 2, p. 123) is in error; and the transportation company's witness, Mr. Bland testified that the flagging system the company will use differs from the flagging system described in the transportation plan.

ITD's conclusion that the transportation plan can meet the 15-minute delay rule is also arbitrary and capricious because ITD relied entirely on the representations of Exxon/Imperial and Mammoet rather than conducting its own assessment. Mr. Rodriguez reviewed the transportation plan only "briefly to see if they have all of the necessary components [but] didn't go in depth into it . . . because our district personnel had already looked at it and approved it." Rodriguez Test., April 25, 2011 p. 117. The District 2 personnel responsible for conducting a thorough review of the transportation plan, however, did not really understand it.

Although both Mr. Frew and Mr. Couch identified Mr. Hoff as the person with primary responsibility for reviewing the transportation plan, and Hoff agreed that this was his responsibility, he had no idea even of the plan's length. See Hoff Test., April 27, 2011 p. 8. Mr.

Hoff testified that he relied on Exxon/Imperial to calculate the average hourly traffic numbers used in the transportation plan, and was unable to explain where the numbers came from. Hoff Test., April 27, 2011 pp. 90-93. Mr. Hoff also admitted that, before approving the transportation plan, he did not understand whether the projected hourly level of traffic contained in the table on page 121 of the transportation plan was based on an annual average or whether it reflected conditions at a certain time of the year. Hoff Test., April 27, 2011 pp. 90-93. Mr. Hoff was unable to explain the 15-minute delay calculation table even though Mommoet had "explained it to him a couple of times." Id. pp. 96-97. *See also* p. 101 (Mr. Hoff unable to explain how "maximum delay to following traffic" was calculated in the table).

Similarly, ITD's traffic engineer, Mr. Couch, was unable to explain whether the "Total Module Travel Time" figures used in projecting traffic delays represents the time it takes the module to move or the time it takes to move the entire convoy. Couch Test., April 28, 2011 p. 141. Mr. Couch did not review the formulas Exxon/Imperial and/or Mammoet used to construct the chart. Couch Test., April 28, 2011 p. 134.

For all of these reasons, the record does not support the Hearing Officer's conclusion that the February 14 Memorandum of Decision complies with the time limits set forth in ITD's regulations. The Hearing Officer's conclusions and recommendations should accordingly be rejected.

VII. PREJUDICE TO THE PETITIONERS' SUBSTANTIAL RIGHTS.

Finally, the Director should reject the Hearing Officer's opinion that there will be no adverse impacts to north central Idaho's tourism industry as a result of the mega-loads because this conclusion is inconsistent with the evidence presented at hearing. The Petitioners presented evidence that traffic disruptions affect tourism, as well as the opinion of an expert economist that

the authorization of two hundred plus mega-loads on Highway 12 will negatively impact the tourism industry. None of this testimony was refuted by ITD or the Applicants. The Hearing Officer's finding is thus arbitrary and capricious.

The Petitioners presented evidence that traffic disruptions on Highway 12 negatively impact tourism operations. *See* May Test., April 25, 2011, pp. 28-29; Grubb Test., April 25, 2011, pp. 98-99. The Petitioners also demonstrated that north central Idaho's scenic views and natural resources are the main attractive forces driving the tourism industry. Seninger Test., April 26, 2011 pp. 524-525. Relying upon this empirical evidence, the only qualified economist who has proffered an opinion concluded that Exxon/Imperial's mega-loads will damage the tourism industry. Seninger Test., April 26, 2011 pp. 557-558.

Neither ITD nor Exxon/Imperial presented any evidence to the contrary. In fact, ITD refused to conduct an economics study, Frew Test., April 28, 2011 p. 83, and Exxon/Imperial's representations to the agency were confined to questionable[5] assertions about the project's potential benefits. Exxon-Imperial made no attempt to address the project's potential economic costs. Seninger Test., April 26, 2011 p. 556.

The Hearing Officer nevertheless rejected the notion that the mega-loads could cause any economic harm. Although neither ITD nor the Applicants so much as argued—much less proved—that the mega-loads themselves could serve as a tourist attraction, the Hearing Officer speculated that this might occur. Recommended Decision, pp. 49-50. This finding is directly contradicted by the evidence in the record, which shows that it is precisely Highway 12's non-industrial components that draw tourists to the area. The Hearing Officer's conclusion that the

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

mega-loads will not have economic impacts thus lacks any grounding in the evidence before the agency and the Director should not adopt it.

CONCLUSION

For the foregoing reasons, the Director should reject and decline to follow the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations for Order; and should reverse and remand the Division of Motor Vehicles' February 14th Memorandum of Decision for reconsideration under the appropriate legal standard and in light of all the relevant evidence.

Dated this 15th day of August, 2011.

Respectfully submitted,

Natalie J. Havlina
Laurence ("Laird") J. Lucas

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2011, I caused to be served the foregoing Petitioners' Exceptions to the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations for Order upon the following persons by the method of service noted below:

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NEWS » OCHENSKI August 11, 2011

Busting Big Oil

Thanks to the little people, the megaloads are halted

by George Ochenski

These days it seems like Big Oil gets to do what it wants, when it wants, and wherever it wants, no matter which political party is dominant or who's in office. It's rare as hen's teeth to see Exxon, BP, Shell or Chevron take one in the chops. But that's just what happened this week thanks to the determined efforts of "the little people" in Idaho and Montana who decided to derail Goliath's plans to ship megaloads of Korean-made equipment through the beautiful and fragile river valleys of our states and on to Alberta's tar sands. The battle isn't totally over, but the moral is clear: You can't win if you don't fight back.

Here's a quick recap: Exxon Mobil decided it would be cheaper to have the enormous tar sands equipment for its Canadian subsidiary, Imperial Oil, made by low-cost labor in Korea than to fabricate it in the U.S. or Canada. Then it had to be shipped across the Pacific and up the Columbia River to the Port of Lewiston in western Idaho. From there, the plan was to truck the monstrous loads—which measured up to 300 feet long and three stories high and wide, and weighed up to 600,000 pounds—up the Clearwater River to its confluence with the Lochsa and then up and over the narrow and winding Lolo Pass into Montana. The proposed route then descended the pass, followed the Bitterroot River into and through Missoula and then paralleled the Blackfoot River corridor to the Rocky Mountain Front, where it would head north to Alberta.

The travesty of the plan is that it was years in the making with the full knowledge of both Idaho's Republican Governor Butch Otter and Montana's Democratic Governor Brian Schweitzer. For the most part, they and their departments of transportation had been nodding their heads like good little servants of Big Oil's needs and assuring Exxon and its fellow Big Oil cohorts that there would be no problems with the chosen route for more than 200 megaloads.

It wasn't until both states finally had to enter the environmental analysis stage of the game that the public finally got to find out what our politicians were planning for our lives. And when we did, the proverbial feces hit the fan. Montana tried to stuff through a wholly inadequate analysis instead of doing a full-on Environmental Impact Statement. Idaho did the same. It was, from all appearances, a "done deal," made and sealed in a backroom by two governors from two different parties who were both willing to sacrifice the wellbeing of their roads, bridges, rivers and citizenry to the whims of Big Oil.

But then a strange thing happened. A couple of folks in Idaho decided to fight back. As residents of the Lochsa River area, they knew well the narrow confines of the roadway, it's inability to handle monstrous loads, and what it would mean to have the only access to hospitals or emergency services blocked by giant trucks with no chance whatsoever to get around the oversize loads. And that says nothing about the degradation of the federally-designated Wild and Scenic Rivers up which the loads would travel.

The names of those Idaho folks, just so everyone remembers, are Borg Hendrickson and Linwood Laughy. With their friends and neighbors, they started a group called Fighting Goliath, took their case to the public, challenged the permits, and rallied a like-minded contingent on the Montana side of the border to fight to protect those precious river corridors.

Here in Montana, the resistance came from the Missoula County Commission, the Montana Environmen-tal Information Center, Northern Rockies Rising Tide, and many others who formed All Against the Haul and took Montana's Department of Transportation to court for its inadequate environmental analysis. In the meantime, Montanan Paul Edwards, the former writer of Gunsmoke, produced a video exposing the tar sands for what they are, one of the greatest environmental travesties on the face of the Earth.

The Lilliputian resistance cast so many tiny ropes over Exxon's plans that the plans began to fail. With production schedules at stake, every delay, appeal, and court hearing cost Exxon considerably more than their planned route was worth. Eventually, they decided to

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cut the giant modules in half and begin shipping them on the interstate in an attempt to get them to the tar sands. When a state district judge in Anaconda issued a temporary restraining order to stop the loads because the Montana Department of Transportation had done such a flimsy job on the environmental analysis, it was the final straw.

On Tuesday, Exxon announced it would be re-routing its equipment to Washington's port of Pasco instead of Lewiston. Now it's seeking permission from the state of Washington to ship the reduced-size loads on the interstate.

"Needless to say, Imperial's plan looks to have gone 'belly up' as the final leg has been dogged with problems," wrote Ian McInnes, of the Canadian publication Industrial Fuels and Power. "Imperial thought it would easily get permits to shift the giant loads up highway 12, a backdrop of outstanding natural beauty... But this has not proved to be the case and Imperial has faced a fierce battle at almost every turn."

"Belly up" has a nice ring to it coming from an industry journal, but it also has an important message: You can't win if you don't stand up and fight. And sometimes that means fighting your own politicians, your own government agencies and those who would willingly prostitute the beauty and environment of our state for more Big Oil money.

The "little people" needed some good news this week and we got some. So here's a big thank-you to all those who fought back and, for once, busted Big Oil's chops.

Helena's George Ochenski rattles the cage of the political establishment as a political analyst for the Independent. Contact Ochenski at opinion@missoulanews.com.

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August 15, 2011

Oilsands modules may finally arrive in Alberta

RICHARD GILBERT
staff writer

Imperial Oil plans to use a new route for the transportation of massive modules to the $10.9 billion Kearl oilsands construction project north of Fort McMurray, Alberta, due to local opposition in Montana and Idaho.

"Smaller loads will have reduced dimensions and weight," said Kearl senior project manager Chris Allard.

"These shipments can be moved safely and we are working with state authorities to confirm that our transportation plans meet or exceed environmental and safety requirements."

Imperial Oil, which is a subsidiary of Exxon Mobil Corp., has been trying to move an initial shipment of giant pre-assembled modules from the Port of Lewiston, Idaho along U.S. Highway 12 to Montana. However, the initial plan met with considerable opposition, which could delay construction in Alberta.

In response to opposition from the local community, Imperial Oil is reducing the size and weight of the shipments and will seek permits for a new route.

"The announcement was a real game changer," said Linwood Laughy who established a website called Fighting Goliath, with his wife Borg Hendrickson, to fight the movement of mega-loads through Idaho.

"We knew they would have to do something, but they have changed the route from Lewiston to Pasco, Washington. This is a major change in plans."

As part of the first phase of construction at the Kearl oilsands project, Imperial arranged for the first 33 modules to arrive in the Port of Vancouver, Washington late last year.

The modules, which are made up of machinery, specialized pressure vessels and heat exchangers, were transported by barge on the Columbia and Snake Rivers to Lewiston, Idaho, before barge traffic closed for winter on Dec. 10.

Delays in the permitting process, from legal challenges in Idaho and Montana, forced Imperial to employ more than 200 people to break the modules into 60 smaller shipments. Disassembling and reassembling the modules involves 5,000 to 6,000 person-hours of work and is estimated to cost at least $500,000 each.

This new approach has allowed Imperial to transport the modules on US 95 in Idaho, then east along I-90 through Idaho and Montana, and north on I-15 to the Canadian border.

More importantly, Imperial is planning to ship additional loads from the Port of Pasco, Washington, by truck on US 395 in Washington and along I-90 through Washington, Idaho and Montana, then north on I-15 to the Canadian border.

"It is clear to many of us who have been involved in the process, that Exxon only recently started to consider a Plan B," said Zack Porter, campaign co-ordinator with All Against The Haul, which is based in Missoula, Montana.

"Exxon failed to do its research with the route, as it was originally proposed. They would never admit defeat, but this is what they did."

Pius Rolheiser, another Imperial spokesman, said the company has not changed plans.

"This is basically about looking at all the options available to us," he said.

"We continue to work through the process in Idaho and Montana to secure permits for US (Highway) 12. There could be a time when we are moving modules on all three routes."

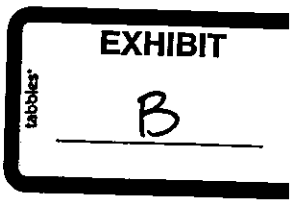
Rolheiser said Imperial continues to view the original route as a viable option and is working on obtaining permits for it.

Imperial has also hauled more than 40 smaller-size modules by truck on the interstate highways from the Port of Vancouver, WA., to Alberta.

"We remain on track for start up of the Kearl development as planned in late 2012," said Rolheiser.

"This delay in getting equipment to site is making things challenging, but we still plan to start on time."

Laughy said he believes these problems will cause delays as the company struggles to bring parts to site.



"Exxon has two real challenges in terms of time. One is that they no longer have their preferred available route – Highway 12 – available in Idaho and Montana," he said

"This route will not be available for six months if they were to prevail in court, which is not likely. If they lose it will take at least a year to undertake an Environmental Impact Statement, which is what has prompted them to change plans."

The second issue is that Imperial is changing its plan by shifting the transportation of the modules to the Port of Pasco.

However, major construction work is scheduled for the I-90 until Oct. 15.

Imperial awarded a US$250-million contract to a South Korean manufacturer Sungjin Geotec Co to supply 207 giant pre-assembled modules to the Kearl oilsands project.

Fighting Goliath was established by people who live on the highway and local small businesses involved in nature tourism.

All Against the Haul is a grass-roots organization that aims to stop the construction of a permanent industrial corridor for oversized loads through Oregon, Washington, Idaho, and Montana to Alberta oilsands projects.

Megaloads in position to take alternate route

Oil company is storing modules at Port of Pasco

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By ELAINE WILLIAMS of the Lewiston Tribune

The number of Imperial Oil megaloads that will go through Lewiston appears to have gotten smaller.

The oil company has stockpiled 49 of its Korean-made modules at the Port of Pasco, according to Jim Toomey, executive director of the Port of Pasco.

Imperial Oil announced Monday it hopes to use an all-four-lane route to get the pieces of a processing plant to the Kearl Oil Sands in Alberta, Canada.

They would take U.S. Highway 395 and Interstate 90 in Washington, continue on I-90 through Idaho and into Montana before reaching the Canadian border on Interstate 15 in Montana, according to an Imperial Oil news release.

"There wouldn't be any road closures. We wouldn't be blocking traffic in both directions for any of the route," said Pius Rolheiser, a spokesman for Imperial Oil, who emphasized his employer still wants to use U.S. Highway 12 in Idaho and Montana.

The Port of Lewiston doesn't have any new deliveries scheduled from Imperial Oil at this time, said port Manager David Doeringsfeld.

Originally, Imperial Oil was going to use the Port of Lewiston and U.S. 12 for 207 extra-large loads. The highway route was appealing because it avoided interstate overpasses that were too low for the cargo.

But it encountered unanticipated delays in getting permission after opponents raised questions about motorist safety and environmental impact.

In February, Imperial Oil announced that 60 shorter shipments would travel on Interstate 5 near the Port of Vancouver and that 33 others already at the Port of Lewiston would be shortened so they could take U.S. 95 and Interstate 90 through Idaho at a cost of about $500,000 per module.

The modules for the processing plant arriving in Pasco still need work before they're ready for their road trip, said Rolheiser, who declined to disclose how many modules will go through the Tri-Cities. "We have made modifications with our manufacturer in Korea ... such that they can be more readily disassembled."

Rolheiser didn't know the timing of his company's shipments in Washington, since it would depend on permitting.

Imperial Oil is still pursuing permits for U.S. 12 and could use that route in combination with the others, Rolheiser said.

The Idaho Transportation Department has yet to reach a decision on Imperial Oil's proposal. The Missoula County commissioners and three environmental groups are in court in Montana trying to block the megaloads on U.S. 12.

In Idaho, two ITD proceedings found no merit to the concerns of the opposition, Doeringsfeld said. "It's unfortunate a few extremists will negatively impact jobs in north central Idaho."

Reducing the size of the megaloads in Lewiston was done by crew of about 300, mostly out-of-town workers who spent money at businesses as diverse as hotels and machine repair shops.

The opponents have no plans to stop their efforts to block megaloads, said Borg Hendrickson in an email Monday. "(Imperial Oil) needs to admit the truth - Highway 12 is the wrong route for their megaloads and they need to find a better path if they want the Kearl project to be built in the foreseeable future."