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**IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO**

LINWOOD LAUGHY, BORG)
HENDRICKSON, and PETER GRUBB,)
)
Plaintiffs,)
v.)
)
IDAHO TRANSPORTATION)
DEPARTMENT,)
)
Defendant.)

No. _____

**MOTION FOR TEMPORARY
RESTRAINING ORDER
AND/OR PRELIMINARY
INJUNCTION; AND
SUPPORTING BRIEF**

Relief requested before
8/18/2010

INTRODUCTION

Plaintiffs request the Court to issue immediate injunctive relief – including an *ex parte* TRO, if necessary – prohibiting the Idaho Transportation Department (“ITD”) from authorizing ConocoPhillips (“Conoco”) to transport massive oil refining equipment up Highway 12 from the Port of Lewiston through Lolo Pass, pending resolution of Plaintiffs’ claims on the merits.

The Conoco shipments – known as the “Coke Drum Transport Project” – are expected to start as early as Wednesday, August 18, 2010, under a five-day permit issued by ITD. Weighing well over a half million pounds, nearly three stories tall, and spanning two-thirds of a football field in length, the Conoco shipments will entirely block Highway

12 as they inch slowly up the Middle Fork Clearwater and Lochsa River canyon; and all vehicle traffic will be required to wait 15 minutes or more, before being able to pass.

In approving Conoco's application for an oversized permit to haul these loads, ITD has violated its own regulations in multiple respects, thus supporting the entry of injunctive relief. First, the regulations specifically limit oversized load permits to 10-minute delays – not the 15-minute delays allowed by ITD. *See* IDAPA 39.03.16.100.01. Second, the regulations require ITD to make a “reasonable determination” that oversized shipments are both feasible and necessary, and to place a “primary concern” on public convenience and safety – none of which ITD has done here. *See* IDAPA 39.03.09.100.

Indeed, ITD has failed to conduct any public hearing on the Conoco proposal, and it has repeatedly brushed off concerns voiced by Plaintiffs and many other members of the public about the harms that these massive oil shipments will cause to their business operations and personal lives. *See* Laughy, Hendrickson, and Grubb Affidavits, submitted herewith.

Injunctive relief is necessary to prevent such irreparable harm to the Plaintiffs and to the public interest. The Conoco shipments are the first wave of over 200 heavy haul loads planned by the oil industry to take massive equipment up Highway 12, thereby creating a new “high-and-wide” industrial transportation corridor. Construction work on Highway 12 for this project has already impacted local residents and harmed businesses that rely on tourism and recreation along Highway 12, including Plaintiffs. That harm will be magnified if the Conoco shipments occur, and the river corridor becomes publicly identified as a congested industrial transportation route rather than the outdoor haven and prime tourism destination that it currently is.

Accordingly, because ITD has violated its own regulations and irreparable harm will occur to Plaintiffs and to the public from that unlawful action, the Court should enjoin the Conoco shipments pending resolution of Plaintiffs' challenges on the merits.

FACTUAL BACKGROUND

Highway 12

As alleged in more detail in the Petition for Judicial Review filed herewith by Plaintiffs, U.S. Highway 12 is the artery that supplies the lifeblood to the rural communities dotted along the Clearwater/Lochsa river corridor. It provides residents access to jobs, groceries, health care, and emergency services. In many places, Highway 12 is the only route possible to reach these essential goods and services; detours simply do not exist.

As the timber industry has declined, Highway 12 has become even more important to the only growing industry in the area – tourism. Travelers from all over the United States flock to the Highway 12 corridor, drawn by its scenic beauty and numerous outdoor recreation opportunities, including hiking, camping, hunting, fishing, and rafting on the Wild and Scenic Lochsa and Middle Fork Clearwater Rivers.

While continuing to serve the commercial traffic that has historically relied upon it, Highway 12 has become “a destination unto itself.” *See* Petition, ¶ 16. Its scenic beauty and proximity to numerous important historical and cultural sites – including places sacred to the Nez Perce Tribe and sites visited by Lewis and Clark – has led the Federal Highway Administration to designate Highway 12 as the Northwest Passage Scenic Byway and an All American Road. *Id.* The remarkable values of the Lochsa and Middle Fork Clearwater Rivers have also been recognized by Congress, which designated

them under the Wild and Scenic Rivers Act in 1968. *Id.*; *see also* Affidavits of Linwood Laughy and Peter Grubb, filed herewith.

The Kearl and Coke Drum Transport Projects

At the behest of the oil industry, ITD now plans to convert this rural, multiple use highway into an industrial “high-and-wide” corridor where the transport of heavy haul commercial loads will take precedence over all other uses. *See* Petition, ¶¶ 17-22.

Two years ago, Exxon Mobil approached ITD about using Highway 12 to transport over 200 loads of foreign-manufactured oil equipment from the Port of Lewiston over Lolo Pass and on to the Kearl Oil Sands Field in Alberta, Canada (the “Kearl Project”). The equipment is so large that, once mounted on trucks, it will take up both lanes of the highway and exceed the statutory size and weight limits set forth in Idaho Code for vehicles traveling on Idaho’s highways. With ITD’s permission, Exxon has spent millions of dollars and made numerous modifications to Highway 12 to accommodate these huge loads, ranging from the relocation of utility lines to the modification of forest vegetation. *Id.*

Exxon will not be able to transport these huge loads unless and until it receives an “overlegal permit” from ITD. This permitting process is still ongoing for the Kearl Project, but Conoco is ready to be the first oil company to try out the new “high and wide” transportation route that Exxon and ITD have prepared for the industry.

Conoco has contracted with Emmert International, a company that specializes in hauling large loads, to haul four massive coke drums manufactured in Japan to Conoco’s oil refinery in Billings, Montana. *See* Petition, ¶¶ 23-30. Relying on the assumption that it will be able to obtain an overlegal permit from ITD, Conoco has already barged the

coke drums up the Columbia and Snake River system. They arrived at the Port of Lewiston in May where they have been awaiting transport. *Id.*

Emmert plans to transport the Conoco loads in two different configurations. Once mounted on trucks for land transport, loads in the first configuration will be approximately 110 feet long, 27 feet wide, 29 feet high, and weigh 646,200 lbs. Loads transported in the other configuration will be approximately 225 feet long, 29 feet wide, 27 feet high, and weigh 636,204 lbs. *Id.*

ITD has been working with Emmert to make the transport of the Conoco loads possible since July 2009. ITD either has approved, or will approve in the imminent future, a Traffic Control Plan for the Conoco loads. Under this plan, the loads will travel between 10 pm and 5:30 am. The loads will be accompanied by an entourage of support vehicles, including five pilot car escorts, two State Police escorts, and two signboards. Altogether, this line of vehicles will extend for almost 500 feet. Lights and flaggers will be employed to alert other traffic.

Like the Kearl loads, the Conoco loads will take up both lanes of the highway. Under the Traffic Control Plan, regular traffic will “leap frog” around the loads by passing them at pre-selected turnouts and roads. In some locations, traffic will be directed onto the turnouts or roads to pass the loads; and in other locations the loads will pull onto pre-selected turnouts or roads and wait while traffic drives by. The pullouts and side roads have been selected in an attempt to limit traffic delays to 15 minutes or less.

Public Concerns

Numerous members of the public have expressed concerns to ITD about the Kearl and Coke Drum Transport Projects. On July 13, concerned citizens presented ITD with a

“Petition to Deny Permits for Transport of Massively Oversized Equipment on U.S. Highway 12” that had been signed by 1704 individuals, including Plaintiffs. *See* Affidavit of Karen Hendrickson, filed herewith. Plaintiffs Mr. Laughy, Ms. Hendrickson, and Mr. Grubb have also submitted comments to ITD.

ITD made no attempt to solicit public input on the Coke Oil Drum and Kearl projects, and even discouraged citizens from sharing their concerns. *See* Affidavits of Linwood Laughy and Peter Grubb, submitted herewith. Although ITD eventually held three public meetings to allow Exxon to communicate directly with the public about the Kearl Project, it never held any such meetings about the Coke Drum Transport Project. Hendrickson Aff. ¶ 8; Laughy Aff. ¶ 8.

In its communications and interactions with the public, ITD has consistently taken the position that it has no discretion to deny Conoco’s and Exxon’s requests for overlegal permits, provided there was some way to haul the loads safely. Laughy Aff. 12; Hendrickson Aff. ¶ 8 & Ex. B. It also maintained that traffic delays would be limited to 15 minutes. When a member of the public pointed out that ITD regulations actually require traffic delays to be limited to 10 minutes, an ITD representative stated that he had never heard of the 10-minute rule and ITD “always uses 15 minutes.” Laughy Aff. ¶ 13; Hendrickson Aff. ¶ 10.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

A. Injunction Standards.

Under the Idaho Rules of Civil Procedure, the Court may grant an *ex parte* temporary restraining order when “immediate and irreparable injury, loss, or damage will

result to the applicant before the adverse party or the party's attorney can be heard in opposition.” I.R.C.P. 65(b). “A temporary restraining order is generally granted without notice to the opposite party, and is intended only as a restraint on the defendant until the propriety of granting an injunction pendente lite can be determined, and it goes no further than to preserve the status quo until that determination.” *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869, 873 (Idaho 1925).

Where a hearing on the applicant’s request for interim relief has been held, the applicant’s request should be evaluated as a request for a preliminary injunction under Idaho Rule of Civil Procedure 65(e). *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984)); *WGI Heavy Minerals, Inc. v. Gorrill*, No. CV 2006 384, 2006 WL 637030 (Idaho Dist. 2006); *Moon v. North Idaho Farmers Ass'n*, No. CV 2002 3890, 2002 WL 32129530, at *3 (Idaho Dist. 2002). The issuance of preliminary injunction is appropriate in a number of circumstances, including

- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
- (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
- (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff’s rights, respecting the subject of the action, and tending to render the judgment ineffectual.

I.R. Civ. P. 65(e). Whether to grant a preliminary injunction is a matter for the sound discretion of the trial court. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (Idaho 1997).

B. APA Standards of Judicial Review.

Because Plaintiffs are challenging the oversized permit issued by ITD, which is a state agency, the provisions of the Idaho Administrative Procedure Act govern the Court's judicial review. *See* I.C. § 67-5270 *et seq.*; I.R.Civ.P. 84. Under the APA, the Court must reverse the ITD decision if “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.

I.C. § 67-5279(3). *See Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441, 442-45 (1985) (reversing where agency failed to consider statutory criteria, and employed improper procedures); *Morgan v. Dept. of Health and Welfare*, 120 Idaho 6, 813 P.2d 345 (1991) (reversing where agency violated its own regulations); *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993) (reversing where agency failed to make requisite findings upon which the decision is based).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs' petition for judicial review identifies two separate legal violations by ITD under these APA standards, either of which supports entry of injunctive relief here.

A. ITD Has Violated The 10-Minute Delay Rule Of IDAPA 39.03.16.

First, ITD has violated its own regulations governing oversized permits by allowing the Conoco shipments to delay traffic for 15 minutes, when the regulations limit

delays to 10 minutes. *See* IDAPA 39.03.16.100.01. Remarkably, ITD staff have publicly stated that they were not even aware of this 10-minute limit. *See* Hendrickson Aff. ¶¶ 10-11 .

In general, the regulations require ITD to ensure that overlegal loads are transported “in such a way that the traveled way will remain open as often as feasibly possible and to provide for frequent passing of vehicles traveling in the same direction.” IDAPA 39.03.11.100.05(a). A traffic control plan providing for the use of pullouts to let traffic go by must be prepared when the load is wider than 20 feet or longer than 150 feet, as is the case here. When a proposed movement of an overlegal load “cannot allow for the passage of traffic as provided in IDAPA 39.03.11,” an overlegal permit may only be issued “under special circumstances when traffic volumes are low 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).

The Coke Drum Transport Project loads are subject to this ten-minute rule because they cannot allow traffic to pass in the manner described in IDAPA 39.03.11; yet ITD is allowing the Conoco shipments to delay traffic by 15 minutes in contradiction of the express 10-minute delay rule set forth in IDAPA 39.03.16.100.01. Accordingly, ITD’s approval of the Project violates the applicable regulations and is subject to reversal under the APA standards above.

B. ITD Has Also Violated IDAPA 39.03.09.

Second, ITD’s decision to authorize the Coke Drum Transport Project should also be reversed by the Court because the agency has violated its separate regulatory duty to

make a “reasonable determination” that the shipments are feasible and necessary, with public convenience being a “primary concern,” as required by IDAPA 39.03.09.

Specifically, the regulations governing when an overlegal permit may be issued provide that ITD “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 (emphasis added). Moreover, the regulations emphasize that ITD’s “primary concern” must be “the safety and convenience of the general public and the preservation of the highway system.” IDAPA 39.03.09.100.01 (emphasis added).

Rather than making public convenience a primary concern, ITD has instead bowed to the desires of the oil industry to turn Highway 12 into a new industrial “high and wide corridor” for heavy haul loads. ITD staff have repeatedly asserted that the agency must issue an oversized permit as long as the contemplated load can reach its destination “safely,” irrespective of the hardships and damage this will cause to businesses and local residents, including Plaintiffs. *See* Laughy Aff. ¶ 12; Hendrickson Aff. ¶¶ 8-9 & Ex. B. ITD’s consideration of safety is limited to the question of whether the load in question can reach its destination without causing a traffic accident or a bridge collapse. *See* Grubb Decl.; Laughy Aff. ¶ 12 (explaining, “ITD has consistently claimed that Idaho law requires ITD to issue permits for Conoco and Exxon’s giant loads as long as the transports will not damage the highway and bridges or create any safety problem”).

In evaluating only whether the loads create a “safety problem” under these limited considerations, ITD has thus breached its obligation, under the regulations, to make a “reasonable determination” that the Coke Drum Transport Project is both “necessary”

and “feasible,” while considering public convenience as a primary factor in its calculus. ITD’s failure to abide by its own regulations is again arbitrary, capricious, an abuse of discretion, and contrary to law under the APA standards above; and justifies granting injunctive relief because Plaintiffs are likely to prevail on this claim.

III. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM AND PROTECT THE PUBLIC INTEREST.

Injunctive relief is also warranted here to maintain the status quo, because Plaintiffs and the public face irreparable injury if the Conoco shipments are allowed to proceed this week as planned.

The Plaintiffs will experience personal harm as well as economic harm as a direct consequence of the coke drums’ passage up Highway 12. Increased traffic levels, delays, and loud noises at night annoy local residents and travelers. Ms. Hendrickson faces health effects associated with the shipments’ noise and obstruction; while Mr. Grubb has already lost business as a result of the large amount of construction caused by Exxon’s many modifications to Highway 12 for the Kearl project. *See* Hendrickson Aff. ¶ 13; Grubb Aff. ¶ 5. Additional traffic, noise, and delays will cause the Plaintiffs to lose additional business and associated revenue. *Id.*

Allowing Conoco to transport its oil drums up Highway 12 also threatens to irreparably damage the area’s reputation as a tourist attraction, and hence the local economy. *See* Laughy Aff. ¶¶ 15-16; Grubb Aff. ¶¶ 8-9. The Plaintiffs, along with many of their friends and neighbors in the Highway 12 corridor, rely on the growing tourism industry to make their living. Laughy Aff. ¶ 4, Hendrickson Aff. ¶¶ 4-5. The tourism industry is dependent upon the reputation of the Clearwater/Lochsa river

corridor. Recent construction on Highway 12 has already damaged the area's reputation as a prime tourist travel location. Grubb Aff. ¶ 8. The massive equipment shipments planned to be taken up the "high and wide corridor" envisioned by the oil industry would destroy the allure of the Clearwater/Lochsa corridor; and allowing the initial Conoco shipments to proceed would tangibly demonstrate to the world that this "high and wide corridor" is now a reality. *Id.* Injuring or destroying the corridor's only growing industry – tourism – would be catastrophic for the Plaintiffs and their neighbors.

The Conoco loads will further injure the Plaintiffs by diminishing the qualities of the area that brought them to this part of the state in the first place. Mr. Laughy, like many other residents of the Highway 12 corridor, enjoys hunting, fishing, floating, swimming, hiking, camping, and picnicking along the corridor. Laughy Aff. ¶ 17. Increased traffic levels associated with the heavy haul shipments and the sight of Conoco's equipment on the side of the road will diminish his enjoyment of these activities. *Id.*

Blocking Highway 12 with equipment would also unjustifiably place the health of the Plaintiffs and everyone staying along the Highway 12 corridor at risk. Like many homes in the area, Ms. Hendrickson's house lies close to the highway. The passage of large equipment accompanied by an entourage of other vehicles and flashing lights would disturb her rest. While losing sleep may be a simple inconvenience for some people, it is a more serious matter for Ms. Hendrickson, who suffers from a chronic health condition that requires her to get adequate sleep. Hendrickson Aff. ¶ 13. It is doubtful that she is the only person living along Highway 12 who could suffer ill health effects as a result of nighttime disturbance.

Moreover, allowing the Conoco shipments to travel on Highway 12 would place an obstacle between every person who lives along Highway 12 and the Clearwater Valley Memorial Hospital, resulting in a delay of at least 15 minutes. There are times when a 15-minute delay in treating an injury or illness can make all the difference to a patient and his or her family, as Ms. Hendrickson once experienced. *See Hendrickson Aff.* ¶ 15.

The Court should grant an injunction so that the rural people of Highway 12 don't have to take that chance.

Finally, there is a high public interest in the future of the Clearwater/Lochsa corridor, which the requested injunction will serve. Whether Highway 12 will remain an outstanding tourist and recreation destination that provides jobs and revenues to the local community – or becomes a congested industrial “high and wide” corridor for the convenience and profit of the oil industry, which will profoundly alter the local economy and community – are matters of great concern to Plaintiffs and many others in the area. *See Hendrickson Aff. Ex. B* (petition signed by over 1700 local residents opposing “high and wide” corridor plans). ITD has acted behind closed doors to approve the oil industry's plans for the Highway 12 “high and wide” corridor, without public disclosure or heeding public input; and no public agency has candidly disclosed and evaluated the likely impacts of this proposal, even though it directly affects the Wild and Scenic Clearwater/Lochsa rivers and associated businesses that survive on tourism and recreation. The Court should not allow these transformations to become reality through initial shipments by Conoco, when ITD has not followed its own regulations.

CONCLUSION

For the foregoing reasons, this Court should issue immediate injunctive relief, in the form of a temporary restraining order and/or preliminary injunction, staying the effectiveness of ITD's overlegal permit for the Coke Drum Transport Project, until the Court can rule on the merits of Plaintiffs' claims.

Dated: August 16, 2010

Respectfully submitted,

Natalie J. Havlina
Attorney for Plaintiffs