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Brian Ness, Director
Idaho Transportation Department
P.O. Box 7129
Boise, ID 83707-1129

Dear Mr. Ness,

The following comments regarding the Kearl Module Transport Project and the Emmert Project¹ are submitted on behalf of *Advocates for the West*, Idaho Rivers United, and Friends of the Clearwater. *Advocates for the West* is a nonprofit organization that works with other conservation groups and activists across the West to protect and restore the native ecosystems and wildlife of the western United States. Idaho Rivers United is a conservation group dedicated exclusively to protecting and restoring the rivers of Idaho. Friends of the Clearwater is not-for-profit conservation organization that defends the Idaho Clearwater Bioregion's wildlands and biodiversity through a litigation, grassroots public involvement, outreach, and education.

We urge the Idaho Transportation Department (“ITD”) to deny Exxon and ConocoPhillip’s applications for overlegal permits for the Kearl Module Transport and Emmert Projects. Not only does ITD possess the authority to deny these permits, it would be illegal for ITD to grant them. Specifically, granting these overlegal permits would violate:

- IDAPA § 30.03.09.100;

¹ In these comments, “Emmert Project” refers to ConocoPhillip’s application for overlegal permits to truck two loads of equipment, each of which measures 225’x29’x26’ and weighs 300 tons, to the oil refinery in Billings, Montana. ConocoPhillips has contracted with Emmert International to transport the loads.

- The National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 and its implementing regulations;
- Highway Easement Deed (1995) and Correction Deeds (1997, 2005) for Highway 12;
- U.S. Highway 12 Corridor Highway Improvement and Maintenance Strategy and Implementation Guidelines (1993);
- Northwest Passage Scenic Byway Corridor Management Plan (1997); and
- Memorandum of Understanding #06-MU-I010500-036 between ITD District 2 and the Clearwater National Forest.

I. ITD Has Authority to Deny Applications for Overlegal Permits.

At the public meetings recently held in Moscow, Lewiston, and Kooskia regarding the Kearsarge Project, District 2 Engineer Jim Carpenter took the position that ITD is legally required to grant requests for overlegal permits as long as the load in question can be transported safely. This position is legally incorrect.

The plain language of the relevant statute permits ITD to deny requests for overlegal permits. The state legislature has limited the length, width, and weight of loads that can be transported on the state's highways. *See* I.C. §§ 49-1001, 49-1002, 49-1010. The statute gives ITD the option of authorizing loads that exceed these limits: “the [appropriate] board of authorities **may, in their discretion** issue a special permit to the owner or operator of any vehicle allowing vehicles or loads having a greater weight or size than permitted by law to be carried over or on the highways and bridges.” I.C. § 49-1004 (emphasis added).

ITD has adopted regulations clarifying the conditions and requirements for such a permit. These regulations confirm that the issuance of an overlegal permit is optional: “The Department shall, in each case, predicate the issuance of an overlegal permit on a

reasonable determination of the necessity and feasibility of the proposed movement.”

IDAPA § 39.03.09.100.02.

II. Granting Overlegal Permits for the Kearn and Emmert Projects Would Violate Multiple Legal Authorities.

ITD Regulations.

Through its regulations, ITD has promised the public, “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. The application of these criteria weighs heavily against the issuance of overlegal permits for the Kearn and Emmert Projects.

Allowing multinational corporations to transport loads of the size contemplated in the Kearn and Emmert Projects would threaten the safety of the general public. As Exxon itself admits, the Kearn loads will block and delay emergency response vehicles. Most of Highway 12’s residents travel to local hospitals in privately owned vehicles. Consequently, 85% of the time the overlegal load’s escort will have no advance warning that an emergency vehicle is approaching. In addition, as a former Department of Corrections employee pointed out at the public meeting in Kooskia, it is necessary to transport 175 employees to the state penitentiary in Orofino very quickly during emergency situations.

As the outcry at the Kearn public meetings illustrated, implementation of the Kearn and Emmert Projects would also greatly inconvenience the general public. A large percentage of the individuals who live in the Highway 12 corridor commute to jobs in other towns. Many of them, such as nurses working 12-hour shifts, make the commute during what ITD may consider to be “the night.” If these individuals are delayed for 15

minutes as a result of even half of Exxon's loads, they will each lose 25 hours or more of their time.

In addition, granting permits for the Kearl and Emmert projects would be inconsistent with the preservation of the highway system. Even assuming that Exxon and Conoco comply with all of ITD's requirements, the transport of loads weighing 250 tons will inevitably put a strain on a highway constructed for ordinary commercial purposes.

ITD has suggested that the Kearl and Emmert loads qualify as commercial traffic of the same ilk as the logging trucks and other semi-trailers that use Highway 12 every day. By virtue of their sheer size, however, the Kearl and Emmert loads are categorically different from other oversize loads that have been authorized on Highway 12 in the past. The transport of loads this big inevitably raises unique logistic and safety questions, as ITD itself knows very well based on the **two years** of state employee time it has already spent trying to make these projects feasible.

The National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires a thorough and public analysis of the environmental consequences of proposed federal actions, including a detailed Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). State agencies must comply with NEPA when "federal and state projects are sufficiently intertwined to constitute a 'federal action.'" *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1092 (9th Cir. 2003). A state must also comply with NEPA "if their proposed action cannot proceed without the prior approval of a federal agency." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992).

State agencies may not “segment” highway projects into multiple pieces in order to avoid NEPA analysis. *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1139 (5th Cir.1992). “A single NEPA review document is required for distinct projects when there is a single proposal governing the projects, or when the projects are ‘connected,’ ‘cumulative,’ or ‘similar’ actions under the regulations implementing NEPA.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-894 (9th Cir. 2002)(citing 40 C.F.R. § 1508.25). In addition, NEPA analysis must include a cumulative analyses of the likely environmental impacts of a proposed action. 40 C.F.R. §§ 1508.7; 1508.25(a)(2).

A comprehensive Environmental Impact Statement must be prepared for the Kearsarge Module Transport Project before it can proceed. The project constitutes a federal action because ITD manages the Highway 12 Northwest Passage Scenic Byway and the Lochsa Wild and Scenic River Corridor cooperatively with the Clearwater National Forest. In addition, multiple federal permits will be required before the project can be implemented, including special use permits from the Forest Service for the relocation of utility lines and a dredge and fill permit from the Army Corps of Engineers for the expansion of the Port of Lewiston. ITD’s authorization of the Kearsarge Module Transport Project thus requires NEPA analysis.

ITD should work with the Forest Service, the Army Corps of Engineers, and the Montana Department of Transportation to prepare a comprehensive EIS for the Kearsarge Module Transport Project. Exxon’s proposal to transport Korean equipment through the United States to Canada is a single proposal that involves four states and two international border crossings. It has given rise to multiple highway projects in both

Idaho and Montana, all for the purpose of enabling the Kearn loads to pass through. The segmentation of these connected actions into multiple environmental reviews would violate NEPA.

The Kearn Module Transport Project will also have significant environmental impacts. If implemented, it will degrade the scenic, historic, and recreational values of a nationally designated All American Road and Wild and Scenic River corridor. It will cause vibrations that could damage historic artifacts and National Historic Trails. Accidents during transport could result in the take of endangered fish. In addition, the transport of Exxon's equipment will indirectly cause further development of the Alberta tar sands, resulting in emissions of greenhouse gases, as well as particulate matter, sulfur dioxide, carbon monoxide, nitrous oxide and the hazardous air pollutants benzene, toluene, ethylbenzene, xylene, and formaldehyde.

The Kearn Module Transport Project is thus a single, federal action that will significantly affect the quality of the human environment and ITD should initiate the preparation of an EIS.

Easement Deed.

Issuing oversize permits for the Kearn Module or the Emmert Project would also violate the terms of ITD's easement deed over Forest Service land. Where Highway 12 passes through the Clearwater National Forest, its management is governed by the 1995 Highway Easement Deed ITD received from the Forest Service. This instrument, as amended by two Correction Deeds recorded in 1997, grants ITD, "an easement for a right-of-way for the operation and maintenance of a highway . . . on, over, and across, in, and upon [certain] described land of the United States within the Clearwater National

Forest.” Highway Easement Deed, June 30, 1995. Under the terms of the deed, the State’s easement is subject to a number of conditions.

First, the easement explicitly “does not include the grant of any rights for nonhighway purposes or facilities.” As Jim Carpenter explained at the Kooskia public meeting, the term “highway purposes” is defined in Highway 12’s Corridor Highway Improvement and Maintenance Strategy and Implementation Guidelines (1993)(“Maintenance Strategy”). According to the maintenance strategy, “highway purposes” on Highway 12 include recreational, commercial, and residential use. *See* Maintenance Strategy at 4, 6-7. Neither the Maintenance Strategy nor the easement designates Highway 12 as a high and wide corridor.

The Kearn and Emmert Projects do not constitute “highway purposes.” Allowing these loads to use the highway would substantially interfere with all of the traditional and historic uses of Highway 12, essentially converting it from a two-lane highway used for multiple purposes into a high and wide corridor where the transport of commercial loads takes precedence over all other uses. In fact, as members of the public have recently brought to ITD’s attention, the current proposal to move the loads at night would substantially interfere with the commercial traffic that Highway 12 has traditionally served.

Authorization of the Kearn Module and Emmert Projects would also be inconsistent with the easement’s requirement that “the State shall protect and preserve soil and vegetative cover and scenic and esthetic values on the right of way outside of construction limits.” Highway Easement Deed at 4. ITD proposes to park the Kearn and Emmert loads along the side of the highway during the day where they will be seen by

every traveler who rafts the river, drives the road or casts a fishing line. Since Exxon proposes to transport over 200 loads with as many as two loads on each segment of the highway at a time, a tourist driving through the corridor would potentially be exposed to as many as 6 modules while traveling from Lewiston to Lolo pass. Local residents who rely on tourism to make their living have testified that the presence of the oversize loads would damage the scenic and esthetic values of the corridor.

Agreements with the Forest Service.

Furthermore, authorization and implementation of the Kearl and/or Emmert Projects would violate multiple agreements that ITD has entered into with the Forest Service by degrading the scenic values of the corridor and conflicting with existing uses of Highway 12. The ITD and the Clearwater National Forest established “a framework for cooperation” in Memorandum of Understanding #06-MU-I010500-036. As part of this agreement, each agency promised to “recognize, utilize, and update” the Maintenance Strategy and the Northwest Passage Scenic Byway Corridor Management Plan (1997)(“Byway Management Plan”). Memorandum of Understanding #06-MU-I010500-036 at 4.

Both the Maintenance Strategy and the Byway Management Plan establish compliance with the Wild and Scenic Rivers Act as a primary goal for corridor management. Maintenance Strategy at 2-3; Byway Management Plan at 19. They also prioritize recreation and scenic values. The Desired Future Condition described in the Maintenance Strategy establishes the goal that, “the highway and other transportation facilities within the corridor are enhancing the recreational experiences of visitors to the area.” Maintenance Strategy at 19. Similarly, the Byway Management Plan provides,

management of the roadway must be consistent with protecting the scenery, water quality, wildlife, historic and cultural resources. The Wild and Scenic Rivers Act prohibits encroachment into the river, thus the narrow and winding road that exists today will be changed only minimally over time.

Byway Management Plan at 17.

Implementation of the Kearl and Emmert Projects would degrade the scenic and recreational values of the National Scenic Byway and the Wild and Scenic River Corridor. Modules sitting on the side of the highway would block the view of the river, the passage of large equipment at night would disturb tourists staying in campgrounds and motels close to the highway, and the weight of the loads would damage the road. These impacts would detract from, rather than enhance, “the recreational experiences of visitors to the area.”

Furthermore, implementation of the Kearl and Emmert Projects would violate the Maintenance Strategy by creating new conflicts between highway users and intensifying existing conflicts. Through the strategy, ITD agreed to “integrate and coordinate highway facility development and maintenance projects” so as to “achieve a long term solution” to conflicts between commercial and recreational users. *Id.* at 1, 16. Although ITD claims that the modules will not delay traffic for more than 15 minutes, it would be physically impossible for Exxon and Conoco to achieve this goal. *See* Comments of Linwood Laughy to ITD (July 14, 2010). Both commercial and recreational² traffic travels at night and will be delayed by the modules. As a result, nighttime traffic will spill over into the early morning commute time, when many residents commute between Lewiston and other parts of the Highway 12 corridor.

² Many people prefer to travel at night, particularly if they have small children. ITD may have received public comments addressing this subject.

III. CONOCO AND EXXON SHOULD LOOK ELSEWHERE.

A state and nationally designated Scenic Byway that runs through a Wild and Scenic River Corridor is not the appropriate route for mammoth-sized loads. The United States has a vast Interstate freeway system. There is an established corridor for oversize loads through the Gulf of Mexico. And there are plenty of workers in the United States and Canada who would welcome the opportunity to construct oversize commercial equipment on or close to the site where it will be used. Exxon and Conoco should use one of these options.

IV. CONCLUSION

It is ITD's responsibility to maintain a transportation system for the people of Idaho and the United States. It is not ITD's responsibility to make it cheaper for the richest companies in the world to use cheap labor on the other side of the world. Where doing so endangers the safety of Idahoans and Idaho's growing tourism industry, rewarding Exxon and Conoco for relying on foreign labor is inconsistent with the State of Idaho's responsibilities to its own people.

Sincerely,

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